

## THE NATIONAL TREATMENT OBLIGATION

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## I. Introduction

- 21.01** The obligation not to discriminate on the basis of nationality is a key feature of most investment agreements.<sup>1</sup> National treatment is a relative obligation; it requires that a host state treat foreign-owned investments at least as well as similarly situated national investments, or foreign investors as well as domestic investors. Determining whether a state has violated the national treatment obligation thus usually requires identifying the appropriate comparator against which to measure the allegedly less favourable treatment. If the foreign entity is not in a like situation as compared to the more favourably treated entity, the national treatment claim will fail. Even if a tribunal determines that the foreign entity is in like circumstances with the more favourably treated domestic entity, however, it must also examine whether the host state had legitimate, non-nationality-based reasons for according the two entities different treatment.
- 21.02** The national treatment obligation protects against both de jure and de facto discrimination. There have been few cases of de jure discrimination; the gravamen of most claims of nationality-based discrimination is the differential effect of a facially neutral measure. A claimant need not demonstrate discriminatory intent in order to prevail on a national treatment claim. Indeed, many tribunals have been concerned that imposing such an obligation would preclude recovery in most instances. Rather, 'in the absence of a legitimate rationale

\* The author thanks Lukas Vanhonnaeker for excellent assistance in updating this chapter for the second edition. Seán Duggan, Meg Kinnear, Jürgen Kurtz, and Andrew Newcombe gave me comments on the version written for the first edition, and I am grateful to them for their insights. Any errors are mine alone.

<sup>1</sup> United Nations Conference on Trade and Development (UNCTAD), *National Treatment* (1999), UNCTAD/ITE/IIT/11 (Vol. IV) 15–24 (noting the importance of the national treatment obligation in investment codes and international investment agreements) [hereinafter UNCTAD, *National Treatment*].

## II. Precluding Nationality-based Discrimination

for the discrimination between investors in like circumstances, the tribunal will presume—or at least infer—that the differential treatment was a result of the claimant’s nationality.<sup>2</sup>

It is generally accepted that a claimant bears the burden of proving that there has been differential treatment more favourable to a domestic entity in like circumstances with the foreign investor or investment. This statement is misleading in its apparent simplicity, as establishing which entities are in like circumstances is a complicated endeavour and is at the heart of most national treatment claims. Another difficult question is precisely what level of treatment states are obliged to accord foreign investors or investments. Claimants frequently argue that national treatment obligates host states to accord foreign investors the best treatment afforded any single domestic investor, whereas states contend that the purpose of the provision is to provide only equality of opportunity to foreign and domestic investors.<sup>3</sup> Another disputed issue is whether, once a prima facie case is established, the burden of proof shifts from the claimant to the respondent state to proffer a legitimate, non-nationality-based explanation for the differential treatment. Finally, most states have taken reservations to their national treatment obligations, an exercise that demonstrates the continued importance states place on reserving a measure of regulatory autonomy in order to further domestic political goals that often will favour local rather than foreign interests.

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This chapter first explores the historical development of the national treatment obligation. It then addresses national treatment in practice, with particular reference to the investment treaty practice of the last decade and a half. As part of that examination, it sets out the difficult and unresolved issues in the national treatment jurisprudence, including the hurdles that claimants face in establishing a national treatment claim. Finally, it addresses some of the reservations to national treatment that states have included in their investment treaties.

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## II. Precluding Nationality-based Discrimination

The national treatment obligation is a response to the tendency of governments to insulate domestic investors and producers from foreign competition. National treatment obligations are usually dated to Hanseatic League treaties of the twelfth and thirteenth centuries.<sup>4</sup> They were part of the concessions extended to foreign merchants during what is often termed the Middle Ages and were also part of the trade treaties prevalent in the nineteenth century.<sup>5</sup>

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<sup>2</sup> A. NEWCOMBE & L. PARADELL, *THE LAW AND PRACTICE OF INVESTMENT TREATIES* 183 (2009) [hereinafter NEWCOMBE & PARADELL]; see also *Bilcon v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability (Mar. 17, 2015), ¶ 719.

<sup>3</sup> C. MCLACHLAN, L. SHORE & M. WEINIGER, *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES* 251 (2007) [hereinafter MCLACHLAN, SHORE & WEINIGER] (‘the requirement of national treatment ... aims to provide a level playing field for foreign investors (at least post establishment)’); cf. NEWCOMBE & PARADELL, *supra* note 2, at 186 (‘References to “no less favorable” treatment in [international investment agreements do not clarify whether the investor is entitled to the best treatment afforded to any other investor, national or foreign, or the average treatment afforded to a group of like investors]’). See generally A. DAVIES, *Group Comparison v. Best Treatment in International Economic Law*, in 2014-15 YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 111 (A. Bjorklund ed., 2016).

<sup>4</sup> P. VERLOREN VAN THEMAAT, *THE CHANGING STRUCTURE OF INTERNATIONAL ECONOMIC LAW* 19-21 (1981); G. SCHWARZENBERGER, *The Principles and Standards of International Economic Law*, 117 RECUEIL DES COURS 1, 18-26 (1966) [hereinafter Schwarzenberger].

<sup>5</sup> Schwarzenberger, *supra* note 4 at 67. Professor Schwarzenberger traced the evolution of international economic law standards in his course at The Hague Academy, and noted that of the seven he identified, six were concerned in some measure with equality of treatment.

- 21.06** Notwithstanding its long history, national treatment remains a conventional obligation:<sup>6</sup> 'A degree of discrimination in the treatment of aliens as compared with nationals is, generally, permissible as a matter of customary international law'.<sup>7</sup> National treatment is thus an essential feature of many treaties seeking to protect foreign nationals. It has been called 'perhaps the single most important standard of treatment enshrined in international investment agreements (IIAs). At the same time, it is perhaps the most difficult to achieve, as it touches upon economically (and politically) sensitive issues'.<sup>8</sup> National treatment is also at the heart of the General Agreement on Tariffs and Trade (GATT) and its related treaties.<sup>9</sup> In addition, human rights treaties require states party to them to treat equally all similarly situated persons within their respective jurisdictions.<sup>10</sup>
- 21.07** A state's promise to accord at least equal treatment (the usual formulation is 'treatment no less favourable' than that accorded to domestic entities, which would permit foreign entities to receive better treatment) is often viewed as a boon to foreign investors or traders, but adopting such an obligation raises some concerns, even as it alleviates others. First, exactly what constitutes less favourable treatment is a matter of debate, as absolutely identical treatment cannot be meted out to everyone. Secondly, in some instances even equal treatment might not be sufficient to protect the interests of foreigners. National treatment requires only that the foreign investor or investment be given the same, or better, treatment as given to nationals. Theoretically, at least, national treatment obligations provide no protection to foreigners should nationals be treated badly.
- 21.08** The Argentine jurist Carlos Calvo steadfastly maintained that national treatment was the most that foreign investors had any right to demand; the 'Calvo' clause found in the laws of several developing countries and in many state contracts recognizes that philosophical position.<sup>11</sup> This position illustrated the potential weakness of national treatment obligations, which provide no particular benefit to foreign investors in circumstances where nationals have few rights.<sup>12</sup> In order to remedy this shortcoming, the minimum standard of treatment in customary international law provides a floor below which treatment cannot fall, regardless of any relevant relative comparison.<sup>13</sup>
- 21.09** Ironically, despite its historic aversion to the Calvo clause, the United States has actually adopted a 'reverse' Calvo clause in its 2015 renewal of Trade Promotion Authority (as well as in the earlier renewal of authority under President George W Bush), which stipulated that the executive branch should not negotiate investment treaties that confer on foreign investors greater substantive rights than are enjoyed by US investors.<sup>14</sup>

<sup>6</sup> McLACHLAN, SHORE & WEINIGER, *supra* note 3, at 212–13.

<sup>7</sup> OPPENHEIM'S INTERNATIONAL LAW 932 (9th ed. R. Jennings & A. Watts eds., 1996).

<sup>8</sup> *Id.* at 1.

<sup>9</sup> See e.g., General Agreement on Tariffs and Trade (Oct. 30, 1947) art. III; General Agreement on Trade in Services art. XVAA; Marrakesh Agreement Establishing the World Trade Organization, Annexes IB and IC; Agreement on Trade-Related Aspects of Intellectual Property Rights art. 3.

<sup>10</sup> See, e.g., Convention for the Protection of Human Rights and Fundamental Freedoms art. 1; American Convention on Human Rights art. 1(1); see also Universal Declaration of Human Rights art. 2.

<sup>11</sup> D. SHEA, THE CALVO CLAUSE 35–36 (1955).

<sup>12</sup> M. KINNEAR, A. K. BJORKLUND, & J.F.G. HANNAFORD, INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11 1102.12 (2007, 2009 Update) (noting that national treatment obligations have been used both to limit and to expand the rights of foreigner traders and investors) [hereinafter KINNEAR, BJORKLUND & HANNAFORD (2009 update)].

<sup>13</sup> R.B. LILICH, THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW 17 (1984); A.K. Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims*, 45 VA. J. INT'L L. 809, 836–37 (2005) [hereinafter Bjorklund].

<sup>14</sup> The Bipartisan Congressional Trade Priorities and Accountability Act of 2015, S. Rep. 114–42, 114th Cong., 1st Sess. (May 12, 2015) 14. See also Bjorklund, *supra* note 13, at 891–92; N. DiMascio & J. Pauwelyn,

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National treatment and the international minimum standard are doctrinally separate. The first is a relative standard, while the second is absolute. The first is conventional, while the second is customary international law.<sup>15</sup> There are, however, some areas in which the two have converged because discrimination on the basis of nationality itself violates the international minimum standard—cases in which the national treatment obligation has become part of customary international law. The best example of this is in the provision of justice, where discrimination on any basis is prohibited by customary international law, and might even be *jus cogens*.<sup>16</sup> For example, the Inter-American Court of Human Rights has concluded, in an advisory opinion, that ‘the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws’.<sup>17</sup> 21.10

In addition, some treaties protect foreign investors or their investments from ‘arbitrary and discriminatory’ treatment.<sup>18</sup> For example, Article 3 of the Bolivia–Netherlands BIT provides: ‘Each Contracting Party shall ensure fair and equitable treatment to the investments of nationals of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals’.<sup>19</sup> In that context, most tribunals have read ‘discriminatory’ as precluding nationality-based discrimination, as well as other arbitrary distinctions.<sup>20</sup> Because many treaties, including the Argentina–United States BIT, contain both national treatment obligations<sup>21</sup> and pledges to refrain from according discriminatory and 21.11

*Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?*, 102 AM. J. INT’L L. 48, 67 & n. 111 (2008).

<sup>15</sup> See MCLACHLAN, SHORE & WEINIGER, *supra* note 3, at 239–40 (noting that international law does not preclude all distinctions between foreigners and nationals in the absence of a specific treaty obligation or customary international law principle).

<sup>16</sup> See e.g., Bjorklund, *supra* note 13, at 837–38; E. Root, *The Basis of Protection to Citizens Residing Abroad*, 4 AM. SOC. INT’L L. PROC. 16, 20 (‘Each country is bound to give to the nationals of another country in its territory the benefit of the same laws, the same administration, the same protection, and the same redress for injury which it gives to its own citizens, and neither more nor less: provided the protection which the country gives to its own citizens conforms to the established standard of civilization’).

<sup>17</sup> Juridical Conditions and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03 of Sept. 17, 2003, Inter-Am. Ct. H.R. (Ser. A) No. 18 (2003), ¶ 101.

<sup>18</sup> See, e.g., the award in *CMS v Argentina*, in which the tribunal noted that it could not ‘hold that arbitrariness and discrimination are present in the context of the crisis noted, and to the extent that some effects become evident they will relate rather to the breach of fair and equitable treatment than to the breach of separate standards under the Treaty.’ See *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8, Award (May 12, 2005), ¶ 295.

<sup>19</sup> Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Republic of Bolivia art. 3(1). The BIT’s full protection and security provision also contains a national treatment obligation: ‘More particularly, each Contracting Party shall accord to such investments full security and protection which in any case shall not be less than that accorded either to investments of its own nationals or to investments of nationals of any third States, whichever is more favourable to the investor’.

<sup>20</sup> See e.g., *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award (Oct. 12, 2005), ¶ 180; *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006), ¶ 146; NEWCOMBE & PARADELL, *supra* note 2, at 151–52 (referring to the OECD model treaty, which made clear that nationality-based discrimination is included in the reference to discrimination); see also MCLACHLAN, SHORE & WEINIGER, *supra* note 3 at 239–40 (noting cases in which the tribunal had considered whether fair & equitable treatment requirements encompassed a nondiscrimination obligation); R. DOLZER & M. STEVENS, *BILATERAL INVESTMENT TREATIES* 61–63 (1995); see also A.F.M. Maniruzzaman, *Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign Investment: An Overview*, 8 J. TRANSNAT’L LAW & POL’Y 57, 69–70 (1998) (describing different types of discrimination).

