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THE INTERNATIONAL MINIMUM STANDARD AND FAIR AND EQUITABLE TREATMENT

Martins Paparinskis

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MARTINS PAPARINSKIS

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The International Minimum Standard and Fair and Equitable Treatment

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AVIAE ET MATRI CARISSIMIS

Series Editors' Preface

Investor–State arbitration makes an important contribution to increasing international investment flows by, *inter alia*, mitigating political risk for investors. This mixed international arbitration in turn relies on the obligations of States, which are embodied in bilateral investment treaties and customary international law.

A key technique used in bilateral investment treaties to achieve protection for foreign investors has been to include a requirement that a host State provide 'fair and equitable treatment' of foreign investments within its territories. One of the key, controversial, issues in mixed international arbitration has been the extent to which a State's compliance with the requirement of fair and equitable treatment should be evaluated according to the customary international minimum standard of protection, or rather according to a national, often lower, standard.

This extremely well-researched contribution by Dr Paparinskis makes crucial contributions to our understanding of the relationship between these two key concepts of foreign investment law, and in so doing also provides invaluable insights into the contemporary content of both concepts.

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The text is, as far as possible, current as at 1 August 2012.

MP
Merton College, Oxford
1 August 2012

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Convention (I) pour le règlement pacifique des conflits internationaux (adopted 18 October 1907) *Deuxième conférence internationale de la paix. Actes et documents* (Tome premier, Imprimerie Nationale, La Haye 1907) 604, (tr) JB Scott (ed), *The Hague Conventions and Declarations of 1899 and 1907* (OUP, New York 1915) 41 33
Convention (II) concernant la limitation de l'emploi de la force pour le recouvrement de dettes contractuelles (adopted 18 October 1907, entered into force 26 January 1910), *Deuxième conférence internationale de la paix. Actes et documents* (Tome premier, Imprimerie Nationale, La Haye 1907) 620, (tr) JB Scott (ed), *The Hague Conventions and Declarations of 1899 and 1907* (OUP, New York 1915) 89 23
Convention (XII) relative à l'établissement d'une Cour internationale des prises *Deuxième conférence internationale de la paix. Actes et documents* (Tome premier, Imprimerie Nationale, La Haye 1907) 668; (tr) JB Scott (ed), *The Hague Conventions and Declarations of 1899 and 1907* (OUP, New York 1915) 188 35
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Treaty of Peace and Commerce between Great Britain and Denmark (adopted 11 July 1670, entered into force 11 August 1670) C Parry (ed), *The Consolidation Treaty Series*

(Volume 11, 1668–1671, Oceana Publications, Inc., Dobs Ferry, New York 1969) 366 (English translation) 6, 85, 161
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Bolivia Model BIT, *International Investment Instruments: A Compendium* (Volume X, United Nations, New York 2002) 275 25

OTHER DOCUMENTS

RESOLUTIONS AND DECISIONS

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NAFTA Free Trade Commission, 'Notes of Interpretation of Certain Chapter 11 Provisions' (adopted 31 July 2001) <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/NAFTA-Interpr.aspx?lang=en&view=d> 38, 245, 247, 252

REPORTS

Economic Committee, 'Report on Equitable Treatment of Commerce September 1922' (1923) 4 League of Nations Official J 468 88

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R Ago, 'Third Report on State Responsibility', UN Doc A/CN.4/246 187
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FV García-Amador, 'Report on International Responsibility' in *Yearbook of the International Law Commission, 1956, Volume II*, UN Doc A/CN.4/SER.A/1956/Add.1 173 142
FV García-Amador, 'Second Report on International Responsibility' in *Yearbook of the International Law Commission, 1957, Volume II*, UN Doc A/CN.4/SER.A/1957/Add.1 104 .... 31, 76, 142
FV García-Amador, 'Fourth Report on State Responsibility' in *Yearbook of the International Law Commission, 1959, Volume II*, UN Doc A/CN.4/SER.A/1959/Add.1 1 142
FV García-Amador, 'Sixth Report on State Responsibility' in *Yearbook of the International Law Commission, 1961, Volume II*, UN Doc A/CN.4/SER.A/1961/Add.1 1 ..... 142, 182
ILC, 'Articles on Responsibility of States for Internationally Wrongful Acts' in *Yearbook of the International Law Commission, 2001, Volume II*, UN Doc A/CN.4/SER.A/2001/Add.1. (Part Two) 31 ..... 9, 25, 148, 176, 183, 252
ILC, 'Draft Articles on Diplomatic Protection with Commentaries' in *Report of the International Law Commission on the Work of its 61st Session*, UN Doc A/61/10 15 ..... 24, 77, 149, 184
ILC, 'Draft Articles on Most-Favoured-Nation Clauses' in *Yearbook of the International Law Commission, 1978, Volume II*, UN Doc A/CN.4/SER.A/1978/Add.1. (Part Two) 16 108
ILC, 'Draft Articles on State Responsibility' in *Yearbook of the International Law Commission, 1976, Volume II*, UN Doc A/CN.4/SER.A/1976/Add.1 (Part 2) 73 187
ILC, 'Draft Articles on the Law of Treaties with Commentaries' in *Yearbook of the International Law Commission, 1966, Volume II*, UN Doc A/CN.4/SER.A/1966/Add.1 112 ..... 101, 109, 127, 145, 156, 181
ILC, 'Draft Articles on the Prevention and Punishment of Crimes against Diplomatic Agents and Other Internationally Protected Persons with Commentaries' in *Yearbook of the International Law Commission, 1972, Volume II*, UN Doc A/CN.4/SER.A/1972/Add.1 312 163
ILC, 'Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations' in *Report of the International Law Commission on the Work of its 61st Session*, UN Doc A/61/10 367 252
ILC, 'Model Rules on Arbitral Procedure' in *Yearbook of the International Law Commission, 1958, Volume II*, UN Doc A/CN.4/SER.A/1958/Add. 1 1 183 118
ILC, *Report of the International Law Commission on the Work of its 63rd Session*, UN Doc A/66/10 ... 108
ILC, *Yearbook of the International Law Commission, 1956, Volume I*, UN Doc A/CN.4/SER.A/1956 ..... 7, 35, 65, 77, 178
ILC, *Yearbook of the International Law Commission, 1957, Volume I*, UN Doc A/CN.4/SER.A/1957 ..... 31, 47, 77, 142, 194
ILC, *Yearbook of the International Law Commission, 1959, Volume I*, UN Doc A/CN.4/SER.A/1959 ..... 31, 47, 78, 178
ILC, *Yearbook of the International Law Commission, 1960, Volume I*, UN Doc A/CN.4/SER.A/1960 ..... 35, 78
ILC, *Yearbook of the International Law Commission, 1964, Volume I*, UN Doc A/CN.4/SER.A/1964 106
ILC, *Yearbook of the International Law Commission, 1964, Volume II*, UN Doc A/CN.4/SER.A/1964/Add.1 106
ILC, *Yearbook of the International Law Commission, 1966, Volume I*, UN Doc A/CN.4/SER.A/1966 (Part Two) 127
ILC, *Yearbook of the International Law Commission, 1973, Volume I*, UN Doc A/CN.4/SER.A/1972 163
ILC, *Yearbook of the International Law Commission, 1973, Volume I*, UN Doc A/CN.4/SER.A/1973 108
ILC, *Yearbook of the International Law Commission, 1975, Volume I*, UN Doc A/CN.4/SER.A/1975 107
Secretary General, 'Preparatory Study Concerning a Draft Declaration on the Rights and Duties of States', UN Doc A/CN.4/2 29
Study Group of the International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', UN Doc A/CN.4/L.682 ..... 129, 157

HUMAN RIGHTS COMMITTEE

HRC, 'General Comment no 32: Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial', UN Doc CCPR/C/GC/32 ..... 200, 204, 214

INTERNATIONAL CONFERENCES

Deuxième Conférence Internationale de la Paix: Actes et documents (Tome premier, Imprimerie Nationale, la Haye 1907) 23, 33, 35
'Text of Articles Adopted in First Reading by the Third Committee of the Conference for the Codification of International Law' League of Nations publication, *V.Legal, 1930.V.17* ... 164, 182
United Nations Conference on the Law of Treaties, Second Session, A/CONF.39/11/Add.1 .... 106, 129

INSTITUTE OF INTERNATIONAL LAW

E Brusa, 'La responsabilité des Etats à raison des dommages soufferts par des étrangers en cas d'émeute ou de guerre civile' (1898) 17 Annuaire de l'IDI 96 59
E Brusa and L von Bar, 'Règlement sur la responsabilité des Etats à raison des dommages soufferts par des étrangers en cas d'émeute, d'insurrection ou de guerre civile' (1900) 18 Annuaire de l'IDI 47 59
A Mandelstam, 'Déclaration des droits internationaux d l'homme' (1929) 35 Annuaire de l'IDI 730 74
L Strisower, 'Responsabilité internationale des Etats à raison des dommages causés sur leur territoire à la personne et aux biens des étrangers' (1927) 33 Annuaire de l'IDI 455 ..... 59, 190, 193

UNITED STATES

Committee on Foreign Affairs of the House of Representatives, 'Expropriation of American-Owned Property by Foreign Governments in the Twentieth Century' (1963) 2 ILM 1066 67
Department of State, 'Report on Nationalization, Expropriation and other Takings of US and Certain Foreign Property since 1960' (1972) 11 ILM 84 68

ARBITRAL RULES

London Court of International Arbitration Arbitration Rules (effective 1 January 1998) <http://www.lcia.org> 118
Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (effective 1 January 2010) <http://www.sccinstitute.com/filearchive/3/35894/K4_Skiljedomsregler eng ARB TRYCK_1_100927.pdf> 118
Rules of Arbitration of the International Chamber of Commerce (effective 1 January 2012) <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/> 118

Abbreviations

ACHR	American Convention of Human Rights
AJIL	American Journal of International Law
ASEAN	Association of Southeast Asian Nations
BIT	Bilateral Investment Treaty
CML Rev	Common Market Law Review
COMESA	Common Market for Eastern and Southern Africa
CUP	Cambridge University Press
DR–CAFTA	Dominican Republic–Central American Free Trade Agreement
DTT	Double Taxation Treaty
ECT	Energy Charter Treaty
EC	European Community
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EJIL	European Journal of International Law
EU	European Union
FCN	Friendship, Commerce and Navigation
GA	General Assembly
GAOR	Official Records of the General Assembly
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
HRC	Human Rights Committee
IACtHR	Inter-American Court of Human Rights
ICC	International Chamber of Commerce
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICSECR	International Covenant on Social, Economic and Cultural Rights
ICSID	International Centre for the Settlement of Investment Disputes
ICTY	International Criminal Tribunal for Former Yugoslavia
IDI	Institut de droit international
ILC	International Law Commission
ILM	International Legal Materials
IMF	International Monetary Fund
Iran–USCTR	Iran–United States Claims Tribunal Reports
LCIA	London Court of International Arbitration
LNTS	League of Nations Treaty Series
MAI	Multilateral Agreement on Investment
MAT	Mixed Arbitral Tribunal
MIT	Multilateral Investment Treaty
MFN	most favoured nation (clause)
NAFTA	North American Free Trade Agreement
NIEO	New International Economic Order
OECD	Organisation for Economic Co-operation and Development
OUP	Oxford University Press
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
RIAA	Reports of International Arbitral Awards
SCC	Stockholm Chamber of Commerce

TRIPS	Trade-Related Aspects of Intellectual Property Rights
TRIMS	Trade-Related Investment Measures
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNTS	United Nations Treaty Series
UK	United Kingdom
US	United States
USAT	Upper Silesian Arbitral Tribunal
WB	World Bank
WTO	World Trade Organisation

Notes on Citations

Judgments of the International Court of Justice that have not yet been published in the ICJ Reports may be found at <http://www.icj-cij.org>. The decisions by investment arbitration Tribunals have been referred to by their publication details (ICSID Rev-Foreign Investment L J, ILM, ILR, or ICSID Rep, in that order, whenever available). In any event, the decisions are largely available online, sometimes on websites of arbitral institutions or institutions of the particular treaty: regarding ICSID disputes at <https://icsid.worldbank.org/ICSID/index.jsp>; regarding PCA disputes at <http://pca-cpa.org/showpage.asp?pag_id=1029>; regarding Energy Charter Treaty disputes at <http://www.encharter.org/index.php?id=213>, and sometimes on institutionally unaffiliated websites: regarding NAFTA disputes at <http://NAFTAclaims.com>; regarding all kinds of investment disputes: <http://investmentclaims.com> and <http://italaw.com>.

Unless indicated otherwise, texts of model investment treaties are available at a number of websites, including: <http://www.unctadxi.org/templates/docsearch.aspx?id=779>; <http://www.investmentclaims.com>, <http://www.kluwerarbitration.com> and <http://italaw.com/investment-treaties>.

Introduction

> *Utraque pars subditis et populo alterius jus et aequitatem secundum uniuscujusque regiones leges et statuta celeriter et absque prolixis et non necessariis ambagibus ac impensis administrari faciet in ombnibus causis et litibus etiamnum pendentibus, quaqve (sic) deinceps exoriri possint.**
>
> The nationals of each High Contracting Party shall receive within the territories of the other, upon submitting to conditions imposed upon its nationals, the most constant protection and security for their persons and property, and shall enjoy in this respect that degree of protection that is required by international law. Their property shall not be taken without due process of law and without payment of just compensation.**
>
> Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties. Such property shall be accorded the most constant protection and security within the territories of the other Parties and the management, use and enjoyment thereof shall not in any way be impaired by unreasonable or discriminatory measures.***
>
> Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.****

Throughout the last century of its development, the international law of foreign investment protection has been concerned with the search for the most appropriate rules and the best means for the settlement of disputes concerning the application of those rules. In general, the shift has been away from vague and crude substantive rules (set out in customary law, general principles, and evocations of equity) discretionarily enforced by the home State, and in the direction of 'treatified' law of investment protection, implemented by means of investor–State arbitration. The contemporary law of foreign investment protection could therefore be said to consist of several strata of legal arguments. The results of the more recent efforts of law-making sometimes accept and incorporate the classical rules; sometimes clarify the classical ambiguities or replace the unsatisfactory solutions; sometimes permit different approaches in parallel; and quite often maintain constructive ambiguity regarding the precise relationship between different rules.[1] Creation, interpretation, and application of contemporary investment protection law

* Treaty of Peace and Commerce between Great Britain and Denmark (adopted 11 July 1670, entered into force 11 August 1670) C Parry (ed), *The Consolidation Treaty Series* (Volume 11, 1668–1671, Oceana Publications, Inc., Dobbs Ferry, New York 1969) 347 art 24.

** Treaty of Friendship, Commerce and Consular Relations between Germany and the United States of America (adopted 8 December 1923, entered into force 14 October 1925) 52 LNTS 133 art I.

*** Abs-Shawcross Draft Convention on Investment Abroad (1960) 9 J Public L 116 art 1.

**** Treaty between the United States of America and the Republic of Argentina Concerning the Encouragement and Reciprocal Protection of Investment (adopted 14 November 1991; entered into force 20 October 1994) (1992) 31 ILM 124 art II(2)(a).

[1] M Paparinskis, 'Investment Arbitration and the Law of Countermeasures' (2008) 79 BYIL 264, 265.

raise important theoretical questions regarding the making of international law,[2] interrelationship between different sources[3] and regimes of international law,[4] the implications of granting the right of invocation of State responsibility to non-State actors,[5] and the possibility of explaining or criticizing existing law from innovative conceptual perspectives.[6] Investment protection dispute settlement is also of practical importance, as reflected among other things in the often quite substantial monetary remedies requested and awarded.[7] The present contribution seeks to examine the contemporary relationship between two primary rules that are sometimes suggested to typify the development of substantive investment protection law in perhaps the starkest terms: the international minimum standard and fair and equitable treatment.[8]

On 28 April 1910, Elihu Root, a President of the American Society of International Law and a former Secretary of State of the US, gave an opening address at the Society's Annual Meeting in the New Willard Hotel in Washington, DC on the topic of 'The Basis of Protection to Citizens Residing Abroad'. At some point around 9 p.m.[9] he made what is considered to be a classical statement of the international standard on the treatment of aliens:[10]

> There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own citizens is that its system of law and administration shall conform to this general standard.[11]

The open-textured language that Root used to express the international standard is in its vagueness and ambiguity not entirely unlike treaty clauses common in contemporary bilateral and multilateral investment protection treaties that address fair and equitable treatment. For example, the 1991 Treaty between the United States of America and the Republic of Argentina Concerning the Encouragement and Reciprocal Protection of

[2] JE Alvarez, 'A BIT on Custom' (2010) 42 NYU J Intl L Politics 17; J Salacuse, *The Law of Investment Treaties* (OUP, Oxford 2010).

[3] C McLachlan, 'Investment Treaties and General International Law' (2008) 57 ICLQ 361; M Paparinskis, 'Investment Treaty Interpretation and Customary Investment Protection Law: Preliminary Remarks' in C Brown and K Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (CUP, Cambridge 2011).

[4] P-M Dupuy, E-U Petersmann, and F Francioni (eds), *Human Rights in International Investment Law and Arbitration* (OUP, Oxford 2009); B Simma and T Kill, 'Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology' in C Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP, Oxford 2009); MW Gehring, M-C Cordonnier-Segger, and A Newcombe (eds), *Sustainable Development in World Investment Law* (Kluwer Law International, The Hague 2011); B Simma, 'Foreign Investment Arbitration: A Place for Human Rights?' (2011) 60 ICLQ 573.

[5] Z Douglas, *The International Law of Investment Claims* (CUP, Cambridge 2009) Ch 1.

[6] G van Harten, *Investment Treaty Arbitration and Public Law* (OUP, Oxford 2007); S Schill, *The Multilateralization of International Investment Law* (CUP, Cambridge 2009); S Schill (ed), *International Investment and Comparative Public Law* (OUP, Oxford 2010).

[7] S Ripinsky and K Williams, *Damages in International Investment Law* (BIICL, London 2008); I Marboe, *Calculation of Compensation and Damages in International Investment Law* (OUP, Oxford 2009); B Sabahi, *Compensation and Restitution in Investor-State Arbitration: Principles and Practice* (OUP, Oxford 2011) Chs 5–7.

[8] The analytical perspective follows an earlier contribution that explored the relationship of investment arbitration and the law of countermeasures, Paparinskis 'Investment Arbitration and the Law of Countermeasures' (n 1) 265–6.

[9] Root started speaking at 8 p.m., (1910) 4 ASIL Proceedings 13. The speech up to the quoted sentences takes seven pages and it would not be unreasonable to estimate the time necessary for coming to the point as about one hour.

[10] J Paulsson, *Denial of Justice in International Law* (CUP, Cambridge 2005) 23–4.

[11] E Root, 'The Basis of Protection to Citizens Residing Abroad' (1910) 4 ASIL Proceedings 16, 21.

Investment, probably the most arbitrated Bilateral Investment Treaty (BIT) in existence, provides that

> Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.[12]

The textual expression of the BIT clause is not necessarily self-explanatory, either regarding the relationship of treaty and customary law or the perspective and techniques that the interpreter should employ in applying the broadly termed rule in particular disputes.

The degree of clarity and detail in the textual expression of the treaty rule and the description of the customary rule may be said to be in inverse proportion to the importance that they play in investment treaties and investment treaty arbitrations. In the middle of 2012, there were almost 3,200 investment protection treaties.[13] Most investment treaties require States to accord fair and equitable treatment to foreign investment, even if the treaty rule and its relationship (if any) with customary rules may be expressed in different terms.[14] The scope, content, and mutual relationship of treaty and customary rules on the issue play considerable role in many legal contexts: drafting treaty rules; *ex ante* review by the State of the compliance of its intended conduct with its international obligations; determination by the investor that particular conduct might give or has given rise to State responsibility; negotiations between the investor and the State regarding alleged breach; presentation of the claim to a Tribunal; decision of the Tribunal; and perhaps even recognition and enforcement of the award.

Of course, other rules traditionally included in investment protection treaties may also assume importance in the same manner, including rules on expropriation (particularly indirect expropriation), national treatment, MFN treatment, and umbrella clauses. However, international minimum standard and fair and equitable treatment may raise particular challenges. Obligations regarding expropriation are also expressed in both treaty and customary law, but there is little support in recent decisions for the view that their content may differ in different sources.[15] The textual expression of fair and equitable treatment and the usual description of the international minimum standard do not contain obvious criteria for delineating the boundaries of the legal rules: there is no requirement for significance of interference (as explicit or necessarily implicit in concepts like 'expropriation', 'taking', or 'deprivation'),[16] comparison of treatment in

[12] Treaty between the United States of America and the Republic of Argentina Concerning the Encouragement and Reciprocal Protection of Investment (adopted 14 November 1991; entered into force 20 October 1994) (1992) 31 ILM 124 art II(2)(a).

[13] According to UNCTAD, '[b]y the end of 2011, the overall IIA [International Investment Agreements] universe consisted of 3,164 agreements, which included 2,833 BITs and 331 "other IIAs"...2012...saw...10 BITs and 2 "other IIAs" concluded during the first five months of the year', UNCTAD, *World Investment Report 2012: Towards a New Generation of Investment Policies* (New York and Geneva, United Nations, 2012) see <http://www.unctad-docs.org/files/UNCTAD-WIR2012-Full-en.pdf> 84.

[14] I Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (OUP, Oxford 2008) Ch 1; R Kläger, *Fair and Equitable Treatment in International Investment Law* (CUP, Cambridge 2011) 9–22.

[15] C McLachlan, L Shore, and M Weiniger, *International Investment Arbitration: Substantive Principles* (OUP, Oxford 2007) 286–8; S Ratner, 'Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law' (2008) 102 AJIL 475, 481–3; R Dolzer and C Schreuer, *Principles of International Investment Law* (OUP, Oxford 2008) Ch 6; A Newcombe and L Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (The Netherlands, Wolters Kluwer 2009) Ch 7.

[16] Ibid.

different situations (as in national and MFN treatment),[17] or particular legal relationship to be protected (as in umbrella clauses).[18]

On a more mundane level (but probably not entirely without significance for those who benefit from or fulfil the awards), claims alleging breach of fair and equitable treatment appear to be the most likely to succeed in investment treaty arbitrations. One could take as an example the (so far) publicly available awards on merits in investment treaty arbitrations rendered in 2010–2011. Twenty-four awards have been rendered,[19] of which ten awards have found breach of fair and equitable treatment or international minimum standard only,[20] three awards have found breach of fair and equitable treatment or international minimum standard and another obligation,[21] and two awards recognized breach of expropriation rules only (not having jurisdiction over other obligations in the first place).[22] Caution is necessary before making any generalizations in light of the small sample and unclear representativeness of publicly available cases, as well as differences in treaty texts, underlying factual issues, and procedural strategies. Still, at the very least these numbers suggest that questions of interpretation and application of fair and equitable treatment rules and its relationship with the international minimum standard touch upon very important developments in the field of investment protection law.

[17] McLachlan and others, *International Investment Arbitration* (n 15) 251–7; Dolzer and Schreuer, *Principles* (n 15) 178–91; Newcombe and Paradell, *Law and Practice* (n 15) Chs 4–5.

[18] A Sinclair, 'The Umbrella Clause Debate' in AK Bjorklund and others (eds), *Investment Treaty Law: Current Issues III* (BIICL, London 2009).

[19] *Joseph Charles Lemire v Ukraine*, ICSID Case no ARB/06/18, Award, 14 January 2010; *Ioannis Kardassopoulos and Ron Fuchs v Georgia*, ICSID Cases nos ARB/05/18 and ARB/07/15, Award, 3 March 2010; *Chevron Corporation and Texaco Petroleum Corporation v Ecuador*, PCA Case no 34877, Partial Award on the Merits, 30 March 2010; *Merrill & Ring Forestry L.P. v Canada*, UNCITRAL, ICSID Administered Case, Award, 31 March 2010; *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. and Talsud S.A. v Mexico*, ICSID Additional Facility Cases nos ARB(AF)/04/3 and ARB(AF)/04/3, Award, 16 June 2010; *Gustav FW Hamester GmbH & Co KG v Ghana*, ICSID Case no ARB/07/24, Award, 18 June 2010; *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua v Argentina*, ICSID Case no ARB/03/19, Decision on Liability, 30 July 2010; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v Argentina*, ICSID Case no ARB/03/19 and *AWG Group v Argentina*, UNCITRAL Case, Decision on Liability, 30 July 2010; *Chemtura Corporation v Canada*, UNCITRAL Case, Award, 2 August 2010; *RosInvestCo UK Ltd v Russia*, SCC Case no V 79/2005, Final Award, 12 September 2010; *AES Summit Generation Limited and AES-Tisza Erömü Kft. v Hungary*, ICSID Case no ARB/07/22, Award, 23 September 2010 (2011) 50 ILM 186; *Alpha Projektholding GmbH v Ukraine*, ICSID Case no ARB/07/16, Award, 8 November 2010; *Frontier Petroleum Services Ltd v Czech Republic*, UNCITRAL Case, Final Award, 12 November 2010; *Total SA v Argentina*, ICSID Case no ARB/04/1, Decision on Liability, 21 December 2010; *ATA Construction, Industrial and Trading Company v Jordan*, ICSID Case no ARB/08/2, Award, 12 May 2010; *Grand River Enterprises Six Nations Ltd and others v US*, UNCITRAL Case, Award, 12 January 2011; *Malicorp Limited v Egypt*, ICSID Case no ARB/08/18, Award, 7 February 2011; *GEA Group Aktiengesellschaft v Ukraine*, ICSID Case no ARB/08/16, Award, 31 March 2011; *Sergei Paushok, CJSC Golden East Company, CJSC Vostokneftegaz Company v Mongolia*, UNCITRAL Case, Award on Jurisdiction and Liability, 28 April 2011; *Impregilo S.p.A. v Argentina*, ICSID Case no ARB/07/17, Award, 21 June 2011; *Tza Yap Shum v Peru*, ICSID Case no ARB/07/6, Award, 7 July 2011; *El Paso Energy International Company v Argentina*, ICSID Case no ARB/03/15, Award, 31 October 2011; *White Industries Australia Limited v India*, UNCITRAL Arbitration, Final Award, 30 November 2011; *Spyridon Roussalis v Romania*, ICSID Case no ARB/06/1, Award, 7 December 2011.

[20] *Lemire* ibid; *Suez and InterAgua* ibid; *Suez and AWG* ibid; *Total* ibid; *Paushok* ibid; *Impregilo* ibid; *El Paso* ibid. In the *Chevron* award, the Tribunal found breach of a treaty rule on delay in administration of justice that specified the customary rule, of denial and did not find it necessary to consider other treaty or customary rules, since they would not provide the claimant with further remedies, *Chevron* Partial Award, ibid [275] (in the *White Industries* award, the Tribunal found a breach of a similar rule but not of denial of justice, ibid [10.4.11]–[10.4.22], [11.4.1]–[11.4.20]). Since denial of justice is part of the international standard of treatment of aliens, for the purpose of this example these cases may be counted as ones where only breach of the international standard is found. In the *ATA Construction*, fair and equitable treatment and international minimum standard were applied through an MFN clause, ibid [125] fn 16.

[21] *Kardassopoulos* (n 19); *Gemplus* (n 19); *Alpha* (n 19).

[22] *RosInvestCo* (n 19); *Tza Yap Shum* (n 19).

The purpose of this monograph is to answer precisely the questions about the relationship and content of the international minimum standard and fair and equitable treatment. These issues have already been subject to considerable attention in decisions by investment treaty Tribunals and leading legal writings.[23] To simplify the subtlety and nuance between and within different positions considerably, two dominant views have been adopted regarding the relationship of the (classical customary law concept of) international standard and the (modern treaty law concept of) fair and equitable treatment. On the one hand, treaty rules on fair and equitable treatment may be taken to refer to customary minimum standard; on the other hand, the interpretation of fair and equitable treatment does not require taking into account the customary standard. If one were to adopt the former position, customary law would necessarily play an important role in the interpretative process. Its content might be determined either by reference to classical pre-Second World War authorities,[24] or to subsequent evolution through treaty practice on fair and equitable treatment,[25] broader changes in the international legal order *inter alia* regarding regulation in related fields,[26] or case-by-case elucidation in arbitral case law.[27] Conversely, if one were to adopt the latter position, customary law authorities would have little or no interpretative relevance. The meaning of the treaty rule of 'fair and equitable treatment' would most likely be fleshed out by reference to its particular elements identified in earlier decisions dealing with *pari materia* rules in other treaties. Finally, the challenges of following through the traditional processes of interpreting treaties and identifying customary law have also led to innovative approaches to legal reasoning and policy criticisms.[28]

This monograph takes a slightly different perspective on most of these issues. As a starting point, the contrast between the classical term of international standard and the modern terms of fair and equitable treatment underlying both approaches might be overstated. The post-Second World War draft instruments[29] that set out the language of international standards and *jus aequum*[30] and provided the example for subsequent

[23] McLachlan and others, *International Investment Arbitration* (n 15) Ch 7; Dolzer and Schreuer, *Principles* (n 15) 119–49; Tudor, *Fair and Equitable Treatment* (n 14); C Yannaca-Small, 'Fair and Equitable Treatment Standard: Recent Developments' in A Reinisch (ed), *Standards of Investment Protection* (OUP, Oxford 2008); T Weiler and I Laird, 'Standards of Treatment' in P Muchlinski, F Ortino, and CH Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP, Oxford 2008); Newcombe and Paradell, *Law and Practice* (n 15) Ch 6; Salacuse *The Law of Investment Treaties* (n 2) 218–43; Kläger, *Fair and Equitable Treatment* (n 14).

[24] *Glamis Gold Ltd v US*, UNCITRAL Case, Award, 8 June 2009 (2009) 48 ILM 1038 [21]–[22], [600]–[618].

[25] *Mondev v US*, ICSID Additional Facility Case no ARB(AF)/99/2, Award, 11 October 2002 (2003) 42 ILM 85 [117].

[26] *Merrill & Ring* (n 19) [206]-[209].

[27] *Waste Management v US (II)*, ICSID Additional Facility Case no ARB(AF)/00/3, Final Award, 30 April 2004 (2004) 43 ILM 967 [92]–[98].

[28] S Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (Hart Publishing, Oxford 2009) Chapter 6; S Schill, 'Fair and Equitable Treatment, the Rule of Law and Comparative Public Law' in S Schill (ed), *International Investment Law and Comparative Public Law* (OUP, Oxford 2010).

[29] 'Abs-Shawcross Draft Convention on Investment Abroad' (1960) 9 J Public L 116 art 1; 'OECD Draft Convention on the Protection of Foreign Property' (1963) 2 ILM 241 art 1(a); 'OECD Draft Convention on the Protection of Foreign Property' (1968) 7 ILM 117 art 1(a).

[30] G Schwarzenberger, 'The Abs-Shawcross Draft Convention on Investment Abroad: A Critical Commentary' (1960) 9 J Public L 147, 152, 153.

treaty-making in bilateral and multilateral fora were not that revolutionary. From seventeenth-century treaties calling States to 'jus et aequitatem ... administrari'[31] ('justice and equity to be administered')[32] to early twentieth-century treaties calling for 'due process of law' in the taking of property[33] so as to 'to secure protection against arbitrary and unjust treatment',[34] these and comparable terms have been used in State practice in a loose and often interchangeable manner. When treaty rules on fair and equitable treatment are read in light of this historical pedigree, their ordinary or special meaning refers to customary law, or at the very least requires taking it into account and attributing considerable importance to it in the interpretative process. Either way, finding contemporary customary law on the issue becomes of crucial importance.

The first step in the normative journey has to be taken by identifying the traditional position against the benchmark of which more recent practice may be assessed. The conservative statement of the 1926 award of the US–Mexican General Claims Commission in *LFH Neer and Pauline Neer* about 'outrage, ... bad faith, ... wilful neglect of duty, ... an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency' is often considered to be a statement of the traditional position regarding the treatment of aliens in general,[35] even though the Commission was heavily influenced by the perspective of denial of justice.[36] However, the peculiarity of the Commission's reasoning is not necessarily a reason to adopt a less demanding standard, but perhaps rather to inquire whether traditional law provided for rules when the interference with property rights did not reach the degree of expropriation. Indeed, the ongoing discussion in the *British Yearbook of International Law* throughout the late 1920s on protection of property in international law[37] referred to *Neer* only as a possible authority for a rule requiring compensation for expropriation.[38] When contemporary practice and arbitral decisions apply fair and equitable treatment treaty clauses and customary minimum standard to the substance of interferences not reaching the degree of expropriation, the original source for this certainty is not necessarily obvious.

In any event, even if one were to follow Robert Jennings in dismissing the *Neer* standard as crude and unseemly, at the end of the day rules on the issue 'must be hammered out in the practice of Governments and by the familiar process of the development of the law through its application by international tribunals'.[39] One way of bridging the temporal gap between the cessation of the Claims Commissions model of dispute settlement at the end of 1930s and the rise of investor–State arbitration at the end of 1990s would be

[31] Treaty of Peace and Commerce between Great Britain and Denmark (adopted 11 July 1670, entered into force 11 August 1670) C Parry (ed), *The Consolidation Treaty Series* (Volume 11, 1668–1671, Oceana Publications, Inc., Dobs Ferry, New York 1969) 347 art 24.

[32] Treaty of Peace and Commerce between Great Britain and Denmark (adopted 11 July 1670, entered into force 11 August 1670) C Parry (ed), *The Consolidation Treaty Series* (Volume 11, 1668–1671, Oceana Publications, Inc., Dobs Ferry, New York 1969) 366 (English translation) art 24.

[33] Treaty of Friendship, Commerce and Consular Relations between Germany and the United States of America (adopted 8 December 1923, entered into force 14 October 1925) 52 LNTS 133 art I.

[34] Memorandum of the Solicitor of the Department of State (Department of State file 711.622/60, National Archive), RR Wilson, 'Property-Protection Provisions in United States Commercial Treaties' (1951) 45 AJIL 83, 99 fn 84.

[35] *LFH Neer and Pauline Neer (US v Mexico)* (1926) 4 RIAA 60, 61–2.

[36] J Paulsson and G Petrochilos, '*Neer*-ly Misled' (2007) 22 ICSID Rev—Foreign Investment L J 242.

[37] AP Fachiri, 'Expropriation and International Law' (1925) 6 BYIL 159.

[38] JF Williams, 'International Law and the Property of Aliens' (1928) 9 BYIL 1, 29; by implication AP Fachiri, 'International Law and the Property of Aliens' (1929) 10 BYIL 32, 33.

[39] RY Jennings, 'State Contracts in International Law' (1961) 37 BYIL 156, 180.

to rely *mutatis mutandis* on State practice and judicial decisions regarding the most similar regime of international law during that time: international human rights. Sometimes international law of human rights will enter the interpretative exercise as relevant treaty rules.[40] In other cases, regional human rights regimes that are explicitly required to apply international law to the treatment of aliens and by implication apply the same standard to aliens and nationals might provide at the very least a fruitful source of analogy (as the international legal regime least unlike that of investment protection).[41]

Speaking in the 1956 ILC debate on the First Report of the First Special Rapporteur on State Responsibility García-Amador, Gerald Fitzmaurice identified two reasons why the 'whole subject [of the international standard] was one of extreme difficulty': 'In the first place, there was insufficient agreement on fundamentals; it might be said that there were two opposing schools of thought.... Secondly, even if the agreement on the fundamental principles could be reached, the amount of detail involved was so great as to inevitably cause further differences.'[42] The examination of international minimum standard and fair and equitable treatment will be taken in three steps, and the two reasons identified by Fitzmaurice will be dealt with in the latter two steps. First, the historical development of the international minimum standard is addressed (Part I). The scene is set for further legal argument by explaining the theoretical and practical complexities of analysing the historical law-making of the rule against the background of changing factual and legal premises and the evolution of the international legal order (Chapter 1). Chapter 2 addresses the creation of the international standard and its conceptualization up to the Second World War, inescapably (if not very helpfully) extrapolating it from denial of justice. Chapter 3 follows the three strands of law-making affecting the international standard after the Second World War: dooming it to irrelevance in favour of debates about compensation for expropriation, attempting synthesis with human rights, and finally, linking it with investment protection treaties.

The second step of the argument addresses the relationship of fair and equitable treatment and the international minimum standard within investment protection law and arbitration (Part II). A case study of most-favoured-nation clauses illustrates the point that interpretation of *pari materia* rules within a decentralized dispute settlement system is not a conceptually new challenge for international law (Chapter 4). Chapter 5 follows the rules of interpretation set out in the Vienna Convention on the Law of Treaties[43] and customary law and suggests that the general practice of elaborating particular principles of fair and equitable treatment on case-by-case basis cannot be explained solely in terms of treaty law. Chapter 6 argues that this practice may and should be explained as a reference to customary law rules on the treatment of aliens.

The third step of the argument explains the content of modern customary law that constitutes, or at least plays an important role in, the interpretation of treaty rules on

[40] Eg S Joseph, J Schultz, and M Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Documents* (2nd edn OUP, Oxford 2005).

[41] U Kriebaum, 'Nationality and the Protection of Property under the European Convention on Human Rights' in I Buffard and others (eds), *International Law between Universalism and Fragmentation. Festschrift in Honour of Gerhard Hafner* (Leiden, Martinus Nijhoff 2008); Paparinskis 'Investment Arbitration and the Law of Countermeasures' (n 1) 325–7; C Tomuschat, 'The European Court of Human Rights and Investment Protection' in C Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP, Oxford 2009) 642–6.

[42] ILC, *Yearbook of the International Law Commission, 1956, Volume I*, UN Doc A/CN.4/SER.A/1956 232.

[43] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 arts 31–2.

fair and equitable treatment. Chapter 7 addresses the methodology for this analysis, suggesting that reliance on international human rights in order to fill the temporal gap between classical authorities (those up to the 1930s) and modern authorities (those after the 1990s) would be the most appropriate solution. Since classical law had clearly established rules on denial of justice, distinction is drawn between the modern standard on administration of justice and on protection of property. Chapter 8 addresses the former aspect of the international standard, setting out the pre-Second World War rules, bridging the temporal gap by resource to comparative human rights analysis, and concluding the argument in terms of contemporary practice and case law. The international law of human rights on fair trial would be a relevant rule for the purposes of interpretation of treaty rules or would provide an appropriate source of analogy, as demonstrated by the ICCPR and the ECHR. The final argument regarding protection of property outside administration of justice raises more complex issues, since the pre-Second World War practice other than for expropriation is limited and human rights rules on protection of property only appear in the regional contexts. With all due caution, relying on classical protection against arbitrariness in the law of indirect and direct expropriation, regional rules on human rights to property and particularly State practice and case law in investment treaty arbitrations, an argument is made regarding the content of the modern standard on investment protection. The main thesis is that the international standard should focus on the arbitrariness of form and procedure rather than the policy choices of the State and expectations of the investors.

This monograph looks only at those aspects of the international minimum standard that have been relevant for the treaty rules on fair and equitable treatment in investment treaties. It does not address other substantive obligations of investment protection law. It does not address rules relating to the protection of physical persons other than relating to protection of property and administration of justice. It does not address the aspects of the international standard relating to the protection of aliens from third private parties[44] that in investment protection law are usually considered under the rubric of full protection and security.[45] It does not address in detail the standard on administration of justice in criminal cases regarding physical persons that was considered in great detail in classical international law but has not been of comparable importance in contemporary practice. This is not to suggest that these topics are less interesting or important in the contemporary legal order; it is simply the case that the line of an intellectual inquiry has to be drawn somewhere, and in this case the line naturally follows the investment treaty rule on fair and equitable treatment and customary law that explains it.

The monograph also does not address, other than incidentally, the situations of conflict with and consequences of breach of fair and equitable treatment and international minimum standard. This is not to understate the importance (and occasional complexity) of resolving these conflicts within the existing procedural regimes.[46] Still, the

[44] E Borchard, *Diplomatic Protection of Citizens Abroad* (The Banks Law Publishing Co., New York 1915) Ch V; AV Freeman, *The International Responsibility of States for Denial of Justice* (Longman, Green & Co., London 1938) Ch XIII.

[45] *Suez and AWG* (n 19) [155]-[173]; McLachlan and others, *International Investment Arbitration* (n 15) 247–50; Dolzer and Schreuer, *Principles* (n 15) 149–53; GC Moss, 'Full Protection and Security' in A Reinisch (ed), *Standards of Investment Protection* (OUP, Oxford 2008); Newcombe and Paradell (n 15) 307–15; CH Schreuer, 'Full Protection and Security' (2010) 1 J Intl Dispute Settlement 353.

[46] Eg M Paparinskis, 'Equivalent Primary Rules and Differential Secondary Rules: Countermeasures in WTO and Investment Protection Law' in T Broude and Y Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Hart Publishing, Oxford 2011). See generally U Kriebaum, 'Privatizing

content of a particular primary rule and the implications of another rule pointing in a different direction are analytically different questions.[47] The former question logically comes first and is the focus of this monograph (of course, an interpreter might need to take into account such rules to complete the interpretative exercise in a particular case). Neither does the monograph address, except incidentally, the secondary rules on the invocation of State responsibility for the breach of the particular primary rule and the remedial consequences of the breach. Secondary rules are in principle distinct from primary rules.[48] Secondary rules 'do not vary with the nature of the wrongful act in question in the absence of a clearly expressed *lex specialis*',[49] therefore an argument in favour of, say, a special rule on remedies has to demonstrate the law-making processes through which the general rule has been displaced.[50] Questions about the operation of law of State responsibility in investment arbitration are important and answers might not necessarily be self-evident,[51] but at the end of the day the scope and content of primary rules and the scope and content of secondary rules have to be determined by two very different inquiries, which should not be conflated.[52]

Human Rights—The Interface between International Investment Protection and Human Rights' (2006) 3 (5) Transnational Dispute Management; M Hirsch, 'Conflicting Obligations in International Investment Law: Investment Tribunals' Perspective' in T Broude and Y Shany (eds), *The Shifting Allocation of Authority in International Law* (Hart Publishing, Oxford 2008); Simma and Kill (n 4) 678–9.

[47] Study Group of the International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', UN Doc A/CN.4/L.682 16 [20].

[48] E David, 'Primary and Secondary Rules' in J Crawford, A Pellet, and S Olleson (eds), *The Law of International Responsibility* (OUP, Oxford 2010).

[49] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia)* (Judgment) [2007] ICJ Rep 43 [401]. While the ICJ talked in particular about rules of attribution, the proposition is applicable to secondary rules in general.

[50] Tudor has argued that the compensation for the breach of fair and equitable treatment requires a balancing of States' and investors' conduct, (n 14) Ch 7. It is not quite clear what that might mean in legal terms: fair and equitable treatment is a primary rule like any other, with its breach giving rise to international responsibility. In order to be able to apply a method of 'balancing' to calculating compensation for the breach of fair and equitable treatment, one would have to demonstrate either that it is required in all cases of State responsibility by the general secondary rule or that a special rule has been created for the (particular) investment treaty obligation(s).

[51] For example, a crucial and preliminary question relates to the possibility of relying on Part Two of the 2001 ILC Articles on State responsibility (that includes rules *inter alia* on reparation) in investor–State arbitrations in light of the explicit 'without prejudice' clause when responsibility accrues 'to any person or entity other than State', ILC, 'Articles on Responsibility of States for Internationally Wrongful Acts' in *Yearbook of the International Law Commission, 2001, Volume II,* UN Doc A/CN.4/SER.A/2001/Add.1. (Part Two) 31 art 33(2). The spectrum of possible solutions ranges from a rejection of reliance because invocation of responsibility by investors is conceptually different from invocation by States (Z Douglas, 'Other Specific Regimes of Responsibility: Investment Treaty Arbitration and ICSID' in J Crawford, A Pellet, and S Olleson (eds), *The Law of International Responsibility* (OUP, Oxford 2010) 829–32), to direct reliance because invocation by investors is not different (S Hindelang, 'Restitution and Compensation: Reconstructing the Relationship in Investment Treaty Law' in R Hoffman and C Tams (eds), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration?* (Nomos, Baden Baden 2011)), to direct reliance without clear justification (Sabahi (n 7) 54–60), to qualified reliance where the 2001 ILC Articles on State responsibility reflect customary law of responsibility by States in general, whether invoked by States or other entities, or applied by analogy (Ripinsky and Williams (n 7) 28–32); M Paparinskis, 'Inherent Powers of ICSID Tribunals: Broad and Rightly So' in I Laird and T Weiler (eds), *Investment Treaty Arbitration and International Law* (Volume 5, JurisNet, LLC, New York 2012) 37–41.

[52] 2001 ILC Articles, ibid Commentary 1 ('articles do not attempt to define the content of the international obligations, the breach of which gives rise to responsibility').

PART I

DEVELOPMENT OF THE INTERNATIONAL MINIMUM STANDARD

International minimum standard is (or at least is alleged to be) a rule of international law. As such, it is necessarily subject to traditional rules on the creation, change, application, and termination of rules of international law. The analysis of the development of the international minimum standard is therefore a conceptually unexceptional endeavour in terms of international legal scholarship. Still, as a practical matter, the significance of changes both in the manner in which particular issues are dealt with and in the broader legal order may pose particular analytical challenges. In 1360, Giovanni de Legnano described in *Tractatus De Bello, De Represaliis et De Duello* the rules on the treatment of aliens of his time. In the fourteenth century, when a citizen was denied access to courts or could not appeal an unjust judgment and therefore suffered from a complete denial of justice, one could turn to the prince, who could in turn grant the right of private reprisal against persons and property of the State that had harmed the citizen.[1] In the twenty-first century, international claims regarding the mistreatment of foreign investment are likely to be decided in the very different procedural context of investment treaty Tribunals.[2] In his Separate Opinion in the *Barcelona Traction, Light and Power Company, Limited* case, Judge Phillip Jessup referred to how Robert Jennings had written,

> in somewhat picturesque and Kiplingesque language: 'It is small wonder that difficulties arise when 19th century precedents about outrageous behaviour towards aliens residing in outlandish parts are sought to be pressed into service to yield principles apposite to sophisticated programmes of international investment'.[3]

Jennings' general proposition about the law of State responsibility and Jessup's narrower point about the law of diplomatic protection is applicable with equal, if not greater, force to analysis of the international minimum standard and fair and equitable treatment. To paraphrase, it is small wonder that difficulties arise when customary and treaty

[1] TE Holland (ed), JL Brierly (tr), G de Legnano, *Tractatus De Bello, De Represaliis et De Duello* (OUP, Oxford 1917) 307–31; M Paparinskis, 'Investment Law of/for/before the Twenty-First Century' (2012) 25 Leiden J Intl L 225, 228.

[2] Z Douglas, *The International Law of Investment Claims* (CUP, Cambridge 2009).

[3] *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* [1970] ICJ Rep 3, Separate Opinion of Judge Jessup 161, 166 (internal footnote omitted).

rules going back in some form at least to the fourteenth[4] and seventeenth centuries[5] respectively are sought to be pressed into service to yield principles apposite to sophisticated programmes of international investment. At the same time, legal developments necessarily display elements of continuities and discontinuities, and the influence of the changing premises or purposes upon legal rules has to be analysed in nuanced terms.[6]

Part I addresses the development of the international minimum standard in three steps. The scene is set for further legal argument by explaining the theoretical and practical complexities of analysing the historical law-making of the rule against the background of changing factual and legal premises and the evolution of the international legal order (Chapter 1). The rest of Part I addresses the development of the international minimum standard, choosing the Second World War as a not entirely arbitrary dividing point between traditional and modern law on the issue. Chapter 2 addresses the creation of the international standard and its conceptualization up to the Second World War, inescapably (if not very helpfully) extrapolating it from denial of justice. Chapter 3 follows the three strands of law-making affecting the international standard after the Second World War: dooming it to irrelevance in favour of debates about compensation for expropriation, attempting synthesis with human rights, and finally linking it with investment protection treaties. The general thesis advanced in this Part is that while disputes about treaty rules on fair and equitable treatment might appear to be relatively recent and conceptually innovatory, they are an integral part of the development of the international minimum standard and cannot be adequately explained without taking this into account. The implications of this argument for the source and content of the modern international standard are addressed further in Parts II and III respectively.

[4] AV Freeman, *The International Responsibility of States for Denial of Justice* (Longman, Green & Co., London 1938) Ch IV; HW Spiegel, 'Origin and Development of Denial of Justice' (1938) 32 AJIL 63.

[5] Treaty of Peace and Commerce between Great Britain and Denmark (adopted 11 July 1670, entered into force 11 August 1670) C Parry (ed), *The Consolidation Treaty Series* (Volume 11, 1868–1871, Oceana Publications, Inc., Dobs Ferry, New York 1969) 347 art 24; *Ambatielos case (Greece v UK)* ICJ Pleadings 412–13, 483–4 (Fitzmaurice on behalf of the UK).

[6] J Crawford, 'Continuity and Discontinuity in International Dispute Settlement' in C Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP, Oxford 2009); Paparinskis 'Investment Law of/for/before the Twenty-First Century' (n 1) 227–33.

1

International Minimum Standard and International Law-Making

I. International Law-Making

Before the making and development of the international minimum standard can be addressed, the broader legal structures within and through which these processes have taken place have to be set out. This chapter addresses in turn several aspects of international law-making regarding the international minimum standard. First, certain general aspects of law-making are noted. Second, the historical legal context within which the international standard was formulated in the nineteenth and early twentieth century are sketched out. Third, some factors and changes influencing the development and possible rethinking of the international standard are addressed. The fair and equitable treatment debate has been challenged regarding the ease with which certain propositions are recognized as having legal value.[1] The correct response is to assess these developments against the benchmark of traditional rules on sources and interpretation so as 'to preserve the purity of the wells from which the norms flow'.[2]

First, in an inquiry regarding the international minimum standard, it is appropriate to discuss as a preliminary issue the relevance of this terminology. For example, Iona Tudor has drawn upon the meaning attributed to 'standard' as a term of art in domestic law to explain fair and equitable treatment as a rule with no stable or fixed content, 'absorbing the circumstances of the case and of the specific society it is applied to'.[3] This raises a broader point: is 'international minimum standard' a descriptive shorthand for referring to rules on the treatment of aliens, or are 'international', 'minimum', and 'standard' legal terms of art that have additional significance in the determination and application of law? As is further suggested in Chapter 2, the former view is the better one. As a starting point, 'international minimum standard' was not the sole term of art but only one of a number of competing ways of referring to rules on the treatment of aliens.[4] Moreover, while 'standard' might have at one point implied uncertainty about the clear limits of the

[1] Z Douglas, 'Nothing if Not Critical for Investment Treaty Arbitration: *Occidental, Eureko* and *Methanex*' (2006) 22 Arbitration Intl 27, 28; G van Harten, *Investment Treaty Arbitration and Public Law* (OUP, Oxford 2007) 88–90; A Orakhelashvili, 'The Normative Basis of "Fair and Equitable Treatment": General International Law of Foreign Investment?' (2008) 46 Archiv des Völkerrechts 74, 76–96.

[2] AV Lowe, 'The Politics of Law-Making' in M Byers (ed), *The Role of Law in International Politics* (OUP, Oxford 2000) 223.

[3] I Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (OUP, Oxford 2008) 131, generally 109–33.

[4] EC Stowell, *International Law: A Restatement of Principles in Accordance with Actual Practice* (Sir Isaac Pitman & Sons, Ltd, London 1931) 160–1; WE Beckett, 'Diplomatic Claims in Respect of Injuries to Companies' (1932) 17 Transactions Grotius Society 175, 179 fn 1; AV Freeman, *The International Responsibility of States for Denial of Justice* (Longman, Green & Co., London 1938) 104, 181; G Goodwin-Gill, *International Law and the Movement of Persons between States* (Clarendon Press, Oxford 1878) 58.

rule,[5] consideration of sources should have predominance in international law analysis.[6] The most thoughtful analysis of the law-making of the international standard in the post-Second World War legal writings (and a clearer explanation either in earlier or later scholarship is not immediately obvious) was provided by Robert Jennings in his research on State contracts. After describing the standard from the *LFH Neer and Pauline Neer* (*Neer*) case as crude and unseemly, he stated that

> The international standard thus means little more in practice than the assertion of the primacy of international over municipal law; though this principle is, of course, fundamental. Still the time has probably come to concentrate on the development of specific rules of law for particular situations rather than to hark back to an obsolete controversy over the most general of principles.[7]

In his later Hague Academy lecture, Jennings restated the argument regarding the law on the treatment of aliens more broadly, adding that 'of course the qualification "minimum" means the least permissible, and not the least possible'. From the three constitutive terms of the 'international minimum standard', 'international' and 'minimum' serve as a doubly superfluous confirmation of the preliminary point that the rule in question is an international obligation, and 'standard' might at most hint at the vagueness and crudeness of its original content.[8] None of these terms add anything to the elaboration of the content of the standard that must still be hammered out in the traditional manner and in the familiar process of international law-making by custom, treaties, and general principles.[9]

[5] C de Visscher, 'Cours général de principes du Droit international public' (1954) 86 Recueil des Cours de l'Académie de Droit International 449, 507–8; cf R Kolb, *La bonne foi en droit international public* (Presses Universitaires de France, Paris 2000) 134–43.

[6] E Riedel, 'Standards and Sources. Farewell to the Exclusivity of the Sources Triad in International Law?' (1991) 2 EJIL 58, 84.

[7] RY Jennings, 'State Contracts in International Law' (1961) 37 BYIL 156, 181; cf Freeman *Denial of Justice* (n 4) 582.

[8] RY Jennings, 'General Course on Principles of Public International Law' (1967) 121 Recueil des Cours de l'Académie de Droit International 323, 487; cf E Borchard, 'The "Minimum Standard" of the Treatment of Aliens' (1939) 33 ASIL Proceedings 51, 61–3; AH Roth, *The Minimum Standard of International Law Applied to Aliens* (AW Sijthoff's Uitgeversmaatschappij N.V., Leiden 1949) 121. In the Hague Conference for the Codification of International Law, Piip on behalf of Estonia praised the decision to 'fix[] the State's responsibility for the acts of the judicial branch of the Government . . . in order to guarantee a minimum international standard of rights in the modern world', S Rosenne (ed), *League of Nations Conference for the Codification of International Law [1930]* (Volume IV, Oceana Publications, Inc., New York 1975) 1539. Vidal on behalf of Spain referred to obligations on denial of justice as 'the minimum guarantees which are indispensable for the proper administration of justice', ibid 1541.

[9] In the *ELSI* case, the ICJ confirmed the synonymous nature of minimum standards and international obligations by saying that the treaty rule on 'full protection and security required by international law' meant that 'in short the "protection and security" must conform to the minimum international standard', *Elettronica Sicula S.p.A. (ELSI) (US v Italy)* [1989] ICJ Rep 15 [111]. This position is confirmed by the pleadings of States in the PCIJ and the ICJ, presumably engaged in with the greatest consideration of the legal position. States that explicitly invoke the international minimum standard discuss it in terms of traditional methods of application of customary law and general principles. In the *Certain German Interests* case, Germany referred to 'normal requirements regarding foreigners that international law imposes on all States of the community of civilised States', *Certain German Interests in Polish Upper Silesia (Germany v Poland)* PCIJ Rep Series C No 11 166 (Kaufmann) (author's translation), also 168, explained in the particular instance by leading writings on the law of expropriation, ibid 168–70. In the *Oscar Chinn* case, Beckett on behalf of the UK argued for 'a minimum of rights which must be accorded to foreigners in all cases', and supported this argument by referring to State practice and international cases on property rights, *Oscar Chinn (UK v Belgium)* PCIJ Rep Series C No 75 307–8. De Ruelle on behalf of Belgium distinguished these instances of practice and case law, ibid 289–92. In the *Phosphates* case, Italy stated that in cases where only common international law imposes obligations regarding the treatment of aliens, 'the existing judicial protection is considered adequate when it responds to requirements of a certain international *standard*', *Phosphates in Morocco (Italy v France)* PCIJ Rep Series C No 85 1207 (Ago) (author's translation) (emphasis in the original). In the *Ambatielos* case, the UK referred to 'the minimum standard of justice required by international law', *Ambatielos case (Greece v UK)* ICJ Pleadings 281, 317 (Beckett), 'a certain basic standard of justice' and 'the minimum standard of law and justice required by international law' to describe the obligations in general international law, ibid, respectively 415 and 479 (Fitzmaurice). In the *Certain Norwegian Loans* case, Norway argued that '"international" or "minimum standard" cannot be defined *a priori*. This is a notion that on its own is vague and that cannot be specified otherwise than in light of State practice. . . . The "minimum standard" results from the attitude taken by the community of civilised States', *Certain Norwegian Loans (France v Norway)* ICJ Pleadings Volume I 484 [104] (Rejoinder of Norway) (author's translation), see generally 290 [133] (Counter-Memorial of Norway), 480 [96]–[152] (Rejoinder of Norway), Volume II 132–3, 139–40 (Bourquin), 141–54 (Evensen). France did not object to the methodology *per se*, but distinguished it by saying that the international standard was only applicable to aliens established in the host State, ibid 182 (Gross). In the *Barcelona Traction* case, where parties famously engaged in a very extensive review of sources, Belgium argued that 'the obligation to provide administration of justice to resident aliens responds to a minimum standard'—*Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* ICJ Pleadings Volume VIII 45 (Rolin) (author's translation)—and invoked 'minimum standards of fairness and justice that international law imposes', ibid 82 (Mann); see also ibid Volume I 164 fn 3 (Memorial). Spain used similar terms: ibid Volume III 790 (Guggenheim), ibid Volume IX 8 (Castro-Rial), 82 (Guggenheim), 695 (Ago), ibid Volume X 656 (Ago). In the *Tehran* case, the US argued that, even leaving aside diplomatic and consular law, 'the treatment which has been meted out to them [hostages] would nonetheless be far below the minimum standard of treatment which is due to *all* aliens', *United States Diplomatic and Consular Staff in Tehran (US v Iran)* ICJ Pleadings 302 (Owen) (emphasis in the original), see further references to the 'long-established and well-developed body of international law concerning the treatment of aliens', ibid 180 (Memorial of the US), generally 179–81. In the *ELSI* case, the US referred to 'international minimum standard(s)' relating to due process of law in takings, and elaborated the content by reference to treaties, cases, and legal writings, *Elettronica Sicula S.p.A. (ELSI) (US v Italy)* ICJ Pleadings Volume I 93 fns 1–2 (Memorial). Italy argued that in relation to treaty rules on discrimination, there did not exist 'a minimum standard of investment protection in accordance with general international law', *Elettronica Sicula S.p.A. (ELSI) (US v Italy)* ICJ Pleadings Volume III 221 (Capotorti) (author's translation). In the *Diallo* case, Guinea did not want to engage in a debate about international minimum standard because international law in any event prohibited mistreatment of aliens, *Ahmadou Sadio Diallo (Guinea v DRC)* Memorial of Guinea, 23 March 2001 <http://www.icj-cij.org/docket/files/103/13496.pdf> [3.3]. See also Iran's argument, calling for proof that 'there exists at the present day a rule of international law, in accordance with the practice of civilized nations, which prohibits States from claiming that their nationalization laws should take precedence over the rights individual foreigners derived from concessionary instruments', *Anglo-Iranian Oil Co. (UK v Iran)* ICJ Pleadings 495 (Rolin) (author's translation); cf *Anglo-Iranian Oil Co. (UK v Iran)* (Jurisdiction) [1952] ICJ Rep 93, Dissenting Opinion of Judge Levi Carneiro 151, 160.

[10] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 arts 31–3.

[11] *See* recently *Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ Rep 14 [64].

[12] I Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn Manchester University Press, Manchester 1984) Ch V; P Reuter, *Introduction au droit des traites* (3rd edn PUF, Paris 1995) 87–91; R Gardiner, *Treaty Interpretation* (OUP, Oxford 2008); ME Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff, Leiden 2009) 415–64; A Gourgourinis, 'The Distinction between Interpretation and Application of Norms in International Adjudication' (2011) 2 J Intl Dispute Settlement 31; J-M Sorel and V Bore-Eveno, 'Article 31 (1969)' in O Corten and P Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary* (OUP, Oxford 2011); Y le Bouthillier, 'Article 32 (1969)' in O Corten and P Klein, ibid; A Papaux, 'Article 33 (1969)' in O Corten and P Klein, ibid.

Second, the development of the international minimum standard has to be assessed against the benchmark of rules on creation, change, application, and termination of the particular type of rules of international law. If the relevant rules are treaty rules, one has to rely upon rules of interpretation to identify their meaning, as expressed in the Vienna Convention on the Law of Treaties (VCLT)[10] and reflected in customary law.[11] There is a considerable number of literature and judicial decisions that one can draw upon in this regard, both regarding interpretation in general[12] and interpretation of investment

protection treaties in particular.[13] If the relevant rules are customary rules, one has to rely on State practice and *opinio juris* to identify their existence and content.[14] State practice and *opinio juris* regarding the traditional international minimum standard may be searched in diplomatic statements and protests in collections of State practice,[15] pleadings in international courts (particularly the PCIJ[16] and the ICJ),[17] as well as statements at international conferences.[18] In contemporary international law, where investment protection disputes are largely settled before investment treaty Tribunals, pleadings by States are the clearest example of State practice.[19] General principles would require an identification of the commonalities of domestic law[20] as well as a

[13] C McLachlan, 'Investment Treaties and General International Law' (2008) 57 ICLQ 361; TW Waelde, 'Interpreting Investment Treaties: Experience and Examples' in C Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP, Oxford 2009); A Gourgourinis, '*Lex Specialis* in WTO and Investment Protection Law' (2010) 53 German Ybk Intl L 579; M Paparinskis, 'Investment Treaty Interpretation and Customary Law: Preliminary Remarks' in C Brown and K Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, Cambridge 2011); M Paparinskis, 'Sources of Law and Arbitral Interpretations of *Pari Materia* Investment Protection Rules' in OK Fauchald and A Nollkaemper (eds), *The Practice of International and Nationals Courts and the (De-)Fragmentation of International Law* (Hart Publishing, Oxford 2012).

[14] M Akehurst, 'Custom as a Source of International Law' (1974–1975) 47 BYIL 1; M Mendelson, 'The Formation of Customary International Law' (1998) 272 Recueil des Cours de l'Académie de Droit International 155; A Pellet, 'Article 38' in A Zimmermann, C Tomuschat, and K Oellers-Frahm (eds), *The Statute of the International Court of Justice: A Commentary* (OUP, Oxford 2006) 748–64.

[15] US practice: *Digest of the Published Opinions of the Attorneys-General, and of the Leading Decisions of the Federal Courts, with Reference to International Law, Treaties, and Kindred Subjects* (Government Printing Office, Washington 1877); F Wharton, *A Digest of the International Law of the United States, Taken from Documents Issued by Presidents and Secretaries of State, and From Decisions of Federal Courts and Opinions of Attorney-General* (Volume II, 2nd edn Government Printing Office, Washington 1887) 490–516; JB Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party* (Government Printing Office, Washington 1898) 3073–664; JB Moore, *A Digest of International Law: As Embodied in Diplomatic Discussions, Treaties and Other International Agreements, International Awards, the Decisions of Municipal Law, and the Writings of Jurists* (Volume IV, Government Printing Office, Washington 1906) Ch XIII; MM Whiteman, *Damages in International Law* (Government Printing Office, Washington 1937); G Hackworth, *Digest of International Law* (Volume 3, Government Printing Office, Washington 1942) 562–630–640, 652–90, 705–17; MM Whiteman, *Digest of International Law* (Volume 8, Government Printing Office, Washington 1967) Ch XXIII; *Digest of United States Practice in International Law* (Volumes 1–8, Department of State Publications, Washington 1973–1980) Ch 9; M Nash, *Cumulative Digest of United States Practice in International Law* (Volume 2, 1981–1989, Office of the Legal Advisor, Department of State, Washington 1994) Ch 9; *Digest of United States Practice in International Law* (International Law Institute, Washington 1989–2009) <http://www.state.gov/s/l/c8183.htm> Ch 8. UK practice: C Parry (ed), *A British Digest of International Law* (Part 6, Stevens & Sons, London 1965) Ch 16. French practice: A-C Kiss, *Répetertoire de la pratique française en matière de droit international public* (Tome IV, Centre National de la Recherche Scientifique, Paris 1962).

[16] *Mavrommatis Palestine Concessions (Greece v UK)* PCIJ Series C No 5/1; *Certain German Interests* Pleadings (n 9); *Oscar Chinn* Pleadings (n 9); *Phosphates* Pleadings (n 9); *The 'Société Commerciale de Belgique' (Belgium v Greece)* PCIJ Series C No 87.

[17] *Franco-Egyptian Case Concerning the Protection of French Nationals and Protected Persons in Egypt (France v Egypt)* ICJ Pleadings; *Ambatielos* Pleadings (n 9); *Anglo-Iranian Oil Co.* Pleadings (n 9); *Barcelona Traction* Pleadings (n 9); *ELSI* Pleadings (n 9); *Diallo* Pleadings (n 9).

[18] Particularly the 1930 Hague Conference for the Codification of International Law, S Rosenne (ed), *League of Nations Conference for the Codification of International Law [1930]* (Volume II, Oceana Publications, Inc., New York 1975); S Rosenne (ed), *League of Nations Conference for the Codification of International Law [1930]* (Volume IV, Oceana Publications, Inc., New York 1975).

[19] A Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (2010) 104 American Journal of International Law 179, 218 fn 183.

[20] JP Bullington, 'Problems of International Law in the Mexican Constitution of 1917' (1927) 21 AJIL 685, 688–94; FA Mann, 'Outlines of a History of Expropriation' (1959) 75 LQR 188, 219 fn 43; FA Mann, 'State Contracts and State Responsibility' (1960) 54 AJIL 572, 583; S Schill, 'International Investment Law and Comparative Public Law—An Introduction' in S Schill (ed), *International Investment Law and Comparative Public Law* (OUP, Oxford 2010) 26–31.

dehydration of domestic rules from their domestic peculiarities and integration in the international legal order.[21] Judgments of international courts and legal writings may authoritatively and accurately reflect the content of rules of international law, representing one of the storehouses[22] from which the content of rules can be extracted.[23] The awards of the Tribunals and Commissions of the nineteenth century may be found in the digests of State practice,[24] while the more recent arbitral awards are in most cases conveniently collected in the Reports of International Arbitral Awards.[25] The judgments of the PCIJ, ICJ,[26] IUSCT, and ICSID and non-ICSID arbitral Tribunals provide the more recent jurisprudence on the matter. Judgments may also be adopted and invoked in subsequent State practice. In all these respects, elaboration and analysis of the international standard goes with the grain of traditional international law analysis and does not present any particular challenges.

Third, some aspects of the development of the international standard raise more complex questions. Some of those are not directly relevant to the argument made here. The NIEO critique in UN GA Resolutions of the rules on protection of foreign investments and particularly compensation for expropriation[27] raised the question about the relevance of Resolutions for international law-making.[28] However, the focus on issues of compensation left international minimum standard (among other things) unexplored, and the possible implication regarding the minimum standard have not been invoked by States in an arbitral or treaty-making context. Another traditionally contested question relates to the contribution that investment treaty

[21] P Weil, 'Le droit international en quête de son identité: Cours général de droit international public' (1992) 237 Recueil des Cours de l'Académie de Droit International 9, 145–6; see generally H Lauterpacht, *Private Law Sources and Analogies of International Law* (Longmans, Green & Co. Ltd., London 1927); A McNair, 'The General Principles of Law Recognised by Civilized Nations' (1957) 33 BYIL 1; B Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Grotius Publications Limited, Cambridge 1987); HWA Thirlway, 'Concepts, Principles, Rules and Analogies: International and Municipal Legal Reasoning' (2002) 294 Recueil des Cours de l'Académie de Droit International 265; Pellet 'Article 38' (n 14) 764–72.

[22] S Rosenne, *The Law and Procedure of the International Court, 1920–2005* (Leiden, Martinus Nijhoff, The Hague 2006) 1551; cf G Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law' in *Symbolae Verzijl* (Martinus Nijhoff, The Hague 1958) 170–1.

[23] H Lauterpacht, *The Development of International Law by the Permanent Court of International Justice* (Longmans, London 1934); H Lauterpacht, *The Development of International Law by the International Court* (Stevens & Sons Limited, London 1958); Pellet 'Article 38' (n 14); G Guillaume, 'Can Arbitral Awards Constitute a Source of International Law under Article 38 of the Statute of the International Court of Justice' in Y Banifetami (ed), *Precedent in International Arbitration* (New York, Juris Publishing, Inc. 2008); C Tams and A Tzanakopoulos, '*Barcelona Traction* at 40: The ICJ as an Agent of Legal Development' (2010) 23 Leiden J Intl L 781.

[24] See n 15.

[25] Although see BL Hunt, *American and Panamanian General Claims Arbitration* (Government Printing Office, Washington 1934); FK Nielsen, *American–Turkish Claims Settlement* (Government Printing Office, Washington 1937).

[26] See text following at nn 51–7.

[27] Declaration on the Establishment of a New International Economic Order, UNGA Res 3201 (S-VI) (1 May 1974), UN Doc A/RES/S-6/3201 art 4(e); Charter of Economic Rights and Duties of States, UNGA Res 3281 (XXIX) (12 December 1974), UN Doc A/RES/29/3281 art 2(2)(c).

[28] Generally B Sloan, 'General Assembly Resolutions Revisited (Forty Years Later)' (1987) 58 BYIL 39; R Higgins, 'The United Nations and Law-Making: The Political Organs' in R Higgins, *Themes and Theories: Selected Speeches, Essays, and Writings in International Law* (Volume I, OUP, Oxford 2009).

practice might make to customary law.[29] In the *Mondev v US* (*Mondev*) case, the Tribunal referred to

> current international law, whose content is shaped by the conclusion of more than two thousand bilateral investment treaties and many treaties of friendship and commerce. These treaties largely and concordantly provide for 'fair and equitable treatment' of, and for 'full protection and security' for, the foreign investor and his investments.[30]

The question as to whether investment treaties can in principle contribute to customary law, as suggested by *Mondev*, will be largely left open. One of the main claims that will be further made is that 'fair and equitable treatment' is not a new term of art in treaty law, but a term referring to customary law. In light of this argument, the question about the role of BITs in customary law-making does not arise: even widespread and consistent repetition of a rule with a legal significance of a *renvoi* does not contribute to the content of the rule to which *renvoi* is made.

Other issues of sources and interpretation may have greater relevance. The role of error in customary law-making raises the question about the impact of State practice and *opinio juris* based on an inaccurate perception of existing law. States have invoked the US–Mexican General Claims Commission's award in *Neer* as a statement of the traditional position regarding general mistreatment of property of aliens,[31] even though the contemporary observers saw it as relating to procedural conduct, and in substantive terms (at most) to conduct rising to the level of expropriations.[32] The technical response is that State practice based on an arguably erroneous premise is just as capable of contributing to customary law as well-informed practice, even if it would be counted against the objectively existing rather than erroneously assumed legal benchmark.[33] In the particular instance, the general assumptions of the States suggest that the contemporary law may sanction mistreatment of property even in sub-exropriatory context, even though the traditional focus on procedural breaches remains paramount.

In terms of treaty interpretation, the mixed nature of investor–State arbitration raises the question about the operation of subsequent agreement and practice in terms of Article 31(3)(a) and (b) regarding treaties when only one of the disputing parties is simultaneously a law-maker and can contribute to interpretative authorities.[34] The decentralized form of investment protection rules also raises a different challenge of justifying reliance on arbitral elaborations in earlier cases of *pari materia* rules from other treaties as legally relevant for interpreting a particular treaty rule. Different solutions have been suggested for explaining this practice: to consider such practice permissible under the existing rules of interpretation;[35] to accept *pari materia* decisions as falling under an extended reading of Article 31(3)(b)[36] or Article 32 of the VCLT;[37] or indeed to move beyond the language of sources and interpretation and apply a concept of *jurisprudence constante*,[38] or to infer an obligation to follow consistent decisions.[39]

The general position taken is that while the form of law-making and dispute settlement in investment law does raise some not entirely mundane challenges, they can and should be resolved within the boundaries of traditional rules on sources and interpretation, to the extent that it cannot be demonstrated that the latter have (been) changed. VCLT rules of interpretation are capable of application in the context of mixed dispute settlement, and theoretical and practical implications of individual access to international courts were discussed already during the early stages of the elaboration of the international standard.[40] These issues are discussed in greater detail in Chapters 5 and 6. In particular, it is suggested that the *prima facie* impossibility of explaining within strictly treaty law terms the general tendency of Tribunals to interpret treaty rules on fair and equitable treatment by reference to principles and rules identified in earlier awards supports the view that Tribunals are by implication applying customary law.[41]

In terms of general principles, some recent legal writings have called for attributing greater relevance to (comparative) analysis of domestic laws. Proceeding from the premise that it is unlikely that States would wish to extend the substantive BIT standards unduly beyond comparative law benchmarks, Santiago Montt has presented an argument for fair and equitable treatment from the perspective of global administrative law.[42] From a somewhat different angle, Stephan Schill has explained fair and equitable treatment as an embodiment of the rule of law reflected in domestic public laws.[43] While these arguments are discussed in Chapter 6 and Part III, a few reasons for caution will be noted here. As a starting point, there seems to be a degree of conflation between the *legal* arguments for establishing content of treaty obligations and the *policy* arguments for criticizing particular interpretations, suggesting particular changes or developments, or making general jurisprudential points. Discussions of fair and equitable treatment as rule of law[44] or as an embodiment of justice might more properly belong to the latter

[29] RR Baxter, 'Treaties and Custom' (1970) 129 Recueil des Cours de l'Académie de Droit International 25, 88–9; Mendelson 'Formation' (n 14) 329–30; AF Lowenfeld, 'Investment Agreements and International Law' (2003–2004) 42 Columbia J Transnational L 123; SM Schwebel, 'The Influence of Bilateral Investment Treaties on Customary International Law' (2004) 98 ASIL Proceedings 27; JE Alvarez, 'A BIT on Custom' (2010) 42 NYU J Intl L Politics 17.

[30] *Mondev v US*, ICSID Additional Facility Case no ARB(AF)/99/2, Award, 11 October 2002 (2003) 42 ILM 85 [125].

[31] *LFH Neer and Pauline Neer (US v Mexico)* (1926) 4 RIAA 60, 61–2.

[32] JF Williams, 'International Law and the Property of Aliens' (1928) 9 BYIL 1, 29; by implication AP Fachiri, 'International Law and the Property of Aliens' (1929) 10 BYIL 32, 33.

[33] M Byers, *Custom, Power and the Power of Rules* (CUP, Cambridge 1999) 110–20.

[34] Roberts 'Power and Persuasion' (n 19).

[35] S Schill, *The Multilateralization of International Investment Law* (CUP, Cambridge 2009) 275.

[36] Z Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (2003) 74 BYIL 151, 168.

[37] *Canadian Cattlemen for Free Trade v United States of America*, UNCITRAL Case, Award on Jurisdiction, 28 January 2008 [49]–[51], [164]–[169].

[38] *SGS Société Générale de Surveillance S.A. v Philippines*, ICSID Cases no ARB/02/6 and ARB/04/08, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004 129 ILR 445 [97]; AK Bjorklund, 'Investment Treaty Arbitral Decisions as *Jurisprudence Constante*' in CB Picker and others (eds), *International Economic Law: State and Future of the Discipline* (Hart Publishing, Oxford 2008).

[39] *Saipem S.p.A. v Bangladesh*, ICSID Case no ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007 (2007) 22 ICSID Rev—Foreign Investment L J 100 [67]; G Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse?' (2007) 24 J Intl Arbitration 357, 377.

[40] *See* n 87.

[41] *See* recently *Alpha Projektholding GmbH v Ukraine*, ICSID Case no ARB/07/16, Award, 8 November 2010 [420]; *Total SA v Argentina*, ICSID Case no ARB/04/1, Decision on Liability, 21 December 2010 [109]–[111]; *Sergei Paushok, CJSC Golden East Company, CJSC Vostokneftegaz Company v Mongolia*, UNCITRAL Case, Award on Jurisdiction and Liability, 28 April 2011 [253]; *Impregilo S.p.A. v Argentina*, ICSID Case no ARB/07/17, Award, 21 June 2011 [285]–[294]; *El Paso Energy International Company v Argentina*, ICSID Case no ARB/03/15, Award, 31 October 2011 [341]–[349]; *Spyridon Roussalis v Romania*, ICSID Case no ARB/06/1, Award, 7 December 2011 [314]–[322].

[42] S Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (Hart Publishing, Oxford 2009) Chs 4, 6.

[43] S Schill, 'Fair and Equitable Treatment, the Rule of Law and Comparative Public Law' in S Schill (ed), *International Investment Law and Comparative Public Law* (OUP, Oxford 2010).

[44] Schill ibid; KJ Vandevelde, 'A Unified Theory of Fair and Equitable Treatment' (2010) 43 New York U J Intl L Politics 43.

type of argument:[45] while there is nothing to preclude States from restating jurisprudential propositions as legal obligations, this would need to be demonstrated by the application of the traditional methodology of sources and interpretation. Similarities between doctrines of legal or political philosophy and patterns of arbitral decisions do not seem to be sufficient to infer an existing or necessary legal relationship.

To the extent that the argument is made in legal terms, it has to fulfil the requirements of the traditional methodology: examine diverse approaches in different legal systems (not limited to the few conveniently accessible traditional claimant States);[46] identify whether sufficient similarities exist for generalization;[47] extrapolate the principle; consider the possibility and manner of expressing it in the very different international legal context; and finally, demonstrate its relevance and role for the interpretation of treaty law. While there is no reason why such a legal argument could not be successfully made, the not entirely unfounded criticism of the traditional standard as a crude restatement on the international level of constitutional law of certain claimant States would require each methodological step to be made with particular diligence. It is not obvious that this can be done or has been done in existing practice.

II. Historical Legal Background

Five issues set the broader historical legal context within which the international minimum standard was elaborated in the late nineteenth and early twentieth centuries. It may be convenient to note them first before addressing the standard itself. First, the international standard for the treatment of aliens operated as an element of the standard of civilization[48] in the debate about civilized nations and the existence and recognition of statehood in the second half of the nineteenth century.[49] The rules on the treatment of aliens existed and operated simultaneously as obligations that could be breached and elaborated within the international legal order, and as a benchmark for the entitlement to be considered a fully fledged subject of this legal order in the first place. The place occupied in the broader legal structures suggests an almost inescapable potential for controversy.

Second, a related legal phenomenon was the variety of legal techniques through which States could protect the rights and interests of their nationals abroad. In his hugely influential 1910 speech, 'The Basis of Protection of Citizens Residing Abroad', Elihu Root set out the premises underlying different approaches to the protection of nationals: if

[45] R Kläger, *Fair and Equitable Treatment in International Investment Law* (CUP, Cambtidge 2011) Ch 6.

[46] Schill 'International Investment Law and Comparative Public Law—An Introduction' (n 20) 29–31.

[47] At least the analysis contemporaneous to the elaboration of the traditional standard failed to find such similarities, Bullington 'Problems of International Law' (n 20) 688–94.

[48] AP Higgins (ed), *Hall's Treatise on International Law* (8th edn Clarendon Press, Oxford 1924) 59–60; G Schwarzenberger, 'The Standard of Civilisation in International Law' (1955) 8 Current Legal Problems 212, 224–9; GW Gong, *The Standard of 'Civilization' in International Society* (Clarendon Press, Oxford 1984) 14–21; A Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40 Harvard J Intl L 1, 52–4.

[49] J Lorimer, *The Institutes of the Law of Nations* (Volume I, William Blackwood and Sons, Edinburgh and London 1883) 104–33; H Lauterpacht, *Recognition in International Law* (CUP, Cambridge 1947) 31–2; M Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (CUP, Cambridge 2001) 132–6; A Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP, Cambridge 2004) 52–65; G Simpson, *Great Powers and Outlaw States* (CUP, Cambridge 2004) 232–47; J Crawford, *The Creation of States in International Law* (2nd edn Clarendon Press, Oxford 2006) 14–16.

control by the State was inadequate for the preservation of order, direct military intervention was the custom; if 'methods of administering justice are very greatly at variance with the methods' in civilized States, extraterritorial consular jurisdiction treaties were concluded; and in cases where order and system of justice were generally maintained, the international standard applied.[50] The case law of the PCIJ and the ICJ on the issue illustrates the variety of ways in which rules on the treatment of aliens may be expressed. The cases brought before the Court include claims about the treatment of aliens in colonies,[51] protectorates,[52] League of Nations Mandates,[53] and in accordance with peace treaties,[54] as well as claims based on such more traditional causes of action as Friendship, Commerce and Navigation (FCN) Treaties,[55] and customary law.[56] While the lines between different legal settings could be drawn only in a rather fine manner,[57] the practice and decisions with greater contemporary relevance mostly developed in the latter type of cases, usually but not exclusively in disputes between the US and European States on the one hand, and the Latin American States on the other hand.[58]

Third, another related phenomenon was the spectrum of different methods of implementation of responsibility, hinted at by the confidence with which Root talked about direct military intervention. Classical international law permitted forcible reprisals, 'such injurious and otherwise internationally illegal acts of a State against another as are exceptionally permitted for the purpose of compelling the latter to consent to a satisfactory settlement of a difference created by its own delinquency'.[59] These practices had ancient origins and were historically linked to the protection of nationals.[60] Even before the

[50] E Root, 'The Basis of Protection to Citizens Residing Abroad' (1910) 4 ASIL Proceedings 16, 19–21; similarly J Westlake, *Chapters on the Principles of International Law* (CUP, Cambridge 1894) 101–2. In Wharton's 1887 *Digest*, relief and protection of citizens abroad were listed as the first exception to the general rule of non-intervention, 2 Wharton Digest (n 15) 187.

[51] *Oscar Chinn (UK v Belgium)* [1934] PCIJ Rep Series A/B No 63 21–6.

[52] *Phosphates in Morocco (Italy v France)* (Preliminary Objections) [1938] PCIJ Rep Series A/B No 74 12; R Higgins, 'Natural Resources in the Case Law of the International Court' in A Boyle and D Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (OUP, Oxford 1999) 93–4.

[53] *Mavrommatis Palestine Concessions (Greece v UK)* (Jurisdiction) [1924] PCIJ Rep Series A No 2, 11–12; *Mavrommatis Jerusalem Concessions (Greece v UK)* [1925] PCIJ Rep Series A No 5 13; Higgins 'Natural Resources' (n 52) 88–93.

[54] *Certain German Interests in Polish Upper Silesia (Germany v Poland)* [1926] PCIJ Rep Series A No 7, 19–35.

[55] *Ambatielos case (Greece v UK)* (Jurisdiction) [1952] ICJ Rep 28, 39–45; *Anglo-Iranian Oil Co. (UK v Iran)* (Jurisdiction) [1952] ICJ Rep 93, 107–10; *Ambatielos case (Greece v UK)* (Merits: Obligation to Arbitrate) [1953] ICJ Rep 10, 19–23; *ELSI* (n 9).

[56] *Phosphates in Morocco* Judgment (n 52) 13–16; *Certain Norwegian Loans (France v Norway)* [1957] ICJ Rep 9; *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Preliminary Objections) [1964] ICJ Rep 6, 46; *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* [1970] ICJ Rep 3, 19–23, [33], [87]; *Ahmadou Sadio Diallo (Guinea v DRC)* (Preliminary Objections) [2007] ICJ Rep 582. Customary law rules could be considered as obligations separate from treaty rules, *Oscar Chinn* Judgment (n 51) 26–7, or as obligations to which treaty rules could make a reference, *Certain German Interests* (n 54) 21–2; *Ambatielos* (Merits) (n 55) 21–2.

[57] The *Anglo-Iranian Oil Co.* case illustrates the variety of legal instruments addressing the treatment of aliens (investors) in Persia (Iran), including FCN treaties, (n 55) 108; capitulation treaties, ibid 105; instruments replacing capitulation treaties, ibid 100; rules of general international law, ibid 97, and contracts with foreign investors, ibid 112.

[58] van Harten *Investment Arbitration Treaty* (n 1) 13–15; Montt *State Liability* (n 42) Ch 1; M Sornarajah, *The International Law on Foreign Investment* (3rd edn CUP, Cambridge 2010) 20–1.

[59] L Oppenheim, *International Law* (Volume II: War and Neutrality, Longmans, Green & Co., London 1905) 34, *see* 34–42; GS Baker (ed), *Halleck's International Law* (4th edn Volume I, Kegam Paul, Trench, Trubner & Co. Ltd, London 1908) 505–16.

[60] See an overview in M Paparinskis, 'Investment Arbitration and the Law of Countermeasures' (2008) 78 BYIL 264, 268–73.

emergence of international law (when only with the benefit of hindsight some embryonic elements of the future international legal order could be detected as emerging),[61] the fourteenth century practices recognized the right of a prince to grant rights of private reprisals to an individual in case of denial of justice by foreign princes.[62] The concept of denial of justice and procedures for invoking reprisals and reviewing their justifiability and scope were described in surprisingly modern terms.[63] The link of denial of justice and reprisals had a lasting impact on legal thinking,[64] leading to extensive analyses of the definition of denial of justice in the classical texts.[65] The main reason appears to be that reprisals, even after the monopolization by the State of the use of military force changed them from public to private,[66] were still considered available only against actions that fell within the concept of denial of justice.[67] To some extent, it may be said that the link between the archaic rules on the treatment of aliens, and the countermeasures mutually reinforced each other and strengthened the law-making arguments that elucidated the broader international standard of treatment regarding the protection of property.[68]

However, in another sense, reprisals very much undermined the argument for developing a sophisticated international standard for the treatment of aliens and their property rights. From the Latin American perspective the procedural aspect was perceived, as the future ICJ Judge Alejandro Álvarez wrote in 1909, to constitute simply the 'use of force, such as the seizure of customs houses, pacific blockades, etc., in order to compel the recognition of claims'. This procedural context influenced the perception of the underlying substantive rules as an attempt by the US and European States to 'assur[e]

[61] M Byers (tr), WG Grewe, *The Epochs of International Law* (Walter de Gruyter, Berlin/New York 2000) Parts 1 and 2.

[62] TE Holland (ed), JL Brierly (tr), G de Legnano, *Tractatus De Bello, De Represaliis et De Duello* (OUP, Oxford 1917) 307–29, esp 324; J Paulsson, *Denial of Justice* (CUP, Cambridge, 2005) 101.

[63] De Legnano *Tractus De Bello* (n 62) 310–13; Freeman *Denial of Justice* (n 4) 13. See Paparinskis 'Investment Arbitration and the Law of Countermeasures' (n 60) 270 fn 26 for an alternative translation of de Legnano even more in line with modern developments.

[64] Y de la Brière, 'Évolution de la doctrine et de la pratique en matière de représailles' (1928) 22 Recueil des Cours de l'Académie de Droit International 241, 251–6; HW Spiegel, 'Origin and Development of Denial of Justice' (1938) 32 AJIL 63, 63–4; Freeman *Denial of Justice* (n 4) 53–67.

[65] De Legnano *Tractus De Bello* (n 62) 324; FW Kelsey (tr), H Grotius, *De jure belli ac pacis libri tres* (Clarendon Press, Oxford 1925) 626–7; CD Fenwick (tr), E de Vattel, *The Law of Nations or the Principles of Natural Law* (Carnegie Institute, Washington 1916) 228–30; RH Dana (ed), *Wheaton's Elements of International Law* (8th edn Sampson Lowe, Son, and Company, London 1866) 369–70; R Phillimore, *Commentaries upon International Law* (Volume 3, 3rd edn Butterworths, London 1885) 19–20; Halleck (n 59) 505–6; E Nys, *Le droit international* (M Weissenbruch, Bruxelles 1912) 266; AP Higgins (ed), *Hall's Treatise on International Law* (8th edn Clarendon Press, Oxford 1924) 59–60.

[66] Ф Мартенс, *Современное международное право цивилизованных народов* (Том II, Типогрфия А. Бенке, Санктпетербург 1905) 506–8; G Clark, 'English Practice with Regard to Reprisals by Private Persons' (1933) 27 AJIL 695, 721–2; F Kalshoven, *Belligerent Reprisals* (AW Sijthoff, Leyden 1971) 1–10.

[67] C de Visscher, 'Le déni de justice en droit international' (1935) 52 Recueil des Cours de l'Académie de Droit International 369, 369–74; EJ de Aréchaga, 'International Responsibility' in M Sorensen (ed), *Manual of Public International Law* (Macmillan, London 1968) 553, 555.

[68] One of the early cases of indirect expropriation was the *Sicilian Sulphur* dispute, where the UK applied reprisals to ensure implementation of responsibility for what it considered to be a treaty breach regarding the treatment of property of its nationals, Great Britain, *State Papers 1839–1840 Volume 28* (Harrison and Sons, London, 1857) 1163–242; *State Papers 1840–1841 Volume 29* (James Ridgway and Sons, London, 1857) 175–204; *State Papers 1841–1842 Volume 30* (James Ridgway and Sons, London, 1858) 111–20; AP Fachiri, 'Expropriation and International Law' (1925) 6 BYIL 159, 163–4. Great Britain relied on the authority of this case regarding the law on the treatment of aliens both in the context of codification and adjudication, see respectively Rosenne *Hague II* (n 18) 551; *Oscar Chinn* Pleadings (n 9) 41 [51]–[57] (Memorial of the UK).

unduly for their citizens who came to those countries a specially privileged situation'.[69] As Robert Jennings later noted, the substance of the law was not necessarily bad law, but the perception of it as a rationalization of European policies at a period of their dominance could not be dismissed.[70] One can certainly admire the sophistication of the 1903–1905 Venezuelan arbitrations: arbitrating *pari materia* disputes against the same respondent in eleven parallel commissions,[71] expressly disagreeing about the most sensitive legal issue of the era,[72] and using different imaginative arguments to harmonize the case law.[73] However, for many States the controversial use of force against Venezuela to compel it to submit disputes to arbitration, probably amounting to war, was a cause of considerable concern.[74] It is therefore not surprising that one of the first exercises in multilateral universal treaty-making to restrict the use of force was directed precisely at reprisals for economic reasons:[75] the 1907 Hague Convention (II) Respecting the Employment of Force for the Recovery of Contract Debts.[76]

Fourth, the existence of the international standard was asserted against the objections of the Calvo Doctrine, so it is important to identify the focus of that argument clearly. Probably largely motivated by the abuse of gunboat diplomacy by the Western home States, the Calvo Doctrine relied on the equality of States to argue that the alien should not be entitled to better substantive or procedural treatment than the nationals

[69] A Álvarez, 'Latin America and International Law' (1909) 3 AJIL 269, 300.

[70] Jennings 'State Contracts' (n 7) 159. For a much-cited criticism of the law on the treatment of investors from this perspective, see *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* [1970] ICJ Rep 3, Separate Opinion of Judge Padilla Nervo 243, 245–7.

[71] Venezuela–US, Belgium, Great Britain (1903–1905) 9 RIAA 111–533; Venezuela–France, Germany, Italy, Mexico, the Netherlands, Spain, Sweden, Norway (1903–1905) 10 RIAA 1–770.

[72] The attribution of State responsibility for the conduct of revolutionaries was perhaps the chief normative concern underlying the Calvo Doctrine, *see* n 90; C Calvo, 'La non-responsabilité des États a raison des pertes et dommages éprouvés par des étrangers en temps de troubles intérieurs ou de guerres civiles' (1869) 1 Revue de droit international 417; C Calvo, *Le Droit International Théorique et Pratique* (Volume III, 5th edn Paris, A Rousseau 1896) 137. Some Commissions attributed the conduct of revolutionaries to the State, *Kummerrow and others (Germany v Venezuela)* (1903) 10 RIAA 369, 390–391; cases referred to in *Acquatella, Bianchi et al. (France v Venezuela)* (1903–1905) 10 RIAA 5, 6; while other Commissions rejected the attribution, *Aroa Mines (Limited) Claim—Supplementary Claim (Great Britain v Venezuela)* (1903) 9 RIAA 402, Opinion of Umpire Plumley 408, 438–41; *JN Henriquez case (Netherlands v Venezuela)* (1903) 10 RIAA 713, 715–17; *Padrón case (Spain v Venezuela)* 10 RIAA 741; *Sambiaggio case (Italy v Venezuela)* (1903) 10 RIAA 499, Opinion of Umpire Ralston 512, 516–17.

[73] Commissions considered the relevance of most-favoured-nation (MFN) clauses, *Sambiaggio* (n 72) 522–3; third-party *pari materia* treaties, *Kummerow* (n 72) 373, 376; *Henriquez* (n 72) 716–17; differences in applicable law, *Guastini case (Italy v Venezuela)* (1902) 10 RIAA 561, 578; correctness of the earlier awards, *Aroa Mines* (n 72) 443.

[74] A Tribunal addressing the implications of the conflict noted 'the war between Germany, Britain and Italy on the one hand and Venezuela on the other hand', *The Venezuelan Preferential case (Germany, Great Britain, Italy v Venezuela)* (1904) 9 RIAA 99; I Brownlie, *International Law and the Use of Force by States* (Clarendon Press, Oxford 1963) 35–6.

[75] Brownlie *Use of Force* (n 74) 24.

[76] Convention (II) concernant la limitation de l'emploi de la force pour le recouvrement de dettes contractuelles (adopted 18 October 1907, entered into force 26 January 1910), *Deuxième conférence internationale de la paix. Actes et documents* (Tome premier, Imprimerie Nationale, La Haye 1907) 620, (tr) JB Scott (ed), *The Hague Conventions and Declarations of 1899 and 1907* (OUP, New York 1915) 89. The Convention was approved by thirty-nine States voting in favour and five abstaining, *Deuxième Conférence Internationale de la Paix: Actes et documents* (Tome premier, Imprimerie Nationale, la Haye 1907) 336–8. See AS Hershey, 'The Calvo and Drago Doctrines' (1907) 1 AJIL 26; LM Drago, 'State Loans in Their Relation to International Policy' (1907) 1 AJIL 692; JB Scott, 'The Work of the Second Hague Peace Conference' (1908) 2 AJIL 1, 15; H Accioly, *Traité de droit international public* (Recueil Sirey, Paris, 1940) 290–3.

of the host State.[77] To employ modern terminology, Calvo made two points:[78] first, as a matter of invocation of State responsibility, home States were not entitled to engage in diplomatic protection of their nationals; second, as a matter of primary rules, the obligations regarding treatment of aliens could not require anything different than treatment of nationals.[79] While described as rejecting international law,[80] both arguments are in principle quite unremarkable. They will be addressed in turn.

The first proposition relates to restrictions of diplomatic protection claiming damages in general and forcible reprisals in particular for the purpose of implementation of responsibility for internationally wrongful acts injuring aliens.[81] There is nothing in the argument that would go against the grain of the international legal order. Invocation and implementation of responsibility is a dispositive right that a State is entitled to choose to exercise or not,[82] and a State can necessarily suspend, waive, or otherwise limit this right's exercise in accordance with international law.[83] There is no problem of principle

[77] E Borchard, *Diplomatic Protection of Citizens Abroad* (The Banks Law Publishing Co., New York 1915) 792–4; Freeman *Denial of Justice* (n 4) 504–7; Roth *International Law Applied to Aliens* (n 8) 65–80; DR Shea, *The Calvo Clause* (Minneapolis, University of Minnesota Press 1955) 19–32; OM Garibaldi, 'Carlos Calvo Redivivus: The Rediscovery of Calvo Doctrines in the Era of Investment Treaties' (2006) 3 Transnational Dispute Management 4–14.

[78] It has been suggested that the intellectual origins of the argument are properly attributable to Andrés Bello, FG Dawson, 'The Influence of Andres Bello on Latin-American Perceptions of Non-Intervention and State Responsibility' (1986) 57 BYIL 253, particularly 296–303; Montt *State Liability* (n 42) 41–5. In principle, if State practice and its reflections in cases and legal writings have unanimously proceeded on an erroneous premise regarding the origins of a particular proposition, for legal purposes it should be the generally shared and accepted practice that forms the benchmark of analysis, even if it is based on a historical error. It seems that Calvo's writings have been treated in such a manner and will therefore be accepted as expressive of the argument, leaving open his originality and the degree of borrowing from earlier authors, see Mr Fisch, Secretary of State, to Mr Foster, minister to Mexico (1873) 2 Wharton Digest 579, 6 Moore Digest 975, 977; 6 Moore Digest (n 15) 978–80; Borchard *Diplomatic Protection* (n 77) 792–4; 3 Hackworth Digest (n 15) 635; 1 Digest of US Practice (n 15) 334; Mr Kissinger, Secretary of State, speech in Mexico City (1974) 2 Digest of US Practice 417; Mr Kubisch, Assistant Secretary of State, statement in Mexico City (1974) 2 Digest of US Practice 659, 660; Mr Moon, Alternate US Representative, statement to the Permanent Council of the OAS (1976) 3 Digest of US practice 434, 435; Nash Cumulative Digest (n 15) 2405–8. When Belgium argued against the international standard before the PCIJ, it invoked Nys' citation of Calvo, *Oscar Chinn* Pleadings (n 9) 285 (de Ruelle on behalf of Belgium). In the *Certain Norwegian Loans* case, Norway referred to Calvo as the first representative of the 'national treatment' school of thought, *Norwegian Loans* Pleadings I (n 9) 480 [97] (Counter-Memorial of Norway). Indeed, Bello was invoked by Austro-Hungary precisely to reject the American argument that 'aliens can not (sic) claim more favorable treatment than natives', *Riots at Lattimer* (1897–99) 6 Moore Digest 868, 881 fn b.

[79] Cf W Shan, 'Calvo Doctrine, State Sovereignty and the Changing Landscape of International Investment Law' in W Shan, P Simons, and D Singh (eds), *Redefining Sovereignty in International Economic Law* (Hart Publishing, Oxford 2008) 250–2.

[80] J Goebel, 'The International Responsibility of States for Injuries Sustained by Aliens on Account of Mob Violence, Insurrections and Civil Wars' (1914) 8 AJIL 802, 832; Roth *International Law Applied to Aliens* (n 8) 113–15.

[81] C Calvo, *Le Droit International Théorique et Pratique* (Volume I, 5th edn A. Rousseau, Paris 1896) 350–1.

[82] *Barcelona Traction* Judgment (n 56) [79]. The 2006 International Law Commission's Articles on Diplomatic Protection also recognize diplomatic protection to be a right and only recommend States to consider the possibility of espousal, ILC, 'Draft Articles on Diplomatic Protection with Commentaries' in *Report of the International Law Commission on the Work of its 61st Session,* UN Doc A/61/10 15 art 19(a).

[83] M Paparinskis, 'The Limits of Depoliticisation in Contemporary Investor-State Arbitration' (2010) 3 Select Proceedings Eur Society Intl L 271, 278–9. The question giving rise to actual controversies was whether the injured alien could, in accordance with international law, waive the right to diplomatic protection by contract ('Calvo Clause'); see a recent review of practice in J Dugard, 'Third Report on Diplomatic Protection', UN Doc A/CN.4/523/Add.1. While the Calvo Clause is usually described as conceptually following Calvo's thinking, Borchard *Diplomatic Protection* (n 77) 792; LM

in Calvo's argument. In fact, many aspects of Calvo's arguments have been accepted in subsequent practice. Forcible reprisals were eventually restricted first in some respects by treaty law,[84] and then by the general prohibition on the use of force.[85] States sometimes suspend their rights to engage in diplomatic protection of foreign investments by treaty law.[86] More recently, it has been suggested that investor–State arbitration might exclude diplomatic protection more generally, whether by reason of the necessary alternative nature of proceedings, an opt-out from the inter-State responsibility regime, the *lex specialis* nature of investor arbitration, or application of certain treaty rules by analogy.[87] While Latin American States were unsuccessful in changing general customary law, treaty rules and possibly special customary rules excluding diplomatic protection did exist *inter se*, and sometimes limitations of diplomatic protection were also included in

Summers, 'The Calvo Clause' (1932–1933) 19 Virginia L Rev 459, 464; Freeman *Denial of Justice* (n 4) 469; K Lipstein, 'The Place of the Calvo Clause in International Law' (1945) 22 BYIL 130, 130–1; Dugard, ibid [4]; Shan 'Calvo Doctrine' (n 79) 252; *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua v Argentina*, ICSID Case no ARB/03/19, Decision on Liability, Separate Opinion of Arbitrator Nikken, 30 July 2010 [13], it stands on very different legal premises. For Calvo, there was no right of diplomatic protection in the first place and the alien was to be as much insulated as possible from the international proceedings; for the Calvo Clause, the right of diplomatic protection existed but could be waived, and the alien had enough of an international capacity to do so, *see* a similar point from a slightly different perspective in Jennings 'State Contracts' (n 7) 160–1; 2006 ILC, Articles, (n 82) art 14 Commentary 8. The Calvo Clause might be better described as merely 'destined to prepare the way for the adoption of the Calvo *doctrine*', *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* [1970] ICJ Rep 3, Separate Opinion of Judge Ammoun 286, 294 (emphasis in the original). The discussion of the investor's capacity to contractually waive its right to investor–State arbitrations illustrates the distinct nature of *ab initio* rejection of invocation of responsibility and different techniques of waiving or suspending its exercise, *SGS Société Générale de Surveillance S.A. v Philippines*, ICSID Cases no ARB/02/6 and ARB/04/08, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004 129 ILR 445 [154]; *Aguas del Tunari S.A. v Bolivia*, ICSID Case no ARB/02/03, Decision on Respondent's Objections to Jurisdiction, 21 October 2005 (2005) 20 ICSID Rev—Foreign Investment L J 450 [118]; O Spiermann, 'Individual Rights, State Interests and the Power to Waive ICSID Jurisdiction under Bilateral Investment Treaties' (2004) 20 Arbitration Intl 179.

[84] Nn 75–6.

[85] Charter of the United Nations with the Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS xvi art 2(4); ILC, 'Articles on Responsibility of States for Internationally Wrongful Acts' in *Yearbook of the International Law Commission, 2001, Volume II,* UN Doc A/CN.4/SER.A/2001/Add.1. (Part Two) 26 art 50(1)(a); *Oil Platforms (Iran v US)* (Judgment) [2003] ICJ Rep 161, Dissenting Opinion of Judge Elaraby 290, 294–5; ibid Separate Opinion of Judge Simma 324, 332 fn 19; ibid Separate Opinion of Judge *ad hoc* Rigaux 362 [18]; Brownlie *Use of Force* (n 74) 219–23, 347–9; A Randelzhofer, 'Article 51' in B Simma (ed), *The Charter of United Nations: A Commentary* (Volume I, OUP, Oxford 2002) 794; O Corten, *The Law against War: The Prohibition on the Use of Force in Cotemporary International Law* (Hart Publishing, Oxford 2010) 234–47.

[86] During ICSID arbitration, Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1066) 575 UNTS 159 art 27(1); cf CH Schreuer and others, *The ICSID Convention: A Commentary* (2nd edn CUP, Cambridge 2009) 414–30. During any investor-State arbitration, 1994 Chile Model BIT art 8(6); 1998 Mongolia Model BIT art 8(6); Bolivia Model BIT, *International Investment Instruments: A Compendium* (Volume X, United Nations, New York 2002) 275 art 10(3); 2003 Kenya Model BIT 10(d); 2003 Italy Model BIT art X(5). The view that 'attempts to enforce Calvo Doctrine by treaty were largely unsuccessful' is therefore questionable, if presented in unqualified terms, CF Amerasinghe, *Diplomatic Protection* (OUP, Oxford 2008) 192.

[87] For the latter position, see *Italy et Cuba* (Sentence preliminaire) (2005) [65]; *Italy et Cuba* (Sentence finale) (2008) [141]. For a general discussion and an argument against implied exclusions of diplomatic protection and for plurality in the invocation of State responsibility, see Paparinskis 'Investment Arbitration and the Law of Countermeasures' (n 60) 281–96.

treaties with potential claimant States.[88] In any event, Calvo did not reject the right of diplomatic protection in the most extreme cases of denial of justice.[89] The argument for restricting the exercise of diplomatic protection is not *per se* directed against the existence of any primary rule: the fact that invocation of responsibility in a particular form is unavailable is perfectly neutral regarding the existence of the primary rule itself and international responsibility that is incurred for its breach.

The second proposition relates to the content of the primary rule regarding the treatment of aliens that for the purpose of convenience may be further subdivided into three points. The first sub-point addresses attribution and due diligence: for Calvo, it did not suffice for the establishment of responsibility to show that a national living abroad had been injured; it was necessary 'in addition to prove that the fact that has caused him damage is morally imputable to the State or that that State should have or could have prevented the fact and had voluntarily neglected to do so'.[90] While a contemporary writer would make the same point in slightly different terms by not treating damages as a criterion of responsibility[91] and by distinguishing the secondary rule of attribution and the primary obligation of full protection and security, the rationale of the argument seems impeccable.[92]

The second sub-point relates to the general non-responsibility for measures adopted for public purpose, health measures, and economic measures (like prohibition of exports or establishment or change of customs tariffs). In Calvo's view, individuals could not argue that precautionary measures in cases like fire fighting were premature, useless, or disproportionate.[93] While these propositions do not postulate an excessively favourable primary rule regarding the treatment of aliens, they are presumably still subject to the national treatment caveat and are not out of line with the contemporaneous practice

[88] Recommendation on Claims and Diplomatic Intervention (adopted 18 April 1890), JB Scott (ed), *The International Conferences of American States 1889–1928* (OUP, New York 1931) 45; Convention Relative to the Rights of Aliens (adopted 29 January 1902), ibid 90–1; cf Freeman *Denial of Justice* (n 4) 463–9, 490–6; Dugard 'Third Report' (n 83) [1], [18], [40]. In *Aminoil*, the Tribunal accepted the possibility of special and restrictive rules on compensation *inter se* certain States, *Kuwait v American Independent Oil Company (Aminoil)* (1982) 66 ILR 518 [145].

[89] C Calvo, *Le Droit International Théorique et Pratique* (Volume II, 5th edn A. Rousseau, Paris 1896) 348. The US relied on this passage as an authority for the requirement to exhaust domestic remedies, *Interhandel case (Switzerland v US)* ICJ Pleadings 316 (Preliminary objection).

[90] Calvo III (n 72) 137 (author's translation). The emphasis on attribution reflects the debates about responsibility of States for activities of insurrectionists, Calvo 'La non-responsabilité' (n 72). Calvo's view about the *prima facie* non-attribution was confirmed in case law, *Sambiaggio* (n 72) 516–17, *Affaire des Biens Britanniques au Maroc Espagnol (Royame-Uni c Espagne)* (1925) 2 RIAA 615, 642, and reflects contemporary international law on the issue, 2001 ILC 'Articles' (n 85) art 10. The authors critical of Calvo's arguments do not seem to cite the particular passage that expressly confirms the possibility of international responsibility, nn 77, 80.

[91] 2001 ILC 'Articles' (n 85) art 9 Commentary 9; cf recognition that damages are not an element of the primary rules of investment protection, even regarding expropriation, *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case no ARB/05/22, Award, 24 July 2008 [464]–[467] (although see an argument for damage as a criterion of all primary rules of investment law, *Merrill & Ring Forestry L.P. v Canada*, UNCITRAL, ICSID Administered Case, Award, 31 March 2010 [244]–[245], [266]).

[92] As Freeman put it, '[f]ew propositions of law are supported by as much authority in international jurisprudence and literature as this one', AV Freeman, 'Recent Aspects of the Calvo Doctrine and the Challenge to International Law' (1946) 40 AJIL 121, 133. Indeed, the US relied on Calvo's views on the requirement to protect aliens from attacks by third parties in justifying its own claims, Mr Fisch, Secretary of State, to Mr Foster, minister to Mexico (1873) 6 Moore Digest 655; Mr Blaine, Secretary of State, to Mr Dogherty, chargé (1891) 6 Moore Digest 802, 804–5.

[93] Calvo III (n 72) 137–8.

of the UK[94] and the US.[95] Indeed, the focus on the taxonomy of purposes rather than procedures of implementation goes with the grain of recent US treaty practice on the law of expropriation.[96]

The third sub-point of the national treatment argument is presented in the section addressing the 'extent of responsibility'; that is, the scope and content of the primary obligations for the treatment of aliens.[97] The argument is therefore not directed against the application of international law or the criteria of international law; it simply suggests that the criterion of international law is non-discrimination. Again, the proposition does not seem extraordinary: contemporary human rights, trade, and investment law have many rules or elements of rules requiring non-discrimination.[98] Suggesting national treatment as a criterion for international law rules relating to individuals does not *per se* go against the grain of international law-making. Overall, there is nothing exceptional about the Calvo Doctrine. As with any other argument of international law-making, it stands to be considered on its merits against the benchmark of relevant sources of international law.

Fifth, despite failing in its absolutist form, Calvo's argument was successful in many aspects and some results of the law-making process.[99] A series of long-running disputes in the late nineteenth and early twentieth centuries about the compatibility of Russia's anti-Jewish legislation with its treaty obligations with the US, the UK, France, Germany, and Switzerland illustrated the argument's persuasive force. The Russian argument that neither treaty nor general international law could require treating Jewish aliens differently

[94] *Export of Corn from Italy* (1847) 6 Parry 348 ('in the absence of any treaty, or, promise to the contrary, a government has a right, notwithstanding any previous usage that may have prevailed, to prohibit foreigners, as well as its own subjects, from sending corn out of the country'); *Destruction of Property during Plague (Turkey)* (1875), ibid 350 (destruction of allegedly plague-infected property entitles to compensation only on non-discriminatory basis).

[95] *Brazilian Watermelons* (1894) 6 Moore Digest 751, 751–2 (destruction of watermelons during epidemic justified by circumstances); *Bischoff case* (1903) 10 RIAA 420, 420–1; *J. Parsons* (1925) FK Nielsen, *American and British Claims Arbitration* (Government Printing Office, Washington 1926) 587 (destruction of poisonous liquor justified by circumstances).

[96] 2004 US Model BIT Annex B; 2012 US Model BIT Annex B; M Paparinskis, 'Regulatory Expropriation and Sustainable Development' in MW Gehring, M-C Cordonnier-Segger, and A Newcombe (eds), *Sustainable Development in World Investment Law* (Kluwer Law International, The Hague 2011) 320–1.

[97] Calvo III (n 72) 138, also 140. The ILC noted in its 2001 Articles that the rules regarding injury to aliens and the property international law may 'incorporat[e] the standard of compliance with internal law as the applicable international standard or as an aspect of it', 2001 ILC 'Articles' (n 85) art 3 Commentary 7; *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v Argentina*, ICSID Case no ARB/97/3, Decision on Annulment, 3 July 2002 (2002) 17 ICSID Rev—Foreign Investment L J 168 [97]; *Azurix Corp. v Argentina*, ICSID Case no ARB/01/12, Decision on the Application of Annulment, 1 September 2009 [149].

[98] J Kurtz, 'The Merits and Limits of Comparativism: National Treatment in International Investment Law and the WTO' in S Schill (ed), *International Investment Law and Comparative Public Law* (OUP, Oxford 2010); F Baetens, 'Discrimination on the Basis of Nationality: Determining Likeness in Human Rights and Investment Law', ibid.

[99] Even though from the earliest days it was described as an implausible rule, perhaps most eloquently by invoking the Dickensian *Christmas Carol* allusion of the dead door nail, 'Intervention for Breach of Contract or Tort where the Contract is Broken by the State or the Tort Committed by the Government or Governmental Agency' (1910) 4 ASIL Proceedings 148, 173 (Clark). An early example of resistance to an international standard is provided by a 1830–1842 dispute between Belgium on the one hand and the US, Great Britain, France, Austria, Prussia, and Brazil on the other hand, regarding responsibility for destruction of property during the Belgian war of independence. Belgium denied its responsibility and paid the damages only on *ex gratia* grounds, PH Laurent, 'State Responsibility: A Possible Historic Precedent to the Calvo Clause' (1966) 15 ICLQ 395.

from Jewish nationals in Russia was accepted by all States[100] apart from the US.[101] The national treatment rules had considerable support in the legislative and treaty practice of the Latin American States and codification bodies.[102] Even the US practice in defending the international standard was not uniform and often emphasized the exhaustiveness of the obligation of non-discrimination.[103] After the US lost the *Norwegian Shipowners' Claims* case,[104] the Secretary of State Charles Hughes stated that the US 'cannot accept certain apparent basis of the award as being declaratory of that [international] law or as herafter binding upon this Government as a precedent'. Hughes was concerned about the award 'subjecting the Government to a different test and a heavier burden where the property is owned by neutral aliens than is the case where it is owned by nationals of the requisitioning state', particularly in light of non-discriminatory application of due process and compensation.[105] Legal writings in connection with the Romanian–Hungarian agrarian dispute showed considerable support for the national treatment argument.[106]

The more formalized law-making context of the 1920s and 1930s gave a better opportunity for traditional respondent States to express their views regarding the existing and preferable rules. Perhaps not entirely without justification, the traditional respondent States perceived some elements of the earlier State practice as having been abusive, and therefore codificatory projects did not command general approval.[107] In 1929, the Council of the League of Nations convened the International Conference on the Treatment of Foreigners with the intention of drafting a treaty addressing these matters. However, the 1929 Paris Draft Treaty on the Treatment of Foreigners was never adopted because even full national treatment was considered to be too ambitious.[108] As will be further discussed in greater detail,[109] the 1930 Hague Conference's attempt to

[100] N Feinberg, 'The National Treatment Clause in a Historical Perspective (A Controversy with Czarist Russia)' in *Recueil d'études de droit international en hommage à Paul Guggenheim* (Imprimerie de la Tribune de Genève, Geneva 1986) 59–62; Марченс (n 66) 348 fn 2.

[101] The US position is reproduced in Mr Blaine, Secretary of State, to Mr Bartholomei (1881) 2 Wharton Digest 519, 519–20; 4 Moore Digest 111–29. See also the US protests in the 1930s against the application of anti-Jewish laws in Danzig, Germany, Italy, and Hungary to American nationals, 3 Hackworth Digest (n 15) 642–7; Mr Hull, Secretary of State, to Mr Montgomery, American Minister in Hungary (1939) 8 Whiteman Digest 376.

[102] Alvarez 'A BIT on Custom' (n 29) 300, 306–7, 333–4; Roth *International Law Applied to Aliens* (n 8) 65–80.

[103] H Lauterpacht, *The Function of Law in the International Community* (Clarendon Press, Oxford 1933) 122. The 1887 Wharton's *Digest* cites an 1837 opinion that '[a]liens coming within our territory are entitled to the same protection in their personal rights as our own citizens and no more', 2 Wharton Digest (n 15) 497. Relating to arrest and punishment of an alien for violation of local law, it was stated that 'because of his foreign citizenship he has no privileges or immunities other than those enjoyed by a citizen of the Republic', Mr Frelinghuysen, Secretary of State, to Mr O'Reily (1884) 2 Wharton Digest 507. In a dispute where Italy claimed that security for costs in the US courts amounted to denial of justice, the US relied on Calvo to argue that aliens were generally subject to domestic procedural laws but could be required to pay special security, Mr Ady, Acting Secretary of State, to Signor Carignani, Italian chargé (1901) 6 Moore Digest 674, 675.

[104] *Norwegian Shipowners' Claims (Norway v US)* (1922) 1 RIAA 307.

[105] JB Scott, 'United States-Norway Arbitration Award' (1923) 17 AJIL 287, 288.

[106] A Álvarez (ed), *La réforme agraire en Roumanie et les Optants hongrois de Transylvanie devant la Société des Nations* (Impr. du palais, Paris 1927).

[107] JW Garner, 'Responsibility of States for Injuries Suffered by Foreigners within Their Territories on Account of Mob Violence, Riots and Insurrections' (1927) 21 ASIL Proceedings 49, 70, 76 (Borchard); FS Dunn, 'International Law and Private Property Rights' (1928) 28 Columbia L Rev 166, 176; Schwarzenberger 'Standard of Civilisation' (n 48) 227; S Rosenne, 'State Responsibility: *Festina Lente*' (2004) 75 BYIL 363, 364.

[108] PB Potter, 'International Legislation on the Treatment of Foreigners' (1930) 24 AJIL 748, 748–50; JW Cutler, 'Treatment of Foreigners: In Relation to the Draft Convention and Conference of 1929' (1933) 27 AJIL 225, 233–7, 245–6.

[109] See Ch 2 nn 162–72.

codify the law of responsibility was unsuccessful and broke down largely along the lines of the international standard and national treatment divide.[110] After the failed conferences, the national and international treatment debate was argued before the PCIJ in the *Oscar Chinn* case, Belgium invoking the failure of both Conferences as an indication of general disagreement about the content of rules on the treatment of aliens beyond non-discrimination.[111] The Court did not mention this argument when describing the position of the parties. While its discussion of the alleged violation of vested rights may be said to implicitly support the validity of the concept, no vested rights were found to exist in the first place.[112] The Court also did not find it appropriate to refer to its earlier (pre-Hague Conference) statements about the protection of vested rights.[113] In fact, even the non-discriminatory elements of the international standard were applied in a rather lax manner, finding no breach in assistance by the State to a domestic competitor of Mr Chinn.[114] The rejection or only qualified support for the international standard was expressed in leading legal writings.[115] A writer supporting the standard in policy terms described certainty about existing positive rules as 'false and foolishly false'.[116] Roth, in a leading monograph, considered the support of practice to be almost equal for both views.[117]

[110] E Borchard, '"Responsibility of States", at the Hague Codification Conference' (1930) 24 AJIL 517, 538; G Hackworth, 'Responsibility of States for Damages Caused in Their Territory to the Person or Property of Foreigners' (1930) 24 AJIL 500, 512–16; Jennings 'State Contracts' (n 7) 487. The national treatment argument had support in the Hague Conference, Rosenne *Hague IV* (n 18) 1567–1568, 1570 (Guerrero, Buero).

[111] *Oscar Chinn* Pleadings (n 9) 284–7 (de Ruelle on behalf of Belgium). In response, Eric Beckett, on behalf of the UK, merely noted the confusion in the Hague Conference between the tasks of codification and legislation, ibid 306–7. In 1949, and in the absence of sufficiently clear and general subsequent State practice in favour of the international standard, the UK shifted the perspective and explained the failure of the Hague Conference as deriving from the failure to abolish the international standard and therefore supporting it, Secretary General, 'Preparatory Study Concerning a Draft Declaration on the Rights and Duties of States', UN Doc A/CN.4/2 71.

[112] *Oscar Chinn* Judgment (n 51) 88. Interestingly, five years later Belgium argued that the respect for at least the irrevocably acquired rights of aliens was clearly established, *The "Société Commerciale de Belgique" (Belgium v Greece)* PCIJ Series C No 87 23 (Memorial), 174 (Levy Morelle).

[113] *Certain German Interests* Judgment (n 54) 22.

[114] The more lax approach was possibly influenced by the Great Depression, the Court emphasizing that 'the interests of transport undertakings may well have suffered as a result of the general trade depression and the measures taken to combat it', *Oscar Chinn* (n 51) 88. Lauterpacht described the narrow rationale in the fifth edition of *Oppenheim* in the following terms: 'the Permanent Court of International Justice held in effect that respect due to the vested rights of an alien does not imply an obligation for the State to refrain from granting of such special benefits to its subjects as may result incidentally result in losses to the alien', H Lauterpacht (ed), *Oppenheim's International Law* (Volume I: Peace, 5th edn Longman, Green & Co., London 1937) 547 fn 3.

[115] Against the standard in general, T Baty, *The Canons of International Law* (John Murray, London 1930) 126–31; against a customary standard but for equitable compensation, G Kaeckenbeeck, 'The Protection of Vested Rights in International Law' (1936) 17 BYIL 1, 13–17; against the standard apart from denial of justice, P Fauchille, *Traité de droit international public* (A. Rousseau, Paris 1922) 525; K Strupp, 'L'intervention en matière financière' (1925) 8 Recueil des Cours de l'Académie de Droit International 1, 59–60; K Strupp, 'Les règles générales du droit de la paix' (1934) 47 Recueil des Cours de l'Académie de Droit International 263, 484–5, 539, 562–3; against responsibility for non-discriminatory expropriation, EA Harriman, 'The Right of Property in International Law' (1926) 6 Boston U L Rev 103, 105–6; JF Williams, 'International Law and the Property of Aliens' (1928) 9 BYIL 1; A Cavaglieri, 'La notion des droits acquis et son application en droit international public' (1931) 38 Revue générale de droit international public 257, 294–6; JL Brierly, 'Règles générales du droit de la paix' (1936) 58 Recueil des Cours de l'Académie de Droit International 5, 171.

[116] Potter *Treatment of Foreigners* (n 108) 750 ('To do nothing means to assume that there do exist certain accepted rules and principles on the matter, when the existing variety of practices followed and theories held among the nations may be so great that any such assumption is false and foolishly false').

[117] Roth *International Law Applied to Aliens* (n 8) 111.

Writing in 1933, Lauterpacht suggested an evolution of a legal rule constituting a judicial compromise between territorial sovereignty and internationally protected rights of aliens.[118] A number of Calvo's arguments appear to have influenced precisely such compromise solutions in law-making. The proposition that by entering the host State, aliens implicitly accept the risk of being treating like nationals[119] may be traced to the policies underlying *Barcelona Traction*:

> When a State admits into its territory foreign investments or foreign nationals it is ... bound to extend to them the protection of the law. However, it does not thereby become an insurer of the part of another State's wealth which these investments represent. Every investment of this kind carries certain risks.[120] ... It does not seem in any way inequitable that the advantages thus obtained [by establishment of a company in a foreign country] should be balanced by the risks arising from the fact that the protection of the company and hence of its shareholders is thus entrusted to a State other than the national State of the shareholders.[121]

Investment treaty Tribunals have stated in a similar vein that investment treaties 'are not insurance policies against bad business judgments', applying this perspective to situations ranging from the interpretation of investor's expectations within domestic legal systems,[122] necessary diligence,[123] and implications of mistaken advice,[124] to identifying breach of contract that would breach international law,[125] to considering the deadlines for making investment claims.[126] A similar perspective of balancing choices made and risks accepted has been adopted in some legal writings.[127] More broadly, it is necessary to appreciate the nuanced manner of law-making in this area where different elements of practice may subtly influence each other. Even arguments commanding less support in cases and legal writings at one point may be useful in explaining the rationale of some elements of the rules that finally emerge.

III. Factors Affecting the International Standard

The development of the international minimum standard has been influenced by a number of changes, five of which appear to have been the most important: changes in theoretical classification, substantive focus, procedural regimes, general degree of legalization, and the relationship between home States, host States, and investors. These issues

[118] Lauterpacht *Function of Law* (n 103) 122; cf PC Jessup, 'Responsibility of States for Injuries to Individuals' (1946) 46 Columbia L Rev 903, 905–6.

[119] Calvo III (n 72) 138; Rosenne *Hague IV* (n 18) 1609–10 (Wu); cf 'Is the Forcible Collection of Contract Debts in the Interest of International Justice and Peace?' (1907) 1 ASIL Proceedings 100, 123–4 (Foster), 142 (Barn); Garner (n 107) 78–81 (Murdock, Jessup).

[120] *Barcelona Traction* Judgment (n 9) [87].

[121] *Barcelona Traction* Judgment (n 9) [99], see also [43].

[122] *Total* (n 41) [124].

[123] *MTD Equity Sdn. Bhv. and MTD Chile S.A. v Chile*, ICSID Case no ARB/01/07, Award, 25 May 2004 (2005) 44 ILM 91 [178].

[124] *Maffezini v Spain*, ICSID Case no ARB/02/1, Award, 13 November 2000 (2001) 16 ICSID Rev—Foreign Investment L J 212 [64].

[125] *Waste Management v US (II)*, ICSID Additional Facility Case no ARB(AF)/00/3, Final Award, 30 April 2004 (2004) 43 ILM 967 [114].

[126] *Grand River Enterprises Six Nations Ltd and others v US*, UNCITRAL Case, Decision on Objections to Jurisdiction, 20 July 2006 15 ICSID Rep 505 [67].

[127] P Muchlinksi, '"Caveat Investor"? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard' (2006) 55 ICLQ 527; P Muchlinski, 'The Diplomatic Protection of Foreign Investors: A Tale of Judicial Caution' in C Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP, Oxford 2009).

will be taken in turn. The twentieth century showed a fundamental reappraisal of the theoretical underpinnings of the law of State responsibility.[128] Classical international law did not maintain the analytical distinction between primary rules addressing the scope and content of the obligations and secondary rules addressing the legal consequences of the breach of the primary obligations.[129] As Roberto Ago pointed out in his Hague Academy lecture of 1939, the discussion of denial of justice took an analytical perspective, at best indirectly related to the content of the international obligations, and the confusion of attribution and content of primary rules was likely to lead to grave confusion.[130] García-Amador's argument in the ILC discussion about the international standard and human rights[131] was still made within the same conceptual categories,[132] despite the increasingly strong suggestions for drawing a distinction between the primary and secondary rules and codifying only the latter.[133]

The distinction between primary and secondary rules is essentially theoretical in nature[134] and has sometimes been minimized to convenience of classification without additional normative significance.[135] Still, the arbitral decisions on such circumstances precluding wrongfulness for the breach of investment treaty obligations as necessity[136] and countermeasures illustrate the practical importance of identifying the nature and implications of the distinction.[137] When the historical development of the international

[128] J Crawford, 'ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 96 AJIL 874, 876–9; J Crawford and T Grant, 'Responsibility of States for Injuries to Foreigners' in JP Grant and JC Barker (eds), *The Harvard Research in International Law: Contemporary Analysis and Appraisal* (WS Hein & Co., New York 2007) 77–114; generally J Crawford, A Pellet, and S Olleson (eds), *The Law of International Responsibility* (OUP, Oxford 2010) Part II.

