Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105

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I. Introduction

Four years ago, the Free Trade Commission (FTC) created by the North American Free Trade Agreement (NAFTA)[1] issued "Notes of Interpretation" (Notes) purporting to restrict the minimum standard of treatment under NAFTA's investment chapter (Chapter 11) to the requirements of customary international law.[2] A controversy ensued regarding the Notes' status as a reasonable interpretation falling within,[3] or as an amendment falling without,[4] the FTC's mandate. While tribunals and many observers have declared their allegiance to each of the opposing views, few have supported their conclusions with detailed analysis.[5] Seeking to provide a more complete and nuanced account, this article draws a distinction between the exclusion of treaty obligations and the exclusion of general principles of law from the minimum standard of treatment. To the extent that the Notes prevent direct incorporation of freestanding treaty obligations into the minimum standard, they constitute a reasonable interpretation,[6] which most tribunals have accepted.[7] To the extent that the Notes exclude general principles of law from the minimum standard, they constitute an *ultra vires* amendment,[8] which virtually all tribunals have ignored.[9] Thus, as is so often the case, a measure of truth lies on each side of the debate.[10]

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This article draws a distinction between the exclusion of treaty obligations and the exclusion of general principles of law from the minimum standard of treatment.

II. The Minimum Standard: Text, Ambiguities, and Early Cases

One may divide NAFTA's Chapter 11 into two sections. The first, Section A, establishes the NAFTA Parties' substantive obligations with respect to each others' investors,[11] for example the duty under Article 1105(1) to provide "treatment in accordance with international law, including fair and equitable treatment."[12] The second, Section B, commits the application of those norms to a process of investor-state arbitration before *ad hoc* tribunals,[13] subject to the FTC's competence to issue binding interpretations of (but not amendments to) NAFTA provisions.[14] As explained below, Article 1105's vague text quickly raised interpretive questions, which Chapter 11's investor-driven, uncoordinated dispute settlement process could not resolve to the NAFTA Parties' satisfaction.

For disputes arising under Article 1105(1), interpretive debate focused on two phrases: "international law" and "fair and equitable treatment."[15] With regard to "international law," disputes called on tribunals to decide whether the term referred to all sources of international law or whether it contained an unstated restriction to customary international law.[16] With regard to "fair and equitable treatment," disputes required tribunals to identify the proper reference points for assessing the fairness and equity of measures adopted or maintained by host states.[17] Given the dearth of precedent[18] and the amounts in controversy,[19] tribunals undertook a difficult task in the face of intense scrutiny.[20] After Mexico successfully defended an arbitration in which Article 1105(1) played a peripheral role,[21] tribunals articulated broad interpretations of the same provision and imposed liability on the respondent states in a series of three cases decided under Chapter 11. Thus, in *Metalclad v. United Mexican States*, the tribunal construed "fair and equitable treatment" to encompass obligations of transparency similar to those articulated in other chapters of NAFTA.[22] Later, in *S.D. Myers, Inc. v. Canada*, the tribunal held that the infringement of any "rule of international law . . . specifically designed to protect investors will tend to weigh heavily in favour of finding a breach of Article 1105."[23] Applying this logic, a majority of the tribunal held that Canada's "breach of Article 1102 [relating to national treatment] essentially establishe[d] a breach of Article 1105 as well."[24] Finally, in *Pope & Talbot, Inc. v. Canada*, the tribunal held that, despite textual indications to the contrary, fair and equitable treatment requires not only compliance with international law, but also with the "ordinary standards" of fairness "applied in the NAFTA countries."[25]

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[1] *See* North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., art. 2001, 32 I.L.M. 605, 693 (1993) [hereinafter NAFTA] (establishing a Free Trade Commission that consists of cabinet-level representatives of the three NAFTA Parties).

[2] Notes of Interpretation of Certain Chapter 11 Provisions, July 31, 2001, § B, *at* http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-e.asp.

