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The Role of International Investment Law in Protecting Investors in Global Banking and Finance: Investment Qualification, Legal Principles, and Arbitral Practice

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Abstract (English)

This thesis explores the evolving role of international investment law in protecting investors in the global banking and finance sector, a field characterised by regulatory complexity, political sensitivity, and systemic importance for every state. It focuses on how arbitral tribunals, particularly under the ICSID framework, have addressed the qualification of financial assets as protected investments, including instruments such as sovereign bonds, derivative agreements, and other intangible financial products.

It further examines how key treaty-based standards, such as fair and equitable treatment, protection against expropriation, non-discrimination, and the role of umbrella clauses are interpreted and applied in disputes involving financial sector investments.

The research combines doctrinal legal analysis with a detailed examination of arbitral jurisprudence and treaty practice, while also engaging with the broader global financial architecture and the most frequent types of financial investments. This approach helps to contextualise legal responses within the realities of international financial governance and aims to present a better understanding of the financial industry and its unique characteristics. It highlights both converging tribunal approaches and areas of ongoing legal uncertainty. Special attention is given to the challenges of risk necessary for this kind of investment, and to how tribunals balance investor protection with the sovereign right to regulate during financial crises.

By examining the distinctive features of financial investments, such as their contractual nature, regulatory exposure, cross-border mobility, and the specific structuring of financial instruments, the thesis also aims to show how these elements influence arbitral reasoning in investment arbitrations. It concludes by assessing the broader implications for legal certainty, investor confidence, and capital flows, and offers recommendations related to investment structuring, treaty development, and the continued, and potentially expanded, engagement of international financial institutions in supporting coherent and effective legal protections for investors in this field.

Abstract (German)

Diese Arbeit untersucht die sich wandelnde Rolle des internationalen Investitionsrechts beim Schutz von Investoren im globalen Banken- und Finanzsektor – einem Bereich, der durch regulatorische Komplexität, politische Sensibilität und systemische Bedeutung für jeden Staat geprägt ist. Im Mittelpunkt steht die Frage, wie Schiedsgerichte, insbesondere im Rahmen des ICSID-Systems, die Qualifikation finanzieller Vermögenswerte als geschützte Investitionen behandelt haben, einschließlich Instrumenten wie Staatsanleihen, Derivatevereinbarungen und anderen immateriellen Finanzprodukten.

Darüber hinaus wird analysiert, wie zentrale vertragliche Schutzstandards – etwa der Grundsatz der fairen und gerechten Behandlung, der Schutz vor Enteignung, das Diskriminierungsverbot sowie die Rolle von sogenannten „Umbrella Clauses"– in Streitigkeiten über Investitionen im Finanzsektor ausgelegt und angewandt werden.

Die Untersuchung kombiniert eine dogmatische Rechtsanalyse mit einer detaillierten Betrachtung der Schiedspraxis und der Vertragspraxis und setzt sich zugleich mit der übergeordneten globalen Finanzarchitektur sowie den häufigsten Formen finanzieller Investitionen auseinander. Dieser Ansatz dient dazu, rechtliche Reaktionen in den Kontext der internationalen Finanzgovernance einzuordnen und ein vertieftes Verständnis der Finanzindustrie und ihrer besonderen Merkmale zu vermitteln. Dabei werden sowohl sich annähernde Argumentationsmuster der Schiedsgerichte als auch Bereiche fortbestehender Rechtsunsicherheit herausgearbeitet. Besonderes Augenmerk gilt den mit dieser Art von Investitionen verbundenen Risikofaktoren und der Frage, wie Schiedsgerichte während Finanzkrisen den Investitionsschutz mit dem souveränen Regulierungsrecht der Staaten in Einklang bringen.

Durch die Analyse der besonderen Merkmale finanzieller Investitionen – wie ihrer vertraglichen Natur, regulatorischen Anfälligkeit, grenzüberschreitenden Mobilität und der spezifischen Strukturierung von Finanzinstrumenten – zeigt die Arbeit zudem, wie diese Elemente die Begründung von Schiedsentscheidungen in Investitionsverfahren beeinflussen. Abschließend werden die weitergehenden Auswirkungen auf Rechtssicherheit, Investorenvertrauen und Kapitalflüsse bewertet sowie Empfehlungen zur Investitionsstrukturierung, zur Weiterentwicklung von Investitionsverträgen und zur fortgesetzten, möglicherweise erweiterten Einbindung internationaler Finanzinstitutionen in die Unterstützung kohärenter und wirksamer Rechtsschutzmechanismen für Investoren in diesem Bereich gegeben.

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List of Abbreviations

ADB	Asian Development Bank
AfDB	The African Development Bank
ASEAN	Association of Southeast Asian Nations
BCBS	Basel Committee on Banking Supervision
BIS	The Bank for International Settlements
BIT/BITs	Bilateral Investment Treaty(es)
CAFTA-DR	Dominican Republic-Central America Free Trade Agreement
CETA	Comprehensive Economic and Trade Agreement
CJEU	Court of Justice of the European Union
CPTPP	The Comprehensive and Progressive Agreement for Trans-Pacific Partnership
ECOWAS	Economic Community of West African States
ECT	Energy Charter Treaty
ESG	Environmental, social, and governance
EU	European Union
FATF	Financial Action Task Force
FSB	Financial Stability Board
FTAs	Free Trade Agreements
HCCH	Hague Conference on Private International Law
IADI	International Association of Deposit Insurers
IAIS	International Association of Insurance Supervisors
IBA	International Bar Association
IBRD	International Bank for Reconstruction and Development
ICC	International Chamber of Commerce

ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States, entered into force on October 14, 1966
IDA	International Development Association
IFC	International Finance Corporation
IFL	International Finance Law
IIA	International Investment Agreement
IIL	International Investment Law
IMF	International Monetary Fund
IOSCO	International Organization of Securities Commissions
ISDA	International Swaps and Derivatives Association
ISDS	Investor–state dispute settlement
ISSB	International Sustainability Standards Board
MIGA	Multilateral Investment Guarantee Agency
NAFTA	The North American Free Trade Agreement
NGFS	Network for Greening the Financial System
OECD	Organization for Economic Co-operation and Development
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	The International Institute for the Unification of Private Law
USMCA	United States–Mexico–Canada Agreement
WTO	World Trade Organization

A. Introduction

Today's national economies are intricately connected by global flows of capital, forming a highly interdependent financial system in which cross-border investments link states, markets, and private actors worldwide. A significant part of this interdependence operates through international capital markets, where banks, institutional investors, and other financial entities channel and allocate funds across borders.

Motivated by recurring global financial crises with severe repercussions for the global society, states, recognising the systemic nature and significance of these risks, have over the past decades participated in the development of an international framework for financial regulation. This framework is primarily designed to preserve the functioning, integrity, and stability of global banking and financial markets and their participants. It consists largely of soft-law instruments (non-binding standards, recommendations, and guidelines) coordinated by bodies such as the Basel Committee on Banking Supervision, the Financial Stability Board, and the G20. Traditionally, its focus has been on market and prudential risks posed by private actors (which, to some extent, can trigger sovereign risks), aiming to reduce the likelihood of crises and mitigate their potential spillover effects on the wider economy.

However, the financial sector is not only exposed to market risks but also to political and sovereign risks. Given the strategic importance and sensitivity of banking and finance for every state, host governments may intervene in ways that create substantial business uncertainty for foreign investors. Such interventions can include arbitrary or unpredictable regulation, forced restructuring of debt, emergency measures adopted during crises, expropriation, or discriminatory treatment. Unlike market or credit risks, these political risks largely remain beyond the reach of conventional international financial regulation, which lacks binding, enforceable mechanisms to constrain sovereign action in this field.

This regulatory gap is partly filled by the international investment protection regime, which establishes binding legal standards limiting how states may treat foreign investors and their assets. Through a network of BITs, multilateral agreements, and customary international law, this system offers enforceable rights such as fair and equitable treatment, protection against unlawful expropriation, and access to international arbitration, most notably through the ICSID system, which has developed an extensive body of arbitral practice in this field. Investment law thus introduces a form of legal accountability, placing constraints on politically motivated state conduct and providing remedies for investors adversely affected by such measures.

This thesis positions international investment law as an integral yet not sufficiently emphasised component of global financial governance. It examines how investments in the banking and finance sector, often taking the form of complex and non-traditional transactions, including sophisticated financial instruments and layered investment structures, are treated as "*investments*" under international investment law by arbitral tribunals, particularly under the ICSID framework. The analysis focuses on how tribunals have interpreted and applied key substantive protections in this context, clarifying the criteria for qualifying a financial investment under international investment law and ICSID jurisprudence so as to be suitable for protection. It further identifies the principal issues in this area that investors should consider when structuring their investments strategically to maximise treaty protection. This, in turn, could foster greater predictability in the investment climate within this industry and, ultimately, contribute to global financial development and stability.

Using doctrinal analysis and empirical studies in this sector, outlining the structure of the IFL and examining the reasoning of relevant arbitral tribunals, this research analyses ISDS jurisprudence (particularly under the ICSID framework), in global banking and finance disputes. It focuses on how tribunals balance the protection of investors' rights against states' regulatory autonomy, public policy objectives, and the political sensitivities of this sector. In doing so, the research seeks to clarify the role of international investment law in addressing the complexities of such investments, mitigating sovereign and political risks in global finance, and assessing its broader implications for investor confidence, the scale of cross-border capital flows, and the stability of the international financial system.

B. Chapter 1: Intersection of International Investment Protection Framework and Global Banking and Finance

International investment law has developed as a distinct and dynamic field of International public law. It governs the treatment of foreign investments by host states and establishes impartial and predictable mechanisms for resolving disputes related to alleged host state breaches of investment protections granted to the investor.[1] This area of law becomes particularly important in the global banking and finance sector, where cross-border financial activities face elevated political and regulatory risks due to the sector's systemic social importance and political sensitivity. Therefore, measures adopted by host states in this industry often reflect a heightened degree of regulatory intervention and control, driven by a legitimate interest in maintaining financial stability and protecting the sovereignty and integrity of national financial markets.

Historically, excessive liberalisation or mismanagement in the financial sector has triggered severe global economic disruptions, most notably, the 2007–2008 Global financial crisis, which originated in the United States and had globally widespread systemic effects. As a result, states have strong incentives to intervene in the financial sector, often through measures such as capital controls, emergency legislation, financial institution restructuring or sovereign debt restructuring. While these measures may be necessary from a regulatory or public policy perspective, they can also adversely affect foreign investors in this sector, triggering the protections provided under international investment agreements. As will be further discussed, investment disputes including global banking and finance participants, often involve similar types of state measures and raise recurring legal issues. In this regard, over time, ISDS arbitral tribunals have developed certain consistent approaches in their reasoning, reflecting the unique characteristics of this sector.[2]

Despite this emerging body of practice, international investment law lacked significant case law until the 1990s. Since then, however, the number of arbitral proceedings, particularly under the ICSID Convention has grown exponentially. This expansion has been driven largely by the proliferation of BITs between states, which have offered binding investor–state dispute settlement

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[1] *See* Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law,* 3rd Edition (2022; online edn, Oxford Law Pro), ch 1 '*History, Sources, and Nature of International Investment Law*'; *See also*, Viñuales, Jorge E., 'Sources of International Investment Law: Conceptual Foundations of Unruly Practices', in Samantha Besson, and Jean d'Aspremont (eds), *The Oxford Handbook of the Sources of International Law*, Oxford Handbooks (2017; online edn, Oxford Academic, 5 Feb. 2018).

[2] For a more detailed discussion, refer to section a. and b. of this chapter; *See also*, Arif Hyder Ali and David L Attanasio, *International Investment Protection of Global Banking and Finance: Legal Principles and Arbitral Practice* (Kluwer Law International 2024) ch 1 '*The Interplay of Banking and Finance and Investment Protection*' 3–14.

mechanisms. While this growth has enhanced investor protection globally, it has also raised concerns about consistency in arbitral decisions and the perceived constraints on state regulatory autonomy and sovereignty.[3]

The resulting criticism has triggered reform initiatives seeking to reduce the dominance of existing ISDS tribunals. Notably, the UNCITRAL Working Group III, has been exploring options such as the establishment of a permanent multilateral investment court, appellate mechanisms, and advisory centres.[4] At the same time, regional developments, especially within the EU, have significantly influenced the structure and future of investment protection. Following the Treaty of Lisbon in 2009 and the CJEU's *Achmea judgment*, 23 EU Member states have signed an agreement on 5 May 2020 to terminate all intra-EU BITs and centralise investment treaty negotiations. This decision aimed to establish a unified, institutionalised investment court system for all EU members.[5] The EU has already concluded several agreements that incorporate a similar dispute settlement mechanism, including the CETA with Canada, and investment protection agreements with Singapore and Vietnam. These agreements introduce the Investment Court System, which replaces traditional investor–state arbitration with a permanent, rules-based tribunal designed to balance investor protection with states' and EU regulatory autonomy.[6]

This evolving legal and institutional landscape is particularly relevant for investments in the banking and finance sector, which are not only economically significant but also politically sensitive and systemically important for the stability and development of national economies. Measures affecting this sector can have far-reaching consequences for both domestic financial stability and society at large. In this context, such investments are often targeted during periods of political turmoil, whether within a single state or on a global scale.

The following sections of this chapter outline the legal foundations of international investment law and provide an overview of the global financial regulatory framework, along with common investment structures in the banking and finance sector, offering a basis for understanding international investment protection with particular attention to its application in this complex and

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[3] Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law*, 3rd Edition (2022; online edn, Oxford Law Pro), ch 1 '*History, Sources, and Nature of International Investment Law*' 13-15.

[4] Available at: https://uncitral.un.org/en/working_groups/3/investor-state.

[5] *See*: https://trade.ec.europa.eu/access-to-markets/en/content/investment-court-system; https://curia.europa.eu/juris/document/document.jsf?docid=199968&doclang=EN; https://eur-lex.europa.eu/legalcontent/EN/TXT/?uri=CELEX%3A52020PC0279

[6] Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law* (2022; online edn, Oxford Law Pro), ch 1, '*History, Sources, and Nature of International Investment Law*' 14-15.

heavily regulated field.

a. Sources of International Investment Law

International investment law derives from a multifaceted and intertwined body of sources, and it has a unique position where public international law and national law meet. It is characterised by a hybrid legal nature, as it governs relations not only between states and foreign investors but also regulates issues traditionally reserved for national legal systems, such as property rights and contractual obligations. This duality is further reflected in the convergence of domestic and international legal norms, particularly where the national law of the host state plays a pivotal role.

Unlike general international law, investment law regularly involves private actors (investors) who have standing to initiate claims against states, which is similar to certain features found in international protection of human rights systems, like the Council of Europe. However, a key distinction is that both states and investors can be claimants or respondents, creating a reciprocal framework, while under the Council of Europe's human rights protection system, member states can only be a respondent. Moreover, the involvement of domestic legal rules, such as those governing property, contracts, or taxation, further illustrates this complexity. These elements of domestic law often operate alongside or are analysed through the perspective of international legal standards.

Described mixed legal nature is also reflected in the diverse range of legal sources that constitute international investment law. These sources include general international law, with its relevant sources and standards (many of which are adapted to protect the undisturbed performance of an investor's business), as well as specific investment protection treaties and applicable national laws of the host country.[7] Together, they form a unique, effective, and flexible legal framework. The following part of this chapter will briefly examine each of its relevant sources.

i. BITs

Bilateral investment treaties are the most important and widespread source of international investment law. With nearly 3,000 BITs concluded globally, they serve as foundational instruments defining the rights and obligations of host states and foreign investors.[8] BITs generally follow a

[7] Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law,* 3rd Edition (2022; online edn, Oxford Law Pro), ch 1, '*History, Sources, and Nature of International Investment Law*' 15.
[8] Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law,* 3rd Edition (2022; online edn, Oxford Law Pro), ch 1, '*History, Sources, and Nature of International Investment Law*' 16.

common structure, including provisions on scope and definitions, substantive protections (such as fair and equitable treatment, protection against expropriation, national and most-favoured-nation treatment, and free transfer of payments), and agreed dispute resolution mechanisms. These treaties grant foreign investors the right to initiate international arbitration, most often under ICSID or UNCITRAL rules, directly against host states, bypassing domestic courts. While initially brief and uniform, BITs have evolved over time to reflect greater complexity and include nuanced obligations and exceptions. They now frequently appear as part of broader trade agreements, such as free FTAs, which integrate investment protections into regional or bilateral economic frameworks. BITs play a central role in creating an investment-friendly legal environment and have significantly shaped the practice of ISDS.[9]

Their significant relevance is further emphasised through the practice of ICSID and other tribunals (*please refer to Chapter 2 and Chapter 3*).

ii. Sectoral and Regional Investment Treaties

Beyond bilateral agreements, international investment law is influenced by sector-specific and regional treaties, which offer broader or specialised regimes. A leading example is the ECT, which, although sectoral and non-universal, provides comprehensive rules on investment protection, trade, and energy cooperation. Similarly, NAFTA's Chapter Eleven and its successor provisions under the USMCA have pioneered innovative investor protection standards and mechanisms for arbitration, setting a precedent for regional treaties. Other regional agreements, such as CAFTA-DR, ASEAN's investment agreements, ECOWAS, and the CPTPP, reflect regional interests while incorporating common international investment standards. These agreements sometimes include procedural innovations, investor obligations, or carve-outs for regulatory autonomy. They demonstrate how regional cooperation contributes to the development and harmonisation of IIL while also serving as laboratories for new legal models that go beyond traditional BIT frameworks.[10]

iii. ICSID Convention

The ICSID Convention is a cornerstone of the international investment dispute settlement system. While it does not contain substantive rules on investment protection, but only procedural

[9] Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law,* 3rd Edition (2022; online edn, Oxford Law Pro), ch 1, '*History, Sources, and Nature of International Investment Law'* 16-18.
[10] Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law,* 3rd Edition (2022; online edn, Oxford Law Pro), ch 1, '*History, Sources, and Nature of International Investment Law*' 18-21.

framework, it provides a widely accepted and neutral forum for the arbitration and conciliation of investment disputes between states and foreign investors. As a procedural treaty, ICSID is crucial in facilitating interpretation and enforcement of BITs and other treaties by offering a self-contained system with strong enforcement mechanisms under the convention. Importantly, ICSID jurisdiction depends on the mutual consent of the state and the investor, usually expressed through a BIT or national legislation. ICSID proceedings have helped standardise arbitral practice in IIL and have significantly influenced the interpretation and application of substantive investment protection standards through its extensive jurisprudence.[11]

iv. Customary International Law

Although treaty law dominates the field, customary international law remains a vital source to IIL, especially where treaties are silent, ambiguous, or absent. Custom still plays an important role in (*among others*), shaping the rules on expropriation, denial of justice, attribution of state conduct, and the calculation of damages. It also underpins several treaty standards, such as the minimum standard of treatment of aliens, which serves as a baseline below which even treaty protections must not fall. Custom is invoked to interpret and supplement treaty obligations in accordance with Article 31(3)(c) of the Vienna Convention on the Law of Treaties.[12] Moreover, the extensive and in certain fields uniform treaty practice across thousands of BITs has itself influenced the evolution of custom, suggesting a dynamic interaction between the two. As arbitral tribunals increasingly rely on custom to support and clarify treaty norms, customary international law remains indispensable in IIL.[13]

v. General Principles of Law

General principles of law, as recognized under Article 38(1)(c) of the ICJ Statute, are often used in investment arbitration to fill legal gaps and to guide treaty interpretation. Tribunals have invoked general principles such as good faith, due process, estoppel, legitimate expectations, *pacta sunt servanda*, unjust enrichment, and the prohibition of abuse of rights, in order to support argumentation on (non) breach of the respective standard.[14] These principles, derived from

[11] Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law,* 3rd Edition (2022; online edn, Oxford Law Pro), ch 1, '*History, Sources, and Nature of International Investment Law*' 16.

