Abstract  From a traditional public international law perspective, a standard is either binding or it is not: there is no in-between. The emergence of international standards as a key component of modern international public policy, however, has

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proven that normativity does not have such a binary notation. The voluntary instruments described as international standards have acquired growing influence in the field of World Trade Organization law. This chapter argues that international investment law has not escaped these developments. Accordingly, the purpose of the present chapter is to identify the role of international standardization bodies as transnational actors of international investment law, by determining their influence on the interpretation and application of rights and obligations under international investment agreements.

1 Introduction

International standardizing bodies have become more and more influential in the international economic law regime. In many instances, the practical implications of the adoption of a new standard surpasses the conventional examination of sources of international law. This is evinced in the present sanitary crisis where World Health Organization (“WHO”) recommendations and standards are the driving force behind domestic and international responses to the coronavirus spread, irrespective of their formal legal status and normativity.\footnote{WHO, Country & Technical Guidance Coronavirus disease (COVID-19), \url{https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance}, (last accessed 23 April 2020).}

Adjudicators and academics have gradually started to recognize the relevance of international standards in the interpretation and application of domestic law.\footnote{See generally: Basedow (2008), Hall and Biersteker (2002), Mattli and Büthe (2005), Mattli (2001) and Glinksi (2007).} World Trade Organization (“WTO”) Members have formally decided that international standards play a decisive role in international trade and have directly incorporated them in the Technical Barriers to Trade (“TBT”) Agreement and the Agreement on the Sanitary and Phytosanitary Measures (“SPS”).\footnote{Desta (2012).}

International investment law has not escaped this development, as evinced by International Investment Agreement (“IIA”) treaty-making, where international standards are directly employed for the determination of treaty rights and obligations. Nevertheless, what we put forward in this chapter is that the relevance of international standards is not limited to such instances of direct incorporation in the treaty text. Accordingly, the present chapter focuses its attention on the role of international standardization in the interpretation and application of typical IIA clauses or customary rules of international law, and argues that international standardizing bodies constitute an overlooked transnational actor of international investment law.

\footnote{46 E.-A. Giannakopoulou and M. Tokas}
2 The Definition of International Standards

The working definition of standardization adopted for the purposes of the present chapter is rather wide. We shall examine standardization as the process of developing and adopting voluntary “best practices”, outside of the strict governmental regulatory reach. The best practices examined usually take the form of codified technical knowledge that enables the development of processes and products, and prescribes the quality or performance of a given procedure, practice or product.

Nevertheless, our definition of an international standard is not output oriented—it does not identify the principal characteristics of a best practice per se. Rather, the definition is concentrated on the fora in which international standards are developed, and the procedures observed for their development. For this reason, our definition of an international standard is focused on identifying two factors. First, the actor, i.e. the international standardizing body. Second, the decision-making processes that are expected to produce a best practice outcome.

2.1 The Classification of International Standardizing Bodies

Various definitions and theoretical frameworks have been put forward so as to examine the phenomenon of international standardization. Notably, Mattli and Büthe introduce a four-way distinction on different standardizing processes based upon the presence of two characteristics, i.e. whether the institutional setting is public or private, and whether the selection mechanism is market-based or a non-market-based. In specific, their typology takes into account two factors. First, whether the development of the standard is set upon a private or public setting. Second, whether there is a single dominant body that leads in the development of a particular kind of international standards, or whether there is competition in that area of standard setting.

Based upon their framework, we will examine the following:

- public non-market standardization, i.e. formal intergovernmental collaborations. Examples of such standardization processes are the Basel Committee on Banking Supervision, or International Labor Organization (“ILO”) when adopting

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4Kerwer (2005), pp. 611–612. This is similar but not exactly the same as the term “standard” in Annex 1.2 TBT Agreement.
5Delimatsis (2018), p. 275; Büthe and Mattli (2011), p. 17.
6For different types of classification and definitions see: Pauwelyn (2014); Kerwer (2005); Mattli and Seddon (2015), pp. 182–183.
7Büthe and Mattli (2011), p. 19.
8Fratianni (2006) and Goodhart (2011).
Recommendations⁹ or the International Telecommunications Union’s (“ITU”) Telecommunications Standardization Sector.¹⁰

- public standard-setting institutions with no universal dominance where we notice different agencies and standard-setting bodies competing for global “normative dominance”,¹¹ such as the Codex Alimentarius Commission, that set permissive food safety standards and the Cartagena Protocol of the Convention on Biological Diversity.¹² The overlap is identified in the regulation of living modified organisms as the Cartagena Protocol introduces more stringent standards than the Codex Alimentarius.¹³
- non-market private “rule-makers”. Examples of such organizations are the International Standardization Organization (“ISO”),¹⁴ the International Electrotechnical Commission (“IEC”)¹⁵ and the International Accounting Standards Board (“IASB”).¹⁶

2.2 The Six Core Principles of International Standard-Setting

The definition of international standards is correlated to a “trust in the process” principle. It derives from the confidence that standard-setting decision making procedures adhering to some core procedural principles produce outcomes with “deference entitling” properties. The definition of an international standard is construed inside-out: any instrument that is the outcome of this procedure is deemed to be a “best practice” which is not to be second-guessed in its substance.

In this sense, our definition of international standards will necessarily include certain core principles that guarantee a “best practice” outcome, which is widely interrelated with the legitimacy of the standard and its recognition in the international sphere. In this regard, inspiration can be drawn from the current scrutinizing trend towards the assessment of internal requirements of international

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⁹International Labour Organization (2019), Rules of the game: An introduction to the standards-related work of the International Labour Organization, https://www.ilo.org/wcmsp5/groups/public/%2D%2D-ed_norm/%2D%2D-normes/documents/publication/wcms_672549.pdf, (last accessed 23 April 2020).
¹⁰Büthe and Mattli (2011), p. 27.
¹¹Büthe and Mattli (2011), pp. 23–25.
¹²Dupuy and Viñuales (2018), pp. 235–237; WHO and FAO (2018), Codex Alimentarius: Understanding Codex, http://www.fao.org/3/CA1176EN/ca1176en.pdf, (last accessed 23 April 2020).
¹³Dupuy and Viñuales (2018), pp. 240–242; Büthe (2009).
¹⁴ISO (2010), Good Standardization Practices, https://www.iso.org/files/live/sites/isoorg/files/store/en/PUB100440.pdf, (last accessed 23 April 2020); Lindahl (2015); Delimatsis (2015); Büthe and Mattli (2011).
¹⁵Larouche and van Overwalle (2015).
¹⁶Mattli and Büthe (2005).
standardization in the WTO regime. This means that the products of international standardizing bodies identified above may not be taken at their face value. The further warranted scrutiny relates to the fundamental concerns of equal and substantive participation in the decision-making process.

To that end, the standard setting processes with which we are concerned here would have to observe six core principles: transparency, openness, impartiality and consensus, relevance and effectiveness, coherence and developing country interests. Accordingly, there must be adequate time and opportunities for written comments on each stage of the standard development; meaningful opportunities for participation; democratic foundations based on increased voting majorities; involvement of science and technology experts; avoidance of duplication or overlap with other standardizing bodies.

3 International Standards and WTO Law

In the WTO context, international standards have mainly been used for the purposes of harmonization and prevention of unnecessary regulatory diversity. International standards have been used as proxies for instituting convergence of national policies, with a view of deflating compliance costs for manufacturers, enhancing market access and achieving inter-operability and global compatibility.