[129] L Laithier, 'Private Codification Efforts' in J Crawford, A Pellet, and S Olleson (eds), *The Law of International Responsibility* (OUP, Oxford 2010); C Bories, 'The Hague Conference of 1930' in Crawford, Pellet, and Olleson, ibid.

[130] R Ago, 'Le délit international' (1939) 68 Recueil des Cours de l'Académie de Droit International 419, 467–8; cf a typical analysis from the beginning of the twentieth century, conflating responsibility, attribution, and scope of primary rules, Goebel *Injuries Sustained by Aliens* (n 80).

[131] D Müller, 'The Work of García-Amador on State Responsibility for Injury Caused to Aliens' in J Crawford, A Pellet, and S Olleson (eds), *The Law of International Responsibility* (OUP, Oxford 2010).

[132] FV García-Amador, 'Second Report on International Responsibility' in *Yearbook of the International Law Commission, 1957, Volume II*, UN Doc A/CN.4/SER.A/1957/Add.1 104 et seq.; FV García-Amador, 'State Responsibility in the Light of the New Trends of International Law' (1955) 49 AJIL 339, 339–46; FV García-Amador, 'The Role of State Responsibility in the Private Financing of Economic and Social Development' (1964–1965) 16 Syracuse L Rev 738, 739.

[133] ILC, *Yearbook of the International Law Commission, 1957, Volume I*, UN Doc A/CN.4/SER.A/1957 156–7 (Ago), 164 (Fitzmaurice), 167 (Ago), 168 (Spiropoulos), 170 (Verdross); ILC, *Yearbook of the International Law Commission, 1959, Volume I*, UN Doc A/CN.4/SER.A/1959 150 (Verdross, Ago); A Pellet, 'The ILC's Articles on State Responsibility' in J Crawford, A Pellet, and S Olleson (eds), *The Law of International Responsibility* (OUP, Oxford 2010).

[134] E David, 'Primary and Secondary Rules' in J Crawford, A Pellet, and S Olleson (eds), *The Law of International Responsibility* (OUP, Oxford 2010).

[135] *Renta 4 S.V.S.A. and others v Russia*, SCC Case no V 24/2007, Award on Preliminary Objections, 20 March 2009 [99]–[100].

[136] *CMS Gas Transmission Company v Argentina*, ICSID Case no ARB 01/08, Decision of the *ad hoc* Committee on the Application for Annulment, 25 September 2007 14 ICSID Rep 251 [134]; *Continental Casualty v Argentina*, ICSID Case no ARB/03/9, Award, 5 September 2008 [164]–[168]; *Sempra Energy International v Argentina*, ICSID Case no ARB/02/16, Decision on the Application for Annulment of the Award, 29 June 2010 (2010) 49 ILM 1445 [111]–[118]; *Enron Corporation & Ponderosa Assets, L.P. v Argentina*, ICSID Case no ARB/01/3, Decision on the Application for Annulment, 30 July 2010 [405].

[137] *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v Mexico*, ICSID Additional Facility Case no ARB/(AF)/04/5, Award, 21 November 2007 146 ILR 439 [110]–[180]; *Corn Products International, Inc. v Mexico*, ICSID Additional Facility Case no ARB/(AF)/04/1, Decision on Responsibility, 15 January 2008 146 ILR 581 [144]–[191]; *Cargill, Incorporated v Mexico*, ICSID

standard is considered, one challenge might be to untangle the practice, and arguments based on different theoretical perceptions of how primary rules interrelate with secondary rules of attribution and admissibility and which rules fall under which rubric.[138]

The development of the international standard during the twentieth century represents an acute battle of imagination and ability to appreciate the changing focus against the constraints of an initially limited vocabulary.[139] International law had long ignored the protection of investments.[140] As Jennings perceptively explained (in the Kiplinquesque terms approved by Judge Jessup),[141] the paradigm situations that the standard was meant to reflect had shifted and changed completely, with the outrageous behaviour towards the life and liberty of the physical person giving way to impermissible regulatory mistreatment of sophisticated programmes of international corporate investment.[142] The process of rationalizing treatment of aliens in terms other than 'procedural outrage' against 'physical persons' was constrained by underlying assumptions about the *ratione materiae* and *ratione personae* scope of regulation of the international standard. With the benefit of hindsight, one is tempted to be critical of the failure to appreciate the most pressing contemporaneous and future challenges that led to reliance on concepts already of seemingly marginal importance, effectively hindering the development of adequate international law.[143] The question of whether and by what legal technique the focus, scope, and content of the classical minimum standard can be applied or extended to contemporary investment disputes seems to underlie the most contentious aspects of the fair and equitable treatment debate.

The development of the peaceful settlement of international disputes is another factor influencing the development of the international standard. While the collections of State practice and arbitral decisions of the nineteenth century on the treatment of aliens were impressively large,[144] the particular rules set out in legal writings were by contrast remarkably concise.[145] The very end of the nineteenth and the beginning of the twentieth century showed considerable improvement in the law of international dispute

Additional Facility Case no ARB/(AF)/05/2, Award, 18 September 2009 146 ILR 642 [410]-[430]; generally Paparinskis 'Investment Arbitration and the Law of Countermeasures' (n 60) 317–51.

[138] C Greenwood, 'State Responsibility for the Decisions of National Courts' in M Fitzmaurice and D Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions* (Hart Publishing, Oxford 2004) 57–8.

[139] In the sense of P Allot, *Eunomia: A New Order for a New World* (OUP, Oxford 1990) 5–13; P Allot, *The Health of Nations* (CUP, Cambridge 2002) 415–16.

[140] P Juillard, 'L'évolution des sources du droit des investissements' (1994) 250 Recueil des Cours de l'Académie de Droit International 9, 22.

[141] *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* [1970] ICJ Rep 3, Separate Opinion of Judge Jessup 161, 166; cited at Part I n 3.

[142] Jennings 'State Contracts' (n 7) 180; Jennings 'General Course' (n 8) 473.

[143] Jennings 'State Contracts' (n 7) 180; although see the perceptive comments by Spykman, distinguishing protection of trader's property in the 18th century from protection of rights resulting from capital investment abroad, JW Garner, 'Responsibility of States for Injuries Suffered by Foreigners within Their Territories on Account of Mob Violence, Riots and Insurrections' (1927) 21 ASIL Proceedings 49, 72.

[144] 2 Wharton Digest (n 15) 490–516; 6 Moore Digest (n 15) 3073–664; 4 Moore Intl Arbitrations (n 15); 6 Parry (n 15) Ch 16.

[145] R Phillimore, *Commentaries upon International Law* (Volume 3, 3rd edn Butterworths, London 1885) 19–20; L Oppenheim, *International Law* (Volume I: Peace, Longman, Green & Co., London 1905) 376.

settlement,[146] restricting forceful methods of dispute settlement,[147] and creating the first embryonic structures of peaceful dispute settlement in the 1899 and 1907 Hague Conferences.[148] The first third of the twentieth century also showed a continuation of the trend of dispute settlement in Arbitral and Claims Commissions, of which the Venezuelan,[149] Mexican,[150] Turkish,[151] and Panamanian Commissions were to have the greatest significance.[152] During these years, legal writers (often themselves practitioners in governmental service or international adjudication),[153] while necessarily drawing upon the extensive nineteenth century practice and arbitral decisions, produced the first treatises presenting different aspects of the international standard and the methods of enforcement in an analytical manner.[154]

The Claims Commissions' systematized approach to settlement of disputes regarding the treatment of aliens essentially collapsed after the Second World War. This development coincided with the shift of focus from subtler aspects of the international standard to the law of expropriation and almost exclusively to its remedial criteria and consequences, law-makers and particularly treaty-makers 'erect[ing] an imposing structure on a shaky foundation'.[155] For what appear to have been purely pragmatic reasons of relevance in settlement of actual disputes, issues subtler than the nomenclature of compensation were left largely unexplored.[156] Only the creation of the IUSCT and its

[146] J Crawford, 'Continuity and Discontinuity in International Dispute Settlement' in C Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP, Oxford 2009) 806–9.

[147] *See* n 76.

[148] Convention (I) for the Pacific Settlement of International Disputes (adopted 29 July 1989) JB Scott (ed), *The Hague Conventions and Declarations of 1899 and 1907* (OUP, New York 1915) 41; Convention (I) pour le règlement pacifique des conflits internationaux (adopted 18 October 1907) *Deuxième conférence internationale de la paix. Actes et documents* (Tome premier, Imprimerie Nationale, La Haye 1907) 604, (tr) JB Scott (ed), *The Hague Conventions and Declarations of 1899 and 1907* (OUP, New York 1915) 41.

[149] J Ralston, *Venezuelan Arbitrations of 1903* (Government Printing Office, Washington DC 1904). Crawford has noted that 'strong continuities with the world... of the Venezuela Claims Commissions' may be seen in modern regimes, Crawford 'Continuity and Discontinuity' (n 146) 802.

[150] AH Feller, *The Mexican Claims Commissions 1923–1934* (The Macmillan Company, New York 1935); JG de Beus, *The Jurisprudence of the General Claims Commission United States and Mexico* (Martinus Nijhoff, The Hague 1938).

[151] Hunt *American and Panamanian General Claims Arbitration* (n 25).

[152] Nielsen *American–Turkish Claims Settlement* (n 25).

[153] As Basdevant stated in his opening address at the 1930 Hague Conference's Third Committee, '[s]ome of you have had a share of establishing... practice and case-law. You have drawn up and signed decisions which have become authoritative in regard to questions of responsibility; you have had a part in establishing principles of law in that connection; you have also, by your writings, endeavoured to determine what exactly was the established law and what principles were recognised in the positive international law in this respect. Finally, you have criticised these principles. This work of a practical nature, this work in jurisprudence, this doctrinal work will serve as a basis for our deliberation', Rosenne *Hague IV* (n 18) 1438.

[154] Borchard *Diplomatic Protection* (n 77); C Eagleton, *The Responsibility of States in International Law* (The New York University Press, New York 1928); FS Dunn, *The Protection of Nationals: A Study in the Application of International Law* (John Hopkins Press, Baltimore 1932); de Visscher 'Le déni de justice' (n 67); CT Eustathiadès, *La responsabilité international de l'état pour les actes des organes judiciares et le problème du déni de justice en droit international* (A Pédone, Paris 1936); Freeman *Denial of Justice* (n 4).

[155] SJ Rubin, *Private Foreign Investment: Legal & Economic Realities* (John Hopkins Press, Baltimore 1956) 30.

[156] The focus on expropriation was in rare cases extended to its indirect aspects, GC Christie, 'What Constitutes a Taking of Property under International Law?' (1962) 38 BYIL 307; R Higgins, 'The Taking of Property by the State: Recent Developments in International Law' (1982) 176 Recueil des Cours de l'Académie de Droit International 259, 322–54.

subsequent decisions reignited the interest in indirect expropriation and other aspects of interference with property rights.[157] More recently, the quantitative increase in the investor–State treaty arbitrations since the end of the twentieth century has led to doctrinal re-evaluation of aspects of the international standard both in the broader structure of investment protection law[158] and as separate rules.[159] This is not to suggest that the correlation between procedural structures and development of substantive rules is inevitable or predetermined. Still, the developments during the twentieth century suggest that the existence of a formalized dispute settlement system of some degree of permanence and consistency that addresses matters of treatment of aliens both provides the opportunity for and requires elaboration of clearer rules.

Another factor of influence relates to the broader trends in the creation of substantive and procedural rules regarding individuals and economic rights. On the one hand, one might read some traditional criticisms of the international standard as directed at the uniquely intrusive nature of the rules on the treatment of aliens and their enforcement in the traditional legal order. The recognition that the treatment of individuals and *inter alia* foreign investors is a permissible and legitimate topic for international legal regulation in the context of human rights and trade law would require taking the extreme criticisms of the rules as compromising sovereignty with a contextualized grain of salt. In substantive terms, 'in the contemporary law concerning the treatment of aliens, the position has changed much with the advent of an international law of human rights which are irrespective of nationality or of allegiance'.[160] In procedural terms, investment protection treaties and the right to directly invoke the responsibility of host States[161] have been considered as 'marking another step in their [investors'] transition from objects to subjects of international law'.[162]

This perspective might justify a more extensive reading of the contemporary international standard. The *Mondev* Tribunal supported its views on the evolution of customary law by the fact that 'both the substantive and procedural rights of the individual in international law have undergone considerable development'.[163] The Tribunal in the *Merrill & Ring Forestry L.P. v Canada* noted that '[t]he trend towards liberalization of the standard applicable to the treatment of business, trade and investments continued unabated over several decades and has not yet stopped'.[164] If in the post-Second World War

[157] GH Aldrich, *The Jurisprudence of the Iran–United States Claims Tribunal: An Analysis of the Decisions of the Tribunal* (OUP, Oxford 1996) Ch 15; CN Brower and JD Brueschke, *The Iran–United States Claims Tribunal* (Martinus Nijhoff, The Hague 1998) Chs 12–13.

[158] C McLachlan, L Shore, and M Weiniger, *International Investment Arbitration: Substantive Principles* (OUP, Oxford 2007) Ch 7; R Dolzer and CH Schreuer, *Principles of International Investment Law* (OUP, Oxford 2008) 119–49; C Yannaca-Small, 'Fair and Equitable Treatment Standard: Recent Developments' in A Reinisch (ed), *Standards of Investment Protection* (OUP, Oxford 2008); T Weiler and I Laird, 'Standards of Treatment' in P Muchlinski, F Ortino, and CH Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP, Oxford 2008); A Newcombe and L Paradell, *Law and Practice of International Treaties: Standards of Treatment* (Walter Kluwer Law & Business, The Netherlands 2009) Ch 6; J Salacuse, *The Law of Investment Treaties* (OUP, Oxford 2010) 218–43.

[159] AK Bjorklund, 'Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims' (2004–2005) 45 Virginia J Intl L 809; Paulsson *Denial of Justice* (n 62); Tudor *Fair and Equitable Treatment* (n 3); Kläger *Fair and Equitable Treatment* (n 45).

[160] *Methanex Corporation v United States of America*, UNCITRAL Case, Second Expert Opinion of Sir Robert Jennings, 6 September 2001 <http://italaw.com> 3.

[161] E Lauterpacht, 'The World Bank Convention on the Settlement of International Investment Disputes' in *Recueil d'études de droit international en hommage à Paul Guggenheim* (Imprimerie de la Tribune de Genève, Genève 1968) 664.

[162] *Plama Consortium Limited v Bulgaria*, ICSID Case no ARB/03/24, Decision on Jurisdiction, 8 February 2005 (2005) 20 ICSID Rev—Foreign Investment L J 262 [141].

[163] *Mondev* (n 30) [116].

[164] *Merrill & Ring* (n 91) [207].

years an argument of synthesis of human rights and the international standard could be rejected because of the overly ambiguous nature of the latter,[165] the contemporary law could *a contrario* suggest that a solution has to be found along the now more sophisticated lines of the human rights argument.[166]

Conversely, one might question both the degree of genuine innovation in the regime of investor–State arbitration and the implications to be drawn from broader trends of legalization. State practice of the first third of the twentieth century, engaged in contemporaneously with leading decisions, statements, and writings on the international standard, suggests considerable flexibility regarding individual access to international dispute settlement bodies.[167] Despite disagreement in classical legal writings[168] and judicial

[165] ILC, *Yearbook of the International Law Commission, 1956, Volume I*, UN Doc A/CN.4/SER.A/1956 236 (Salamanca), 243 (El-Khouri, Francois), 244 (Zourek); ILC *1957* (n 132) 160 (Matine-Daftary, Edmonds), 166 (Tunkin, Zourek); ILC, *Yearbook of the International Law Commission, 1960, Volume I*, UN Doc A/CN.4/SER.A/1960 281 (Tunkin).

[166] To paraphrase Zourek, ILC 1957 (n 132) 166. See generally Part III.

[167] Convention (XII) relative à l'établissement d'une Cour internationale des prises *Deuxième conférence internationale de la paix. Actes et documents* (Tome premier, Imprimerie Nationale, La Haye 1907) 668; (tr) JB Scott (ed), *The Hague Conventions and Declarations of 1899 and 1907* (OUP, New York 1915) 188 arts 4, 5. While the Convention did not come into force for reasons unrelated to individual access to the International Prize Court, the drafting process illustrates the nonchalance with which States in 1907 perceived individual access to international courts: Kriege (Germany), Hagerup (Norway), Bustamante (Cuba), Borel (Switzerland), and Choate (US) supported individual access to the International Prize Court, *Deuxième conférence internationale de la paix. Actes et documents* (Tome II, Imprimerie Nationale, La Haye 1907) 790–1, 811; Sir Edward Fry's (UK) objection that it would be logical to permit only States as subjects of international law to appear before the Court was ignored, ibid 789–90. The US–Mexican General Claims Commission rejected the view 'that the rules of public international law apply only to nations and that individuals can not (sic) under any circumstances have a personal standing under it' by reference to the Prize Convention where 'this conception, so far as ever held, was repudiated', *North American Dredging Company (US v Mexico)* (1926) 4 RIAA 26 [6] (although see *International Fisheries Company (US v Mexico)* (1931) 4 RIAA 691, Dissenting Opinion of Commissioner Nielsen 703, 721–3). After the First World War, individuals had extensive access to MAT, *Recueil des décisions des Tribunaux Arbitraux Mixtes institués par les Traités de Paix* (Tomes I–X, Librairie de la Société du Recueil Sirey, Paris 1922–1930); A de Lapradelle, *Recueil de la jurisprudence des Tribunaux Arbitraux Mixtes crées par les Traités de la Paix* (Documentation Internationale, Paris 1927), and the USAT, G Kaeckenbeeck, *The International Experiment of Upper Silesia: A Study in the Working of the Upper Silesian Settlement, 1922–1937* (OUP, London 1942). Individuals also had access to the short-lived Central American Court of Justice, even if results were not particularly impressive, M Hudson, 'The Central American Court of Justice' (1932) 26 AJIL 759, 769–70, 772–3. See generally K Parlett, *The Individual in the International Legal System* (CUP, Cambridge 2011) 45–84.

[168] The access of individuals to international tribunals could be explained in terms of an exercise of the general right of their State of nationality to create such an institution, M Huber, 'Die Fortbildung des Völkerrechts auf dem Gebeite des Prozess- und Landkriegsrechts durch die II. internationale Friedenskonferenz im Haag 1907' (1908) 2 Jahrbuch des öffentlichen Rechts der Gegenwart 470, 540; by viewing the treaty as a delegation of the State's rights to its nationals, F Donker-Curtius, 'La Cour internationale des prises' (1909) 11 Revue de droit international et de législation comparée 5, 18–19, 27–32, R Blühdorn, 'La fonctionnement et la jurisprudence des Tribunaux Arbitraux Mixtes créés par les Traités de Paris' (1932) 41 Recueil des Cours de l'Académie de Droit International 141, 144–5; as an instrument in favour of third persons, G Diena, 'L'individu devant l'autorité judiciaire et le droit international' (1909) 16 Revue Générale de Droit International Public 57, 71–6 (even though the lack of international subjectivity of individuals could make the latter explanations questionable, H Wehberg, *Das Seekriegsrecht* (W Kohlhammer, Stuttgart 1915) 362–4), or as an instrument granting direct rights to individuals, F Baumgarten, 'La protection des intérets des particuliers devants les jurisdictions internationales' (1922) 59 Revue de droit international et de législation comparée 742, 772–3; A Cavaglieri, 'I sogetti del diritto internazionale' (1925) III (4) Rivista di diritto internazionale 18, 26–7; A Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Verlag von Julius Springer, Wien und Berlin 1926) 159–60; S Rundstein, 'L'arbitrage international en matière privée' (1928) 23 Recueil des Cours de l'Académie de Droit International 331, 381–98; S Séfériadès, 'Le probleme de l'accès des particuliers a des juridictions internationales' (1935) 51 Recueil des Cours de l'Académie de Droit International 1, 38–41. For writers who rejected the possibility of individuals making international law argument before international

decisions about the precise legal rationale for and of this practice,[169] the spectrum of explanations does not seem radically different or less sophisticated from that existing in contemporary law.[170] The inclusion of investor–State arbitration in investment protection treaties is not revolutionary enough to require broader reassessment of the underlying premises.[171]

The broader trends of legalization in the field of international trade might also be read to support a cautious approach to the implicit evolution of customary law on the treatment of aliens. For example, investment treaty disputes have addressed measures adopted for health and environmental reasons.[172] Within trade law, States have negotiated detailed rules on the issue that have been subject to elaborate interpretation through sophisticated structures of dispute settlement,[173] and trade in services[174] and IP rights have also been addressed in similarly detailed terms.[175] Conversely, the Agreement on

courts, practice to the contrary could be explained as implementing international law solely in domestic law terms, R Knubben, *Die Subjekte des Völkerrechts* (Verlag von W Kohlhammer, Stuttgart 1928) 493; or the international tribunals not being properly international but only *de facto* common domestic courts, D Anzilotti, *Cours de droit international* (Librairie de Recueil Sirey, Paris 1929) 134–5; or the rights before the international courts being neither international nor municipal but 'only rights within the organization concerned', RF Roxburgh (ed), *Oppenheim's International Law* (Volume I: Peace, 3rd edn Longman, Green & Co., London 1920) 459. For Borchard, the access of individuals to international courts raised questions not of legal permissibility but of policy desirability, E Borchard, 'The Access of Individuals to International Courts' (1930) 24 AJIL 359.

169 The PCIJ addressed the issue in passing in the series of cases relating to the Chorzow Factory where, simultaneously with the PCIJ case between Germany and Poland, the affected German companies and individuals had brought direct claims against Poland in the Germano-Polish MAT. The Court did not follow the agency theory: it rejected the Polish admissibility objection of *litispendence* because parties before the Court and the MAT were different, *Certain German Interests in Polish Upper Silesia (Germany v Poland)* (Preliminary Objections) [1925] PCIJ Rep Ser A no 5 20. It is less clear what the Court thought about the legal nature of the MAT and the USAT in positive terms. Its position seemed to evolve from viewing the MAT as something between the Court and domestic courts, ibid, to describing the rights of affected individuals and companies to bring claims to MAT and USAT for *inter alia* breaches of international law, *Certain German Interests* Judgment (n 54) 33; *Factory at Chorzow (Germany v Poland)* (Jurisdiction) [1927] PCIJ Rep Series A No 9 26–31, and noting 'that the Geneva Convention, with its very elaborate system of legal remedies, has created or maintained for certain categories of private claims arbitral tribunals of a special international character', *Factory at Chorzow (Germany v Poland)* (Merits) [1928] PCIJ Rep Series A No 17 27.

170 The alternative explanations of investor–State arbitration from the perspective of direct or derivative rights, Douglas 'Hybrid Foundations' (n 36) 162–93, do not seem far removed from debates of the early 20th century regarding individual access to the International Prize Court and MATs and the direct, third-party, or delegated rights under these regimes, n 168.

171 DM Price, 'Some Observations on Chapter Eleven of NAFTA' (1999–2000) 23 Hastings Intl Comp L Rev 421, 421; DM Price, 'Chapter 11—Private Party vs. Government, Investor–State Dispute Settlement: Frankenstein or Safety Valve?' (2000) 26 Canada–US L J 107, 107–8; B Legum, 'The Innovation of Investor–State Arbitration' (2002) 43 Harvard J I L 531; Paparinskis 'The Limits of Depoliticisation' (n 83) 279.

172 *Methanex Corporation v US*, UNCITRAL Case , Final Award, 3 August 2005 16 ICSID Rep 40; *Chemtura Corporation v Canada*, UNCITRAL Case, Award, 2 August 2010.

173 Agreement on the Application of Sanitary and Phytosanitary Measures (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 493; Agreement on Technical Barriers to Trade (adopted 15 April 1994, entered into force 1 January 1995) 1868 UNTS 120; cf J Scott, *The WTO Agreement on Sanitary and Phytosanitary Measures: A Commentary* (OUP, Oxford 2009); L Gruszczynski, *Regulating Health and Environmental Risks under WTO Law: A Critical Analysis of the SPS Agreement* (OUP, Oxford 2010).

174 General Agreement on Trade in Services (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 183; cf N Munin, *Legal Guide to GATS* (Kluwer Law International, Alphen aan den Rijn 2010).

175 Agreement on Trade-Related Aspects of Intellectual Property Rights (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 299; cf CM Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement* (OUP, Oxford 2007).

Trade-Related Investment Measures only provides for national treatment and quantitative restrictions in rather concise terms.[176] A plausible explanation of this practice might be that in light of complexity and subtlety of rules relating to protection of economic rights and interests, States prefer to create express and specific treaty rules on the issue when they wish to do so. If that were the case, the broader trends of explicit legalization of related issues would count against an inferred consensus of implicitly developed customary law. A satisfactory middle ground would be to say that the broader changes in the international legal order might have direct legal relevance when a particular legal argument is based on *per se* impossibility of particular rules. Since not many arguments are put forward in such radical terms, the broader tendencies are likely to be relevant when and to the extent that they can be articulated in terms of traditional sources and interpretation, or appropriate and careful analogy.

The final factor of influence is the shift in the perception of policies that are at play in the field of investment protection law. The orthodox explanation of law-making and application in the treatment of aliens and investors throughout most of the twentieth century drew upon the balance between States that traditionally protected their nationals (or whose nationals traditionally brought investment claims) and States that were traditionally respondents. This view was taken by Fitzmaurice and Beckett in 1932, when they spoke about creditor and debtor States;[177] in 1951, when Jennings spoke in terms of defendant and plaintiff States;[178] in 1958, when Bagge wrote about Western States with disposable capital and superior technical skills;[179] certainly during the NIEO debate during the 1970s,[180] and even in 2004, when Schwebel and Sornarajah, from very different perspectives, looked back at the developments over the past 200 years.[181]

The sharp dichotomy of claimants and respondents was probably always overstated both in terms of general policy and particular legal arguments: after all, a considerable part of Root's famous 1910 speech on the international standard was devoted precisely to the failure of the US to comply with its own international obligations regarding the protection of aliens from xenophobic attacks.[182] Still, starting from late 1990s, investor–State arbitrations against the US and Canada in NAFTA[183] have been the cause of, or at least have closely correlated with, an explicitly critical re-examination[184] and revision

176 Agreement on Trade-Related Investment Measures (adopted 15 April 1994, entered into force 1 January 1995) 1868 UNTS 186 art 2.

177 G Fitzmaurice, 'The Meaning of the Term "Denial of Justice"' (1932) 13 BYIL 93, 93; Beckett (n 4) 188.

178 Jennings 'State Contracts' (n 7) 179.

179 A Bagge, 'Intervention on the Ground of Damage Caused to Nationals, with Particular Reference to Exhaustion of Local Remedies and the Rights of Shareholders' (1958) 34 BYIL 162, 162.

180 TW Waelde, 'A Requiem for the "New International Order"' in G Hafner (ed), *Liber Amicorum Professor Ignaz Seidl-Hohenveldern: in Honour of His 80th Birthday* (Kluwer Law International, The Hague 1998) 771–803.

181 SM Schwebel, 'The Influence of Bilateral Investment Treaties on Customary International Law' (2004) 98 ASIL Proceedings 27, 27–8; M Sornarajah, *The International Law on Foreign Investment* (2nd edn CUP, Cambridge 2004) 37–50; cf Sornarajah *The International Law on Foreign Investment 3* (n 58) 33–47.

182 Root 'Basis of Protection' (n 50) 23–5.

183 G Alvarez and W Park, 'The New Face of Investment Arbitration: NAFTA Chapter 11' (2003) 28 Yale J Intl L 365, 368–71; Paulsson *Denial of Justice* (n 62) 228–31.

184 van Harten (n 1); D Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (CUP, Cambridge 2008).

of,[185] and perhaps even backlash against, investment protection law.[186] The most plausible (if uncharitable) explanation of this current in thought and practice would point to the unfamiliarity of some States with the practice of formalized and prospective individual–State dispute settlement.[187] One of the few important legal consequences has been a closer focus on issues of treaty interpretation and customary law in investment protection law.[188] The application of the pre-Second World War practice and decisions to the formulation of the contemporary standard has to appreciate these broader shifts in the legal order.

[185] Regarding the Model BITs of the US and Canada, SM Schwebel, 'The United States 2004 Model Bilateral Investment Treaty: an Exercise in the Regressive Development of International Law' (2006) 3 (2) Transnational Dispute Management; SM Schwebel, 'A Critical Assessment of the U.S. Model BIT' <http://www.biicl.org/files/4253_schwebel-biicl15may2009speech_cor2.pdf> 10–11, 13; SM Schwebel, 'The United States 2004 Model Bilateral Investment Treaty and Denial of Justice in International Law' in C Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP, Oxford 2009); LY Fortier, 'The Canadian Approach to Investment Protection: How Far Have We Come', ibid; JE Alvarez, 'The Evolving BIT' (2009) 6 Transnational Dispute Management; KJ Vandevelde, *U.S. International Investment Agreements* (OUP, Oxford 2009) 64–82.

[186] M Waibel, A Kaushal, K-H Chung, and C Balchin (eds), *The Backlash against Investment Arbitration* (Kluwer Law International, The Netherlands 2010).

[187] Cf the European reaction in 1970s to the first leading judgments of the ECtHR, W Dale, 'Human Rights in the United Kingdom—International Standards' (1976) 25 ICLQ 292, 302; FA Mann, 'Britain's Bill of Rights' (1978) 74 LQR 512, 523, fn 53.

[188] NAFTA Free Trade Commission, 'Notes of Interpretation of Certain Chapter 11 Provisions' (adopted 31 July 2001) <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/NAFTA-Interp.aspx?lang=en&view=d> [2].

2

Making of the International Minimum Standard (–1930s)

I. Nature of the International Standard

Elihu Root's 1910 speech about 'Basis of Protection to Citizens Residing Abroad' exercised an almost mystical effect on the (English-speaking) international lawyers of the first half of the twentieth century so it is important to unravel its argumentative process.[1] In his speech, Root addressed three aspects of the international standard: the source of the standard, the structure of the standard, and the content of the standard. For the purpose of convenience, these issues will be discussed in turn.

First, Root is ambiguous regarding the source of the international standard. In a crucial passage, Root notes the 'general acceptance by all civilized countries as to form a part of the international law of the world'.[2] This seems to be a reference to the process of customary law-making. However, the accuracy of the proposition is not demonstrated in terms of State practice, but rather by reliance on arguments of a less obviously relevant nature. Despite the conciseness of Root's paper (twelve pages), it is only at the bottom of page five that the international standard is first addressed. The first four pages make only an empirical argument, which is essentially that due to the improving facilities for transportation and communication as well as jobs following international investment a considerable number of people now travel abroad.[3] The empirical argument is relevant because 'conditions so universal plainly must be dealt with pursuant to fixed,

[1] See CC Hyde, 'How Far is the Position of Resident Aliens Recognised and Protected by International Law?' (1911) 5 ASIL Proceedings 32, 39; E Borchard, 'Basic Elements of Diplomatic Protection of Citizens Abroad' (1913) 7 AJIL 497, 517–18; N Gammans, 'The Responsibility of the Federal Government for Violations of the Rights of Aliens' (1914) 8 AJIL 73, 73; JW Garner, 'Responsibility of States for Injuries Suffered by Foreigners within Their Territories on Account of Mob Violence, Riots and Insurrections' (1927) 21 ASIL Proceedings 49, 52; FS Dunn, 'International Law and Private Property Rights' (1928) 28 Columbia L Rev 166, 174; C Hill, 'Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigner' (1928) 22 ASIL Proceedings 67, 80 (Garner); FS Dunn, *The Protection of Nationals: A Study in the Application of International Law* (John Hopkins Press, Baltimore 1932) 141; W Malkin, 'International Law in Practice' (1933) 49 LQR 489, 501–2; CT Eustathiadès, *La responsabilité international de l'état pour les actes des organes judiciares et le problème du déni de justice en droit international* (A Pédone, Paris 1936) 258; CC Hyde, 'Confiscatory Expropriation' (1938) 22 AJIL 759, 761–2 fn 10; E Borchard, 'The "Minimum Standard" of the Treatment of Aliens' (1939) 33 ASIL Proceedings 51, 65 (Nielsen); AK Kuhn, 'International Standards of Criminal Justice' (1939) 33 AJIL 338, 340; NR Doman, 'Postwar Nationalization of Foreign Property in Europe' (1948) 48 Columbia L Rev 1125, 1138; FG Dawson, 'International Law and the Procedural Rights of Aliens before National Tribunals' (1968) 17 ICLQ 404, 407; J Paulsson, *Denial of Justice in International Law* (CUP, Cambridge 2005) 23–4; C McLachlan, L Shore, and M Weiniger, *International Investment Arbitration: Substantive Principles* (OUP, Oxford 2007) 204–5; A Newcombe and L Paradell, *Law and Practice of International Treaties: Standards of Treatment* (Walter Kluwer Law & Business, The Netherlands 2009) 11–12. Root's definition of the standard is reproduced in the 1942 Hackworth's *Digest*, probably reflecting the US official position, G Hackworth, *Digest of International Law* (Volume 3, Government Printing Office, Washington DC 1942) 635.

[2] E Root, 'The Basis of Protection to Citizens Residing Abroad' (1910) 4 ASIL Proceedings 16, 21.

[3] Ibid 16–19.

definite, certain, and universally recognized rules of international action'.[4] In other words, because more people travel abroad, international law ought to provide rules for dealing with these (new) challenges. While one might expect that the legal implication of this statement would be the creation of the international standard, Root's argument does not go directly from the empirical necessity to the substantive standard of treatment. Instead, Root outlines the different methods of protection: use of force, consular jurisdiction, and, 'between countries which maintain the effective government for the maintenance of order within their territories', the international standard.[5]

If one were to present Root's position in an abbreviated form,[6] it would look like this:

1. Many citizens of other countries *are* present in civilized countries.
2. These conditions *ought to* be dealt with pursuant to clear and accepted international law rules.
3. These conditions *are* dealt with by use of force, extra-territorial jurisdiction, or the established standard of civilization.
4. (Therefore), the standard of civilization *is* accepted by all civilized countries.

This argument is problematic on a number of levels. One problem lies in the dual and seemingly contradictory application of the concept of the standard of civilization:[7] on the one hand, it is a criterion for acceptance of a polity as a civilized State (not subject to use of force or extra-territorial treaties) in the first place; on the other hand, it is an obligation with which a civilized State has to comply. Root's attempt to resolve this contradiction by describing potential respondents as being 'in an intermediate position between those incapable of maintaining order, and those which conform fully to the international standard'[8] only emphasizes the vagueness of the distinction and the potential for abuse. From the law-making perspective, the qualification of the standard as 'accept[ed] by all *civilized* countries'[9] raises the immediate question about the sufficiency of this acceptance for the creation of a general rule of international law. Unsurprisingly, the perception that law on the treatment of aliens was created by and unfairly favoured some States followed the development of the international standard throughout the twentieth century.[10]

The narrower aspects of Root's argument are also not unproblematic. The empirical proposition that people travel abroad does not automatically translate into a conclusion that international law has rules on people travelling abroad: at most, it suggests that international lawmakers should consider the creation or modification of rules on the matter. Similarly, the proposition that different methods may be used to protect nationals abroad, including use of force and special treaties, does not logically require the existence of a general rule on the matter. Root's focus on the use of force might be explained as an illustration of the intrusive and potentially abusive alternatives to the international standard.[11] Still, there is a logical leap from the statement that certain procedures are abusive to the conclusion that a certain substantive rule exists. In any event, forcible reprisals would still be applicable in relation to breaches of the international standard.[12]

[4] Ibid 19. [5] Ibid 19–20; see text at Ch 1 nn 50–76.
[6] Cf P Allot, 'Language, Method and the Nature of International Law' (1971) 45 BYIL 79.
[7] See text at Ch 1 nn 48–9. [8] Root 'Basis' (n 2) 21–2.
[9] Ibid 21 (emphasis added).
[10] Garner 'Responsibility of States' (n 1) 70, 76 (Borchard); Dunn *International Law and Private Property Rights* (n 1) 176; G Schwarzenberger, 'The Standard of Civilisation in International Law' (1955) 8 Current Legal Problems 212, 227; D Müller, 'The Work of García-Amador on State Responsibility for Injury Caused to Aliens' in J Crawford, A Pellet, and S Olleson (eds), *The Law of International Responsibility* (OUP, Oxford 2010) 70.
[11] Root 'Basis' (n 2) 20.

When Root comes to particular instances of State practice itself that would illustrate the existence and application of the international standard, his examples are far from demonstrating general acceptance. The single example Root provides in favour of the international standard comes from a citation of Lord Palmerston's speech in the *Don Pacifico* case.[13] His more extensive examination of the US practice illustrates only the failure to ensure the protection of aliens from mob attacks and attempts by the State Department to deny responsibility.[14] Overall, Root presents policy arguments on why rules on the issue should exist and deductive arguments as to why some alternatives might be worse, but the legal reasoning is sparse and the concept of 'civilization' inserts an almost irresolvable internal contradiction into the argument.

Second, the structure of the argument is based on the nearly exclusive nature of a general rule of non-discrimination, with a narrow exception. For Root, non-discrimination constitutes an integral *de minimis* element of the obligations under the international standard. In the last sentence of the speech, Root praises 'the wisdom and sound policy of equal protection and impartial justice',[15] and in relation to administration of justice he emphasizes the requirement to provide aliens with 'the same rights, the same protection, and the same means of redress for wrong... as are given to the citizens of country where they are'.[16] As a US Acting Secretary of State had stated thirty-five years before Root, '[i]t may be acknowledged that usually by public law and even by treaties, foreigners are not allowed greater immunities than citizens'.[17]

The general rule of non-discrimination is sufficient in all but a few exceptional cases, and the unusual or arbitrary nature of the practices, provided that they are non-discriminatory, will often not be sufficient to breach international law.[18] This is the lesson of Lord Palmerston's argument in *Don Pacifico* about completely outrageous behaviour that Root cites ('heavy stones placed upon their breasts, and police officers to dance upon them;... heads tied to their knees, and to be left for hours in that state; or to be

[12] See text at Ch 1 nn 59–76; RY Jennings, 'State Contracts in International Law' (1961) 37 BYIL 156, 159–60.
[13] Root 'Basis' (n 2) 21. [14] Ibid 23–5. [15] Ibid 27. [16] Ibid 26.
[17] He continued to say that '[t]reaties, however, in some instances, for reasons best known to the parties, make an exception to general rule', Mr Cadwalader, Acting Secretary of State, to Mr Foster (1874) 2 Wharton Digest 511. See also the letter of a King's Advocate, concluding that in the absence of 'any peculiar [treaty] Rights' the alien 'can justly claim no privilege in that respect [of trial] beyond the Natives of France', Sir J Dodson to Viscount Palmerston (1835) 6 Parry 278; similarly *Case of Patrick Higgins* (1842) 6 Parry 279; *Case of Dart* (1847) 6 Parry 279.
[18] In the UK practice, in a case of confiscation for the breach of law, 'the severity of the sentence was not sufficient to justify' a protest by the UK, *Case of the John Catto* (1834) 6 Parry 279, 280; even the punishment of temporary slavery could not be challenged 'unless there has been some Irregularity in the arrest of, or in the proceedings against' the aliens, *Florida Enslavement case* (1835) 6 Parry 280, and a law providing for twice longer imprisonment of aliens than nationals 'imposes no peculiar, or, exclusive Hardship', *French Law of 1832* (1847) 6 Parry 291. In the US practice, '[i]n almost all the European States there are police and administrative powers exercised by the Governments, which enable them to exert a very arbitrary authority over residents, whether natives or foreigners. When our citizens enter those countries, they enter them subject to the operation of the laws, *however arbitrary these may be*, and responsible for any violation of them', Mr Cass, Secretary of State, to Mr Wright (1858) 2 Wharton Digest 505, 505–6 (emphasis added). Similarly, even though certain power may be abused, aliens 'who, of their own accord, visit countries where it exists, must expect to incur that hazard, *unless by treaty stipulations they should be placed upon more favorable footing that the subjects of the Government who commit the abuse*', Mr Marcy, Secretary of State, to Mr Richter (1854) 2 Wharton Digest 504, 505 (emphasis added).

swung like a pendulum, and to be bastinadoed as they swing'): in such cases it is not 'the opinion of any reasonable man' to say that foreigners 'have no business to complain if the same things are practiced upon them'.[19] The doctrinal structure of Root's argument is foreshadowed in a letter that Root wrote in his official capacity in 1907.[20] As elaborated in doctrinal terms three years later, the non-discriminatory application of domestic law is internationally lawful in principle but not in the particular situation where due process has not been complied with.

The emphasis on non-discrimination was shared by leading writers. Borchard, whose 'views in any matter of international claims must carry great weight',[21] twenty years later explained the limited reach of the international standard when discussing the argument of national treatment in the 1930 Hague Conference:

> The flaw in the argument was that the proposition had been made too absolute, for international law has probably established the rule that certain exceptional types of injury transgressing the requirements of international justice and administration would justify an international claim, even though nationals might for a lack of remedy have to tolerate them.[22]

From this perspective, Calvo's error was not in being wrong in principle but in turning the normal default rule into an exhaustive rule that would not permit exceptions for unusual situations.[23] The argument of the international standard operated as 'national-treatment-plus' in those circumstances where the treatment of nationals could not serve as an appropriate benchmark because it was exceptionally outrageous.[24] The implicit

[19] Root 'Basis' (n 2) 21.

[20] 'While the department does not call into question the duty of persons residing in Haiti to comply with provisions of the Haitian law concerning the corvée, it must insist that American citizens residing in Haiti shall be subjected to the legal punishment for violation of a provision of law and that the violation of such law shall be established in an appropriate proceeding. Flogging an American citizen by Haitian soldiers under the command of a Haitian officer can not (sic) be considered due process of law or due punishment for violations of law', Mr Root, Secretary of State, to Mr Furniss, minister to Haiti (1907) 3 Hackworth Digest 553.

[21] JL Brierly, 'The Theory of Implied State Complicity in International Claims' (1928) 9 BYIL 42, 45.

[22] E Borchard, '"Responsibility of States", at the Hague Codification Conference' (1930) 24 AJIL 517, 538.

[23] E Borchard, 'The Citizen Abroad' (1927) 21 ASIL Proceedings 23, 24–5.

[24] *Louis Chazen (US v Mexico)* (1930) 4 RIAA 564, Concurring Opinion of Commissioner Nielsen 573, 574; 'Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners' (1929) 23 AJIL Special Supplement 133 arts 5 and 9; Root 'Basis' (n 2) 26; AS Hershey, 'Denial of Justice' (1927) 21 ASIL Proceedings 27, 27–8; PC Jessup, 'Confiscation' (1927) 21 ASIL Proceedings 38, 45 (Murdock, Borchard); Garner 'Responsibility of States' (n 1) 52; AP Fachiri, 'International Law and the Property of Aliens' (1929) 10 BYIL 32, 33; O Hoijer, 'La Responsabilité internationale des Etats en matière d'actes législatifs' (1929) 4 Revue de droit international 577, 578–9; Eustathiadès *La responsibilité international* (n 1) 263–4; AV Freeman, *The International Responsibility of States for Denial of Justice* (Longmans, Green & Co., London 1938) 298–9, 504–5. The same paradigm was invoked before the PCIJ and the ICJ. In the *Certain German Properties* case, Kaufmann on behalf of Germany argued in relation to protection of property that equality of treatment was sufficient only provided that 'the State in question treats its nationals in conformity with certain fundamental principles acquired by all civilised States', *Certain German Interests in Polish Upper Silesia (Germany v Poland)* PCIJ Rep Series C No 11 167–8 (author's translation). In the *Ambatielos* case, Fitzmaurice on behalf of the UK argued in relation to administration of justice that, 'provided a certain basic standard of justice exists and is applied, foreigners before the courts must take things as they find them and cannot claim special treatment, so long as they receive the same treatment as a native of the country would have received in like circumstances', *Ambatielos case (Greece v UK)* ICJ Pleadings 415. In the *Norwegian Loans* case, Bourquin on behalf of Norway suggested that when States were at the same level of development and organization and offered similar principles and guarantees, national treatment was sufficient, *Certain Norwegian Loans (France v Norway)* ICJ Pleadings Volume II 131–2. See also *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* ICJ Pleadings Volume X 656 (Ago on behalf of Spain).

duality of the argument is reflected in Oppenheim's *International Law*, where the obligation of the host State is formulated in *prima facie* conditional terms of 'grant[ing] to foreigners equality before the law with its citizens as far as safety of person and property is concerned'. However, further elaboration suggests an implicit minimum of unconditional rules, particularly regarding administration of justice, and '[c]orrupt administration of law against natives is no excuse for the same against foreigners'.[25] The duality is explicit in the 1942 Hackworth's *Digest*: on the one hand, '[a]liens within the jurisdiction of a state are entitled, generally speaking, to the protection of person and property assured by local law to nationals of the country'; on the other hand, '[e]qual protection in this sense presupposes the maintenance by the state of a standard of law and order conformable to the requirements of international law'.[26]

Third, while Root's standard was 'very simple', he did not proceed to detail its content in any but the most general terms.[27] There are two elements that are of importance in light of subsequent development. When evaluating the appropriateness of reliance on classical authorities, it is necessary to determine whether they were formulated with the protection of foreign investment in mind. Root did emphasize the 'great increase of international investment extending over the entire surface of the earth'.[28] However, foreign investment does not appear as an object of legal protection of the international standard, but only as a part of factual introduction into reasons why people might want to go abroad. For Root and the international legal order he represented, foreign investment was a familiar phenomenon but did not seem to be considered as a natural object of protection by the international standard. The normal focus of the international standard postulated was instead the protection from mobs[29] and denial of justice in courts, particularly in criminal trials.[30] In the judicial context, independence and impartiality of courts and non-discriminatory application of procedural rights and remedies were the only examples of clear and explicit elaboration of the content of the standard.[31]

Root also noted that no wrongfulness arose from the fact that the alien 'is less familiar than they [nationals] with the laws, the ways of doing business, the habits of thought and action, the method of procedure, the local customs and prejudices and often with the language in which business is done and the proceedings are carried on'.[32] While made specifically in relation to administration of justice, this statement is formulated in sufficiently broad terms so as to constitute a strong requirement for the alien to be familiar with the law and practice of the host State. Finally, Root is explicit about the

[25] L Oppenheim, *International Law* (Volume I: Peace, Longmans, Green & Co., London 1905) 376; cf a similar position taken in the later editions: L Oppenheim, *International Law* (Volume I: Peace, 2nd edn Longmans, Green & Co., London 1912) 397; RF Roxburgh (ed), *Oppenheim's International Law* (Volume I: Peace, 3rd edn Longmans, Green & Co., London 1920) 495–6; A McNair (ed), *Oppenheim's International Law* (Volume I: Peace, 4th edn Longmans, Green & Co., London 1928) 558; H Lauterpacht (ed), *Oppenheim's International Law* (Volume I: Peace, 5th edn Longmans, Green & Co., London 1937) 547–8; H Lauterpacht (ed), *Oppenheim's International Law* (Volume I: Peace, 6th edn Longmans, Green & Co., London 1947) 627–8; H Lauterpacht (ed), *Oppenheim's International Law* (Volume I: Peace, 7th edn Longmans, Green & Co., London 1948) 627–8; H Lauterpacht (ed), *Oppenheim's International Law* (Volume I: Peace, 8th edn Longmans, Green & Co., London 1955) 687–8. However, starting from the fourth edition in 1928, footnotes called attention to 'the question whether equality of treatment of aliens and nationals is the test or whether aliens are entitled to be treated in accordance with ordinary standards of civilisation', McNair Oppenheim 4th Peace, ibid 558 fn 1. Starting from the 5th edition in 1937, a separate entry was included on the protection of property as part of the standard, Lauterpacht Oppenheim 5th Peace, ibid 283–5; Lauterpacht Oppenheim 7th Peace, ibid 317–18; Lauterpacht Oppenheim 8th Peace, ibid 351–2.

[26] 3 Hackworth Digest (n 1) 630. [27] Root 'Basis' (n 2) 21. [28] Ibid 17–18.

[29] Ibid 22–5. [30] Ibid 25–7. [31] Ibid 25–6. [32] Ibid 26.

importance of the 'possibilities of government under existing conditions', while focusing in particular on 'the obligations of protection of aliens'.[33]

The vagueness of the exposition of the international standard in Root's paper was characteristic for most subsequent analysis. The first page of Borchard's treatise declared in axiomatic terms that '[t]he standard of treatment which an alien is entitled to receive is incapable of exact definition'.[34] When he did attempt to elaborate it, he found it to be mild, flexible, and variable under circumstances, and the argument that a non-discriminatory legislation could breach international law he perceived to be an unusual one.[35] The perception of the international standard as vague, confusing, undefined, and indefinable dominated both US[36] and European scholarship,[37] and even those supporting the standard at the 1930 Hague Conference emphasized its limited reach.[38] The standard was left to operate as a vague exceptional clause for outrageous situations. As Hughes explained in 1928, '[i]t is more easy to recognise when it is denied than it is to define affirmatively to establish that in which it consists'.[39]

The ubiquitous emphasis on the vagueness of the international standard was crucial for supporting the existence of the standard in light of controversial practice. However, what at one point was merely a descriptive justification of an exception for outrageous treatment, at another point started to develop into a normative prescription for State conduct, creating a tension between the structural focus on vagueness and the pragmatic necessity for specificity. The arguments in State practice and legal writings therefore became more confused and even directly contradictory. Root's thesis was that the international standard was simple, reasonable, and expressed in general principles. However, from his work as the Secretary of State he was well aware of the far-reaching, injurious, and disruptive nature of the international standard,[40] and during the drafting process

[33] 'The rights of the foreigner vary as the rights of the citizen vary between ordinary and peaceful times and times of disturbance and tumult; between settled and ordinary communities and frontier regions and mining camps' ibid 22.

[34] E Borchard, *Diplomatic Protection of Citizens Abroad* (The Banks Law Publishing Co., New York 1915) v.

[35] Borchard 'Basic Elements' (n 1) 517–18; Borchard 'The Citizen Abroad' (n 23) 24–5; Borchard 'The "Minimum Standard"' (n 1) 61; Hershey 'Denial of Justice' (n 24) 36–7 (Borchard); Jessup 'Confiscation' (n 24) 45–6 (Borchard); Garner 'Responsibility of States' (n 1) 73, 79 (Borchard); E Borchard, 'Protection of Foreign Investment' (1945–1946) 11 L Contemporary Problems 835, 844.

[36] Hyde 'How Far' (n 1) 32; similar to Root's earlier terminology of justice and doing 'what is just', E Root, 'The Relations between International Tribunals of Arbitration and the Jurisdiction of National Courts' (1909) 3 AJIL 529, 531; Hill 'Responsibility of States' (n 1) 86–7 (Hughes); Dunn *Protection* (n 1) 141; Q Wright, 'Due Process and International Law' (1946) 40 AJIL 398, 402.

[37] A Cavaglieri, 'Règles générales du droit de la paix' (1929) 26 Recueil des Cours de l'Académie de Droit International 315, 354; WE Beckett, 'Diplomatic Claims in Respect of Injuries to Companies' (1932) 17 Transactions Grotius Society 175, 179 (Beckett made a similar point as the UK representative at the 1930 Hague Conference, S Rosenne (ed), *League of Nations Conference for the Codification of International Law [1930]* (Volume IV, Oceana Publications, Inc., New York 1975) 1529); G Kaeckenbeeck, 'The Protection of Vested Rights in International Law' (1936) 17 BYIL 1, 16; Malkin 'International Law' (n 1) 502; AH Roth, *The Minimum Standard of International Law Applied to Aliens* (AW Sijthoff's Uitgeversmaatschappij N.V., Leiden 1949) 87; C de Visscher, 'Cours général de principes du Droit international public' (1954) 86 Recueil des Cours de l'Académie de Droit International 449, 507–8.

[38] Rosenne *Hague IV* (n 37) 1568 (Landsown stated that 'States are not an insurer for every foreigner who chooses to come upon its territory. In general, he knows the condition of affairs, and he comes there prepared to accept that condition of affair'), 1569–1570 (according to de Visscher, '[w]e say merely this: it is the duty of the State to provide a certain minimum protection for the benefit of the foreigner').

[39] Hill 'Responsibility of States' (n 1) 86 (Hughes); Malkin 'International Law' (n 1) 502.

[40] Root 'Relations' (n 36) 536. Scott later suggested that a specific case made Root 'reflect upon the danger of protection lightly accorded' when an American national asked for protection when he was himself suspect of fraud, JB Scott, 'Elihu Root's Services to International Law' (1924) 18 ASIL

of the PCIJ Statute he was critical of entrusting the Court with 'interpretation of more or less vague principles' and pointed out that 'the scope of the expression "principles of justice" varied with the countries'.[41] The simultaneous argument for a reasonable and vague standard and against an injurious and vague standard put forward by one person within one decade suggests a considerable tension within the standard's rationale.

The national treatment explored this uncertainty on at least two levels. The first criticism was that vague standards extrapolated from the consensus of civilized States did not comply with the traditional law-making processes. The criticism at the 1930 Hague Conference of vague customary rules and general principles used to explain obligations relating to the treatment of aliens illustrates the concerns about the legal underpinnings of the international standard.[42] Politis confessed that he did not understand the objections that were being raised, but they make considerable sense in the broader and somewhat peculiar context of the elucidation of the international standard.[43] The second criticism was directed at the result of the process. The international standard was weak and nebulous,[44] and the alleged criteria of propriety, normality, and reasonableness were not really standards at all because of their ambiguity.[45] Since the only clear and settled standard could be found in domestic laws, and since it would be impermissible to take it from the home State's legal order, the only logically remaining option would be to adopt the host State's law as the benchmark for a national treatment standard.

There were at least four ways of answering this critique. First, one could acknowledge, as Schwarzenberger did in 1955, that the standard indeed was nothing more than an internationalized Anglo-Saxon rule of law.[46] However, this would effectively

Proceedings 2, 16–17. The problematic implications were not unappreciated by the home States traditionally exercising diplomatic protection: the Queen's Advocate recognized the '[p]ossible abuse of such an interference on the part of Great Britain' 'being invoked to confirm suspicious or fraudulent titles in these unsettled and ill-governed States', *Mr Haycroft's case* (1862) 6 Parry 342, 343, and the Attorney-General Cushing admitted that the US, the UK, and France had interfered with questionable justifications, sometimes aggravating the evils of misgovernment, *Montano case (Peru v US)* (1855) 2 Moore Intl Arbitrations 1630, 1631–1632. In the drafting process of the Covenant of the League of Nations, President Wilson objected to a proposed treaty rule on protection of foreign property and the approach of 'Flag follows the Dollar', noting that under his administration the US did not protect unreasonable investments abroad that gave the investors undue advantage over host States, DH Miller, *The Drafting of the Covenant* (Volume One, New York–London, GP Putnam's Sons 1928) 349; DH Miller, *The Drafting of the Covenant* (Volume Two, New York–London, GP Putnam's Sons 1928) 532.

[41] *Procès-verbaux of the Proceedings of the Committee, June 16th—July 24th 1920 with Annexes* (Van Langenhuysen Brothers, The Hague 1920) 286, 310; O Spiermann, '"Who Attempts Too Much Does Nothing Well": the 1920 Advisory Commitee of Jurists and the Statute of the Permanent Court of International Justice' (2002) 73 BYIL 187, 212–15. Vagueness of rules was an object of Root's criticism also regarding treaties, A Carty, 'The Legacy of Elihu Root: Commentary' (2006) 100 ASIL Proceedings 210, 212.

[42] The Third Committee debated whether general principles and customary law could be sources of law of State responsibility for five days (out of twelve they had); thus the theoretical law-making debate very much undermined the whole codification project. Arguing against the vaguer and less-established rules: Rosenne *Hague IV* (n 37) 1442–1443 (Sipsom), 1456 (Guerrero), 1457 (Sipsom), 1461 (Guerrero), 1463 (Sipsom), 1465 (Lima, Buero), 1474–75 (Sipsom), 1476–77 (Cruchaga-Tocornal), 1583 (Suarez, Plesinger-Bozinov, Simpsom); in favour of customary rules and general principles in the field 1457 (Beckett), 1458 (Dinichert), 1460 (Basdevante), 1461 (Matter), 1462 (Vidal), 1463 (Basdevant), 1464 (Cavaglieri), 1464–65 (Castberg), 1465 (Basdevante), 1477–76 (Pacha), 1583 (Politis). On the unsolvable controversy about sources, C Bories, 'The Hague Conference of 1930' in J Crawford, A Pellet, and S Olleson (eds), *The Law of International Responsibility* (OUP, Oxford 2010) 65.

[43] Rosenne *Hague IV* (n 37) 1583.

[44] Hershey 'Denial of Justice' (n 24) 29, 30, 35 (Pegler).

[45] Rosenne *Hague IV* (n 37) 1609–1610 (Wu).

[46] Schwarzenberger 'Standard of Civilisation' (n 10) 227.

concede the national treatment point and as such would be an unattractive position during the debate. Second, Borchard accepted the broader point that internationalization of one's domestic law would be impermissible, but maintained the original argument for a vague and deferential exception.[47] Third, from the other end of the spectrum Fenwick attacked the premise of vagueness and argued in utilitarian policy terms for the necessity of creating strict and 'constructive rules of international law'.[48] This is reminiscent of Root's argument in favour of the international standard because people go abroad and therefore will inevitably be subject to some protection, and other methods of protection are only more abusive. Fourth, one could adopt a compromise position with Jessup, suggesting that the desirability of clearer rules should not lead to ignoring the normal sources:

> I fully agree there is an overwhelming necessity for definite criteria... but I deny the implication that merely because there is necessity for this definite position you have a right to inject into international law a criterion merely because it is definite without ascertaining whether that criterion is actually accepted. We cannot dismiss something as a generality in favor of something which is definite merely because one is definite and one is general, unless the definite criterion is actually accepted.[49]

While Borchard, Fenwick, and Jessup discussed these matters in the morning of 29 April 1927, an award that would 'inject into international law' the most influential criteria for the international standard had already been rendered half a year before, on 15 October 1926.[50]

II. Content of the International Standard

In the 1927 ASIL debate, Jessup called for an international standard with definite criteria where 'the definite criterion is actually accepted'. In the apparent absence of a more general consensus about the international standard, one way to proceed could be to identify those aspects of the international standard where definite criteria were accepted, and then to extrapolate and reconstruct the rationale of the general standard from them. The focus of the post-Second World War debates[51] makes it natural to think of expropriation first when one considers unlawful interference with the legal interests of the foreign investor.[52] However, the focus of the practice of the 1920s and 1930s as well as earlier law was not on protection of property but on denial of justice. The only aspect of the international standard that Root elaborated in detail related to rights in judicial process.[53] As Fitzmaurice reminded those critical of the colonial roots

[47] Hershey 'Denial of Justice' (n 24) 36–7 (Borchard); Jessup 'Confiscation' (n 24) 45–6 (Borchard).

[48] Hershey 'Denial of Justice' (n 24) 30–1 (Fenwick).

[49] Ibid 35–6 (Jessup).

[50] *LFH Neer and Pauline Neer (US v Mexico)* (1926) 4 RIAA 60.

[51] Eg S Friedman, *Expropriation in International Law* (Stevens & Sons Limited, London 1953); BA Wortley, *Expropriation in Public International Law* (CUP, Cambridge 1959); R Dolzer, 'New Foundations of the Law of Expropriation of Alien Property' (1981) 75 AJIL 553; MD Verwey and NJ Schrijver, 'The Taking of Property under International Law: A New Legal Perspective?' (1984) 15 Netherlands Ybk Intl L 3.

[52] L Henkin, 'International Law: Politics, Values and Functions' (1989) 216 Recueil des Cours de l'Académie de Droit International 9, 194–6; AV Lowe, 'Changing Dimensions of International Investment Law' (2007) (4) University of Oxford Faculty of Law Legal Studies Research Paper Series 53; see generally Ch 3.I.

[53] Text at nn 15–16, 31.

of the international standard in a 1957 ILC debate on State responsibility and the treatment of aliens:

> ... the rules relating... to the denial of justice were centuries old, thus they could be found, stated in very modern terms in *De Bello, De Represaliis et De Duello*, a treatise written by the Italian jurist Giovanni de Legnano, three hundred years before Grotius.[54]

The classical authors addressed the treatment of aliens solely in terms of denial of justice.[55] The same approach was adopted by writers in the nineteenth and early twentieth centuries.[56] In the digests of (US) State practice, a greater variety of issues were addressed, but denial of justice still operated as a general qualification to the standard of non-discrimination. In the 1887 Wharton's *Digest*, the practice on aliens is divided into sections on rights (particularly to purchase immovable property and to access courts), non-compellability to military service, local allegiance, taxation, liability of the sovereign, and right of expulsion.[57] The specific statements that usually emphasized non-discrimination were qualified by the exception where 'there has been a wilful denial of justice, or the tribunals have been corruptly used as instruments to perpetrate wrongs or outrage'.[58] In the 1898 Moore's *Digest of International Arbitrations*, the first section to address the substantive rules on the treatment is Chapter LVII on 'Denial of Justice',[59] and only then 'Arrest, Imprisonment, and Detention', 'Expulsion', 'Revenue Cases', 'Forced Loans', 'Contract Claims', and 'Bond Cases' are dealt with.[60] Only the chapter on contractual claims reproduces a comparable amount of practice to that on denial of justice. In the 1908 Moore's *Digest*, the section on property rights of aliens relied solely on application of treaties, while the section on judicial remedies contained pronouncements of general application.[61] Anzilotti's 1906 article on State responsibility for injuries suffered by

[54] ILC, *Yearbook of the International Law Commission, 1957, Volume I*, UN Doc A/CN.4/SER.A/1957 155; see also ILC, *Yearbook of the International Law Commission, 1959, Volume I*, UN Doc A/CN.4/SER.A/1959 152.

[55] JC Rolf (tr), A Gentili, *De Iure Belli Libri Tres* (Clarendon Press, Oxford 1933) 100–1 (implicitly); FW Kelsey (tr), H Grotius, *De jure belli ac pacis libri tres* (Clarendon Press, Oxford 1925) 626–7; R Zouche, *An Exposition of Fecial Law and Procedure, or of Law between Nations, and Questions concerning the Same* (Carnegie Institute of Washington, Washington 1911) 33; T Frank (tr), C van Bynkershoek, *Quaestrionum Juris Publici Libri Duo* (Clarendon Press, Oxford 1930) 135–6; JH Drake (tr), C Wolff, *Jus Gentium Methodo Scientifica Pertractatum* (Carnegie Endowement of International Peace, Washington 1934) 302; CD Fenwick (tr), E de Vattel, *The Law of Nations or the Principles of Natural Law* (Carnegie Institute, Washington 1916) 228, 230.

[56] RH Dana (ed), *Wheaton's Elements of International Law* (8th edn Sampson Lowe, Son, and Company, London 1866) 369–70; R Phillimore, *Commentaries upon International Law* (Volume 3, 3rd edn Butterworths, London 1885) 19–20; GS Baker (ed), *Halleck's International Law* (Volume I, 4th edn Kegam Paul, Trench, Trubner & Co. Ltd, London 1908) 505–6; E Nys, *Le droit international* (M Weissenbruch, Bruxelles 1912) 266; P Fauchille, *Traité de droit international public* (A Rousseau, Paris 1922) 525; AP Higgins (ed), *Hall's Treatise on International Law* (8th edn Clarendon Press, Oxford 1924) 59–60; EC Stowell, *International Law: A Restatement of Principles in Accordance with Actual Practice* (Sir Isaac Pitman & Sons, Ltd, London 1931) 160–1.

[57] F Wharton, *A Digest of the International Law of the United States, Taken from Documents Issued by Presidents and Secretaries of State, and From Decisions of Federal Courts and Opinions of Attorney-General* (Volume II, 2nd edn Government Printing Office, Washington 1887) respectively 490–8, 498–503, 503–10, 511–16, 516–28.

[58] Mr Marcy, Secretary of State, to Baron de Kalb (1855) 2 Wharton Digest 505.

[59] JB Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party* (Government Printing Office, Washington 1898) 3073–234.

[60] Ibid Moore *Digest* ibid respectively 3235–332, 3333–60, 3361–408, 3409–24, 3425–590, 3591–664.

[61] JB Moore, *A Digest of International Law: As Embodied in Diplomatic Discussions, Treaties and Other International Agreements, International Awards, the Decisions of Municipal Law, and the Writings of Jurists* (Volume IV, Government Printing Office, Washington 1906) respectively 5–7, 7–9.

aliens addressed in greater detail only the breach of denial of justice.[62] Borchard's 1915 *Diplomatic Protection* dealt with war claims, protection from mob violence, contractual claims, and denial of justice.[63] Expropriation did not feature either as a separate section or even as an index entry in these works. For Root, the international standard was 'a standard of justice' that measured 'justice due', the other 'sound policy' apart from equality was 'impartial justice',[64] and States had to do 'what is just'.[65] When thinking of ways to conceptualize the international standard, one simply could not 'overlook how well-established is the phrase's [denial of justice] usage, how ancient the practice which sanctions it, and how frequently it recurs in diplomatic communications, treaties and the literature of international law'.[66]

1. Argument of denial of justice: the *Neer* Award

Root's argument influenced the debate about the framework of the international standard. The 1926 award of the US–Mexico General Claims Commission in the *LFH Neer and Pauline Neer* case (*Neer*) exercised similar influence in the argument about the content of the standard, with most legal writers[67] and adjudicators accepting it as a starting point of the 1920s law both then[68] and subsequently (even if differing regarding its contemporary relevance in light of subsequent evolution).[69] States such as Argentina,

[62] D Anzilotti, 'La responsabilité internationale des États a raison des dommages soufferts par des étrangers' (1906) 13 Revue générale de droit international public 5, 20–5.

[63] Borchard *Diplomatic Protection* (n 34) 229–7, 281–329, 330–44.

[64] Root 'Basis' (n 2) 21, 27. [65] Root 'Relations' (n 36) 531.

[66] Freeman *Denial of Justice* (n 24) 181.

[67] E Borchard, 'Important Decisions of the Mixed Claims Commission United States and Mexico' (1927) 21 AJIL 516, 522; Eustathiadès *La responsibilité international* (n 1) 258; Borchard '"Minimum Standard"' (n 1) 58–9; Roth *Minimum Standard* (n 37) 95–6; FV García-Amador, 'State Responsibility: Some New Problems' (1958) 94 Recueil des Cours de l'Académie de Droit International 365, 429; H Waldock (ed), *Brierly's The Law of Nations* (6th edn Clarendon Press, Oxford 1963) 280–1; RY Jennings, 'General Course on Principles of Public International Law' (1967) 121 Recueil des Cours de l'Académie de Droit International 323, 487; S Vasciannie, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice' (1999) 70 BYIL 99, 105 fn 21; JC Thomas, 'Reflections on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators' (2002) 17 ICSID Rev—Foreign Investment L J 21, 29–32; McLachlan and others, *International Investment Arbitration* (n 1) 215; G van Harten, *Investment Treaty Arbitration and Public Law* (OUP, Oxford 2007) 87–8; P Muchlinski, *Multinational Enterprises and the Law* (2nd edn OUP, Oxford 2007) 638; R Dolzer and CH Schreuer, *Principles of International Investment Law* (OUP, Oxford 2008) 126–7; I Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (OUP, Oxford 2008) 63; C Yannaca-Small, 'Fair and Equitable Treatment Standard: Recent Developments' in A Reinisch (ed), *Standards of Investment Protection* (OUP, Oxford 2008) 115; Newcombe and Paradell *Law and Practice* (n 1) 235–7; KJ Vandevelde, *U.S. International Investment Agreements* (OUP, Oxford 2009) 268; R Kläger, *Fair and Equitable Treatment in International Investment Law* (CUP, Cambridge 2011) 51–2.

[68] *Walter F Faulkner (US v Mexico)* (1926) 4 RIAA 67 [10]; *Gertrude Parker Massey (US v Mexico)* (1927) 4 RIAA 155, Concurring Opinion of Commissioner MacGregor 162; *George Adams Kennedy (US v Mexico)* (1927) 4 RIAA 194, Concurring Opinion of Commissioner Nielsen 199, 201; *HG Venable (US v Mexico)* (1927) IV RIAA 219 [14]; *BE Chattin (US v Mexico)* (1927) 4 RIAA 282, Dissenting Opinion of Commissioner MacGregor 302 [2]; *Irma Eitelman Miller and others (US v Mexico)* (1928) 4 RIAA 336 [5]; *Ethel Morton (US v Mexico)* (1929) 4 RIAA 428, 429.

[69] *Pope & Talbot Inc. v Canada,* UNCITRAL Case, Award on Damages, 31 May 2002 126 ILR 131 [60]; *Mondev v US,* ICSID Additional Facility Case no ARB(AF)/99/2, Award, 11 October 2002 (2003) 42 ILM 85 [114]-[117]; *ADF v United States of America,* ICSID Additional Facility Case no ARB(AF)/00/1, Award, 9 January 2003 (2003) 18 ICSID Rev—Foreign Inv L J 195 [180]–[181]; *Técnicas Medioambientales Tecmed, S.A. v Mexico,* ICSID Additional Facility Case no ARB(AF)/00/02, Award, 29 May 2003 10 ICSID Rep 134 [154] fn 191; *Waste Management v US (II),* ICSID Additional Facility Case no ARB(AF)/00/3, Final Award, 30 April 2004 (2004) 43 ILM 967 [93]; *GAMI Investments v Mexico,* UNCITRAL Case, Final Award, 15 November 2004 13 ICSID Rep 147 [95]; *International*

Canada, the Czech Republic, Mexico, Mongolia, and the US have invoked *Neer* as authoritatively stating (at least) the classical customary law; no State seems to have explicitly rejected the authority of the case.[70] It is therefore useful to consider the line of the Claims Commission's reasoning.

The Claims Commission made three important points. First, it 'recognise[d] the difficulty of devising a general formula for determining the boundary between an international delinquency of this type and an unsatisfactory use of power included in national sovereignty'. The Commission referred to Moore, de Lapradelle, and Politis as authorities for the proposition that it was complicated to define denial of justice.[71] Second, the Commission addressed the relationship between denial of justice and the 'general formula' it was devising, and concluded that '[i]t is immaterial whether the expression "denial of justice" be taken in that broad sense in which it applies to acts of executive and legislative authorities as well as to acts of the courts, or whether it is used in a narrow sense which confines it to acts of judicial authorities only'. The reason for the irrelevance of the distinction was that the applicable standard was identical in all cases:

> ... in the latter case of reasoning, identical to that which—under the name of 'denial of justice'—applies to acts of the judiciary, will apply—be it under a different name—to unwarranted acts of executive and legislative authorities.

Third, the Commission considered it 'possible to go a little further than the authors quoted' and held

> ... (first) that the propriety of governmental acts should be put to the test of international standards, and (second) that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency so far short of international standards that every reasonable and impartial man would readily recognise its insufficiency.[72]

The reasoning about the general international standard from the particular aspect of denial of justice has three implications.

First, the Commission's approach fits within the broader debate about the definition of denial of justice. One view, expressed in *Neer* by Nielsen, was that 'it is useful and proper to apply the term denial of justice in a broader sense than that of a designation solely of a wrongful act on the part of the judicial branch of the government.... a

Thunderbird Gaming Corporation v Mexico, UNCITRAL Case, Final Award, 26 January 2006 [194]; *Saluka Investment BV v Czech Republic,* UNCITRAL Case, Partial Award, 17 March 2006 15 ICSID Rep 274 [295]; *Azurix Corp. v Argentina,* ICSID Case no ARB/01/12, Award, 14 July 2006 14 ICSID Rep 374 [365]; *LG&E v Argentina,* ICSID Case no ARB/02/1, Decision on Liability, 3 October 2006 (2006) 21 ICSID Rev—Foreign Inv L J 203 [123] fn 29; *Siemens A.G. v Argentina,* ICSID Case no ARB/02/8, Award, 6 February 2007 14 ICSID Rep 518 [293]; *Compañid de Aguas del Aconquija S.A. and Vivendi Universal v Argentina,* ICSID Case no ARB/97/3, Award, 20 August 2007 [7.4.7] fn 325; *BG Group Plc v Argentina,* UNCITRAL Case, Final Award, 24 December 2007 [301]–[302]; *Glamis Gold Ltd v US,* UNCITRAL Case, Award, 8 June 2009 (2009) 48 ILM 1038 [600]; *Cargill, Incorporated v Mexico,* ICSID AF Case no ARB/(AF)/05/2, Award, 18 September 2009 146 ILR 642 [272], [275]; *Merrill & Ring Forestry L.P. v Canada,* UNCITRAL, ICSID Administered Case, Award, 31 March 2010 [195]-[196]; *Total S.A. v Argentina,* ICSID Case no ARB/04/1, Decision on Liability, 21 December 2010 fn 133; *Impregilo S.p.A. v Argentina,* ICSID Case no ARB/07/17, Award, 21 June 2011 fn 101.

[70] *Gertrude Parker Massey (US v Mexico)* (1927) 4 RIAA 155 [21] (Mexico); *Pope* Damages (n 69) [46], [57] (Canada); *ADF* (n 69) [121] (Canada), [125] (Mexico); *Saluka* (n 69) [290] (Czech Republic); *Vivendi II* (n 69) [6.6.3] (Argentina); *National Grid v Argentina,* UNCITRAL Case, Award, 3 November 2008 [161] (Argentina); *Glamis* (n 69) [21] (the US); *Cargill* (n 69) [244] (Mexico); *Sergei Paushok, CJSC Golden East Company, CJSC Vostokneftegaz Company v Mongolia,* UNCITRAL Case, Award on Jurisdiction and Liability, 28 April 2011 [403] (Mongolia). Cf *Azurix* (n 69) [350] (Argentina denied that it had invoked *Neer*).

[71] *Neer* (n 50) [4]. [72] Ibid.

denial of justice may, broadly speaking, be properly regarded as the general ground of diplomatic intervention'.[73] For Nielsen, every wrongful act injuring aliens is denial of justice. Another view was expressed by Guerrero, similarly identifying denial of justice with all obligations in the area, but attempting to limit these obligations to extreme cases of denial of access to courts.[74] The third approach distinguished denial of justice in particular for the rules on treatment of aliens in general, recognizing that the former was part of but did not exhaust the latter.[75]

While the third approach was the most sensible and prevailed in the law of denial of justice, *Neer* is actually a restatement of the first approach in the form of an argument by analogy, expressly in Nielsen's opinion and clearly, if implicitly, in the Commission's opinion. Nielsen argued that the term 'denial of justice' covered all the acts of the State administration, while the majority considered this terminological issue irrelevant because the substantive content did not depend on it. Similarly, Nielsen's criteria of 'an obvious error in the administration of justice, or fraud, or clear outrage'[76] simply restated *Neer*'s procedural justice pedigree in more explicit terms than the standard put forward by the majority. Both on the conceptual level and regarding the terminological formulations, *Neer* proceeded from the perspective of judicial administration to formulate rules for other branches of government. To escape the illogical extension of the language of denial of justice and to 'be a little more specific than Root in his famous article',[77] the *Neer* Commission presented the broad concept of denial of justice in the neutral terms of an international standard,[78] justifying the standard's existence by borrowing the criteria of procedural outrages from denial of justice.[79]

Second, since the Commission considered denial of justice to be barely determinable, the criteria that it sought to extrapolate provided no guidance regarding the content of the standard. 'Outrage' and the perceptions of the reasonable man merely restated the *ad hoc* exception operating in the eye of the normative beholder, and do not seem very helpful outside the context of administration of justice where they had already been spelled out in detail. While 'bad faith', 'wilful neglect of duty', and 'pronounced impropriety' appear more meaningful, their circularity carries little in terms of legally significant criteria: if the scope and content of the obligation itself is not identified, then to consider whether compliance or incompliance has been in bad faith does not have much (added) legal value. The focus on wilful neglect and bad faith may have made sense regarding the

[73] *LFH Neer and Pauline Neer (US v Mexico)* (1926) 4 RIAA 60, Separate Opinion of Commissioner Nielsen 62, 64.

[74] S Rosenne (ed), *League of Nations Committee of Experts for the Progressive Codification of International Law [1925–1928]* (Volume II, Oceana Publications, Inc., New York 1972) 130.

[75] G Fitzmaurice, 'The Meaning of the Term "Denial of Justice"' (1932) 13 BYIL 93, 93–105; Eustathiadès *La responsibilité international* (n 1) 103–39; Freeman *Denial of Justice* (n 24) 84–186; Paulsson *Denial of Justice* (n 1) 46 fn 33.

[76] *Neer* Nielsen (n 73) 65.

[77] Borchard 'The "Minimum Standard"' (n 1) 65 (Nielsen).

[78] A number of authors took the view that the international standard was simply another way of presenting the broad view of denial of justice, Stowell *International Law* (n 56) 160–1; Beckett in Rosenne, *Hague IV* (n 37) 179 fn 1; Freeman *Denial of Justice* (n 24) 104, 181. In the first comment on the Commission's case law, Borchard described its position as one where 'the test of "denial of justice" in these matters is ... whether ... the act or omission in question ... meets the so-called international standard of civilized justice', Borchard 'Important Decisions' (n 67) 521. See cases where the Commission discusses denial of justice in the broad and the narrow sense: *Laura MB Janes et al (US v Mexico)* (1925) 4 RIAA 82 [22]; *Neer* (n 50) [4]; *BE Chattin (US v Mexico)* (1927) 4 RIAA 282, Opinion of Presiding Commissioner Van Vollenhoven 283 [10].

[79] Borchard 'The "Minimum Standard"' (n 1) 65 (Nielsen). The 1929 Harvard Draft Convention used *Neer* as an authority for State responsibility for denial of justice in judicial or quasi-judicial capacity, 1929 Draft Convention (n 24) 182.

issue that the Commission was tackling, since the obligations relating to the protection and security of aliens in general, and punishment of crimes against them in particular, were considered to require an obligation of due diligence.[80] However, it is problematic in other areas for the treatment of aliens.[81] Explaining the standard's content by reliance on the procedural outrage vocabulary from denial of justice was an obvious and perhaps even inescapable choice, but it carried with itself certain problems.

Third, the argument extrapolating the vague and deferential standard is questionable within its own framework, building on some distinctly backward aspects of international practice and theory.[82] In substantive terms, the Commission's perception of the indefinable denial of justice should be situated within the scholarship existing at the end of the 1920s, before the publications of monographs of de Visscher, Eustathiadès, and particularly Freeman demonstrated the structural logic of the rule.[83] In theoretical terms, the Commission's argument extrapolated the general standard for all branches of government from the particular standard relating to the judiciary. Such an approach misdirects the analysis by confusing attribution with the content of the international obligation,[84] and possibly finds support in the old debates about the special status of judiciary for an additional vagueness and deference.[85] The deference derived from the particular branch committing most breaches should not necessarily be generalized towards breaches committed by all branches of the government. In factual terms, *Neer* did not raise the issue of the mistreatment of an alien by the State. It concerned the scope of the obligation to capture criminals that had murdered an alien. Since the scope of a State's obligation to preclude and punish mistreatment by non-State actors may plausibly be different from the obligation not to mistreat aliens itself, a generalization about the content of standard for a State's conduct, including on protection of foreign investment, from such an atypical rule may be inaccurate.[86] In addition, *Neer* raised the question of the conduct of the criminal justice system, a matter that international law has traditionally treated with great deference.[87] Consequently, the vagueness and deference of *Neer* may have come from a theoretically, systemically, and factually misguided approach to the legal issue at hand, and its legally almost meaningless criteria should not be taken as an exhaustive, self-sufficient, and irreplaceable elaboration of the content of classical law.

Jan Paulsson and Georgios Petrochilos have suggested that the *Neer* standard was meant to apply only to obligations of protection of aliens from attacks ('derivative responsibility') and regarding administration of justice but not to 'direct responsibility' of the

[80] Borchard *Diplomatic Protection* (n 34) Ch V; Freeman *Denial of Justice* (n 24) Ch XIII.

[81] Freeman *Denial of Justice* (n 24) 372–81. As Borchard commented on a cautiously positive note, '[s]uch a test, while broad and general, may perhaps be approved. Its value will depend upon its application to particular cases', Borchard 'Important Decisions' (n 67) 522.

[82] To paraphrase H Lauterpacht, *The Function of Law in the International Community* (Clarendon Press, Oxford 1933) 6.

[83] C de Visscher, 'Le déni de justice en droit international' (1935) 52 Recueil des Cours de l'Académie de Droit International 369; Eustathiadès *La responsibilité international* (n 1); Freeman *Denial of Justice* (n 24).

[84] R Ago, 'Le délit international' (1939) 68 Recueil des Cours de l'Académie de Droit International 419, 468.

[85] Freeman *Denial of Justice* (n 24) Ch II.

[86] *Methanex Corporation v United States of America*, UNCITRAL Case, Second Expert Opinion of Sir Robert Jennings, 6 September 2001 <http://italaw.com> 3; *Mondev* (n 69) [115]; *ADF* (n 69) [181]; *Merrill* (n 69) [196]–[201].

[87] Particularly regarding property rights, A Verdross, 'Règles internationales concernant le traitement des étrangers' (1931) 37 Recueil des Cours de l'Académie de Droit International 327, 372; Wortley *Expropriation* (n 51) 41–4.

executive in other cases.[88] Their argument consists of three sub-points: first, *Neer* was never perceived as a general standard;[89] second, the *Chattin* Award limits *Neer* to 'aggravated' criteria of derivative responsibility and judicial administration;[90] third, the Commission applied *Neer* only to these cases, otherwise relying on the 'ordinary standards of civilization' test from the *Roberts* Award.[91] The first point about perceptions is difficult to determine with certainty because *Neer* (as almost any judicial pronouncement) can support different propositions at different degrees of abstraction: the existence of international standards in principle, the existence of an international standard of a general nature, and the application of international standards to an allegation of failure to protect.[92] At least in the very first comment on the Commission's case law written in 1927, Borchard cited *Neer* as a general expression of 'a kind of international "due process of law", by which the legitimacy and propriety of national action may in the last resort be tested'.[93]

Despite the muddling of conceptual waters in *Chattin*, the better view is that the scope of *Neer* is determined not by the distinction between direct and derivate liability but by the existence of more specific rules on the matter.[94] In the very last award on merits rendered by the Commission, Nielsen noted in general terms that, 'on the basis of convincing evidence of a pronounced degree of improper governmental administration

[88] J Paulsson and G Petrochilos, '*Neer*-ly Misled' (2007) 22 ICSID Rev—Foreign Investment L J 242.

[89] Ibid 244–7; cf *Joseph Charles Lemire v Ukraine*, ICSID Case no ARB/06/18, Award, 14 January 2010 [248]–[249].

[90] Paulsson and Petrochilos '*Neer*-ly Misled' (n 88) 254–6; *Chattin Van Vollenhoven* (n 78) [7]–[11].

[91] Paulsson and Petrochilos '*Neer*-ly Misled' (n 88) 253–4, 257; *Harry Roberts (US v Mexico)* (1926) 4 RIAA 77 [8].

[92] In the *Certain Norwegian Loans* case, *Neer* was cited as an authority supporting the international minimum standard against national treatment, *Certain Norwegian Loans* Pleadings I (n 24) 482 (Rejoinder of Norway). In the *Barcelona Traction* case, *Neer* was discussed in relation to the requirement of bad faith in the treatment of aliens, showing, if anything, the breadth of its potential application, *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* ICJ Pleadings Volume IV 508 fn 4 (Counter-memorial of Spain); ibid Volume V 316 [466] (Reply of Belgium); ibid Volume VI 216 [35]–[36] (Reply of Spain); ibid Volume VIII 49 (Rolin on behalf of Belgium); ibid Volume IX 94 (Guggenheim on behalf of Spain). In the *Tehran* case, the US cited *Neer* both as the general proposition for the existence of customary standards and as providing the criteria for the 'protection and security' standard, *United States Diplomatic and Consular Staff in Tehran (US v Iran)* ICJ Pleadings 181 (Memorial). In the *ELSI* case, the US referred to *Neer* as one of the authorities explaining the purpose of the 'due process' criterion of expropriation clause, supporting the relevance of *Neer* for investment law, *Elettronica Sicula S.p.A. (ELSI) (US v Italy)* ICJ Pleadings Volume I 93 fn 2 (Memorial).

[93] Borchard 'Important Decisions' (n 67) 521–2; see also text at n 181.

[94] The Presiding Commissioner of the *Chattin* Tribunal drew the distinction between indirect liability of States (for failure to punish third persons) and direct liability, and further between direct liability of judicial and other authorities. In the first two situations, the 'aggravated' *Neer* standard applied but not in cases of direct liability by executive authorities, *Chattin Van Vollenhoven* (n 78) [6]–[11]. The authority of *Chattin* is suspect on a number of levels: first, both Commissioners expressed reservations about the Presiding Commissioner's taxonomy, ibid Opinion of Commissioner Nielsen 295, 295, *Chattin* MacGregor (n 68) [13]–[14]; second, the terms of art and distinctions of the taxonomy do not seem to appear in any subsequent opinions by either the Presiding Commissioner or any of the Commissioners; third, the taxonomy is *obiter dictum* because the *Chattin* case was clearly about judicial proceedings; fourth, the considerable confusion between attribution, breach, and responsibility makes any rationale that might be untangled inherently suspect. There is little to justify the 'direct liability' theory in the particular authorities to which van Vollenhoven refers. As one might expect, the criteria for wrongfulness identified in those cases were set out by the primary rules in question: the law on naval ceremonies, Mermaid *(Grande-Bretagne c Espagne)* (1869) II Lapradelle Politis Recueil 491, 496–7; the law on the taking of neutral property, *Union Bridge Company (US v GB)* (1924) 6 RIAA 138, 141–2; and the law on State contracts, *Illinois Central Railroad Co. (US v Mexico)* (1926) 4 RIAA 134 [2]; *John B Okie (US v Mexico)* (1926) 4 RIAA 54 [7]; *Venable* (n 68) [9]. It is questionable whether one can use *Chattin* as an authoritative gloss on *Neer*, Paulsson, and Petrochilos '*Neer*-ly Misled' (n 88) 254–6: taken at its strongest, it is an *obiter dictum* by the Presiding Commissioner, introducing theoretically and materially unsustainable distinctions that even he himself did not subsequently follow.

on the part of the legislature, executive or judicial branch of the Government, one nation may properly call another to account'.[95] The argument for switching from *Neer* to the 'ordinary standards of civilization' from *Roberts* as a qualitatively different alternative rests on a somewhat questionable premise. The 'ordinary standards' is not an innovation of *Roberts*, but originates in Nielsen's opinion in *Neer* itself, where Nielsen goes on to explain the 'standards' as 'an obvious error . . . , or fraud, or a clear outrage'. *Roberts* is only shorthand for *Neer*, rather than a different legal argument.[96] When the Commission took the view that such more specific rules did not exist (on judicial administration in general[97] and punishment of crimes against aliens),[98] the *Neer* standard applied;[99] when such rules existed (on State contracts)[100] or were formulated by the Commission (on imprisonment[101] and taking of life),[102] it was only logical that they would be applied instead.

Within the boundaries of this case law, *Neer* operates as the default rule, extrapolated by analogy from denial of justice, and is replaced by more specific and detailed rules on

[95] *International Fisheries Company (US v Mexico)* (1931) 4 RIAA 691, Dissenting Opinion of Commissioner Nielsen 703, 712.

[96] *Neer* Nielsen (73) 65. In subsequent cases, Nielsen relied on 'ordinary standards of civilization' precisely to criticize the failure of the Commission to apply the demanding standard expressed in *Neer*, *Teodoro García and MA Garza (Mexico v US)* (1926) 4 RIAA 119, Dissenting Opinion of Commissioner Nielsen 123, 127, 133; *Francisco Mallén (Mexico v US)* (1927) 4 RIAA 173, Separate Opinion of Commissioner Nielsen 180, 181; *James H McMahan (US v Mexico)* (1929) 4 RIAA 486, Dissenting Opinion of Commissioner Nielsen 492, 494. Similar terms like 'normal standards of civilization' were applied to judicial proceedings, showing (*pace Chattin*) that this concept is not limited to non-judicial instances of direct liability, *Walter JN McCurdy (US v Mexico)* (1929) 4 RIAA 418. In the *Salem* arbitration between the US and Egypt, where Nielsen was again the US arbitrator, the Tribunal addressed alleged mistreatment in judicial proceedings by reference to 'the standard of international law', *Salem case (US v Egypt)* (1932) 2 RIAA 1161, 1197. Nielsen in his dissent referred to 'ordinary standards obtaining among members of the family of nations', 'ordinary standards of civilization' and also the *Neer* standard of 'pronounced degree of improper governmental action [administration]', Dissenting Opinion of Arbitrator Nielsen 1204, respectively 1211, 1214, 1211, 1223, cf *Neer* (n 50) [5] ('pronounced degree of improper action'), *Neer* Nielsen (73) 65 ('pronounced degree of improper governmental administration').

[97] *Teodoro García and MA Garza (Mexico v US)* (1926) 4 RIAA 119 [8]; *Venable* (n 68) [23]; *HG Venable (US v Mexico)* (1927) 4 RIAA 219, Opinion of Commissioner MacGregor 249 [5]; *Louis B Gordon (US v Mexico)* (1930) 4 RIAA 586, 590.

[98] *Eitelman* (n 68) [1]; *Laura A Mecham and Lucian Mecham, Jr (US v Mexico)* (1929) 4 RIAA 440, 443; *Mary M Hall (US v Mexico)* (1929) 4 RIAA 539, Concurring Opinion of Commissioner Nielsen 541, 542; *Naomi Russel (US v Mexico)* (1931) 4 RIAA 805, Dissenting Opinion of Commissioner Nielsen 806, 832.

[99] Paulsson and Petrochilos suggest that in the *Faulkner* Award *Neer* was relied on only for the basic principle of existence of international standards, '*Neer*-ly Misled' (n 88) 253, but the criterion applied ('a treatment of apparent international insufficiency') comes directly from the second alternative of Neer, see *Faulkner* (n 68) [10]. In the *Adler* case, the Commission stated that it 'has heretofore *broadly* indicated a standard by which it considers it must be guided in making judicial pronouncements with respect to *alleged wrongful acts of authorities directed against private persons*', and the criterion was 'a pronounced degree of improper governmental administration', *Leonard E Adler (US v Mexico)* (1926) 4 RIAA 74 [9] (emphasis added), cf *García* Nielsen (n 96) 127.

[100] See the cases cited at n 174; cf Moore *History and Digest of International Arbitrations* (n 59) Ch LXIII; Borchard *Diplomatic Protection* (n 34) Ch VII.

[101] If the 'cruel and inhuman imprisonment' in *Roberts* is neither an elaboration of 'outrage' of *Neer* nor a reference to Nielsen's separate opinion, it may also be read as an expression of a special standard of imprisonment, *Roberts* (n 91) [8], further developed in later cases as 'a maltreatment and a hardship unwarranted by the purpose of the arrest', *Daniel Dillon (US v Mexico)* (1928) 4 RIAA 368, 369, and 'inhuman treatment []or treatment up . . . to the standards of civilized nations', *Louis Chazen (US v Mexico)* (1930) 4 RIAA 564, 569.

[102] The *García* case expressed an 'international standard concerning the taking of human life', *García* (n 97) [4]–[5]; see also *James H McMahan (US v Mexico)* (1929) 4 RIAA 486, 489.

the issue when they exist or are developed. This explanation perfectly fits the broader development of the international standard and is a relative improvement over Root's argument. For Root, international standard is a (generally) indefinable rule for outrageous cases, with the exception of specific rules on denial of justice; for *Neer*, the specific rules on denial of justice provide a source for analogy to make the 'outrageous' rule slightly more specific. However, simultaneously with specifying the default element of the international standard, *Neer* also made it potentially more complicated to develop more detailed rules that did not fit within the procedural framework. There are good reasons to be sceptical about the authority of the *Neer* standard, particularly in considering the questionable appropriateness of such an argument by analogy. Still, once *Neer* is accepted as (only) the default rule, the solution should lie not in replacement of one shorthand description with another but in elaboration of more specific rules on particular issues, as the Commission itself proceeded to do regarding the taking of life.[103] As Robert Jennings explained, after citing 'the well-known statement of the measure of the standard in the *Neer* case':

> so crude a standard has little relevance to questions arising from modern commercial contracts and concessions.... What is now required in a sphere like contract is not so much of very general principles as of detailed rules of technical law. No doubt these rules may then be said to represent the contemporary content of the international standard.... But such rules cannot be deduced a priori from the idea of the international standard.[104]

2. Consequences for the international standard

When opening the 1930 Hague Conference, Jules Basdevant urged that 'we must rely upon the past, we must frame rules for the present, but we must also keep our eyes fixed for the future'.[105] At best, the *Neer* standard imperfectly followed the first of these guidelines. In the 1920s and 1930s, the law faced a number of important challenges, and the most important of those related to the protection of property. Writing in 2007, Vagts considered that in 1907 '[b]eyond crass expropriation, international law offered some rudimentary safeguards against unfair treatment'.[106] In fact, and while it seems perplexing after decades of debates about compensation for expropriation,[107] the situation was almost the opposite. International law offered considerable safeguards against unfair treatment in the form of denial of justice. However, the safeguards regarding protection of property were quite rudimentary, receiving serious attention only after the Soviet and Mexican expropriations, when the previously silent consensus broke down.[108] The *Neer* vocabulary of 'outrage' and 'an obvious error in the administration of justice' was badly equipped to explain non-arbitrary interferences with alien property. The use of

[103] Ibid.

[104] Jennings 'State Contracts' (n 12) 180 (emphasis added). Jennings was partly drawing upon the Norwegian argument in the *Certain Norwegian Loans* case that '[o]nly State practice, *the general practice of civilised States*, can reveal it [the internationally required minimum]. The "minimum standard" cannot be defined *a priori* pursuant to certain abstract concepts', *Certain Norwegian Loans (France v Norway)* Pleadings Volume II 132 (Bourquin) (author's translation) (emphasis added).

[105] Rosenne *Hague IV* (n 37) 1438.

[106] DF Vagts, 'International Economic Law and the American Journal of International Law' (2006) 100 AJIL 769, 773.

[107] See Ch 3.1.

[108] JES Fawcett, 'Some Foreign Effects of Nationalization of Property' (1950) 27 BYIL 355, 356–7; G Schwarzenberger, 'The Protection of British Property Abroad' (1952) 5 Current Legal Problems 295, 298–9; see Ch 3 nn 30–4.

these criteria therefore slowed and misdirected the development of the international standard.[109] The consideration of different law-making and law-rationalizing strategies employed is helpful in appreciating what arguments could be employed in the contemporary debate.[110]

First, the rules on the protection of property could be addressed in terms of the *Neer* standard, as best seen in the celebrated[111] and heart-searching British debate on the protection of property between Fachiri and Williams.[112] Writing in 1925, Fachiri initially argued that '[a] state is entitled to protect its subjects in another state from *gross injustice* at the hands of such other state', and that uncompensated expropriation fell under the 'gross injustice' rule.[113] Nineteenth-century State practice indeed appears to have considered property protection from the perspective of arbitrariness, as Palmerston explained in the 1837–1842 *Sicilian Sulphur* controversy about the grant of a sulphur monopoly to French traders:

> ... in countries where the Government is arbitrary and despotic, and subject to no responsibility or control, it may often happen that caprice, want of political knowledge, prejudice, private interest, or undue influence, may procure the promulgation of unjust and impolitic edicts, inflicting much injury upon the people of such State, interfering with the legitimate industry of individuals, deranging the natural transactions of commerce, and causing great detriment to private interests, and to national prosperity.[114]

The UK complained that its nationals had been 'arbitrarily and suddenly deprived of the free disposal of his property',[115] just as in the 1842 *John Finlay* controversy Palmerston protested against the Greek expropriations of land seized arbitrarily and allegedly without legal authority, and not for proper public purpose.[116] Indeed, many of the early expropriation cases debated in the 1920s addressed indirect or otherwise arbitrary takings,[117] and State practice of the nineteenth-century dealing with property rights focused on the elements of substantive and particularly procedural arbitrariness.[118] In *Sicilian Sulphur*,

[109] Jennings 'State Contracts' (n 12) 180.

[110] On law-making strategies M Byers, 'Pre-Emptive Self-Defence: Hegemony, Equality and Strategies of Legal Change' (2003) 11 J Political Philosophy 171; M Byers, 'Policing the Seas: The Proliferation Security Initiative' (2004) 98 AJIL 526.

[111] Fawcett 'Nationalization of Property' (n 108) 355.

[112] Schwarzenberger 'Protection' (n 108) 295–6.

[113] AP Fachiri, 'Expropriation and International Law' (1925) 6 BYIL 159, 161 (emphasis in the original).

[114] Great Britain, *State Papers 1839–1840 Volume 28* (Harrison and Sons, London 1857) 1163, 1218.

[115] Ibid 1173 (Temple).

[116] *John Finlay* case (1849–1850) 39 British and Foreign State Papers 410, 431. The *Finlay* controversy unfolded in parallel with the better-known *Don Pacifico* case (Paulsson *Denial of Justice* (n 1) 15–17), and there was no perception of qualitative difference, ibid 481; T Baty, *International Law* (John Murray, London 1909) 85.

[117] The indirect expropriations were *Sicilian Sulphur* (n 114); *Savage Claim (US v Salvador)* (1865) 2 Moore Intl Arbitrations 1855; 1911 and 1912 disputes about life insurance monopolies in Italy and Uruguay respectively, Fachiri 'Expropriation' (n 113) 166–7; JF Williams, 'International Law and the Property of Aliens' (1928) 9 BYIL 1, 3–5; *Norwegian Shipowners' Claims (Norway v US)* (1922) 1 RIAA 307, 332–4; the arbitrary direct expropriations were *John Finlay* (n 116); *Mr. Stiebel's case* (1868) 6 Parry 349; Mr Bayard, Secretary of State, to Mr Scott, minister to Venezuela (1887) 6 Moore Digest 724, 725; *Etats-Unis d'Amérique, Siam* (1897) H La Fontaine, *Pasicrisie internationale 1794–1900* (Martinus Nijhoff, The Hague 1997) 579; *Walter Fletcher Smith v the Compañía Urbanizadora del Parque y Playa de Marianao* (1930) 24 AJIL 384, 386–7.

[118] The seizure and sale of merchandise without legal process was wrongful in *Eli E and Jervis S Hammond (US v Mexico)* (1839) 4 Moore Intl Arbitrations 3241; the claim about wrongful confiscation of a trunk of clothing was rejected because no denial of justice had taken place, *Baldwin's case (US v Mexico)* (1849) 3 Moore Intl Arbitrations 3126, 3127; condemnation of property by a court could be challenged if 'the sentence is in violation of well-established principles of national law or based upon

Palmerston concluded that 'foreign Governments... are, therefore, often anxious to secure their subjects... from being liable to the injuries and uncertainties', therefore leaving open the question of whether property was also protected from injuries that were *prima facie* not arbitrary and uncertain.[119]

The practice of non-discriminatory nationalizations exposed the underlying uncertainty about the rationale of property protection. Writing in 1928, Williams adopted the *Neer* standard and demonstrated the limitations of its vocabulary outside the procedural outrage paradigm:

> For the confiscation of property it may very well be that the same rule is applicable as that which only the other day an international tribunal laid down in a case where life had been lost: [*Neer* standard]. This is not the language in which all sober men in civilized countries would at the present time describe any and every measure of expropriation which, though not accompanied by full compensation, was undertaken by a civilized government and applied impartially to aliens and nationals in pursuit of policy which that government, rightly or wrongly, acting within the sphere of its own independent authority, conceives to be in the interest of peace, order, and good government of the territory and people committed to its charge.[120]

Responding in 1929, Fachiri modified his position, both by adopting a pre-*Neer* broad approach to denial of justice potentially covering property protection,[121] and considering post-*Neer* whether property protection is among those fundamental rights with which international law is concerned.[122] Any argument made within the limits of the *Neer* approach left itself open to Borchard's criticism:

> To convert the requirement of conformity with elementary principles of justice into an "international standard of treatment", and then into a right to own private property, preferably unqualified, is calculated to create dangerous confusion and to assume a definite established category of substantive rights protected by international law, when in fact none such exists.[123]

testimony clearly insufficient', *Case of the 'Orient' (US v Mexico)* (1849) 3 Moore Intl Arbitrations 3229, 3230; in case of seizure of a vessel on the basis of unjustified suspicions, '[t]he proceedings against the property of the claimant were vexatious and oppressive in the highest degree', *Case of the 'Patrick B Hayes'* (1850) 4 Moore Intl Arbitrations 3392, 3393; the 'singl[ing] out' of an alien's trading in Peru, *Mr Ledger's case* (1851) 6 Parry 347; a shipment of tobacco detained but not subject to proper proceedings for adjudicating seizure 'through this wilfulness and neglect on the part of the government authorities' unlawful, *Vanstavoren's case* (1851) 4 Moore Intl Arbitrations 3388, similarly in *Case of the 'Harriet'* (1851) 4 Moore Intl Arbitrations 3394, 3395; the sudden and unreasoned suspension of Dr Gamble's medical practice in Mexico, *Dr Gamble's case* (1852) 6 Parry 347; a threatened expropriation where protection was not advised because '[n]o arbitrary violation of law or absolute Denial of justice has taken place or appears to in contemplation', *Mr Drinkwater's Mills* (1857) 6 Parry 338, 339; a 'sudden abrogation' of the right to own land, *New Granada* (1861) 6 Parry 345; an objection to 'acts of arbitrary and unjustifiable oppression in the matter of quarantine', *Case of the 'Azorian'* (1861) 6 Parry 291, 292–3; the 1865 admission by the Queen's Advocate regarding a claim about real property mistreatment that in principle '[t]here may be, of course, exceptional cases of absolute refusal or flagrant violation of justice *in re minima dubia*', *Mr Crutchett's case* (1865) 6 Parry 337; confiscation of a vessel '[a]fter a fair and full hearing' lawful, *Case of Reed and Fry (US v Mexico)* 3 Moore Intl Arbitrations 3132; confiscation when 'the decision appears to him [the umpire] so unfair as to amount to a denial of justice' unlawful, *Bronner's case (US v Mexico)* (1874) 3 Moore Intl Arbitrations 3134, 3135; advice to protest a fine for a small breach that amounts to more than the value of cargo, *The 'Dolores'* (1875) 6 Parry 294, 294–5; advice to protest the abrogation of licenses to trade to 'British subjects who have already established themselves in Haiti on the faith of a different state of things', *Haiti* (1890) 6 Parry 346, 346–7. Illustratively, the 1929 Harvard Draft Convention considered arbitrary annulments of concession contracts and confiscation without legal process as part of denial of justice, (n 24) 182.

[119] *Sicilian Sulphur* (n 114) 1218.

[120] Williams 'International Law' (n 117) 29.

[121] Fachiri 'Property' (n 24) 36.

[122] Ibid 33.

[123] E Borchard, 'Book Review' (1932) 26 AJIL 924, 925; also Borchard 'The "Minimum Standard"' (n 1) 452–60.

Protection of property therefore could be justified only by abandoning the procedural outrage language and developing specific rules on the issue.[124] This is not something that would go against the logic of *Neer* but precisely the kind of development that is implicit in its model of a default rule. Indeed, this was the challenge that the US–Mexican Commission itself faced post-*Neer* regarding cases on the taking of life: Commission rejected the vernacular of outrage and formulated criteria on necessity of use of force, against the dissent of Nielsen, who still wanted to apply the formula of outrage.[125]

Second, it would have been possible to argue that customary law on the protection of property could be derived from treaty law on the issue. However, it was considered that treaties could not support the existence of custom, and moreover that precisely their diminishing number demonstrated existence of custom.[126] At the same time, a considerable part of US FCN treaties from the mid-nineteenth century included provisions on the protection of property.[127] The British position in the *Sicilian Sulphur* controversy was based on treaty rules[128] that were explained to exist 'precisely for securing in certain cases such greater immunities and exemptions'.[129] The theoretical proposition of bilateral treaties influencing custom on the treatment of aliens was also accepted, as de

[124] Verdross 'Règles internationales' (n 87) 382–3; Lauterpacht *Function of Law* (n 82) 122; Freeman *Denial of Justice* (n 24) 50–1, 68–9.

[125] Cf *García* (n 97) [4]–[5]; *García* Nielsen (n 96) 127.

[126] For the former point, 'Report of Dr. J. C. Witenberg to the Protection of Private Property Committee' in *International Law Association's Report of the Thirty-Sixth Conference 1929* (Sweet & Maxwell, London 1930) 309–10, 317–18. For the latter point, Fachiri 'Expropriation' (n 113) 169; Fachiri 'Property' (n 24) 34.

[127] RR Wilson, 'Property-Protection Provisions in United Stares Commercial Treaties' (1951) 45 AJIL 83, 90–104; Vandevelde *U.S. International Investment Agreements* (n 67) 46–467; cf US response to the Hague Conference regarding acquired rights, pointing to a US–Germany treaty, S Rosenne (ed), *League of Nations Conference for the Codification of International Law [1930]* (Volume II, Oceana Publications, Inc., New York 1975) 684–5, and provisions from the 1923 treaty with Germany and the 1926 treaty with El-Salvador reproduced in 3 Hackworth Digest (n 1), respectively 630, 653.

[128] *Sicilian Sulphur 1839–1840* (n 114) 1171 (Temple). Seventeenth- and 18th-century treaty practice also provided for the protection of commercial interests of aliens, H Neufeld, *The International Protection of Private Creditors from the Treaties of Westphalia to the Congress of Vienna* (AW Sijthoff, Leiden 1971) 94–114. On 19th-century treaty practice on property protection of Great Britain, C Parry (ed), *A British Digest of International Law* (Part 6, Stevens & Sons Limited, London 1965) 331–3; of Latin-American countries, FG Dawson, 'The Influence of Andres Bello on Latin-American Perceptions of Non-Intervention and State Responsibility' (1986) 57 BYIL 253, 288–92. A standard clause in the 19th-century British Commercial treaties provided for succession and disposal of personal property (as well as administration of justice) on a non-discriminatory basis, eg Treaty of Amity, Commerce and Navigation, between His Majesty and the United Provinces of Rio de la Plata (adopted 2 February 1825) Herrslet Collection Volume III 44 art IX; Treaty of Amity, Commerce and Navigation, between Great Britain and Colombia (adopted 18 April 1825) Hertslet Collection Volume III 56 art IX; Treaty of Amity, Commerce and Navigation, between Great Britain and Mexico (adopted 26 December 1826) Hertslet Collection Volume III 247 art IX; Treaty of Amity, Commerce and Navigation, between His Britannic Majesty and the Peru–Bolivian Confederation (adopted 5 June 1837) Hertslet Collection Volume V 383 art VIII. In some cases, more specific rights were provided, eg 'full and perfect protection for their persons and property' (as well as administration of justice) on a non-discriminatory basis, Treaty of Amity, Commerce and Navigation, between Great Britain and Bolivia (adopted 29 September 1840) Hertslet Collection Volume VI 90 art VIII; Treaty of Amity, Commerce and Navigation, between Great Britain and Uruguay (adopted 26 August 1842) Hertslet Collection Volume VI 926 art VII (see further in *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua v Argentina*, ICSID Case no ARB/03/19, Decision on Liability [161]), or even more extensive rights, eg a rule that 'properties... shall not be taken from them, against their will, by any authority whatsoever', Treaty of Amity and Commerce between His Majesty and the Emperor of Brazil (adopted 17 August 1827) Hertslet Collection Volume IV 38 art V.

[129] *Sicilian Sulphur 1839–1840* (n 114) 1221 (Palmerston). In the *Ambatielos* case Fitzmaurice, on behalf of the UK, suggested that rules on the treatment of foreigners 'were formerly [in the 17th century] the subject, not of general international law, but of special clauses in bilateral treaties, precisely

Visscher demonstrated in his analysis about treaties and denial of justice.[130] In light of the many ways that BITs have been used to influence and interrelate with customary law more recently, it seems puzzling that such an argument was at least not considered.[131] One possible explanation is that the focus on procedural outrages precluded reliance on treaty rules formulated in neutral terms of protection of property.

Third, it was possible to present an argument by analogy, relying on the established rules of property protection in war time and the absence of effect of State succession on property rights to construct a general rule of property protection in peace time.[132] State succession and changes of territorial title *per se* did not affect property rights.[133] In the law of war, while the rigour of protection of property was limited by the rules on confiscation of contraband and the controversial right to capture belligerent property from neutral ships,[134] and the general idea was contested in the aftermath of conflicts in which practice contradicted the rule,[135] rules against confiscation seem to have accurately stated international law.[136]

The problem with the succession argument was that these rules were expressly considered to be without prejudice to treatment of property after succession.[137] The law of war was also not considered to be a particular example of a general proposition on the protection of property. While puzzling to the modern eye, detailed treatment of the protection of private property was limited to war time.[138] The Institute of International Law

because then they were not the subject of generally accepted principles of international law', *Ambatielos* Pleadings (n 24) 409.

[130] de Visscher 'Le déni de justice' (n 83) 372–3; cf Freeman *Denial of Justice* (n 24) 227.

[131] Eg the recent discussions in: AF Lowenfeld, 'Investment Agreements and International Law' (2003–2004) 42 Columbia J Transnational L 123; S Hindelang, 'Bilateral Investment Treaties, Custom and Healthy Investment Climate—The Question of Whether BITs Influence Customary International Law' (2004) 5 J World Investment Trade 789; SM Schwebel, 'The Influence of Bilateral Investment Treaties on Customary International Law' (2004) 98 ASIL Proceedings 27; T Gazzini, 'The Role of Customary International Law in the Field of Foreign Investment' (2007) 8 J World Investment Trade 691; C McLachlan, 'Investment Treaties and General International Law' (2008) 57 ICLQ 361; JE Alvarez, 'A BIT on Custom' (2010) 42 NYU J Intl L Politics 17.

[132] JP Bullington, 'Problems of International Law in the Mexican Constitution of 1917' (1927) 21 AJIL 685, 694–5. The US–Mexico Commission relied on the *jus in bello* rules on the respect for human life in formulating the standard on the taking of life of aliens, *Garcia* (n 97) [5], and in a number of cases referred to the 1907 Hague Convention (IV) by analogy, *Francisco Quintanilla (Mexico v US)* (1926) 4 RIAA 101 [3]; *Edgar A Hatton (US v Mexico)* (1928) 4 RIAA 329, 332; *ER Kelly (US v Mexico)* (1930) 4 RIAA 608, 615. On the possibility of analogy between humanitarian law and investment protection law, see also M Paparinskis, 'Investment Arbitration and the Law of Countermeasures' (2008) 78 BYIL 264, 319–25.

[133] *Settlers of German Origin in the Territory Ceded by Germany to Poland* (Advisory Opinion) [1923] PCIJ Rep Series B No 6 36; FB Sayre, 'Change of Sovereignty and Private Ownership of Land' (1918) 12 AJIL 475, 475–97; DP O'Connell, *The Law of State Succession* (CUP, Cambridge 1956) 77–99.

[134] On contraband, G Fitzmaurice, 'Modern Contraband Control and the Law of Prize' (1945) 22 BYIL 73, 73–95; JHW Verzijl, WP Heere, and JPS Offerhaus, *International Law in the Historical Perspective: Part IX-C* (Martinus Nijhoff, Dordrecht 1992) 331–70; on enemy goods on neutral ships, Verzijl and others ibid 299–330.

[135] C Mullins, 'Private Enemy Property' (1918) 8 Transactions Grotius Society 89, 89–106.

[136] Wheaton (n 56) 417; Oppenheim 1st Peace (n 25) 146–50; JB Moore, 'International Law and Some Current Illusions' in JB Moore, *International Law and Some Current Illusions and Other Essays* (The MacMillan Company, New York 1924); Stowell (n 56) 520; G Fitzmaurice, 'The Juridical Clauses of the Peace Treaties' (1948) 73 Recueil des Cours de l'Académie de Droit International 255, 335–6. The full compensation also applied to angary, C Bullock, 'Angary' (1922–1923) 3 BYIL 98, particularly 111–29.

[137] FB Sayre, 'Change of Sovereignty and Concessions' (1918) 12 AJIL 705, 729–30; Williams (n 117) 12; Kaeckenbeeck 'Vested Rights' (n 37) 8–18.

[138] Wheaton (n 56) 378–88; Halleck (n 56) 73–142; Hall (n 56) 501–52. According to Heffter, aliens were not subject to taxes and uncompensated requisitions when they related to military matters,

did not address the treatment of persons and property by the State in peace time before 1927,[139] and indeed as late as 1926 the mind of an ASIL speaker on property protection naturally averted to confiscation in times of war.[140] The argument in favour of protection of property in war time could be made simultaneously with one rejecting it in peace time. At the League of Nations Committee of Experts for the Progressive Codification of International Law, Rapporteur Guerrero argued for a very narrow concept of treatment of aliens outside national treatment rules, limiting it to the denial of justice.[141] While supporting compensation for expropriations during civil wars[142] and wars,[143] he rejected compensation in cases of non-discriminatory expropriations.[144]

Fourth, it was possible to fall back on general principles *in foro domestico*. At the simplest level, the argument simply internationalized the US constitutional rules on protection of property. The 1922 *Norwegian Shipowners' Claims* Tribunal relied on the Fifth Amendment to conclude that 'in this respect the public law of the Parties is in complete accord with the international public law of all civilised countries'.[145] Writing in 1927, the American arbitrator in this case, Anderson, without any analysis declared that 'all of the elder members of the family of nations... disclose[] a profound respect... for the sanctity of private property'.[146] Hull's note to Mexico referred generally to 'the constitutions of most countries of the word, and of every republic of the American continent'.[147] Nielsen (who apart from his contribution to the *Neer* standard also persuaded the American–Turkish Claims Commission about 'abundance of evidence in various forms' regarding protection of property)[148] explained the legal source of protection of property in the following terms:

> I like to think, in a practical way—in trying to give application to law in a practical way—those constitutional guarantees, with the superstructure of interpretation framed by the courts, exemplify the international standards. And I think that, without any improper or dangerous confusion of domestic law with international law, the principles underlying those provisions may so very

J Bergson (tr), A-G Heffter, *Le droit international public de l'Europe* (3rd edn, Cotillon et Fils, Paris 1873) 126.

[139] L Strisower, 'Responsabilité internationale des Etats à raison des dommages causés sur leur territoire à la personne et aux biens des étrangers' (1927) 33 Annuaire de l'IDI 455. The earlier documents dealt with responsibility for the conduct of insurrectionists and in war-time, E Brusa, 'La responsabilité des Etats à raison des dommages soufferts par des étrangers en cas d'émeute ou de guerre civile' (1898) 17 Annuaire de l'IDI 96; E Brusa and L von Bar, 'Règlement sur la responsabilité des Etats à raison des dommages soufferts par des étrangers en cas d'émeute, d'insurrection ou de guerre civile' (1900) 18 Annuaire de l'IDI 47. See G Fitzmaurice, 'The Contribution of the Institute of International Law to the Development of International Law' (1973) 138 Recueil des Cours de l'Académie de Droit International 203, 227–8, 255.

[140] C Bouve, 'The Confiscation of Alien Property' (1926) 20 ASIL Proceedings 14, 14. When Jessup had to address protection of property in war time thirty years later, his natural starting point was the protection granted in peace time, PC Jessup, 'Enemy Property' (1955) 49 AJIL 57, 57.

[141] Rosenne *Committee of Experts II* (n 74) 120, 125–6.

[142] Ibid 128.

[143] S Rosenne (ed), *League of Nations Committee of Experts for the Progressive Codification of International Law [1925–1928]* (Volume I, Oceana Publications, Inc., New York 1972) 96–7.

[144] Ibid 98.

[145] *Norwegian Shipowners' Claims* (n 117) 332.

[146] CP Anderson, 'Basis of the Law against Confiscating Foreign-Owned Property' (1927) 21 AJIL 525.

[147] CC Hyde, *International Law: Chiefly as Interpreted and Applied by the United States* (2nd revised edn Little, Brown and Company, Boston 1947) 714.

[148] FK Nielsen, *American–Turkish Claims Settlement* (Government Printing Office, Washington 1937) 22. The argument was accepted in *Ina M Hofmann and Dulcie H Steinhardt (US v Turkey)* Nielsen 286, 289.

usefully be given application in the settlement of international controversies relating to property rights.[149]

Such *sub silentio* or even quite overt internationalization of US constitutional law appeared to abuse normal methods of legal reasoning[150] and ignored the calls for caution in law-making in such a contested area.[151]

A closer look at the general principles argument shows it to be problematic in a number of ways. In policy terms, the broader practice raised (not unjustifiable) concerns about externalization of peculiar Western conceptions.[152] In terms of sources, the extensive analysis that Bullington conducted in 1927 (addressing property rules in France, Germany, the UK, Switzerland, Italy, New Zealand, and the US) found 'variations in practice which render worse than useless the attempt to impose any one system of law as the standard for international comparison'.[153] In law-making terms, the pre-human rights legal order did not ordinarily deal with relationships between States and individuals in terms of rights. It is therefore unclear whether an argument made on the basis of domestic rules on treatment of individuals would apply to international rules on the treatment of individuals,[154] or rather the analogous conduct in relation of States to other subjects of international law.[155] In other words, in a legal order where States are considered to be the sole subjects, a general principle argument from the protection of private property would not translate into an international rule on the protection

[149] Borchard 'The "Minimum Standard"' (n 1) 65. The tendency to conceptualize international law in terms of familiar domestic law is evident from the *Glamis* Award, where Tribunal noted that 'Parties both cite to and rely on U.S. law of takings, not because it is applicable, but because it is argued by both as a well-developed body of law', (n 69) fn 703.

[150] Similarly to the patronizing analysis regarding general principles in the *Abu Dhabi* arbitration, *Petroleum Development Ltd v Sheikh of Abu Dhabi* (1951) 18 ILR 144, 149; AV Lowe, 'The Politics of Law-Making' in M Byers (ed), *The Role of Law in International Politics* (OUP, Oxford 2000) 208; and unlike the influential *Trail Smelter* case, where the application of domestic law was expressly authorized, *Trail Smelter case (US v Canada)* (1938, 1941) 3 RIAA 1905, 1908; P Birnie, A Boyle, and C Redgwell, *International Law & the Environment* (3rd edn OUP, Oxford 2009) 27. The dismissive attitude to non-Western approaches to property rights can be seen in a late 19th-century case relating to identification of title arising out of contracts with indigenous peoples, seeing them as 'semi-civilized people..., differing so widely in all their habits of thought from white men, and labouring under the suspiciousness or timidity which is, we believe, a common characteristic of half savage races', *Allemagne, Grande-Bretagne* (1884–1885) H La Fontaine, *Pasicrisie internationale 1794–1900* (Martinus Nijhoff, The Hague 1997) 267, 270 [18].

[151] PC Jessup, 'Responsibility of States for Injuries to Individuals' (1946) 46 Columbia L Rev 903, 913–14.

[152] Williams 'International Law' (n 117) 13, 19–22. On general principles derived from domestic law, R Kolb, *La bonne foi en droit international public* (Presses Universitaires de France, Paris 2000) 45–54, 57–9.

[153] Bullington 'Problems' (n 132) 694. Mann came to a not dissimilar conclusion more than thirty years later, FA Mann, 'Outlines of a History of Expropriation' (1959) 75 LQR 188, 219 fn 43; FA Mann, 'State Contracts and State Responsibility' (1960) 54 AJIL 572, 583. In 1961, Jennings was even more sceptical: 'It is perhaps also a mistaken notion to set too much store by the method of establishing international minimum standards by comparative research into selected municipal laws', 'State Contracts' (n 12) 180 fn 2. The variety of domestic practices is illustrated by a case where the question arose about possibility to obtain a valid title when '[b]y Fijian custom, that is by Fijian law, the absolute alienation of land as understood by us was unknown, and therefore, strictly speaking, unlawful', *Allemagne, Grande-Bretagne* (n 150) 271 [32]. The Commission concluded that in cases when title had been obtained in good faith there would be right to compensation, even though differing about the importance of the Fijian customary law requirement of consultation with tribesmen, ibid 274 [16].

[154] As it would in modern international law, C Tomuschat, 'Obligations Arising against States without or against Their Will' (1993) 241 Recueil des Cours de l'Académie de Droit International 195, 315.

[155] HWA Thirlway, 'Concepts, Principles, Rules and Analogies: International and Municipal Legal Reasoning' (2002) 294 Recueil des Cours de l'Académie de Droit International 265, 289.

of private property[156] but rather elucidate rules on territorial title and acquisition of sovereignty.[157]

Fifth, the argument could be made in more abstract terms of acquired or vested rights.[158] In the 1926 *Certain German Interests in Polish Upper Silesia* Judgment, the PCIJ confirmed the existence of 'rules generally applied in regard to the treatment of foreigners and the principle of respect for vested rights'.[159] The authority of the PCIJ meant that its pronouncement came to be accepted to be the law, and the 1928 4th edition of *Oppenheim* for the first time confirmed that protection of property extended to protection from expropriation.[160] From the perspective of the twenty-first-century international standard, the important lesson is that protection of property was not formulated within the boundaries of the standard but as an analytically separate rule.[161]

Be that as it may, it is not clear whether the Court's view accurately reflected State practice on the point. At the 1930 Hague Conference, States were asked whether there would be State responsibility in case of 'enactment of legislation infringing vested rights of foreigners'.[162] The responses showed at best a mixed picture.[163] Four States gave broadly affirmative answers, even though acknowledging the complexity of the matter,[164] five States gave affirmative answers with different qualifications to the principle,[165] five States did not give direct answers or preferred to leave the issue open,[166] three States appeared to have misunderstood the question,[167] two States did not answer at all,[168] and six States gave negative answers.[169] Even the developed States often acting as investors' home States were not unanimously defensive of acquired rights: the US conditioned the principle by broad police powers, the UK (and India, Australia, and New Zealand by association) considered that acquired right could be affected by or modified under domestic law, France answered the question solely in terms of domestic responsibility,

[156] Williams 'International Law' (n 117) 17–19.

[157] H Lauterpacht, *Private Law Sources and Analogies of International Law* (Longmans, Green & Co. Ltd, London 1927) 99–107.

[158] Kaeckenbeeck 'Vested Rights' (n 37); G Kaeckenbeeck, 'La protection internationale des droits acquis' (1936) 59 Recueil des Cours de l'Académie de Droit International 321; J-C Witenberg, 'La protection de la propriété immobilière des étrangers' (1928) 55 Journal du droit international 566, 570–2; 'Report of Witenberg' (n 126) 317–22; C Dupuis, 'Règles générales du droit de la paix' (1930) 32 Recueil des Cours de l'Académie de Droit International 5, 160; S de Százy, 'Protection of Private Property' in *International Law Association's Report of the Thirty-Sixth Conference 1929* (Sweet & Maxwell, London 1930) 584–7; Hyde 'Confiscatory Expropriation' (n 1) 760; A McNair, 'The General Principles of Law Recognised by Civilized Nations' (1957) 33 BYIL 1, 16–18.

[159] *Certain German Interests in Polish Upper Silesia (Germany v Poland)* [1926] PCIJ Rep Series A No 7 22. A year earlier, the PCIJ President Huber had taken the view that 'it can be considered as accepted that in international law an alien cannot be deprived from his property without just compensation', *Affaire des Biens Britanniques au Maroc Espagnol (Royame-Uni c Espagne)* (1925) 2 RIAA 615, 647 (author's translation); see also *Margeruite de Joly de Sabla (US v Panama)* (1933) 6 RIAA 358, 366.

[160] McNair Oppenheim 4th Peace (n 25) 294 fn 2; cf Roxburgh Oppenheim 3rd Peace (n 25) 249 fn 1.

[161] See *Barcelona Traction* Pleadings X (n 24) 656 (Ago on behalf of Spain).

[162] Rosenne *Hague II* (n 127) 455.