<sup>21</sup> Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment (entered into force Oct. 20, 1994) art II(1): ‘Each Party shall

arbitrary treatment,<sup>22</sup> discrimination needs to extend to more than just nationality-based protection in order to give each provision meaning, as required by the principle of effective interpretation.<sup>23</sup> Tribunals have not necessarily made this distinction in practice.<sup>24</sup>

- 21.12** The scope of the national treatment obligation to which states have adhered varies by treaty. Many treaties accord protection only after an investment has been permitted to enter the country, while others include obligations to permit entry and establishment. The UK prototype only requires a host state to permit the investment of capital 'subject to its right to exercise powers conferred by its laws'.<sup>25</sup> On the other hand, many North American treaties, such as NAFTA Chapter 11, the 2012 US Model BIT, and the 2004 Canadian Model FIPA offer broad pre-establishment protections.<sup>26</sup> Some treaties—particularly those that offer only post-establishment protections—apply only to investments.<sup>27</sup> If a treaty offers the right to establish an investment, its protection probably extends to investors who have not yet made an investment, as well as to the investment itself.
- 21.13** Treaties differ in the breadth of the protection offered to foreign investors. The Energy Charter Treaty (ECT), for example, contains an open-ended list of obligations: national treatment must be afforded investments of investors of other contracting parties, and 'their related activities including management, maintenance, use, enjoyment or disposal'.<sup>28</sup> Other treaties, such as the UK prototype, contain a closed list requiring states party to extend national treatment to the 'management, maintenance, use, enjoyment or disposal of [investors'] investments'.<sup>29</sup>
- 21.14** National treatment is relatively new in the investment context and has reached prominence only recently with the rapid increase in investor-state arbitrations that commenced in the mid-1990s. Yet national treatment is a core obligation in the General Agreement on Tariffs and Trade and has been extensively construed by GATT and WTO panels and examined comprehensively by GATT and WTO scholars. National treatment is also included in the

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permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies . . . [hereinafter Argentina–United States BIT].

<sup>22</sup> *Id.* art. II(2)(b): 'Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments'.

<sup>23</sup> See I. SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 118–19 (2d ed. 1984) (noting the principle of effective interpretation, but cautioning that it must be read in conjunction with the teleological approach to treaty interpretation); A. MCNAIR, *THE LAW OF TREATIES* 385 (1961) (quoting *Cayuga Indians Claims* case: 'Nothing is better settled, as a canon of interpretation in all systems of law, than that a clause must be so interpreted as to give it a meaning rather than so as to deprive it of meaning').

<sup>24</sup> See discussion in ¶¶ 21.74–79 *infra*. See also T. WEILER, *THE INTERPRETATION OF INTERNATIONAL INVESTMENT LAW* 288–96 (2013).

<sup>25</sup> Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of [Country] for the Promotion and Protection of Investments, Model Text 2008 art. 2(1) [hereinafter 2008 U.K. Model BIT], <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2847> (last visited Nov. 11, 2017).

<sup>26</sup> North American Free Trade Agreement, Can.–Mex.–U.S. (Dec. 17, 1992) arts. 1102(1), 1102(2) [hereinafter NAFTA], <https://www.nafta-sec-alena.org/Home/Texts-of-the-Agreement/North-American-Free-Trade-Agreement> (last visited Nov. 11, 2017); 2012 U.S. Model Bilateral Investment Treaty arts. 3(1), 3(2) [hereinafter U.S. Model BIT], <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> (last visited Nov. 11, 2017); Agreement Between Canada and ----- for the Promotion and Protection of Investments, arts. 3(1), 3(2) [hereinafter 2004 Canadian Model FIPA], <https://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf> (last visited Nov. 11, 2017).

<sup>27</sup> NEWCOMBE & PARADELL, *supra* note 2, at 159.

<sup>28</sup> Energy Charter Treaty art. 10(7), <http://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf> (last visited Nov. 11, 2017).

<sup>29</sup> U.K. Model BIT art. 3(2).

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General Agreement on Trade in Services (GATS), although there have as yet been relatively few GATS cases.<sup>30</sup> In GATT cases, the question is usually whether the goods that have received less favourable treatment are 'like products' as compared to the more-favoured goods.<sup>31</sup>

To what extent GATT 'like products' analyses provide fruitful analogies for 'like circumstances' or 'like situations' analyses is unclear. Early cases such as *S.D. Myers v Canada* and *Pope & Talbot v Canada* were characterized by frequent references to GATT and WTO jurisprudence by claimants, respondents, and the tribunals themselves.<sup>32</sup> After these initial cases, the *Methanex* tribunal suggested that it 'would be open to persuasion based on legal reasoning developed in GATT and WTO jurisprudence, if relevant',<sup>33</sup> but that GATT like-products analysis offered inappropriate guidance for a tribunal construing an investment treaty's 'like circumstances' language.<sup>34</sup> In particular, the *Methanex* tribunal rejected the claim that because two producers manufactured goods that competed in the gasoline oxygenate market, their producers were necessarily in like circumstances with each other. To the contrary, according to the *Methanex* tribunal, the NAFTA negotiators were 'fluent in GATT law and incorporated, in very precise ways, the term "like goods" and the GATT provisions relating to it when they wished to do so'.<sup>35</sup> Article 1102 of NAFTA does not contain any reference to 'any like, directly competitive or substitutable goods'.<sup>36</sup> More recent decisions confirm this approach, with tribunals in *Cargill v Mexico*, *Merrill & Ring v Canada*, and *Bilcon v Canada* all questioning the applicability of GATT decisions on like products in the broader 'like circumstances' context.<sup>37</sup> Thus, the Article 1102 like circumstances inquiry is different from that conducted by a typical WTO tribunal.

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This summarizes well what is likely to be the general approach: investor-state tribunals may consult GATT/WTO practice when called upon to consider issues that have also arisen in the trade context, but they will not necessarily follow the same analytical path. Particularly as investment treaty tribunals themselves have developed an investment-specific approach in the increasing number of investment treaty cases, their incentives to find guidance in GATT/WTO jurisprudence has waned.<sup>38</sup>

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<sup>30</sup> KINNEAR, BJORKLUND & HANNAFORD (2009 Update), *supra* note 12, at 1102.15–16.

<sup>31</sup> See e.g., WTO Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (Apr. 5, 2001), ¶ 99.

<sup>32</sup> See generally KINNEAR, BJORKLUND & HANNAFORD, *supra* note 12, at 1102.10–17a.

<sup>33</sup> *Methanex Corp. v. United States of America*, UNCITRAL, Award (Aug. 3, 2005), Pt. II, Ch. B, ¶ 6.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* Pt. IV, Ch. B, ¶ 30.

<sup>36</sup> *Id.* Pt. IV, Ch. B, ¶ 37.

<sup>37</sup> *Cargill Inc. v. Mexico*, ICSID Case No. ARB(AF)/05/2, Award (Sept. 18, 2009), ¶ 193 (finding that 'like circumstances' in art. 1102 must be interpreted on its own terms); *Merrill & Ring Forestry L.P. v. Canada*, UNCITRAL (ICSID Administered), Award (Mar. 31, 2010), ¶ 86 (expressions used in different treaties and different contexts are not interchangeable in spite of their similarity); *Bilcon*, Award, *supra* note 2, ¶ 692 (language in art. 1102 is 'less restrictive' than that found in other trade-liberalizing agreements, such as those that refer to 'like products').

<sup>38</sup> Many have recently written on investment arbitral awards as a source of law, and even as quasi-precedent. See, e.g., G. Kaufmann-Kohler, *The 2006 Freshfields Lecture: Arbitral Precedent: Dream, Necessity, or Excuse?*, 23 *ARB. INT'L* 357 (2007); C. Schreuer, *Diversity and Harmonization of Treaty Interpretation in Investment Arbitration*, 3 *TRANSNAT'L DISP. MGMT.* 11 (2006); J. Commission, *Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence*, 24 *J. INT'L ARB.* 129 (2007); A. Bjorklund, *Investment Treaty Arbitral Decisions as Jurisprudence Constante*, in *INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE* 265 (C. Picker et al. eds., 2008). One commentator has provocatively and persuasively argued that investment tribunals should not so quickly eschew reliance on—or at least guidance from—WTO tribunals. J. Kurtz, 'The Merits and Limits of Comparativism: National Treatment', in *INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW* 243 (Stephan W. Schill ed., 2010).

### III. National Treatment in Practice

- 21.17** No one disputes that national treatment obligations in investment treaties extend to de facto, as well as de jure, discrimination. Indeed, there are remarkably few cases of de jure discrimination. The key issue is ordinarily not identifying evidence of a state's intent to discriminate, but, rather, which entity or entities the allegedly injured party should be measured against when it comes to assessing the treatment accorded.
- 21.18** Many if not most national treatment cases have arisen under NAFTA Chapter 11, and a large number of NAFTA Chapter 11 cases have contained allegations of national treatment violations.<sup>39</sup> Despite these initial allegations, national treatment has not necessarily been the basis for the decision in every one of the awards rendered. In some cases, the focus shifted to other grounds during the case's development.<sup>40</sup> Notwithstanding this qualification, however, NAFTA Chapter 11 awards have played a leading role in developing the national treatment jurisprudence.
- 21.19** Joost Pauwelyn and Nicholas DiMascio suggest that national treatment claims are more likely in cases brought against developed countries, in which violations of minimum standards or the prohibition against expropriation are unlikely to be at issue.<sup>41</sup> This explanation is not altogether convincing, as nearly every case brought against the United States and Canada, the two most frequent developed-country defendants, has involved allegations that the minimum standard of treatment was also violated, and often those claims have eclipsed the national treatment allegations. Yet allegations of nationality-based discrimination might play an important role in creating a particular atmosphere around the case. After all, one of the reasons for having an investment treaty is to level the playing field for a foreign investor who might be at a disadvantage in a home state's courts and who might have less political leverage than domestic investors.<sup>42</sup> Thus, claiming national treatment violations can help set the tone for the rest of the case.
- 21.20** While there is no universally accepted approach to addressing a national treatment claim, a common essential element is the identification of the appropriate domestic comparator—the entity in 'like circumstances'—against which to assess the treatment accorded the allegedly injured foreign investment (or investor). The analysis also requires identifying the treatment itself that is less favourable than that given the domestic comparator. A third inquiry usually involves an assessment of whether the host government had non-discriminatory reasons that justified the difference in treatment.<sup>43</sup>

<sup>39</sup> As of August 2007, all but two NAFTA statements of claim had included alleged national treatment violations. See KINNEAR, BJORKLUND & HANNAFORD (2009 Update), *supra* note 12, at 1102.18. That number has diminished some over the years, but five NAFTA cases decided from 2010 to 2016 involved alleged national treatment violations. See *Bilcon*, *supra* note 2, Award; *Merrill & Ring*, *supra* note 37, Award; *Apotex Holdings Inc. and Apotex Inc. v. United States*, ICSID Case No. ARB (AF)/12/1 Award (Aug. 25, 2014); *Grand River Enterprises Six Nations, Ltd. et al. v. United States*, UNCITRAL (ICSID Administered), Award, 12 January 2011; and *Windstream v. Canada*, UNCITRAL (PCA Administered), Award (Sept. 27, 2016).

<sup>40</sup> KINNEAR, BJORKLUND & HANNAFORD (2009 Update), *supra* note 12 at 1102.18 (noting that, in *Azinian v. Mexico*, *Mondev v. United States*, and *Metalclad v. Mexico*, the national treatment allegations played virtually no role in the conduct of the case).

<sup>41</sup> DiMascio & Pauwelyn, *supra* note 14, at 67.

<sup>42</sup> Weiler, *supra* note 24, at 430 (quoting Jan Paulsson as having said 'the very fact of being foreign creates an inequality').

<sup>43</sup> NEWCOMBE & PARADELL, *supra* note 2 at 162; McLACHLAN, SHORE & WEINIGER, *supra* note 3, at 253–54; A. Reinisch, *National Treatment*, in INTERNATIONAL INVESTMENT LAW: A HANDBOOK 846, 869 (M. Bungenberg et al. eds., 2015).

