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Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law

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Abstract and Keywords

This chapter discusses fair and equitable treatment as one of the core concepts of international investment protection. It suggests that the jurisprudence of investment tribunals on fair and equitable treatment can be conceptualized under a primarily institutional and procedural concept of the rule for law that has parallels in the major domestic legal systems of liberal democracies, and argues that such an understanding can be normatively grounded in the objective of international investment treaties. This overarching understanding translates into several sub-elements of fair and equitable treatment, including the requirement of stability, predictability and consistency, the principle of legality, the protection of legitimate expectations, procedural due process and denial of justice, substantive due process and protection against discrimination and arbitrariness, transparency, and the principles of reasonableness and proportionality.

Keywords: fair and equitable treatment, rule of law, stability, predictability, denial of justice, legitimate expectations, due process, arbitrariness, discrimination, transparency

I. Introduction

Fair and equitable treatment is one of the core concepts in international investment law. It appears prominently in almost all of the more than 2,600 bilateral investment treaties (BITs), as well as in regional and multilateral treaties, including in Article 1105(1) of the North American Free Trade Agreement (NAFTA) and in Article 10(1) of the Energy Charter Treaty (ECT).¹ It also frequently is invoked and applied in investor-state dispute settlement

and is attested to have ‘the potential to reach further into the traditional “domaine réservé” of the host state than any one of the other rules’.² The frequency with which fair and equitable treatment is applied, and its importance in investment treaty arbitration, contrast, however, with a lack of clarity concerning its normative content. Although fair and equitable treatment undoubtedly constitutes a legal standard, not an empowerment of tribunals to render decisions *ex aequo et bono*,³ arbitral tribunals often do not display a conceptually clear vision of (p. 152) what limitations fair and equitable treatment entails for state measures affecting foreign investors.

Certainly, the framing of fair and equitable treatment provisions in investment treaties is not uniform.⁴ Yet, arbitral tribunals have not attributed much weight to textual differences, but interpreted similar provisions, for example a clause requiring ‘equitable and reasonable’ instead of ‘fair and equitable’ treatment, as part of a treaty-overarching concept of fair and equitable treatment.⁵ Furthermore, fair and equitable treatment provisions vary between a plain prescription of fair and equitable treatment and a combination of the standard with an explicit reference to international or customary international law.⁶ This has led to an active debate in arbitral practice and scholarship about the relationship between fair and equitable treatment and the customary international law minimum standard.⁷

For example, pursuant to a binding interpretation by NAFTA’s Free Trade Commission, fair and equitable treatment in Article 1105(1) of NAFTA has to be equated with the international minimum standard.⁸ The content of the customary international minimum standard, in turn, often is considered to have been expressed in the *Neer* case, in which the United States-Mexican General Claims Commission in 1926 stated that: ‘[t]he 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 of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency’.⁹

In arbitral practice, however, this debate has, with the recent decision in *Glamis Gold v United States* being the exception,¹⁰ hardly led to differing interpretations (p. 153) and applications of fair and equitable treatment. Instead, numerous tribunals commenting on whether fair and equitable treatment is an autonomous treaty standard or equivalent to customary international law observe that ‘it appears that the difference between the Treaty standard [of fair and equitable treatment] and the customary

minimum standard, when applied to the specific facts of a case, may well be more apparent than real'.¹¹

Several factors level possible differences between treaty law and custom in this context. First, some tribunals consider that the inclusion of fair and equitable treatment in the vast web of investment treaties has transformed the standard itself into customary international law.¹² Secondly, even in the absence of such an explicit transformation, other tribunals interpret the international minimum standard as an evolutionary concept that has developed since the days of traditional international law, thus levelling possible differences between treaty and custom.¹³ Thirdly, from a historic perspective, by concluding investment treaties, capital-exporting countries intended to uphold, in view of challenges mounted during the New International Economic Order, the continuous validity of the standards of investment protection they defended under customary international law, including the Hull formula of 'prompt, adequate and effective' expropriation and the international minimum standard, at the level of treaty law, thus equally suggesting that no difference exists between customary and treaty standard.¹⁴