[163] Kaeckenbeeck, a (if not *the*) leading authority on acquired rights, who had delivered a Hague Academy lecture on the topic, 'Droits acquis' (n 158), commented regarding the responses that '[s]urely this is sufficient confirmation that no generally accepted rule of international law is here in existence', 'Vested Rights' (n 37) 14. Freeman disagreed: in his view, the problem was in the question itself, which had been badly formulated, *Denial of Justice* (n 24) 516 fn 1.

[164] Denmark, Egypt (Rosenne *Hague II* (n 127) 456), Finland, Japan (457).

[165] Belgium (Rosenne *Hague II* (n 127) 456), Norway, Poland, Switzerland (458), the US (684–5).

[166] Germany, Austria (ibid 456), Netherlands, Sweden, Czechoslovakia (458).

[167] Bulgaria, Egypt (ibid 456), France (457).

[168] Italy (ibid 457), Siam (458).

[169] South Africa (ibid 455), Australia (456), Great Britain, Hungary, India (457), New Zealand (458).

Germany solely in terms of responsibility for legislation, and Italy found it impossible to answer the question at all.[170] It was concluded that '[t]he replies on this question reveal fairly substantial differences of opinion'; the question was not made the subject of a separate basis of discussion[171] and was almost completely ignored in the Hague Conference, where the debate concentrated on denial of justice.[172]

The *Neer* standard framed the debate about protection of property and limited the possible legal arguments. The vocabulary of outrages, and in particular of procedural outrages, probably precluded the rationalization of protection of property within the terms of the international standard and possibly influenced the absence of the treaty law argument. The property protection argument therefore had to be presented outside the standard's framework, falling back on analogies, general principles, and the principle of acquired rights, all presenting problems of their own. Even though the practice confirmed the rules on the protection of property, the lack of a single intellectually satisfactory explanation for the rule undermined both its value and the broader structure of the standard. Indeed, despite all the limitations of the vocabulary of arbitrariness, in 1938 the UK still protested against 'expropriations essentially arbitrary in character', and in 1947 Hyde explained expropriations as 'seemingly arbitrary or tortuous conduct in its treatment of an alien'.[173]

The classical debate probably finished at some point before the Second World War but its pedigree shaped the subsequent debates.[174] In the 1957 ILC debate, Nervo criticized the international standard because '[t]he vast majority of new States had taken no part in the creation of the many institutions of international law which were consolidated and systematized in the nineteenth century'.[175] Fitzmaurice responded to this criticism by relying on the long pedigree of denial of justice.[176] While this exchange undoubtedly reflected disagreement about treatment of aliens between developing and developed States,[177] it seems more accurate to say that the ILC members were speaking past each other. Nervo criticized Root's standard of civilization, while Fitzmaurice defended the *Neer* standard extrapolated from the denial of justice rules.

The making of the international standard in the pre-War years is relevant for contemporary concerns on a number of levels. The first and the least controversial proposition is that, while in the absence of consent through treaties or genuine consensus through customary law it is always possible to proceed by means of creative legal reasoning, such inventiveness is not conducive to efficient long-term law-making. As Jessup rightly said, 'I deny the implication that merely because there is necessity for this definite position you have a right to inject into international law a criterion merely because it is definite without ascertaining whether that criterion is actually accepted.'[178] The second and third propositions relate to particular methods of law-making. Trying to establish the

[170] Ibid 456–8, 684–5. [171] Ibid 459.

[172] As noted by Finland, *Hague IV* (n 37) 1634–1635. It seems that expropriation was expressly mentioned only when the Austrian representative Leitmaier referred to discriminatory expropriations as an example of a breach of international law, Rosenne *Hague IV* (n 37) 1459; on acquired rights *see* Bories 'Hague' (n 42) 62.

[173] Respectively A Ducker, 'The Nationalization of United Nations Property in Europe' (1950) 36 Transactions Grotius Society 75 fn 2; Hyde *International Law* (n 147) 715.

[174] The case law of the American–Turkish Claims Commission that dealt with interferences with property rights in a more sophisticated manner received little attention, Nielsen *American–Turkish Claims Settlement* (n 148) 19, 22, 78.

[175] ILC 1957 (n 54) 155. [176] See text at nn 54–66.

[177] RB Lillich, 'Duties of States Regarding Civil Rights of Aliens' (1978) 161 Recueil des Cours de l'Académie de Droit International 329, 360–5.

[178] Hershey 'Denial' (n 24) 35–6 (Jessup).

international standard by analogy, whether from the law of succession, law of war, or denial of justice, requires a careful identification of the rationale of the particular rules and regimes and the functional similarity between different rules.[179] Similarly, trying to establish the international standard by recourse to general principles requires a careful examination of different domestic legal systems and the way in which such principles can be dehydrated from one legal order and injected into another one.[180] The somewhat careless way of legal reasoning about analogy and particularly about general principles during the making of the standard requires the future use of such arguments in the area to be made with particular caution and diligence, without confusing desirability and existence of particular norms.

The results of the law-making efforts described in this chapter left open a number of avenues of legal development (that are particularly clear with the benefit of hindsight). One could be dispirited with the fundamental vagueness of the standard and its apparent inability to incorporate clear and specific rules on the protection of property rights. In such a case, further developments could focus precisely on property protection and its remedial implications, leaving the international standard aside. This approach was adopted in the practice relating to expropriation and compensation. Alternatively, one could recognize that the international standard, in some way associated with the rights of man while not identical to them, could benefit from further developments in the area of human rights.[181] This approach was adopted in the human rights debate in the ILC and more generally. Finally, one could conclude that the main error of Root's argument was the controversy about the source of the standard, and that it could hardly be remedied through creative invocations of civilization, standards, principles, and pronounced outrages. A solution would be to link the international standard to a treaty rule to provide a firm and legally undeniable foundation. This was the approach adopted in the treaty practice on fair and equitable treatment. These developments and their implications will be explored in the next chapter.

[179] Generally D Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (OUP, Oxford 2005) 16; R Michaels, 'The Functional Method of Comparative Law' in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP, Oxford 2006) 339–82.

[180] P Weil, 'Le droit international en quête de son identité: Cours général de droit international public' (1992) 237 Recueil des Cours de l'Académie de Droit International 9, 145–6.

[181] Borchard 'The "Minimum Standard"' (n 1) 61.

3

Development of the International Minimum Standard (1940s–)

The creation of the international minimum standard, as outlined in the previous chapter, passed through a number of stages. The first stage is reflected in the nineteenth-century State practice, (almost) exclusively focusing on the non-discriminatory aspects of the treatment of aliens and denial of justice. Elihu Root's speech of 1910 illustrates the second stage of development, simultaneously explicit about the non-exhaustive nature of the non-discriminatory aspect of the international standard, and uncertain and contradictory about the source and content of this exception that could go further and apply to outrageous cases.[1] The third stage is exemplified by the 1926 award of the US–Mexico General Claims Commission in the *LFH Neer and Pauline Neer* (*Neer*) case.[2] The Commission attempted to define the international standard by means of analogy, deriving criteria of procedural outrage from the better-established rules of denial of justice and then applying these more generally. *Neer* was a relative improvement, attempting to give some juridical certainty to the previously indefinable exception (and indeed it is complicated to see what better legal argument could have been made at that point). However and simultaneously, the focus on procedural outrage made it more complicated to develop rules that fell outside this paradigm, as the Commission itself discovered when it grappled with the standard on taking of life.[3] It also raised considerable challenges to the formulation of the standard on the protection of property.[4] Despite the implicit consensus of the nineteenth century and the first decades of the twentieth century on the existence of such a rule and the explicit confirmation by the PCIJ in the 1920s,[5] State practice in the 1930s Hague Conference and during the 1930s raised questions about the continuing correctness of this view.

The development of the international standard was influenced by a number of legal shifts in the international legal order.[6] When the different avenues of development of the international standard after the Second World War are considered, an issue of particular importance is the shift of the paradigm that the standard was meant to regulate. In the 1910 Root's speech, foreign investment appears only as one of the factual considerations that lead to greater travel abroad by physical persons that have to be protected.[7] The matters that the Commission addressed in *Neer* and similar cases were subsequently marginalized and replaced by a different paradigm of regulatory mistreatment of business interests of corporate investors.[8] In *ratione materiae* terms, 'international intercourse

[1] E Root, 'The Basis of Protection to Citizens Residing Abroad' (1910) 4 ASIL Proceedings 16.

[2] *LFH Neer and Pauline Neer (US v Mexico)* (1926) 4 RIAA 60.

[3] Cf *Teodoro Garcia and MA Garza (Mexico v US)* (1926) 4 RIAA 119 [4]–[5]; ibid Dissenting Opinion of Commissioner Nielsen 123, 127.

[4] See Ch 2.II.2.

[5] *Certain German Interests in Polish Upper Silesia (Germany v Poland)* [1926] PCIJ Rep Series A No 7 22.

[6] See Ch 1.III.

[7] Root 'Basis' (n 1) 17–18.

[8] *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* [1970] ICJ Rep 3, Separate Opinion of Judge Jessup 161, 166; RY Jennings, 'State Contracts in International Law' (1961) 37 BYIL 156, 180–1; RY Jennings, 'General Course on Principles of Public International Law' (1967) 121 Recueil des Cours de l'Académie de Droit International 323, 487; M Paparinskis, '*Barcelona Traction*: A Friend of Investment Protection Law' (2008) 8 Baltic Ybk Intl L 105, 108–14.

depended for its smooth flow on clearly formulated rules, with regard to the treatment of aliens in the broadest sense of the word—i.e., with regard not only to their persons, but also their property, commercial interests and the like'.[9] In *ratione personae* terms, the protection shifted to the corporate investor. Corporations were latecomers to the international law of treatment of aliens,[10] and, despite their increasing importance in practical terms,[11] their position was considered to be theoretically problematic,[12] addressed in terms of slow *mutatis mutandis* extension of classical rules on the treatment of the physical person.[13] Only in 1911 was the protection of corporations expressly included in the US commercial treaties, and its scope remained limited until the treaty series after the Second World War, with inconvenient restrictions still maintained.[14] (The British practice appears to have been more sophisticated.)[15]

At the time of the debates about the international standard of the inter-War period the corporate dimension was mostly absent from the argument. Addressing corporate nationality in international law, Baty stated that '[w]e have heard of the indelible American nationality of fur-seal; and it seemed a silly idea—but the nationality of a mental concept is a more dangerous one'.[16] While that was an extreme statement, substantive

[9] ILC, *Yearbook of the International Law Commission, 1956, Volume I*, UN Doc A/CN.4/SER.A/1956 233 (Fitzmaurice).

[10] JM Jones, 'Claims on Behalf of Nationals who are Shareholders in Foreign Companies' (1949) 26 BYIL 225, 226–8.

[11] ER Latty, 'International Standing in Court of Foreign Corporations' (1930) 29 AJIL 28, 32.

[12] RL Bindschedler, 'La protection de la propriété privée en Droit international public' (1956) 90 Recueil des Cours de l'Académie de Droit International 173, 231; P Juillard, 'L'évolution des sources du droit des investissements' (1994) 250 Recueil des Cours de l'Académie de Droit International 9, 23.

[13] C Parry, 'Some Considerations upon the Protection of Individuals in International Law' (1956) 90 Recueil des Cours de l'Académie de Droit International 653, 703; on early cases KA Al-Shawi, *The Role of the Corporate Entity in International Law* (Overbeck Company, Ann Arbor, Michigan 1957) 33–5. Regarding denial of justice, the rules regarding criminal proceedings (that one would assume to be more relevant for physical persons) were better developed than those regarding civil proceedings, AV Freeman, *The International Responsibility of States for Denial of Justice* (Longmans, Green & Co., London 1938) respectively 247–57, 257–62 (unreasonable delays), 273–87, 287–95 (procedural improprieties), and a number of rules would be likely to apply exclusively regarding physical persons, Ch VIII (detention and mistreatment), Ch XIII (punishment of violent crimes against aliens).

[14] H Walker, 'Provisions on Companies in United States Commercial Treaties' (1956) 50 AJIL 373, 379–80; RR Wilson, 'Postwar Commercial Treaties of the United States' (1949) 43 AJIL 262, 265–6; RR Wilson, 'Property-Protection Provisions in United States Commercial Treaties' (1951) 45 AJIL 83, 103–4; rights of access to court for corporations were included starting from 1890s, RR Wilson, 'Access-to-Courts Provisions in United States Commercial Treaties' (1953) 47 AJIL 20, 41–2. As the US explained in the *ELSI* case, '[s]ince international investment in modern times is predominantly by corporate rather than individual enterprise, the new [post-War] FCN treaties devised ways of providing adequately for the protection of companies, not only of individuals', *Elettronica Sicula S.p.A. (ELSI) (US v Italy)* ICJ Pleadings Volume III 92 (Gardner). The corporate right of establishment was made dependent upon domestic laws of the host State, H Walker, 'Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice' (1956) 5 Am J Comp L 229, 232–3; generally KJ Vandevelde, *U.S. International Investment Agreements* (OUP, Oxford 2009) 147–9.

[15] Seven treaties concluded between 1862 and 1911 included a general rule of non-discrimination, including corporate access to court, C Parry (ed), *A British Digest of International Law* (Part 6, Stevens & Sons Limited, London 1965) 428–9, and their interpretation and application were addressed in British practice, see *Convention with Italy* (1867) 6 Parry 431; *Convention with France* (1877) 6 Parry 429; Foreign Office to Mr Metaxas (1900) 6 Parry 429.

[16] T Baty, 'The Nationality and Domicile of Corporations' (1917) 2 Intl L Notes 133, 135. In another article, Baty compared the nationality of corporations to the nationality of committee-managed horses and donkeys, T Baty, 'The Rights of Ideas—and of Corporations' (1919–1920) 33 Harvard L

treatment of corporations received negligible treatment in the early State practice. To take the US digests as an example, in the 1877 *Digest*, no practice on corporations is listed.[17] In the 1886 Wharton's *Digest*, one instance of practice is listed in relation to treaty rights.[18] In the 1898 Moore's *Digest*, a limited number of instances are noted.[19] The 1906 Moore's *Digest* contains moderate comment[20] and a small separate section on corporations,[21] and some elements of practice touch upon investment protection.[22] In Borchard's 1915 treatise on *Diplomatic Protection*, the protection of the physical person was addressed for 150, and that of corporations for 10 pages.[23] The analysis is somewhat more substantial in the 1937 Whiteman's *Damages*.[24] Freeman's *Denial of Justice* addressed corporations only in the narrow context of access to court, and even then concluded that it was doubtful that, in the absence of treaty rules, the right of access to a court applied.[25] Only as late as 1942 did the Hackworth's *Digest* include practice on due process and equal treatment of corporations, together with cases accepting discretion of US States to exclude corporations from doing business.[26] This approach was fairly typical, with both the substantive[27] and procedural aspects of corporate investment in peace

Rev 358, 364–5. The capacity of Baty to pose the right questions and give the wrong answers applies in this area as well, AV Lowe, *International Law* (OUP, Oxford 2007) 148.

[17] Corporations are not mentioned in sections on Aliens and Claims, and there is no separate section on corporations, *Digest of the Published Opinions of the Attorneys-General, and of the Leading Decisions of the Federal Courts, with Reference to International Law, Treaties, and Kindred Subjects* (Government Printing Office, Washington 1877) respectively 3–5, 41–8.

[18] The single instance where substantive aspects are considered relates to applicability of treaty rights to acquire property to corporations, F Wharton, *A Digest of the International Law of the United States, Taken from Documents Issued by Presidents and Secretaries of State, and From Decisions of Federal Courts and Opinions of Attorney-General* (2nd edn Government Printing Office, Washington 1887) 155, 491. Three instances of practice relate to corporate nationality, ibid 528, and shareholders' claims, ibid 547.

[19] Relating to trade, *Drawback of Duties of Coal (Great Britain v US)* (1855) 4 Moore Intl Arbitration 3365, forced loans, *Homan's case* (1850) 4 Moore Intl Arbitration 3409, contractual breaches, eg *Case of the Union Land Co., Colonization Contracts* 4 Moore Intl Arbitrations 3434; *Melville E Day and others (US v Venezuela)* 4 Moore Intl Arbitrations 3548, and derivative claims of insurers, eg *Amos B Corwin (US v Venezuela)* 3 Moore Intl Arbitrations 3210; *Case of the 'Robert Wilson' (US v Mexico)* 4 Moore Intl Arbitration 3373.

[20] Walker 'Provisions on Companies' (n 14) 376.

[21] JB Moore, *A Digest of International Law: As Embodied in Diplomatic Discussions, Treaties and Other International Agreements, International Awards, the Decisions of Municipal Law, and the Writings of Jurists* (Government Printing Office, Washington 1906) 19–20.

[22] Eg protests against expulsion of Greek nationals from the Ottoman Empire because 'abrupt expulsion would result in serious pecuniary loss, as in the case of the Stamford Manufacturing Company' that had Greek employees, Foreign Relations 1897, 585–8 (1897) 4 Moore Digest 140, 140–1; and Bayard to Scott (n 60) 725.

[23] E Borchard, *Diplomatic Protection of Citizens Abroad* (The Banks Law Publishing Co., New York 1915) respectively 457–616 and 617–26.

[24] Particularly regarding contractual breaches, MM Whiteman, *Damages in International Law* (Volume 3, Government Printing Office, Washington 1937) Ch VI.

[25] Freeman *Denial of Justice* (n 13) 239–41; see also EH Feilchenfeld, 'Foreign Corporations in International Public Law' (1926) 3 J Comp Legislation Intl L 81, 104–6 (corporate property is protected to the same extent as that of the physical persons, but no access to court); H Kelsen, 'Théorie générale du droit international public. Problèmes choisis' (1932) 42 Recueil des Cours de l'Académie de Droit International 117, 251.

[26] G Hackworth, *Digest of International Law* (Volume 3, Government Printing Office, Washington 1942) 716–17.

[27] JW Garner, 'Responsibility of States for Injuries Suffered by Foreigners within Their Territories on Account of Mob Violence, Riots and Insurrections' (1927) 21 ASIL Proceedings 49, 79–80 (after thirty pages of debate about physical persons Wilson asks whether the lengthy debate also applies to corporations and Borchard briefly replies that probably it does).

time receiving meagre attention.[28] A rare contrary example was Idelson's intervention at the 1930 Grotius Society:

> ... protection of its nationals (including companies) would be much easier for the State concerned if the rights of such nationals were defined by elaborate treaties and not allowed to rest on general principles of International Law. Those principles were formulated in times when the economic life of nations was much simpler than it is to-day.[29]

When one compares the international standard of the nineteenth century and the inter-War period with the challenges that the twenty-first-century standard is meant to address, the paradigm shift was the most important challenge that the post-Second World War law-makers and writers had to address. Three legal avenues in particular were pursued: the first almost exclusively focusing on compensation for expropriation, the second proposing a synthesis of the international standard and human rights, and the third binding the international standard to the investment protection treaties. The approaches taken and their legal consequences will be addressed in turn.

I. International Minimum Standard and Compensation for Expropriation

A 1963 report of the Foreign Affairs Committee of the US Congress noted that

> Prior to the First World War expropriations involving foreign property holders were infrequent. In 1917 the Russian revolution ushered in the problem of nationalization of all private property by Communist states. The Mexican land and oil expropriations ushered in the problem of underdeveloped nations seeking to change the status quo in regard to foreign control of important segments of the economy.[30]

Large-scale expropriations had already taken place in Russia and Central and Eastern Europe after the First World War[31] and in Mexico in the inter-War years,[32] but the

[28] R Minor, 'The Citizenship of Individuals, or of Artificial Persons (Such as Corporations, Partnerships, and so Forth) for Whom Protection is Invoked' (1910) 4 ASIL Proceedings 62, 76; addressing solely the enemy character: EJ Schuster, 'The Nationality and Domicil of Trading Corporations' (1916) 2 Problems War 57; A McNair, 'National Character and Status of Corporations' (1923–1924) 4 BYIL 44.

[29] WE Beckett, 'Diplomatic Claims in Respect of Injuries to Companies' (1932) 17 Transactions Grotius Society 175, 194. Idelson's insight may have partly come from his own recent experience of arbitrating the treatment of foreign investors with host States, acting as the lead counsel for the claimant in the *Lena Goldfields* arbitration, VV Veeder, 'The *Lena Goldfields* Arbitration: The Historical Roots of Three Ideas' (1995) 47 ICLQ 747, 772. When Idelson made his intervention in the Grotius Society on 10 December 1931, the very considerable award against the USSR had been rendered more than a year previously (on 3 September 1930), but the USSR had not yet complied with the award and did not seem likely to do so in the near future (and indeed the agreement on the compensation between the USSR and the UK for note-holders of the already-defunct *Lena* was concluded only in 1968, with the funds coming from the Baltic gold in the British banks in apparent breach of the UK obligation of non-recognition of the annexation of Baltic States), ibid 789; RB Lillich, 'The Anglo-Soviet Claims Agreement of 1968' (1972) 21 ICLQ 1.

[30] Committee on Foreign Affairs of US House of Representatives, 'Expropriation of American-Owned Property by Foreign Governments in the Twentieth Century' (1963) 2 ILM 1066, 1067.

[31] Ibid 1077–8.

[32] Ibid 1079–81; JP Bullington, 'The Land and Petroleum Laws of Mexico' (1928) 22 AJIL 50. Positions of States were likely to change over time. For example, in the 1920s Latvia undertook an agrarian reform expropriating considerable amounts of land belonging to German owners with little compensation, 'Report of Dr. J. C. Witenberg to the Protection of Private Property Committee' in *International Law Association's Report of the Thirty-Sixth Conference 1929* (Sweet & Maxwell, London

expropriations in post-Second World War Eastern Europe were those that set the scene for the State practice[33] and legal writings for the next fifty years.[34] With some degree of arbitrariness, the debate may be said to have begun in July–September 1938 through the famous exchange of letters between the US and Mexico regarding the Mexican expropriations[35] and finished around 14 March 2003, when the *CME v Czech Republic* Tribunal concluded—without being criticized for it in State practice or legal writings—that the Hull Formula of compensation now enjoyed the status of customary law.[36]

The dynamic of the expropriation debate moved the State practice and attention of the writers to the protection of property and even more prominently to the question of compensation for direct expropriation.[37] The international standard lost its role as the benchmark and structuring rule. This approach is in line with the general practice, moving the focus away from the scope of the protected rights themselves to their remedial aspects, in particular to compensation. While the focus on expropriation dominated the debate, the concept of expropriation (especially indirect expropriation) itself was rarely examined in great detail. As Rubin observed relating to the treaty practice on expropriation, '[t]he treaties erect an imposing structure on a shaky foundation'.[38] More broadly,

1930) 319; Z Steiner, *The Lights that Failed: European International History 1919–1933* (OUP, Oxford 2005) 276, and allegedly expropriated French railway owners without compensation, Ministère des Affaires étrangères. Note du Service juridique (1937) 4 Kiss 392, but in the 1930 Hague Conference it supported the existence of an international standard regarding protection of aliens, G Hackworth, 'Responsibility of States for Damages Caused in Their Territory to the Person or Property of Foreigners' (1930) 24 AJIL 500, 513.

[33] For an overview of the US practice see Committee on Foreign Affairs (n 30) 1081–91; Department of State, 'Report on Nationalization, Expropriation and other Takings of US and Certain Foreign Property since 1960' (1972) 11 ILM 84, 89–118. In the post-War US digests, entries on substantive bases for international claims regarding foreign investments dealt only with expropriation and compensation, see *Digest of United States Practice in International Law* (Volume 3, Department of State Publications, Washington 1975) 486–91; ibid 1976 Volume 4 443–6; ibid 1977 Volume 5 674–80; ibid 1978 Volume 6 1226–7; ibid 1980 Volume 8 708–10; M Nash, *Cumulative Digest of United States Practice in International Law* (Volume 2, 1981–9, Office of the Legal Advisor, Department of State, Washington 1994) 2309–22; *Digest of United States Practice in International Law* (International Law Institute, Washington 1989–1990) <http://www.state.gov/s/l/c8183.htm> 219–20. One of the first cases brought (and the first case settled) before the ICJ related to an allegedly uncompensated sequestration of property, *Franco-Egyptian Case Concerning the Protection of French Nationals and Protected Persons in Egypt (France v Egypt)* ICJ Pleadings 8–12.

[34] Eg NR Doman, 'Compensation for Nationalized Property in Post-War Europe' (1950) 3 Intl L Q 323; JES Fawcett, 'Some Foreign Effects of Nationalization of Property' (1950) 27 BYIL 355; S Friedman, *Expropriation in International Law* (Stevens & Sons Limited, London 1953); B Cheng, 'The Rationale of Compensation for Expropriation' (1958) 44 Transactions Grotius Society 267; BA Wortley, *Expropriation in Public International Law* (CUP, Cambridge 1959); LE Becker, 'Just Compensation in Expropriation Cases: Decline and Partial Recovery' (1959) 53 ASIL Proceedings 336; F Francioni, 'Compensation for Nationalisation of Foreign Property: The Borderland between Law and Equity' (1975) 24 ICLQ 255; R Dolzer, 'New Foundations of the Law of Expropriation of Alien Property' (1981) 75 AJIL 553; MD Verwey and NJ Schrijver, 'The Taking of Property under International Law: A New Legal Perspective?' (1984) 15 Netherlands Ybk Intl L 3; M Mendelson, 'What Price Expropriation: The Case Law' (1985) 79 AJIL 414; O Schachter, 'Compensation Cases—Leading and Misleading' (1985) 79 AJIL 420.

[35] The US Secretary of State Hull famously argued that international law required 'prompt, adequate, and effective payment', 3 Hackworth Digest (n 26) 659, see the general exchange 655–65.

[36] *CME v Czech Republic*, UNCITRAL Case, Final Award, 14 March 2003 9 ICSID Rep 264 [497]; B Sabahi, *Compensation and Restitution in Investor–State Arbitration: Principles and Practice* (OUP, Oxford 2011) 92–94.

[37] HW Shawcross, 'The Problems of Foreign Investment in International Law' (1961) 102 Recueil des Cours de l'Académie de Droit International 335, 344–58; n 31.

[38] SJ Rubin, *Private Foreign Investment: Legal & Economic Realities* (Johns Hopkins Press, Baltimore 1956) 30.

the contours of the concept of expropriation were left largely unexplored by States and Tribunals, receiving greater interest towards the end of the last century.[39]

Against this background of compensation debate, while some authors still considered denial of justice to be the central rule in the area[40] or at least instrumental in justifying the protection of property,[41] the correct formula of compensation overshadowed other legal issues.[42] Denial of justice and the international standard came to be considered as unsatisfactory both in addressing the wrong issue and by needlessly irritating States.[43] The term 'international standard' lost its independent legal significance and came to be understood in a broad variety of ways. At one end of the spectrum, Fitzmaurice seemed to consider that the standard only supplemented more precisely established rules.[44] Mann treated the minimum standard, protection of property, denial of justice, and abuse of rights in an interchangeable manner.[45] At some point the standard came to be associated with the remedial standard of compensation.[46] Even when denial of justice was dealt with, its least controversial aspects relating to access to a court were discussed.[47] It is complicated to determine the effect of the State practice and case law on expropriation and compensation on the international minimum standard because it addresses related but different issues. It may be convenient to address two things separately: first, the arguments about foreign investment presented in the UN General Assembly; second, the arbitral decisions and treaty practice on expropriation.

[39] Ibid 29–50; GC Christie, 'What Constitutes a Taking of Property under International Law?' (1962) 38 BYIL 307; R Higgins, 'The Taking of Property by the State: Recent Developments in International Law' (1982) 176 Recueil des Cours de l'Académie de Droit International 259; R Dolzer, 'Indirect Expropriation of Alien Property' (1986) 1 ICSID Rev—Foreign Investment L J 41; R Dolzer, 'Indirect Expropriation: New Developments' (2002–2003) 11 New York U Environmental L J 64; S Ratner, 'Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law' (2008) 102 AJIL 475; M Paparinskis, 'Regulatory Expropriation and Sustainable Development' in MW Gehring, M-C Cordonnier-Segger, and A Newcombe (eds), *Sustainable Development in World Investment Law* (Kluwer Law International, The Hague 2011).

[40] C de Visscher, 'Cours général de principes du Droit international public' (1954) 86 Recueil des Cours de l'Académie de Droit International 449, 510; B Cheng, 'Justice and Equity in International Law' (1955) 8 Current Legal Problems 185, 188.

[41] CC Hyde, *International Law: Chiefly as Interpreted and Applied by the United States* (2nd revised edn Little, Brown and Company, Boston 1947) 715; Doman, 'Compensation' (n 34) 323; M Brandon, 'Legal Deterrents and Incentives to Foreign Private Investment' (1957) 43 Transactions Grotius Society 39, 48; M Domke, 'Foreign Nationalizations' (1961) 55 AJIL 585, 586.

[42] W Friedmann, 'General Course in Public International Law' (1969) 127 Recueil des Cours de l'Académie de Droit International 39, 179; Dolzer 'Indirect Expropriation of Alien Property' (n 39) 42.

[43] BA Wortley, 'The Mexican Oil Dispute 1938–1946' (1957) 43 Transactions Grotius Society 15, 35–6.

[44] G Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law' (1957) 92 Recueil des Cours de l'Académie de Droit International 1, 189–90. In his separate opinion to the *Aminoil* Award, Fitzmaurice used the concepts of 'arbitrary, capricious, basically punitive, or otherwise discriminatory' to explain 'public interest', *Kuwait v American Independent Oil Company (Aminoil)* (1982) 66 ILR 518, Separate Opinion of Arbitrator Fitzmaurice 614 [21], fn 26.

[45] FA Mann, 'State Contracts and State Responsibility' (1960) 54 AJIL 572, 574.

[46] Doman 'Compensation' (n 34) 324–7; ED Re, 'The Nationalization of Foreign-Owned Property' (1951–1952) 36 Minnesota L Rev 323, 332–6; Francioni 'Compensation' (n 34) 262–3; DA Lapres, 'Principles of Compensation for Nationalised Property' (1977) 26 ICLQ 97, 97–107.

[47] SM Schwebel, 'International Protection of Contractual Arrangements' (1959) 53 ASIL Proceedings 266, 268–9.

1. New International Economic Order

In the GA, the protection of foreign investment was addressed in a number of famous Resolutions, initially supporting[48] and subsequently denying the obligation to compensate for expropriation in accordance with international law.[49] As a result, an equally famous exploration of the law-making relevance of Resolutions in general[50] and in particular their possible effect in making, changing, and superseding rules of international law of foreign investment took place.[51]

It is probably not necessary for the purpose of the present argument to take a position regarding the effect of General Assembly Resolutions of the 1970s: first, taking at their strongest, the arguments did not address the content of international law but the anterior question of its applicability; second, in any event it did not address the international standard at all. There is no support in the international law of the 1990s and 2000s for the view that international law does not extend to the protection of foreign investment. Of course, the existence of treaty obligations on a particular issue does not in principle preclude a simultaneous denial of customary obligations on the issue.[52] Still, there is no support in the pleadings by host States on fair and equitable treatment for the view that no customary law exists; the most conservative position is expressed by reference to the classical confirmation of the international standard in *Neer*.[53] More broadly, this background shows why a reference to customary law had an important role to play in the treaty practice starting from the 1970s. A State can no longer deny the existence of customary law on the matter if it has concluded a treaty that refers to or applies customary law on the matter.

[48] Permanent Sovereignty over Natural Resources, UNGA Res 1803 (XVII) (14 December 1962), UN Doc A/5217 art 4.

[49] Declaration on the Establishment of a New International Economic Order, UNGA Res 3201 (S-VI) (1 May 1974), UN Doc A/RES/S-6/3201 art 4(e); Charter of Economic Rights and Duties of States, UNGA Res 3281 (XXIX) (12 December 1974), UN Doc A/RES/29/3281 art 2(2)(c).

[50] SM Schwebel, 'The Effect of Resolutions of the UN General Assembly on Customary International Law' (1979) 73 ASIL Proceedings 301; B Sloan, 'General Assembly Resolutions Revisited (Forty Years Later)' (1987) 58 BYIL 39.

[51] *Texaco Overseas Petroleum Company (TOPCO) v Libya* (1975, 1977) 53 ILR 389, 483 [63]–[74]; *Libyan American Oil Company (LIAMCO) v Libya* (1977) 62 ILR 140, 191 [109]; *Revere Copper & Brass, Inc. v OPIC* (1978) 56 ILR 258, 279; *Kuwait v American Independent Oil Company (Aminoil)* (1982) 66 ILR 518 [143]–[144]; *Starret Housing Corporation v Iran*, Dissenting Opinion of Judge Kashani (1984) 7 Iran–USCTR 119 [170]; *Sedco Inc. v National Iran Oil Company*, Separate Opinion of Judge Brower (1986) 10 Iran–USCTR 189 [198]–[200]; CN Brower and JB Tepe, Jr, 'The Charter of Economic Rights and Duties of the States: A Reflection or Rejection of International Law?' (1975) 9 Intl Lawyer 295; BH Weston, 'Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth' (1981) 75 AJIL 437; AO Adede, 'The Minimum Standard in a World of Disparities' in RSJ MacDonald and DM Johnston (eds), *The Structure and Process of International Law* (Martinus Nijhoff, The Hague 1986) 1012–22; M Mendelson, 'The Formation of Customary International Law' (1998) 272 Recueil des Cours de l'Académie de Droit International 155, 377–8.

[52] Mendelson, ibid 330.

[53] See Ch 2 nn 70, 92. The ICJ has confirmed the existence of international rules in the area. In the *Barcelona Traction* case, it accepted that '[w]hen a State admits into its territory foreign investments or foreign nationals, it ... assumes obligations concerning the treatment to be afforded to them', *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* [1970] ICJ Rep 3 [33] (despite a rhetorical inquiry of one Judge about the existence of any international tests and criteria for evaluating domestic laws and administration of justice, ibid Separate Opinion of Judge Padilla Nervo 243, 265); see also *United States Diplomatic and Consular Staff in Tehran (US v Iran)* (Request for the Indication of Provisional Measures) [1979] ICJ Rep 4 [19]; *Elettronica Sicula S.p.A. (ELSI) (US v Italy)* [1989] ICJ Rep 15 [111]; *Ahmadou Sadio Diallo (Guinea v DRC)* (Preliminary Objections) [2007] ICJ Rep 582 [39].

2. Treaty practice and arbitral decisions

The post-War *ad hoc* international arbitrations demonstrate the marginalization of all considerations that do not directly or indirectly relate to compensation for expropriation. In the three great oil arbitrations against Libya, even though the awards found expropriations[54] that had taken place in a discriminatory manner or without public purpose,[55] no detailed consideration of the international minimum standard, due process, or denial of justice took place.[56] The other prominent international arbitrations similarly focused on matters that were more closely connected to compensation or other remedial aspects of the case.[57] These decisions are of limited value for the international minimum standard, focusing almost exclusively on expropriation and particularly its remedial consequences.[58] The treaty practice on compensation for expropriation, while being of importance for the theory of international law-making, is not helpful for the present discussion because it addresses a different substantive issue.[59]

The FCN treaties and BIT rules on expropriation among the criteria of lawfulness often, but not invariably, include the requirement of due process.[60] While not having been of great importance in practice, the formulation of due process in these terms is important for the discussion of the minimum standard. It seems to be the case that 'due process' in these treaties refers to the international minimum standard. The US treaty practice from the 1920s onwards illustrates this role. A 1923 FCN treaty with Germany provided that 'property [of nationals] shall not be taken without due process of law'[61]

[54] *Texaco* (n 51) [58]-[73]; LIAMCO (n 51) 193–6.

[55] *BP Exploration Company (Libya) Limited v Libya* (1973) 53 ILR 297, 329.

[56] The *BP* Tribunal briefly noted that expropriation was among others things 'arbitrary', ibid. The US protested against the uncooperative attitude of Libya to arbitration with Texaco as 'denial of justice and an additional breach of international law', US Embassy in Tripoli note to Libya (1973) 3 US Digest of Practice 489, 490; *RB v Mehren* and PN Kourides, 'International Arbitrations between States and Foreign Private Parties: The Libyan Nationalization Cases' (1981) 75 AJIL 476, 487–8, 537; on this point more generally, Mann 'State Contracts' (n 45) 26–9; SM Schwebel, *International Arbitration: Three Salient Problems* (Grotius Publications Limited, Cambridge 1987) 61–143.

[57] Eg *Aminoil* (n 51) [83] et seq. The *Amoco* Tribunal doubted that a breach of domestic law was a separate ground on unlawfulness, *Amoco International Finance Corp v Iran* (1987) 15 Iran–USCTR 189 [120].

[58] S Vasciannie, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice' (1999) 70 BYIL 99, 120.

[59] Mendelson 'Formation' (n 51) 329–30.

[60] A Reinisch, 'Legality of Expropriations' in A Reinisch (ed), *Standards of Investment Protection* (OUP, Oxford 2008) 191–3. The aspects of due process had some limited role in the practice on expropriation, nn 54, 239; Friedman *Expropriation* (n 34) 137–8 (criticizing hasty and arbitrary expropriations); I Sipkov, 'Postwar Nationalizations and Alien Property in Bulgaria' (1958) 52 AJIL 469, 494; R Higgins, *Conflict of Interests: International Law in a Divided World* (The Bodley Head, London 1965) 56; PTB Kohona, 'Investment Protection Agreements: An Australian Perspective' (1987) 21 J World Trade L 79, 96; see particularly regarding Chilean copper companies, SA Stern, 'The Judicial and Administrative Procedures Involved in the Chilean Copper Expropriations' (1972) 66 ASIL Proceedings 205, 211–13; F Orrego Vicuña, 'Some International Law Problems Posed by the Nationalization of the Copper Industry by Chile' (1973) 67 AJIL 711, 715–16. The concept was more prominent in classical practice, see the protest against the 'forcible deprivation of this corporation from its property and franchises, without due process of law and fair trial' in Mr Bayard, Secretary of State, to Mr Scott, minister to Venezuela (1887) 6 Moore Digest 724, 725.

[61] Treaty of Friendship, Commerce and Consular Relations between Germany and the United States of America (adopted 8 December 1923, entered into force 14 October 1925) 52 LNTS 133 art I. 'Due process' was a standard guarantee for takings in the inter-War US FCN Treaties, see a representative sample: Treaty of Friendship, Commerce and Consular Rights between Estonia and the United States of America (adopted 23 December 1925, entered into force 22 May 1926) 50 LNTS 14 art I; Treaty of Friendship, Commerce and Consular Rights between Latvia and the United States of America (adopted 20 April 1928, entered into force 25 July 1928) 80 LNTS 37 art I; Treaty of Friendship, Commerce and

and this rule was meant 'to secure protection against arbitrary and unjust treatment'.[62] A 1948 FCN treaty with Italy again required that 'property of nationals, corporations and associations... shall not be taken... without due process of law', meaning 'the due process required by international law' that had been elaborated in the 1923 treaty with Germany and the minimum standard of the US–Mexico General Claims Commission.[63] The draft multilateral treaties of the 1960s drew upon this US practice, again reading 'due process' as a reference to international standards,[64] influencing in turn the formulation of more successful bilateral treaties.[65] In the more recent practice, important multilateral treaties and Model BITs include such rules,[66] sometimes expressly linking the criterion of 'due process' with the international minimum standard.[67]

This practice may be important for the international minimum standard in two ways. If 'due process' refers to the international minimum standard, then the elaboration of due process in State practice and arbitral decisions is directly relevant for explaining the standard, formulated precisely in the context of foreign investment. The (limited) practice and case law on the issue require lawful procedure,[68] reasonable advance notice,

Consular Rights between the United States of America and Finland (adopted 13 February 1934, entered into force 11 July 1934) 152 LNTS 46 art I; Treaty of Friendship, Commerce and Navigation between the United States of America and Liberia (adopted 8 August 1938, entered into force 21 November 1939) 201 LNTS 164 art I.

[62] Memorandum of the Solicitor of the Department of State (Department of State file 711.622/60, National Archive), RR Wilson, 'Property-Protection Provisions in United States Commercial Treaties' (1951) 45 AJIL 83, 99 fn 84; *Elettronica Sicula S.p.A. (ELSI) (US v Italy)* ICJ Pleadings Volume I 93 fn 2 (Memorial of the US).

[63] Ibid.

[64] In the 1959 Abs-Shawcross Draft Convention, 'Abs-Shawcross Draft Convention on Investment Abroad' (1960) 9 J Public L 116 art III, 'due process' 'restate[s] the minimum standards' and 'follows closely' US FCN treaties, 121. In the 1963 and 1967 OECD Draft Conventions, 'due process' is based on US treaty practice and 'must correspond to the principles of international law', 'OECD Draft Convention on the Protection of Foreign Property' (1963) 2 ILM 241 art III, 249–50; 'OECD Draft Convention on the Protection of Foreign Property' (1968) 7 ILM 117 art III, 125–6; cf *Ioannis Kardassopoulos and Ron Fuchs v Georgia*, ICSID Cases nos ARB/05/18 and ARB/07/15, Award, 3 March 2010 [394].

[65] Eg, the first BIT, Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments (adopted 25 November 1959, entered into force 28 April 1962) 457 UNTS 23 art 3(2); the first BIT with investor–State arbitration, Agreement on Economic Cooperation between the Government of the Kingdom of the Netherlands and the Government of the Republic of Indonesia (adopted 7 July 1968, applied provisionally 7 July 1968, entered into force 17 July 1971, partly terminated 1 July 1995) 799 UNTS 14 art 7(a); one of the first BITs with unconditional investor-State arbitration, Agreement between the Kingdom of Belgium and the Republic of Indonesia on the Encouragement and Reciprocal Protection of Investments (adopted 15 January 1970, applied provisionally 15 January 1970, entered into force 17 June 1972) 843 UNTS 19 art 5(a).

[66] Energy Charter Treaty (adopted 17 December 1994, entered into force 16 April 1998) 2080 UNTS 95 art 13(1)(c); Investment Agreement in the COMESA Investment Area (adopted 22 and 23 May 2007, not in force) M Paparinskis, *Basic Documents on International Investment Protection* (Hart Publishing, Oxford 2012) 442 art 20(1)(c); ASEAN Comprehensive Investment Agreement (adopted 26 February 2009, entered into force 29 March 2012) <http://www.aseansec.org/22218.htm> art 14(1)(d); 2004 Canada Model BIT art 13(1); 2004 Netherlands Model Treaty <http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/convenanten/2004/08/27/ibo-modelovereenkomst/ibo-modelovereenkomst.pdf> art 6(a); 2008 Germany Model BIT art 4(2).

[67] North American Free Trade Agreement (adopted 17 December 1992, entered into force 1 January 1994) (1993) 32 ILM 612 art 1110(1)(c); Dominican Republic–Central America–United States Free Trade Agreement (adopted 5 August 2004, entered into force 1 March 2006) <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta> art 10.7(1)(b); 2004 US Model BIT art 6(1)(c); 2012 US Model BIT art 6(1)(c)

[68] *ELSI* Pleadings I (n 62) 93 (Memorial of the US); *Goetz and others v Burundi*, ICSID Case no ARB/95/3, Award, 10 February 1999 (2000) 15 ICSID Rev—Foreign Investment L J 457 [127];

access to a court, and a fair hearing by an impartial and unbiased adjudicator.[69] It may be less clear whether treaty rules reflect customary minimum standard when they set out procedural rights in greater detail.[70] To the extent that they do not extend further than the requirements identified in the customary law of denial of justice and the case law on due process, they might be taken as simply spelling out and clarifying custom; to the extent that they go further (for example, by requiring particular promptness of review), they might lack broader relevance.[71]

The elaboration of due process as (mainly) focused on the form of and procedural safeguards relating to decision-making might also be viewed as having a broader implication. It may be recalled that the pre-Second World War international standard was built on the idea of procedural outrages, and the protection of property of expropriation was developed as a separate rule on the basis of acquired rights. The same logic, albeit from the opposite perspective, is reflected in the formulation of the law of expropriation, with the rule on protection of property standing separately from the international standard expressed in terms of due process. In both cases, the international standard provides the procedural safeguards, and the substantive aspects of the object to be protected are introduced by a separate legal argument. If the substantive element is removed, the correct implication seems to be that the international minimum standard remains focused on procedural elements, and substantive protection needs to be justified in terms of a new legal argument. In terms of contemporary concerns, this perspective would support criteria that address formal and procedural aspects (transparency, notice, procedural rights) but would be less obviously open to substantive review of the content of the decisions (legitimate expectations).

Waguih Elie George Siag and Clorinda Vecchi v Egypt, ICSID Case no ARB/05/15, Award, 1 June 2009 [441]; although the *ELSI* Court found that breach of domestic law did not necessarily constitute international arbitrariness in the treatment of foreign investors, *ELSI* (n 53) [128].

[69] In the *Anglo-Iranian Oil Co.* case, the UK argued that the determination of compensation by the Iranian legislature and executive was not impartial but 'is an extreme example of a party making itself the judge of its own cause and failing to provide a fair and judicial method of assessing compensation', *Anglo-Iranian Oil Co. (UK v Iran)* ICJ Pleadings 107, also 108 (Memorial). Some decisions require both notice and access to the court, *Sedco* Brower (n 51) 204 fn 39; *ADC Affiliate Limited, ADC & ADMC Management Limited v Hungary*, ICSID Case no ARB/03/16, Award, 2 October 2006 15 ICSID Rep 534 [434]–[440]; *Kardassopoulos* (n 64) [396]–[404]. The *ADC* and *Kardassopoulos* Tribunals described the requirement as 'a reasonable chance within a reasonable time to claim its [investor's] legitimate rights and have its claims heard', *ADC*, ibid [435]; *Kardassopoulos* (n 64) [396]. Other decisions emphasize the requirement for notice, *Middle East Cement Shipping and Handling Co. S.A. v Egypt*, ICSID Case no ARB/99/6, Award, 12 April 2002 (2003) 18 ICSID Rev—Foreign Inv L J 602 [143] (explicitly equating due process with fair and equitable treatment); *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v Kazakhstan*, ICSID Case no ARB/05/16, Award, 29 July 2008 [717]; *Siag* (n 68) [442], or the availability of judicial access, *Marvin Feldman v Mexico*, ICSID Additional Facility Case no ARB(AF)/991/1, Award, 16 December 2002 (2003) 18 ICSID Rev—Foreign Investment L J 488 [139]-[140].

[70] Eg the right to a prompt review of the expropriation and valuation, 2004 India Model BIT <http://www.finmin.nic.in/the_ministry/dept_eco_affairs/icsection/Indian Model Text BIPA.asp> art 5(2).

[71] Similarly to how the obligation to provide effective means of asserting claims and enforcing rights has been suggested to go further than the customary obligation not to deny justice, *Chevron Corporation and Texaco Petroleum Corporation v Ecuador*, PCA Case no 34877, Partial Award on the Merits, 30 March 2010 [241]–[248]; A Gourgourinis, '*Lex Specialis* in WTO and Investment Protection Law' (2010) 53 German Ybk Intl L 579, 602–3; M Paparinskis, 'Investment Treaty Interpretation and Customary Investment Protection Law: Preliminary Remarks' in C Brown and K Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (CUP, Cambridge 2011) 90–1.

II. International Minimum Standard and International Human Rights

Classical international law did not recognize fundamental human rights, but only the rights of aliens.[72] Still, the underlying conceptual similarity between the rights of aliens and broader human rights (or 'rights of man') was tentatively recognized already in the inter-War years.[73] With the human rights arguments being increasingly put forward in different fora after the Second World War, a reassessment of the international standard was required not only in philosophical terms but also as a matter of positive law.[74] A spectrum of positions regarding the relationship of human rights and the international standard could be identified.

One possible approach was to use human rights arguments to justify the international standard as a matter of sources of international law and provide it with more detailed content. The value of human rights arguments was accepted by different participants in the inter-War debates. Fenwick, who had argued for a specific and far-reaching standard at the ASIL 1927 debate (and had been unable to demonstrate persuasively the legal basis for his position),[75] now restated his position by relying on human rights:

> ... an 'international standard of justice', [is] a standard representing the degree of protection of human rights which may be expected from a civilized state.... The international standard... means a standard which the public opinion of the civilized world has come to accept as just and equitable and which now finds expression in the Universal Declaration of Human Rights.[76]

Freeman, whose *Denial of Justice* had been the most sophisticated positivist analysis of the central element of the international standard,[77] also saw the potential for human rights to place the international standard on a sounder legal footing as well as to re-enact, develop, and enlarge the rights already enjoyed by aliens.[78] At the same time, the exact relationship between the international standard and human rights was unclear, as was to be expected in light of various law-making arguments employed during the pre-War debates. Tellingly, the parallel debate about the relationship of diplomatic protection and regimes of human rights protection also produced a broad spectrum of answers, ranging from a historical continuum, absorption of one rule by the other and *vice versa*, treating human rights protection as a particularization of diplomatic protection and recognizing their conceptually distinct nature.[79]

[72] H Lauterpacht, 'Law of Nations, Law of Nature, and Rights of Man' (1944) 29 Transactions Grotius Society 1, 27; although see A Mandelstam, 'Déclaration des droits internationaux d l'homme' (1929) 35 Annuaire de l'IDI 730 art 1.

[73] E Borchard, 'The "Minimum Standard" of the Treatment of Aliens' (1939) 33 ASIL Proceedings 51, 61; cf regarding possible relevance of international law on minorities for the protection of property in the context of Latvian expropriation of German property, A Heyking, 'Some Defects in the Protection of Racial and Religious Minorities' (1924) 10 Transactions Grotius Society 143, 152–5; E Loewenfeld, 'The Protection of Private Property under the Minorities Protection Treaties' (1931) 16 Transactions Grotius Society 41.

[74] FV Garciá-Amador, 'State Responsibility in the Light of the New Trends of International Law' (1955) 49 AJIL 339, 343.

[75] AS Hershey, 'Denial of Justice' (1927) 21 ASIL Proceedings 27, 30–1; on the discussion see Ch 2 text at nn 47–9.

[76] CG Fenwick, 'The Progress of International Law during the Past Forty Years' (1951) 79 Recueil des Cours de l'Académie de Droit International 5, 43–4. Importantly, customary international standard is referred to by using the terms 'just and equitable'.

[77] Freeman *Denial of Justice* (n 13).

[78] AV Freeman, 'Human Rights and the Rights of Aliens' (1951) 45 ASIL Proceedings 120, 125.

[79] C Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights* (CUP, Cambridge 1983) 18 et seq.; CF Amerasinghe, *Local Remedies in International Law* (2nd edn CUP, Cambridge 2004) 77–83.

At one end of the spectrum, human rights and the international standard were seen as converging, or at least heading towards such a convergence. Jessup suggested that human rights would transform the responsibility for injuries to aliens to responsibility for injuries to individuals.[80] Waldock considered logical the assimilation of the substantive international standard with the rules on human rights.[81] McDougal argued for a 'noble synthesis' of human rights and treatment of aliens.[82] García-Amador suggested that the classical debate should be abandoned in favour of an international standard with the content of human rights.[83] As late as 1983, Virally explained human rights as the twentieth-century statement of liberties that had replaced the nineteenth-century statement of the international standard.[84] However, none of the writers explained in detail the methodology of this process.[85]

A subtler approach was proposed by Jennings, who indicated a variety of options for explaining the relationship, including 'some osmosis between these two branches of the law and perhaps eventually a synthesis'.[86] In an earlier article, García-Amador made a more modest proposal to 'interpret and apply the "international standard of justice" in the light of the (essential) human rights which have been internationally recognised'.[87] Kiss seemed to be making a similar point when he said that the minimum standard includes certain human rights. At least by implication, the content of these rights would be identified by reference to human rights provisions.[88] Eustathiadès, another influential participant in the doctrinal part of the inter-War developments,[89] noted that the influence of human rights would be indirect, clarifying and interpreting the minimum standard.[90] Guggenheim suggested that human rights made concrete the international standard.[91] While the exact methods of the suggested interplay were not explained in greater detail, the assumption seemed to be that human rights and the international standard were legally distinct but the content of the latter could be established through the lenses of the former, probably either by analogy or partial integration.

At the other end of the spectrum, the lack of an effective system of enforcement and implementation in the immediate post-War years gave rise to a sceptical view about

[80] PC Jessup, *A Modern Law of Nations* (Archon Books, 1968) 97.

[81] H Waldock, 'Human Rights in Contemporary International Law and the Significance of the European Convention' in *The European Convention on Human Rights* (BIICL, London 1965) 3.

[82] MS McDougal, HD Lasswell, and L-C Chen, 'The Protection of Aliens from Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights' (1976) 70 AJIL 432, 454 et seq.

[83] FV Garciá-Amador, 'State Responsibility: Some New Problems' (1958) 94 Recueil des Cours de l'Académie de Droit International 365, 433–7.

[84] M Virraly, 'Panorama de droit international contemporain' (1983) 183 Recueil des Cours de l'Académie de Droit International 9, 120.

[85] RB Lillich, 'Duties of States Regarding Civil Rights of Aliens' (1978) 161 Recueil des Cours de l'Académie de Droit International 329, 394. The ambiguity is reflected in Schwebel's position, who simultaneously considered the international standard to be a standard of human rights and one that existed apart from the traditional human rights, Schwebel *Salient Problems* (n 56) 67–8.

[86] Jennings 'General Course' (n 8) 488.

[87] Garciá-Amador 'New Trends' (n 74) 344.

[88] A-C Kiss, 'La condition des étrangers en droit international et les droits de l'homme' in *Miscellanea WJ Ganshof van der Meersch* (LGDJ, Paris 1972) 505.

[89] CT Eustathiadès, *La responsabilité international de l'état pour les actes des organes judiciares et le problème du déni de justice en droit international* (A Pédone, Paris 1936).

[90] CT Eustathiadès, 'Les sujets de Droit international et le responsabilité internationale. Nouvelles tendances' (1953) 81 Recueil des Cours de l'Académie de Droit International 397, 597, 599.

[91] P Guggenheim, 'Les principles de droit international public' (1952) 80 Recueil des Cours de l'Académie de Droit International 1, 130.

the potential of human rights in general,[92] and the ability to replace the international standard in particular. The developing States criticized the international standard, suggesting that it had been elucidated without their participation and that consequently they did not consider it to be an appropriate rule for the post-War legal order.[93] Writing in 1946, Freeman described an argument to replace the international standard with human rights as an abandonment of any realistic protection.[94] Even as late as 1986, Seidl-Hohenveldern considered the story of protection of property as a human right to be in almost uninterrupted decline since the end of the Second World War.[95] However, despite the widely differing views regarding the desirability of, and methodology for, integrating arguments of human rights and the international standard, there was agreement that both concepts addressed broadly similar matters.

1. Argument of human rights: García-Amador

García-Amador clearly appreciated the problems of the international standard. In his view, 'the principle of the "international standard of justice"... has always suffered from a fundamental defect: its obvious vagueness and imprecision'.[96] To remedy this problem, he considered that the distinction between the rights of aliens and nationals that was crucial within both classical approaches has disappeared in the human rights law that would constitute the basis of the new standard. The fact that

> ...these two traditional principles are no longer applicable does not necessarily imply that the new legal system must ignore their essential elements and their basic purposes. On the contrary, the "international recognition of human rights and fundamental freedoms" constitutes precisely a synthesis of the two principles.[97]

Even though he claimed to reject both classical approaches in favour of a conceptually new one, García-Amador was in effect arguing for a restatement of the international standard in terms of human rights.[98] García-Amador presented his argument in the ILC work of State responsibility, and the failure of his project is broadly known.[99] While the decentralized process of the pre-War debate meant that its result was in many ways left open, it is clear that García-Amador's extreme argument for the synthesis of international standard and human rights was rejected in the ILC, and it does not seem to have been successful more generally. The ILC chose to follow the Second Special Rapporteur Ago and his theoretical model of distinction between primary and secondary rules, and Garciá-Amador's proposals had little direct effect on the development of international law.[100] Because of the clarity of the result, it is important to identify the precise reason or reasons why the human rights project was rejected.

Lillich explained the rejection as a result of the ideological opposition to the international standard by Communist and developing States.[101] However, the actual situation seems to have been more nuanced. The supporters of the national treatment and international standard were divided not—as one would expect—along the lines of support or rejection of the Rapporteur's argument, but rather along the lines of exactly why the proposal should be rejected. There was little support for Garciá-Amador.[102] The general and sweeping rejection is therefore capable of being explained by deeper normative considerations.

There were three reasons for those who in principle supported the international standard to reject the particular proposal. First, the international standard and human rights were substantively different. As Fitzmaurice observed, '[t]he two concepts of "international standard of justice" and "observance of fundamental human rights" might be found not completely to coincide'. As a result, they could overlap in some situations, but not in others.[103] Second, another criticism was the controversial legal authority and questionable customary law status of human rights norms.[104] Edmonds stated that '[i]t was difficult for him to accept the view that certain fundamental rights had been recognized and had become familiar in international law'.[105] Third, in pragmatic terms, the human rights standards were considered to be too vague to offer practical assistance in the elucidation of the international standard. As François observed regarding the ECHR, 'to settle disputes a tribunal must have clear criteria on which to base its judgments, and those laid down in the convention were vague—too vague, in fact, to be of much use to the Commission'.[106]

The opponents of the international standard pointed to substantially the same reasons. First, they similarly considered the international standard and human rights to be

[92] H Lauterpacht, 'The International Protection of Human Rights' (1947) 70 Recueil des Cours de l'Académie de Droit International 1, 80–6; CF Amerasinghe, *State Responsibility for Injuries to Aliens* (Clarendon Press, Oxford 1967) 4–6; G Fitzmaurice and FA Vallat, 'Sir (William) Eric Beckett, K.C.M.G., Q.C. (1896–1966)' (1968) 17 ICLQ 267, 295–6.

[93] SNG Roy, 'Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?' (1961) 55 AJIL 863.

[94] AV Freeman, 'Recent Aspects of the Calvo Doctrine and the Challenge to International Law' (1946) 40 AJIL 121, 145–6.

[95] I Seidl-Hohenveldern, 'International Economic Law. General Course on Public International Law' (1986) 198 Recueil des Cours de l'Académie de Droit International 9, 163.

[96] FV García-Amador, 'Report on International Responsibility' in *Yearbook of the International Law Commission, 1956, Volume II,* UN Doc A/CN.4/SER.A/1956/Add.1 173, 202.

[97] García-Amador 'Some New Problems' (n 83) 438; García-Amador 'First Report', ibid 202; FV García-Amador, 'Second Report on International Responsibility' in *Yearbook of the International Law Commission, 1957, Volume II,* UN Doc A/CN.4/SER.A/1957/Add.1 104, 113–14.

[98] RB Lillich, 'The Current Status of the Law of State Responsibility for Injuries to Aliens' (1979) 73 ASIL Proceedings 245, 246; RB Lillich, *The Human Rights of Aliens in Contemporary International Law* (Manchester University Press, Manchester 1984) 49.

[99] D Müller, 'The Work of García-Amador on State Responsibility for Injury Caused to Aliens' in J Crawford, A Pellet, and S Olleson (eds), *The Law of International Responsibility* (OUP, Oxford 2010). Thus there can be no reliance upon suspense to sustain the interest, as Lord Bingham observed about the *Alabama* case, T Bingham, 'The *Alabama* Claims Arbitration' (2005) 54 ICLQ 1, 1.

[100] J Crawford and T Grant, 'Responsibility of States for Injuries to Foreigners' in JP Grant and JC Barker (eds), *The Harvard Research in International Law: Contemporary Analysis and Appraisal* (WS Hein & Co., New York 2007) 88–93. A number of proposals had some limited effect on the ILC work on State responsibility and diplomatic protection, see respectively J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP, Cambridge 2002) 15 fn 45; ILC, 'Draft Articles on Diplomatic Protection with Commentaries' in *Report of the International Law Commission on the Work of its 61st Session,* UN Doc A/61/10 15, 22, 42, 45, 80, 99.

[101] Lillich 'Duties' (n 85) 377.

[102] Spiropoulos initially agreed that 'it might well be that a new standard could be set up', ILC, *Yearbook of the International Law Commission, 1956, Volume I,* UN Doc A/CN.4/SER.A/1956 235, but later suggested concentrating on secondary rules of State responsibility, ILC, *Yearbook of the International Law Commission, 1957, Volume I,* UN Doc A/CN.4/SER.A/1957 235, and abandoning human rights arguments, ibid 169. Hsu recognized the problems in the project but 'thought that the Rapporteur was on the right track', ibid 156. Yokota approved the approach in principle, somewhat confusingly both supporting equality of treatment, ibid 160, and arguing for the inclusion of human rights, ibid 169.

[103] ILC 1956 (n 102) 243–34; also ILC 1957 (n 102) 164, 169 (Spiropoulos).

[104] ILC 1956 (n 102) 243 (Fitzmaurice).

[105] ILC 1957 (n 102) 160.

[106] ILC 1956 (n 102) 243; also ILC 1957 (n 102) 163. The property protection rules of ECHR have now probably the richest judicial gloss of any international instrument dealing with comparable matters, C Tomuschat, 'The European Court of Human Rights and Investment Protection' in C Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP, Oxford 2009) 638–40.

conceptually distinct.[107] The second argument queried whether human rights could be considered a valid source of synthesis because of their controversial customary law status,[108] and in any case because of the problems with their enforcement.[109] Third, in a mirror image to Garciá-Amador's argument to restate the international standard in terms of human rights, the opponents argued for a restatement of national treatment in terms of the non-discrimination rule.[110] According to Nervo, 'the rule of the fundamental equality of rights between nationals and foreigners must... be accepted purely and simply and without exception as the sole rule truly compatible with the principle of the sovereign equality of States.'[111] Fourth, the concern about parochial standards was still evident, as Matine-Daftary openly acknowledged: '[d]iscussion of the Special Rapporteur's draft had been postponed not only owing to lack of time, but also because the draft was based on purely European standards of justice'.[112] Apart from arguments relating to the substance of the project, there was also increasing support in favour of changing the focus to secondary rules of State responsibility, as the ILC finally proceeded to do under Ago.[113]

The legal objections to human rights synthesis were largely shared by the supporters and opponents of the international standard.[114] The doubts about the customary nature of human rights were voiced by Fitzmaurice (UK), Edmonds (US), and Tunkin (USSR). Fitzmaurice and Amado (Brazil) both considered human rights and the international standard to be conceptually distinct. The objection about the vagueness of human rights was made by François (the Netherlands) and approvingly referred to by Zourek (Czechoslovakia). Even though the ILC members deeply disagreed about the existence and desirability of the international standard, the reasons for rejecting García-Amador's project may be taken to reflect a general consensus about the relationship of the standard and human rights.

2. Consequences for the international standard

Paradoxically, the formality of the debate and the clarity of the rejection may turn the seemingly futile human rights debate into a valuable laboratory for the contemporary international standard debate. The four objections against the human rights project related to the conceptually confused relationship between the regimes, the controversial

[107] ILC 1957 (n 102) 155 (Amado).

[108] ILC 1956 (n 102) 243 (El-Khouri), 244 (Zourek); ILC 1957 (n 102) 156 (Nervo), 160 (Matine-Daftary), 166 (Tunkin), 166 (Zourek); ILC, *Yearbook of the International Law Commission, 1959, Volume I*, UN Doc A/CN.4/SER.A/1959 149 (Matine-Daftary); ILC, *Yearbook of the International Law Commission, 1960, Volume I*, UN Doc A/CN.4/SER.A/1960 281 (Tunkin).

[109] ILC 1956 (n 102) 236, also 243 (Salamanka).

[110] The Soviet representative Krylov's position is somewhat unclear, since he approvingly refers to Guerrero and then says that rights and guarantees accorded to aliens should not be less than those accorded by human rights, ILC 1956 (n 102) 234. Since it is unlikely that a Soviet representative would argue for broad protection of aliens and human rights, he probably considered human rights limited to non-discrimination. ILC 1956 (n 102) 244 (Zourek); ILC 1957 (n 102) 160–1 (Matine-Daftary), 166 (Zourek).

[111] ILC 1957 (n 102) 156. El-Erian pointed out that even equality was too high a standard, ibid 162.

[112] ILC 1959 (n 108) 149.

[113] ILC 1957 (n 102) 156–7, 167 (Ago), 164 (implicitly Fitzmaurice), 168 (Spiropoulus), 170 (Verdross); ILC 1959 (n 102) 150 (Verdross, Ago); Crawford and Grant 'Responsibility of States' (n 100) 102–8; A Pellet, 'The ILC's Articles on State Responsibility' in J Crawford, A Pellet, and S Olleson (eds), *The Law of International Responsibility* (OUP, Oxford 2010) 76–9.

[114] Crawford and Grant 'Responsibility of States' (n 100) 96–7.

status of human rights, the ambiguity of their content (the latter two somewhat overlapping), and their European origin. It is useful to reconsider these arguments against the benchmark of contemporary law and test their persuasiveness in the twenty-first-century legal order.[115]

The case law of the PCIJ stated the classical position on the matter. The Court confirmed that the manner of proceedings,[116] application of domestic law,[117] or 'a lacuna in the judicial organisation or... the refusal of administrative or extraordinary methods of redress designed to supplement its deficiencies' could amount to denial of justice,[118] and that the protection of acquired rights constituted a part of the rules on the treatment of aliens.[119] In the 1970 *Barcelona Traction, Light and Power Company, Limited* (*Barcelona Traction*) Judgment, the Court directly addressed the relationship of human rights and protection of investors:

> With regard more particularly to human rights, to which reference has already been made in the paragraph 34 of this judgment, it should be noted that these also include protection against denial of justice. However, on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality. It is therefore still on the regional level that a solution to this problem has had to be sought...[120]

More recently, the Court first implicitly[121] and then explicitly rejected the argument that the right to consular protection under the Vienna Convention on Consular Relations was a human right of aliens.[122] Finally, in the 2008 judgment in the *Ahmadou Sadio Diallo* (*Diallo*) case the Court directly addressed the issue and recognized that:

> Owing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, the scope *ratione materiae* of diplomatic protection, originally limited to alleged violations of the minimum standard of treatment of aliens, has subsequently widened to include, *inter alia*, internationally guaranteed human rights.[123]

The development from the classical position to *Diallo* shows the waning force of the objections relating to the confused relationship between human rights and the international standard, and the controversial legal status of human rights. Classical law did not (and could not) consider the relevance of human rights arguments, despite the background of earlier case law[124] recognizing the ability of the individual to benefit from treaty rights directly[125] and providing conceptual tools for later human rights developments.[126] *Barcelona Traction* recognized that human rights instruments and claims may

[115] For the application of similar method in a related context, M Paparinskis, 'Investment Arbitration and the Law of Countermeasures' (2008) 78 BYIL 264, 325–30.

[116] *S.S. 'Lotus' (France v Turkey)* [1927] PCIJ Rep Series A No 7 13.

[117] *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* (Advisory Opinion) [1923] PCIJ Rep Series A/B No 44 24.

[118] *Phosphates in Morocco (Italy v France)* (Preliminary Objections) [1938] PCIJ Rep Series A/B 74 28.

[119] *Certain German Interests* (n 5) 22; a proposition that has to be taken with some caution in light of State practice at the Hague Conference, Ch 2 nn 162–172.

[120] *Barcelona Traction* (n 53) [91].

[121] *LaGrand (Germany v US)* (Judgment) [2001] ICJ Rep 466 [78].

[122] *Avena and Other Mexican Nationals (Mexico v US)* (Judgment) [2004] ICJ Rep 12 [124].

[123] *Diallo* (n 53) [39].

[124] *Treatment of Polish Nationals* (n 117) 24–5; *Polish Postal Service in Danzig* (Advisory Opinion) [1925] PCIJ Rep Series A/B No 11 17–18.

[125] H Lauterpacht, 'The Subjects of the Law of Nations [Part II]' (1948) 64 LQR 97, 97–9.

[126] H Lauterpacht, *International Law and Human Rights* (Stevens & Sons Limited, London 1950) 28–9.

be appropriate for dealing with investment issues. Despite the fact that hindsight has reshaped the whole judgment around *erga omnes* obligations,[127] sidelining the denial of justice and investment protection perspective,[128] for the present purpose paragraph 91 in fact only makes a very limited and even mundane point. After addressing different types of investment protection rules in paragraph 90 (and concluding that '[n]o such instrument is in force between the Parties to the present case'), the Court looked 'more particularly to human rights' in paragraph 91. This perspective was similarly unhelpful because inter-State procedures were not provided on the universal level and Spain was not a member of the ECHR regional regime (where 'the problem of admissibility encountered by the claim in the present case has been resolved').[129] Reference to paragraph 34 neither refers to nor modifies the *erga omnes* doctrine;[130] it simply reminds the reader that human rights have already been mentioned in the judgment.

It may be concluded that the Court has confirmed both the validity and conceptual autonomy of human rights and the international standard, rejecting the first two objections of the human rights debate. *Barcelona Traction* may be read as suggesting a certain synthesis between human rights and the treatment of aliens. The Court in *Diallo* dispelled any such doubt. Human rights have not replaced or synthesized with the international standard; they have simply extended the *ratione materiae* protection of individuals, acting as a parallel but conceptually distinct regime. The third and fourth objections about the vagueness and the European origin of the standards are intrinsically related, requiring the human rights argument to be both universal and specific. These criteria are easier to satisfy regarding the rules that relate to administration of justice, since the right to a fair trial is expressed in broadly similar terms in universal[131] and regional human rights instruments.[132] Universal treaties on human rights provide less assistance in relation to property rights.[133] Since the ECtHR has interpreted the ECHR in thousands of judgments *inter alia* regarding the human rights of corporations, focus on the ECHR would provide the most fruitful source of inspiration.[134] At the same time, relying upon regional instruments to explain the content of general international

[127] HWA Thirlway, 'The Law and Procedure of the International Court of Justice (Part One)' (1989) 60 BYIL 1, 99–100; B Simma, 'From Bilateralism to Community Interest' (1994) 250 Recueil des Cours de l'Académie de Droit International 217, 296–7; M Ragazzi, *The Concept of International Obligations* Erga Omnes (Clarendon Press, Oxford 1997) 211–12; CJ Tams, *Enforcing Obligations* Erga Omnes *in International Law* (CUP, Cambridge 2005) 176–79.

[128] Ragazzi, ibid 10.

[129] *Barcelona Traction* (n 53) [90]; F Berman, 'The Relevance of the Law on Diplomatic Protection in Investment Arbitration' in F Ortino and others (eds), *Investment Treaty Law: Current Issues II* (BIICL, London 2007) 71; Paparinskis '*Barcelona Traction*' (n 8) 128–9.

[130] J Crawford, 'The Standing of States: A Critique of Article 40 of the ILC's Articles on State Responsibility' in M Andenas (ed), *Liber Amicorum in Honour of Lord Slynn of Hadley* (Kluwer Law International, The Hague 2000) 26.

[131] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 14.

[132] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222 art 6; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 art 8; African (Banjul) Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 art 7(1).

[133] ICCPR does not have rules on the protection of property, and, while the issue have sometimes arisen from the perspective of other rules, its treatment does not have general relevance, S Joseph, J Schultz, and M Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Documents* (2nd edn OUP, Oxford 2005) 700–5, 746.

[134] M Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (OUP, Oxford 2006). The Inter-American and African human rights regimes also include rules on the protection of property, American Convention (n 132) art 21(2); African Charter (n 132) art 14, but

law may leave the position open to Matine-Daftary's criticism about relying on peculiarly European concepts.[135] One needs to take into account all these considerations and express them through the existing structures of sources and interpretation.

The role of the four objections in the contemporary law may be visualized along a spectrum. On the one hand, human rights arguments can be used in principle. On the other hand, human rights and the international standard are conceptually distinct rules. These propositions suggest that the developments should take place on the basis of, and not through a replacement of, the classical standard. Generality and specificity are no longer reasons for rejecting human rights *in limine*, but simply criteria suggesting the types of rules and the methodology to be employed in relying on them. The arguments suggest a shift of methodological focus, rejecting the extremes of total dismissal and total synthesis and adopting a careful comparative approach, always keeping in mind the systemic differences.[136] Indeed, that was the position advocated in the 1940s and 1950s by a respectable (perhaps even dominant) part of the doctrine,[137] including Fitzmaurice, who suggested that 'by recourse to the concept of human rights it might be possible to provide such a definition [of the minimum standard]'.[138] Arguments relying on the ICCPR[139] and the ECHR have been used in international criminal law[140] for precisely the same reasons of legitimizing and clarifying the substantive rules.[141]

The contemporary developments follow the suggested approach, carefully identifying the systemic context and applying human rights arguments to clarify existing law. Sometimes human rights rules are applied as interpretative materials,[142] while in other cases they are applied by analogy.[143] The *Mondev* Tribunal set out the considerations relating to systemic context in the latter situation:

> These decisions concern the 'right to a court', an aspect of the human rights conferred on all persons by the major human rights conventions and interpreted by the European Court in an evolutionary way. They emanate from a different region, and are not concerned, as Article 1105(1) of NAFTA is concerned, specifically with investment protection. At most, they provide guidance by analogy...[144]

their judicial elaboration is somewhat less helpful regarding foreign investment, Tomuschat 'European Court of Human Rights' (n 106) 639–40.

[135] M Sornarajah, *The Pursuit of Nationalized Property* (Martinus Nijhoff, Dordrecht 1986) 7–10.

[136] AV Lowe, 'Regulation or Expropriation?' (2002) 55 Current Legal Problems 447, 463.

[137] See text at nn 75–8, 86–91.

[138] ILC 1957 (n 102) 164.

[139] Eg *Prosecutor v Delalić et al.* (Judgment) IT-96-21-T, T Ch II (16 November 1998) [461], [539]–[541]; *Prosecutor v Furundžija* (Judgment) IT-95-17/1-T, T Ch (10 December 1998) [160]; *Prosecutor v Blaškić* (Judgment) IT-95-14-A, A Ch (29 July 2004) [143].

[140] Eg *Delalić* Judgment, ibid [462]–[466], [487]–[489], [534]–[538]; *Furundžija* Judgment, ibid [160]; *Prosecutor v Milutinović et al.* (Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction—Joint Criminal Enterprise) IT-99-37-AR72, A Ch (21 May 2003) [38]–[39]; *Prosecutor v Nahimana et al.* (Judgment and Sentence) ICTR-99-25-T, T Ch III (3 December 2003) [991]–[999]; *Blaškić* Judgment, ibid [143].

[141] A Cassese, 'The Influence of the European Court of Human Rights on International Criminal Tribunals—Some Methodological Remarks' in M Bergsmo (ed), *Human Rights and Criminal Justice for the Downtrodden* (Martinus Nijhoff, Leiden 2003) 31–43.

[142] *Toto Construzioni Generali S.p.A. v Lebanon*, ICSID Case no ARB/07/12, Decision on Jurisdiction, 8 September 2009 [158]–[160]; *Frontier Petroleum Services Ltd v Czech Republic*, UNCITRAL Case, Final Award, 12 November 2010 [328].

[143] In such cases, human rights are not interpretative materials, *Fireman's Fund Insurance Company v Mexico*, ICSID Additional Facility Case no ARB(AF0/02/01, Award, 17 July 2006 16 ICSID Rep 523 fn 161; *Toto* (n 142) [157].

[144] *Mondev v US*, ICSID Additional Facility Case no ARB(AF)/99/2, Award, 11 October 2002 (2003) 42 ILM 85 [144].

The superficial similarities should not disguise structural differences which, in their turn, should not preclude guidance based on functionally analogous rules. In line with these guidelines, Tribunals have relied on the ECtHR case law to explain[145] the concepts of property,[146] denial of justice,[147] regulatory expropriation,[148] fair and equitable treatment relating to expectations[149] and proportionality[150] and some aspects of compensation,[151] but not regarding other matters where the rules were not functionally analogous.[152] The absence of publicly available pleadings in investment arbitrations (apart from NAFTA) makes the identification of the host State's position quite problematic. However, there is some State practice expressly supporting the use of ECHR comparative arguments,[153] and in the other cases it may be tentatively suggested that States at the very least did not strongly object to such arguments.[154]

The proper lesson of the human rights debate is therefore not that García-Amador was conceptually wrong. The lesson is rather that he came too early, when human rights

[145] States have also invoked human rights obligations that might conflict or at least point in another direction from investment protection obligations in the particular situation. As noted in the Introduction, 8–9, this monograph does not address the interpretative implications of rules pointing in another direction and deals only with the logically anterior question about the content of the obligation itself. Of course, an interpreter might need to take into account such rules to complete the interpretative exercise in a particular case.

[146] *Saipem S.p.A. v Bangladesh*, ICSID Case no ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007 (2007) 22 ICSID Rev—Foreign Investment L J 100 [130], [132].

[147] *Mondev* (n 144) [138], [141], [143]–[144]; *Victor Pey Casado and President Allende Foundation v Chile*, ICSID Case no ARB/98/2, Award, 8 May 2008 [662]; *Toto* (n 142) fn 48.

[148] *Lauder v Czech Republic*, UNCITRAL Case, Award, 3 September 2001 9 ICSID Rep 66 [200]; *Técnicas Medioambientales Tecmed, S.A. v Mexico*, ICSID Additional Facility Case no ARB(AF)/00/02, Award, 29 May 2003 10 ICSID Rep 134 [116], [122]; *Azurix Corp. v Argentina*, ICSID Case no ARB/01/12, Award, 14 July 2006 14 ICSID Rep 374 [311]; *Continental Casualty v Argentina*, ICSID Case no ARB/03/9, Award, 5 September 2008 [276] fn 402 (refers only to the text of Article 1 of Protocol 1 ECHR); *Impregilo S.p.A. v Argentina*, ICSID Case no ARB/07/17, Award, 21 June 2011 fn 153.

[149] *International Thunderbird Gaming Corporation v Mexico*, UNCITRAL Case, Final Award, 26 January 2006, Separate Opinion of Arbitrator Waelde [27]; *Total SA v Argentina*, ICSID Case no ARB/04/1, Decision on Liability, 21 December 2010 [129], [134].

[150] *EDF (Services) Ltd v Romania*, ICSID Case No ARB/05/13, Award, 2 October 2009 fn 126.

[151] *ADC* (n 69) [497].

[152] The instances that were not considered functionally similar include compensation, *Amco Asia Corporation and others v Indonesia*, ICSID Case no ARB/81/1, Resubmitted Case, Award, 31 May 1990 (1992) 89 ILR 580 [125]–[128]; *Siemens A.G. v Argentina*, ICSID Case no ARB/02/8, Award, 6 February 2007 14 ICSID Rep 518 [354], rules regarding the protection of shareholders, *Azurix Corp. v Argentina*, ICSID Case no ARB/01/12, Decision on the Application of Annulment, 1 September 2009 [128], and retroactivity of treaties, *Société Générale v Dominican Republic*, LCIA Case no UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008 [93]; *Chevron Corporation and Texaco Petroleum Corporation v Ecuador*, UNCITRAL Case, Interim Award, 1 December 2008 [176].

[153] *Amco II* Award, ibid [125] (Indonesia); *Mondev v US*, ICSID Additional Facility Case no ARB(AF)/99/2, Pleadings, 22 May 2002 <http://www.state.gov/documents/organization/15441.pdf> 723, 724 (Pawlak); ibid 23 May 2002 <http://www.state.gov/documents/organization/15440.pdf> 759–67, 776 (Legum), 836–40 (Svat) (US); *Siemens* Award (n 152) [241], [346] (Argentina); *National Grid v Argentina*, UNCITRAL Case, Award, 3 November 2008 [241] (Argentina); *Azurix* Annulment (n 152) [128] (Argentina). The US also relied on ECtHR case law by analogy in the ICJ regarding exhaustion of local remedies, *LaGrand (Germany v US)* ICJ Pleadings CR 2000/31, 17 November 2000 <http://www.icj-cij.org/docket/files/104/4669.pdf> 17 [3.10] (Meron).

[154] *Lauder* (n 148) [200] (Czech Republic); *Tecmed Award* (n 148) (Mexico); *Azurix* Award (n 148) [311] (Argentina); *Saipem* Jurisdiction (n 146) [132] (Bangladesh); *Continental Casualty* (n 148) (Argentina); *Victor Pey Casado* (n 147) (Chile). The complexity of identifying the State's position on an issue from the summary of the argument is illustrated by the *Mondev* case, where the text of the award only concisely refers to the position of the US in favour of the application of ECtHR arguments (n 141) and of the investor against it, *Mondev v US*, ICSID Additional Facility Case no ARB(AF)/99/2, Pleadings, 21 May 2002 <http://www.state.gov/documents/organization/15442.pdf> 308–9, 313 (Smutny).

law was not sufficiently developed, and wanted to go too far, changing the underlying structures rather than working through them.[155] Keeping in mind developments in the human rights case law and the systemic limitations of the argument that needs to be expressed through the strictures of sources and interpretation or careful analogy, it should now be possible to be more successful, as put succinctly in the US pleadings in the *Mondev* case:

> The jurisprudence of the European Court, meaning the Strasbourg Court, is admittedly of a specialized regional nature. We nonetheless submit that the jurisprudence of that court does serve as a useful if rough barometer.[156]

III. International Minimum Standard and Fair and Equitable Treatment

The contemporary debate has taken place from the middle of the twentieth century, primarily through treaty practice but from the end of the twentieth century also through investment treaty arbitration, and has focused on the legal relationship between the international minimum standard and fair and equitable treatment. The background to the fair and equitable treatment debate was formed by the practice from before the Second World War. From the immediate post-War perspective, the error in Root's argument was the insolvable contradiction that the concept of civilization inserted into the source of the standard; the error in the *Neer* argument was the legal emptiness of its criteria and the peculiarity of their origin. The fair and equitable treatment practice was also influenced by the parallel developments relating to compensation for expropriation and international human rights. The almost exclusive focus of the former practice on direct expropriation, restating the international standard as a criterion of lawfulness of marginal relevance, was due to the inability of the international standard to conceptualize the protection of property persuasively. The latter debate suggested, albeit in negative terms, that the international standard could not be fully merged with other rules, and that one should not resort to arguments that were conceptually or substantively unlikely to clarify the situation.

Against this background (and with the benefit of hindsight), the new international standard could be formulated along the lines of four propositions. To cure Root's fundamental vagueness inherent in the customary or general principles argument, a 'treatification' of the international standard would be necessary.[157] The *Neer* standard of procedural outrages had not been very helpful for addressing protection of property, so the rule could be restated in more neutral terms that would not exclude different interpretative approaches.[158] The focus on compensation for direct expropriation showed that protection of property was formulated as a separate rule, and the most that the international standard could do was to provide one of its associated guarantees. The human rights debate cautioned against radical reforms of the international standard, calling rather for a nuanced and ambiguous relationship between the classical rules and modern

[155] Müller 'García-Amador' (n 99) 72.

[156] *Mondev* Pleadings 23 May 2002 (n 153) 760 (Legum).

[157] JW Salacuse, 'The Treatification of International Investment Law: A Victory of Form over Life? Or Crossroads Crossed?' (2006) 3 (3) Transnational Dispute Management.

[158] FA Mann, 'British Treaties for the Promotion and Prorection of Investments' (1981) 52 BYIL 241, 243–4.

developments, both to maintain the legitimacy associated with the historical pedigree and correct the classical inadequacies.[159]

State practice and case law has broadly followed these propositions. Compliance with the international minimum standard has often been imposed as a matter of treaty law, sometimes expressly linking it with fair and equitable treatment, and sometimes providing only for fair and equitable treatment,[160] and by 1996 'the key term[]... "fair and equitable treatment to nationals and companies"... was [a] legal term[] of art well known in the field of overseas investment protection'.[161] A subtle position has been adopted in many aspects of the fair and equitable treatment debate, in particular regarding the unclear relationship that the treaty fair and equitable rules have with the customary minimum standard. After the fair and equitable treatment debate was directly addressed at the turn of the millennium in response to the early investor–State arbitrations under NAFTA (the first treaty to provide for investor–State arbitration between developed States),[162] the Tribunals found themselves grappling with the old queries from the foundational debate: what is the source of the international standard, and how should one go about identifying its content?

1. Pre-Second World War background

The dominant view seems to be that 'fair and equitable treatment' as a term of art originates in the post-Second World War treaty practice.[163] This view may be said to be not entirely accurate. The precise language of 'fair and equitable' or very similar to that was not unknown to the pre-Second World War international law; the real challenge seems to be to determine the more relevant aspects for investment law in light of its ubiquity. On the basis of pre-War treaty and State practice, three arguments could be made. The first and seemingly dominant stratum of practice uses 'fair and equitable' and comparable terms to refer to customary rules on the treatment of aliens. The first treaties that require 'justice and equity' in the treatment of aliens appear in the late seventeenth-century British practice, relating specifically to administration of justice. A 1654 treaty with

[159] On pedigree and legitimacy, TM Franck, 'Legitimacy in the International System' (1988) 82 AJIL 705, 726; PM Norton, 'A Law of the Future of the Law of the Past? Modern Tribunals and the International Law of Expropriation' (1991) 85 AJIL 474, 499–500; TM Franck, *Fairness in International Law and Institutions* (Clarendon Press, Oxford 1995) 37.

[160] On differences in treaty practice, I Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (OUP, Oxford 2008) 15–52; A Newcombe and L Paradell, *Law and Practice of International Treaties: Standards of Treatment* (Walter Kluwer Law & Business, the Netherlands 2009) 255–61; R Kläger, *Fair and Equitable Treatment in International Investment Law* (CUP, Cambridge 2011) 9–22.

[161] *Oil Platforms (Iran v US)* (Preliminary Objections) [1996] ICJ Rep 803, Separate Opinion of Judge Higgins 847 [39].

[162] DM Price, 'Remarks' (1997) 91 ASIL Proceedings 492.

[163] *Pope & Talbot Inc. v Canada*, UNCITRAL Case, Award on Damages, 31 May 2002 126 ILR 131 [60]; *LG&E v Argentina*, ICSID Case no ARB/02/1, Decision on Liability, 3 October 2006 (2006) 21 ICSID Rev—Foreign Inv L J 203 [29]; Vasciannie 'Fair and Equitable Treatment Standard' (n 58) 107–13; OECD, 'Fair and Equitable Treatment Standard in International Investment Law' Working Papers on International Investment No 2004/03 <http//www.oecd.org> 3–5; R Dolzer, 'Fair and Equitable Treatment: A Key Standard in Investment Treaties' (2005) 39 Intl Lawyer 87, 89; CH Schreuer, 'Fair and Equitable Treatment in Arbitral Practice' (2005) 6 J World Investment Trade 357, 357–8; R Dolzer and CH Schreuer, *Principles of International Investment Law* (OUP, Oxford 2008) 119–20; Tudor *Fair and Equitable Treatment* (n 160) 15, 19–20; C Yannaca-Small, 'Fair and Equitable Treatment Standard: Recent Developments' in A Reinisch (ed), *Standards of Investment Protection* (OUP, Oxford 2008) 112; Newcombe and Paradell *Law and Practice* (n 160) 255–6.

Sweden included a broad clause *inter alia* prohibiting seizures of goods of merchants, with the exception that

> such arrests, *as are comfortable to justice and equity* be not hereby prohibited, so be it they are made according to the ordinary course of law, and not granted upon affection or impartiality, but are requisite for the administration of *right and justice*.[164]

A 1670 treaty with Denmark is another early example of a document that requires 'justice and equity' ('jus et aequitatem' in the authentic Latin text)[165] in relation to treatment of aliens, in particular calling for speediness in judicial and other proceedings:

> Both parties shall cause *justice and equity* to be administered to the subjects and people of each other, according to the laws and statutes of either country, speedily, and without long and unnecessary formalities of law and expenses, in all causes and controversies, as well now depending, as which hereafter arise.[166]

The meaning of these treaty rules was debated in the *Ambatielos* case.[167] The Arbitral Tribunal took the view that these rules required national treatment in the administration of justice.[168] In late eighteenth century, the 1798 Lord Chancellor Loughborough's opinion regarding *compétence de la compétence* of the Jay Commission in the *Betsey* case[169] used 'fair and equitable treatment' to describe treaty claims regarding treatment of aliens in broad terms; he noted that decisions of prize courts

> ...must stand; that they settled the property and would not be affected by any acts of the commissioners. Nevertheless, there might exist a fair and equitable treatment claim upon the King's treasury, under the provisions of the treaty, for complete compensation for the losses sustained by such condemnation.[170]

In the nineteenth-century State practice, the language of fairness and equity was used to describe different aspects of the required treatment of aliens: taxation could not exceed 'fair share'[171] or be 'unfairly assessed';[172] recognition of medical diplomas required 'fair

[164] Treaty between Great Britain and Sweden (adopted 11 April (13 May) 1654) Hertslet Collection Volume II 310 art 5 (emphasis added); also Treaty between Great Britain and Sweden (adopted 21 October 1661) Hertslet Collection Volume II 324 art 5. The 1654 Treaty was concluded during Cromwell's Commonwealth and the essentially identical 1661 Treaty was remade after Restoration, *Ambatielos case (Greece v UK)* ICJ Pleadings 405 (Fitzmaurice on behalf of the UK).

[165] Treaty of Peace and Commerce between Great Britain and Denmark (adopted 11 July 1670, entered into force 11 August 1670) C Parry (ed), *The Consolidation Treaty Series* (Volume 11, 1668–1671, Oceana Publications, Inc., Dobs Ferry, New York 1969) 347 art 24.

[166] Treaty of Peace and Commerce between Great Britain and Denmark (adopted 11 July 1670, entered into force 11 August 1670) C Parry (ed), *The Consolidation Treaty Series* (Volume 11, 1668–1671, Oceana Publications, Inc., Dobs Ferry, New York 1969) 366 (English translation) art 24 (emphasis added); see identical language in the Treaty between Great Britain and Denmark (adopted 13 February 1660) Hertslet Collection Volume I 179 art 24; cf *Ambatielos* Pleadings (n 164) 405 (Fitzmaurice).

[167] Greece argued that '[j]ustice and right, that does not only mean justice in the courts, it means that he [Ambatielos] will be fairly dealt with, and our complaint here is that he has... been unfairly dealt with', *Ambatielos* Pleadings (n 164) 462–3 (Soskice). The UK took the view that the rules 'confer no more than... national treatment', ibid 483–4, and 'that that is a matter... which raises issues under well-known principles of general international law', ibid 479 (Fitzmaurice).

[168] *Ambatielos case (Greece/UK)* (1956) 12 RIAA 83, 108–9.

[169] JL Simpson and H Fox, *International Arbitration: Law and Practice* (Stevens & Sons Limited, London 1959) 2; IFI Shihata, *The Power of the International Court to Determine its Own Jurisdiction* (Martinus Nijhoff, The Hague 1965) 12–15; J Crawford, 'Continuity and Discontinuity in International Dispute Settlement' in C Binder *et al.* (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP, Oxford 2009) 812–13.

[170] Opinion of Lord Justice Loughborough (1798) 1 Moore Intl Arbitrations 326, 327.

[171] Mr Fisch, Secretary of State, to Mr Cushing (1876) 2 Wharton Digest 512, 513.

[172] Mr Fisch, Secretary of State, to Mr Adee (1876) 2 Wharton Digest 513.

and impartial treatment';[173] investigation of attacks on aliens needed to be a 'fair and just one';[174] prisons had to be 'just and fair';[175] and while it was 'just' for the government to retain the confiscated goods, it was also 'equitable, on the other hand, to pay the value'.[176] Administration of justice in particular was measured by reference to such broader standards as 'fair'[177] and 'fair and just',[178] as well as more specific criteria like 'fair trial',[179] 'full and fair benefit of her [judicial] system',[180] 'trial ... decorous and fair',[181] 'a fair and full hearing',[182] 'fair and impartial examination and adjudication',[183] and 'fair treatment in such courts'.[184] The early twentieth-century practice similarly characterized a case where non-discriminatory treatment was insufficient as 'less than equitable' and required 'a fair and speedy public trial'.[185] In PCIJ proceedings, States talked about 'the guaranty of equitable treatment to foreigners', and described its breach as 'treatment of an alien in an inequitable manner' and 'arbitrary and unfair acts'.[186] Freeman wrote in 1938 regarding denial of justice that '[w]herever some irregular aspects of the proceedings is condemned as wrongful, an arbitral commission must inevitably have resource to

[173] Mr Frelinghuysen, Secretary of State, to Mr Wallace (1884) 1 Wharton Digest 246, 247.

[174] *Amelia de Brissot and others (US v Venezuela)* 3 Moore Intl Arbitrations 2949, Opinion of Mr Little 2967, 2968.

[175] Mr Tower, ambassador to Russia, to Mr Hay, Secretary of State (*Kennan's case*) (1901) 4 Moore Digest 94.

[176] *Italy and Persia* (1891) 5 Moore Intl Arbitrations 5019, 5020.

[177] One of the requirements of international law is that 'the procedure is fair', Opinion of Dr Francis Wharton, Solicitor of the Department of State (1885) 6 Moore Digest 699. Another similar term used was 'just', Mr Cass, Secretary of State, to Mr Lamar, minister to Central America (1858) 6 Moore Digest 722, 724.

[178] Mr Evarts, Secretary of State, to Mr Langston (1879) 2 Wharton Digest 658.

[179] Mr Bayard, Secretary of State, to Mr Lowell (1885) 2 Wharton Digest 438; Bayard to Scott (n 60) 725; Mr Gresham, Secretary of State, to Mr Baker, minister to Nicaragua (1894) 4 Moore Digest 100; Mr Everett, Secretary of State, to Mr Marsh, minister to Turkey (1853) 6 Moore Digest 333; Mr Frelinghuysen, Secretary of State, to Mr Morgan (1885) 2 Wharton Digest 154, 155.

[180] Mr Marcy, Secretary of State, to Mr Jackson (1855) 2 Wharton Digest 613, 614.

[181] *Claims of Pelletier and Lazare* Protocol between the US and Hayti of 24 May 1884 2 Moore Intl Arbitrations 1749, 1796.

[182] *Case of Reed and Fry (US v Mexico)* 3 Moore Intl Arbitrations 3132. A similar requirement was 'a just, fair, and impartial hearing', Mr Frelinghuysen, Secretary of State, to Mr Baker, minister to Venezuela (1884) 6 Moore Digest 320, 'a full and fair hearing', President McKinley, annual message (1899) 3 Moore Digest 258, and 'a fair and open process of law', Mr Hay, Secretary of State, to Secretary of Navy (1899) 2 Moore Digest 882, 883.

[183] Mr Davis, Acting Secretary of State, to Mr Bingham, minister to Japan (1882) 2 Moore Digest 603. Similar requirements were also expressed as 'a fair hearing', *Final Report Relating to the Van Ness Convention* (1838) 4 Moore Intl Arbitrations 4542, 4545; *AB Hannum (US v Mexico)* 4 Moore Intl Arbitrations 3243; Mr Fisch, Secretary of State, to Mr Delaplaine, chargé at Vienna (1875) 2 Moore Digest 172; 'a fair and impartial investigation', Cass to Lamar (n 177) 724; 'fair examination by an impartial tribunal', Mr Cass, Secretary of State, to Mr Jerez (1859) 3 Moore Digest 257 258; 'a fair and impartial trial', Mr Evarts, Secretary of State, to Aristarchi Bey (1877) 2 Wharton Digest 623; Mr Evarts, Secretary of State, to Mr Welsch, minister to England (1878) 6 Moore Digest 265; and 'a fair and impartial hearing', Foreign Relations 1902, 838–80 (1897) 6 Moore Digest 731, 732.

[184] Mr Evarts, Secretary of State, to Mr Christiancy (1879) 2 Wharton Digest 669, 671.

[185] Respectively, the British Ambassador to the Italian Government (1911) *Oscar Chinn (UK v Belgium)* [1934] PCIJ Rep Series C No 75 48 [64] and Mr Polk, Acting Secretary of State, to Mr Reinsch (1917) 2 Hackworth Digest 633, 634.

[186] Respectively, *Oscar Chinn* Pleadings, ibid 284, 283 (de Ruelle on behalf of Belgium) (author's translation); and *Phosphates in Morocco (Italy v France)* PCIJ Rep Series C No 85 79 (Memorial of Italy) (author's translation). France described Italy's position as based on unjust dispossession of internationally recognized acquired rights, ibid 1103 (Basdevant), 1246, 1250, 1259 (Lémonon), 1275, 1286 (Basdevant).

some concept such as "fairness" '.[187] In the famous exchange of notes between US and Mexico regarding compensation, the US called for 'a fair and equitable solution' and 'fair and equitable agreement'.[188] Finally, in the 1943 Hackworth's *Digest*, the US understanding of the international standard of denial of justice was set out as requiring 'a fair application of law to aliens and citizens alike' and a 'system of law [that] conforms with reasonable principles of civilized justice and ... is fairly administered'.[189] Judged against the background of this practice, the post-Second World War treaties could plausibly be viewed as a continuation of the same trend of referencing general international law.

Second, similar terms were used in other areas of international law and international dispute settlement, ranging quite loosely in formulation and subject matter from 'fair and equitable'[190] to 'fair and just',[191] 'just and fair',[192] 'just and equitable',[193] 'reasonable and equitable',[194] 'reasonable and just',[195] and 'equitable and just'.[196] Some instances extended beyond legal rules and procedures: British and French acquiescence in the American annexation of the Hawaiian Islands seemed 'reasonable and fair';[197] it was 'just and fair' to pay debts as a matter of grace;[198] and 'fair and equitable basis' was the

[187] Freeman *Denial of Justice* (n 13) 267. For Fenwick, international standard was a standard accepted 'as just and equitable', see citation at n 76.

[188] Fair and equitable solution meant a solution in accordance with international law: as the next paragraph put it, '[i]t is of course evident that a solution of this controversy must be found in accordance with the basic principles of international law', 3 Hackworth Digest (n 26) 661.

[189] G Hackworth, *Digest of International Law* (Volume 5, Government Printing Office, Washington 1943) 541.

[190] Terms upon which a canal could be constructed, Clayton-Bulwer Treaty (adopted 19 April 1850) 2 Wharton Digest 184 art III; manner in which the arbitrator should exercise authority, *Cerruti case (Italy v Colombia)* (1897) 2 Moore Intl Arbitrations 2117, 2120, 2122, 4699, 4700; desirable form of international arbitration in an early (and unsuccessful) American offer of arbitration regarding the *Alabama* dispute, Note of CF Adams to Earl Russel of 23 October 1863 (1863) 1 Moore Intl Arbitrations 496, 496 (Bingham *'Alabama'* (n 99) 11); appropriate rate of interest, *Georges Pinson (France v Mexico)* (1928) 5 RIAA 327, 330, 331.

[191] Manner of settlement of disputes, Mr Evarts, Secretary of State, report to President (1880) 2 Wharton Digest 551.

[192] Characterization of the proposal not to decide claims individually, *Rafael Aguire (Mexico v US)* (1873) 3 Moore Intl Arbitration 1307, 1308; a justified claim, Mr Bayard, Secretary of State, to Mr McLane (1885) 2 Wharton Digest 569, 570.

[193] Calculation of damages, *Piedras Negras Claims (US v Mexico)* (1872) 3 Moore Intl Arbitrations 3035, 3035; *Santos case (US v Ecuador)* (1897) 2 Moore Intl Arbitrations 1579, 1588. A *modus vivendi* regarding damages in the Fur Seal Arbitration stated that '[t]he amount awarded ... shall be such as under all circumstances is just and equitable', *Modus Vivendi* regarding Fur Seal Arbitration between United States and Great Britain (adopted 18 April 1882, entered into force 9 May 1882) 1 Moore Intl Arbitration 804 art V. Calculation of interest, Opinion of Mr Pinckney (1803) 4 Moore Intl Arbitrations 4316, 4316–23. Operation of an arbitral commission, Mr Boutwell's report regarding the French and American Claims Commission (1884) 2 Moore Intl Arbitrations 1156, 1156. In the *Expropriated Religious Properties* case, the settlement of claims, by which Portugal retained property rights but had to pay compensation, was described as 'just and equitable', *Expropriated Religious Properties case (France, Great Britain and Spain v Portugal)* (1920) 15 AJIL 99, 100, 104. Similar-sounding concepts were used in other contexts in the 19th century; eg when 'just and equitable law' described the equitable equilibrium between the employer and employee, E Hobsbawm, *The Age of Revolutions 1789–1848* (Cardinal, London 1973) 228.

[194] Preferred method for calculating damages, *Case of the 'William Lee' (US v Peru)* (1863) 4 Moore Intl Arbitrations 3405, 3406; sum of lump settlement without prejudice to merits, Brazilian Indemnity Convention (adopted 27 January 1884) 5 Moore Intl Arbitrations 4609, 4609.

[195] Situations when deadlines can be extended, Notice of Organization (1796) 1 Moore Intl Arbitrations 321.

[196] Sum of demonstrated damages, *Case of the Union Land Co., Colonization Contracts* (n 19) 3453.

[197] Mr Marcy, Secretary of State, to Mr Jackson (1855) 2 Wharton Digest 613.

[198] Earl of Carnarvon, Colonial Secretary, to Sir H Gordon, governor of Fiji (1875) 1 Moore Digest 349, 350.

way to settle disputes that, because of their political nature, could not be submitted to international arbitration.[199] One plausible reading of these authorities would find the unifying element in the looseness and flexibility of the criteria, at its weakest introducing flexibility within the law and at its strongest providing for extra-legal discretion. This process is similar to the 'law and equity' clauses common in the arbitral practice of the late nineteenth century.[200] Commissioner Nielsen (who had been instrumental in the formulation of the *Neer* standard) explained his view of the strongest form of such rules in the *Naomi Russel* case of the US–Mexico Special Claims Commission in these terms:

> The Convention contains specific stipulations which show beyond any doubt that the Commission is not authorized to decide any case in accordance with notions of the members as to what may be *fair or equitable*—whatever those handsome terms may mean. The Commission must decide cases in accordance with rules prescribed by the Convention, these rules being law for the parties to that agreement and for the Commission. There can therefore be no place for any theory that the members should play the role of jugglers in dealing with facts and law.[201]

The third line of practice, where 'fair and equitable' appeared specifically in relation to foreign commercial interests, may probably be traced to 'equitable treatment for the commerce' in the Covenant of the League of Nations[202] and was expressed in treaties concluded from the mid-1930s (mainly by the US but also by Canada and the UK) in a number of ways. 'Fair and equitable treatment' was required in the 'allotment among exporting countries' of quantity of articles if quantitative restrictions or advantages were introduced relating to import or sale.[203] 'Fair and equitable treatment' was required 'in

[199] Mr Hay, Secretary of State, to General Reyes, special minister of Colombia (1904) 3 Moore Digest 90, 105. In the *Mavrommatis* case, where operation of public works 'upon fair and equitable terms' was at issue, *Mavrommatis Palestine Concessions (Greece v UK)* PCIJ Series C No 5/1 36, Sir Cecil Hurst on behalf of the UK stated that 'the reason why the British Government were so anxious to see a friendly understanding arrived at between M. Mavrommatis and Mr. Rutenberg was because that seemed to be the fair and simple way of meeting his claims on the basis of equity and justice in its broadest sense', ibid 28. In a later case, the PCIJ described an argument as presented from 'considerations as what would be fair and equitable, as opposed to that of strict law', *The 'Société Commerciale de Belgique' (Belgium v Greece)* [1939] PCIJ Series No A/B 78 160, 178; see the discussion in Ch 5 n 66.

[200] Cheng 'Justice and Equity' (n 40) 204–11; Simpson and Fox *International Arbitration* (n 169) 128–9; LB Sohn, 'The Function of International Arbitration Today' (1960) 108 Recueil des Cours de l'Académie de Droit International 9, 41–5.

[201] *Naomi Russel (US v Mexico)* (1931) 4 RIAA 805, Opinion of Commissioner Nielsen 806, 830 (emphasis added). Nielsen's reasoning that leads to up to the citation is somewhat confusing: he seems to equate 'equity' with everything that is not general international law, and then distinguishes self-judging notions of what is fair and equitable from 'equity' formulated in the treaty rules (that is, normal *lex specialis*). Be that as it may, it does not affect the authority of his perception of the 'handsome terms' fair and equitable in 1930s as something associated with juridical acrobatics of unlimited flexibility.

[202] According to the Covenant of the League of Nations, '[s]ubject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the Members of the League ... will make provision to secure and maintain ... equitable treatment for the commerce of all Members of the League', Covenant of the League of Nations (adopted 28 June 1919, entered into force 10 January 1920) 1 League Nations Official J 3 art 23(e). The Economic Committee enumerated a number of activities that would be in breach of equitable treatment, including 'unjust or oppressive treatment in fiscal or other matters', Economic Committee, 'Report on Equitable Treatment of Commerce September 1922' (1923) 4 League of Nations Official J 468, 469. Other aspects of equitable treatment related to unfair competition, excessive customs formalities, and unjust discrimination, and were suggested to be addressed by conclusion of more detailed treaties on the issue, ibid 468–70. See generally J Ray, *Commentaire du Pacte de la Societe des Nations* (Paris, Sirey 1930) 663–5.

[203] Eg Exchange of Notes between the Government of the United States of America and the Government of the Czechoslovak Republic Constituting an Agreement Amending the Commercial Agreement of October 29th, 1923, as Prolonged by the Agreement of December 5th, 1924 (adopted 29 March 1935, entered into force 1 May 1935) 159 LNTS 156, US Note 156 art 3, Czechoslovakian Note 158 art 3. Later treaties explained 'a fair and equitable allotment' as maintaining the earlier

respect of the foreign purchases' by a monopoly or similar agency, further explained to mean that purchase 'will be influenced solely by those considerations ... which would ordinarily be taken into account by a private commercial enterprise interested solely in purchasing such product on the most favorable terms'.[204] 'Fair and equitable share in the allotment of exchange' was required for cases of control of foreign exchange.[205]

The implications of this practice will be considered in greater detail in Part II. Three points may nevertheless be tentatively noted. First, 'fair and equitable treatment' was an accepted term of art in inter-war international economic law, addressing complex issues primarily relating to trade of goods (quantitative restrictions, State monopolies, exchange control). Second, in this context 'fair and equitable treatment' did not seem to refer to customary law or the law on the treatment of aliens.[206] Third, with the evolution of treaty practice, the content of fair and equitable treatment in the particular circumstances was explicitly spelled out. With all due caution, the unifying principle of these explanations (proportionate share of import or exchange control and monopoly purchases on solely commercial basis) is a maintenance of equilibrium between traders from different States; that is, an obligation of non-discriminatory treatment on an MFN basis.[207]

proportion of total importation, Trade Agreement between the Government of the United States of America and the Government of the French Republic (adopted 6 May 1936, entered into force 15 June 1936) 199 LNTS 261 art VI(5); Agreement Concerning Tariff Questions between the United States of America and Finland (adopted 18 May 1936, entered into force 2 November 1936) 172 LNTS 99 art VIII(1)(b).

[204] US–France Trade Agreement, ibid art IX. The considerations were 'such as price, quality, marketability, and terms of sale'; eg Commercial Agreement between the United States of America and Sweden (adopted 25 May 1935, entered into force 5 August 1935) 161 LNTS 111 art VIII. The 1941 Hackworth Digest cited this provision and stated that '[a] substantially similar provision is found in the reciprocal-trade agreements with' Canada, Ecuador, El Salvador, Finland, Honduras, Netherlands, Nicaragua, Switzerland, the UK, and France, G Hackworth, *Digest of International Law* (Volume 2, Government Printing Office, Washington 1941) 66, 67. See also Trade Agreement between Canada and Haiti (adopted 23 April 1937, entered into force 8 December 1938) 194 LNTS 60 art IV; Treaty of Commerce and Navigation between Great Britain and Northern Ireland and Siam (adopted 23 November 1937, entered into force 19 February 1938) 188 LNTS 334, Exchange of Notes 356; Exchange of Notes between the Government of the United States of America and the Italian Government Constituting a Temporary Commercial Arrangement (adopted 16 December 1937, entered into force 16 December 1937) 187 LNTS 16, 17 art VIII; Trade Agreement between the United States of America and Canada (adopted 17 November 1938, entered into force 17 June 1939) 199 LNTS 92 art IV. A later treaty described these considerations as 'competitive', Commercial Agreement between the United States of America and Switzerland (adopted 9 January 1936, entered into force 6 June 1936) 171 LNTS 233 art VIII.

[205] Eg US–Sweden Commercial Agreement, ibid art IX; Commercial Agreement between the United States of America and the Republic of Honduras (adopted 18 December 1935, entered into force 1 February 1936) 167 LNTS 314 art VIII. Later treaties explained the requirement as maintaining the earlier share, Canada–Haiti Trade Agreement, ibid art V; US–Finland Agreement (n 203) art X. The 1941 Hackworth Digest noted other 'substantially similar' provisions in treaties with El Salvador, Nicaragua, Costa Rica, and Guatemala, 2 Hackworth Digest (n 204) 75.

[206] In the drafting process of the Covenant of the League of Nations (where 'equitable treatment for the commerce' was addressed, see n 202), France proposed a rule on the protection of rights and property of foreigners, DH Miller, *The Drafting of the Covenant* (Volume Two, New York–London, GP Putnam's Sons 1928) 531–2, which was strongly objected to by President Wilson and was not included in the Covenant, ibid 532. The US–Liberia FCN Treaty required 'due process' in expropriation and 'fair and equitable treatment' in monopoly purchases without suggesting any relationship between those rules, (n 61) respectively arts I, XI; similarly Treaty of Friendship, Commerce and Navigation between the United States of America and Siam (adopted 13 November 1937, entered into force 1 October 1938) 192 LNTS 248 art I, Exchange of Notes 266.

[207] The 1941 Hackworth Digest, after reproducing the provision on fair and equitable treatment in monopoly purchases, 2 Hackworth Digest (n 204), continued with a rule explicitly directed at non-discrimination in such situations, 67. In relation to foreign exchange control, treaties with Costa Rica

2. Source of fair and equitable treatment

The post-Second World War treaty-making regarding fair and equitable treatment proceeded in two ways.[208] First, from the 1940s to the 1960s States engaged in consistently unsuccessful attempts at multilateral treaty-making. While failing on their own terms, the attempts at multilateral treaty-making were important in disseminating the concept of fair and equitable treatment that could be taken up in bilateral treaty-making. The 1947 Havana Charter of the International Trade Organization used the language and equitable treatment in a number of ways. 'Fair and equitable treatment' was required in the context of MFN treatment of State trading,[209] borrowing from the US practice of inter-War treaties,[210] but narrowing it from an overreaching principle to a subsidiary guarantee for cases when the 'commercial considerations' would not apply.[211] More importantly for present purposes, the Charter also referred to 'just and equitable treatment for foreign nationals and enterprises', expressed only in aspirational terms of rules that should be created.[212] While the Charter never entered into force, the negotiating materials might be expected to provide an important insight into how 'just and equitable' in relation to investment law was understood in 1940s. However, the term received only limited attention in the debates: in most instances, States treated it as an umbrella term of good policies that may be achieved by concluding treaties;[213] sometimes it brought back the old discussions about relationship of treaties and domestic law and interests in investment protection;[214] and the more specific proposals either separated the concept

and Guatemala in addition provided explicit non-discrimination rules, ibid 75. Schwarzenberger saw the standard of equitable treatment as providing 'proportional equality', and explained the standard of equitable treatment as providing an equitable and reasonable share of trade, G Schwarzenberger, 'The Principles and Standards of International Economic Law' (1966) 117 Recueil des Cours de l'Académie de Droit International 5, 87.

[208] See a detailed overview of post-War instruments in Vasciannie 'Fair and Equitable Treatment Standard' (n 58) 107–19.

[209] Havana Charter for an International Trade Organization (adopted on 24 March 1948, not in force), UN Doc E/Conf.2/78 art 30(2).

[210] Cf nn 203–4.

[211] The rule appeared in the first US draft without the mention of fair and equitable treatment, US State Department, *Suggested Charter for an International Trade Organization of the United Nations* (Department of State Publication 2598, September 1946) art 26. Since the requirement of taking into account only 'commercial considerations' was limited to governmental purchases for resale, the London Draft provided for other cases 'fair and equitable treatment having full regard to all relevant circumstances', Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment (November 1946), UN Doc E/PC/T/33 17, 32 art 31(2). The 'all relevant circumstances' proviso was dropped in the Geneva Draft, Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment (30 August 1947), UN Doc E/PC/T/189 art 16(2).

[212] Havana Charter (n 209) art 72(1)(c)(i), also art 11(2)(a)(i).

[213] In the first US draft, 'just and equitable treatment' could be assured by concluding treaties 'on the treatment of foreign nationals and enterprises, on the treatment of commercial travellers, on commercial arbitration, and on the avoidance of double taxation', US Suggested Charter (n 211) art 50(5); see also Verbatim Record of the Fourteenth Meeting (15 November 1946), UN Doc E/PC/T/C.V/PV/14 6 (China, UK, Brazil), 7 (US, Brazil); Summary Record of the Thirteenth Meeting (24 June 1947), UN Doc E/PC/B/SR/13 3 (UK). The non-technical meaning was confirmed by a comment to one of the drafts: 'This broad provision is intended to cover many types of questions such as the treatment of commercial travellers, discrimination against foreign creditors in bankruptcy, insolvency or reorganization, etc', Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment (19 June 1947), UN Doc E/PC/T/W/204 2.

[214] Summary Record of Twenty-First Meeting (6 February 1948), UN Doc E/CONF.2/C.6/SR.25 1 (India, Mexico), 2 (UK, Chile, Cuba, Argentina, Greece). In a sign of personal continuity, Greece was still represented by Politis, who was just as puzzled about the objections as he had been in the 1930 Hague Conference, see S Rosenne (ed), *League of Nations Conference for the Codification of International Law [1930]* (Volume IV, Oceana Publications, Inc., New York 1975) 1583; cf Ch 2 n 43.

from protection of investments[215] or attempted to use it to limit the protection.[216] In light of the general focus of post-War practice on expropriation and compensation,[217] 'just' was used in the technical sense relating to compensation so as to include all possible considerations.[218] The investors themselves dismissed the aspirations of justice and equity, calling instead for 'effective guarantees against several types of "unfair" treatment' including discriminatory and burdensome taxation and expropriation.[219] The general principles and indefinite terms were felt inadequate,[220] diverting attention and failing to provide for,[221] if not positively undermining, the protection of investments.[222] With all due caution, 'just and equitable treatment' of investment was most likely perceived only as a policy aspiration.

Three further multilateral failures followed the Havana Charter. The 1948 Economic Agreement of Bogotá treated 'equitable treatment' as an obligation, spelling it out as a prohibition of 'unjustified, unreasonable or discriminatory measures that would impair the legally acquired rights or interests'.[223] The 1959 Abs-Shawcross Draft required 'fair and equitable treatment', seemingly as an umbrella term including 'protection and security' and excluding 'unreasonable or discriminatory measures',[224] drawing both on US treaty practice and principles of international law.[225] Finally, the 1963 and 1967 OECD Draft Conventions on the Protection of Foreign Property also required fair and equitable treatment, explaining it as 'customary in relevant bilateral agreements' and seemed to equate its content with that of the international minimum standard.[226] In light of the post-War concerns about expropriation, the necessity of simple and clear rules immediately rendered the general and vague international standard obsolete. The Abs-Shawcross Draft followed a similar approach and focused on expropriation and *pacta sunt servanda* clauses.[227] The elasticity of fair and equitable treatment was considered to be outweighed

[215] Mexico proposed 'reasonable opportunities upon equitable terms' as something separate from 'security to existing and future investments', Second Committee on Economic Development: Mexico's Proposed Amendments to the Draft Charter (6 December 1947), UN Doc E/CONF.2/C.2/6/2 Add.14.

[216] Czechoslovakia linked just and equitable treatment with national treatment, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment (6 June 1947), UN Doc E/PC/T/W/174 1. Peru proposed 'just, equitable and non-discriminatory treatment' by investors of their employees, Notes on the First Meeting of the Sub-Committee B (Article 12) of the Second Committee on Economic Development (29 December 1947), UN Doc E/CONF.2/C.2/B/W.2 1.

[217] See above.

[218] Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment (19 August 1947), UN Doc E/PC/T/180 13–14.

[219] G Bronz, 'The International Trade Organization Charter' (1948–1949) 62 Harvard L Rev 1089, 1111 fn 65.

[220] PW Bidwell and W Diebold, 'The United States and the International Trade Organisation' (1949) 27 Intl Conciliation 185, 209–10; AA Fatouros, 'An International Code to Protect Private Investment-Proposals and Perspectives' (1961) 14 U Toronto L J 77, 80.

[221] W Diebold, *The End of the I.T.O.* (International Finance Section, Dept. of Economics and Social Institutions, Princeton University, Princeton 1952) 18.

[222] C Wilcox, *A Charter for World Trade* (Macmillan Co., New York 1949) 145–7.

[223] Economic Agreement of Bogotá (adopted 2 May 1948, not in force) (English translation) <http://www.oas.org/juridico/english/treaties/a-43.html> art 22.

[224] Abs-Shawcross 'Draft Convention' (n 64) 116 art I.

[225] Ibid 119–20.

[226] 1963 OECD Draft Convention (n 64) art 1, 244; 1967 OECD Draft Convention (n 64) art 1, 120.

[227] M Brandon, 'Recent Measures to Improve the International Investment Climate' (1960) 9 J Public L 125, 129–30; SD Metzger, 'Multilateral Convention for the Protection of Private Foreign Investment' (1960) 9 J Public L 133, 134–43; I Seidl-Hohenveldern, 'The Abs-Shawcross Draft Convention to Protect Private Foreign Investment: Comments on the Round Table' (1961) 10 J Public L 100, 102–10; Shawcross 'Foreign Investment' (n 37) 361–2; AC Sinclair, 'Origins of the Umbrella Clause in the International Law of Investment Protection' (2004) 20 Arbitration Intl 411, 418–27.

by the corresponding measure of vagueness and subjectivity, not appropriate in the particular context where the actual concerns were clearly identifiable.[228] Finally, whether providing insufficient or excessive investment protection,[229] the failure of the multilateral treaty projects was probably inescapable at this point. '[T]he intense conflict of systems and interests' precluded the indispensable 'consent of those concerned' to create international law on the protection of investment.[230]

The second trend of law-making was expressed in the form of bilateral treaties. The relationship between (unsuccessful) multilateral efforts and (successful) bilateral ones was symbiotic. On the one hand, the Abs-Shawross and OECD Drafts referred to the origins of the 'fair and equitable treatment' clauses in the bilateral treaties, the former even explicitly listing certain US FCN treaties.[231] On the other hand, starting from the US FCN Treaties in the 1950s and 1960s that also provided a broader coverage of trade and investment matters,[232] rules on fair and equitable treatment were included in the BIT programmes focusing more specifically on investment protection rules.[233] As a result of this practice, rules on fair and equitable treatment are now included in the majority of existing BITs.[234] The small sample of investment arbitrations suggest that fair and equitable treatment is likely to be available in most treaty disputes, unless it is excluded from the jurisdiction of the Tribunal[235] or is not provided by the treaty, and even in the latter case MFN clauses may render it relevant.[236]

If the historical narrative sketched above (the formulae travelling from US bilateral treaties to multilateral drafts and then being dispersed to all bilateral treaties) is correct, then the original position taken in the US treaties up to the 1940s and 1950s on the source and structure of fair and equitable treatment may an important factor in the interpretation of modern treaties (as accepted ordinary meaning or at least as circumstances of conclusion). There is little consistency either between or within the treaties. Fair and

[228] G Schwarzenberger, 'The Abs-Shawcross Draft Convention on Investment Abroad: A Critical Commentary' (1960) 9 J Public L 147, 153.

[229] AS Miller, 'Protection of Private Foreign Investment by Multilateral Convention' (1959) 53 AJIL 371, 375–8; Schwarzenberger, ibid 155, 158; A Larson, 'Recipients' Rights under an International Investment Code' (1960) 9 J Public L 172, 172–5; Metzger 'Multilateral Convention' (n 227) 143–6; PO Proehl, 'Private Investment Abroad' (1960) 9 J Public L 362, 363–73; D Metzger (1961) 10 J Public L 110, 110–11.

[230] *Barcelona Traction* (n 53) [89]. The International Court's point about customary law-making seems *mutatis mutandis* applicable to the particular dynamic of multilateral treaty making.

[231] Schwarzenberger 'Abs-Shawcross Draft' (n 228) 118; 1963 OECD Draft Convention (n 226) 244; 1967 OECD Draft Convention (n 226) 120.

[232] Wilson 'Postwar Commercial Treaties' (n 14) 279; Walker 'Present United States Practice' (n 14) 231.

[233] R Dolzer and M Stevens, *Bilateral Investment Treaties* (Martinus Nijhoff, The Hague 1995) 3–13; Vasciannie 'Fair and Equitale Treatment Standards' (n 58) 109–30; KJ Vandevelde, 'A Brief History of International Investment Agreements' (2005–2006) 12 U C Davis J Intl L Policy 157, 161–75; Vandevelde *U.S. International Investment Agreements* (n 14) 255–321.

[234] MI Khalil, 'Treatment of Foreign Investment in Bilateral Investment Treaties' (1992) 7 ICSID Rev—Foreign Investment L J 339, 351; Tudor *Fair and Equitable Treatment* (n 160) 16–51; Newcombe and Paradell *Law and Practice* (n 160) 257; Kläger *Fair and Equitable Treatment* (n 160) 21.

[235] Eg in NAFTA relating to taxation, *Feldman* (n 69) fn 9; and financial services, *Fireman's Fund Insurance Company v Mexico*, ICSID Additional Facility Case no ARB(AF)/02/01, Decision on a Preliminary Question, 17 July 2003 10 ICSID Rep 214 [61]–[75]; *Fireman's Fund* Award (n 143) fn 206; and in some Soviet-era BITs relating to matters other than some aspects of expropriation, *RosInvestCo UK Ltd. v Russia*, SCC Case no V 79/2005, Award on Jurisdiction, November 2008; *Renta 4 S.V.S.A. and others v Russia*, SCC Case no V 24/2007, Award on Preliminary Objections, 20 March 2009.

[236] *MTD Equity Sdn. Bhv. and MTD Chile S.A. v Chile*, ICSID Case no ARB/01/07, Award, 25 May 2004 (2005) 44 ILM 91 [101]-[104]; *MTD Equity Sdn. Bhv. and MTD Chile S.A. v Chile*, ICSID Case no ARB/01/07, Decision on Annulment, 21 March 2007 13 ICSID Rep 500 [64]; *Rumeli* Award (n 69) [575].

equitable treatment always appeared as an MFN obligation relating to State trading.[237] In the context of establishment, treaties sometimes precluded an unreasonable impediment of investors from 'obtaining on equitable terms' certain assets.[238] Due process as a criterion of expropriation no longer appeared in most treaties.[239] Finally, in most treaties 'fair and equitable treatment' or 'equitable treatment' appeared as a separate obligation in a recognizably modern form.[240] This practice leaves open multiple possible readings, with contextual influence from trade law, ambiguous flexibility of 'equitable terms', and possible replacement of the 'due process' criterion all being *prima facie* plausible.

The more recent treaty practice and case law regarding the relationship of treaty and non-treaty rules in the international minimum standard and fair and equitable treatment may be visualized along a spectrum. To consider the Model BITs as possibly reflecting the broad contours of treaty practice, at one end of the spectrum, fair and equitable treatment is expressly recognized as being identical with the customary minimum standard.[241] At the other end of the spectrum, fair and equitable treatment appears on its own, without any explicit reference to customary law.[242] In between these extremes, States have adopted a wide variety of approaches: either recognizing fair and equitable treatment as customary without describing it as exhaustive of all the customary law on the issue,[243] linking fair and equitable treatment with other rules,[244] providing

[237] Treaty of Friendship, Commerce and Navigation between the United States of America and Italy (adopted 2 February 1948, entered into force 26 July 1949) 79 UNTS 171 art XVIII(1); Treaty of Friendship, Commerce and Navigation between the United States of America and Ireland (adopted 21 January 1950, entered into force 14 September 1950) 206 UNTS 270 art XIV(2); Treaty of Friendship, Commerce and Navigation between the Kingdom of Greece and the United States of America (adopted 3 August 1951, entered into force 13 October 1954) 224 UNTS 300 art XIV(4); Treaty of Amity and Economic Relations between the United States of America and Ethiopia (adopted 7 September 1951, entered into force 8 October 1953) 206 UNTS 60 art XV(2); Treaty of Friendship, Commerce and Navigation between the United States of America and Japan (adopted 2 April 1953, entered into force 30 October 1953) 206 UNTS 192 art XVII(2); Treaty of Friendship, Commerce and Navigation between Israel and the United States of America (adopted 23 August 1951, entered into force 3 April 1954) 219 UNTS 252 art XVII(2); Treaty of Friendship, Commerce and Navigation between the United States of America and the Federal Republic of Germany (adopted 29 October 1954, entered into force 14 July 1956) 273 UNTS 4 art XVII(2); Treaty of Amity, Commerce and Navigation, between the United States of America and Iran (adopted 15 August 1955, entered into force 16 June 1957) 284 UNTS 110 art XI(1); Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Nicaragua (adopted 21 January 1956, entered into force 24 May 1958) 367 UNTS 4 art XVII(2); Treaty of Friendship, Commerce and Navigation between the Kingdom of the Netherlands and the United States of America (adopted 27 March 1956, entered into force 5 December 1957) 285 UNTS 233 art XVII(2). Schwarzenbeger explained the standard of equitable treatment as providing an equitable and reasonable share of trade, Schwarzenberger 'The Principles and Standards of International Economic Law' (n 207) 87.

