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CHAPTER 28

National Treatment

Bayindir v. Pakistan, ICSID Case No. ARB/03/29[1]

August Reinisch

I. INTRODUCTION

National treatment is one of the basic non-discrimination disciplines in international investment law. Almost all bilateral investment treaties ("BITs") and multilateral investment agreements contain national treatment provisions requiring contracting states to provide investors and investments from other contracting parties treatment no less favorable than that accorded to their own investors and investments. As recognized by the ICSID tribunal in *Consortium R.F.C.C. v. Kingdom of Morocco*, national treatment clauses are systematically included in BITs[2] and are often found in multilateral international investment agreements ("IIAs") and in a number of soft law instruments relating to the treatment of foreign investment.

National treatment clauses may appear as stand-alone obligations. However, in most IIAs national treatment is combined with most favored nation ("MFN") obligations.[3]

1. *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award (27 August 2009) (Kaufmann-Kohler, Böckstiegel, Berman) [hereinafter *Bayindir v. Pakistan*].
2. *Cf. Consortium R.F.C.C. v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Award (22 December 2003) (Briner, Cremades, Fadlallah), ¶ 53 ("*[C]ette disposition qui se rencontre systématiquement dans les traités de protection des investissements …*").
3. *See, e.g.*, UK Model BIT (2005), Art. 3(1). *See also* references in UNCTAD, *National Treatment* 42-43 (1999); Andrea K. Bjorklund, "National Treatment" in August Reinisch, *Standards of Investment Protection* 29 (Oxford University Press 2008); Todd Grierson-Weiler & Ian Laird, "Standards of Treatment" in *The Oxford Handbook of International Investment Law* 259 (Peter Muchlinski, Federico Ortino & Christoph Schreuer (eds.), Oxford University Press 2008); August

While the North American Free Trade Agreement ("NAFTA") as well as US and Canadian BITs provide for national treatment both in the pre-establishment (pre-entry) phase and in the post-establishment phase,[4] most European BITs restrict national treatment to already established investments. This implies that the latter do not grant an implicit right of establishment or access to invest in a contracting party.

Contrary to the typical expropriation, fair and equitable treatment as well as full protection and security provisions – which are largely seen as elaborations of customary international law standards – national treatment is a treaty obligation whereby contracting parties specifically undertake duties not to discriminate they would otherwise not have.[5]

National treatment found in IIAs must be distinguished from national treatment inspired by the *Calvo* doctrine.[6] While the former seeks treatment as favorable as that accorded to national investors and their investments, the latter aims at preventing any treatment of foreigners that may be better than that accorded to nationals.[7]

National treatment is crucial in counteracting and preventing protectionist measures of host States, intended to favor national investors over foreign competitors. As recognized by the ICSID tribunal in *Bayindir v. Pakistan*, the aim of national treatment is to guarantee a "level playing field" between foreign and domestic investors.[8]

In numerous, though not all IIAs, national treatment clauses contain specifications as to when the non-discrimination obligation of a national treatment clause should apply. This is usually achieved by specifications in the clauses stating that the treatment is owed towards investors/investments in "like situations"[9] or "like circumstances."[10]

Reinisch, "National Treatment" in *International Investment Law. A Handbook* 846-869 (Marc Bungenberg, Jörn Griebel, Stephan Hobe & August Reinisch (eds.), C.H.BECK – Hart Publishing – Nomos 2015).

4. *See, e.g.*, NAFTA, Art. 1102; US Model BIT (2004), Art. 3; Canadian Model FIPA (2003), Art. 3.
5. *See* Burkhard Schöbener, "Outlook on the Developments in Public International Law and the Law Relating to Aliens" in *International Investment Law. A Handbook* 64, 76 (Marc Bungenberg, Jörn Griebel, Stephan Hobe & August Reinisch (eds.), C.H.BECK – Hart Publishing – Nomos 2015).
6. Donald Shea, *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy* (University of Minnesota Press 1955).
7. *See also* Stephan Hobe, "The Development of the Law of Aliens and the Emergence of General Principles of Protection under Public International Law" in *International Investment Law. A Handbook* 6, 9 (Marc Bungenberg, Jörn Griebel, Stephan Hobe & August Reinisch (eds.), C.H.BECK – Hart Publishing – Nomos, 2015).
8. *Bayindir v. Pakistan*, *supra* n.1, ¶ 387.
9. *See, e.g.,* Argentina-US BIT, Art. II (1) ("Each Party shall 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, or of nationals or companies of any third country, whichever is the more favorable, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Protocol to this Treaty. …").
10. *See, e.g.,* NAFTA, Art. 1102(1) ("Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.").