Most tribunals will address the three analytical questions suggested, but they will not necessarily do so in the order suggested or in discrete steps. In certain cases, the type of treatment at issue cannot be severed from the like circumstances inquiry. In the *UPS Dissent*, for example, Dean Cass cautioned against deciding that two entities are not in like circumstances *because of the different treatment accorded them, rather than because the host state had legitimate reasons for structuring the differential treatment.*<sup>44</sup> 21.21

A. The Like Circumstances Inquiry

The most important component of the national treatment analysis in almost any national treatment case is the identification of the appropriate comparator, as the outcome usually depends on whether the allegedly favoured entity was actually in like circumstances with the foreign investor or investment.<sup>45</sup> By far the bulk of national treatment cases have involved facially neutral statutes or regulations that allegedly had a disparate impact on foreign investors or investors. If the allegedly favoured entity is not like the less-favoured entity, the inquiry ends as the claimant will not have any way of showing the discriminatory effect of facially neutral treatment. While some treaties, particularly those that prohibit arbitrary and discriminatory treatment, do not specify that the assessment of discrimination must involve a comparative assessment, tribunals to date have assumed that the inquiry requires the identification of a similarly situated comparator or comparators.<sup>46</sup> The existence of only one comparator can suffice to establish a violation if that entity receives more favourable treatment in circumstances that suggest nationality considerations explain the distinction made. 21.22

1. Comparators in cases of *de jure* National Treatment Violations

In cases of *de facto* national treatment violations, the absence of any actual comparator will nearly always be fatal. This contrasts with the situation presented by a *de jure* measure, as a claimant needs not show a disparate impact if the discrimination is inherent in the terms of the measure. For example, legislation establishing an investment incentive but limiting its availability to domestic-owned entities could serve as the basis for a national treatment claim, even if no domestic entities had sought to take advantage of the opportunity.<sup>47</sup> However, even *de jure* cases can fail if the apparently discriminatory measure does not in fact confer any advantage on a domestic investor that is in like circumstances with the foreign investor. 21.23

A section on *de jure* national treatment must necessarily be short and largely hypothetical as there are no decided cases based strictly on *de jure* measures. Some investment treaty cases 21.24

<sup>44</sup> *United Parcel Service of America Inc. v. Canada*, UNCITRAL, Separate Statement of Dean Cass (May 24, 2007), ¶¶ 49–50 (noting that the determination of whether circumstances are like could not be segregated completely from the question of whether less favorable treatment had actually been accorded the foreign investment).

<sup>45</sup> KINNEAR, BJORKLUND & HANNAFORD (2009 Update), *supra* note 12, at 1102.20–40c; McLACHLAN, SHORE & WEINIGER, *supra* note 3, at 251–54, 263. Some treaties refer to those ‘similarly situated’ or ‘in like situations’. See NEWCOMBE & PARADELL, *supra* note 2, at 159–62. It is unlikely that any difference in outcome hinges on the use of ‘same’ or ‘like’ or ‘similar’. *Id.*

<sup>46</sup> See, e.g., *Rusoro Mining Ltd. v. Venezuela*, ICSID Case No. ARB(AF)/12/5, Award (Aug. 22, 2016), ¶ 563; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Pakistan*, ICSID Case No. ARB/03/29, Award (Aug. 27, 2009), ¶ 389; *Invesmart v. Czech Republic*, UNCITRAL, Award (June 26, 2009), ¶¶ 404, 414–15; *Champion Trading Co. et al. v. Egypt*, ICSID Case No. ARB/02/9, Award (Oct. 27, 2006), ¶ 387; *Occidental Exploration and Production Company v. Ecuador*, LCIA Case No. UN 3467, Final Award (July 1, 2004), ¶ 170; *Nykomb Synergetics Technology Holding AB v. Latvia*, Stockholm Chamber of Commerce, Award (Dec. 16, 2003), 34; *Consortium RFCC v. Morocco*, ICSID Case No. ARB/00/6, Award (Dec. 22, 2003), ¶ 53.

<sup>47</sup> See e.g., McLACHLAN, SHORE & WEINIGER, *supra* note 3, at 35 (discussing possible national treatment violation if preferential tax treatment were offered only to qualified domestic investments).

have included de jure elements, but most have been treated more like de facto cases. For example, *S.D. Myers v Canada* included statements by the then-Minister of the Environment, Sheila Copps, that closing the Canadian border to prevent exports of PCB waste was essential to ensure the health of the domestic PCB waste remediation industry. In the House of Commons, as well as on other occasions, she stated that it was Canada's policy that PCB waste should be remediated in Canada by Canadians.<sup>48</sup> There were also reports that she had promised the Canadian industry that she would close the border.<sup>49</sup> The measure itself, however, was neutral in that it prohibited *any* entity from exporting PCB waste. The case thus focused on de facto, rather than de jure, national treatment. The impulse giving rise to the export prohibition did, however, lead to an inference that the border had been closed to limit competition from US PCB waste remediation entities.<sup>50</sup>

- 21.25** *ADF* involved a challenge to the United States' apparently facially discriminatory 'Buy America Act', which requires government contractors using funds provided by the US government to purchase US-origin products. On its face, the statute appears de jure discriminatory, and the tribunal held first that the purchase of steel by the State of Virginia for use in a highway construction project constituted government procurement that was excepted from NAFTA's national treatment obligations.<sup>51</sup> Yet, the tribunal also analysed the case on the merits to determine whether the application of the law resulted in a violation of the national treatment provision, and it did so by identifying the appropriate comparators to determine whether *ADF* was in like circumstances with more favourably treated entities.
- 21.26** Canadian-owned *ADF* proposed to purchase steel manufactured in the United States and transport it to Canada for fabrication before conveying it to the contractor. The processing done to the steel in Canada would make it 'Canadian' for purposes of the Buy America Act and ineligible for purchase with federal funds. Based on the treatment proposed, the tribunal concluded that the appropriate comparison was to examine the treatment accorded the investment of the investor, which it identified as its steel in the United States, and that accorded to the investments of US investors, which it defined as US-origin steel.<sup>52</sup> Because all of the investments would lose their US-origin designation if subject to sufficient fabrication in Canada, the tribunal concluded that, for the investments in like circumstances, there was no difference in treatment.<sup>53</sup>
- 21.27** A de jure case need not inevitably involve a like circumstances determination, yet one tribunal faced with an arguably de jure case dismissed the national treatment claim when it sought to no avail an appropriate comparator. In *The Loewen Group Inc. v United States*, the claimants (The Loewen Group Inc. and its US subsidiary, collectively 'Loewen') challenged the acts of the Mississippi judiciary as national treatment violations on the grounds that they were permeated with bias because of Loewen's Canadian origin. The *Loewen* tribunal concluded that there was no comparator against which it could assess the treatment accorded to Loewen. The other litigant would be inappropriate, and there were no other comparators in like circumstances.<sup>54</sup> It seems correct that the other litigant is not an appropriate comparator—the mere fact that the domestic party wins and the foreign party loses a trial should be an

<sup>48</sup> *S.D. Myers Inc. v. Canada*, UNCITRAL, Partial Award (Nov. 13, 2000), ¶ 244.

<sup>49</sup> *Id.* ¶ 172.

<sup>50</sup> *Id.* ¶¶ 252–55.

<sup>51</sup> *ADF Group Inc. v. United States*, ICSID Case No. ARB(AF)/00/1, Award (Jan. 9, 2003), ¶¶ 162–68.

<sup>52</sup> *Id.* ¶ 155.

<sup>53</sup> *Id.* ¶ 156.

<sup>54</sup> *The Loewen Group Inc. & Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, Award (June 26, 2003), ¶ 149.

insufficient basis for finding a national treatment violation. Yet in the case of alleged *de jure* national treatment, in which the presiding judge failed to rein in adverse commentary about the nationality of the defendant that could have had an effect on the outcome of the trial, requiring that there be a comparator seems superfluous. The appropriate question would be whether the treatment has actually injured the claimant.<sup>55</sup>

2. *Comparators in cases of de facto national treatment violations*

Tribunals have not adopted a uniform approach to identifying the entity or entities in like circumstances. Rather, they have made clear that the approach needs to be flexible and can vary according to the circumstances of the investment or investor and according to the treatment at issue. One NAFTA tribunal has said '[b]y their very nature, "circumstances" are context dependent and have no unalterable meaning across the spectrum of fact situations . . . the concept of "like" can have a range of meanings, from "similar" all the way to "identical"'.<sup>56</sup> Another tribunal borrowed phraseology from a WTO decision: "The accordion of "likeness" stretches and squeezes in different places as different provisions of the WTO Agreement are applied'.<sup>57</sup>

Most, but not all, entities in like circumstances with each other will have a competitive relationship. This analysis stems in part from the GATT/WTO context, in which the question for the panel is whether products are 'like' each other, which ordinarily means that they compete in the same economic sector or that one product is substitutable for the other, such that a measure limiting market access will protect the local product that would otherwise face competition and potential displacement by the rival product. In the investment context, the existence of a competitive relationship between the domestic comparator and the claimant is not an essential prerequisite to a tribunal's finding that they are in like circumstances, but it is helpful in that the protection a measure gives an apparently competing entity might lead to an inference of nationality-based preference.

Most of the attention is on the entity or entities to which the tribunal is comparing the foreign investment (or investor). Yet this focus can obscure an important nuance in the like circumstances analysis. The appropriate comparison will often be between the like-circumstanced treatment accorded the investments (or investors), rather than between the like-circumstanced investments (or investors) themselves.<sup>58</sup> This emphasis explains the approach many tribunals take when they are identifying the appropriate comparators and is also consistent with the statutory language in many investment agreements. NAFTA Article 1102, for example, provides that: 'Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, *in like circumstances*, to its own investors. . .'.<sup>59</sup> The like circumstances qualification appears to modify the word 'treatment', rather than 'investor'. There is thus textual encouragement for tribunals to be sure that their comparative analysis takes into account the regulatory context, as well as any market-based competition, in determining the identity of those in like circumstances with the foreign claimant.<sup>60</sup>

<sup>55</sup> The *S.D. Myers* tribunal has suggested that protectionist intent alone is insufficient to sustain a claim absent actual injury. See *infra* § 21.61.

<sup>56</sup> *Pope & Talbot Inc. v. Canada*, UNCITRAL, Award on the Merits of Phase 2 (Apr. 10, 2001), ¶ 75.

<sup>57</sup> *S.D. Myers*, Partial Award, *supra* note 48, ¶ 244 (citing *Japan-Alcoholic Beverages*, WT/DS38/AB/R ¶¶ 8.5 & 9), cited approvingly in *Attorney General of Canada v. Myers*, 2004 FC 38, at 32 (Trial Division) (Jan. 13, 2004).

<sup>58</sup> See Rodney Neufeld, *Trade and Investment*, in *OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW* 620, 630-31 (D. Bethlehem et al. eds., 2009).

<sup>59</sup> NAFTA art. 1102(1) (emphasis added). The same language is in art. 3(1) of the 2004 U.S. Model BIT.

<sup>60</sup> *DiMascio & Pauwelyn*, *supra* note 14, at 76. Cf. *Corn Products Int'l v. Mexico*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility (Jan. 15, 2008), ¶ 126 (cautioning against giving too much

- 21.31** Many of these subtleties are best illustrated by the case law. In *S.D. Myers v Canada*, a US investor, S.D. Myers, challenged Canada's closing of its border to the export of polychlorinated biphenyl (PCB) waste as discriminatory because it was not able to compete in Canada for contracts to process PCB waste at its Ohio remediation facility. In its like-circumstances analysis, the tribunal determined that generally comparisons should be made between firms operating in the same business and economic sectors and that general policy considerations, such as environmental concerns, should also play a role.<sup>61</sup> The tribunal weighed environmental concerns that might justify treating companies differently to protect public health and safety and also considered Canada's obligations to avoid unjustified trade distortions.<sup>62</sup> Ultimately, the tribunal concluded that S.D. Myers and its Canadian investment were in like circumstances with the Canadian PCB waste-disposal industry. Their competitive relationship was a significant factor in its conclusion: 'It was precisely because [S.D. Myers International] was in a position to take business away from its Canadian competitors that [they] lobbied the Minister of the Environment to ban exports when the U.S. authorities opened the border'.<sup>63</sup>
- 21.32** In *United Parcel Service Inc. v Canada*, United Parcel Service (UPS) alleged that Canada accorded more favourable treatment to Canada Post in the non-monopoly postal services market than it accorded UPS or its Canadian subsidiary, UPS Canada. UPS also alleged that Canada Post's monopoly network conferred on it an advantage in purveying non-monopoly postal services. In particular, UPS claimed that courier companies had to pay customs fees for the processing of mail that Canada Post did not have to pay and that Canada Post collects certain import duties on behalf of Customs Canada for which it is paid a fee.
- 21.33** UPS's claim failed because the majority of the *UPS* tribunal found that neither UPS nor UPS Canada was in like circumstances with Canada Post. It based this decision on a distinction between postal imports and courier imports and held that the different characteristics of each warranted different customs treatment.<sup>64</sup> The dissenting arbitrator, on the other hand, found that the appropriate comparison was between the investor and the entity with which it was in a competitive relationship with respect to the matters at issue; the provision of services for mail not in the regular postal stream.<sup>65</sup> He thus focused on two of UPS's allegations: the first was that Canada Customs pays handling fees to Canada Post for services that UPS must perform without compensation, and the second was that Canada Customs does not penalize Canada Post for failure to comply with Customs regulations as it does UPS, nor does it collect the same duties and taxes from Canada Post. He concluded that UPS was indeed similarly situated to Canada Post but was accorded different treatment.<sup>66</sup>
- 21.34** The *UPS* tribunal also considered whether Canada's Publications Assistance Program (PAP), under which the government subsidizes Canada Post's delivery of eligible Canadian publications, violated NAFTA's national treatment obligation.<sup>67</sup> Although the majority found that the PAP was covered by the cultural industries exception to NAFTA,<sup>68</sup> it considered whether UPS would have been in like circumstances with Canada Post for purposes of the PAP had it

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weight to differences in the ways products are 'owned, managed, regulated, or priced' because they are inevitable and doing so would negate the effectiveness of nondiscrimination clauses).