[238] US–Ireland FCN Treaty, ibid art V; US–Ethiopia Treaty, ibid VIII(4); US–Japan FCN Treaty, ibid art V; US–Israel FCN Treaty ibid art VI(4); US–Greece FCN Treaty ibid art VIII; US–Nicaragua FCN Treaty ibid art X(3).

[239] Due process is still provided in US–Italy FCN Treaty (n 237) art V(2); US–Germany FCN Treaty (n 237) art V(4).

[240] Fair and equitable treatment: US–Ethiopia FCN Treaty (n 237) art VIII(1); US–Germany FCN Treaty (n 237) art I(1); US–Iran Treaty (n 237) art IV(1); US–Netherlands FCN Treaty (n 237) art I(1); equitable treatment: US–Ireland FCN Treaty (n 237) art V; US–Greece FCN Treaty (n 237) art I; US–Israel FCN Treaty (n 237) art I; US–Nicaragua FCN Treaty (n 237) art I.

[241] 2004 Canada Model BIT art 5; 2004 US Model BIT art 5 Annex A; 2012 US Model BIT art 5 Annex A.

[242] 1991 Germany Model BIT art 2(2); 1994 Chile Model BIT art 4(1); 2002 Burundi Model BIT art 3(1); 2004 India Model BIT (n 70) art 3(2).

[243] 1994 US Model BIT art 3(a); 1998 US Model BIT art 3(a).

[244] 1991 UK Model BIT art 2(2); 1994 China Model BIT art 3; 1995 Switzerland Model BIT art 4(1); 1997 Netherlands Model BIT art 3(1); 1998 Germany Model BIT art 2(2); 1998 Malaysia Model

examples of what fair and equitable treatment means,[245] or combining a number of those elements.[246] The multilateral experience is equally varied: the NAFTA suggests some relationship between treaty and custom, and the early arbitral attempts to separate them have been authoritatively interpreted away by the NAFTA FTC;[247] the ECT provides for fair and equitable treatment in parallel to other customary and treaty rules,[248] and the recent ASEAN Comprehensive Investment Agreement limits fair and equitable treatment to denial of justice without invoking customary law at all.[249] To paraphrase Henkin, it is probably the case that while almost all nations include obligations relating to fair and equitable treatment in almost all of their BITs, the approaches to the relationship with other treaty or customary rules varies greatly between different States, different treaties, and different times.[250]

The variety of approaches to treaty making and the underlying uncertainty about the rationale of the rule, taken together with the decentralized regime of dispute settlement, have perhaps unsurprisingly resulted in a similar variety of approaches in arbitral decisions.[251] As the *CMS Gas Transmission Company v Argentina* annulment committee observed in a piece of well-put understatement, 'the fair and equitable standard has been invoked in a great number of cases brought to ICSID arbitration and... there is some variation in the practice of arbitral tribunals in this respect'.[252] At one end of the spectrum, Tribunals take the view that fair and equitable treatment refers to a customary minimum standard.[253] At the other end of the spectrum, Tribunals take the view that

BIT art 3(1); 1998 Mongolia Model BIT art 4(2); 2001 Finland Model BIT art 2(2); 2002 Thailand Model BIT art 3(2); 2002 Burundi Model BIT art 2(2); 2002 Mauritius Model BIT art 3(3); 2004 Netherlands Model Treaty <http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/convenanten/2004/08/27/ibo-modelovereenkomst/ibo-modelovereenkomst.pdf> art 3(1); 2008 German Model BIT art 2(2); 2008 UK Model BIT art 2(2).

[245] 1998 South Africa Model BIT art 3(1); 1999 France Model BIT art 4; 2000 Turkey Model BIT art II(2); 2002 Sweden Model BIT art 2(3); 2006 France Model BIT; cf P Juillard, 'Les conventions bilatérales d'investissement conclues par la France' (1979) 106 Journal du droit international 274, 303–4.

[246] 1998 Croatia Model BIT art 3(2); 2000 Peru Model BIT art 3; 2000 Denmark Model BIT art 3; 2001 Greece Model BIT art 3(2).

[247] NAFTA art 1105; M Fitzmaurice, 'Canons of Treaty Interpretation: Selected Case Studies from the World Trade Organization and the North American Free Trade Agreement' (2005) 10 Austrian Ybk Intl L 41, 86–92.

[248] Energy Charter Treaty (adopted 17 December 1994, entered into force 16 April 1998) 2080 UNTS 95 art 10(1).

[249] ASEAN Comprehensive Investment Agreement (adopted 26 February 2009, entered into force 29 March 2012) <http://www.aseansec.org/22218.htm> art 11(2)(a).

[250] L Henkin, *How Nations Behave* (2nd edn Columbia University Press, New York 1979) 47.

[251] NAFTA parties have effectively reversed many of the propositions about fair and equitable treatment made by the first three Tribunals, SD Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2005) 73 Fordham L Rev 1521, 1574–82.

[252] *CMS Gas Transmission Company v Argentina*, ICSID Case no ARB 01/08, Decision of the *ad hoc* Committee on the Application for Annulment, 25 September 2007 14 ICSID Rep 251 fn 86.

[253] *SD Myers, Inc. v Canada*, UNCITRAL Case, Partial Award, 13 November 2000 121 ILR 173 [258]–[262]; *Genin, Eastern Credit Limited, Inc. and AS Baltoil v Estonia*, ICSID Case no ARB/99/2, Award, 25 June 2001 (2002) 17 ICSID Rev—Foreign Investment L J 395 [367]; *Lauder* (n 148) [292]; *Pope* Damages (n 163) [52]–[56]; *Mondev* (n 144) [119]–[121]; *United Parcel Service v Canada*, UNCITRAL Case, Award on Jurisdiction, 22 November 2002 7 ICSID Rep 288 [97]; *ADF v US*, ICSID Additional Facility Case no ARB(AF)/00/1, Award, 9 January 2003 (2003) 18 ICSID Rev—Foreign Inv L J 195 [183]; *Loewen v US*, ICSID Additional Facility Case no ARB(AF)/98/3, Award, 26 June 2003 (2003) 42 ILM 811 [125]–[128]; *Waste Management v US (II)*, ICSID Additional Facility Case no ARB(AF)/00/3, Final Award, 30 April 2004 (2004) 43 ILM 967 [89]–[96]; *GAMI Investments v Mexico*, UNCITRAL Case, Final Award, 15 November 2004 13 ICSID Rep 147 [92]; *Methanex Corporation v US*, UNCITRAL Case, Final Award, 3 August 2005 16 ICSID Rep 40 Part IV—Ch C [9]–[11]; *Thunderbird* (n 149) [192]–[193]; *Glamis Gold Ltd v US*, UNCITRAL Case, Award, 8 June 2009 (2009) 48 ILM 1038 [541]; *Merrill & Ring Forestry L.P. v Canada*, UNCITRAL, ICSID Administered Case, Award, 31 March 2010 [182]–[213]; *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua v Argentina*, ICSID Case no ARB/03/19, Decision on Liability, Separate Opinion of Arbitrator Nikken, 30 July 2010 [6]–[20]; *Chemtura Corporation v Canada*, UNCITRAL Case, Award, 2 August 2010 [117]–[123]; *Grand River Enterprises Six Nations Ltd and others v US*, UNCITRAL Case, Award, 12 January 2011 [208]–[209].

fair and equitable treatment is a treaty standard that does not refer to customary law,[254] and that goes further than it.[255] As between the two extremes, Tribunals do not consider it necessary to make a clear distinction,[256] or indeed even recognize the distinction, but consider the rules to be substantively similar,[257] or at least similar in the particular cases.[258]

Part II of this book addresses the relationship between the international standard and fair and equitable treatment in the framework of sources and interpretation. It is suggested that both in negative and in positive terms the treaty rule of fair and equitable treatment makes a reference to the customary standard, or at least strongly requires it to be taken into account. In the former sense, the generally accepted practice of elaborating particular aspects of treaty rules of fair and equitable treatment by reference to arbitral interpretation of *pari materia* rules in other treaties cannot be explained otherwise than by reference to a single underlying rule of international law; that is, custom. In the positive sense, there is some support for treating rules on fair and equitable treatment either as merely aspirational or as providing the interpreter with extra-legal discretion (and the decentralized regime of investment law-making and dispute settlement necessarily provides material for making a number of plausible arguments). However, there is sufficient

[254] *Metalclad Corporation v United States of America*, ICSID Additional Facility Case no ARB(AF)/97/1, Award, 30 August 2000 (2001) 16 ICSID Rev—Foreign Investment L J 168 [74]–[76]; *MTD* Award (n 236) [110]–[112]; *Iurii Bogdanov and others v Moldova*, SCC Case, Award, 22 September 2005 [4.2.4.]; *Noble Ventures v Romania*, ICSID Arbitration no ARB/01/11, Award, 12 October 2005 16 ICSID Rep 216 [181]; *Eastern Sugar B.V. v Czech Republic*, SCC Case no 88/2004, Partial Award, 27 March 2007 [335]; *Desert Line Projects LLC v Yemen*, ICSID Case no ARB/05/17, Award, 6 February 2008 (2009) 48 ILM 82 [192]; *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua v Argentina*, ICSID Case no ARB/03/17, Decision on Liability, 30 July 2010 [176]–[178]; *Total* (n 149) [125].

[255] *Pope & Talbot Inc. v Canada*, UNCITRAL Case, Final Merits Award, 10 April 2001 122 ILR 352 [105]–[118]; *CME v Czech Republic*, UNCITRAL Case, Partial Award, 13 September 2001 [156]; *Saluka Investment BV v Czech Republic*, UNCITRAL Case, Partial Award, 17 March 2006 15 ICSID Rep 274 [291]–[295]; *Enron Corporation & Ponderosa Assets, L.P. v Argentina*, ICSID Case no ARB/01/3, Award, 22 May 2007 [258]; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v Argentina*, ICSID Case no ARB/97/3, Award, 20 August 2007 [7.4.7]; *Continental* (n 148) [254].

[256] *Eureko B.V. v Poland*, UNCITRAL Case, Partial Award, 19 August 2005 12 ICSID Rep 335 [234]–[235]; *ADC* (n 69) [445]; *LG&E* (n 163) [121]–[123]; *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v Turkey*, ICSID Case no ARB/02/05, Award, 19 January 2007 [238]–[239]; *Helnan International Hotels A/S v Egypt*, ICSID Case no ARB/05/09, Award, 7 June 2008 [143]; *Plama Consortium Limited v Bulgaria*, ICSID Case no ARB/03/24, Award, 27 August 2008 [175]; *National Grid* Award (n 153) [167]; *Siag* (n 68) [450].

[257] *Tecmed* Award (n 148) [154–5]; *Azurix* Award (n 148) [359]–[364]; *Siemens* Award (n 152) [290]–[299]; *LLC Amto v Ukraine*, SCC Case no 80/2005, Final Award, 26 March 2008 [74]; *Biwater Gauff (Tanzania) Ltd. v Tanzania*, ICSID Case no ARB/05/22, Award, 24 July 2008 [591]–[592]; *Rumeli* Award (n 69) [611]; *Duke Energy Electroquil Partners & Electroquil S.A. v Ecuador*, ICSID Case no ARB/04/19, Award, 18 August 2008 [337].

[258] *Occidental Exploration and Production Company v Ecuador*, LCIA Case no UN 3467, Final Award, July 1, 2004 12 ICSID Rep 54 [190]–[192]; *CMS Gas Transmission Company v Argentina*, ICSID Case no ARB 01/08, Final Award, 12 May 2005 (2005) 44 ILM 1205 [282]–[284]; *Sempra Energy International v Argentina*, ICSID Case no ARB/02/16, Award, 28 September 2007 [302]; *BG Group Plc v Argentina*, UNCITRAL Case, Final Award, 24 December 2007 [290]–[291]; *Impregilo S.p.A. v Argentina*, ICSID Case no ARB/07/17, Award, 21 June 2011 [286]–[289].

support in State practice in the form of treaties, protests, and pleadings to treat 'fair and equitable treatment' as a reference to customary law on the treatment of aliens, or at least as strongly requiring it to be taken into account.

3. Content of fair and equitable treatment

The challenges of the international law of the pre-Second World War and the twenty-first century seem similar: how can one derive sufficiently detailed rules from an *a priori* (indefinable) proposition at a very high degree of abstraction? In the 1920s and 1930s, lawyers responded to this challenge by emphasizing the policy necessity for more detailed rules and by putting forward creative arguments of analogy and general principles (that sometimes *prima facie* did not fulfil the requirements of law-making processes). The contemporary lawyers have also resorted to different imaginative legal arguments, and the broader shifts in the international legal order (discussed in Chapter 1) have broadened the available range of authorities and materials on which the argument may be based. Different approaches to the content of fair and equitable treatment suggested in arbitral decisions starting from the late 1990s may be situated on a spectrum, partly influenced by the perception of the proper source of the standard.

At one end of the spectrum, particularly when the international standard is taken to be a customary rule, the immediate challenge is to demonstrate the law-making mechanisms through which it has evolved since the 1930s. The most conservative position would take it as the starting point that the classical international law did not protect property from interferences of lesser severity than expropriation, and therefore the creation of such rules would have to be demonstrated.[259] There is very limited support in State practice for the view that denial of justice is the only aspect of the treatment of aliens that may be considered under fair and equitable treatment.[260] A slightly less conservative position would address the development of the international standard not from the perspective of the severity of interference but the area of coverage. For example, the *United Parcel Service v Canada* Tribunal took the view that the international standard did not apply to matters of competition, since no relevant State practice could be identified.[261] Still, the premise that international law never protected property in competition-related matters is at the very least questionable without further justification.[262] The conceptual approach of the Tribunal of limiting the scope of the standard by reference to the substantive aspect of the issue seems to go against the grain of law-making in the area. The scope of the obligations has generally not been identified by reference to the nature of

[259] M Sornarajah, 'The Fair and Equitable Standard of Treatment: Whose Fairness? Whose Equity?' in F Ortino *et al.* (eds), *Investment Treaty Law: Current Issues II* (BIICL, London 2007) 172; A Falsafi, 'The International Minimum Standard of Treatment of Foreigners' Property: A Contingent Standard' (2007) 30 Suffolk Intl L Rev 317, 354–63; M Sornarajah, *The International Law on Foreign Investment* (3rd edn CUP, Cambridge 2010) 345–9.

[260] See Argentina's argument in *Vivendi II* (n 255) [7.4.10]. However, in parallel cases Argentina accepted the broader view, eg *Azurix* Award (n 148) [392]; *BG* (n 258) [284].

[261] *UPS* Jurisdiction (n 253) [85]-[99].

[262] There is 19th- and early twentieth-century practice that considers in principle (if not necessarily accepts *in casibus*) competition-related behaviour as breaching rules on the treatment of aliens, *Sicilian Sulphur* (Ch 2 n 114); *Savage Claim (US v Salvador)* (1865) 2 Moore Intl Arbitrations 1855; *Peruvian Monopoly* (1873) 6 Parry 349; disputes relating to Italy and Uruguay life insurance monopolies, AP Fachiri, 'Expropriation and International Law' (1925) 6 BYIL 159, 166–7; *Oscar Chinn (UK v Belgium)* [1934] PCIJ Rep Series A/B No 63 88; oil monopoly in Spain, referred to in Ministère des Affaires étrangères. Note du Service juridique au sujet du projet d'une traite d'établissement (1935) 4 Kiss 392.

the issue addressed (environmental, social, competition matters) but by the method and type of regulation (administration of justice, taking of property, general mistreatment).

If the rules are accepted as applying to the protection of property in principle, the approach exemplified by the *Glamis Gold v US* Tribunal takes the *Neer* standard as an authoritative statement of classical and a presumptively authoritative statement of modern law.[263] While the sociological changes and their doctrinal explanations may be relevant in identifying or explaining State practice and *opinio juris* better, that may change the law (or perhaps require to take old State practice built on discredited assumptions with a grain of salt), they cannot *per se* result in legal changes. If this position is adopted, the classical rules (usually expressed in the shorthand of *Neer*) are taken to provide an authoritative starting point. Indeed, even when it is not, its assumptions about the vague and indefinable content are adopted, with compliance considered only in the particular factual circumstances,[264] sometimes even expressly abstaining from identifying the content of the rule.[265] Other Tribunals have taken the view that customary law has developed, sometimes drawing on the effects of generalized treaty practice[266] or broader legalization of the commercial conduct of aliens,[267] or emphasizing development of the law on the case-by-case basis.[268]

Even when the content of fair and equitable treatment is determined *prima facie* within the boundaries of treaty law, equitable reconciliation of conflicting interests in each case and the development of rule of law by international courts[269] is used to elucidate generally relevant criteria on a case-by-case basis.[270] Reliance is also placed on general principles, *de facto* internationalizing peculiar domestic approaches.[271] Finally, the desire for specificity sometimes leads to reliance upon generalized notions to translate them into far-reaching rules[272] with somewhat questionable compliance with the normal processes

[263] *Glamis* (n 253) [600].

[264] *Petrobart Limited v Kyrgyz Republic*, SCC Case no 126/2003, Award, 29 March 2005 13 ICSID Rep 387 [VIII.8]; *Noble Ventures* (n 254) [181]; *Eastern Sugar* (n 254) [333]–[338]; Mann 'British Treaties' (n 158) 244; Tudor *Fair and Equitable Treatment* (n 160) 123–33, 154–6.

[265] *Tokios Tokelés v Ukraine*, ICSID Case no ARB/01/3, Award, 26 July 2007 [123]; *Plama* Award (n 256) [175].

[266] *Mondev* (n 144) [117].

[267] *Mondev* (n 144) [116]; *Merrill* (n 253) [207].

[268] *Waste Management II* (n 253) [98].

[269] Cf JP Bullington, 'Problems of International Law in the Mexican Constitution of 1917' (1927) 21 AJIL 685, 704–5; AV Lowe, 'Fair and Equitable Treatment in International Law (Remarks)' (2006) 100 ASIL Proceedings 73, 73–4.

[270] *Sempra* Award (n 258) [297]; *BG* (n 258) [292]–[302]; *Amto* (n 257) [76]; *Victor Pey Casado* (n 147) [580]–[584], [657], [659]; *Metalpar S.A. and Buen Aire S.A. v Argentine Republic*, ICSID Case no ARB/03/5, Award, 6 June 2008 [182]–[185]; *Helnan* Award (n 256) [148]; *Biwater* Award (n 257) [602]; *Rumeli* Award (n 69) [609]; *Duke* Award (n 257) [339]–[341]; *Plama* Award (256) [175]; *National Grid* Award (n 153) [173]–[175]; *Jan de Nul N.V. and Dredging International N.V. v Egypt*, ICSID Case no ARB/04/13, Award, 6 November 2008 15 ICSID Rep 437 [185]–[194]; *L.E.S.I. S.p.A. et ASTALDI S.p.A. v Algeria*, ICSID Case no ARB/05/3, Award, 12 November 2008; *Siag* Award (n 68) [450]; *Suez* (n 254) [223]–[225]; *AES Summit Generation Limited and AES-Tisza Erömü Kft. v Hungary*, ICSID Case no ARB/07/22, Award, 23 September 2010 (2011) 50 ILM 186 [9.3.8]–[9.3.12]; *Alpha Projektholding GmbH v Ukraine*, ICSID Case no ARB/07/16, Award, 8 November 2010 [420]; *Sergei Paushok, CJSC Golden East Company, CJSC Vostokneftegaz Company v Mongolia*, UNCITRAL Case, Award on Jurisdiction and Liability, 28 April 2011 [253].

[271] S Fietta, 'Expropriation and the "Fair and Equitable" Standard' (2006) 23 J Intl Arbitration 375, 376–8; E Snodgrass, 'Protecting Investors' Legitimate Expectations—Recognising and Delimiting a General Principle' (2006) 21 ICSID Rev—Foreign Investment L J 1, 25–30; A von Walter, 'The Investor's Expectations in International Investment Arbitration' in A Reinisch and C Knahr (eds), *International Investment Law* (Eleven International Publishing, Utrecht 2009) 197–8.

[272] *Tecmed* Award (n 148) [154–5].

of law-making and legal reasoning.[273] In the more recent cases, some States seem to have accepted certain criteria developed in earlier decisions (particularly legitimate expectations) as relevant in determining the compliance with fair and equitable treatment.[274]

In conceptual terms, the debate has not advanced much beyond where it stood on the morning of 29 April 1927.[275] Borchard's scepticism about the existence of specific rules is reflected in the express emphasis that modern decisions usually place on the fact-specific nature of the legal arguments. Fenwick's emphasis on specificity, glossing over the compliance with traditional law-making methods, is reflected in the sometimes *ipse dixit* claims about the content of customary law and general principles. Jessup's call for caution in the development is reflected in the comparative human rights arguments, providing the systemic perspective for the systematization of the case law. Indeed, the tentative indications of possible further developments suggest that the legal argument has gone full circle, with developed traditional home States appreciating the value of national treatment arguments from the host States' perspective.[276]

Part III of the book addresses the content of the contemporary customary standard. Pre-Second World War customary law, approaching it with all due caution to its internal contradictions and insufficiencies, necessarily has to be taken as the starting point of analysis. The temporal lacuna between the collapse of the inter-War regime of Claims Commissions and the rise of the investment treaty Tribunals may be filled, again with all due caution, by rules of international human rights law that might appear either as 'relevant' rules under Article 31(3)(c) VCLT, or as careful arguments by analogy. A distinction should be drawn between the international standard in the administration of justice—clearly established in the traditional international law and addressed along the same lines in human rights law and modern cases—and other aspects of the international standard that have to be extrapolated from elements of the traditional law of indirect expropriation, regional human rights mechanisms, and divergent trends in modern law. Nevertheless, these are challenges not of a conceptual nature but ones that lie at the level of lawyers' law, and are to be resolved by its mundane methods of interpretation, application, distinctions, and analogies.

[273] Cf Hershey 'Denial' (n 75) 30–1 (Fenwick); Z Douglas, 'Nothing if Not Critical for Investment Treaty Arbitration: *Occidental, Eureko* and *Methanex*' (2006) 22 Arbitration Intl 27, 27–8; A Orakhelashvili, 'The Normative Basis of "Fair and Equitable Treatment": General International Law of Foreign Investment?' (2008) 46 Archiv des Völkerrechts 74.

[274] *Rumeli* Award (n 69) [609]; *GEA Group Aktiengesellschaft v Ukraine*, ICSID Case no ARB/08/16, Award, 31 March 2011 [271].

[275] AS Hershey, 'Denial' (n 75); see Ch 2 nn 47–49.

[276] OM Garibaldi, 'Carlos Calvo Redivivus: The Rediscovery of Calvo Doctrines in the Era of Investment Treaties' (2006) 3 Transnational Dispute Management 2–4, 44–55; MJ Bond, 'The Americanization of Carlos Calvo' (2007) 22 (8) Mealy's Intl Arbitration Reports 1; Vandevelde *U.S. International Investment Agreements* (n 14) 64–82.

PART II

SOURCE OF THE INTERNATIONAL MINIMUM STANDARD

Debates about the international standard span the whole spectrum of sources of international law. At one end of the spectrum, the pre-Second World War debate operated in terms of exultations of equity and justice, as well as somewhat questionable recourse to general principles, standards, and rules of customary international law. At the other end of the spectrum, the contemporary fair and equitable treatment debate takes place, at least in the first instance, on the basis of treaty law. The history of overlapping law-making arguments and techniques that still retain their relevance suggests that situating the standard within the sources framework is not going to be an easy task, or one that provides an obvious legal solution.

The dominant approach in the arbitral decisions[1] and legal writings has been to use case-by-case analysis to develop criteria, sub-criteria, and presumptions so as to explain

[1] Eg *Waste Management v US (II)*, ICSID Additional Facility Case no ARB(AF)/00/3, Final Award, 30 April 2004 (2004) 43 ILM 967 [98]; *Sempra Energy International v Argentina*, ICSID Case no ARB/02/16, Award, 28 September 2007 [297]; *BG Group Plc v Argentina*, UNCITRAL Case, Final Award, 24 December 2007 [292]–[302]; *LLC Amto v Ukraine*, SCC Case no 80/2005, Final Award, 26 March 2008 [76]; *Victor Pey Casado and President Allende Foundation v Chile*, ICSID Case no ARB/98/2, Award, 8 May 2008 [580]–[584], [657], [659]; *Metalpar S.A. and Buen Aire S.A. v Argentine Republic*, ICSID Case no ARB/03/5, Award, 6 June 2008 [182]–[185]; *Helnan International Hotels A/S v Egypt*, ICSID Case no ARB/05/09, Award, 7 June 2008 [148]; *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case no ARB/05/22, Award, 24 July 2008 [602]; *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v Kazakhstan*, ICSID Case no ARB/05/16, Award, 29 July 2008 [609]; *Duke Energy Electroquil Partners & Electroquil S.A. v Ecuador*, ICSID Case no ARB/04/19, Award, 18 August 2008 [339]–[341]; *Plama Consortium Limited v Bulgaria*, ICSID Case no ARB/03/24, Award, 27 August 2008 [175]; *National Grid v Argentina*, UNCITRAL Case, Award, 3 November 2008 [173]-[175]; *Jan de Nul N.V. and Dredging International N.V. v Egypt*, ICSID Case no ARB/04/13, Award, 6 November 2008 15 ICSID Rep 437 [185]–[194]; *L.E.S.I. S.p.A. et ASTALDI S.p.A. v Algeria*, ICSID Case no ARB/05/3, Award, 12 November 2008 [151]; *Waguih Elie George Siag and Clorinda Vecchi v Egypt*, ICSID Case no ARB/05/15, Award, 1 June 2009 [450]; *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua v Argentina*, ICSID Case no ARB/03/19, Decision on Liability, 30 July 2010 [223]–[225]; *AES Summit Generation Limited and AES-Tisza Erömü Kft. v Hungary*, ICSID Case no ARB/07/22, Award, 23 September 2010 (2011) 50 ILM 186 [9.3.8]–[9.3.12]; *Alpha Projektholding GmbH v Ukraine*, ICSID Case no ARB/07/16, Award, 8 November 2010 [420]; *Sergei Paushok, CJSC Golden East Company, CJSC Vostokneftegaz Company v Mongolia*, UNCITRAL Case, Award on Jurisdiction and Liability, 28 April 2011 [253]; *El Paso Energy International Company v Argentina*, ICSID Case no ARB/03/15, Award, 31 October 2011 [341]–[348]; *Spyridon Roussalis v Romania*, ICSID Case no ARB/06/1, Award, 7 December 2011 [314]–[318].

the content of fair and equitable treatment.[2] To consider a few examples, the *Plama Consortium Ltd v Bulgaria* Tribunal stated that 'arbitral awards published in the past few years have contributed to providing some guidance to ascertain the content of the standard'.[3] The *National Grid Plc v Argentina* Tribunal noted that the 'review of the case law adduced by parties shows that fair and equitable treatment' had certain criteria.[4] The *Waguih Elie George Siag and other* (*Siag*) Tribunal observed that,

> While its [fair and equitable treatment's] precise ambit is not easily articulated, a number of categories of frequent application may be observed from past cases. These include such notions as transparency, protection of legitimate expectations, due process, freedom from discrimination and freedom from coercion and harassment. Claimants submit that Egypt has violated each of the generally recognised 'strands' of the fair and equitable treatment doctrine and the Tribunal upholds this contention.[5]

In the 2011 award in the *Sergei Paushok and others v Mongolia* case, the Tribunal noted that

> The *Rumeli* award, for example, lists the following principles to be applied: transparency, good faith, conduct that cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, lacking in due process or procedural propriety and respect of the investor's reasonable and legitimate expectations.[6]

The *Rumeli Telekom A.S. and other v Kazakstan* award referred to had in its own turn drawn the principles from even earlier decisions.[7]

There are many reasons why an adjudicator might wish to refer to earlier awards. An earlier award may have explained the application of general concepts applying in a particular context. For example, the *Vivendi v Argentina* annulment decision is often the starting point for discussing how cause, object, and attribution operate in treaty claims involving contractual breaches.[8] Different views of applicable law, privity, cause, and scope of umbrella clauses naturally invite (critical) consideration of approaches taken in other cases.[9] The reasoning of the earlier awards may also serve as an inspiration or be applied by analogy. However, the approach to fair and equitable treatment seems to go further than that, identifying (as in *Siag*) 'a number of categories of frequent application... from past cases', conceptualizing them as 'notions' and then finding

[2] AV Lowe, 'Fair and Equitable Treatment in International Law (Remarks)' (2006) 100 ASIL Proceedings 73, 73–4; J Kalicki and S Medeiros, 'Fair, Equitable and Ambiguous: What is Fair and Equitable Treatment in International Investment Law?' (2007) 22 ICSID Rev—Foreign Investment L J 24, 30–41; C McLachlan, L Shore, and M Weiniger, *International Investment Arbitration: Substantive Principles* (OUP, Oxford 2007) 224–47; I Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (OUP, Oxford 2008) 154–81; R Dolzer and CH Schreuer, *Principles of International Investment Law* (OUP, Oxford 2008) 133–49; C Yannaca-Small, 'Fair and Equitable Treatment Standard: Recent Developments' in A Reinisch (ed), *Standards of Investment Protection* (OUP, Oxford 2008) 118–29; A Newcombe and L Paradell, *Law and Practice of International Treaties: Standards of Treatment* (Walter Kluwer Law & Business, The Netherlands 2009) 275–98.

[3] *Plama* Award (n 1) [175].

[4] *National Grid* Award (n 1) [173].

[5] *Siag* Award (n 1) [450] (footnotes omitted).

[6] *Paushok* Award (n 1) [253] (footnote omitted); similarly *Roussalis* Award (n 1) [314].

[7] *Rumeli* Award (n 1) [583].

[8] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v Argentina*, ICSID Case no ARB/97/3, Decision on Annulment, 3 July 2002 (2002) 17 ICSID Rev—Foreign Investment L J 168 [94]–[115]; J Crawford, 'Treaty and Contract in Investment Arbitration' (2009) 6 (1) Transnational Dispute Management 8–10.

[9] Eg *Pan American Energy LLC and others v Argentina*, ICSID Cases no ARB/03/13 and ARB/04/8, Decision on Preliminary Objections, 27 July 2006 [99]–[113]; A Sinclair, 'The Umbrella Clause Debate' in AK Bjorklund and others (eds), *Investment Treaty Law: Current Issues III* (BIICL, London 2009).

breaches of these 'generally recognised "strands" '. Such a case-by-case identification of different aspects and criteria from the factual mistreatment in particular cases can be legitimately undertaken to the extent that all adjudicators interpret the same rule of law, or at least the rule of law interpreted in other cases is legally relevant for the particular interpretation.[10]

Since formalized dispute settlement regarding the international standard would in most cases have at least the starting point in treaty law,[11] the place of the prevailing practice within the sources framework will be addressed from the analytical perspective of treaty interpretation. Treaty interpretation has been famously described as more of an art than a science,[12] or even artfully masquerading as a pseudo science.[13] Indeed, while VCLT rules of interpretation somewhat constrain the interpreter,[14] the 'throwing into the crucible' of all relevant interpretative materials to engage in a single combined interpretative exercise involves a great degree of artistry.[15] At the same time, identifying the materials that can be thrown 'into the crucible' is *a contrario* a scientific enough inquiry to be subject to meaningful legal analysis.[16] The present chapter addresses the *in limine* issue of admissibility of arbitral interpretations of *pari materia* fair and equitable treatment clauses for the purpose of interpretative process. The concept of '*pari materia* clauses' will be used to refer to treaty clauses of similar or identical textual formulation that provide for structurally and functionally similar or identical rules.[17]

The analysis of the place of fair and equitable treatment and the international minimum standard in the structure of sources is undertaken in three steps. First, MFN treatment clauses are used as a case study here for the proposition that interpretation of *pari materia* treaty rules is not a conceptually new challenge. Second, an argument is made

[10] *Glamis Gold Ltd v US*, UNCITRAL Case, Award, 8 June 2009 (2009) 48 ILM 1038 [606]–[611].

[11] A prominent exception is *Ahmadou Sadio Diallo (Guinea v DRC)* (Preliminary Objections) [2007] ICJ Rep 582.

[12] ILC, 'Draft Articles on the Law of Treaties with Commentaries' in *Yearbook of the International Law Commission, 1966, Volume II*, UN Doc A/CN.4/SER.A/1966/Add.1 112, 218.

[13] RY Jennings, 'General Course on Principles of Public International Law' (1967) 121 Recueil des Cours de l'Académie de Droit International 323, 544; J Klabbers, 'On Rationalism in Politics: Interpretation of Treaties and the World Trade Organization' (2005) 74 Nordic J Intl L 405, 406.

[14] *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A.*, ICSID Case no ARB/03/4, Decision on Annulment, 5 September 2007, Dissenting Opinion of Arbitrator Berman [5]–[12].

[15] 1966 ILC Draft Articles on the Law of Treaties (n 12) arts 27–28; Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 arts 31–2; I Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn Manchester University Press, Manchester 1984) 117–19; P Reuter, *Introduction au droit des traites* (3rd edn PUF, Paris 1995) 89–90; F Ortino, 'Treaty Interpretation and the WTO Appellate Body Report in US—Gambling: A Critique' (2006) 9 J Intl Economic L 117, 120; R Gardiner, *Treaty Interpretation* (OUP, Oxford 2008) 9–10, 141–2. Lowe has noted that 'treaty interpretation is an area in which returns on abstract theorizing are low, and diminishing', AV Lowe, *International Law* (OUP, Oxford 2007) 74.

[16] Sinclair, ibid 116–17; Gardiner, ibid xv (citing Lowe's criticism from the previous footnote and continuing that '[y]et the practical importance of the subject is shown by the number of cases in which interpretation of a treaty plays a central part'). For a careful examination of the admissibility of interpretative materials see *HICEE B.V. v Slovakia*, PCA Case no 2009–11, Partial Award, 23 May 2011 [122]–[140].

[17] M Paparinskis, 'Sources of Law and Arbitral Interpretations of *Pari Materia* Investment Protection Rules' in OK Fauchald and A Nollkaemper (eds), *The Practice of International and Nationals Courts and the (De-)Fragmentation of International Law* (Hart Publishing, Oxford 2012). *Pari materia* rules are like multi-sourced equivalent rules because they are similar or identical in their normative content and have been established through different international instruments, and unlike because they are not binding upon the same international legal subject, see T Broude and Y Shany, 'The International Law and Policy of Multi-Sourced Equivalent Norms' in T Broude and Y Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Hart Publishing, Oxford 2011) 5.

for situating the fair and equitable treatment exclusively within the boundaries of treaty law and interpretation. Chapter 5 considers different approaches to interpretation that might support such a conclusion and concludes that none of them are fully persuasive. Third, an argument for situating treaty rules on fair and equitable treatment within the structures of general international law is considered. Chapter 6 suggests that the most persuasive reading of existing practice is to accept that treaty rules on fair and equitable treatment make reference to customary law, or at least strongly require it to be taken into account. The earlier debates and contemporary experience suggest a necessity for a broad and inclusive legal model capable of incorporating both the historical pedigree and contemporary developments through arbitral decisions. An interpretative argument limited to treaty law is incapable of explaining and containing such an argument, and therefore explicit or implicit reliance upon the customary minimum standard is necessary to carry out the process of interpretation properly.

Before addressing the place of the international standard in sources, the fair and equitable treatment debate should be put in perspective. The textual incorporation of fairness and equity into the standard is, as Schwarzenberger put it, an imaginative attempt to combine the minimum standard with the standard of equitable treatment, requiring the States to act in accordance with *jus aequum*.[18] Another combination of law and equity, formulated in the law of maritime delimitation, resulted in a 30-year-long adjudicative grappling with the normative implications of treaty and custom,[19] and only recently a semblance of consistency has emerged[20] from the previously unsettled law.[21] The legal context is certainly very different. However, this experience puts in perspective the expectations regarding clarity, predictability, and uniformity of judicial interpretation of equitable treatment. The interpretation of widely ratified multilateral treaties and customary law by ICJ and arbitral Tribunals in reasonably but not excessively frequent cases took considerable time and attracted much controversy before consistent approaches emerged. The substantively and procedurally decentralized framework of BITs and investor–State arbitral Tribunals would make such a dynamic *a fortiori* probable. It is not suggested that the likelihood of arriving at a clear and predictable core concept of fair and equitable treatment would require 30 years, multiplied by the number

[18] G Schwarzenberger, 'The Abs-Shawcross Draft Convention on Investment Abroad: A Critical Commentary' (1960) 9 J Public L 147, 153–5; see also McLachlan and others, *International Investment Arbitration* (n 2) 206; C McLachlan, 'Investment Treaties and General International Law' (2008) 57 ICLQ 361, 368. On the distinction between minimum and equitable standards, G Schwarzenberger, 'The Most-Favoured-Nation Standard in British State Practice' (1945) 22 BYIL 96, 118.

[19] 'ICJ Decision in the Libya–Tunisia Continental Shelf Case' (1982) 76 ASIL Proceedings 150, 154–8 (Charney), 161–5 (Stein); LL Herman, 'The Court Giveth and the Court Taketh Away: An Analysis of the *Tunisia–Libya Continental Shelf* Case' (1984) 33 ICLQ 825, 841–6; J Schneider, 'The Gulf of Maine Case: The Nature of An Equitable Result' (1985) 79 AJIL 539, 576; NM Antunes, *Towards the Conceptualisation of Maritime Delimitation* (Martinus Nijhoff, Leiden 2003) 177–238.

[20] D Colson, 'The Delimitation of the Outer Continental Shelf' (2003) 97 AJIL 91, 100–2; RR Churchill, 'Dispute Settlement under the UN Convention on the Law of the Sea: Survey for 2006' (2007) 22 Intl J Marine Coastal L 470, 474–5; B Kwiatkowska, 'Barbados/Trinidad and Tobago' (2007) 101 AJIL 149, 149–57.

[21] P Weil, *The Law of Maritime Delimitation—Reflections* (Grotius Publications Limited, Cambridge 1989) 9–14; P Weil, 'L'equité dans la jurisprudence de la Cour Internationale de Justice' in AV Lowe and M Fitzmaurice (eds), *Fifty Years of the International Court of Justice* (CUP, Cambridge 1996) 144; RR Churchill and AV Lowe, *The Law of the Sea* (3rd edn Manchester University Press, Manchester 1999) 185; Colson, ibid 99–100; Y Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation* (Hart Publishing, Oxford 2006) 123–5; HWA Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989. Supplement, 2006: Part Three' (2006) 77 BYIL 1, 129–64.

of treaties providing for such a rule and the number of Tribunals interpreting it.[22] Still, the substantively and procedurally decentralized framework of the development should make a long and controversial process of elaboration the likely dynamic, rather than an unexpected error that requires a critical re-examination of basic legal premises.

[22] If States were able to agree on the substance of the standard, it would not be technically complicated to authoritatively reinterpret the existing treaties by taking advantage of international fora (eg, OECD) and applying the accepted tools of subsequent practice and agreement to synchronize the positions of traditional home States and traditional host States in particular disputes, see on subsequent practice and agreement Ch 2.II.2.

4

Most-favoured-nation Clause: A Case Study

BITs are not the first treaties to raise questions about the interpretative process of *pari materia* treaty rules dealing with commercial matters. In the classical international law, the often-used MFN clause was perceived as being an 'essentially commercial clause' and a 'clause which belongs to the domain of commerce'.[1] As Root explained in another important speech,[2] the effect of an MFN clause was that:

> ... if any state chooses to extend privileges to alien residents ..., the state will be forbidden by the operation of the treaty to discriminate against the resident citizens of the particular country with which the treaty is made and will be forbidden to deny to them the privileges which it grants to the citizens of other foreign countries.[3]

MFN clauses have an impressive historic pedigree. The idea pre-dates Westphalian international law and goes back for almost 1000 years, the recognizable form for more than 500 years, and the MFN wording for more than 350 years.[4] The problems facing the interpreters of MFN clauses were similar to those faced in contemporary investment protection law, attempting to identify the legal relevance of *pari materia* similarly but not identically worded rules expressed in numerous bilateral treaties. The greater quantitative development of modern formalized dispute settlement institutions means that the classical interpreter was looking at fewer international judgments and more State practice in the form of claims and protests, while the contemporary interpreter would primarily look at diverse arbitral decisions. The conceptual questions would, however, remain very similar. The approach adopted was also not dissimilar, accepting the lack of *the* MFN clause[5] but simultaneously acknowledging broad similarities and attempting

[1] *Nationality Decrees Issued in Tunis and Morocco* (Advisory Opinion) [1923] PCIJ Rep Series C No 2 172 (de Lapradelle on behalf of France); cf. L Oppenheim, *International Law* (Volume I: Peace, Longmans, Green & Co., London 1905) 518 fn 1; F von Liszt, *Le droit international* (9th édn A Pedonne, Paris 1928) 184; K Strupp, *Éléments du droit international public* (2nd édn Les editions internationales, Paris 1930) 286; C Rousseau, *Principes généraux du droit international public* (A Pedone, Paris 1944) 466. This chapter draws on the argument made in M Paparinskis, 'MFN Clauses and International Dispute Settlement: Moving Beyond *Maffezini* and *Plama*?' (2011) 26 (2) ICSID Rev—Foreign Investment L J 14, 16–25.

[2] While having lesser influence on the legal thinking than his speech three years later on the treatment of aliens, E Root, 'The Basis of Protection to Citizens Residing Abroad' (1910) 4 ASIL Proceedings 16, Root's conduct in resolving the US–Japanese crisis was one of the reasons for his later Nobel Peace Prize, JB Scott, 'Elihu Root's Services to International Law' (1924) 18 ASIL Proceedings 2, 11–14.

[3] E Root, 'The Real Question Under the Japanese Treaty and the San Francisco School Board Resolution' (1907) 1 AJIL 273, 277–8.

[4] SK Hornbeck, 'The Most-Favored-Nation Clause' (1909) 3 AJIL 395, 395–403; B Nolde, 'La clause de la nation la plus favorisée et les tarifs préférentiels' (1932) 39 Recueil des Cours de l'Académie de Droit International 1, 29–30; G Schwarzenberger, 'The Most-Favoured-Nation Standard in British State Practice' (1945) 22 BYIL 96, 97; A Nussbaum, *A Concise History of the Law of Nations* (The Macmillan Company, New York 1947) 30–1; H Neufeld, *The International Protection of Private Creditors from the Treaties of Westphalia to the Congress of Vienna* (AW Sijthoff, Leiden 1971) 110–12.

[5] D Anzilotti, *Cours de droit international* (Librairie de Recueil Sirey, Paris 1929) 438; G Scelle, *Précis de droit des gens: principles et systématique* (Libraire du Recueil Sirey, Paris 1932) 391; Schwarzenberger 'British State Practice' (n 4) 103; A McNair, *The Law of Treaties* (Clarendon Press, Oxford 1961) 273.

to explain 'one of the basic standards in international law'[6] by means of 'clarification [in] innumerable individual treaties by which [the MFN standard] has been developed'.[7] Against the historical background raising challenges broadly similar to contemporary law, the variety of the interpretative arguments are briefly sketched, and the implications for the contemporary debate considered.

There is a spectrum of ways in which the interpretation of MFN clauses may be approached. At one extreme, MFN clauses could be presented as fully removed from the sphere of law. The argument may be illustrated by reference to the US practice. In the debate about whether MFN clauses contained an implicit distinction between favours granted gratuitously and those given for some consideration,[8] a distinction was drawn between interpretation according to 'the strict or literal, perhaps the more truly juristic school', and 'the practical, or—as it may seem to some—opportunist, but surely more truly economic', preferring the latter one.[9] The US raised a similar argument in the case concerning *Rights of US Nationals in Morocco (US Nationals)*, where the possibility of using MFN clauses to permanently incorporate rights from third-State treaties was discussed. The US conceded that the law of 1951–1952 did not provide for such a rule,[10] but argued that it was only 'the modern theory' and thus could not govern the interpretation of the 1836 treaty in question. The US contrasted the 'substantial identity of civilizations, cultures, legal systems [and] concepts'[11] and 'common foundation of jurisprudence and socio-political development' of Western States *inter se* with 'the disparity between the social order and legal system of the Mohammedan States and their own'.[12] These arguments relied on extra-legal considerations to dictate the interpretative conclusions.

Another approach would acknowledge the legal nature of interpretation, but would emphasize the special nature of the clause. The structural uniqueness of MFN clauses in terms of the law of treaties was raised both in the ILC debates and in the Vienna Conference on the Law of Treaties.[13] However, on both occasions the majority took the view that MFN clauses were substantive treaty rules that did not add much to the general law of treaties.[14] A slightly different approach would place MFN clauses within

[6] Schwarzenberger 'British State Practice' (n 4) 97. For Schwarzenbeger, 'standard' was a 'standard of conduct', ibid 96; a stereotyped pattern of treaty practice, G Schwarzenberger, 'The Province and Standards of International Economic Law' (1948) 2 Intl L Q 402, 409–10; G Schwarzenberger, 'The Principles and Standards of International Economic Law' (1966) 117 Recueil des Cours de l'Académie de Droit International 5, 66.

[7] Schwarzenberger 'British State Practice' (n 4) 103–4.

[8] SK Hornbeck, 'The Most-Favored-Nation Clause' (1909) 3 AJIL 619, 619–27; Rousseau *Principes généraux* (n 1) 467; McNair 1961 (n 5) 275–8.

[9] Hornbeck II, ibid 628–9.

[10] *Rights of Nationals of the United States of America in Morocco (France v US)* ICJ Pleadings Volume I 372 (Counter-Memorial).

[11] Ibid. [12] Ibid 375.

[13] MFN clauses were discussed as part of the *pacta tertii* law of treaties, ILC, *Yearbook of the International Law Commission, 1964, Volume I*, UN Doc A/CN.4/SER.A/1964 184–5; United Nations Conference on the Law of Treaties, Second Session, UN Doc A/CONF.39/11/Add.1 60, 63 (Soviet Union); von Liszt *Le droit international* (n 1) 184–5; Anzilotti *Cours* (n 5) 432–9; Rousseau *Principes généraux* (n 1) 464–8. Sometimes they were considered to have implications of a quasi-legislative or self-contained nature, ILC 1964 I, ibid 113 (de Aréchaga), 188 (Yasseen); Scelle *Précis* (n 5) 383–95.

[14] ILC 1964 I, ibid 45, 110, 113 (Waldock), 113 (Reuter) 114, 187 (Waldock), 188 (Briggs, Verdross); ILC, *Yearbook of the International Law Commission, 1964, Volume II*, UN Doc A/CN.4/SER.A/1964/Add.1 176; S Rosenne, *Developments in the Law of Treaties 1945–1986* (CUP, Cambridge 1989) 67. Fitzmaurice emphasized that issues involved in MFN treatment were matters of substantive rather than treaty law, G Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951–1954' (1956–1957) 32 BYIL 20, 84 fn 1.

the rubric of substantive treaty rules but require special rules of interpretation because of their structural peculiarity.[15] At the 1927 Committee of Experts for the Progressive Codification of International Law, the majority took the view that it was neither necessary nor desirable to frame specific rules because the usual rules of judicial interpretation seemed adequate.[16] De Magalhães, the lone dissenter, countered that 'it was desirable to frame supplementary provisions in a general international convention' that would assist in uncertain cases where States have not clearly expressed their intention.[17] While there is some limited support for such an approach in earlier State practice[18] and case law,[19] to adopt this approach in contemporary law would mean 'to treat the most-favoured-nation clause as a particular kind of treaty and to depart from the system of article 31 of the Vienna Convention, in which the idea of specific rules of interpretation had been deliberately avoided'.[20]

A third way of making the argument would operate within the *a priori* normal rules of treaty interpretation but would require special rules of interpretation. This argument could also be made in a number of ways. Special rules of interpretation could become relevant through VCLT Article 31(3)(c), probably in terms of customary international law that would have to be 'very well founded in doctrine and practice'.[21] Debates regarding the conditionality of MFN clauses[22] and US arguments in the *US Nationals* case blur the difference between customary and treaty law-making, presenting legal arguments in terms of the consistent practice of States.[23] Another way of making a similar point would combine arguments of contemporaneous interpretation and special meaning, requiring interpretation in light of earlier special meaning.[24] Finally, special rules

[15] Hyde divided his article on interpretation into the 'general' and 'MFN' parts, CC Hyde, 'Concerning the Interpretation of Treaties' (1909) 3 Am J Comp L 46, 46–61. McNair's 1938 *Law of Treaties* addressed MFN clauses as part on the 'interpretation of treaties', A McNair, *The Law of Treaties* (Clarendon Press, Oxford 1938) 285–306, while the 1961 edition dealt with MFN clauses in the part on 'certain kinds of treaties', McNair 1961 (n 5) 272–305.

[16] S Rosenne (ed), *League of Nations Committee of Experts for the Progressive Codification of International Law [1925–1928]* (Volume I, Oceana Publications, Inc., New York 1972) 243–4 (McNair, Rundstein, Diena), 329–30 (Wickersham).

[17] Ibid 330–1, without much guidance as to what these rules should be, Q Wright, 'The Most-Favored-Nation Clause' (1927) 21 AJIL 760, 762.

[18] The US distinguished capitulation treaties from commercial treaties concluded by European States *inter se* because of different purposes and effects, *US Nationals* Pleadings I 374–6 (Counter-Memorial).

[19] *Re Application to Swiss Nationals of the Italian Special Capital Levy Duty* (1956) 25 ILR 313, 318–19. Alternatively, the Commission might have called for the application of the established meaning of MFN clauses that would have informed the parties to the treaty, E Lauterpacht, 'The Development of the Law of International Organization by the Decisions of International Tribunals' (1976) 152 Recueil des Cours de l'Académie de Droit International 377, 398–9.

[20] ILC, *Yearbook of the International Law Commission, 1975, Volume I*, UN Doc A/CN.4/SER.A/1975 152 (Vallat).

[21] Ibid. [22] Nn 8–9.

[23] The US argument seems to present the modern doctrine as a special customary rule that later developed into a general custom and thus was not opposable to States from other regions regarding the time when the rule was still local, *US Nationals* Pleadings I (n 18) 372 (Counter-Memorial); *Rights of Nationals of the United States of America in Morocco (France v US)* ICJ Pleadings Volume II 120 (Rejoinder). On special customary law, G Cohen-Jonathan, 'La coutume locale' (1961) 7 Annuaire Français de Droit International 119, 132–3; M Mendelson, 'The Formation of Customary International Law' (1998) 272 Recueil des Cours de l'Académie de Droit International 155, 215–17; AV Lowe, *International Law* (OUP, Oxford 2007) 54.

[24] From this perspective, practice would rebut the presumption of ordinariness, cf HWA Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989 (Part Three)' (1991) 62 BYIL 1, 27–8.

of interpretation could be created through treaty law;[25] 'conventional rules binding exclusively between the parties' would be the least objectionable of ways of creating special rules of interpretation.[26]

At the end of the day, despite imaginative arguments for reading MFN clauses in light of extra-legal considerations, their structural uniqueness, or otherwise-created special rules of interpretations, such attempts were rejected by the majority of State practice and judicial decisions. In *US Nationals*, the Court unanimously rejected the US contention as 'inconsistent with the intentions of the parties', 'shown both by the wording of the particular treaties, and by the general treaty pattern'.[27] More generally, Vallat's view that 'nothing should be done to detract from the authority of the rules in articles 31 and 32 of the Vienna Convention'[28] since '[t]he application of the most-favoured-nation clause in a treaty was *par excellence* a question of the interpretation of the particular clause in the particular treaty'[29] accurately reflects the way in which international law treats the question.[30] Consequently, even though efforts of developing 'specialist' interpretations of MFN clauses were made, they have so far always been resolutely unsuccessful.[31]

There are at least three more general propositions about interpretation of *pari materia* rules that may be derived from the analysis of MFN clauses. First, the arguments for specialty of interpretation are admissible in the law-making process, but there is a presumption for the application of the normal rules. The Court in *US Nationals* did not reject the very idea of the US argument about special rules of interpretation. However, it considered the substance of the argument through the prism of traditional approaches to interpretation where the US position was likely to fail. All in all, there is a pull towards the default rules, particularly in light of the many ways in which interpretative arguments can already be presented within the existing system. The *US Nationals* scepticism about the relevance of materials extraneous to the specific dispute is in line with the Court's general approach in the area, dealing with MFN clauses in four cases[32] but (somewhat unusually for the Court)[33] not relying on its earlier pronouncements on the issue.[34] Debates about MFN clauses suggest that international law is both sceptical

[25] Rosenne *Committee of Experts I* (n 16) 330–1 (de Magalhães).

[26] ILC 1975 (n 20) 152 (Vallat).

[27] *Rights of Nationals of the United States of America in Morocco (France v US)* (Judgment) [1952] ICJ Rep 176, 191–2. Judge Hsu Mo took the view that consular jurisdiction could not 'derive from any admission made... to a third party', Declaration of Judge Hsu Mo 214. The dissenting judges also accepted that 'the external sources of the right have ceased', Dissenting Opinion of Judges Hackworth, Badawi, Levi Carneiro, and Sir Benegal Rau 215, 219.

[28] ILC 1975 (n 20) 152.

[29] ILC, *Yearbook of the International Law Commission, 1973, Volume I*, UN Doc A/CN.4/SER.A/1973 64, also 67 (Tammes).

[30] ILC 1975 (n 20) 156 (Ustor); ILC, 'Draft Articles on Most-Favoured-Nation Clauses' in *Yearbook of the International Law Commission, 1978, Volume II*, UN Doc A/CN.4/SER.A/1978/Add.1. (Part Two) 16, 30 ('the rule follows clearly from the general principles of treaty interpretation').

[31] In the 2011 ILC report, a Study Group on the MFN Clauses stated that 'the whole process was about treaty interpretation.... the general point of departure would the [VCLT], supplemented by any principles that may be adduced from practice in the investment arena', ILC, *Report of the International Law Commission on the Work of its 63rd Session*, UN Doc A/66/10 [360].

[32] *Nationality Decrees Issued in Tunis and Morocco* (Advisory Opinion) [1923] PCIJ Rep Series B No 4 30–1; *US Nationals* Judgment (n 27) 191–2; *Anglo-Iranian Oil Co. (UK v Iran)* (Jurisdiction) [1952] ICJ Rep 93, 107–10; *Ambatielos case (Greece v UK)* (Merits: Obligation to Arbitrate) [1953] ICJ Rep 10, 22.

[33] In light of its traditional reliance on its previous cases, M Shahabuddeen, *Precedent in the World Court* (CUP, Cambridge 1996); A Pellet, 'Article 38' in A Zimmermann, C Tomuschat, and K Oellers-Frahm (eds), *The Statute of the International Court of Justice: A Commentary* (OUP, Oxford 2006) 785.

[34] The silence of the Court is even more pronounced in the *Anglo-Iranian Oil Co.* and *Ambatielos* cases, which were decided within a year of one another, were decided by the same permanent bench bar one judge, raised the same legal issue (application of MFN clauses to general international law), had the same party appearing in both cases (the UK) and the parties expressly raised the relevance of the earlier case, *Ambatielos case (Greece v UK)* ICJ Pleadings 232 (Observations on Preliminary Objections by Greece), 329 (Reply by Greece), 361–2 (Rolin on behalf of Greece), 387–8, 407 (Fitzmaurice on behalf of the UK), 453–4, 463, 465 (Soskice on behalf of Greece), 482 (Fitzmaurice).

regarding special rules and approaches to *pari materia* clauses, and cautious about providing generalized judge-made solutions to treaty law terms.

Second, with all due caution it seems possible to identify a shift in the interpretative approaches taken towards the relevance of legal arguments extraneous to the particular treaties, gradually marginalizing the contextual materials. In 1909, Hornbeck emphasized the essential nature of 'knowledge of the time when the treaty was made'[35] and 'the importance of the historical survey'. Almost as an afterthought, he noted that 'the value of inductive method is not to be ignored'.[36] In 1945, Schwarzenberger recognized the absence of *the* MFN clause but attempted to identify *the* MFN standard clarified by the innumerable individual treaties by which it had been developed.[37] In 1961, McNair limited the role of existing practice to being 'capable of illustrating the questions of legal principle to which these clauses give rise'.[38] The shift seems clear: from Hornbeck in 1909, who focused on extra-legal considerations and historical context almost to the exclusion of the particular rules, to Schwarzenberger in 1945, who began the analysis with the particular rules but sought legal answers in the innumerable other treaties, to McNair in 1961, for whom the existing practice merely permitted the formulation of questions in more accurate terms.[39]

Third, the shift of approaches to MFN clauses partly reflects the parallel elucidation of the rules of interpretation, with the consequence that materials permissible or even central in earlier years were subsequently marginalized, or even completely excluded. The international law of the beginning of the twentieth century could afford to be sceptical about rules of interpretation.[40] The international law between the World Wars could be quite permissive regarding materials relevant for treaty interpretation.[41] However, the post-Second World War international law was sceptical about the 'founding father'[42] and 'teleology' approaches to interpretation,[43] and adopted a greater focus on the textual aspects, taken up by the ILC and the Vienna Conference on the Law of Treaties.[44] The

[35] Hornbeck II (n 8) 619. [36] Ibid 628.

[37] Schwarzenbeger 'British State Practice' (n 4) 103–4. [38] McNair 1961 (n 5) 263.

[39] While the 1938 McNair's *Law of Treaties* states in similar terms the caution against generalization, it does not have the 1961 point that existing State practice may illustrate the questions of legal principle that may arise, McNair 1938 (n 15) 285.

[40] TJ Lawrence, *The Principles of International Law* (Macmillan and Co., London 1895) 286–7; Oppenheim 1st Peace (n 1) 559; H Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) 26 BYIL 48, 50 fn 1–3; cf an anecdote from the 1930s about the pitfalls of using *Lawrence* as an exam textbook on treaty interpretation, W Malkin, 'International Law in Practice' (1933) 49 LQR 489, 505–6.

[41] 'Draft Convention on the Law of Treaties' (1935) 29 AJIL Supplement 657, 937–71; H Lauterpacht, *The Development of International Law by the International Court* (Stevens & Sons Limited, London 1958) 116–21; D Greig, *Intertemporality and the Law of Treaties* (BIICL, London 2001) 23–4, 30, 33–7.

[42] H Lauterpacht, 'Les travaux préparatoires et l'interprétation des traités' (1934) 48 Recueil des Cours de l'Académie de Droit International 709, 779–815; H Lauterpacht, 'Some Observations on the Preparatory Work in the Interpretation of Treaties' (1934–1935) 48 Harvard L Rev 549, 549–91; H Lauterpacht, 'De l'interpétation des traités' in *Annuaire de L'Institut de Droit International 1950* (Tome I, Editions juridiques et sociologiques S.A., Bale 1950) 390–402.

[43] MS McDougal, 'The International Law Commission's Draft Articles upon Interpretation: Textuality *Redivivus*' (1967) 61 AJIL 992, 992–1000; MS McDougal (1968) 62 AJIL 1021, 1021–7.

[44] 1966 ILC Draft Articles on the Law of Treaties (n 12) 218; G Fitzmaurice, 'The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points' (1951) 27 BYIL 1, 9; G Fitzmaurice and FA Vallat, 'Sir (William) Eric Beckett, K.C.M.G., Q.C. (1896–1966)'

rules of interpretation became more constraining regarding permissible materials. Consequently, the attention of the interpreter had to move from the broader to narrower contextual circumstances and then to the treaty rule itself, contextual elements remaining at the boundary between mildly helpful legal considerations and legally irrelevant arguments supporting the conclusion in policy terms.

While the more flexible approaches taken by earlier authorities may be justifiable if considered against the benchmark of the rules of interpretation of the time,[45] they cannot legitimize and instruct the contemporary interpreter. Such an interpreter should follow the careful, individualized approach of McNair, and not the nuanced, normative approach to general practice by Schwarzenberger, nor *a fortiori* the exclusive reliance on vague legal and economic policies by Hornbeck. While the 'innumerable treaties' may present special challenges, the interpretation of MFN clauses throughout the twentieth century suggests that answers and solutions can be provided within the framework of the existing legal order and its rules.

The interpretative framework also does not impose the rigidity of a single legal solution of a particular challenge, showing a constant reappraisal of the most appropriate technique. The argument may be located within the accepted framework (special meaning or other applicable rules), creating minor modifications (special treaty rules or structural uniqueness), or more important changes (creating special rules of interpretation), all against the background of elucidation of the accepted framework itself. The broader point is that the proliferation of *pari materia* rules in BITs is not structurally unique. International law is capable of satisfactorily resolving these challenges without the need for any major conceptual changes.

(1968) 17 ICLQ 267, 302–13; I Sinclair, 'Vienna Conference on the Law of Treaties' (1970) 19 ICLQ 47, 60–6.

[45] Schwarzenberger understood rules of interpretation to call for interpretation in accordance with common sense and reasonableness, G Schwarzenberger, 'Myths and Realities of Treaty Interpretation' (1969) 22 Current Legal Problems 205, 216.

5

International Minimum Standard and the Law of Treaties

It will be taken as a given that rules of interpretation provided in VCLT Articles 31 and 32 accurately state contemporary customary international law and thus have to be applied to any treaty interpretation, whether as treaty or customary law.[1] Tribunals have taken such an approach in practice, whether explaining the source of the rule,[2] relying upon VCLT without considering inter-temporal limitations[3] (even when VCLT was not binding as a treaty),[4] or treating customary law and VCLT obligations in interchangeable terms.[5] As one ICSID annulment committee observed,

> Malaysia only became a party to the Convention in 1994, after the conclusion of the BIT: thus the Vienna Convention *qua* treaty does not apply to the BIT (*see* Vienna Convention, Art. 4). But since the norms of interpretation would apply in any event this point is without incidence so far as the Award is concerned.[6]

Since 'the principles set out in the' VCLT 'are familiar to all involved in investment arbitration',[7] the VCLT rules of interpretation provide the best analytical perspective for considering different ways of how the practice relating to fair and equitable treatment, in particular the reliance on *pari materia* rules, could be justified. Without questioning the proposition that the interpreter has to deal with all relevant materials holistically, '[o]ne has to start somewhere'.[8]

[1] *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* [2009] ICJ Rep 213 [47]; *Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ Rep 14 [64]; HWA Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989. Supplement, 2006: Part Three' (2006) 77 BYIL 1, 25–26; A Aust, *Modern Treaty Law and Practice* (2nd edn CUP, Cambridge 2007) 12; R Gardiner, *Treaty Interpretation* (OUP, Oxford 2008) 12–19.

[2] *National Grid v Argentina*, UNCITRAL Case, Decision on Jurisdiction, 20 June 2006 [51]; *Saluka Investment BV v Czech Republic*, UNCITRAL Case, Partial Award, 17 March 2006 15 ICSID Rep 274 [296]; *Canadian Cattlemen for Free Trade v United States of America*, UNCITRAL Case, Award on Jurisdiction, 28 January 2008 [46]; *Desert Line Projects LLC v Yemen*, ICSID Case no ARB/05/17, Award, 6 February 2008 *(2009) 48 ILM 82* [100].

[3] *Siemens A.G. v Argentina*, ICSID Case no ARB/02/8, Award, 6 February 2007 14 ICSID Rep 518 [80]; *ADC Affiliate Limited, ADC & ADMC Management Limited v Hungary*, ICSID Case no ARB/03/16, Award, 2 October 2006 15 ICSID Rep 534 [290].

[4] *Telenor Mobile Communications a.s. v Hungary*, ICSID Case no ARB/04/15, Award, 13 September 2006 [92] (Norway is not a party to the VCLT); *Azurix Corp. v Argentina*, ICSID Case no ARB/01/12, Award, 14 July 2006 14 ICSID Rep 374 [307]; *International Thunderbird Gaming Corporation v Mexico*, UNCITRAL Case, Final Award, 26 January 2006 [91] (the US is not a party to the VCLT).

[5] *LG&E v Argentina*, ICSID Case no ARB/02/1, Decision on Liability, 3 October 2006 (2006) 21 ICSID Rev—Foreign Inv L J 203 [89] (the US is not a party to the VCLT).

[6] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v Chile*, ICSID Case no ARB/01/07, Decision on Annulment, 21 March 2007 13 ICSID Rep 500 fn 69; cf *Award in the Arbitration Regarding the Iron Rhine ('Ijzeren Rijn') Railway between the Kingdom of Belgium and the Kingdom of Netherlands* (2005) 27 RIAA 35 [45].

[7] *Hochtief AG v Argentina*, ICSID Case no ARB/07/13, Decision on Jurisdiction, 24 October 2011 [26].

[8] Gardiner *Treaty Interpretation* (n 1) 162.

The argument will be made in five steps. First, the road(s) not taken are briefly explored: *prima facie* plausible interpretative arguments of fair and equitable treatment that have not been taken up in practice (I). The argument then follows the structure of VCLT in considering different possible reasons for relying on third-party *pari materia* rules in the interpretative process, dealing in turn with Article 31(1) (II), the rest of Article 31 except reliance on general international law (III), and Article 32 (IV). It is argued that none of these arguments can explain the existing practice. Apart from the VCLT, the possible relevance of MFN clauses (V) and special rules of interpretation are considered (VI). The overall thesis is that none of these arguments is capable of providing legal support for the existing and desirable practice, and therefore the solutions have to be sought through customary law (Chapter 6).

I. Fair and equitable treatment and the road(s) not taken[9]

1. Rule 'formulated in a broad and general manner'

The arbitral decisions of the early 2000s interpreting rules on fair and equitable treatment established the broad contours within which the subsequent debate was conducted, including the important structural premise that the customary standard was potentially less demanding than the treaty rule on fair and equitable treatment.[10] Later arbitral decisions have been decided within these terms, taking different views as to whether customary law had evolved to the level of the treaty standard in all or particular circumstances.[11] However, while the State practice and arbitral decisions of the 2000s have gone in a different direction, a plausible interpretative argument may be made about the ordinary meaning of fair and equitable treatment as merely an obligation 'formulated in a broad and general manner'.[12]

VCLT Article 31(1) provides that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. One approach to 'fair and equitable treatment' would simply look at its ordinary meaning in the dictionaries: '"just", "even-handed", "unbiased", "legitimate"'.[13] However, at least according to one (seemingly representative) Tribunal, '[t]o say [that] is quite frankly to state a tautology. Such formulations are not judicially operational in the sense that they lend themselves to being readily applied to complex, concrete investment fact situations.'[14] While perfectly accurate regarding

[9] R Frost, 'The Road not Taken' in R Frost, *Mountain Interval* (Henry Holt and Company, New York 1916).

[10] Particularly *Metalclad Corporation v United States of America*, ICSID Additional Facility Case no ARB(AF)/97/1, Award, 30 August 2000 (2001) 16 ICSID Rev—Foreign Investment L J 168 [74]-[76], [100]; *Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v Estonia*, ICSID Case no ARB/99/2, Award, 25 June 2001 (2002) 17 ICSID Rev—Foreign Investment L J 395 [371]; *Pope & Talbot Inc. v Canada*, UNCITRAL Case, Award on Damages, 31 May 2002 126 ILR 131 [55]–[66]; *Técnicas Medioambientales Tecmed, S.A. v Mexico*, ICSID Additional Facility Case no ARB(AF)/00/02, Award, 29 May 2003 10 ICSID Rep 134 [154].

[11] See Ch 3 nn 253–8.

[12] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* [2008] ICJ Rep 177 [113].

[13] *MTD Equity Sdn. Bhv. and MTD Chile S.A. v Chile*, ICSID Case no ARB/01/07, Award, 25 May 2004 (2005) 44 ILM 91 [113]; *Saluka Investment BV v Czech Republic*, UNCITRAL Case, Partial Award, 17 March 2006 [297].

[14] *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua v Argentina*, ICSID Case no ARB/03/19, Decision on Liability, 30 July 2010 [202].

the problems with making the ordinary meaning 'judicially operational', this argument puts the cart before the normative horse: if the ordinary meaning of a treaty rule is not judicially operational, the *prima facie* implication is that the rule does not impose an obligation of such a character, rather than that there is anything wrong with the technique of ordinary meaning. After all, broad coverage and vague content have always been the defining characteristics of the clause,[15] 'provid[ing] ... commendable elasticity [and] [i]nevitably ... suffer[ing] from the drawbacks of its virtues: a corresponding degree of vagueness and subjectivity'.[16]

The vagueness of the interpretative result does not suggest an error in the interpretative process or the inadequacy of the rules of interpretation. The result can just as well constitute an accurate reflection of the ambiguous content of the rule itself. Leaving *jus cogens* aside, States are entitled to create rules of international law with any content and at any place on a normative spectrum between specificity and vagueness, and the formula of fair and equitable treatment lies at the very outlying border between legal vagueness and non-legal equity. The existence of such rules is not exceptional in international law: for example, in a number of cases dealing with FCN Treaties the ICJ has found that certain rules are 'formulated in a broad and general manner, having an aspirational character' or are only 'such as to throw light on the interpretation of the other Treaty provisions'.[17] In the *Ambatielos* case, Fitzmaurice on behalf of the UK objected to the Greek argument about the 'treatment in accordance with common right, equity, justice, love and friendship and so on', noting in relation to some that they 'are not, in our view, couched in the language of precise obligation at all'.[18] Indeed, in the *Military and Paramilitary Activities in and Against Nicaragua* case, Pellet on behalf of Nicaragua conceded that 'equitable treatment' in the FCN Treaty lacked such precise meaning as national and MFN treatment but argued that it still should, just like amity clauses in general, have at least some legal significance.[19] To say that a rule is 'broad and general' or is not a 'precise obligation at all' (or is 'not judicially operational') does not lead to a manifestly absurd result but is in itself a perfectly legitimate interpretative conclusion.

There is some support in State practice and arbitral decisions for treating 'fair and equitable' in precisely such terms that could form the background of ordinariness for the 1940–1960s drafts and treaties.[20] The nineteenth-century State and arbitral practice

[15] PW Bidwell and W Diebold, 'The United States and the International Trade Organisation' (1949) 27 Intl Conciliation 185, 209–210; C Wilcox, *A Charter for World Trade* (Macmillan Co., New York 1949) 145–147; RR Wilson, *United States Commercial Treaties and International Law* (The Hauser Press, New Orleans 1960) 9.

[16] G Schwarzenberger, 'The Abs-Shawcross Draft Convention on Investment Abroad: A Critical Commentary' (1960) 9 J Public L 147, 153.

[17] *Djibouti* (n 12) [113]; *Oil Platforms (Iran v US)* (Preliminary Objections) [1996] ICJ Rep 803 [31].

[18] *Ambatielos case (Greece v UK)* ICJ Pleadings 406, 412. Since 'justice and equity' was included in provisions spelling out rules on administration of justice, Fitzmaurice did not argue that it was not a 'precise obligation'—as he probably would have done regarding a stand-alone rule of justice and equity (see treaty rules discussed at n 19)—but that it provided only for national treatment, ibid 483. In the subsequent arbitration, the Tribunal seemed to reject the argument that 'equity and fairness' were part of legal reasoning at all, *Ambatielos (Greece/UK)* (1956) 12 RIAA 83, 117, see full quotation at n 66.

[19] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)* (Merits) ICJ Pleadings Volume V 205, generally 196 [18], 205–7. (Iran made a similar argument in *Aerial Incident of 3 July 1988 (Iran v US)* Memorial of Iran, 24 July 1988 182.) The Court 'expresse[d] no opinion' 'as to' whether 'the provision for "equitable treatment" in the Treaty is read as involving an obligation not to kill, wound or kidnap Nicaraguan citizens in Nicaragua', *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)* (Merits) [1986] ICJ Rep 392 [277].

[20] On the establishment of ordinary meaning by reference to treaty materials and cases pre-dating the particular rule, see below II.1. If the materials do not rise to the level of ordinary meaning, in

contained numerous examples where such and similar terms were used in a very loose sense in a variety of legal contexts.[21] The treaty practice of the 1940s and 1950s may also be read to support the non-technical meaning of fair and equitable treatment. In the 1947 Havana Charter of the International Trade Organization, 'just and equitable treatment' served as a framework reference to different types of treaty rules that could be created relating to investors,[22] and during the negotiations States did not argue for a broader technical meaning.[23] When '[fair and] equitable treatment' was first included in the post-War US FCN Treaties relating to investment protection,[24] these Treaties also required fair and equitable treatment as an MFN obligation relating to State trading,[25] continuing the inter-War Commercial and Trade Treaty practice.[26] It seems permissible to interpret obligations in investment law in the context of the identically worded obligation in trade law with a more established pedigree. In the latter setting, fair and equitable treatment was almost invariably applied in a narrow substantive context and spelled out in great detail (showing the degree of legislative intervention necessary to spell out the content of the obligation so as to make it operational). Finally, in the 1956 *Ambatielos* award, the Tribunal considered and rejected the Greek argument that seventeenth-century treaties requiring 'justice and equity' and 'rights and justice' in administration of justice[27] 'can be interpreted as assuring to the beneficiaries of the most-favoured-nation clause a system of "justice", "right" and "equity" different from that for which the municipal law of the State concerned provides':[28]

> The Commission takes the view that to attribute such significance to these provisions would be to strain their meaning. 'Justice', 'right' and 'equity' are not guaranteed by these provisions as rights independent of and superior to positive law, but simply within the framework of the municipal law of the Contracting States. It was not an ideal system of 'justice', 'right' and 'equity' which the signatory Governments intended to assure to their respective nationals; it was the application of their national laws concerning the administration of justice.[29]

The argument for treating fair and equitable treatment as a broad and general clause that (at least without explicit concretization) does not impose specific obligations does not seem to appear in the recent State practice and arbitral decisions. The relevant question is about the legal implications of the consistent failure by States to invoke a *prima facie* plausible interpretative argument. In technical terms, the ordinary meaning (or circumstances of conclusion) exists objectively and is unaffected by failure of invocation by disputing parties, and acquiescence to arguments in terms of subsequent practice would at most apply to treaties actually arbitrated and not all *pari materia* instruments.[30] At the same time, in light of the clear trend of case-by-case elaboration of fair and equitable treatment for a whole decade[31] one would expect States to have expressed their views in some form if *jurisprudence constante* and legal writings had gone in an entirely erroneous direction. The correct answer is not necessarily obvious (and one hopes that States will explicitly test the argument in arbitral proceedings). At the very least this practice

any event they would constitute circumstances of conclusion within the meaning of Article 32 VCLT, and the ambiguity of fair and equitable treatment would satisfy the criterion of Article 32(a) for their introduction.

[21] See Ch 3 nn 190–6.

[22] Havana Charter for an International Trade Organization (adopted on 24 March 1948, not in force), UN Doc E/Conf.2/78 art 72(1)(c)(i), also art 11(2)(a)(i).

[23] See Ch 3 nn 209–18. [24] See Ch 3 nn 233, 240. [25] See Ch 3 n 237.

[26] See Ch 3 nn 202–5. [27] See provisions cited at Ch 3 nn 164–6.

[28] *Ambatielos* (n 18) 109–110.

[29] Ibid 109.

[30] See below II.2 on VCLT Article 31(3)(b). [31] See Part II nn 1–2.

constitutes a strong argument against decisions that extrapolate demanding standards from the formulation of fair and equitable treatment.[32]

2. Rule requiring 'equitable treatment'

When a treaty rule requires States to act in accordance with *jus aequum*,[33] the ordinary meaning itself suggests the possible relevance of equity. The relationship of equity and law may be conceptualized in a number of ways[34] but Prosper Weil's framework of normative density provides a useful analytical perspective for the present purpose.[35] At one end of the spectrum (with the highest normative density), fair and equitable treatment is a rule that requires fairness to be taken into account.[36] At the other (and lowest) end of the spectrum, fair and equitable treatment contains no rule of law other than the requirement to ensure fairness, and there is full freedom for the Tribunals to decide on a case-by-case basis.

Fair and equitable treatment may be situated on a number of places on this spectrum. At the highest normative density, it contains legal principles, distilled from State practice and earlier decisions and applied as relevant factors to determine fairness and equity of conduct (not entirely dissimilar from the law of maritime delimitation).[37] The nineteenth-century practice employed equitable criteria as elements of different substantive and procedural rules in a manner that may support this reading.[38] The case-by-case development of fair and equitable treatment in arbitral decisions broadly follows this paradigm.[39]

The perspective of higher normative density is problematic on at least two levels. In structural terms, both classical and modern equity-based rules usually provide equity with a corrective function of *infra leges*, in fields as diverse as construction of canals,[40] extension of procedural deadlines,[41] calculation of damages,[42] and modification of equidistance lines in delimitation.[43] In the formulation of fair and equitable treatment, equity itself takes the central position without an obvious potentially inequitable legal rule that it could correct (such as equidistance in the law of delimitation). In terms of sources, whether in the determination of content equity overshadows the rule of law or

[32] Eg *Tecmed* Award (n 10) [154].

[33] Schwarzenberger 'Abs-Shawcross Draft Convention' (n 16) 153–5.

[34] See B Cheng, 'Justice and Equity in International Law' (1955) 8 Current Legal Problems 185; C de Visscher, *De l'équité dans le règlement arbitral ou judiciaire des litiges de droit international public* (A Pedone, Paris 1972); AV Lowe, 'The Role of Equity in International Law' (1988–1989) 12 Australian Ybk Intl L 54; HWA Thirlway, 'The Law and Procedure of the International Court of Justice (Part One)' (1989) 60 BYIL 1, 49–62; P Weil, 'L'equité dans la jurisprudence de la Cour Internationale de Justice' in AV Lowe and M Fitzmaurice (eds), *Fifty Years of the International Court of Justice* (CUP, Cambridge 1996); HWA Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989. Supplement, 2005: Parts One and Two' (2005) 76 BYIL 1, 26–35; A Gourgourinis, 'Delineating the Normativity of Equity in International Law' (2009) 11 Intl Community L Rev 327.

[35] P Weil, *The Law of Maritime Delimitation—Reflections* (Grotius Publications Limited, Cambridge 1989) 160–2.

[36] *MTD* Annulment (n 6) [48].

[37] See Part II n 19; *Arbitration between Barbados and the Republic of Trinidad and Tobago* (2006) 27 RIAA 147 [230]–[233]; *Maritime Delimitation in the Black Sea (Romania v Ukraine)* [2009] ICJ Rep 61 [155]–[204].

[38] See Ch 3 nn 190–6. [39] See Part II nn 1–7.

[40] Clayton-Bulwer Treaty (adopted 19 April 1850) 2 Wharton Digest 184 art III.

[41] Notice of Organization (1796) 1 Moore Intl Arbitrations 321.

[42] *Case of the 'William Lee' (US v Peru)* (1863) 4 Moore Intl Arbitrations 3405, 3406; *Piedras Negras Claims (US v Mexico)* (1872) 3 Moore Intl Arbitrations 3035, 3035; *Santos Case (US v Ecuador)* (1897) 2 Moore Intl Arbitrations 1579, 1588.

[43] n 37.

exists within it, it still operates regarding the particular rule in question. Whatever flexibility equity inserts into the process of ascertaining content of the rule, it does not assist with broadening the scope of permissible interpretative materials to rely on interpretation of *pari materia* rules. In other words, while equity may have relevance in framing the inquiry into the materials that are admissible for the interpretation of the particular rule, it does not seem to be relevant in justifying the permissibility of such authorities in the first place.[44]

It should be noted in parenthesis that this problem does not arise if fair and equitable treatment makes a reference to a single body of customary law that may be developed by all the Tribunals. Equity does not change the normal techniques of development of (customary) international law.[45] In the classical law, rules formulated by reference to equity expressed in negative terms (justice denied) were developed through conceptually unremarkable processes of customary law-making;[46] in the contemporary law, the expression of the modern standard in positive terms (fairness and equity provided) could be addressed in similar terms.[47]

Moving further along the spectrum, at a lower normative density the only question is whether 'the conduct in issue is fair and equitable or unfair and inequitable'.[48] The perspective of the arbitral interpreter might be that of an individual and personal emotional disapproval ('shock' and 'surprise').[49] Some Tribunals might even fail to articulate any standard at all, deciding the case on the facts.[50] While not entirely indefensible, the implications of this position are problematic on a number of levels. It would go against the grain of historical law-making in the area—the trend of developing the international standard in the direction of greater normative density, moving from exultations of justice to extrapolation and development of clearer rules of customary and treaty law.[51] If Elihu Root's speech on the international standard is taken as the temporal point

[44] Possibly contra, P-M Dupuy, 'Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law' in P-M Dupuy, E-U Petersmann, and F Francioni (eds), *Human Rights in International Investment Law and Arbitration* (OUP, Oxford 2009) 52. The situation is different in maritime delimitations, where the applicable law is set out in multilateral treaties and customary law that are considered to provide broadly similar rules, making the case-by-case identification of relevant factors unproblematic, *Barbados* (n 37) [223], [229]; *Black Sea* (n 37) [116], [120], [122].

[45] Lowe 'Equity' (n 34) 56–59.

[46] See the very orthodox analysis of State and treaty practice and arbitral and judicial decisions on denial of justice in the leading pre-War treatise, AV Freeman, *The International Responsibility of States for Denial of Justice* (Longmans, Green & Co., London 1938).

[47] The conceptual similarity between the prohibition of arbitrary conduct and the affirmation of fair and equitable treatment was later noted by the US in *ELSI*, quoted at Ch 6 n 49. The mundane character of law-making of rules expressed in the form of justice and fairness in the classic law on the treatment of aliens requires taking the helpfulness of *a priori* extrapolations from jurisprudential statements of justice with a grain of salt, R Kläger, *Fair and Equitable Treatment in International Investment Law* (CUP, Cambridge 2011) Ch 6.

[48] FA Mann, 'British Treaties for the Promotion and Protection of Investments' (1981) 52 BYIL 241, 244; *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v Argentina*, ICSID Case no ARB/97/3, Award, 20 August 2007 [7.4.12].

[49] *Genin* Award (n 10) [371] ('the Tribunal does not regard the license withdrawal as an arbitrary act that violates the Tribunal's "sense of juridical propriety" '); *Pope* Damages (n 10) [64] ('formulation ... perhaps permits a bit less injury to the psyche of the observer'), [68] ('actions ... did shock and outrage the Tribunal'); *Thunderbird* Award (n 4) [200].

[50] *Eastern Sugar B.V. v Czech Republic*, SCC Case no 88/2004, Partial Award, 27 March 2007 [335]; *Tokios Tokelés v Ukraine*, ICSID Case no ARB/01/3, Award, 26 July 2007 [123]; *Plama Consortium Limited v Bulgaria*, ICSID Case no ARB/03/24, Award, 27 August 2008 [175].

[51] RY Jennings, 'State Contracts in International Law' (1961) 37 BYIL 156, 180–1.

of departure,[52] the post-1910 practice decidedly moved away from the framework of indefinable exceptions and in the direction of systematized and increasingly specific principles and rules. To situate equity of fair and equitable treatment at the lower level of density suggests an effective rejection of the last century of development.

The argument would also go against the prevalent practice of States, Tribunals, and writers to identify generally relevant standards from case-by-case developments or require the showing of State practice and *opinio juris*,[53] but certainly not to see '[t]he judge [as] effectively given the task of lawmaker'.[54] The *ad hoc* nature of the equitable results that proved unsatisfactory even for the one-off maritime delimitations should be *a fortiori* inappropriate for identifying the content of a continuously binding obligation regarding multiple actors and situations. Moreover, the lower degree of normative density would be unhelpful outside the formalized dispute settlement. If equities of each particular case provide the only benchmark, States would be hard pressed to *ex ante* formulate generally applicable rules and procedures that would ensure compliance with international obligations. Also, if the density of the law is so low as to cast no normatively perceptible shadow, it will be provide little assistance in the negotiations between investors and States.[55]

The argument of equity, albeit of lower normative density but still within the boundaries of law, may also be approached from the very different perspective of *ex aequo et bono*.[56] To say that an adjudicator is concerned solely about fairness and unfairness of the particular situation and that the conclusion is reached solely by reference to personal disapproval and particular facts, without articulating principles and rules,[57] is to describe a decision *ex aequo et bono*.[58] This argument might be presented as a criticism of blatant misapplication of legal rules;[59] however, it might also mean in positive terms

[52] E Root, 'The Basis of Protection to Citizens Residing Abroad' (1910) 4 ASIL Proceedings 16.

[53] Part II nn 1–7.

[54] E Lauterpacht, *Aspects of the Administration of International Justice* (Grotius Publications Limited, Cambridge 1991) 119.

[55] See the classic analysis, RH Mnookin and L Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 Yale L J 950, particularly 975–6.

[56] D Katsikis, 'Fair and Equitable Treatment as *Ex Aequo et Bono*' (BCL thesis, University of Oxford 2011). On the distinction between equity within the law and *ex aequo et bono* see *North Sea Continental Shelf Cases (Germany/Denmark; Germany/Netherlands)* [1969] ICJ Rep 3 [88]; *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* [1970] ICJ Rep 3, Separate Opinion of President Rivero 54 [36]; *Continental Shelf (Tunisia/Libya)* [1982] ICJ Rep 18 [71]; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/US)* [1984] ICJ Rep 246 [59]; *Continental Shelf (Libya v Malta)* [1985] ICJ Rep 13 [45].

[57] nn 48–50.

[58] M Habicht, 'Le pouvoir du juge international de statuer "ex aequo et bono" ' (1934) 49 Recueil des Cours de l'Académie de Droit International 277. Generally see H Lauterpacht, *The Development of International Law by the International Court* (Stevens & Sons Limited, London 1958) 213; LB Sohn, 'The Function of International Arbitration Today' (1960) 108 Recueil des Cours de l'Académie de Droit International 9, Ch III; Thirlway 1960–1989 (n 34) 50–1. As Abi-Saab stated (albeit in a different context), 'both the language ("it would be unfair") and the stance of the argument, are those of a tribunal judging *ex aequo et bono*', *Abaclat and others v Argentina*, ICSID Case no ARB/07/5, Decision on Jurisdiction and Admissibility, Dissenting Opinion of Abi-Saab, 28 October 2011 [32].

[59] *Judgments of the Administrative Tribunal of the I.L.O. upon Complaints Made against the UNESCO* (Advisory Opinion) [1956] ICJ Rep 77, Dissenting Opinion of Judge Read 143, 153; *Temple of Preah Vihear (Cambodia v Thailand)* (Merits) [1962] ICJ Rep 6, Dissenting Opinion of Judge Spender 101, 131; *Continental Shelf (Tunisia/Libya)* [1982] ICJ Rep 18, Dissenting Opinion of Judge Mosler 114, 114; ibid Dissenting Opinion of Judge Gros 143 [19]; ibid Dissenting Opinion of Judge Ago 157 [1]; ibid Dissenting Opinion of Judge Evensen 278 [12], [14], 319; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/US)* [1984] ICJ Rep 246, Dissenting Opinion of Judge Gros 360 [37]; *Maritime Delimitation and Territorial Questions between Qatar and*

that adjudicators were authorized to decide in precisely such a manner. The first intuitive objection is that *ex aequo et bono* is qualitatively different from rules of law containing equity.[60] All the procedural rules to address the issue require an explicit opt-in by the parties for the application of *ex aequo et bono*,[61] and, in the rare instances when it has been applied, parties have explicitly invoked it.[62] However, while parties have to authorize the adjudicator to decide *ex aequo et bono*, there does not seem to exist a requirement for the use of the specific Latin formula.[63] When the PCIJ in the *Free Zones of Upper Savoy and the District of Gex* (*Free Zones*) case narrowly rejected (by the deciding vote of the President) the French argument that the authority to 'settle... all the questions' included a decision *ex aequo et bono*, it did not suggest that only the specific Latin term could have achieved the effect.[64] If 'fair and equitable treatment' is neither a recognized

Bahrain (Qatar v Bahrain) (Merits) [2001] ICJ Rep 40, Joint Dissenting Opinion of Judges Bedjaoui, Ranjeva and Koroma 145 [8].

[60] *MTD* Annulment (n 6) [48]; *M.C.I. Power Group L.C. and New Turbine, Inc. v Ecuador*, ICSID Case no 03/6, Award, 31 July 2007 [370]; *Azurix Corp. v Argentina*, ICSID Case no ARB/01/12, Decision on the Application of Annulment, 1 September 2009 [136]; CH Schreuer and others, *The ICSID Convention: A Commentary* (2nd edn CUP, Cambridge 2009) 632–5.

[61] Statute for the Permanent Court of International Justice (adopted 16 December 1920, entered into force 20 August 1921) 6 LNTS 389 art 38(2); Charter of the United Nations with the Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS xvi art 38(2); ILC, 'Model Rules on Arbitral Procedure' in *Yearbook of the International Law Commission, 1958, Volume II*, UN Doc A/CN.4/SER.A/1958/Add. 1 1 183 art 10(2); Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1066) 575 UNTS 159 42(3); Arbitration Rules of the United Nations Commission on International Trade Law, UNGA Res 31/98 (15 December 1976), UN Doc A/RES/31/98 33(2); London Court of International Arbitration Arbitration Rules (effective 1 January 1998) <http://www.lcia.org> art 22(4); UNCITRAL Arbitration Rules as revised in 2010, UNGA Res 65/22 (10 January 2011), UN Doc A/RES/65/22 art 35(2); Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (effective 1 January 2010) <http://www.sccinstitute.com/filearchive/3/35894/K4_Skiljedomsregler eng ARB TRYCK_1_100927.pdf> art 22(3); Rules of Arbitration of the International Chamber of Commerce (effective 1 January 2012) <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/> art 21(3); see as a statement of a general principle, *Judgments of the Administrative Tribunal of the I.L.O.* Read (n 59) 150; *Abaclat* Abi-Saab (n 58) [32].

[62] *S.A.R.L. Benvenuti & Bonfant v PRC*, ICSID Case no ARB/77/2, Award, 8 August 1980, 67 ILR 345, 348, 350.

[63] In the drafting of the PCIJ Statute, *ex aequo et bono* was introduced not as a necessary term of art but only to make a clearer distinction between justice within and outside the law, *Free Zones of Upper Savoy and the District of Gex (Second Phase) (France v Switzerland)* (Order) [1930] PCIJ Rep Series A no 24, Observations by Judge Kellog 29, 40–1; *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)* [1993] ICJ Rep 38, Separate Opinion of Judge Weeremantry 211 [57]–[58]; Habicht '"ex aequo et bono"' (n 58) 299–300; O Spiermann, '"Who Attempts Too Much Does Nothing Well": the 1920 Advisory Committee of Jurists and the Statute of the Permanent Court of International Justice' (2002) 73 BYIL 187, 248–9. Opinion was divided whether 'law and equity' clauses authorized decisions *ex aequo et bono*, Habicht '"ex aequo et bono"' (n 58) 344, and at least Nielsen explicitly equated 'justice and equity' clauses with *ex aequo et bono*, *Naomi Russel (US v Mexico)* (1931) 4 RIAA 805, Opinion of Commissioner Nielsen 806, 828–30, particularly 829; similarly *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* [1970] ICJ Rep 3, Separate Opinion of Judge Ammoun 286 [8], [42]. In the *Free Zones* case, France argued at length by reference to arbitral practice that the specific Latin formula was not required, *Free Zones of Upper Savoy and the District of Gex (Second Phase) (France v Switzerland)* PCIJ Rep Series C no 19 34, 62 (Paul-Boncour), particularly 314–19 (Basdevant), and was not substantially challenged on the point by Switzerland, 151–2, 382 (Logoz).

[64] The Court did not find 'a clear and explicit provision to that effect', *Free Zones*, ibid 10. The six dissenting judges disagreed, finding that '[b]y reference [to the Treaty of Versailles] the task of the Court [under the Special Agreement] begins to be clear', ibid Dissenting Opinion of Judges Nyholm, Altamira, Hurst, Yovanovitch, Negulesco and Dreyfus 20, 22. While not without ambiguity, Judge Kellog might have been the only judge to call for the specific Latin terms, *Free Zones* Kellog, ibid 29,

term of art for designating broad and general rules nor makes a reference to customary law,[65] then the third way regarding how the practice of 1930s might be read is as an *ex aequo et bono* authorization (even if expressed in a living rather than dead language). As the PCIJ noted in the *'Société Commerciale de Belgique'* case, certain arguments had been presented from 'precisely the standpoint of fact and of considerations as what would be fair and equitable, as opposed to that of strict law'.[66]

The perspective of *ex aequo et bono* might be helpful from the perspective of the broader structure of investment protection treaties. If fair and equitable treatment has no established or readily identifiable meaning as a term of art, it is the odd rule that does not really belong in the regime that otherwise consists of specific and technical rules with immediately perceptible benchmarks and considerable historical pedigree: expropriation, full protection and security, national treatment, MFN treatment, and umbrella clauses. If fair and equitable treatment really authorizes *ex aequo et bono*, the structural peculiarity would be resolved and the (exclusively) fact-based and unarticulated decisions would not be a reason for criticism but a sign of fulfilment of the mandate of the Tribunal: to decide the disputes in a comprehensive and non-technical manner.

The legal benchmark is whether 'such power... of an absolutely exceptional character' has been granted,[67] and the answer has to be given by interpretation of each particular rule. When treaties link fair and equitable treatment rules with customary law, provide illustrations of the content or formulate them in parallel with other obligations, or when Tribunals articulate and apply legal principles and rules, the 'clear and explicit provision' standard of *Free Zones* is not reached.[68] In other cases, the argument is not indefensible. In policy terms, the grant of unlimited discretion to Tribunals does not seem to go with

40, even though it was only part of his broader *a priori* scepticism about the compatibility of political decision-making with the Court's Statute, ibid 40–3.

[65] See respectively II.1 above and Ch 6 below.

[66] *The 'Société Commerciale de Belgique' (Belgium v Greece)* [1939] PCIJ Series No A/B 78 160, 178, referring to the Greek argument about 'the fair and equitable basis' for an arrangement, ibid 163, 165, 177, derived from its acceptance by creditors in other similar cases, *The 'Société Commerciale de Belgique' (Belgium v Greece)* PCIJ Series C No 87 191, 194 (Youpis on behalf of Greece). The Court earlier noted the Belgium offer to resolve *ex aequo et bono* issues relating to complexities of compliance, *'Société Commerciale de Belgique'* Judgment, ibid 172, so it is plausible to read the language of parties and the Court as expressing the same concerns by using more and less technical terms. State practice used such terms to designate extra-legal considerations, see Ch 3 nn 197–9, especially 'fair and equitable basis' as the way to settle disputes inappropriate for arbitration, Mr Hay, Secretary of State, to General Reyes, special minister of Colombia (1904) 3 Moore Digest 90, 105; or relating to the nature of the negotiations that 'depend entirely upon the will of parties concerned', *'Société Commerciale de Belgique'* Judgment, ibid 177. Nielsen described the 'justice and equity' clauses (similar, in his view, to the PCIJ Statute art 38(2)) as authorizing arbitrators 'to decide any case in accordance with notions of the members as to what may be fair or equitable', *Russel* Nielsen (n 63) 829–30. The only Hague Academy lecture that exclusively addressed the topic described one explanation of *ex aequo et bono* as the authority of the judge to decide 'whether the law is unfair and its application inequitable', Habicht '"ex aequo et bono"' (n 58) 282 (author's translation). The *Ambatielos* Tribunal seemed to conclude (again in response to a Greek argument) that fairness and equity were not legal rules at all: '[i]f it were held, as intimated at the hearing, that considerations of equity and fairness impose upon the State an obligation to make known to an alien opponent all documents that have or may have a bearing on the case, even if they are favourable to the alien, such considerations would be of no avail in the present controversy, which can only be decided on legal grounds', *Ambatielos* (n 18) 117.

[67] *Free Zones* Judgment (n 64) 10.

[68] Ibid. The request to take into account 'accepted trends' is not an authorization to decide *ex aequo et bono*, *Continental Shelf (Tunisia/Libya)* (n 56) [46]. As a Chamber observed, 'reference to the rules of international law and to the '"first paragraph"' of Article 38 obviously excludes the possibility of any decision *ex aequo et bono*', *Land, Island and Maritime Frontier Dispute (El Salvador / Honduras, Nicaragua intervening)* [1992] ICJ Rep 351 [47].

the grain of either State practice or criticisms in other fora. The alternative of linking fair and equitable treatment with custom suggested in Chapter 6 might more accurately capture the contemporary normative sensitivities.

II. Fair and equitable treatment and VCLT Articles 31–32 (except general international law)

Despite the *prima facie* plausibility of textual arguments sketched above, most recent decisions have proceeded on the basis of case-by-case formulation and elaboration of rules and principles, raising a legal challenge of a different nature: how can the arbitral interpretations of different rules of international law be taken into account as admissible materials for the interpretation of the particular treaty rule? This section will consider how reliance on *pari materia* treaty rules could be justified within the boundaries of VCLT Articles 31 and 32 (without relying on general international law), and suggests that the argument is deeply problematic.

1. VCLT Article 31(1)

As a starting point, nothing precludes States from formulating fair and equitable treatment in terms that expressly or implicitly direct the interpreter to arbitral interpretations of *pari materia* rules. However, to the extent that States have taken into account such decisions in their treaty-making and interpretation, their approach has consistently been to reverse, or at least to modify, their rationale substantially.[69] In the few cases where States have relied on case law in formulating treaty rules, it has been taken from other sources and not from investment protection treaties.[70] The apparent unwillingness of States to rely on arbitral interpretations of *pari materia* rules in law-making and their preference for using instead concepts from domestic law or other fields of international law should serve as a caution against arguments for attributing greater normative influence to case law. The argument for interpretative admissibility of *pari materia* third-party treaties could be made in at least three ways: considering the treaty rules as informed by arbitral decisions, as generic terms, or as rules with meaning created by arbitral decisions.

[69] Regarding arbitral interpretation of fair and equitable treatment in the first NAFTA cases, NAFTA FTC interpretation, *Methanex Corporation v US*, UNCITRAL Case, Final Award, 3 August 2005 Part IV 16 ICSID Rep 40 Ch C [21]–[23]; regarding arbitral interpretation of MFN clauses in *Maffezini v Spain*, *National Grid* Jurisdiction (n 2) [85]; A Newcombe and L Paradell, *Law and Practice of International Treaties: Standards of Treatment* (Walter Kluwer Law & Business, The Netherlands 2009) 222–3. The analysis in II.1–2 on ordinary meaning, generic meaning, and subsidiary materials draws upon M Paparinskis, 'Sources of Law and Arbitral Interpretations of *Pari Materia* Investment Protection Rules' in OK Fauchald and A Nollkaemper (eds), *The Practice of International and Nationals Courts and the (De-)Fragmentation of International Law* (Hart Publishing, Oxford 2012).

[70] Some States take the definition of expropriation from the US constitutional law, 2004 Canada Model BIT Annex B.13(1)(b); 2004 US Model BIT Annex B 4(a); 2012 US Model BIT Annex B 4(a); ASEAN Comprehensive Investment Agreement (adopted 26 February 2009, entered into force 29 March 2012) <http://www.aseansec.org/22218.htm> Annex 2, 3; A Newcombe, 'Canada's New Model Foreign Investment Protection Agreement' (2005) 2 Transnational Dispute Management 6–7. The 2007 Norwegian BIT (reportedly abandoned) took the definition of expropriation from Article 1 of Protocol 1 of ECHR, art 6; the commentary emphasizing that these 'standards... are well known through the case law of [the ECtHR]', 2007 Norway Model BIT: Comments on the Model for Future Investment Agreements <http://www.italaw.com/documents/NorwayModel2007-commentary.doc> [4.2.4].

These approaches will be considered in turn and rejected as incapable of providing legal support for the existing practice.

The first way of bringing case law regarding *pari materia* rules within the permissible authorities of interpretation would be to assume that 'the Parties must have had in contemplation at the time when they concluded the second instrument the meaning which had been attributed to like expressions in the earlier instrument'.[71] The ordinary meaning of a treaty term may be sought from materials extrinsic to the particular treaty-making, provided they reflect generally accepted meaning. Apart from dictionaries these materials may include earlier treaties.[72] The meaning in the earlier treaties may also be established through adjudication. Consequently, to the extent that arbitral interpretations of investment protection rules become generally accepted, they could inform the ordinary meaning of terms and therefore implicitly justify their legitimate use in the interpretative process.

The ordinary meaning argument has two logical qualifications. The first qualification is of a temporal character: to conclude a treaty with a certain proposition of ordinariness in mind, the first treaty must already be in existence.[73] The second qualification is of a qualitative character. To imply an assumption of ordinariness in the minds of treaty-makers, the particular issue needs to be both clearly and conclusively settled. The treaties and State practice regarding the Panama and Suez Canals illuminated the rules of the Treaty of Versailles on the Kiel Canal both because they preceded it and because the limited number of similar canals necessarily formed the background of ordinariness against which the treaty-makers operated.[74] The other minority treaties were relevant for interpreting the Albanian obligations because the latter built on matters 'which had already been agreed upon'[75] and 'follow[ed] closely the wording' of earlier treaties.[76]

The authoritative statement regarding the content of particular rules may also be established through case law. In the *Oil Platforms* case, the Court implicitly accepted the 1935 PCIJ *Oscar Chinn* interpretation of 'freedom of commerce' in a 1919 treaty as informing the meaning of 'freedom of trade' in a 1955 treaty.[77] Conversely, in the *Methanex* case, the Tribunal rejected the claimant's argument that WTO approaches to the interpretation of national treatment may be employed in interpreting NAFTA, pointing out that '[t]he drafting parties of NAFTA were fluent in GATT law and incorporated, in very precise ways, the term "like goods" and the GATT provisions relating to it when they wished to do so'.[78] Consequently, other treaties and their judicial interpretation may in

[71] E Lauterpacht, 'The Development of the Law of International Organization by the Decisions of International Tribunals' (1976) 152 Recueil des Cours de l'Académie de Droit International 377, 396.

[72] *Interpretation of the Convention of 1919 concerning Employment of Women during the Night* (Advisory Opinion) [1932] PCIJ Rep Series A/B No 50 365, 374–6; *Rights of Passage over Indian Territory (Portugal v India)* (Merits) [1960] ICJ Rep 6, 38; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)* [2007] ICJ Rep 659 [280]; *Black Sea* (n 37) [133]–[134]. In the classic law, 'any words which may have a customary meaning in treaties, differing from their common signification, must be understood to have that meaning', AP Higgins (ed), *Hall's Treatise on International Law* (8th edn Clarendon Press, Oxford 1924) 390.

[73] J Pauwelyn, 'The Role of Public International Law in the WTO Law: How Far Can We Go?' (2001) 95 AJIL 535, 574; MA Young, 'The WTO's Use of Relevant Rules of International Law: An Analysis of the *Biotech* Case' (2007) 56 ICLQ 907, 918–25.

[74] *S.S. Wimbledon* [1923] PCIJ Series Rep A No 1 16, 25–8.

[75] *Minority Schools in Albania* (Advisory Opinion) [1935] PCIJ Series Rep A/B No 64 4, 16.

[76] Ibid Dissenting Opinion of Judges Hurst, Rostworowski, and Negulesco 24, 27.

[77] *Oil Platforms* Preliminary Objections (n 17) [48]; F Berman, 'Treaty Interpretation in a Judicial Context' (2004) 29 Yale J Intl L 315, 318.

[78] *Methanex* Award (n 69) Part IV—Ch B [30], also [29]–[37]. Conversely, the *Continental Casualty* Tribunal interpreted the non-precluded-measures clause by reference to WTO and GATT practice

principle become relevant interpretative materials in this manner, but the limitation may render the reach of the argument limited in practice.

The temporal and qualitative qualifications seem to render the argument inapplicable to fair and equitable treatment. In temporal terms, the modern controversy about the meaning of the clause arose relatively recently, mostly within the past decade. Since a large part of the existing treaties were already concluded, their ordinary meaning could not be influenced by interpretations taking place after the conclusion. In qualitative terms, the arbitral interpretations are very much unsettled, and in fact this very unsettledness calls for new conceptualizations. Consequently, it would seem that the consensus cannot be implied to form the legal ordinariness either because there was no practice at all on the issue (before the 2000s), or because the practice is too inconsistent (2000s). At most, if a consensus could be identified regarding the general *approach* to interpreting fair and equitable treatment in light of the relevant factors, it could form the background of ordinariness to future treaties. It is unclear whether the rather inconsistent decisions could be read as indicating such consensus, and it would in any event be unhelpful regarding treaties already in existence.

Second, since inter-temporal considerations limit the scope of the ordinary meaning argument, a more promising way of making a similar point would rely on the concept of generic terms.[79] It has been recognized that there are some terms that can be classified as generic,[80] and have 'a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law'.[81] If fair and equitable treatment were such a term, then the interpreter could legitimately follow the evolution of investment protection law to the contemporary standard, probably expressed in arbitral awards regarding *pari materia* rules.

There are at least three objections to this argument. First, it is not clear whether fair and equitable treatment is a generic term. A generic term is 'a known legal term, whose content the Parties expected would change through time'.[82] The conclusion of the treaty for a very long or continuous period[83] and the purpose of the treaty to resolve controversial matters conclusively can support the evolutionary character of the particular term.[84] The most common BIT practice seems to be to have a fixed period of duration of ten years

because it considered that the treaty rule was based on the US Model BIT that was in it turn based on GATT, *Continental Casualty v Argentina,* ICSID Case no ARB/03/9, Award, 5 September 2008 [192]. The ease of the interpretative argument is surprising, particularly since the Tribunal failed to demonstrate empirically either the first or the second instance of normative borrowing other than by pointing to the textual similarity, fn 291. Another questionable aspect is the readiness of the Tribunal to use WTO reports directly in interpreting the particular BIT, without considering the remoteness of interpretative connection, the post-conclusion issuance of most of the reports, and the changes within the GATT and WTO approach itself, N DiMascio and J Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin' (2008) 102 AJIL 48, 62–6.

[79] M Paparinskis, 'Investment Protection Law and Sources of Law: A Critical Look' (2009) 103 ASIL Proceedings 76, 78.

[80] *Aegean Sea Continental Shelf (Greece v Turkey)* (Judgment) [1978] ICJ Rep 3 [77]; WTO, *US: Import Prohibition of Certain Shrimps and Shrimp Products* (6 November 1998) WT/DS58/AB/R [130]; *Iron Rhine* (n 6) [59], [79]-[82]; Thirlway 1989 (n 34) 135–43; R Higgins, 'Time and Law: International Perspectives on a New Problem' (1997) 46 ICLQ 501, 517–19; Thirlway 2005 (n 34) 71–7; HWA Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989. Supplement, 2006: Part Three' (2006) 77 BYIL 1, 67–9; Gardiner *Treaty Interpretation* (n 1) 172–3.

[81] *Navigational and Related Rights* (n 1) [64].

[82] *Kasikili/Sedudu Island (Botswana/Namibia)* (Judgment) [1999] ICJ Rep 1045, Declaration of Judge Higgins 1113 [2].

[83] *Navigational and Related Rights* (n 1) [66].

[84] Ibid [68]; *Iron Rhine* (n 6) [83].

with subsequent continuation in force unless notified otherwise.[85] The implications are unclear: treaties are concluded for a continuous period and the purpose may be to provide the most contemporary level of protection; at the same time, the period is not excessively long and the obligations do not provide for any kind of definite settlement.

The principal difference between fair and equitable treatment and generic terms[86] seems to be that in the latter case there is always a determinable initial meaning that has then evolved.[87] Despite the prominence of fair and equitable treatment rules in treaty practice, it would be complicated to identify a clearly determinable initial meaning that had afterwards undergone a qualitative change. The general caution against replacing contemporary intention with beneficial hindsight should have an *a fortiori* force when States lacked sufficient normative interest to even indicate the content of the rule at the moment of conclusion, let alone implicitly experiment with inter-temporal references.[88] Moreover, since States have at their disposal more certain tools for linking rules to future developments, like reference to customary law[89] or the use of MFN clauses, one should be cautious about implying the less obvious generic term *renvoi*.[90]

Second, the generic term argument is problematic in structural terms. The contemporary meaning is usually sought in the understanding reflected in multilateral treaties or customary law, or otherwise through determinable general consensus. Consequently, even if the term is itself capable of being elaborated through the development of the international legal order, it may be questioned whether bilateral elucidations may ever accurately state the general consensus usually reflected in genuinely multilateral rules. In any event, even if the evolution of generic terms through interpretation of bilateral treaties is not theoretically impossible, one would expect a very high degree of consistency over a lengthy period of time that is not present.

Third, the generic term argument is also problematic in conceptual terms. To treat fair and equitable treatment as a generic term would distort the clear dichotomy between the starting point of the argument requiring contemporary meaning ('territorial status', 'environment', 'natural resources') and conclusion of the argument providing it (customary law or generally accepted multilateral documents). This argument would turn the investment treaty rules into the start and the finish of the analysis, all rules simultaneously being both evolutionary terms requiring contemporary meaning and authoritative statements through which that meaning is provided. In other words, the interpreter would not engage in a one-direction intellectual operation of explaining open-textured classical rules through the lenses of the developments in the international legal order,

[85] C McLachlan, L Shore, and M Weiniger, *International Investment Arbitration: Substantive Principles* (OUP, Oxford 2007) 33–4.

[86] For a contrary (albeit unelaborated) view that the concept of generic terms 'seems tailor-made to support reference to evolving international law to inform the content of... fair and equitable treatment', see B Simma and T Kill, 'Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology' in C Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP, Oxford 2009) 704.

[87] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16 [53]–[54] (expansive rights following from the treaty mandate); *Agean Sea* Judgment (n 80) [77] ('territorial rights' in a reservation not covering continental shelf); *Gabčikovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ Rep 7 [112] (less developed environmental law); *Navigational Rights* (n 1) [71] ('commerce' in a treaty not covering services).

[88] Thirlway 1989 (n 34) 137.

[89] Even though Simma and Kill view the practice of express reference to customary law as supporting their view that fair and equitable treatment is a generic term, it is complicated to see how the use of an explicit customary *renvoi* supports rather than counts against the qualitatively different implied treaty *renvoi,* Simma and Kill 'Harmonizing Investment' (n 86) 704.

[90] *RosInvestCo UK Ltd v Russia,* SCC Case no V 79/2005, Award on Jurisdiction, November 2008 [40].

but rather become part of the ongoing process of the subsequent development itself. The circularity of the argument is qualitatively different from the relatively one-directional generic terms, and would probably be a distortion of the traditional understanding of this concept.

The third argument relates to the broader effect of arbitral decisions. 'That a special jurisprudence is developing from the leading awards in the domain of investment arbitration can only be denied by those determined to close their eyes',[91] and the importance of cases dealing with *pari materia* matters for arbitral reasoning is undeniable in empirical terms.[92] However, apart from the empirical accuracy of the observation, it has been suggested that case law possesses some inherent normative quality, with Tribunals 'subject to compelling contrary grounds [having] a duty to adopt solutions established in a series of consistent cases'.[93] While this may be the most radical version of the argument, case law has been described as a source[94] or as capable of acquiring the character of customary law,[95] or as constituting *jurisprudence contante* to be followed.[96] There certainly are shades of difference between these arguments, but at least *sub silentio* they seem to be underlined by assumptions that the empirical importance leads to or is justified by some normative law-creating considerations.

If this proposition is correct, then situating fair and equitable treatment within the sources framework should not only be unproblematic but almost superfluous. The legal relevance of cases would be a given and the debate would shift to the persuasive force of the argumentation, identification of the rationale, and the possibility of distinguishing between the factual and legal issues in different cases.[97] Vasciannie's study of fair and equitable treatment seemed to hint at such a possibility when he noted that 'difficulties of interpretation may also arise from the fact that the words "fair and equitable treatment", in their plain meaning, do not refer to an established body of law *or* to existing legal precedents'.[98]

De lege lata, it does not seem possible to maintain that arbitral and judicial decisions possess law-creating capacities. Awards are the storehouses from which the content of

[91] J Paulsson, 'International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law' (2006) 3 (5) Transnational Dispute Management 13.

[92] JP Commission, 'Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence' (2007) 24 J Intl Arbitration 129, 129–58; OK Fauchald, 'The Legal Reasoning of ICSID Tribunals: An Empirical Analysis' (2008) 19 EJIL 301, 333–43.

[93] *Saipem S.p.A. v Bangladesh*, ICSID Case no ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007 (2007) 22 ICSID Rev—Foreign Investment L J 100 [67]; *Victor Pey Casado and President Allende Foundation v Chile*, ICSID Case no ARB/98/2, Award, 8 May 2008 [119]; G Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse?' (2007) 24 J Intl Arbitration 129, 373; T-H Cheng, 'Precedent and Control in Investment Treaty Arbitration' (2007) 30 Fordham Intl L J 1014.

[94] *ADF v United States of America*, ICSID Additional Facility Case no ARB(AF)/00/1, Award, 9 January 2003 (2003) 18 ICSID Rev—Foreign Inv L J 195 [184].

[95] *International Thunderbird Gaming Corporation v Mexico*, UNCITRAL Case, Final Award, 26 January 2006, Separate Opinion of Arbitrator Waelde [16].

[96] *SGS Société Générale de Surveillance S.A. v Philippines*, ICSID Cases no ARB/02/6 and ARB/04/08, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004 129 ILR 445 [97]; AK Bjorklund, 'Investment Treaty Arbitral Decisions as *Jurisprudence Constante*' in CB Picker and others (eds), *International Economic Law: State and Future of the Discipline* (Hart Publishing, Oxford 2008).

[97] J Paulsson, 'Awards—and Awards' in AK Bjorklund and others (eds), *Investment Treaty Law: Current Issues III* (BIICL, London 2009) 97–9.

[98] S Vasciannie, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice' (1999) 70 BYIL 99, 103 (emphasis added).

the binding obligations get extracted.[99] While being extremely useful for this purpose, in structural terms awards only illuminate the content of treaties, customary law or general principles. The real question to be asked is about the relevance of the treaties and customary law that have been illuminated in these awards to the particular obligations in question.[100] The adjudicative pronouncements that illuminate the content of specific obligations are relevant for interpretation if and to the extent that the rule of law interpreted is itself relevant for the particular issue (leaving aside the accuracy of the illumination). The point was clearly appreciated in the discussion of the IUSCT, where the distinction was drawn between awards explaining customary law (and therefore having general relevance) and awards explaining the particular treaty (and therefore in principle not having it).[101]

The fact that in formal terms '[international tribunals] state what the law is' does not detract from the enormous practical impact of the awards because '[i]t is of little import whether the pronouncements of the Court are in the nature of evidence or of a source of international law so long as it is clear that in so far as they show what are the rules of international law they are largely identical with it'.[102] As Fitzmaurice famously observed in his contribution to *Symbolae Verzijl*, despite the theoretical limitations of the judgments to the particular dispute between particular States, '[i]n practice, it is obvious that neither the United Kingdom nor any other country could now successfully contest the general *principle* of straight base-lines'.[103] However, the practical influence is limited by the particular rule that is authoritatively explained. As Fitzmaurice added in a footnote, 'decisions turning on the *interpretation* of treaties or other instruments would not always readily lend themselves to this process'.[104] Even if the content of a rule is taken from the award, it still relates to the particular rule, and its broader relevance has to be derived not from its existence but from the relationship of the underlying rules and sources.

The view that judgments have no law-making effect was taken at the drafting of the PCIJ Statute and accurately reflects contemporary law.[105] The fact that the international legal order has experienced important changes during the twentieth century does not suggest a modification to the underlying model of law-making in this regard. Article 38(1) of the ICJ Statute is sufficiently flexible to accommodate situations in which the content of treaty and custom is largely or even exclusively determined through the lenses of judicial decisions. The structurally subsidiary role of judicial decisions does not mean

[99] S Rosenne, *The Law and Procedure of the International Court, 1920–2005* (Martinus Nijhoff, Leiden 2006) 1551.

[100] C McLachlan, 'Investment Treaties and General International Law' (2008) 57 ICLQ 361, 364.

[101] Even if disagreeing whether particular propositions turned on custom or treaty, G Abi-Saab 'Permanent Sovereignty over Natural Resources and Economic Activities' in M Bedjaoui (ed), *International Law: Achievements and Prospects* (UNESCO, Paris 1991) 613; D Magraw, 'The Iran–US Claims Tribunal: Its Contributions to International Law and Practice: Remarks' in *Contemporary International Law Issues: Opportunities at a Time of Momentous Change* (Martinus Nijhoff, Dordrecht 1994) 2–3; J Crook, ibid 6; D Caron, ibid 6–9; M Pellonpää, ibid 13–14; A Mouri, ibid 19–20; CN Brower and JD Brueschke, *The Iran–United States Claims Tribunal* (Martinus Nijhoff, The Hague 1998) 645–8.

[102] Lauterpacht *Development* (n 58) 21; A Pellet, 'Article 38' in A Zimmermann, C Tomuschat, and K Oellers-Frahm (eds), *The Statute of the International Court of Justice: A Commentary* (OUP, Oxford 2006) 789.

[103] G Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law' in *Symbolae Verzijl* (Martinus Nijhoff, The Hague 1958) 170. It is now known that after the *Norwegian Fisheries* judgment, the UK carried out a general re-examination of its territorial sea claims, *Sovereignty over Pedra Branca/Pulau Batu Puten, Middle Rocks and South Ledge (Malaysia/Singapore)* [2008] ICJ Rep 12 [225].

[104] Fitzmaurice, ibid 171 fn 1 (emphasis in the original).

[105] Spierman 'Attempts' (n 63) 212–18; Thirlway 2005 (n 34) 114–17.

that they should also be marginally relevant in the elaboration of rules. Article 38 simply enumerates the tools for determination of content of the rules and leaves open the question as to which of those would be most appropriate at each particular stage of development of the international legal order. Paulsson's point that the *pacti tertii* aspect of treaties and the 'wooliness' of customary law (in the sense that it evolves slowly and is unlikely to give specific answers) mean that lawyers will look for precedents, understates the legal rationale.[106] In practical terms, the lawyers will certainly look for precedents, but in legal terms they will look for precedents not for the precedents' sake but because they would illuminate the content of treaties and customary law.

The position accurately reflecting the traditional approach to sources of law was explained in the *Glamis* case:

> Arbitral awards, Respondent rightly notes, do not constitute State practice and thus cannot create or prove customary international law. They can, however, serve as illustrations of customary international law if they involve an examination of customary international law, as opposed to a treaty-based, or autonomous, interpretation.... the Tribunal notes that it finds two categories of arbitral awards that examine a fair and equitable treatment standard: those that look to define customary international law and those that examine the autonomous language and nuances of the underlying treaty language. Fundamental to this divide is the treaty underlying the dispute: those treaties and free trade agreements, like the NAFTA, that are to be understood by reference to the customary international law minimum standard of treatment necessarily lead their tribunals to analyze custom; while those treaties with fair and equitable treatment clauses that expand upon, or move beyond, customary international law, lead their reviewing tribunals into an analysis of the treaty language and its meaning, as guided by Article 31(1) of the Vienna Convention.[107]

The *Glamis* approach is not necessarily exhaustive. Rules of treaty interpretation are not limited to VCLT Article 31(1), and it is possible (and will be further argued to be the case) that either VCLT Article 31 or 31(3)(c) might require the interpreter of fair and equitable treatment treaty clauses to take into account customary international law. It is also not inconceivable that recent developments in investment protection law have changed the underlying rules of interpretation into more permissive ones (it will be argued, however, that this is not in fact the case). Still, it provides the analytical default position from which the argument about the interpretative relevance of the *pari materia* case law should be taken.

2. VCLT Article 31(2)–(4)

VCLT Article 31(2) explains the meaning of context in Article 31(1). Third-party treaties *prima facie* do not fall under any of these aspects of context, being neither agreements 'between all the parties' nor instruments made by one state and accepted by the other one.[108] This *ratione personae* limitation to matters legally relevant for (at least) the parties to the original treaty is the factor that generally excludes *pari materia* third-party treaties from being relevant in term of Article 31(2). In the *Oil Platforms* case, the ICJ relied on the US State practice regarding other FCN Treaties in interpreting the particular treaty before it.[109] The Court did not explain the interpretative relevance of these materials, but individual judges and legal writers agree that they could not have been addressed as

[106] Paulsson 'Generation of Legal Norms' (n 91) 2–4.

[107] *Glamis Gold Ltd v US*, UNCITRAL Case, Award, 8 June 2009 (2009) 48 ILM 1038 [605], [606].

[108] Gardiner *Treaty Interpretation* (n 1) 212–16.

[109] *Oil Platforms* Preliminary Objections (n 17) [30].

context.[110] Thirlway has suggested that there could be exceptional cases where third-party treaties could constitute context, posing the following hypothetical: 'what if it could, for example, be shown that both parties had the "similar" treaty in view during their negotiations, might it not be deemed part of the context?'[111] It is not entirely clear what having a treaty 'in view' means in practical terms, nor how upon any possible construction it could satisfy either 31(2)(a) or (b), nor, most importantly, how it would be different from *travaux préparatoires* in Article 32. It may be concluded that the Article 31(2) context is unhelpful for bringing *pari materia* treaties within the scope of permissible interpretative materials.[112]

VCLT Article 31(4) provides that '[a] special meaning shall be given to a term if it is established that the parties so intended'. McLachlan has suggested that this provision relates to the phenomenon of treaty development in an iterative process in which many normative elements are shared, the meaning being informed by earlier treaty practice even if not of customary law character.[113] The proposition that treaty drafting is informed by earlier treaty (and other) practice is unremarkable, and investment protection law has demonstrated the changes in treaty practice due to adjudicative interpretations regarding particular rules.[114] However, it is less clear whether the argument can be presented in terms of special meaning.

First, Article 31(4) is not intended to provide ground for the introduction of materials not covered by other provisions of Article 31. It simply strengthens in the particular context the general preference for the ordinariness of meaning stated in Article 31(1). The repeated emphasis on the burden of proof required to come to a different conclusion is included for the benefit of treaty interpreters incapable of otherwise understanding the subtlety of the proposition.[115] Second, the fact that States have some earlier experience with the matter does not exclude the application of the normal rules of treaty interpretation that require identification of whether this experience has been successfully combined into a treaty rule or has remained merely a view of one party not taken up by the other one. Third, Articles 31(1) and 32 seem adequate for addressing the issue without any need of innovative reading of Article 31(4). To the extent that the earlier practice of parties is reflective of the general consensus, it may constitute the ordinary meaning of the terms, and otherwise it could be considered in terms of Article 32 as *travaux préparatoires* or as circumstances of conclusion. In any event, even if McLachlan's argument is accepted, it would not justify reliance on case law in unrelated *pari materia* treaties due to the *ratione temporis* and *ratione personae* limitations to earlier treaties of the particular parties.

VCLT Article 31(3) requires the taking into account of subsequent agreements, subsequent practice, and other applicable rules of international law. While these arguments

[110] Ibid Separate Opinion of Judge Shahabuddeen 822, 836; Dissenting Opinion of Vice-President Schwebel 874, 882; Berman 'Treaty Interpretation' (n 77) 317; Thirlway 2006 (n 1) 74–7.

[111] Thirlway 2006 (n 1) 74.

[112] Article 31(2) may have some relevance in multilateral investment protection law, TW Waelde, 'Interpreting Investment Treaties: Experience and Examples' in C Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP, Oxford 2009) 754–7.

[113] C McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 279, 284; McLachlan and others *International Investment Arbitration* (n 85) 223–4.

[114] KJ Vandevelde, *U.S. International Investment Agreements* (OUP, Oxford 2009) 260, 268–73.

[115] ILC, *Yearbook of the International Law Commission, 1966, Volume I*, UN Doc A/CN.4/SER.A/1966 (Part Two) 198 (Waldock); ILC, 'Draft Articles on the Law of Treaties with Commentaries' in *Yearbook of the International Law Commission, 1966, Volume II*, UN Doc A/CN.4/SER.A/1966/Add.1 112, 222; Gardiner *Treaty Interpretation* (n 1) 291–7.

may play some role in the interpretation of investment protection treaties, the *ratione personae* limitation to the particular parties makes them unhelpful for the purpose of bringing *pari materia* treaties within the permissible interpretative materials. States have agreed on the interpretation of investment protection rules both through pre-established institutions and in an *ad hoc* manner.[116] While no particular form of the agreement is required, the subsequent agreement has to exist 'between the parties', and the legal relevance of developments regarding third-party treaties is therefore excluded. Even though the content of the agreement between the parties could conceivably incorporate meaning taken from *pari materia* cases, there have been no such examples in practice.