However, what is not clear from these formulations is what exactly is decisive to determine whether a foreign investor and a national one are in such "like situations" or "like circumstances" in order to ensure the "level playing field."

It is mostly in NAFTA cases, conducted under the UNCITRAL Arbitration Rules or the ICSID Additional Facility Arbitration Rules, that these issues have been clarified.[11]

National treatment cases are usually analyzed in a three-step process. First, tribunals identify a domestic comparator "in like circumstances" against which to measure the allegedly discriminatory behavior. Second, they investigate whether the treatment accorded to a foreign investor was indeed less favorable than that received by domestic investors. Finally, they accept that there may have been legitimate reasons justifying different treatment.[12]

Bayindir v. Pakistan,[13] the landmark case discussed below, is significant because it incorporated and refined this NAFTA jurisprudence into ICSID case-law.

II. THE CASE

At issue in *Bayindir v. Pakistan*[14] was an alleged discrimination between a foreign investor and a domestic one in the context of a highway construction contract. In 1997, the Turkish investor had renewed an agreement originally entered into in 1993 with the National Highway Authority of Pakistan ("NHA") for the construction of a highway between Islamabad and Peshawar. When the construction was not completed according to schedule, the Pakistani authorities cancelled the project and awarded the contract in a subsequent bidding to a domestic constructor, PMC-JV, on allegedly more favorable terms.[15]

The Tribunal had to apply the following combined national treatment and MFN clause of the Pakistan-Turkey BIT:

> Each Party shall accord to these investments once established, treatment no less favourable than that accorded in similar situations to investments of its investors or to investments of investors of any third country, whichever is the most favourable.
>
> Each party shall encourage participation of its investors, in trade promotional events such as fairs, exhibitions, mission and seminary organized in both the countries.[16]

11. *See infra* n.34.
12. *See* Bjorklund, *supra* n.3, at 37; Andrew Newcombe & Lluís Paradell, *The Law and Practice of Investment Treaties: Standards of Treatment* 147-189 (Wolters Kluwer 2008); Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles* 253-254 (Oxford University Press 2007); Christopher Dugan, Don Wallace, Noah Rubins & Borzu Sabahi, *Investor-State Arbitration* 400 (Oxford University Press 2008); Andrea K. Bjorklund, "The National Treatment Obligation" in *Arbitration under International Investment Agreements: A Guide to Key Issues* 411, 419 (Katia Yannaca-Small (ed.), Oxford University Press 2010); Reinisch, *supra* n.3, at 855.
13. *Bayindir v. Pakistan*, *supra* n.1.
14. *Ibid.*
15. *Ibid.*, ¶ 391.
16. Pakistan-Turkey BIT, Art. II (2).

The Tribunal, composed of prominent ICSID arbitrators, found that the investor was not in a "like situation" with the local company that continued to carry out the project and, as a result, the national treatment claim failed.

The *Bayindir* Tribunal first clarified that the national treatment obligation of the applicable BIT was not limited to regulatory treatment, but also encompassed actual treatment.[17] This finding was relevant because, in essence, Bayindir's claim was one alleging that there was a factual discrimination in favor of a local competitor.

Also by way of a general introductory remark, the Tribunal insisted on the fact-specific nature of the national treatment test and remarked that it would not be guided by trade law considerations.[18]

As a final preliminary point, the *Bayindir* Tribunal confirmed the prevailing view that for a finding of discrimination there was no need to demonstrate intent.[19]

In assessing whether the applicable national treatment obligation was indeed breached by Pakistan, the *Bayindir* Tribunal clearly endorsed the three-step test developed by NAFTA tribunals. It held:

> The Tribunal will first determine whether Bayindir's investment was in a 'similar situation.' If so, it will then assess whether Bayindir's investment was accorded less favourable treatment than PMC-JV and whether the difference in treatment was justified.[20]

In a detailed reasoning, the Tribunal then set out the following analytical framework to determine whether there was a "like situation" between Bayindir and