[12] '*There shall be taken into account, together with the context: any relevant rules of international law applicable in the relations between the parties*', article 31(3)(c) of the Vienna Convention on the Law of Treaties (1969).

[13] Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law,* 3rd Edition (2022; online edn, Oxford Law Pro), ch 1, '*History, Sources, and Nature of International Investment Law*' 22.

[14] Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law,* 3rd Edition (2022; online edn, Oxford Law Pro), ch 1, '*History, Sources, and Nature of International Investment Law*' 22-23.

common elements of major legal systems, serve to reinforce normative coherence and legitimacy within the investment protection regime. For instance, good faith and non-arbitrariness (as general principles of law), often appear as interpretative tools in applying fair and equitable treatment standards. The increasing use of general principles reflects IIL's convergence with broader international public law values and its need to uphold fundamental legal norms in the absence of express treaty text.[15]

vi. Domestic Law of the Host State

The domestic law of the host state has a dual role in international investment law. It is relevant not only as the legal framework that governs the investor's activities on the host state territory, covering areas such as taxation, zoning, labour, and property rights, but also as a determinant of jurisdiction and applicable law in arbitral proceedings. In many cases, domestic law informs the definition of an investment, nationality of the investor, or whether a breach of treaty obligations has occurred. Arbitral tribunals frequently analyse national laws when assessing whether state conduct complies with international standards. While public international law often supersedes conflicting domestic provisions, the interpretation and application of national law remain important for resolving investment disputes.[16]

vii. Unilateral Acts and Representations

Unilateral statements and conduct by representatives of host states can create binding legal obligations under international law, especially when foreign investors have relied on them in good faith.[17] Grounded in the principles of estoppel and legitimate expectations, such commitments, whether made through legislation, official statements, or conduct, can be invoked by investors as part of their claims under the fair and equitable treatment standard. Arbitral tribunals have recognised that clear, specific assurances given by host state authorities, if reasonably relied upon by the investor, may give rise to enforceable obligations. Cases such as *Waste Management v. Mexico*[18] and *Total v. Argentina*[19] have affirmed this principle, emphasising that unilateral acts,

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[15] Stephan W Schill, 'Sources of International Investment Law: Multilateralization, Arbitral Precedent, Comparativism, Soft Law' in Samantha Besson and Jean d'Aspremont (eds), *The Oxford Handbook of the Sources of International Law,* Oxford Handbooks (2017; online edn, Oxford Academic, 5 Feb. 2018), 1107-1110.

[16] Viñuales, Jorge E., *'Sources of International Investment Law: Conceptual Foundations of Unruly Practices*', in Samantha Besson, and Jean d'Aspremont (eds), *The Oxford Handbook of the Sources of International Law*, Oxford Handbooks (2017; online edn, Oxford Academic, 5 Feb. 2018), 1076-1079.

[17] Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law,* 3rd Edition (2022; online edn, Oxford Law Pro), ch 1, '*History, Sources, and Nature of International Investment Law*' 23-24.

[18] *Waste Management, Inc. v. United Mexican States*, ICSID Case No ARB(AF)/00/3, Award (30 April 2004).

[19] *Total SA v. Argentina*, ICSID Case No ARB/04/01, Decision on Liability (27 December 2010), para 131.

although not treaty-based, can still generate expectations protected by international law.

viii. Case Law and Arbitral Precedents

Although not formally a source of law, arbitral jurisprudence has become a central element in the practice of IIL. Under the article 38(1)(d) of the ICJ Statute, judicial decisions are "*subsidiary means for the determination of rules of law*" for determining rules of law. Nevertheless, in investment arbitration, prior decisions, particularly those interpreting treaty standards like FET or indirect expropriation, are frequently cited by tribunals as persuasive authority. The cumulative referencing of previous awards has given rise to a jurisprudence constant, contributing to consistency and predictability in the field. Despite their non-binding nature, arbitral precedents carry considerable weight, especially when multiple tribunals have adopted similar interpretations. This reliance on case law also reflects the growing institutional role of arbitral tribunals in shaping the content of international investment law.[20]

ix. Comparative Law

Comparative law and soft law, while not formal sources of international law under article 38(1) of the ICJ Statute, play an increasingly influential role in international investment law. Tribunals often draw on comparative public and international legal systems, such as administrative, constitutional, human rights, and WTO law, to interpret abstract and potentially vague treaty standards like fair and equitable treatment, full protection and security or indirect expropriation. This practice helps in identifying general principles, supporting consistent reasoning, and aligning investment law with broader legal regulations.

Soft law instruments, including the IBA Rules on Evidence, the UN Guiding Principles on Business and Human Rights, and the OECD Guidelines for Multinational Enterprises, also shape arbitral practice. Although non-binding, they are frequently used to regulate procedure, define professional conduct, and guide the balancing of investment protection with public policy objectives. Both comparative law and soft law reflect the pragmatic, evolving nature of investor–state dispute settlement and help tribunals to resolve normative gaps, enhance legitimacy, and maintain coherence in a fragmented legal framework.[21]

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[20] Stephan W Schill, 'Sources of International Investment Law: Multilateralization, Arbitral Precedent, Comparativism, Soft Law', in Samantha Besson, and Jean d'Aspremont (eds), *The Oxford Handbook of the Sources of International Law*, Oxford Handbooks (2017; online edn, Oxford Academic, 5 Feb. 2018), 1103-1106.

[21] Stephan W Schill, 'Sources of International Investment Law: Multilateralization, Arbitral Precedent, Comparativism, Soft Law' in Samantha Besson and Jean d'Aspremont (eds), *The Oxford Handbook of the Sources of International Law* (OUP 2017), 1110-1113.

b. Overview of the Global Banking and Finance

i. Institutions of Global Financial Law

IFL is typically characterized by its architecture, specifically the actors involved and the networks or hierarchical structures connecting them.[22] While states play a significant role in shaping and developing the global financial system, this section will focus primarily on providing a brief overview of relevant supranational financial institutions. That said, it is important to recognize the distinct roles states play in IFL. On one hand, states act as internal regulators, coordinating or harmonizing national rules by adhering to mutually agreed standards. The authority of states to regulate financial and monetary affairs is rooted in the concept of monetary sovereignty, which still continues to hold significant relevance. Despite the growing influence of private actors in raising capital and proposing new regulatory frameworks, monetary sovereignty remains one of the core principles of IFL. On the other hand, they also function as participants in international financial relations, where they are subject to the very rules they have helped establish. States actively participate in the international financial system as borrowers and lenders. For example, sovereign bonds are one of the most important instruments in financial markets worldwide, serving as investments, collateral, liquid assets, and benchmarks for pricing other securities.[23] For these reasons, understanding the global financial architecture is essential to assess how these institutions can enhance investment protection in this sector and strengthen international investment law principles, thereby positively influencing the global financial investment climate.

Despite the increasing internationalisation of financial activity, there is no unified, binding international legal system governing banking and finance. Regulation operates through a fragmented network of domestic and international actors, relying on non-binding coordination, soft-law standards, and informal cooperation mechanisms. These networks such as Basel Committee, IOSCO, IAIS coordinate primarily through consensus and lack treaty-based authority or direct enforceability.[24] However, often overlooked within this landscape is the international investment protection regime. This system, while operating in parallel, also plays a crucial role in

[22] N. Kearse, R. Maria Lastra, M. Lehmann, M.M. Mbengue, M. Vallée and C. Zilioli, *ADI-ILA White Paper 11: International financial law in the next decades* (ILA Paris, Version 02, English, 2023), 16.
[23] N. Kearse, R. Maria Lastra, M. Lehmann, M.M. Mbengue, M. Vallée and C. Zilioli, *ADI-ILA White Paper 11: International financial law in the next decades* (ILA Paris, Version 02, English, 2023), 16-17.
[24] Zaring D. The Structure and Rules of the Globalized Governance of Finance. In: *The Globalized Governance of Finance.* Cambridge University Press; 2019:13-45.

the broader sense of regulatory financial network by providing binding legal substantive and procedural safeguards for foreign investors in this sector.

Alongside bodies such as the G20, FSB, BCBS, IOSCO, IAIS, and FATF, which gained significant importance after the 2008 global financial crisis, other "*more traditional*" global institutions also play crucial roles in shaping the international financial order:[25]

- **International Monetary Fund (IMF)**: Central to monetary cooperation, exchange rate stability, and balance-of-payments support.
- **World Bank Group (IBRD, IDA, IFC, MIGA)**: Supports development finance, economic development of developing countries, investment guarantees, and cross-border capital flows with main objective to fight poverty, increase shared prosperity and promote sustainable development.
- **Regional Development Banks**: Includes EBRD, AfDB, ADB, and others fostering financing and regulatory convergence in various regions.
- **IADI**: Sets global standards for deposit protection and promotes financial stability.
- **Private Law Standard-Setting Bodies**: ISDA, ICC Banking Commission, and others harmonising contractual practices for derivatives, syndicated loans, and trade finance.
- **Sustainability and ESG Bodies**: NGFS and the emerging ISSB, addressing climate risks and sustainable finance disclosures.

Today's global regulatory framework for banking and finance is structured as a network of connected and coordinated international institution architecture, which although lacking binding international law, guide and harmonise regulatory actions of domestic authorities.[26] However, prior to the financial 2007-2008 crisis, networks of regulators (focused on banking, securities, and insurance respectively) operated with little interaction between one another. Regulatory progress varied by sector, i.e. banking regulation advanced the fastest, while insurance regulation lagged.

[25] N. Kearse, R. Maria Lastra, M. Lehmann, M.M. Mbengue, M. Vallée and C. Zilioli, *ADI-ILA White Paper 11: International financial law in the next decades* (ILA Paris, Version 02, English, 2023), 16-30.
[26] Ali AH and Attanasio DL, *International Investment Protection of Global Banking and Finance: Legal Principles and Arbitral Practice* (Kluwer Law International BV 2021), ch 1: '*The Interplay of Banking and Finance and Investment Protection*' 3–14.

These networks coordinated international policy without binding obligations or formal treaties, relying instead on technocratic collaboration and soft-law instruments.[27]

The global financial crisis of 2008 was a turning point, exposing weaknesses in financial regulation and triggering institutional innovation and stronger political oversight. The FSB was established (replacing the Financial Stability Forum) and resolution frameworks for failing banks, alongside stronger capital and liquidity requirements (Basel III), were developed. Therefore, three core institutional levels currently define the post-crisis international financial regulatory architecture:[28]

- **G20**: Provides top-level political oversight of the global financial system. Originally established in 1999, it assumed a central role in financial governance following the 2008 global financial crisis. It convenes meetings, forums and summits of heads of state and finance ministers from the world's major economies to set regulatory agendas, issue *communiqués*, and guide global priorities. These inputs are political rather than legal in nature, as the G20 is not treaty-based and operates informally by consensus.[29]

- **FSB**: Established by the G20 as the successor to the Financial Stability Forum, it functions as a *"network of/over networks"*, coordinating activities across sectors and jurisdictions and cooperating with other relevant international organisations. It monitors systemic risks, promotes regulatory coherence, and conducts peer reviews. It does not have legal powers but enforces soft law through consensus and compliance monitoring.[30]

- Sector**-Specific Networks; these include:**

  - **BIS** acts as the secretariat and host of the BCBS, though it does not formally participate in decision-making, it provides logistical and administrative support for key global regulatory networks. Owned by over 50 central banks, the BIS promotes monetary and financial stability and facilitates cooperation among national regulators. Its support role reflects the informal, non-treaty-based structure of global financial governance.[31]

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[27] Zaring D. The Structure and Rules of the Globalized Governance of Finance. In: *The Globalized Governance of Finance*. Cambridge University Press; 2019:13-45.
[28] Zaring D. The Structure and Rules of the Globalized Governance of Finance. In: *The Globalized Governance of Finance*. Cambridge University Press; 2019:13-45.
[29] *See* G20*, 'About the G20':*https://g20.org/about-g20/
[30] *See* FSB, *'About the FSB'*: https://www.fsb.org/about/
[31] Zaring D. Banking, Global Oversight's Ne Plus Ultra. In: *The Globalized Governance of Finance*. Cambridge

- **BCBS:** Focused on capital adequacy and other important bank regulation; most active and influential.
- **IOSCO:** Coordinates securities regulation and enforcement cooperation.
- **IAIS:** Oversees insurance sector regulation.
- Other bodies such as the **FATF** address various issues like anti-money laundering.

As it can be concluded, the international financial system operates through a decentralised network of specialised regulatory organisations and agencies rather than states, with decisions made by consensus and outputs taking the form of soft law, such as, best practices, harmonised principles, guidelines and recommended standards. Implementation rests with domestic authorities under the principle of subsidiarity, while compliance is promoted through peer review. This post-crisis architecture emphasises rulemaking over adjudication, guided by principles such as national treatment, most-favoured nation, and a level playing field. Although lacking binding legal force, these norms demonstrate significant influence when incorporated into national regimes. At the political highest level, the G20 sets broad priorities, the FSB coordinates cross-sectoral oversight, and specialised networks like the Basel Committee, IOSCO, and IAIS develop and refine regulatory standards, marking a shift toward more formalised, transparent, and procedurally regular soft-law governance.

Apart from these international public-law structures (and political bodies like the G20), there are also other relevant private-law unification bodies, such as UNIDROIT, UNCITRAL (within the UN), and the HCCH, which develop conventions, model laws, and principles relevant to cross-border financial activity and complement the broader regulatory regime.[32]

ii. Investments in Global Banking and Finance that have given rise to Disputes[33]

Cross-border investments in the banking and finance sector, despite their diversity, can be broadly categorised into two forms:[34] The first involves situations where an institution or individual

University Press; 2019: 46-61.

[32] For example see, UNCITRAL Model Law on Secured Transactions (2016); UNIDROIT Model Law on leasing (2008); and Regulations on financial matters and budgetary practices of the HCCH: https://www.hcch.net/en/governance/regulations-on-budgetary-questions.

[33] Arif H Ali, David L Attanasio, Yarik Kryvoi and Kai-Chieh Chan, *Empirical Study: International Investment Law Protections in Global Banking and Finance* (British Institute of International and Comparative Law, March 2025).

[34] Friederike Niepmann, Banking Across Borders (Deutsche Bundesbank, Discussion Paper No. 19/2013), discussion about

in one state holds a financial instrument (such as a loan, bond, or derivative) whose ultimate counterparty, meaning the party responsible for fulfilling the financial obligation, is located in another state. The second encompasses cross-border equity or ownership interests, where an investor acquires a stake in a financial institution that is legally established and operates under the laws of a different state. Both forms of investment are potentially eligible for protection under international investment treaties.[35]

a) Financial Instruments

Cross-border financial instruments present a major international financial activity and commonly take the form of debt, equity, derivatives, and deposit accounts. Their global nature increasingly places them within the scope of investment treaty protections.[36]

In this regard, investors holding financial instruments have generally experienced more success in disputes compared to those invested in financial institutions. Notably, investors have consistently prevailed in cases involving sovereign debt (restructuring), where decisions have largely been in their favour. In contrast, in disputes relating to currency regulations and emergency measures aimed at addressing financial instability, investor claims have been less successful, with respondent states prevailing on the merits.[37]

Also, the most prevalent type of dispute pertains to the investor's ownership in financial instruments such as bonds and loans (33%).[38] Types of instruments are:

Debt Instruments – International lending remains an important feature of global finance, especially through cross-border bank loans and the issuance of debt securities in foreign markets. These instruments may involve either sovereign debt, where the borrower is a state or other public entity or private debt, issued by corporations and financial institutions or other private entities eligible to do so. While financial crises and regulatory changes have periodically disrupted growth,

Internal Banking and Global Banking.

[35] Ali AH and Attanasio DL, *International Investment Protection of Global Banking and Finance: Legal Principles and Arbitral Practice* (Kluwer Law International BV 2021), ch 2: '*Cross-Border Banking and Finance Investment'* 15–50.

[36] Ali AH and Attanasio DL, *International Investment Protection of Global Banking and Finance: Legal Principles and Arbitral Practice* (Kluwer Law International BV 2021), ch 2: '*Cross-Border Banking and Finance Investment'* 15–50.

[37] Arif H Ali, David L Attanasio, Yarik Kryvoi and Kai-Chieh Chan, *Empirical Study: International Investment Law Protections in Global Banking and Finance* (British Institute of International and Comparative Law, March 2025), Executive Summary.