[3] *The Loewen Group, Inc. v. United States*, ICSID Case No. ARB(AF)/98/3, Award ¶ 126 (June 26, 2003), at http://www.state.gov/documents/organization/22094.pdf [hereinafter Loewen Award]; *United Parcel Serv. of Am., Inc. v. Canada*, UNCITRAL Arbitration Rules, Award on Jurisdiction ¶ 97 (Nov. 22, 2002), at http://www.dfait-maeci.gc.ca/tna-nac/documents/Jurisdiction%20Award_22Nov02.pdf [hereinafter *UPS* Award on Jurisdiction]; *Mondev Int'l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award ¶¶ 120-21 (Oct. 11, 2002), at http://www.state.gov/documents/organization/14442.pdf [hereinafter *Mondev* Award]; Michael Ewing-Chow, *Investor Protection in Free Trade Agreements: Lessons from North America*, 5 SING. J. INT'L & COMP. L. 748, 769 (2001); Stefan Matiation, *Arbitration with Two Twists: Loewen v. United States and Free Trade Commission Intervention in NAFTA Chapter 11 Disputes*, 24 U. PA. J. INT'L ECON. L. 451, 487-88, 494-95 (2003); J.C. Thomas, *A Reply to Professor Brower*, 41 COLUM. J. TRANSNAT'L L. 433, 454 (2002); Courtney C. Kirkman, Note, *Fair and Equitable Treatment; Mechanic v. United States and the Narrowing Scope of NAFTA Article 1105*, 34 LAW & POL'Y INT'L BUS. 343, 383, 391 (2002).

[4] *Pope & Talbot, Inc. v. Canada*, UNCITRAL Arbitration Rules, Award in Respect of Damages ¶ 47 (May 31, 2002), at http://www.dfait-maeci.gc.ca/tna-nac/documents/damage_award.pdf [hereinafter *Pope & Talbot* Award in Respect of Damages]; Second Opinion of Professor Sir Robert Jennings, Q.C. (Sept. 6, 2001) at 4-5, *Methanex Corp. v. United States*, UNCITRAL Arbitration Rules, at http://www.naftaclaims.com [hereinafter Second Opinion of Professor Sir Robert Jennings]; Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT'L L. 365, 397 (2003); Charles H. Brower, II, *Beware the Jabberwock: A Reply to Mr. Thomas*, 40 COLUM. J. TRANSNAT'L L. 465, 486 n.142 (2002) [hereinafter Brower, *Beware the Jabberwock*]; Charles H. Brower, II, *Fair and Equitable Treatment Under NAFTA's Investment Chapter*, 96 AM. SOCY INT'L L. PROC. 9, 10 (2002) [hereinafter Brower, *Fair and Equitable Treatment*]; Charles H. Brower, II, *Investor-State Disputes Under NAFTA: The Empire Strikes Back*, 40 COLUM. J. TRANSNAT'L L. 43, 56 n.71 (2001) [hereinafter Brower, *Empire Strikes Back*]; Charles H. Brower, II, *Investor-State Disputes Under NAFTA: A Tale of Fear and Equilibrium*, 29 PEPP. L. REV. 43, 78 n.249 (2002) [hereinafter Brower, *Fear and Equilibrium*]; Charles N. Brower, *NAFTA's Investment Chapter: Dynamic Laboratory, Failed Experiments, and Lessons for the FTAA*, 97 AM. SOCY INT'L L. PROC. 251, 255 (2003) [hereinafter Brower, *Dynamic Laboratory*]; Ian Laird, *Betrayal, Shock and Outrage—Recent Developments in NAFTA Article 1105*, in NAFTA INVESTMENT LAW AND ARBITRATION 49, 49 (Todd Weiler ed., 2004); William W. Park, *The Specificity of International Arbitration: The Case for FAA Reform*, 36 VAND. J. TRANSNAT'L L. 1241, 1305 (2003); Todd Weiler, *NAFTA Investments Arbitration and the Growth of International Economic Law*, 36 CAN. BUS. L.J. 405, 429 (2002) [hereinafter Weiler, *NAFTA Investment Arbitration*]; Todd Weiler, *NAFTA Investment Law in 2001: As the Legal Order Starts to Settle, the Bureaucrats Strike Back*, 36 INT'L L. 345, 347 (2002) [hereinafter Weiler, *Bureaucrats Strike Back*].