Nevertheless, in the context of the general agreements—the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and the General Agreement on Trade in Services ("GATS")—harmonization through the use of international standards has been nothing more than wishful thinking. Despite the fact that both Agreements explicitly recognize their importance, they do not attribute normativity to international standards. In fact, in the regulation of services there is no WTO provision requiring their use by regulators.

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17 In this regard, see Delimatsis (2015, 2019) and Pauwelyn (2014).
18 Delimatsis (2019), Pauwelyn (2014) and Mavroidis and Wolfe (2017).
19 WTO Committee on Technical Barriers to Trade, 21 January 2012, WTO Doc. G/TBT/1/Rev.12, Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with relation to Articles 2, 5 and Annex 3 of the Agreement, pp. 47–49; International Organization for Standardization (2019), ISO Publications on Good Standardization Practices, https://www.iso.org/publication/PUB100440.html (last accessed 22 April 2020), pp. 63–88.
20 Delimatsis (2018), pp. 273–325.
21 Mavroidis (2012), pp. 670–678.
22 E.g. GATT 1994, Art. XXXVIII:2(e); GATS Article VII:5, Annex A:7(a).
23 Marceau and Trachtman (2014), p. 393.
24 Hoekman B and Mavroidis P (2015), A Technical Barriers to Trade Agreement for Services?, EUI Working Paper RSCAS 2015/25, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625640 (last accessed 22 April 2020), pp. 3–7; Marchetti (2015), pp. 137–159.
By contrast, the TBT and the SPS Agreements do not merely envision harmonization as a remote goal. The adoption of international standards for the regulation of trade in goods constitutes a hard law obligation under both of the Agreements. By their very terms, the TBT and the SPS delegate regulatory authority to international standardizing bodies and explicitly lend normativity to international standards.

In view of this glaring difference, the following questions seem to be exceptionally apposite for the purposes of the present chapter: what is the relevance of international standards when applying WTO provisions that do not explicitly accord them any normative value? Could the choice of the WTO Member not to “normativize” a “best practice” be interpreted as ipso facto excluding its evidentiary power?

3.1 The Scope and Extent of the Normativity Loan Contained in the TBT and the SPS Agreements

The normativity loan to international standards in the TBT and the SPS Agreements takes place in two ways. In the first instance, Article 2.4 of the TBT Agreement and Article 3.1 of the SPS Agreement oblige national governments to use international standards as a basis for their technical regulations and SPS measures respectively. In the second instance, under Article 2.5 of the TBT and Article 3.2 of the SPS Agreement, when a measure is in accordance with relevant international standards, this creates a rebuttable presumption of conformity with WTO obligations. In particular, there is a presumption that international standards constitute the least trade restrictive option. Measures conforming to relevant international standards are presumed to be permitted under Article 2.2 of the TBT Agreement, which prohibits unnecessary obstacles to trade. The presumption of consistency under Article 3.2 of the SPS goes even further: the conforming measure is deemed to be consistent with the entirety of the SPS Agreement and the GATT 1994.

The scope and extent of these two types of normativity loans are qualified by a key consideration: the degree of the required conformity of the measures with the relevant international standards. The conceptual similarities between the

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25Tamiotti (2007), pp. 221–226; Landwehr (2007), pp. 415–422; Büthe (2008), pp. 231–238.
26See TBT, Art. 2.4 and 2.5; SPS, Art. 3.1 and 3.2.
27Hoekman B and Mavroidis P (2015), A Technical Barriers to Trade Agreement for Services?. European University Institute Working Paper RSCAS 2015/25, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625640 (last accessed 22 April 2020), p. 3; Marceau and Trachtman (2014), pp. 386–393.
28Tamiotti (2007), p. 226; Panel Report, Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, para. 7.402, WTO Docs. WT/DS435/R, WT/DS441/R WT/DS458/R, WT/DS467/R (adopted August 27, 2018).
29Landwehr (2007), p. 422; Büthe (2008), pp. 223–226.
corresponding provisions of the TBT and the SPS allows for a common answer. A juxtaposition of the relevant terms used in each of the corresponding provisions makes it clear that the degree of conformity required under Article 2.4 of the TBT Agreement and Article 3.1 of the SPS Agreement is not the same as the one envisaged under Article 2.5 of the TBT and Article 3.2 of the SPS Agreement.  

While the degree of the required conformity in Article 2.5 of the TBT and Article 3.2 of the SPS Agreement amounts to a full adoption of the international standard, the conformity requirement in Article 2.4 of the TBT Agreement and Article 3.1 of the SPS Agreement is substantially lower. As interpreted by the Appellate Body, the obligation under Article 2.4 of the TBT and 3.1 of the SPS Agreement merely requires the use of the international standard “as a constituent basis” for the measure.

### 3.2 The Evidentiary Pertinence of International Standards in WTO Law

Under traditional public international law thinking, normativity and State consent go hand-in-hand. In the absence of State consent, no international instrument can produce normative effects. It could be argued that this is also the case with international standards: their normativity derives from the normativity loans provided by explicit references in the texts of the TBT and the SPS Agreements and does not go any further than that. Nevertheless, the pertinence of international standards in WTO law is not limited to (or, rather, dependent on) explicit treaty references.
The Panel in *Australia – Tobacco Plain Packaging* has explicitly rejected the idea that Article 2.5 of the TBT Agreement—or any other similar provision—is the only avenue for an instrument to shape WTO obligations. The Panel in that case saw no basis to dismiss ex ante the evidentiary relevance of the Framework Convention on Tobacco Control (“FCTC”) guidelines on the sole ground that they did not fall within the narrow contours of the normativity loan contained in Article 2.5 TBT. Indeed, it would be unreasonable to assume that an internationally recognized best practice, reflecting the international consensus among the scientific community and 180 FCTC parties, would be stripped of its probative value in the absence of a specific provision warranting its use. The evidentiary pertinence of international standards has been demonstrated in the following instances under WTO law: the assessment of “necessity”, “justifiability” of interference and “justifiability” of discrimination.

The FCTC Guidelines were determinative for the Panel in *Australia – Tobacco Plain Packaging* to conclude that the tobacco plain packaging measures were “necessary” under Article 2.2 of the TBT Agreement. The FCTC guidelines were used as a proxy for the effectiveness of the alternative measures proposed by the complainants. In particular, the Panel rejected the alternative measures relating to the increase of the minimum legal age for the purchase of tobacco products, the increase of tobacco taxation and the improvement of social marketing campaigns based on the fact that they are all recognized in the FCTC as part of a comprehensive tobacco control policy and could not be thus effectively implemented as individual measures. The pre-vetting mechanism suggested by the complainants was also dismissed on the premise that it is not recognized in the FCTC as an effective tobacco control policy, and could not thus constitute a substitute to the tobacco

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36Panel Reports, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, paras 7.404–7.417, WTO Docs WT/DS435/R, WT/DS441/R WT/DS458/R, WT/DS467/R (adopted August 27, 2018).
37Panel Reports, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, para. 7.416, WTO Docs WT/DS435/R, WT/DS441/R WT/DS458/R, WT/DS467/R (adopted August 27, 2018).
38Panel Reports, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, para. 7.1457, WTO Docs WT/DS435/R, WT/DS441/R WT/DS458/R, WT/DS467/R (adopted August 27, 2018).
39Panel Reports, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, paras 7.1509, 7.1531, WTO Docs. WT/DS435/R, WT/DS441/R WT/DS458/R, WT/DS467/R (adopted August 27, 2018).
40Panel Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, para. 7.1594, 7.1531, WTO Docs. WT/DS435/R, WT/DS441/R WT/DS458/R, WT/DS467/R (adopted August 27, 2018).
plain packaging measures. On the same conceptual grounds, the Panel also found that the tobacco plain packaging measures were not an “unjustifiable” encumbrance of intellectual property rights under Article 20 of the Agreement on Trade Related aspects of Intellectual Property Rights.