The role of subsequent agreement in this context is somewhat unsettled, but it may have relevance in particular circumstances. The central question relates to the permissibility of treating States' pleadings as practice, particularly in light of the duty of counsel to put forward every conceivable argument[117] and the fact-specific nature of many pleadings.[118] However, it is better to treat these objections as directed at the weight to be given to practice and not to its *in limine* admissibility,[119] with clear, consistent, and focused pleadings naturally being given greater importance than ambiguous, contradictory, and confused ones.[120] Another unsettled issue relates to the legal relevance of the home State's silence in terms of acquiescence:

> The failure of one party to a treaty to protest against acts of the other party in which a particular interpretation of the terms of the treaty is clearly asserted affords cogent evidence of the understanding of the parties of their respective rights and obligations under the treaty.[121]

The absence of the home State in the investor–State arbitrations raises complex questions about the degree to which the classical proposition regarding acquiescence is applicable where 'a particular interpretation of the terms of the treaty is clearly asserted' but not against the other State. While the general absence of protests may indicate either general acquiescence or general absence of an expectation of protest, the limited practice suggests that in the absence of very clear assertions on very important matters acquiescence should not be easily implied.[122] However, even if in exceptional circumstances

[116] CH Schreuer and M Weiniger, 'Conversations across Cases—Is There a Doctrine of Precedent in Investment Arbitration?' (eds), *The Oxford Handbook of International Investment Law* (OUP, Oxford 2008) 1200–01; A Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (2010) 104 AJIL 179.

[117] *Enron Corporation & Ponderosa Assets, L.P. v Argentina*, ICSID Case no ARB/01/3, Decision on Jurisdiction, 14 January 2004 11 ICSID Rep 273 [48]; *Sempra Energy International v Argentina*, ICSID Case no ARB/02/16, Decision on Objections to Jurisdiction, 11 May 2005 [146].

[118] Fauchald 'Legal Reasoning' (n 92) 348.

[119] *CCFT* Jurisdiction (n 2) [188]–[189].

[120] Roberts 'Power and Persuasion' (n 116) 217–20. Other relevant factors might include the reaction of the State to the rejection of its argument, differing from lack of any opposition at one end of the spectrum to restatement as a matter of principle, JB Scott, 'United States–Norway Arbitration Award' (1923) 17 AJIL 287, 288, imposition through agreed interpretation, n 69, rejection of the award as rendered *ultra vires*, WM Reisman, 'Has the International Court Exceeded its Jurisdiction?' (1986) 80 AJIL 128, or termination of the applicable substantive or procedural rules (or creation of or attempt to create new rules) due to disagreement about interpretation at the other end of the spectrum, lending a greater weight to the practice.

[121] IC MacGibbon, 'The Scope of Acquiescence in International Law' (1954) 31 BYIL 143, 146; Thirlway 2006 (n 1) 59.

[122] D Bethlehem, 'The Secret Life of International Law' (2012) 1 Cambridge J Intl Comp L 23, 32–3. Switzerland protested the interpretation of *pacta sunt servanda* clause in the *SGS v Pakistan* case, 'Interpretation of Article 11 of the Bilateral Investment Treaty between Switzerland and Pakistan in the light of the decision of the Tribunal on Objections to Jurisdiction of ICSID in Case No ARB/01/12 SGS Société Générale de Surveillance SA versus Islamic Republic of Pakistan' (2004) 1 (3) Transnational Dispute Management. The US protested against the Argentinean interpretation of the ICSID

practice of States regarding another treaty may be used,[123] the *ratione personae* limitation to the practice of the original parties to the treaty excludes third-party-related developments.[124]

VCLT Article 31(3)(c) provides for 'any relevant rules of international law applicable in the relations between the parties' to be taken into account in interpretation.[125] In light of the decentralized investment treaty regime, the questions about required overlap of parties of different multilateral treaties[126] or reliance on treaties by the same States[127] is not directly relevant, since the question is about the possible relevance of third-party treaties.[128] A possibly wider view could follow from a view expressed in the Vienna Conference that such 'method of interpretation should be followed, wherever treaties could be interpreted so as to be consistent with the treaty obligations of parties to it, so as to avoid conflicting treaty obligations'.[129] However, even if a broad view of the meaning of conflict is taken,[130] the international standard is based on the idea of providing at least the minimum protection. Different investment obligations included in treaties with different States (to the extent that the content is not harmonized by MFN clauses) would all point in the same direction and therefore not conflict.[131] The *Oil Platforms* case supports the view that treaties with third States are not relevant in terms of Article 31 VCLT.[132] A rare contrary view is taken by Gardiner, who considers 'common form treaties' (including BITs) and treaties on the same topic as part of his Article 31(3)(c) analysis. However, despite the broad general proposition the instances discussed relate to identification of ordinary meaning or generic meaning, or proof of customary law, and not to general relevance of all *pari materia* treaties *eo ipso*.[133] Consequently, to the extent

Convention in a case on the basis of a Germany–Argentina BIT. It noted the exceptional nature of the unsolicited submission and justified it by the mischaracterization of its position in Argentinean arguments and 'fundamental importance' of the interpretative issue, including in cases brought by US investors, *Siemens A.G. v Argentina*, ICSID Case no ARB/02/8, Letter of US State Department Re Annulment Proceedings, 1 May 2008 1.

[123] A Chamber of the Court appeared to accept in principle that practice of the two parties to the treaty in question regarding an identical term in another treaty to which they also were parties could constitute subsequent practice, *Land, Island and Maritime Frontier Dispute* (n 68) [380].

[124] Z Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (2003) 74 BYIL 151, 167–8.

[125] Study Group of the International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', UN Doc A/CN.4/L.682 206–44. Generally McLachlan 'Systemic Integration' (n 113); D French, 'Treaty Interpretation and the Incorporation of Extraneous Legal Rules' (2006) 55 ICLQ 281; M Paparinskis, 'Investment Treaty Interpretation and Customaty Investment Protection Law: Preliminary Remarks' in C Brown and K Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (CUP, Cambridge 2011) 70–80.

[126] Gardiner *Treaty Interpretation* (n 1) 269–75.

[127] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* [2008] ICJ Rep 177 [112]–[113].

[128] Even the broadest constructions of Article 31(3)(c) that include non-ratified treaties still respect the *ratione personae* limitation to the particular parties, *Proceedings Pursuant to the OSPAR Convention (Ireland v UK)* (Final Award) (2003) 22 RIAA 59, Dissenting Opinion of Arbitrator Griffith 119 [9]–[19].

[129] United Nations Conference on the Law of Treaties, Second Session, UN Doc A/CONF.39/11/Add.1 57 (Fleischhauer on behalf of Germany).

[130] J Pauwelyn, *Conflict of Norms in Public International Law* (CUP, Cambridge 2003) 184–7; E Vranes, *Trade and the Environment: Fundamental Issues in International Law, WTO Law, and Legal Theory* (OUP, Oxford 2009) 9–38; M Paparinskis, 'Equivalent Primary Rules and Differential Secondary Rules: Countermeasures in WTO and Investment Protection Law' in T Broude and Y Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Hart Publishing, Oxford 2011) 274.

[131] Study Group 'Fragmentation' (n 125) [15].

[132] nn 109–10.

[133] Gardiner *Treaty Interpretation* (n 1) 282–4.

that customary law is not resorted to, Article 31(3)(c) is unable to bring *pari materia* treaties within the limits of permissible interpretative materials.

3. VCLT Article 32

The relationship of VCLT Articles 31 and 32 is based on the view that Article 32 contains subsidiary rules of interpretation that are resorted to only when Article 31 'leaves the meaning ambiguous or obscure' or 'leads to a result which is manifestly absurd or unreasonable'. Whatever view one takes about the value and the practical impact of this distinction,[134] the ambiguities of fair and equitable treatment would most likely permit recourse to Article 32 due to the 'ambiguous or obscure' meaning. The argument for treating third-party *pari materia* treaties as relevant interpretative materials in terms of Article 32 could be made in at least five ways.

First, States may consider third-party treaties or cases in the preparation of particular treaties.[135] Nothing distinguishes such materials from any other type of information used in the preparation of the treaties, and its relevance similarly has to be identified by the interpreter. The use of Model BITs in the drafting process of investment protection treaties does not raise any qualitatively new challenges, simply requiring the interpreter to identify the information on the basis of which parties have proceeded (the model treaty, perhaps its commentaries) and the degree to which the final version is based on the model.[136] The fact that one or both States approach the treaty negotiations with a certain experience regarding previous treaties or cases does not *per se* influence the importance to be attributed to such materials. In practice, preparatory materials have not been helpful in interpreting substantive investment protection rules.[137]

Second, assuming that a BIT or a Model BIT can be shown to have been the basis of the rule on fair and equitable treatment, could the cases regarding that BIT or other BITs based on the Model BIT also be brought within Article 32 materials? The starting point of analysis is that *travaux préparatoires* are those materials that are used for the preparation of the treaty.[138] The relevance of case law may be considered against the background of a number of possible situations. States may draft the fair and equitable treatment clause on the basis of a BIT and its case law existing at the moment of conclusion, or on the basis of a Model BIT and case law existing regarding other BITs concluded on its basis. The best way to approach the issue would be to adopt a pragmatic perspective,

[134] SM Schwebel, 'May Preparatory Work be Used to Correct Rather than Confirm the "Clear" Meaning of a Treaty Provision?' in J Makarczyk (ed), *Theory of International Law at the Threshold of the 21st Century, Essays in Honour of Kzrysztof Skubiszewski* (Kluwer Law International, The Hague 1996); J Klabbers, 'International Legal Histories: the Declining Importance of *Travaux Préparatoires* in Treaty Interpretation?' (2003) 50 Netherlands Intl L Rev 267, 285; M Mendelson, 'Comment on "May Preparatory Work be Used to Correct Rather than Confirm the 'Clear' Meaning of a Treaty Provision?"' (2005) 2 (5) Transnational Dispute Management; Thirlway 2006 (n 1) 39.

[135] Thirlway 2006 (n 1) 74.

[136] *Siemens A.G. v Argentina*, ICSID Case no ARB/02/8, Decision on Jurisdiction, 3 August 2004 12 ICSID Rep 174 [106]. The *Continental Casualty* Tribunal took the view that a BIT clause was based on a Model BIT without examining the preparatory process or justifying the reference to Article 32, (n 78) [192].

[137] *Aguas del Tunari S.A. v Bolivia*, ICSID Case no ARB/02/03, Decision on Respondent's Objections to Jurisdiction, 21 October 2005 (2005) 20 ICSID Rev—Foreign Investment L J 450 [274]; McLachlan and others *International Investment Arbitration* (n 85) 224; Newcombe and Paradell *Law and Practice* (n 69) 113; Waelde 'Interpreting Investment Treaties' (n 112) 777–80.

[138] Leaving open the question whether one State's domestic practice during conclusion falls within this concept, *Mondev v US*, ICSID Case no ARB(AF)/99/2, Award, 11 October 2002 (2003) 42 ILM 85 [111]; *Sempra* Jurisdiction (n 117) [381].

identifying the degree to which the other cases and treaties were relied on in the preparation of the particular treaty.

Alternatively, and more importantly in practice, cases interpreting *pari materia* rules in other treaties drafted on the basis of the same Model BIT may be decided after the conclusion. In *ratione temporis* terms, such post-conclusion developments fall outside the limits of preparatory materials. The opposite view would distort the consciously narrow scope and influence of preparatory materials, making an effective *renvoi* to unpredictable post-conclusion developments through case law (as well as through subsequent agreements and practice regarding third-party treaties).

Third, Article 32 is not limited to *travaux préparatoires* but also refers in a non-exhaustive manner to 'circumstances of conclusion', understood as the historical background and broader political, economical, and social considerations underlying the treaty.[139] The generality of the language used and the existence of other supplementary materials not expressly enumerated would permit reliance on various materials under either of these headings, as the Court seems to have done in *Oil Platforms* regarding the US practice relating to other FCN treaties.[140] Still, whatever the *ratione materiae* scope of circumstances of conclusion, the textual emphasis on 'conclusion' imposes a clear *ratione temporis* limitation to the situation at the time of conclusion. Articles 31 and 32 authorize reliance on authorities explicitly, or at least implicitly (through 'any relevant rules' or acquiescence to subsequent practice) reflecting the legal preferences of the particular States. In systemic terms, to interpret 'other' supplementary materials to justify reliance on totally unconnected *pari materia* treaties[141] is less preferable than the *ejusdem generis* reading with the grain of other aspects of VCLT rules of interpretation.

Fourth, it has been suggested that because international judgments and awards are supplementary means for identifying law, they could be addressed in terms of subsidiary sources of interpretation.[142] This argument is problematic in a number of ways. From the perspective of sources, judgments are not sources of law.[143] The result of treaty interpretation would not become a part of the primary rule itself, just as the process of interpretation of customary law or a general principle would not transform an international court's judgment into an element of State practice or domestic rules that were the formal basis for the creation of the primary rule in the first place. From the perspective of interpretation, such an approach would go against the grain of the VCLT regime, similarly to the expansive interpretation of supplementary rules discussed above.[144] In any event, even if awards and judgments are brought within Article 32, there is nothing within the argument that would justify reliance on *pari materia* cases: supplementary materials are only the supplementary materials of the particular treaty.

[139] I Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn Manchester University Press, Manchester 1984) 141; P Reuter, *Introduction au droit des traites* (3rd edn PUF, Paris 1995) 90; Gardiner *Treaty Interpretation* (n 1) 343–5.

[140] *Oil Platforms* Preliminary Objections Schwebel (n 110) 882; Gardiner *Treaty Interpretation* (n 1) 345–6 (circumstances of conclusion); Berman 'Treaty Interpretation' (n 77) 317; Thirlway 2006 (n 1) 76–7; Aust *Modern Treaty Law* (n 1) 248 (another type of supplementary materials).

[141] U Linderfalk, 'Doing the Right Thing for the Right Reason–Why Dynamic or Static Approaches Should be Taken in the Interpretation of Treaties' (2008) 10 Intl Community L Rev 109, 139–40.

[142] *CCFT* Jurisdiction (n 2) [49]–[51], [164]–[169]; *Chevron Corporation and Texaco Petroleum Corporation v Ecuador*, UNCITRAL Case, Interim Award, 1 December 2008 [119]–[124]. The *Azurix* annulment committee accepted *arguendo* that awards fell within VCLT Article 32 without elaborating their place within it, (n 60) [125].

[143] nn 99–107.

[144] A Orakhelashvilli, 'Principles of Treaty Interpretation in the NAFTA Arbitral Award on *Canadian Cattlemen*' (2009) 26 J Intl Arb 159, 167–9.

Fifth, it has been suggested that there is authority in favour of treating *pari materia* treaties as relevant means of interpretation.[145] However, most instances may be comfortably explained within the limits of the traditional approaches to interpretation and their inter-temporal limitations. Some of the cases rely on instruments concluded before the particular treaty, therefore probably treating them as explanatory of the ordinary meaning.[146] Some cases rely in more general terms on the presumed content for the particular type of instrument, probably either in terms of ordinary meaning or as circumstances of the conclusion of treaty.[147] In some cases, the rationale of the decisions may be situated within the VCLT, despite certain looseness of language employed. For example, in the *Rights of Passage over Indian Territory* case, the Court had to determine whether a term *jagir* in a 1779 treaty referred to cession of territory or only a revenue grant, and observed that

> There are several instances on the record of treaties concluded by the Marathas which show that, where a transfer of sovereignty was intended, appropriate and adequate expressions like cession "in perpetuity" or "in perpetual sovereignty" were used.[148]

While some of the 'several instances' took place after 1779[149] and Portugal relied generally on 'the treaties concluded in India at that time',[150] the Indian argument (from which the Court appears to have taken the language in the citation) contrasted the 1779 treaty with an earlier 1776 treaty.[151]

Some cases can be explained in light of the use of the argument by both parties to the treaty, arguably legitimizing recourse to such materials through subsequent practice.[152] Some cases interpret ancient treaties and are decided in pre-VCLT time. Both reasons possibly explain a more flexible approach to interpretation.[153] Finally, the cases relying on treaty

[145] S Schill, *The Multilateralization of International Investment Law* (CUP, Cambridge 2009) 270–3.

[146] nn 71–8; *Rights of Nationals of the United States of America in Morocco (France v US)* (Judgment) [1952] ICJ Rep 176, 189 (the term 'disputes' in an 1836 US–Morocco treaty was interpreted against the background of 17th-century France–Morocco and 18th-century Great Britain–Morocco treaties).

[147] *Factory at Chorzow (Germany v Poland)* (Jurisdiction) [1927] PCIJ Rep Series A No 9 22 (interpretation of an arbitration clause in light of 'the movement in favour of general arbitration' from the end of the 18th century), 23 ('typical arbitration clause').

[148] *Rights of Passage* Judgment (n 72) 38.

[149] *Rights of Passage over the Indian Territory (Portugal v India)* ICJ Pleadings Volume III 479–83 (Rejoinder of Portugal) (treaties of 1775, 1802, 1804).

[150] *Rights of Passage over the Indian Territory (Portugal v India)* ICJ Pleadings Volume IV 367 (da Cruz on behalf of Portugal) (author's translation).

[151] Ibid 731 (Setalvad on behalf of India).

[152] *Oil Platforms* Preliminary Objections (n 18) [48]. Thirlway has criticized the *Nicaragua* Court as 'over-hasty' for relying on the *Tehran Hostages* judgment to justify an interpretation of an identical provision in a treaty concluded before the latter judgment, HWA Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989 (Part Three)' (1991) 62 BYIL 1, 69; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)* (Jurisdiction and Admissibility) [1984] ICJ Rep 392 [81]. However, the Court's conclusion in *Tehran Hostages* (*United States Diplomatic and Consular Staff in Tehran (US v Iran)* [1980] ICJ Rep 3 [52]) was based on the US memorial describing 'identical or nearly identical' treaty practice, *United States Diplomatic and Consular Staff in Tehran (US v Iran)* ICJ Pleadings 236–42, expressly mentioning the treaty with Nicaragua, ibid 236. US pleadings in *Tehran Hostages* and Nicaraguan pleadings in *Nicaragua* regarding the content of the US–Nicaragua treaty may be read to constitute subsequent practice regarding the same treaty, even though performed in different proceedings.

[153] *'Kronprins Gustaf Adolf' (Sweden v US)* (1932) 2 RIAA 1239, 1258–9 (interpreting a 1783 Sweden–US treaty confirmed in 1827 in light of late 18th- and early 19th-century US treaty practice). The oral pleadings reveal a more nuanced picture: Sweden initially relied on treaty practice in general, *Arbitration between the United States and Sweden under Special Agreement of 17 December 1930: the 'Kronprins Gustaf Adolf' and the 'Pacific': Oral Arguments* (Volume I, Government Printing Office, Washington 1934) 108–9, 121–7 (Uden), 133, 138–42 (Acheson), while the US inquired 'what was the law in that field in 1783 and 1827', ibid 587 (Hunt) and expressly addressed treaties concluded up to 1827, ibid 611, 613, 614–24 (Hunt). Later in the pleadings, Sweden narrowed its position, 'turn[ing] to the treaties with France and Prussia, which were made just before and just after this treaty with Sweden, because they throw a great deal of light' on interpretation, ibid Volume II 1257 (Acheson). Possibly also the *Rights of Passage* Judgment (n 72), on the greater flexibility of ancient law of treaties in this case, Thirlway 1989 (n 34) 130–1; HWA Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989 (Part Four)' (1992) 62 BYIL 1, 19–20.

practice posterior to the particular treaty that cannot be clearly explained in terms of any of the recognized interpretative approaches represent only a minority view.[154] It may be concluded that the traditional understanding of Articles 31 and 32 does not permit recourse to unrelated *pari materia* treaties, and to the extent that the interpreter does not resort to underlying customary law, the textual similarity of the clauses is not a sufficient reason for reaching identical interpretative conclusions.[155] *De lege ferenda*, it may be worthwhile to develop the 'other' supplementary means so as to permit recourse to post-conclusion case law regarding identical rules on the basis of the same Model BIT, combining elements of subsequent practice and preparatory materials.[156] *De lege lata*, the examples of supplementary materials expressly provided for strongly suggest an inter-temporal limitation, and the unwillingness of States and Tribunals to elaborate even 'circumstances of conclusion' should suggest an *a fortiori* caution regarding more expansive elucidations.

III. MFN Clauses

Most investment protection treaties include MFN clauses, requiring the grant to the particular State of the most favoured treatment granted to any other State.[157] While the application of MFN clauses to procedural rules has been uneven,[158] even quite

[154] In the *ELSI* case, only Judge Oda relied on the US treaty practice posterior to the US–Italy FCN Treaty, *Elettronica Sicula S.p.A. (ELSI) (US v Italy)* [1989] ICJ Rep 15, Separate Opinion of Judge Oda 83, 87–8, 90–1. Similarly, in the early *North Atlantic Coast Fisheries* case, where an 1818 Great Britain–US treaty had to be interpreted, the dissenting arbitrator Drago considered that post-1818 British treaties 'may [evolve] the right interpretation' (1910) 9 RIAA 203, 206; while the majority used these treaties only to make *de lege ferenda* policy recommendations: *North Atlantic Coast Fisheries (GB v US)* (1910) 9 RIAA 173, 199. In investment treaty arbitration, some Tribunals have relied on the trends of treaty practice in interpretation (particularly in the earlier cases relating to MFN clauses), *Maffezini v Spain*, ICSID Case no ARB/02/1, Decision on Jurisdiction, 25 January 2000 (2001) 16 ICSID Rev—Foreign Investment L J 207 [58]–[61]; *Telenor* Award (n 4) [96]; *Vladimir Berschader and Moïse Berschader v Russia*, SCC Case no 080/2004, Award, 21 April 2006 16 ICSID Rep 467 [203]–[205]. However, the majority of cases reject the legal relevance of such considerations, *Plama Consortium Limited v Bulgaria*, ICSID Case no ARB/03/24, Decision on Jurisdiction, 8 February 2005 (2005) 20 ICSID Rev—Foreign Investment L J 262 [195]–[196]; *Aguas del Tunari* Jurisdiction (n 137) [266]; *Berschader*, ibid Separate Opinion of Weiler 16 ICSID Rep 512 [24]; *Czech Republic v European Media Ventures*, SA 2007 EWHC 2851 (Comm) [24]–[30], [31]; *RosInvestCo* Jurisdiction (n 90) [38]; cf Z Douglas, *The International Law of Investment Claims* (CUP, Cambridge 2009) 250–5.

[155] *Mox Plant Case (Ireland v UK)* (Provisional Measures, Order of 3 December 2001) <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/Order.03.12.01.E.pdf> [51].

[156] The Swiss protest regarding the interpretation of *pacta sunt servanda* stated that '*such a clause forms*, in more or less the same wording, *part of virtually every BIT concluded by Switzerland* and of many investment treaties found all over the globe.... The Swiss authorities... urge all parties concerned to take these views into consideration when examining *cases that imply a provision similar* to Article 11 of the BIT Switzerland–Pakistan', (n 122) 4, 5 (emphasis added). In *'Kronprins Gustaf Adolf'*, Sweden noted that the other treaties it referred to 'were made upon the Congressional draft as the Swedish treaty', *Gustaf Adolf* Pleadings (n 153) 1258 (Acheson).

[157] Ch 4; P Acconci, 'Most-Favoured-Nation Treatment' in P Muchlinski, F Ortino, and CH Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP, Oxford 2008).

[158] McLachlan and others *International Investment Arbitration* (n 85) 254–7; Newcombe and Paradell *Law and Practice* (n 69) 205–22; see also M Paparinskis, 'MFN Clauses and International Dispute Settlement: Moving Beyond *Maffezini* and *Plama*?' (2011) 26 (2) ICSID Rev—Foreign Investment L J 14.

far-reaching incorporation of substantive rules has been carried out in an uncontroversial manner.[159] If MFN clauses could be used to harmonize the arbitral interpretations on fair and equitable treatment, then the earlier analysis of the rules of interpretation would become superfluous in practice: even though the relevance of *pari materia* case law would not follow from the interpretation of the clause itself, the operation of the MFN clause would ensure the same result. Indeed, were that possible, a more favourable interpretation would simultaneously spread to all investment treaties having MFN clauses (the more favourable interpretation of a Sarmatian–Patagonian BIT would be incorporated in all Sarmatian and Patagonian investment treaties having MFN clauses, and then in all investment treaties of those States having MFN clauses, etc.). However, even though MFN clauses could have some effect even when both treaties already have the particular rule, the argument does not seem to be applicable to the case-by-case elucidation of fair and equitable treatment.

First, there is no reason of principle why an MFN clause could not apply to a substantive rule that already exists within the treaty. Reuter has explained the operation of MFN clauses as identifying the content of the State's obligations by use of a variable parameter of the State's obligations in other respects.[160] The criterion is the more or less favourable nature of these obligations, and unless the MFN clause specifically provides otherwise there are no implied exceptions or limitations to this argument.

MFN clauses may be applied to substantive rules in a number of ways. The easiest situation is where the treaty lacks the particular substantive rule, and the MFN clause brings it within the treaty. The same approach should be applied in situations where the more favourable aspect is not expressed in terms of a separate provision, like when the scope of a provision is subject to exceptions (for example, national treatment does not apply to a particular industry), lacks additional criteria (for example, expropriation with no protection from discrimination),[161] or the content of a provision is more detailed (for example, specific examples of what is fair and equitable treatment). While it may be more complicated to apply the criterion of favourability within the limits of one provision, there is no reason of principle why the legal argument should not be applicable. The scope of a rule may coincide with the scope of a provision, but it may also be narrower or broader than it.

Second, while MFN clauses are applicable to incorporate more favourable substantive rules in general and more favourable parts of substantive rules in particular, they do not seem easily applicable to criteria developed by case law. The criterion of 'favourability' can be applied only if matter can be compared on the spectrum of greater and lesser favourability.[162] If the absence of, for example, protection from discrimination

[159] *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v Kazakhstan*, ICSID Case no ARB/05/16, Award, 29 July 2008 [575]; R Dolzer and CH Schreuer, *Principles of International Investment Law* (OUP, Oxford 2008) 190–1.

[160] Reuter *Introduction* (n 139) 98.

[161] Considering the question solely from the treaty law perspective and leaving aside the controversial question about MFN clauses and customary law, Ch 4 n 34; *Renta 4 S.V.S.A. and others v Russia*, SCC Case no V 24/2007, Award on Preliminary Objections, 20 March 2009 [108].

[162] Favourable is 'attended with advantage or convenience', *Oxford English Dictionary* (Volume V, 2nd edn Clarendon Press, Oxford 1989) 774–5; the first meaning of 'advantage' is 'superior position', ibid Volume I 184; and 'superior' is '[i]n a positive or absolute sense (admitting comparison with *more* and *most*): Supereminent in degree, amount, or (most commonly) quality; surpassing the generality of its class or kind', ibid Volume XVII 229; cf *Berschader* Weiler (n 154) [22]; *ICS Inspection and Control Services Limited (United Kingdom) v Argentina*, PCA Case no 2010-9, Award on Jurisdiction, 10 February 2012 [318]–[325]; Paparinskis, 'MFN Clauses and International Dispute Settlement' (n 158) 47–56.

in general or discrimination in a particular *ratione materiae* or *loci* context, or specific elaboration of this protection can be conceptualized in terms of lesser favourability, the contested and closely interrelated criteria of fair and equitable treatment do not permit such clear distinctions.

Criteria of form may both require greater transparency from the State and impose a greater duty of due diligence on the reasonable investor, procedural guarantees may require the creation of an effective regime for access to justice and disadvantage the investor who has not used it, and the contextual balancing of the whole conduct makes clear distinctions even more complicated to make.[163] It would seem that the contested nature of the existence, content, and relationship between the criteria precludes their meaningful comparison in terms of greater and lesser favourability, and therefore also their incorporation through MFN clauses. Inapplicability of MFN clauses to case law would be in line with the approach of Venezuela–Great Britain[164] and Venezuela–Italy Commissions, rejecting the claims for incorporation of the more favourable approaches to responsibility for the conduct of insurrectionists taken by the French and German Commissions.[165] Consequently, even though it should be possible to treat more detailed rules on fair and equitable treatment on the scale of favourability, the argument cannot be applied to the contemporary case-by-case developments through case law.

IV. Special Rules of Interpretation

The law of treaty interpretation, as traditionally understood, does not seem to authorize *pari materia* case law as permissible means of interpretation. However, this proposition merely moves the inquiry to the next level to consider whether new rules of interpretation have emerged or been created. The MFN clause debate shows how the interpretative arguments may also be made in terms of special rules of interpretation, invoking the historical, structural, substantive, or other peculiarity of the particular rules.[166] The arguments for special rules of interpretation may also be made regarding investment protection law. First, the argument could be made within the traditional terms, suggesting that in the particular circumstances the general law is inapplicable because of acquiescence or estoppel (1).[167] Second, the argument could acknowledge the validity

[163] *GAMI Investments v Mexico*, UNCITRAL Case, Final Award, 15 November 2004 13 ICSID Rep 147 [97].

[164] *Aroa Mines (Limited) Claim—Supplementary Claim (Great Britain v Venezuela)* (1903) 9 RIAA 402, Opinion of Commissioner Grisante 406, 407; Opinion of Umpire Plumley 408, 443.

[165] See a summary of conflicting decisions in Paparinskis 'Equivalent Primary Rules' (n 130) 260. As Ralston observed, '[r]ules for the settlement of prior disputes, which die with the Commission acting under them, accord nothing partaking of "favored-nation" treatment', and would be liable to cause substantive and procedural confusion', *Sambiaggio case (Italy v Venezuela)* (1903) 10 RIAA 499, 522–3. The point was developed by Commissioner Zuloaga in a later case: 'It is difficult to determine which is the nation having the most favored claimants in these mixed commissions.... In some, the responsibility of the Government for the acts of revolutionists has not been admitted, while admitting its responsibility for the acts of its agents; in others, the Government has been held accountable for the acts of revolutionists, but not for the acts of its agents. Again, interest has been allowed in some commissions, and not in others. England has presented no revolutionary claims, yet it has a protocol similar to the Italian. By what criterion is it possible to determine which is the most favored nation in carrying out the provisions of the various protocols?', *Guastini case (Italy v Venezuela)* (1902) 10 RIAA 561, Opinion of Commissioner Zuloaga 575, 576.

[166] Ch 4 nn 8–26.

[167] AV Lowe, 'Comments on Chapters 16 and 17' in M Byers and G Nolte (eds), *United States Hegemony and the Foundations of International Law* (CUP, Cambridge 2003) 478.

of the restrictive general rule in the contemporary legal order but attempt to explain the practice through the prism of the more flexible pre-VCLT law (2). Third, the validity of VCLT as providing the general rule could be challenged directly (3). These arguments will be addressed in the order of increasing challenge for the traditional approaches.

1. Acquiescence and estoppel

In the MFN clause debates, special interpretative approaches were justified by the particular legal relationships between the parties.[168] In the context of fair and equitable treatment and investment protection law, a similar argument could be made by reference to acquiescence and estoppel. The ICJ has explained the concept of acquiescence in the following terms:

> The absence of reaction may well amount to acquiescence. The concept of acquiescence 'is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent...'.... That is to say, silence may also speak, but only if the conduct of the other State calls for a response.[169]

Acquiescence may play some limited role in investment arbitration in terms of subsequent practice and Article 31(3)(b).[170] The key question is whether 'the conduct of the other State calls for a response'; the absence of a clear benchmark against which to judge silence leads to it being read either as general consensus or (more persuasively) as a lack of obligation and expectation of protest in the first place. There are two ways in which the argument of acquiescence could be made that would go beyond the strict limits of VCLT.

First, in the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (Namibia)* advisory opinion, the ICJ took the view that

> the proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention as not constituting a bar to the adoption of resolution.[171]

The precise rationale of this argument is somewhat contested,[172] but what the Court seemed to be saying is that the failure of the members of the Council and other members of the United Nations to challenge the procedural impropriety of the practice led to the reinterpretation of the underlying rule in line with the practice. More generally, *Namibia* may be suggesting that the failure of States to protest against a particular legal position regarding the treaty may lead to its acceptance as correct even if States themselves (as non-members of the SC) could not have directly challenged the practice.[173]

To transpose this argument to investment arbitration and to extend the reasoning regarding SC to investment Tribunals, the failure of treaty parties to protest case law

[168] Ch 4 nn 8–26.

[169] *Pedra Branca* (n 103) [121] (references omitted); generally MG Kohen, *Possession contestée et souveraineté territoriale* (Presses Universitaires de France, Paris 1997) 281–312.

[170] nn 121–4. [171] *Legal Consequences* (n 87) 22.

[172] The Court's reasoning may be read either in terms of VCLT Article 31(3)(b), Sinclair *Vienna Convention* (n 139) 137–8; Gardiner *Treaty Interpretation* (n 1) 245; or in terms of customary law, HWA Thirlway, 'The Law and Procedure of the International Court of Justice (Part Two)' (1990) 60 BYIL 1, 75–9.

[173] To the extent that *Namibia* is read as relying on customary law, the concept of persistent objections may be relevant, D Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (OUP, Oxford 2005) 115–16.

'consistently and uniformly' interpreting a particular rule 'over a long period of time' may constitute acquiescence in the correctness of this case law. The argument would have the greatest force when States have *ex ante* created a particular procedural regime for expressing their disapproval and have showed their willingness to use it in practice. In NAFTA, the existence of the FTC and Article 1128 right of intervention, and the readiness of States to employ these procedures in expressing their disapproval could result in the absence of protest against a consistent line of cases being treated as acquiescence. Paradoxically, it seems that the greater willingness of NAFTA Parties to engage in institutional reinterpretation makes the acquiescence argument stronger than it would have been otherwise. Still, the *ratione materiae* and *personae* limits of the argument to the particular treaty, particular States, and particular case law do not permit its use to legitimize any *pari materia* case law and, even in the context of NAFTA Article 1105, has to be addressed through the lenses of customary law.[174]

Second, it may be argued that 'the absence of reaction' to *pari materia* case law could signify acquiescence even if the case law is not directly relevant for the interpretation of the particular rules. However, silence speaks 'only if the conduct of the other State calls for a response', and in the absence of direct legal relevance for the particular rule it does not seem that a response is required. The empirical evidence about the reliance of Tribunals on *pari materia* case law[175] explains criticisms of such case law in the process of law-making and reinterpretation as being made *ex abundanti cautela*.[176] The furthest that the argument can be taken (most likely *de lege ferenda*) would be to say that identical rules on the basis of Model BITs could become relevant by virtue of arguments combining elements of preparatory materials and subsequent practice. However, even in such cases the argument would be *ratione materiae* limited to treaties concluded on such basis, and would not provide a general authority to rely on any *pari materia* rules.[177]

Acquiescence is closely linked to estoppel,[178] and if acquiescence operates as tacit consent then estoppel has the slightly different effect of 'prevent[ing] an assertion of what might in fact be *true*'[179] through making a clear and voluntary representation that is relied by the other party to its detriment.[180] Treaty is one of the forms of estoppel,[181] and estoppel probably operates regarding all aspects of law of treaties (except absolute nullity),[182] including the rules of interpretation.[183]

Still, the role of estoppel in broadening the scope of permissible interpretative authorities seems fairly limited. At most, if a State makes a representation regarding a particular treaty rule (for example, referring in its pleadings to the meaning that it attributes to the rule in its *pari materia* treaties), then the position of other treaty parties would relatively worsen if they agree with this position and therefore decide not to engage in its formal confirmation. In such a situation, the estoppel could arguably preclude the first State

[174] n 69. [175] n 92.

[176] n 69; see the US acknowledgment that 'it would not normally seek to make an unsolicited submission' even when it related to the same treaty rule in dispute, *Siemens A.G.* (n 122) 1.

[177] n 156.

[178] I Sinclair, 'Estoppel and Acquiescence' in M Fitzmaurice and V Lowe (eds), *Fifty Years of the International Court of Justice* (CUP, Cambridge 1996) 120.

[179] *Temple of Preah Vihear (Cambodia v Thailand)* (Merits) [1962] ICJ Rep 6, Separate Opinion of Judge Fitzmaurice 52, 63 (emphasis in the original).

[180] DW Bowett, 'Estoppel before International Tribunals and its Relation to Acquiescence' (1957) 33 BYIL 176, 188–94; R Kolb, *La bonne foi en droit international public* (Presses Universitaires de France, Paris 2000) 357–93; Kohen *Possession contestée* (n 169) 355–6.

[181] Bowett, ibid 181–3. [182] Sinclair *Vienna Convention* (n 139) 168.

[183] A McNair, *The Law of Treaties* (Clarendon Press, Oxford 1961) 485–9.

from changing its position.[184] However, this rule would address only very specific and narrow situations even regarding treaty parties, and in any event might be articulated in the more orthodox terms of subsequent practice or agreement. Regarding practice relating to third-party treaties and estoppel, McNair's view that 'principle would appear to be opposed to any such doctrine' seems correct for contemporary law as well.[185] To conclude, the role of acquiescence and estoppel in sanctioning the use of additional interpretative materials seems fairly limited, in particular because 'the conduct of other States' rarely calls for a response or reaction, and therefore cannot justify general reliance on *pari materia* cases.

2. Pre-VCLT rules of interpretation

In the *US Nationals* case, US conceded that international law contemporary to adjudication did not permanently incorporate rules from third-party treaties. However, it also argued that it was only the modern approach and therefore could not be applied to the interpretation of pre-modern rules created against a different legal background.[186] In the context of fair and equitable treatment and investment protection law, a similar argument could be made by reference to pre-VCLT rules of interpretation.

First, as Arbitrator Huber stated in the *Island of Palmas* case, 'a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time such a dispute in regard to it arises or falls to be settled'.[187] A treaty is a juridical fact in the meaning of the inter-temporal principle, and the principle of contemporaneous interpretation directs the attention of the interpreter in the first instance at the meaning attributed to treaties at the time of their conclusion.[188] The view that 'the starting point of any process of interpretation and application for dealing with the treaty is the situation prevailing at the time when the treaty was made' has been taken both by Greig, one of the few authors to directly address inter-temporality and rules of interpretation,[189] and Yasseen, Chairman of the Drafting Committee at the Vienna Conference.[190] While the moment of interpretation is critical, its importance lies not in the application of international law of the time but in the fact that the existence of subsequent agreement and practice and the evolution of generic terms and customary law are identified at that point.[191]

[184] In the *Nicaragua* case, the US maintained the same position regarding the unilateral seizing of the Court that it had put forward in the *Tehran Hostages*, also regarding the US–Nicaragua treaty. However, had it changed the position, and had Nicaragua been able to demonstrate that the *Tehran Hostages* pleadings precluded it from seeking express confirmation, estoppel could apply, n 152; on the possibility to apply estoppel to legal issues, Kolb *La bonne foi* (n 180) 361–3.

[185] McNair 1961 (n 183) 489.

[186] *Rights of Nationals of the United States of America in Morocco (France v US)* ICJ Pleadings Volume I 372.

[187] *Island of Palmas case (Netherlands v US)* (1928) 2 RIAA 829, 845.

[188] *US Nationals* Judgment (n 146) 185–7; *Rights of Passage* Judgment (n 72) 37; G Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951–4: Treaty Interpretation and Other Treaty Points' (1957) 33 British Ybk Int L 203, 212; P Tavernier, *Recherches sur l'application dans le temps des actes et des règles en droit international public* (L.G.D.J., Paris 1970) 129–31; Higgins 'Time and Law' (n 80) 515–19; Thirlway 2006 (n 1) 65.

[189] D Greig, *Intertemporality and the Law of Treaties* (BIICL, London 2001) 138.

[190] MK Yasseen, 'L'interprétation des traités d'après la convention Vienne sur le droit des traités' (1976) 151 Recueil des Cours de l'Académie de Droit International 1, 64.

[191] R Higgins, 'Some Observations on the Inter-Temporal Rule in International Law' in J Makarczyk (ed), *Theory of International Law at the Treshold of the 21st Century, Essays in Honour of Krzysztof Skubiszewski* (Kluwer Law International, The Hague 1996) 174–81; Greig *Intertemporality* (n 189) 143.

Second, the inter-temporal principle applies both to the primary rules of international law and more broadly to the law of treaties (and other sources) framework within which they are created. In *Island of Palmas*, Arbitrator Huber drew the distinction between the creation of rights, on the one hand, and the existence and continued manifestation of the rights, on the other.[192] The benchmark against which the legal implications of the States' conduct are tested evolves over time. In the law of territorial title, emergence of additional criteria for the creation of title would not affect the existence of an already existing title.[193]

The same approach should be applied to the evolving law of treaties. For example, the ancient law of treaties imposed fewer formal requirements regarding the conclusion of treaties, and therefore informal agreements that might not qualify as treaties in contemporary law can still be recognized as valid by reference to the law of treaties at the time of their creation.[194] *Mutatis mutandis*, to the extent that the rules of treaty interpretation can be demonstrated as having been evolved, the treaty interpretation would need to be carried out by reference to the rules of interpretation at the time of conclusion and not at the time of interpretation of the treaty.

Third, to identify the rules of interpretation that need to be applied, it is necessary to address the relationship of VCLT rules to customary law. The three models of relationship between treaty and custom are well known: a treaty may codify, crystallize, or give rise to customary international law.[195] The VCLT came into force as a treaty in 1980. However, to treat this year as conclusive for the creation of analogous custom[196] would ignore the nuanced approach to the VCLT in the settlement of international disputes.[197] In the Court's only investment treaty case, the 1989 *Elettronica Sicula S.p.A.* judgment,[198] the VCLT was not relied on, the Court merely noting (without approving) the fact that Italy had invoked VCLT Article 33.[199] The caution is particularly evident against the background of the agreement by both the US[200] and Italy that the VCLT

[192] *Palmas* (n 187) 845.

[193] Kohen *Possession contestée* (n 169) 183–90, although see the classic criticism in PC Jessup, 'The Palmas Island Arbitration' (1928) 22 AJIL 735, 735–40.

[194] n 153.

[195] RR Baxter, 'Treaties and Custom' (1970) 129 Recueil des Cours de l'Académie de Droit International 25, 57–74; O Schachter, 'Entangled Treaty and Custom' in Y Dinstein (ed), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Martinus Nijhoff, Dordrecht 1989) 718; M Mendelson, 'The Formation of Customary International Law' (1998) 272 Recueil des Cours de l'Académie de Droit International 155, 294–346; Y Dinstein, 'The Interaction between Customary International Law and Treaties' (2006) 322 Recueil des Cours de l'Académie de Droit International 243, 371–6.

[196] *Iron Rhine* (n 6) [45].

[197] ST Bernárdez, 'Interpretation of Treaties by the International Court of Justice Following the Adoption of the 1969 Vienna Convention on the Law of Treaties' in *Liber Amicorum: Professor Ignaz Seidl-Hohenveldern* (Kluwer Law International, The Hague 1998) 721–48.

[198] P Juillard, 'L'arrêt de la Court Internationale de Justice (Chambre) du 20 juillet 1989 dans l'affair de l'Elettronica Sicula (Etats-Unis c. Italie), procès sur un traité, ou procès d'un traité?' (1989) 35 Annuaire Français de Droit International 276; B Stern, 'La protection diplomatique des investissements internationaux: de Barcelona Traction à Elettronica Sicula ou les glissements progressifs de l'analyse' (1990) 117 Journal du droit international 897; FA Mann, 'Foreign Investment in the International Court of Justice: The *ELSI* Case' (1992) 86 AJIL 92.

[199] *Elettronica Sicula S.p.A. (ELSI) (US v Italy)* [1989] ICJ Rep 15 [118].

[200] *Elettronica Sicula S.p.A. (ELSI) (US v Italy)* ICJ Pleadings Volume I 76 (Memorial of the US); *Elettronica Sicula S.p.A. (ELSI) (US v Italy)* ICJ Pleadings Volume II 379, 389 (Reply of the US); *Elettronica Sicula S.p.A. (ELSI) (US v Italy)* ICJ Pleadings Volume III 95 (Gardner on behalf of the US).

reflected the customary law of interpretation,[201] noted by Judge Schwebel.[202] Only in the mid-1990s did the Court start to endorse expressly the customary law nature of VCLT.[203] To the extent that this caution accurately reflects the influence of VCLT rules of interpretation on customary law, the interpretation of pre-1990s treaties could be conducted on the basis of VCLT only to the extent that it codified pre-existing law, and not if it progressively developed it.[204]

Fourth, to justify the flexible approaches to interpretative materials, it would be necessary to show that classical rules of interpretation were more permissive in this regard than VCLT. The strongest argument could be made regarding pre-Second World War international law. While the practice of PCIJ may be explained in orthodox interpretative terms, there was a clear readiness to rely on materials extrinsic to the particular treaty in the process of interpretation.[205] The Harvard Draft Convention on the Law of Treaties considered that '[a] treaty is to be interpreted in the light of the general purpose which it is intended to serve',[206] prescribing a teleological approach with greater flexibility of materials that could clarify this purpose.[207] The post-Second World War practice adopted a more textual approach, and despite McDougal's critique of its 'rigidities and restrictions' and his plea for a (return to the) 'reference to extraneous factors',[208] the textual emphasis was accepted in the Vienna Conference.[209] Against the background of this development, the interpretative flexibility may be seen as diminishing: the 1920s and 1930s law reflected in the Harvard Draft may have had some sympathy for it, the 1940–1960s ICJ cases, ILC debates, and Vienna Conference adopted a more restricted framework, and there is little authority to support a more flexible approach in the years between Vienna and the 1990s when the customary law nature of VCLT rules was finally and conclusively recognized in an explicit manner.

Fifth, even if the flexibility of the Harvard Draft and McDougal are taken at the strongest as accurately stating the law of the time, they are not helpful for the particular debate. The waning of the arguably broader interpretative rule is paralleled by the rise of investor–State arbitration and BITs framing contemporary law, with the first BITs with investor–State arbitration clauses concluded in 1968 and 1969.[210] No investor–State arbitration will be governed by the Harvard Draft view of international law and, unless cases are brought regarding the very first BITs, by McDougal's perception of international law. The majority of BITs have been concluded in the 1990s and 2000s, being comfortably situated within the VCLT framework even upon the most conservative estimate of the development of the law. Consequently, only a small part of investment protection treaties (concluded between the emergence of investor–State treaty clauses and the acceptance of VCLT customary nature) could be susceptible to the inter-temporal argument, made at its strongest possible form of assuming that McDougal's unsuccessful

[201] *ELSI* Pleadings II, ibid 30–2, 40 (Counter-Memorial of Italy), 457 (Rejoinder of Italy), *ELSI* Pleadings III, ibid 214–15, 222, 369 (Capotorti on behalf of Italy).

[202] *Elettronica Sicula S.p.A. (ELSI) (US v Italy)* [1989] ICJ Rep 15, Dissenting Opinion of Judge Schwebel 94 [47].

[203] Bernárdez 'Interpretation of Treaties' (n 197).

[204] S Rosenne, 'The Temporal Application of the Vienna Convention on the Law of Treaties' (1970) 4 Cornell Intl L J 1, 1–24; Yasseen 'L'interpretation des traités' (n 190) 64–5.

[205] nn 72, 74–6; Greig *Intertemporality* (n 189) 113–14.

[206] 'Draft Convention on the Law of Treaties' (1935) 29 AJIL Supplement 657, 937 art 19(a).

[207] Greig *Intertemporality* (n 189) 113 fn 452; A Aust, 'Law of Treaties' in JP Grant and JC Barker (eds), *The Harvard Research in International Law: Contemporary Analysis and Appraisal* (WS Hein & Co., New York 2007) 318.

[208] MS McDougal, Statement to Committee of the Whole, April 19, (1968) 62 AJIL 1021, 1024.

[209] Text at Ch 4 nn 42–4.

[210] Newcombe and Paradell *Law and Practice* (n 69) 44–5; Ch 3 n 65.

argument was and remained positive law. The proposition of the *Iron Rhine* Tribunal that VCLT rules are to be applied to earlier treaties 'unless there are particular indications to the contrary'[211] is fully confirmed by the State practice and investment case law, often even failing to distinguish the source of contemporary rules of interpretation, let alone engaging in any deeper inter-temporal analysis.[212] More generally, this analysis reinforces the lesson of the MFN clause study: greater flexibility regarding interpretative materials is not a progressive solution but an approach that has been marginalized by the emergence of clearer understanding of the law of sources and more specific and detailed primary rules.

3. *Lex specialis* rules of interpretation

Zachary Douglas has suggested that the 'field of subsequent practice for the interpretation of a specific treaty needs to be cast wider than envisaged by Article 31 of the Vienna Convention' so as to include 'practice across a network of similar investment treaties, manifest in arbitral awards, municipal court decisions and the parties' pleadings in investor/State cases'.[213] This proposition is a convenient starting point for the analysis of possible *lex specialis* rules of interpretation in investment protection law. In structural terms, it recognizes the more restrictive nature of the VCLT, but suggests *de lege ferenda* that analysis 'needs' to be conducted more broadly. Even though the legal process through which 'ought' will become 'is' does not get expressly spelled out, the scope of the additional interpretative materials suggests four possible lines of inquiry. The speciality of the new approach could be justified by the 'network of similar investment treaties', raising the question whether the *pari materia* bilateralism does not pose qualitatively new challenges for the VCLT (i). Speciality of the new approaches could also be reflected in the 'parties' pleadings in investor/State cases'. State practice in the form of pleadings would be the natural form through which changes in international law in this area would be expressed (ii). The argument is not limited to the pleadings by States, implicitly raising the question about the normative effects of the investors' participation in the investor–State arbitrations (iii). Finally, the new approach would be 'manifest in arbitral awards', suggesting some role for the judge (or arbitrator)-made law (iv). The legal effect of investment protection treaties, State practice, investors' rights, and case law will be considered in turn.

i. Speciality of investment protection treaties

The investor–State arbitrations that take place in parallel on the basis of similar and largely bilateral investment treaties undoubtedly raise particular problems. If the simultaneous dispute settlement regarding *pari materia* rules could be shown to be qualitatively new and not anticipated by the VCLT drafters, and the bilateralism in the investment treaty practice to be an accidental error recognized as such, there would be at the very least a strong policy argument in favour of a more specialized approach. However, such an argument does not seem to be valid on any of its grounds.

First, the existence of bilateral *pari materia* treaties and treaty clauses and the possibility of parallel international dispute settlement in their regard were appreciated by the ILC during its work on the law of treaties. MFN clauses were an example of treaty clauses

[211] *Iron Rhine* (n 6) [45].

[212] nn 1–7.

[213] Douglas 'Hybrid Foundations' (n 124) 168.

with similar wording and effect included in mostly bilateral treaties dealing with commercial matters.[214] Both the ILC, during its work on the law of treaties, and the Vienna Conference considered the question whether MFN clauses could amount to something more than simple rules of treaty law, and on both occasions rejected the proposition by overwhelming majorities.[215] When the ILC later addressed the question from the perspective of MFN clauses, the dominant view was that there was nothing special about their interpretation that VCLT rules would not be capable of handling.[216]

Classical international law also dealt with parallel dispute settlements regarding similar rules and possibly leading to different outcomes. The 1903–1905 Venezuelan arbitrations are probably most relevant in the particular context, arbitrating claims regarding Venezuelan treatment of aliens in eleven parallel Claims Commissions. The respondent State in these Commissions was Venezuela and the claimant States were the US, Belgium, Great Britain,[217] France, Germany, Italy, Mexico, the Netherlands, Spain, Sweden, and Norway.[218] Venezuelan Claims Commissions also dealt with the conflicting decisions on similar legal and factual issues, in particular regarding the law of attribution of responsibility for the acts of insurrectionists,[219] and considered the relevance of MFN clauses,[220] third-party treaties on the issue,[221] different applicable law,[222] and correctness of the decisions of other Tribunals in resolving the divergences.[223] There is strong continuity between these debates and contemporary dispute-settlement regimes.[224] While Venezuelan cases were not expressly used in the drafts on the law of treaties, they were relied on in other documents that the ILC was working on at the time.[225] VCLT rules of interpretation have therefore been drafted with this practice in mind, and modern approaches do not pose qualitatively new challenges that VCLT would not be capable of handling.

Second, bilateralism was a conscious choice regarding law-making in investment protection law. Historically, States experimented with different law-making methods in investment protection law, primarily with customary law, but also making consistently unsuccessful attempts at multilateral treaty-making. In the post-War period, the parallel

[214] See Ch 4. [215] Ch 4 nn 13–14. [216] Ch 4 nn 28–31.
[217] 9 RIAA 111–533. [218] 10 RIAA 1–770. [219] Ch 1 n 72. [220] See nn 164–5.
[221] In *Kummerow*, the Venezuelan Commissioner Zuloaga argued that a treaty between Germany and Colombia excluding responsibility for insurrectionists reflected the position of Germany and general law, *Kummerrow and others (Germany v Venezuela)* (1903) 10 RIAA 369, Opinion of Commissioner Zuolaga 372, 373, to which the German Commissioner Goetch responded that the necessity of concluding the treaty showed that the general position was different, ibid Second Opinion of Commissioner Goetch 374, 376 (Umpire Duffield did not refer to this treaty at all, ibid 390); *N. Henriquez case (Netherlands v Venezuela)* (1903) 10 RIAA 713, 716–17.
[222] In *Guastini*, Umpire Ralston noted that the conflicting approach of the German Commission might have been explained by the particular treaty and thus had no general relevance, *Guastini case (Italy v Venezuela)* (1902) 10 RIAA 561, Opinion of Umpire Ralston 577, 578.
[223] *Aroa Mines (Limited) Claim—Supplementary Claim (Great Britain v Venezuela)* (1903) 9 RIAA 402, Opinion of Umpire Plumley 408, 443.
[224] J Crawford, 'Continuity and Discontinuity in International Dispute Settlement' in C Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP, Oxford 2009) 802.
[225] FV García-Amador, 'Report on International Responsibility' in *Yearbook of the International Law Commission, 1956, Volume II*, UN Doc A/CN.4/SER.A/1956/Add.1 173 [120]; FV García-Amador, 'Second Report on International Responsibility' in *Yearbook of the International Law Commission, 1957, Volume II*, UN Doc A/CN.4/SER.A/1957/Add.1 104 [26]; FV García-Amador, 'Fourth Report on State Responsibility' in *Yearbook of the International Law Commission, 1959, Volume II*, UN Doc A/CN.4/SER.A/1959/Add.1 1 fn 54, fn 91, FV García-Amador, 'Sixth Report on State Responsibility' in *Yearbook of the International Law Commission, 1961, Volume II*, UN Doc A/CN.4/SER.A/1961/Add.1 1 [57], fn 89, [67], [69], [103], [104], [106], fn 197 [122], [123], [130], [132], [137], fn 244, [142], [150], [153], [161].

experiments with law-making continued. Step by step, the customary and multilateral treaty avenues were closed. The attempts at drafting multilateral treaties failed, and the scepticism about investment protection and quantitative strengthening of the Second and Third Worlds made any generalized consensus unlikely. The customary law avenue was effectively closed by the ICJ in the *Barcelona Traction* case.[226] While the excessive focus on customary law at the time resulted in the perception of *Barcelona Traction* as negative for investment protection law in general (and not only for customary investment protection law),[227] the Court's suggestion to focus on bilateral treaty-making[228] resulted in a reassessment of law-making options, with the States increasingly accepting bilateral treaties as the appropriate tool for contracting out of the inflexible customary law.[229] The post-*Barcelona* start of a number of important BIT programmes suggests a choice of bilateral treaty as the preferred legal instrument in the legal environment where customary law and multilateral treaties were not appropriate, and as such should be respected.[230]

Third, while the multiplicity of similar treaties and similar treaty disputes may *prima facie* suggest some underlying error that needs to be corrected, neither the conscious choice to engage in such treaty-making nor the parallelism of disputes it has given rise to are exceptional. At best, if it could be shown that the rationale underlying the focus on bilateralism has disappeared, one could look more favourably at the elements of practice attempting to bridge the normative gap left by obsolete policies. However, the end of a clear dichotomy between developed home States and developing host States has not resolved the underlying controversies, instead paradoxically deepening them and turning every law-maker into simultaneously Calvo and Hull. While it is complicated to establish the general attitude of States towards certain policy propositions, an instructive case study is the failure of the MAI negotiations that appear to some extent to have been

[226] *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* [1970] ICJ Rep 3 [89].
[227] The perception was shared by most writers, whether questioning the correctness of the rejection of Belgian *locus standi*, R Higgins, 'Aspects of the Case Concerning Barcelona Traction, Light and Power Company, Ltd.' (1970–1971) 11 Virginia J Intl L 327, 341; RB Lillich, 'The Rigidity of Barcelona' (1971) 65 AJIL 522, 522–7; SD Metzger, 'Nationality of Corporate Investment under Investment Guaranty Schemes—the Relevance of Barcelona Traction' (1971) 65 AJIL 532; FA Mann, 'The Protection of Shareholder's Interests in the Light of the *Barcelona Traction* Case' (1972) 66 AJIL 259, 273–4; G Sacerdoti, 'Barcelona Traction Revisited: Foreign-Owned and Controlled Companies in International Law' in Y Dinstein (ed), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Martinus Nijhoff, Dordrecht 1989) 700–1; Mann '*ELSI*' (n 198); accepting the correctness but recognizing the restrictive implications, LC Caflisch, 'Protection of Corporate Investment Abroad (Barcelona Traction)' (1971) 31 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 162, 196; MD de Velasco, 'La protection diplomatique des sociétés et des actionnaires' (1974) 141 Recueil des Cours de l'Académie de Droit International 87, 161–2, or considering the restrictiveness to be a positive aspect, G Abi-Saab, 'The International Law of Multinational Corporations' (1971) 2 Annales d'Etudes Internationales 115.
[228] *Barcelona Traction* Rivero (n 56) [3]; *Rompetrol Group N.V. v Romania*, ICSID Case no ARB/06/3, Decision on Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008 [91]; C de Visscher, 'La notion de reference (renvoi) au droit interne dans la protection diplomatique des actionnaires de societes anonymes' (1971) 7 Revue Belge de Droit International 1, 6; F Berman, 'The Relevance of the Law on Diplomatic Protection in Investment Arbitration' in F Ortino and others (eds), *Investment Treaty Law: Current Issues II* (BIICL, London 2007) 69.
[229] 'Legal Principles and Practices Relating to Private Foreign Investment' (1983) *77* ASIL Proceedings 293, 296 (Hackney); M Sornarajah, 'State Responsibility and Bilateral Investment Treaties' (1986) 20 J World Trade L 79, 87; Vandevelde *U.S. International Investment Agreements* (n 114) 115, 676–7; *Enron* Jurisdiction (n 117) [46].
[230] The UK (1975), Austria (1976), Japan (1977), the US (1978), KJ Vandevelde, 'A Brief History of International Investment Agreements' (2005–2006) 12 U C Davis J Intl L Policy 157, 169–70; see the general argument in M Paparinskis, '*Barcelona Traction*: A Friend of Investment Protection Law' (2008) 8 Baltic Ybk Intl L 105.

due to concerns about the implications of a mere jurisdictional decision by a NAFTA Tribunal.[231] If this reaction is taken as a benchmark reflecting the concerns of States in law-making, and considered in light of the awards issued on the merits within the past ten years routinely dealing with matters such as health,[232] environment,[233] taxation,[234] judicial administration,[235] economic emergencies,[236] and provision of important services to the general public, willingness to import greater interpretive flexibility in the law-making process would be the least likely attitude that States *in abstracto* would be likely to take.[237]

ii. Speciality of State practice

The starting point of the analysis is that rules of treaty interpretation are *jus dispositivum*, and therefore there is no reason of principle why they could not be changed. If States are unsatisfied with the overly restrictive rules of interpretation in a particular context, they can engage in practice that would change both the relevant customary and treaty rules on interpretation. In the case of investment protection law, States would most likely express such concerns in their pleadings, whether expressly arguing for a more flexible interpretative approach or consistently putting forward and acknowledging as normatively relevant materials that would not qualify as such under the existing rules. Just as in any other instance of attempted changes of international law through practice, it would be necessary to demonstrate the widespread and consistent practice supporting a new rule of customary law, or concordant, common, and consistent subsequent

[231] R Greiger, 'Regulatory Expropriation in International Law: Lessons from the Multilateral Agreement on Investment' (2003) 11 NYU Environmental LJ 94, 96–9. While a finding on jurisdiction is undoubtedly without prejudice to the merits, in the absence of a better benchmark expressing the views of a multiplicity of States the MAI experience will be adopted as one, J Paulsson, 'Avoiding Unintended Consequences' in KP Sauvant (ed), *Appeals Mechanism in International Investment Disputes* (OUP, Oxford 2008) 248–50.

[232] *Methanex* Award (n 69).

[233] *Methanex* Award (n 69); *Metalclad* Award (n 10).

[234] *Link-Trading Joint Stock Company v Moldova*, UNCITRAL Case, Award, 18 April 2002 13 ICSID Rep 14; *Marvin Feldman v Mexico*, ICSID Additional Facility Case no ARB(AF)/991/1, Award, 16 December 2002 (2003) 18 ICSID Rev—Foreign Investment L J 488; *Occidental Exploration and Production Company v Ecuador*, LCIA Case no UN 3467, Final Award, July 1, 2004 12 ICSID Rep 54; *EnCana Corporation v Ecuador*, LCIA Case no UN3481, Award, 3 February 2006.

[235] *Mondev* Award (n 138); *Loewen v US*, ICSID Additional Facility Case no ARB(AF)/98/3, Award, 26 June 2003 (2003) 42 ILM 811; *Petrobart Limited v Kyrgyz Republic*, SCC Case no 126/2003, Award, 29 March 2005 13 ICSID Rep 387; *LLC Amto v Ukraine*, SCC Case no 80/2005, Final Award, 26 March 2008; *Victor Pey Casado* Award (n 93); *Jan de Nul N.V. and Dredging International N.V. v Egypt*, ICSID Case no ARB/04/13, Award, 6 November 2008 15 ICSID Rep 437; *Waguih Elie George Siag and Clorinda Vecchi v Egypt*, ICSID Case no ARB/05/15, Award, 1 June 2009; *Saipem S.p.A. v Bangladesh*, ICSID Case no ARB/05/07, Award, 30 June 2009 (2009) 48 ILM 999; *Pantechniki S.A. Contractors and Engineers v Albania*, ICSID Case no ARB/07/21, Award, 30 July 2009.

[236] *CMS Gas Transmission Company v Argentina*, ICSID Case no ARB 01/08, Final Award, 12 May 2005 (2005) 44 ILM 1205; *Enron Corporation & Ponderosa Assets, L.P.* v Argentina, ICSID Case no ARB/01/3, Award, 22 May 2007; *LG&E* (n 5); *Sempra Energy International v Argentina*, ICSID Case no ARB/02/16, Award, 28 September 2007; *BG Group Plc v Argentina*, UNCITRAL Case, Final Award, 24 December 2007; *Metalpar S.A. and Buen Aire S.A. v Argentine Republic*, ICSID Case no ARB/03/5, Award, 6 June 2008; *Continental Casualty* Award (n 78); *National Grid v Argentina*, UNCITRAL Case, Award, 3 November 2008. The contradictions between different awards and annulment decisions are unlikely to have inspired greater confidence either, JE Alvarez, 'The Public International Law Regime Governing International Investment' (2009) 344 Recueil des Cours de l'Académie de Droit International 193, Ch IV.

[237] *Azurix* Award (n 4); *Siemens* Award (n 3); *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v Turkey*, ICSID Case no ARB/02/05, Award, 19 January 2007; *Vivendi II* Award (n 48); *Biwater Gauff (Tanzania) Ltd. v Tanzania*, ICSID Case no ARB/05/22, Award, 24 July 2008.

practice supporting a new content of treaty law.[238] There are a number of theoretical and practical problems with this argument.

First, the identification of the normative relevance of State practice is distorted by the procedural model of investor–State arbitration. Leaving aside the possible relevance of investors' conduct (to be addressed in the next section), only the pleadings of the States can be taken into account in identifying subsequent practice or new customary law. The dynamic of investor–State arbitrations means that in most cases only the conduct of the respondents will be taken into account for the purpose of identifying the law. These considerations do not exclude the relevance of the analysis of such practice (and perhaps paradoxically make changing the law easier, since respondents are more likely to have similar practice than opposing parties.) Still, it makes it conceptually challenging to 'show[] the common understanding of the parties as to the meaning of the words'.[239]

Second, the analysis of practice would also suffer from empirical distortions. While the ICSID awards may be made public by ICSID with the consent of both parties or by any party on its own (and many ICSID awards are public),[240] in arbitrations conducted under other rules publication usually requires the consent of both parties.[241] While many awards become publicly available in one way or another,[242] it seems impossible to make even an educated guess about the number of confidential awards.[243] Moreover, it is rare for pleadings to be public.[244] Since there may be important nuances in the way the State argues its position, other cases introduced in different ways from having direct legal relevance to constituting mildly persuasive rebuttals of the opponent's argument, the State's view may not be confidently identified only on the basis of the Tribunal's summary. The different approaches to publicity suggest two equally unattractive possibilities of making the argument: either to proceed on the basis of the positions of States contained in all awards (and therefore probably make erroneous assumptions about the nature and content of State practice), or focus on those positions that may be clearly identified through publicly available pleadings (and attribute disproportionate influence to the practice of NAFTA parties).

Third, even pleadings apparently relying on case law may be explained in terms of the traditional approaches. The case law may be invoked simply as providing an erudite summary regarding the approaches generally taken, similarly to legal writings, and presented to refute a similar argument by the opposing party. The case law of the earlier Tribunals may become relevant in terms of VCLT Article 31 and 32 considered above.[245] The earlier Tribunals may have dealt with the same treaty, whether the BIT or the ICSID Convention, or the same custom, explaining therefore the same rule of law.

[238] Yasseen 'L'interprétation des traités' (n 190) 48; Sinclair *Vienna Convention* (n 139) 137.

[239] 1966 ILC Draft Articles on the Law of Treaties (n 115) 222.

[240] ICSID Convention (n 61) art 48(5); Schreuer *Commentary* (n 60) 834–9. Even though there is no general obligation of confidentiality in ICC arbitrations, no ICC treaty awards have been made public so far, MW Bühler and TH Webster, *Handbook of ICC Arbitration: Commentary, Precedents, Materials* (Sweet & Maxwell, London 2008) 308–12.

[241] D Caron, L Caplan, and M Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary* (OUP, Oxford 2006) 817–19; P Turner and R Mohtashami, *A Guide to the LCIA Arbitration Rules* (OUP, Oxford 2009) 219–26.

[242] J Delaney and DB Magraw 'Procedural Transparency' in P Muchlinski, F Ortino, and CH Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP, Oxford 2008) 775–6.

[243] TW Waelde, 'Confidential Awards as Precedent in Arbitration' in Y Banifatemi (ed), *Precedent in International Arbitration* (Juris Publishing, Inc., New York 2008) 131–2.

[244] The exception is the practice in NAFTA, Delaney and Magraw 'Procedural Transparency' (n 242) 770–2, and very rarely outside it, eg in the proceedings regarding *Malaysian Historical Salvors, SDN, BHD v Malaysia*, ICSID Case no ARB/05/10, Decision on Jurisdiction, 17 May 2007.

[245] See above II.

Even if the precise rationale of introduction of particular arguments is not explained, in systemic terms it is plausible to read them in the first instance as going with the grain of established order (by implicitly relying on generic terms, special meaning, and customary law, or simply making an error) rather than as qualitatively changing it.

Fourth, with all the caveats in mind, the pleading practice is at best inconclusive. Some States have expressly argued against the legal relevance of *pari materia* case law.[246] Some States appear to have accepted it.[247] In most cases, the summaries of the arguments in the awards leave the rationale for the introduction of the particular authorities unclear[248] or do not mention the invocation of cases at all.[249] To the extent that the early NAFTA case law can be traced to different perceptions of rules of interpretation, the reaction by NAFTA parties expressed through FTC was to reject any interpretative innovations. The case law regarding the applicability of MFN clauses to procedural rules is the best case study since MFN treatment has no customary law analogue and therefore cannot be explained in terms of implicit reference to custom. However, despite the contrasting approaches taken in case law,[250] two awards have rejected the relevance of earlier cases and adopted different solutions.[251] The lack of protests suggests that States are not willing to defend any new interpretative approaches seriously (*arguendo* assuming that they existed in the first place).[252] The procedural and empirical qualifications for identifying the argument with precision, the contradictions within the identifiable practice, and the consistent emphasis by States and Tribunals alike on the application of VCLT form the background to this debate. It does not seem possible to maintain that there exists sufficient practice to change either the content of custom or reinterpret the treaty rules of VCLT.[253]

[246] *AES Corporation v Argentina*, ICSID Case no ARB/02/17, Decision on Jurisdiction, 26 April 2005 12 ICSID Rep 312 [20]–[22] (Argentina); *MTD* Annulment (n 6) [63] (Chile); *Vivendi II* Award (n 48) [7.4.12.] (Argentina); *AMTO* Award (n 235) [28.iii] (Ukraine); *Glamis* Award (n 107) [605] (US).

[247] *Rumeli* Award (n 159) [609] (Kazakhstan); *Plama* Award (n 50) [175] (Bulgaria).

[248] Czech Republic 'relie[d], *inter alia*, on *Genin* award', *Saluka* (n 2) [289], Ecuador 'cit[ed] precedents', *M.C.I.* Award (n 60) [250], and Argentina 'adduce[d] case law to show' how fair and equitable treatment referred to international minimum standard, *National Grid* Award (n 236) [161]. In *Jan de Nul* Egypt submitted that certain propositions regarding denial of justice had been affirmed and reaffirmed in other cases, (n 235) [182]. While relying on *pari materia* case law, the most plausible way of reading these submissions would be as direct or indirect references to customary law and hence illuminating the same rule of law.

[249] *Noble Ventures v Romania*, ICSID Case no ARB/01/11, Award, 12 October 2005 16 ICSID Rep 216 [163], [209] (Romania); *Parkerings Compagniet AS v Lithuania*, ICSID Case no ARB/05/8, Award on Jurisdiction and Merits, 14 August 2007 [215]–[231] (Lithuania); *L.E.S.I. S.p.A. et ASTALDI S.p.A. v Algeria*, ICSID Case no ARB/05/3, Award, 12 November 2008 [145]–[148], [169]–[172] (Algeria).

[250] Paparinskis, 'MFN Clauses and International Dispute Settlement' (n 158).

[251] The *RosInvestCo* Tribunal rejected the relevance of other cases, *RosInvestCo* Jurisdiction (n 90) [49], [136]–[137], and found its jurisdiction on the basis of an MFN clause, ibid [130]. The *Wintershall* Tribunal did not find the earlier decisions binding or helpful, *Wintershall Aktiengesellschaft v Argentina*, ICSID Case no ARB/04/14, Award, 8 December 2008 [178]–[184], [194], and rejected the application of an MFN clause to remove the requirement to litigate in domestic courts for a set period of time, ibid [160]–[197]. Both awards went against the accepted wisdom of the time that MFN clauses could remove the domestic litigation requirement but could not create jurisdiction, McLachlan and others *International Investment Arbitration* (n 85) 255–7.

[252] Paparinskis 'Sources of Law' (n 69) 112–15.

[253] The identical nature of treaty and customary law on the issue raises further theoretical obstacles. First, State practice would operate on two levels, counting as subsequent practice of treaty interpretation for the VCLT parties that entered into the BIT after becoming parties to VCLT, and practice for customary law for other States. Second, since the content of customary law is identified from VCLT, it is not clear whether the practice regarding customary law could directly change it. In any event, it seems strained to suggest that when States and Tribunals are content to apply VCLT rules even without identifying their source, reinterpretation of rules of interpretation through subsequent practice can be made, identified, accepted, and become law.

iii. Speciality of investors

It is clear that, as a practical matter, investors play an important role in investment arbitration. It is less clear whether the practical importance also leads to or signifies direct legal influence. If investors' conduct and pleadings could be considered as relevant for the purpose of identifying treaty and customary law, it would call for an analysis of a qualitatively different level, also impacting the perception of rules of interpretation. Vaughan Lowe has explained the possible lines of analysis in the following terms:

> If, for example in the course of US–Mexican claims concerning the treatment of the property of foreign nationals, claims are put forward and accepted by States, we say that the process—to the extent that it reflects an international consensus, at least—generates customary international law. Why should we not say so if the claim is made or accepted in the course of dealings between companies and States?... We might insist that it is only the acceptance of corporate claims by States, and not their making by corporations, that is legally relevant. We might say that the powers of corporations all derive ultimately from States, so that any authority their actions may have is the authority of the State.... [Corporations] should be recognised as entities *sui generis* whose treatment, and the treatment of whose actions, in international law needs to be approached on a pragmatic, case-by-case, basis.[254]

The importance of investors in investor–State treaty arbitration appears in many contexts. In procedural terms, investors appear to have initiated almost all treaty-based arbitrations, and so far States have not successfully presented any counterclaims.[255] In substantive terms, the *ratione materiae* coverage of investment protection law naturally requires the interpreter to examine the conduct of the investor and the treatment of the investor by the State. However, even though investors choose what disputes are brought before the Tribunals and from what angles they may be examined, the procedural entitlement does not on its own transform the underlying rules relating to interpretation and creation of international law.[256] Similarly, even though substantive rules are sometimes applied by reference to concepts such as legitimate expectations, which may appear to attribute some direct legal relevance to the investor's perceptions, even at strongest they do not amount to anything more than criteria for the identification of the State's binding treaty obligations.[257]

The possibility of the legal influence of the investors' conduct may be addressed through the prism of investors' rights. There are at least two ways of how the legal nature of the investors' rights may be conceptualized. On the one hand, a host State's obligations under an investment protection treaty may be owed simultaneously to the home State and the investor, and the investor would be invoking responsibility as a beneficiary of an obligation directly owed to it. On the other hand, a host State's obligations may also be owed exclusively to the home State, and the investor invokes responsibility only as an

[254] AV Lowe, 'Corporations as International Actors and Law Makers' (2004) 14 Italian Ybk Intl L 23, 24.

[255] Douglas *Investment Claims* (n 154) 255–63.

[256] J Christoffersen, 'Impact on General Principles of Treaty Interpretation' in MT Kamminga and M Scheinin (eds), *The Impact of Human Rights Law on General International Law* (OUP, Oxford 2009) 44–6.

[257] *MTD* Annulment (n 6) [67]; *CMS Gas Transmission Company v Argentina*, ICSID Case no ARB 01/08, Decision of the *ad hoc* Committee on the Application for Annulment, 25 September 2007 14 ICSID Rep 251 [89]; *Glamis* Award (n 107) [620].

agent of the home State.[258] The ILC noted investment protection treaties as one possible example of international responsibility accruing to non-State entities,[259] but it did not take any view on the issue of the beneficiary of the primary obligations,[260] and 'the starting point must be that international legal theory allows for both possibilities'.[261] It may be tentatively suggested that to the extent that obligation is owed to the investor itself, there *prima facie* should not be any added legal value from the investor's conduct, while if the obligation is owed to a State and the investor invokes it as an agent, there could be an argument for some residual law-making influence.

It is more natural to read the factual autonomy of investors in most investment treaties as reflecting their legal autonomy, rather than implying a somewhat counterintuitive arrangement of modified agency. Douglas has argued that the nature of the investor–State arbitrations, in particular the investors' full functional control of the claim, evidences a qualitatively different legal instrument from the classic diplomatic protection.[262] The weight of authority supports the view that investor–State arbitration is an invocation of State responsibility regarding obligations owed to the investor.[263] Even if the position is not irresistible—in principle, changes can reflect either the inherent qualitative differences of the regime or the modifications from diplomatic protection—it provides a convenient starting point of ordinariness that needs to be rebutted. As the Tribunal put it in *Corn Products International, Inc. v Mexico* award, '[t]he notion that [NAFTA] Chapter XI conferred upon investors a right, in their own name and for their own benefit, to institute proceedings to enforce rights which were not theirs but were solely the property of the State of their nationality is counterintuitive'.[264] A legally stronger argument might be derived from the *prima facie* incompatibility of the agency model with the ICSID regime and its exclusion of home States and diplomatic protection.[265] The ICJ has noted in a pragmatic vein that '[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community'.[266] The fact that States owe obligations to the investor and that the investor is entitled to invoke the responsibility through investor–State

[258] On the distinction and implications in different contexts see M Paparinskis, 'Investment Arbitration and the Law of Countermeasures' (2008) 79 BYIL 264, 295 fn 150, 334–5; Paparinskis 'Equivalent Primary Rules' (n 130) 265–8, 279; Paparinskis 'Investment Treaty Interpretation' (n 125) 81–5.

[259] ILC, 'Articles on Responsibility of States for Internationally Wrongful Acts' in *Yearbook of the International Law Commission, 2001, Volume II,* UN Doc A/CN.4/SER.A/2001/Add.1. (Part Two) 31 art 33(2) Commentary 4.

[260] J Crawford, 'ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 96 AJIL 874, 888; *Wintershall* Award (n 251) [112].

[261] Douglas 'Hybrid Foundations' (n 124) 168.

[262] Ibid 167–84.

[263] M Bennouna, 'Preliminary Report on Diplomatic Protection', UN Doc A/CN.4/484 [40]; O Spiermann, 'Individual Rights, State Interests and the Power to Waive ICSID Jurisdiction under Bilateral Investment Treaties' (2004) 20 Arbitration Intl 179, 183–8; Z Douglas, 'Nothing if Not Critical for Investment Treaty Arbitration: *Occidental, Eureko and Methanex*' (2006) 22 Arbitration Intl 27 (n 25) 37–8; AK Hoffmann, 'The Investor's Right to Waive Access to Protection under a Bilateral Investment Treaty' (2007) 22 ICSID Rev—Foreign Investment L J 69, 80–92; AK Bjorklund, 'Private Rights and Public International Law: Why Competition among International Economic Law Tribunals is not Working' (2007–2008) 59 Hastings Intl L J 241, 264–70; Douglas *Investment Claims* (n 154) 6–38.

[264] *Corn Products International, Inc. v Mexico,* ICSID Additional Facility Case no ARB/(AF)/04/1, Decision on Responsibility, 15 January 2008 146 ILR 581 [169]; also *Occidental Exploration & Production Company and the Republic of Ecuador* [2005] EWCA Civ 1116 [18]; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v Mexico,* ICSID Additional Facility Case no ARB/(AF)/04/5, Award, 21 November 2007, Concurring Opinion of Arbitrator Rovine 146 ILR 534.

[265] ICSID Convention (n 61) arts 25(1), 27(1); see Paparinskis 'Investment Treaty Interpretation' (n 125) 84–5.

[266] *Reparation for Injuries Suffered in the Service of United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 178.

arbitration has an important impact on the legal status of the investor, but it otherwise does not affect its absence of capacity of law-making. If this approach is accepted, Lowe's first alternative seems to follow, and 'only the acceptance of corporate claims by States, and not their making by corporations, . . . is legally relevant'.

There is also some support for the view that investor–State arbitration is merely an 'in some sense institutionaliz[ed] and reinforce[ed] . . . system of diplomatic protection'.[267] In theoretical terms, this position would consist of two sub-arguments: first, that an investment protection treaty is an agreement between the home State and the host State to authorize the investor to exercise diplomatic protection; second, that the authorization also considerably modifies the procedure of exercise of the right. While the 2006 ILC Articles on Diplomatic Protection do not address the concept of agency in express terms,[268] one could rely by analogy on the classical practice of authorizing the exercise of diplomatic protection upon an agreement of all three States (the home State, the host State, and the agent State).[269] An investment protection treaty providing for investor–State arbitration would be conceptualized as an authorization by the home State of the investor to exercise diplomatic protection, and the agreement of the host State to this arrangement.

If this approach is accepted, and the investor is considered as exercising authorized diplomatic protection, a view could be taken that at least its pleadings in the guise of an agent should be attributed the same legal influence as those of the principal.[270] Leaving aside the torturous interpretative route through which the well-hidden intent of State to create such a legal undertaking could be teased out, the context of the practice in support of the agency theory needs to be considered: it mostly comes from NAFTA, and has largely been invoked against the investor, whether in order to read in restrictive rules from diplomatic protection to limits its procedural rights or to apply countermeasures to preclude the wrongfulness for the breach.[271] Despite the possible internal theoretical incoherence, the context of the NAFTA arguments makes it reasonably clear that these States are not arguing for attribution of certain law-making capacities to the investors.[272]

[267] Crawford 'Retrospect' (n 260) 887–8.

[268] ILC, 'Draft Articles on Diplomatic Protection with Commentaries' in *Report of the International Law Commission on the Work of its 61st Session,* UN Doc A/61/10 15.

[269] E Borchard, *Diplomatic Protection of Citizens Abroad* (The Banks Law Publishing Co., New York 1915) 471–5; AP Sereni, 'Agency in International Law' (1940) 34 AJIL 638, 642–4; AP Sereni, 'La représéntation en droit international' (1948) 73 Recueil des Cours de l'Académie de Droit International 69, 112–17.

[270] As Sarooshi observed in the context of conferral of powers by States to international organizations, 'an agent when exercising conferred powers can change the principal's legal relations with third parties', D Sarooshi, 'Conferrals by States of Powers on International Organizations: The Case of Agency' (2003) 74 BYIL 291, 329; and the same proposition is correct for cases when States act as agents, C Chinkin, *Third Parties in International Law* (Clarendon Press, Oxford 1993) 64–7. The agent's ability to change the legal relations of the principal 'as if [acts] had been personally performed by the latter', Sereni 'Agency', ibid 655, suggests *a fortiori* that the agent's conduct should be given the same law-making significance as if it had been performed by the principal, *inter alia* relating to the normative influence of the pleadings. Since the agent's original status or capacity do not influence the effect of its conduct within the limits of the authorization (provided that the entity is capable of being an agent in the first place), the proposition regarding States and international organization seems *mutatis mutandis* applicable to the hypothetical agency arrangement with the investor.

[271] *Loewen* Award (n 235) [233]; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v Mexico,* ICSID Additional Facility Case no ARB/(AF)/04/5, Award, 21 November 2007 146 ILR 439 [176]. The right of the home and host State to block claims regarding expropriatory taxation would also make sense if the obligations operated only *vis-à-vis* States, WW Park, 'Arbitration and the Fisc: NAFTA's "Tax Veto"' (2001) 2 Chicago J Intl L 231.

[272] In *Glamis,* the US successfully argued that the frustration of the investor's expectations was not an independent breach, (n 107) [576].

Considering the unfocused and at best inconclusive debate on the issue, at its strongest, State practice in favour of the agency theory can be read as tinkering within and around existing rules, rather than changing or attempting to change the meta-rules of interpretation.

iv. Speciality of judicial law-making

Neither the parallelism of bilateral investment treaties, nor the practice of States and investors in investment arbitrations, can support *lex specialis* rules of interpretation in investment protection law. Another possible argument would focus on the possibility of a judge-made change to the principles of interpretation. The process of judicial interpretation and the different approaches to legal reasoning make it difficult to draw the line between application, development, and creation of law in any circumstances, and particularly regarding the rules of interpretation. This section therefore proceeds in two parts, suggesting a possible case study of evolution of rules of interpretation of the ECHR, and applying the case study to investment protection law.

First, the interpretation of the ECHR by the ECtHR has shown considerable judicial creativity, particularly regarding the 'living instrument', 'autonomous meaning', and effectiveness doctrines.[273] While it is questionable whether this language objectively constitutes an innovation over the purposive interpretation and generic terms already provided by the VCLT,[274] the ECtHR appeared to perceive itself as operating on the basis of qualitatively new rules.[275] The development of new approaches to interpretation may be traced to the early *Golder v UK (Golder)* case, 'undoubtedly one of the most important cases in the history of the ECHR'.[276] The Court was ready to read the right of access to court into Article 6(1) of ECHR, despite a trenchant dissent by Fitzmaurice, who attacked the majority for 'proceeded[ing] on the footing of methods of interpretation that I regard as contrary to sound principle'.[277]

[273] A Mowbray, 'The Creativity of the European Court of Human Rights' (2005) 4 Human Rights L Rev 57.

[274] Christoffersen 'Impact on General Principles' (n 256) 42–52; MT Kamminga, 'Final Report on the Impact of International Human Rights Law on General International Law' in MT Kamminga and M Scheinin (eds), *The Impact of Human Rights Law on General International Law* (OUP, Oxford 2009) 9–10. An uncharitable explanation for the avowed specialty of the ECHR would be that the view that the Judges held of the pre-Strasbourg international law might not have been entirely accurate. Judges laid less emphasis than might have been preferable on the developed individual–State adjudication mechanisms of the pre-War era, Ch 1 nn 167–8, and attempted to distinguish themselves from a caricature of late 19th-century practices of interpreting treaties as restrictive and self-judging instruments (as well as whatever the normative antonym of 'living instruments' might be), cf a similar argument regarding European Community law, O Spiermann, 'The Other Side of the Story: An Unpopular Essay on the Making of the European Community Legal Order' (1999) 10 EJIL 763, 787–8.

[275] R Bernhardt, 'Thoughts on the Interpretation of Human-Rights Treaties' in F Matscher and H Petzold (eds), *Protecting Human Rights: The European Dimension* (Carl Heymanns Verlag, Koln 1988); F Matscher, 'Methods of Interpretation of the Convention' in RSJ Macdonald and others (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff, Dordrecth 1993) 66; generally Christoffersen 'Impact on General Principles' (n 256). The special character is emphasized throughout the case law, from *Soering v UK* (App no 14038/88) (1989) Series A no 161 [87]; to *Mamatkulova and Askador v Turkey* (App nos 46827/99 and 46951/99) [GC] (2005) ECHR 2005-I [100].

[276] G Letsas, *A Theory of Interpretation of the European Convention of Human Rights* (OUP, Oxford 2007) 61.

[277] *Golder v UK* (App no 4451/70) (1975) Series A no 18, Separate Opinion of Judge Fitzmaurice [24]; Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222 art 6(1).

After *Golder*, Fitzmaurice's opinions became increasingly sceptical, from the early pleas for ordinary rules of interpretation not to be brushed aside,[278] to criticism of quasi-legislative operations exceeding the normal judicial function,[279] and self-serving, strained, and artificial interpretations,[280] to the final resigned hopes that 'the Court modifies the general trend of its present policy in the interpretation'.[281] His views had no effect on the Court,[282] and the *Golder* approach was strengthened in subsequent cases, becoming accepted and uncontroversial.[283] It is instructive to consider why Fitzmaurice, whose influence on the development of VCLT rules of interpretation was probably second only to Waldock's,[284] adopted an approach that from the twenty-first-century perspective with the benefit of hindsight has been described as one that 'could not have been more wrong'.[285]

There are at least two ways of reading the development of the new language (if not necessarily substance) of interpretation. An argument relying on the special nature of human rights treaties goes against the grain of generally applicable rules of interpretation, and would be unhelpful for the present purpose. It seems more persuasive and useful to consider the relevance of subsequent practice (in the form of acquiescence) in legitimizing normatively questionable approaches in case law.[286] Four considerations appear to have played a role in this process. First, the Court's approach to interpretation was clear and consistent. Second, Fitzmaurice's opinions expressly notified both the Court and States about the (arguably) qualitatively new nature of the developments.[287] Third, Fitzmaurice's criticisms of the philosophy of interpretations were expressed in individual opinions, and were neither joined nor taken up by anybody else during or after his departure from the Court. Fourth, States also did not engage in any protests against interpretative approaches (criticisms in the pleadings, refusal to comply with judgments, withdrawal from the ECtHR), *a contrario* implicitly approving it through the extension of substantive and procedural coverage of the ECHR. The developments seem to some extent analogous to an extended version of the *Namibia* argument: if a court consistently breaches (or at least questionably applies) a particular rule of law, and both the court and States are aware of it, and neither the court nor the States attempt to

[278] *National Union of Belgian Police v Belgium* (App no 4464/70) (1975) Series A no 19, Separate Opinion of Judge Fitzmaurice [9].

[279] *Ireland v UK* (App no 5310/71) (1978) Series A no 25, Separate Opinion of Judge Fitzmaurice [6].

[280] *Marckx v Belgium* (App no 6833/74) (1979) Series A no 31, Dissenting Opinion of Judge Fitzmaurice [9], [13].

[281] *Guzzardi v Italy* (App no 7367/76) (1980) Series A no 39, Dissenting Opinion of Judge Fitzmaurice [10].

[282] Appropriately, the only ECtHR opinion ever to rely on Fitzmaurice's writings is a dissent by Judge Kreća, himself a perennial dissenter in the ICJ cases relating to what is now Serbia, *Lepojić v Serbia* (App no 13909/05) (2007) ECHR 6 November 2007, Dissenting Opinion of Judge Kreća [6].

[283] D Harris and others, *Harris, O'Boyle & Warbrick Law of the European Convention on Human Rights* (2nd edn OUP, Oxford 2009) 5–18.

[284] Ch 4 n 44.

[285] Letsas *Theory of Interpretation* (n 276) 65; on Fitzmaurice in the ECtHR generally see E Bates, *The Evolution of the European Convention on Human Rights* (OUP, Oxford 2010) 360–81.

[286] The role of subsequent practice has been recognized in the human rights law, even though in a somewhat different context regarding the non-binding views of the treaty bodies, Kamminga 'Final Report' (n 274) 10.

[287] Mann noted the 'sometimes astonishing principles of construction prevailing in Strasbourg' 'lacking in precedent anywhere', contrasting them with Fitzmaurice's 'most impressive and forceful statement of the principles guiding an international as opposed to constitutional lawyer or, so one is tempted to say, a lawyer as opposed to politician', FA Mann, 'Britain's Bill of Rights' (1978) 74 LQR 512, 523, fn 53; cf W Dale, 'Human Rights in the United Kingdom—International Standards' (1976) 25 ICLQ 292, 302; JG Merrills, 'Sir Gerald Fitzmaurice's Contribution to the Jurisprudence of the European Court of Human Rights' (1982) 53 BYIL 115, 116–19, 160–2.

change this practice, the acquiescence by States may provide the legitimizing approval to previously incorrect or at least questionable practice.[288]

Second, the developments in investment protection law may be considered from the perspective of this framework. Within investment protection law there is no single and clear argument for a new approach to interpretation. The *SGS v Philippines* Tribunal saw 'the applicable law... by definition... different for each BIT', and therefore argued for a *jurisprudence constante*.[289] However, if customary law needs to be taken into account in the interpretative process, it will provide partly identical applicable law and therefore render the premise questionable. The concept of *jurisprudence constante* does not seem to add much to the analytical tools that the interpreter already possesses regarding applicable law and the application of general concepts (cause, object, etc.) to particular rules.

In a different vein, the *Saipem v Bangladesh* Tribunal considered that 'subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases'.[290] Even if the proposition is relatively uncontroversial regarding cases interpreting the same rule of customary or treaty law, to say that interpretation of five or seven treaties without more *requires* certain interpretation of thousands of other BITs and MITs goes further than *lex lata*. The Tribunal's purpose 'to satisfy the legitimate expectations of the community of States and of investors as regards the predictability of the law on these questions' is not very helpful in identifying the normative rationale of the argument.[291] It is not clear why expectations of investors and States, other than the parties to the dispute and the home State, should be of any immediate legal relevance. Conversely, if for some reason they are, it is not clear why international organizations (such as the European Union) do not have such expectations. If 'community of States' refers to *erga omnes* obligations, it has questionable relevance for investment protection law which, even if in its multilateral form amounting to more than multilateral BITs,[292] has not moved beyond bundles of bilateral obligations.[293]

Third, to the extent that that *SGS II* or *Saipem* may be considered as suggesting qualitatively new approaches to interpretation, the decentralized investment arbitration regime has not been able to (or even cannot) provide the framework for providing necessary acquiescence. There is no Fitzmaurice to identify the innovation and put before the subsequent Tribunals and States the clear normative choice. There is no consensus about the approach between the Tribunals, some expressly rejecting direct relevance for *pari*

[288] n 171 and surrounding text. The absence of protests may have played a somewhat analogous role regarding law of reservations, where early practice of severability was described as a deviation in serious disregard of the VCLT, H Golsong, 'Interpreting the European Convention on Human Rights beyond the Confines of the Vienna Convention on the Law of Treaties?' in RSJ Macdonald and others (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff Publishers, Dordrecth 1993) 155–61, but is now generally accepted regarding the ECHR, even though vigorously protested (including by the ECHR members UK and France) regarding the ICCPR, B Simma, 'Reservations to Human Rights Treaties: Some Recent Developments' in *Liber Amicorum Professor Ignaz Seidl-Hohenveldern* (Kluwer Law International, the Hague 1998) 675.

[289] *SGS II* (n 96) [97].

[290] *Saipem* Jurisdiction (n 93) [67]; *Victor Pey Casado* Award (n 93) [119].

[291] Ibid.

[292] *CCFT* (n 2) [164]–[169].

[293] C Carmody, 'WTO Obligations as Collective' (2006) 17 EJIL 419, fns 76–7; TW Waelde, 'International Investment Law: An Overview of Key Concepts and Methodologies' (2007) 4(4) Transnational Dispute Management 48–9 fn 104. BITs 'are concluded *intuitu personae*. The limited scope of their personal reach is part of the game', R Kolb, 'Note: Is an Obligation Assumed by Two Different States in Two Different Treaties Binding between Them?' (2004) 51 Netherlands Intl L Rev 185, 191. Exceptionally, at some level of seriousness of breach other contracting States of MITs could be treated as injured because of the threat to the functioning of the MIT, 2001 ILC Articles (n 259) 118. See more generally Paparinskis 'Investment Arbitration and the Law of Countermeasures' (n 258) 330–1.

materia case law,[294] some situating their reliance on case law within the VCLT,[295] and many not expressing themselves on the issue at all. There is also no consensus among the States, and to the extent that their practice in the form of pleadings and treaty-making can provide any guidance, there is little willingness to acquiesce in innovative interpretative approaches by the Tribunals. To conclude, even assuming that an extended version of the acquiescence argument could operate to legitimize new judge-made approaches, the form and content of the propositions themselves and the reactions by other Tribunals and States cannot support any change in the rules of interpretation.[296]

Any analysis of the legal nature of fair and equitable treatment necessarily has to start by explaining the legal basis for the ubiquitous practice of elaborating the concept on a case-by-case basis. Part II suggests that treaty rules on fair and equitable treatment directly refer to the customary minimum standard or at the very least requires it to be taken into account. The argument is made both in negative and positive terms: in negative terms, this chapter demonstrates that no argument limited to treaty law can explain the existing and accepted practice; Chapter 6 makes the positive claim that it is the customary minimum standard that provides the interpretative unity of fair and equitable treatment.

[294] *AES* Jurisdiction (n 246) [26]; *RosInvestCo* Jurisdiction (n 90) [49], [136]–[137]; *Wintershall* Award (n 251) [194].

[295] n 142.

[296] See more generally Paparinskis 'Sources of Law' (n 69) 108–15.

6

International Minimum Standard and General International Law

I. Treaty Interpretation and General International Law

The prevalent practice of interpreting fair and equitable treatment by reference to arbitral awards on *pari materia* treaty rules cannot be explained by arguments that do not rely on general international law.[1] This chapter addresses the positive side of the normative coin that was approached from the negative perspective earlier, exploring the possibility that customary law might provide the unifying framework. Before considering the validity of the arguments about reliance on customary law, it is necessary to establish the general benchmark against which they would be judged.[2]

The limits of the permissible and required interpretative reference to customary law seem formulated with some ambiguity, raising important theoretical questions with considerable practical relevance. The methodology for distinguishing required interpretative reliance on custom from impermissible often seems at best unclear. For example, the Tribunal in *Saluka Investment BV v Czech Republic* (*Saluka*) case accepted as uncontroversial an argument that a treaty rule of 'deprivation' made a reference to customary law of expropriation (that was in its turn explained in a draft text using the term of art of 'taking'). Forty paragraphs later, the same Tribunal summarily rejected a proposition that the treaty rule of 'fair and equitable treatment' made a reference to the customary minimum standard.[3] It is not at all clear why the Tribunal disposed of *prima facie* similar arguments in such a different manner.

Interpretation of treaties by reference to other rules of international law has been subject to considerable attention over the past few years, both in general[4] and in investment treaty context.[5] The general issues of investment treaty interpretation by reference to customary law will be analysed in three steps: first, the admissibility of customary law as interpretative materials under Article 31(3)(c) will be considered; second, the interpretative weight of admissible customary law will be addressed; and third, other approaches

[1] Ch 5; M Paparinskis, 'Sources of Law and Arbitral Interpretations of *Pari Materia* Investment Protection Rules' in OK Fauchald and A Nollkaemper (eds), *The Practice of International and Nationals Courts and the (De-)Fragmentation of International Law* (Hart Publishing, Oxford 2012).

[2] This section summarizes the argument that is made in M Paparinskis, 'Investment Treaty Interpretation and Customary Investment Protection Law: Preliminary Remarks' in C Brown and K Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (CUP, Cambridge 2011) 65–80, 90–1.

[3] *Saluka Investment BV v Czech Republic*, UNCITRAL Case, Partial Award, 17 March 2006 15 ICSID Rep 274 [254]–[294].

[4] Ch 1 n 12.

[5] C McLachlan, 'Investment Treaties and General International Law' (2008) 57 ICLQ 361; TW Waelde, 'Interpreting Investment Treaties: Experience and Examples' in C Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP, Oxford 2009); A Gourgourinis, '*Lex Specialis* in WTO and Investment Protection Law' (2010) 53 German Ybk Intl L 579; A Gourgourinis, 'The Distinction between Interpretation and Application of Norms in International Adjudication' (2011) 2 J Intl Dispute Settlement 31; Paparinskis 'Preliminary Remarks' (n 2).

for dealing with custom suggested by the ILC will be considered. The main thesis is that Article 31 provides for two ways of introducing customary law in the interpretative process: first, the ordinary or special meaning of treaty term(s) may make a direct reference to customary law (31(1) or (4)); second, substantively relevant customary law may be taken into account together with context (31(3)(c)).

A common starting point of analysis is Article 31(3)(c) of the VCLT and analogous customary law,[6] which provide that '[t]here shall be taken into account, together with the context: ... (c) any relevant rules of international law applicable in the relations between the parties'.[7] Each word and concept of Article 31(3)(c)—'any', 'relevant', 'rules of international law', 'applicable', 'in the relations', 'between the parties'—has raised further interpretative questions relating to the scope of permissible reference. However, the focus on general international law seems to leave aside most of these controversies, since such rules are likely to be 'any ... rules of international law applicable between the parties'.[8] The only explicit qualification for distinguishing appropriate from inappropriate interpretative references under Article 31(3)(c) is that customary law has to be 'relevant'. The scope of 'relevance' in Article 31(3)(c) may be subject to different readings. At the narrower end of the spectrum, Judge Villiger has suggested that relevant rules 'concern the subject-matter of the treaty term at issue. In the case of customary rules, these may even be identical with, and run parallel to, the treaty rule.'[9] A number of authors explain relevance primarily by reference to the subject matter of the rules.[10] At the other end of the spectrum, Judge Simma and Theodore Kill have argued for a broad reading under which '[a]lmost any rule of international law will be "relevant" when considered with the proper degree of abstraction'.[11] The broader reading is supported by reference to Article 30 of the VCLT, which explicitly uses the concept of 'the same subject-matter', with the ordinary meaning of 'relevant' *a contrario* suggesting a broader scope.[12] The International Court's judgment in the *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti)* case seems closer to the latter reading of relevance, finding aspirational rules from a Friendship and Co-operation Treaty 'relevant' for interpreting rules on mutual criminal assistance in another treaty.[13] At the same time, the explicit reference to context in the *chapeau* of Article 31(3) and to 'applicable [rules]' in subparagraph (c) could narrow back the broader reading of relevance.[14]

The different readings of relevance can have a significant impact on the interpretation of investment treaties that may be illustrated by reference to the *Loewen Group, Inc. and Raymond L Loewen v US* (*Loewen*) and *Sempra Energy International v Argentina* (*Sempra*)

[6] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* [2008] ICJ Rep 177 [112].

[7] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 31(3)(c).

[8] G Abi-Saab, 'The Appellate Body and Treaty Interpretation' in G Sacerdoti and others (eds), *The WTO at Ten—The Contribution of the Dispute Settlement System* (CUP, Cambridge 2006) 463.

[9] ME Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff, Leiden/Boston 2009) 433.

[10] G Marceau, 'Conflict of Norms and Conflict of Jurisdictions: The Relationship between WTO Law and Agreements and Other Treaties' (2001) 35 World Trade J 1081, 1087; J Pauwelyn, *Conflict of Norms in Public International Law* (CUP, Cambridge 2003) 253–74.

[11] B Simma and T Kill, 'Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology' in C Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP, Oxford 2009) 696.

[12] Ibid 695.

[13] *Djibouti* (n 6) [113].

[14] *Oil Platforms (Iran v US)* (Judgment) [2003] ICJ Rep 161, Separate Opinion of Judge Higgins 225 [46]; F Berman, 'Treaty Interpretation in a Judicial Context' (2004) 29 Yale J Intl L 315, 320; R Gardiner, *Treaty Interpretation* (OUP, Oxford 2008) 278–80.

cases. If 'relevant' rules have to 'run parallel', then in the *Loewen* case the interpreter of treaty rules on investor–State arbitration could refer to customary law of diplomatic protection dealing with invocation of responsibility by States only if investor–State arbitration (despite appearance to the contrary) also constituted invocation of responsibility by States.[15] Similarly, in the *Sempra* case the interpreter could refer to customary law of circumstances precluding wrongfulness only if the treaty rules on non-precluded-measure (NPM) clauses were secondary rules of State responsibility.[16] An interpreter adopting this approach has to identify the nature of treaty and customary law, and the absence of relevance directly leads to *ab initio* inadmissibility of custom as an interpretative material. Conversely, an interpreter for whom almost any rule of international law is relevant would probably be less concerned about the exact normative parallelism and admissibility of interpretative materials: even if investor–State arbitration is not exactly diplomatic protection or NPM clauses are not precisely secondary rules, with the proper degree of abstraction similar issues of invocation of responsibility or conduct in emergency situations may be identified. The qualification of relevance is less important for the present purpose: even if the minimum standard imposes obligations with different content, they address the same subject matter and would probably qualify as 'relevant' even under the stricter reading of relevance.[17]

Second, when customary rules have been recognized as admissible interpretative materials, their weight in the interpretative process still needs to be considered. The discussion of the role of customary law often focuses on the first question of admissibility, implicitly assuming that 'relevant' customary law would necessarily dictate the result of the interpretative exercise. However, the mere fact that customary law is 'relevant' does not on its own mean that it carries significant interpretative weight, or even replaces the ordinary meaning of the treaty term. Article 31(3)(c) only determines the admissibility of interpretative materials. The *chapeau* of Article 31(3) explains the role and weight of admissible interpretative materials in the interpretative process by placing them 'together with the context'. The *chapeau* suggests that materials introduced in the interpretative process through Article 31(3)(c) play the same role and carry (only) the same interpretative weight as the context. To paraphrase the ILC Commentary of the Draft Articles on the Law of Treaties, 'the ordinary meaning of a term is not to be determined in the abstract but in the context of the treaty [and relevant customary law] and in light of its object and purpose'.[18]

In the *Djibouti* case, the ICJ found that the 'relevant' rules only 'have a certain bearing on interpretation' and 'cannot possibly stand in the way' of particular rules in the treaty under interpretation.[19] Context (and rules considered 'together with context') should

[15] *Loewen v US*, ICSID Additional Facility Case no ARB(AF)/98/3, Award, 26 June 2003 (2003) 42 ILM 811 [226]–[239]; Z Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (2003) 74 BYIL 151, 163; Z Douglas, 'Other Specific Regimes of Responsibility: Investment Treaty Arbitration and ICSID' in J Crawford, A Pellet, and S Olleson (eds), *The Law of International Responsibility* (OUP, Oxford 2010) 821–8.

[16] *Sempra Energy International v Argentina*, ICSID Case no ARB/02/16, Decision on the Application for Annulment of the Award, 29 June 2010 (2010) 49 ILM 1445 [186]–[209]; see also *CMS Gas Transmission Company v Argentina*, ICSID Case no ARB 01/08, Decision of the *ad hoc* Committee on the Application for Annulment, 25 September 2007 14 ICSID Rep 251 [129]–[135].

[17] See II.2 below.

[18] ILC, 'Draft Articles on the Law of Treaties with Commentaries' in *Yearbook of the International Law Commission, 1966, Volume II*, UN Doc A/CN.4/SER.A/1966/Add.1 112, 221 [12]. For a similar if terminologically differently expressed point *see* Gourgourinis 'Distinction' (n 5) 49–51.

[19] *Djibouti* (n 6) [114]. Simma and Kill explain that 'the impact of the rule on the interpretation of the treaty in dispute should be low. If, however, the rule does provide "operational guidance" for the determination of the meaning of a treaty's terms as argued by either party, then it is appropriate for that rule to play a greater role in informing the interpreters understanding of the treaty', Simma and Kill 'Harmonizing Investment Protection' (n 11) 696.

have greater bearing on the framing of the ordinary meaning if they deal with the same or similar issues and *vice versa*. Since a certain degree of 'sameness' of admissible customary law may be assumed due to the scope-orientated admissibility criterion of relevance, customary law would play the same role as similar treaty rules would *qua* context, providing material for comparing and contrasting different approaches.[20]

Third, even though the textual expression of Article 31(3)(c) and Article 31(3) provide an adequate framework for dealing with customary law, most of the recent authorities have used a different vernacular without explicit pedigree in the VCLT. Campbell McLachlan's landmark article on systemic integration[21] and the ILC Study Group's Report[22] and Conclusions all suggest a number of considerations that support reference to customary law. To adopt the terminology of the ILC Study Group's Conclusions, in general terms there is a positive presumption that 'parties are taken to refer to customary international law and general principles of law for all questions which the treaty does not itself resolve in express terms'. More particularly, customary law is of special relevance where '[t]he treaty rule is unclear or open-textured'; '[t]he terms used in the treaty have a recognized meaning in customary international law'; or the treaty is silent on applicable law and the general presumption is applied.[23]

This exposition is problematic on two levels: it both unnecessarily distances itself from the VCLT by creating new terminology of interpretation and seems to conflate two distinct legal arguments. The 'positive presumption' and the 'unclear or open-textured... rule' tests seem to be a somewhat roundabout way of expressing the reading of Article 31(3)(c) suggested in the previous paragraphs. McLachlan's later article supports the view that the technique of the ILC Conclusions is simply another way of expressing Article 31(3)(c). In applying his methodology to particular case studies, McLachlan suggested that interpretation of treaty rules on fair and equitable treatment could draw upon the customary international minimum standard because of the similarity of functions in assessing administration of justice.[24] The criterion of similarity of functions between treaty and customary rules can be restated as a VCLT-compliant inquiry into 'relevance' under Article 31(3)(c). However, if that is the case, there is no obvious added value from introducing these new terms and criteria instead of the tests already provided by Article 31(3)(c).

Introduction of a content-sensitive criterion ('does not resolve itself in express terms') as a matter of admissibility ('parties are taken to refer to customary international law') is problematic because it goes against the explicitly scope-focused and content-neutral test of VCLT ('relevant', not 'relevant and not resolved differently in the treaty'). As a formal point, to the extent that these tests suggest something different from VCLT, as a matter of sources one should probably prefer the customary law rules of interpretation

[20] Gardiner *Treaty Interpretation* (n 14) 185–6.

[21] C McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 279, 311–13.

[22] Study Group of the International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', UN Doc A/CN.4/L.682 [467].

[23] Conclusions of the Work of the Study Group, 'Fragmentation of International Law: Difficulties Arising from Diversification and Expansion of International Law', UN Doc A/CN.4/L.682 Add 1 [19(a)], [20(a)]–[(c)].

[24] McLachlan 'Investment Treaties and General International Law' (n 5) 361, 381 (emphasis in the original), more generally 380–3.

established from 1960s onwards to a single quotation from one pre-Second World War case.[25] As a practical point, even if the Study Group of the ILC only attempted to explain the application of the VCLT, the 'positive presumption' seems to merge the logical two-step process of separately establishing admissibility and weight of interpretative materials into one single exercise. This calls for a rather blunt technique of finding admissible only those materials that are important for the result of the interpretive process, rather than accepting all relevant materials as admissible and using them for subtle contextualization. In fact, much of the concern about exaggerated reliance on custom may be traced to the almost total focus on admissibility of interpretative materials, leaving aside the issues of interpretative weight and seemingly implying that any custom introduced replaces the ordinary meaning. Saying that a 'treaty rule... is unclear' is not that different from the concept of 'ambiguous or obscure' that Article 32 of the VCLT provides as one of the alternative preconditions for relying on supplementary means of interpretation. If a criterion for application of a part of the primary rule of interpretation is substantially the same as the condition for having resource to supplementary means, then the fundamental distinction between Articles 31 and 32 is close to disappearing, with Article 31(3)(c) effectively collapsing into Article 32. Overall, to the extent that these tests only restate Article 31(3)(c), they are unnecessary, misleading, and potentially dangerous; to the extent that they provide for a different approach, their supporters bear the burden of demonstrating the law-making processes through which VCLT and analogous customary law have been displaced.

Reliance on 'recognized meaning in customary international law' is better treated as a different legal technique not falling under Article 31(3)(c) at all. The application of Article 31(3)(c) may be analytically separated into finding 'relevant' customary rules admissible and then 'taking [them] into account, together with the context'. The treaty rule under interpretation sets the limits of admissible custom not by its content but by the scope of coverage, with the content of treaty and customary rules becoming important only during the interpretative exercise when custom serves the contextualizing role. However, customary law may also be brought into the interpretative process directly when the treaty rule under interpretation makes a reference to customary law. Rather than engaging in a content-neutral exercise in order to place custom at the level of context, this is a content-focused exercise to place custom at the level of ordinary or special meaning. If a treaty term has a 'recognized meaning' in customary law, it seems better to say that reference to customary law simply *is* the 'ordinary meaning' under Article 31(1) or 'special meaning' under Article 31(4) of the particular term.[26]

There are at least two ways of making the reference. The easiest technique is to describe the process of reference. In *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua*), the ICJ explained how the reference to customary law was contained in the actual text of Article 51, which mentioned the 'inherent right' [and] it is hard to see how this can be other than of a customary nature'.[27] The other technique mentioned in the Conclusions is to describe the result of the reference by using a term of art recognized in customary law. While the *Aegean Sea Continental Shelf* (*Aegean Sea*) case is usually dealt

[25] Conclusions of the Work of the Study Group (n 23) [19(a)], basing the 'positive presumption' on *Georges Pinson (France v Mexico)* (1928) 5 RIAA 327, 422.

[26] JE Alvarez, 'The Factors Driving and Constraining the Incorporation of International Law in WTO Adjudication' in ME Janow and others (eds), *The WTO: Governance, Dispute Settlement & Developing Countries* (Juris Publishing, Inc., New York 2008) 622.

[27] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)* (Merits) [1986] ICJ Rep 392 [176].

with in the context of generic terms, it also shows how the use of a customary law term of art results in a reference to custom: 'the expression "relating to the territorial status of Greece" in reservation (b) is to be understood as a generic term denoting any matters properly to be considered as comprised within the concept of territorial status under general international law'.[28]

The two ways of bringing customary law into the interpretative process have importantly different effects. In the argument by Article 31(1) or Article 31(4), the benchmark is the content of (the reference in) the treaty rule and the interpretative weight directly affects ordinary or special meaning. In the argument by Article 31(3)(c), the benchmark of admissibility is the subject matter of the treaty rule and the interpretative weight is limited to that of context. An accurate (if not explicit) application of the VCLT methodology may be illustrated by the *Chevron Corporation (USA) and Texaco Corporation (USA) v Ecuador (Chevron)* case. The Tribunal had to address the impact of customary law of denial of justice on the treaty obligation to 'provide effective means of asserting claims and enforcing rights'. The Tribunal first dealt with the relationship of treaty and custom, concluding that the treaty rule did not make a reference to custom.[29] The absence of explicit language and language corresponding to the customary standard paralleled the *Nicaragua* and *Aegean Sea* techniques of introducing customary law in terms of Article 31(1) or 31(4). For reference to take place, the treaty would have had to refer to, for example, 'obligations in accordance with customary law' or the customary term of art 'denial of justice'. The degree of overlap and the similarity of wrongs relate to the question whether custom is 'relevant' in terms of Article 31(3)(c). The Tribunal introduced customary law into the interpretative process because it was 'relevant' rather than directly referred to.

At the second stage of analysis, the Tribunal accurately captured the subtle contextualizing role that admissible 'relevant' international law may play, simultaneously explaining similarities and contrasting differences: 'the interpretation and application of Article II(7) is informed by the law on denial of justice. However, the Tribunal emphasizes that its role is to interpret and apply Article II(7) as it appears in the present BIT.'[30] One should applaud the VCLT-consistency of the methodology that was *de facto* applied. The Tribunal distinguished between the issues of admissibility and weight of customary law in the interpretative process. At the first level of analysis, a further distinction was made between a reference to custom (that had not taken place) and introduction of 'relevant' custom because of the substantive and functional overlap. At the second level of analysis, custom operated in subtle contextualizing terms, illuminating the methodology and criteria of the treaty obligation to the extent that treaty terms did not call for something different.

The distinction between a reference to customary law and the taking into account of customary law will structure the further analysis. First, it will be suggested that treaty rules on fair and equitable treatment refer to the customary minimum standard (II.1). Second, even if that is not the case, the interpreter of fair and equitable treatment has to take the customary minimum standard into account (II.2).

[28] *Aegean Sea Continental Shelf (Greece v Turkey)* (Judgment) [1978] ICJ Rep 3 [76].

[29] *Chevron Corporation and Texaco Petroleum Corporation v Ecuador*, PCA Case no 34877, Partial Award on the Merits, 30 March 2010 [242].

[30] Ibid [244], [250], [264], [328], [331].

II. Fair and equitable treatment and the international minimum standard

1. Reference to the international minimum standard

Different investment protection treaties deal with the relationship between fair and equitable treatment and customary minimum standard in different terms. At one end of the spectrum, treaties expressly recognize that fair and equitable treatment is identical with the customary minimum standard; at the other end of the spectrum, fair and equitable treatment appears on its own, without any explicit reference to customary law; many versions of intermediate formulae exist.[31] Clearly, the term of art 'fair and equitable treatment' may in principle be used to refer to the customary minimum standard. The treaty language and arbitral decisions show no conceptual controversy surrounding the technique of the reference;[32] the debate rather addresses the mundane interpretative question whether a reference has in fact been made in the particular instance.

In abstract terms, differences in treaty practice may, as always, be read in two ways. They may signify that when States wish to refer to customary law they do so in express terms, and the absence of such a reference *a contrario* suggests that the analysis should be limited to treaty law. Alternatively, the uncontroversial practice of making the references to customary law could suggest that some States make *ex abundanti cautela* express an arrangement that would have been otherwise valid. The issue cannot be resolved *in abstracto* and requires closer analysis from the perspective of treaty interpretation.

In the particular instance, it is important that the question is not about the existence of a rule—the treaty obligation of fair and equitable treatment exists in all these treaties—but about whether the rule is a technical term of art for a reference to custom. If the generally accepted ordinary meaning under Article 31(1) VCLT is a reference to custom, then to preclude a reference and provide a special meaning under Article 31(4) VCLT it would be insufficient for the treaty to be silent. The reference would have to be denied either explicitly or by necessary implication (for example, by elaborating it in a manner clearly different from custom).

The argument against reading fair and equitable treatment as a reference to customary law consists of several strands.[33] In interpretative terms, '[a]s a matter of textual interpretation it is inherently implausible that a treaty would use an expression such as "fair and equitable treatment" to denote a well known concept like the "minimum standard of treatment in customary international law" '.[34] More generally, it might be superfluous to restate customary rules that would be in any event binding. In terms of historical narrative, the opposition by Calvo Doctrine and the NIEO to the international standard would make it doubtful that these States would agree to the inclusion of the term in their

[31] See Ch 3.III.2, text at nn 241–9. [32] See Ch 3.III.2, text at nn 241–9, 251–8.

[33] The authors who have taken the view that fair and equitable treatment does not refer to customary standard include FA Mann, 'British Treaties for the Promotion and Protection of Investments' (1981) 52 BYIL 241, 243 (although see a different position in an earlier pleading on behalf of Belgium in *Barcelona Traction, Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* ICJ Pleadings Volume VIII 56–7, cited at n 49; and in later writings, FA Mann, *The Legal Aspects of Money* (5th edn Clarendon Press, Oxford 1992) 427, 556); S Vasciannie, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice' (1999) 70 BYIL 99, 139–45; I Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (OUP, Oxford 2008) 53–68; R Kläger, *Fair and Equitable Treatment in International Investment Law* (CUP, Cambridge 2011) Ch 4.

[34] CH Schreuer, 'Fair and Equitable Treatment (FET): Interactions with Other Standards' (2007) 4 (5) Transnational Dispute Management 10.

treaties.[35] In policy terms, it would not be particularly helpful to refer to 'arcane norms of customary international law' for identifying the criteria for the treatment of modern investment projects.[36] Overall, the textual and conceptual innovations of fair and equitable treatment require a new level of analysis that would not involve the obsolescence of customary minimum standard.

The quotation from the previous paragraph rightly identifies the key question: does 'fair and equitable treatment' denote 'international minimum standard'? This is fundamentally a question about the ordinary meaning of a treaty term. As such, it has to be answered by reference to State practice and judicial and arbitral decisions.[37] The pre-Second World War practice provides considerable support for answering the question in affirmative terms.[38] To recall a few examples, in the seventeenth century, British FCN treaty practice used such terms as 'justice and equity' to refer to different aspects of administration of justice.[39] The Arbitral Tribunal in the *Ambatielos* case confirmed that these provisions required administration of justice in a non-discriminatory manner.[40] In late eighteenth century, Chancellor Loughborough's opinion regarding the Jay Commission used 'fair and equitable treatment' to describe treaty claims regarding treatment of aliens.[41] In the nineteenth and early twentieth centuries, the language of fairness and equity was extensively used in State practice to describe different aspects of the required treatment of aliens,[42] and similar practice continued in the inter-War years.[43] In the 1930 Conference for the Codification of International Law, Hackworth, on behalf of the US, suggested that one could 'expect from the courts that standard of fairness which will be calculated to give complete justice to litigants'. Taken together, the State practice suggests that requirements 'not to deny justice' (or 'not to act in an arbitrary manner') and 'to provide fair treatment' expressed the same rule in respectively negative and positive terms.[44] While the language was also used in other contexts, the old treaty practice and the more recent State practice provide sufficient support for accepting fair and equitable treatment as a (non-exclusive) pre-Second World War term of art for referring to customary law on the treatment of aliens.

The post-Second World War practice broadly follows the same trend. The post-War 1940s and 1950s US FCN Treaties that first used fair and equitable treatment in the modern sense were varied and left open multiple possible readings, with contextual influence from trade law, ambiguous flexibility of 'equitable terms', and possible replacement

[35] Vasciannie 'Fair and Equitable Treatment' (n 33) 144.

[36] T Weiler and WT Waelde, 'Investment Arbitration under the Energy Charter Treaty in the Light of New NAFTA Precedents: Towards a Global Code of Conduct for Economic Regulation' (2004) 1 (1) Transnational Dispute Management 19–27; T Weiler and I Laird, 'Standards of Treatment' in P Muchlinski, F Ortino, and CH Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP, Oxford 2008) 269–70.

[37] See Ch 5.II.1. [38] See Ch 3.III.1, text at nn 164–89.

[39] Treaty between Great Britain and Sweden (adopted 11 April (13 May) 1654) Hertslet Collection Volume II 310 art 5; Treaty of Peace and Commerce between Great Britain and Denmark (adopted 11 July 1670, entered into force 11 August 1670) C Parry (ed), *The Consolidation Treaty Series* (Volume 11, 1668–1671, Oceana Publications, Inc., Dobs Ferry, New York 1969) 366 (English translation) art 24.

[40] *Ambatielos (Greece/UK)* (1956) 12 RIAA 83, 108–9.

[41] Opinion of Lord Justice Loughborough (1798) 1 Moore Intl Arbitrations 326, 327.

[42] See Ch 3.III.1, text at nn 171–85. [43] See Ch 3.III.1, text at nn 187–9.

[44] S Rosenne (ed), *League of Nations Conference for the Codification of International Law [1930]* (Volume IV, Oceana Publications, Inc., New York 1975) 1576. Freeman explained how 'fairness' provided the ultimate criterion of denial of justice, AV Freeman, *The International Responsibility of States for Denial of Justice* (Longmans, Green & Co., London 1938) 267. The conceptual similarity between the prohibition of arbitrary conduct and the affirmation of fair and equitable treatment was later noted by the US in *ELSI*, see n 49.

of the 'due process' criterion all being *prima facie* plausible.[45] However, the 1967 OECD Draft Convention on the Protection of Foreign Property (that drew upon these treaties and provided the basis for subsequent bilateral practice) seemed to equate the content of fair and equitable treatment with that of the international minimum standard.[46] State practice supports this view.[47] Pleadings in the ICJ (where one might expect to find the most considered statements on legal issues) show that such States as Belgium, Spain, the UK, and the US used the language of fair and equitable treatment to refer to the customary of law administration of justice (in particular for claims regarding the content of the judgment),[48] as well as to customary rules of the treatment of aliens in general.[49] In the ILC work on the protection of diplomatic agents in early 1970s, 'fair treatment' was used to incorporate all the procedural guarantees generally recognized to a detained

[45] See Ch 3.III.1, text at nn 237–40.

[46] 'OECD Draft Convention on the Protection of Foreign Property' (1963) 2 ILM 241 art 1, 244; 'OECD Draft Convention on the Protection of Foreign Property' (1968) 7 ILM 117 art 1, 120; cf *Asian Agricultural Products Ltd v Sri Lanka*, ICSID Case no ARB/87/3, Final Award on Merits and Damages, 21 June 1990 (1991) 30 ILM 580, Dissenting Opinion of Asante 628 [25]–[26].

[47] In the *Barcelona Traction* case, a US note to Spain was cited regarding the treatment of Barcelona Traction that the US considered 'motivated by a more general concern to secure equitable treatment of foreign investments in Spain', *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* [1970] ICJ Rep 3 [22]; for the text of the note and earlier US notes protesting the arbitrary mistreatment of the company, see *Barcelona Traction* Pleadings (n 33) Volume VIII 449–50 (Lauterpacht on behalf of Belgium). For the Swiss position, LC Caflisch, 'La pratique Suisse en matière de droit international public 1979' (1980) 36 Schweizerisches Jahrbuch für internationales Recht 138, 178–9.

[48] In the *Ambatielos case*, the UK argued that 'Mr. Ambatielo's claim is that … treatment he received was unfair, unjust and inequitable. … that is a matter which does not raise any issue on the Treaty but does raise issues under well-known principles of general international law … . His claim is in fact that the treatment he received was so inequitable as to amount to a denial of justice under international law', *Ambatielos case (Greece v UK)* ICJ Pleadings 479 (Fitzmaurice). In the *Interhandel* case, the US argued that the proceedings 'were conducted in full compliance with the standards of international law for a fair hearing', *Interhandel case (Switzerland v US)* ICJ Pleadings 457 (Townsend) and promised 'fair treatment' 'in the United States courts', ibid 612 (Becker). In the *Barcelona Traction* case, Belgium relied on the 'fair trial, this equitable process which international law permits foreigners to invoke when they appear before tribunals of countries other than their own', *Barcelona Traction* Pleadings (n 33) Volume VIII 305–6 (Rolin) (author's translation), see also ibid Volume II 369 (Rolin). While rejecting the substance of the argument, Spain accepted the 'equitable process (fair trial)' terminology, ibid Volume IX 82, 85 (Guggenheim). Spain elaborated its position by saying that 'the judicial decisions of which complaint was made were in all cases just, fair and equitable … . the positive rules of customary international law on State responsibility for the contents of municipal judicial decisions already require that, to create an international responsibility, the decisions must be grossly unjust, notoriously unfair and manifestly inequitable', ibid Volume IX 470 (Guggenheim).