[5] *See* Matiation, *supra* note 3, at 468-95; Kirkman, *supra* note 3, at 381-92 (providing two of the most comprehensive, yet still incomplete, analyses of the Notes).

[6] *See infra* notes 44-57 and accompanying text.

[7] *See infra* notes 37-40 and accompanying text.

[8] *See infra* notes 58-83 and accompanying text.

[9] *See infra* notes 84-92 and accompanying text.

[10] *Cf.* Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1525-26 (2004) (opining that the Notes "occupy a peculiar middle ground between interpretation and law creation"). *Cf.* also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 325 cmt. e (1987) (explaining that the distinction between interpretation and amendment "may be imperceptible in some instances"); ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 193 (2003) (observing that the "distinction between interpretation and amendment is not always easy to draw").

[11] *See* NAFTA, *supra* note 1, arts. 1101-1114, 32 I.L.M. at 639-42. *See also* Brower, *Empire Strikes Back*, *supra* note 4, at 48-49; Brower, *Fear and Equilibrium*, *supra* note 4, at 46; Charles H. Brower, II, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36 VAND. J. TRANSNAT'L L. 37, 40-41 (2003) [hereinafter Brower, *Legitimacy*].

[12] NAFTA, *supra* note 1, art. 1105(1), 32 I.L.M. at 639.

[13] *See* NAFTA, *supra* note 1, arts. 1115-1138, 32 I.L.M. at 642-47. *See also* Brower, *Empire Strikes Back*, *supra* note 4, at 49-51; Brower, *Fear and Equilibrium*, *supra* note 4, at 46; Brower, *Legitimacy*, *supra* note 11, at 42-44.

[14] Compare NAFTA, *supra* note 1, art. 1131(2), 32 I.L.M. at 645 (authorizing the Free Trade Commission to adopt binding interpretations of NAFTA provisions), *with id.*, art. 2202, 32 I.L.M. at 702 (permitting the NAFTA Parties to adopt modifications of or additions to NAFTA provisions, which take effect only after approval "in accordance with the applicable legal procedures of each Party"). *See also Pope & Talbot* Award in Respect of Damages, *supra* note 4, ¶¶ 17-19; Brower, *Empire Strikes Back*, *supra* note 4, at 56 n.71; Brower, *Fair and Equitable Treatment*, *supra* note 4, at 10; Brower, *Fear and Equilibrium*, *supra* note 4, at 78 n.249; Brower, *Legitimacy*, *supra* note 11, at 84; David A. Gantz, *International Decision: Pope & Talbot, Inc. v. Canada*, 97 AM. J. INT'L L. 937, 945 (2003); Matiation, *supra* note 3, at 479; Swaine, *supra* note 10, at 1526 n.128; Joel C. Beauvais, *Regulatory Expropriations Under NAFTA: Emerging Principles and Lingering Doubts*, 10 N.Y.U. ENVTL. L.J. 245, 246, 288 n.194 (2002); Kirkman, *supra* note 3, at 373.

[15] *See* Brower, *Empire Strikes Back*, *supra* note 4, at 53-55; Brower, *Fear and Equilibrium*, *supra* note 4, at 75-77.