[38] Arif H Ali, David L Attanasio, Yarik Kryvoi and Kai-Chieh Chan, *Empirical Study: International Investment Law Protections in Global Banking and Finance* (British Institute of International and Comparative Law, March 2025) 11-12.

lending and borrowing across borders have remained robust.[39] Investor-state arbitration has emerged as a key mechanism for addressing disputes related to this instrument, especially when states restructure sovereign debt or interfere with payment obligations. Even though private debt lacks a direct sovereign connection, states may still become involved, for example when courts refuse to enforce loan agreements or when regulatory frameworks affect debt recovery. In *OKO Pankki v. Estonia*, foreign banks initiated ICSID arbitration after Estonian courts declined to enforce pre-Soviet-era loan agreements with a local debtor, demonstrating how judicial actions can trigger international responsibility under investment treaties.[40]

- **Equity Instruments** – Foreign equity securities and other equity holdings in companies, including financial institutions, are widespread. These investments are often diversified across jurisdictions and held through intermediaries such as funds or brokers or as direct assets of financial institutions like investment banks. Regulatory measures, particularly those affecting currency exchange or capital flows, have triggered treaty-based claims by equity investors when such actions resulted in substantial financial loss.[41] In this context, even small and individual investors can benefit from international investment protection. For example, *Philippe Gruslin* invested several million USD in the Kuala Lumpur Stock Exchange through a mutual fund. When Malaysia imposed currency exchange controls, he lost his entire investment and initiated ICSID arbitration proceedings against the state.[42]

- **Derivatives** – Derivatives have become a major component of cross-border financial activity, with complex instruments often involving counterparties in multiple jurisdictions. Although the legal qualification of derivatives under investment treaties is debated, arbitral tribunals have increasingly recognized them as protected investments, particularly where state action undermines contract performance or market value.[43]

- **Deposit Accounts –** While generally considered low-risk, cross-border deposit holdings have

[39] Ali AH and Attanasio DL, *International Investment Protection of Global Banking and Finance: Legal Principles and Arbitral Practice* (Kluwer Law International BV 2021), ch 2: '*Cross-Border Banking and Finance Investment' 28-33*. Based on data provided by BIS.
[40] *OKO Pankki Oyj and others v. Republic of Estonia*, ICSID Case No. ARB/04/6, Award, 59-60 (Nov. 19, 2007).
[41] Ali AH and Attanasio DL, *International Investment Protection of Global Banking and Finance: Legal Principles and Arbitral Practice* (Kluwer Law International BV 2021), ch 2: '*Cross-Border Banking and Finance Investment'* 15–50.
[42] *Philippe Gruslin v. Malaysia*, ICSID Case No. ARB/99/3.
[43] Lisa Bohmer '*Majority Arbitrators Uphold Jurisdiction over Claims by Financial Institution which Funded Renewable Energy Projects in Spain'*, IA Reporter (Aug. 21 2020), https://www.iareporter.com/articles/breaking-majority-arbitrators-uphold-jurisdiction-over-claims-by-financial-institution-which-funded-renewable-energy-projects-in-spain/.

led to significant investment protection treaty claims in cases where governments intervened in failing banks or restricted depositors' access to funds. This was the case in *Bryn Services v. Latvia*, where the claimant initiated arbitration after the Latvian government took over *Latvijas Krājbanka*, making the investor unable to access its deposited funds.[44]

b) Banking and Finance Institutions[45]

Cross-border investments in the banking and finance sector frequently take the form of equity stakes in foreign financial institutions rather than purely financial instruments. These equity investments span commercial banks, insurance firms, investment fonds, private individuals and asset management companies, and are often eligible for protection under international investment treaties. Investor-state arbitration has been a recurring recourse for resolving disputes stemming from these investments.

- **Commercial banks** – Commercial banks are major sector in cross-border banking and finance, acquiring equity stakes in other foreign banks alongside providing domestic and international banking services. Both global giants and regional banks have initiated Investor-state arbitrations in response to state measures affecting their operations. Particularly when foreign ownership surged between 1995 and 2008, in Eastern Europe and Central Asia. Austrian banks like Erste, Raiffeisen, and Addiko brought claims against Croatia over mortgage currency reforms.[46] Similar banking dispute arose also in Argentina.[47] Global banks such as Deutsche Bank, UniCredit, and Standard Chartered have also pursued arbitration over breach of agreements, loan disruptions and regulatory actions in countries like Sri Lanka, India, and Tanzania.[48] Midsize players like Bank of Cyprus, Bank Melli, and CIT Group have followed suit, reflecting the sector's broad exposure to sovereign risk.[49]

- **Insurance companies** – Important players in cross-border finance, both as providers of

[44] Bryn Services Ltd. v. Latvia, ICC Arbitration (2013 Submission to Arbitration).
[45] Ali AH and Attanasio DL, *International Investment Protection of Global Banking and Finance: Legal Principles and Arbitral Practice* (Kluwer Law International BV 2021), ch 2: '*Cross-Border Banking and Finance Investment'* 15–50.
[46] Erste Grp. Bank AG and others v. Republic of Croatia, ICSID Case No. ARB/17/49; Raiffeisen Bank Int'l AG and Raiffeisenbank Austria d.d. v. Republic of Croatia, ICSID Case No. ARB/17/34; Addiko Bank AG and Addiko Bank d.d. v. Republic of Croatia, ICSID Case No. ARB/17/37.
[47] Bank of Nova Scotia v. Argentine Republic, UNCITRAL Arbitration, claim over forced pesification (currency conversion) affecting its subsidiary, Scotiabank Quilmes SA.
[48] Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/2; UniCredit Bank Austria AG and Zagrebačka Banka d.d. v. Republic of Croatia, ICSID Case No. ARB/16/31; Offshore Power Prod. C.V. and others v. Republic of India; Standard Chartered Bank v. United Republic of Tanzania, ICSID Case No. ARB/10/12.
[49] Bank of Cyprus Pub. Co. Ltd. v. Hellenic Republic, ICSID Case No. ARB/17/4; Bank Melli Iran and Bank Saderat Iran v. Bahrain, PCA Case No. 2017-25; CIT Grp. Inc. v. Argentine Republic, ICSID Case No. ARB/04/9.

services abroad and as investors managing large capital pools. Foreign ownership and branch operations are widespread, particularly in Europe, where international insurers hold significant market shares. This global reach has made the sector a notable source of investor-state disputes. Several of the world's largest insurance groups, some designated as Global Systemically Important Insurers,[50] have pursued international arbitration to protect their investments. Notable cases include Ping An's claim against Belgium following the collapse of Fortis during the global financial crisis,[51] and famous *Achmea's* dispute with Slovakia over the re-nationalization of health insurance providers. Similar arbitrations have arisen in other states.[52]

- **Investment Funds** – Private equity firms, hedge funds, and sovereign wealth funds are increasingly active in global banking and finance. These investors often pursue legal remedies when local regulators or judicial action undermines their investments. For example, *Lone Star Funds v. Korea* challenged restrictions on exiting a stake in Korea Exchange Bank.[53]

- **Other Institutions** – This includes asset management and pension fund firms, which are increasingly attracting international equity investments.

- **Private Individuals –** Investment in financial institutions is not limited to large players. High-net-worth individuals and collective groups have pursued arbitration to protect foreign holdings in banks or financial instruments. Cases such as *Al-Warraq v. Indonesia*, *Carrizosa v. Colombia*, and *Abaclat v. Argentina* (Italian bondholders)[54] highlight how individual investors can also seek international protection for financial losses arising from state actions.

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[50] Financial Stability Board, 2016 List of Global Systemically Important Insurers (G-SIIs) (Nov. 21, 2016).
[51] Ping An Life Ins. Co. of China, Ltd. and Ping An Ins. (Grp.) Co. of China, Ltd. v. Kingdom of Belgium, ICSID Case No. ARB/12/29.
[52] Achmea B.V. (formerly Eureko B.V.) v. Slovak Republic (I), PCA Case No. 2008-13. *See also* HICEE B.V. v. Slovak Republic, PCA Case No. 2009-11; Eur. Am. Inv. Bank AG v. Slovak Republic, PCA Case No. 2010-17.
[53] *LSF-KEB Holdings SCA and others v. Republic of Korea*, ICSID Case No. ARB/12/37.
[54] *Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, UNCITRAL Arbitration; Alex Genin and others v. Republic of Estonia, ICSID Case No. ARB/99/2; Alberto Carrizosa Gelzis and others v. Republic of Colombia (I), PCA Case No. 2018-56; Astrida Benita Carrizosa v. Republic of Colombia, ICSID Case No. ARB/18/5; Abaclat and others v. Argentine Republic, ICSID Case No. ARB/07/5; Giovanni Alemanni and others v. Argentine Republic, ICSID Case No. ARB/07/8; Ambiente Ufficio S.p.A. and others v. Argentine Republic, ICSID Case No. ARB/08/9.

iii. Types of Harmful State Measures and Political Risks Affecting Global Banking and Finance[55] *that have given rise to Disputes*[56]

Political risks and harmful state measures in the context of international banking and finance refer to the risks of the host state actions, whether direct or indirect, that adversely affect foreign financial investments. This encompasses a wide range of measures, including interference with both public and private contracts of investors, restructurings, regulatory instability, discriminatory enforcement, currency shifts and restrictions, and emergency interventions. Although political risks are present in all cross-border investments, they are especially acute in the banking and finance sector due to its heavy dependence on state regulation, sensitivity to policy changes, and exposure to populist political narratives about national and global economic control.

As analysed and concluded by cited authors through a detailed examination of investor-state arbitral practice, there is a distinctive pattern to these state measures. Drawing from actual disputes, the authors identify both systemic regulatory practices and crisis-driven state actions, including those prompted by financial emergencies or political upheaval in countries such as in Argentina, Greece and Poland,[57] as recurring sources of harm. These patterns illustrate not only persistent regulatory instability but also ad hoc, politically motivated interventions that arise during times of economic or governmental disruption and social-political transition. Together, they point out the distinct vulnerability of the financial sector to political risk and affirm the importance of reliable international investment protections in mitigating such exposures.[58]

States may act as direct counterparties in transactions or may exert influence over private

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[55] Ali AH and Attanasio DL, *International Investment Protection of Global Banking and Finance: Legal Principles and Arbitral Practice* (Kluwer Law International BV 2021) ch 3: '*Political Risks Affecting Banking and Finance*' 51-80.

[56] Detail graphic statistical overview is also available in Arif H Ali, David L Attanasio, Yarik Kryvoi and Kai-Chieh Chan, *Empirical Study: International Investment Law Protections in Global Banking and Finance* (British Institute of International and Comparative Law, March 2025).

[57] *"Argentina converted all dollar-denominated debt into Argentine peso-denominated debt, so-called pesification"; Greece restructured its debt by exchanging, in part, outstanding Greek government bonds for new ones "in a face amount of 31.5% of the nominal amount of the exchanged [bonds]";* "*Poland reversed its privatization strategy without warning and announced it would sell PZU's shares in a public offering rather than pursuant to the Share Purchase Agreement".* For further discussion, see Ali AH and Attanasio DL, *International Investment Protection of Global Banking and Finance: Legal Principles and Arbitral Practice* (Kluwer Law International BV 2021) ch 3: '*Political Risks Affecting Banking and Finance*'.

[58] For detailed analysis of these measures and statistical overview, see Ali AH and Attanasio DL, *International Investment Protection of Global Banking and Finance: Legal Principles and Arbitral Practice* (Kluwer Law International BV 2021), ch 3: '*Political Risks Affecting Banking and Finance*'; See also, Arif H Ali, David L Attanasio, Yarik Kryvoi and Kai-Chieh Chan, *Empirical Study: International Investment Law Protections in Global Banking and Finance* (British Institute of International and Comparative Law, March 2025).

contractual relations, exposing investors to risks such as sovereign default, forced debt restructurings, forced changes of the currency of an agreement or the non-performance of state-owned enterprises. Regulatory risks also emerge where states unpredictably alter or inconsistently enforce financial regulations, especially during times of political or economic upheaval. Moreover, states may adopt currency and exchange control measures, such as redenominating foreign currency debt or devaluing their currency, resulting in significant financial loss to investors in this sector.

Past investor-state arbitrations illustrate these risks. Cases involving Argentina, Greece, Sri Lanka, and Poland demonstrate how state actions, ranging from debt restructuring to nationalisation and regulatory overreach, have severely impacted foreign financial investments. Similarly, failures to act, such as under-enforcement of financial regulations or the denial of stabilization aid, have also generated disputes and damages. Emergency financial measures, while often aimed at preserving systemic stability, can disproportionately affect foreign stakeholders through dilution of equity, forced liquidations, or discriminatory treatment.

As the international investment protection regime and its practice evolves, such risks continue to emphasise the need for comprehensive legal frameworks and specific investment treaty protections for investors in this sector. The investment arbitration practice record serves not only as a legal resource but also as a witness of and practical guide to understanding and managing political risk in financial investments.

The following Table also clearly presents and briefly explains the typical types of such harmful state measures (*Table is on the next page*):

Table 1: Displays common types of state measures in banking and finance disputes

[59]

Sovereign Debt Measures	Measures relating to sovereign debt default and restructuring.
Emergency Interventions	Measures ostensibly in response to an emergency affecting an individual financial institution or the financial sector more broadly.
Currency and Exchange Interventions	Measures relating to exchange controls, asset redenomination, and capital controls.
General Regulatory and Sectoral Reform	Measures ostensibly to reform or restructure the banking and finance sector broadly, such as the privatization or nationalization of a particular financial subsector.
Criminal Investigations	Investigations or prosecutions for actions in connection with banking and finance sector investments.
Other Institution-related Measures	Other measures that, directly or indirectly, affect institutions in the banking and finance sector.
Other Instrument-related Measures	Other measures that, directly or indirectly, affect financial instruments.

C. Chapter 2: Scope of Jurisdiction and Interpretation of "*Investment*" under Investment Treaties and the ICSID Convention, and Its Application by ICSID Tribunals in Global Banking and Finance Disputes

a. General Jurisdictional Requirements

This chapter explores the scope of jurisdiction and admissibility as they apply to investment

[59] Arif H Ali, David L Attanasio, Yarik Kryvoi and Kai-Chieh Chan, *Empirical Study: International Investment Law Protections in Global Banking and Finance* (British Institute of International and Comparative Law, March 2025) 11, Table 2 '*Types of Measures at Issue in Banking and Finance Disputes*'.

disputes in the global banking and finance sector. Each element required for the establishment of jurisdiction (*mentioned below*) presents its own interpretative and practical challenges, particularly in the context of ICSID arbitration involving financial investments. However, particular attention will be given to the meaning and interpretation of "*investment*" under international investment treaties and ICSID Convention as applied to the banking and finance investments.

The application of substantive investment protections contained in investment law sources (*discussed in Chapter 1*) begins with meeting the key requirements for establishing the jurisdiction of an investment tribunal. For the purposes of this Thesis, the focus will be limited to a general explanation of ICSID jurisdiction, with specific consideration of the concept of "*investment*" under international investment law and the practice of ICSID tribunals. The second part of this chapter will examine how the notion of investment has been applied and interpreted by tribunals in ICSID cases involving global banking and finance disputes, highlighting the particular challenges to qualify those investments as appropriate and sufficient for jurisdiction.

Generally, an investor seeking to initiate investor-state arbitration under the ICSID system must satisfy jurisdictional requirements found in both the ICSID Convention and the applicable investment treaty, which provides the basis for the dispute and the substantive protections. The ICSID Convention imposes additional jurisdictional criteria beyond those set out in the treaty, limiting ICSID arbitration to disputes arising directly out of an investment between a contracting state and a national of another contracting state. These ICSID-specific requirements, however, do not apply to non-ICSID arbitrations (where applicable), nor do they limit the substantive protections provided by the investment treaty itself.[60]

In terms of jurisdiction, four key categories generally apply under both the ICSID Convention and most investment treaties. These include: a) the existence of a qualifying investment (jurisdiction *ratione materiae*), b) a qualifying investor (jurisdiction *ratione personae*), c) an investment made in the territory of the host state (jurisdiction *ratione loci*), and d) compliance with the treaty's temporal requirements (jurisdiction *ratione temporis*).[61]

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[60] Ali AH and Attanasio DL, *International Investment Protection of Global Banking and Finance: Legal Principles and Arbitral Practice* (Kluwer Law International BV 2021) ch 5: '*Jurisdiction and Admissibility: The Scope of Investment Protection*' 115-116.
[61] Ali AH and Attanasio DL, *International Investment Protection of Global Banking and Finance: Legal Principles and Arbitral Practice* (Kluwer Law International BV 2021) ch 5: '*Jurisdiction and Admissibility: The Scope of Investment Protection*' 116.

According to ICSID Convention, to assert jurisdiction, an ICSID tribunal must determine that: (1) there is a legal dispute, (2) arising directly out of an investment, (3) between a national of one contracting state (the investor) and another contracting state (the host state), and (4) that both parties have given their consent in writing to submit the dispute to ICSID arbitration.[62] These conditions must all be satisfied for the ICSID Centre to exercise jurisdiction.[63] However, the complex and often non-traditional structure of financial investments frequently gives rise to unique interpretative challenges. These challenges have led to varying approaches and decisions by arbitral tribunals in determining jurisdiction in disputes involving financial sector investments (*as discussed under section c. bellow*).