[49] In the *Barcelona Traction* case, Belgium explicitly referred to FCN Treaty rules on equitable treatment as assuring 'something that is customary in public international law, namely treatment that is fair, reasonable and objective, that is neither arbitrary, nor abusive, nor discriminatory', *Barcelona Traction* Pleadings (n 33) Volume VIII 56–7 (Mann). It also referred to 'the minimum of equitable treatment that the qualifying aliens may invoke pursuant to international law', ibid Volume I 164 fn 3 (Memorial) (author's translation) (Spain rejected the substance of the 'equitable treatment' argument without questioning the appropriateness of addressing the law on the treatment of aliens under this heading, ibid Volume IV 556 [225], 557 [228], 558 [229] (Counter-Memorial of Spain)). In the *ELSI* case, the US described its treaty practice prohibiting arbitrary or unreasonable treatment, and pointed out the similar practice by which 'other treaties, rather than prohibiting unfair or unequal treatment, affirmatively guarantee fair and equitable treatment', *Elettronica Sicula S.p.A. (ELSI) (US v Italy)* ICJ Pleadings Volume I 77 fn 2 (for US, 'arbitrariness' was closely linked to 'due process of law' in takings and the customary minimum standard, ibid 93) (Memorial). Perhaps also *Nottebohm case (Liechtenstein v Guatemala)* ICJ Pleadings Volume II (Molina on behalf of Guatemala).

or accused person throughout the criminal proceedings.[50] Legal writers also used the language of fairness in describing the customary standards.[51]

If one takes together the pre- and post-Second World War materials pre-dating investment arbitrations, it seems permissible to conclude that the ordinary meaning of fair and equitable treatment was a reference to customary minimum standard, in particular regarding administration of justice. More recent practice confirms this view by necessary implication. The considerable number of arbitral decisions that read in the elements of customary law of denial of justice (particularly regarding the exhaustion of remedies) in the treaty rules on fair and equitable treatment necessarily engage in a reference to custom. It would be *prima facie* impossible to derive different standards of exhaustion merely from the neutral expression of treaty language.[52]

The broader historical narrative of the resistance by Calvo/NIEO States is not particularly helpful. One might plausibly say both that international minimum standard was a discredited term and therefore replaced by the neutral-sounding fair and equitable treatment and that precisely because of its discredited nature the change could not have happened in such an unremarkable manner. In any event, there is considerable certainty about at least some issues: first, international minimum standard was not a common term of art in the pre-War treaty practice for reference to customary law;[53] second, even outside treaty practice it was not an exclusive term for designating the

[50] ILC, 'Draft Articles on the Prevention and Punishment of Crimes against Diplomatic Agents and Other Internationally Protected Persons with Commentaries' in *Yearbook of the International Law Commission, 1972, Volume II*, UN Doc A/CN.4/SER.A/1972/Add.1 312 art 8, Commentary. In the ILC debate, Elias introduced the term 'fair treatment' because '[t]hat wording would better convey the intention … to guarantee to the alleged offender not only that he would have a fair trial at the hearing in court, but also that he would be properly treated during earlier stages of the proceedings', ILC, *Yearbook of the International Law Commission, 1973, Volume I*, UN Doc A/CN.4/SER.A/1972 224 [8]. He also referred to 'fair and equitable treatment from the time of arrest until judgment', ibid 225 [16]. The relevance of the international minimum standard was also appreciated by the ILC (even if considered to be expressed by human rights), ibid 225–6.

[51] Fenwick wrote that 'the international standard … means a standard which the public opinion of the civilized world has come to accept as just and equitable', CG Fenwick, 'The Progress of International Law during the Past Forty Years' (1951) 79 Recueil des Cours de l'Académie de Droit International 5, 44. Henkin explained the creation of an international standard by the fact that 'States were concerned … that their nationals (and property of their nationals) be treated reasonably, "fairly"', L Henkin, 'International Law: Politics, Values and Functions' (1989) 216 Recueil des Cours de l'Académie de Droit International 9, 209. Asante stated that one of the underlying principles was the duty of the State to display fair and equitable treatment, SKB Asante, 'International Law and Investments' in M Bedjaoui (ed), *International Law: Achievements and Prospects* (UNESCO, Paris 1991) 669; cf *AAPL* Asante (n 46) [25]-[26].

[52] *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v Kazakhstan*, ICSID Case no ARB/05/16, Award, 29 July 2008 [651]; *Jan de Nul N.V. and Dredging International N.V. v Egypt*, ICSID Case no ARB/04/13, Award, 6 November 2008 15 ICSID Rep 437 [254]–[261]; *Pantechniki S.A. Contractors and Engineers v Albania*, ICSID Case no ARB/07/21, Award, 30 July 2009 [93]; *ATA Construction, Industrial and Trading Company v Jordan*, ICSID Case no ARB/08/2, Award, 12 May 2010 [107]; *Frontier Petroleum Services Ltd v Czech Republic*, UNCITRAL Case, Final Award, 12 November 2010 [293]; *Sergei Paushok, CJSC Golden East Company, CJSC Vostokneftegaz Company v Mongolia*, UNCITRAL Case, Award on Jurisdiction and Liability, 28 April 2011 [348]; *Alps Finance and Trade AG v Slovakia, Ad hoc* Case, Award, 5 March 2011 [250]–[251]; *White Industries Australia Limited v India*, UNCITRAL Case, Final Award, 30 November 2011 [10.4.5]–[10.4.9], [10.4.20]; *Spyridon Roussalis v Romania*, ICSID Case no ARB/06/1, Award, 7 December 2011 [315]. More broadly, the decisions that systematize *jurisprudence constante* regarding other treaties, or derive principles from case law or domestic law, necessarily assume a very broad approach to admissibility. It is not obvious that there is an elegant way of distinguishing between finding admissible the elaboration of other treaties but not customary law.

[53] States used terms such as 'protection for … property', Ch 2 n 128, or 'due process of law' in the taking of property, text at Ch 3 n 61.

pre-War law on the treatment of aliens;[54] third, fair and equitable treatment was not a post-War innovation;[55] fourth, the 1950–2000s ICJ proceedings demonstrated that States (Belgium, France, Guinea, Iran, Italy, Norway, Spain, the UK, and the US) were perfectly happy to use the terminology of international minimum standard (of civilization), demonstrating that it is not, in fact, obsolete.[56] At least in the absence of specific preparatory or other relevant materials, the historical narrative does not affect the argument of ordinary meaning made above.

The reference to a customary rule is not superfluous. In practical terms, it enables access to dispute settlement process under the treaty. In terms of sources, by agreeing to customary minimum standard in treaty terms, parties signify the rejection of the (Calvo) argument that the content of obligation cannot be more demanding than non-discrimination and the (NIEO) argument that there is no obligation under international law at all. To the extent that either of these positions constitutes a special customary rule, States parties to such treaties have opted back into the general rule.

The argument relying on inappropriateness of the international minimum standard for addressing modern challenges appears to rest on two questionable premises. To reject a legal argument because of its result turns the process of legal reasoning on its head, suggesting that the interpreter already has a predetermined result in mind and the legal analysis is only relevant for providing formal justification for it. The fact that the standard is not as stringent as one might expect or want, whether in general or in a particular dispute, is not a reason for rejecting a conclusion that is otherwise validly mandated by the applicable sources. More particularly, the argument about a reference to customary law is without prejudice to the question about the content of customary law, and it is perfectly possible that it has appropriately evolved since the pre-War times, therefore taking account of the concern about obsoleteness of the standard.

It is also helpful to consider the practice regarding expropriation and full protection and security, other investment treaty rules with a customary law dimension. The examination of relationship of treaty rules on expropriation and custom may be helpful in identifying the manner in which customary law becomes relevant in this field of law, possibly forming the normative background against which States engage in investment treaty-making. The classical practice, for example, in the nineteenth-century *Sicilian Sulphur* dispute[57] and the early twentieth-century *Certain German Properties* case,

[54] 'International minimum standard' does not appear in the 1929 Harvard Draft Convention, 'Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners' (1929) 23 AJIL Special Supplement 133, or in the text adopted in the 1930 Hague Conference, 'Text of Articles Adopted in First Reading by the Third Committee of the Conference for the Codification of International Law' League of Nations publication, *V.Legal, 1930.V.17*, and a number of pre-War authors took the view that the international standard was simply another way of presenting the broad view of denial of justice, Ch 2 n 76.

[55] See Ch 3.III.1.

[56] Ch 1 n 9. The terminology of the post-War pleadings in the ICJ continues the inter-War pleadings by Belgium, Germany, and the UK, ibid.

[57] In the 1837–1842 *Sicilian Sulphur* dispute Great Britain argued that Sicily had granted sulphur monopoly rights to French traders in breach of the rights of property protection provided by the 1816 Treaty of Commerce, *Sicilian Sulphur* dispute (1839–1840) 28 British and Foreign State Papers 1163, 1201–42, especially 1218–19 (Lord Palmerston), 'interpreting the words of the Commercial Treaty in the light of general principles of international law', *Oscar Chinn (UK v Belgium)* PCIJ Rep Series C No 75 43 [54] (Memorial of the UK), also ibid 44 [56].

supported a close link between treaty and customary rules on expropriation.[58] A similar view has been taken in the post-War legal writings.[59]

Regarding protection and security, the US explained in *ELSI* that '[t]he effect of the Treaty is to translate these generally recognized and extensively applied principles of international law [concerning the treatment of aliens] into a concrete and explicit set of bilateral obligations'.[60] The *ELSI* Court accepted the relevance of customary law of protection and security.[61] Even though it did not take a position regarding expropriation, both the US and Italy accepted the relevance of customary law.[62] The IUSCT addressed expropriation in considerable detail, and despite disagreement about some aspects relating to creeping expropriation, there seemed to be broad agreement that most cases drew on customary law.[63] The more recent State practice[64] and case law have treated differently expressed rules on expropriation as referring to customary law.[65] The law of expropriation and the international minimum standard have been classically interrelated, even though conceptual uncertainties during the pre-War debates resulted in expropriation being developed as a separate rule.[66] From the 1920s law of *Certain German Interests*, if not from the 1830s law of *Sicilian Sulphur*, the treaty rules relating on the treatment of aliens have been read as liberally referring to customary law on the issue, and treating fair and equitable treatment as a reference to custom would go with the grain of the law in the area.

If the ordinary meaning of a treaty term refers to a customary rule, the content of the customary rule directly informs the ordinary meaning of the treaty term (to borrow the

[58] Germany and Poland disagreed whether a provision of the Versailles Treaty regarding liquidation included general obligations regarding protection of property of aliens, and Kaufmann, on behalf of Germany, submitted that '[n]o rule of written law exists in vacuum. … It is precisely the general international law regarding aliens that can provide the necessary perspectives', *Certain German Interests in Polish Upper Silesia (Germany v Poland)* PCIJ Rep Series C No 11 Volume I 167 (author's translation); ibid Volume III 838–9 (German Counter-Memorial); Volume I 162–74, 261–2 (Kaufmann). Poland disagreed, arguing that the treaty entitlement to liquidate did not entail the obligation to respect the private property in accordance with general international law, ibid Volume I 211–20, 286 (Sobolewski). The Court agreed with Germany and found that 'subject to provisions authorising expropriation, the treatment accorded to Germany private property, rights and interests in Polish Upper Silesia is to be treatment recognised by the general accepted principles of international law', *Certain German Interests in Polish Upper Silesia (Germany v Poland)* [1926] PCIJ Rep Series A No 7 21. Count Rostworowski was the sole dissenter: 'However worthy of all respect general international law may be, it is certain that it was not incorporated by the will of the parties', ibid Dissenting Opinion of Count Rostworowski 86, 90.

[59] I Seidl-Hohenveldern, 'The Abs-Shawcross Draft Convention to Protect Private Foreign Investment: Comments on the Round Table' (1961) 10 J Public L 100, 107–8 (describing the contrary view as 'alien to international law in general'). Metzger disagreed, but probably less about the possibility to refer to customary law than about the scope of the treaty rule itself from which such a reference could be made, SD Metzger, 'Multilateral Convention for the Protection of Private Foreign Investment' (1960) 9 J Public L 133, 141.

[60] *United States Diplomatic and Consular Staff in Tehran (US v Iran)* ICJ Pleadings 180 (Memorial).

[61] *Elettronica Sicula S.p.A. (ELSI) (US v Italy)* [1989] ICJ Rep 15 [113].

[62] *ELSI* Pleadings I (n 49) 89–92 (Memorial of the US); ibid Volume II 40 (Memorial of Italy), 468 (Rejoinder of Italy); ibid Volume III 105–7 (Gardner on behalf of the US).

[63] Ch 5 n 101.

[64] 2004 Canada Model BIT Annex B. 13(1); 2004 US Model BIT Annex B; 2012 US Model BIT Annex B.

[65] *Pope & Talbot Inc. v Canada*, UNCITRAL Arbitration, Interim Award, 26 June 2000 122 ILR 316 [104] ('tantamount to expropriation'); *Saluka* (n 3) [254] ('deprivation'); *LG&E v Argentina*, ICSID Case no ARB/02/1, Decision on Liability, 3 October 2006 (2006) 21 ICSID Rev—Foreign Inv L J 203 [188] ('tantamount to expropriation').

[66] See Ch 2.II.2.

elegant turn of phrase from the US pleading in *ELSI*, translates general international law into a treaty obligation).[67] Consequently, the meaning of the obligation to provide fair and equitable treatment is established by examination of the content of the customary minimum standard. With all due caution, the technical meaning attributed to fair and equitable treatment in other contexts might provide certain residual interpretative influence at least in two distinct ways. On the one hand, the practice of trade and commercial treaties confirms that the rule formulated as fair and equitable treatment is capable of applying to the treatment of sophisticated corporations in complex commercial settings, moving beyond the classically limited paradigms.[68] On the other hand, a number of strands of practice caution from very different perspectives against deriving excessively stringent obligations from the language itself: in the commercial treaties, extensive legislative intervention was necessary to make concrete the content of the obligation so as to make it operational;[69] in State practice, the term was used to formulate broad, flexible and equity-based rules;[70] finally, in the ICJ cases, States invoked fair and equitable treatment to refer specifically to denial of justice by unjust judgments,[71] the aspect of denial of justice famously most complicated to demonstrate.[72] While the content of the standard is to be established by reference to custom, the residual interpretative influence of the reference is helpful in identifying the arguments that go (or do not go) with the grain of international practice.

2. Taking into account the international minimum standard

Customary law can be taken into account in the interpretative process even if one were to reject the argument that fair and equitable treatment refers to the customary minimum standard. The difference is that its introduction would have to be considered not as a matter of Article 31(1) VCLT but as a matter of Article 31(3)(c) VCLT. First, unlike the earlier argument of Article 31(1) that attempted to identify a reference to general international law, Article 31(3)(c) is activated by the mere presence of 'relevant' international law. The 'relevance' of the customary minimum standard for the interpretation of fair and equitable treatment seems unquestionable. The whole spectrum of positions in treaty law and arbitral practice, from identifying treaty with custom to finding custom to be archaic or modern, similar to treaty in general or in the particular instance necessarily rests on the same premise: treaty and customary rules address the same subject matter, whether with the same or different content.[73]

Second, Article 31(3)(c) VCLT deals only with the narrow but important issue of admissibility of interpretative materials. If rules of general international law are relevant, then the *chapeau* of Article 31(3) imperatively requires that they are taken into account. It is complicated to explain within the VCLT framework the position of Tribunals that consider treaty rules to be 'autonomous' (and are content to note that customary law on the issue exists as an entirely different stratum of law that might lead to a similar or different solution in general or in the particular instance).[74] The acknowledgment of similarity of the subject matter immediately satisfies the criterion of admissibility, and the interpreter has no choice but to take customary law into account as an interpretative authority. Consequently, even if fair and equitable treatment does not refer to the

[67] n 62.
[68] See for the pre-War practice Ch 3 text at nn 202–7; for the post-War practice see Ch 3.III.2.
[69] See Ch 3 text at nn 203–5; Ch 3 n 237. [70] See Ch 5.I.1.
[71] See n 48. [72] See Ch 8 nn 110–25, III.2.iv.
[73] See Ch 3.III.2, text at nn 251–8. [74] See Ch 3 nn 255–8.

customary standard, the standard is always an admissible interpretative material of fair and equitable treatment due to its relevance. However, the question of admissibility of customary law as an interpretative material is entirely different from its weight in the interpretative process.

Third, the weight of customary law introduced by virtue of Article 31(3)(c) is determined by the *chapeau* of Article 31(3). Unlike the introduction of the customary minimum standard pursuant to a reference (that would directly affect the ordinary or special meaning of fair and equitable treatment), customary minimum standard introduced pursuant to its relevance has only the same weight as context. Consequently, customary law should perform the subtle contextualizing role of simultaneously explaining similarities and contrasting differences. In the *Chevron* case, the Tribunal relied on the customary law of denial of justice both to illuminate the criteria of the treaty obligation to provide effective means of redress and to contrast the differences between treaty and custom. Criteria for determining delay and burden of proof regarding exhaustion from customary law could be relied upon in explaining the treaty rule, while the ordinary meaning of the treaty term qualified the customary obligation to fully exhaust remedies.[75] Similarly, the rules from customary minimum standard would explain the content of fair and equitable treatment to the extent that perceptibly different rules do not follow from its formulation.

The vagueness of the formulation of fair and equitable treatment[76] makes the argument about perceptible differences between the ordinary meaning and (context-level) customary law complicated to demonstrate. Consequently, the introduction of customary law at the level of context carries significant weight in the interpretative process. In effect, the result of the interpretative process is similar to that achieved by treating fair and equitable treatment as a reference to custom, even if the intellectual justification for prioritizing custom relies on the considerable weight that context can play in the interpretation of vague terms, rather than direct reference to custom by the term itself. Moreover, the pedigree of fair and equitable treatment in different contexts suggests openness to further elaboration and specification, and therefore supports giving considerable weight to rules providing more detailed criteria.[77] Finally, when the treaty formulation of fair and equitable treatment provides examples of its meaning, the interpreter has to engage in analysis similar to that carried out by the *Chevron* Tribunal, distinguishing those elements of the treaty text that restate customary law (and therefore customary criteria can be relied upon in their elaboration) from those that provide for different content (and therefore customary criteria cannot, or at least cannot directly, be relied upon). Whatever approach one adopts, the content of general international law is likely to provide at least an authoritative starting point for determining the content of the treaty.

Part I of the book explored the process of law-making of the international minimum standard. Part II has analysed the legal basis of the international standard, arguing both in negative and positive terms that treaty rules of fair and equitable treatment refer to, or at the very least require, the customary minimum standard to be taken into account in the interpretative process. Part III elaborates the content of the modern international minimum standard.

[75] *Chevron* (n 29) [244], [250], [264], [328], [331]. [76] See text at nn 69–72.
[77] See text at nn 68–72.

PART III

CONTENT OF THE INTERNATIONAL MINIMUM STANDARD

In Part I, it was suggested that the law-making process of the international minimum standard consists of multiple strands, evolving from pre-Second World War extrapolations from denial of justice to post-War experiments with compensation for expropriation, international human rights, and investment treaties. In Part II, the relationship of the international minimum standard and fair and equitable treatment was explored within the framework of sources and interpretation, concluding that the customary standard has to play a decisive role in the interpretation of fair and equitable treatment. Part III provides the conclusion to the legal argument, testing the history of law-making from Part I against the benchmark of sources from Part II so as to determine the content of the modern international standard.

Historically, the law-making process has drawn a distinction between the aspects of the international standard addressing administration of justice, well-established already in the pre-War practice, and protection of property in other contexts, contested in the last decade of investment arbitrations. Part III follows this distinction, after the preliminary observations about the approach taken (Chapter 7), dealing in turn with the international standard on administration of justice (Chapter 8), and the international standard on protection of property (Chapter 9).

7

Investment Treaties, General International Law, and International Human Rights Law

Practice, case law, and legal writings have suggested a number of approaches to identifying the content of the international standard. Some of the approaches are questionable in legal terms. Other approaches are unlikely to provide a clearer understanding of the rules in question. This section considers different approaches from the perspectives of legal soundness and practical usefulness.

The interpreter of a treaty-based obligation to provide fair and equitable treatment has to draw on multiple legal authorities, some set out in the treaty and some extraneous to treaty text. First, fair and equitable treatment is a treaty rule, and as such has to be interpreted in accordance with rules of treaty interpretation set out in VCLT and customary law.[1] Apart from operating as a reference to customary law, treaty rules may provide specific examples of the international standard, either clarifying its content or creating special rules, and also constitute context in terms of other rules and preamble recitals of the treaty.

Second, customary law provides another relevant source. Fair and equitable treatment directly refers to general international law or at the very least requires it to be taken into account with considerable effect.[2] In very traditional terms, rules of customary law have to be identified in accordance with the rules on sources, examining State practice and *opinio juris*, as reflected in authoritative judicial or arbitral decisions and legal writings. It is reasonably clear where one should search for State practice in the classical law.[3] In modern law, State practice would most likely be expressed in the form of pleadings in particular cases. However, while admissible in principle and useful in highlighting certain aspects of legal development, reliance on pleadings might not be very helpful more generally. The pleadings of the relatively few respondent States are unlikely to constitute widespread practice, and the distortions following from the procedural regime, repeat respondents, tactical choices, and the limited access to pleadings would make the identification of the generalized consensus problematic. In any event, such pleadings would mostly relate to the legal significance of the particular factual situations in dispute, failing to provide and at best implying broader systemic and theoretical positions. Reliance on State practice in pleadings is legally sound, but it is doubtful whether at this stage it can have a direct and significant impact on customary law.

Third, some authors have suggested that customary law could be influenced by the treaty practice on fair and equitable treatment.[4] Again, while there is no reason of principle why a sufficiently widespread and consistent practice together with *opinio juris* could not give rise to customary law, the argument is problematic on a number of levels. Leaving aside the general question as to whether investment treaties influence customary

[1] See Ch 5. [2] See Ch 6. [3] See text at Ch 1 nn 15–18.

[4] AF Lowenfeld, 'Investment Agreements and International Law' (2003–2004) 42 Columbia J Transnational L 123, 129; I Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (OUP, Oxford 2008) 68–83; SM Schwebel, 'Book Review' (2008) 102 AJIL 915, 917.

law,[5] a preliminary consideration is whether fair and equitable treatment is 'of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law'.[6] None of the possible readings of fair and equitable treatment lead to a rule that can affect customary law. If fair and equitable treatment is a reference to customary law,[7] it does not contribute to the content of customary law (just as treaty terms 'denial of justice' or 'administration of justice in accordance with international law' would refer to but would not influence the content of customary law on administration of justice). If fair and equitable treatment is a framework term of art from treaties of trade and commerce,[8] its capacity to affect customary law is questionable both because trade and commerce treaties rarely produce customary law and because even within these treaties additional legislative elaboration was necessary to make the rule operative. If fair and equitable treatment is an aspirational concept similar to 'friendship',[9] then it might be incapable of articulation in terms of legal rights and obligations. Finally, if fair and equitable treatment provides equity-based legal or extra-legal flexibility,[10] then it simply reinforces the indefinable aspects of the classical minimum standard. Treaty practice on fair and equitable treatment could make a difference for customary law if its meaning required a specific and more exacting standard, and that does not seem to be the case. The only possible relevance is to confirm the applicability of the international standard outside the classically limited life-and-limb paradigm to corporate investment.

Even if the argument in favour of fair and equitable treatment affecting customary law is accepted, further questions arise. If fair and equitable treatment has developed into a rule different from the international standard, then the odd implication seems to be that States would have to treat investors fairly and equitably, while being permitted to treat non-investors unfairly. Conversely, if fair and equitable treatment has replaced the minimum standard, then States that expressly require the application of international minimum standard would be opting out *inter se* of fair and equitable treatment customary law, and returning to the minimum standard as a special customary rule. Neither of these readings fits the law-making and dispute settlement practice. In any event, even the customary nature of fair and equitable treatment would not *per se* justify reliance on other treaty interpretations. To bring *pari materia* rules within the permissible interpretative materials one would have to demonstrate that the term simultaneously creates customary law and refers to it, blurring to the point of irrelevance the distinction between law-making and interpretation, and custom and treaties.

Fourth, to the extent that Article 31(3)(c) is read as referring to general international law, general principles may become a relevant authority.[11] Even though the argument is not theoretically impossible, it is not obvious that it could in most instances be successfully presented as fulfilling the traditional criteria for general principles.[12] The test that an argument of general principles *in foro domestico* regarding the treatment of aliens has to satisfy was set out by parties in the *Certain Norwegian Loans* case in the following terms:

> ... for the Government of the [French] Republic to be able to oppose us a rule cherished by it, it has to demonstrate that this rule of French origin has become a rule of international law. It has to demonstrate that the community of civilised States has accepted it. Then—but only then—can one say that it represents on this point this 'minimum standard', this 'international standard' that evety State has the obligation to respect'.... [The standard] cannot be defined after the practice of *certain States.* Only the concordance of *practice followed by the community of civilised States permits to extrapolate it.*[13]

In the classical law-making the practice of reliance on general principles to *de facto* internationalize constitutional law of particular States was perceived as deeply problematic and therefore calls for particular diligence in the identification of such principles in contemporary law.[14] In quantitative terms, as an editor of a recent comprehensive volume on the issue concedes, 'the legal orders most often analysed are German, French, English, and US law'.[15] An analysis limited to English, the US, Australian, and European approaches[16] or 'several developed systems of administrative law'[17] seems close to Nielsen's view that 'constitutional guarantees, with the superstructure of interpretation framed by the [American] courts, exemplify the international standards'.[18] Even in quantitative terms, this falls short of the generality that one might expect.[19]

In qualitative terms, reliance on legal systems of traditional capital-exporting claimant States (and not, say, Brazil, China, Russia, or Sharia) might be appropriate in searching for a principle common to a regional or other group of countries but not to general international law.[20] There is little legal support for attributing particular relevance to

[5] Ch 1 n 29.

[6] *North Sea Continental Shelf Cases (Germany/Denmark; Germany/Netherlands)* [1969] ICJ Rep 3 [72].

[7] Ch 6.II.1. [8] Ch 3 nn 202–7, 209–22; Ch 5 nn 22–6.

[9] Ch 5.I.1. [10] Ch 5.I.2.

[11] *Golder v UK* (App no 4451/70) (1975) Series A no 18 [35]; R Gardiner, *Treaty Interpretation* (OUP, Oxford 2008) 267–9; AD Mitchell, *Legal Principles in WTO Dispute* (CUP, Cambridge 2008) 81–5; S Schill, 'International Investment Law and Comparative Public Law—An Introduction' in S Schill (ed), *International Investment Law and Comparative Public Law* (OUP, Oxford 2010) 26–7.

[12] See text at Ch 1 nn 46–7.

[13] *Certain Norwegian Loans (France v Norway)* ICJ Pleadings Volume II 121, 132 (Bourquin on behalf of Norway) (author's translation); not challenged by France, ibid 182 (Gros); Ch 1 n 6.

[14] See text at Ch 2 nn 145–57.

[15] Schill 'International Investment Law and Comparative Public Law—An Introduction' (n 11) 29.

[16] S Fietta, 'Expropriation and the "Fair and Equitable" Standard' (2006) 23 J Intl Arbitration 375, 376–8; E Snodgrass, 'Protecting Investors' Legitimate Expectations—Recognising and Delimiting a General Principle' (2006) 21 ICSID Rev—Foreign Investment L J 1, 25–30; A von Walter, 'The Investor's Expectations in International Investment Arbitration' in A Reinisch and C Knahr (eds), *International Investment Law* (Eleven International Publishing, Utrecht 2009) 197–8; C Brown, 'The Protection of Legitimate Expectations as a "General Principle of Law": Some Preliminary Thoughts' (2009) 6 (1) Transnational Dispute Management 4–5; Schill 'International Investment Law and Comparative Public Law—An Introduction' (n 11) 29. Even Kingsbury and Schill, who correctly caution against arguments treating administrative and constitutional law of developed countries as establishing the international standard, B Kingsbury and S Schill, 'Investor–State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law' (2006) IILJ Working Paper 2009/6 9, themselves rely on arguments from only a limited number of domestic legal systems such as the UK, France, Germany, and Australia, ibid fn 34.

[17] *International Thunderbird Gaming Corporation v Mexico,* UNCITRAL Case, Final Award, 26 January 2006, Separate Opinion of Arbitrator Waelde [28].

[18] E Borchard, 'The "Minimum Standard" of the Treatment of Aliens' (1939) 33 ASIL Proceedings 51, 65.

[19] In *Certain Norwegian Loans,* Norway relied on domestic law and practice to demonstrate (the absence of) a general principle, discussing in detail the positions of Germany, Australia, Austria, Brazil, Canada, Colombia, Cuba, Denmark, Egypt, the US, France, and Salvador, and more briefly the positions of Belgium, Japan, Finland, Poland, Sweden, and the UK, *Certain Norwegian Loans (France v Norway)* ICJ Pleadings Volume I 490 [114]–546 [152], see the relevant texts ibid 577–632.

[20] For example, in a brief review of different practices regarding interference with contractual rights, Crawford concluded that four European systems (the UK, the US, France, and Germany) recognized the principle but approached it in different ways, 'and these differences are accentuated if one brings into account a wider range of comparisons, such as, for example, Islamic law or Russian law', J Crawford, 'Second Report on State Responsibility: Addendum', UN Doc A/CN.4/498/Add.3 [15], see [12]–[14]. As Akehurst noted from the opposite perspective, 'it is easier to analyse the laws of six, nine or ten States than to analyse the laws of 160, and the chances of finding a principle which is common to the laws of six, nine or ten States (which are fairly homogenous in terms of culture and political ideology) are greater than the chances of finding a principle which is common to the laws of 160 States,' M Akehurst 'The Application of General Principles of Law by the Court of Justice of the European Communities'

views adopted by a developed country or countries.[21] While such a perspective was adopted by some developed States in relation to adverse arguments and judgments in particular disputes,[22] its acceptance as a general approach would constitute abuse of law-making of precisely the kind criticized in classical law (and could at most operate as a special rule or presumption in a dispute regarding international obligations that bind such developed States).[23] In structural terms, since investment protection law sets the international standards in light of (presumably) inadequate domestic legal systems, it would be odd to fall back on a legal argument that would derive content of international law from the very domestic systems it is meant to discipline. While the relevance of general principles cannot be excluded in *a priori* terms, it is questionable whether between the diligence of analysis necessary due to the classical and modern law-making concerns and the increasingly more detailed understanding of the content of treaty and customary law, and the available practice regarding treatment of aliens and humans, they could provide a great added value. Both in terms of principle and convenience, after proper extrapolation from domestic legal orders, the propositions would be set at such a high degree of abstractions as to neither perceptibly influence the content of custom nor to illuminate issues relevant in particular disputes. Rare explicit references to general principles aside,[24] arguments relying on general principles to determine the content of fair and equitable treatment should be subject to sceptical scrutiny to establish the satisfaction of the stringent criteria of law-making and interpretation.

Fifth, the relevant criteria of the international standard could be identified through case law, finding generally important rules on the basis of particular cases. This approach has considerable support in the case law itself.[25] To the extent that different cases are read as accurately elaborating the same underlying rule of customary law, reliance upon them seems unobjectionable. The considerable number of ongoing investment arbitrations also makes the elucidation of the international standard a speedier (and easier) process than those drawing upon general State practice or general approaches in domestic

(1981) 52 BYIL 29, 31–2; see also K Lenaerts, 'Interlocking Legal Orders in the European Union and Comparative Law' (2003) 52 ICLQ 873, 884–94. Akehurst's point is a valid one for the purpose of general international law, even if within the European legal order itself the concerns about excessive creativity in finding general principles without general support in constitutional traditions (famously regarding Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-09981 [75]) might to some extent be resolved, K Lenaerts and JA Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law' (2010) 47 CMLR 1629, 1654–60.

[21] S Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (Hart Publishing, Oxford 2009) 76–7, Ch 6.

[22] JB Scott, 'United States–Norway Arbitration Award' (1923) 17 AJIL 287, 288; see text at Ch 1 nn 103–5.

[23] *Certain Norwegian Loans* Pleadings II (n 13) 131–2 (Bourquin on behalf of Norway).

[24] There is limited support for reliance on general principles in some elements of practice and decisions. In the *Ambatielos* Award, one of the arbitrators thought that the treaty rules on 'justice' and 'equity' could justify reliance on unjust enrichment as 'part of the general principles of law applicable in international relations', *Ambatielos (Greece/UK)* (1956) 12 RIAA 83, Dissenting Opinion of Commissioner Spiropoulos 126, 128–9. Even though the OECD Draft Convention on the Protection of Foreign Property stated that due process as a criterion of taking was 'akin' to Anglo-Saxon rule of law or continental *Rechtsstaat*, 'OECD Draft Convention on the Protection of Foreign Property' (1968) 7 ILM 117 art III Commentary 5(a), it referred back to national and international law for its content, ibid Commentary 5(b)–(d). The Sohn–Baxter Draft relied in a number of instances on 'general principles of law and justice recognized by the principal legal systems of the world', LB Sohn and RR Baxter, 'Responsibility of States for Injuries to the Economic Interests of Aliens' (1961) 55 AJIL 545, 547, arts 4(4), 5(1)(b), 8(c), 9(2)(c), 10(5)(c), 12(1)(c), 12(4)(b). Some Model BITs define fair and equitable treatment by reference to 'the principle of due process embodied in the principal legal systems of the world', 2004 US Model BIT art 5(2)(a); 2012 US Model BIT art 5(1).

[25] Part II nn 1–7.

law. At the same time, the decentralized nature of investment protection law cautions against the likelihood of development of a coherent body of law. In conceptual terms, while the approach could usefully systematize the practice in descriptive terms, it would have inherent prescriptive limitations. In particular, such an approach is likely to find it problematic to develop a clear systemic perspective of interrelation of particular rules, distinguish unsatisfactory legal solution from those reflecting an inherent uncertainty of a particular situation, and identify the directions where law is most likely to develop.

Finally, human rights law may enter the interpretative process in a number of ways.[26] On the one hand, human rights rules may contain functionally analogous obligations regarding the treatment of investors and investment.[27] It is complicated to see why even under the strictest possible construction of Article 31(3)(c) these parallel human rights obligations would not be 'relevant' in such circumstances, with potentially significant effect in the interpretative process.[28] Rules on fair trial and protection of property may be included in human rights treaties of universal or regional character. If parties to particular investment treaties do not belong to the same regional human rights regimes, they would not be bound by the same human rights treaty. Consequently, these rules would not become admissible interpretative materials since Article 31(3)(c) would not be applicable 'between the parties'. The spaghetti-bowl of regional human rights regimes may result in different functionally analogous treaty rules becoming admissible interpretative materials, therefore the analysis has to be undertaken on a treaty-by-treaty basis. Universal treaties can provide an authoritative starting point for this analysis, and Chapter 7 considers the obligation to provide a fair trial in Article 14 of the ICCPR as a relevant rule for the interpretation of fair and equitable treatment regarding

[26] The monograph does not address conflicts with human rights, see Ch III n 145; or the elaboration of the scope of obligation by reference to human rights obligations, eg obligation to protect investments from protests (*Elettronica Sicula S.p.A. (ELSI) (US v Italy)* [1989] ICJ Rep 15) may require the freedom of assembly to be taken into account in determination of their content; or the possibility of using human rights regimes for protecting investments, see M Ruffert, 'The Protection of Foreign Direct Investment by the European Convention on Human Rights' (2000) 43 German Ybk Intl L 116; C Pfaff, 'Alternative Approaches to Foreign Investment Protection' (2006) 3 (5) Transnational Dispute Management 6–13; U Kriebaum, 'Is the European Court of Human Rights an Alternative to Investor–State Arbitration?' (2009) 6 (1) Transnational Dispute Management; C Tomuschat, 'The European Court of Human Rights and Investment Protection' in C Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP, Oxford 2009).

[27] For example, in the *Saluka v Czech Republic* case the Czech Republic simultaneously owed two obligations regarding deprivation and fair and equitable treatment of investments: obligations under Articles 5 and 3 of the Dutch–Czech BIT to the Netherlands (and perhaps also to the investor), but also an *erga omnes partes* obligation under Article 1 of the Protocol 1 of the ECHR to the investor and to all other parties to the Protocol, *Saluka Investment BV v Czech Republic*, UNCITRAL Case, Partial Award, 17 March 2006 15 ICSID Rep 274. In the *Mondev v US* and *Loewen v US* cases, the US owed an obligation regarding the administration of justice both under Article 1105 of NAFTA and customary law to Canada (and perhaps also to the investors), but also an *erga omnes partes* obligation under Article 14 of the ICCPR to the investors and to all other parties to the Covenant, *Mondev v US*, ICSID Additional Facility Case no ARB(AF)/99/2, Award, 11 October 2002 (2003) 42 ILM 85; *Loewen v US*, ICSID Additional Facility Case no ARB(AF)/98/3, Award, 26 June 2003 (2003) 42 ILM 811. The argument by the US in the *Tehran* case was methodologically impeccable, suggesting that a provision of the Treaty of Amity on constant protection and security imported the customary minimum standard on the treatment of aliens, and then relying on the ICCPR to elaborate the content of the customary international minimum standard thus brought into the treaty, *United States Diplomatic and Consular Staff in Tehran (US v Iran)* ICJ Pleadings 180–3 (Memorial) (the only caveat is that the US had signed but not ratified the ICCPR at that point, therefore Iran was bound by the ICCPR, but not regarding the US).

[28] For authorities calling for the use of human rights to clarify the international standard in the post-War years, see Ch III nn 86–91; for the application of the approach in recent practice, see Ch III n 142.

administration of justice,[29] 'ascrib[ing] great weight to the interpretation adopted by this independent body [Human Rights Committee] that was established specifically to supervise the application of that treaty [ICCPR]'.[30]

With greater caution, human rights may also be relied on in terms of a comparative argument by analogy. Chapter 3 explored how, during the time between the decline of the Claims Commissions regime of the pre-Second World War years and the rise of investment arbitration at the end of the twentieth century, States set up regimes of international and regional human rights within which they created rules of functionally comparable nature.[31] The contrast between paucity of practice in the law on the treatment of aliens and its abundance in the law of human rights intuitively calls for an examination of whether analogy would be appropriate. Hersch Lauterpacht argued for an application of analogy in international law as 'identity or similarity of proportion' to draw from the domestic private law, even where the argument had to make the intellectual leap between the profoundly different regimes of domestic and international law.[32] '[I]n the absence of *a priori* limits on the legitimacy of analogical reasoning in international law',[33] analogy is *a fortiori* permissible between international regimes.

An appropriately calibrated argument of analogy between investment and human rights regimes goes with the logic of international practice. In broad structural terms, treaties on human rights and investment protection contain rules regarding the treatment of individuals within a State. The particular rights provided seem functionally analogous: denial of justice and rights to fair trial and liberty, expropriation and deprivation, fair and equitable treatment and protection of property, full protection and security and aspects of right to life.[34] Importantly, unlike the argument of general principles that seeks to derive international rules from the structurally different domestic legal orders to translate it internationally, human rights are already set out in the international legal order as international obligations of States regarding the treatment of *inter alia* aliens. Responsibility for their breach accrues directly to and is invoked by individuals under both regimes.[35]

[29] The argument made only constitutes a starting point of analysis, since the content of human rights obligations binding in the particular instance might vary: with 167 parties, ICCPR is generally but not universally ratified, <http://treaties.un.org>; regional human rights treaties might be applicable when treaty parties are from the same region but not between regions; States might have made reservations or interpretative declarations to the ICCPR that could affect its content.

[30] *Ahmadou Sadio Diallo (Guinea v DRC)* (Judgment) [2010] ICJ Rep [66]; also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 [109]–[110], [136]; ibid Separate Opinion of Judge Higgins 207 [26]; *Judgment No 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund of Agricultural Development* (Advisory Opinion) [2012] ICJ Rep [39].

[31] See Ch 3.II.

[32] H Lauterpacht, *Private Law Sources and Analogies of International Law* (Longmans, Green & Co. Ltd, London 1927) 83; see also MG Kohen, *Possession contestée et souveraineté territoriale* (Presses Universitaires de France, Paris 1997) 10; HWA Thirlway, 'Concepts, Principles, Rules and Analogies: International and Municipal Legal Reasoning' (2002) 294 Recueil des Cours de l'Académie de Droit International 265, 274–5.

[33] AV Lowe, 'The Role of Equity in International Law' (1988–1989) 12 Australian Ybk Intl L 54, 61; also AV Lowe, 'The Politics of Law-Making' in M Byers (ed), *The Role of Law in International Politics* (OUP, Oxford 2000) 201 fn 5.

[34] M Perkams, 'The Concept of Indirect Expropriation in Comparative Public Law—Searching for Light in the Dark' in S Schill (ed), *International Investment Law and Comparative Public Law* (OUP, Oxford 2010) 112.

[35] ILC, 'Articles on Responsibility of States for Internationally Wrongful Acts' in *Yearbook of the International Law Commission, 2001, Volume II*, UN Doc A/CN.4/SER.A/2001/Add.1. (Part Two) 26 art 33(2), Commentary 4.

Concerns about unjustifiable reliance on human rights that fails to appreciate the divergent purposes of rules and regimes, particularly the additional instrumental justification of investment law, have to be taken very seriously.[36] However, they do not require a rejection of the comparative argument but its application in an appropriately nuanced manner, and can be incorporated as part of the reasoning so as to reject or modify solutions dictated by dissimilar challenges. Since reliance on an authority by analogy does not make it an interpretative material, it is appropriate to employ such arguments only with narrow and limited effect, operating within the boundaries of existing rules and confirming, elaborating, or explaining the established rules and criteria, rather than replacing them. Still, Chapter 7 shows that, with rare exceptions, international and regional human rights rules on fair trial point in the same direction, therefore the important conceptual distinction between interpretative and comparative arguments may have less determinative importance in practice.

There is some support for going further than analogy and presenting such arguments as admissible interpretative materials, by reference to general principles, ordinary meaning, or equity. In terms of general principles,[37] even though there is some support for conceptualizing human rights in such terms,[38] the usefulness of this argument in the particular context is unclear. If the human rights rules are expressed in universal treaties that bind parties to the investment treaty (for example, right to fair trial), they can already enter the interpretative process directly as 'relevant' treaty rules, without travelling the roundabout route from treaty to general principles and back to treaty. If the human rights rules are expressed in regional treaties that do not bind parties to the investment treaty (for example, right to protection of property), an attribution of universal and direct legal relevance to rules developed in a regional setting might extend beyond what the law-making processes permit. Neither ordinary meaning nor equity seems more helpful. It is *prima facie* unlikely that ordinary meaning of treaty terms within a particular regime could be located in an entirely different legal regime, particularly originating from another region.[39] The invocation of equity to rely on other legal regimes[40] goes against the general grain of application of equity to insert flexibility within particular rules, rather than to reconstruct the admissible authorities for their interpretation.[41]

In terms of historical process, in the post-War years the weight of academic opinion called for clarification of the international standard through the lenses of human rights by what essentially was an argument by analogy.[42] The rationale for the rejection of the human rights argument in the ILC illuminated by necessary implication the manner in which human rights arguments could be used to explain the law on the treatment of

[36] G van Harten, *Investment Treaty Arbitration and Public Law* (OUP, Oxford 2007) 136–43; P-M Dupuy, 'Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law' in P-M Dupuy, E-U Petersmann, and F Francioni (eds), *Human Rights in International Investment Law and Arbitration* (OUP, Oxford 2009) 46–8.

[37] C McLachlan, L Shore, and M Weiniger, *International Investment Arbitration: Substantive Principles* (OUP, Oxford 2007) 206; B Simma and T Kill, 'Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology' in C Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP, Oxford 2009) 698.

[38] B Simma and P Alston, 'The Sources of Human Rights Law: Custom, *Jus Cogens* and General Principles' (1998–1999) 12 Australian Ybk Intl L 82; C Tomuschat, 'Obligations Arising against States without or against Their Will' (1993) 241 Recueil des Cours de l'Académie de Droit International 195, 315.

[39] Perkams 'The Concept of Indirect Expropriation' (n 34) 111.

[40] Dupuy 'Unification' (n 36) 52.

[41] See Ch 3 nn 190–6, Ch 5 n 44.

[42] See Ch 3 nn 86–91.

aliens.[43] In particular, human rights rules needed to overcome the pragmatic scepticism expressed by François that they were incapable of providing clearer guidance to the content of the rules than was already available in the law on the treatment of aliens itself.[44] At the same time, Matine-Daftary objected to reliance upon purely European standards of justice.[45] Both positions reflect valid concerns: while it is not helpful to look for answers in rules that are incapable of providing them, one cannot 'inject into international law a criterion merely because it is definite without ascertaining whether that criterion is actually accepted'.[46]

In practical terms, the comparative argument has to rely on regimes that have addressed the particular issue in a detailed and extensive manner.[47] From the regional human rights treaties, the ECHR rules on fair trial and protection of property have been subject to extensive judicial interpretation, and therefore are the most convenient source of inspiration in terms of practical usefulness, although other regional regimes may also be relied upon.[48] In legal terms, the more recent pleadings by States and decisions by Tribunals support the permissibility of such an approach, elaborating ambiguities and filling gaps in investment law by appropriate reliance on analogies from European human rights law.[49] Indeed, cases by the ECtHR have been invoked and applied by analogy even in disputes where one or both parties to the investment treaty were not parties to the ECHR, supporting general permissibility of such an argument.[50]

Certain recent developments support the use of the ECHR at least as a starting point for the comparative argument. The parties to the ECHR come from both common and civil law traditions, and the ECtHR case law deals with issues from different kinds of legal systems in an integrated manner. The accession of Central and Eastern European States in the 1990s has further transformed the type of protection of property and also fair trial cases that the ECtHR has in its docket. The traditional cases brought against States (likely to be home States of investors in investment disputes) and dealing with fine points intuitively appropriate for constitutional adjudication[51] have been replaced by cases brought against traditional host States, with the substantive issues relating to 'exaggerated formalism, chicanery, and tricks by authorities, refusals to implement final court decisions, or simply by arbitrary acts or omissions'.[52] If, at the end of the 1980s,

[43] See text at Ch 3 nn 115–35.

[44] ILC, *Yearbook of the International Law Commission, 1956, Volume I*, UN Doc A/CN.4/SER.A/1956 243.

[45] ILC, *Yearbook of the International Law Commission, 1959, Volume I*, UN Doc A/CN.4/SER.A/1959 149.

[46] AS Hershey, 'Denial of Justice ' (1927) 21 ASIL Proceedings 27, 35–6 (Jessup).

[47] In the *LaGrand* case, the US relied on the case law of the ECtHR because it was 'the only international tribunal that has considered the matter', *LaGrand (Germany v US)* ICJ Pleadings CR 2000/31, 17 November 2000 <http://www.icj-cij.org/docket/files/104/4669.pdf> 17 [3.10] (Meron), and because of its quantitatively impressive case law, ibid 31 [6.7] (Trehsel). For a less benevolent explanation of the US preference for the ECtHR instead of the IACtHR, see ibid ICJ Pleadings CR 2000/30, 16 November 2000 <http://www.icj-cij.org/docket/files/104/4667.pdf> 20 [5], 23 [11] (Simma on behalf of Germany).

[48] Tomuschat 'Investment Protection' (n 26) 638–40.

[49] See text at Ch 3 nn 143–56.

[50] Argentina, Indonesia, the US, Ch 3 n 153, possibly also Bangladesh, Chile, and Mexico, Ch 3 n 154; see C Reiner and C Schreuer, 'Human Rights and International Investment Arbitration' in P-M Dupuy, E-U Petersmann, and F Francioni (eds), *Human Rights in International Investment Law and Arbitration* (OUP, Oxford 2009) 94.

[51] In particular relating to the permissible limits of interference with immovable property, *Sporrong and Lönnroth v Sweden* (App nos 7151/75 and 7152/75) (1982) Series A no 52.

[52] L Wildhaber and I Wildhaber, 'Recent Case Law on the Protection of Property in the European Convention on Human Rights' in C Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP, Oxford 2009) 674 (footnotes omitted).

one could have been sceptical about the value of generalizations from cases dealing with relatively minor errors in States with established rule-of-law societies, the case law of the 1990s and 2000s has raised questions about arbitrariness and unpredictability of State conduct in terms familiar from investment cases. Importantly, while P1-1 draws distinction between the protection of property of aliens and nationals, in practice the ECtHR applies the same rules to both types of cases.[53]

The *prima facie* permissibility of analogies from ECHR does not mean that the approaches followed by ECtHR are applicable *verbatim* or even *mutatis mutandis* within investment protection law. One should identify the systemic similarities and differences and address the key question of comparative analysis in international law: *to what extent* is it appropriate to employ these considerations for the analysis of investment protection law?[54] If this perspective is not properly identified, then the comparative argument may significantly distort the original logic. Such a result may occur both at the systemic level and regarding particular rules. For example, Jan Paulsson has in *prima facie* contradictory terms both advocated reliance upon the 'new and formidable body of jurisprudence under human rights treaties' to explain denial of justice,[55] and cautioned against the temptation to rely upon notions of property deprivation and breach of due process imported from human rights instruments 'devised for quite different purposes'.[56] A clear exposition of the structural similarities and differences is necessary for formulating the framework within which the argument may be presented.[57]

At the level of particular rules, the example of indirect expropriation shows how an incomplete transposition of the ECHR *ratio* may lead both to overreaching and underreaching.[58] The ECtHR approach appears to downplay the distinctions between different types of interferences and concentrate on the form and procedure through which these measures are expressed.[59] Overreaching may have happened in *Tecmed v Mexico*, with the Tribunal applying proportionality in a rather intrusive manner without the

To illustrate his proposition, the former President of the ECtHR pointed to cases against Ukraine, Russia, Moldova, Romania, Bosnia and Herzegovina, and Bulgaria, ibid 674–5, fn 125; cf M Evans, 'State Responsibility and the European Convention on Human Rights: Role and Realm' in M Fitzmaurice and D Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions* (Hart Publishing, Oxford 2004) fn 52; Tomuschat 'Investment Protection' (n 26) 650.

[53] U Kriebaum, 'Nationality and the Protection of Property under the European Convention on Human Rights' (2009) 6 (1) Transnational Dispute Management.

[54] D Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (OUP, Oxford 2005) 16.

[55] J Paulsson, *Denial of Justice* (CUP, Cambridge 2005) 133.

[56] J Paulsson, 'Indirect Expropriation: Is the Right to Regulate at Risk?' (2006) 3 (2) Transnational Dispute Management 8–9.

[57] See the discussion about the framework of comparative analysis between investment and trade law, J Kurtz, 'The Use and Abuse of WTO Law in Investor–State Arbitration: Competition and Its Discontents' (2009) 20 EJIL 749, 752–9; R Howse and E Chalamish, 'The Use and Abuse of WTO Law in Investor–State Arbitration: A Reply to Jürgen Kurtz' (2010) 20 EJIL 1087, 1088–9; J Kurtz, 'The Use and Abuse of WTO Law in Investor–State Arbitration: Competition and Its Discontents: a Rejoinder to Robert Howse and Efraim Chalamish' (2009) 20 EJIL 1095, 1096–7; J Kurtz, 'The Merits and Limits of Comparativism: National Treatment in International Investment Law and the WTO' in S Schill (ed), *International Investment Law and Comparative Public Law* (OUP, Oxford 2010) 250–5; M Paparinskis, 'MFN Clauses and International Dispute Settlement: Moving Beyond *Maffezini* and *Plama*?' (2011) 26 (2) ICSID Rev—Foreign Investment L J 14, 44–6.

[58] To borrow the terms from AK Bjorklund, 'Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims' (2004–2005) 45 Virginia J Intl L 809, 867–9.

[59] See Ch 9.II.2, nn 141–79; M Paparinskis, 'Regulatory Expropriation and Sustainable Development' in MW Gehring, M-C Cordonnier-Segger, and A Newcombe (eds), *Sustainable Development in World Investment Law* (Kluwer Law International, The Hague 2011) 324–5.

margin of discretion traditionally provided by the ECtHR.[60] Underreaching may occur if the principles of broad discretion are transposed without the accompanying qualitative requirements regarding the form and procedure.[61] The comparative reasoning may therefore fail for many reasons, whether ones flowing from the systemic comparison itself or from overreaching or underreaching due to incomplete transposition of the original systemic logic.

Chapters 8 and 9 apply the methodology to the determination of the modern international standard, following the distinction accepted both by the classical and the modern international standard between the rules relating to administration of justice and other aspects of the standard. The comparative argument in both cases will be taken in three steps: sketching the broad framework of the classical customary law rule, setting out the prism of the human rights argument, and elucidating the modern standard in line with the modern practice. The law of administration of justice will be taken first due to its conceptually clearer nature, with well-established classical rules echoed in the human rights practice and not facing any qualitatively new challenges in contemporary law. The protection of property other than in the context of administration of justice presents a more complicated challenge, with the classical position being identifiable by reference to expropriation, human rights practice operating only at the regional level, and the modern practice displaying some uncertainty regarding the underlying rationale and content of the rule.

[60] *Tēcnicas Medioambientales Tecmed, S.A. v Mexico*, ICSID Additional Facility Case no ARB(AF)/00/02, Award, 29 May 2003 10 ICSID Rep 134 [122].

[61] Comparative analysis seems to downplay these arguments: EM Freeman, 'Regulatory Expropriation under NAFTA Chapter 11: Some Lessons from the European Court of Human Rights' (2003) 42 Columbia J Transnational L 177, 201–2; H Mountfield, 'Regulatory Expropriations in Europe: The Approach of the European Court of Human Rights' (2002–2003) 11 New York U Environmental L J 136, 140; HR Fabri, 'The Approach Taken by the European Court of Human Rights to the Assessment of Compensation for "Regulatory Expropriations" of the Property of Foreign Investors' (2003) 11 New York U Environmental L J 148, 159–60.

8

International Minimum Standard and Administration of Justice

It is unquestionable that a treaty obligation to provide fair and equitable treatment applies to administration of justice. The person(s) charged with the interpretation and application of this treaty obligation 'would [have to] throw[] into the crucible' '[a]ll the various elements [of interpretation]'.[1] The first element of interpretation is the treaty language itself, which may provide examples or clarification of the content of the obligation or context in other obligations or preambles. Second, arbitral decisions have accepted, whether expressly or by necessary implication, that the treaty rule on fair and equitable treatment makes a reference to the customary law of denial of justice.[2] Customary law is likely to be the most detailed and influential source of authority. The third source of interpretative authorities is provided by international human rights binding parties to the treaty. Article 14(1) of the ICCPR will be further considered as the most widely ratified treaty rule on fair trial. Finally, human rights arguments from experienced regional regimes may also be considered by analogy, without becoming interpretative elements. The content of the standard on administration of justice will be established in three steps, relying on the classical customary law of denial of justice to provide the broad contours of the rule (I) that will be filled in by human rights reasoning (II) and confirmed by modern investment cases (III). While the classical law of denial of justice dealt with (and indeed focused on) administration of criminal justice, it has not been subject to much attention in recent practice, and the chapter does not address it, except incidentally.[3]

[1] ILC, 'Draft Articles on the Law of Treaties with Commentaries' in *Yearbook of the International Law Commission, 1966, Volume II*, UN Doc A/CN.4/SER.A/1966/Add.1 112 219 [8].

[2] Ch 6 n 52.

[3] In descriptive terms, recent cases on fair and equitable treatment in administration of justice have largely not focused on criminal proceedings (for an exception, see *Spyridon Roussalis v Romania*, ICSID Case no ARB/06/1, Award, 7 December 2011 [602]–[605]). The dominance of corporate investors in dispute settlement and the differences regarding domestic laws on corporate criminal responsibility suggest that the questions of criminal responsibility of investors would be less likely to be expressed in these terms, J Coffee, 'Corporate Criminal Liability: An Introduction and Comparative Survey' in A Eser and others (eds), *Criminal Responsibility of Legal and Other Entities* (Max Planck Institute, Freiburg 1999) 13–25. While the domestic rules on criminal responsibility of corporations have spread in recent years, certain civil law States remain sceptical, T Weigend, '*Societas Delinquere Non Potest?*' (2008) 6 J Intl Crim Justice 927, 928–30; 'Discussion' (2008) 6 J Intl Crim Justice 947. In normative terms, questions of criminal procedure relating to the investment might be more usefully addressed from the perspective of full protection and security under the broader rubric of use of the security powers of the State (for example, when employees of the investor are subject to unjustified prosecutions or police harassment), *Saluka Investment BV v Czech Republic*, UNCITRAL Case, Partial Award, 17 March 2006 15 ICSID Rep 274 [493]; Treaty of Friendship, Commerce and Navigation between the United States of America and Italy (adopted 2 February 1948, entered into force 26 July 1949) 79 UNTS 171 art V(1); Treaty of Amity, Commerce and Navigation, between the United States of America and Iran (adopted 15 August 1955, entered into force 16 June 1957) 284 UNTS 110 art II(4).

I. Administration of justice and the classical denial of justice

1. Denial of justice in context

Denial of justice was historically the most developed part of the international standard on the treatment, providing the international obligation of the treatment of aliens in administration of justice.[4] Before addressing the content of denial of justice, the following sections will explore its structural context, considering in turn the role of exhaustion of remedies in the law of denial of justice, the distinction between denial of justice and other wrongful acts, and the scope of denial of justice. It is accepted that denial of justice becomes internationally wrongful only after the whole system of administration of justice has been put to the test by exhaustion of local remedies.[5] As Roberto Ago put it, 'an internationally wrongful act as understood in the term "denial of justice" is not

[4] Ch 2 nn 53–66, Ch 2.II.1.

[5] In the 1930 Conference for the Codification of International Law ('Hague Conference'), the Texts adopted by the Committee in First Reading as Revised by the Drafting Committee ('Hague Texts'), even though addressing the issue from the perspective of attribution rather than obligation, stated that responsibility is incurred if 'a judicial decision, which is not subject to appeal, is clearly incompatible with the international obligations of a State', 'Texts of Articles Adopted in First Reading by the Third Committee of the Conference for the Codification of International Law' League of Nations publication, *V.Legal, 1930.V.17* art 9(1). States that specifically addressed the issue of denial of justice as an obligation accepted that responsibility for judicial decisions required exhaustion of available remedies: Germany, S Rosenne (ed), *League of Nations Conference for the Codification of International Law [1930]* (Volume II, Oceana Publications, Inc., New York 1975) 463–4, Denmark, ibid 465, the Netherlands, ibid 467, the US, ibid 687–8, Sicezowski on behalf of Poland, S Rosenne (ed), *League of Nations Conference for the Codification of International Law [1930]* (Volume IV, Oceana Publications, Inc., New York 1975) 1540, Dinichert on behalf of Switzerland, ibid 1582, India, ibid 1644. In *Barcelona Traction,* both parties accepted the requirement of exhaustion for denial of justice to be complete, *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* ICJ Pleadings Volume IV 512 [121]–[124] (Counter-Memorial of Spain), ibid Volume V 313 [460] (Reply of Belgium). The position has also been accepted in cases, opinions, drafts, and legal writings: *Case of Samuel Phillips & Co* (1855) 6 Parry 287, 288 [1]; Mr Marcy, Secretary of State, to Chevalier Bertinatti, Sardinian minister (1855) 6 Moore Digest 747, 748; *Mr Lindsay's case* (1862) 6 Parry 289; Mr Davis, Assistant Secretary of State, to Mr Chase, consul at Tampico (1870) 6 Moore Digest 750; *Jennings, Laughland and Co. (US v Mexico)* (1874) 3 Moore Intl Arbitrations 3135, 3136 (and four other decisions by the same Umpire, referred to in *Loewen v US,* ICSID Additional Facility Case no ARB(AF)/98/3, Award, 26 June 2003 (2003) 42 ILM 811 [151]); *Amos B Corwin (US v Venezuela)* 3 Moore Intl Arbitrations 3210, 3218; *Driggs case (US v Venezuela)* 3 Moore Intl Arbitrations 3125, 3160; Mr Gresham, Secretary of State, to Mr Osborn (1893) 6 Moore Digest 669; *Rudloff case (US v Venezuela)* (1903–1905) 9 RIAA 244, Opinion of Commissioner Bainbridge 244, 245; ibid Opinion of Commissioner Paúl 250, 251–2; *Heirs of Jean Maninat (France v Venezuela)* (1905) 10 RIAA 55, 58–9; *Jesse Lewis (US v Great Britain)* (1921) 6 RIAA 85, 89–90; *Christo G Pirocaco (US v Turkey)* Nielsen 587, 599; *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* [1970] ICJ Rep 3, Separate Opinion of Judge Fitzmaurice 64 [75]; *Oil Field of Texas, Inc. v Iran et al* (1986) 12 Iran–USCTR 308, 318–19; R Ago, 'Sixth Report on State Responsibility' in *Yearbook of the International Law Commission, 1977, Volume II,* UN Doc A/CN.4/SER.A/1977/Add.1 (Part One) 3 57; J Crawford, 'Second Report on State Responsibility', UN Doc A/CN.4/498 [74]; J Dugard, 'Second Report on Diplomatic Protection', UN Doc A/CN.4/513 [31] art 13; G Fitzmaurice, 'The Meaning of the Term "Denial of Justice"' (1932) 13 BYIL 93, 107; C de Visscher, 'Le déni de justice en droit international' (1935) 52 Recueil des Cours de l'Académie de Droit International 369, Ch III; AV Freeman, *The International Responsibility of States for Denial of Justice* (Longmans, Green & Co., London 1938) Ch XIV; G Fitzmaurice, 'Hersch Lauterpacht—The Scholar as Judge. Part I' (1961) 37 BYIL 1, 58–9; C Greenwood, 'State Responsibility for the Decisions of National Courts' in M Fitzmaurice and D Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions* (Hart Publishing, Oxford 2004); J Paulsson, *Denial of Justice in International Law* (CUP, Cambridge 2005) Ch 5; A Nollkaemper, 'Internationally Wrongful Acts in Domestic Courts' (2007) 101 AJIL 760, 766.

considered as complete until the higher courts have successively given their judgment and confirmed the decision of the court of first instance'.[6]

In traditional law, the particular legal point of completeness of wrongful act was sometimes obscured by the procedural context. When diplomatic protection was the prevailing model of dispute settlement, the general requirement to exhaust local remedies as part of the implementation of responsibility tended to subsume the requirement to exhaust remedies as part of the particular substantive rule. The practice and cases that directly address the requirement of exhaustion as part of denial of justice are not very helpful in elaborating the rule. If one leaves aside the extreme instances of obvious failure to exhaust available remedies[7] and obvious absence of any remedies,[8] only a few rather fragmented elements of the rule emerge. One of the rare examples is the acceptance by parties in the *Phosphates in Morocco* case that a claim for damages, and not only a claim for annulment, could constitute an effective remedy that had to be exhausted for the purposes of establishing denial of justice.[9]

The scope and criteria of the exhaustion of local remedies have been considered in greater detail in the more general procedural context. The legal nature of local remedies has been subject to some controversy. As Ago explained, it could be read in three ways: as a substantive rule relevant for the generation of international responsibility; as a procedural rule of admissibility in invocation of responsibility; or as procedural rule with the qualification that in cases of denial of justice exhaustion of remedies operated as a part of the primary rule.[10] The procedural view was adopted by the PCIJ in the *Phosphates in Morocco* case, where the temporarily limited jurisdiction required the Court to consider whether the alleged dispossession of Italian nationals had occurred during the act itself or only when the remedies had failed.[11] The Court rejected the eloquent defence of the substantive view by Ago himself on behalf of Italy[12] in favour of the procedural approach presented by Jules Basdevant on behalf of France.[13] The procedural view is accepted in contemporary practice.[14]

[6] Ago, ibid 57; similarly Nollkaemper, ibid 766.

[7] *Samuel Phillips* (n 5) 288 [1]; Mr Marcy to Chevalier Bertinatti (n 5) 748; *Lindsay* (n 5) 289; Mr Davis to Mr Chase (n 5) 750; *Jennings* (n 5) 3136; *Corwin* (n 5); *Rudloff* Bainbridge (n 5) 245; *Rudloff* Paúl (n 5) 251–2; *Maninet* (n 5) 58–9; *Jesse Lewis* (n 5) 89–90.

[8] *Oil Field* (n 5) 318–19.

[9] While Italy initially argued more broadly that denial of justice had taken place because the only remedy that its nationals had was access to civil courts for a fault-based damages claim against the public authorities, *Phosphates in Morocco (Italy v France)* PCIJ Rep Series C No 85 487, 503 (Observations and Conclusions of Italy), it later modified its position, conceding that damages could generally be an effective remedy regarding treatment of aliens but distinguished the particular instance as one where rights had been acquired on the basis of a treaty, ibid 1207 (Ago). France maintained throughout that a claim for damages was an available remedy both in law and in fact, ibid 632, 717 (Reply of France), 1039, 1103–4, 1280 (Basdevant).

[10] Ago 'Sixth Report' (n 5) 23–4, with references at fns 101–26.

[11] *Phosphates in Morocco (Italy v France)* (Preliminary Objections) [1938] PCIJ Rep Series A/B No 74 28; ibid Separate Opinion of Judge Cheng Tien-Hsi 36, 36; Dugard 'Second Report' (n 5) [46].

[12] *Phosphates* Pleadings (n 9) 1224–30.

[13] Ibid 1048.

[14] For an overview see Dugard 'Second Report' (n 5) [35]–[62]. The 2001 ILC Articles address local remedies as an aspect of admissibility of claims, ILC, 'Articles on Responsibility of States for Internationally Wrongful Acts' in *Yearbook of the International Law Commission, 2001, Volume II,* UN Doc A/CN.4/SER.A/2001/Add.1. (Part Two) 26 art 44(b); J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP, Cambridge 2002) 23; see also CF Amerasinghe, *Local Remedies in International Law* (2nd edn CUP, Cambridge 2004) 385–421; HWA Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989. Supplement, 2009: Parts Seven and Eight' (2009) 80 BYIL 10, 151–9.

For the purposes of denial of justice, the third view that situates the exhaustion of domestic remedies as part of the primary rule has been accepted.[15] The proposition is unproblematic in principle, since States are entitled to create primary rules with content similar to that of secondary rules.[16] Even though the Second Special Rapporteur on Diplomatic Protection John Dugard seemed slightly concerned at a conceptual level that elements of exhaustion could become relevant simultaneously as primary and secondary rules,[17] it is an unremarkable aspect of international legal reasoning that similar arguments may be presented in both primary and secondary terms.[18] Still, the distinction between primary and secondary rules may be relevant in a number of ways. In structural terms, the nature of a rule directly affects the way in which a particular rule may be changed. While the requirement to exhaust remedies can be waived,[19] it would remove an objection of admissibility as a secondary rule but would not affect the content of a primary rule providing for such a requirement.[20]

A question of substantive nature is whether it is appropriate to rely on the criteria from the law of exhaustion of remedies as a secondary rule and transpose it into the primary rule of denial of justice. The question might become relevant when the objectionable judicial conduct has already taken place and the question is whether the whole judicial system has been put to the test to remedy it. It may be convenient to address the rule and its possible exceptions separately.[21] If the objectionable judicial conduct is such that it does not simultaneously constitute an exception to the obligation to exhaust remedies (for example, an appearance of bias by a judge in the first instance, rather than denial of access to justice), remedies have to be exhausted before denial of justice is complete.[22] The ICJ has stated in general terms that 'local remedies that must be exhausted include

[15] Dugard 'Second Report' (n 5) [63]; C Eagleton, *The Responsibility of States in International Law* (The New York University Press, New York 1928) 95; CT Eustathiadès, *La responsabilité international de l'état pour les actes des organes judiciares et le problème du déni de justice en droit international* (A Pédone, Paris 1936) 243–53, 331–43; Freeman *Denial of Justice* (n 5) 407–8; JES Fawcett, 'The Exhaustion of Local Remedies' (1954) 31 BYIL 452.

[16] 2001 ILC Articles recognize that '[t]he plea of distress is also accepted in many treaties as a circumstance justifying conduct which would otherwise be wrongful,' (n 14) art 24 Commentary 5. In investment protection law, NPM clauses would probably operate at the level of primary rules, and countermeasures and necessity at the level of secondary rules, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)* (Merits) [1986] ICJ Rep 14, Dissenting Opinion of Judge Jennings 528, 541; *CMS Gas Transmission Company v Argentina*, ICSID Case no ARB 01/08, Decision of the *ad hoc* Committee on the Application for Annulment, 25 September 2007 14 ICSID Rep 251 [129]-[133]; M Paparinskis, 'Investment Arbitration and the Law of Countermeasures' (2008) 79 BYIL 264, 349–50.

[17] Dugard 'Second Report' (n 5) [10]; J Dugard, 'Third Report on Diplomatic Protection', UN Doc A/CN.4/523/Add.1 [21].

[18] *Gabčíkovo/Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ Rep 7 [46]–[115]; *Application of the Interim Accord of 13 September 1995 (FYRM v Greece)* [2011] ICJ Rep [161]–[165].

[19] *Elettronica Sicula S.p.A. (ELSI) (US v Italy)* [1989] ICJ Rep 15 [50]; *Hochtief AG v Argentina*, ICSID Case no ARB/07/13, Decision on Jurisdiction, 24 October 2011 [95]; ILC, 'Draft Articles on Diplomatic Protection with Commentaries' in *Report of the International Law Commission on the Work of its 61st Session*, UN Doc A/61/10 15 art 15(e).

[20] HWA Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989 (Part Seven)' (1995) 66 BYIL 1, 84; Paulsson *Denial of Justice* (n 5) 102–12.

[21] 2006 ILC Articles (n 19), respectively arts 14, 15.

[22] *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* [1970] ICJ Rep 3, Separate Opinion of Judge Tanaka 114, 145–7; Dugard 'Second Report' (n 5) [31] art 13; Dugard 'Third Report' (n 17) [21]; see also n 5. Judges in the *Barcelona Traction* case discussed a question whether non-exhausted denial of justice was complete because the proceedings had not been properly notified to the investor, with the answer being probably positive, *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Preliminary Objections) [1964] ICJ Rep 6, Dissenting Opinion of Judge Armand-Ugon 116, 166; *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* [1970] ICJ Rep 3, Separate Opinion of President Rivero 54 [9]; ibid Separate Opinion of Judge Fitzmaurice 64 [73]–[83].

all remedies of a legal nature, judicial redress as well as redress before administrative bodies',[23] and 'the essence of the claim has [to be] brought before the competent tribunal and pursued as far as permitted by local law and procedures, and without success'.[24] These principles can be transposed to denial of justice. Indeed, they would operate in the latter setting in a more straightforward manner: rather than bringing a challenge of a different internationally wrongful act to the system of administration of justice, the existing objectionable judicial conduct has to further be pursued within the system itself.

In the law of diplomatic protection, the claimant has to show the exhaustion of remedies (or presence of exceptions), while the respondent then has to demonstrate the presence of non-exhausted remedies.[25] To the extent that this formula reflects the general principles of proof, they can be transposed to denial of justice. In the *Barcelona Traction, Light and Power Company, Limited* (*Barcelona Traction*) case, where the exhaustion of local remedies was considered as a preliminary objection (and one of the alleged breaches was denial of justice), Judge Tanaka seemed to apply a similar methodology by examining the great number of different challenges that had been unsuccessfully made in domestic courts before concluding that remedies had been exhausted.[26]

Exceptions of the local remedies rule may be relevant for denial of justice either by constituting denial of justice itself or by completing the denial of justice resulting from another aspect of objectionable judicial conduct. Exhaustion of remedies might be directly relevant to establishing denial of justice. To take the 2006 ILC Articles on Diplomatic Protection as a recent attempt at codification in the area, some of the exceptions, particularly those directed at lack of reasonably available remedies[27] and undue delays, may simultaneously constitute denial of justice.[28] Conversely, other exceptions

[23] *Ahmadou Sadio Diallo (Guinea v DRC)* (Preliminary Objections) [2007] ICJ Rep 582 [47]; following in substance if not in the particular wording the 2006 ILC Articles, (n 19) art 14(2). However, remedies of grace aimed at obtaining a favour rather than vindicate rights do not have to be exhausted, *Diallo* Judgment, ibid, following the language of the 2006 ILC Articles (n 19) art 14 Commentary 5.

[24] *ELSI* (n 19) [59]. The 'essence of the claim' departs from stricter criteria applied by certain earlier Tribunals, *Claim of Finnish shipowners against Great Britain in respect of the use of certain Finnish vessels during the war (Finland v UK)* (1934) 3 RIAA 1479, 1502; *Ambatielos (Greece/UK)* (1956) 12 RIAA 83, 120, 123.

[25] *ELSI* (n 19) [56]–[59]; *Diallo* Judgment (n 23) [44].

[26] *Barcelona Traction* Tanaka (n 22) [148]–[150].

[27] The exception of futility was sometimes generally formulated in terms of denial of justice, see Dugard 'Third Report' (n 17) [26]–[27]. Judge Fitzmaurice took the view that for 'proceedings which, if invalid, are so *ab initio*' and 'where the alleged vice relates not to the outcome but to the very inception of the proceedings', it was not evident that remedies had to be exhausted, *Barcelona* Fitzmaurice (n 5) [75]. The particular examples invoked by the ILC to illustrate the absence of reasonably available remedies, 2006 ILC Articles (n 19) art 15(a) Commentary 3, are not automatically transposable into the taxonomy of primary rules: lack of jurisdiction, *Panevezys-Saldutiskis Railway* [1939] PCIJ Rep Series A/B No 76 18, limited right to review particular acts by domestic courts, *Arbitration under Article 181 of the Treaty of Neuilly (Greece v Bulgaria)* (1931) 28 AJIL 760, 789, absence of appropriate remedies in domestic courts, *Finnish shipowners* (n 24) 1496–7, or general absence of an adequate judicial system might constitute denial of justice as denial of access; lack of independence by domestic courts could constitute denial of justice by procedural improprieties, *Robert E Brown (US v Great Britain)* (1923) 6 RIAA 120, 129; while a consistent line of precedents adverse to the alien would relate to the substance of the dispute and would not *prima facie* relate to denial of justice at all, *Panevezys*, ibid 18. Even though the traditional denial of justice probably did not accept the absence of means as a justification of non-exhaustion (even in exceptionally moving personal circumstances, *Jesse Lewis* (n 5) 89–90, 93), the ILC has engaged in progressive development regarding manifest preclusion of access, *inter alia* due to financial reasons similar to limitations of the rights to access, 2006 ILC Articles (n 19) 15(d).

[28] Principles regarding undue delay as an exception to the requirement of exhaustion and undue delay as denial of justice seem very similar, and indeed a leading authority from denial of justice is relied

would be relevant only for the failure to correct a potential denial of justice or may be irrelevant even in that context.[29]

When situating denial of justice in its broader context, the starting point is that denial of justice is only one of the primary obligations that may be breached in the process of administration of justice. The distinction is important in conceptual terms and may also be relevant for adjudicators of limited substantive or temporal jurisdiction and in decisions on remedies. In a number of cases, the PCIJ stated that domestic courts may breach international law by the (mis)application of domestic law, either by denial of justice or by breaching treaty obligations or other obligations of general international law.[30] The ICJ does not seem to have addressed the question directly, but the separate opinions of Judges[31] and the positions of parties confirm the distinction between judicial breach of international law by denial of justice and by breaching other international obligations of treaty or customary character.[32]

The distinction between denial of justice and other breaches of international law by courts seems relatively clear: a court might be the organ whose conduct is attributed to the State[33] and breach either treaty obligations (for example, regarding recognition and enforcement of arbitral awards) or customary obligations (for example, regarding jurisdiction),[34] but denial of justice is directed at the entirely different issue of administration of justice through the 'manner in which the proceedings... were conducted'.[35]

on by the ILC to elaborate the exception, *El Oro Mining and Railway (Ltd) (Great Britain v Mexico)* (1931) 5 RIAA 191, 198; see 2006 ILC Articles (n 19) art 15(b) Commentary 5.

[29] The presence of the alien within the territory of the host State and disputes regarding rights under domestic law would render inapplicable the exception of no relevant connection between the injured person and the responsible State, 2006 ILC Articles (n 19) art 15(c); T Meron, 'The Incidence of the Rule of Exhaustion of Local Remedies' (1959) 35 BYIL 83, 95–6. The waiver of the requirement of exhaustion, 2006 ILC Articles (n 19) 15(e), would be entirely unrelated to the substance of the primary rule, see nn 19–20, 240–5.

[30] In the *Lotus* case, the Court noted that errors by courts 'can only affect international law in so far as a treaty provision enters into account, or the possibility of a denial of justice arises', *S.S. 'Lotus' (France v Turkey)* [1927] PCIJ Rep Series A No 7 24 (the importance of using 'or' was emphasized by Riphagen on behalf of the Netherlands in the *Guardianship of Infants* case, *Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v Sweden)* ICJ Pleadings 243). In the *Treatment of Polish Nationals* advisory opinion, the Court stated that the application of the Danzig Constitution may breach international law 'whether under treaty stipulations or under general international law, as for instance in the case of denial of justice', *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* (Advisory Opinion) [1923] PCIJ Rep Series A/B No 44 24.

[31] In *Norwegian Loans*, Lauterpacht stated that after an adverse decision by Norwegian courts in the claims by French bond-holders, France could claim not only regarding denial of justice, but probably also regarding a breach by the underlying Norwegian legislation, *Certain Norwegian Loans (France v Norway)* [1957] ICJ Rep 9, Separate Opinion of Judge Lauterpacht 34, 41. In a later case, he accepted that the Court was competent to consider the application of Swedish law, since 'this being a case of treaty obligation no reliance on a charge of denial of justice was necessary for that purpose', *Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v Sweden)* [1958] ICJ Rep 55, Separate Opinion of Judge Lauterpacht 79, 99; similarly *Guardianship*, ibid Separate Opinion of Judge Moreno Quintana 102, 103; ibid Separate Opinion of Judge Spender 116, 120.

[32] In *Barcelona Traction*, while Belgium mainly based its claim on denial of justice, a separate argument was that Spain had breached international law by usurpation of jurisdiction by its courts, *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* [1970] ICJ Rep 3, 17–18, 30.

[33] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) [1999] ICJ Rep 62 [62]; 2001 ILC Articles (n 14) art 4(1), Commentary 6.

[34] *Costa Rica Packet (Great Britain v the Netherlands)* (1897) 5 Moore Intl Arbitrations 4948, 4952–3; Erick Beckett on behalf of the UK, Rosenne *Hague IV* (n 5) 1530; Fitzmaurice 'Hersch Lauterpacht' (n 5) 58.

[35] *Lotus* (n 30) 13. There is limited support for reading denial of justice more broadly, as all rules directed at the protection of rights of foreigners in courts, Freeman *Denial of Justice* (n 5) 47–52; perhaps

As Ago explained, the proper way to approach the issue is to ask 'not whether judicial organs can commit breaches of international obligations, but what are the international obligations of the State in regard to the administration of justice'. Otherwise the issues of primary rules are not approached directly but from the point of view of their breach.[36]

While the distinction is clear in principle, its application could be problematic in a number of situations: within the law of denial of justice; between 'direct' and 'indirect' responsibility; and between denial of justice and other breaches of the rules on the treatment of aliens. These situations will be considered in turn. The possible wrongfulness of judicial errors is a traditionally contested issue and, while usually directed at errors regarding domestic law and facts, it might *mutatis mutandis* apply to erroneous application of international law.[37] The second issue relates to the distinction that was sometimes drawn between 'direct' responsibility for the treatment of aliens engaged for conduct of State officials, and 'indirect' responsibility due to failure to respond through judiciary or to punish private crimes.[38] This view confused primary rules of different content with different types of responsibility.[39] In both instances, the State (directly) breaches international obligations, and the only difference appears at the technical level of formulation of obligation in negative terms (a prohibition of certain conduct), or in positive terms (a requirement of prevention of certain conduct).[40] For example, a prejudiced court that decides a contractual dispute between a foreigner and a domestic private party against the foreigner because of its bias would commit a wrongful act where none existed before.[41]

A State may commit only one breach of international law by an internationally wrongful administration of justice, but it might also have committed an earlier and distinct wrongful act; for example, by denying fair and equitable treatment or discriminating (and, of course, it might commit only the latter type of wrong and not denial of justice). For example, a State's non-performance of a contract with an alien as such may constitute only a wrong under the domestic legal order, but a related and subsequent denial of justice will engage international responsibility of the State.[42] Conversely, a dispossession of an alien of its acquired rights would immediately constitute a wrongful act, whatever additional legal relevance the subsequent attempts to overturn it might have.[43] Finally, the lack of remedies to challenge the dispossession might constitute an additional wrongful act. When reading *Phosphates in Morocco* with this distinction in mind, it is hard to fault the logic of Ago's fall-back argument that, even assuming that a dispute about the mistreatment of individuals had already existed between the two States, denial

also *Certain Norwegian Loans (France v Norway)* [1957] ICJ Rep 9, Separate Opinion of Vice-President Badawi 29, 32, 33.

[36] R Ago, 'Third Report on State Responsibility', UN Doc A/CN.4/246 [143].

[37] *Frontier Petroleum Services Ltd v Czech Republic*, UNCITRAL Case, Final Award, 12 November 2010 [526]-[527]. See below nn 110–24, III.2.iv.

[38] *BE Chattin (US v Mexico)* (1927) 4 RIAA 282, Opinion of Presiding Commissioner Van Vollenhoven 283 [7]–[11]; see the discussion at Ch 2 n 98.

[39] Freeman *Denial of Justice* (n 5) 20.

[40] In the *Tehran* case, the Court dealt both with the obligation to protect embassies and the obligation not to attack embassies, *United States Diplomatic and Consular Staff in Tehran (US v Iran)* [1980] ICJ Rep 3 respectively [67]–[68], [77]–[79].

[41] *Loewen* Award (n 5) [138]; Fitzmaurice 'Denial of Justice' (n 5) 107–8; Fitzmaurice 'Hersch Lauterpacht' (n 5) 64.

[42] ILC, 'Draft Articles on State Responsibility' in *Yearbook of the International Law Commission, 1976, Volume II*, UN Doc A/CN.4/SER.A/1976/Add.1 (Part 2) 73 art 16 Commentary 7; 2001 ILC Articles (n 14) art 4 Commentary 6; more generally Dugard 'Second Report' (n 5) [64].

[43] Crawford 'Second Report' (n 5) [146]; eg *Young, Smith & Co. (US v Spain)* (1879) 3 Moore Intl Arbitrations 3147, 3148.

of justice would constitute a breach of international law of its own, different from any preceding one.[44] The rejection of the argument by the Court should be limited to the peculiar procedural situation where allegations of denial of justice could not be considered 'unless the Court had first satisfied itself as to existence of the rights of the private citizens alleged to have been refused judicial protection', and the answer to this question was on the wrong *ratione temporis* side of the restrictive reservation.[45]

Finally, the classical debates relating to denial of justice reflected the relatively undeveloped theory of State responsibility that approached the issue of responsibility without making a clear distinction between primary rules of denial of justice and secondary rules of attribution and reparation.[46] The benefit of hindsight and the different conceptual framework accepted in contemporary law may make it complicated to distinguish arguments that have been rendered irrelevant through broader shifts in legal thinking from those that may still be valid, even if expressed by using obsolete terminology.

For example, some objections against denial of justice relied on the independence of judiciary and the *res judicata* of the judgments of domestic courts.[47] If these arguments suggest that the conduct of judiciary is not attributable to the State for the purpose of international law or that compliance with domestic law is exclusively determinative for compliance with international law, then they can have no contemporary relevance. Existence of obligation, existence of responsibility, and complexities of compliance are conceptually distinct matters.[48] At the same time, these arguments may pertain to the content of the primary rule itself, making the pragmatic point that it would be undesirable, if possible in principle, to create rules that would *sine qua non* raise structural problems of compliance for the governments. Constitutional structure of States regarding separation of powers would be likely to lead to such problems (and indeed elements of denial of justice may require administration of justice to be independent from the executive). Despite the demise of the underlying theoretical propositions, the particular argument may still influence the content of the primary rule, framing denial of justice in primarily procedural terms, and employing utmost caution regarding the substance of the judgments.[49]

[44] *Phosphates* Pleadings (n 9) 1229; cf *Mondev v US*, ICSID Additional Facility Case no ARB(AF)/99/2, Award, 11 October 2002 (2003) 42 ILM 85 [57]–[75].

[45] *Phosphates* Judgment (n 11) 29; cf *ATA Construction, Industrial and Trading Company v Jordan*, ICSID Case no ARB/08/2, Award, 12 May 2010 [110]. As France put it, the denial of justice regarding a right required the Court to 'presume the existence' of the very right that it could not address, *Phosphates* Pleadings (n 9) 1049–50 (Basdevant) (author's translation).

[46] R Ago, 'Le délit international' (1939) 68 Recueil des Cours de l'Académie de Droit International 419, 467–8, in general Ch 1 nn 128–38. In the Hague Conference, denial of justice was addressed as part of the law of attribution, Hague Texts (n 5) arts 6–9.

[47] *Croft (UK v Portugal)* (1856) II Lapradelle Politis Recueil 22, 23–4; *Yuille, Shortridge & Co. (UK Portugal)* (1861) II Lapradelle Politis Recueil 101, 103; see generally Freeman *Denial of Justice* (n 5) 29–38. Some States supported this position in the 1930 Hague Conference, Bulgaria, Rosenne *Hague II* (n 5) 465, France, ibid 466, the Netherlands, ibid 467; Sipsom on behalf of Roumania, Rosenne *Hague IV* (n 5) 1535–6, Colombia, ibid 1627 [4].

[48] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 27; 2001 ILC Articles (n 14) arts 4 and 3; also 'Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners' (1929) 23 AJIL Special Supplement 133 ars 2 and 3; Paulsson *Denial of Justice* (n 5) 38–40. Challenges in the enforcement of international obligations that touch upon administration of justice are not unknown in recent practice, eg *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mexico v US)* (Judgment) [2009] ICJ Rep 3.

[49] Accepting that such considerations influence the narrow scope of denial of justice, *Salem case (US v Egypt)* (1932) 2 RIAA 1161, 1202; JW Garner, 'International Responsibility of States for Judgments of Courts and Verdicts of Juries Amounting to Denial of Justice' (1929) 10 BYIL 181, 182–3. As the Netherlands stated at the Hague Conference, '[t]he independence of the judicature and its particular impartiality must in almost all cases preclude any dispute as to the proper dispensation of justice under the internal laws', Rosenne *Hague II* (n 5) 467. See below nn 110–24, III.2.iv.

Finally, in the classical law the scope of denial of justice was subject to some controversy. Due to the historical pedigree of denial of justice there was some disagreement whether denial of justice exhausted the whole international standard or was only one of many breaches relating to the treatment of aliens, the more persuasive latter view prevailing. If viewed from a contemporary perspective, even the narrow view of denial of justice adopted a broad definition of administration of justice, also addressing deprivation of liberty, associated mistreatment, and prosecution of crimes against aliens.[50] Another debate, again probably reflecting underlying uncertainty about the role of attribution in State responsibility, addressed the possibility of treating interference by other branches of government in the judicial process in terms of denial of justice, resolving it in affirmative terms.[51]

2. Law of denial of justice

The traditional law contained a considerable amount of State practice and case law on denial of justice, considered in legal writings from the earliest authors[52] to elaborate analyses made during the 1910s to the 1930s.[53] Indeed, even before the emergence of international law, the fourteenth-century practices recognized the right of a prince to grant rights of private reprisals to an individual in case of denial of justice by foreign princes,[54] explaining the concept of denial of justice in surprisingly modern terms.[55] The broad structure of the law of denial of justice will be explained according to the approach adopted by Freeman, following the logical development in the judicial process and dealing in turn with the access to the court, delay in the administration of justice, irregularities in the procedure, content of the judgment, and the execution of judgment.[56] The 1930 Hague Conference for the Codification of International Law ('Hague Conference') is of particular importance for identifying the pre-War position, in light of the explicit engagement by States with different aspects of denial of justice. It shows both the limited consensus, reflected in the Texts adopted in the First Reading by the Third Committee ('Hague Texts'), and the variety of plausible readings of the more controversial aspects.

[50] Freeman *Denial of Justice* (n 5), respectively Chs VIII and XIII; see n 61 below on the debates in the Hague Conference.

[51] *Brown* (n 27) 128–9; Fitzmaurice 'Denial of Justice' (n 5) 94; Freeman *Denial of Justice* (n 5) 106.

[52] Ch 2 nn 51–2.

[53] Particularly E Borchard, *Diplomatic Protection of Citizens Abroad* (The Banks Law Publishing Co., New York 1915) 330–43; de Visscher 'Le déni de justice' (n 5); Eustathiadès *La responsabilité international* (n 15); Freeman *Denial of Justice* (n 5).

[54] TE Holland (ed), JL Brierly (tr), G de Legnano, *Tractatus De Bello, de Represaliis et De Duello* (OUP, Oxford 1917) 307–29, esp 324.

[55] Similarities are even more striking if one does not rely on what appears to be a somewhat unpersuasive translation by Brierly, see M Paparinskis 'Investment Arbitration and the Law of Countermeasures' (n 16) 270 fn 26.

[56] Freeman *Denial of Justice* (n 5) 215–366, 392–402. Eustathiadès addresses the content of the judgment after the section on failures of execution, Eustathiadès *La responsabilité international* (n 15) 140–73, 194–209, but Freeman's approach is aesthetically more pleasing, dealing with the intellectual result of the judicial process before its enforcement.

First, the denial of access to courts most clearly follows from the formulation of the rule, as recognized by the State practice and legal writings.[57] Indeed, the formulation of the regime in terms of denial of access led to a tendency to explain all rules on the treatment of aliens in light of the ordinary denial of justice.[58] The denial of a right to access to court presupposed the existence of such a right, and this had to be in principle verified by reference to the domestic legal system.[59] Where a right existed under domestic law, the refusal of access to court due to another rule of domestic law could result in denial of justice.[60] The easiest case, accepted as uncontroversially wrongful in the Hague Conference, was a discriminatory denial of access to court,[61] described in the Hague Texts as the situation where 'the foreigner has been hindered by the judicial authorities in the exercise of his right to pursue judicial remedies'.[62] Denial had to be definite and not simply relate to jurisdictional limitations of particular courts.[63] A refusal to provide documents necessary to initiate the proceedings,[64] to accept a claim presented in accordance with the required forms,[65] an enactment of adverse proceedings by the State,[66]

[57] L Strisower, 'Responsabilité internationale des Etats à raison des dommages causés sur leur territoire à la personne et aux biens des étrangers' (1927) 33 Annuaire de l'IDI 455 art V(1), (2); 1929 Harvard Draft Convention (n 48) art 9; LB Sohn and RR Baxter, 'Responsibility of States for Injuries to the Economic Interests of Aliens' (1961) 55 AJIL 545 art 6; R Zouche, *An Exposition of Fecial Law and Procedure, or of Law between Nations, and Questions concerning the Same* (Carnegie Institute of Washington, Washington 1911) 33; T Frank (tr), C van Bynkershoek, *Quaestrionum Juris Publici Libri Duo* (Clarendon Press, Oxford 1930) 135–6; JH Drake (tr), C Wolff, *Jus Gentium Methodo Scientifica Pertractatum* (Carnegie Endowement of International Peace, Washington 1934) 302; CD Fenwick (tr), E de Vattel, *The Law of Nations or the Principles of Natural Law* (Carnegie Institute, Washington 1916) 228, 230; R Phillimore, *Commentaries upon International Law* (Volume 3, 3rd edn Butterworths, London 1885) 21; J Westlake, *Chapters on the Principles of International Law* (University Press, Cambridge 1894) 103–4; Freeman *Denial of Justice* (n 5) Ch IX. It was also accepted in the UK treaty practice of the 19th and 20th centuries, C Parry (ed), *A British Digest of International Law* (Part 6, Stevens & Sons, London 1965) 286 (see also Ch 2 n 128).

[58] *Antoin Fabiani case (France v Venezuela)* (1891) 4 Moore Intl Arbitrations 4878, 4900, 4904.

[59] A de Lapradelle and N Politis, *Recueil des arbitrages internationaux* (Volume I, Les editions internationales, Paris 1905) 726; 1929 Harvard Draft Convention (n 48) 180; Freeman *Denial of Justice* (n 5) 228–30, 236–9. As Judge Morelli put it, '[a]ny State which, having attributed certain rights to foreign nationals, prevents them from gaining access to the courts for the purpose of asserting those rights is guilty, in international law, of a denial of justice', *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* [1970] ICJ Rep 3, Separate Opinion of Judge Morelli 222, 233.

[60] *Case of Ruden & Co. (US v Peru)* (1869) 2 Moore Intl Arbitrations 1653, 1655; *Case of RT Johnson (US v Peru)*, ibid 1656, 1656–7; *Tagliaferro case (Italy v Venezuela)* (1903) 10 RIAA 592, 593–4.

[61] Even the famously restrictive Guerrero's Report recognized that denial of justice consisted of 'refusing to allow foreigners easy access to the courts to defend those rights which the national law accords them', Rosenne *Hague II* (n 5) 253. In answering question IV(1), States generally accepted that 'refusal to allow foreigners access to the tribunals to defend their rights' was a ground of responsibility, see South Africa, ibid 463, Australia, Austria, ibid 464, Belgium, Chile, Denmark, Egypt, ibid 465, Great Britain, Hungary, India, Italy, Japan, Norway, ibid 466, New Zealand, the Netherlands, Poland, ibid 467, Roumania, Switzerland, ibid 467, Czechoslovakia, ibid 468, Canada, ibid 678, the US, ibid 685–6. The Basis of Discussion no 5 suggested international responsibility when the foreigner 'is refused access to the courts to defend his rights', ibid 470, and States confirmed this position during the Conference, Cavaglieri on behalf of Italy, Rosenne *Hague IV* (n 5) 1533, Vidal on behalf of Spain, ibid 1541.

[62] Hague Texts (n 5) art 9(2). The early drafts adopted a broader language ('foreigner has been hindered in his rights by the judicial authorities'), de Visscher on behalf of Belgium, Rosenne *Hague IV* (n 5) 1575, so as to accommodate the wish of the US to cover detention pending trial, de Visscher, Hackworth on behalf of the US, ibid 1576.

[63] *HG Venable (US v Mexico)* (1927) 4 RIAA 219, Opinion of Commissioner Nielsen 232, 241; Matter on behalf of France, Rosenne *Hague IV* (n 5) 1538; Freeman *Denial of Justice* (n 5) 227–9.

[64] *Ballistini case (France v Venezuela)* (1903–1905) 10 RIAA 18 [3].

[65] *Cotesworth and Powell (Great Britain v Colombia)* (1875) 2 Moore Intl Arbitrations 2050, 2083.

[66] Mr Bayard, Secretary of State, to Mr Jackson, minister to Mexico (*ED Sidbury*) (1880) 6 Moore Digest 681, 682.

adoption of laws against claimants,[67] a purposeful disruption of the commencement of the proceedings,[68] or even the absence of notification about proceedings that excluded the possibility to challenge them could all result in denial of justice.[69]

The broader reaches of the rule were more contested. The denial of access might follow from the formulation of the underlying substantive right in domestic law. For example, in the *Venable* case Commissioner Nielsen accepted that, if Mexican law really did not permit a lessee (rather than the owner) to apply for the release of property, no breach would be committed by a refusal of the court, 'and if [the alien] suffered a denial of justice, that was inherent in the law'.[70] A particularly complicated situation could arise when the lack of substantive rights was itself a result of discriminatory law-making. On the one hand, the absence of a substantive cause makes the claim of denial of access conceptually problematic; on the other hand, discriminatory distinctions in the judicial protection are at the heart of the law of denial of justice, and it would be disconcerting if the State could evade this obligation by skilful drafting of the distinction at the substantive, rather than procedural level.[71] Even when the rights existed, despite the seeming breadth of the formulation of the right to access, the particular elements of practice were focused at discriminatory denials of procedural rights recognized under domestic law.[72] In the pre-War writings, the varieties of domestic approaches regarding claims against the State (or its highest authorities) were thought to suggest a lack of an obligation to provide general access to court.[73] The post-War evidence of domestic rules generally accepting such a right makes the limitation of the obligation to provide access by reference to the importance of the respondent less persuasive.[74] Finally, if the particular relief

[67] Venezuelan Decree, respecting Claims by Natives and Foreigners, of 14 February 1873 (1882–1883) 74 British and Foreign State Papers 1065, 1066 art 8.

[68] Mr Evarts, Secretary of State, to Mr Fairchild, minister to Spain (1881) 6 Moore Digest 656. In an exceptional situation, the claimant was even allegedly murdered, *France et Saint-Dominique* (1900) 7 Revue générale de droit international public 274, 274–6.

[69] In the *Barcelona Traction* case, Belgium argued denial of justice because of a refusal of access to justice (and denial of rights of defence) from the lack of notification about bankruptcy proceedings, *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* ICJ Pleadings Volume I 171 [343]–[350] (Memorial). Judge Fitzmaurice considered the argument from the perspective of exhaustion of local remedies and accepted that the investors had not been properly notified, *Barcelona* Fitzmaurice (n 5) [73]–[83].

[70] *Venable* Nielsen (n 63) 241.

[71] In the context of a treaty rule on free access to courts in the *Ambatielos* case, the UK approvingly invoked a US Supreme Court judgment on such a treaty clause that had found no breach when substantive domestic law had not provided for a cause of action for particular types of suit brought by non-resident aliens. According to Fawcett, '[o]n the face of it, this might seem to be a denial of access, even a denial of justice... but if the local law says she has no rights in the matter, that is not a denial of free access', *Ambatielos case (Greece v UK)* ICJ Pleadings 425–6.

[72] Mr Porter, Acting Secretary of State, to Mr Phelps, minister to Peru (1885) 6 Moore Digest 253 (referred to by the US in its submission to the Hague Conference, Rosenne *Hague II* (n 5) 686). The *Ambatielos* Tribunal described the treaty rule of 'free access to the Courts' as *inter alia* entitling the alien 'to bring any action provided or authorised by law', *Ambatielos* (n 24) 111.

[73] Freeman *Denial of Justice* (n 5) 228–9. The Hackworth *Digest* cites a US law that provides for the right to claim against government on a reciprocal basis, G Hackworth, *Digest of International Law* (Volume 3, Government Printing Office, Washington 1942) 565–6.

[74] Lauterpacht's *Oppenheim* approvingly cited domestic decisions permitting claims against the State, H Lauterpacht (ed), *Oppenheim's International Law* (Volume I: Peace, 8th edn Longman, Green & Co., London 1955) 688 fn 3. A 1959 survey concluded that, in a substantial majority of countries, nationals and aliens could bring suit against the government, CH Sullivan, 'The Alien's Right to Bring Suit against the State: A Preliminary Survey' (1959) 8 Whiteman Digest 411, 411–13.

could not be claimed as a matter of right but only in discretionary terms, its refusal probably would not constitute denial of justice.[75]

Beyond these general propositions, the scope of right to access to court could be subject to certain restrictions. The controversy regarding the legal status of corporate investors led to scepticism about their right of access to court, and State practice in this regard tended to rely on specific treaty rules.[76] Differential treatment did not necessarily result in denial of justice if access to justice was still possible and 'in so far as such difference is justified by the nature of the subject', for example, regarding security of costs[77] or absence of free legal assistance for alien litigants.[78] The analysis of reasonableness of restrictions explains the preference of the law of denial of justice for a case-by-case elucidation.

Second, another branch of denial of justice of similarly impressive historic pedigree dealt with the unreasonable delays of justice,[79] treating the abnormal length of proceedings as equivalent to denial of access to justice in the broadest sense.[80] The Hague Texts included among the grounds of responsibility the cases where 'the foreigner... has encountered in the proceedings unjustifiable... delays implying a refusal to do justice'.[81] State practice and case law tended to adopt an analytical perspective similar to access to

[75] See the position regarding exhaustion of local remedies at n 23. In the *Phosphates in Morocco* case, Italy argued that 'the doctrine and practice plainly agree in recognising that a refusal to provide means of recourse that could effectively re-establish the injured rights constitutes a certain case of *denegata iustitia*', *Phosphates* Pleadings (n 9) 486 (Observations and Conclusions of Italy) (author's translation), also 504. France rejected the argument on the facts, ibid 631–2, 717 (Reply of France), but also added that, in legal terms, a refusal of discretionary remedies for an unjustified request would not be a denial of justice, ibid 716–17.

[76] Ch 3 nn 14–15.

[77] Austria, Rosenne *Hague II* (n 5) 464, also Germany, Rosenne *Hague IV* (n 5) 1638. See generally Mr Hay, Secretary of State, to Signor Carignani (1901) 6 Moore Digest 674, 674–5 (regarding a treaty rule guaranteeing 'free access'); D Anzilotti, 'La responsabilité internationale des États a raison des dommages soufferts par des étrangers' (1906) 13 Revue générale de droit international public 5 23 fn 2; P Fauchille, *Traité de droit international public* (A Rousseau, Paris 1922) 534; A Verdross, 'Règles internationales concernant le traitement des étrangers' (1931) 37 Recueil des Cours de l'Académie de Droit International 327, 384; Freeman *Denial of Justice* (n 5) 224–7. The traditional practice is fairly inconclusive. In the 1920s and 1930s, the US defended the practice as non-discriminatory because it equally applied to non-resident nationals, 3 Hackworth (n 73) 569–70. In the *Ambatielos* proceedings, the UK relied on inter-War judgments of Austrian, German, and US courts on treaty clauses regarding free access so as to demonstrate their narrow reach, which did not even extend to the exemption from security for costs, *Ambatielos* Pleadings (n 71) 424–5 (Fawcett). A 1959 change in the US law extended the personal scope of the right to ask for a waiver of costs and fees from 'citizens' to 'persons', MM Whiteman, *Digest of International Law* (Volume 8, Government Printing Office, Washington 1967) 415.

[78] Germany, Rosenne *Hague IV* (n 5) 1638; Eustathiadès *La responsabilité international* (n 15) 149–50; Freeman *Denial of Justice* (n 5) 227.

[79] FW Kelsey (tr), H Grotius, *De jure belli ac pacis libri tres* (Clarendon Press, Oxford 1925) 626–7; Zouche *Exposition* (n 57) 33; Wolf *Jus Gentium* (n 57) 302; de Vattel *Law of Nations* (n 57) 230; Phillimore *Commentaries* (n 57) 21; Fitzmaurice 'Denial of Justice' (n 5) 180. British treaty practice provided for speedy justice already in the 17th and 18th centuries, 6 Parry (n 57) 286.

[80] *Fabiani* (n 58) 4895; Eustathiadès *La responsabilité international* (n 15) 152. In the *Barcelona Traction* case, parties accepted in principle that unreasonable delay might constitute denial of justice, *Barcelona Traction* Pleadings I (n 69) 173 [351] (Memorial of Belgium), *Barcelona Traction* Pleadings IV (n 5) 501 [95]–[97] (Counter-Memorial of Spain).

[81] Hague Texts (n 5) art 9(2). In answering question IV(3), States accepted that 'unconscionable delay on the part of the tribunals' was a ground of responsibility, see South Africa, Rosenne *Hague II* (n 5) 463, Australia, Austria, ibid 464, Belgium, Chile, Denmark, Egypt, ibid 465, Great Britain, Hungary, India, Italy, Japan, Norway, ibid 466, New Zealand, the Netherlands, Poland, ibid 467, Roumania, Switzerland, ibid 467 (and 472), Czechoslovakia, ibid 468, Canada, ibid 678, the US, ibid 685–6. The Basis of Discussion no 5 suggested international responsibility when the foreigner 'is refused access to the courts to defend his rights', ibid 470, and the view was also confirmed during the Conference, see Matter on behalf of France, Rosenne *Hague IV* (n 5) 1539, Vidal on behalf of Spain, ibid 1541.

justice, considering reasonableness of the length of proceedings in light of the facts of the particular case. Relevant considerations for identifying undue and needless delay[82] were 'the volume of the work involved by a thorough examination of the case, in other words,... the magnitude of the latter',[83] the natural delays in collecting evidence from different places,[84] the amount at issue in the particular case,[85] and the legal nature of the case (speedy proceedings being more important in criminal than in civil cases).[86] As with the other aspects of denial of justice, the excessive length of proceedings could follow from ineffectiveness of the judicial administration or could reflect impermissible influence by the executive, the latter aspect buttressing the broader impropriety of executive interference in judicial process.[87]

Third, the broadest aspect of denial of justice related to failure to 'offer guarantees which are indispensible to the proper administration of justice'.[88] In the Hague Conference, despite the initial support for a broader rule addressing different kinds of indispensible procedural guarantees, the Hague Texts only provided a succinct statement on responsibility when 'unjustifiable obstacles... imply a refusal to do justice'.[89] This rubric is of particular relevance for the fair and equitable treatment debate, since it determined the wrongfulness of particular conduct by 'recourse to some concept such as "fairness"'.[90] Even though an element of reasonableness appears in the exclusion of *de minimis* procedural improprieties,[91] the analytical approach differs from the reasonableness analysis considered before regarding access and delays. Rather, the practice shows a case-by-case identification of permissible conduct against the background benchmark of fairness.

Reflecting the debate between the national treatment and international standard, while a breach of domestic rules on judicial procedure and discrimination could lead to denial of justice,[92] compliance with domestic law did not exclude the possibility of international wrongfulness.[93] Similarly to the more general aspects of the treatment of aliens, non-discrimination was an essential aspect of the guarantee, particularly when considered from the historical perspective.[94] One strand of procedural improprieties

[82] Mr Frelinghuysen, Secretary of State, to Mr Morgan, minister to Mexico (1884) 6 Moore Digest 277. In *Barcelona Traction*, parties went into great detail in discussing the justifiability of the delays in light of the underlying rationale of different procedural regimes and facts relevant for the particular case, *Barcelona Traction* Pleadings I (n 69) 173 [351] (Memorial of Belgium), *Barcelona Traction* Pleadings IV (n 5) 501 [98]–[105] (Counter-Memorial of Spain).

[83] *El Oro* (n 28) [9]; cf *Clyde Dyches (US v Mexico)* (1929) 4 RIAA 458, 460–1.

[84] *Captain T Melville White (Great Britain v Peru)* (1864) 5 Moore Intl Arbitrations 4967, 4974–6.

[85] *Interoceanic Railway of Mexico (Acapulco to Veracruz) (Ltd) and others (Great Britain v Mexico)* (1931) 5 RIAA 178 [13].

[86] *Chattin* Van Vollenhoven (n 38) [15]; Freeman *Denial of Justice* (n 5) 246.

[87] Freeman *Denial of Justice* (n 5) 261–2.

[88] Strisower 'Responsabilité' (n 57) art V(3).

[89] Hague Texts (n 5) art 9(2).

[90] Freeman *Denial of Justice* (n 5) 266–7.

[91] Mr Marcy, Secretary of State, to Mr Starkweather (1855) 6 Moore Digest 264; Mr Bayard, Secretary of State, to Mr Morrow (1886) ibid 280; Mr Olney's report in relation to the case of John L Waller to the President (1896) ibid 696, 696–7; Freeman *Denial of Justice* (n 5) 292–3.

[92] *Parrott's case (US v Mexico)* (1849) 3 Moore Intl Arbitrations 3009, 3010–11; Mr Marcy, Secretary of State, to Baron de Kalb (1855) 2 Wharton Digest 505; *Cotesworth and Powell* (n 65) 2083–4; *Driggs* (n 5) 3125; *Salem* (n 49) 1202.

[93] Freeman *Denial of Justice* (n 5) 264–6.

[94] The *Ambatielos* Tribunal situated non-discrimination at the centre of the rule, explaining the historical development of law in the area as 'a reaction against the practice of obstructing and hindering the appearance of foreigners in Court, a practice which existed in former times and in certain countries, and which constituted an unjust discrimination against foreigners. Hence, the essence of "free access" is adherence to and effectiveness of the principle of non-discrimination against foreigners who are in

related to equality of arms, in particular regarding the right of aliens to be notified about procedural developments,[95] the right to be heard,[96] the right to counsel,[97] the right to call and confront witnesses,[98] the right to produce evidence,[99] and the right to public proceedings in criminal cases.[100] Another strand addressed the integrity of judicial conduct, dealing with situations where judges lacked impartiality,[101] followed strong public feeling on the particular issue,[102] were subject to impermissible influence by the executive (whether in the particular case[103] or due to the general constitutional structure),[104] or corruption by the parties.[105] The quintessential case of procedural impropriety was *Cotesworth and Powell*, where the judge hid and destroyed court papers, colluded with other parties, and finally disappeared, but not before selling the claimant's tobacco in dispute to his own secretary.[106]

The *Ambatielos* Tribunal provides perhaps the most exhaustive and concise summary of the procedural guarantees from the perspective of non-discrimination in the following terms:

> the foreigner shall enjoy full freedom to appear before the courts for the protection or defence of his rights, whether as plaintiff or defendant; to bring any action provided or authorised by law; to deliver any pleading by way of defence, set off or counterclaim; to engage Counsel; to adduce evidence, whether documentary or oral or of any other kind; to apply for bail; to lodge appeals and, in short, to use the Courts fully and to avail himself of any procedural remedies or guarantees provided by the law of the land in order that justice may be administered on a footing of equality with nationals of the country.[107]

need of seeking justice before the courts of the land for the protection and defence of their rights', (n 24) 111.

[95] *Cotesworth and Powell* (n 65) 2083, 2084; *Bullis case (US v Venezuela)* (1903–1905) 9 RIAA 231, 232; *Walter Fletcher Smith v the Compañía Urbanizadora del Parque y Playa de Marianao* (1930) 24 AJIL 384, 386–7; see on *Barcelona Traction* at n 69.

[96] *Cotesworth and Powell* (n 65) 2083, 2084; Mr Evarts, Secretary of State, to Aristarchi Bey (1877) 2 Wharton Digest 623; *Sidbury* (n 66) 680; see on *Barcelona Traction* at n 69.

[97] Mr Fisch, Secretary of State, to Mr Cushing (1875) 2 Wharton Digest 621; Mr Bayard, Secretary of State, to Mr Jackson, minister to Mexico (*Cutting*) (1886) 2 Moore Digest 228, 229.

[98] Mr Evarts to Arisarchi Bey (n 96); *Cutting*, ibid 228–9.

[99] *Cotesworth and Powell* (n 65) 2083; *Cutting*, ibid 229; the Netherlands, Rosenne *Hague II* (n 5) 472.

[100] Freeman *Denial of Justice* (n 5) 304–206.

[101] Mr Cass, Secretary of State, to Mr Dimitry (1860) 2 Wharton Digest 615; *Cornelius H Garrison (US v Mexico)* (1871) 3 Moore Intl Arbitrations 3129. Root's speech also called for 'impartial justice', E Root, 'The Basis of Protection to Citizens Residing Abroad' (1910) 4 ASIL Proceedings 16, 27.

[102] *Abraham Solomon (US v Panama)* (1933) 6 RIAA 370, 373.

[103] Mr Marcy, Secretary of State, to Mr Clay, minister to Peru (1855) 6 Moore Digest 659; Mr Cass to Mr Dimitry (n 101); *Jacob Idler (US v Venezuela)* 4 Moore Digest 3491, 3517; *Fabiani* (n 58) 4882, 4901; *Davy case (Great Britain v Venezuela)* (1903) 9 RIAA 467; *Brown* (n 27) 129. In its submissions to the Hague Conference, the US stated that '[w]here there is a denial of justice due to the fact that the courts are under the arbitrary control of the government, the State has been held responsible', Rosenne *Hague II* (n 5) 688, similarly South Africa, Australia, Great Britain, ibid 471.

[104] Freeman *Denial of Justice* (n 5) 302.

[105] Mr Marcy to Mr Clay (n 103); Mr Marcy to Baron de Kalb (n 92); Freeman *Denial of Justice* (n 5) 268 fn 5; Austria, Rosenne *Hague II* (n 5) 464, South Africa, Australia, Great Britain, ibid 471.

[106] *Cotesworth and Powell* (n 65) 2064–85. Fitzmaurice 'defied anyone to read [*Cotesoworth*] ... without being shocked at the kind of treatment sometimes meted out to foreigners', ILC, *Yearbook of the International Law Commission, 1957, Volume I*, UN Doc A/CN.4/SER.A/1957, 163.

[107] *Ambatielos* Tribunal (n 24) 111. In *Barcelona Traction*, both parties accepted the obligatory character of independence and impartiality of judges, rights of defence, and non-discrimination in the judicial process, *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* ICJ Pleadings Volume VIII 45 (Rolin on behalf of Belgium). The 1961 Harvard Draft Convention provides an extensive list of procedural rights, (n 57) art 7, of which some (for example, the 'full opportunity to have

The *Ambatielos* award was rendered in the post-War years in a case between two European countries, with the UK, a traditional claimant country, appearing as a respondent. As such, it provides a balanced and authoritative statement of the developments in the post-War international law. Indeed, since the contested withholding of evidence had been neither in breach of British law nor in pursuance to discriminatory British law, the claim was rejected.[108]

The fourth, and conceptually the most controversial, aspect related to the content of the judgment, the position maintaining an uneasy balance between the rule that substance of the judgment did not usually engage international responsibility and the exception that it sometimes still did. A judgment breaching other rules of international law would undoubtedly engage State responsibility, and it was sometimes suggested that it would also constitute denial of justice. However, as noted above, this breach would not be a denial of justice because it would breach another primary rule, the only similarity with denial of justice being that it would be committed by the same organ of the State.[109]

The PCIJ accepted the principle that the content of the judgment may breach international law, noting in passing that '[t]he fact that the judicial authorities may have committed an error in their choice of the legal provision applicable to the particular case and compatible with international law ... can only affect international law in so far as ... the possibility of denial of justice arises'.[110] This type of denial of justice related to judgments obviously incorrect or unjust. The legal writers agreed that only 'obviously' and not 'ordinarily' incorrect and unjust judgments gave rise to international wrongfulness.[111] A number of schools of thought existed on how this line could be drawn, contradictory both between and within each other. For example, the nineteenth-century British practice recognized the principle of responsibility for unjust judgments but did not intervene even in cases of wrong and absurdly reasoned judgments,[112] unless procedural

compulsory process of obtaining witness and evidence', art 7(d)) might reflect particular domestic perspectives and not necessarily customary law.

[108] Ibid 117–18. In formal terms, the Commission was dealing with a treaty rule on 'freedom of access', rather than the customary law of denial of justice. However, the historical narrative cited above, n 94, puts the treaty rule within the broader rubric of international law on the administration of justice; the formulation of the rule, n 107, is, by necessary implication, derived from underlying customary law, rather than merely the ordinary meaning of the treaty terms (see the UK argument to the effect in *Ambatielos* Pleadings (n 71) 391, 415–16 (Fitzmaurice)); the Greek argument alleged denial of justice, *Ambatielos* Tribunal (n 24) 94, 102; and the UK position throughout the ICJ proceedings was that the dispute was about customary law of denial of justice, *Ambatielos* Pleadings (n 71) 279, 281–2, 289, 317 (Beckett), 389–91, 413, 415–16 (Fitzmaurice).

[109] Text at nn 30–45.

[110] *Lotus* (n 30) 24.

[111] Grotius *De jure belli* (n 79) 627; Zouche *Exposition* (n 57) 33; Bynkershoek *Quaestrionum* (n 57) 135–6; Wolf *Jus Gentium* (n 57) 302; de Vattel *Law of Nations* (n 57) 228, 230; Phillimore *Commentaries* (n 57) 22; Westlake *Principles of International Law* (n 57) 104–5; D Anzilotti, 'La responsabilité internationale des États a raison des dommages soufferts par des étrangers' (1906) 13 Revue générale de droit international public 5, 297; Eagleton *Responsibility of States* (n 15) 72, 120; 1929 Harvard Draft Convention (n 48) 186; Fitzmaurice 'Denial of Justice' (n 5) 109; G Scelle, *Précis de droit des gens: principles et systématique* (Libraire du Recueil Sirey, Paris 1932) 95; Verdross 'Règles internationales' (n 77) 385; de Visscher 'Le déni de justice' (n 5) 405; Eustathiadès *La responsabilité international* (n 15) 228–30; Freeman *Denial of Justice* (n 5) 317–22 (see references to further pre-War authorities, ibid 318 fn 1).

[112] The UK refused to intervene in cases where the judgment was 'erroneous in principle and oppressive in its results', *Samuel Phillips* (n 5) [4], 'unsound in law, ... ill, and even absurdly reasoned', *Mr Phillips' case* (1860) 6 Parry 288, 289, 'wrong in law', *Lindsay* (n 5) 289, also *Mr Colbeck's case* (1861) 6 Parry 289, 290, in the absence of 'corruption or unequal application of the laws, or clear perversion of justice', *Abouloff v Oppenheimer* (1882) 6 Parry 287.

improprieties had also taken place;[113] in the Hague Conference, the representative of the UK made a much broader argument for responsibility for evident errors of fact.[114]

At one end of the spectrum, content of the judgment could not provide grounds of responsibility,[115] unless it was inspired by manifest ill-will towards foreigners[116] or unless other procedural breaches had taken place.[117] Further along the spectrum, the possible responsibility for manifestly unjust judgments would be accepted in principle, without elaborating the criteria or methodology for their determination.[118] An intermediate position would not require the presence of procedural breaches, but rather infer them from the inferior quality of judgments.[119] In such cases, 'it should be shown that the decision was so palpably unjust that the good faith of the court is open to suspicion',[120] and the substantive analysis would be reframed in terms of a presumption of procedural impropriety.[121] Another way of making a similar point would be to reformulate the obligation as requiring the existence of courts properly constituted and run by competent judges (rather than delivery of a judgment of particular content), basing the responsibility for unjust judgments on the failure to provide a competent judge, rather than the particular judicial error.[122] The latter two points could also be presented in a

[113] In a case where the insurer had been required to pay the whole sum insured without regard to actual loss, 'a very gross violation of natural justice' was found, but the unjustifiable imprisonment of agents of the company probably coloured the conclusion, *Case of Messrs Figuredo Bros* (1872) 6 Parry 293.

[114] Erick Beckett formulated the standard of breach as the case when 'the result of the proceedings is... clearly contrary to the elementary principles of justice', and illustrated it by an example where a ship's captain had been prosecuted for murdering people in a boat when, at most, he might have been negligent, Rosenne *Hague IV* (n 5) 1530–1.

[115] In Japan's view, '[i]n cases of intrinsically unjust decisions a State should, in principle, not incur responsibility', Rosenne *Hague II* (n 5) 472. Colombia considered the possibility of ill-will to be inevitable, observing wittily that 'judges are only men, we cannot bring down the gods of Olympus to do justice for us. In any case, from what mythology tells us, even they were not free from passion and prejudice', Rosenne *Hague IV* (n 5) 1628 [10].

[116] The Basis of Discussion 5(4) suggested responsibility when '[t]he substance of a judicial decision has manifestly been prompted by ill-will toward foreigners as such or as subjects of particular States', Rosenne *Hague II* (n 5) 470. There was support for the rule, albeit not overwhelming: South Africa (provided the judgment was erroneous), ibid 463, 471, Australia, ibid 464, Belgium, probably Denmark, ibid 465, Great Britain, India, Italy, Japan, Norway, ibid 466, New Zealand, ibid 467, Poland, ibid 468, Switzerland, Czechoslovakia, ibid 470, Canada, ibid 678, US, ibid 688, Vidal on behalf of Spain, Rosenne *Hague IV* (n 5) 1541; Hungary simultaneously denied responsibility and thought it would constitute denial of justice, Rosenne *Hague II* (n 5) 466. See also Verdross 'Règles internationales' (n 77) 385; *Lettie Charlotte Denham and Frank Parlin Denham (US v Panama)* (1933) 6 RIAA 334, 337.

[117] In the Hague Conference, the US broadly stated that '[a] denial of justice may result from palpable injustice in the conduct of a trial', relying on its practice on procedural guarantees, Rosenne *Hague II* (n 5) 688; see also Borchard *Diplomatic Protection* (n 53) 340–1; Eagleton *Responsibility of States* (n 15) 120.

[118] Netherlands, Rosenne *Hague II* (n 5) 467.

[119] For example, responsibility was suggested in cases when 'the decision... is manifestly at variance with the established jurisprudence of the courts of the State concerned and no other logical reason [other than ill-will towards foreigners] exists to justify such a departure from the settled practice', Rosenne *Hague II* (n 5) 469 (Poland); and when 'the decision is... so erroneous that it could not honestly be given by a competent court', ibid 471 (Australia). In *Barcelona Traction*, Belgium argued that the conduct of courts could not be explained otherwise than by being discriminatory and arbitrary, and as such constituted denial of justice, *Barcelona Traction* Pleadings I (n 69) [353]-[367] (Memorial).

[120] 1929 Harvard Draft Convention (n 48) 186.

[121] Fitzmaurice 'Denial of Justice' (n 5) 113–14; de Visscher 'Le déni de justice' (n 5) 404; Freeman *Denial of Justice* (n 5) 331. Denmark suggested reference to an international court 'in respect of the material justice of the decision, since some judges might, as State officials, have a subconscious bias in favour of their own Government', Rosenne *Hague II* (n 5) 471. The *Solomon* Award supports a slightly different element of the same principle, reading the otherwise indefensible domestic judgment as 'unconsciously influenced by strong popular feeling', (n 102) 373.

[122] Fitzmaurice 'Denial of Justice' (n 5) 113–14.

conflated manner.[123] Finally, at the other end of the spectrum some authorities, such as the *Martini* award, explicitly rejected any direct relevance of implied or clear ill-will, focusing instead on the quality and internal consistency of the reasoning and the evaluation of evidence.[124]

Overall, the weight of the traditional practice was directed at cases where the unjust content was only one of the many breaches, leaving open several equally plausible avenues for dealing with procedurally impeccable and substantively unjust judgments. In the post-War years, the issue was extensively reargued in the *Barcelona Traction* case, with Spain and Belgium emphasizing respectively the subjective bad faith and discriminatory intent on the one hand and the objectively manifest error on the other one.[125] The Court did not reach the merits stage and therefore left the issue open.

The logical final point in the administration of justice relates to the execution of judgment. The classic cases confirmed that the failure to execute a judgment due to various reasons, ranging from a formal refusal of authorities[126] and an indefinite postponement,[127] to such mundane incidents as embezzlement of the funds by a clerk of the court, could lead to international responsibility.[128] International law therefore required the authorities to use 'means at [their] disposal' in order to enforce the judgments.[129]

II. Administration of justice and the human right to fair trial

1. Right to fair trial in context

At the universal level, Article 14(1) of the ICCPR provides *inter alia* that '[a]ll persons shall be equal before the courts and tribunals. In the determination of... his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'.[130] The ECHR, the oldest and probably most influential regional treaty, addresses the right to fair trial in Article 6, providing in its first paragraph *inter alia* that '[i]n the determination of his civil

[123] As the UK put it in its submission to the Hague Conference, 'an erroneous judgment... may engage the responsibility of the State if it is: So erroneous that no *properly constituted court* could *honestly* have arrived at such a decision', Rosenne *Hague II* (n 5) 271 (emphases added), also adopted by India, New Zealand, ibid 272.

[124] *Martini (Italie c Venezuela)* (1930) 2 RIAA 975, 987. The Tribunal found that some parts of the challenged judgment could have been 'adopted for purely juridical reasons', ibid 994, while others 'implied an obvious juridical contradiction', ibid 1000 (author's translation); see similar earlier authorities *Case of the 'Orient' (US v Mexico)* (1849) 3 Moore Intl Arbitrations 3229, 3229–31; *Bronner's case (US v Mexico)* (1874) 3 Moore Intl Arbitrations 3134, 3134.

[125] Spain argued that State practice and case law required bad faith and discriminatory intent for denial of justice, *Barcelona Traction* Pleadings IV (n 5) 507 [108]-[112] (Counter-Memorial); *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* ICJ Pleadings Volume VI 212 [26]–[51] (Rejoinder). Belgium disagreed, reading the same elements of practice and case law as supporting a test of objectively unjust judgments, *Barcelona Traction* Pleadings V (n 5) 313 [458]–[476] (Reply), ibid Volume VIII (n 107) 45–9 (Rolin).

[126] Mr Bayard, Secretary of State, to Mr McLane (1886) 6 Moore Digest 266; *Sidbury* (n 66) 679.

[127] *Interoceanic Railway* (n 85) [11].

[128] *Henry James Bethune (Lord Nelson Case) (Great Britain v US)* (1914) 6 RIAA 32, 33–4.

[129] *Montano case (Peru v US)* (1863) 2 Moore Intl Arbitrations 1630, 1635; see further cases on enforcement of judgments in criminal proceedings, cited at *Venable* Nielsen (n 63) 245–6.

[130] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 14(1).

rights..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'.[131]

Arguments from human rights treaties may be used to explain analogous investment protection rules in at least two ways.[132] Human rights treaties may be used as 'relevant rules' in terms of VCLT Article 31(3)(c). In the context of the administration of justice, the host State may owe international obligations to the home State regarding the treatment of the home State's investor, both under the investment protection treaty's rules on fair and equitable treatment and denial of justice, and under a universal or regional human rights treaty's rules on the right to fair trial. The interpretation of bilateral obligations (or bilateralizable obligations within multilateral investment treaties)[133] therefore requires the consideration of whether the parallel *erga omnes partes* human rights obligations (*inter alia* owed to the home State) are 'relevant'. Relevance is an objective criterion[134] and a number of Tribunals have relied on the ICCPR.[135] While it is puzzling that more Tribunals have not taken into account Article 14(1) of the ICCPR in interpreting the obligation to grant fair and equitable treatment in the administration of justice, in the absence of explicit engagement with the issue these positions cannot count towards rejection of the argument.[136]

The arguments from the ICCPR, and the ECHR and other regional regimes could also be presented in comparative terms. It is important to identify the functional similarities and differences between the ECHR and investment protection rules. Rules on denial of justice and fair trial occupy functionally analogous positions in the relevant bodies of law, operating as procedural guarantees for the fair administration of judicial justice. Some degree of functional similarity has also been accepted in practice and legal writings.[137] From the human rights perspective, the landmark *Golder v UK* case drew upon

[131] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222 art 6(1); see also American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 art 8; African (Banjul) Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 art 7(1).