In the context of necessity valuation, in United States – Clove Cigarettes the Panel reaffirmed its finding that the banning of clove cigarettes was in full conformity with Article 2.2 of the TBT, by stating that a ban of flavoured cigarettes is recommended in the WHO Partial Guidelines for the application of the FCTC. Similarly, the Dominican Republic in Dominican Republic – Import and Sale of Cigarettes, also cited the FCTC in support of its argument on the international recognition of tax stamps as a legitimate method to prevent the smuggling of cigarettes and tax evasion. By reference to the FCTC, the Panel agreed that, in principle, tax stamps constitute a useful tool to monitor tax collection, notwithstanding the fact that both parties agreed that the FCTC was not legally binding on them.

Finally, in Argentina – Financial Services, the Financial Action Task Force constituted the drive for the Appellate Body to disqualify Argentina’s measure under the chapeau of Article XIV of the GATS. Although the Appellate Body made no direct reference to the particular instrument, it made a finding that reflected the Financial Action Task Force Guidelines. The Appellate Body had already agreed with Argentina that imposing penalty taxes on financial transactions with “non-cooperative countries” was a necessary measure. Nevertheless, in the context of assessing “arbitrary or unjustifiable discrimination” the Appellate Body had to take a closer look at how countries were listed as “cooperative” or “non cooperative” by Argentina. Against the backdrop of preventing money laundering and the financing of terrorism, the proxy used for the justifiability of the distinction was the availability of tax information; a proxy that clearly reflected the Financial Action Task Force Guidelines. It was this proxy that Argentina had failed to observe by listing countries with no available tax information as “cooperative”, and led the Appellate Body to find that there was “arbitrary discrimination”.

41Panel Report, United States – Measures Affecting the Production and Sale of Clove Cigarettes, paras 7.427–7.428, WTO Doc. WT/DS406/R (adopted April 24, 2012).
42Panel Report, Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes, paras 7.216–7.217, WTO Doc. WT/DS302/R (adopted May 19, 2005).
43Panel Report, Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes, para. 4.314, WTO Doc. WT/DS302/R (adopted May 19, 2005).
44Delimatsis and Hoekman (2018), pp. 283–288.
45Appellate Body Report, Argentina – Measures Relating to Trade in Goods and Services, para. 6.197, WTO Doc. WT/DS453/AB/R (adopted May 9, 2016).
46Panel Report, Argentina – Measures Relating to Trade in Goods and Services, paras 7.751–7.753, WTO Doc. WT/DS453/R (adopted May 9, 2016).
4 IIAs Containing Direct References to International Standards

In a manner similar to the TBT and the SPS Agreements, there are some instances in modern IIA treaty-making where normativity loans to international standards have been recorded. Drawing inspiration from the TBT – SPS model of operation, the purpose of this section is to classify direct references to international standards in IIAs, to identify their typology and to determine their normative value in shaping the scope of the substantive investment protection. It is important to note that, for the purposes of the present section, the analysis will not be limited to IIAs that contain an investor-State dispute settlement mechanism. Rather, it shall also involve any agreements that regulate State activity interfering with the operations of foreign direct investment.

The first type of direct references to international standards consists of clauses that require their use by the host State. The obligatory effect of those clauses—similarly to Article 2.4 of the TBT Agreement and 3.1 of the SPS—does not amount to a requirement for positive integration. Accordingly, there is no obligation for the contracting parties to adopt international standards every time that they are concluded. Rather, the obligation for adopting international standards only comes into play when the State unilaterally decides to regulate on an area covered by an international standard.

Typically, this class of clauses comes with the title “right to regulate”. Contrary to standard IIAs, these provisions do not vaguely define the State’s right to regulatory intervention. Instead of a generic qualification, such as “fair and equitable treatment”, these clauses make a specific determination of the permissible regulatory interference by reference to international standards, thus, substituting normative flexibility with normative precision.

In some of these clauses, there are direct references to specific international standards. For example, Article 8.3 of the Ecuador—European Free Trade Agreement (“EFTA”) Free Trade Agreement (“FTA”) qualifies state interference with investors’ rights only in cases of compliance with among others, the Declaration of the United Nations Conference on the Human Environment of 1972, the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up of 1998, the Ministerial Declaration of the United Nations Economic and Social Council on Full and Productive Employment and Decent Work of 2006. Similarly, in Article 8(4) of the Kazakhstan - Singapore BIT, exceptions to free capital transfers are only permitted “in accordance with the international standards of the Financial Action Task Force to prevent money laundering, terrorism and proliferation financing”.

47Mavroidis (2012), p. 679.
48EFTA States – Indonesia Economic Partnership Agreement, Art. 8.2; Ecuador – EFTA States FTA, Art. 8.3; EU – Japan Economic Partnership Agreement, Art. 8.3.
By contrast, other clauses of this type give obligatory effect to relevant “international standards” without any further specification. In these cases, our analysis on the definition of a best practice finds immediate traction. A very illustrative example would be the Economic Partnership Agreement between the EU and its member States, and the South African Development Community States. Article 9, titled “Right to regulate and levels of protection” reads:

1. The Parties recognise the right of each Party to establish its own levels of domestic environmental and labour protection, and to adopt or modify accordingly its relevant laws and policies, consistently with internationally recognised standards and agreements to which they are a party.

The second type of direct references consists of clauses obliging the use of international standards by investors. The new developments in investment arbitration have generated a new wave of IIAs that recognize the obligation of strong market players for self-regulation. Interestingly, these obligations are directly defined by international standards on Corporate Social Responsibility ("CSR"). As a result, they may form the legal premise for the defence of post establishment illegality, or the substantive basis for the filing of a counter-claim.

For instance, the modern Brazilian Investment Cooperation and Facilitation Agreements contain CSR clauses with relatively strong wording, while, notably, Article 18 of the Morocco – Nigeria Bilateral Investment Treaty ("BIT"), entitled “Post establishment obligations” stands out for the explicit imposition of CSR obligations to investors:

[...] Companies in areas of resource exploitation and high-risk industrial enterprises shall maintain a current certification to ISO 14001 or an equivalent environmental management standard. Investments shall uphold human rights in the host State. Investors and investments shall act in accordance with core labour standards as required by the ILO Declaration on Fundamental Principles and Rights of Work, 1998. [...] 