17. *Bayindir v. Pakistan*, *supra* n.1, ¶ 388 ("As noted in the Decision on Jurisdiction, the Tribunal considers that the scope of the national treatment and MFN clauses in Article II(2) is not limited to regulatory treatment. It may also apply to the manner in which a State concludes an investment contract and/or exercises its rights thereunder.") (footnote omitted).
18. *Ibid.*, ¶ 389 ("To decide whether Pakistan has breached Article II(2), the Tribunal must first assess whether Bayindir was in a 'similar situation' to that of other investors. The inquiry into the similar situation is fact specific. In line with *Occidental v. Ecuador*, *Methanex*, and *Thunderbird*, the Tribunal considers that the national treatment clause in Article II(2) must be interpreted in an autonomous manner independently from trade law considerations.") (footnotes omitted).
19. *Ibid.*, ¶ 390 ("If the requirement of a similar situation is met, the Tribunal must further inquire whether Bayindir was granted less favourable treatment than other investors. This raises the question whether the test is subjective or objective, i.e. whether an intent to discriminate is required or whether a showing of discrimination of an investor who happens to be a foreigner is sufficient. The Tribunal considers that the second solution is the correct one. This arises from the wording of Article II(2) quoted above. It is also in line with the rationale of the protection as was emphasized in *Feldman v. Mexico,* to which the Claimant referred:

    > It is clear that the concept of national treatment as embodied in NAFTA and similar agreements is designed to prevent discrimination on the basis of nationality, or 'by reason of nationality.' … However, it is not self-evident … that any departure from national treatment must be *explicitly* shown to be a result of the investor's nationality. There is no such language in Article 1102. Rather, Article 1102 by its terms suggests that it is sufficient to show less favorable treatment for the foreign investor than for domestic investors in like circumstances.").

20. *Ibid.*, ¶ 399.

PMC-JV, the local competitor to whom the highway construction contract was ultimately awarded:

> In respect of the first requirement, the Tribunal must start by determining whether there is a relevant comparator to be used for the assessment of NHA's treatment of Bayindir and PMC-JV. In its Decision on Jurisdiction, the Tribunal did not rule out that the contracts with PMC-JV and Bayindir may be similar, as they both related to the same project. The Tribunal must now go further and look at the terms and circumstances of the contractual relationships between, on the one hand, NHA and Bayindir, and, on the other hand, NHA and PMC-JV.[21]

This first step, the identification of a comparator in a "like situation" or "like circumstance," is of course crucial for the advancement of any national treatment case.

With regard to the contractual relationship, the Tribunal found a number of differences in the financial terms, the level of experience and expertise of the two companies involved, and the scope of work.[22] The Tribunal stressed that the financial terms differed with regard to the foreign currency component and concerning the advance payment.[23] It found that the local contractor agreed to build a six-lane highway, whereas the contract with Bayindir was only for a four lane one.[24] Finally, it stated that Bayindir was able to charge a higher price because it had more work experience in the field.[25]

Most significantly, the *Bayindir* Tribunal held that the fact that the two companies were active in the same "business sector" was not sufficient to establish that they were in "like situations." It held:

> The Claimant is right that the project and business sectors are the same. This may be relevant in a trade law context. Under a free-standing test, however, such as the one applied here, that degree of identity does not suffice to displace the differences between the two contractual relationships.[26]

The Tribunal then concluded that:

> [T]he two contractual relationships are too different for Bayindir and the local contractors to be deemed in 'similar situations.' Consequently, the first requirement for a breach of the national treatment clause embodied in Article II(2) of the Treaty is not met. It thus makes no sense to pursue the analysis of the other requirements.[27]

The *Bayindir* Tribunal's conclusion that the companies were not in like situations, even though they were active in the same business sector, followed an approach also adopted by the ICSID tribunal in *Champion Trading v. Egypt*.[28]

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21. *Ibid.*, ¶ 400.
22. *Ibid.*, ¶ 402.
23. *Ibid.*, ¶¶ 402-407.
24. *Ibid.*, ¶ 409.
25. *Ibid.*, ¶ 410.
26. *Ibid.*, ¶ 402.
27. *Ibid.*, ¶ 411.
28. *Champion Trading Company and Ameritrade International, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Award (27 October 2006) (Briner, Fortier, Aynés), ¶ 154 ("Although both

III. *BAYINDIR V. PAKISTAN'S* IMPACT AND CONTRIBUTION TO THE DEVELOPMENT OF INVESTMENT LAW

As outlined above, in *Bayindir v. Pakistan* the Tribunal addressed a whole range of issues central to a finding of a violation of a national treatment obligation typically included in IIAs. It is remarkable that in spite of its frequent invocation, investment tribunals do not often find breaches of national treatment. This is probably a result of the applicable test to determine whether host States comply with the national treatment standard.