<sup>61</sup> S.D. Myers, Partial Award, *supra* note 48, ¶ 250.

<sup>62</sup> *Id.* ¶¶ 247, 250.

<sup>63</sup> *Id.* ¶ 251.

<sup>64</sup> United Parcel Service of America, Inc. v. Canada, UNCITRAL, Award (May 24, 2007), ¶ 99.

<sup>65</sup> UPS, Dissent, *supra* note 44, ¶ 17.

<sup>66</sup> *Id.* ¶¶ 33, 39.

<sup>67</sup> UPS, Award, *supra* note 64, ¶ 146.

<sup>68</sup> *Id.* ¶ 137. See discussion at ¶¶ 21.42–45 *infra*.

gone on to consider the merits of the case and concluded it was not. The basis for this decision was that only Canada Post had the ability to deliver to every postal address in Canada, while UPS's capabilities were slightly more limited.<sup>69</sup> Given the objectives of the PAP, UPS, and Canada Post were not in like circumstances and Canada did not breach any NAFTA obligations.<sup>70</sup>

Again the dissenting arbitrator came to a different conclusion. He found that UPS had made a prima facie showing that it was in like circumstances with Canada Post with respect to the PAP: both UPS and Canada Post deliver materials of the sort that the PAP subsidizes; both do so routinely as a part of their business, and both do so to make money.<sup>71</sup> The burden thus shifted to Canada to explain the difference in treatment. Here he found Canada's proffered justification—that only Canada Post could deliver to every address in Canada—to be a *post hoc* rationalization designed to defend the programme during dispute settlement proceedings.<sup>72</sup> **21.35**

In the three high-fructose corn syrup (HFCS) cases, the tribunals had to decide whether US-controlled manufacturers of HFCS, a corn-based sweetener used as a sugar substitute, were treated less favourably than Mexican cane sugar producers.<sup>73</sup> Mexico had imposed a 20 per cent tax on the transfer and importation of any beverage using a sweetener other than cane sugar and a 20 per cent tax on distribution agreements that involved transferring products using any sweeteners besides cane sugar.<sup>74</sup> Those obligated to pay the taxes were also subject to other government-imposed requirements.<sup>75</sup> The *ADM* tribunal was the first to issue a decision. It determined that identifying the appropriate comparators required focusing on the competitive requirement of the parties in the marketplace. The tribunal concluded that Mexican cane sugar producers were in like circumstances with the claimants' joint venture that produced HFCS in Mexico given their face-to-face competition supplying sweeteners to the Mexican food and beverage industry and Mexico's having filed a WTO case against HFCS at the behest of the Mexican sugar industry.<sup>76</sup> The *Corn Products* tribunal came to a similar decision,<sup>77</sup> as did the *Cargill* tribunal.<sup>78</sup> **21.36**

In *Champion Trading Co. v Egypt*, a claim brought under the Egypt–United States BIT, the claimants alleged that Egypt had failed to include their investment, a cotton company, in the settlements they paid to certain Egyptian cotton producers to compensate them for the losses they incurred by selling their cotton to government-owned collection centres, which paid a fixed price to producers, rather than by selling the cotton on the open market. Egypt had promised to compensate producers who were penalized by participating in the state-regulated cotton market. Champion's claim failed, however, because the claimants' cotton company could not show it was in like circumstances with the favoured producers. Although the investments at issue operated in the same economic sector, that alone was insufficient to **21.37**

<sup>69</sup> *Id.* ¶¶ 173–74.

<sup>70</sup> Given its conclusion with respect to the cultural industries exception, the majority did not consider whether the program also fell within the purview of the subsidies exception. The dissenting arbitrator concluded that it did not.

<sup>71</sup> UPS, Dissent, *supra* note 44, ¶ 94.

<sup>72</sup> *Id.* ¶¶ 124–25.

<sup>73</sup> Corn Products Int'l Decision, *supra* note 60; Archer Daniels Midland Co et al. v. Mexico, ICSID Case No. ARB(AF)/04/05, Award (Nov. 21, 2007); Cargill, *supra* note 37.

<sup>74</sup> ADM, Award, *supra* note 73, ¶ 82.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* ¶¶ 199, 201.

<sup>77</sup> Corn Products, Award, *supra* note 60, ¶¶ 120–21.

<sup>78</sup> Cargill, Award, *supra* note 37, ¶¶ 219–23.

sustain the claim that they were in like circumstances with respect to the treatment at issue.<sup>79</sup> Champion's company had not sold any cotton to government-owned collection centres and was thus ineligible to collect any of the settlement monies made available to those who did.

- 21.38** As is clear from the discussion of the preceding cases, the like circumstances determination cannot be cordoned off from the treatment alleged to cause injury. The challenge in any case, however, is to ensure that the focus on treatment does not swallow the like circumstances determination. In other words, the policy considerations motivating the treatment can justify a finding that entities are not in like circumstances even though they would ordinarily seem to be; contrarily, a focus on treatment to the exclusion of differential circumstances (e.g. operation in entirely different economic sectors) might uphold the finding of a national treatment violation.
- 21.39** In *Pope & Talbot v Canada*, the claimant was a US investor that owned three lumber mills in British Columbia which brought a Chapter 11 challenge to Canada's implementation of the US-Canada Softwood Lumber Agreement, which suspended for five years the long-running trade dispute over Canadian exports of softwood lumber to the United States. Under the terms of the agreement, Canada agreed to limit the exports of softwood lumber from four 'covered' provinces—Alberta, British Columbia, Quebec, and Ontario—that had historically been the largest exporters of softwood lumber to the United States. Lumber exports from the non-covered provinces were not limited. In return, the United States would not institute any unfair trade remedies cases against Canadian softwood lumber exporters.
- 21.40** The agreement required that Canadian softwood lumber be broken into three categories. Up to 14.7 billion board feet of lumber could be exported free of charge; exports between 14.7 and 15.35 billion board feet would be charged a duty at the rate of US\$50 per board foot; and exports in excess of 15.35 billion board feet would be charged a duty at the rate of US\$100 per board foot.<sup>80</sup> To implement the agreement, Canada allocated the quota among Canadian lumber producers in each of the covered provinces. That allocation was based primarily on their historic levels of export to the United States.
- 21.41** Pope & Talbot claimed a violation of Article 1102, NAFTA's national treatment provision, because lumber producers in the non-covered provinces were not subject to the quota and were thus accorded more favourable treatment than lumber producers in the covered provinces. Pope & Talbot also claimed that it was treated less favourably than some other producers in the covered provinces.
- 21.42** The *Pope & Talbot* tribunal had to make separate like circumstances determinations to resolve these different allegations. The first question for the *Pope & Talbot* tribunal was whether Pope & Talbot was in like circumstances with lumber producers in the non-covered provinces. The *Pope & Talbot* tribunal approached this question by conflating the initial determination of like circumstances and whether the government offered a rationale for the difference in treatment. The first inquiry was whether the foreign investor was in like circumstances with the allegedly more favourably treated domestic investor, which required merely that the two entities operating in the same economic sector received differential treatment.<sup>81</sup> If the foreign investor could make such a showing, the burden then shifted to Canada to show that some legitimate government objective justified the differential treatment and thereby demonstrate that the two were not really in like circumstances: 'once a difference in treatment between

<sup>79</sup> *Champion Trading Co. et al. v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Award (Oct. 23, 2006), ¶¶ 131, 155–56.

<sup>80</sup> *Pope & Talbot*, Phase II Merits Award, *supra* note 56, ¶ 18.

<sup>81</sup> *Id.* ¶ 78.

a domestic and a foreign-owned investment is discerned, the question becomes, are they in like circumstances?<sup>82</sup>

Using this approach, the *Pope & Talbot* tribunal determined that Pope & Talbot's investments in British Columbia were not in like circumstances with any of the allegedly more favourably treated investments because Canada had justifiable policies explaining the differences in treatment. First, the tribunal concluded that limiting exports only from the four covered provinces was rational given the historical background of the case. Because the United States had never imposed duties on producers in the non-covered provinces, limiting exports from only the covered provinces was 'reasonably related to the rational policy of removing the threat of CVD [countervailing duty] actions'.<sup>83</sup> Secondly, the tribunal concluded that the allegedly more favourable treatment given to producers within the covered provinces (and particularly in Quebec) than to producers in British Columbia was also warranted as it was based on the allocation of some quota to new entrants into the lumber industry, most of whom were in Quebec. Thus, British Columbian producers were not in like circumstances with Quebecois new entrants; in any event, Pope & Talbot was not a new entrant.<sup>84</sup> Finally, within British Columbia, producers of lumber operating in the interior of the province, rather than on the Coast, were required to pay an extra fee to settle a dispute about British Columbian stumpage fees (the amount British Columbia charges producers for the privilege of cutting timber on Crown land). Again, the *Pope & Talbot* tribunal determined that Pope was not in like circumstances with the more favourably treated coastal producers.<sup>85</sup> 21.43

*Occidental Exploration and Production Co. v Ecuador* provides the unusual example of a tribunal finding two entities to be in like circumstances notwithstanding the lack of any competitive relationship between them. Ecuador has a value-added tax (VAT) refund programme that permits exporters dealing in certain products, including flowers and seafood, to claim a refund of the VAT on all products exported from the country. Occidental was not permitted to claim a VAT refund on exports of oil, which it claimed violated the national treatment obligation in the Ecuador–United States BIT. In defence, Ecuador argued that the VAT refund was not available to any exporters of oil, including Petroecuador, the state-owned oil company, and that there was thus no evidence of any attempt to discriminate against foreign companies. 21.44

The tribunal found Ecuador's arguments unavailing. Because the purpose of the national treatment obligation is to protect foreign investors, it would be inappropriate to address 'exclusively the sector in which that particular activity is undertaken'.<sup>86</sup> Going further, the tribunal concluded that exporters should not be placed at a disadvantage in foreign markets because they had to pay more taxes in the country of origin.<sup>87</sup> 21.45

The *Occidental* tribunal's conclusion that exporters qua exporters are in like circumstances is unlikely to be replicated often. The lack of any competitive relationship between the comparators would ordinarily be a difficult hurdle to overcome with respect to the like-circumstances determination. On the other hand, to the extent the tribunal's decision reflected an assessment that VAT refunds are denied the oil exploration sector because it is dominated by foreign competitors, the decision is less surprising.<sup>88</sup> Here you could say there was a strong focus 21.46

<sup>82</sup> *Id.* ¶ 79.

<sup>83</sup> *Id.* ¶ 87.

<sup>84</sup> *Id.* ¶ 93.

<sup>85</sup> *Id.* ¶ 103.

<sup>86</sup> *Occidental, Award*, *supra* note 46, ¶ 60.

<sup>87</sup> *Id.* ¶ 175.

<sup>88</sup> Ecuador moved to set aside the award, but its petition was denied. Because the award was subject to challenge on only limited grounds, the English courts did not address the proper application of the

on the treatment—refund of VAT—given to exporters, all of whom were viewed as being in like circumstances.