In addition, while jurisdiction concerns whether an arbitral tribunal has the legal authority to hear a dispute between an investor and a host state under the applicable investment treaty, *"the concept of 'admissibility' refers to the varied reasons that a tribunal, although it has jurisdiction, may decline to hear a case or a claim"*.[64] This difference is rooted in the idea that "*jurisdiction is an attribute of a tribunal and not of a claim, whereas admissibility is an attribute of a claim but not of a tribunal*"[65]

For instance, investments in financial instruments like loans or bonds may not fit within the typical definitions of territorial or local investments, while multinational ownership structures can complicate questions of investor nationality. Even when these jurisdictional thresholds are met, additional admissibility difficulties may still limit access to protection. These include issues such as compliance with domestic laws, potential abuse of process, the pursuit of domestic remedies, or the submission of collective claims.

b. Understanding *of "Investment"* in International Investment Protection Law *(Ratione Materiae)*

In international investment law, the notion of "*investment*" plays a pivotal role in delimiting the

[62] Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 25(1) (April 2006).
[63] Alexandrov, S. A. (2005). '*The "baby boom" of treaty-based arbitrations and the jurisdiction of ICSID tribunals: Shareholders as "investors" under investment treaties*'. *The Journal of World Investment & Trade*, 6(3), 389.
[64] *Erhas Dis Ticaret Ltd. Sti, et al. v. Republic of Turkmenistan*, PCA Case No. 2013-27, Separate Declaration of Stanimir A. Alexandrov dated 19 May 2015, para. 5; *see also* in August Reinisch (2017). Jurisdiction and Admissibility in International Investment Law. *The Law and Practice of International Courts and Tribunals*, 16(1), 21–43.
[65] August Reinisch (2017). Jurisdiction and Admissibility in International Investment Law. *The Law and Practice of International Courts and Tribunals*, 16(1), 21–43.

jurisdictional reach of arbitral tribunals and the substantive scope of investor protection. It is a threshold concept that determines whether a dispute qualifies for adjudication under IIAs, including BITs and multilateral agreements such as the ICSID Convention. Jurisdiction is often predicated upon satisfying two layers of investment definitions: that in the applicable treaty and, if arbitration is pursued under the ICSID Convention, the independent requirement of Article 25(1) of the ICSID Convention. This dual framework requires that an investor demonstrate that the subject of the dispute qualifies as an investment under both applicable investment treaty and ICSID Convention, if applicable.[66]

Despite the practical importance of the term, the ICSID Convention does not define "*investment*". This omission has given rise to interpretive uncertainty and doctrinal fragmentation. Conversely, most IIAs contain broad and inclusive definitions of investment.[67] This layered approach has led to circumstances where an asset may satisfy a treaty's definition yet fall outside the ICSID meaning of investment, resulting in dismissal of claims due to lack of jurisdiction.[68]

Investment treaties generally adopt a broad, asset-based definition of investment, often beginning with the phrase "*every kind of asset*", and followed by illustrative lists including shares, property, intellectual property, claims to money, and contractual rights. This formulation reflects a deliberate policy by states to offer comprehensive protection to foreign capital, encompassing both traditional and modern forms of investment.[69] As observed in the arbitral literature, BITs aim to provide "*the broadest possible protection for investors and their investments*" consistent with their object and purpose.[70]

In addition, apart from international instruments, certain national codes contain possibility of arbitration. These codes often contain narrow definitions of investment and exclude certain

[66] Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law,* 3rd Edition (2022; online edn, Oxford Law Pro), ch 4: '*Investment*' 85-96.
[67] Ali AH and Attanasio DL, *International Investment Protection of Global Banking and Finance: Legal Principles and Arbitral Practice* (Kluwer Law International BV 2021), ch 5: '*Jurisdiction and Admissibility: The Scope of Investment Protection*' 117-118; *see also* Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law* (2022; online edn, Oxford Law Pro), ch 4: '*Investment*' 90.
[68] Alexandrov, S. A. (2005). 'The "baby boom" of treaty-based arbitrations and the jurisdiction of ICSID tribunals: Shareholders as "investors" under investment treaties. *The Journal of World Investment & Trade*, 6(3), 391-392.
[69] Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law,* 3rd Edition (2022; online edn, Oxford Law Pro), ch 4: '*Investment*' 83-87; *see also*: A typical example of a multilateral treaty containing a standard definition of '*investment*' is the Energy Charter Treaty, specifically in article 1(6).
[70] Carlevaris, a. (2008). 'Conformity of Investments with the Law of the Host State and the Jurisdiction of International Tribunals' (2008) 9(1) *Journal of World Investment & Trad* 35-49.

economic activities from investment protection.[71] However, even when international treaty language is broad, arbitral tribunals do not treat such definitions as automatically dispositive. Instead, tribunals often conduct an independent examination of whether the underlying transaction possesses the objective characteristics of an investment. This interpretive trend outlines the continuing influence of ICSID-based jurisprudence, which shapes investment definitions even outside the ICSID framework (*as discussed in the paragraph below*).

One of the earliest tribunals to engage with the meaning of "*investment*" under the ICSID Convention was in *Fedax NV v. Venezuela*, a case in the banking and finance sector.[72] The Tribunal in this case determined five criteria as the necessary features of an investment.[73]

However, the most influential tribunal's reasoning in this regard is qualification of investment in *Salini v. Morocco*.[74] This case has created so called "*Salini Test*", which outlines four hallmarks of an investment: (i) contribution of capital or assets, (ii) a certain duration, (iii) the assumption of risk, and (iv) a contribution to the host state's economic development.[75]

Arbitral tribunals have consistently invoked the Salini criteria,[76] though the precise legal significance attributed to them and terminology used has varied and was somewhat ambiguous. Despite this variability in terminology and approach, three of the original Salini elements, namely, contribution, duration, and risk, have been widely applied across arbitral jurisprudence. The fourth element, contribution to the economic development of the host state is recognised by the tribunals to be to most controversial and has been met with more cautious and inconsistent application.

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[71] In Lahoud v. DR Congo, ICSID Case No. ARB/10/4, the applicable investment Code of Congo, excluded investments in mining, hydrocarbons, banking, insurance, production of arms and explosives, and commercial activities; *see also*, Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law,* 3rd Edition (2022; online edn, Oxford Law Pro), ch 4: '*Investment*' 85.

[72] Ali AH and Attanasio DL, *International Investment Protection of Global Banking and Finance: Legal Principles and Arbitral Practice* (Kluwer Law International BV 2021) ch 5: *'Jurisdiction and Admissibility: The Scope of Investment Protection*' 129; *see also*, Fedax N.V. v. Republic of Venezuela, ICSID Case No. ARB/96/3, *Decision on Objections to Jurisdiction,* 11 July 1997.

[73] Tribunal in Fedax N.V. v. Republic of Venezuela, ICSID Case No. ARB/96/3, *Decision on Objections to Jurisdiction,*11 July 1997, para 43: "*The basic features of an investment have been described as involving a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and a significance for the host State's development*."

[74] Salini v. Morocco, ICSID Case No. ARB/00/4, *Decision on Jurisdiction*, 16 July 2001; *see also*, Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law,* 3rd Edition (2022; online edn, Oxford Law Pro), ch 4: '*Investment*' 91.

[75] Salini v. Morocco, ICSID Case No. ARB/00/4, *Decision on Jurisdiction*, 16 July 2001, para 52.

[76] For example: Bayindir v. Pakistan, ICSID Case No. ARB/03/29, *Decision on Jurisdiction*, 14 November 2005, paras 130–138; Noble Energy v. Ecuador, ICSID Case No. ARB/05/12, *Decision on Jurisdiction*, 5 March 2008, paras 125–135; Pey Casado v. Chile, ICSID Case No. ARB/98/2, *Award*, 8 May 2008, paras 231–232.

Although the ICSID Convention refers to economic development in its Preamble[77], tribunals have differed on whether the contribution to the host state's development constitutes a jurisdictional requirement. In *Mitchell v. DR Congo*, the annulment committee rejected jurisdiction due to the claimant's limited economic contribution, i.e. that the law firm did not contribute to the host state's economic and social development.[78] In contrast, in *Malaysian Historical Salvors v. Malaysia*, the tribunal denied jurisdiction, but the annulment committee later overturned that decision, criticizing the elevation of development contribution into a strict threshold.[79]

Recent cases mark a shift toward a more flexible and holistic approach. For example, the tribunal in *İçkale v. Turkmenistan*[80] emphasised the interdependence of Salini's elements, observing that capital contribution inherently involves duration and risk. This approach reflects an effort to balance textual fidelity with the ICSID Convention's overarching potentials and goals to protect variety of investments.

In addition, it should be noted that the element of risk, as part of the *Salini test*, takes on a distinct meaning in the context of global financial transactions.[81] While financial instruments inherently involve commercial risk, such as the chance a counterparty may default, ICSID tribunals have emphasised that operational risk which is linked to the "*risk of the host State's sovereign intervention*" is what distinguishes an investment for ICSID purposes. This includes risks stemming from sovereign intervention or from the political and economic conditions in the host state.[82] To exemplify, in *Ambiente Ufficio v. Argentine,* the investment in question was in sovereign bonds issued by the Respondent, and the tribunal said:

"*Thirdly, in terms of the requirement of an operational as opposed to a mere commercial risk, Respondent submits that the risk assumed by the Claimants of not being paid is not different from that involved in any commercial contract between a creditor and a debtor and that such ordinary commercial contracts cannot be considered an investment (R I §§ 164, 165). However, given the*

[77] CSOB v. Slovakia, ICSID Case No. ARB/97/4, *Decision of the Tribunal on Objections to Jurisdiction*, 24 May 1999, para 64; Bayindir v. Pakistan, ICSID Case No. ARB/03/29, *Decision on Jurisdictio*n, 14 November 2005, para 137.
[78] Mitchell v. DR Congo, ICSID Case No. ARB/99/7, *Decision on Annulment*, 1 November 2006, paras 39–48.
[79] Malaysian Historical Salvors v. Malaysia, ICSID Case No. ARB/05/10, *Decision on Annulment*, 16 April 2009, paras 64–80.
[80] İçkale v. Turkmenistan, ICSID Case No. ARB/10/24, *Award*, 8 March 2016, para 290.
[81] Ali AH and Attanasio DL, *International Investment Protection of Global Banking and Finance: Legal Principles and Arbitral Practice* (Kluwer Law International BV 2021) ch 5: '*Jurisdiction and Admissibility: The Scope of Investment Protection*' 140-141.
[82] Ambiente Ufficio S.p.A. and others v. Argentine Republic, ICSID Case No. ARB/08/9, *Decision on Jurisdiction and Admissibility*, 8 February 2013, 485.

risk of the host State's sovereign intervention, a risk that became manifest in Argentina's very default and restructuring, what is at stake is not an ordinary commercial risk."[83]

c. Application of Investment Qualification by the ICSID Tribunals in Global Banking and Finance Disputes

Investment treaties typically define types of economic activity eligible for protection, serving as a gatekeeping mechanism for activating treaty benefits such as international arbitration. These definitions commonly include corporate shares, property rights, contracts, and claims to money, categories that, *prima facie*, appear broad enough to cover most banking and finance sector investments (*as discussed in previous section*).[84] Within global banking and finance, investments may be structured either as equity instruments (such as shares) or as contractual arrangements (such as derivatives and structured products). However, ICSID tribunals have adopted varying approaches when assessing whether specific investments in the global banking and finance sector, particularly financial instruments, satisfy treaty-based definitions of "*investmen*t". Jurisdictional challenges arise where the investment consists of financial instruments (e.g. derivatives, bonds, loans) that lack a physical presence or operational structure in the host state, as opposed to equity interests in financial institutions, which have generally not faced significant objections, given their similarity to typical forms of investment in other sectors, i.e. equity in locally constituted companies. Resistance typically arises because investments in financial instruments, such as loans, bonds, derivatives, or deposit accounts, do not resemble the traditional forms of covered investments, like interests in mining concessions or real estate development projects.[85]

By analysing significant ICSID arbitral cases, the following section presents the range of approaches adopted by tribunals in determining whether certain investments in financial instruments as a part of global banking and finance constitute "*investments*" under the ICSID Convention and applicable BITs.

[83] Ambiente Ufficio S.p.A. and others v. Argentine Republic, ICSID Case No. ARB/08/9, *Decision on Jurisdiction and Admissibility*, 8 February 2013, 485.
[84] Ali AH and Attanasio DL, *International Investment Protection of Global Banking and Finance: Legal Principles and Arbitral Practice* (Kluwer Law International BV 2021) ch 5: '*Jurisdiction and Admissibility: The Scope of Investment Protection*' 117.
[85] Ali AH and Attanasio DL, *International Investment Protection of Global Banking and Finance: Legal Principles and Arbitral Practice* (Kluwer Law International BV 2021) ch 5: '*Jurisdiction and Admissibility: The Scope of Investment Protection*' 121.

1. Deutsche Bank v. Sri Lanka (ICSID Case No. ARB/09/2) [86]

- Significance: This case is recognised as the leading on derivatives contracts, establishing a valuable decision for the treatment of financial instruments under investment treaty protection.[87]

- Type of Investment: Hedging agreement with domestic state-owned company (oil price swap instrument). Deutsche Bank agreed to pay the Sri Lankan state-owned oil company (Ceylon Petroleum Corporation) when oil prices rose above a certain benchmark (strike price/reference price). In turn, the Sri Lankan entity agreed to pay Deutsche Bank when prices fell below that benchmark.

- Context of the case: The claimant had entered into an oil hedging agreement with the state-owned Ceylon Petroleum Corporation, under which amounts became due following a decline in global oil prices. The agreement was subsequently reviewed by both the Supreme Court of Sri Lanka and the Central Bank of Sri Lanka. The Supreme Court suspended all payments due under the agreement, while the Central Bank concluded that the transaction had been improperly executed. As a result, the claimant remained unpaid and initiated proceedings, alleging violations of the FET and FPS standards under the applicable BIT.

- Decision related to "*investment*" qualification: Tribunal held that a derivative oil hedging agreement constituted a protected investment under both the Germany–Sri Lanka BIT and the ICSID Convention. The contract, which involved reciprocal payment obligations based on oil price fluctuations, was found to be a "*claims to money which has been used to create an economic value or claims to any performance having an economic value and associated with an investment*".[88] Sri Lanka argued that the agreement was not associated with any separate underlying investment which is required under the BIT for the protection, i.e. "*claims to money which has been used to create an economic value or claims to any performance having an*

[86] Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/2, *Award*, 31 October 2012; *see also* Ali AH and Attanasio DL, *International Investment Protection of Global Banking and Finance: Legal Principles and Arbitral Practice* (Kluwer Law International BV 2021) ch 5: '*Jurisdiction and Admissibility: The Scope of Investment Protection*' 126-127.
[87] Ali AH and Attanasio DL, *International Investment Protection of Global Banking and Finance: Legal Principles and Arbitral Practice* (Kluwer Law International BV 2021) ch 5: '*Jurisdiction and Admissibility: The Scope of Investment Protection*' 126.
[88] Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/2, *Award*, 31 October 2012, para 130.

economic value and associated with an investment"[89], and thus failed to meet the treaty's jurisdictional requirement. The tribunal rejected this argument, finding that the "*associated with an investment*" clause applied only to claims to performance, not to claims to money. More importantly, the tribunal argued that Sri Lanka's argument had to be rejected because "*defining an investment by reference to an investment would be a circular reasoning.*"[90]

2. Abaclat v. Argentina (ICSID Case No. ARB/07/5)[91]

- Significance: Influential case concerning sovereign bonds, notable for its broad interpretation of investment and its rejection of the strict application of the *Salini test* as mandatory, as it could frustrate the intent of the parties and the spirit of the ICSID Convention.[92]
- Type of Investment: Sovereign bonds issued by Respondent and acquired by the claimant.
- Context of the case: Big number of Italian investors, approximately 60,000 claimants, reduced from an initial 195,000, held Argentine sovereign bonds. Following Argentina's default on its sovereign debt in 2001, the government launched a voluntary debt restructuring in 2005, offering bondholders an exchange of old bonds for new ones. To implement this, Argentina also enacted legislation that unilaterally altered its bond obligations. The claimants initiated arbitration under the Italy–Argentina BIT, alleging breaches of several treaty protections.
- Decision related to "*investment*" qualification: The tribunal, by the majority, held that the Argentine sovereign bonds held by the Italian claimants constituted a protected investment under both the Italy–Argentina BIT and the ICSID Convention. The BIT explicitly included obligations, public or private securities, or any other right to services or performances having economic value in its non-exhaustive definition of investment. The tribunal concluded that the

[89] Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/2, *Award*, 31 October 2012, para 130.
[90] Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/2, *Award*, 31 October 2012, para 286.
[91] Abaclat and others v. Argentine Republic, ICSID Case No. ARB/07/5, *Decision on Jurisdiction and Admissibility*, 4 August 2011; *see also* other cases with similar factual context in Giovanni Alemanni and others v. Argentine Republic, ICSID Case No. ARB/07/8, *Decision on Jurisdiction and Admissibility*, 17 November 2014; *see also* Ambiente Ufficio S.p.A. and others v. Argentine Republic, ICSID Case No. ARB/08/9, *Decision on Jurisdiction and Admissibility*, 8 February 2013; for further discussion, *see* Ali AH and Attanasio DL, *International Investment Protection of Global Banking and Finance: Legal Principles and Arbitral Practice* (Kluwer Law International BV 2021) ch 5: '*Jurisdiction and Admissibility: The Scope of Investment Protection*' 113-141.
[92] Ali AH and Attanasio DL, *International Investment Protection of Global Banking and Finance: Legal Principles and Arbitral Practice* (Kluwer Law International BV 2021) ch 5: '*Jurisdiction and Admissibility: The Scope of Investment Protection*' 131.

bonds fell within the explicit scope of this definition, as they are "*obligations*" and/or at least "*public securities*" …."[93] It also noted that "this kind of obligations would in the English language more commonly be called "*bond*" rather than "*obligation*".[94] They added, that an investment is protected under the ICSID Convention if it is "*apt to create the value that is protected under the BIT*".[95] It concluded that the sovereign bonds met this standard, as they represented "*contributions ... which ... created the value that is protected under the BIT*". Instead of strictly applying the Salini criteria, in particular the element of contribution (*discussed in section b. of this Chapter*), the tribunal held that the investors "*paid a certain amount of money in exchange of the security entitlements*" and "*the value generated by this contribution is the right attached to the security entitlements to claim reimbursement from Argentina of the principal amount and the interests accrued*".[96] It also took the position that the ICSID Convention allow for mass claims and, thus, Respondent had consented to the mass proceedings.[97]

3. Poštová Banka v. Greece (ICSID Case No. ARB/13/8)[98]

- Significance: This case serves as an important example where jurisdiction was denied in a sovereign bond dispute, reaching the opposite jurisdictional conclusion to Abaclat and standing as a contrary authority.

- Type of Investment: Sovereign debt issued by Respondent.