The third type of direct references consists of IIA clauses explicitly permitting measures which are in accordance with international standards. This kind of references to international standards could be assimilated to Article 2.5 of the TBT Agreement and Article 3.2 of the SPS. They do not establish a positive obligation for host States to regulate in conformity with existing international standards. In this sense, they do not rule out other regulatory possibilities of the host State, which remains free to opt for different measures to address a specific situation. Yet, they effectively incentivize the observance of relevant international standards by explicitly allowing the taking of measures which are in accordance with the latter, as is the case in certain IIA clauses regarding taxation. For example, under Annex 11-I of the investment chapter of the Australia – Korea FTA the consistency of a taxation

49See also on CSR: Marx (2014) and Dimopoulos (2015).
50See, Brazil – Malawi BIT, Art. 9; Brazil – Ecuador BIT, Art. 14. Cf. also the references to CSR in Canada – Burkina Faso BIT, Art. 16; Australia – Hong Kong Investment Agreement, Art. 16; Belarus – India BIT, Art. 12; Argentina – Japan BIT, Art. 17.
51See for example, Kazakhstan – Singapore BIT, Art. 21; Armenia – Korea BIT, Annex II.
measure with internationally recognized tax policies, principles, and practices renders it non-expropriatory in character:

The determination of whether a taxation measure, in a specific fact situation, constitutes an expropriation requires a case-by-case, fact-based inquiry that considers all relevant factors relating to the investment, including the factors listed in Annex 11-B and the following considerations: [. . .] (b) a taxation measure that is consistent with internationally recognised tax policies, principles, and practices should not constitute an expropriation.

5 Interpretation and Application of IIA Clauses with Direct References to International Standards

Notwithstanding the instances of normativity loans to international standards in modern IIA treaty-making, the vast majority of IIAs in force lack such or similar clauses. Nevertheless, it is the typical generic wording of standard IIA clauses which constitutes an indicator that international standards may be useful either for the purposes of their interpretation or for their fact-intensive application.

Taking WTO law as a paradigm, the purpose of the present section is to display the potential usefulness of international standards as part of the practice of treaty interpretation or as an objective point of reference in fact-intensive determinations, either under IIA clauses or customary rules of international law.

5.1 International Standards and the Definition of “Investment” in IIAs

International standards become highly relevant for a treaty interpreter when examining the ordinary meaning of term. In specific, according to Article 31(1) of the Vienna Convention on the Law of Treaties, a term should be examined in light of its ordinary meaning. The common practice is to identify this ordinary meaning in dictionaries.

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52 Kasikili/Sedudu Island (Botswana v Namibia) (Judgment) [1999] ICJ Rep 1045, para. 18; Oil Platforms (Islamic Republic of Iran v United States of America) (Judgment) [1996] ICJ Reports 161, para. 41; Romak S.A. (Switzerland) v. The Republic of Uzbekistan, UNCITRAL, PCA Case No. AA280, Award, 26 November 2009, para. 159; Wintershall Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/04/14, Award, 8 December 2008, para. 77; Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, para. 104.

53 Dörr (2018), p. 542; Weeramantry (2012), pp. 49–50; Gardiner (2017), pp. 186–187; Alasdair Ross Anderson et al v. Republic of Costa Rica, ICSID Case No. ARB(AF)/07/3, Award, 19 May 2010, paras 48, 57; Aguas del Tunari, S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Jurisdiction, 21 October 2005, paras 227, 229, 231, and 232; Ronald S. Lauder v. The Czech Republic, UNCITRAL, Final Award, 3 September 2001, para. 221.
Yet, according to the International Court of Justice, the ordinary meaning of the term in question is found by reference to “the most commonly used criteria in international law and practice, to which the parties have referred”. On this note, international tribunals have started to examine the ordinary meaning of a term in other international instruments, whether international agreements or soft law instruments.

In this context, WTO case law has corroborated in many instances that the search of the ordinary meaning is a contemporary scavenger hunt of the usage of the term. Most relevant to our examination are the findings in EC – Biotech. The Panel explicitly reasoned that:

in addition to dictionaries, other relevant rules of international law may in some cases aid a treaty interpreter in establishing, or confirming, the ordinary meaning of treaty terms in the specific context in which they are used. Such rules would not be considered because they are legal rules, but rather because they may provide evidence of the ordinary meaning of terms in the same way that dictionaries do. They would be considered for their informative character.

The Panel examined different materials such as “reference works, glossaries, official documents of the relevant international organizations, including conventions, standards and guidelines” that were provided by the parties and other international organizations such as the Convention on Biological Diversity Secretariat.

Similarly, the Panel in Mexico – Telecoms interpreted the term “anti-competitive practices” in light of domestic competition law of WTO Members, the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business, Organization for Economic Co-operation and Development (“OECD”) Recommendations and the WTO Working Group on the Interaction between Trade and Competition Policy. The Panel in Australia – Tobacco Plain

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54 Kasikili/Sedudu Island (Botswana v Namibia) (Judgment) [1999] ICJ Rep 1045, paras 21, 27.
55 Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation) (Provisional Measures) [2008] ICJ Report 2011, para. 29; Rantsev v. Cyprus and Russia, App. no. 25965/04 (ECtHR, 7 January 2010), paras 272–282 and 137–185.
56 E.g. Appellate Body Report, United States – Tax Treatment for “Foreign Sales Corporations” Recourse to Article 21.5 of the DSU by the European Communities, para. 141, WTO Doc. WT/DS108/AB/RW (adopted January 29, 2002); Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, paras 128, 130–131, WTO Doc. WT/DS58/AB/R, (adopted November 6, 1998).
57 Panel Reports, European Communities – Measures Affecting the Approval and Marketing of Biotech Products, WTO Docs WT/DS291/R, WT/DS292/R, WT/DS293/R, (adopted November 21, 2006), paras 7.92, 7.94–7.96.
58 Panel Reports, European Communities – Measures Affecting the Approval and Marketing of Biotech Products, WTO Docs WT/DS291/R, WT/DS292/R, WT/DS293/R, (adopted November 21, 2006), paras 7.92, 7.94–7.96.
59 Panel Report, Mexico – Measures Affecting Telecommunications Services, paras 7.235–7.236, WTO Doc. WT/DS204/R, (adopted June 1, 2004).
Packaging was quite explicit in reasoning that international standards may inform the interpretation of specific provisions under a covered agreement.60

In investment arbitration, the Methanex v USA tribunal considered that issues should not be strictly considered in their literal meaning, i.e. on a purely semantic basis,61 while the tribunal in Bayindir v Pakistan made references to a comparative study of BITs in order to confirm its interpretation of the term “investment”.62

In this regard, the possibility for lex mercatoria or other non-binding instruments to be considered in the process of determining the ordinary meaning of a term has also been supported by Gazzini.63

As such, international standards should be considered relevant evidence of the ordinary usage of a term.64 As described by N. Koenig, one of the forefathers of the Codex Alimentarius, standards are “especially important in providing buyers and sellers with a common language for local and long-distance trading”.65

Such standardizing practices could be considered as highly relevant when examining the exact scope of the definition of investment in an IIA. This could be exemplified by taking a look at the Postova v Greece case.66 In specific, the tribunal had to examine whether Government Bonds are covered by the definition of investment in the Greek-Slovakia BIT. Claimants argued that Government Bonds can be classified either as “loans, claims to money or to any performance under contract having a financial value”, or “shares in and stock and debentures of a company and any other form of participation in a company”.67

The tribunal utilized general dictionaries such as the Merriam Webster, examined the text of third-party BITs (as interpreted by other tribunals) and provided some general comments on the particular nature of governmental bonds.68 Yet, notwithstanding the validity and persuasiveness of the award, it is undoubtable that the

60Panel Reports, Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, paras 7.412, 7.1531, WTO Docs. WT/DS435/R, WT/DS441/R WT/DS458/R, WT/DS467/R (adopted August 27, 2018).
61Methanex Corporation v the United States of America, UNCITRAL, Partial Award, 7 August 2002, para. 136.
62Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, para. 113; Weeramantry (2012), paras 3.32–3.51.
63Gazzini (2016), p. 214.
64Also proposed by Pauwelyn (2014), p. 757.
65Koenig (1964), p. 335.
66Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic, ICSID Case No. ARB/13/8, Award, 9 April 2015.
67Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic, ICSID Case No. ARB/13/8, Award, 9 April 2015, paras 248–350.
68Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic, ICSID Case No. ARB/13/8, Award, 9 April 2015, paras 313–324.
tribunal could have been more robust, if it had utilized the tools provided by the Vienna Convention on treaty interpretation differently.