- 21.47** At least one tribunal has taken a more holistic approach. The *Apotex v United States* tribunal said that identifying comparators in like circumstances requires looking at, inter alia, 'whether those which are said to be comparators: (i) are in the same economic or business sector; (ii) have investment in, or are businesses that compete with the investor or its investments in terms of goods or services; or (iii) are subject to a comparable legal regime or regulatory requirements, as the claimants and their investments'.<sup>89</sup>

### 3. Few versus many comparators

- 21.48** Some tribunals have grappled with the analytical challenge posed when a claimant alleges the discriminatory effect of a facially neutral measure, but there are few entities against which to compare the treatment accorded. Many of these cases will turn on suggesting that there is a disparate impact on foreign investors or their investments, but demonstrating a disparate impact is a challenge if the size of the respective pools is small. *Feldman v Mexico* involved a challenge to a Mexican tax rebate law by a US investor in a Mexican enterprise, CEMSA, which resold and exported cigarettes from Mexico. Feldman claimed that Mexican laws discriminated against his company because the rebates were available only to exporters who were also producers of cigarettes, rather than to resellers of cigarettes. Moreover, notwithstanding the provisions of the law, Feldman alleged that in practice Mexican resellers/exporters of cigarettes were able to claim rebates.
- 21.49** The *Feldman* tribunal determined that CEMSA was not in like circumstances with the producers/exporters because Mexico had rational bases for treating producers differently from resellers, including 'better control over tax revenues, discourag[ing] smuggling, protect[ing] intellectual property rights, and prohibit[ing] gray market sales'.<sup>90</sup> The decision does not clarify whether the tribunal was determining that CEMSA was not in like circumstances with the producers/exporters, or whether, notwithstanding the facially like circumstances, Mexico had good reason for treating the two differently.<sup>91</sup> The difference in these approaches is the stage at which the burden shifts to the respondent to justify the difference in treatment.
- 21.50** On the other hand, the *Feldman* tribunal did find that CEMSA was in like circumstances with one Mexican reseller/exporter of cigarettes and that it was given less favourable treatment.<sup>92</sup> The dissenting arbitrator departed from this analysis on the ground that a tribunal could not find de facto discrimination based on a single domestic comparator who allegedly received advantageous treatment but only if there were 'composite acts involving a set of conducts of a state evincing a systematic practice',<sup>93</sup> as described in the International Law Commission's State Responsibility article on composite acts.<sup>94</sup>

nondiscrimination principle. See *Occidental Exploration Production Co. v. Republic of Ecuador* (2005) EWCA Civ. 1116 (Sept. 9, 2005); *Republic of Ecuador v. Occidental Exploration & Production Co.* [2006] EWHC 345 (Comm.) (Mar. 2, 2006); *Republic of Ecuador v. Occidental Exploration & Production Co.* [2007] EWCA Civ. 656 (July 4, 2007). See generally Susan D. Franck, *International Decision: Occidental Exploration & Production Co. v. Republic of Ecuador*, 99 AM. J. INT'L L. 675, 679–80 (2005).

<sup>89</sup> *Apotex*, Award, *supra* note 39, ¶ 8.15. See also *Railroad Development Corporation v. Guatemala*, ICSID Case No. ARB/07/23, Award (June 29, 2012), ¶¶ 153–55 (rejecting claim that investors are in like circumstances merely because they have possibly competing interests).

<sup>90</sup> *Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (Dec. 16, 2002), ¶¶ 17–72.  
<sup>91</sup> *Id.* ¶ 170.

<sup>92</sup> *Id.* ¶¶ 177–80.

<sup>93</sup> *Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Dissenting Opinion of Arbitrator Covarrubias Bravo (Dec. 3, 2002), ¶ 15.

<sup>94</sup> *Id.*

The composite acts argument misses the mark. Nothing in treaty language or practice suggests that only systemic discrimination can qualify as a violation of a state's national treatment obligation. The crux of ILC State Responsibility Article 15 is that certain breaches consist of composite acts that occur over an extended time; it is not that only composite acts can be a breach of a state's obligations.<sup>95</sup> Rather, the real concern when there are few comparators is whether the differential treatment can be explained only by nationality-based distinctions or whether the differences are mere happenstance. 21.51

*GAMI v Mexico* is another instance of a case in which the number of entities in like circumstances was small. *GAMI* involved a challenge to Mexico's decision to nationalize some, but not all, sugar mills. *GAMI*'s Mexican subsidiary, *GAM*, owned five mills, all of which were expropriated. The question was whether *GAM* was in like circumstances with owners of non-expropriated mills. Although *GAMI* presented evidence showing that one domestic-owned mill with very similar characteristics to *GAM*'s mills was not expropriated, the tribunal concluded that the circumstances were not so alike as to make the difference in treatment wrong.<sup>96</sup> The tribunal concluded that *GAM*'s mills fell within the category of insolvent sugar mills that Mexico had determined to nationalize in the public interest. While Mexico's drawing of the line between mills to expropriate and not to expropriate might have been clumsy, there was no evidence that it was discriminatory.<sup>97</sup> Again, the mere fact that one domestic comparator happened to fall on the more favourable side of the line was insufficient to demonstrate nationality-based discrimination. 21.52

In *Bayindir v Pakistan*, the tribunal had to consider whether the claimant was in like circumstances with one allegedly more favourably treated entity, and concluded that it was not. *Bayindir* had a contract with the government of Pakistan to build a motorway from Islamabad to Peshawar.<sup>98</sup> When construction under the contract did not proceed as planned, Pakistan terminated its relationship with *Bayindir*, requested bids on the project, and engaged another company to complete the construction project. *Bayindir* alleged that the domestic company was a nearly ideal comparator, and that Pakistan had given it much more favourable terms under which to complete the work on the motorway. The tribunal concluded that the domestic entity was not in like circumstances with *Bayindir*. Even though the two operated in the same project and business sectors, the terms of the specific contracts were very different, including the fact that the new contract did not permit payment in foreign exchange, and that the scope of work was different.<sup>99</sup> The tribunal was not troubled by the fact that there was only one comparator, but the claimant's inability to point to other favourably treated entities meant its claim failed. 21.53

In *Methanex Corp. v United States*, a Canadian methanol producer challenged California's ban on methyl tertiary-butyl ether (MTBE), a gasoline oxygenate for which methanol is a feedstock, on the grounds that the ban resulted in more favourable treatment being accorded to the US-based ethanol industry. High-pollution areas in the United States are required to sell only oxygenated gasoline in order to improve air quality, but the only effective oxygenates are MTBE and ethanol, as others are not yet commercially viable. 21.54

<sup>95</sup> J. CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 141-44 (2002).

<sup>96</sup> *GAMI Investments Inc. v Mexico*, UNCITRAL, Final Award (Nov. 15, 2004), ¶ 113.

<sup>97</sup> *Id.* ¶ 114.

<sup>98</sup> *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Pakistan*, ICSID Case No. ARB/03/29, Award (Aug. 27, 2009).

<sup>99</sup> *Id.* ¶¶ 403-11.

- 21.55** In contrast to *Feldman* and *GAMI*, *Methanex* involved a situation in which there were many possible comparators, including US producers of ethanol, methanol, and MTBE. Methanex had to show that it was in like circumstances with producers of ethanol, who received the more favourable treatment, rather than only with producers of methanol, or producers of MTBE. Methanex did not overcome this hurdle. According to the *Methanex* tribunal: '[i]t would be as perverse to ignore identical comparators if they were available and to use comparators that were less "like" as it would be perverse to refuse to find and to apply less "like" comparators when no identical comparators existed'.<sup>100</sup> Methanex could not prevail on its national treatment claim because it was in like circumstances with other producers of methanol and was accorded the same treatment as they were.<sup>101</sup>
- 21.56** In *Bilcon v Canada*, the claimant argued, inter alia, that Canada violated Article 1102 by requiring that it undergo the most rigorous form of environmental impact assessment in its application to develop a mining quarry and marine terminal in Nova Scotia. Bilcon successfully pointed to three other similarly situated investors who were subject to less stringent environmental impact assessments in prevailing on its national treatment claim.<sup>102</sup>
- 21.57** For investors, convincing the tribunal that the more favourable treatment is accorded to entities in like circumstances is crucial to their case. An entity not like the allegedly more favourably treated entity can sustain no claim, regardless of the difference in treatment. Yet the like circumstances analysis cannot be segregated from considerations of the type of treatment accorded.
- 21.58** Establishing like circumstances is easier when the differentially treated entities compete in the same economic sector, and the more favourable treatment accords domestic entities a competitive advantage. However, even demonstrating that the foreign investment is similarly situated to more favourably treated domestic entities is not sufficient if other domestic entities bear the same burden placed on the allegedly less-favourably treated foreign entity. On the other hand, *Occidental* illustrates that even entities in different sectors can be like if it appears the state is taking advantage of sectoral dominance by foreign entities to impose a burden on them.

#### B. Treatment Accorded the Investor

- 21.59** To sustain its national treatment claim, an investor (or investment) must demonstrate that a host state has accorded the domestic investor (or investment) more favourable treatment. In most instances, this will not be difficult as the alleged advantage conferred will be relatively clear. Yet there are nuances here, too, that give rise to difficulty in application. One question is the degree to which the differential treatment need give rise to an inference of nationality-based prejudice, while another is the level of treatment that need be given the foreign investor. Is she entitled to treatment that ensures an equal playing field, or is she entitled to the best treatment given any domestic investor in like circumstances?
- 21.60** De facto national treatment claims by definition challenge measures that have a differential effect on foreign investors. Some claimants have argued that the disparate impact alone is sufficient to permit them to maintain a national treatment claim. In other words, any adverse effect on a foreign investor violates the national treatment obligation, whether or not the differential treatment is attributable to nationality-based considerations.<sup>103</sup>

<sup>100</sup> *Methanex*, Award, *supra* note 33, Pt. IV, Ch. B, ¶ 17.

<sup>101</sup> *Id.* Pt. IV, Ch. B, ¶ 28.

<sup>102</sup> *Bilcon*, Award, *supra* note 2, ¶¶ 696–716.

<sup>103</sup> See Weiler, *supra* note 24 at 430 (arguing that: 'There is not even so much as a hint in such texts [ILA provisions] that the aim or intent of the State responsible for the impugned measures should be relevant in

The argument that any disparate impact, no matter how small, can sustain a national treatment claim fails for historical as well as textual reasons. First, it does not comport with the general understanding that the purpose of the national treatment obligation is to discourage protectionism. Secondly, this interpretation is also inconsistent with the existence in most treaties of non-contingent obligations. Unreasonable differential treatment accorded a foreign-owned investment is probably a violation of the fair and equitable treatment standard, so interpreting the national treatment obligation to prohibit it would render one of the two provisions redundant. This is particularly evident for those treaties that contain a prohibition against 'arbitrary or discriminatory' treatment, as well as a national treatment obligation, as the effect of this argument is to import the whole of the discrimination element in that standard into the national treatment obligation.<sup>104</sup> **21.61**

It is important to note, however, that prevailing on a nationality-based discrimination claim does not require actual *proof* of protectionist intent. As the *Feldman* tribunal noted, imposing such an evidentiary hurdle would make it too difficult for claimants to prevail on de facto national treatment claims.<sup>105</sup> Intent-based claims are hard enough to sustain when the allegation is directed against an individual actor. When the defendant is a government entity, it might be difficult to demonstrate that a governmental department formed the requisite intent. Different actors within the department might have had different motivations, some of which were innocent of any nationality-based concerns. Yet it is likely that creating an inference of discriminatory intent will make it harder for the state to justify its conduct; conversely if the effect is inadvertent the state will have an easier time justifying the conduct.<sup>106</sup> **21.62**

Even if a claimant can demonstrate discriminatory intent, that alone will not be sufficient to sustain a claim unless there is damage to the individual investor. The *S.D. Myers* tribunal said: 'Intent is important, but protectionist intent is not necessarily decisive on its own ... The word "treatment" suggests that practical impact is required to produce a breach of Article 1102, not merely a motive or intent that is in violation of Chapter 11'.<sup>107</sup> **21.63**

The case law accords with the position that the less favourable treatment must be motivated, at least inferentially, by nationality-based discrimination. In *GAMI*, which illustrates a clear example of differential treatment—some US-owned sugar mills were expropriated, while some Mexican-owned sugar mills were not—the tribunal dismissed the idea that differential treatment alone violated Mexico's national treatment obligations: '[i]t is not conceivable that a Mexican corporation becomes entitled to the anti-discrimination protections of international law by virtue of the sole fact that a foreigner buys a share of it'.<sup>108</sup> The difference in treatment had to create the inference that the distinction had been made on the basis of nationality to sustain the claim. **21.64**

The *S.D. Myers* tribunal was faced with a situation in which Canada's ban on the export of PCB waste was facially neutral, but the alleged practical effect of the ban was to put the claimant at a disadvantage compared with the Canadian PCB waste disposal industry.<sup>109</sup> The **21.65**

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the determination of *prima facie* compliance. There is also no mention whatsoever of the concept of nativist protections').

<sup>104</sup> See discussion at §§ 21.74–79 *infra*.

<sup>105</sup> *Feldman*, Award, *supra* note 90, ¶ 183.

<sup>106</sup> F. Baetens, *Discrimination on the Basis of Nationality: Determining Likeness in Human Rights and Investment Law*, in *INVESTMENT LAW AND COMPARATIVE PUBLIC LAW* 280, 313 (S. Schill ed., 2010); Reinisch, *supra* note 43 at 869 ('Here [in de facto discrimination cases] discriminatory intent, though not required, will add probative value').

<sup>107</sup> *S.D. Myers*, Award, *supra* note 48, ¶ 254.

<sup>108</sup> *GAMI*, Award, *supra* note 96, ¶ 115.