- Context of the case: The dispute arose after Poštová Banka, a Slovak investor in which ISTROKAPITAL SE held shares, acquired Greek sovereign bonds on the secondary market. Following the 2008 Global Financial Crisis, Greece faced severe challenges in servicing its debt, leading to a sovereign debt crisis. As a condition of an international bailout, Greece restructured its sovereign debt by legislatively inserting collective action clauses, allowing a supermajority

[93] Abaclat and others v. Argentine Republic, ICSID Case No. ARB/07/5, *Decision on Jurisdiction and Admissibility*, 4 August 2011, para 356.
[94] Abaclat and others v. Argentine Republic, ICSID Case No. ARB/07/5, *Decision on Jurisdiction and Admissibility*, 4 August 2011, para 355.
[95] Abaclat and others v. Argentine Republic, ICSID Case No. ARB/07/5, *Decision on Jurisdiction and Admissibility*, 4 August 2011, para 355 (Aug. 4, 2011), 365.
[96] Abaclat and others v. Argentine Republic, ICSID Case No. ARB/07/5, *Decision on Jurisdiction and Admissibility*, 4 August 2011, para 366.
[97]Abaclat and others v. Argentine Republic, ICSID Case No. ARB/07/5, *Decision on Jurisdiction and Admissibility*, 4 August 2011, para 492.
[98] Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic, ICSID Case No. ARB/13/8, *Award*, 9 April 2015.

of bondholders to impose new terms, less favourable to creditors on all bondholders. Poštová claimed this restructuring violated the Slovakia–Greece BIT.

- Decision related to "*investment*" qualification: The tribunal declined jurisdiction on the basis that the Greek sovereign bonds held by the claimant did not qualify as a protected investment under the Slovakia–Greece BIT.[99] . The tribunal emphasised that "*sovereign debt is an instrument of government monetary and economic policy and its impact at the local and international levels makes it an important tool for the handling of social and economic policies of a State*".[100] The tribunal further noted that the BIT's definition of investment made no explicit reference to sovereign debt securities, and only mentioned debt instruments issued by companies.[101] In this regard, it reasoned that it should "*not lightly expand*" the definition of investment to include sovereign bonds, ultimately concluding that the Greek sovereign bonds were not covered by the BIT.[102] However, the tribunal did not explain why the sovereign nature of the bonds would preclude them from being treated as claims to money or performance, which might have otherwise fallen within the BIT's existing language.[103]

  Another position of the tribunal's reasoning was that Banka lacked a direct contractual relationship with Greece, as the bonds were issued on the primary market by Greece, while the Bank acquired them on the secondary market. The tribunal noted that Banka had no "*contractual relationship*" with Greece regarding the "*issuance and distribution*" of the bonds.[104]

  Furthermore, the tribunal argued that the bonds were acquired through a process of exchange of pre-existing value, and thus did not involve the creation of value, stating that "*an investment, in the economic sense, is linked with a process of creation of value, which distinguishes it clearly from a sale, which is a process of exchange of values or a subscription to sovereign bonds which*

[99] Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic, ICSID Case No. ARB/13/8, *Award*, 9 April 2015, para 350.
[100] Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic, ICSID Case No. ARB/13/8, *Award*, 9 April 2015, para 324.
[101] Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic, ICSID Case No. ARB/13/8, *Award*, 9 April 2015, para 340.
[102] Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic, ICSID Case No. ARB/13/8, *Award*, 9 April 2015, para 342.
[103] For further explanation see Ali AH and Attanasio DL, *International Investment Protection of Global Banking and Finance: Legal Principles and Arbitral Practice* (Kluwer Law International BV 2021) ch 5: '*Jurisdiction and Admissibility: The Scope of Investment Protection*' 126.
[104] Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic, ICSID Case No. ARB/13/8, *Award*, 9 April 2015, paras 344-47.

is also a process of exchange of values, i.e. a process of providing money for a given amount of money in return."[105]. Because of this Poštová Banka did not generate new value but simply participated in a value exchange that lacked a contribution to the Greek economy.[106]

Having decided that investment in this case is not protected, tribunal also assessed operational risk in this case (foe the meaning *see above in this Chapter*). They took a narrow view of operational risk, holding that it requires the dependence of profits on "*the success or failure of the economic venture concerned*" and excludes sovereign risk, such as state intervention.[107] It found that investment involved only sovereign risk, not operational risk, and thus did not qualify as an investment.[108] However, the tribunal offered no clear rationale for why sovereign risk was insufficient, nor did it address other typical risks of cross-border debt, such as economic or political volatility.[109]

4. KT Asia Inv. Grp. B.V. v. Republic of Kazakhstan (ICSID Case No. ARB/09/8)

Apart from cases involving financial instruments, one significant case related to equity ownership in a bank is *KT Asia v. Kazakhstan*.[110] The tribunal found that although the investment involved shares in BTA Bank (minority-owned by Claimant), it failed to qualify under the ICSID Convention because the investor intended only short-term ownership, despite the fact that the actual holding period turned out to be longer.[111] KT Asia "*was created as a vehicle*" solely to hold the shares temporarily, approximately three to four weeks[112], before reselling them, and the tribunal held that this lack of intended duration meant the investment did not satisfy duration element of Salini test.[113] Even though the shares were ultimately held for longer period due to market disruption, jurisdiction was declined.

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[105] Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic, ICSID Case No. ARB/13/8, *Award*, 9 April 2015 para 361, (citations omitted).
[106] Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic, ICSID Case No. ARB/13/8, *Award*, 9 April 2015, paras 362-63.
[107] Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic, ICSID Case No. ARB/13/8, *Award*, 9 April 2015, paras 369-70.
[108] Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic, ICSID Case No. ARB/13/8, *Award*, 9 April 2015, para 371.
[109] Ali AH and Attanasio DL, *International Investment Protection of Global Banking and Finance: Legal Principles and Arbitral Practice* (Kluwer Law International BV 2021) ch 5: '*Jurisdiction and Admissibility: The Scope of Investment Protection*' 141.
[110] KT Asia Inv. Grp. B.V. v. Republic of Kazakhstan, ICSID Case No. ARB/09/8, *Award*, 17 October 2013.
[111] KT Asia Inv. Grp. B.V. v. Republic of Kazakhstan, ICSID Case No. ARB/09/8, *Award*, 17 October 2013, paras 209, 213.
[112] KT Asia Inv. Grp. B.V. v. Republic of Kazakhstan, ICSID Case No. ARB/09/8, *Award*, 17 October 2013, paras 210-11.
[113] KT Asia Inv. Grp. B.V. v. Republic of Kazakhstan, ICSID Case No. ARB/09/8, *Award*, 17 October 2013, paras 214-16.

D. Chapter 3: Standards of International Investment Protection and ISDS Tribunal Application in Banking and Finance Disputes

a. Standards of International Investment Protection

When investors bring claims before arbitral tribunals under investment treaties, they most frequently allege that the host state has violated their substantive rights, the protection of which is enshrined in the treaty(s). These rights are commonly referred to as *standards of investment protection*.[114]

The core investment protections available to the banking and finance sector are largely the same as those in other sectors. However, their application often diverges due to the sector's exposure to distinctive state measures, such as sovereign debt defaults, currency interventions, regulatory actions, and politicised enforcement. These recurring patterns have led arbitral tribunals to develop a sector-specific approach to applying general investment protections, which would be presented in the remaining part of this chapter.[115]

While the sources of international investment law (*discussed in Chapter 1*) contain various substantive standards of protection, one stands out in particular – the FET standard, which is included in nearly all modern BITs and multilateral IIAs.[116]

However, these standards are generally classified into two main categories based on their contingent or non-contingent nature, that is, whether the protection is determined solely by reference to the standard itself (non-contingent or absolute), or whether it depends on an external legal norm or factual comparison, such as the treatment accorded to other persons or entities in a comparable situation (contingent).[117] Absolute standards of treatment that arise from three types of common investment treaty obligations are: fair and equitable treatment (FET), full protection and security (FPS), and non-impairment of investments; while relative standards which may arise from of investment treaty obligations are: prohibitions on discrimination, national treatment and most-favoured nation treatment.

[114] Alexandra Diehl, '*The Core Standard of International Investment Protection*' (Kluwer Law International 2012), 1-13.
[115] *See* Ali AH and Attanasio DL, *International Investment Protection of Global Banking and Finance: Legal Principles and Arbitral Practice* (Kluwer Law International BV 2021), ch 7: 'Merits: Applications of Investment Protection' 261–340.
[116] *See* Alexandra Diehl, '*The Core Standard of International Investment Protection*' pt 1: '*The Framework of Protection, Chapter 1: Sources of the FET Standard*' (Kluwer Law International 2012).
[117] Alexandra Diehl, '*The Core Standard of International Investment Protection*' (Kluwer Law International 2012), 9-11.

In addition to absolute and relative standards of treatment, many investment treaties incorporate more specialised protections particularly relevant to the banking and finance sector. These include obligations related to the promotion and admission of investments, performance requirements, and transparency. Of paramount importance for financial investors are the state obligations to observe other (often contractual) commitments (commonly referred to as *umbrella clauses*) and to permit the free transfer of funds associated with the investment. The last two standards are especially important in the banking and finance sectors that have the core function of allocating funds and risk and typically where the allocation of capital and risk typically relies on complex contractual arrangements.[118]

It should also be noted that one of the most fundamental protections contained in investment treaties is the protection against expropriation, whether direct or indirect. This is perhaps one of the most frequently invoked standards by investors and adjudicated by arbitral tribunals (*see section* v. *below*). It is particularly relevant for the banking and finance sector, especially in cases of indirect expropriation where regulatory or governmental measures may substantially deprive an investor of the value or control of its investment without a formal transfer of title.

i. Fair and Equitable treatment (FET) Standard

Among all the standards of protection granted in BITs and/or other sources of international investment law (*see above*), one stands out as particularly distinct, and none has been more elusive or sparked as much controversy as the guarantee of FET.[119] This standard is also the most frequently cited and invoked protection principle in investment disputes. It also holds the greatest practical significance, as a substantial number of successful claims in international arbitration are based on its violation.[120]

Although nearly all BIT provisions use the formulation "*fair and equitable treatment*" they are not uniform. In particular, they differ in how they link this standard to customary international law, i.e. whether the FET obligation is expressly linked to customary international law or treated as an

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[118] Ali AH and Attanasio DL, *International Investment Protection of Global Banking and Finance: Legal Principles and Arbitral Practice* (Kluwer Law International BV 2021), ch 6: '*Merits: The Content of Investment Protection*', sections 6.5.1–6.5.2, 245–251.
[119] *See* Alexandra Diehl, '*The Core Standard of International Investment Protection*', 'Introduction'; and pt 1: '*The Framework of Protection, Chapter 1: Sources of the FET Standard*' (Kluwer Law International 2012).
[120] Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law,* 3rd Edition (2022; online edn, Oxford Law Pro), ch 8: '*Standards of Protection*' 187-188.

autonomous treaty standard.[121] In the absence of consistent and precise treaty language, arbitral tribunals have developed the content of the FET through case-by-case interpretation, identifying a core set of principles that commonly fall within its scope. These include the protection of legitimate expectations, transparency, due process, non-discrimination, and protection from arbitrary, abusive or coercive conduct.[122] Investment tribunals have repeatedly emphasised the practical relevance of this standard, especially in cases involving regulatory intervention in sensitive sectors such as banking and finance, where measures by state authorities can rapidly affect the legal and economic environment of investors (*as explained below*). Interpretation and explanation of these FET criteria is presented through the practice of the arbitral tribunals in the paragraphs bellow (*and section b. of this Chapter*).

While the precise nature of FET remains debated, it is now largely accepted as a self-standing, autonomous standard of treatment, not merely a reflection of the international minimum standard under customary international law. As Schreuer explains, the better view is that, absent a clear indication to the contrary, FET provisions in BITs constitute autonomous obligations whose content is determined by the specific wording of the treaty in question. Although the FET standard may in some cases overlap with or even mirror the international minimum standard, it is not confined to it. A breach of international law can serve as strong evidence of a violation of FET, but it is not a necessary condition, i.e. FET may be violated through conduct that, while not breaching a specific rule of customary international law, nonetheless fails to meet the broader standard of fairness, equity, and good faith required under the treaty.[123]

To exemplify the wording and description of this principle in main sources, FET as a protective standard in BITs and multilateral conventions is often expressed in broad and open-ended language, such as:

"*Each Contracting Party shall in its territory fair and equitable treatment to investments of investors of the other contracting party. This treatment shall not be less favourable than that granted by each contracting party to investments made within its territory or by its own investors*

[121] Christoph Schreuer, 'Fair and Equitable Treatment in Arbitral Practice' (2005) 6(3) *Journal of World Investment & Trade* 357-364; *see also* NAFTA art 1105 (Minimum Standard of Treatment).
[122] Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law,* 3rd Edition (2022; online edn, Oxford Law Pro), ch 8: '*Standards of Protection*' 191-195.
[123] Christoph Schreuer, '*Fair and Equitable Treatment in Arbitral Practice*' (2005) 6(3) *Journal of World Investment & Trade* 364-374.

than that granted by each contracting party to investments made in its territory by investors of a third State, if the latter is more favourable treatment"; [124]

and

"*Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security*". [125]

As can be seen from these examples, the exact and concrete definition of the fair and equitable treatment standard is typically not precisely or concretely defined in treaty texts. However, given its paramount importance, a substantial body of arbitral jurisprudence has emerged that further interprets and elaborates the clause, progressively clarifying its content and establishing it as a practically significant legal standard in investor–state dispute settlements.[126]

Important and comprehensive definition is provided in *Tecmed v. Mexico*[127] which concerned the withdrawal of a license for a landfill for hazardous waste. In this case the tribunal, while interpreting FET autonomously covering its ordinary meaning, international law, and the good faith principle, held that FET requires the host state to act consistently, transparently, and in a manner that does not frustrate the investor's basic expectations.

"*The Arbitral Tribunal considers that this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that* ***does not affect the basic expectations that were taken into account by the foreign investor to make the investment****. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any*

[124] Article 3 (2) of the Romania - Switzerland BIT (1993) [https://edit.wti.org/document/show/9d134de2-a85b-44ef-a055-7b56003d5175].
[125] Article 1105 (1) of the NAFTA (1992) [https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/fta-ale/11.aspx?lang=eng].
[126] Christoph Schreuer, '*Fair and Equitable Treatment in Arbitral Practice*' (2005) 6(3) *Journal of World Investment & Trade* 364-374.
[127] Tecmed v. Mexico, ICSID Case No. ARB (AF)/00/2, *Award*, 29 May 2003; *see also* Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law,* 3rd Edition (2022; online edn, Oxford Law Pro), ch 8: '*Standards of Protection*' 191-192.

preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation."[128]

In the significant financial dispute *Genin v. Estonia*,[129] which concerned the withdrawal of a banking licence by the Estonian Central Bank, the tribunal clarified that conduct breaching the fair and equitable treatment standard "*would include acts showing a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith*".[130] Also, in the *Eureko v. Poland*, tribunal stated that explicit undertakings and representations made by the host state are the strongest basis for legitimate expectations.[131]

In equally instructive and important financial case, *Saluka v. Czech Republic*,[132] tribunal examined the Czech government's conduct in facilitating the takeover of a failing private bank by a competitor that received state financial assistance, while the claimant, a foreign investor, had been denied similar support. The tribunal provided a detailed articulation of the fair and equitable treatment standard, stating that FET requires consistency, transparency, reasonableness, and non-discrimination.[133] However, despite these findings, the tribunal ultimately did not conclude that there had been a breach of the FET standard on the facts of the case.

In the latter case, the tribunal reiterated that under the FET, a balance must be struck between the investor's right to stability, through the protection of legitimate expectations, and the state's sovereign right to regulate in the public interest.[134]

The principle of procedural fairness has been closely linked to the FET, with tribunals such as

[128] Tecmed v. Mexico, ICSID Case No. ARB (AF)/00/2, *Award*, 29 May 2003, para 154.
[129] Genin v. Estonia, ICSID Case No. ARB/99/2, *Award*, 25 June 2001.
[130] Genin v. Estonia, ICSID Case No. ARB/99/2, *Award*, 25 June 2001, para 367.
[131] Eureko B.V. v. Poland, Ad hoc, *Partial Award*, 19 August 2005, paras 231–234.
[132] Saluka v. Czech Republic, *Partial Award*, 17 March 2006.
[133] Saluka v. Czech Republic, *Partial Award*, 17 March 2006, para 309.
[134] Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law,* 3rd Edition (2022; online edn, Oxford Law Pro), ch 8: '*Standards of Protection*' 207.

in *Waste Management v. Mexico II*[135] and *Middle East Cement v. Egypt*[136] finding that serious procedural irregularities, denial of justice, or manifest failures of natural justice may constitute violations of this standard. Tribunals have further clarified that the FET standard includes protection from arbitrary, abusive, harassing or coercive conduct, as recognised in *Eureko v. Poland*[137] and *Al-Bahloul v Tajikistan*[138], which addressed bad-faith behaviour by states involving such elements. Lastly, tribunals have acknowledged that while the standard is flexible, it requires host states to provide a stable and predictable legal framework and to refrain from sudden or unjustified regulatory shifts that would undermine the investment climate.[139] Taken together, these elements show that FET operates as a multidimensional standard grounded in the rule of law, good faith and fairness, tailored by investment treaty wording and contextualized by evolving arbitral jurisprudence. However, there is a trend in modern investment treaties to restrict the impact and overall reach of the FET standard.[140]

ii. Full protection and security (FSP)

The FPS clause is a protection standard commonly found in BITs and other international agreements containing investment protection clauses. It imposes an obligation on host states to take active measures to protect foreign investments against adverse effects, which may originate from both private actors and organs of the state.[141] While the original understanding of the FPS standard focused primarily on physical protection including insurgents, rioting groups, state's police, military units, ensuring safety from violence, vandalism, or civil unrest, the interpretation by arbitral tribunals has expanded over time to include legal and regulatory protection of investor from

[135] Waste Management v Mexico II, ICSID Case No. ARB(AF)/00/3, *Award*, 30 April 2004: *"the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process."*

[136] Middle East Cement v. Egypt, ICSID Case No. ARB/99/6, *Award*, 12 April 2002.