[16] *See* Loewen Award, *supra* note 3, ¶ 124; Brower, *Empire Strikes Back*, *supra* note 4, at 53-54; Brower, *Fear and Equilibrium*, *supra* note 4, at 75-76; Jack J. Coe, Jr., *Taking Stock of NAFTA Chapter 11 in Its Tenth Year: An Interim Sketch of Selected Themes, Issues, and Methods*, 36 VAND. J. TRANSNAT'L L. 1381, 1427 (2003); Gaetan Verhoosel, *The Use of Investor-State Arbitration Under Bilateral Investment Treaties to Seek Relief for Breaches of WTO Law*, 6 J. INT'L ECON. L. 493, 497-98 (2003).

[17] *Loewen* Award, *supra* note 3, ¶ 124; Brower, *Empire Strikes Back*, *supra* note 4, at 54-55; Brower, *Fear and Equilibrium*, *supra* note 4, at 77; Coe, *supra* note 16, at 1427-28.

[18] Although bilateral investment treaties (BITs) frequently referred to the obligation of host states to provide "fair and equitable treatment," virtually no case law addressed the meaning of that term before the advent of Chapter 11 disputes. *See* Brower, *Empire Strikes Back*, *supra* note 4, at 54-55; Brower, *Fear and Equilibrium*, *supra* note 4, at 77. *See also* F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, 1981 BRIT. Y.B. INT'L L. 241, 243; John A. Westberg & Bertrand P. Marchais, *General Principles Governing Foreign Investment as Articulated in Recent International Tribunal Awards and Writings of Publicists*, in IBRAHIM EL SHIHATA LEGAL TREATMENT OF FOREIGN INVESTMENTS 337, 353 (1993).

[19] *See* Brower, *Fair and Equitable Treatment*, *supra* note 4, at 9; Brower, *Legitimacy*, *supra* note 11, at 68 (both observing that the Chapter 11 disputes then pending placed "over $2 billion in controversy").

[20] *See* Coe, *supra* note 16, at 1385 ("NAFTA's investor-state docket has generated predictably high levels of interest among international law scholars and practitioners. It has also sustained a remarkable collection of observers beyond specialist circles. Numerous critiques have issued from both groups . . .").

[21] *Azinian v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award (Nov. 1, 1999), *at* http://www.economia-snci.gob.mx/sphp_pags/imporna/sol_control/consultoria/Casos_Mexico/ Robert_Azinian/Robert_Azinian.htm.

[22] *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award ¶¶ 71, 76, 88 (Aug. 30, 2000), *at* http://www.economia-snci.gob.mx/sphp_pags/imporna/sol_control/consultoria/ Casos_Mexico/Metalclad/Metalclad.htm. According to some observers, the tribunal directly incorporated the provisions of other chapters into Article 1105. *See United Mexican States v. Metalclad Corp.*, Reasons for Judgment, 2001 B.C.S.C. 664, ¶¶ 66, 68, 70-73 (May 2, 2001), *at* http://www.courts.gov.bc.ca; Thomas, *supra* note 3, at 438, 449. In this author's view, the tribunal properly referred to the provisions of other chapters as context for defining the scope of "fair and equitable treatment" under Article 1105(1). *See* Brower, *Beware the Jabberwock*, *supra* note 4, at 468-70.

[23] *S.D. Myers, Inc. v. Canada*, UNCITRAL Arbitration Rules, Partial Award ¶ 264 (Nov. 13, 2000), *at* http://www.dfait-maeci.gc.ca/tna-nac/documents/myerscanadapartialaward_final_13-11-00.pdf [hereinafter *S.D. Myers* Partial Award].

[24] *Id.* ¶ 266.

[25] *Pope & Talbot, Inc. v. Canada*, UNCITRAL Arbitration Rules, Award on the Merits of Phase 2, at ¶ ¶ 110-13, 118 (Apr. 10, 2001), *at* http://www.dfait-maeci.gc.ca/tna-nac/documents/Award_Merits-e.pdf.