<sup>109</sup> *Id.* ¶ 209.

tribunal concluded that it had to assess 'whether the practical effect of the measure is to create a disproportionate benefit for nationals over non-nationals'.<sup>110</sup> The tribunal also examined 'whether the measure, on its face, appears to favour its nationals over non-nationals who are protected by the relevant treaty'.<sup>111</sup> The effect of the measure, coupled with evidence that the ban was motivated at least in part by protectionist motives, led the tribunal to reject Canada's argument that the ban was simply part of a uniform regulatory regime.<sup>112</sup>

- 21.66** The *UPS* tribunal considered the matter of according treatment to be distinct from the question of discrimination. Thus, the first question was whether Canada had accorded any treatment whatsoever to either the investor or its investment. The tribunal determined that Canada had indeed accorded treatment to UPS and UPS Canada. In so doing it rejected Canada's arguments that the only treatment alleged to have been given was the processing of goods shipped by UPS into Canada<sup>113</sup> and that the processing did not encompass treatment accorded to UPS or UPS Canada. Such an argument, said the tribunal, 'would essentially open an enormous hole in the protection of investments and investors'.<sup>114</sup> Given the *UPS* tribunal's decision with respect to like circumstances, it did not need to consider whether the treatment allegedly given was less favourable or was based on nationality. It did suggest in *obiter dicta*, however, that the appropriate question would be whether the disparate treatment suggested some nationality-based motivation: 'the rationale for providing distribution assistance through Canada Post does not comprise any nationality-based discrimination'.<sup>115</sup>
- 21.67** The tribunal in *ADF* addressed the question of discrimination only briefly and in *obiter dicta* owing to its conclusion that the alleged treatment fell within the government procurement exception to NAFTA Article 1102. The tribunal acknowledged that the facially equal treatment it had identified—that all steel was treated the same, regardless of ownership—could hide *de facto* discrimination. In order to make such a determination, however, the tribunal suggested it would need information, such as evidence that steel fabrication costs were much lower in Canada, to demonstrate that the measure had actual discriminatory effect and had been adopted as a result of a protectionist impulse.<sup>116</sup>
- 21.68** The *Loewen* tribunal addressed national treatment cursorily but confirmed its view that NAFTA's national treatment obligation relates only to 'nationality-based discrimination and ... it proscribes only demonstrable and significant indications of bias and prejudice on the basis of national origin, of a nature and consequence likely to have affected the outcome of the trial'.<sup>117</sup>
- 21.69** The *ADM* tribunal found producers of HFCS were discriminated against based on both the intent and effect of the tax imposed against them.<sup>118</sup> The tribunal discerned the intent from Mexico's desire to protect the Mexican sugar industry,<sup>119</sup> and the effect from the more favourable treatment accorded to cane sugar producers.<sup>120</sup> The *Corn Products* tribunal, for its part, also concluded that circumstances demonstrated Mexico's intent to treat HFCS producers

<sup>110</sup> S.D. Myers, Award, *supra* note 48, ¶ 252.

<sup>111</sup> *Id.* ¶ 252.

<sup>112</sup> *Id.* ¶ 242.

<sup>113</sup> UPS, Award, *supra* note 64, ¶ 85.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* ¶ 177.

<sup>116</sup> ADF, Award, *supra* note 51, ¶ 157.

<sup>117</sup> Loewen, Award, *supra* note 54, ¶ 139.

<sup>118</sup> ADM, Award, *supra* note 73, ¶ 209.

<sup>119</sup> *Id.* ¶ 210.

<sup>120</sup> *Id.* ¶ 211.

differently on the grounds of nationality, although proof of discriminatory intent was not required to sustain the claim.<sup>121</sup> In an ironic twist, the tribunal found in Mexico's assertion of a counter-measures defence—that its imposition of the tax should be excused because it was enacted in retaliation for US discrimination against Mexican interests—evidence of Mexico's intent to discriminate. 'If the HFCS tax was intended as a countermeasure targeted against the United States, it had to have been crafted in such a way that it bore especially heavily upon US interests ... the very fact that such a justification has been advanced amounts to a recognition by Mexico that HFCS producers and suppliers were targeted, in part at least, because of the extent of their links to the United States'.<sup>122</sup>

In *Consortium RFCC v Morocco*, an ICSID case, the tribunal suggested that a national treatment claim must be predicated on distinctions made because of nationality. *Consortium RFCC* involved tenders made by Italian and Moroccan companies for the concession to construct portions of the highway between Rabat and Fez. The tribunal held that the tenders were objectively different, and the choice between them was made on the basis of objective criteria, thus suggesting no way in which the non-discrimination provision of the BIT was violated.<sup>123</sup> 21.70

A few tribunals have been more ambiguous about whether a successful national treatment claim can rest on differential treatment alone. At bottom, they seem to agree that the differential treatment must give rise to an inference of nationality-based discrimination to be actionable but would impose a strong presumption in the claimant's favour that differential treatment is the result of nationality-based discrimination. 21.71

In *Pope & Talbot*, the focus was the allegedly differential effect of the implementation of the Softwood Lumber Agreement. Canada allocated quotas to all mills in the covered provinces, whether Canadian or foreign-owned. Canada argued that Pope & Talbot needed to show that Canadian-owned mills received a disproportionate advantage, a test similar to that employed in some WTO cases, when compared to US-owned mills in order to prevail on its national treatment claim. The *Pope & Talbot* tribunal rejected this approach. Because NAFTA plainly contemplated a case brought by one investor to vindicate its rights, the question was whether that particular investor was at a disadvantage because of the ostensibly neutral government measure.<sup>124</sup> Requiring the claimant to gather evidence to permit comparisons between all US-owned lumber producing companies and all Canadian-owned lumber producing companies would place too large a burden on the investor, which in turn would be inconsistent with the investment-liberalizing principles of the NAFTA. Such an approach 'would hamstring foreign owned investments seeking to vindicate their Article 1102 rights'.<sup>125</sup> 21.72

Nonetheless, the *Pope & Talbot* tribunal appeared to endorse a requirement that claimants demonstrate some nationality-based motivation for the difference in treatment once a claimant had made a preliminary like-circumstances showing, stating that 'any difference in treatment [must] be justified by showing that it bears a reasonable relationship to rational policies not motivated by preference of domestic over foreign owned investments'.<sup>126</sup> 21.73

The *Feldman* tribunal's decision is also less than clear on the question of whether differential treatment alone can sustain a national treatment claim. The tribunal cited the US Statement 21.74

<sup>121</sup> Corn Products, Award, *supra* note 60, ¶ 138.

<sup>122</sup> *Id.* ¶ 137.

<sup>123</sup> Consortium RFCC, *supra* note 46, ¶ 75.

<sup>124</sup> *Id.* ¶¶ 56, 71.

<sup>125</sup> *Id.* ¶ 72.

<sup>126</sup> *Id.* ¶ 79 (original emphasis).

of Administrative Action's description of Article 1102's purpose being to prevent discrimination 'by reason of nationality',<sup>127</sup> but also described the plain language of Article 1102 as 'by its terms suggest[ing] that it is sufficient to show less favorable treatment for the foreign investor than for domestic investors in like circumstances'.<sup>128</sup> The *Feldman* tribunal's concern, for which it found support in the *Pope & Talbot* tribunal's decision, was that requiring proof of nationality-based discrimination would forestall most de facto national treatment claims. Ultimately, the *Feldman* tribunal seemed to suggest that some presumption of national-origin discrimination must underlie that differential treatment. Like the *Pope & Talbot* tribunal, it would establish a presumption that differential treatment between similarly situated foreign and domestic investors was a result of nationality-based discrimination.<sup>129</sup> In the end, however, the tribunal found a fairly strong connection between the discrimination and the claimant's US nationality.<sup>130</sup> Mexico offered no explanation for the treatment accorded CEMSA 'other than the obvious fact that CEMSA was owned by a very outspoken foreigner who had, prior to the initiation of the audit, filed a NAFTA Chapter 11 claim against the Government of Mexico'.<sup>131</sup>

- 21.75 The *Bayindir v Pakistan* tribunal endorsed the approach of *Feldman*. It described the approach as objective and rejected any requirement that a claimant prove intent: 'a showing of discrimination [against] an investor who happens to be a foreigner is sufficient'.<sup>132</sup>
- 21.76 The clearest statement in favour of a pure differential impact statement is found in *International Thunderbird Gaming Corporation v Mexico*. The *Thunderbird* tribunal emphasized that *Thunderbird* need not show that any less favourable treatment accorded it was 'motivated because of nationality'.<sup>133</sup> Notwithstanding this apparent rejection of any nationality-based reason for the differential treatment, the tribunal also suggested that *Thunderbird*, in addition to proving the existence of less favourable treatment, also needed to show 'the reason why there was a less favorable treatment'.<sup>134</sup> What reason would suffice to sustain a claim was not addressed.

### C. 'Arbitrary and Discriminatory' Treatment

- 21.77 Several investment agreements prohibit 'arbitrary and discriminatory' treatment. A threshold question is whether nationality-based discrimination is included in that formulation. Most tribunals have concluded that it is, even when there is a separate national treatment provision. Several United States BITs have such dual provisions. The Argentina–United States BIT is one example; Article II(1) prohibits nationality-based discrimination, while Article II(2)(b) prohibits a host state from engaging in arbitrary and discriminatory treatment.<sup>135</sup> The BITs between Romania and the United States and the Czech Republic and the United States have virtually identical provisions.<sup>136</sup>

<sup>127</sup> *Feldman*, Award, *supra* note 90, ¶ 181.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* ¶¶ 183–84.

<sup>130</sup> *Id.* ¶ 182.

<sup>131</sup> *Id.*

<sup>132</sup> *Bayindir*, Award, *supra* note 98, ¶ 390.

<sup>133</sup> *International Thunderbird Gaming Corp. v Mexico*, UNCITRAL, Award (Jan. 26, 2006), ¶¶ 175–76.

<sup>134</sup> *Id.* ¶ 177 (emphasis added). The *Merrill & Ring* tribunal discussed, without deciding, whether the purpose of NAFTA art. 1102 is to prevent nationality-based discrimination, or whether it encompasses differential treatment that is arbitrary and unjustified. *Merrill & Ring*, Award, *supra* note 37, ¶ 94.

<sup>135</sup> Argentina–United States BIT, *supra* note 21.

<sup>136</sup> Treaty Between the Government of the United States of America and the Government of Romania Concerning the Reciprocal Encouragement and Protection of Investment (May 28, 1992); Treaty with the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investment (the Czech Republic later succeeded to the Agreement) (Oct. 22, 1991).

Several of the tribunals in cases brought under the Argentina–United States BIT have addressed claims brought under that provision. In *LG&E v Argentina*, for example, the claimant argued that gas distribution companies were treated less favourably than other public utility companies in violation of the prohibition against arbitrary and discriminatory treatment. The tribunal held that the nationality-based aspect of discriminatory treatment was missing: the claimants had not proved that the measures targeted their investments specifically as *foreign* investments, although the measures did treat gas distribution companies worse than others.<sup>137</sup> On the other hand, the *Enron v Argentina* tribunal did not treat the provision as encompassing nationality-based discrimination, but only as requiring rational reasons for according different treatment to different sectors: ‘The Tribunal does not find that there has been any capricious, irrational or absurd differentiation in the treatment accorded to the Claimants as compared to other entities or sectors’.<sup>138</sup> **21.78**

In *Noble Ventures v Romania*, the owners of a US-owned steel mill claimed that judicial measures initiated against it were ‘unreasonable or discriminatory’ under the Romania–United States BIT. The tribunal assumed that the US investor would have to show the measures were ‘directed specifically against a certain investor by reason of his, her or its nationality’ to sustain a claim under the article.<sup>139</sup> The claimant could not do so as there was no suggestion that Romanian-owned ventures that were similarly situated were not also the subject of proceedings initiated by the Romanian government.<sup>140</sup> **21.79**

The *Lauder v Czech Republic* tribunal decided that the Czech Republic–United States BIT’s prohibition on according ‘arbitrary and discriminatory’ treatment required that a claimant show discrimination on the basis of nationality.<sup>141</sup> The question arose as the Czech Republic argued that it was not enough for the claimant to show arbitrary treatment; to prevail, the treatment needed to be both arbitrary and discriminatory. The tribunal agreed, and bolstered its conclusion that discriminatory meant nationality-based discrimination by referring to Clause 3 of the Treaty Annex, which provides that: ‘Consistent with Article II, paragraph 1, the Czech and Slovak Federal Republic reserves the right to make or maintain limited exceptions to national treatment in the sectors or matters it has indicated below’.<sup>142</sup> This provision served as textual evidence of the meaning of discrimination. The tribunal also referred to Article II(1) itself (the prohibition against national treatment) as evidence that nationality-based discrimination was precluded by the treaty. Furthermore, it said that if Article II(2)(b) required only the showing of arbitrary or discriminatory measures, it would be redundant of Article II(1).<sup>143</sup> **21.80**

On that basis, the *Lauder* tribunal found that the Czech Republic had violated the obligation because its refusal to award to a German company a licence to operate a television station in the Czech Republic resulted from fear of the adverse political repercussions should a foreign-owned entity be awarded such a licence.<sup>144</sup> Mr Lauder did not receive any damages, however, as he and his affiliates were able to structure their holdings to avoid the nationality requirements. Without actual injury, Mr Lauder could not prevail on his claim.<sup>145</sup> **21.81**

<sup>137</sup> LG&E, Award, *supra* note 20, ¶ 147.