Finally, the customary international law minimum standard itself lacks precise content and is in need of interpretation by arbitral tribunals. In order to concretize such a standard, arbitral tribunals generally recur to the decisions of other arbitral tribunals without distinguishing whether those decisions were based on the customary variant or an autonomous treaty standard.¹⁵ This use of precedent (p. 154) by arbitral tribunals equally suggests that there is no categorical difference between the content of the customary international law minimum standard and an autonomously worded treaty standard of fair and equitable treatment. Instead, both variants arguably converge into a general principle of international investment law concerning the treatment of foreign investors by host states.¹⁶

This chapter attempts to develop a conceptual and normative understanding of fair and equitable treatment against the background of understanding international investment law as a public law framework that imposes limitations on the conduct of states. Instead of exhaustively describing the facts of the existing case-law,¹⁷ it focuses on outlining the elements arbitral tribunals attribute to fair and equitable treatment in a more conceptual way and attempts to provide a general framework of analysis for the standard's application and interpretation. The chapter shows how international tribunals

have developed certain sub-elements of fair and equitable treatment that appear in recurrent fashion and argues that these elements can be understood as and united under the concept of the rule of law (*Rechtsstaat, état de droit*). The underlying assumption is that fair and equitable treatment has an independent and genuine normative content. Understanding fair and equitable treatment in such a fashion attributes to the standard a quasi-constitutional function that serves as a yardstick for the exercise of the host states' administrative, judicial, and legislative activity vis-à-vis foreign investors. In this perspective, arbitral jurisprudence does not appear as a fragmented and disordered aggregate of awards but as part of the emerging global regime governing foreign investments and limiting the conduct of host states relating to it.

Conceptualizing fair and equitable treatment as an embodiment of the rule of law mainly relies on a comparative public law approach that takes a cross-view of the restrictions of governmental activity in domestic legal systems that embrace the concept of the rule of law. Conversely, the appropriate methodology for concretizing fair and equitable treatment that this chapter suggests, consists in a comparative law methodology that attempts to extract general principles of public law from those domestic and international legal regimes that embrace an institutional design prescribing rule of law standards for the exercise of public power in administrative and judicial proceedings and through legislation.

At the same time, a comparative law approach to fair and equitable treatment illustrates the tension between the rule of law as a legal value and competing (p. 155) public interests. It underscores that fair and equitable treatment cannot be understood as an absolute guarantee but rather as a principle that allows for a proportionate balance between investment protection and other public interests. Thus, the chapter aims at clarifying the normative content of fair and equitable treatment and outlines a methodology for its application. This can arguably promote predictability and uniformity in the standard's interpretation and enhance its acceptance by states and investors.

This understanding of fair and equitable treatment can, however, not only be used in reconstructing the existing arbitral jurisprudence, but can be grounded in the normative framework of investment treaties themselves, above all the treaties' object and purpose. The final part therefore provides an analysis of the economics of international investment treaties and points to the positive effects the adoption of the concept of the rule of law can have

for promoting foreign investment, economic growth, and development in host countries.

II. Conceptualizing Arbitral Jurisprudence: Fair and Equitable Treatment as an Embodiment of the Rule of Law

When arbitral tribunals first started to apply fair and equitable treatment provisions in investment treaty arbitrations, they regularly criticized the fact that the standard was not further defined and offered little guidance for its application to concrete circumstances.¹⁸ Accordingly, earlier arbitral jurisprudence has not managed to develop a uniform methodology for the standard's application.¹⁹ The main reason for this is that traditional interpretative approaches, applying Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT),²⁰ are hardly able to clarify the meaning of fair and equitable treatment. The standard does not have a consolidated and conventional core meaning that one can easily apply; it also is not concretized by state practice, nor elucidated by *travaux préparatoires*.