In specific, instead of examining the text of third-party BITs and their subsequent interpretation by tribunals, which is academically disputed,\(^{69}\) the tribunal could have examined the common usage of the term described in the BIT by taking a look at international glossaries and standards. In specific, the Basel Committee has an extensive glossary on financial instruments where details definitions on terms like “debt instrument”, “loan”, “financial claim” or “financial asset” can be found.\(^{70}\) Similarly, the OECD holds a detailed Glossary Glossary of Foreign Direct Investment Terms and Definitions\(^{71}\) while similarly the International Monetary Fund (“IMF”) has published its own Glossary of Foreign Direct Investment Terms.\(^{72}\) Lastly, the Tribunal could have sought guidance from relevant international standards such as the ISO 10962:2019\(^{73}\) on Securities and related financial instruments – Classification of financial instruments code that provides the basis for classifying financial negotiated internationally as well as to domestic instruments.

These examples are a mere illustration of the usefulness of international standards and glossaries that, practically speaking, provide the basis of the international understanding of economic, financial and commercial transactions. No one can deny the fact that the understanding of the Basel Committee on banking regulation and transactions, or the understanding of the International Chamber of Commerce on documentary credits, or even the understanding of the International Institute for the Unification of Private Law on commercial contracts or leasing, reflects the common and predominant understanding of the terms at the international level. As such, the ordinary meaning of the economic activities encapsulated in the definition of “investment” should constitute the reflection of international harmonization and unification as depicted in such international instruments, standards, and glossaries.

5.2 International Standards and the “Fair and Equitable Treatment” Clauses in IIAs

International standards may definitely provide for an objective point of reference for evaluating “fair and equitable treatment”. Their existence may be particularly

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\(^{69}\) E.g. Mitchell and Munro (2017); Weeramantry (2012), paras 5.35–5.37.

\(^{70}\) Basel Committee, Glossary, https://www.bis.org/statistics/glossary.html, (last accessed 23 April 2020).

\(^{71}\) OECD, Glossary Glossary of Foreign Direct Investment Terms and Definitions, https://www.oecd.org/daf/inv/investment-policy/2487495.pdf, (last accessed 23 April 2020).

\(^{72}\) IMF, Report on the Survey of Implementation of Implementation of Methodological Standards for Direct Investment–Appendix II: Glossary of Foreign Direct Investment Terms, https://www.imf.org/external/np/sta/di/glossary.pdf, (last accessed 23 April 2020).

\(^{73}\) At that time ISO 10962:2015. Available at: https://www.iso.org/obp/ui/#iso:std:iso:10962:ed-4:v1:en.
relevant in two instances: the evaluation of legitimate expectations and arbitrariness or unreasonableness.

International standards can provide for the frame of the investor’s legitimate expectations. Being the outcome of a transparent standardization process, an international standard is by definition readily available to the investor as a potential regulatory change. The fact that the investors themselves might have taken place in the standardization process further reiterates the idea that the adoption of an international standard could not easily frustrate any legitimate expectations.74

This notion was confirmed in the *Philip Morris v Uruguay* case. There, the tribunal examined the investor’s legitimate expectations in the light of the widely accepted articulations of international concern on the harmful effect of tobacco, as reflected in the FCTC and the guidelines adopted thereunder.75 The obvious international regulatory concerns with regard to tobacco plain packaging, could only lead the tribunal to a single conclusion: that “the expectation could only have been of progressively more stringent regulation of the sale and use of tobacco products”.76

International standards are also highly relevant for the assessment of the standards of “arbitrariness” or “unreasonableness”. In clarifying the standards, the tribunals in *Saluka v Czech Republic* and *Micula v Romania* explained that a measure is reasonable when it “bears a reasonable relationship to some rational policy” and the pursuit of this policy takes into account the consequences that may bring upon the investors.77 The tribunal in *Occidental v Ecuador* concluded that a decision is arbitrary if it is “founded on prejudice or preference rather than on reason and fact”,78 while the tribunal in *Cystallex v Venezuela* considered that the reasonableness of a measure needs to be examined in its scientifically evidenced justification.79

It follows that the requirement for “reasonableness” and “non-arbitrariness” is closely interrelated to a requirement of suitability; there must be a reasonable relationship between the means employed and the ends sought to be achieved.80

This reasonable causal relationship is the outcome of science backed assumptions—

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74See generally: Palombino (2018), pp. 96–121; Potestà (2013).
75*Philip Morris Brands Sàrl, Philip Morris Products s.a. and Abal Hermanos s.a. v. Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016.
76*Philip Morris Brands Sàrl, Philip Morris Products s.a. and Abal Hermanos s.a. v. Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, para. 430.
77*Saluka Investment BV v. Czech*, UNCITRAL, Partial Award, 17 March 2006, para. 460; *Ioana Micula at al. v. Romania*, ICSID Case No. ARB/05/20, Final Award, 11 December 2013, para. 525; *AES Summit Generation Limited and AES-Tisza Erőmű Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 10 September 2010, para. 10.3.7.
78*Occidental Exploration and Production Company v. Ecuador*, UNCITRAL/LCIA Case No. UN 3467, Final Award, 1 July 2004, para. 162; *Link-Trading Joint Stock Company v. Department for Customs Control of the Republic of Moldova*, Final Award, UNCITRAL, Final Award, 18 April 2002, para. 501.
79*Cystallex International Corporation v. Venezuela*, ICSID Case No. ARB (AF)/11/2, Award, 4 April 2016, paras 591, 594.
80*Heiskanen (2008); Paparinskis (2014), pp. 218–259; Dolzer and Schreuer (2012), pp. 193–195.
that, in general, the measure taken by the host State is scientifically expected to reach a certain result. 81

This reasonable relationship was founded by the \textit{Philip Morris v Uruguay} tribunal on the basis of the FCTC guidelines. The tribunal rejected the claimant’s argument that there was not enough scientific evidence to suggest that the 80/80 packaging rule would achieve the purported results. In specific it deemed:

For a country with limited technical and economic resources, such as Uruguay, adhesion to the FCTC and involvement in the process of scientific and technical cooperation and reporting and of exchange of information represented an important if not indispensable means for acquiring the scientific knowledge and market experience needed for the proper implementation of its obligations under the FCTC and for ensuring the fulfilment of its tobacco control policy. 82

In the tribunal’s view, the international standard provided in the FCTC guidelines constituted by definition a sufficient evidentiary basis for the reasonableness of the tobacco control policy. There was no need for Uruguay to perform additional scientific studies or to gather further evidence in support of the 80/80 packaging rule. The FCTC guidelines provided par excellence the required scientific justification for the implementation of the measures. 83 The FCTC guidelines were explicitly used by the tribunal as an objective point of reference as per the required reasonableness. 84

In a similar manner, the tribunal in \textit{Chemtura v Canada} examined the legality of Canada’s cancellation of Chemtura’s authorization to produce certain lindane-based pesticides that have been environmentally damaging. 85 The tribunal examined the measure in light of the international practice on banning lindane usage such as the Aarhus Protocol on Persistent Organic Pollutants of the Convention on Long-range Transboundary Air Pollution and the Stockholm Convention on Persistent Organic Pollutants, and found that even if the measures adopted could have been stricter than necessary, it constituted a legitimate exercise of its right to regulate. 86 As a result, the tribunal rejected a FET violation under North American Free Trade Agreement (“NAFTA”).