Notes seem to modify Article 1105(1) by excluding treaties,[59] the most important source of international law in the modern era.[60]

Of course, one cannot construe the phrase "international law" in isolation. To the contrary, one must interpret it in context." For Article 1105(1), the relevant context includes Articles 1116 and 1117, which authorize investors to bring claims before *ad hoc* tribunals only for measures alleged to violate obligations established by Section A of Chapter 11 or by two provisions in Chapter 15 of NAFTA.[52] In other words, the NAFTA Parties consented to investor-state arbitration only for claims alleging violations of enumerated NAFTA provisions,[53] but not for claims alleging violations of other NAFTA provisions,[54] much less the provisions of other treaties.[55] When interpreting Article 1105(1), one should not use it as a vehicle to re-incorporate independent treaty provisions, because that would subvert Chapter 11's jurisdictional limitations.[56] Thus, whether viewed as context or as evidence of the intent to adopt a special meaning, Articles 1116 and 1117 imply that Article 1105(1)'s reference to "international law" excludes independent treaty obligations. To the extent that they make the same point explicitly, the Notes appear to fall within the bounds of reasonable interpretation.[57]

V. Exclusion of General Principles of Law: Unlawful and Ineffective Amendment

As stated above, the Notes exclude from the minimum standard of treatment all obligations that exceed the scope of customary international law.[58] Since general principles constitute a source of international law for situations *not* addressed by custom or treaty,[59] the Notes logically exclude general principles as an independent source of obligation under Article 1105(1).[60] Because general principles typically play a limited role in the development of international law,[61] one might treat their omission either as insignificant or as a reasonable interpretation because the NAFTA Parties did not consider such a trivial source of "international law" when drafting Article 1105(1). Such views would, however, prove unsound because they ignore the important contributions that general principles have made to the law of state responsibility and protection of foreign investment.

While treaties and custom dominate most areas of international law, general principles "have long played an important role in the articulation of the principles of international state responsibility insofar as they concern interference with persons."[62] Likewise, with respect to the protection of foreign investment, general principles have provided much of the "fodder" for claims and, consequently, have acquired a substantial role in shaping the law.[63] Thus, when introducing Harvard's Draft Convention on the International Responsibility of States for Injuries to Aliens, Professors Sohn and Baxter described the international minimum standard of treatment in the following terms: "[N]ational treatment may suffice, unless the national standard departs unreasonably from the general principles accepted by the principal legal systems."[64] Furthermore, Professors Sohn and Baxter emphasized that they had found it "necessary" to include express references to general principles of law in several provisions,[65] including articles on:

(1) justification for state action;[66]
(2) arrest and detention;[67]
(3) denial of justice;[68]
(4) destruction of and damage to property;[69]
(5) taking and deprivation of use or enjoyment of property;[70]
(6) violation, annulment, and modification of contracts and concessions;[71] and
(7) lack of due diligence in protecting aliens.[72]

Contemporaneously, Lord Arnold McNair (former President of the International Court of Justice) and Professor Wolfgang Friedmann of Columbia University commended general principles as the most appropriate source of law for natural resource concessions and other long-term economic arrangements between states and foreign investors,[73] which incorporate elements of public interest and private commerce.[74] In writings of a more recent vintage, Professors Ian Brownlie[75] and Malcolm Shaw[76] discuss the role played by general principles in leading cases frequently cited in the pleadings and decisions of investment claims: *AMCO Asia v. Republic of Indonesia*,[77] the *Barcelona Traction*[78] case, and the *Chorzów Factory* case.[79]

Given their role in developing the law of state responsibility and the minimum standard of treatment for aliens, one would naturally expect general principles to fall within the scope of "international law" for purposes of Article 1105(1). By parity of reasoning, the Notes' exclusion of general principles would seem to constitute a significant amendment to Article 1105(1), absent context or clear evidence of a special meaning that repudiates them as a foundation of the minimum standard. In the view of this author, no such context or evidence exists. While Articles 1116 and 1117 contextually indicate a desire to limit the investor-state dispute settlement mechanism to the obligations enumerated in Section A of Chapter 11 and two provisions of Chapter 15,[80] they do not suggest any desire to eliminate the historical foundation of the minimum standard enumerated in Article 1105(1).