An interpretation of the ordinary meaning may replace the terms 'fair and equitable' with similarly vague and empty phrases such as 'just', 'even-handed', (p. 156) 'un-biased', or 'legitimate',²¹ but does not succeed in clarifying its normative content.²² Fairness and equitableness may equally refer to notions of equality or substantive justice, or to less grand notions of procedural due process. Likewise, a teleological interpretation hardly provides more specific meaning. Even though the purpose of investment treaties suggests an economic approach geared towards protection and promotion of foreign investment, it does not enable tribunals directly to translate the broad language of fair and equitable treatment into specific guarantees for foreign investors. In particular, it is difficult to predict whether a specific interpretation will actually encourage investment flows or, on the contrary, will have the effect of chilling the investment climate due to host states admitting less foreign investment.

The traditional methods of treaty interpretation therefore prove to be relatively ineffective in helping to understand the normative content of fair and equitable treatment. Understandably, investment tribunals do not follow a uniform methodology.²³ Some tribunals extensively describe the facts of a case and simply characterize them as a violation of fair and equitable treatment.²⁴ The problem with this approach is that it does not elucidate the normative content of fair and equitable treatment and obscures the legal

reasoning underlying the decision. Other tribunals simply posit an abstract standard as part of fair and equitable treatment and subsequently subsume the facts of the case under this standard.²⁵ With such a methodology tribunals equally fail to justify how they normatively ground the abstract standards they postulate.

Most tribunals, finally, in particular with increasing numbers of arbitral awards available, apply fair and equitable treatment with a strong reference to arbitral precedent.²⁶ This approach has the benefit of allowing tribunals to approach the interpretation of fair and equitable treatment in a case-sensitive way, while taking account of the fact that arbitral jurisprudence, including on fair and equitable treatment, is a source of expectations investors and states develop regarding the future application of the standard principles of international investment law, even (p. 157) if arbitral precedent is not formally binding.²⁷ Nevertheless, this last approach, while ensuring consistency and furthering predictability,²⁸ remains problematic from a normative perspective, as it faces the criticism that earlier decisions have themselves applied a problematic methodology, which failed to justify the normative content of fair and equitable treatment.

By failing to justify a clear normative, ie prescriptive, content of fair and equitable treatment, arbitral tribunals run the risk of facing the reproach that they handle the standard as a malleable tool of *ex post facto* control of host states' measures based on the arbitrators' personal conviction and understanding about what is fair and equitable. The assumption that personal convictions, instead of prescriptive legal standards, play a major role in applying fair and equitable treatment is nourished by the frequent reference to treatment that 'shocks, or at least surprises, a sense of juridical propriety'²⁹ as a yardstick for the standard's application.³⁰ In addition, some tribunals rather openly admit that '[t]he concept of "*fair and equitable treatment*" is not precisely defined in the BIT, but appears to give each arbitral tribunal much latitude...The BIT therefore leaves the precise scope of the "*fair and equitable treatment*" standard to the determination of the Arbitral Tribunal.'³¹

Yet, an attempt to provide a normative framework of analysis for the interpretation and application of fair and equitable treatment arguably can be made by conceptualizing existing arbitral jurisprudence, in line with the general concept of the present book, as public law concepts. Thus, the argument forwarded in this chapter is, first, that fair and equitable treatment can properly be understood as an embodiment of the concept of the rule

of law (*Rechtsstaat* in the German, *état de droit* in the French tradition) and, secondly, that the jurisprudence of arbitral tribunals rather neatly fits with the understanding of this public law concept, (p. 158) which can be found with similar characteristics, often as a constitutional principle, in all domestic legal systems that adhere to liberal constitutionalism,³² as well as in international legal regimes more generally, which enshrine the concept of the international rule of law.

Relying on a common tradition,³³ the main thrust of the rule of law is the aspiration to subject public power to legal control,³⁴ to grant individual rights,³⁵ and to make conduct of the state foreseeable.³⁶ The rule of law primarily refers to the formal quality of law as providing guidance for human affairs and comprises the institutional aspiration that government has to use law as a means of exercising power.³⁷ First, the rule of law translates into procedural requirements for the deployment of legal processes³⁸ and mandates that ‘individuals whose interests are affected by the decisions of...officials have certain rights’, such as ‘the right to a hearing before a decision is made, the right to have the decision made in an unbiased and impartial fashion, the right to know the basis of the decision so that it can be contested, the right to reasons for the official's decision, and the right to a decision that is reasonably justified by all relevant legal and factual considerations’.³⁹ Hence, the rule of law requires that the affected individual is recognized as a subject with certain rights, which have to be taken into account in the decision-making process of public authorities. Furthermore, the rule of law is also at the origin of the idea of proportionality, referring to the proper balance that has to be struck between the interests of the individual and competing public interests.⁴⁰ Secondly, the rule of law has implications for the institutional design of government. It mandates a basic separation of powers and the possibility to seek review of public acts by an independent judiciary.⁴¹ Essentially it is this (p. 159) primarily formal understanding of the rule of law that prevails in many domestic legal traditions.⁴²