In fact, the applicable IIA standards usually do not provide specific guidance to tribunals. Usually, they merely call for treatment "no less favourable" than that accorded to the host State's own investors. Sometimes, this is accompanied by a reference to "like situations" or "like circumstances," but the treaty provisions are rarely more helpful in determining which precise aspects need to be taken into account for a finding of discrimination.

It is thus no wonder that a number of investment tribunals have sought inspiration from trade law. In particular, GATT/WTO jurisprudence on "National Treatment on Internal Taxation and Regulation"[29] has been referred to.[30] A number of NAFTA cases seem to have accepted the persuasive value of GATT/WTO rulings.[31]

However, siding more with those decisions which have exhibited skepticism towards the transferability of trade law reasoning to the investment realm, such as *Occidental v. Ecuador*,[32] the *Bayindir* Tribunal tersely stated that:

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kinds of companies operate in the same industry and are subject to same kind [*sic*] of rules, there is a significant difference between a company which opts to buy cotton from the Collection Centres at fixed prices and a company which opts to trade on the free market, whether or not the company is privately-owned or State-owned or whether the company is national or foreign.").

29. General Agreement on Tariffs and Trade ("GATT"), Art. III.
30. *See, e.g.,* WTO Appellate Body Report, *European Communities-Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (2001), ¶ 99; WTO Appellate Body Report, *Japan-Alcoholic Beverages*, WT/DS38/AB/R (1996), ¶¶ 8.5 and 9. *See also* Jonell B. Goco, *Non-Discrimination, "Likeness," and Market Definition in World Trade Organization Jurisprudence*, 40 Journal of World Trade 315 (2006); Meg Kinnear, Andrea Bjorklund & John F. Hannaford, *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11* 1102.10-17a (Kluwer Law International 2007).
31. *Methanex Corporation v. United States of America*, UNCITRAL (NAFTA), Final Award (3 August 2005) (Veeder, Reisman, Rowley), Part II, Chapter B, ¶ 6 [hereinafter *Methanex v. US*] ("When it comes to interpreting the provisions of Section A of Chapter 11, in particular in the instant case Article 1102, the Tribunal may derive guidance from the way in which a similar phrase in the GATT has been interpreted in the past. Whilst such interpretations cannot be treated by this Tribunal as binding precedents, the Tribunal may remain open to persuasion based on legal reasoning developed in GATT and WTO jurisprudence, if relevant."). *See also Pope & Talbot Inc. v. The Government of Canada*, NAFTA, Award on the Merits of Phase 2 (10 April 2001) (Dervaird, Greenberg, Belman), ¶ 43 [hereinafter *Pope & Talbot v. Canada*].
32. *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN 3467, Award (1 July 2004) (Orrego Vicuña, Brower, Barrera Sweeney), ¶ 175 ("In fact, the purpose of national treatment in this dispute is the opposite of that under the GATT/WTO, namely it is to avoid exporters being placed at a disadvantage in foreign markets because of the indirect taxes paid in the country of origin, while in GATT/WTO the purpose is to avoid imported products being affected by a distortion of competition with similar domestic products because of taxes and other regulations in the country of destination.").

> [T]he national treatment clause in Article II(2) must be interpreted in an autonomous manner independently from trade law considerations.[33]

Nevertheless, *Bayindir v. Pakistan*'s central importance lies in its adoption of the three-step test developed by NAFTA tribunals,[34] and endorsed by other non-NAFTA tribunals as well.[35]

As explained, under this three-step test, investment tribunals first identify a domestic comparator "in like circumstances"; second, they determine if the foreign investor indeed received treatment less favorable than that afforded to the domestic investor; and third, they assess whether the different treatment might be justified by legitimate reasons.

While the second limb of this test is clearly indicated by the text of all national treatment provisions, the first is only by some – those which include a reference to "like circumstances" or "like situations"[36] – and the third is basically a judicial development integrating possible justifications.