In its analysis, the Tribunal agreed with the parties that it does not have the capacity to “second-guess the correctness of the science-based decision-making of highly specialized national regulatory agencies”; yet, it could not disregard “the fact

81 Similar analysis is made in Kurtz (2016), pp. 136–167.
82 \textit{Philip Morris Brands Sàrl, Philip Morris Products s.a. and Abal Hermanos s.a. v. Uruguay}, ICSID Case No. ARB/10/7, Award, 8 July 2016, para. 393.
83 \textit{Philip Morris Brands Sàrl, Philip Morris Products s.a. and Abal Hermanos s.a. v. Uruguay}, ICSID Case No. ARB/10/7, Award, 8 July 2016, para. 396.
84 \textit{Philip Morris Brands Sàrl, Philip Morris Products s.a. and Abal Hermanos s.a. v. Uruguay}, ICSID Case No. ARB/10/7, Award, 8 July 2016, para. 401.
85 \textit{Chemtura Corporation v. Government of Canada}, UNCITRAL (formerly Crompton Corporation v. Government of Canada), Award, 2 August 2010.
86 \textit{Chemtura Corporation v. Government of Canada}, UNCITRAL (formerly Crompton Corporation v. Government of Canada), paras 131, 135–136, 192, 266–267; Dupuy and Viñuales (2018), p. 464.
that lindane has raised increasingly serious concerns both in other countries and at the international level since the 1970s”.87 Accordingly, the tribunal accepted a further degree of deference to the host State based on the fact that the measure at issue was a domestic manifestation of an international concern and an international law-making practice towards restriction. It follows that adherence to international standards by the host state creates a presumption of legality - thus ascribing them a de facto abrogatory effect similar to that contained explicitly in Articles 2.5 of the TBT and 3.2 of the SPS Agreement.

5.3 International Standards and Non-discrimination Clauses in IIAs

Our next example on the relevance of international standards in international investment arbitration is the examination of “like circumstances” in non-discrimination clauses, i.e. Most Favoured Nation (“MFN”) and National Treatment.

Notwithstanding the textual differences or even the silence on the matter, tribunals have consistently examined the “likeness” of the circumstances or situations as a prerequisite for establishing “less favourable treatment” in MFN and National Treatment clauses.88 In their examinations, the tribunals have adopted a variety of different tests89 such as the “competition criterion”,90 the “economic sector criterion”91 and the “regulatory framework criterion”.92 In most of the instances, Tribunals seem to examine all three of the criteria without a specific consistent methodology; yet, they also seem to agree that the overall legal context in which

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87 Chemtura Corporation v. Government of Canada, UNCITRAL (formerly Crompton Corporation v. Government of Canada), Award, 2 August 2010, paras 133–143.
88 Diebold (2011), p. 841; Nikième (2017), The Most-Favoured Nation clause in Investment Treaties, https://www.iisd.org/sites/default/files/publications/mfn-most-favoured-nation-clause-best-practices-en.pdf, (last accessed 23 April 2020), p. 19; Dolzer and Schreuer (2012), p. 199; Consortium RFCC v. Morocco, ICSID Case No. ARB/00/6, Award, 22 December 2003, para. 53; Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 369.
89 The criteria can be found in academia with different names: Sarzo (2018), pp. 383–391; Diebold (2011), pp. 835–845; Bjorklund (2008), pp. 38–48.
90 Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Government of Mongolia, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, para. 315; S.D. Myers v. Canada, UNCITRAL, Partial Award, 13 November 2000, para. 250.
91 Archer Daniels Midland Co. v. Mexico, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007, para. 198; Marvin Roy Feldman Karpa v. Mexico, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, paras 171–172; Grand River Enters. Six Nations Ltd. v. United States, UNCITRAL, Award, 12 January 2011, para. 165.
92 Apotex Holdings Inc. v. United States, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014, para. 8.15; Pope & Talbot v. Canada, NAFTA/UNCITRAL, Award on the Merits, Phase 2, 10 April 2001, paras 83–95.
the measure at issue is placed has to be considered. 93 In this regard, a proper examination of international standardizing practices could bridge the possible difference in the methodology or application of the different test, especially since international standards may not only reflect regulatory concerns but may also have a bearing into the competitiveness of the operators at issue.

In sum, the “competition criterion” focuses on the competitive relation between the investors or investments in comparison, i.e. whether “the producers of like products which were directly competitive were in like circumstances as regards a measure designed expressly for the purpose of affecting that competition”. 94 The “economic sector criterion” examines whether the investors operate in the same business, economic sector or industry. 95 Lastly, the “regulatory framework criterion” places at the centre of the “likeness” analysis the relevant applicable regulatory framework. 96 The tribunal in Merrill v Canada exemplifies this approach by stating that “the proper comparison is between investors which are subject to the same regulatory measures under the same jurisdictional authority”. 97

Within all these approaches, which even the tribunals that utilized them considered as insufficient or not decisive, 98 we can find some common threads that can be harmoniously knitted together. In specific, we have seen the case law infuse the regulatory considerations when utilizing the economic sector or competition criteria. 99

The tribunal in SD Myers v Canada accepted that “like circumstances” exist within the same economic or business sector. It noted though, without specifically applying it, that “the assessment of ‘like circumstances’ must also take into account

93 Dolzer and Schreuer (2012), p. 200.
94 Corn Products International Inc v United Mexican States, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility, 15 January 2008, paras 137, 120; Paushok Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v Government of Mongolia, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, para. 315.
95 Occidental Exploration and Production Company v. Ecuador, LCIA Case No. UN3467, Final Award, 1 July 2004, para. 173; Pope & Talbot v. Canada, NAFTA/UNCITRAL, Award on the Merits, Phase 2, 10 April 2001, para. 78; Champion Trading Company and Ameritrade International, Inc v. Arab Republic of Egypt, ICSID Case No. ARB/02/9, Award, 27 October 2006, para. 130; Archer Daniels Midland Co. v. Mexico, ICSID Case No. ARB (AF)/04/5, Award, 21 November 2007, paras 197–201; S.D. Myers v. Canada, NAFTA/UNCITRAL, Partial Award, 13 November 2000, para. 250.
96 Pope & Talbot v. Canada, NAFTA/UNCITRAL, Award on the Merits, Phase 2, 10 April 2001, paras 83–95; DiMascio and Pauwelyn (2008).
97 Merrill & Ring Forestry LP v. Government of Canada, UNCITRAL/ICSID Administrated, Award, 31 March 2010, para. 89.
98 Champion Trading Company and Ameritrade International, Inc v. Arab Republic of Egypt, ICSID Case No. ARB/02/9, Award, 27 October 2006, para. 154; Railroad Development Corporation v Republic of Guatemala, ICSID Case No ARB/07/23 Award, 29 June 2012, para. 153; Molinuevo (2012), p. 119.
99 Merrill & Ring Forestry LP v. Government of Canada, UNCITRAL/ICSID Administrated, Award, 31 March 2010, para. 88.
circumstances that would justify governmental regulations that treat them differently in order to protect the public interest.” In this sense, it proclaimed as relevant certain environmental considerations adopted by the NAFTA parties and the practice of OECD countries as enshrined in the OECD Declaration on International and Multinational Enterprises. Accordingly, any examination for discrimination in international investment law, would resemble the examination of “arbitrary or unjustifiably discrimination” in the context of the WTO. However, this acceptance by the tribunal was left at the level of pronouncements since the analysis of the tribunal did not really focus on the aforementioned instruments and considerations.