<sup>138</sup> Enron Corp. & Ponderosa Assets LP v. Argentina, ICSID Case No. ARB/01/3, Award (May 22, 2007), ¶ 282. The award in *Sempra v. Argentina* was similar. See *Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007), ¶ 319.

<sup>139</sup> Noble Ventures, Award, *supra* note 20, ¶ 180.

<sup>140</sup> *Id.*

<sup>141</sup> Ronald S. Lauder v. Czech Republic, UNCITRAL, Award (Sept. 3, 2001), ¶¶ 219–20.

<sup>142</sup> *Id.* ¶ 218.

<sup>143</sup> *Id.* ¶ 219.

<sup>144</sup> *Id.* ¶¶ 229–31.

<sup>145</sup> *Id.* ¶¶ 232–35.

- 21.82 What might be described as *Lauder's* companion case, *CME v Czech Republic*, was brought by Mr Lauder's Dutch subsidiary based on the Czech Republic–Netherlands BIT, which also contained a provision precluding arbitrary or discriminatory measures. That tribunal's conclusion rested primarily on the expropriation provision of the BIT. Nonetheless, it held that: '[r]he behaviour of the Media Council also smacks of discrimination against the foreign investor'.<sup>146</sup>

D. Determining the Level of Treatment that Must Be Accorded  
a Foreign Investor

- 21.83 Most investment treaties require that host states accord foreign investments treatment 'no less favourable' than that accorded to domestic investments in like circumstances, while some refer to 'the same' or 'as favourable' treatment.<sup>147</sup> Any of these formulations permit foreign investments to be treated more favourably than domestic investments.<sup>148</sup> However, none of them specifies whether a foreign investment must be given the *most* favourable treatment given to any domestic investment, or whether a state need only establish a level playing field in which foreigners and nationals compete equally. As yet, the 'most favourable treatment' argument has not been outcome-determinative in any case, but some tribunals have been called on to address the point.
- 21.84 The tribunal in *Pope & Talbot v Canada* concluded that the national treatment guarantee in NAFTA Article 1102 required a state to give the foreign investor the best treatment accorded any one domestic investor.<sup>149</sup> In coming to its decision, the *Pope & Talbot* tribunal rejected the contentions of all three NAFTA parties that treatment 'no less favorable' did not mean the best treatment accorded to any domestic investor.<sup>150</sup>
- 21.85 The *Pope & Talbot* tribunal was able to engage in further textual analysis because of the portion of NAFTA's national treatment obligation specifically applicable to state and local governments. NAFTA Article 1102(3) provides:
- The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.
- 21.86 Does 'treatment no less favorable than the *most* favorable treatment accorded' articulate a more demanding requirement than the simpler 'no less favorable' formulation in the other paragraphs of Article 1102? If so, sub-national government units would actually have a more stringent obligation than the federal governments, an unusual outcome given the general tendency to impose lesser obligations on sub-national government units.<sup>151</sup> This unlikely result was one of the reasons the *Pope & Talbot* tribunal concluded that the NAFTA requires host states to afford the most favourable treatment given to any domestic investor.<sup>152</sup>
- 21.87 The *Feldman* tribunal also faced the argument, but because there was only one other entity in like circumstances with Feldman's investment, the *Feldman* tribunal did not in fact decide

<sup>146</sup> CME Czech Republic B.V. v. Czech Republic, UNCITRAL, Partial Award (Sept. 13, 2001), ¶ 612.

<sup>147</sup> UNCTAD, *National Treatment*, *supra* note 1 at 37.

<sup>148</sup> *Id.* at 35–37.

<sup>149</sup> *Pope & Talbot*, Phase II Merits Award, *supra* note 56 at ¶ 41. For a discussion of this finding, see Davies, *supra* note 3 at 141–44.

<sup>150</sup> *Pope & Talbot*, Phase II Merits Award, *supra* note 56 at ¶ 39. See also KINNEAR, BJORKLUND & HANNAFORD (2009 Update), *supra* note 12 at 1102.51–54.

<sup>151</sup> See ¶¶ 21.95–99 *infra*, for more discussion of the meaning of this provision.

<sup>152</sup> *Pope & Talbot*, Phase II Merits Award, *supra* note 56, ¶ 40.

whether NAFTA's text required such a determination.<sup>153</sup> The *Feldman* tribunal said that the provision was 'on its face unclear as to whether the foreign investor must be treated in the most favorable manner provided for any domestic investor, or only with regard to the treatment generally accorded to domestic investors, or even the least favorably treated domestic investor'.<sup>154</sup> However, the *Feldman* tribunal also compared the language in Article 1102 to that in Article 1103, the MFN provision, which clearly provides for a covered investor to receive the same treatment afforded the 'most-favored' nation.<sup>155</sup> The implication of this textual analysis is that the national treatment obligation is less onerous.

Because the *UPS* tribunal disposed of the case on like-circumstances grounds, it did not address the issue. In his dissent, Dean Cass suggested that the national treatment obligation required 'an effective parity' between foreign and domestic investors and investments.<sup>156</sup> His view of parity would preclude a host state from favouring a national entity over foreign entities, even if some domestic entities also received less favourable treatment.<sup>157</sup> **21.88**

#### E. Objective Justifications for Differential Treatment: The Role of Burden Shifting in National Treatment Analysis

A claimant bears the burden of proof to sustain his or her claims under international law.<sup>158</sup> Exactly what is required to establish a prima facie case of a national treatment violation is not clear, and most tribunals have given at most limited attention to burden of proof. Moreover, tribunals have not taken a uniform approach to analysing the existence of a national treatment violation so that discerning a general practice is difficult. Implicit in most cases is that the arguments made by the claimant must give rise to an inference that the difference in treatment was attributable to nationality-based considerations or that the distinction made between apparently similarly situated entities disguises protectionist intent. The main difference in cases seems to be the ease with which an assumption of discriminatory intent can be established. **21.89**

The *Pope & Talbot* and *Feldman* tribunals adopted a burden-shifting approach that would be triggered after a showing of differential treatment—a conclusion that seems to set a low hurdle for a claimant to establish a prima facie case. The *Pope & Talbot* tribunal stated that: '[d]ifferences in treatment will presumptively violate Article 1102(2), unless they have a reasonable nexus to rational government policies that (1) do not distinguish, on their face or *de facto*, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA'.<sup>159</sup> The *Feldman* tribunal explicitly embraced a burden-shifting approach,<sup>160</sup> although the dissenting arbitrator took issue with the majority's conclusion: 'neither the NAFTA nor international law provide any grounds to account for the fact that, as in this case, the burden of proof should shift to the Respondent' when the claimant has made a prima facie case.<sup>161</sup> Rather, the burden should remain with the claimant at all times.<sup>162</sup> **21.90**

<sup>153</sup> Feldman, Award, *supra* note 90, ¶ 186.

<sup>154</sup> *Id.* ¶ 185.

<sup>155</sup> *Id.*

<sup>156</sup> *UPS*, Dissent, *supra* note 44, ¶ 59.

<sup>157</sup> *Id.* at ¶ 60.

<sup>158</sup> S. ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-1996* 1083 (1997).

<sup>159</sup> *Pope & Talbot*, Phase II Merits Award, *supra* note 56, ¶ 78.

<sup>160</sup> Feldman, Award, *supra* note 90, ¶ 177 (quoting United State Measures Affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33/AB/R, 14 (May 23, 1997)).

<sup>161</sup> Feldman, Dissent, *supra* note 93, 9-10.

<sup>162</sup> *Id.*

**21.91** The tribunal in *Nykomb v Latvia*, an ECT case, interpreted international law differently than did the *Feldman* dissent. It endorsed a burden-shifting approach that would be triggered once the claimant had established that it was in like circumstances with a more favourably treated entity. After the claimant makes such a showing,

and in accordance with established international law, the burden of proof lies with the Respondent to prove that no discrimination has taken or is taking place. The Arbitral Tribunal finds that such burden of proof has not been satisfied, and therefore concludes that Windau has been subject to a discriminatory measure in violation of Article 10 (1).<sup>163</sup>

**21.92** In *UPS*, once the dissenting arbitrator had determined that UPS was similarly situated to Canada Post with respect to the provision of courier services but was subject to less favourable treatment, the burden shifted to Canada to show that the difference in treatment was justified.<sup>164</sup> He emphasized that UPS was not challenging Canada Post's delivery of products using regular postal channels; rather, the question was whether Canada Post's express mail services were similar to courier services.<sup>165</sup> In marked contrast to the determination made by the majority, he suggested that the different characteristics advanced by Canada to explain why mail services were different from courier services not only did not justify less favourable treatment of the latter but actually illustrated that even providing equal treatment to the courier services would not suffice to place courier services on an even playing field with postal services.<sup>166</sup> This was because customs inspection of courier imports was actually less costly than the inspection of postal imports.<sup>167</sup> Arbitrator Cass did not go so far as to claim that the national treatment obligation in Article 1102 would actually require such equalizing action.<sup>168</sup>

**21.93** A more sophisticated distinction can be found in the *Apotex* case, where the tribunal distinguished between the legal burden of proof, which rests with the claimant throughout the case, and the evidential burden of proof, which can shift from one party to another.<sup>169</sup> Adopting a burden-shifting approach is not inconsistent with requiring that the claimant present a prima facie case. In discrimination cases, the respondent ordinarily has access to the evidence that would rebut the presumption established by the investor. Thus, shifting the burden of evidential proof to the respondent makes sense from the standpoint of ensuring procedural fairness.<sup>170</sup> The real question is at which stage the burden should shift. Professor Newcombe suggests that the claimant be required to identify the relevant subjects for comparison, demonstrate that it is in like circumstances with the domestic entity with respect to the treatment at issue, and demonstrate that it has received less favourable treatment.<sup>171</sup> The burden would then shift to the state to adduce legitimate public policy considerations

<sup>163</sup> *Nykomb*, Award, *supra* note 46, at 34.

<sup>164</sup> *Id.* ¶¶ 33, 39.

<sup>165</sup> *Id.* ¶¶ 43–45.

<sup>166</sup> *Id.* ¶¶ 46–48.

<sup>167</sup> *Id.* ¶ 46–47.

<sup>168</sup> *Id.* ¶ 48.

<sup>169</sup> *Apotex*, Award, *supra* note 39, ¶¶ 8.7–8.9; see also *Adel A. Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/22/33, Award (Oct. 27, 2015), ¶ 457 (the principle of burden shifting does not obviate the need for a claimant to provide at least some relevant evidence to support his or her claim).

<sup>170</sup> In the context of most-favored-nation treatment, see *Apotex*, Award, *supra* note 39, ¶ 8.66 (“Where crucial documents are properly withheld by a respondent State on grounds of strict confidentiality or other like privilege and not ordered for production by a tribunal (on those grounds), how then can the claimant investor discharge the legal burden of providing its positive case under NAFTA Article 1103 [the MFN provision] in regard to factual matters essentially within the exclusive domain of the respondent State?”). The same would hold true for burden shifting in the national treatment context.

<sup>171</sup> NEWCOMBE & PARADELL, *supra* note 2, at 163.

justifying the measure.<sup>172</sup> Under this approach, the plaintiff bears the burden of presenting a prima facie case but does not face an insurmountable hurdle. This outcome is a reasonable balance between protecting the ability of the investor to succeed on a national treatment claim and that of the host state to defend itself against allegations of misconduct. Nonetheless, one commentator cautions against granting too much deference to the state when it proffers its justifications for the treatment, counselling the tribunal's obligation to ensure that the justification makes sense in the context in which it occurs.<sup>173</sup>

#### IV. Reservations and Exceptions

Most investment treaties contain national treatment obligations, but most investment treaties also contain many exceptions and reservations to those obligations. Reservations and exceptions come in many sizes and shapes, so to speak. Some are temporally focused. Thus, broad reservations, particularly those regarding economic sectors worthy of special treatment, such as telecommunications, aviation, or energy, preserve the ability of a state to take particular actions in future. Others are retrospective and protect existing laws but require that future measures be changed only to accord more favourable treatment for foreign investments.<sup>174</sup> 21.94

Certain business or economic sectors, such as telecommunications, aviation, and energy production, tend to be subject to exceptions.<sup>175</sup> A few states have taken broad-based reservations to permit activity addressing 'development considerations'.<sup>176</sup> In the NAFTA Canada took an exception to protect its cultural industries.<sup>177</sup> 21.95

Some treaties protect measures whose goal is to elevate the status of historically disadvantaged minorities. Thus, in its investment treaties, the United States 'reserves the right to adopt or maintain any measure according rights or preferences to socially or economically disadvantaged minorities . . .'.<sup>178</sup> South Africa did not take any such reservations, and a controversial case filed against it, which was subsequently withdrawn, demonstrates the potential consequences of such an omission. A group of Italian nationals and a Luxembourg company filed a claim against the Republic of South Africa under the Italy-South Africa and Belgo-Luxembourg-South Africa BITs challenging a South African law that modified the mineral rights owned by companies as of 1 May 2004 and gives preferential treatment in the awarding of mining rights and licences to companies that are partially owned by historically disadvantaged South Africans.<sup>179</sup> The acts were challenged as violations of fair and equitable treatment and expropriation, rather than as denials of national treatment, although discrimination would probably have played a role had the tribunal analysed the legality of the alleged expropriation. 21.96

<sup>172</sup> *Id.*

<sup>173</sup> Kurtz, *supra* note 38, at 276-77.