Although national treatment clauses usually do not expressly provide for potential justifications, investment tribunals regularly accept that different treatment of investors in "like circumstances" which *prima facie* violates the standard may be justified in some cases. This has been recognized by a number of NAFTA tribunals, such as *Pope & Talbot v. Canada*,[37] *S. D. Myers v. Canada*,[38] or *Feldman v.*

33. *Bayindir v. Pakistan*, *supra* n.1,¶ 389.
34. *Methanex v. US*, *supra* n.31, Part IV, Chapter B, ¶ 13 ("According to Methanex: 'Article 1102 requires a three-step analysis. First, the Tribunal must determine whether the U.S. ethanol industry is 'in like circumstances' with Methanex and its investments. Second, if they are in like circumstances, the Tribunal must determine whether any portion of the domestic ethanol industry received better treatment than Methanex and its investments did. Third, if the Tribunal finds that Methanex is not accorded the most favorable treatment, then the burden shifts to the U.S. to justify the disparate treatment accorded to methanol producers by showing that the measures should be permitted because they implement valid environmental goals'."); *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award (21 November 2007) (Cremades, Rovine, Siqueiros), ¶ 196 ("Pursuant to the ordinary meaning of Article 1102, the Arbitral Tribunal shall: (i) identify the relevant subjects for comparison; (ii) consider the treatment each comparator receives; and (iii) consider any factors that justify any differential treatment … .").
35. *See, e.g.*, *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award (17 March 2006) (Watts, Fortier, Behrens), ¶ 313 ("State conduct is discriminatory, if (i) similar cases are (ii) treated differently (iii) and without reasonable justification"); *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (27 August 2008) (Salans, van den Berg, Veeder), ¶ 184 (Discrimination "entails like persons being treated in a different manner in similar circumstances without reasonable or justifiable grounds.").
36. *See supra* nn.9 and 10.
37. *Pope & Talbot v. Canada*, *supra* n.31, ¶ 78 ("Differences in treatment will presumptively violate Article 1102 (2), unless they have a reasonable nexus to rational government policies that (1) do not distinguish, on their face or *de facto*, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA.") (footnotes omitted).
38. *S. D. Myers, Inc. v. Government of Canada*, UNICITRAL (NAFTA), Partial Award (13 November 2000) (Hunter, Schwartz, Chiasson), ¶ 250 [hereinafter *S.D. Myers v. Canada*] ("[T]he interpretation of the phrase 'like circumstances' in Article 1102 must take into account the general principles that emerge from the legal context of the NAFTA, including both its concern with the environment and the need to avoid trade distortions that are not justified by environmental

Mexico,[39] though partly by integrating the justification into an assessment of whether like circumstances prevailed.[40] Subsequently, ICSID tribunals such as the tribunal in *Parkerings v. Lithuania* have accepted this "inherent" justification possibility.[41]

The *Bayindir* Tribunal did not reach the issue of potential justifications because it held that the Claimant and the allegedly preferred local competitor were not in a "like situation," but, as noted above, the Tribunal did endorse the three-step test.[42]

And while *Bayindir v. Pakistan*'s endorsement of the three-step test to identify possible violations of national treatment obligations contained in IIAs is crucial,[43] the Tribunal gave rather short shrift to the potential relevance of WTO and other trade law jurisprudence for determining national treatment violations in international investment law. In fact, this issue has led to a lively academic debate,[44] and while it is not advocated here that a wholesale adoption of trade principles is needed, a more nuanced discussion may have been useful.

Nevertheless, *Bayindir v. Pakistan*'s main relevance will remain its endorsement of the three-step test to identify possible violations of national treatment.

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concerns. The assessment of 'like circumstances' must also take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest.").

39. *Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002) (Kerameus, Covarrubias Bravo, Gantz), ¶ 170 ("In the investment context, the concept of discrimination has been defined to imply *unreasonable* distinctions between foreign and domestic investors in like circumstances …") (emphasis in original).
40. *See* Bjorklund, *supra* n.3, at 41 (suggesting that the lack of an express justification in IIAs may account for the fact that tribunals sometimes "conflate" the "like circumstances" test with the question whether the government offered a rationale for the difference in treatment).
41. *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award (11 September 2007) (Lévy, Lalonde, Lew), ¶ 368 [hereinafter *Parkerings v. Lithuania*] ("An objective justification may justify differentiated treatments of similar cases. It would be necessary, in each case, to evaluate the exact circumstances and the context.").
42. *Bayindir v. Pakistan*, *supra* n.1, ¶ 399, quoted *supra* n.20.
43. *Ibid*.
44. *See, e.g.,* Jürgen Kurtz, "National Treatment, Foreign Investment and Regulatory Autonomy: The Research for Protectionism or Something More?" in *New Aspects of International Investment Law* (Philippe Kahn & Thomas Wälde (eds.), Maritinus Nijhoff Publishers 2007); Nicholas DiMascio & Joost Pauwelyn, *Non-discrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?*, 102 A.J.I.L. 48 (2008); Sylvie Tabet, "Beyond the Smoking Gun – Is a Discriminatory Objective Necessary to Find a Breach of National Treatment?" in *Investment Treaty Arbitration and International Law* 299-313 (Todd Weiler (ed.), Juris 2008); Jürgen Kurtz, *The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and Discontents*, 20 E.J.I.L. 749 (2009); Robert Howse & Efraim Chalamish, *The Use and Abuse of WTO Law in Investor-State Arbitration: A Reply to Jürgen Kurtz*, 20 E.J.I.L 1087 (2010); Freya Baetens, "Discrimination on the Basis of Nationality: Determining Likeness in Human Rights and Investment Law" in *International Investment Law and Comparative Public Law* 279-315 (Stephan Schill (ed.), Oxford University Press 2010); Jürgen Kurtz, "The Merits and Limits of Comparativism: National Treatment in International Investment Law and the WTO" in *International Investment Law and Comparative Public Law* 243-278 (Stephan Schill (ed.), Oxford University Press 2010); Peter Gerhart & Michael Baron, "Understanding National Treatment: the Participatory Vision of the WTO" in *International Economic Law: Critical Concepts in Law* 77-127 (Asif H. Qureshi and Xuan Gao (eds.), Milton Park Abingdon 2011).