In a different instance, the tribunal in Parkerings v Lithuania examined whether the claimant, Parkerings, and Pinues Proprius, a Dutch investor operated in like circumstances. The tribunal utilized the economic sector criterion with a slight differentiation. In specific, the tribunal infused in its analysis of the economic sector and the size of the projects of each investor, regulatory considerations. It found decisive the fact that Claimant’s investment extended significantly more in the culturally sensitive are of old town of Vilnius, which is a protected cultural heritage under the United Nations Educational, Scientific and Cultural Organization. Hence, the tribunal found the investors not to operate in “like circumstances” due to non-economic values and considerations, even though the analysis was based upon the economic sector criterion.

Similarly, the tribunal in Levy v Peru examined whether Banco Nuevo Mundo operated in “like circumstances” as the second largest domestic bank or as certain other smaller domestic banks. The analysis of the tribunal initiated by examining the relevant economic sector and moved on to examine the specific market circumstances within the sector, which it considered as “a sensitive area for any country, there are marked differences between the various banks operating in it”. The tribunal considered in its examination issues of competitiveness such as the “segment [of a bank] and the number of individuals affected, its market share, and other similar factors”. What was decisive was the fact that claimant did not consistently demonstrate whether Banco Nuevo Mundo classified as a small or as a systemic bank. The market strength of an undertaking or a company should normally be

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100 S.D. Myers v. Canada, NAFTA/UNCITRAL, Partial Award, 13 November 2000, para. 250.
101 S.D. Myers v. Canada, NAFTA/UNCITRAL, Partial Award, 13 November 2000, paras 247–248.
102 Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 391.
103 Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, 11 September 2007, paras 381–396.
104 Renée Rose Levy De Levi v. The Republic of Peru, ICSID Case No. ARB/10/17, Award, 26 February 2014.
105 Renée Rose Levy De Levi v. The Republic of Peru, ICSID Case No. ARB/10/17, Award, 26 February 2014, para. 397.
106 Renée Rose Levy De Levi v. The Republic of Peru, ICSID Case No. ARB/10/17, Award, 26 February 2014, para. 401.
considered irrelevant for the economic sector criterion. Yet, the examination of the tribunal was upon the examination of the consequences of a bank’s failure—liquidation. As such, a purely economic analysis of the circumstances is affected by the general policy consideration attached to the different systemic consequences caused by the insolvency of a bank as considered small or systemic.

This jurisprudential example clearly illustrates our point on the relevance of international standards. Indeed, the explanation followed by the tribunal would have been much more convincing if they utilised standards such as the Basel Committee’s standards on global systemically important banks the Basel Committee’s framework on International Convergence of Capital Measurement and Capital Standards and ISO’s 03.060 standards on Finance, Banking and Monetary Systems. Each of those set of standards could provide the objective point of reference on the specific characteristics of banking operators, especially in relation to the systemic significance which was considered important by the tribunal.

Such considerations could be further expanded into an analysis of the adherence of investors to the ISO standards 13.020 on environmental protection or 27.015 on energy efficiency, or other corporate social responsibility standards such as “The Equator Principles” or the OECD Guidelines for Multinational Enterprises. The

107 *International Thunderbird Gaming Corporation v. United Mexican States, NAFTA/UNCITRAL, Arbitral Award, 26 January 2006, paras 175–183; Corn Products International Inc v. United Mexican States, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility, 15 January 2008, para. 267.*

108 Basel Committee on Banking Supervision, July 2013, Global systemically important banks: updated assessment methodology and the higher loss absorbency requirement, [https://www.bis.org/publ/bcbs255.pdf](https://www.bis.org/publ/bcbs255.pdf), (last accessed 23 April 2020).

109 Basel Committee on Banking Supervision, June 2011, Basel III: A global regulatory framework for more resilient banks and banking systems, [https://www.bis.org/publ/bcbs189.pdf](https://www.bis.org/publ/bcbs189.pdf), (last accessed 23 April 2020); Basel Committee on Banking Supervision, June 2006, International convergence on capital measurements and capital standards, [https://www.bis.org/publ/bcbs128.pdf](https://www.bis.org/publ/bcbs128.pdf), (last accessed 23 April 2020).

110 ISO, 03.060: Finance, Banking, Monetary Systems, Insurance, [https://www.iso.org/ics/03.060/x/](https://www.iso.org/ics/03.060/x/), (last accessed 23 April 2020).

111 ISO, 13.020: Energy Efficiency, Energy Conservation in General, [https://www.iso.org/ics/13.020/x/](https://www.iso.org/ics/13.020/x/), (last accessed 23 April 2020).

112 ISO, 27.015: Environmental Protection, [https://www.iso.org/ics/27.015/x/](https://www.iso.org/ics/27.015/x/), (last accessed 23 April 2020).

113 The Equator Principles, A financial industry benchmark for determining, assessing and managing environmental and social risk in projects, [https://equator-principles.com/wp-content/uploads/2020/01/The-Equator-Principles-July-2020.pdf](https://equator-principles.com/wp-content/uploads/2020/01/The-Equator-Principles-July-2020.pdf), (last accessed 23 April 2020); Wörsdörfer (2015).

114 OECD, Guidelines for Multinational Enterprises, [https://read.oecd-ilibrary.org/taxation/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-2017_tpg-2017-en#page1](https://read.oecd-ilibrary.org/taxation/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-2017_tpg-2017-en#page1), (last accessed 23 April 2020).
adoption of standards by market operators constitute a market-based manifestation of policy considerations.\textsuperscript{115}

In this sense, the tribunal in *Bilcon v Canada* could have reached a decision that “core community values” constituted the basis to distinguish between investors.\textsuperscript{116} Indeed, should Canada adhere to an international standard that reflected those “core community values”, then the tribunal could have only concluded that the circumstances between projects that satisfy international standards and those that do not, are not situated in “like circumstances”. To reach such a result, it would be required to show whether the international standard truly reflected the considerations of the local community. The latter requires an analysis on whether the standards satisfies the criteria that we set: transparency, effectiveness, participation and scientific rigorousness.