Against this background, fair and equitable treatment can be understood as embodying the rule of law as a standard that the legal systems of host states have to embrace in their treatment of foreign investors. While this may not seem much of a concretization, given different historic developments and thrusts of the rule of law in different national legal systems and in the light of the fact that the exact content and the requirements of the rule of law are often debated,⁴³ it nevertheless constitutes a viable approach to explain the normative content of fair and equitable treatment and to concretize it

based on a comparative public law methodology. A comparative analysis of municipal law reveals certain common ideas and standards that can be transferred to the international level and help to identify the paradigm features a state has to conform to in order to comply with the notions of 'fairness and equitableness' in international investment law.

A. Principles Derived from Fair and Equitable Treatment

Even though (albeit few) divergent decisions necessarily persist when one-off arbitral tribunals resolve disputes without supervisory authorities that can ensure consistency, more recent arbitral jurisprudence increasingly converges in its application of fair and equitable treatment. It uses the standard to restrict the exercise of sovereign powers by host states, thus interpreting fair and equitable treatment as a public law concept.⁴⁴ Fair and equitable treatment is not used, by contrast, as a concept to judge the adequateness of contractual arrangements between foreign investors and host states.⁴⁵ Based on the arbitral case law, seven specific clusters can be discerned that occur in recurring fashion as sub-elements of fair and equitable treatment.⁴⁶ These are: (1) the requirement of stability, predictability, and consistency of the legal framework; (2) the principle of legality; (3) the protection (p. 160) of legitimate expectations; (4) procedural due process and denial of justice; (5) substantive due process and protection against discrimination and arbitrariness; (6) transparency; and (7) the principle of reasonableness and proportionality. These principles also figure prominently as sub-elements or expressions of the broader concept of the rule of law in domestic legal systems.

(1) Stability, predictability, consistency

Investment treaties seek to enhance the stability of the investment climate and reduce political risk.⁴⁷ Accordingly, aspects that are recurrently invoked by arbitral tribunals as part of fair and equitable treatment are the concepts of stability, predictability, and consistency of the host state's legal order. The tribunal in *CMS v Argentina*, for example, found that 'there can be no doubt... that a stable legal and business environment is an essential element of fair and equitable treatment'.⁴⁸ In *PSEG v Turkey* the tribunal found a breach of fair and equitable treatment by what it described as 'the "roller-coaster" effect of the continuing legislative changes'.⁴⁹ 'Stability,' it observed, 'cannot exist in a situation where the law kept changing continuously and endlessly, as did its interpretation and implementation.'⁵⁰

Similarly, the predictability of the legal framework governing the activity of foreign investors is frequently considered as an element of fair and equitable treatment. The tribunal in *Metalclad v Mexico*, for instance, based its finding of a violation of Article 1105(1) of NAFTA, *inter alia*, on the argument that Mexico 'failed to ensure a...predictable framework for Metalclad's business planning and investment'.⁵¹ Likewise, the tribunal in *Tecmed v Mexico* stressed that a foreign investor needs to 'know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices and directives, to be able to plan its investment and comply (p. 161) with such regulations'.⁵² Accordingly, a lack of clarity of the legal framework or excessively vague rules can violate fair and equitable treatment.⁵³

Likewise, the concept of consistency plays an important role in applying fair and equitable treatment provisions. The tribunal in *Lauder v Czech Republic*, for example, stressed that fair and equitable treatment could be violated if domestic agencies acted inconsistently in applying domestic legislation.⁵⁴ Similarly, in *MTD v Chile* the tribunal found a violation of fair and equitable treatment due to 'the inconsistency of action between two arms of the same Government *vis-à-vis* the same investor'.⁵⁵