Turning from context to drafting history, one still finds no evidence of the intent to develop a special meaning of "international law" that excludes general principles from the scope of Article 1105(1). After the Notes appeared, the *Pope & Talbot* tribunal requested Canada to supply all drafting history supporting the NAFTA Parties' alleged intent to restrict "international law" to custom for purposes of Article

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[49] *Pope & Talbot* Award in Respect of Damages, *supra* note 4, ¶¶ 20, 26 n.9, 46-47; Kirkman, *supra* note 3, at 383.

[50] SHAW, *supra* note 48, at 89.

[51] *See supra* note 45 and accompanying text.

[52] *See* NAFTA, *supra* note 1, arts. 1116(1), 1117(1), 32 I.L.M. at 642-43; *Mondev* Award, *supra* 3, ¶ 42; Thomas, *supra* note 3, at 449; Kirkman, *supra* note 3, at 383, 391.

[53] *UPS* Award on Jurisdiction, *supra* note 3, ¶ 69; *Mondev* Award, *supra* note 3, ¶ 42; Thomas, *supra* note 3, at 449.

[54] *Mondev* Award, *supra* note 3, ¶ 42; Thomas, *supra* note 3, at 450.

[55] *Mondev* Award, *supra* note 3, ¶ 121; Gantz, *supra* note 28, at 715; Matiation, *supra* note 3, at 487; Thomas, *supra* note 3, at 450.

[56] Thomas, *supra* note 3, at 449-50, 451; Kirkman, *supra* note 3, at 383, 391.

[57] *UPS* Award on Jurisdiction, *supra* note 3, ¶ 97; *Mondev* Award, *supra* note 3, ¶¶ 119-21; Matiation, *supra* note 3, at 487-88, 494-95; Thomas, *supra* note 3, at 449-50; Kirkman, *supra* note 3, at 383, 391. Although Article 1105(1) does not justify direct incorporation of free-standing treaty norms, certain treaty obligations may remain or become pertinent to its interpretation. For example, to the extent that treaties codify existing custom, their content should influence the application of Article 1105(1). RESTATEMENT, *supra* note 10, § 102 Reporters' Note 5; Matiation, *supra* note 3, at 487. Alternatively, the widespread adoption of multilateral or bilateral treaties may reflect state practice sufficient to influence the development of custom and, thus, the meaning of Article 1105(1). *Mondev* Award, *supra* note 3, ¶¶ 117, 125; *Pope & Talbot* Award in Respect of Damages, *supra* note 4, ¶¶ 58, 62; RESTATEMENT, *supra* note 10 § 102(3) & cmt. i; Laird, *supra* note 4, at 67; Andreas F. Lowenfeld, *Investment Agreements and International Law*, 42 COLUM. J. TRANSNAT'L L. 123, 129 (2003).

[58] *See supra* notes 29, 31 and accompanying text.

[59] RESTATEMENT, *supra* note 10, § 102 cmt. h; SHAW, *supra* note 48, at 93.

[60] Alternatively, the Notes might reflect an endorsement of the discredited minority view (formerly espoused by Soviet legal scholars) that general principles merely constitute a subset of customary international law. *See* SHAW, *supra* note 48, at 94 (attributing this view to Soviet writers, but opining that "most writers are prepared to accept that the general principles do constitute a separate source of law"). *See also* RESTATEMENT, *supra* note 10, § 102, Reporters' Note 7 (concluding that "the view of Soviet scholars . . . has not gained acceptance").