Our proposition becomes more vivid in instances where the IIA introduces a list of relevant considerations for the determination of “likeness”. For example, Article 17 of the Investment Agreement for the COMESA Common Investment Area (2007) reads:

For greater certainty, references to ‘like circumstances’ in paragraph 1 of this Article requires an overall examination on a case-by-case basis of all the circumstances of an investment including, inter alia: (a) its effects on third persons and the local community; . . . (e) the regulatory process generally applied in relation to the measure concerned; and (f) other factors directly relating to the investment or investor in relation to the measure concerned; and the examination shall not be limited to or be biased towards any one factor\textsuperscript{117}

It is evident that international standards on environmental protection, responsible finance, labour protection and other policy related international best practices are more than relevant in an IIA that provides for such an elaborate list of relevant considerations. In this sense, adherence to international standards may even become de facto obligatory when deciding reasonable distinctions between investors or investments.

\textsuperscript{115}References are made, for example, to legitimate expectations of consumers: Glinski (2007), pp. 122 et seq.; or reasonable reliance of market actors: Beckers (2018), p. 366; or means for overcoming information asymmetries: Büthe and Mattli (2011).

\textsuperscript{116} *Bilcon of Delaware et al v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015.

\textsuperscript{117}Investment Agreement for the COMESA (Common Market for Eastern and Southern Africa) Common Investment Area.
6 International Standards and the Assessment of Contributory Fault in Investment Arbitration

Investment tribunals are often called upon to determine the existence of investor’s contributory fault; in other words, whether the investor has materially contributed to the injury it sustained by an internationally wrongful act of the host State. To the extent not explicitly provided otherwise in an IIA, the default position is that the assessment of contributory fault takes place in accordance with the customary secondary rules enshrined in Article 39 of the International Law Commission Articles on State Responsibility. International standards are could have a role to play in this respect.

Acts provoking a breach are sufficient for a finding of contributory fault. Not every action or omission which contributes to the damage suffered is relevant for this purpose. The actions or omissions to be taken into consideration under Article 39 may only be those which can be considered as wilful or negligent, “those that manifest a lack of due care”. Against this backdrop, any assessment of negligence would prove itself to be extremely difficult. The absence of a precise legal standard for the evaluation of negligence, arguably, allows for too much space for adjudicatory opinion or even imagination. This might prove to be even worse when it comes to instances of investment reprisal due to the indirect causality of the action or omission on the eventual loss. How should an international adjudicator assess the wrongfulness of the investor’s conduct in those cases?

The assessment of the wrongfulness has been a relatively straightforward exercise in cases of illegal investors’ actions. Typical examples would be the cases in Occidental v Ecuador, Copper Mesa v Ecuador and Goetz v Burundi. In all those cases, the action that prompted the disproportionate sanction by the host State was illegal, and, thus, a finding of a contributory fault did not face any particular difficulties. In Occidental v Ecuador, the investor violated the terms of the concession agreement by transferring certain rights without Ecuador’s consent. In Goetz v Burundi, the revocation of the investor’s operating license was caused by a breach of the certificate’s conditions. Much more, in Copper Mesa v Ecuador, the investor was guilty of directing violent acts, using armed men, firing guns and  

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118 Occidental Petroleum Corp, Occidental Exploration and Production Company v. Ecuador, ICSID Case No. ARB/06/11, ICSID ARB/06/11, Award, 5 October 2012, para. 687.
119 United Nations, International Law Commission (2001), Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf, (last accessed 23 April 2020), pp. 109–110.
120 Occidental Petroleum Corp, Occidental Exploration and Production Company v. Ecuador, ICSID Case No. ARB/06/11, ICSID ARB/06/11, Award, 5 October 2012, para. 679.
121 Goetz and others v. Burundi, ICSID Case No. ARB/95/3, Award, 10 February 1999, paras 296–299.
spraying mace at civilians, which were all in violation of the Ecuadorian criminal law.\textsuperscript{122}

Nevertheless, the cases of contributory fault have not been limited to instances of illegality. In \textit{South American Silver v Bolivia}, the tribunal confirmed this thesis. In that case, a severe social conflict among Bolivia’s indigenous communities, marches, demonstrations, physical violence and deaths were all caused by the investor’s failure to implement an indigenous community relations program.\textsuperscript{123} As a response to this situation, Bolivia revoked the investor’s mining concessions, and subsequently pleaded contributory negligence. Indeed, the conflict among the indigenous communities had its genesis in the investor’s project. Nevertheless, the investor emphasized that the respondent could not invoke contributory negligence since there was no regulatory framework in Bolivia defining any obligation for the implementation of a community relations program.\textsuperscript{124} The tribunal departed from the reasoning of previous case law,\textsuperscript{125} and rejected the claimant’s argument.\textsuperscript{126}

The \textit{Yukos v Russian Federation} case offers a quite similar example. There, the underlying reason for the investment’s expropriation was the investor’s tax optimization arrangements of the investor, which allowed it to avoid paying significant amounts of taxes to Russia. The tribunal emphasized that there was no evidence in the record suggesting that this tax minimization scheme was illegal.\textsuperscript{127} However, the tribunal deemed that it was an “abuse”\textsuperscript{128} and “questionable”.\textsuperscript{129} Particular instances of misconduct were not violations of the law, but rather an abuse of Russian corporate law and “principles of corporate governance”.\textsuperscript{130}

Still, measuring misconduct as the \textit{Yukos} tribunal did is not unproblematic. Indeed, there is no textbook definition of “abusive” or “questionable”—and, certainly—many diametrically different opinions may exist as to whether a particular,
otherwise legal, conduct constitutes an abuse or is of questionable morality. Nor is imposing an “illegality” requirement for the finding of contributory fault a veritable solution, since this would allow investors to benefit from legal systems that are still developing to regulate negative externalities of investments, that may be yet unknown. More importantly, it would allow multinational enterprises—with significant experience on the various regulations on their activities—to benefit from the inexperince of developing host States that might not have identified the precise risks of their investment activities. Some form of self-regulation of multi-national enterprises, which would then become the benchmark for the evaluation of contributory fault, is necessitated.131

This benchmark may well be provided by international standards. The OECD Guidelines for multinational enterprises, the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, the United Nations Global Compact, as well as industry driven standards on CSR such as the ISO 26000132 and ISO 14001 constitute landmark standardisation efforts on key issues of international public policy which are suitable to be taken into consideration in contributory fault analysis.

7 Conclusions

The present chapter sought to demonstrate why and how international standardizing bodies function as transnational actors of international investment law, given the important role of international standardization in the interpretation and application of IIA clauses and rules of public international law. International standards, as defined in the present chapter, enjoy a significant interpretative and evidentiary utility in the context of the determining rights and obligations in international investment law. It should be noted, though, that the instances past or potential resort to international standards provided in the present chapter are not exhaustive. Additional arguments can also be raised on the effects of CSR standards on the lawfulness and reasonableness of the conduct of the investor,133 while international standards may be considered a de facto obligatory effect in the operation of the FET standard, in manner similar to the claim in Peter Allard v Barbados.134 To this end, it is beyond the shadow of doubt that international standardizing bodies today have grown to

131 For more: Yilmaz Vastardis and Chambers (2018).
132 See Bijlmakers and van Calster (2015), pp. 275–310.
133 Similarly: Bonnitcha and McCorquodale (2017) and Fasterling (2017).
134 Claimant tried to substantiate a claim of violation of FET on the basis of alleged violations of commitments made by Barbados under international environmental treaties. Peter A. Allard v. The Government of Barbados, PCA Case No. 2012-06. Award, 27 June 2016, paras 33–52, 164–165, 170.
become a highly influential actor of international investment law, in a way that it may even appear to challenge traditional approaches to normativity.

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