[132] Ch 7 nn 24–61.

[133] Paparinskis 'Investment Arbitration and the Law of Countermeasures' (n 16) V.A.4.

[134] R Gardiner, *Treaty Interpretation* (OUP, Oxford 2008) 260.

[135] *Toto Construzioni Generali S.p.A. v Lebanon*, ICSID Case no ARB/07/12, Decision on Jurisdiction, 8 September 2009 [158]–[160]; *Frontier Petroleum Services* Award (n 37) [328]. The general relevance of Article 14(1) to 'the development of the principle of equality of access to courts and tribunals since 1946' was also noted by the ICJ, *Judgment No 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund of Agricultural Development* (Advisory Opinion) [2012] ICJ Rep [39]. See also the US argument for reading treaty rules as making a reference to customary law that might be elaborated by reliance on the ICCPR, *United States Diplomatic and Consular Staff in Tehran (US v Iran)* ICJ Pleadings 180–183 (Memorial), discussed at Ch 7 n 27.

[136] In most cases where denial of justice was alleged, the criteria of relevance seemed to have been satisfied because the home and host States were parties to the ICCPR. It may be possible to explain the silence in *Petrobart Limited v Kyrgyz Republic*, SCC Case no 126/2003, Award, 29 March 2005 or *LLC Amto v Ukraine*, SCC Case no 80/2005, Final Award, 26 March 2008 13 ICSID Rep 387 as being due to the problematic application of VCLT Article 31(3)(c) to the multilateral ECT, where EC was not a party to ICCPR, and in *Jan de Nul N.V. and Dredging International N.V. v Egypt*, ICSID Case no ARB/04/13, Award, 6 November 2008 15 ICSID Rep 437 because the other party was not a State but an Economic Union. Still, the failure of Tribunals in other denial of justice cases to consider the ICCPR, particularly in light of the explicit use of ECHR arguments in the *Mondev* Award (n 44) and *Victor Pey Casado and President Allende Foundation v Chile*, ICSID Case no ARB/98/2, Award, 8 May 2008 has no obvious legal explanation. In practice, Tribunals might have decided not to consider the ICCPR because parties had not invoked it, because the respondent States were particularly sensitive regarding international human rights adjudication or, indeed, because there would have been no added value because the HRC had not addressed the particular issue.

[137] F Francioni, 'The Right to Access to Justice under Customary International Law' in F Francioni (ed), *Access to Justice as a Human Rights* (OUP, Oxford 2007) 9–55; F Francioni, 'Access to Justice, Denial of Justice and International Investment Law' (2009) 20 EJIL 729, 732–7; J Kurtz, 'Access to Justice, Denial of Justice and International Investment Law: A Reply to Francesco Francioni' (2009) 20 EJIL 1077, 1080–2; A Ehsassi, 'Cain and Abel: Congruence and Conflict in the Application of the Denial of Justice Principle' in S Schill (ed), *International Investment Law and Comparative Public Law* (OUP, Oxford 2010) 233–41.

general principles of international law.[138] From the investment protection perspective, States have invoked, and Tribunals have accepted, the arguments from ECHR.[139]

Still, ECHR is a human rights treaty and deals with the administration of justice in areas not limited to investment protection. The evolutionary interpretation of the ECHR in general, and the right to a fair trial in particular, has sometimes been criticized for its questionable compliance with traditional approach to interpretation. The purposive interpretation of human rights may lead to more extensive protection not necessarily paralleling investment protection law. Some human rights guarantees may also be directed at the systemic perspective of enhancing confidence in courts,[140] and would therefore not necessarily parallel the logic of investment protection law, primarily concerned with the mistreatment of investors and only indirectly with general reforms. On the other hand, the entrance of the foreign investor into the legal system of the host State may support a higher degree of protection against unexpected or even retroactive developments than could be justified by reference to paramount public purpose in human rights law.

The systemic comparison may identify both similarities and important differences. Article 6(1) has given rise to extensive case law, of which the civil rights perspective will be discussed as having potentially greater relevance for investment law. Since the right to fair trial is *ratione materiae* limited to 'the determination of... civil rights and obligations', the ECtHR has given considerable consideration to the scope of Article 6(1). Article 6(1) does not guarantee any particular content of the domestic law,[141] therefore 'rights and obligations' in issue have to exist, at least on arguable grounds, in domestic law.[142] At the same time, the qualification of 'civil' has been given an autonomous ECHR meaning,[143] and even though the pecuniary nature of the rights is an important consideration,[144] the concept has been interpreted in a more expansive manner.[145] For Article 6(1) to apply, there also has to be a dispute regarding the rights,[146] and the outcome of the proceedings must be directly decisive for the rights in question.[147]

At the level of particular rights, the type of legal argument employed in the law of denial of justice may be relevant for identifying the approaches that can be appropriately transposed from human rights law. The classic law mostly engaged in a case-by-case elucidation of required reasonableness and fairness of the particular judicial conduct. Consequently, the human rights arguments would be most useful where the HRC and the ECtHR have elaborated different aspects of broadly worded rules (or even implied particular guarantees in these rules), rather than where specifically provided rules have been confirmed.

[138] *Golder v UK* (App no 4451/70) (1975) Series A no 18 [35].

[139] Ch 3 nn 145–51.

[140] *Malhous v Czech Republic* (App no 33071/96) [GC] (2001) ECHR 2001-XII [55].

[141] *Roche v UK* (App no 32555/96) (2005) ECHR 2005-X [119].

[142] *Gorou v Greece (No 2)* [GC] (App no 12686/03) (2009) ECHR 20 March 2009 [27].

[143] *Roche* (n 141) [119].

[144] *Ferrazini v Italy* (App no 44759/88) (2001) ECHR 2001-VII [25].

[145] D Harris and others, *Harris, O'Boyle & Warbrick Law of the European Convention on Human Rights* (2nd edn OUP, Oxford 2009) 210–23.

[146] *Gorou* (n 142) [27].

[147] *Kravchenko v Russia* (App no 34615/02) (2009) ECHR 2 April 2009 [39].

To conclude, one needs to be mindful of the scope and context of the argument so as to avoid both underreaching and overreaching. The human rights argument is applied to identify the content of customary law, and this constitutes the logical limit of the proposition. The *Mondev* Tribunal might therefore have been overly enthusiastic in relying on human rights arguments, leaving open the relevant position in the classical law before applying the human rights arguments by analogy.[148] The most appropriate analytical approach would be to start with a rule in the traditional law, identify a functionally similar rule in human rights law, and use the human rights arguments to explain the content of the classic rule against the background of the modern practice and case law. To the extent that certain propositions are absent from the classic rules, it would be important to identify whether the particular issue simply never came up or whether it was (or would have been) consciously rejected. In any event, in light of the amount of State practice and case law elaborating the classic law of denial of justice, it should constitute a strong starting point of any analysis.

2. Law of fair trial

For the purpose of convenience, the role of rights to fair trial in judicial proceedings will be addressed in the same order as earlier regarding denial of justice: considering in turn the rules on access to court, unreasonable delays of justice, procedural improprieties during the proceedings, substance of the judgment, and the failure to execute the judgment. Human rights treaties usually protect the right to fair trial within certain *ratione materiae* limits. Article 6(1) of the ECHR does not guarantee any particular content of the domestic law,[149] therefore 'rights and obligations' in issue have to exist, at least on arguable grounds, in domestic law.[150] Similarly, Article 14(1) of the ICCPR applies 'in a suit of law', determined by reference to the nature of the right in question and not the status of parties or forum of proceedings, applying therefore both to private law and equivalent administrative law disputes.[151] Conversely, the ACHR applies to all forms of litigation.[152]

First, the early *Golder* case of the ECtHR importantly recognized that Article 6(1) also provided for the right of access to court,[153] drawing support from general principles of international law.[154] The ICJ has recently emphasized the importance that the HRC has come to attribute to equal access to courts.[155] The ECtHR has accepted that no fair trial issue can arise if the domestic legal order does not provide for the particular right in the first place.[156] The HRC has similarly concluded that the right of access to court 'does not apply where domestic law does not grant any entitlement to the person concerned'.[157] When the entitlement exists but access to courts is systematically frustrated or is restricted in a discriminatory manner, a breach of the right to equality before courts would take

[148] *Mondev* Award (n 44); cf nn 60, 73–4, 269–72.
[149] *Roche* (n 141) [119].
[150] *Gorou* (n 142) [27].
[151] HRC, 'General Comment no 32: Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial', UN Doc CCPR/C/GC/32 [16] (summarizing the pre-2007 practice of the HRC); S Joseph, J Schultz, and M Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Documents* (2nd edn OUP, Oxford 2005) 391–4.
[152] L Burgorgue-Larsen and A Úbeda de Torres, *The Inter-American Court of Human Rights: Case Law and Commentary* (OUP, Oxford 2011) 649–50.
[153] *Golder* (n 138) [28]–[36].
[154] *Golder* (n 138) [35].
[155] *Judgment no 2867* (n 135) [39]; referring to HRC, General Comment 32 (n 151) [8], [9], [12], [13].
[156] *James and others v UK* (App no 8793/79) (1986) Series A no 98 [81].
[157] HRC, General Comment 32 (n 151) [17].

place.[158] If the domestic law provided for the right at some point but was subsequently amended with retroactive effect, the ECtHR has recognized that a restriction of fair trial would occur[159] that could be justified only by the most compelling public interest.[160] Defence or immunity against the claim would also restrict the right of access and would require a persuasive public interest for its justification.[161] It may be conceptually complicated to distinguish a substantive defence (with no right existing in the first place) from a procedural one (with the restriction of the right requiring justification).[162]

The scope of the right of access to court may also be subject to other types of restrictions. Limitations of access relating to particular persons,[163] requiring legal representation for particular cases[164] or the payment of reasonable security costs have been recognized by the ECtHR as permissible.[165] More broadly, the right of access to court also has to be effective, and legal assistance may be required in particular cases[166] where the financial situation of the litigants, their prospects of success, and the complexity of factual and legal issues require it.[167] The HRC has emphasized the importance of financial considerations surrounding access to courts. In positive terms, free legal aid is encouraged in all cases to individuals who do not have sufficient means to pay for access to the court;[168] in negative terms, excessive fees[169] or award of costs might *de facto* prevent access to justice.[170]

Second, Article 6(1) of the ECHR expressly requires the trial to take place within a 'reasonable time'. The HRC has implied the prohibition of undue delays in non-criminal proceedings into the general concept of fair trial, examining *inter alia* 'the complexity of the case, the conduct of the parties, the manner in which the case was dealt by the administrative and judicial authorities, and any detrimental effects that the delay may have had on the legal position of the complainant'.[171] The ECtHR has not set any strict time limit, similarly considering the reasonableness of the delay 'in the light of the circumstances of the case and with reference to the following criteria: the complexity

[158] Respectively, *Oló Bahamonde v Guinea* (1993), UN Doc CCPR/C/49/D/468/1991 [9.4]; *Graciela Ato del Avellanal v Peru* (1988), UN Doc CCPR/C/34/D/202/1986 [10.1]–[10.2].
[159] *Stran Greek Refineries and Stratis Andreadis v Greece* (App no 13427/87) (1994) Series A no 301-B [42]-[50].
[160] Retroactive legislation regarding an accidental tax loophole was justified, *National and Provincial Building Society and others v UK* (Apps no 117/1996/736/933-935) (1997) ECHR 1997-VII [104]–[113].
[161] Defence of privilege against defamation, *Fayed v UK* (App no 1701/90) (1990) Series A no 294-B [69]–[82]; parliamentary immunity, *A v UK* (App no 35373/97) (2002) ECHR 2002-X [73]–[89]; State immunity, *Fogarty v UK* (App no 37112/97) (2001) ECHR 2001-XI [32]–[39]. The ICCPR would preclude total but perhaps not qualified immunity, Joseph and others *International Covenant* (n 151) 395.
[162] *Roche* (n 141) [120]–[121].
[163] *Golder* (n 138) [38]–[39].
[164] *Gillow v UK* (App no 9063/80) (1986) Series A no 109 [69].
[165] *Tolstoy Miloslavsky v UK* (App no 18139/91) (1995) Series A no 315-B [59]–[67].
[166] *Airey v UK* (App no 6289/73) (1979) Series A no 32 [26]–[28].
[167] *Steel and Morris v UK* (App no 68416/00) (2005) ECHR 2005-II [59]–[72].
[168] HRC, General Comment 32 (n 151) [10].
[169] *Leonard John Lindon v Australia* (1998), UN Doc CCPR/C/64/D/646/1995 [6.4].
[170] *Äärelä and Näkkäläjärvi v Finland* (2001), UN Doc CCPR/C/73/D/779/1997 [7.2]; HRC, General Comment 32 (n 151) [11].
[171] *Dušan Vojnović v Serbia* (2009), UN Doc CCPR/C/95/D/1510/2006 [8.4]; see generally HRC, General Comment 32 (n 151) [27]; a summary of the early HRC's practice in *Toto* Jurisdiction (n 135) [160]; *Mariano Pimentel et al. v Philippines* (2007), UN Doc CCPR/C/89/D/1320/2004 [9.2]; *Olga Dranichnikov v Australia* (2007), UN Doc CCPR/C/88/D/1291/2004 [7.2]; *Wolfgang Lederbauder v Austria* (2007), UN Doc CCPR/C/90/D/1454/2006 [8.1]; *Patricia Angela Gonzalez v Guyana* (2010), UN Doc CCPR/C/98/D/1246/2004 [14.2].

of the case, the conduct of the applicant and the relevant authorities'[172] as well as what is at stake for the applicant.[173] The complexity of the case requires consideration of the particular legal and factual and evidentiary issues involved,[174] including the necessary expert evidence, technical evidence, or evidence of an otherwise time-consuming nature,[175] or from abroad.[176] The conduct of the applicants may be relevant when, even though the individuals cannot be blamed for taking full advantage of resources afforded by national law, the substantial lengthening of proceedings would be due solely to their conduct.[177] The same point may also be expressed as a focus on delays attributable to the State as capable of breaching the requirement of reasonable length of proceedings.[178] The conduct of the authorities is more relevant in criminal cases, but long adjournments may be considered also in administrative and civil cases.[179] Finally, the individual situation may require particular expediency, particularly when proceedings concern the applicant's employment,[180] reputation,[181] are of acute financial importance,[182] or when interest is charged during the dispute.[183] General over-burdening of the courts does not excuse otherwise unreasonable delays, since States are under a duty to organize the judicial system to enable the courts to meet these requirements.[184]

Third, the State is required to provide different fair trial guarantees during the judicial process. The right to a fair trial includes the right to a hearing in one's presence, and the ECtHR has taken the view that in most non-criminal cases the participation of the party's lawyer should satisfy this requirement.[185] One element of fair trial is expressed in terms of equality of arms, requiring, in the view of the HRC, '*inter alia* that each side be given the opportunity to contest all the arguments and evidence adduced by the other party'.[186] The requirement can be breached by a refusal to hear witnesses[187] or admit evidence proposed by one party.[188] ECtHR expressed the principle as that 'each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent or opponents'.[189] Equality of arms calls for both legal and factual equality, and excludes inequality following from

[172] *Korbely v Hungary* (App no 9174/02) [GC] (2008) ECHR 19 September 2008 [101]. The Strasbourg approach has been explicitly adopted by the IACtHR, see *Suárez-Rosero v Ecuador* (Judgment) Inter-American Court of Human Rights Series C No 35 (12 November 1997) [72]; generally Burgorgue-Larsen and Úbeda de Torres *Inter-American Court of Human Rights* (n 152) 658–9.

[173] *Lukenda v Slovenia* (App no 23032/02) (2005) ECHR 2005-X [74]; see similarly the position adopted by the IACtHR, *Valle Jaramillo et al v Colombia* (Judgment) Inter-American Court of Human Rights Series C No 192 (27 November 2008) [155]; *Barrios Family v Venezuela* (Judgment) Inter-American Court of Human Rights Series C No 237 (24 November 2011) [273].

[174] *Blake v UK* (App no 68890/01) (2006) ECHR 26 September 2006 [42].

[175] *Panzari v Poland* (App no 27516/04) (2008) ECHR 4 November 2008 [29].

[176] *Neumeister v Austria* (App no 1936/63) (1968) Series A no 8 [21].

[177] *Svetlana Orlova v Russia* (App no 4487/04) (2009) ECHR 30 July 2009 [46].

[178] *Idalov v Russia* (App no 5826/03) (2012) ECHR 22 May 2012 [186].

[179] *König v Germany* (App no 6232/73) (1978) Series A no 27 [110].

[180] *G v Finland* (App no 33173/05) (2009) ECHR 27 January 2009 [39].

[181] *Pieniążek v Poland* (App no 62179/00) (2004) ECHR 28 September 2004 [28].

[182] *Blake* (n 174) [43].

[183] *Shouten and Meldrum v the Netherlands* (App nos 19005/91 and 19006/91) [1994] Series A no 304 [68].

[184] *Hentrich v France* (App no 13616/88) (1994) Series A no 296 A [61]; *Kaemena and Thöneböhm v Germany* (App no 45749/06 and 51115/06) (2009) ECHR 22 January 2009 [64]; HRC, General Comment 32 (n 151) [27].

[185] *X v Switzerland* (App no 7370/76) (1977) 9 DR 97, 98.

[186] HRC, General Comment 32 (n 151) [13].

[187] *Vojnović* (n 171) [8.3].

[188] *Valery Khostikoev v Tajikistan* (2009), UN Doc CCPR/C/97/D/1519/2006 [7.2].

[189] *Andrejeva v Latvia* (App no 55707/00) [GC] (2009) ECHR 18 February 2009 [96].

the general judicial structure[190] or retroactive laws passed to favour one party.[191] It may also apply regarding matters such as attendance of hearings,[192] neutrality of the expert,[193] the rights to call witnesses,[194] submit evidence,[195] have the evidence considered by the court,[196] comment on observations,[197] and be informed about the reasons of challenged decisions.[198] Right to an adversarial trial overlaps with the right to equality of arms but goes further than it in requiring access to all relevant materials, whatever the treatment of the other party may be.[199]

The judicial process also has to satisfy other qualitative criteria relating to the courts themselves. Virulent press campaigns may influence the fairness of the process.[200] More broadly, the domestic courts have to be independent and impartial. The HRC has taken into account a variety of factors, from the appointment, tenure, and promotion of judges to actual political interference and control by other branches of government.[201] The ECtHR has recognized that courts have to be independent both from the parties and the executive, both structurally and in terms of appearance.[202] Courts also have to be impartial, both in the subjective sense regarding the personal convictions of particular judges, and in the objective sense of offering guarantees sufficient to exclude any legitimate doubt in this respect.[203] Both independence and objective impartiality may be compromised by public pronouncements by the executive regarding the proceedings.[204]

Fourth, the right of fair trial may also impose certain requirements regarding the content of the judgment. The ECtHR has recognized that, even though courts are allowed considerable discretion regarding the structure and content of their judgments in light of the differences regarding rules and approaches to drafting, adequate reasons must be given.[205] While it is not necessary to deal with every possible point raised by the parties, decisive submissions need to be addressed expressly[206] or implicitly with sufficient clarity.[207] Judgments failing to mention a decisive,[208] or at least very important argument,[209] making a clear error regarding established facts,[210]

[190] *Menchinskaya v Russia* (App no 42454/02) (2009) ECHR 15 January 2009 [30]–[40].

[191] nn 159–61.

[192] *Komanický v Slovenia* (App no 32106/96) (2002) ECHR 4 June 2002 [48]–[55].

[193] *Sara Lind Eggertsdóttir v Iceland* (App no 31930/04) (2007) ECHR 5 July 2007 [41]–[55].

[194] *Wierzbicki v Poland* (App no 24541/94) (2002) ECHR 18 June 2002 [39].

[195] *Hentrich* (n 184) [56].

[196] *Olujić v Croatia* (App no 22330/05) (2009) ECHR 5 February 2009 [85].

[197] *Andrejeva* (n 189) [96].

[198] *Hentrich* (n 184) [56].

[199] *Dağtekin and others v Turkey* (App no 70516/01) (2007) ECHR 13 December 2007 [32]–[35].

[200] Usually in the context of criminal proceedings, HRC, General Comment 32 (n 151) [25]; Harris and others *Harris, O'Boyle & Warbrick* (n 145) 265–6.

[201] HRC, General Comment 32 (n 151) [19]. The IACtHR has similarly focused on appointments, fixed terms in office, and actual pressure on the judiciary, *Atala Riffo and Daughters v Chile* (Judgment) Inter-American Court of Human Rights Series C No 239 (24 February 2012) [186]; generally Burgorgue-Larsen and Úbeda de Torres *The Inter-American Court of Human Rights* (n 152) 655.

[202] *Campbell and Fell v UK* (App nos 7819/77 and 7878/77) (1984) Series A no 80 [78].

[203] HRC, General Comment 32 (n 151) [21]; *Wolfgang Jenny v Austria* (2008), UN Doc CCPR/C/93/D/1437/2005 [9.3]–[9.6]; *María Cristina Lagunas Castedo v Spain* (2008), UN Doc CCPR/C/94/D/1122/2002 [9.5]–[9.8]; similarly in the regional regimes: *Cooper v UK* (App no 48843/99) [GC] (2003) ECHR 2003-XII [104]; *Atala Riffo* (n 201) [189]; generally Burgorgue-Larsen and Úbeda de Torres *The Inter-American Court of Human Rights* (n 152) 656–7.

[204] *Sovtransavto Holding v Ukraine* (App no 48553/99) (2002) ECHR 2002-VII [71]–[82].

[205] *Jokela v Finland* (App no 28856/95) (2002) ECHR 2002-IV [72].

[206] *Kyriakides v Cyprus* (App no 39058) (2008) ECHR 16 October 2008 [25].

[207] *Ferreira Alves v Portugal (No 4)* (App no 41879/05) (2009) ECHR 14 April 2009 [36].

[208] *Velted 98-AD v Bulgaria* (App no 15239/02) (2008) ECHR 11 December 2008 [47]–[49].

[209] *Benderskiy v Ukraine* (App no 22750/02) (2007) ECHR 25 November 2007 [44]–[46].

[210] *Kalkanov v Bulgaria* (App no 19612/02) (2008) ECHR 9 October 2008 [26].

or deciding a case for a legal reason that is not good reason in law, would breach this requirement.[211]

Direct substantive review is more controversial. The general tendency, reminiscent of the law of denial of justice, is to exclude substantive review in principle but permit it in certain exceptional circumstances. The HRC has taken the view that facts and domestic law are for the domestic courts to consider, 'unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice, or that the court otherwise violated its obligation of independence and impartiality'.[212] For example, an erroneous referral of a judgment for enforcement to a court that lacked competence, as recognized by the State and the courts, could not be held against the individual.[213] In the ECtHR, Article 6(1) is usually read only as a procedural guarantee, but some cases have suggested that it also guarantees a substantive fair trial.[214] The substantive guarantee may be breached where the 'decisions by the domestic courts appear arbitrary or manifestly unreasonable';[215] for example, when domestic courts inexplicably ignored[216] or did not seek necessary evidence, failing to follow the ECtHR approach in the latter case.[217]

Finally, the right to a fair trial also implies a right to the execution of judgments. The HRC has recognized that administrative authorities have to comply with binding judgments without undue delay.[218] The ECtHR has similarly recognized that the right clearly applies to judgments against public entities,[219] and a lack of funds is not a valid excuse for failure to comply.[220] States must also take action to ensure that the execution of judgments against private persons is adequate and effective.[221] Moreover, States may not actively obstruct the enforcement of judgments.[222]

III. Administration of justice and the modern standard of administration of justice

1. Modern standard in context

The questions that troubled traditional customary law of denial of justice have been partly answered by the recent developments, considered against the backdrop of the

[211] *De Moor v Belgium* (App no 16997/90) (1994) Series A no 292-A [55].

[212] HRC, General Comment 32 (n 151) [26]; *José Ingancio de Jorge Asensi v Spain* (2008), UN Doc CCPR/C/92/D/1413/2005 [8.2]–[8.3]; *I.S. v Belarus* (2011), UN Doc CCPR/C/101/D/1994/2010 [4.3].

[213] *Florentino Bonilla Lerma v Colombia* (2011), UN Doc CCPR/C/102/D/1611/2007 [10.2]–[10.3].

[214] LG Loucaides, 'Questions of Fair Trial under the European Convention on Human Rights' (2003) 3 Human Rights L Rev 27, 31–3. Other cases seem to read the same requirement as falling within the traditional rule of proper reasoning, *Ilyadi v Russia* (App no 6642/05) (2011) ECHR 5 May 2011 [39].

[215] *Ajdarić v Croatia* (App no 20883/09) (2011) ECHR 4 June 2011 [32]; *Communist Party of Russia v Russia* (App no 29400/05) (2012) ECHR 19 June 2012 [116]–[122].

[216] *Khamidov v Russia* (App no 72118/01) (2007) ECHR 15 November 2007 [170]–[175].

[217] *Van Kück v Germany* (App no 35968/97) (2003) ECHR 2003-VII [55]–[57]; *Schlumpff v Switzerland* (App no 29002/06) (2009) ECHR 5 June 2009 [57].

[218] *Rudolf Czernin v Czech Republic* (2005), UN Doc CCPR/C/83/D/823/1998 [7.4]–[7.5].

[219] *Hornsby v Greece* (App no 18357/91) (1997) ECHR 1997-II [41]–[42].

[220] *Burdov v Russia* (App no 59498/00) (2002) ECHR 2002-III [35].

[221] *Immobiliare Saffi v Italy* (App no 22774/93) (1999) ECHR 1999-V [69]–[75].

[222] *Jasiūnienė v Lithuania* (App no 41510/98) (2003) ECHR 6 March 2003 [27]–[32]; *Satka and others v Greece* (App no 55828/00) (2003) ECHR 27 March 2003 [57].

experience of the HRC and regional regimes, and partly are still left open. The following sections consider in turn the contemporary position on a number of issues: the relevance of the host State's circumstances; exhaustion of local remedies as a criterion of denial of justice; impact of waiver of the requirement of exhaustion on the primary obligations; relationship between denial of justice and other wrongful acts; and denial of justice by administrative authorities.

The first and preliminary question relates to the possible relevance of the host State's circumstances for the obligations regarding administration of justice.[223] The traditional position is complicated to determine because of the manner in which the rules and procedures were expressed at that point. The classical standard operated when the host State was perceived as both sufficiently civilized and safe (and therefore did not need to be dealt with by respectively consular treaties or use of force).[224] Consequently, the standard would not operate at all if either the legal system or the safety situation of the host State significantly diverged from the civilized normality,[225] since special rules or regimes, or indeed circumstances precluding wrongfulness or law of war would be applicable. To the extent that the standard was applicable (or one imagines the hypothetical application of the standard), the practice may be read in two ways. On the one hand, there was some support for taking into account the particular circumstances.[226] On the other hand, in technical terms the formulation of denial of justice as a *de minimis* negative obligation, largely focused on non-discrimination, could not generally attribute legal relevance to broader circumstances of the host State.

The human rights practice does not attribute significant legal impact to the circumstances of the host State, to the extent that special derogations have not been invoked. The recent practice is inconclusive: with an unwitting nod to Root's three alternative methods of protecting aliens, three Tribunals have proposed three solutions, concluding either that the circumstances of the host State were irrelevant for denial of justice,[227] or that they were relevant because of the factual and legal peculiarities,[228] or the safety situation of the host State.[229] Since the latter two cases both dealt with delays in judicial proceedings, the contemporary position may be best stated as not taking into account the circumstances of the host State in principle but leaving open the possibility that it could be one of the criteria for the particular case of delay.

Second, the requirement of exhaustion of remedies before breach of denial of justice as a primary obligation can take place has been generally accepted, even though its scope and content are not determined with absolute certainty.[230] Some decisions note the

[223] *See* generally N Gallus, 'The 'Fair and Equitable Treatment' Standard and the Circumstances of the Host State' in C Brown and K Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (CUP, Cambridge 2011).

[224] E Root, 'The Basis of Protection to Citizens Residing Abroad' (1910) 4 ASIL Proceedings 16, 19–20; *see* text at Ch 1 nn 50–76, Ch 2 n 2.

[225] The underlying assumptions of relative safety explain the debate about special rules of attribution for countries subject to permanent insurrections and revolutions, Ch 1 n 90.

[226] Root 'Basis' (n 224) 22, cited at Ch 2 n 27.

[227] *Pantechniki S.A. Contractors and Engineers v Albania*, ICSID Case no ARB/07/21, Award, 30 July 2009 [76].

[228] *White Industries Australia Limited v India*, UNCITRAL Case, Final Award, 30 November 2011 [10.4.18].

[229] *Toto* (n 135) [165].

[230] *Loewen* (n 5) [151]–[155]; *Waste Management v US (II)*, ICSID Additional Facility Case no ARB(AF)/00/3, Final Award, 30 April 2004 (2004) 43 ILM 967 [97]; *Jan de Nul* Award (n 136) [255]–[259]; *Pantechniki* Award (n 227) [96]–[97]; *ATA Construction* Award (n 45) [107]; *Frontier Petroleum Services* Award (n 37) [293]; *Alps Finance and Trade AG v Slovakia, Ad hoc* Case, Award, 5 March 2011 [250]–[251]. Possibly contrary, *Helnan International Hotels A/S v Egypt*, ICSID Case no ARB/05/19, Decision of the *Ad*

obvious failure to exhaust available remedies;[231] others suggest in passing the exhaustion of plausible remedies.[232] The recent decisions that directly address the exhaustion of remedies required for a complete denial of justice seem either insufficiently or excessively demanding.

The former concern is illustrated by the Tribunal in the *Saipem v Bangladesh* (*Saipem*) case, which found that the failure to even attempt to exhaust any remedies was reasonable because the investor had litigated for a number of years regarding a related issue.[233] Conversely, the Tribunal in the *Loewen v US* (*Loewen*) did consider whether the investor had a reasonably available adequate remedy and made a useful observation that a procedural remedy that was necessarily accompanied with major negative consequences (immediate execution against the assets) could not be considered to be reasonably available.[234] Still, its ultimate dismissal of the claim seems erroneous on at least three levels: the Tribunal evaluated not the remedies available to redress the judicial wrong but the remedies available to access remedies to redress the judicial wrong;[235] it judged the reasonableness not in objective terms but by introducing a self-judging perspective of the investor; and it applied the standard of reasonableness in what might have been an excessively demanding manner, finding that filing of bankruptcy or constitutional challenges of cumbersome appeals procedure were reasonable.[236] Overall, the directly relevant practice still raises rather than answers questions about the criteria for establishing a complete denial of justice.

The distinction between aspects of local remedies that constitute denial of justice and those that complete denial of justice has been followed. The *Loewen* Tribunal found that the trial at a lower court had fallen below the international standard; that the decision not to relax the bonding requirement meant that appeal would have detrimental consequences of immediate execution; but that the decision regarding bond nevertheless was not potentially wrongful on its own.[237] Paulsson has suggested that the refusal to relax bonding requirements was also wrongful.[238] At least on this point, the Tribunal's view is to be preferred: if it cannot be shown that international law requires States to provide a right of appeal,[239] then a (non-discriminatory) rule that makes appeal excessively complicated would not constitute on its own a potential denial of justice. It would only be

Hoc Committee, 14 June 2010 [48]; M Sattorova, 'Denial of Justice Disguised? Investment Arbitration and the Protection of Foreign Investors from Judicial Misconduct' (2012) 61 ICLQ 223, 226–8.

[231] *Jan de Nul* Award (n 136) [260]; *Pantechniki* Award (n 227) [97]; *Alps Finance* Award, ibid [251].

[232] *ATA Construction* (n 45) [107].

[233] While the *Saipem* Tribunal approached the issue from the somewhat peculiar perspective of expropriation, it seemed to apply the traditional approach to reasonableness of remedies on the particular point, *Saipem S.p.A. v Bangladesh*, ICSID Case no ARB/05/07, Award, 30 June 2009 (2009) 48 ILM 999 [183].

[234] *Loewen* (n 5) [170], [208]; moving beyond the classical scepticism in line with the progressive development in the ILC, n 27.

[235] While different stages and remedies in litigation may be conditioned upon one another, at some point the available remedies in the judicial process are no longer directly related to redressing the objectionable conduct in question. The *Loewen* Tribunal dismissed the claim because of availability of remedies to make the appeals process less cumbersome, *Loewen* (n 5) [207]–[217]. Arguably, the proper question should have been whether there were remedies to correct the potential wrong, rather than whether there were remedies that could make the remedies to correct the potential wrong less cumbersome. Conversely, in the *Saluka v Czech Republic* the Tribunal rightly took into account the possibility of approaching the Constitutional Court about rights to privacy and hearings that directly related to the particular challenge, *Saluka* (n 3) [493], [495].

[236] *Loewen* (n 5) [119]–[123], [138], [189], [209]–[213].

[237] *Loewen* (n 5), respectively [119]–[123], [138]; ibid [212]; ibid [189]; ibid [209]–[213].

[238] Paulsson *Denial of Justice* (n 5) 122–3.

[239] Something that both parties accepted was not the case, *Loewen* (n 5) [188].

relevant in determining whether the judicial system provided any remedies for correcting the improprieties of the first trial.

Third, the established requirement of exhaustion of judicial remedies as an element of the primary rule of denial of justice directly affects the way in which it can be changed. The proposition that secondary rules on admissibility can be waived while primary rules cannot has been accepted in practice. While formulated within the context of inter-State dispute settlement, it also applies to primary rules applied in investor–State arbitration. Whether exhaustion in mixed arbitrations pertains exclusively to admissibility[240] or, at least by inclusion in the jurisdictional title of ICSID arbitrations, becomes a jurisdictional requirement,[241] it certainly does not affect the content of the primary rule in question.

The criticism of *Loewen* as mistakenly requiring full exhaustion of judicial remedies in the presence of a waiver is misplaced.[242] Whatever the policy wisdom in exhausting judicial but not non-judicial conduct, the Tribunal was right to distinguish between a procedural objection (that could be and had been waived) and a primary rule of customary law (that had not been superseded).[243] States are perfectly entitled to establish international wrongfulness for non-exhausted judicial conduct, but for that they would need to create new primary rules either through creation of special treaty rules[244] or (less likely) demonstrate the emergence of new practice and *opinio juris* displacing the established customary rule.[245]

Fourth, the classic confusion about direct and indirect responsibility and justice caused and justice denied has been largely resolved by the development in the theory of State responsibility that makes a clear distinction between primary and secondary rules. Denial of justice is a breach of international obligations regarding the administration of justice. Denial of justice may be the sole breach of international law considered, as it was in the *Loewen* case, where the Canadian investor argued that it had not received a fair trial in a contractual dispute with a private party submitted to the US courts.[246] The conduct of the host State may also be in breach of other international obligations. In the *Mondev* case, the municipality had allegedly breached rules on expropriation by contractual incompliance giving rise to the judicial proceedings.[247] In the *Petrobart v Kyrgyzstan (Petrobart)* case, the executive had not only intervened in the judicial process but also transferred funds from the corporation to which the investor was a creditor.[248]

[240] *SGS Société Générale de Surveillance S.A. v Philippines*, ICSID Cases no ARB/02/6 and ARB/04/08, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004 129 ILR 145 fn 84; *Jan de Nul* Award (n 136) [255].

[241] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1066) 575 UNTS 159 art 26; *Helnan* Annulment (n 230) [34]; *Impregilo S.p.A. v Argentina*, ICSID Case no ARB/07/17, Award, Concurring and Dissenting Opinion of Arbitrator Stern, 21 June 2011 [88]; *Abaclat and others v Argentina*, ICSID Case no ARB/07/5, Decision on Jurisdiction and Admissibility, Dissenting Opinion of Abi-Saab, 28 October 2011 [23]–[24]. An UNITRAL Tribunal concluded that the BIT had tacitly waived the exhaustion requirement as a jurisdictional issue, *Mytilineos Holdings S.A. v Serbia*, UNCITRAL Case, Partial Award on Jurisdiction, 8 September 2006 16 ICSID Rep 572 [197]–[225].

[242] AK Bjorklund, 'Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims' (2004–2005) 45 Virginia J Intl L 809, 858; Sattorova 'Denial of Justice Disguised?' (n 235) 231.

[243] *Loewen* (n 5) [158]–[164].

[244] Some Tribunals have concluded that the obligation to provide effective means of asserting claims creates a special rule on administration of justice with a less demanding threshold, *Chevron Corporation and Texaco Petroleum Corporation v Ecuador*, PCA Case no 34877, Partial Award on the Merits, 30 March 2010 [321]–[323]; *White Industries* Award (n 229) [11.3.1]–[11.3.3].

[245] Paulsson *Denial of Justice* (n 5) 102–12.

[246] *Loewen* (n 5) [136]–[138].

[247] *Mondev* Award (n 44) [57]–[75].

[248] *Petrobart* Award (n 136) 76–7.

In the *Jan de Nul v Egypt* case, the investor argued that fair and equitable treatment had been breached both by the conduct of the courts and independently by executive authorities.[249] The distinction between denial of justice and other internationally wrongful acts means that denial of justice may be considered by the Tribunal even if other alleged wrongful acts fall outside its jurisdiction.[250]

The delineation of denial of justice from other international wrongs is still challenging. The award in the *Saipem* case provides an illustration of an insufficiently rigorous distinction both between denial of justice and other mistreatments of investors, and between denial of justice and other obligations under international law. Because the Tribunal's *ratione materiae* jurisdiction did not include fair and equitable treatment, the investor argued that a setting aside of an international arbitration award by domestic courts had amounted to expropriation. The Tribunal accepted this argument, *inter alia* finding that the requirement of exhaustion of local remedies probably did not apply to expropriation by judicial conduct and that Bangladesh had breached the New York Convention.[251] The decision is problematic on both grounds. This approach goes against the grain of established approaches regarding mistreatment of aliens and investors by courts: while taking of property through the judicial process could be said to constitute expropriation, the rules and criteria to be applied for establishing the breach should come from denial of justice.[252] It is unclear how *Saipem* can be reconciled with the law of denial of justice and how 'judicial expropriation' can be distinguished from denial of justice, with the award turning the traditional focus away from the procedural propriety to the perspective of attribution and remedies and deconstructing the accepted primary rules back to the pre-Ago framework. The ease with which the Tribunal examined compliance with the New York Convention might also suggest a conflation of primary and secondary rules and assumption of (unlimited) jurisdiction over all primary obligations addressed by the judicial organ in the administration of justice.

Finally, a somewhat unclear issue relates to procedural misconduct by administrative authorities. Paulsson has suggested that these cases may also constitute denial of justice, and as such would require the exhaustion of available judicial remedies.[253] Case law on the issue indeed seems inconsistent. The *Amco v Indonesia (II)* Tribunal described the rejection of licence by an administrative agency as a denial of justice but did not require the exhaustion of judicial remedies.[254] The *Genin v Estonia*[255] and *Thunderbird v Mexico* Tribunals also used the language of denial of justice regarding the conduct of, respectively, banking and gambling regulators, and similarly did not require exhaustion of judicial remedies.[256] The better view of this practice is that parties and Tribunals used 'denial of justice' not as a term of art of the primary rule on the administration of judicial justice but as a descriptive reference to breaches of procedural propriety. Unquestionably, investment obligations may be breached by administrative authorities (and in fact in many instances responsibility for arbitrary cancellations of licences or breaches of contracts would arise precisely from conduct by such authorities or municipalities). Since the exhaustion of judicial remedies is not required in such cases, they are better viewed as falling within the international standard's requirements for compliance with certain procedural criteria, but situated outside the international standard's rules on the administration of justice, and therefore do not require full exhaustion of judicial remedies.[257]

The comparative experience of the ECtHR suggests that the relationship between administrative and judicial remedies is unlikely to be straightforward, and may play a role both regarding the protection of property and the right to fair trial. While the right to fair trial is legally distinct from the protection of property, the lack of full judicial access will breach the right to fair trial if the procedural guarantees in the conduct of authorities are inadequate.[258] Conversely, broad and arbitrary discretion of authorities will breach the right to property if full judicial access is unavailable.[259] A comprehensive approach needs to be taken of all available procedural remedies. The *Saluka v Czech Republic* Tribunal and the ECtHR in *Forminster Enterprises Limited v Czech Republic* both appeared to adopt this approach, taking the view that freezing of shares did not amount to breaches of full protection and security and protection of property, respectively, because even though the prosecutor's decision could not be appealed to the courts, a constitutional claim could be brought.[260] More broadly, while breaches of investment obligations regarding judicial administration and other matters are legally distinct, the availability of judicial access may be relevant even when the conduct of other authorities is considered.[261]

[249] *Jan de Nul* Award (n 136) [195]–[265].

[250] *Mondev* Award (n 44) [57]–[75].

[251] *Saipem* Award (n 233), respectively [167]–[170] and [181].

[252] In the *Barcelona Traction* case, a local competitor had allegedly conspired with authorities and courts to exercise a takeover of the investor's business, *inter alia* through numerous instances of denial of justice. Even though the claim was rejected on admissibility grounds, Belgium described its denial of justice more broadly as expropriation, *Barcelona Traction* Pleadings VIII (n 107) 50 (Rolin), 126 (van Ryn), and some judges accepted this language, while otherwise engaging with the criteria of denial of justice, *Barcelona* Fitzmaurice (n 5) 64 [19]; ibid, Separate Opinion of Judge Gross 267 [12]. Judge Tanaka used the language of denial of justice, ibid, Separate Opinion of Judge Tanaka 114, 159–60. See also *Oil Field* (n 5) 318–19; *Loewen* (n 5) [141], [156]. Even within the framework of expropriation, taking by judicial conduct would be intrinsically lawful unless conducted in breach of due process, bringing back the analysis to the criteria of denial of justice, M Paparinskis, 'Regulatory Expropriation and Sustainable Development' in MW Gehring, M-C Cordonnier-Segger, and A Newcombe (eds), *Sustainable Development in World Investment Law* (Kluwer Law International, The Hague 2011) 317–22; probably *contra, Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v Kazakhstan*, ICSID Case no ARB/05/16, Decision of the *ad hoc* Committee on the Application for Annulment, 25 March 2010 [116].

[253] Paulsson *Denial of Justice* (n 5) 124–5.

[254] *Amco Asia Corporation and others v Indonesia*, ICSID Case no ARB/81/1, Resubmitted Case, Award, 31 May 1990 (1992) 89 ILR 580 [137].

[255] *Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v Estonia*, ICSID Case no ARB/99/2, Award, 25 June 2001 (2002) 17 ICSID Rev—Foreign Investment L J 395 [357].

[256] *International Thunderbird Gaming Corporation v Mexico*, UNCITRAL Case, Final Award, 26 January 2006 [197]–[201].

[257] Ch 9 III.2.vi.

[258] *Albert and Le Compte v Belgium* (App nos 7299/75 and 7496/76) (1983) Series A no 58 [32]–[37]; *Frankowicz v Poland* (App no 53025/99) (2008) ECHR 16 December 2008 [60]. As the ECtHR explained the distinction, '[regarding Article 6(1)], the question was one of determining whether the length of the consolidation proceedings had exceeded a "reasonable time", whereas [regarding P1-1] their length—whether excessive or not—is material, together with other elements, in determining whether the disputed transfer was compatible with the guarantee of the right of property', *Erkner and Hofauer v Austria* (App no 9616/81) (1987) Series A no 117 [76].

[259] *Hentrich* (n 184) [45]–[49]; *Capital Bank AD v Bulgaria* (App no 49429) (2005) ECHR 24 November 2005 [134]–[135]; *Forminster Enterprises Limited v Czech Republic* (App no 38238/04) (2008) ECHR 9 October 2008 [69]–[70].

[260] *Saluka* (n 3) [493]; *Forminster*, ibid [69]–[72].

[261] *Parkerings Compagniet AS v Lithuania*, ICSID Case no ARB/05/8, Award on Jurisdiction and Merits, 14 August 2007 [315]–[319]. The relevance of access to judicial remedies has also been recognised regarding indirect expropriation, *Generation Ukraine, Inc. v Ukraine*, ICSID Case no ARB/00/9, Final Award, 16 September 2003 13 ICSID Rep 147 [93]; *Helnan International Hotels A/S v Egypt*, ICSID Case no ARB/05/09, Award, 7 June 2008 [148] (although the particular portion of the award was annulled, *Helnan* Annulment (n 230) [34]–[57], the reasoning might be limited to the unfortunate wording chosen by the Tribunal: the award seemed to hearken back to Ago's 'substantive rule' arguments that wrongfulness could not arise before the exhaustion, see text at nn 10–13; it might also be of some

2. Modern standard of administration of justice

i. Refusal of access to court or its equivalent

As with most elements of the law relating to administration of justice, the law of denial of justice, the human rights practice and (the much more limited) modern investment case law all point in the same direction. Indeed, Vattel's first type of denial of justice of 'refusal . . . to allow the subjects to assert their rights before ordinary tribunals'[262] through the 'principle of international law which forbids the denial of justice' may be directly traced to the landmark *Golder* recognition of the right of access to justice.[263] The first aspect of access to court relates to the distinction between substantive and procedural restrictions.

Both the law of denial of justice and the law of human rights accept the distinction between cases where the domestic law does not provide for a particular substantive right at all (and no question of denial of access can arise) and cases where a substantive right exists but the access to court is restricted by a procedural rule of immunity, privilege, or defence.[264] The analytical distinction between substantive and procedural rules has been explicitly accepted by the *Mondev* Tribunal, acknowledging at the same time the problems of its practical application.[265] The case law of the ECtHR confirms both the appropriateness of the perspective and the probable complexity of its application in particular cases.[266]

Second, assuming that a substantive right exists but has been subject to a procedural restriction, the permissibility of such a rule would depend on the reasonableness of the restriction in light of the public purpose relevant in the particular case. At one end of the spectrum, a retroactive legislation designated to preclude the access to court of a particular individual or arbitrary application of a rule would probably constitute denial of justice.[267] At the other end of the spectrum, a limited immunity applying to the official conduct of a particular public official would probably be permissible.[268] In between these two extremes, the reasonableness of restrictions has to be appreciated in light of the legal and factual context of each particular case.

Consistency can only be established when all the relevant authorities are taken into consideration and integrated within a harmonious interpretative framework. For example, the *Mondev* Tribunal concluded that a comprehensive immunity from tort claims for certain public employers did not lead to a denial of justice in the case in questions.[269] While the particular conclusion of the *Mondev* Tribunal seems plausible, a number of general considerations at least explicitly not taken into account could support a stricter position against immunities in future cases: the nineteenth-century awards of the Peruvian commission finding breaches in not incomparable circumstances,[270] the general trend in the direction of accepting claims against respondents even in sensitive cases,[271] and even the ECtHR itself has become more critical of immunities after the *Fogarty v UK* judgment cited by the Tribunal.[272] It might be the case that *Mondev* is not the last word on the matter.

Third, the classical law of denial of justice[273] and the human rights practice similarly recognize the permissibility of reasonable restrictions of access to justice to the extent that they do not render the access itself impossible.[274] The classical authorities dealing even with murder of the claimant posed the question in radical terms[275] but the issue of principle involved in distinguishing arbitrary and excessive from reasonable and permissible restrictions appears to be identical. The only aspect where the focus of the classic law was different from the human rights law relates to restrictions regarding costs and legal assistance: the denial of justice in principle accepted additional restrictions for the aliens in light of their specific status,[276] while human rights law has dealt with the restrictions and necessary measures for ensuring effective access applicable to all litigants.[277] The recent practice has not directly dealt with the question whether the foreign nature of the investor can justify appropriate distinctions relating to access, but the general trend would require very persuasive justification for such a restriction. More broadly, the human rights practice goes with the grain of the law of denial of justice in the area and can be appropriately used *mutatis mutandis* to elaborate the modern law.

ii. Unreasonable delays in administering justice

The unreasonable delays of the judicial process are treated in similar terms by the classical law, human rights arguments, and the limited modern case law. Grotius talked about cases when 'a judgment cannot be obtained against . . . a debtor . . . within a reasonable time'.[278] The classical decisions and State practice identified the magnitude of the case, the evidentiary issues, the issues at stake, and the conduct of the State as relevant for appreciating reasonableness in each particular case.[279] Human rights institutions follow the same approach in identifying reasonableness on a case-by-case basis, and

relevance that the President of the *ad hoc* committee had been the sole dissenting voice in *ELSI* to doubt the relevance of the availability of judicial review for evaluating arbitrariness, (n 19) Dissenting Opinion of Judge Schwebel 94, 115–21).

[262] de Vattel *Law of Nations* (n 57) 230.

[263] *Golder* (n 138) [35]. Ironically, despite Fitzmaurice's defence of denial of justice and the international standard against Nervo almost twenty years ago, ILC 1957 (n 106) 155, he was dismissive of the reliance on international law on the issue, describing it as one of the 'factors external . . . , and having little or no direct bearing on the precise point of interpretation involved', *Golder v UK* (App no 4451/70) (1975) Series A no 18, Separate Opinion of Judge Fitzmaurice [35]. One may only speculate about the role that the 1957 ILC debate played here, or possibly the even earlier 1953 *Ambatielos* case, where Fitzmaurice had argued on behalf of the UK in a mirror image to his position in *Golder* that 'the question of access to courts is a separate question from that of treatment in the actual course of a litigation; and a right to access confers no other specific rights than simple access', *Ambatielos* Pleadings (n 71) 397.

[264] Cf nn 59, 70–2 and nn 156–62. [265] *Mondev* Award (n 44) [143], [156]. [266] n 161.

[267] Paulsson *Denial of Justice* (n 5) 146; *Tagliaferro* (n 60) 593–4. Schwebel has famously argued, by extensive reference to State practice and pleadings, that a refusal to participate in international arbitration constitutes a denial of justice, SM Schwebel, *International Arbitration: Three Salient Problems* (Grotius Publications Limited, Cambridge 1987) Ch II. The correctness of this view may be respectfully questioned: a Tribunal is not an organ the conduct of which is attributable to the State for the purposes of responsibility; and, unless the State commits a wrongful act by breaching the contract by public powers, SM Schwebel, 'On Whether a Breach by a State of a Contract With an Alien is a Breach of International Law' in S Schwebel, *Justice in International Law* (CUP, Cambridge 1994), its failure to participate in proceedings would *prima facie* not breach international law (while it certainly may breach applicable law, precisely in the same way as a failure of the investor to engage in such acts would, see *Bayindir Insaat Turizm Ticaret ve Sanayi A Ş v Pakistan*, ICSID Case no ARB/03/29, Award, 24 August 2009 [345]–[346]).

[268] *Fayed* (n 161) [69]–[82]; *A* (n 161) [73]–[89].

[269] *Mondev* Award (n 44) [151]–[156]. [270] n 60. [271] nn 73–4.

[272] The *Mondev* Tribunal cited the *Fogarty* Judgment, n 161, where the ECtHR had found no breach of fair trial when absolute immunity had been granted in employment claims, *Mondev* Award (n 44) [143]. Subsequent judgments (including by the Grand Chamber) have found breaches when immunity had been granted against employment claims, *Cudak v Lithiania* (App no 15869/02) [GC] ECHR 2010 [60]-[75]; *Guadagnino v Italy* (App no 2555/03) ECHR 18 January 2011 [55]–[77]; *Sabeh El Leil v France* (App no 34869/05) [GC] ECHR 29 June 2011 [55]–[68].

[273] nn 77–8. [274] nn 163–70. [275] n 68. [276] nn 77–8.

[277] nn 168–75. [278] Grotius *De jure belli* (n 79) 627. [279] nn 79–87.

distinguish between considerations pertaining to the nature of the case itself, conduct of the individual, conduct of the State, and matters at stake for the individual.[280] When investment Tribunals address judicial delays, the criteria expressed or implied generally go with the grain of the classical customary law and human rights practice,[281] taking into account the complexity of the case, need for speedy resolution, the conduct of parties and courts, and particular suffering by the investor.[282] What appear to be new criteria have also been invoked by some Tribunals, in particular the overall security situation[283] and the development status and size of population of the particular States.[284] Still, challenges of wars and terrorist attacks are better addressed from the perspective of circumstances precluding wrongfulness or special primary rules of, for example, humanitarian law, rather than primary rules of investment law,[285] and the broader structural problems do not justify but only reinforce the inappropriateness of delays as a systemic concern.[286] The better perspective to be adopted would take the customary and human rights criteria as an authoritative starting point and only then consider whether the structure of investment protection law is such that justifies departure and normative innovation.

iii. Irregularities in the conduct of proceedings

The classical law of denial of justice approached the different kinds of irregularities in the conduct of proceedings against the background of the concept of 'fairness', elaborating on a case-by-case basis the types of acts or omissions that were internationally wrongful. Human rights bodies have proceeded in rather similar terms, identifying the particular rights following from the concept of 'fair hearing', as well as elaborating other concepts expressly provided for, such as equality, public hearing, and independent and impartial tribunal. The modern investment law expresses the criterion as whether courts 'administer justice in a seriously inadequate way',[287] even if the issue has not played such a role in disputes as its structural importance might suggest.

The materials and cases may be addressed on three levels: first, the rights similar to rights in the classical law that the human rights practice has identified as implicit in the broader concepts of fair hearing or equality; second, rights explicitly provided for in the human rights instruments that were recognized by the classical law; third, human rights that are not paralleled by the classic law. The interpretative or comparative argument for identifying modern law would be permissible in the first and the second cases. In the third case, it should be considered whether the specific rules reflect the logic of the law of denial of justice or are peculiar to human rights law.

[280] nn 171–84.

[281] Most Tribunals adopt a methodologically appropriate perspective, drawing on customary law and human rights authorities to formulate the criteria, *Victor Pay Casado* Award (n 136) [661]–[662]; *Toto* (n 135) [159]–[162]; *White Industries* Award (n 229) [10.4.20].

[282] *Victor Pay Casado* Award (n 136) [661]–[664]; *Pantechniki* Award (n 227) [101]–[102]; *Toto* (n 135) [163]; *Frontier Petroleum Services* Award (n 37) [328]; *White Industries* Award (n 229) [10.4.9]–[10.4.23]; similarly in the rare case dealing with criminal proceedings, *Roussalis* (n 3) [603]. The *Pantechniki* Tribunal rejected the claim regarding unreasonable length of proceedings because several of the requests for postponement had been made by the claimant, (n 227) [102]. The *Frontier Petroleum Services* counted against the investor the failure to actively accelerate the proceedings, ibid [330].

[283] *Toto* (n 135) [165].

[284] *White Industries* Award (n 229) [10.4.18].

[285] Self-defence, 2001 ILC Articles (n 14) art 21; *force majeure*, ibid art 23; necessity, ibid art 25.

[286] nn 87, 184.

[287] *Robert Azinian and others v Mexico*, ICSID Additional Facility Case no ARB(AF)/97/2, Award, 1 November 1999 (1999) 14 ICSID Rev—Foreign Investment L J 538 [102].

First, the classical law required the administration of justice not to be discriminatory,[288] and the ICCPR even expresses the guarantee of fair trial from the perspective of equality.[289] The traditional requirement appeared to largely follow from the nature of the judicial process itself, which suggested the existence in civil proceedings of an *a priori* procedural equilibrium. The rule of non-discrimination was therefore likely to operate in terms of more particular expressions of the fairness of judicial procedure, like equality of arms and independence and impartiality of the court. The *Loewen* case confirms this perspective. The Tribunal noted that a discriminatory decision amounts to manifest injustice under international law, and decided that in the particular case the failure of the judge to stop the appeals to the local favouritism made by the other party to the jury had led to such a result.[290] While the conduct fell under the broader rubric of discrimination, the particular aspect was an instance of failure of objective impartiality, the court failing to offer sufficient guarantees against the perception of bias even if actual bias could not be proven.[291]

Second, both the classical law[292] and human rights practice require the provision of different kinds of procedural rights, addressed by the HRC and the ECtHR in terms of equality of arms.[293] The rights recognized by the classic law and elaborated by ECtHR include the right to be notified about procedural developments, the right to be heard, the right to a counsel, the right to call and confront witnesses, and the right to produce evidence.[294] The *Pantechniki v Albania* Tribunal criticized the breach of fair procedure when the case was rejected on a ground that the investor had not had an opportunity to address.[295] New aspects identified by the ECtHR, such as the requirement for the court-appointed expert to be neutral, fall within the scope of the permissible comparative argument.[296] The retroactive changes to the laws favouring one party can also be considered under this part of analysis.[297]

It is less clear whether a general requirement of public trial can be identified in the modern law. The law of denial of justice required public proceedings only in the context of criminal trials and justified it by reference to the interest of the home State to be aware about the prosecutions of its nationals.[298] These considerations are less relevant in civil and administrative proceedings and in the presence of investor–State arbitration clauses. In the human rights context, public trial is not implied from general fairness or equality but follows express rules on the issue, and is also particularly relevant at criminal proceedings.[299] It has been partly explained by reference to the general perception

[288] nn 92–9. [289] ICCPR (n 130) art 14(1). [290] *Loewen* (n 5) [135]–[136].

[291] Ibid [137]. [292] nn 95–108. [293] n 189. [294] nn 186–98.

[295] *Pantechniki* Award (n 227) [100]. Tribunals have elaborated the issue on a number of levels: in *Mondev*, the Tribunal noted that a failure to allow the affected investor to present its case regarding new facts on the appellate level might be problematic, (n 44) [136]; in *Al-Bahloul*, the Tribunal considered and rejected a claim about denial of justice where the court had proceeded in the absence of the claimant because it had been informed about the proceedings, and its representative was in fact in the building, *Al-Bahloul v Tajikistan*, SCC Case no 64/2008, Partial Award on Jurisdiction and Liability, 2 September 2009 [229]–[231]. It is less obvious that *Frontier Petroleum Services* is correct when it rejects the claim that an unfavourable judgment, decided on an argument introduced by a third party and on which the investor could not comment, was contrary to due process, because the investor should have been aware about the relevance of the argument, (n 37) [405]–[411]. Deciding a case on a point not commented on by the party affected seems contrary to due process, and issues of appeal and causation between pleadings and judgments do not change the conclusion: the former argument relates to the completion of wrongful act and not to initial impropriety, and the latter, if accepted, would logically exclude most rights of effective participation.

[296] n 193. [297] nn 159–60, 191. [298] Freeman *Denial of Jutice* (n 5) 304–7.

[299] ICCPR (n 130) art 14(1); ECHR (n 131) art 6(1); ACHR (n 131) art 8(5).

of courts,[300] a consideration which again has lesser relevance for rules directed at the protection of investors (where the promotion of general rule of law would have a more incidental character). Whether presented as an interpretative or comparative argument, the structural differences would probably lead to its rejection (unless, of course, it can be expressed in terms of breaching another requirement; for example, a discriminatory denial of public trial to a foreigner).

Third, both the classical law[301] and human rights practice require the judicial process to have certain integrity, addressed by human rights bodies in terms of independence and impartiality of the court.[302] The practice and case law point to the same types of impermissible conduct that compromise the independence of courts from the executive and the parties in general or in the particular instances, or show actual or perceived bias. The investment arbitration has followed these propositions. The *Petrobart* Tribunal found a breach where the executive intervened in the proceedings and compromised the independence of the courts.[303] The *Loewen* Tribunal criticized the failure of the court to suppress comments about local favouritism even if no actual bias could be proved.[304]

While there is no conceptual distinction between classical law, human rights law, and modern case law, it is useful to adopt the lines of inquiry identified by the human rights regimes, expressed in terms of taxonomy between objective and perceived independence and objective and subjective impartiality. The *Loewen* Tribunal seemed somewhat uncertain about the precise rationale of wrongfulness in the absence of proven bias, even though the facts could have been easily explained in terms of impermissible perception of bias. A particular issue accepted both by the classical law and ECtHR relates to strong public feelings, possibly fuelled by press campaigns, influencing the fairness of judicial proceedings in a manner seemingly similar to the perception of bias.[305]

Fourth, the human rights practice regarding the requirement of reasoning provides an elegant and coherent solution for the classical uncertainties about the proper way to address the substance of the judgments. The ECtHR has taken the view that, while the court need not consider every argument from every angle, it needs to respond to important arguments, and the failure to do so or obvious errors of law or fact can breach Article 6(1) due to insufficient reasoning.[306] Since the classical practice was famously reticent in scrutinizing the substantive aspects of the judgment, some caution is required in transposing such an argument. Still, the requirement for a reasoned judgment is treated by the ECtHR as qualitatively different from substantive fairness.[307] The requirement of reasoning has also been identified as implicit in the notion of fair trial, going with the grain of the case-by-case elaboration of different aspects of denial of justice. The inquiry is not primarily directed at the correctness of the judgment but at the internal coherence of the argument. Such a focus on quality rather than correctness of reasoning was not unknown in the classical law, and was in fact adopted in the leading *Martini* award, analysing the internal consistency and plausibility of reasons provided in a domestic

[300] HRC, General Comment 32 (n 151) [28].
[301] nn 101–6. [302] nn 201–4.
[303] *Petrobart* Award (n 136) 76–7; cf *Sovtransavto* (n 204) [71]-[82]. Conversely, a letter by one official to another expressing certainty that its counsel would get a favourable outcome in judicial proceedings did not affect judicial independence, *Bayindir Insaat Turizm Ticaret ve Sanayi A Ş v Pakistan*, ICSID Case no ARB/03/29, Decision on Jurisdiction, 14 November 2005 [252]. In *AMTO*, even though governmental resolutions and amendments to laws affected the bankruptcy proceedings, they were incidental and in fact helpful to the investor, so did not constitute denial of justice, (n 136) [92]–[95].
[304] *Loewen* (n 5) [135]–[137]. [305] Cf n 121 and n 200.
[306] nn 205–13. [307] nn 214–17.

judgment.[308] In light of these considerations, it seems possible to make a comparative argument that would elaborate *Martini* for the purposes of modern law, excluding the furthest-reaching aspects bordering on substantive analysis and taking into account the pragmatic perspective of

> ... the diversity of the submissions that a litigant may bring before the courts and the differences existing in the ... States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments.[309]

iv. Responsibility arising from the content of the judgment

Responsibility arising from the content of the judgment was probably the most controversial aspect of the classic law of denial of justice. The breach of other international obligations by the court relates to a conceptually different issue and has already been dealt with.[310] As Paulsson has persuasively demonstrated, a breach of an international obligation by a judicial organ does not transform the wrongful act into denial of justice.[311] The second aspect of substantive denial of justice relates to the fundamental unfairness of the content of the judgment. The classical debates suggested a number of possible approaches, each problematic in its own way.[312]

The first approach would be to entirely reject the traditional law and directly engage in a substantive review of the judgment.[313] Of course, the change of traditional customary law would need to be demonstrated first. Second, one might accept the gross unfairness of the judgment as an indefinable exception, however unsatisfactory that might be in intellectual terms. Third, the whole question of substance might be evaded if a clear and malicious misapplication of law[314] (or indeed any other procedural breach) has taken place, leading to denial of justice and leaving the substantive aspects aside. Paulsson has suggested in pragmatic terms that judges making clearly erroneous judgments are likely to have also engaged in other irregularities amounting to a procedural denial of justice.[315] The empirical correctness of his premise is difficult to verify. If the ECtHR case law on insufficient reasoning is taken as a case study, in some instances other breaches of fair trial apart from insufficient reasoning had indeed been committed,[316] while in others insufficient reasoning was the only breach.[317] In any event, the question of principle about dealing with procedurally impeccable and substantively preposterous judgments would remain unanswered.

[308] n 124. In one case, no denial of justice was found because the domestic courts had not failed to take the investor's arguments into account but only rejected them, *GEA Group Aktiengesellschaft v Ukraine*, ICSID Case no ARB/08/16, Award, 31 March 2011 [318].
[309] *Hiro Balani v Spain* (App no 18064/91) (1994) ECHR Series A 303-B [27]. The *AMTO* Tribunal noted that '[t]he decisions of Ukrainian courts might be considered by practitioners from other jurisdictions to be formalistic, but bankruptcy legislation is a technical subject matter', (n 136) [84].
[310] nn 246–52. [311] Paulsson *Denial of Justice* (n 5) 84–7. [312] nn 110–24.
[313] In the *Frontier Petroleum Services* case, the Tribunal considered whether the interpretation of Article V(2)(b) of the New York Convention by the Czech courts was 'reasonably tenable' by reference to other domestic judgments and legal writings, (n 37) [527]–[529].
[314] *Azinian* Award (n 287) [103]; *Waste Management II* Award (n 230) [130], [132]. The 1961 Harvard Draft Convention accepted 'a clear and discriminatory violation of the law of the State concerned' as one ground of wrongfulness for adverse judgments, (n 57) art 8(a).
[315] Paulsson *Denial of Justice* (n 5) 83–4.
[316] *Ferreira Alves* (n 207); *De Moor* (n 211).
[317] *Velted 98-AD* (n 208); *Benderskiy* (n 209); *Kalkanov* (n 210); *Hiro Balani* (n 309); *Antica and Society 'R' v Romania* (App no 26732/03) ECHR 2 March 2010.

Fourth, the effectively substantive review might be restated so as to appear like a procedural inquiry, whether by extrapolating implicit ill-will from otherwise inexplicable errors[318] or by formulating the obligation at a greater degree of abstraction as a requirement to provide competent courts.[319] Still, there is something faintly unattractive about the adoption of very similar, if not identical criteria to those formally rejected, merely by skilful use of presumptions and abstractions. The final and the most persuasive approach would be to rely on the procedural requirement of sufficient reasoning outlined above.[320] This criterion seems to capture best the classical distinction between permissibility of *de minimis* errors and insufficiencies, and different styles of legal writing on the one hand and internally incoherent judgments failing to answer decisive questions that lead to international wrongfulness on the other hand. It remains to be seen which approach will be adopted in future practice and decisions.

v. Non-execution of the judgment

The rules relating to the execution of judgments have been addressed in broadly similar terms in all three legal regimes under consideration, requiring the State to take every reasonable effort to ensure that the result of the judicial process is implemented. The law of denial of justice required the use of 'means at [their] disposal' in order to enforce the judgments,[321] and the human rights practice also requires reasonable efforts to ensure the enforcement.[322] The Tribunal in the *Siag v Egypt* case dealt with expropriation without compensation, and similarly concluded that the failure of the State to comply with the judgments of its own courts led to denial of justice, even though at some point the State started negotiations about compensation.[323] In line with the normative solutions proposed regarding other rules of denial of justice, the systemic similarity of the classic and modern cases indicate the broad contours of the obligations regarding execution of judgments, and the human rights practice highlights the spectrum of possible situations in greater detail, ranging from permissible minor delays due to important public considerations to incompliance due to obstruction.

[318] *Azinian* Award (n 287) [105] ('evidence for... finding... so insubstantial, or so bereft of a basis in law, that the judgments were in effect... malicious').

[319] *Pantechniki* Award (n 287) [94].

[320] nn 306–9; *Azinian* Award (n 287) [105] ('evidence for... finding... so insubstantial, or so bereft of a basis in law, that the judgments were in effect arbitrary').

[321] *Montano* (n 129) 1635. [322] nn 218–22.

[323] *Waguih Elie George Siag and Clorinda Vecchi v Egypt*, ICSID Case no ARB/05/15, Award, 1 June 2009 [454]; see similarly in *PSEG*, even though not using the language of denial of justice, *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v Turkey*, ICSID Case no ARB/02/05, Award, 19 January 2007 [249].

9

International Minimum Standard and the Protection of Property

The international minimum standard on administration of justice has a relatively simple structure. Its different normative strands—customary law, human rights practice, modern case law—point in the same direction even at the level of fine print. The international minimum standard other than relating to administration of justice is more complicated. An interpreter of the treaty rule of fair and equitable treatment would again draw on multiple authorities: first, the treaty language itself that might elaborate the content of the standard; second, customary law that the treaty rule directly refers to or at least requires to be taken into account; third, with all due caution, comparative arguments from the regional human rights regimes; fourth, modern investment arbitration cases. Unlike the standard of administration of justice where practice of sufficient quantity and similarity exists at all levels of the argument, the broader standard of protection of property requires considerable qualifications at each step. The traditional customary law on the protection of property was heavily contested, particularly to the extent that it was not dealt with by denial of justice and expropriation; human rights regimes do not address property protection at the universal level; and the contemporary case law is contradictory both regarding the source of the rule and particular aspects of its content. Still, with all due caution, the tripartite analytical approach applied in Chapter 8 will be followed, relying on the classical customary law to provide the broad contours of the rule (I) that will be filled in by human rights reasoning (II) and confirmed by modern investment cases (III).

I. Protection of property and the classical customary law

1. Protection of property in context

As explored in Part I, the manner in which the international standard dealt with the protection of property passed through several stages. The nineteenth-century State practice almost exclusively focused on non-discrimination and denial of justice. Elihu Root's speech of 1910 was simultaneously explicit about the non-exhaustive nature of the non-discriminatory aspect of the international standard and uncertain about the exception for outrageous cases, not engaging directly with the protection of property and foreign investment.[1] The third stage is exemplified by the *LFH Neer and Pauline Neer* (*Neer*) case.[2] The US–Mexico General Claims Commission attempted to define the international standard by means of analogy, deriving criteria of procedural outrage from the better-established rules of denial of justice and then applying it more generally. *Neer* was a relative improvement, attempting to give some juridical certainty to the previously indefinable exception. However, the focus on procedural outrageous made it more

[1] E Root, 'The Basis of Protection to Citizens Residing Abroad' (1910) 4 ASIL Proceedings 16.

[2] *LFH Neer and Pauline Neer (US v Mexico)* (1926) 4 RIAA 60.

complicated to develop rules that fell outside this paradigm, whether regarding protection of life within the Commission itself[3] or the protection of property in other fora, ultimately derived from the principle of acquired rights.[4] The international standard on protection of property in general therefore lacked its own coherent structure, falling into the intellectual cracks between the more specific regimes with different rationales.

The traditional position has to be identified by drawing (with all due caution) upon three bodies of law: the definition of indirect expropriation, due process as a criterion of lawfulness of expropriation, and the law of State contracts. Expropriation is, of course, characterized by the *sine qua non* requirement of significant interference with property rights. Consequently, one has to consider the possibility of extrapolating certain rules and criteria that would be capable of being applied more generally, even when the interference is not so significant. The competing approaches to the conceptualization of protection of property are relevant in considering the position of the classic law regarding mistreatment of property other than in the law of expropriation. The perspectives of domestic rules[5] and unjust enrichment were directed at compensation for expropriation,[6] and the practice regarding acquired rights at its furthest identified the limits of indirect expropriation. The early perspective of arbitrariness may be more helpful, dealing with cases of sudden indirect expropriations in breach of due process. The close connection between the arbitrariness, process, and property rights was emphasized by leading scholars in the 1920s: Bullington called for the identification of international due process of property protection,[7] and Fachiri explained uncompensated expropriations in the *Neer* terms of injustice.[8] Finally, entirely in line with the merely default role of the *Neer* standard, the law of State contracts generated its own special rules for determining responsibility.[9]

2. Law of protection of property

The law on protection of property will be addressed in three steps: first and most substantially, considering the concept of indirect expropriation; second, dealing with due process in expropriation; third, analysing the law of State contracts. In all of these contexts, international law has grappled with guarantees that related to protection of property in situations where something other than the transfer of title was at stake.

There is a broad degree of continuity between the traditional law and the modern approaches to indirect expropriation.[10] For convenience, the discussion of the classical law will be conducted in terms of the recent doctrinal distinction between

[3] Cf *Teodoro García and MA Garza (Mexico v US)* (1926) 4 RIAA 119 [4]–[5]; Dissenting Opinion of Commissioner Nielsen 123, 127.

[4] See Ch 2.II.2.

[5] CP Anderson, 'Basis of the Law against Confiscating Foreign-Owned Property' (1927) 21 AJIL 525, 525–526; JP Bullington, 'Problems of International Law in the Mexican Constitution of 1917' (1927) 21 AJIL 685, 688–93.

[6] CH Schreuer, 'Unjustified Enrichment in International Law' (1974) 22 Am J Comp L 281, 285–9; R Dolzer, 'New Foundations of the Law of Expropriation of Alien Property' (1981) 75 AJIL 553, 580–2.

[7] Bullington 'Problems' (n 5) 688–693.

[8] AP Fachiri, 'International Law and the Property of Aliens' (1929) 10 BYIL 32, 33.

[9] Ch 2 n 94.

[10] Parts of this section summarize the argument made in M Paparinskis, 'Regulatory Expropriation and Sustainable Development' in MW Gehring, M-C Cordonnier-Segger, and A Newcombe (eds), *Sustainable Development in World Investment Law* (Kluwer Law International, The Hague 2011) 312–20.

the 'sole effect' and 'purpose' approaches, concentrating respectively on the effect of the measures and on the regulatory perspective.[11] The argument will be made in three steps, considering respectively the 'sole effect' and the 'purpose' approaches to expropriation, and drawing together both approaches to suggest criteria relevant for defining indirect expropriations.

First, the 'sole effect' approach sees no conceptual difference between unreasonable effect on property by regulation and losses caused by direct and express State conduct. In policy terms, this approach would not preclude the legitimate regulation, but would only distribute the costs in a more equitable manner, with the whole society, rather than the sole foreign investor, paying for the change in the regulatory regime.[12] While the doctrinal formulation of the approach suggests a sweeping application, State practice and case law of the early twentieth century supported a more limited rule, applying effect-focused analysis to two types of cases: disguised expropriations (to borrow the term from the *Elettronica Sicula S.p.A. (ELSI)* case) and those substantial interferences with property rights that take place in breach of due process.

Disguised expropriations are indirect in the broadest descriptive sense, but they do not present qualitatively new definitional challenges since the only aspect of indirectness is the form by which the transfer of title is effectively carried out. Many of the early cases on indirect expropriation were disguised expropriations.[13] More recently, as the *ELSI* Court noted, the US had alleged, 'if not an overt expropriation, might be regarded as a disguised expropriation; because, at the end of the process, it is indeed title to property itself that is at stake'.[14] The *Waste Management v Mexico II* (*Waste Management II*) Tribunal made a similar point: 'An indirect expropriation is still a taking of property.'[15] It is important to delineate the limitations of this argument: it is conceptually both artificial and problematic to apply the argument to regulatory expropriations, where 'there may have been no actual transfer, taking or loss of property by any person or entity, but rather an effect on property which makes formal distinctions of ownership irrelevant'.[16]

The other type of indirect expropriations where effect-focused analysis has and can be usefully applied is where regulation has taken place in breach of due process. Classical international law addressed these concerns in two types of cases, regarding monopolies in particular and regulatory mistreatment in general. The 1837–1842 *Sicilian Sulphur* dispute regarding monopoly on sulphur sale,[17] the 1851–1852 unpublished *Savage* award regarding monopoly on gunpowder sale,[18] the 1911 Uruguay and 1912 Italian measures

[11] LY Fortier and SL Drymer 'Indirect Expropriation in the Law of International Investment: I Know It When I See It, or *Caveat Investor*' (2004) 19 ICSID Rev—Foreign Investment L J 293; R Dolzer, 'Indirect Expropriation: New Developments' (2002–2003) 11 New York U Environmental L J 64.

[12] R Higgins, 'The Taking of Property by the State: Recent Developments in International Law' (1982) 176 Recueil des Cours de l'Académie de Droit International 259, 322–31; F Orrego Vicuña, 'Carlos Calvo, Honorary NAFTA Citizen' (2002–2003) 11 New York U Environmental L J 19, 23–4, 27.

[13] See Ch 2 n 117; *Certain German Interests in Polish Upper Silesia (Germany v Poland)* [1926] PCIJ Rep Series A No 7 43–5; *Norwegian Shipowners' Claims (Norway v US)* (1922) 1 RIAA 307, 332–4; A Newcombe, 'The Boundaries of Regulatory Expropriation in International Law' (2005) 20 ICSID Rev—Foreign Investment L J 1, 11–12.

[14] *Elettronica Sicula S.p.A. (ELSI) (US v Italy)* [1989] ICJ Rep 15 [116].

[15] *Waste Management v US (II)*, ICSID Additional Facility Case no ARB(AF)/00/3, Final Award, 30 April 2004 (2004) 43 ILM 967 [143].

[16] Ibid; Dolzer 'New Foundations' (n 6) 579–581; J Paulsson, 'Indirect Expropriation: Is the Right to Regulate at Risk?' (2006) 3 (2) Transnational Dispute Management 9–10.

[17] *Sicilian Sulphur*, Great Britain, *State Papers 1839–1840 Volume 28* (Harrison and Sons, London 1857) 1163.

[18] *Savage Claim (US v Salvador)* (1865) 2 Moore Intl Arbitrations 1855.

regarding monopoly on life insurance,[19] and the PCIJ *Oscar Chinn* case regarding *de facto* monopoly in river transport raised familiar issues and dilemmas. On the one hand, the investments had been made and investment activities conducted in reliance on the consistency of treatment and lack of arbitrariness;[20] on the other hand, the particular State conduct furthered important regulatory concerns aimed at benefitting the society as a whole.[21] Even though the concerns were articulated, the politically sensitive monopoly cases did not lead to the emergence of a clear rule on the issue. The Permanent Court rejected the British claim in *Oscar Chinn* on the narrow ground that there had been no rights in the first place that could have been violated,[22] and the Italian insurance case was conceptualized in the more familiar terms of enrichment by the State.[23]

International law on the issue thus has to be identified from a number of other lesser-known cases and legal writings, suggesting a combination of a deferential attitude to the policy choices that the State wants to pursue and a critical analysis of the particular regulatory methods through the prism of a heightened standard of due process. Pleading in 1926, Kaufmann on behalf of Germany stated that there would be a breach when confiscation due to contraband constituted a denial of justice.[24] Writing in 1927, Bullington recognized the healthy tendency of democratic governments towards social experiments, but emphasized the importance of methods chosen that should not be sudden and violent but gradual and careful.[25] Speaking in 1933, Jessup recognized the lawfulness of uncompensated interference with property when it was 'a reasonable measure taken by the state in the interests of the public welfare'.[26]

The nineteenth-century British and American practice emphasized sudden reversals of established rules, and arbitrariness in the form and breach of due process in their application as grounds of diplomatic protection.[27] The 1933 US–Panama Claims Commission's *de Sabla* award engaged in a tripartite analysis, stating that in principle an act of deprivation without compensation was wrongful, recognizing the *bona fide* of the reforms that Panama had engaged in, but finding that the substantive and procedural safeguards did not satisfy the standards of due process.[28] (Borchard perceived this standard of due process as unusually exacting.)[29] The US–Turkey Claims Commission in the *Pandaleon* case made the same point in one sentence: 'Proof of arbitrary acts in prohibiting exportation of the property—act in effect equivalent to expropriation—might have required the payment of compensation to the claimant.'[30] From somewhat different angles, these opinions suggested a combination of deference to the policy experiments that any State is entitled to pursue, and scrutiny of the method it employs to achieve them, particularly regarding their gradual and non-violent substance and the pertaining formal and procedural guarantees.

Due to the importance for the international standard of the debates of the 1920s and 1930s, later developments of indirect expropriation may be of lesser importance. It may still be noted that despite some *dicta* drawn out of context, the post-Second World War effect-orientated practice has not extended beyond the limits of disguised expropriation and regulatory mistreatment. The cases of 'creeping expropriation' were decided against the background of unjustified regulations and breaches of prior promises.[31] The case law of the IUSCT that emphasizes effect[32] or even expressly rejects the relevance of the regulatory perspective[33] may be explained either as implicitly finding breach of due process[34] or as treating Iran's conduct as disguised expropriation.[35] Even the early investment arbitrations that seemed to deal with indirect expropriations in terms of effect may be explained as direct expropriations,[36] disguised expropriations,[37] cases

[19] Bullington 'Problems' (n 5) 699–700.

[20] Regarding the *Sicilian Sulphur* dispute, *Sicilian Sulphur* (n 17) 1173 (Temple), 1218, 1221 (Palmerston); regarding the Italian life insurance, E Audinet, 'Le monopole des assurances en Italie et le droit des étrangers' (1913) 20 Revue générale de droit international public 5, 9–17; O Hoijer, 'La Responsabilité internationale des Etats en matière d'actes législatifs' (1929) 4 Revue de droit international 577, 588–90; regarding *Oscar Chinn, Oscar Chinn (UK v Belgium)* PCIJ Rep Series C No 75 41 [49] (Memorial of the UK), 164 [50], 165 [52] (Reply of the UK), 308–9 (Beckett on behalf of the UK).

[21] Regarding the *Sicilian Sulphur* dispute, *Sicilian Sulphur* (n 17) 1205 (Sicilian response by Ludolf); regarding the *Savage* Award, I Foighel, *Nationalization and Compensation* (Steven & Sons Limited, London 1964) 67; regarding *Oscar Chinn* (n 20) [39] (Rejoinder of Belgium), 313 (de Ruelle on behalf of Belgium).

[22] *Oscar Chinn (UK v Belgium)* [1934] PCIJ Rep Series A/B No 63 88.

[23] 'Report of Dr. J. C. Witenberg to the Protection of Private Property Committee' in *International Law Association's Report of the Thirty-Sixth Conference 1929* (Sweet & Maxwell, London 1930) 332.

[24] *Certain German Interests in Polish Upper Silesia (Germany v Poland)* PCIJ Rep Series C No 11 258.

[25] Bullington 'Problems' (n 5) 704; also JP Bullington, 'Treatment of Private Property of Aliens on Land in Time of Peace' (1933) 27 ASIL Proceedings 103, 105.

[26] PC Jessup, 'Confiscation' (1927) 21 ASIL Proceedings 38, 40.

[27] See Ch 2 n 118.

[28] *Margeruite de Joly de Sabla (US v Panama)* (1934) 28 AJIL 602, 611–12. This case is perhaps the first to recognize that availability or insufficiency of judicial remedies may be taken into account in identifying expropriation. Freeman probably errs when he considers *de Sabla* as the exceptional case of wrongfulness for misapplication of domestic law, AV Freeman, *The International Responsibility of States for Denial of Justice* (Longmans, Green & Co., London 1938) 346–7. Paulson correctly identifies the issues of expropriation and procedural problems, but seems to suggest that this is a denial of justice case (even though the alien did not even consider the use of the courts) rather than using the procedural insufficiencies to identify expropriation, J Paulsson, *Denial of Justice in International Law* (CUP, Cambridge 2005) 88. McNair is closest to the truth when he emphasizes as the most important aspect that remedies 'had proved unworkable and illusory', A McNair, 'The Seizure of Property and Enterprises in Indonesia' (1959) 6 Netherlands Intl L Rev 218, 232.

[29] EM Borchard, 'The United States—Panama Claims Arbitration' (1935) 29 AJIL 99, 102–3. The Commission found the available remedies inadequate, in that they would require the alien to monitor edicts constantly and oppose and protest, including by adjudication, registration on her land, *de Sabla* ibid 607–8, 611. Identifying the inadequacy may be a complex endeavour, as shown by the strong dissent of Panama's Commissioner, who took the view that the majority had misunderstood the procedural regime, 'that the burden of bringing opposition was not so grievous as the claimant would attempt to make [it] appear' and that the situation was due to her own lack of reasonable vigilance, *Margeruite de Joly de Sabla (US v Panama)* (1934) BL Hunt, *American and Panamanian General Claims Arbitration* (Government Printing Office, Washington 1934) 379, Dissenting Opinion of Commissioner Alfaro 451, 452–3.

[30] *Costa Andrew Pandaleon and George Andrew Pandaleon Doing Business as Pandaleon Brothers (US v Turkey)* Nielsen 333, 336.

[31] *Revere Copper & Brass, Inc. v OPIC* (1978) 56 ILR 258, 269–96; *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v Kazakhstan*, ICSID Case no ARB/05/16, Award, 29 July 2008 [708]; WM Reisman and RD Sloan, 'Indirect Expropriation and Its Valuation in the BIT Generation' (2003) 74 BYIL 115, 122–6.

[32] *Starret Housing Corporation v Iran* (1983) 4 Iran–USCTR 122, 154; *Tippets, Abbet, McCarthy, Stratton v TAMS-AFFA* (1984) 6 Iran–USCTR 219, 225–6.

[33] *Phelps Dodge Corp. v Iran* (1986) 10 Iran–USCTR 121, 130 [22].

[34] V Heiskanen, 'The Doctrine of Indirect Expropriation in Light of the Practice of the Iran–United States Claims Tribunal' (2007) J World Trade Investment 215, 225.

[35] *Starret Housing Corporation v Iran*, Concurring Opinion of Judge Holtzmann (1983) 4 Iran–USCTR 159, 162–4 (referring to classical disguised expropriations); *Sedco v Iran* (1985) 9 Iran–USCTR 248, 278 (referring to German sequestrations of French vineyards).

[36] *Compañía del Desarrollo de Santa Elena S.A. v Republic of Costa Rica*, ICSID Additional Facility Case no ARB(AF)/00/01, Final Award, 17 February 2000 (2000) 15 ICSID Rev—Foreign Investment L J 169 [92].

[37] *ADC Affiliate Limited, ADC & ADMC Management Limited v Hungary*, ICSID Case no ARB/03/16, Award, 2 October 2006 15 ICSID Rep 534 [423]–[426].

raising issues of breach of due process,[38] or relating to the special case of contractual breaches.[39]

The opposite perspective of 'purpose' relied on the classically ambiguous concept of police powers, attempting to identify or create a rule making certain types of general regulatory measures non-compensatable, whatever their effect.[40] The proposition is controversial, primarily because there are two conceptually and analytically distinct ways of making this argument for non-compensatability, emphasizing respectively the regulatory purpose and the regulatory method. The ambiguity of the rationale for non-compensatable restrictive regulations can be traced back to Vattel, who wrote that

> ... individuals have not such liberty in the management and control of their property as not to be subject to the police laws and regulations enacted by the sovereign. For example, if a country has too many vineyards and is in need of grain, the sovereign may forbid the planting of vines in fields which can grow grain, for here the public welfare and the safety of State are concerned.[41]

This apparently simple example can be read in a number of ways. Perhaps Vattel's point is that the State has an unlimited right to interfere with property rights. Perhaps the emphasis is on the *a priori* liberty that is limited but still maintained. Perhaps it is important that some economic benefit can still be derived from property. Perhaps the last sentence calls for a balancing exercise of important regulatory policies (welfare and safety) with individual liberty, applying reasonable restrictive measures (requiring growing grain) to achieve a particular legitimate objective (food sufficiency). Vattel's example is not a model of clarity, and the wide spectrum of the possible rationales foreshadows the different approaches that have been subsequently taken in law-making and case law.

The first approach to identifying non-compensatable regulation would identify the taxonomy of public purposes that would preclude compensation for regulatory activities, whatever their effect. The intellectual pedigree of arguments about health and security non-compensatable rules[42] may be traced to the American constitutional law,[43] and the strong influence that the precepts of American law had on conceptualizing international rules on the treatment of aliens.[44] However, this perspective was not generally adopted in State practice, as reflected in the studies of authors directly dealing

[38] *Metalclad Corporation v United States of America*, ICSID Additional Facility Case no ARB(AF)/97/1, Award, 30 August 2000 (2001) 16 ICSID Rev—Foreign Investment L J 168 [103], [111]; *CME v Czech Republic*, UNCITRAL Case, Partial Award, 13 September 2001 9 ICSID Rep 121 [602]–[603]; *Eureko B.V. v Poland*, UNCITRAL Case, Partial Award, 19 August 2005 12 ICSID Rep 335 [241]–[242].

[39] *Consortium R.F.C.C. v Morocco*, ICSID Case no ARB/00/6, Award, 22 December 2003 (2005) 20 ICSID Rev—Foreign Investment L J 391 [67]–[68].

[40] Newcombe 'Regulatory Expropriation' (n 13) 26; A Newcombe and L Paradell, *Law and Practice of International Treaties: Standards of Treatment* (Walter Kluwer Law & Business, the Netherlands 2009) 358–63.

[41] CD Fenwick (tr), E de Vattel, *The Law of Nations or the Principles of Natural Law* (Carnegie Institute, Washington 1916) 98. This also applies to foreigners, ibid 144 (foreigners impliedly accept local laws); ibid 145, 148 (land or other real property owned by the foreigners in the State's territory remain subject to its jurisdiction, laws, and taxation). Vattel's example was quite prophetic, since the European Court of Justice in the *Hauer* case addressed a similar factual scenario with an identical result, Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727 [17]–[33].

[42] This argument was mainly espoused by American international lawyers, FS Dunn, 'International Law and Private Property Rights' (1928) 28 Columbia L Rev 166, 180; E Borchard, 'Book Review' (1932) 26 AJIL 924.

[43] In the 1930 Hague Conference, the US relied on a US Supreme Court judgment on police powers (*Lawton v Steele*, 152 U.S. 133 (1894)) to explain its position regarding non-responsibility for certain breaches of contract, S Rosenne (ed), *League of Nations Conference for the Codification of International Law [1930]* (Volume II, Oceana Publications, Inc., New York 1975) 684.

[44] Ch 2 nn 145–51.

with the issue.[45] The post-War practice does not support the purpose-orientated examination of indirect expropriation. The few authorities that invoked it were either not State practice in the technical sense or reflected US perceptions not accepted by States more generally, or upon closer analysis were rather narrow in scope (or indeed all three together).[46] Even though the recent treaty practice of some States has expressly adopted the taxonomy of purposes as reflecting customary law, it is unlikely to have changed the general rule, and would in any event not affect this analysis, which concentrates on the law of the time of the pre-War debate.[47]

The second approach to identifying non-compensatable regulation would rather look at those intrinsically lawful methods of regulation that, *sine qua non*, require substantial interference with property rights and that are indispensable for the functioning of a State.[48] As the PCIJ said in *Certain German Interests*, 'the only measures prohibited are those which generally accepted international law does not sanction in respect of foreigners; expropriation for reasons of public utility, judicial liquidation and similar measures are not affected'.[49] The examination of State practice and case law up to the 1930s shows at least six types of situations falling within the 'judicial liquidation and similar measures' rule enunciated by the Court as in principle not being expropriations. Such situations

[45] Bullington 'Problems' (n 5) 703–5; Jessup 'Confiscation' (n 26) 39–40; G Kaeckenbeeck, 'La protection internationale des droits acquis' (1936) 59 Recueil des Cours de l'Académie de Droit International 321, 404; JH Herz, 'Expropriation of Foreign Property' (1941) 35 AJIL 243, 251–2; SJ Rubin, 'Nationalization and Compensation: A Comparative Approach' (1949–1950) 17 U Chicago L Rev 458, 460 fn 9; Board of Editors, 'The Measures Taken by the Indonesian Government Against Netherlands Enterprises' (1958) 5 Netherlands Intl L Rev 227, 245. The authors supporting purpose-orientated police powers did so without particular analysis of the practice on the issue, A Verdross, 'Règles internationales concernant le traitement des étrangers' (1931) 37 Recueil des Cours de l'Académie de Droit International 327, 372.

[46] LB Sohn and RR Baxter, 'Responsibility of States for Injuries to the Economic Interests of Aliens' (1961) 55 AJIL 545, 553–4, the commentary at 561–2 limits the broad wording to operation of criminal law and civil and criminal procedure. OECD Draft Convention on the Protection of Foreign Property talks about *bona fide* not to define expropriation (as the *Saluka* Tribunal inaccurately suggested, *Saluka Investment BV v Czech Republic*, UNCITRAL Case, Partial Award, 17 March 2006 15 ICSID Rep 274 [259]) but to support compensation, 'OECD Draft Convention on the Protection of Foreign Property' (1963) 2 ILM 241 art III, A1(a); 'OECD Draft Convention on the Protection of Foreign Property' (1968) 7 ILM 117 art III A1(a). The Third Restatement invokes balancing from American constitutional law without showing the international relevance of this domestic approach, *Restatement (Third) of the Foreign Relations Law of the United States* (American Law Institute Publishers, St Paul, Minn. 1987) 196–7, 211–12. The definition of expropriation in the 1997 MIGA Convention is expressly without prejudice to general international law, 'Commentary on the Convention Establishing the Multilateral Investment Agency' (1986) 1 ICSID Rev—Foreign Investment L J 193, 200 [14].

[47] Eg 2004 Canada Model BIT Annex B.13(1)(b); 2004 US Model BIT Annex B 4(b); 2012 US Model BIT Annex B 4(b). The ASEAN Comprehensive Investment Agreement adopts similar language but does not purport to state customary law, ASEAN Comprehensive Investment Agreement (adopted 26 February 2009, entered into force 29 March 2012) <http://www.aseansec.org/22218.htm> Annex 2 3.

[48] FV García-Amador, 'Report on International Responsibility' in *Yearbook of the International Law Commission, 1956, Volume II*, UN Doc A/CN.4/SER.A/1956/Add.1 173 11 [43]–[44]; BA Wortley, *Expropriation in Public International Law* (CUP, Cambridge 1959) 38–57; C Levesque, 'Les fondements de la distinction entre l'expropriation et la reglamentation en droit international' (2003) 33 Revue General de Droit 39, 70–4. As Lauterpacht put it from the 5th to the 8th editions of *Oppenheim*, 'law of most States permits far-reaching interference with private property in connection with taxation, measure of police, public health, and the administration of public utilities', H Lauterpacht (ed), *Oppenheim's International Law* (Volume I: Peace, 5th edn Longman, Green & Co., London 1937) 283–5; H Lauterpacht (ed), *Oppenheim's International Law* (Volume I: Peace, 8th edn Longman, Green & Co., London 1955) 351–2.

[49] *Certain German Interests* Judgment (n 13) 22.

may be broadly divided into destruction of property in emergency cases;[50] bankruptcy and liquidation proceedings;[51] confiscation for breaches of criminal law;[52] confiscation or foreclosure of property in non-criminal proceedings;[53] taxation,[54] and the suppression of activities (including business activities).[55] It does not mean that these measures can never be expropriatory; it merely means that their effect on the property *per se* does not lead to that conclusion, since it is an inherent element of exercising these methods. If a breach of due process can be shown, interference with property rights by way of bankruptcy proceedings, confiscation for breaches of criminal law, or taxation would lose the presumptive veil of legitimacy and could be classified as expropriations.[56]

Third, the 'effect' and 'purpose' approaches both suggest, albeit from different perspectives, that the distinction between compensatable and non-compensatable interferences with property rights is drawn by reference to the substance, form, and procedural safeguards of the particular measures. The substantive perspective may be further separated into reasonableness of the measures, changes compared with the previous regime and discriminatory nature. The reasonableness of the measures in relation to their purpose provided the conceptual framework for addressing the interferences with property rights.[57] For example, in the *Case of 'Azorian'* (*Azorian*), the UK objected to the conduct of Spain as 'unreasonable, and *prima facie* indefensible' on a number of grounds: Spain had applied quarantine when it was not necessary to prevent infection; Spanish authorities themselves had issued a clean bill of health; no ports of quarantine had been provided; and, finally, discrimination seemed to have taken place.[58]

The analysis of reasonableness was generally applied with considerable deference, as shown by the practice regarding confiscatory taxation, where something more than substantive unreasonableness of the rate was required.[59] Indeed, *Azorian* is an illustration

[50] Generally: *Dickson Car Wheel Company (US v Mexico)* (1931) 4 RIAA 669, 681–2; B Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Grotius Publications Limited, Cambridge 1987) 52–5. On property interferences: *Destruction of Property During Plague (Turkey)* (1875) 6 Parry 350; Mr Adee, Acting Secretary of State, to Mr Thompson, minister to Brazil (1896), Mr Sherman, Secretary of State, to Mr Thompson (1897) (Brazilian Watermelons) 6 Moore Digest 751, 751–2; *Bischoff case* (1903) 10 RIAA 420, 420–1; *J. Parsons* (1925) FK Nielsen, *American and British Claims Arbitration* (Government Printing Office, Washington 1926) 587. Even though the property was destroyed due to health concerns, the language and context of these authorities support the rule permitting emergency destructions and not any purpose-orientated rule regarding health measures. Lauterpacht's 1937 General Course is in that respect more accurate than *Oppenheim*, identifying the destruction of property for reasons of health and security as part of the uncompensatable interferences, H Lauterpacht, 'Regles Generales du Droit de la Paix' (1937) 62 Recueil des Cours de l'Académie de Droit International 99, 346.

[51] *Certain German Interests* Pleadings (n 24) 22 (Kaufmann on behalf of Germany); Freeman *Denial of Justice* (n 28) 518; AV Lowe, 'Shareholder's Rights: From Barcelona Traction to ELSI' in N Ando, E McWhinney and R Wolfrum (eds), *Liber Amicorum Judge Oda* (Kluwer Law International, London 2002) 283.

[52] Verdross 'Règles internationales' (n 45) 372.

[53] *Case of the 'Robert Wilson'* 4 Moore International Arbitration 3373, 3373–4; *Fritz & Co. v STSS* (1989) 22 Iran–USCTR 170, 180–1; *Sedelmayer v Russian Federation*, SCC Case, Award, 7 July 1998 99–100; S Friedman, *Expropriation in International Law* (Steven & Sons Limited, London 1953) 1–2.

[54] AR Albrecht, 'The Taxation of Aliens under International Law' (1952) 29 BYIL 145, 171–2.

[55] The prohibition of slavery and alcohol in the US and the less-noted prohibitions of margarine, ole-margarine, and pool halls in France are examples of this rule, Bullington 'Problems' (n 5) 703–4; 'Report of Witenberg' (n 23) 332–3; A Weinfield, 'The Mexican Oil Expropriation' (1937–1938) 1 National Lawyers Guild Q 367, 378–80.

[56] Albrecht 'Taxation' (n 54) 173–5.

[57] Jessup 'Confiscation' (n 26) 40.

[58] *Case of the 'Azorian'* (1861) 6 Parry 291, 292–3; see also a protest of an unreasonable fine in *The 'Dolores'* (1875) 6 Parry 294, 294–5.

[59] 1914 British and German practice, Albrecht 'Taxation' (n 54) 172; *Kügele v Polish State* (1932) 6 Annual Digest Public Intl L 69, 69–70; cf more recent cases rejecting claims based only on substantive unreasonableness, *Link-Trading Joint Stock Company v Moldova*, UNCITRAL Case, Award, 18 April

of unreasonableness that was accompanied and exacerbated precisely by other formal and procedural breaches. The dynamic of the legal regime was also relevant, with the preference being for development without violent abruptness.[60] The limits of this criterion were quite unsettled. State practice ranged from dismissal of the relevance of 'any previous usage that may have prevailed'[61] to criticism of changes regarding 'subjects who have already established themselves ... on the faith of a different state of things',[62] with the most thoughtful authorities focusing on retroactivity and the formal and procedural safeguards of changes.[63] The classical international law also treated discrimination as one ground of wrongfulness.[64]

The form of the measure required compliance with domestic law[65] and sometimes also sufficient reasoning, both subsumed under the broadest impermissibility of arbitrariness.[66] The procedural aspects of the measures were also relevant, and to the extent that interferences with property rights took place through or required judicial proceedings, denial of justice would render them internationally wrongful.[67] Outside judicial proceedings, while minor breaches did not render interference wrongful,[68] more important issues such as lack of notification could lead to a finding of expropriation.[69] The *de*

2002 13 ICSID Rep 14 [64]; *EnCana Corporation v Ecuador*, LCIA Case no UN3481, Award, 3 February 2006 138 ILR 249 [174]. Even Albrecht, who defended the rule on confiscatory taxation, included the manner, timing, and lawfulness of taxation as relevant considerations in identifying confiscation, (n 54) 174–5. The *Savage* case (n 18) can also be read as being based on unreasonableness of sanction, A-C Kiss, *L'abus de droit en droit international* (Librairie générale de droit et de jurisprudence, Paris 1953) 124–5.

[60] n 25.

[61] *Export of Corn from Italy* (1847) 6 Parry 348; Mr Uhl, Acting Secretary of State, to Messrs Flint & Co. (1894) 6 Moore Digest 752, 752–3 (immediate cancellation of preferential treatment under an expired treaty without advanced notice lawful); *Oscar Chinn* Judgment (n 22) 88. At the Hague Conference, Poland noted that '[a] foreign national who voluntarily enters into relations with the State should consider beforehand the risk of legislative change', Rosenne *Hague II* (n 43) 454.

[62] *Haiti* (1890) 6 Parry 346; also *Dr Gamble's case* (1852) 6 Parry 347; *New Granada* (1861) 6 Parry 345; perhaps also *Rudloff case (US v Venezuela)* (On Merits) (1903–1905) 9 RIAA 255, Opinion of Commissioner Grisanti (for the Commission) 259, 261 (the *dispositif* requires 'indemnification for having *suddenly* put a stop to a contract' (emphasis added), even though the analysis addresses the nature of the breach, ibid 260–1). In the dispute regarding Italian insurance monopoly, Italy adopted a transitional period for both national and alien insurers, perhaps reacting to the protests and implicitly accepting the necessity for the changes to be gradual, JF Williams, 'International Law and the Property of Aliens' (1928) 9 BYIL 1, 3.

[63] Mr Fisch, Secretary of State, to Mr Lopez Roberts, Spanish minister (1869) 6 Moore Digest 752; generally JB Moore, *A Digest of International Law: As Embodied in Diplomatic Discussions, Treaties and Other International Agreements, International Awards, the Decisions of Municipal Law, and the Writings of Jurists* (Volume 6, Government Printing Office, Washington 1906) 752–3; *Jesse Lewis (US v Great Britain)* (1921) 6 RIAA 85, 92.

[64] Regarding taxation, Mr Fisch, Secretary of State, to Mr Davis, minister to Germany (1874) 2 Moore Digest 58; *Brewer, Moller & Co. case* (1903) 10 RIAA 423; Albrecht 'Taxation' (n 54) 171; in general see text at Ch nn 15–26; *Mr Ledger's case* (1851) 6 Parry 347.

[65] *Case of the 'Fair American'* 4 Moore Intl Arbitrations 3369; *Case of the 'Phare'* (1880) 6 Moore Intl Arbitration 4870, 4870–3; *Case of the 'Orient' (US v Mexico)* (1849) 3 Moore Intl Arbitrations 3229, 32301 *Brewer*, ibid; Albrecht 'Taxation' (n 54) 175.

[66] *Dr Gamble* (n 62).

[67] Ch 8 in general; particularly *Eli E and Jervis S Hammond (US v Mexico)* (1839) 4 Moore Intl Arbitrations 3241; *Baldwin's case (US v Mexico)* (1849) 3 Moore Intl Arbitrations 3126, 3127; *Case of the 'Patrick B Hayes'* (1850) 4 Moore Intl Arbitrations 3392, 3393; *Vanstavoren's case* (1851) 4 Moore Intl Arbitrations 3388; *Case of the 'Harriet'* (1851) 4 Moore Intl Arbitrations 3394, 3395; *Case of Reed and Fry (US v Mexico)* 3 Moore Intl Arbitrations 3132; *Bronner's case (US v Mexico)* (1874) 3 Moore Intl Arbitrations 3134, 3135.

[68] *Louis Chazen (US v Mexico)* (1930) 4 RIAA 564, 572–3.

[69] *International Technical Products Corp. v Iran* (1985) 9 Iran–USCTR 207, 240–1 (insufficient notification could be reason for finding a breach, but was not tested for lack of jurisdiction); *Middle East Cement Shipping and Handling Co. S.A. v Egypt*, ICSID Case no ARB/99/6, Award, 12 April 2002

Sabla award also required the existence of reasonably effective procedural remedies.[70] Overall, the law of indirect expropriation structured the inquiry in broad terms of deferential reasonableness, focusing instead on substantive and procedural safeguards against arbitrariness. In systemic terms, the logic seems *mutatis mutandis* applicable to those instances of mistreatment with the lesser degree of interference.

The practice and case law on due process as a criterion of lawfulness of expropriation require lawful procedure, reasonable advance notice, access to a court, and a fair hearing by an impartial and unbiased adjudicator. If 'due process' refers to the international minimum standard, then the elaboration of due process in State practice and arbitral decisions is directly relevant for explaining the standard, formulated precisely in the context of foreign investment. In structural terms, the international standard provides the procedural safeguards, and the substantive aspects of the object to be protected are introduced by a separate legal argument. If the substantive element is removed, the correct implication seems to be that the international minimum standard remains focused on procedural elements, and substantive protection needs to be justified in terms of a new legal argument. This perspective would support criteria that address formal and procedural aspects (transparency, notice, procedural rights), but would be less obviously open to substantive review of the content of the decisions (legitimate expectations).[71]

International law also contained particular rules for dealing with contracts concluded with public authorities. Three positions were taken in State practice and legal writings:[72] at one extreme, a primary international obligation to comply with contracts was identified;[73] at the other extreme, the possibility of international responsibility for contractual breaches was entirely denied; the intermediate and the most influential position accepted international responsibility for some but not all contractual breaches, the former category often defined by reference to arbitrariness.[74] The third approach drew the distinction between those breaches that any contractual party could have committed (for example, because of genuine disagreement about the obligations, inability of performance, or commercial reasons)[75] and those breaches that could be committed only by stepping outside the contractual framework and employing extra-contractual public or governmental powers.[76]

(2003) 18 ICSID Rev—Foreign Inv L J 602 [139]–[144]. In a different context, ITLOS required confiscation not be taken 'through proceedings inconsistent with international standards of due process of law', *'Tomimaru' case (Japan v Russia)* Prompt Release, Judgment of 6 August 2007, <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_15/Judgement_E_1.09.2010.pdf> [76], also [79].

[70] n 28. [71] Ch 3 I.2.

[72] Still the subtlest examination of legal issues involved is RY Jennings, 'State Contracts in International Law' (1961) 37 BYIL 156, 156–61; see also SM Schwebel, 'On Whether a Breach by a State of a Contract With an Alien is a Breach of International Law' in S Schwebel, *Justice in International Law* (CUP, Cambridge 1994); C Leben, 'La théorie du contrat d'état et l'évolution du droit international des investissements' (2003) 302 Recueil des Cours de l'Académie de Droit International 197.

[73] *Singer Sewing Machine Co. (US v Turkey)* Nielsen 490, 491 (see *Waste Management II* Award (n 15) [169]–[170]); *Ambatielos case (Greece v UK)* ICJ Pleadings 369 (Rolin on behalf of Greece); 1961 Harvard Draft Convention (n 46) art 12(1)(c).

[74] Schwebel 'On Whether' (n 72).

[75] *International Fisheries Company (US v Mexico)* (1931) 4 RIAA 691, Opinion of Commissioner MacGregor 691, 699–700; *Ambatielos* Pleadings (n 73) 389–90, 475–6 (Fitzmaurice on behalf of the UK); Third Restatement (n 46) 201 (the latter point not appearing in the earlier *Restatement (Second) of the Foreign Relations Law of the United States* (American Law Institute Publishers, St Paul, Minn. 1965) 578).

[76] *Rudloff* (n 62) 260–1 (approvingly referred to by the US in the Hague Conference, Rosenne *Hague II* (n 43) 689); *Company General of the Orinoco (France v Venezuela)* (1905) 10 RIAA 184, Opinion

The materials of the 1930 Hague Conference provide the starting point for thinking about different ways of drawing the distinction between wrongfulness and lawful conduct in contractual breaches: breaches of rights/measures of a general character;[77] positive acts of State/mere administrative failures of compliance;[78] State as a public law person in public law relations/private law person in private law relations;[79] or, conversely, arbitrary hindrances/fundamental public purpose.[80] Leaving aside the peculiarly American police powers of the last dichotomy, the common theme is the wrongfulness of direct public interference with the contract, whether by positive repudiation or negative frustration. The classical practice may be read as reflecting two distinct policies that may partly overlap in practice: first, the preclusion of abusive reliance on *puissance publique* by one contractual partly; second, the denial of justice in contractual disputes, particularly because of the probable absence of judicial remedies to challenge such abuse.[81] Consequently, even when the benchmark of arbitrariness focuses on the inappropriate reliance on, rather than inappropriate use of, public powers, the broader formal and procedural propriety and the absence of denial of justice are relevant considerations weighing against the breach.[82]

To conclude, the criteria for identifying the scope and content of the law of indirect expropriation and lawfulness of direct expropriation provide an appropriate starting point for thinking about the contemporary international standard on the protection of property (the peculiarity of rules on State contracts make their general relevance less obvious). Of course, the international standard on the protection of property is importantly different from the law of expropriation in that it does not require such significant interference with property rights. The challenge is to distinguish the criteria that may be of more general relevance from those that are related only to the most significant interferences with property rights. In systemic terms, it would make sense if international law provided the same or greater degree of protection for the most serious interferences in the form of expropriation as it did regarding lesser interferences. Consequently, if the rules protecting from less-than-expropriation contain certain guarantees, the rules on expropriation would also be likely to have them. Conversely, the existence of certain

of the Umpire 250, 280; *International Fisheries*, ibid 700; *Oscar Chinn (UK v Belgium)* [1934] PCIJ Rep Series A/B No 63 88, Dissenting Opinion of Judge Hurst 115, 121–2; E Borchard, *Diplomatic Protection of Citizens Abroad* (The Banks Law Publishing Co., New York 1915) 284; G Fitzmaurice, 'Hersch Lauterpacht—The Scholar as Judge. Part I' (1961) 37 BYIL 1, 64–5; Schwebel 'On Whether' (n 72) 425–35. In the Hague Conference, the position with different emphases was adopted by the UK, India, New Zealand, Rosenne *Hague II* (n 43) 479; Czechoslovakia, ibid 480; Canada, ibid 678; the US, ibid 688–9.

[77] Bases of Discussion 3, 5, Rosenne *Hague II* (n 43) 470; Belgium suggested that the obstruction of execution of a contract due to a rise of labour costs because of a change in pension laws would not be wrongful, ibid 453.

[78] Australia, UK, India, New Zealand, Rosenne *Hague II* (n 43) 478–9.

[79] Czechoslovakia, Rosenne *Hague II* (n 43) 480.

[80] The US, Rosenne *Hague II* (n 43) 684; see n 43.

[81] According to Australia, responsibility would arise from a positive repudiation by the State in the absence of judicial redress, Rosenne *Hague II* (n 43) 478; the relevance of judicial access was also recognized by Denmark, ibid 452; Poland, ibid 454; Egypt, ibid 478–9; and Norway, ibid 479.

[82] Mr Cass, Secretary of State, to Mr Lamar, minister to Central America (1858) 6 Moore Digest 722, 723–4 (approvingly referred to by the US in the Hague Conference, Rosenne *Hague II* (n 43) 688); generally Moore Digest 6 (n 63) 722–38; MM Whiteman, *Damages in International Law* (Government Printing Office, Washington 1937) 1555–7, 1580–3. In the Hague Conference, the US described its practice as directed at instances when aliens are 'deprived of concessions by the executive, without due process of law and a fair examination by an impartial tribunal', Rosenne *Hague II* (n 43) 689, also 684.

guarantees in the law of expropriation does not necessarily mean that they apply to lesser interferences, particularly to the extent that they address the substance of interference, since they may be justified precisely by the seriousness of interference.

II. Protection of property and the human right to property

1. Right to property in context

The human right to property is internationally protected on the regional, rather than universal level.[83] The case law of the ECtHR regarding Article 1 of Protocol 1 of the ECHR (P1-1) is the most extensive source of authority, even though the case law of the IACtHR may also be useful. Arguments from human rights treaties may be used to explain analogous investment protection rules in at least two ways: by being 'relevant' rules in terms of VCLT Article 31(3)(c), and by being used as comparative arguments. While P1-1 expressly refers to international law, interpreted to mean the rules on the treatment of aliens, the ECtHR in its case law applies the same criteria to claims by nationals and claims by aliens. Consequently, the broader corpus of the case law on the treatment of nationals is directly relevant for the treatment of non-nationals.[84] If parties to the investment treaty are also parties to the Protocol, there is a strong argument that P1-1, as interpreted by the ECtHR, becomes an admissible interpretative material because of its relevance.[85] However, the ECtHR case law on property protection may be appropriately used more broadly only in terms of comparative analysis.

It is important to identify the functional similarities and differences between the human rights and investment protection rules. Rules on fair and equitable treatment and protection of property in P1-1 occupy functionally analogous positions in the

[83] While the ICCPR (and indeed the ICSECR) do not directly address protection of property, it is covered in regional human rights instruments, Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 20 March 1952, entered into force 18 May 1954) 213 UNTS 262 art 1; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 art 21(1)–(2); African (Banjul) Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 art 14.

[84] U Kriebaum, 'Nationality and the Protection of Property under the European Convention on Human Rights' in I Buffard and others (eds), *International Law between Universalism and Fragmentation.* Festschrift *in Honour of Gerhard Hafner* (Martinus Nijhoff, Leiden, 2008).

[85] One Tribunal has rejected an argument invoking the ECHR, albeit presented as an autonomous legal obligation rather than in the interpretative terms suggested here, *Spyridon Roussalis v Romania,* ICSID Case no ARB/06/1, Award, 7 December 2011 [312]. In a recent award under a Spain–USSR BIT dealing with an aspect of the Yukos dispute, a Tribunal disagreed with a judgment of the ECtHR on the same matter, seemingly without appreciating that the ECHR could be a 'relevant rule[] of international law' for the interpretation of the BIT, and addressing the judgment only because it 'traverse[d] much of the same ground as the voluminous materials of the Parties in the present case', just as an award under another BIT did, *Renta 4 S.V.S.A. and others v Russia,* SCC Case no V 24/2007, Award, 20 July 2012 [17], [22]–[24], generally [15]–[25], [42]–[43], [82], [125]–[126], [158]. The particular aspect of the award might be defensible on two levels: in terms of admissibility of interpretative materials, under the ECHR (just as under traditional law of diplomatic protection), a shareholder cannot usually claim for the mistreatment of the company; so, while the ECHR might be 'relevant' for the mistreatment of Yukos, it might not be relevant for such claims brought by Yukos' shareholders. In terms of the weight of interpretative materials, the peculiar aspects of the ECHR identified by the Tribunal to reject the persuasiveness of the judgment (particularly the margin of appreciation, ibid [22], [126], [158]), if accepted, could operate as part of the interpretative process to diminish the weight of the extraneous material. Conversely, the facts that the investor was not a party to the ECHR proceedings or that decisions in particular cases might be affected by procedural strategies, ibid [24]–[25], are not directly important: it is the relevance and weight of interpretative materials, rather than techniques of their creation, that are determinative.

relevant bodies of law, operating as substantive guarantees of protection of property from restrictions and interferences of different degrees of severity.[86] The IACtHR has explicitly drawn upon the case law of the ECtHR and has addressed situations not rising to the level of deprivation,[87] decided cases without making it clear whether deprivation has taken place,[88] and, even when focusing on deprivation, formulated criteria of more general relevance to all types of restrictions.[89] Investment protection law is different in formulating the most severe interference with property rights in a separate rule of expropriation, but this structural distinction does not seem to affect the functional similarity of non-expropriation rules.

More broadly, the ECHR is a regional human rights treaty, and its evolutionary interpretation has sometimes been criticized from the perspective of traditional rules of interpretation.[90] However, in the context of property protection the criticism is less compelling, since the ECtHR case law is sometimes considered to be overly cautious:[91] in investment protection law, by contrast, fair and equitable treatment cases have been criticized for overly expansive readings of the State's obligations. The recent case law of the ECtHR, especially regarding the States acceding to ECHR in the 1990s, reinforces the similarity in increasingly dealing with arbitrary mistreatments of property rights familiar from investment protection cases.[92] Human rights may sometimes even arguably provide more effective protection: for example, a claim about arbitrariness and procedural improprieties in the cancellation of a banking licence was accepted by the ECtHR[93] but rejected by an investment Tribunal.[94] The Inter-American system poses a different kind of comparative challenge, since it recognizes human rights only for individuals and not legal entities,[95] therefore arguably making it less likely in descriptive terms that it would consider issues similar to the corporation-dominated investment arbitrations.[96] At the same time, the personal scope of the beneficiaries is a different issue from the content of

[86] The increasing preference of the ECtHR to address all types of interferences from a similar perspective of proportionality may be significant for the comparative argument regarding indirect expropriation: it is questionable whether the contradictory distinctions (of relatively little practical relevance) between *de jure* and *de facto* deprivations, control of use of property, and the 'third rule' of ECHR, nn 148–52, can be transposed into investment law, where the *ratione materiae* distinction between compensatory expropriation and non-compensatory regulation is critical, I.2. The criticism of the ECtHR's *Yukos* judgment by the *Renta 4* Tribunal might also be read as partly underplaying the little relevance that the distinction between different types of interference has for the application of P1-1: the Tribunal could consider only the claim about expropriation, while the Court, even though rejecting the argument about expropriation, *OAO Neftyanaya Kompaniya Yukos v Russia* (App no 14902/04) (2011) ECHR 20 September 2011 [663]–[666], found other kinds of breaches of P1-1, ibid [563]–[575], [635]–[658].

[87] *Chaparro Álvarez and Lapo Íñiguez v Ecuador* (Judgment) Inter-American Court of Human Rights Series C No 170 (21 November 2007) [183]–[218]; *Abrill Alosilla et al. v Peru* (Judgment) Inter-American Court of Human Rights Series C No 223 (4 March 2011) [77]–[85].

[88] *Perozo et al. v Venezuela* (Judgment) Inter-American Court of Human Rights Series C No 195 (28 February 2009) [396]–[403]; *Acevedo Buendía et al. v Peru* (Judgment) Inter-American Court of Human Rights Series C No 198 (1 July 2009) [85]–[91]; *Barrios Family v Venezuela* (Judgment) Inter-American Court of Human Rights Series C No 237 (24 November 2011) [148]–[150].

[89] *Ivcher-Bronstein v Peru* (Judgment) Inter-American Court of Human Rights Series C No 74 (6 February 2001) [119]–[131]; *Salvador Chiriboga v Ecuador* (Judgment) Inter-American Court of Human Rights Series C No 179 (6 May 2008) [60]–[118].

[90] Ch 5 nn 273–88.

[91] Higgins 'Taking of Property' (n 11) 343–7.

[92] Ch 7 nn 46–51.

[93] *Capital Bank AD v Bulgaria* (App no 49429) (2005) ECHR 24 November 2005 [134]–[140].

[94] *Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v Estonia,* ICSID Case no ARB/99/2, Award, 25 June 2001 (2002) 17 ICSID Rev—Foreign Investment L J 395 [364]–[367].

[95] *Perozo* Judgment (n 88) [399].

[96] CH Schreuer and U Kriebaum, 'The Concept of Property in Human Rights Law and International Investment Law' in S Breitenmoser and others (eds), *Human Rights, Democracy and the Rule of Law: Liber Amicorum Luzius Wildhaber* (Dike, Zürich/St. Gallen 2007) 754–5.

the rule, and the case law of the IACtHR does not seem to have construed the right to property in a particular manner because of its *ratione personae* scope.[97]

The systemic comparison may identify both similarities and important differences. At the most general level, the material scope of protection of fair and equitable treatment and definitions of investment are paralleled by the ECtHR case law on 'possessions'. Despite some terminological uncertainty,[98] no argument of analogy can be made between the ECtHR case law on legitimate expectations to identify assets qualifying as 'possessions'[99] and investment case law on legitimate expectations as one alleged aspect of fair and equitable treatment.[100] The object of protection and content of the primary obligation are too distinct issues. More particularly, the comparative argument has to appreciate the systemic logic of the ECtHR case law, deferring in the proportionality analysis of policy choices and intrusively analysing formal and procedural safeguards. Transposing only the former aspect would likely misstate the systemic logic, whether underreaching in losing the close connection to the latter safeguards, or overreaching in applying an intrusive analysis of proportionality.

Paulsson has questioned the appropriateness of the analogy due to the specific nature of the 'outsider' that requires a higher degree of protection, both regarding the promises given and mistreatment endured.[101] While this concern is valid, it is not a reason for rejecting the reasoning by analogy *ab initio*, but only supports its inclusion as one of the factors in the *mutatis mutandis* analysis. In some cases, the 'outsider effect' would support the application of the ECtHR logic even *a fortiori*, for example, regarding the expectation that corporate entities would employ qualified legal assistance for identifying relevant rules and their likely development.[102] In other cases, it may require better protection: despite the importance of public purpose, the 'technicalities' should probably play a greater role in investment law than in the exceptional ECtHR case, where a retroactive closing of a tax loophole was found justified.[103] If the State has actively

[97] Individuals are permitted to bring claims for breaches of their shareholders' rights, *Ivcher-Bronstein* Judgment (n 89) [127]; *Perozo* Judgment (n 88) [399]–[400]; in a case where one of the claimants was a 50 per cent shareholder and a manager of the company, breaches of company's rights appeared to have been effectively considered, *Álvarez* Judgment (n 87) [182], [198], [209], [214]; the IACtHR has interpreted the right of property by relying on the case law of the ECtHR, including cases brought by corporations, eg *Chiriboga* Judgment (n 89) fns 60, 91; and it has also relied on decisions brought by corporations against States in contractual mixed arbitrations, *Chiriboga* Judgment (n 89) fns 90, 93, investment treaty arbitrations, *Chiriboga* Judgment (n 89) fn 93, *Alosilla* Judgment (n 87) fn 74, and the IUSCT, *Chiriboga* Judgment (n 89) fns 90. Some disputes would not look out of place in an investment arbitration, for example, a claim about arbitrary deprivation of shares, *Ivcher-Bronstein* Judgment (n 89), a claim by a Chilean national against Ecuador regarding arbitrariness in the seizure and return of his factory, *Álvarez* Judgment (n 87); or a claim about arbitrary expropriation, *Chiriboga* Judgment (n 89).

[98] C Brown, 'The Protection of Legitimate Expectations as a "General Principle of Law": Some Preliminary Thoughts' (2009) 6 (1) Transnational Dispute Management 6–8.

[99] *Kopecký v Slovakia* (App no 44912/98) [GC] (2004) ECHR 2004-IX [45]–[52].

[100] See below III.2.vi.

[101] Paulsson 'Right to Regulate' (n 16) 8–9; similarly *Renta 4* (n 86) [22]–[23]. The *Renta 4* Tribunal considered the margin of appreciation to be peculiar to human rights, (n 86) [22], and thus justified the difference of its conclusions, ibid [158]. However, there is support for a not dissimilar kind of deference in international investment law, particularly in the *ELSI* case, see III.2.i. One might also respectfully point to other possible reasons for differences in the conclusions by the Tribunal and the Court, such as differences in the scope of rules considered (expropriation and interferences with property), as well as their legal nature (expropriation and intentional abuse of taxation under Article 18 of the ECHR), and simply different appreciations of the same facts (which, as the *CME/Lauder* cases demonstrate, is perfectly possible even within investment arbitrations argued by the same counsel from the same perspectives about effectively identical rules).

[102] See below nn 168–9.

[103] *National and Provincial Building Society and others v UK* (Apps no 117/1996/736/933–935) (1997) ECHR 1997-VII [80]–[83].

solicited the investment with particular promises, the ECtHR model could reflect the dynamic in an arguably incomplete manner, though even then the State's conduct could simply be taken into account as part of the considerations outlining the limits of formal and procedural consistency and arbitrariness.

A more important difference possibly influencing the functional perspective is the exhaustion of domestic remedies that is generally required by human rights but not by investment treaties. Since the ECtHR, unlike investment Tribunals, will probably have before it judgments of domestic courts on the issue, it would be more likely both to accept their interpretation of domestic law at least as the starting point and take a stricter view regarding possible breaches. Conversely, a Tribunal could be the first adjudicator dealing with the particular challenge, and therefore quite plausibly focus on broader issues of arbitrariness rather than the precise content of the rules. Overall, since the crucial criteria in ECtHR case law are the purpose-neutral requirements of form and procedure, and not the issues of necessity and appropriateness of regulatory policy, the inquiry into whether 'the state abided by or implemented [the regulatory] programme' 'extant before an investor decides to commit' permits the appropriate argument by analogy.[104]

2. Law of property protection

The ECHR sets outs the rule on the protection of property in P1-1 in an ambiguous manner, combining references to peaceful enjoyment of possessions, the protection from deprivation, and the rights to control the use of property.[105] The considerable disagreement about what protection of property meant led to a textual expression that left some ground for interpretative flexibility.[106] The purpose and content of P1-1 may have seemed obvious to Fitzmaurice, who remarked that '[t]he truth of the matter... is that the chief, if not the sole object of Article 1 of the Protocol (P1-1) was to prevent the arbitrary seizures, confiscations, expropriations, extortions, or other capricious interferences with peaceful possession that many governments are—or frequently have been—all too prone to resort to'.[107] However, this clarity of vision was not shared by the rest of the ECtHR,[108] and indeed came from a dissenting opinion where Fitzmaurice characterized his position as 'obvious to anyone not intent on this scope-extending process'.[109] A considerable amount of case law was required before the content of P1-1 became clearer.