In addition, *Bayindir v. Pakistan* also confirmed that there is no need to prove or establish intent for a finding of discrimination,[45] a conclusion that corresponds to the prevailing view of investment tribunals.[46]

Moreover, the importance of the scope of host State obligations under national treatment has recently come to the forefront in the negotiations of the European Union ("EU") with Canada and the United States. In particular, the *Bayindir* Tribunal's finding that the national treatment obligation of the applicable BIT was not limited to regulatory treatment, but also encompassed actual treatment[47] is relevant to the current EU debate on fashioning non-discrimination clauses in IIAs.

In the investment chapters of Free Trade Agreements ("FTAs") that the EU Commission is currently negotiating with Canada (the EU-Canada Comprehensive Trade Agreement ("CETA"))[48] and the United States (the EU-US Transatlantic Trade and Investment Partnership ("TTIP")),[49] the Commission has tried to limit the scope of MFN obligations, but interestingly this is not a limitation to regulatory obligations, but rather to actual treatment. The formulation of the MFN clause in the draft CETA text published in late September 2014 reads as follows:

> Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute 'treatment', and thus cannot give rise to a breach of this article, absent measures adopted by a Party pursuant to such obligations.[50]

This clearly departs from the established interpretation of non-discrimination clauses in previous IIAs, as adopted by a clear line of cases, including *Bayindir v. Pakistan*, in the sense that they include both regulatory and actual treatment.[51] But, of course, treaty negotiators are free to change and adapt as they please.

IV. CONCLUSION

National treatment is one of the central aspects of the non-discrimination obligations routinely contained in IIAs. It has not been as frequently invoked as the fair and

45. *Bayindir v. Pakistan*, *supra* n.1, ¶ 390, quoted *supra* n.19.
46. *See, e.g, S.D. Myers v. Canada*, *supra* n.38, ¶ 254; *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL Award (NAFTA) (26 January 2006) (van den Berg, Ariosa, Wälde), ¶ 177; *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award (6 February 2007) (Rigo Sureda, Brower, Bello Janeiro), ¶ 321; *Parkerings v. Lithuania*, *supra* n.41, ¶ 368. *See also* Borzu Sabahi, "National Treatment – Is Discriminatory Intent Relevant" in *Investment Treaty Arbitration: A Debate and Discussion* 269-297 (Todd Weiler (ed.), Juris 2008).
47. *Bayindir v. Pakistan*, *supra* n.1, ¶ 388, quoted *supra* n.17.
48. Consolidated CETA Text, published on 26 September 2014, http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.
49. *See* Marc Bungenberg & August Reinisch (eds.), *The Anatomy of the (Invisible) EU Model BIT*, 15 Journal of World Investment and Trade 375-704 (2014).
50. Art. X.7(4), Most-Favoured-Nation Treatment.
51. *Bayindir v. Pakistan*, *supra* n.1, ¶ 388, quoted *supra* n.17. *See also Parkerings v. Lithuania*, *supra* n.41, ¶ 368 ("Discrimination involves either issues of law, such as legislation affording different treatments in function of citizenship, or issues of fact where a State unduly treats differently investors who are in similar circumstances.").

equitable treatment standard and probably also less often than expropriation. Still, national treatment forms a core discipline of modern investment law and will most likely reveal its fundamental importance in future case-law.