[137] Eureko B.V. v. Republic of Poland, Ad hoc, *Partial Award*, 19 August 2005, para 233, under FET breach: "*The Tribunal has found that the RoP, by the conduct of organs of the State, acted not for cause but for purely arbitrary reasons linked to the interplay of Polish politics and nationalistic reasons of a discriminatory character*".

[138] Al-Bahloul v. Tajikistan, SCC Case No. V (064/2008), *Partial Award on Jurisdiction and Liability*, 2 September 2009, para 221; *see also* Biwater Gauff v. Tanzania, ICSID Case No. ARB/05/22, *Award*, 24 July 2008, para 709.

[139] Total S.A. v. Argentine Republic, ICSID Case No. ARB/04/1, *Decision on Liability*, 27 December 2010, para 125; *see also*: LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, *Decision on Liability*, 3 October 2006, paras 124–139.

[140] Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law,* 3rd Edition (2022; online edn, Oxford Law Pro), ch 8: '*Standards of Protection*'230.

[141] Christoph Schreuer, '*Full Protection and Security'* (2010) 1 *Journal of International Dispute Settlement,* 1.

the state's organs and governmental regulatory acts as well.[142] The standard is thus no longer confined solely to guarding against physical harm but encompasses the host state's duty to ensure that its own legal and administrative framework in which the investment operates remains sufficiently secure and predictable to allow the investor to exercise its rights effectively:

"*[The]* host State *is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor's investment withdrawn or devalued.*"[143]

Also,

"*Thus protection and full security (sometimes full protection and security) can apply to more than physical security of an investor or its property, because either could be subject to harassment without being physically harmed or seized."*[144]

iii. Relative Standards of Protection: Protection of Arbitrary or Discriminatory Measures; National Treatment (NT) and Most Favoured Nation Treatment (MFN)

The relative standards of protection in international investment law, namely, protection against arbitrary or discriminatory measures, MFN, and NT are central to ensuring equal, non-discriminatory and non-prejudicial treatment of foreign investors and their investments by host states. These standards operate not in isolation, but through a logic of comparison, requiring arbitral tribunals to assess whether foreign investors have been treated arbitrary lacking reliable legal and reasonable framework and/or less favourably than appropriate comparators, whether domestic or third-party foreign investors.[145] While FET or FPS are considered "*absolute*" standards, relative standards derive their content from comparative assessments with other entities in "*like circumstances*" or similar treaty arrangements. Their interrelated purpose is to limit unjustifiable distinctions made by states based on nationality or other arbitrary factors, thereby fostering a transparent and predictable investment environment.[146]

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[142] Christoph Schreuer, '*Full Protection and Security'* (2010) 1 *Journal of International Dispute Settlement*, 1–6.
[143] CME v. Czech Republic, *Partial Award*, 13 September 2001, para 613, cited in Schreuer, '*Full Protection and Security'* (2010) 1 *Journal of International Dispute Settlement,* 7.
[144] Vivendi v. Argentina, ICSID Case No. ARB/97/3, *Award*, 20 August 2007, para. 7.4.17.
[145] Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law,* 3rd Edition (2022; online edn, Oxford Law Pro), ch 8: '*Standards of Protection*' 240.
[146] *See* August Reinisch, "Most Favoured Nation Treatment," in Marc Bungenberg, Jörn Griebel, Stephan Hobe and August Reinisch (eds) *International Investment Law* (Nomos et al., 2015) 808–809, 815-816.

The prohibition against arbitrary or discriminatory measures serves as a check against state action that lacks rational justification or is implemented in bad faith.[147] The legal essence of this standard lies in its dual requirement: first, the measure must not be arbitrary, meaning that it should possess a rational connection to a legitimate public policy aim; and second, it must not discriminate without reasonable and objective justification.[148] In *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, the tribunal emphasised that "*arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of reason*".[149] Also, tribunal in *Plama v. Bulgaria* clarified that a measure is discriminatory if "*It entails like persons being treated in a different manner in similar circumstances without reasonable or justifiable grounds.*".[150] To conclude, arbitrariness and discrimination has been linked by tribunals to a lack of due process, legal standards, or rational justification, and includes unjustified differences in treatment between investors in similar circumstances.

NT obliges host states to treat foreign investors no less favourably than it treats its own nationals in like circumstances.[151] Vinuesa notes that the principle covers that foreign investors are not disadvantaged on grounds of different nationality, particularly in sensitive contexts such as taxation or subsidies.[152] NT is context-dependent and requires tribunals to evaluate whether investors are "*in like circumstances*" and whether the differentiation is justified by a legitimate regulatory and policy purpose.[153] Tribunal in *SD Myers v. Canada* emphasized the relevance of the same "*business*" sector for the determination of likeness and held that "*The concept of 'like circumstances' invites an examination of whether a nonnational investor complaining of less favourable treatment is in the same 'sector' as the national investor.*"[154] In another case, *Occidental v. Ecuador*, the tribunal found that although the tax policy lacked a discriminatory intent

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[147] Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law,* 3rd Edition (2022; online edn, Oxford Law Pro), ch 8: '*Standards of Protection*' 239-249.
[148] Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, Principles of International Investment Law, 3rd Edition (2022; online edn, Oxford Law Pro), ch 8: '*Standards of Protection*' 244–246.
[149] Elettronica Sicula SpA (ELSI) (United States v Italy), International Court of Justice, Judgment, 20 July 1989, ICJ Reports (1989) 15, para 128.
[150] Plama v. Bulgaria, ICSID Case No. ARB/03/24, *Award*, 27 August 2008, para 184.
[151] Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law*, 3rd Edition (2022; online edn, Oxford Law Pro), ch 8: '*Standards of Protection*' 253; *see also* definition of NT in article 1102(1) NAFTA.
[152] Ignacio Vincent Vinuesa, '*National Treatment, Principle*' in Oxford Public International Law (2011 Max Planck Encyclopedia of Public International Law, OUP) 2-3.
[153] Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law*, 3rd Edition (2022; online edn, Oxford Law Pro), ch 8: '*Standards of Protection*' 254-261.
[154] SD Myers, Inc. v. Government of Canada, UNCITRAL, *Partial Award*, 13 November 2000) para 250.

and was based on neutral legal criteria, its effect was to accord less favourable treatment to the foreign investor, thus breaching the national treatment standard.[155] This aligns with the prevailing view in investment arbitration that national treatment violations do not require proof of discriminatory intent or nationality-based motive. Tribunals have held that proof of less favourable treatment alone may suffice, without requiring separate evidence that the discrimination was based on the investor's nationality.[156]

The MFN standard of treatment ensures that a host state does not provide more favourable treatment to investors from third states than to the investor of the contracting home state party.[157] It is designed to promote equality between foreign investors from different jurisdictions and to prevent discrimination.[158] The purpose of the MFN clauses is to ensure equality of competitive opportunitie*s* and harmonize rights available under BITs of different states.[159] In a famous case *Maffezini v. Spain*, the tribunal accepted the application of MFN to dispute settlement clauses, holding: "*if a third-party treaty contains provisions more favourable to the protection of the investor's rights... such provisions may be extended to the beneficiary of the most favoured nation clause.*"[160] However, *Plama v. Bulgaria* and *Salini v. Jordan* criticised and rejected *Maffezini* approach, warning that importing procedural rights without host state consent could undermine legal certainty.[161]

Importantly, both MFN and NT standards in investment law reflect parallels with WTO law, where they are foundational disciplines. In the WTO, the MFN principle under Article I of the GATT ensures that "*any advantage*" granted to one trading partner "*shall be accorded immediately and unconditionally*" to all others. Likewise, NT under Article III prohibits treating imported products less favourably than "*like*" domestic products. While these WTO disciplines are primarily

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[155] Occidental Exploration and Production Company v. The Republic of Ecuador, LCIA Case No. UN3467, *Final Award*, 1 July 2004, paras 170–179.

[156] Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law*, 3rd Edition (2022; online edn, Oxford Law Pro), ch 8: '*Standards of Protection*' 258-259.

[157] August Reinisch, 'Most Favoured Nation Treatment', in Marc Bungenberg, Jörn Griebel, Stephan Hobe and August Reinisch (eds) *International Investment Law*, eds. Bungenberg et al. (Nomos et al., 2015) 813.

[158] August Reinisch, 'Most-Favoured-Nation Treatment' in Marc Bungenberg, Jörn Griebel, Stephan Hobe and August Reinisch (eds), *International Investment Law* (CH Beck, Hart, Nomos 2015), 814-815.

[159] Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law*, 3rd Edition (2022; online edn, Oxford Law Pro), ch 8: '*Standards of Protection*' 264-265.

[160] Maffezini v. Kingdom of Spain, ICSID Case No ARB/97/7, *Decision on Objection to Jurisdiction*, 25 January 2000, para 56.

[161] Plama Consortium Ltd v. Republic of Bulgaria, ICSID Case No ARB/03/24, *Decision on Jurisdiction*, 8 February 2005, paras 198–223; Salini v. Jordan, ICSID Case No ARB/02/13, *Decision on Jurisdiction*, 9 November 2004, paras 101–103.

trade-focused and automatic in application, investment law adapts them more flexibly, particularly by embedding MFN in BITs through explicit treaty language and assessing its scope on a case-by-case basis. In that regard, even investment tribunals have at times referred to WTO case law when interpreting MFN and NT clauses, particularly to clarify concepts such as "*like circumstances*" and "*less favourable treatment*".[162]

Each of these standards relies on comparative assessment and has evolved through arbitral jurisprudence to constrain unjustified differential treatment of foreign investors, an issue that is particularly sensitive in highly regulated sectors such as banking and finance, where tribunals must carefully balance regulatory discretion with investor protection.

iv. Umbrella Clause and Free Transfer of Funds

1) Umbrella Clause

Umbrella clauses are treaty provisions that have the effect of transforming contractual or other legal obligations assumed by a host state into obligations governed by international law. These clauses typically state that the host state shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other contracting party.[163] As some authors explain, such clauses act as a legal bridge between private contractual commitments, national law and international law along with international obligations, potentially elevating breaches of national law or private contract into violations of the investment treaty.[164]

Despite their prevalence, the interpretation and scope of umbrella clauses remain contested. In particular, tribunals have adopted divergent views regarding whether these clauses apply broadly to all types of state obligations or only to certain categories, such as investment-related contracts. In *SGS v. Pakistan*, the tribunal took more restrictive and limited reaching effect of this clause and acknowledged that the umbrella clause might elevate breaches of contract to international treaty breaches, but cautioned that not every contractual claim is necessarily transformed into an

[162] Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law*, 3rd Edition (2022; online edn, Oxford Law Pro), ch 8: '*Standards of Protection*' 262–263.
[163] Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law*, 3rd Edition (2022; online edn, Oxford Law Pro), ch 8: '*Standards of Protection*' 271-273; *see also*: Sinclair, A.C. (2004) '*The Origins of the Umbrella Clause in the International Law of Investment Protection*', Arbitration international, 20(4).
[164] Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law*, 3rd Edition (2022; online edn, Oxford Law Pro), ch 8: '*Standards of Protection*', 274; *see also*, Sinclair, A.C. (2004) '*The Origins of the Umbrella Clause in the International Law of Investment Protection*', Arbitration international, 20(4).

international obligation.[165] Conversely, in *SGS v. Philippines*, the tribunal interpreted the clause more expansively, holding that it included any legal obligation entered into with respect to an investment.[166]

This divergence reflects deeper issues in investment law concerning the distinction between contractual and international treaty obligations, especially their wording, as well as how consent to jurisdiction is interpreted by arbitral tribunals.[167] To manage this controversy tribunals take a clause-specific approach, interpreting the wording and context to determine scope. Broad formulations, such as a duty to "*observe any obligation*" are more likely to elevate contractual promises, while narrower clauses may not.[168] This is particularly relevant in regulated sectors like banking and finance, where sovereign obligations often stem from financial instruments or licenses. Whether such commitments fall under the treaty depends on both the language used and the tribunal's interpretive stance.

2) *Free Transfer of Funds*

The free transfer of funds is a widely embedded protection standard in international investment treaties, serving as a vital protection for investors to repatriate profits, recover capital, or service financial obligations. This is pivotal in the banking and finance sector, where the fluidity of capital is fundamental to operations and business continuity.[169]

Investment treaties often guarantee that investors may transfer capital and related payments freely, both into and out of the host state. These payments include profits, dividends, loan repayments, liquidation proceeds, royalties, and salaries.[170] Some treaties, such as the Netherlands–Slovak Republic BIT and the Turkey–Afghanistan BIT, enumerate these categories explicitly, while others refer more generally to "*transfers related to an investment.*"[171] In most cases, transfers

[165] SGS Société Générale de Surveillance SA v. Islamic Republic of Pakistan, ICSID Case No ARB/01/13, *Decision on Jurisdiction,* 6 August 2003, paras 167-172.
[166] SGS Société Générale de Surveillance SA v. Republic of the Philippines, ICSID Case No ARB/02/6, *Decision on Jurisdiction*, 29 January 2004, paras 115–128.
[167] Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law*, 3rd Edition (2022; online edn, Oxford Law Pro), ch 8: '*Standards of Protection*' 273-275.
[168] Eureko v. Poland, *Partial Award*, 19 August 2005; *see also*: Strabag v. Libya, *Award*, 29 June 2020; *see also*, Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law*, 3rd Edition (2022; online edn, Oxford Law Pro), ch 8: '*Standards of Protection*' 277-285.
[169] Ali AH and Attanasio DL, *International Investment Protection of Global Banking and Finance: Legal Principles and Arbitral Practice* (Kluwer Law International BV 2021) ch 6: '*Merits: The Content of Investment Protection*' 191–260.
[170] Ali AH and Attanasio DL, *International Investment Protection of Global Banking and Finance: Legal Principles and Arbitral Practice* (Kluwer Law International BV 2021) ch 6: '*Merits: The Content of Investment Protection*' 191–260.
[171] Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and

must be made in freely convertible currency and without undue delay.[172]

Despite the broad language of granted protections, many treaties contain exceptions. These include measures taken in good faith for bankruptcy, criminal enforcement, securities regulation, and the protection of creditors, among others.[173] Moreover, to claim protection under such clauses, investors are typically expected to comply with local administrative procedures, as emphasized in *Metalpar v. Argentina*, where the failure to request a transfer under domestic procedures was fatal to the claim.[174]

Notably, investment protections must be balanced against the host state's monetary sovereignty, such as the right to regulate capital flows, maintain exchange controls, and manage financial stability.[175] The IMF Articles of Agreement draw a distinction between current and capital transactions, generally prohibiting restrictions on the former but allowing states more flexibility over the latter.[176]

A prominent case elaborating this is *Continental Casualty v. Argentina*, where the tribunal recognized the host state's monetary sovereignty but affirmed that the BIT's transfer provisions could function as *lex specialis*, providing stronger protection than the general IMF framework.[177] Similarly, in *Rusoro v. Venezuela*, the tribunal upheld the legality of stringent exchange controls, provided they were implemented in good faith and did not amount to indirect expropriation.[178]

The legality of restrictions on fund transfers depends on whether the measures are necessary, temporary, consistent with the Articles of Agreement of the IMF, and applied in a non-discriminatory manner. Arbitral tribunals are expected to scrutinize whether such measures are genuinely necessary, proportionate, and the least restrictive means available, in order to prevent abuse of regulatory powers. Even when investment treaties include emergency or national security exceptions, such clauses are not necessarily self-judging; tribunals may still assess whether they

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the Czech and Slovak Federal Republic (1991) article 4; *see also*: Agreement between the Republic of Turkey and the Transitional Islamic State of Afghanistan (2004) article 5.

[172] Ali AH and Attanasio DL, *International Investment Protection of Global Banking and Finance: Legal Principles and Arbitral Practice* (Kluwer Law International BV 2021) ch 6: '*Merits: The Content of Investment Protection*' 191–260.

[173] US Model Bilateral Investment Treaty (2012) article 7(4).

[174] Metalpar SA and Buen Aire SA v. Argentine Republic ICSID Case No ARB/03/5, *Award*, 6 June 2008, paras 178–179.

[175] Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law*, 3rd Edition (2022; online edn, Oxford Law Pro), ch 8: '*Standards of Protection*' 291.

[176] Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law*, 3rd Edition (2022; online edn, Oxford Law Pro), ch 8: '*Standards of Protection*' 291-292.

[177] Continental Casualty Company v. Argentina ICSID Case No ARB/03/9, *Award,* 5 September 2008, para 261.

[178] Rusoro Mining Ltd v. Venezuela ICSID Case No ARB(AF)/12/5, *Award*, 22 August 2016.

have been invoked in good faith and in accordance with the object and purpose of the treaty.[179]

Prolonged or excessive restrictions, especially those that are discriminatory or imposed in bad faith, may amount to indirect expropriation or violate fair and equitable treatment standards. Even absent expropriation, investors may seek compensation where restrictive measures are arbitrary, lack transparency, or frustrate legitimate expectations.[180]

Overall, while states retain discretion to regulate capital movement, such regulation must comply with treaty obligations. Free transfer clauses in investment treaties aim to prevent arbitrary interference with cross-border financial flows and play a central role in protecting investment in the banking and finance sector.

v. Expropriation

Expropriation under international investment law represents the most severe form of state interference with investor's property rights and it is particularly relevant in sectors such as global banking and finance, where investments often rely on complex contractual and intangible rights. While international law acknowledges the sovereign right of host states to expropriate foreign property, this right is strictly limited by customary and treaty-based standards requiring public purpose, non-discrimination, due process, and compensation.[181]

Expropriation can affect a wide range of assets, including tangible property and intangible rights such as mortgages, shares, financial claims, and contractual entitlements.[182] This is significant for banking and finance, where investments often consist of rights under financial instruments or agreements with the host state.[183] Jurisprudence, including *SPP v. Egypt*,[184] *Tokios Tokelės v. Ukraine*,[185] and *Siemens v. Argentina*,[186] affirms that contractual and financial rights,

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[179] A Kolo and T Wälde, 'Capital Transfer Restrictions under Modern Investment Treaties' in August Reinisch (ed), *Standards of Investment Protection* (OUP 2008) 205–226.