Although one might regard the NAFTA Parties' willingness to endorse the former Soviet view as highly improbable, the United States arguably did so in its new Model BIT and in recently concluded investment and trade agreements, all of which first prescribe "customary international law" as the minimum standard of treatment for covered investments, but then define that standard to include "the principle of due process embodied in the principal legal systems of the world." United States Model BIT (2004), art. 5(1), (2)(a), at http://www.state.gov/e/eb/rls/othr/38602.htm; Treaty Concerning the Encouragement and Reciprocal Protection of Investment, Oct. 25, 2004, U.S.-Uru., art. 5(1), (2)(a), *at* http://www.ustr.gov/assets/World_Regional/Americas/South_America/asset_upload_file583_6728.pdf; Free Trade Agreement, June 15, 2004, U.S.-Morocco, art. 10.5(1), (2)(a), *at* http://www.ustr.gov/new/fta/Morocco/final/index.htm; U.S.-Central American Free Trade Agreement, May 28, 2004, art. 10.5(1), (2)(a), at http://www.ustr.gov/new/fta/Cafta/final/index.htm; Free Trade Agreement, June 6, 2003, U.S.-Chile, art. 10.4(1), (2)(a), at http://www.ustr.gov/new/fta/Chile/final/index.htm; Free Trade Agreement, May 6, 2003, U.S.-Sing., art. 15.5(1)(2)(a), at http://www.ustr.gov/new/fta/Singapore/final.htm.

[61] MANLEY O. HUDSON, INTERNATIONAL TRIBUNALS 102 (1944); SHAW, *supra* note 48, at 94; Michael Akehurst, *Equity and General Principles of Law*, 25 INT'L & COMP. L.Q. 801, 817 (1976). *See also* RESTATEMENT, *supra* note 10, Part I, Introductory Note ("International law is made in two principal ways—by the practice of states ('customary law') and by purposeful agreement among states (sometimes called 'conventional law' *i.e.*, law by convention, by agreement."); SORNARAJAH, *supra* note 27, at 93 ("Positivist legal scholars . . . treat custom and treaty solely as the significant sources of international law,").

[62] Wolfgang Friedmann, *The Uses of "General Principles" in the Development of International Law*, 57 AM. J. INT'L L. 279, 290 (1963).

[63] SORNARAJAH, *supra* note 27, at 93-94.

[64] Louis B. Sohn & R.R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AM. J. INT'L L. 545, 547 (1961).

[65] *Id.*

[66] Draft Convention on the International Responsibility of States for Injuries to Aliens, art. 4(2), (4), (5), 55 AM. J. INT'L L. 548, 549 (1961).

[67] *Id.*, art. 5(1)(b), 55 AM. J. INT'L L. at 549.

[68] *Id.*, arts. 6(b), 7(f),(k), 8(b), 55 AM. J. INT'L L. at 550-51.

[69] *Id.*, art. 9(2)(e), 55 AM. J. INT'L L. at 551.

[70] *Id.*, art. 10(5)(e), 55 AM. J. INT'L L. at 554.

[71] *Id.*, art. 12(1)(e), (4)(b), 55 AM. J. INT'L L. at 567.

[72] *Id.*, art. 13(1)(b), 55 AM. J. INT'L L. at 575.

[73] *See* generally Lord Arnold McNair, Q.C., *The General Principles of Law Recognized by Civilized Nations*, 1957 BRIT. Y.B. INT'L L. 1; Friedmann, *supra* note 62.

[74] *See* Brower, *Beware the Jabberwock*, *supra* note 4, at 472-73 (recognizing that investor-state disputes combine elements of private commerce and public regulation); Coe, *supra* note 16, at 1389 (observing that investor-state disputes have "characteristics of inter-state arbitration and of private international commercial arbitration").

[75] BROWNLIE, *supra* note 48, at 17-18.

[76] SHAW, *supra* note 48, at 95, 97.

[77] *AMCO Asia v. Indonesia*, 23 I.L.M. 351 (1984).

[78] *Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3 (Feb. 5).

[79] *Chorzów Factory (F.R.G. v. Pol.)*, 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13), 1927 P.C.I.J. (ser. A) No. 9 (July 26).

[80] *See supra* notes 52-57 and accompanying text.