<sup>174</sup> See, e.g., D. Price, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement*, 27 *Int'l Lawyer* 727, 731 (1993); KINNEAR, BJORKLUND & HANNAFORD (2009 Update), *supra* note 12, at 1108.13.

<sup>175</sup> UNCTAD, *National Treatment*, *supra* note 1, at 45-46.

<sup>176</sup> *Id.* at 47-50.

<sup>177</sup> NAFTA art. 2106, NAFTA Annex 2106. See generally KINNEAR, BJORKLUND & HANNAFORD (2009 Update), *supra* note 12, Article 1108 commentary; O.R. Goodenough, *Defending the Imaginary to the Death? Free Trade, National Identity, and Canada's Cultural Preoccupation*, 15 *ARIZ. J. INT'L & COMP. L.* 203 (1998).

<sup>178</sup> NAFTA Annex II-U-6.

<sup>179</sup> See Luke Eric Peterson, *More Details Emerge of Miner's Case Against South Africa*, INVESTMENT TREATY NEWS (Nov. 30, 2007).

A. State, Provincial, or Municipal Government Measures

- 21.97** Federal governments whose constituent states have a good deal of autonomy pose special problems for national treatment obligations and for exceptions to those obligations. These difficulties have more to do with internal domestic politics than international law. It is axiomatic that, under customary international law, federal governments are responsible for the acts of their constituent states. Thus, state or local government measures that violate national treatment obligations contained in an investment treaty entail international responsibility for the federal government. Because local government entities frequently give preferential treatment to local industries, many investment treaties exclude their activities from the treaty's purview to protect the federal government from liability.
- 21.98** Some investment treaties have special provisions pertaining to state and local governments both with respect to exceptions and reservations and with respect to the national treatment obligation itself. NAFTA, for example, excluded from the national treatment obligation existing non-conforming federal government measures set out in a Schedule to Annex I; existing state or provincial government measures to be identified within two years of NAFTA's entry into force; and existing local government measures.<sup>180</sup> As the deadline for the state and provincial governments to list their existing non-conforming measures became imminent, the parties agreed simply to a short general reservation excluding all existing state or provincial government measures.<sup>181</sup> NAFTA's national treatment article also contains a specific section identifying the obligations of state and provincial governments, but the import of that provision has not always been clear.
- 21.99** The ambiguity in the text of NAFTA's provision respecting state and provincial measures is problematic on two fronts. First, it has caused confusion regarding the extent of the obligation of the federal government, as discussed above. Secondly, the language does not even clearly explain the obligations borne by the state and provincial governments.
- 21.100** Article 1102(3) provides that provinces accord foreign investors (and investments) treatment 'no less favourable than the most favourable treatment accorded, in like circumstances' to investors (and investments) 'of the Party of which it forms a part'. If an 'investor of the Party of which it forms a part' includes *any* investor, whether hailing from within or without the province, then it seems that the province can make no distinction between them. Yet this interpretation means that states would have the same obligations as the federal government, and those obligations would have been encompassed in Article 1102(1) and 1102(2). The *Pope & Talbot* tribunal's interpretation of this language borrowed the 'most favorable' standard from Article 1102(3), but made the obligations of state and provincial authorities and federal authorities uniform. If provinces were to have only the same obligation as federal states, however, there would have been no need to include a specific provision to extend that obligation to the provinces, as international obligations undertaken by the federal government extend to the states. Thus, contrary to the conclusion of the *Pope & Talbot* tribunal, the better interpretation of Article 1102 is that 'investor of the Party of which it forms a part' includes only investors hailing from outside the province. Then the obligation would permit provinces to discriminate in favour of local, in-province investors

<sup>180</sup> See, e.g., NAFTA art. 1108; KINNEAR, BJORKLUND & HANNAFORD (2009 Update), *supra* note 12, commentary to art. 1108.

<sup>181</sup> NAFTA Trilateral Agreement on Listing State and Provincial Reservations (1996), <https://www.nafta-sec-alena.org/Portals/0/Documents/en/NAFTAreservations0001.pdf?ver=2015-11-02-140540-943> (last visited Nov. 11, 2017); KINNEAR, BJORKLUND & HANNAFORD (2009 Update), *supra* note 12, at 1108.13.

but would require provinces to treat foreign investors the same way it treats the most-favoured extra-provincial investor.

Moreover, the United States revised the text of the model BIT commensurate with the interpretation that permits in-province discrimination: **21.101**

The treatment to be accorded . . . means, with respect to a regional level of government, treatment no less favorable than the treatment accorded, in like circumstances, by that regional level of government to natural persons resident in and enterprises constituted under the laws of other regional levels of government of the Party of which it forms a part, and to their respective investments.<sup>182</sup>

Mexico has offered another possible interpretation of Article 1102(3). In an Article 1128 submission (Article 1128 permits non-disputing states to file *amicus curiae* type memorials on matters of NAFTA interpretation), Mexico argued that Article 1102(3) means that the treatment given by one province is not the standard by which to judge treatment given by another province.<sup>183</sup> If, for example, Alabama offers tax incentives to lure investment, Florida cannot be required to give similar tax breaks. This interpretation is also consistent with the language of the provision suggested by the United States' clarification of the language in its 2004 Model BIT. **21.102**

#### B. Measures to Protect Health, Safety, and the Environment

Many, although not all, investment instruments contain exceptions to national treatment obligations for the protection of public health, order, and morals.<sup>184</sup> The ECT, for example, contains in Article 24 a general exception for the adoption or enforcement of measures 'necessary to protect human, animal or plant life or health'.<sup>185</sup> On the other hand, NAFTA Chapter 11 is not subject to such a provision. Although Article 2101 contains exceptions virtually identical to those included in Article XX of the General Agreement on Tariffs and Trade (including measures necessary to protect public morals, necessary to protect human, animal, or plant life or health and that relate to the conservations of exhaustible natural resources), Article 2101 does not apply to Chapter 11.<sup>186</sup> Notwithstanding this exclusion, however, at least one arbitrator has suggested that the treaty be construed to encompass such an exception. **21.103**

The *S.D. Myers* tribunal was faced with a situation in which Canada defended its closure of the border to the export of PCB waste on the grounds that it had a legitimate desire, consistent with its obligations under the Basel Convention, to maintain its ability to remediate PCB waste in Canada. The tribunal recognized the legitimacy of Canada's goal but not its means of effectuating that goal: 'Canada's right to source all government requirements and to grant subsidies to the Canadian industry are but two examples of legitimate alternative measures'.<sup>187</sup> The concurring arbitrator in *S.D. Myers* would have gone further with respect to incorporating environmental protection objectives into the investment chapter (even though, in the particular case, he found Canada's arguments unavailing): he would have concluded that Article 2101 applied to Chapter 11, that a legitimate policy goal such as environmental **21.104**

<sup>182</sup> 2012 U.S. Model BIT art. 3(3). The provision was first modified in the 2004 U.S. Model BIT.

<sup>183</sup> *Pope & Talbot Inc. v. Canada*, UNCITRAL, Mexican 1128 Submission (Apr. 3, 2000), ¶ 65.

<sup>184</sup> UNCTAD, *National Treatment*, *supra* note 1, at 44.

<sup>185</sup> Energy Charter Treaty art. 24(2)(b)(i). Article 24 does not apply to the prohibition on expropriation. Expropriating property for the reasons listed in art. 24, *inter alia*, might render the expropriation legal as done to further a public purpose, but would not alleviate the host state's obligation to pay compensation.

<sup>186</sup> NAFTA art. 2101.

<sup>187</sup> *S.D. Myers*, Partial Award, *supra* note 48, ¶ 255.

protection would justify differential treatment under Article 1102 so long as it was pursued by using the least restrictive means available, and that the precautionary principle could justify measures that violate national treatment.<sup>188</sup>

### C. Measures to Protect Local Culture

- 21.105** Canada took an exception for cultural industries in the Canada–US Free Trade Agreement and maintained that exception in the NAFTA as to the United States and Mexico (it does not apply as between Mexico and the United States).<sup>189</sup> Canada has long believed that the encroachment of US products—including television programmes, books, magazines, newspapers, and audio or video recordings—on the Canadian market will result in the dilution of Canadian culture.<sup>190</sup> The *UPS* tribunal considered whether Canada's PAP, under which the government subsidizes Canada Post's delivery of eligible Canadian publications, fell under this exception.<sup>191</sup> The tribunal noted that Canada's programme of subsidizing postal rates for eligible Canadian publications had two main purposes: 'to connect Canadians to each other through the provision of accessible Canadian cultural products' and to 'sustain and develop the Canadian publishing industry'.<sup>192</sup> The majority found first that the PAP was covered by the cultural industries exception to NAFTA.<sup>193</sup> It went on to consider, however, whether UPS would have been in like circumstances with Canada Post had it considered the merits of the case and concluded it was not. Only Canada Post had the capacity to deliver to every postal address in Canada. Given this ability, the tribunal found that Canada Post was not in like circumstances with UPS, which had somewhat more limited delivery capabilities.<sup>194</sup> Given the objectives of the PAP, Canada was justified in limiting the availability of the subsidy to Canada Post.<sup>195</sup>

## V. Conclusions

- 21.106** The national treatment obligation is at the core of the international investment law regime. A successful national treatment claim is more likely to be based on discriminatory effect, rather than on discriminatory intent, given the difficulty of proving the latter. The primary challenge for any tribunal hearing *de facto* (and even most *de jure*) national treatment claims is to determine the appropriate comparator. Is the less favourably treated entity 'like' the more favourably treated entity with respect to the treatment at issue? If not, the national treatment claim must fail. Usually the comparators will operate in the same economic sector as the allegedly disfavoured foreign-owned investment, although this assessment might change depending on the kind of treatment accorded.
- 21.107** A claimant's challenge in bringing a national treatment claim is to establish a *prima facie* case—that the investor (or investment) is like a domestic entity whose more favourable

<sup>188</sup> *Id.* Separate Opinion of Bryan Schwartz, ¶ 129.

<sup>189</sup> NAFTA art. 2106 & Annex 2106.

<sup>190</sup> For a general discussion of Canada's cultural industries exception, see KINNEAR, BJORKLUND & HANNAFORD (2009 Update), *supra* note 12 at 1108.21–23. See also CULTURE/TRADE QUANDARY: CANADA'S POLICY OPTIONS (Dennis Browne ed., 1998); Goodenough, *supra* note 177, 207–208.

<sup>191</sup> UPS, Award, *supra* note 64, ¶ 146.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* ¶ 137.

<sup>194</sup> *Id.* ¶¶ 173–74.

<sup>195</sup> Given its conclusion with respect to the cultural industries exception, the majority did not consider whether the program also fell within the purview of the subsidies exception. The dissenting arbitrator concluded that it did not.

treatment gives rise to an inference of nationality-based discrimination. Once the claimant has been successful, the evidential burden shifts to the respondent to offer neutral reasons for the difference in treatment. If at the stage of the like circumstances analysis the reasons for the difference in treatment are evident, a tribunal will probably determine that the suggested comparators are not like and terminate the analysis at that stage, thus obviating the need for a state to proffer a non-discriminatory justification for its measure.

National treatment allegations can be used by claimants to paint a contextual picture for the rest of their claim, even if those complaints turn out not to be the gravamen of their case. Even though many cases have tended recently to coalesce around the ubiquitous 'fair and equitable treatment' obligation, those cases often include allegations of nationality-based bias, as well as a failure by the host state to meet the investor's legitimate expectations. In addition, discriminatory treatment is one of the factors involved in assessing whether a state has illegally expropriated a foreign investment. Thus, whether or not it is the crux of an investor's case, concerns about nationality-based discrimination are likely to permeate most investment cases. **21.108**