[180] A Kolo and T Wälde, 'Capital Transfer Restrictions under Modern Investment Treaties' in August Reinisch (ed), *Standards of Investment Protection* (OUP 2008) paras 214, 218, 228 and 240, page 214 and 218.

[181] Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law*, 3rd Edition (2022; online edn, Oxford Law Pro), ch 7: '*Expropriation'* 146-147, 182-183.

[182] Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law*, 3rd Edition (2022; online edn, Oxford Law Pro), ch 7: '*Expropriation'* 147.

[183] "*The taking away or destruction of rights acquired, transmitted, and defined by a contract is as much a wrong, entitling the sufferer to redress, as the taking away or destruction of tangible property.".* This principal was included in American Venezuelan Mixed Claims Commission - Rudloff Case, Decision on Merits, 1 January 1903, 9 RIAA 255.

[184] SPP v. Egypt, ICSID Case No. ARB/84/3, *Award*, 20 May 1992, *Moreover, it has long been recognized that contractual rights may be indirectly expropriated*, paras 164–165.

[185] Tokios Tokelès v. Ukraine, ICSID Case No. ARB/02/18, *Decision on Jurisdiction*, 29 April 2004, paras 92–93.

[186] Siemens v. Argentina, ICSID Case No. ARB/02/8, *Award*, 6 February 2007, para 267.

when taken or destroyed through sovereign acts, qualify as protected investments under treaties and can be subject to expropriation. Even arbitral awards and rights to future share acquisitions, central in financial transactions, have been recognised as susceptible to expropriation.[187]

Indirect expropriation has become highly relevant in modern investment law because states increasingly avoid overt takings that damage their investment reputation, instead adopting measures that leave legal title intact but deprive investors (especially in banking and finance) of the ability to use, control, or derive economic benefits from their investments.[188] Measures such as arbitrary revocation of licenses, freezing of bank accounts, withdrawal of financial permits, or regulatory actions undermining financial operations can amount to expropriation if they substantially deprive the investor of control or expected returns. Tribunals have focused on the real economic impact rather than the state's declared intent, recognizing that covert or incremental measures can have the same effect as outright takings.[189]

The phenomenon of creeping expropriation, where a series of state actions gradually erodes investment value, is particularly relevant in finance. For example, incremental regulatory changes, discriminatory taxation, or administrative barriers imposed on foreign banks can cumulatively neutralize investments without a formal expropriation act, as seen in *Siemens v. Argentina*[190] and *Generation Ukraine v. Ukraine*.[191]Analogically, these cases could be good demonstration of the vulnerability of financial investments which are highly sensitive to incremental regulatory or administrative interference.

Concerning the legality, expropriation hinges on four cumulative conditions: the measure must serve a public purpose, be non-discriminatory, comply with due process, and include prompt, adequate, and effective compensation based on the fair market value of the investment.[192] In

[187] Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law*, 3rd Edition (2022; online edn, Oxford Law Pro), ch 7: '*Expropriation'* 147; *see also*, Eureko B.V. v. Republic of Poland, UNCITRAL, *Partial Award*, 19 August 2005.

[188] Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law*, 3rd Edition (2022; online edn, Oxford Law Pro), ch 7: '*Expropriation'* 153-182.

[189] WM Reisman and RD Sloane, '*Indirect Expropriation and its Valuation in the BIT Generation*' (2003) 74 BYIL, 115, 121.

[190] Siemens v. Argentina, ICSID Case No. ARB/02/8, *Award*, 6 February 2007: '*By definition, creeping expropriation refers to a process, to steps that eventually have the effect of an expropriation'*, para 263.

[191] Generation Ukraine v. Ukraine, ICSID Case No. ARB/00/9, *Award*, 16 September 2003: '*Creeping expropriation is a form of indirect expropriation with a distinctive temporal quality in the sense that it encapsulates the situation whereby a series of acts attributable to the State over a period of time culminate in the expropriatory taking of such property*', paras 20.22, 20.26.

[192] Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law*, 3rd Edition

banking and finance, where investment valuation depends heavily on expected cash flows, licenses, and contractual guarantees, compensation claims can be complex and substantial. Where expropriation is unlawful, international law suggests damages should restore the investor to the position they would have held absent the wrongful act, potentially exceeding standard market-value compensation.[193]

Overall, the protection against expropriation in international investment law is critical to safeguarding cross-border banking and financial investments. It ensures that sovereign acts, whether direct, indirect, or creeping, do not arbitrarily deprive investors of their rights or expected economic benefits, maintaining confidence in global financial markets while balancing states' regulatory autonomy.

b. Application of International Investment Protection Standards by the Arbitral Tribunals in Global Banking and Finance Disputes

In contrast to Chapter 2(c) of the Thesis, this section does not follow the same structural approach. Instead, it focuses on specific substantive standards of international investment protection and examines their concrete application by arbitral tribunals (not only ICSID) in disputes arising in the global banking and finance sector.

1) Expropriation[194]

Expropriation is one of the most commonly invoked protections in banking and finance disputes under investment treaties. Tribunals have recognised that state measures depriving investors of the title or substantial value of their contractual financial rights, such as loans, security interests, or privatization commitments, can constitute indirect expropriation even if no formal transfer of property occurs.[195]

In *Eureko v. Poland*[196], the tribunal found that Poland's unilateral cancellation of agreements to sell an additional 21% of shares in state-owned insurance company Powszechny Zaklad Ubezpieczen S.A. (PZU) and to conduct an IPO, deprived the investor of its contractual rights. This

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(2022; online edn, Oxford Law Pro), ch 7: '*Expropriation*' 182-185.

[193] Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law*, 3rd Edition (2022; online edn, Oxford Law Pro), ch 7: '*Expropriation*' 184-185.

[194] *See* Chapter 3 (a)(v).

[195] Eureko B.V. v. Republic of Poland, UNCITRAL, *Partial Award*, 19 August 2005: '*an amplitude of authority for the proposition that when a State deprives an investor of the benefit of its contractual rights, directly or indirectly, it may be tantamount to [an expropriation*' para 241.

[196] Eureko B.V. v. Republic of Poland, UNCITRAL, *Partial Award*, 19 August 2005.

amounted to an unlawful indirect expropriation of "*assets by conduct which the Tribunal … found to be inadmis*sible".[197] This reversed privatization effectively nullified Eureko's binding rights to acquire further ownership, demonstrating that a state's cancellation of agreed privatisation commitments can amount to expropriation where it deprives the investor of the value of its contractual rights.

Similarly, in *British Caribbean Bank v. Belize* claimant alleged that Respondent expropriated the loans.[198] The state compulsorily acquired loan and security agreements concluded between Claimant and Belize Telemedia and Sunshine Holding Limited (as part of nationalization plan for those entities) without providing compensation (i.e. repayment of the loans to the Claimant). While Belize did not deny the intention to acquire without compensation, it argued that expropriation had not occurred because ongoing domestic litigation could potentially restore the investor's rights. The tribunal rejected this defence, holding that "*The possibility that another forum might, at some future point, order the return of the Claimant's property is not sufficient to prevent this Tribunal from assessing whether Article 5 has been complied with*"[199], in other words, tribunal concluded that this was not a precondition to the finding of an expropriation. This established that a state cannot rely on uncertain domestic remedies to escape responsibility under international law and that "*The Treaty calls for the Tribunal to provide judgment, independently of the possibility that other fora might also be able to provide relief*".[200]

In another case, *Fireman's Fund v. Mexico*, the claimant argued that Mexico had expropriated its investment in debentures issued by BanCrecer, a Mexican financial holding company, through various measures taken during the country's 1990s financial crisis. Among other allegations, the claimant asserted that Mexico had failed to honour a supposed commitment to assume BanCrecer's nonperforming loan portfolio when it returned that portfolio in November 1998.[201] The tribunal rejected the expropriation claim, holding that the alleged commitment was subject to limitations that made it inapplicable, that BanCrecer's shareholders had not objected to Mexico's decision, and that in any event, the investor's debentures were already worthless at the time of the disputed measures.[202] This decision demonstrates that tribunals may deny expropriation claims where

[197] Eureko B.V. v. Republic of Poland, UNCITRAL, *Partial Award*, 19 August 2005, para 240.
[198] British Caribbean Bank Ltd. (United Kingdom) v. Government of Belize, PCA Case No 2010-18 (UNCITRAL).
[199] British Caribbean Bank Ltd. v. Government of Belize, PCA Case No. 2010-18, 19 December 2014, *Award*, para 233.
[200] British Caribbean Bank Ltd. v. Government of Belize, PCA Case No. 2010-18, 19 December 2014, *Award*, para 233.
[201] Fireman's Fund Ins. Co. v. United Mexican States, ICSID Case No. ARB(AF)/02/1, *Award*, 17 July 2006, para 103(iv).
[202] Fireman's Fund Ins. Co. v. United Mexican States, ICSID Case No. ARB(AF)/02/1, *Award*, 17 July 2006, paras 210-

investor fails to demonstrate a strong link between the contested state measures and an actual deprivation of economic value, particularly where the investment was already devoid of worth prior to the alleged expropriatory act.

2) FET Standard[203]

In *Eureko v. Poland*[204], the tribunal held that Poland's politically motivated decision to cancel binding privatization agreements violated the investor's "*basic expectations*", as agreed in the binding agreements between them, i.e., that Poland would sell an additional 21% and then conduct an IPO of PZU, amounting to a breach of FET.[205] The tribunal emphasized that the state consciously disregarded its obligations "*for purely arbitrary reasons linked to the interplay of Polish politics and nationalistic reasons of a discriminatory character*", In other words those reasons were not linked to the legitimate reasons of public interest and public policy.

British Caribbean Bank v. Belize[206] further clarified that investors may "*legitimately expect that legislation to assume outright ownership of their investment will not be adopted except in the service of a public purpose,*"[207] and held that Belize breached FET by acting arbitrarily and without legitimate justification. Also, the tribunal concluded that it is not sufficient for the state to establish a legitimate public purpose for its interference into private sector, by doing so it must still act in a fair and equitable manner.[208]

Even in the absent of political motives, flawed criminal investigations or prosecutions against investors may breach the FET. In *Renée Rose Levy de Levi v. Peru*, the claimant alleged that shareholders and managers of its bank were subjected to dozens of criminal prosecutions, with more than 25 acquittals.[209] The tribunal rejected the FET breach, relying on the fact that "*the Banking Law imposes a clear obligation on the Superintendent of Banking and Insurance to inform the prosecutors of 'the criminal offences that have been detected in the course of the inspections practiced on the institutions subject to its control*'" and that that the Peruvian authorities were simply acting in accordance with their statutory obligations. Therefore, the Public Prosecutor and

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[203] *See* Chapter 3(i).

[204] Eureko B.V. v. Republic of Poland, UNCITRAL, *Partial Award*, 19 August 2005.

[205] Eureko B.V. v. Republic of Poland, UNCITRAL, *Partial Award*, 19 August 2005, para 232.

[206] British Caribbean Bank Ltd. (United Kingdom) v. Government of Belize, PCA Case No 2010-18 (UNCITRAL).

[207] British Caribbean Bank Ltd. v. Government of Belize, PCA Case No. 2010-18, *Award*, 19 December 2014, para 283.

[208] British Caribbean Bank Ltd. v. Government of Belize, PCA Case No. 2010-18, *Award*, 19 December 2014, para 282.

[209] Renée Rose Levy de Levi v. Republic of Peru, ICSID Case No. ARB/10/17, *Award*, 26 February 2014, para 182.

courts were responsible for deciding whether these facts constituted crimes.[210]

In *Al-Warraq v. Indonesia*,[211] the investor held interests in Bank Century, an Indonesian financial institution. He was tried and convicted in absentia for alleged money laundering and embezzlement linked to the bank's operations. The tribunal found that Indonesia committed a denial of justice, noting procedural defects such as the failure to properly notify the investor of the charges, the trial in absentia without legal counsel, and the investor being prevented from appealing the judgment.[212]

3) Non-Discrimination/National Treatment[213]

In the financial sector, discrimination often occurs in sovereign debt restructuring or selective support for domestic institutions.

In *Abaclat v. Argentina*, the claimants alleged that Argentina "*shielded such domestic investors* (domestic bond holders) *from the negative impact on their investments of Argentina's acts surrounding its financial restructuring*"[214] while foreign bondholders suffered losses. The tribunal did not rule on the merits but recognised that allegations of "*different treatment afforded to domestic investors, such as Argentine pension funds, are susceptible of constituting a discriminatory treatment in breach of the obligation to refrain from discriminatory measures and to provide for national treatment*".[215]

In *Fireman's Fund v. Mexico*, domestic peso-denominated debenture holders were repaid in full while foreign US dollar-denominated holders suffered cuts. The tribunal illustratively described this as: "*a clear case of discriminatory treatment of a foreign investor*" and "*if there is a 'haircut' for holders of debentures, all should be shaven*"[216], though no breach was found because

[210] Renée Rose Levy de Levi v. Republic of Peru, ICSID Case No. ARB/10/17, *Award*, 26 February 2014, para 386.
[211] Hesham Talaat M. Al-Warraq v. Republic of Indonesia, UNCITRAL, Final *Award*, 15 December 2014.
[212] Hesham Talaat M. Al-Warraq v. Republic of Indonesia, UNCITRAL, Final *Award*, 15 December 2014, paras 567-620.
[213] *See* Chapter 3(iii).
[214] Abaclat and others v. Argentine Republic, ICSID Case No. ARB/07/5, *Decision on Jurisdiction and Admissibility*, 4 August 2011, para 312(ii).
[215] Abaclat and others v. Argentine Republic, ICSID Case No. ARB/07/5, *Decision on Jurisdiction and Admissibility*, 4 August 2011, para 314(ii).
[216] Fireman's Fund Ins. Co. v. United Mexican States, ICSID Case No. ARB(AF)/02/1, *Award*, 17 July 2006, para 203.

the treaty only protected against expropriation.[217] Similarly, in *Saluka v. Czech Republic*[218], state aid was provided exclusively to domestic banks awaiting privatization, while the foreign-owned bank that had already been privatized was excluded. The tribunal stressed that the privatisation policy carried out by the Czech Republic was "*perfectly legitimate*"[219] and that the investor could not legitimately expect that a different government would not adopt a different privatization policy in the future. Also, the investor could not legitimately expect that a different government would not adopt a different privatization policy in the future.[220] However, the tribunal found that the Czech Republic was obliged to ensure that any new policy was carried out in a non-discriminatory manner, which it breached by providing state aid to all of the banks that were still to be privatized but not the investor's bank (which had already been privatised).[221]

In *Belokon v. Kyrgyzstan*, the tribunal found that pursuing criminal proceedings for alleged money loundering against a foreign investor and its managers "*in the absence of evidentiary support (or even cogent explanations)*" resulted in unreasonable and discriminatory measures and breach of the treaty.[222] This case shows that while states may charge investors with a crime, tribunals examine whether such proceedings results in arbitrary and unjustified targeting of the foreign investor through baseless accusations.

4) Umbrella Clauses[223]

This standard is particularly relevant in disputes involving privatisation agreements or financial contracts with state entities, here many investments are structured through privatisation agreements and/or other financial agreements with state entities.

In famous case, *Eureko v. Poland*, the tribunal found that Poland's share purchase agreement (SPA) with Eureko was a binding obligation and that the state's failure to honour it breached the umbrella clause of the Netherlands-Poland BIT:[224] "*In view of the foregoing analysis, the Tribunal*

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[217] The tribunal considered that the state's discriminatory treatment did not amount to an expropriation on the grounds that "*a discriminatory lack of effort by a host State to rescue an investment that has become virtually worthless, is not a taking of that investment.*" - Fireman's Fund Ins. Co. v. United Mexican States, ICSID Case No. ARB(AF)/02/1, *Award*, 17 July 2006, 207.
[218] Saluka Inv. B.V. v. Czech Republic, PCA Case No. 2001-04, *Partial Award*, 17 March 2006.
[219] Saluka Inv. B.V. v. Czech Republic, PCA Case No. 2001-04, *Partial Award*, 17 March 2006, para 337.
[220] Saluka Inv. B.V. v. Czech Republic, PCA Case No. 2001-04, *Partial Award*, 17 March 2006, paras 324, 351.
[221] Saluka Inv. B.V. v. Czech Republic, PCA Case No. 2001-04, *Partial Award*, 17 March 2006, paras 329, 337, 353.
[222] Valeri Belokon v. Kyrgyz Republic, UNCITRAL, *Award*, 24 October 2014, para 270.
[223] See Chapter 3(iv).
[224] Eureko B.V. v. Republic of Poland, UNCITRAL, *Partial Award*, 24 October 2014, paras 134, 260.

concludes that the actions and inactions of the Government of Poland that are in breach of Poland's obligations under the Treaty - those that have been held to be unfair and inequitable and expropriatory in effect – also are in breach of its commitment under Article 3.5 of the Treaty to 'observe any obligations it may have entered into with regards to investments of investors'".[225] The tribunal emphasized that treaty protection could not be avoided merely because the commitment was contractual in nature.

By contrast, in *Genin v. Estonia*, the investor failed to prove that a settlement agreement between the investors' bank, EIB, and Estonia was binding. Although the tribunal did not explicitly grapple with the umbrella clause, it emphasized that the agreement was labelled as a "*Tentative Agreement*" and concluded: "*Simply put, the claim that the Bank of Estonia breached a binding agreement was not proven to our satisfaction.*" [226] This illustrates that investors must demonstrate clear and binding obligations undertaken by the state in order to successfully invoke umbrella clause protection.

[225] Eureko B.V. v. Republic of Poland, UNCITRAL, *Partial Award*, 24 October 2014, para 260.
[226] Alex Genin and others v. Republic of Estonia, ICSID Case No. ARB/99/2, *Award*, 25 June 2001, para 346.