The text seems to provide for two rules on deprivation and control of use[110] and is silent on compensation, providing an ambiguous reference to international law.[111] The early case law affirmed states as 'sole judges' of necessity to use property[112] and rejected

[104] *GAMI Investments v Mexico*, UNCITRAL Case, Final Award, 15 November 2004 13 ICSID Rep 147 [91].

[105] ECHR Protocol 1 (n 83) art 1.

[106] On the convoluted drafting process, see AWB Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (OUP, Oxford 2001) 754–5, 757–8, 761–2, 767–72, 776–9, 781–2, 785–6, 792, 797, 799.

[107] *Marckx v Belgium* (App no 6833/74) (1979) Series A no 31, Dissenting Opinion of Judge Fitzmaurice [20].

[108] Similarly to Fitzmaurice's position regarding the interpretation of the ECHR more generally, Ch 5 nn 277–85.

[109] *Marckx* Fitzmaurice (n 107) [20].

[110] Higgins 'Taking of Property' (n 12) 345.

[111] Ibid 361–75; E Schwelb, 'The Protection of the Right of Property of Nationals under the First Protocol to the European Convention of Human Rights' (1964) 13 Am J Comp L 518, 518–41.

[112] *Handyside v UK* (App no 5493/72) (1976) Series A no 24 [24].

the extension of international law principles to nationals.[113] The qualitative shift from textual fidelity to general balancing started with the *Sporrong and Lönnroth v Sweden* (*Sporrong*) case, where the ECtHR found a third rule in P1-1, dealing with peaceful enjoyment of possessions.[114] The examination of the fair balance struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights[115] is also applied to the first two rules in the more recent practice.[116] The recent case law has also elaborated the obligations of States to follow their legislative policies,[117] and to ensure that the form of the measures[118] and the procedural safeguards protect from arbitrariness.[119] In light of the focus of the present inquiry on the comparative argument, it is useful to consider the process through which the loosely drafted provision was reformed into the coherent tool of the sometimes rather intrusive inquiry it is now. The two landmark steps to consider in this development are *Handyside v UK (Handyside)*[120] and *Sporrong*, highlighting respectively the normative solutions that could be adopted and those which were in fact adopted, and will therefore be considered in greater detail.[121]

The *Handyside* case was the first judgment to address the protection of property rights, in a case relating to seizure and forfeiture of books considered threatening to the public morale, showing the variety of approaches that could be taken to interpreting the rules on the protection of property. P1-1 could be interpreted in a textually faithful manner, strictly categorizing different types of interferences.[122] The public purpose of the State and the necessity for enacting the particular measures could be treated as self-judging,[123] read as permitting judicial examination of reasonableness and good faith but effectively being deferred to,[124] or interpreted as requiring a stringent review of actual purposes and measures with no deference accorded.[125] The efficiency of the procedural safeguards could be ignored,[126] approved in light of the important public purpose behind the measures,[127] or examined and found satisfactory in the broader procedural context.[128] Finally, the arguments drawing on comparative experience could be ignored,[129] used as

[113] *James and others v UK* (App no 8793/79) (1986) Series A no 98 [58]–[66]; *Lithgow and others v UK* (Apps no 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81 and 9405/81) (1986) Series A no 102 [111]–[119].

[114] *Sporrong and Lönnroth v Sweden* (App nos 7151/75 and 7152/75) (1982) Series A no 52 [61], [66]-[74].

[115] Ibid [69]; *James* (n 113) [37].

[116] K Reid, *A Practitioner's Guide to the European Convention on Human Rights* (2nd edn Thomson/Sweet and Maxwell, London 2004) 293.

[117] *Broniowski v Poland* (App no 31443/96) [GC] (2004) ECHR 2004-V [184].

[118] *Carbonara and Ventura v Italy* (App no 24638/94) (2000) ECHR 2000-VI [63]–[73].

[119] Ch 8 n 263.

[120] *Handyside v UK* (App no 5493/72) (1975) Series B no 22; *Handyside* Court (n 112).

[121] *Sporrong and Lönnroth v Sweden* (App nos 7151/75 and 7152/75) (1980) Series B no 46; *Sporrong* Court (n 114).

[122] There was some disagreement about whether the forfeiture and destruction were 'control [of] the use of property', *Handyside* Court (n 112) [63], or deprivation of property, ibid Separate Opinion of Judge Zekia; *Handyside* Commission (n 120) [165]–[166].

[123] *Handyside* Court (n 112) [62].

[124] *Handyside* Commission (n 120) [167]–[169].

[125] Ibid Dissenting Opinion of Commissioners Fawcett and Triantafyllides [7]–[15]; Dissenting Opinion of Commissioners Kellberg, Norgaard and Trechsel 53–5.

[126] *Handyside* Court (n 112).

[127] *Handyside* Commission (n 120) [168].

[128] *Handyside* Commission Kellberg (n 125) 55.

[129] *Handyside* Commission (n 120).

an *ipse dixit* reference to 'interpret[ation] in the light of the principle of law, common to the Contracting States',[130] or subjected to explicit comparative analysis.[131]

Handyside highlights the choice of criteria and the stringency of their application that may be used to interpret restrictions of property rights. *Sporrong* shows how the ECtHR chose certain approaches from the normative toolbox left open by *Handyside*, creating the conceptual framework to interpreting P1-1 that has been broadly followed ever since. In *Sporrong*, the dispute arose from a long-running threat by the Stockholm city authorities to expropriate the property of the claimants, placing them at considerable uncertainty regarding the present and future status of their property. In response, the *Sporrong* Court rejected the textual dichotomy of *Handyside*[132] in favour of an implicit 'third rule' requiring the examination of proportionality.[133] The self-judging character of the necessity was rejected,[134] even if its analysis was approached in rather deferential terms.[135] In substantive terms, at one end of the spectrum, the Commission and the dissenting judges saw no breach, emphasizing the complexity of the matter in issue predictable in a modern society,[136] the remaining substantive rights,[137] and procedural safeguards.[138] An intermediate position found breach in light of the excessive length of the restriction that could no longer fulfil the public purpose.[139] At the other end of the spectrum, the ECtHR found a breach, particularly emphasizing its inflexibility.[140]

The subsequent case law regarding P1-1 will be addressed along the lines of inquiry identified in the *Handyside* and *Sporrong* cases, dealing in turn with the categories of interference, necessity of the measures, the expectations regarding rules and criteria regarding the form of measures and procedural safeguards. There seem to be two lines of arguments in the subsequent case law, one of them being deferential and contradictory, with the other providing a strict and coherent doctrine. The former cases deal with the purpose of the state, possible alternative measures, and the effect of the measures. The ECtHR has affirmed the broad discretion of the domestic authorities in formulating the public purpose that the measures pursue, motivated by their greater legitimacy and expert knowledge.[141] The absence of the legitimate aim would lead to a finding of the breach of P1-1,[142] as it happened in a case where police authorities unlawfully occupied the applicant's property.[143] However, any proposed justification will be accepted unless

[130] *Handyside* Court (n 112) [63].

[131] *Handyside* Commission (n 120) Separate Opinion of Commissioner Polak; ibid Dissenting Opinion of Commissioner Ermakora.

[132] *Sporrong* Commission (n 114) [104]; *Sporrong* Court (n 121) Joint Dissenting Opinion of Judges Zekia, Cremona, Thór Vilhjálmsson, Lagergren, Sir Vincent Evans, Macdonald, Bernhardt, and Gersing with Regard to P1-1 [3].

[133] *Sporrong* Court (n 114) [68]–[69].

[134] *Sporrong* Commission (n 121) [105]; *Sporrong* Court (n 114) [69].

[135] As four Commissioners noted, '[i]t may be doubtful whether it is the task of the Convention organs to control' the necessity of extension of expropriation permits, *Sporrong* Commission (n 121) Individual Opinion of Commissioner Frowein, Joined by Commissioners Trechsel, Melchior, and Sampaio 74.

[136] *Sporrong* Commission (n 121) [118]; *Sporrong* Court Zekia (n 132) [3]; *Sporrong* Court (n 114) Partly Dissenting Opinion of Judge Walsh [5].

[137] *Sporrong* Commission (n 121) [115]; ibid (n 135) Frowein 74; *Sporrong* Court Zekia (n 132) [3].

[138] *Sporrong* Commission (n 121) [116].

[139] *Sporrong* Commission (n 121) Dissenting Opinion of Commissioner Kiernan 78.

[140] *Sporrong* Court (n 114) [70].

[141] *Kozacioğlu v Turkey* (App no 2334/03) [GC] (2009) ECHR 19 February 2009 [53]; Y Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, Antwerpen 2002) 154–6.

[142] *Burdov v Russia* (App no 59498/00) (2002) ECHR 2002-III [41].

[143] *Zwierzyński v Poland* (App no 34049/96) (2001) ECHR 2001-VI [73].

it is manifestly without any reasonable foundation.[144] The availability of alternative and less restrictive measures usually does not exceed the margin of discretion of the state,[145] even though, importantly, it can support a finding of the breach through otherwise arbitrary measures.[146]

The case law on the effect of the measures seems quite confusing, and the distinctions made change from case to case. *De jure* taking of property is deprivation.[147] The ECtHR rarely recognizes interferences as constituting *de facto* takings, accepting them only in such exceptional cases of a *de facto* appropriation of land for building a navy base[148] or retention by the State of unlawfully taken property.[149] Many instances are addressed under the rule of control of use of property, such as planning controls, environmental orders, rent control, import and export laws, economic regulation of profession, seizure of property for legal proceedings, inheritance laws, penalties, confiscations, taxation, and bankruptcy rules.[150] The third rule of peaceful enjoyment of possessions is the most cryptic, and the distinction between the three rules of P1-1 has been criticized as unprincipled and confusing.[151] The fact that the ECtHR seemingly ignores these subtleties, increasingly addressing all interferences in terms of the proportionality analysis, may be explained by the lesser relevance of these issues for the final decision.

The ECtHR has also developed a second line of case law on certain qualitative criteria regarding the substance, form, and procedural safeguards of the State's conduct. The substantive aspect addresses the dynamic elements of the legal regime. The ECtHR has found no breach in cases where the restrictions where foreseeable even if their application *in casu* seemed disproportionate. For example, rules relating to mandatory reselling of property bought at an auction,[152] adverse possession of land,[153] and revocation of the permit of extraction of gravel were, or should have been, known to the applicants; the risks undertaken could not constitute a breach.[154] Even an annulment of a planning permission originally granted in good faith was an expected result in a risky business,[155] and a taking by taxation authorities of goods the title of which had been retained was in accordance with rules of domestic law.[156] A high degree of legal due diligence and the ability to rely on available legal remedies is required; for example, in the latter case the applicants instead of using retention of title

[144] Arai-Takahashi *Margin of Appreciation* (n 141) 154–6; Reid *Practitioner's Guide* (n 116) 293; D Harris and others, *Harris, O'Boyle & Warbrick Law of the European Convention on Human Rights* (2nd edn OUP, Oxford 2009) 668–9.

[145] *James* (n 113) [51]; M Mendelson, 'The United Kingdom Nationalization Cases and the European Convention on Human Rights' (1986) 57 BYIL 33, 52–63.

[146] *Hentrich v France* (App no 13616/88) (1994) Series A no 296 A [42]–[49]; *Beyeler v Italy* (App no 33202/96) [GC] [2000] ECHR 2000-I [108]–[110], [120]–[122]; *Capital Bank* (n 93) [137]–[138].

[147] *Lithgow* (n 113) [107].

[148] *Papamichalopoulos v Greece* (App no 14556/89) (1993) A 260-B.

[149] *Vasilescu v Romania* (App no 27053/95) (1998) ECHR 1998-III [47]–[48].

[150] *Harris, O'Boyle and Warbrick* (n 144) 686–92.

[151] Higgins 'Taking of Property' (n 12) 368; JA Frowein, 'The Protection of Property' in RStJ Macdonald, F Matscher and H Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff, Dordrecht 1993) 529–30; D Anderson, 'Compensation for Interference with Property' (1999) 6 E Human Rights L Rev 543, 533; AR Çoban, *Protection of Property Rights within the European Convention on Human Rights* (Ashgate Dartmouth, Aldershot 2004) 190–1.

[152] *Håkansson and Sturesson v Sweden* (App no 11855/85) (1990) Series A 171-A [51]–[55].

[153] *JA Pye (Oxford) Ltd and JA Pye (Oxford) Land Ltd v UK* (App no 44302/02) [GC] (2007) ECHR 2007-III [75]–[85].

[154] *Fredin v Sweden (No 1)* (App no 12033/86) (1991) Series A no 192 [51]–[55].

[155] *Pine Valley Developments Ltd and others v Ireland* (App no 12742/00) (1991) Series A no 222 [59].

[156] *Gasus Dosier- und Fördertechnik GmbH v the Netherlands* (App no 15375/89) (1995) Series A no 306-B [60]–[74].

> ...could have eliminated their risk altogether by declining to extend credit...: they could have stipulated payment of the entire purchase price in advance or else refused to sell the concrete-mixer in the first place.... the applicant company might have obtained additional security, for example in the form of insurance or a banker's guarantee, which pass the risk on to another party.[157]

While the Court tends to rule against applicants that have not displayed necessary diligence, the judgments are usually narrowly divided, suggesting that drawing the line between predictable (and preventable) and impermissible changes is an inherently complex matter.[158]

Changes in the legal system may also sometimes support the finding of the breach. Retroactive and therefore objectively unpredictable changes in the legal regime are likely to constitute a breach[159] (even if in one exceptional case the public interest in retroactively closing a tax loophole was found to be more important than the technicalities).[160] Recent case law has also recognized that when the legal system requires certain developments to take place, the criterion of lawfulness requires States 'to ensure the legal and practical conditions for... [the] implementation of [laws]' and as a result 'to fulfil in good time, in an appropriate and consistent manner, the legislative promises'.[161] The interaction between different authorities and between authorities and courts must also be consistent. Cumulative application of different rules leading to a disproportionate result[162] and contradictory and seemingly unmotivated conduct in the cancellation of licences have been found to be unlawful because of their inconsistency.[163] On balance, the ECtHR refers to the domestic legal system itself as the benchmark for the permissibility of developments: if the developments could have been expected, they would not support a breach; if developments could not have been expected or if promised developments did not take place, a breach would be supported.

The form of the measures is addressed in terms of the requirement of 'lawfulness', the incompliance with which directly leads to a breach of P1-1 without the need to examine proportionality.[164] Several criteria of lawfulness have been further elucidated in the case law. The restrictive measures must have some basis in domestic law, and be accessible and

[157] Ibid [70]; TW Waelde and A Kolo, Environmental Regulation, Investment Protection and 'Regulatory Taking under International Law' (2003) 50 ICLQ 811, 832. Commissioner Pellonpää dissented on the particular point, taking the view that 'the applicant could not reasonably be expected to take specific precautionary measures with a view to protecting itself against the application of those rules', *Gasus Dosier- und Fördertechnik GmbH v the Netherlands* (App no 15375/89) (1993) Dissenting Opinion of Commissioner Pellonpää.

[158] The Commission rejected the *Pine Valley* application by nine votes to four, *Pine Valley Developments Ltd and others v Ireland* (App no 12742/00) (1990), and the ECtHR by six votes to three, n 155. The Commission rejected the *Gasus* application by six votes to six with the President's decisive vote, *Gasus Dosier- und Fördertechnik GmbH v the Netherlands* (App no 15375/89) (1993), and the ECtHR by six votes to three, *Gasus* Court (n 156). The Chamber of the ECtHR accepted the *JA Pye (Oxford) Ltd* application by four votes to three, *JA Pye (Oxford) Ltd and JA Pye (Oxford) Land Ltd v UK* (App no 44302/02) (2005) ECHR 15 November 2005, while the Grand Chamber reversed the Chamber by ten votes to seven, *JA Pye* GC (n 153).

[159] *Stran Greek Refineries and Stratis Andreadis v Greece* (App no 13427/87) (1994) Series A no 301-B [72]–[75]; *Carbonara* (n 118) [66]; *Pressos Compania Naviera S.A. and others v Belgium* (App no 17849/91) (1995) Series A no 332 [39]–[43]; P Popelier, 'Legitimate Expectations and the Law Maker in the Case Law of the European Court of Human Rights' (2006) 1 E Human Rights L Rev 10, 16–20.

[160] *National and Provincial Building Society* (n 103) [80]–[83].

[161] *Broniowski* (n 117) [184].

[162] *Jokela v Finland* (App no 28856/95) (2002) ECHR 2002-IV [65].

[163] *Rosenzweig and Bonded Warehouses Ltd v Poland* (App no 51728/99) (2005) ECHR 28 July 2005 [50]–[64].

[164] *Frizen v Russia* (App no 58254/00) (2005) ECHR 24 March 2005 [32]–[37].

foreseeable.[165] The conclusions of domestic authorities will usually not be questioned unless they are in manifest breach of domestic law; for example, failure to comply with a judgment.[166] The accessibility of laws is complied with if they are subject to the usual process of publication, and legal entities can and should consult competent specialists to find the relevant rules.[167] The foreseeability requirement does not require absolute certainty about the rules, and 'depends to a considerable degree on the content of the text in issue, the field it is designed to cover and the number and status of those to whom it is addressed'. A law may be foreseeable even if persons have to take appropriate legal advice to assess its consequences, and special care to assess the risk must be taken when engaging in professional conduct.[168] Still, in a recent case the Grand Chamber found that Italian law was not sufficiently precise and foreseeable when the applicant company had been unable to operate in television broadcasting for ten years despite its license.[169] Inconsistencies within rules and relevant case law may lead to a breach of lawfulness[170] (similarly to the Article 6(1) requirement to have a reasoned judgment).[171] The final aspect of formal requirements requires the State to apply rules in a consistent manner and implement proclaimed policies.[172]

The last element of qualitative requirement relates to procedural safeguards. Even though decisive in *Sporrong*[173] and accepted in principle, it had limited effect in early case law, which rejected applications even when rules provided broad discretion to the executive with limited procedural safeguards.[174] In later case law, the inability to challenge an arbitrary decision of taxation authorities directly lead to a breach,[175] the Court recognizing the general P1-1 'obligation to afford judicial procedures that offer the necessary procedural guarantees'.[176] Most recently, procedural safeguards have come to be treated as elements of lawfulness.[177] The breach of these safeguards (and therefore an automatic breach of P1-1 without the need to consider proportionality) has been found in a number of cases that would not look out of place in investment arbitrations.[178]

[165] *Lithgow* (n 113) [110]; *Hentrich* (n 146) [42]; A-L Svensson-McCarthy, *The International Law of Human Rights and States of Exception: With Special Reference to the* Travaux Préparatoires *and Case-Law of the International Monitoring Organs* (Martinus Nijhoff, The Hague 1998) 73–92.

[166] *Iatridis v Greece* (App no 31107/96) (1999) ECHR 1999-II [62].

[167] *Špaček, s.r.o. v Czech Republic* (App no 26449/95) (1999) ECHR 9 November 1999 [56].

[168] *Forminster Enterprises Limited v Czech Republic* (App no 38238/04) (2008) ECHR 9 October 2008 [65].

[169] *Europa 7 S.r.l. and Di Stefano v Italy* (App no 38433/09) [GC] (2012) ECHR 7 June 2012 [144]–[158], [185]–[189].

[170] *Carbonara* (n 118) [66]; *Baklanov v Russia* (App no 68443/01) (2005) ECHR 9 June 2005 [46]; *Mullai and others v Albania* (App no 9074/07) (2010) ECHR 23 March 2010 [115]–[116].

[171] Ch 8 nn 310–13.

[172] nn 152–3.

[173] *Sporrong* Court (n 114) [70]. The importance of the procedural perspective is indirectly seen in the votes regarding breaches of Articles 6(1) and P1-1, which almost fully overlap.

[174] *Agosi v UK* (App no 9118/80) (1986) Series A no 108 [55]–[61]; *Air Canada v UK* (App no 18465/91) (1995) Series A no 316-A [40]–[48].

[175] *Hentrich* (n 146) [49].

[176] *Sovtransavto Holding v Ukraine* (App no 48553/99) (2002) ECHR 2002-VII [96].

[177] P Leach, *Taking a Case to the European Court of Human Rights* (2nd edn OUP, Oxford 2005) 362–3.

[178] A cancellation of a banking license was not notified to the applicant and could not be appealed, *Capital Bank* (n 93) [134]–[140]; the applicant company was placed under receivership and denied access to business documents without the possibility of appeal, *Družstevní Záložna Pria and others v Czech Republic* (App no 72034/01) (2008) ECHR 31 July 2008 [93]–[95]; a broadly worded authority to cancel investment contracts was not subject to judicial review, *Zlinsat, spol. S r.o. v Bulgaria* (App no 57785/00) (2006) ECHR 15 June 2006 [99]; the State did not comply with judgments of domestic courts regarding an investment contract; *Marini v Albania* (App no 3738/02) (2007) ECHR 18 December 2007 [172]–[174].

The process of development of the ECtHR case law on P1-1 is instructive on a number of levels. The normative tools identified in *Handyside* and connected in a systemically consistent framework in *Sporrong* have been refined by trial and error, broadly confirming the wisdom of the latter case. The purpose of the regulator in enacting the measures, the possible alternatives to the regulatory policy, and the nature of the measures are all justiciable matters and form the broad contours of the analysis. However, the crucial aspects of the legal argument are not located at the level of these policy choices, since the proportionality analysis is directed at 'the *way* in which the national authorities strike the balance [that] may be a factor in deciding whether in *substance* they have struck the balance compatibly with the Convention's requirements'.[179] The purpose-neutral formal criteria of substance, form, and procedure, rather than the double-checking of the policy choices, has emerged as the most appropriate perspective for the ECtHR.

The case law of the IACtHR suggests a similar conceptual framework of deference to policy choices and scrutiny of formal and procedural safeguards to prevent arbitrariness.[180] For example, in the *Chaparro Álvarez and Lapo Íñiguez v Ecuador* case, the IACtHR considered a claim about seizure and return of property rights of a factory that was suspected of involvement in criminal activities. The Court accepted that material precautionary measures of seizure of property had a legitimate purpose and were adequate and effective in ensuring the availability of evidence.[181] However, their application in the particular instance was arbitrary—the continuation of the precautionary measures was not justified, there was an unnecessary delay in returning the property, it was not completely returned, and had been unsatisfactorily administered during the seizure—leading to a finding of a breach.[182] In the case law in general, the Court focuses on the formal requirements: rules may not be abused to pursue improper interests;[183] at least the rules affecting the essential content of property should be embodied in the law;[184] the proper procedures have to be applied,[185] and indeed judgments have to be complied with.[186] Overall, it seems that the ECtHR and the IACtHR have both treated the restrictions of property rights with the grain of classical customary law (exemplified by the *Azorian*),[187] deferring on issues of policy choices but scrutinizing *ad hoc* abuses and formal and procedural safeguards.

III. Protection of property and the modern standard

1. Modern standard in context

The classical customary law of indirect expropriation and the more recent practice on lawfulness of expropriation provide broad contours for approaching the modern standard. The practice of the regional human rights regimes of America and Europe go with

[179] *Harris, O'Boyle, and Warbrick* (n 144) 674; cf P Sales and B Hooper, 'Proportionality and the Form of Law' (2003) 119 LQR 426, 453.

[180] *Chiriboga* (n 89) [116]–[118].

[181] *Álvarez* Judgment (n 87) [187]–[195].

[182] *Álvarez* (n 87) respectively [198]–[199], [202]–[204], [208]–[209], [214].

[183] *Ivcher-Bronstein* Judgment (n 89) [129] (State was determined to deprive the applicant of the control of the company rather than pursue a genuine public interest).

[184] *Chiriboga* (n 89) [64]–[65].

[185] *Álvarez* Judgment (n 87) [198]–[199], [202]–[204], [208]–[209]; *Chiriboga* (n 89) [89]–[90], [116]–[118]; *Barrios Family* Judgment (n 88) [149].

[186] *Buendía* Judgment (n 88) [85]–[91].

[187] n 58.

the grain of the classical approaches, confirming the appropriateness of the methodology and applying it in a structural context broadly similar to investment law (or at least less dissimilar than any other international legal regime in existence). Modern case law and State practice present the most recent statement on the issue, even if the considerable uncertainty about the pedigree and rationale of the standard make clear conclusions problematic.

It was suggested in Part II that fair and equitable treatment refers to, or at least heavily draws upon, customary law, impacting the weight of recent practice. At one end of the spectrum, decisions of Tribunals that explicitly apply customary law would carry the greatest weight; decisions of Tribunals that accept the similarity of the treaty rule and customary law would also carry considerable weight; further along the line, decisions of Tribunals that implicitly adopt the methodology of identifying customary law *inter alia* by reference to other decisions could be taken into account; finally, decisions that neither explicitly nor implicitly apply customary law would carry least weight. Of course, explicit invocation by States of criteria of awards may contribute to customary law as State practice.

2. Modern standard of protection of property

The *Waste Management II* Tribunal elaborated the standard as an obligation not to engage in:

> conduct [that is] ... arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candor in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.[188]

Taking *Waste Management II* as the point of departure, the following sections will consider in turn different elements that have been alleged to constitute the modern

[188] *Waste Management II* Award (n 15) [98], accepted as accurate by Tribunals that explicitly apply the customary minimum standard, *GAMI* Award (n 104) [95]–[97]; *Methanex Corporation v US,* UNCITRAL Case, Final Award, 3 August 2005 16 ICSID Rep 40 Part IV Ch C [12]; *Glamis Gold Ltd v US,* UNCITRAL Case, Award, 8 June 2009 (2009) 48 ILM 1038 [559]; *Chemtura Corporation v Canada,* UNCITRAL Case, Award, 2 August 2010 [215]; *Railroad Development Corporation (RDC) v Guatemala,* ICSID Case no ARB/07/23, Award, 29 June 2012 [219], by Tribunals that accept some similarity between treaty and custom, *BG Group Plc v Argentina,* UNCITRAL Case, Final Award, 24 December 2007 [292] (set aside for an unrelated reason); *Victor Pey Casado and President Allende Foundation v Chile,* ICSID Case no ARB/98/2, Award, 8 May 2008 fn 611, [670]; *Biwater Gauff (Tanzania) Ltd v Tanzania,* ICSID Case no ARB/05/22, Award, 24 July 2008 [597]; *Rumeli* Award (n 31) [609]; *Jan de Nul N.V. and Dredging International N.V. v Egypt,* ICSID Case no ARB/04/13, Award, 6 November 2008 15 ICSID Rep 437 [187]; *Total S.A. v Argentina,* ICSID Case no ARB/04/1, Decision on Liability, 21 December 2010 [110]; by Tribunals that do not explicitly engage with customary law, *Frontier Petroleum Services Ltd v Czech Republic,* UNCITRAL Case, Final Award, 12 November 2010 [290]. It has also been invoked by States: Argentina (*Azurix Corp. v Argentina,* ICSID Case no ARB/01/12, Award, 14 July 2006 14 ICSID Rep 374 [350]; *Continental Casualty v Argentina,* ICSID Case no ARB/03/9, Award, 5 September 2008 [253]), Canada (*Chemtura Corporation v Canada,* UNCITRAL Case, Counter-Memorial of Canada, 20 October 2008 <http://naftaclaims.com> [680]), Ecuador (*Ulysseas, Inc v Ecuador,* UNCITRAL Case, Final Award, 12 June 2012 [206]), India (*White Industries Australia Limited v India,* UNCITRAL Case, Final Award, 30 November 2011 [5.2.2]), Kazakhstan (*Rumeli* Award (n 31) [592]), Mexico (*Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. and Talsud S.A. v Mexico,* ICSID Additional Facility Cases no ARB(AF)/04/3 and ARB(AF)/04/3, Award, 16 June 2010 [6–19]) and the US (*Chemtura,* Award ibid [115]).

standard: (i) arbitrariness, (ii) good faith, (iii) discrimination, (iv) transparency, (v) due process, and (vi) expectations. The main thesis is that the excessive focus on expectations may be systemically misleading: apart from the special rules on State contracts and the peculiar situation of entire dismantling of the regime upon which the investor has been invited to invest, an approach more with the grain of general practice would be to articulate the analysis in terms of arbitrariness, discrimination, transparency, and due process.

i. Arbitrariness

The *Waste Management II* Tribunal began its description of conduct capable of breaching the international standard by noting 'arbitrary, grossly unfair, unjust or idiosyncratic' conduct.[189] The ICJ in the *ELSI* case addressed arbitrariness in investment disputes by describing it as 'not so much opposed to a rule of law, as something opposed to the rule of law. ... a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety'.[190] While technically dealing with a treaty rule on arbitrary conduct, the analysis could have broader relevance,[191] and has been accepted as providing authoritative guidance to fair and equitable treatment.[192] Importantly, while the US and Italy mostly dealt with the appropriateness of goals and reasonableness of particular measures,[193] the test set out and applied in the judgment deferred on these issues

[189] *Waste Management II* Award (n 15) [98]. [190] *ELSI* Judgment (n 14) [128].

[191] The US relied on the meaning of arbitrariness in general international law, and interpreted references to general international law by invoking arbitrariness, *Elettronica Sicula S.p.A. (ELSI) (US v Italy)* ICJ Pleadings Volume I 79, 93 (Memorial of the US); ibid Volume II 385 (Reply of the US). The Italian elaboration of arbitrariness was introduced as applying '[i]n general', ibid Volume II 43 (Counter-Memorial of Italy). While the US later sought to limit the broader relevance of the *ELSI* holding, see below n 192, in the *ELSI* proceedings it emphasized the similarity of treaty rules on arbitrariness, unreasonableness, and fair and equitable treatment: 'other treaties, rather than prohibiting unfair or unequal treatment, affirmatively guarantee fair and equitable treatment', ibid Volume I 77 fn 2 (Memorial).

[192] *Mondev v US,* ICSID Additional Facility Case no ARB(AF)/99/2, Award, 11 October 2002 (2003) 42 ILM 85 [127]; *Técnicas Medioambientales Tecmed, S.A. v Mexico,* ICSID Additional Facility Case no ARB(AF)/00/02, Award, 29 May 2003 10 ICSID Rep 134 [154]; *Glamis* Award (n 188) [625]; *Cargill, Incorporated v Mexico,* ICSID AF Case no ARB/(AF)/05/2, Award, 18 September 2009 146 ILR 642 [291]; *Total* (n 188) [110] fn 99. The reaction of States has been broadly positive: while within the NAFTA context the US attempted to limit the relevance of *ELSI* standards of arbitrariness to the particular treaty term (*Mondev v US,* ICSID Additional Facility Case no ARB(AF)/99/2, Pleadings, 22 May 2002 <http://www.state.gov/documents/organization/15441.pdf> 688 (Clodfelter); *Mondev,* ibid [106]; *Glamis Gold Ltd v US,* UNCITRAL Case, Counter-Memorial of the US, 19 September 2006 <http://www.naftaclaims.com> [228]); Mexico (*Mondev,* ibid [108]; *Gemplus* Award (n 188) [2.19]) and Canada considered it to be instructive more generally (*ADF v US,* ICSID Additional Facility Case no ARB(AF)/00/1, Award, 9 January 2003 (2003) 18 ICSID Rev—Foreign Inv L J 195 [121]; *Merrill & Ring Forestry L.P. v Canada,* UNCITRAL, ICSID Administered Case, Award, 31 March 2010 [173]), and it has been approvingly invoked in the context of fair and equitable treatment by Ecuador (*M.C.I. Power Group L.C. and New Turbine, Inc. v Ecuador,* ICSID Case no 03/6, Award, 31 July 2007 [250]) and Kazakshtan (*Rumeli* Award (n 31) [592]). One implication of the broader relevance of *ELSI* is that one might in turn rely, with all due caution, on the investment cases dealing with treaty rules on arbitrariness to elaborate the particular aspect of the international standard, *Consortium R.F.C.C.* Award (n 39) [3.2.2.1]; *Noble Ventures v Romania,* ICSID Arbitration no ARB/01/11, Award, 12 October 2005 16 ICSID Rep 216 [182].

[193] The US argued that the 'where the means employed do not fit the expressed goal, or are legally impermissible, then those means are arbitrary and unreasonable', *ELSI* Pleadings II (n 191) 385 (Reply), see generally *ELSI* Pleadings I (n 191) 76–80 (Memorial), ibid Pleadings II 384–5 (Reply), ibid Pleadings III 101 (Gardner). Italy objected that concerns had been sufficiently serious, and that the goal was an appropriate one in principle but only could not be achieved by the particular measures, ibid Pleadings II 44–5 (Counter-Memorial). Later in the proceedings, Italy shifted the focus from the

and focused almost entirely on the formal and procedural safeguards of the measures adopted.[194] The *ELSI* Court might have decided the case through the lenses of intrusive or even moderately deferential reasonableness (as the US quite plausibly suggested, an unlawful purpose was *per se* arbitrary, and the domestic courts themselves had recognized the inappropriateness of measures for achieving the purpose). The methodology in fact adopted suggests considerable deference to what the State does and why, and scrutiny of the form and procedure by which it does it.

The deference to the policy choices, combined with the scrutiny of their implementation, underpin both the classical customary law and the practice of regional human rights courts.[195] When the UK presented *Azorian* under the broader rubric of unreasonableness, it did not challenge the policy of the quarantine but the formal and procedural problems of its implementation.[196] The law of direct expropriation explained public purpose as a necessary criterion but one read in deferential terms,[197] except when other criteria of lawfulness such as non-discrimination were also breached.[198] In the human rights context, the ECtHR in *Sporrong* authoritatively addressed purpose and necessity of measures as part of a deferential legal analysis.[199] Subsequent case law has endorsed the approach, deferring to the choices of regulatory policy and only considering alternative means to support the breach by otherwise arbitrary measures.[200]

There is no inevitability in adopting a particular structure of arbitrariness or stringency of review of particular components (legitimacy of purpose and appropriateness, necessity, and proportionality of measures provide the usual taxonomy). In different legal regimes, the lack of arbitrariness is determined differently,[201] and disputes regarding the Argentinean crisis illustrate the proposition within investment law.[202] The right

broader questions of ends of means to the more technical aspects of availability of competence in principle and the providing of reasons and legal basis in the decisions, ibid 464–5 (Rejoinder); ibid Volume III 229 (Capotorti).

[194] The examination of reasonableness of goals and measures was limited to the very deferential statement that '[i]t cannot be said to have been unreasonable or merely capricious', and it was the availability of the formal and procedural safeguards invoked by Italy in the Rejoinder and oral pleadings (n 193)—recitation of reasons and legal bases, existence of broader competence, availability of functioning remedies—that were decisive in rejecting the claim, *ELSI* Judgment (n 14) [129].

[195] nn 57–70. [196] n 58.

[197] 1961 Harvard Draft Convention (n 46) 555–6; *Amoco International Finance Corp v Iran* (1987) 15 Iran–USCTR 189, 233 [145]–[146]; *Santa Elena* Award (n 36) [71]; P Muchlinski, *Multinational Enterprises and the Law* (2nd edn OUP, Oxford 2007) 599–600; A Reinisch, 'Legality of Expropriations' in A Reinisch (ed), *Standards of Investment Protection* (OUP, Oxford 2008) 178–86.

[198] *BP Exploration Company (Libya) Limited v Libya* (1973) 53 ILR 297, 329; *ADC* Award (n 37) [430]–[433].

[199] *Sporrong* Court (n 114) [69]. [200] nn 141–6.

[201] N Emiliou, *The Principle of Proportionality in European Law: A Comparative Study* (Kluwer Law International, London 1996); JH Jans, 'Proportionality Revisited' (2000) 27 Legal Issues Economic Integration 239; B Kingsbury and S Schill, 'Investor–State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law' (2006) IILJ Working Paper 2009/6 24–30; R Kläger, *Fair and Equitable Treatment in International Investment Law* (CUP, Cambridge 2011) Ch 7.C.

[202] Necessity was sometimes considered by reference to the strict standards of circumstances precluding wrongfulness, for example, *CMS Gas Transmission Company v Argentina*, ICSID Case no ARB 01/08, Final Award, 12 May 2005 (2005) 44 ILM 1205 [315]–[331], or the more deferential standards of WTO law, *Continental Casualty* Award (n 188) [189]–[195], and other possible frameworks suggested include the margin of appreciation from the ECHR, WW Burke-White, and A von Staden, 'Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties' (2008) 48 Virginia J Intl L 307, or indeed an appropriately nuanced combination and modification of a number of approaches, J Kurtz, 'Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis' (2010) 59 ICLQ 325.

question to pose is whether the modern practice has changed the preference of the regimes outlined above to defer to the choices of the State and scrutinize the manner of implementation.

As one might expect in a decentralized regime, the modern investment protection law has dealt with arbitrariness in many different ways. At one end of the spectrum, the State's regulatory prerogatives provide the starting point,[203] and reasonableness is accepted without scrutinizing the alternatives.[204] An intermediate position accepts a high degree of deference in principle,[205] even if the availability of less restrictive measures[206] and excessive individual burden might lead to a finding of a breach.[207] A balanced position was adopted by the *Saluka v Czech Republic* (*Saluka*) Tribunal, requiring conduct 'reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and nondiscrimination'.[208] At the other end of the spectrum, an intrusive approach is adopted, rejecting the legitimacy of purpose[209] and reviewing the appropriateness and necessity of particular measures.[210] To recall the different approaches tested by the ECtHR, the cases at the former end of the spectrum reflect the ultimate deference of the *Handyside* Court, the latter cases follow the intrusiveness of dissenting Commissioners in *Handyside*, while *Saluka* suggests a *Sporrong* and *ELSI*-like focus on the manner in which the balance is struck.[211]

A systemically coherent approach would further separate the *Saluka* criteria directed at form and procedure from reasonableness, scrutinizing reasonableness if the safeguards are not complied with.[212] Unless either no justification can be provided[213] or formal and procedural safeguards have not been complied with, the legitimacy of the purpose and the choice of particular measures should be treated with great deference.[214] Conversely, arbitrariness and inconsistency of content, form, and procedure permits a critical consideration of the purpose behind apparently arbitrary measures,[215] moreover, if harassment

[203] *Saluka* (n 46) [306]; *Enron Corporation & Ponderosa Assets, L.P. v Argentina*, ICSID Case no ARB/01/3, Award, 22 May 2007 [261] (annulled for unrelated reasons).

[204] *Pope & Talbot Inc. v Canada*, UNCITRAL Case, Final Merits Award, 10 April 2001 122 ILR 352 [123], [125], [128], [155].

[205] *SD Myers, Inc. v Canada*, UNCITRAL Case, Partial Award, 13 November 2000 121 ILR 173 [261], [263]; *GAMI* Award (n 104) [93].

[206] Ibid [255], [266].

[207] *EDF (Services) Ltd v Romania*, ICSID Case No ARB/05/13, Award, 2 October 2009 [290]–[297].

[208] *Saluka* (n 46) [307].

[209] *Eastern Sugar B.V. v Czech Republic*, SCC Case no 88/2004, Partial Award, 27 March 2007 [338].

[210] *Tecmed* Award (n 192) [158]–[173]. In the *Total* case, the Tribunal considered the policy of energy pricing to be inappropriate for achieving its objective, (n 188) [325]–[335].

[211] *Harris, O'Boyle and Warbrick* (n 144) 674. [212] *Capital Bank* (n 93) [135]–[140].

[213] *Siemens A.G. v Argentina*, ICSID Case no ARB/02/8, Award, 6 February 2007 14 ICSID Rep 518 [319], *Yury Bogdanov v Moldova*, SCC Case no V (114/2009), Final Arbitral Award, 30 March 2010 [89]; or if the purpose is entirely unjustifiable, such as corruption, *EDF* Award (n 207) [221].

[214] *Methanex* Award (n 188) Part IV-Ch C [9]–[27]; *Noble Ventures* Award (n 192) [177]–[179]; *Glamis* Award (n 188) [804]–[806], [817]–[818]; *Chemtura* Award (n 188) [135]–[163]. In the *ELSI* case, the US argued that the plant had been seized for political reasons, regardless of social unrest, and therefore was arbitrary, *ELSI* Pleadings II (n 191) 384. While Judge Schwebel relied on the impropriety of purpose in finding arbitrariness, *Elettronica Sicula S.p.A. (ELSI) (US v Italy)* [1989] ICJ Rep 15, Dissenting Opinion of Judge Schwebel 94, 115, the Court emphasized the formal and procedural propriety and did not engage in further inquiry of proper purposes and means, n 194, *ELSI* Judgment (n 14) [129].

[215] *Tecmed* Award (n 192) [158]–[173]; *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v Turkey*, ICSID Case no ARB/02/05, Award, 19 January 2007 [247]–[248]. In the *GAMI* case, the Tribunal identified the breach of domestic law and failure to adopt appropriate measures but rejected the claim on the grounds of non-attribution (n 104) [104]–[110].

has taken place.[216] The *Railroad Development Corporation (RDC) v Guatemala* (*RDC*) award shows how this approach could be applied. After identifying the substantive ambiguity and lack of procedural safeguards in the regime as such, the Tribunal demonstrated how it had been abused for inappropriate purposes, 'under a cloak of formal correctness in defense of the rule of law, in fact for exacting concessions unrelated to the finding'.[217] Classical law, human rights practice, and the leading authorities of modern law point in the same direction: international law defers to the legitimacy of the purpose and means chosen to pursue it as such (unless they are entirely indefensible), but scrutinizes the formal and procedural safeguards against abuse in their implementation (the absence of which permits a more critical engagement with the ends and means).

Classical law had also generated special rules regarding arbitrariness of contractual breaches, in most instances focusing on the inappropriate reliance on, rather than inappropriate use of, public powers, and the broader formal and procedural propriety.[218] The modern cases have largely accepted that a breach of a contract is not *per se* a breach of international law,[219] and the availability of judicial remedies weighs against inappropriateness of the breach.[220] For most authorities, the criterion of wrongfulness is the character of the extra-contractual public power by which the breach has been committed.[221]

[216] *Pope* Merits (n 204) [156]–[181]; *Tecmed* Award (n 192) [163]; *Azurix* Award (n 188) [390]–[393]; *Tokios Tokelès v Ukraine*, ICSID Case no ARB/01/3, Award, 26 July 2007 [123]; ibid Dissenting Opinion of Arbitrator Price [2]; *Desert Line Projects L.L.C. v Yemen*, ICSID Case no ARB/05/17, Award, 6 February 2008 (2009) 48 ILM 82 [179].

[217] *RDC* Award (n 188) [220]–[235]. The *Renta 4* Tribunal sought to distinguish what appears to have been a similar kind of reasoning from that practised by the ECtHR under the aegis of the margin of discretion, (n 86) [158]. However, the comparative experience calls precisely for such an examination of substantive and procedural arbitrariness so as to identify the abusive intention behind the measures, and the differences between *Renta 4* and *Yukos* are better explained either by reference to the peculiar legal standard of intentional abuse brought in by Article 18 of the ECHR, or by plausibly different appreciations of complex facts, see n 86.

[218] nn 72–82.

[219] See, among others, *Robert Azinian and others v Mexico*, ICSID Additional Facility Case no ARB(AF)/97/2, Award, 1 November 1999 (1999) 14 ICSID Rev—Foreign Investment L J 538 [87]; *Waste Management II* Award (n 15) [114]; *Parkerings Compagniet AS v Lithuania*, ICSID Case no ARB/05/8, Award on Jurisdiction and Merits, 14 August 2007 [316], [341]–[345]; *Impregilo S.p.A. v Pakistan*, ICSID Case no ARB/03/3, Decision on Jurisdiction, 22 April 2005 12 ICSID Rep 245 [260]; *Biwater* Award (n 188) [457]–[460]; *Bayindir Insaat Turizm Ticaret ve Sanayi A Ş v Pakistan*, ICSID Case no ARB/03/29, Award, 24 August 2009 [180]; *Gustav F W Hamester GmbH & Co. KG v Ghana*, ICSID Case no ARB/07/24, Award, 18 June 2010 [328]. While not without uncertainty, some authorities might conflate both breaches, *Iurii Bogdanov and others v Moldova*, SCC Case, Award, 22 September 2005 15 ICSID Rep 49 [76]; *Eureko* (n 38) [232]; *Rumeli* Award (n 31) [615]; *Walter Bau v Thailand*, UNCITRAL Case, Award, 1 July 2009 [12.31]. The *Azurix* Tribunal seemed to follow both approaches simultaneously, finding breaches of fair and equitable treatment because of a factually indefensible contractual conduct, *Azurix* Award (n 188) [374], and politicization, ibid [375] (the *Azurix* annulment committee noted the latter point, refusing to infer, however, that in the former situation the basis of breach was merely domestic law, *Azurix Corp. v Argentina*, ICSID Case no ARB/01/12, Decision on the Application of Annulment, 1 September 2009 [166], [171]).

[220] *Waste Management II* Award (n 15) [116]; *Parkerings*, ibid [316]–[320].

[221] *Mondev* Award (n 192) [134] ('a governmental prerogative to violate investment contracts'); *Consortium R.F.C.C.* Award (n 39) [3.2.2.1] ('*puissance publique*'); *Waste Management II* Award (n 15) [115] ('outright and unjustified repudiation'); *Impregilo v Pakistan* (n 219) [260] ('the State in the exercise of its sovereign authority ("*puissance publique*")'); *Continental Casualty* Award (n 188) [261.iii] ('unilateral modification of contractual undertakings by governments'); *Duke Energy Electroquil Partners & Electroquil S.A. v Ecuador*, ICSID Case no ARB/04/19, Award, 18 August 2008 [354] ('any use of sovereign power'), [355] ('use of the State's "*imperium*"'); *Biwater* Award (n 188) [497]–[502], [615], [627], [636]; *LLC Amto v Ukraine*, SCC Case no 80/2005, Final Award, 26 March 2008 [108]. The *Impregilo* Tribunal may also be included in this category in the broadest sense: even though responsibility was based on a contractual breach to restore equilibrium, it had been upset by governmental measures in the first place, *Impregilo S.p.A. v Argentina*, ICSID Case no ARB/07/17, Award, 21 June 2011 [325]–[331].

The cases that consider the discriminatory purpose of the breach[222] are better read not as addressing the public/private powers distinction—after all, xenophobia-inspired conduct is hardly limited to public authorities—but as applying a separate rule that prohibits discriminatory breaches of contracts.[223]

An intermediate question relates to politicized contractual breaches. One line of authority may be explained as elaborating the classical rule on arbitrary frustration of contracts, taking into account both the public character and broader purpose to undermine the contract by all possible means.[224] A particularly vexing question relates to politically inspired breaches that are neither public in character nor discriminatory in purpose.[225] At the other end of the spectrum, the distinction between contractual breaches in bad faith and breaches of the international standard becomes blurred, with the public elements in the picture not necessarily relating to the character of the breach. For example, one Tribunal identified a breach of fair and equitable treatment when the State had arbitrarily, irrationally, and in bad faith applied the contractual clauses on requisition and termination of the concession.[226] Unless the traditional position has been superseded and fair and equitable treatment now requires compliance with contracts in good faith (as an umbrella clause 'lite'), this conclusion is not obviously correct, at least if the contractual remedies are available.[227]

ii. Good faith

Since the vague text of the fair and equitable treatment clause does not explicitly direct the interpreter to the applicable criteria, some Tribunals have turned to more general concepts such as good faith and abuse of rights. The relationship between these principles

[222] *Waste Management II* Award (n 15) [115] (failure to comply because of the financial crisis rather than prejudice); *Eureko* (n 38) [233] ('acted not for cause but for purely arbitrary reasons linked to the interplay of Polish politics and nationalistic reasons of a discriminatory character'); the *Bayindir* Tribunal found that the contractual termination was justified under the contract and not motivated by considerations of political, financial, or discriminatory character, *Bayindir* Award (n 219) [281]–[315].

[223] In the Hague Conference, States emphasized the wrongfulness of discriminatory breaches, Austria, Rosenne *Hague II* (n 43) 452, Hungary, ibid 453, the Netherlands, Poland, Switzerland, ibid 454. On the 19th-century US practice, see Whiteman *Damages* (n 82) 1555, 1557, 1589–90.

[224] *Eureko* (n 38) [233]; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v Argentina*, ICSID Case no ARB/97/3, Award, 20 August 2007 [7.4.18]–[7.4.46]; *Biwater* Award (n 188) [497]–[502], [615], [627], [636].

[225] On the one hand, a political manner of reasoning may be said to be peculiar to the public authority. On the other hand, non-commercial or not directly commercial concerns might motivate private actors (for example, public perception of the counterparty), and, if no extra-contractual public powers are employed, the underlying legal policy of precluding abuse of dual powers may be fulfilled without finding conduct wrongful. See *Azurix* Award (n 188) [375] ('the tariff regime was politicized'); *Azurix* Annulment (n 219) [171] ('conduct…based on political considerations, rather than on applying the terms of the Concession Agreement'); *Bayindir* Award (n 219) [283]–[287].

[226] While the State's avowed reason for acting was the imminent peril of national security, the basis of this right was contractual, *Gemplus* Award (n 188) [7.70], [7.77]–[7.78]. The *Siemens* Tribunal also based its conclusion on the breach of good faith, even though the invocation by the State of its constitutional inability to comply with contract might arguably support viewing the breach as public in character, *Siemens* Award (n 213) [308].

[227] As the *Waste Management II* puts it, responsibility would not arise 'provided that it [the breach] does not amount to an outright and unjustified repudiation *and* provided that some remedy is open to the creditor to address the problem' (n 15) [115] (emphasis added); see also on the lack of any special good faith obligation for States, *Ambatielos* Pleadings (n 73) 389–90 (Fitzmaurice on behalf of the UK).

and the international standard has been presented in a number of ways,[228] from the international standard providing for a 'basic obligation to act in good faith',[229] to good faith guiding the application[230] or explaining the limits of fair and equitable treatment,[231] to fair and equitable treatment constituting an expression of good faith and therefore imposing concrete and far-reaching obligations.[232] However, while the international standard and good faith may reflect similar normative sentiments in the broadest sense of the term, it is questionable whether the suggested legal connection can be properly demonstrated.

Good faith might certainly be relevant in informing other established aspects of the international standard. The more extreme aspects of arbitrariness might be explained from the perspective of bad faith and abuse of rights (as in the *RDC* award, where Guatemala had abused particular rules for improper ends).[233] Similarly, if discrimination is an element of the international standard, then certain aspects of discrimination may be viewed from the perspective of bad faith.[234] More controversially, some Tribunals might have accepted that breach of a contract in bad faith is internationally wrongful.[235] However, it is one thing to apply recognized rules and principles through the lens of good faith, and entirely another to derive new rules solely from good faith.

The ICJ has recognized that, while the principle of good faith is one of the basic principles governing the creation and performance of international obligations, 'it is not in itself a source of obligation where none would otherwise exist'.[236] The abuse of rights precludes the exercise of existing rights in a particular manner, leading to the same result in negative terms that good faith calls for in positive terms.[237] Consideration of good faith and abuse of rights may underline particular legal regimes,[238] and the requirements of good faith and abuse of rights for the performance of particular obligations may be concretized in separate rules,[239] but it would be problematic if an interpreter were to rely solely on good faith to *ipse dixit* justify new content of the obligations.[240]

The *Neer* standard relied on 'bad faith' and 'wilful neglect of duty' to explain the international standard, showing the legal emptiness of such qualifications when the

[228] R Dolzer and CH Schreuer, *Principles of International Investment Law* (OUP, Oxford 2008) 5–6, 144–6; Newcombe and Paradell *Law and Practice* (n 40) 280; A von Walter, 'The Investor's Expectations in International Investment Arbitration' in A Reinisch and C Knahr (eds), *International Investment Law* (Eleven International Publishing, Utrecht 2009) 195–7.

[229] *Waste Management II* Award (n 15) [138].

[230] *International Thunderbird Gaming Corporation v Mexico*, UNCITRAL Case, Final Award, 26 January 2006, Separate Opinion of Arbitrator Waelde [25]–[26].

[231] *International Thunderbird Gaming Corporation v Mexico*, UNCITRAL Case, Final Award, 26 January 2006 [147].

[232] *Tecmed* Award (n 192) [153]–[155].

[233] *RDC* Award (n 188) [220]–[235]; similarly regarding different hypotheses of arbitrary behaviour, *ADF* Award (n 192) [191], or a conspiracy against the investor, *Waste Management II* Award (n 15) [138], *Bayindir* Award (n 219) [224] (in some cases conspiracies were found to have actually taken place, *Petrobart Limited v Kyrgyz Republic*, SCC Case no 126/2003, Award, 29 March 2005 13 ICSID Rep 387 [80]–[92], [119]–[123]; *Vivendi II* Award (n 224) [7.4.18]–[7.4.46]).

[234] Certain aspects of denial of justice have been considered from the perspective of ill-will, Ch 8 n 116.

[235] nn 225–6.

[236] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)* (Preliminary Objections) [1998] ICJ Rep 275 [39].

[237] R Kolb, *La bonne foi en droit international public* (Presses Universitaires de France, Paris 2000) 441.

[238] Ibid 157, 177 et seq.

[239] WTO, *US: Import Prohibition of Certain Shrimps and Shrimp Products* (6 November 1998) WT/DS58/AB/R [158].

[240] See the Canadian argument in *Merrill & Ring* Award (n 192) [170].

content of the obligation itself was not established in the first place.[241] The contemporary developments seem similarly vulnerable to the criticism that to use the manner of performance of obligation in the process of identifying the content of the obligation is either superfluous or circular. To treat fair and equitable treatment as imposing obligations to act in good faith is superfluous because this principle is already implicit in the international legal order. If States want to reconfirm the existence of this principle *inter se*, then fair and equitable treatment would not impose any obligation at all, operating only as a reminder that the compliance with other obligations has to be conducted in good faith. Conversely, to treat fair and equitable treatment as an expression of good faith (and to derive far-reaching obligations from this argument) requires an anterior primary rule to which fair and equitable treatment would explain the manner of application. To abuse rights or to comply with obligations in good faith, rights and obligations with certain content must exist which can be abused or complied with. To restate the international standard in terms of treating investors in good faith or not abusing the investors' rights does not provide any obvious added value to the identification of the standard's content.

iii. Discrimination

The relationship between the international standard and non-discrimination was at the heart of the classical debates of the international standard, and was also important in the NAFTA's fair and equitable treatment debate. In the NAFTA, after some uncertainty in the earlier cases[242] and the reminder by the FTC about the distinction between fair and equitable treatment and other obligations,[243] Tribunals have rejected non-discrimination as an element of the international standard,[244] relying on the formulation of other treaty rules where prohibition of discrimination has been formulated in explicit terms.[245] This reasoning attributes excessive importance to the formulation of *treaty* rules in the determination of the content of *customary* law. If Article 1105(1) of the NAFTA indeed 'prescribes the customary international law minimum standard',[246] then the ordinary meaning of the treaty term is directly derived from customary law.[247] Even if parties do not consider non-discrimination to be a prominent element of the international standard, 'in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough'.[248] If customary law does not provide a rule of non-discrimination, it is not brought into the treaty; if customary law provides a rule of non-discrimination, treaty parties have to either explicitly agree to remove it by a treaty rule or agree on an exhaustive rule of special customary law to prevent it from being brought into the treaty. Non-confirmation is insufficient to preclude an otherwise valid reference to customary law.[249]

[241] See text at Ch 2 nn 80–1.

[242] *SD Myers* (n 205) [266]–[267].

[243] NAFTA Free Trade Commission, 'Notes of Interpretation of Certain Chapter 11 Provisions' (adopted 31 July 2001) <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/NAFTA-Interpr.aspx?lang=en&view=d" www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/NAFTA-Interpr.aspx?lang=en&view=d>.

[244] *Methanex* Award (n 188) Part IV—Ch C [14]-[26]; *Grand River Enterprises Six Nations Ltd and others v US*, UNCITRAL Case, Award, 12 January 2011 [208]–[209].

[245] Ibid.

[246] NAFTA Free Trade Commission (n 243) 2(1).

[247] See the argument in Ch 6 I, II.1.

[248] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)* (Merits) [1986] ICJ Rep 14 [184].

[249] It is not uncommon for a treaty rule that refers to customary law to list the elements of customary law in a non-exhaustive manner. For example, Article 51 of the UN Charter explicitly lists 'armed attack' as a condition of self-defence, referring to customary law both for its definition, and for the (unlisted) conditions of necessity and proportionality, *Nicaragua* ibid [176].

In the classical international law, the obligation to treat persons and property of aliens in a non-discriminatory manner was well-established.[250] The disagreement between supporters of the Calvo Doctrine and the international standard was underpinned by a fundamental agreement about non-discrimination as a *de minimis* element of the treatment of aliens.[251] The better-developed rules were based on non-discrimination: within denial of justice, a discriminatory denial of access to justice was uncontroversially wrongful,[252] as were discriminatory breaches of contract[253] and discriminatory expropriations.[254] More recently, a different reading of the developments has been proposed, suggesting that, rather than accepting non-discrimination as implicit in rules on the treatment of aliens, international law permits discrimination, to the extent that special rules do not prohibit it and the international standard is satisfied.[255] However, the historical narrative, starting from the prominent prohibitions of discriminatory administration of justice in particular and the discriminatory conduct in general, suggests that when new rules are developed, they go with, rather than against, the grain of non-discrimination. There are no obvious examples of other customary rules on the treatment of aliens that would permit discrimination. If non-discrimination is accepted as constituting a non-exhaustive[256] core of the international standard of the first half of the twentieth century, the proper question to ask is whether subsequent practice and *opinio juris* in favour of lawfulness of discriminatory conduct have changed the rule.

The recent treaty practice may be read in two ways. The extensive treaty practice on non-discrimination, often subject to careful limitations and carve-outs, could become superfluous if non-discrimination were to be implicit in the international standard.[257] When States draft treaty rules linked with non-discrimination guarantees, they usually include the criterion of non-discrimination explicitly,[258] even if it already exists in custom.[259] This practice suggests that when States wish to provide for discrimination as a part of other rules, they provide so expressly, even when it may be superfluous in normative terms. The treaty practice linking reasonableness or non-arbitrariness with discrimination may reflect an attempt to recreate the structural logic of the classical law

[250] According to *Oppenheim*, 'every State is by the Law of Nations compelled to grant to foreigners equality before the law with its citizens as far as safety of person and property is concerned', L Oppenheim, *International Law* (Volume I: Peace, Longmans, Green & Co., London 1905) 376; substantively similar if less capitalized, R Jennings and A Watts (eds), *Oppenheim's International Law* (Volume I: Peace, 9th edn Longman, London 1992) 910; see Ch 2 n 25 for full references to the intervening editions.

[251] See text at Ch 1 nn 97–8; Ch 2 nn 15–26; 6 Moore Digest (n 63) 698–701.

[252] Ch 8 nn 61–2. [253] n 223.

[254] *BP* (n 198) 329; AFM Maniruzzaman, 'Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign Investment: An Overview' (1998–1999) 8 J Transnational L Policy 57; Muchlinski *Multinational Enterprises and the Law* (n 197) 600; Reinisch 'Legality of Expropriations' (n 197) 186–91; Newcombe and Paradell *Law and Practice* (n 40) 373–4.

[255] Jennings and Watts Oppenheim 9th (250) 932, relied on by C McLachlan, L Shore, and M Weiniger, *International Investment Arbitration: Substantive Principles* (OUP, Oxford 2007) 213; *Grand River Enterprises* Award (n 244) [208]. While the editors do not rely on any particular practice in support of discrimination, one of them was a judge in the *ELSI* case, where Italy denied the customary nature of the prohibition of discrimination, *ELSI* Pleadings III (n 193) 221 (Capotorti).

[256] Indeed, Freeman suggested that in the general economic activity national treatment was the absolute maximum that the alien might be entitled to, Freeman *Denial of Justice* (n 28) 513–14.

[257] Newcombe and Paradell *Law and Practice* (n 40) 290.

[258] Reinisch 'Legality of Expropriations' (n 197) 186; Newcombe and Paradell *Law and Practice* (n 40) 373. [259] Ibid.

through treaty law.[260] While not influencing customary law, these patterns of treaty-making suggest a change in the perception and thinking of law-makers.

At the same time, the limits of the international standard were always uncertain, and the Calvo/NIEO arguments,[261] or limitation of the standard by reference to the subject-matter of regulation (for example, competition),[262] could have led to narrow readings, with treaty rules of non-discrimination providing the only realistic protection.[263] The treaty practice and case law on fair and equitable treatment, full protection and security, arbitrariness and unreasonableness, and expropriation show sometimes considerable substantive overlap between different rules.[264] If an *ex abundanti cautela* overlap is tolerated by BITs, the argument about clear separation of treaty rules has less force.

On balance, the role of non-discrimination in the classical law was so great that very clear and consistent practice and *opinio juris* regarding lawfulness of discriminatory conduct would be required to change it. While the treaty-making practice suggests a shift in that direction, it has not yet been expressed in an appropriate form to affect and change customary law. The better view therefore is that discrimination is still a part of the international standard, requiring reasonable justification for different treatment of similar cases.[265] In any event, at least some instances of discrimination may trigger other aspects of the international standard. Conduct motivated by bias and prejudice may be too arbitrary to qualify as undertaken for a public purpose.[266] The same factors could breach the minimal requirements of form. Finally, discrimination may be relevant in terms of procedural propriety; for example, when a State favours another investor in negotiations.[267]

iv. Transparency

The modern investment law has addressed the formal propriety of measures through the lenses of transparency, after some initial uncertainty about the source[268] elaborating it

[260] *Lauder v Czech Republic*, UNCITRAL Case, Award, 3 September 2001 9 ICSID Rep 66 [214]–[221]; *CME* Partial Award (n 38) [612]; *Saluka* (n 46) [457]–[463]; *Rumeli* Award (n 188) [679]; *Joseph Charles Lemire v Ukraine*, ICSID Case no ARB/06/18, Award, 14 January 2010 [354], [369]–[372].

[261] On Calvo, see Ch 1 nn 77–98; on NIEO, see Ch 3 I.1.

[262] *United Parcel Service v Canada*, UNCITRAL Case, Award on Jurisdiction, 22 November 2002 7 ICSID Rep 288 [83]–[99].

[263] *United Parcel Service v Canada*, UNCITRAL Case, Award on the Merits, 24 May 2007 [80]–[81].

[264] GC Moss, 'Full Protection and Security' in A Reinisch (ed), *Standards of Investment Protection* (OUP, Oxford 2008) 146–9; CH Schreuer, 'Fair and Equitable Treatment (FET): Interactions with Other Standards' (2007) 4 (5) Transnational Dispute Management; V Heiskanen, 'Arbitrary and Unreasonable Measures' in A Reinisch (ed), *Standards of Investment Protection* (OUP, Oxford 2008).

[265] *CMS* Award (n 202) [290]; *Saluka* (n 46) [311]–[347].

[266] *CMS* Award (n 202) [290]; *Eureko* (n 38) [233]; *Eastern Sugar* (n 209) [314]. The *Saluka* Tribunal understood discriminatory conduct as 'based on unjustifiable distinctions', (n 46) [309].

[267] *Saluka* (n 46) [361]–[407].

[268] The early *Metalclad* case drew on transparency expressed in other treaty rules, *Metalclad* Award (n 38) [76], but the FTC interpretation was taken as a criticism of this position, n 243, and it was not followed. Some Tribunals might have relied on the WTO rules on transparency, *SD Myers, Inc. v Canada*, UNCITRAL Case, Partial Award, 13 November 2000, Separate Opinion of Arbitrator Schwartz 121 ILR 130 [245]–[258]; *Champion Trading Company Ameritrade International, Inc. v Egypt*, ICSID Case no ARB/02/9, Award, 27 October 2006 14 ICSID Rep 485 [161], but neither the interpretative relevance nor functional similarity seem sufficient to make such an argument.

in the traditional case-by-case manner.[269] The language of transparency is used to designate different matters, sometimes criticizing conduct for being in apparent breach of domestic law[270] or justified only by sparse reasoning,[271] and sometimes addressing the choice of different means,[272] matters that may be reasonably expected,[273] or procedural improprieties.[274] For the concept of 'transparency' to serve a useful analytical purpose, it should have certain logical limits. In line with the human rights practice, the issues of transparency will be considered through the prism of formal requirements of lawfulness, as distinct from reasonableness or expectations.

In the classical law, direct expropriation did not focus on the form as such, with due process as a criterion of international lawfulness requiring domestic lawfulness without much further elaboration.[275] The inquiry into indirect expropriation by arbitrary conduct did consider compliance with domestic law sufficient reasoning.[276] The *ELSI* case memorably rejected the international arbitrariness despite the domestically recognized unlawfulness, emphasizing the presence of legal and factual reasoning.[277] Finally, the case law of the ECtHR has explained the requirements of form in great detail, building on the concept of 'lawfulness' and elaborating the separate criteria of compliance with domestic law, accessibility, foreseeability, consistency, and also the procedural safeguards.[278] The following sections will consider the investment case law from the perspective of *ELSI* and the ECtHR, addressing in turn the lawfulness, accessibility, and foreseeability.

First, investment Tribunals have been willing to expressly or implicitly decide on the non-compliance with domestic law.[279] The difference from the greater caution of the human rights practice may be explained in light of the different requirements for the exhaustion of domestic remedies: the ECtHR is likely to be able to consult the domestic judgments in the dispute, while the investment Tribunal will possibly be the first judicial body to consider the issue. In addition, breach of domestic law would lead to an automatic breach of P1-1[280] but probably not of fair and equitable treatment, therefore Tribunals may afford to be more intrusive in light of relatively lesser importance of the criterion.[281] Investment treaty Tribunals are entitled to consider *inter alia* domestic law issues.[282] Still, the general trend in the international standard seems to be to evade the issue of technical breach of domestic law and focus on broader improprieties.[283] In

[269] *Maffezini v Spain*, ICSID Case no ARB/02/1, Award, 13 November 2000 (2001) 16 ICSID Rev—Foreign Investment L J 212 [83]; *Waste Management II* Award (n 15) [98]; *Tecmed* Award (n 192) [154]; *Saluka* (n 46) [309]; *Vivendi II* Award (n 224) [7.4.31]; *Rumeli* Award (n 31) [609], [617]–[618]; *PSEG* Award (n 215) [173]–[174], [240]–[256]; *Biwater* Award (n 188) [602]; *Siemens* Award (n 226) [308].

[270] *Maffezini* Award ibid. [271] *Rumeli* Award (n 31) [617].

[272] *Vivendi II* Award (n 224) [7.4.31]. [273] *Tecmed* Award (n 192) [154]; *Saluka* (n 46) [348]–[407].

[274] *Rumeli* Award (n 31) [618]; *PSEG* Award (n 215) [246]. [275] Ch 3 n 68.

[276] nn 65–6. [277] nn 190–4. [278] nn 164–72.

[279] *Metalclad* Award (n 38) [85]–[86]; *Maffezini* Award (n 269) [72]–[83]; *PSEG* Award (n 215) [256]; *Lemire* Award (n 260) [354], [385].

[280] nn 190–4.

[281] *ELSI* (n 14) [73]; *ADF* Award (n 192) [190]; *GAMI* Award (n 104) [97]; *Azurix* Annulment (n 219) [171].

[282] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v Chile*, ICSID Case no ARB/01/07, Decision on Annulment, 21 March 2007 13 ICSID Rep 500 [72]–[75]; *CMS Gas Transmission Company v Argentina*, ICSID Case no ARB 01/08, Decision of the *ad hoc* Committee on the Application for Annulment, 25 September 2007 14 ICSID Rep 251 [81]–[85]; *Azurix* Annulment (n 219) [157]–[177]; E Gaillard and Y Banifatemi, 'The Meaning of "and" in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process' (2003) 18 ICSID Rev—Foreign Investment L J 375; Z Douglas, *The International Law of Investment Claims* (CUP, Cambridge 2009) Ch 2.

[283] In denial of justice, review of substance of the judgment is the exception, Ch 8.III.2.iv, law of contracts focuses on the character of powers exercised rather than the substance of the breach, nn 72–82, 218–27, and the law of expropriation presents domestic lawfulness as systemically linked with domestic remedies, Ch 3 nn 68–9.

line with the general ECtHR tendency to defer to the opinions of domestic authorities on lawfulness, it may be preferable to restate such criticism in terms of other formal inadequacies.

The second perspective relates to the accessibility of relevant rules, considered as satisfied in the classical law by public governmental proclamations.[284] The usual publication practices have been deemed sufficient in the human rights practice, and corporations are expected to employ competent specialists in finding the relevant rules. In investment law, at one end of the spectrum the *Tecmed* Tribunal has called for absolute transparency,[285] while other Tribunals have used the more cautious negative language of complete lack of transparency.[286] The second perspective goes more with the grain of protection of the diligent investor, but it may be preferable to restate its subjective positive–negative dichotomy in the more constructive terms of sufficient accessibility in light of local practices, where the investor has relied on competent assistance.[287]

The third ECtHR requirement addresses the foreseeability and predictability of rules, compliance depending on the nature of the particular issue and, similarly to accessibility, requiring reliance on competent legal advice. In *ELSI*, the presence of factual and legal reasoning—albeit found to be legally wrong—was one of the two considerations that supported the lack of arbitrariness.[288] The relevance of foreseeability of rules and their application has been recognized in recent case law. This consideration may work against the investor who has failed to receive competent advice.[289] If officials suggest or imply a certain position of domestic law, the benchmark for the value of such statements is domestic law: unless the law authorizes the official to interpret the law authoritatively,[290] the statements should not replace an objective inquiry into the legal merits.[291] Giving due deference to different styles of legal reasoning, Tribunals have accepted appropriate developments within judge-made law,[292] and well-reasoned[293] or even seemingly formalistic and superficial documents, when the substantive position is correct.[294] Conversely, lack of foreseeability may support the investor's position where the content of broader rules is impossible to identify[295] or particular decisions relating to the investor do not reach the degree of intelligibility to enable the investor to understand the position of the authorities.[296]

[284] *Jesse Lewis* (n 63) 92.

[285] *Tecmed* Award (n 192) [154]. [286] *Waste Management II* Award (n 15) [98].

[287] One Tribunal rejected the claim about lack of transparency by noting that the relevant laws and decrees 'were public, available, or have been published or produced by the Respondent upon the request of the Claimant', *Champion Trading* Award (n 268) [164].

[288] *ELSI* (n 14) [129]; nn 193–4.

[289] *ADF* Award (n 192) [189]; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v Chile*, ICSID Case no ARB/01/07, Award, 25 May 2004 (2005) 44 ILM 91 [175]–[178]; *Parkerings* Award (n 219) [342]. While the emphasis by the *Metalclad* Tribunal on the belief of the investor in a certain reading of law, induced by officials, may be read as going too far in not requiring an independent inquiry, *Metalclad* Award (n 38) [85], the Tribunal found the belief to be either entirely or substantially correct, ibid [85]–[86].

[290] *Thunderbird* Award (n 231) [149]–[162].

[291] *Metalclad* Award (n 38) [85]–[86]. The *MTD* Tribunal might have attributed slightly excessive importance to the investor's perception of the importance of a particular institution that did not seem to follow objectively from the domestic law or independent legal advice, *MTD* Award (n 289) [163].

[292] *Mondev* Award (n 192) [137]–[138]; *ADF* Award (n 192) [189].

[293] *Thunderbird* Award (n 231) [198]; *Glamis* Award (n 188) [764].

[294] *Genin* Award (n 94) [351]–[357]. [295] *Metalclad* Award (n 38) [88].

[296] *Saluka* (n 46) [420]–[425]; *Rumeli* Award (n 31) [617]; *Lemire* Award (n 260) [315], [371]. Despite the far-reaching language of expectations, parts of the *Tecmed* award may be read as legitimately

The final aspect of lawfulness identified by the ECtHR case law relates to consistency of conduct.[297] Even though the inconsistency of proclaimed purposes, means, pronouncements and conduct has been at issue in a number of investment cases,[298] it has usually been rationalized in terms of frustration of expectations. The comparative analysis suggests that it is preferable to minimize the importance of the theoretically somewhat uncertain perspective of expectations in favour of an objective formal criterion of consistency of conduct of authorities in relation to the investor. The measures below the *de minimis* level of consistency preclude any meaningful foreseeability and understanding of the legal position.

v. Due process

The focus on procedural aspects has a strong pedigree in the interpretation of the international standard, particularly denial of justice. The law of indirect expropriation addressed the procedural elements in two ways, with either the expropriation itself taking place through denial of justice, or, as illustrated by the *de Sabla* case, the absence of procedural remedies supplementing the general picture of arbitrariness.[299] The practice regarding due process as a criterion of lawfulness for expropriation has similarly recognized both the direct relevance of procedural propriety (particularly regarding advance notices) and the indirect requirement of access to justice.[300] Finally, the case law of the ECtHR has required either access to court or significant procedural safeguards when interference with property rights takes place.[301] The position of modern investment protection law will also be addressed from the dual perspective of procedural safeguards as such and the indirect relevance of access to justice.

The necessary procedural safeguards may be addressed on three levels. The law of denial of justice is entirely devoted to procedural safeguards within administration of justice.[302] Conversely, within a contractual context, the usual contractual procedures and remedies, rather than due process, provide the benchmark.[303] The interesting case relates to the matters that fall in between denial of judicial justice and contractual remedies, mainly regarding different kinds of administrative proceedings. While the particular requirements of judicial conduct cannot be applied *verbatim* to conduct outside judicial proceedings, some of them may be taken as a starting point of analysis, accepting that they are likely to be less demanding than in the judicial process.[304] The *Thunderbird v Mexico* and *Genin v Estonia* awards are consistent with this approach, addressing the due process of administrative decision-making by using the vernacular of denial of justice, and not finding the breach of the international standard despite procedural irregularities that had taken place.[305] The issues addressed are mostly analogous to the 'irregularities in the conduct of proceedings' aspect of the administration of justice, considering the

directed at problems with foreseeability and predictability of the conduct of the municipality, (n 192) [162]–[164]; see similarly *Metalclad* Award (n 38) [81], [85]–[86].

[297] nn 161–3, 170.

[298] *Genin* Award (n 94) [351]–[357]; *MTD* Award (n 289) [166]–[167]; *Saluka* (n 46) [417]–[419]; *PSEG* Award (n 215) [250]–[254].

[299] nn 28–9. [300] Ch 3 n 69. [301] nn 160–8. [302] Ch 8.

[303] *Bayindir* Award (n 219) [345]–[346].

[304] *Thunderbird* Award (n 231) [200]. The *Lemire* Tribunal seemed to transpose elements of judicial independence to its analysis of improper influences on independent decision-makers, (n 260) [345], [356].

[305] *Thunderbird* Award (n 231) [197]–[201]; *Genin* Award (n 94) [357], [364]–[373]; *Bayindir* Award (n 219) [344].

adequacy of notification,[306] effectiveness of participation,[307] and minimal requirements of impartiality and integrity.[308] Overall, the best analytical approach would be to consider the functional and structural similarity of the particular proceedings with issues dealt with by the better-developed law of denial of justice, so as to appropriately either transpose the solutions *verbatim* or *mutatis mutandis* or *a contrario* reject them.

The second procedural aspect relates to the indirect relevance of the opportunity to access court. The *De Sabla* case accepted the importance of access to efficient judicial proceedings in balancing substantive irregularities.[309] In the contractual context, the *Parkerings v Lithuania* Tribunal also relied on the availability of access to court in rejecting a fair and equitable treatment claim.[310] Conversely, absence of judicial review might supplement the picture of general arbitrariness.[311] This type of reasoning has been increasingly employed in the recent ECtHR case law.[312] Overall, the different approaches are in line with *ELSI*, taking a comprehensive view of the formal and procedural safeguards that the legal system provides.[313]

Finally, one might question the appropriateness of the earlier reliance on inter-State and human rights dispute settlement regimes where domestic remedies have to be exhausted, with the danger that the explicitly removed exhaustion requirement might be *sub silentio* reintroduced in investment law.[314] However, exhaustion was not required to make the claim admissible in *de Sabla,* therefore the lack of procedural remedies relates to the primary rule.[315] More broadly, primary rules are autonomous from secondary rules of invocation, and, while their substance may overlap, the techniques for creation or suspension of these rules are different.[316]

vi. Expectations

The legitimate or reasonable expectations of the investors have been accepted in case law as a key and probably the most far-reaching element of the international standard.[317] Unlike arbitrariness, discrimination, and procedural propriety, anchored in the traditional practice, the source of the rules on expectations is less obvious. The analysis

[306] *Genin* Award (n 94) [364]; *Middle East Cement Shipping* Award (n 69) [143]; *Tecmed* Award (n 192) [162], [173]; *Thunderbird* Award (n 231) [198].

[307] Opportunity to be present and produce evidence would satisfy this requirement, *Thunderbird* Award (n 231) [200]; *EDF* Award (n 207) [275]–[278]; *Chemtura* Award (n 188) [147]; while lack of communication, *Genin* Award (n 94) [357], [364]; *Saluka* (n 46) [426]–[432]; or opportunity to comment, *Glamis* Award (n 188) [771]; an invitation made in circumstances *de facto* obstructing effective participation, *Metalclad* Award (n 38) [91]; *Rumeli* Award (n 31) [617], or mishandling of negotiations in an arbitrary and non-transparent manner could lead to a breach, *PSEG* Award (n 215) [246]; *Joannis Kardassopoulos and Ron Fuchs v Georgia*, ICSID Cases nos ARB/05/18 and ARB/07/15, Award, 3 March 2010 [446]–[447].

[308] *Saluka* (n 46) [408]–[416].

[309] nn 28–9. [310] *Parkerings* Award (n 219) [315]–[319]. [311] *Lemire* Award (n 260) [418].

[312] nn 173–8. [313] *ELSI* (n 14) [129]; nn 193–4.

[314] CH Schreuer, 'Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration' (2005) 4 L Practice Intl Courts Tribunals 1, 13–17.

[315] Claims Convention between the United States of America and Panama (adopted 28 July 1926, entered into force 3 October 1931) 138 LNTS 120 art 5; *James Perry (US v Panama)* (1933) 6 RIAA 315, 317.

[316] See regarding denial of justice and local remedies, Ch 8 nn 15–20, 240–5.

[317] McLachlan and others *International Investment Arbitration* (n 255) 235–9; Dolzer and Schreuer *Principles* (n 228) 133–40; I Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (OUP, Oxford 2008) 163–9; Newcombe and Paradell *Law and Practice* (n 40) 279; Kläger *Fair and Equitable Treatment* (n 201) 164–87.

will therefore be undertaken in two steps, first identifying the source that mandates the legal relevance of expectations, and second, considering the scope and criteria of expectations.

1. Source of the expectations

The source of expectations will be dealt with by in turn discussing the perspectives of the investor's expectations *per se,* customary law, and general principles. First, some cases might be read as attributing direct legal relevance to the investors' expectations.[318] Whether or not investment treaties also create obligations owed directly to investors,[319] the rules have been created and are to be interpreted and applied within the four corners of traditional law of treaties.[320] The question is whether investors' expectations could go further than operating as interpretative criteria of obligations created at the inter-State level and directly affect law-making and interpretation. In principle, States can become internationally bound by unilateral acts,[321] and international obligations can be owed to non-State actors.[322] If States wished to do so, there is no reason why they could not create international obligations by the use of unilateral acts binding only *vis-à-vis* the investor, leaving aside the question whether international obligations protecting investors already exist in the form of investment treaties (or customary law) or not.

If the investor's expectations reflect a unilateral act owed to it, this would be a separate international obligation, operating autonomously from the rules expressed in the investment protection treaty. The unilateral act would be different from the investment protection treaty in general and fair and equitable treatment in particular, and (unless the jurisdictional or MFN clauses were formulated in very wide terms) the Tribunal would lack jurisdiction to rule on its breach. Only if the international standard imposes the extraordinary obligation of compliance with all international obligations regarding the investor (a proposition expressly rejected by the NAFTA FTC), could the unilateral act become directly relevant.[323] The controversial effect of explicit *pacta sunt servanda* clauses on establishing international responsibility for the breach of contractual obligations suggests that arguments of normative 'repackaging' in the absence of clear language to such effect should be treated with caution.[324]

[318] *Tecmed* Award (n 192) [154]; *MTD* Award (n 289) [144]; *CMS* Award (n 202) [279]; *Azurix* Award (n 188) [371]; *Parkerings* Award (n 219) [333]; *Siemens* Award (n 213) [298]–[299]. This position was criticized in *MTD* Annulment (n 282) [67].

[319] Ch 5 IV.3.iii.

[320] Ch 5 IV.

[321] *Nuclear Tests (New Zealand v France)* [1974] ICJ Rep 457 [46]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia)* (Judgment) [2007] ICJ Rep 43 [378]; ILC, 'Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations' in *Report of the International Law Commission on the Work of its 61st Session,* UN Doc A/61/10 367 art 1; WM Reisman and MH Arsanjani, 'The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes' (2004) 19 ICSID Rev—Foreign Investment L J 328. It is questionable whether one can make a comparative argument from the method of creation of an international obligation of one kind to the content of an international obligation of another kind, merely because they both consider the relevance of the conduct of a State (as in *Total* (n 188) [132]–[134]), *Impregilo v Argentina* Award (n 221) [392].

[322] ILC, 'Articles on Responsibility of States for Internationally Wrongful Acts' in *Yearbook of the International Law Commission, 2001, Volume II,* UN Doc A/CN.4/SER.A/2001/Add.1. (Part Two) 26 art 33(2).

[323] NAFTA Free Trade Commission (n 243) 2(3).

[324] A Sinclair, 'The Umbrella Clause Debate' in AK Bjorklund and others (eds), *Investment Treaty Law: Current Issues III* (BIICL, London 2009).

A different way to attribute legal relevance to the investor's conduct would use the concept of estoppel[325] and apply it to the conduct of the State.[326] The investor–State relationship probably cannot rely on the concept of estoppel that operates between equal actors, making representations in their normal interaction of law-making and application in a manner that may change their international rights and obligations. Even if investment protection obligations are owed directly to the investor, they would represent the only relevant international law relationship between the State and the investor (human rights aside), created through traditional treaty and customary law-making process in which the investor does not participate. The investor–State relationship is qualitatively different from the model that assumes normal interaction with possible legal consequences.[327] Finally, even assuming that such an estoppel exists, it would not be relevant for the interpretation of the international standard for the same reasons that were suggested above regarding unilateral acts.

In terms of custom, while Root in his famous speech approved the relevance of local circumstances in general terms,[328] his focus was on the obligations of protection and punishment, and establishment in negative terms that unfamiliarity of local rules is not a ground of responsibility.[329] The law on the prevention and punishment of crimes against aliens did take into account the circumstances of the host State, but it was because the obligation itself was formulated in terms of due diligence.[330] One cannot generalize on the basis of a rule that is peculiar precisely because it explicitly takes the circumstances into account. The law of denial of justice, with the possible exception of certain elements

[325] *Duke Energy International Peru Investments No. 1, Ltd v Peru,* ICSID Case no ARB/03/28, Award, 18 August 2008 15 ICSID Rep 146 [241]–[251]. The *Duke* annulment committee considered the argument of estoppel to be *obiter dictum* and therefore did not directly address it, but the language used suggests some scepticism about its correctness, *Duke Energy International Peru Investments No. 1, Ltd v Peru,* ICSID Case no ARB/03/28, Decision of the *ad hoc* Committee, 28 February 2011 [249]. The *Feldman* Tribunal might have accepted the applicability of estoppel in principle, albeit requiring a very high standard of uniformity and consistency of behaviour to satisfy it, *Marvin Feldman v Mexico,* ICSID Additional Facility Case no ARB(AF)/991/1, Award, 16 December 2002 (2003) 18 ICSID Rev—Foreign Investment L J 488 [63]–[65]. While the concept of estoppel has also been considered for the very different legal question of the inconsistency of the investor's conduct, *Petrobart Limited v Kyrgyz Republic,* SCC Case no 126/2003, Award, 29 March 2005 [363]–[369]; *Chevron Corporation and Texaco Petroleum Corporation v Ecuador,* UNCITRAL Case, Interim Award, 1 December 2008 [136]–[149]; *Waguih Elie George Siag and Clorinda Vecchi v Egypt,* ICSID Case no ARB/05/15, Award, 1 June 2009 [348]–[354], this practice is better read through the lenses of abuse of process that would not require structural equality between the parties, M Paparinskis, 'Inherent Powers of ICSID Tribunals: Broad and Rightly So' in I Laird and T Weiler (eds), *Investment Treaty Arbitration and International Law* (Volume 5, JurisNet, LLC, New York 2012) 27–31.

[326] On estoppel see Ch 5 IV.3.iii.

[327] In *Feldman,* Mexico objected to reliance on estoppel from the inter-State context, contrasting 'the conduct of States in boundary disputes, which they are presumed to have considered with the utmost seriousness, [with] cases where a large state bureaucracy deals with an individual taxpayer', (n 325) [62]. The general relevance of *Duke* Award, n 325, may be limited because it was decided on the basis of an investment contract and not a treaty, with some degree of equality between the parties therefore present, and simultaneously drew upon similar rules of domestic and international law.

[328] E Root, 'The Basis of Protection to Citizens Residing Abroad' (1910) 4 ASIL Proceedings 16, 22; Ch 2 n 30.

[329] Root, ibid 26.

[330] E Borchard, *Diplomatic Protection of Citizens Abroad* (The Banks Law Publishing Co., New York 1915) Ch V; Freeman *Denial of Justice* (n 28) Ch XIII; 6 Moore Digest (n 63) 787–800. For example, the US stated that the obligation of protection was discharged by having it 'honestly and diligently fulfilled' 'by all the means in its power', and those 'who engage in business near the border must not at present, or perhaps for some time to come, expect either government to insure them against all the risks inseparable from such enterprises', *Case of Mexican Shepherds* (1875) 6 Moore Digest 787, 788–9.

of delay of justice, does not attribute legal relevance to expectation about particular circumstances of the host State.[331]

The position of the classical law of property protection on the expectations of aliens is complicated to identify with absolute certainty because protests and arguments rarely focused solely on the suddenness of the change. One can point to practice both accepting[332] and rejecting the legal relevance of radical changes,[333] and the broader principle seems to be focused on precluding retroactive developments, requiring 'important changes [to be] usually prospective in their operation, so that they might have no injurious effect on previous transactions'.[334] Indeed, the PCIJ noted in a markedly fatalistic spirit that '[f]avourable business conditions ... are ... subject to inevitable change'.[335] In structural terms, the traditional position seems best reflected in authorities such as *Jesse Lewis,* where the Tribunal was primarily focused on the propriety of form and process and availability of judicial remedies, and only identified suddenness of change as possibly a supporting consideration of wrongfulness.[336] With all due caution, human rights practice goes with the grain of this proposition, not scrutinizing the dynamic elements of restrictions, and rather approaching the question from the perspective of foreseeability and consistency of the restrictive rules.[337] Of course, even if general customary law does not contain a rule on legitimate expectations, a special customary rule may be created to the effect, as the States explicitly recognizing the legal relevance of legitimate expectations might have done.[338]

In the law of State contracts, the 'incursion of international law into this kind of situation' protects, as Jennings put it, 'precisely the reasonable expectation and will of

[331] Ch 8 nn 228–34, 287–90. [332] nn 19, 61.

[333] nn 20, 25, 60. In the Hague Conference, Poland noted that '[a] foreign national who voluntarily enters into relations with the State should consider beforehand the risk of legislative change', Rosenne *Hague II* (n 43) 454.

[334] Fish to Lopez Roberts (n 63) 752. In the *Jesse Lewis* case, the Tribunal rejected the US argument about suddenness of legal change because the alien had neither been already engaged in transactions nor acted *bona fide*, and the public proclamations by States meant that there was no sudden surprise, *Jesse Lewis* (n 63) 92.

[335] *Oscar Chinn* Judgment (n 22) 88. While the UK claim about the mistreatment of Mr Chinn was rejected by six votes to five, the Court was unanimous in rejecting the argument about acquired rights, see *Chinn* Hurst (n 76) 121–2. In a later case, the roles were partly reversed and Belgium itself presented a claim about a breach of acquired rights, this time regarding a Greek non-compliance with an arbitral award. With a silent but unmistakable nod to *Oscar Chinn*, Belgium argued that only completely and irrevocably acquired rights could be protected, as opposed to mere aspirations, reliant on the revocable will of the legislature or third parties, *The 'Société Commerciale de Belgique' (Belgium v Greece)* PCIJ Series C No 87 23 (Memorial), 174–5 (Levy Morelle). Greece argued that it had not breached acquired rights because of the exceptional financial considerations, but did not directly challenge the Belgian argument about acquited rights, ibid 101–2 (Counter-Memorial), 222 (Youpis). Since Greece accepted that it was under an obligation to comply with the award, the Court did not directly address the limited reading of acquired rights suggested by Belgium, but it must be considered necessarily implicit in its reasoning, *The 'Société Commerciale de Belgique' (Belgium v Greece)* [1939] PCIJ Series No A/B 78 160, 174–8.

[336] See *Jesse Lewis* (n 63) 92.

[337] nn 159–72. In a recent Grand Chamber judgment, where the applicant company had been unable to operate in television broadcasting for ten years despite its license, the Court took into account the legitimate expectations in defining the object of protection but found the breach in the unforeseeability of the rules, *Europa 7 S.r.l.* (n 169) [144]–[158], [185]–[189].

[338] In recent cases, a number of States seem to have explicitly accepted legitimate expectations as a legally relevant criterion of fair and equitable treatment: for example, Bulgaria (*Plama Consortium Limited v Bulgaria,* ICSID Case no ARB/03/24, Award, 27 August 2008 [175]), Chile (*MTD* Annulment (n 282) [69]); Czech Republic (*Frontier Petroleum Services* Award (n 188) [279]–[282]). In technical terms, special custom is opposable only between the States that have opted into the regime, therefore—assuming that legitimate expectations do not exist as a general rule—it would be applicable when both the home State and host State have approvingly invoked it.

at least one of the parties'.[339] However, the expectation is only that the State would not breach the contract by stepping outside the contractual framework and employing extra-contractual public or governmental powers.[340] To say that contractual rights are expectations protected under international law[341] is not entirely persuasive: it would simply be a restatement of the rejected extreme position that every breach of a contract is a breach of international law; it does not support expectations either regarding contracts or more broadly because it accepts their relevance as a given; finally, the international wrongfulness of contractual breaches, if genuinely intended by States and investors, may be achieved by appropriately drafted stabilization clauses in contracts or umbrella clauses in treaties.

More broadly, the law of contractual breaches may suggest that international law protects expectations in general, provided that they are expressed in sufficiently certain terms. The *Glamis Gold v US* Tribunal required a showing of a quantitative 'threshold circumstance, at least a quasi-contractual relationship between the State and the investor, whereby the State has purposely and specifically induced the investment'.[342] However, the rationale of the law of State contracts is not to protect quantitative certainty or inducement but to preclude the disruption of the contractual equilibrium by public powers.[343] Even perfectly clear contracts concluded on the initiative of the State may be breached without incurring international responsibility; conversely, breaches of vague clauses in contracts suggested by the investor may be internationally wrongful when committed by *puissance publique.* The better view is that the focus of the law of State contract on the impermissibility of abusing the dual powers by one contracting party makes any generalizations regarding protection of expectations outside this peculiar normative framework complicated.

Third, the argument of legitimate expectations could be made in terms of general principles of international law, relying on similarities of domestic approaches on the issue,[344] and may be addressed both in terms of existence of such principles and their admissibility in construing the particular rule. The *de facto* internationalization of rules of a limited number of developed States during the foundational debate led to a normative backlash, suggesting that similar arguments in light of this historical pedigree should be employed with great caution.[345] While the research into expectations may be quantitatively more extensive than that underlying the debates in the 1920s, in qualitative terms it seems vulnerable to precisely the same objection: legal approaches of a limited number of developed traditionally home States are attributed direct legal influence on international law that the traditional approaches to sources *prima facie* do not support.[346] Even among the unrepresentative sample of legal systems of the traditional claimant States considered,

[339] Jennings 'State Contracts in International Law' (n 72) 181–2; SM Schwebel, *International Arbitration: Three Salient Problems* (Grotius Publications Limited, Cambridge 1987) 409, 413; A von Walter 'The Investor's Expectations' (n 228) 185–6.

[340] nn 210–16.

[341] Possibly *Eureko* (n 38) [232], *Vivendi II* Award (n 224) [7.4.42] fn 355, although the holdings may perhaps be justifiable as respectively finding wrongfulness in the breach for non-commercial reasons of discriminatory character, and arbitrary frusttration of contractual execution by public powers.

[342] *Glamis* Award (n 188) [766]; the *Continental Casualty* Tribunal considered expectations from the perspective of specificity, (n 188) [261.i].

[343] As the *Glamis* Tribunal itself accepted, ibid [620].

[344] Ch 7 nn 14–15; *Total* (n 188) [128]–[130]. [345] Ch 7 nn 7–21.

[346] See generally Ch 7 11–24. A legal argument deriving the principle of legitimate expectations from a limited number of legal systems, for example, French and German law, might be appropriate in a regional legal order, P Craig, *EU Administrative Law* (2nd edn OUP, Oxford 2012) 589, but not in general international law, Ch 7 n 20.

there are significant differences in the way in which legitimate expectations are addressed, in particular regarding the distinction between substantive expectations and expectations relating to due process.[347]

In terms of sources, for a general principle to elaborate vagueness or fill a lacuna, the international rule on the question has to contain (vague) rules on the issue or be open to their introduction. It is not the case that, in the absence of a hypothetical rule on expectations, the international standard would be entirely lacking in criteria to apply to evaluating the international lawfulness of changes in the domestic legal system: as was suggested in the previous sections, the considerations of non-arbitrariness, transparency, and due process, and most likely also non-discrimination, would still discipline the host State. The traditional law on the treatment of aliens dealt with expectations in very diverse manners for each particular rule: rules on protection and punishment explicitly took the situation of the State as the benchmark; rules on contractual breaches protected the very peculiar expectation of not having the contract breached by non-contractual powers; and rules on denial of justice probably did not take expectations into account at all. In systemic terms, States were clearly capable of creating sophisticated rules that attributed legal relevance to different kinds of expectations, and the absence of clear practice regarding the standard does not necessarily mean that there was a lacuna, and might plausibly be read instead as a positive rule excluding the relevance in principle. The early writings on fair and equitable treatment did not focus on the investor's expectations as part of the interpretative process.[348] Consequently, even assuming that such a general principle exists, in the absence of contrary treaty language[349] it is not obvious that it can be taken into account in interpreting the treaty rules on fair and equitable treatment or the customary standard, rather than other treaty or customary rules in the area, or even operating as a separate obligation.

2. Content of the expectations

As one might expect in a decentralized system of dispute settlement, different cases have addressed expectations in widely different terms. One might distinguish issues not relating to expectations at all; the expectations expressed in appropriate legal form; the particular case of expectations of investors invited and a legal regime dismantled; and other expectations identified in the case law. Overall, particularly in light of the unclear normative pedigree of the concepts, it would be better to articulate the concerns in terms of formal and procedural arbitrariness or develop special rules, rather than incorporate all other concerns as part of expectations.

First, certain elements of modern practice that use the language of expectations do not address the appropriate degree of changes at all. Investment Tribunals[350] (and

[347] E Snodgrass, 'Protecting Investors' Legitimate Expectations—Recognising and Delimiting a General Principle' (2006) 21 ICSID Rev—Foreign Investment L J 1, 25–30; Newcombe and Paradell *Law and Practice* (n 40) 280; Brown '"General Principle of Law"' (n 98) 6–8.

[348] FA Mann, 'British Treaties for the Promotion and Protection of Investments' (1981) 52 BYIL 241. Vasciannie uses the term 'expectations' in a non-technical sense, S Vasciannie, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice' (1999) 70 BYIL 99, 99, 146. The concept was used in the particular context of contracts and remedies, G Burdeau, 'Droit international et contrats d'Etats' (1982) 28 Annuaire Français de Droit International 454, 470.

[349] For example, the preamble of the US–Argentina BIT emphasizing stability, *CMS* Award (n 202) [274].

[350] The *Metalclad* Tribunal famously referred to 'reasonably-to-be-expected economic benefit of property', (n 38) [103].

the ECtHR) sometimes use the language of expectations to define the scope of protected objects, a conceptually different matter from the content of obligation.[351] Other Tribunals explain the obligations of treatment by reference to the investors' expectations.[352] To the extent that these statements suggest an expectation of compliance with an international obligation, they are either circular or superfluous, and could have added legal value only if the investor's perspective had direct legal effect (which has been argued not to be the case).[353] The particular examples are better read as criteria regarding the content of the measures (reasonableness, non-discrimination), form of the measures (transparency, consistency), and due process (even-handedness).

Second, as the ECtHR noted in a somewhat different context, there may be many legal instruments providing protection from particular risks.[354] A diligent investor is assumed to be aware of them and capable and willing to use them. For example, the investor may use investment contracts with stabilization clauses to set out the agreement of parties as to the reasonableness of future developments.[355] The investor may obtain formal and official assurances under the domestic law regarding lawfulness of particular conduct (that would provide grounds for a claim for arbitrariness because of inconsistency of form).[356] In any event, international law protects the peculiar expectation of not having the contract breached by extra-contractual powers.

Third, the disputes arising out of the Argentinean crisis, despite the breadth of language of the awards generally requiring stability,[357] are atypical on many levels.[358] The distinguishing considerations seem to be that, first, investors had been positively invited on the basis of a specific legal regime, second, investments had been made in pursuance to this invitation, and third, the legal regime had been later entirely dismantled.[359] The rationale might be expressed in different ways: it might lie in the *ELSI* and the ECtHR arbitrariness because a minimum degree of consistency within the evolution of rules had not been maintained; or the arbitrariness of form and procedure may have permitted a closer scrutiny of reasonableness, and the measures might have been unnecessary or placed an excessive burden on the investor; or, indeed, in terms of expectations, the

[351] *Kopecký* (n 99) [45]–[52]; *Europa 7 S.r.l.* (n 169) [173], [175], [179]; ibid Concurring Opinion of Judge Vajić.

[352] *Tecmed* Award (n 192) [154]; *Saluka* (n 46) [307]; similarly *Metalclad* Award (n 38) [99]; *Lemire* Award (n 260) [267].

[353] nn 152–8. [354] *Gasus* Court (n 156) [70].

[355] TM Waelde and G Ndi, 'Stabilizing International Investment Commitments: International Law Versus Contract Interpretation' (1996) 31 Texas Intl L J 215; or unsuccessfully try to conclude one, *Sergei Paushok, CJSC Golden East Company, CJSC Vostokneftegaz Company v Mongolia*, UNCITRAL Case, Award on Jurisdiction and Liability, 28 April 2011 [302].

[356] See the discussion of different assurances in *Glamis* Award (n 188) [802].

[357] *CMS* Award (n 202) [276]–[277]; *LG&E v Argentina*, ICSID Case no ARB/02/1, Decision on Liability, 3 October 2006 (2006) 21 ICSID Rev—Foreign Inv L J 203 [131]; *Enron* Award (n 203) [260].

[358] Some of the atypical aspects of the Argentinean cases that simultaneously pull in different directions are: the invitation of investors to conclude the contracts, weighing in favour of greater protection; the economic crisis and measures adopted in response, weighing perhaps in favour of lesser protection in exceptional circumstances; the preamble language of the US BIT that was sometimes read to require particular stability, *CMS* Award (n 202) [274]; and the broader structural uncertainties about the appropriate way to articulate the arguments of economic necessity and their implications, whether within the standard, *National Grid v Argentina*, UNCITRAL Case, Award, 3 November 2008 [180], or other primary or secondary rules, n 202.

[359] *CMS* Award (n 202) [136]–[137], [275]; *LG&E* (n 357) [132]–[139]; *BG* Award (n 188) [82]–[86]; [305]–[310]; *Enron* Award (n 203) [264]–[266]; *National Grid*, ibid [176]–[180]; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v Argentina*, ICSID Case no ARB/03/19 and *AWG Group v Argentina*, UNCITRAL Case, Decision on Liability, 30 July 2010 [208], [212]–[228]; *Impregilo v Argentina* (n 221) [517]. The limited broader relevance of these cases was accepted by the *Continental Casualty* Tribunal, (n 188) [259]–[260].

standard of the US argument in the *Jesse Lewis* case might have been reached, and the State that has 'for a long continued period... permitted to aliens a certain course of action... suddenly change[s] that course and make it affect those aliens already engaged in forbidden transactions as the result of that course and deprive aliens of their property so acquired'.[360] In any event, it is possible to read these authorities as addressing a particular challenge and not necessarily supporting a general proposition about stability.

Fourth, the most complex cases are those that do not fall under any of the special scenarios sketched above, in particular radical changes of legislation in the absence of specific promises.[361] The starting point is that favourable business opportunities are fleeting,[362] the State has its regulatory freedom,[363] and the investor should conduct legal and financial due diligence both before making the investment and during its performance.[364] As *Paushok v Mongolia* recognized, there could be no expectation against introduction of windfall tax.[365] The comparative experience of the ECtHR suggests that in such cases the investor should accept the full risk that certain developments will no longer continue.[366] The arbitral decisions are broadly consistent in identifying the investor's expectations at the moment of its entrance into the particular legal system and then comparing subsequent changes;[367] evaluating the nature of representation (ranging from political and general legislative promises, with very limited protection in usual circumstances, to those having individualized character and a a respectively higher degree of protection)[368] as well as their particular content and reliance by the investor, dismissing those given in response to incomplete or fraudulent representations by the investors.[369] The expectations relate to the full legal system of the host State from its constitutional structure to the legislative practices in general and in the particular area,[370] probably also including international obligations.[371]

[360] *Jesse Lewis* (n 63) [92]. [361] *Total* (n 188) [309].

[362] n 334; *Impregilo v Argentina* (n 221) [366].

[363] Among many authorities, *Lauder* (n 260) [297]; *Parkerings* (n 219) [332]–[333]; *Paushok* (n 355) [299]; *Ulysseas* (n 188) [249]. As the *EDF* Tribunal put it, '[e]xcept where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework', (n 207) [217];

[364] *ADF* Award (n 192) [189]; *MTD* Award (n 289) [168]–[178]; P Muchlinksi, "Caveat Investor"? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard' (2006) 55 ICLQ 527, 542–7.

[365] *Paushok* (n 355) [304]. [366] nn 152–8.

[367] *Feldman* (n 324) [128]; *GAMI* Award (n 104) [93]; *Plama* Award (n 338) [220]; *AES Summit Generation Limited and AES–Tisza Erömü Kft. v Hungary*, ICSID Case no ARB/07/22, Award, September 23, 2010 (2011) 50 ILM 186 [9.3.8].

[368] *Parkerings* (n 219) [331]; *Continental Casualty* (n 188) [261]; *Kardassopoulos* Award (n 307) [449]-[450].

[369] *Thunderbird* Award (n 231) [149]–[167]. Several cases rely on the fraudulent misrepresentations of the investors to reject the applicability of the treaty *in limine* but also illustrate situations where no reasonable expectations would exist, *Inceysa Vallisoletana S.L. v El Salvador*, ICSID Case no 03/26, Award, 2 August 2006 [208]–[257]; *Plama* Award (n 338) [130]–[146].

[370] *Bayindir* Award (n 219) [192].

[371] Regarding human rights obligations, U Kriebaum, 'Privatizing Human Rights—The Interface between International Investment Protection and Human Rights' (2006) 3 (5) Transnational Dispute Management 8–22; regarding obligations under EU law, T Eilmansberger, 'Bilateral Investment Treaties and EU Law' (2009) 46 CML Rev 383, 415–18; M Burgstaller, 'European Law and Investment Treaties' (2009) 26 J Intl Arbitration 181, 193–6. A more complex question is whether expectations also have to take into account the rights of the host State, particularly the rights under certain conditions to breach international law with precluded wrongfulness under general or special rules of State responsibility, M Paparinskis, 'Equivalent Primary Rules and Differential Secondary Rules: Countermeasures in WTO and Investment Protection Law' in T Broude and Y Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Hart Publishing, Oxford 2011) 270–80.

While the role of expectations seems broadly accepted in mainstream decisions and writings, the systemic uniqueness of investment law in focusing on expectations raises the question of whether this perspective fulfils a useful function that could not be addressed otherwise.[372] It is not obvious that the answer is necessarily affirmative: some authorities superfluously repeat the importance of compliance with international obligations; others might properly relate to the temporal or substantive scope of the primary rule or the remedial consequences of its breach, rather than its content; yet other challenges are adequately dealt with by the special rules on State contracts; breaches of formally binding confirmations or official representations in domestic law could breach the minimum requirements of due form; and the broader perspectives of formal and procedural arbitrariness, permitting in turn more intrusive analysis of ends and means, seem capable of taking care of most of other challenges. In fact, in many instances the focus on expectations seems to distract attention from the sophisticated criteria for evaluating different forms of arbitrariness already in existence, therefore deconstructing the progress of the twentieth century back to the subjective perception of the normative beholder. At the end of the day, if changes in domestic law and its application are articulated in reasonable form, procedure, and substance, and the diligent investor has not pre-empted them by appropriate mechanisms in domestic or international law, the sage reminder about evaporation of favourable business opportunities from *Oscar Chinn* may be the best consolation.[373]

It is appropriate to conclude by recalling the words that Jennings wrote about the development on the law of treatment of aliens:

> rules cannot be deduced *a priori* from the idea of an international standard. They must be hammered out in the practice of Governments and by the familiar process of the development of the law through its application by international tribunals.[374]

The twenty-first-century system of international dispute settlement has provided the intellectual framework through which such development can take place. There is much room for clarification and further development of law, and it remains to be seen in precisely which way States and Tribunals will address the ongoing challenges. It is to be hoped that further elaboration of the law will proceed in a systemically coherent manner, with a full appreciation of all interpretative and comparative arguments that may bear upon its meaning, including the classical practice, human rights, and, of course, the most recent developments.

[372] The exceptional character of adopting expectations as a dominant perspective may be illustrated by the EU law. With all due regard to the many functional differences between protection of foreign investors from host States and of traders from EU institutions, legitimate expectations address a fairly narrow concern and have been defined in strict terms: even regarding individual representations, the claims in most cases fail because of the lack of precision and specificity in the representation, or insufficient prudency or inappropriate conduct of the representee, Craig *EU Administrative Law* (n 246) 567–573; in cases of general policy, the argument is almost bound to fail, in the absence of exceptional situations of bargain with or assurance by the authorities, ibid 573–578.

[373] *Oscar Chinn* Judgment (n 22) 88.

[374] Jennings 'State Contracts' (n 72) 180–1 (internal footnote ommited).

Conclusion

This book attempts to answer the debate about the role of the international standard and its relation to fair and equitable treatment in the contemporary legal order. The multi-level law-making efforts and the important changes at the level of both the theoretical perception of international law and creation of particular rules and regimes complicate the analysis. Since it would not be possible to address the contemporary standard without first identifying the historical and legal framework within which it operates, the analysis has been conducted in three steps: contextualizing the development of the multi-level law-making efforts in Part I, formulating the sources framework within which the contemporary practice takes place in Part II, and identifying the content of the contemporary standard in Part III.

The challenges of the twenty-first-century investment law and arbitration are surely no less perplexing than those of protection of property beyond the boundaries of particular polities of 1393, when Giovanni de Legnano mused about the possibility of applying reprisals to married clerks, people going to a festival, or students on their way to studies.[1] While different epochs of international law have formulated the international minimum standard in different ways, most recently embodying it in the treaty rules of fair and equitable treatment, it is still possible to answer legal questions by reference to traditional methods and techniques of international law. The classical pre-Second World War customary law provides a very strong starting point of analysis, elaborated either in interpretative or comparative terms by the post-war human rights developments and crystallized by the contemporary practice and case law. It remains to be seen whether future practice will develop the law in line with the traditional approaches—as has been largely the case regarding denial of justice—or resolve legal complexities in a (sometimes perhaps excessively) innovative manner—as has been the case regarding the protection of property more broadly.

[1] TE Holland (ed), JL Brierly (tr), G de Legnano, *Tractatus De Bello, de Represaliis et De Duello* (OUP, Oxford 1917) 318–320; see M Paparinskis, 'Investment Arbitration and the Law of Countermeasures' (2008) 79 BYIL 264, 271, 352.

Bibliography

1. BOOKS

GH Aldrich, *The Jurisprudence of the Iran–United States Claims Tribunal: An Analysis of the Decisions of the Tribunal* (Oxford University Press, Oxford 1996).

CF Amerasinghe, *Local Remedies in International Law* (2nd edn, Cambridge University Press, Cambridge 2004).

——, *Diplomatic Protection* (Oxford University Press, Oxford 2008).

F Berman, 'The Relevance of the Law on Diplomatic Protection in Investment Arbitration' in F Ortino and others (eds), *Investment Treaty Law: Current Issues II* (BIICL, London 2007).

E Borchard, *Diplomatic Protection of Citizens Abroad* (The Banks Law Publishing Co., New York 1915).

CN Brower and JD Brueseckhe, *The Iran–United States Claims Tribunal* (Martinus Nijhoff, The Hague 1998).

L Burgorgue-Larsen and A Úbeda de Torres, *The Inter-American Court of Human Rights: Case Law and Commentary* (Oxford University Press, Oxford 2011).

C Calvo, *Le Droit International Théorique et Pratique* (5th edn A. Rousseau, Paris 1896).

J Crawford, 'Continuity and Discontinuity in International Dispute Settlement' in C Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, Oxford 2009).

——, A Pellet, and S Olleson (eds), *The Law of International Responsibility* (Oxford University Press, Oxford 2010).

RH Dana (ed), *Wheaton's Elements of International Law* (8th edn Sampson Lowe, Son, and Company, London 1866).

R Dolzer and CH Schreuer, *Principles of International Investment Law* (Oxford University Press, Oxford 2008).

Z Douglas, *The International Law of Investment Claims* (Cambridge University Press, Cambridge 2009).

JH Drake (tr), C Wolff, *Jus Gentium Methodo Scientifica Pertractatum* (Carnegie Endowement of International Peace, Washington 1934).

P-M Dupuy, E-U Petersmann, and F Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, Oxford 2009).

CT Eustathiadès, *La responsabilité international de l'état pour les actes des organes judiciares et le problème du déni de justice en droit international* (A. Pédone, Paris 1936).

CD Fenwick (tr), E de Vattel, *The Law of Nations or the Principles of Natural Law* (Carnegie Institute, Washington 1916).

R Gardiner, *Treaty Interpretation* (Oxford University Press, Oxford 2008).

C Greenwood, 'State Responsibility for the Decisions of National Courts' in M Fitzmaurice and D Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions* (Hart Publishing, Oxford 2004).

D Greig, *Intertemporality and the Law of Treaties* (BIICL, London 2001).

FW Kelsey (tr), H Grotius, *De jure belli ac pacis libri tres* (Clarendon Press, Oxford 1925).

D Harris and others, *Harris, O'Boyle & Warbrick Law of the European Convention on Human Rights* (2nd edn Oxford University Press, Oxford 2009).

G van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, Oxford 2007).

AP Higgins (ed), *Hall's Treatise on International Law* (8th edn Clarendon Press, Oxford 1924).

TE Holland (ed), JL Brierly (tr), G de Legnano, *Tractatus De Bello, de Represaliis et De Duello* (Oxford University Press, Oxford 1917).

CC Hyde, *International Law: Chiefly as Interpreted and Applied by the United States* (2nd revised edn Little, Brown and Company, Boston 1947).

R Jennings and A Watts (eds), *Oppenheim's International Law* (Volume I: Peace, 9th edn Longman, London 1992).

S Joseph, J Schultz, and M Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Documents* (2nd edn Oxford University Press, Oxford 2005).

R Kläger, *Fair and Equitable Treatment in International Investment Law* (Cambridge University Press, Cambridge 2011).

H Lauterpacht, *Private Law Sources and Analogies of International Law* (Longmans, Green & Co. Ltd, London 1927).

——, *The Function of Law in the International Community* (Clarendon Press, Oxford 1933).

——, *International Law and Human Rights* (Stevens, London 1950).

RB Lillich, *The Human Rights of Aliens in Contemporary International Law* (Manchester University Press, Manchester 1984).

C McLachlan, L Shore, and M Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford University Press, Oxford 2007).

A McNair (ed), *Oppenheim's International Law* (Volume I: Peace, 4th edn Longman, Green & Co., London 1928).

A McNair, *The Law of Treaties* (Clarendon Press, Oxford 1961).

S Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (Hart Publishing, Oxford 2009).

P Muchlinski, *Multinational Enterprises and the Law* (2nd edn Oxford University Press, Oxford 2007).

P Muchlinski, 'The Diplomatic Protection of Foreign Investors: A Tale of Judicial Caution' in C Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, Oxford 2009).

A Newcombe and L Paradell, *Law and Practice of International Treaties: Standards of Treatment* (Walter Kluwer Law & Business, the Netherlands 2009).

L Oppenheim, *International Law* (Volume I: Peace, Longmans, Green & Co., London 1905).

M Paparinskis, 'Investment Treaty Interpretation and Customary Investment Protection Law: Preliminary Remarks' in C Brown and K Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, Cambridge 2011).

——, 'Regulatory Expropriation and Sustainable Development' in MW Gehring, M-C Cordonnier-Segger, and A Newcombe (eds), *Sustainable Development in World Investment Law* (Kluwer Law International, The Hague 2011).

——, 'Sources of Law and Arbitral Interpretations of *Pari Materia* Investment Protection Rules' in OK Fauchald and A Nollkaemper (eds), *The Practice of International and Nationals Courts and the (De-)Fragmentation of International Law* (Hart Publishing, Oxford 2012).

J Paulsson, *Denial of Justice in International Law* (Cambridge University Press, Cambridge 2005).

R Phillimore, *Commentaries upon International Law* (Volume 3, 3rd edn Butterworths, London 1885).

A Reinisch, 'Legality of Expropriations' in A Reinisch (ed), *Standards of Investment Protection* (Oxford University Press, Oxford 2008).

P Reuter, *Introduction au droit des traites* (3rd edn PUF Paris 1995).

JC Rolf (tr), A Gentili, *De Iure Belli Libri Tres* (Clarendon Press, Oxford 1933).

AH Roth, *The Minimum Standard of International Law Applied to Aliens* (AW Sijthoffs Uitgeversmaatschappij N.V., Leiden 1949).

RF Roxburgh (ed), *Oppenheim's International Law* (Volume I: Peace, 3rd edn Longman, Green & Co., London 1920).

SJ Rubin, *Private Foreign Investment: Legal & Economic Realities* (John Hopkins Press, Baltimore 1956).

J Salacuse, *The Law of Investment Treaties* (Oxford University Press, Oxford 2010).

CH Schreuer and others, *The ICSID Convention: A Commentary* (2nd edn Cambridge University Press, Cambridge 2009).

SM Schwebel, *International Arbitration: Three Salient Problems* (Grotius Publications Limited, Cambridge 1987).

——, 'On Whether a Breach by a State of a Contract With an Alien is a Breach of International Law' in S Schwebel, *Justice in International Law* (Cambridge University Press, Cambridge 1994).

DR Shea, *The Calvo Clause* (Minneapolis, University of Minnesota Press 1955).

S Schill, 'Fair and Equitable Treatment, the Rule of Law and Comparative Public Law' in S Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press, Oxford 2010).

B Simma and T Kill, 'Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology' in C Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, Oxford 2009).

I Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn Manchester University Press, Manchester 1984).

M Sornarajah, *The International Law on Foreign Investment* (3rd edn Cambridge University Press, Cambridge 2010).

EC Stowell, *International Law: A Restatement of Principles in Accordance with Actual Practice* (Sir Isaac Pitman & Sons, Ltd, London 1931).

C Tomuschat, 'The European Court of Human Rights and Investment Protection' in C Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, Oxford 2009).

I Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (Oxford University Press, Oxford 2008).

UNCTAD, *World Investment Report 2012: Towards a New Generation of Investment Policies* (New York and Geneva, United Nations, 2012) <http://www.unctad-docs.org/files/UNCTAD-WIR2012-Full-en.pdf>.

KJ Vandevelde, *U.S. International Investment Agreements* (Oxford University Press, Oxford 2009).

J Westlake, *Chapters on the Principles of International Law* (University Press, Cambridge 1894).

L Wildhaber and I Wildhaber, 'Recent Case Law on the Protection of Property in the European Convention on Human Rights' in C Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, Oxford 2009).

RR Wilson, *United States Commercial Treaties and International Law* (The Hauser Press, New Orleans 1960).

BA Wortley, *Expropriation in Public International Law* (Cambridge University Press, Cambridge 1959).

C Yannaca-Small, 'Fair and Equitable Treatment Standard: Recent Developments' in A Reinisch (ed), *Standards of Investment Protection* (Oxford University Press, Oxford 2008).

2. ARTICLES

R Ago, 'Le délit international' (1939) 68 Recueil des Cours de l'Académie de Droit International 419.

AR Albrecht, 'The Taxation of Aliens under International Law' (1952) 29 BYIL 145.

A Álvarez, 'Latin America and International Law' (1909) 3 AJIL 269.

JE Alvarez, 'The Public International Law Regime Governing International Investment' (2009) 344 Recueil des Cours de l'Académie de Droit International 193.
——, 'A BIT on Custom' (2010) 42 NYU J Intl L Politics 17.
D Anzilotti, 'La responsabilité internationale des États a raison des dommages soufferts par des étrangers' (1906) 13 Revue générale de droit international public 5.
WE Beckett, 'Diplomatic Claims in Respect of Injuries to Companies' (1932) 17 Transactions Grotius Society 175.
E Borchard, '"Responsibility of States", at the Hague Codification Conference' (1930) 24 AJIL 517.
——, 'The "Minimum Standard" of the Treatment of Aliens' (1939) 33 ASIL Proceedings 51.
JP Bullington, 'Problems of International Law in the Mexican Constitution of 1917' (1927) 21 AJIL 685.
GC Christie, 'What Constitutes a Taking of Property under International Law?' (1962) 38 BYIL 307.
J Crawford, 'ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 96 AJIL 874.
——, 'Treaty and Contract in Investment Arbitration' (2009) 6 (1) Transnational Dispute Management.
R Dolzer, 'Indirect Expropriation of Alien Property' (1986) 1 ICSID Rev—Foreign Investment L J 41.
——, 'Indirect Expropriation: New Developments' (2002–2003) 11 New York U Environmental L J 64.
Z Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (2003) 74 BYIL 151.
AP Fachiri, 'Expropriation and International Law' (1925) 6 BYIL 159.
——, 'International Law and the Property of Aliens' (1929) 10 BYIL 32.
G Fitzmaurice, 'The Meaning of the Term "Denial of Justice" ' (1932) 13 BYIL 93.
LY Fortier and SL Drymer, 'Indirect Expropriation in the Law of International Investment: I Know It When I See It, or *Caveat Investor*' (2004) 19 ICSID Rev—Foreign Investment L J 293.
FV Garciá-Amador, 'State Responsibility in the Light of the New Trends of International Law' (1955) 49 AJIL 339.
——, 'State Responsibility: Some New Problems' (1958) 94 Recueil des Cours de l'Académie de Droit International 365.
M Habicht, 'Le pouvoir du juge international de statuer "ex aequo et bono" ' (1934) 49 Recueil des Cours de l'Académie de Droit International 277.
R Higgins, 'The Taking of Property by the State: Recent Developments in International Law' (1982) 176 Recueil des Cours de l'Académie de Droit International 259.
RY Jennings, 'State Contracts in International Law' (1961) 37 BYIL 156.
——, 'General Course on Principles of Public International Law' (1967) 121 Recueil des Cours de l'Académie de Droit International 323.
PC Jessup, 'Confiscation' (1927) 21 ASIL Proceedings 38.
——, 'Responsibility of States for Injuries to Individuals' (1946) 46 Columbia L Rev 903.
P Juillard, 'L'évolution des sources du droit des investissements' (1994) 250 Recueil des Cours de l'Académie de Droit International 9.
G Kaeckenbeeck, 'La protection internationale des droits acquis' (1936) 59 Recueil des Cours de l'Académie de Droit International 321.
H Lauterpacht, 'The International Protection of Human Rights' (1947) 70 Recueil des Cours de l'Académie de Droit International 1.
C Leben, 'La théorie du contrat d'état et l'évolution du droit international des investissements' (2003) 302 Recueil des Cours de l'Académie de Droit International 197.

B Legum, 'The Innovation of Investor-State Arbitration' (2002) 43 Harvard J I L 531.
RB Lillich, 'Duties of States Regarding Civil Rights of Aliens' (1978) 161 Recueil des Cours de l'Académie de Droit International 329.
AV Lowe, 'The Role of Equity in International Law' (1988–1989) 12 Australian Ybk Intl L 54.
——, 'Regulation or Expropriation?' (2002) 55 Current Legal Problems 447.
——, 'Corporations as International Actors and Law Makers' (2004) 14 Italian Ybk Intl L 23.
——, 'Changing Dimensions of International Investment Law' (2007) (4) University of Oxford Faculty of Law Legal Studies Research Paper Series.
FA Mann, 'British Treaties for the Promotion and Protection of Investments' (1981) 52 BYIL 241.
FA Mann, 'Outlines of a History of Expropriation' (1959) 75 LQR 188.
——, 'The Protection of Shareholder's Interests in the Light of the *Barcelona Traction* Case' (1972) 66 AJIL 259.
C McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005)54 ICLQ 279.
——, 'Investment Treaties and General International Law' (2008) 57 ICLQ 361.
P Muchlinksi, "Caveat Investor"? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard' (2006) 55 ICLQ 527.
A Newcombe, 'The Boundaries of Regulatory Expropriation in International Law' (2005) 20 ICSID Rev—Foreign Investment L J 1.
M Paparinskis, '*Barcelona Traction*: A Friend of Investment Protection Law' (2008) 8 Baltic Ybk Intl L 105.
——, 'Investment Arbitration and the Law of Countermeasures' (2008) 79 BYIL 264.
——, 'The Limits of Depoliticisation in Contemporary Investor-State Arbitration' (2010) 3 Select Proceedings Eur Society Intl L 271.
——, 'MFN Clauses and International Dispute Settlement: Moving Beyond *Maffezini* and *Plama*?' (2011) 26 (2) ICSID Rev—Foreign Investment L J 14.
J Paulsson, 'International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law' (2006) 3 (5) Transnational Dispute Management.
—— and G Petrochilos, '*Neer*-ly Misled' (2007) 22 ICSID Rev—Foreign Investment L J 242.
S Ratner, 'Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law' (2008) 102 AJIL 475.
WM Reisman and MH Arsanjani, 'The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes' (2004) 19 ICSID Rev—Foreign Investment L J 328.
—— and RD Sloan, 'Indirect Expropriation and Its Valuation in the BIT Generation' (2003) 74 BYIL 115.
A Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (2010) 104 AJIL 179.
E Root, 'The Basis of Protection to Citizens Residing Abroad' (1910) 4 ASIL Proceedings 16.
S Rosenne, 'State Responsibility: *Festina Lente*' (2004) 75 BYIL 363.
M Sattorova, 'Denial of Justice Disguised? Investment Arbitration and the Protection of Foreign Investors from Judicial Misconduct' (2012) 61 ICLQ 223.
CH Schreuer, 'Calvo's Grandchildren: the Return of Local Remedies in Investment Arbitration' (2005) 4 L Practice Intl Courts Tribunals 1.
——, 'Fair and Equitable Treatment in Arbitral Practice' (2005) 6 J World Investment Trade 357.
——, 'Diversity and Harmonization of Treaty Interpretation in Investment Arbitration' (2006) 3 (2) Transnational Dispute Management.

——, 'Fair and Equitable Treatment (FET): Interactions with Other Standards' (2007) 4 (5) Transnational Dispute Management.
G Schwarzenberger, 'The Most-Favoured-Nation Standard in British State Practice' (1945) 22 BYIL 96.
——, 'The Abs-Shawcross Draft Convention on Investment Abroad: A Critical Commentary' (1960) 9 J Public L 147.
——, 'The Principles and Standards of International Economic Law' (1966) 117 Recueil des Cours de l'Académie de Droit International 5.
SM Schwebel, 'The Influence of Bilateral Investment Treaties on Customary International Law' (2004) 98 ASIL Proceedings 27.
I Seidle-Hohenveldern, 'The Abs-Shawcross Draft Convention to Protect Private Foreign Investment: Comments on the Round Table' (1961) 10 J Public L 100.
——, 'International Economic Law. General Course on Public International Law' (1986) 198 Recueil des Cours de l'Académie de Droit International 9.
LB Sohn and RR Baxter, 'Responsibility of States for Injuries to the Economic Interests of Aliens' (1961) 55 AJIL 545.
S Vasciannie, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice' (1999) 70 BYIL 99.
C de Visscher, 'Le déni de justice en droit international' (1935) 52 Recueil des Cours de l'Académie de Droit International 369.

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