E. Conclusion

a. Summary of Key Findings

Arbitral tribunals, particularly those under the ICSID system, have demonstrated a growing but cautious willingness to extend protection to non-traditional financial instruments such as derivatives, sovereign bonds, and complex equity structures. The jurisprudence reveals certain converging criteria for determining protected investments, notably those stemming from the *Salini test*: contribution, risk, duration, and, sometimes controversially, contribution to economic development. Over time, tribunals have demonstrated a pragmatic and investor-friendly orientation, either stretching or selectively applying these criteria in recognition of the unique features of financial transactions. This trend signals a shift away from rigid formalism and towards a more functional understanding of financial investments.

An important legal issue remains the qualification of financial assets as "*investments*" under both BITs and the ICSID Convention. This is particularly complex for assets such as secondary market securities, sovereign debt instruments, or contractual claims that lack physical presence or operations in the host state. Tribunals have struggled with the distinction between commercial and investment risks, with some adopting a broader view that emphasizes operational risk, i.e., the investor's exposure to the host state's regulatory and sovereign conduct as a basis for protection. Others, like the tribunal in *Postova banka v. Greece*, have taken a more cautious stance, rejecting jurisdiction where there was insufficient connection to the host state's territory or economy, particularly in secondary market transactions and excluding sovereign risk from operational risk conception.

When it comes to substantive protections, certain standards remain particularly important in the context of banking and finance investments. These include protection against unlawful expropriation, FET, non-discrimination, and the enforcement of umbrella clauses. Their significance stems from the inherent characteristics of financial investments, often highly regulated, contract-based, and politically sensitive. States frequently breach initial assurances or introduce sudden regulatory shifts that disrupt the investment environment. Such conduct typically results in breach of expectations, indirect or creeping expropriation where investors are deprived of the value or use of their assets without formal nationalization. Discriminatory treatment, particularly favouring domestic financial institutions and investors over foreign ones, remains a recurring concern. Given the contractual foundation of many financial investments, umbrella clauses play a vital role in those disputes by elevating breaches of state contractual obligations to violations of international treaty protections.

The financial sector's exposure to politically sensitive state action is another defining feature of these disputes. Banking and finance investments are frequently targeted during periods of economic or fiscal crisis, during which states adopt emergency measures such as debt restructuring, forced currency conversions, capital controls, (indirect/creeping) expropriations, or revocation of licenses. In some cases, states may breach previously agreed obligations with investors or intervene to protect their domestic financial institutions—at times even enabling them to deprive foreign investors of their assets or shareholding interests. While such measures are typically presented as necessary to preserve the stability of national capital markets or the broader financial system, they can also reflect populist or politically motivated decision-making, especially where foreign investors are involved. This volatile and unpredictable regulatory environment outlines the critical importance of comprehensive and reliable investment protection mechanisms.

Thus, investment tribunals have been tasked with the delicate job of balancing investor rights with states' sovereign regulatory space, particularly under circumstances involving systemic financial risk or macroeconomic instability. While arbitral tribunals tend to respect states' right to regulate, they have consistently reaffirmed that such measures must conform to international standards of proportionality, non-discrimination, due process, and legal stability.

Overall, throughout the case law, tribunals have applied a flexible and functional approach that acknowledges the economic realities of cross-border finance and the intangible, often contractual nature of financial assets. Their willingness to adapt functional doctrinal tools and treaty interpretations reflects a growing maturity and practical usefulness in the treatment of financial investments under international investment law, ensuring that the system remains responsive to the complexities and constant developments of modern financial systems and financial disputes.

b. Recommendations for Future Endeavours

In order to mitigate all the identified issues and risks, investors should proactively structure their investments to maximize protection under applicable international treaties. This includes selecting jurisdictions with favourable BIT or other IIA coverage, ensuring that investment vehicles meet the jurisdictional requirements under instruments like the ICSID Convention, and avoiding vague and ambiguous ownership structures that could jeopardise treaty protection. However, given that many financial investments are contractual in nature, incorporating investment protection clauses into contracts with the state (including all its entities), particularly those that explicitly reference applicable BITs, stabilization clauses and arbitration forums, can significantly enhance legal protection. This approach not only strengthens the investor's legal position but may also help clarify and reinforce the state's consent to arbitration, which can be crucial in avoiding jurisdictional disputes. Accordingly, such considerations should be addressed carefully at the investment structuring stage.

In light of the *Achmea* ruling and the subsequent termination or inoperability of many intra-EU BITs, EU-based investors in the banking and finance sector and all potential investors, should consider (re)structuring their investments through third-country jurisdictions, outside the EU, such as Serbia, Bosnia and Herzegovina, Montenegro, Albania or North Macedonia. These countries not only maintain active BIT networks but also provide access to ICSID arbitration, offering a more secure legal basis for investment protection.

The banking and finance sector is uniquely vulnerable to emergency regulations, political populism, and crisis-driven state conduct. Investors must therefore anticipate state interventions that may affect their assets, even retroactively. Where possible, risk mitigation strategies should include political risk insurance, multilateral support, or co-investment with institutions that offer higher degrees of legal and diplomatic leverage.

Further engagement by IFL actors such as multilateral institutions, standard-setting bodies, and international banking organizations, could substantially contribute to this area. Their role in regulatory stabilisation, negotiations and policy dialogue, and promoting a coordinated multilateral approach would help strengthen the legal and institutional framework for financial sector investments. Involvement in developing more tailored BITs, investment protocols, and soft law tools could enhance clarity in investor protection, offering practical guidance for states and supporting ISDS tribunals in applying legal standards more consistently.

c. Recommendations for Future Research

The intersection of international investment law and global financial governance remains a relatively underexplored area that warrants further academic and policy-oriented research.

Future research could explore how global financial organisations can further contribute to strengthening the protection of investors in this sector. Their involvement in crisis response, regulatory stabilization, and the development of soft law tools (such as model clauses or sector-specific guidelines) could help clarify protections and support both states and investors. While MIGA remains the most prominent actor in this regard, the role of other organisations could be further examined in this context.

As reforms to the ISDS system continue to gain momentum, their impact on financial disputes could be further investigated and traced. Key topics could include the effect of proposals like a multilateral investment court project, appellate mechanisms, and greater transparency, especially in politically sensitive cases involving banking or sovereign debt.

Finally, more attention should be given to capacity building that promotes a better balance between states' sovereign regulatory powers and the protection of investors in the financial industry. States need stronger legal and institutional tools to design financial policies and regulations in a manner consistent with their international obligations, particularly during times of crisis. At the same time, investors would benefit from clearer guidance on how to structure their investments and assert their rights without undermining legitimate public policy objectives. Strengthening this mutual understanding is essential to fostering a more stable and predictable investment environment and to ensuring that investors are not unfairly deprived of protection, even by arbitral tribunals, in cases of alleged rights violations.

Bibliography

A. Primary Sources

i. Literature and Other Publications

1. Arif H Ali and David L Attanasio '*International Investment Protection of Global Banking and Finance: Legal Principles and Arbitral Practice'* (Kluwer Law International 2024)
2. Arif H Ali, David L Attanasio, Yarik Kryvoi and Kai-Chieh Chan, *Empirical Study: International Investment Law Protections in Global Banking and Finance* (British Institute of International and Comparative Law, March 2025)
3. Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer '*Principles of International Investment Law'* 3rd edn (2022; online edn, Oxford Law Pro)
4. Zaring D '*The Structure and Rules of the Globalized Governance of Finance'* Cambridge University Press (2019)

ii. Arbitral Cases

5. Waste Management, Inc. v. United Mexican States, ICSID Case No ARB(AF)/00/3, Award (30 April 2004)
6. Total S.A. v. Argentina, ICSID Case No ARB/04/01
7. OKO Pankki Oyj and others v. Republic of Estonia, ICSID Case No. ARB/04/6, Award (19 Nov. 2007)
8. Philippe Gruslin v. Malaysia, ICSID Case No. ARB/99/3
9. Bryn Services Ltd. v. Latvia, ICC Arbitration (2013 Submission to Arbitration)
10. Erste Grp. Bank AG v. Republic of Croatia, ICSID Case No. ARB/17/49
11. Raiffeisen Bank Int'l AG and Raiffeisenbank Austria d.d. v. Republic of Croatia, ICSID Case No. ARB/17/34
12. Addiko Bank AG v. Republic of Croatia, ICSID Case No. ARB/17/37
13. Bank of Nova Scotia v. Argentine Republic, UNCITRAL Arbitration
14. Deutsche Bank AG v. Sri Lanka, ICSID Case No. ARB/09/2
15. UniCredit Bank Austria AG and Zagrebačka Banka d.d. v. Republic of Croatia, ICSID Case No. ARB/16/31
16. Offshore Power Prod. C.V. v. Republic of India
17. Standard Chartered Bank v. United Republic of Tanzania, ICSID Case No. ARB/10/12
18. Bank of Cyprus v. Hellenic Republic, ICSID Case No. ARB/17/4
19. Bank Melli Iran and Bank Saderat Iran v. Bahrain, PCA Case No. 2017-25
20. CIT Grp. Inc. v. Argentine Republic, ICSID Case No. ARB/04/9
21. Ping An Life Ins. Co. of China, Ltd. v. Kingdom of Belgium, ICSID Case No. ARB/12/29
22. Achmea B.V. v. Slovak Republic, PCA Case No. 2008-13
23. HICEE B.V. v. Slovak Republic, PCA Case No. 2009-11
24. Eur. Am. Inv. Bank AG v. Slovak Republic, PCA Case No. 2010-17
25. LSF-KEB Holdings SCA v. Republic of Korea, ICSID Case No. ARB/12/37
26. Hesham Talaat M. Al-Warraq v. Republic of Indonesia, UNCITRAL Arbitration
27. Alex Genin v. Republic of Estonia, ICSID Case No. ARB/99/2
28. Alberto Carrizosa Gelzis v. Republic of Colombia, PCA Case No. 2018-56
29. Astrida Benita Carrizosa v. Republic of Colombia, ICSID Case No. ARB/18/5
30. *Erhas Dis Ticaret Ltd. Sti, et al. v. Republic of Turkmenistan*, PCA Case No. 2013-27
31. Abaclat and others v. Argentine Republic, ICSID Case No. ARB/07/5
32. Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic, ICSID Case No. ARB/13/8
33. Giovanni Alemanni and others v. Argentine Republic, ICSID Case No. ARB/07/8
34. Ambiente Ufficio S.p.A. v. Argentine Republic, ICSID Case No. ARB/08/9
35. Lahoud v. DR Congo, ICSID Case No. ARB/10/4
36. Fedax N.V. v. Republic of Venezuela, ICSID Case No. ARB/96/3
37. Salini v. Morocco, ICSID Case No. ARB/00/4
38. Bayindir v. Pakistan, ICSID Case No. ARB/03/29
39. Noble Energy v. Ecuador, ICSID Case No. ARB/05/12
40. Pey Casado v. Chile, ICSID Case No. ARB/98/2
41. Vivendi v. Argentina, ICSID Case No. ARB/97/3
42. CSOB v. Slovakia, ICSID Case No. ARB/97/4
43. CME v. Czech Republic, UNCITRAL
44. Mitchell v. DR Congo, ICSID Case No. ARB/99/7
45. Malaysian Historical Salvors v. Malaysia, ICSID Case No. ARB/05/10
46. İçkale v. Turkmenistan, ICSID Case No. ARB/10/24
47. KT Asia Inv. Grp. B.V. v. Republic of Kazakhstan, ICSID Case No. ARB/09/8

48. Tecmed v. Mexico, ICSID Case No. ARB (AF)/00/2
49. Genin v. Estonia, ICSID Case No. ARB/99/2
50. Eureko B.V. v. Poland, Ad hoc Arbitration (UNCITRAL rules)
51. Saluka Inv. B.V. v. Czech Republic, PCA Case No. 2001-04
52. Middle East Cement v. Egypt, ICSID Case No. ARB/99/6
53. Al-Bahloul v. Tajikistan, SCC Case No. V (064/2008)
54. Biwater Gauff v. Tanzania, ICSID Case No. ARB/05/22
55. LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1
56. Continental Casualty Company v. Argentina, ICSID Case No. ARB/03/9
57. Rusoro Mining Ltd v. Venezuela, ICSID Case No. ARB(AF)/12/5
58. SPP v. Egypt, ICSID Case No. ARB/84/3
59. Tokios Tokelės v. Ukraine, ICSID Case No. ARB/02/18
60. Siemens v. Argentina, ICSID Case No. ARB/02/8
61. Generation Ukraine v. Ukraine, ICSID Case No. ARB/00/9
62. British Caribbean Bank Ltd. v. Government of Belize, PCA Case No. 2010-18
63. Fireman's Fund Ins. Co. v. United Mexican States, ICSID Case No. ARB(AF)/02/1
64. Renée Rose Levy de Levi v. Republic of Peru, ICSID Case No. ARB/10/17
65. Hesham Talaat M. Al-Warraq v. Republic of Indonesia
66. Valeri Belokon v. Kyrgyz Republic, UNCITRAL Arbitration
67. Elettronica Sicula SpA (ELSI) (United States v Italy), International Court of Justice, Judgment, 20 July 1989, ICJ Reports (1989) 15
68. SD Myers, Inc. v. Government of Canada, UNCITRAL
69. Occidental Exploration and Production Company v. The Republic of Ecuador, LCIA Case No. UN3467
70. Maffezini v. Kingdom of Spain, ICSID Case No ARB/97/7
71. Plama Consortium Ltd v. Republic of Bulgaria, ICSID Case No ARB/03/24
72. Salini v. Jordan, ICSID Case No ARB/02/13
73. SGS Société Générale de Surveillance SA v. Islamic Republic of Pakistan, ICSID Case No ARB/01/13
74. Metalpar SA and Buen Aire SA v. Argentine Republic ICSID Case No ARB/03/5
75. American Venezuelan Mixed Claims Commission - Rudloff Case, Decision on Merits, 1 January 1903, 9 RIAA

iii. Conventions and Model Laws

76. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Article 25(1) (April 2006)
77. Vienna Convention on the Law of Treaties (1969)
78. Energy Charter Treaty (amend. 2024)
79. North American Free Trade Agreement (NAFTA) (1992/1994)
80. US Model BIT (2012)
81. Romania - Switzerland BIT (1993)
82. Netherlands–Czech/Slovak BIT (1991)
83. Turkey–Afghanistan BIT (2004)
84. United States-Mexico-Canada Agreement (2020)
85. UNCITRAL Model Law on Secured Transactions (2016)
86. UNIDROIT Model Law on leasing (2008)

B. Secondary Sources

i. Literature and Articles

87. Alexandrov, S. A. (2005). *'The "baby boom" of treaty-based arbitrations and the jurisdiction of ICSID tribunals*', Journal of World Investment & Trade, 6(3)
88. Christoph Schreuer, *'Fair and Equitable Treatment in Arbitral Practice*' (2005) Journal of World Investment & Trade 6(3)
89. Christoph Schreuer, '*Full Protection and Security'* (2010) 1 Journal of International Dispute Settlement
90. August Reinisch (2017). *'Jurisdiction and Admissibility in International Investment Law'*, The Law and Practice of International Courts and Tribunals 16(1).
91. August Reinisch, '*Most Favoured Nation Treatment*', in Marc Bungenberg, Jörn Griebel, Stephan Hobe and August Reinisch (eds) *International Investment Law* (Nomos et al., 2015)
92. Stephan W Schill, 'Sources of International Investment Law: Multilateralization, Arbitral Precedent,

Comparativism, Soft Law', in Samantha Besson, and Jean d'Aspremont (eds), *The Oxford Handbook of the Sources of International Law*, Oxford Handbooks (2017; online edn, Oxford Academic, 5 Feb. 2018)

93. Viñuales, Jorge E., 'Sources of International Investment Law: Conceptual Foundations of Unruly Practices', in Samantha Besson, and Jean d'Aspremont (eds), *The Oxford Handbook of the Sources of International Law*, Oxford Handbooks (2017; online edn, Oxford Academic, 5 Feb. 2018)
94. N. Kearse, R. Maria Lastra, M. Lehmann, M.M. Mbengue, M. Vallée and C. Zilioli, *ADI-ILA White Paper 11: International financial law in the next decades* (ILA Paris, Version 02, English, 2023),
95. Friederike Niepmann, Banking Across Borders (Deutsche Bundesbank, Discussion Paper No. 19/2013), discussion about Internal Banking and Global Banking
96. Lisa Bohmer '*Majority Arbitrators Uphold Jurisdiction over Claims by Financial Institution which Funded Renewable Energy Projects in Spain'*, IA Reporter (Aug. 21 2020), https://www.iareporter.com/articles/breaking-majority-arbitrators-uphold-jurisdiction-over-claims-by-financial-institution-which-funded-renewable-energy-projects-in-spain/.
97. Alexandra Diehl '*The Core Standard of International Investment Protection*' (Kluwer Law International 2012)
98. Carlevaris, a. (2008). '*Conformity of Investments with the Law of the Host State and the Jurisdiction of International Tribunals*' (2008) 9(1) *Journal of World Investment & Trade*
99. Ignacio Vincent Vinuesa, '*National Treatment, Principle*' in Oxford Public International Law (2011 Max Planck Encyclopedia of Public International Law, OUP)
100. Sinclair, A.C. (2004) '*The Origins of the Umbrella Clause in the International Law of Investment Protection*', Arbitration international
101. WM Reisman and RD Sloane, '*Indirect Expropriation and its Valuation in the BIT Generation*' (2003) 74 BYIL
102. Financial Stability Board, 2016 List of Global Systemically Important Insurers (G-SIIs) (Nov. 21, 2016)
103. A Kolo and T Wälde, 'Capital Transfer Restrictions under Modern Investment Treaties' in August Reinisch (ed), *Standards of Investment Protection* (OUP 2008)

ii. Websites

104. Achmea Judgement: https://curia.europa.eu/juris/document/document.jsf?docid=199968&doclang=EN
105. EUR-Lex Proposal: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020PC0279
106. Financial Stability Board: https://www.fsb.org/about/
107. G20 Website: https://g20.org/about-g20/
108. HCCH Financial Regulations: https://www.hcch.net/en/governance/regulations-on-budgetary-questions
109. Investment Court System (EU): https://trade.ec.europa.eu/access-to-markets/en/content/investment-court-system
110. UNCITRAL Working Group III: https://uncitral.un.org/en/working_groups/3/investor-state