These lines of argument run parallel to one of the central elements the concept of the rule of law is associated with in domestic legal systems: legal certainty and legal security (*Rechtssicherheit*).⁵⁶ This element of the rule of law refers to the core aspect of normativity of law that allows individuals to adapt their behaviour to the requirements of the legal order and, on that basis, form stable social relationships. Especially in the commercial context, stability is a critical component for long-term investments. Legal security requires a certain stability of the legal order, legal certainty calls for predictable and understandable rules and their consistent application. This interpretation notably conforms with the object and purpose of investment treaties, as stability, predictability, and consistency are necessary for investors in order to plan their investment and adjust to the host country's domestic legal framework.

Yet, one has to be aware that the stability and predictability of domestic law can only relate to the normal deployment of governmental law- and policy-making and, parallel to the function of the rule of law in domestic constitutional law, should not be understood as an absolute requirement that would allow foreign investors to be effectively excluded from regulatory changes in the host state.⁵⁷ Accordingly, stability and predictability should

not be misunderstood as a guarantee that the legal framework will never change or even serve as a business (p. 162) guarantee to investment projects.⁵⁸ Rather, the stability of the legal order due as part of fair and equitable treatment will vary with the circumstances: a serious crisis or even an emergency situation may call for different reactions than the deployment of public power in the normal course of things.⁵⁹ Likewise, concerning consistency, one should be aware that domestic regulatory frameworks are never completely free of inconsistencies. A violation of this sub-element should therefore be handled in a prudent manner.

(2) Legality

Fair and equitable treatment has also been interpreted by arbitral tribunals as including the principle of legality. In various cases tribunals based their assessment of fair and equitable treatment on whether domestic actors complied with national legal provisions. Although tribunals diverge on the question to what extent the correct application of domestic law is subject to arbitral review, their jurisprudence is consistent in holding that at least a qualified violation of domestic law can constitute a violation of fair and equitable treatment. Such qualified violations take place, for example, when the host state acts in bad faith vis-à-vis foreign investors by misusing its governmental powers, for example in order to inflict harm on an investor, to coerce an investor in negotiations, or to induce an investor to abandon its investment.⁶⁰ In *Pope & Talbot v Canada*, for example, the tribunal took into account that a domestic agency failed to produce a legal basis under domestic law for the administrative proceedings it initiated against a foreign investor in a case where the relations with the investor 'were more like combat than cooperative regulation'.⁶¹

Fair and equitable treatment was also interpreted to include an obligation to apply domestic law. In *GAMI Investments v Mexico*, the tribunal deduced from fair and equitable treatment an obligation not only to abide by, but also to enforce, provisions of national law.⁶² Similarly, in *Tecmed v Mexico* the tribunal underscored that host states have to make use of 'the legal instruments that govern the actions (p. 163) of the investor or the investment in conformity with the function usually assigned to such instruments'.⁶³

However, the connection between fair and equitable treatment and the principle of legality not only becomes apparent when domestic decision-makers violate municipal laws. On the contrary, the observance of domestic

legal rules is often relied upon by tribunals in order to decline a violation of fair and equitable treatment. In *Noble Ventures v Romania*, for example, the tribunal observed that certain bankruptcy proceedings ‘were initiated and conducted according to the law and not against it’⁶⁴ and thus declined to find a breach of fair and equitable treatment.

Arbitral jurisprudence therefore clearly considers the principle of legality as an element of fair and equitable treatment. The principle of legality also finds its counterpart in rule of law concepts that encompass the requirement that public power derives its authority from a legal basis and is exercised along the lines of pre-established procedural and substantive rules.⁶⁵ The principle of legality should, however, not distract from the fact that fair and equitable treatment does not simply buttress the application of domestic law and provide a claim of the foreign investor against the host state to apply its domestic law correctly. Rather, fair and equitable treatment remains an independent standard of international law against which the domestic legal order is measured. In consequence, only qualified breaches of domestic law will constitute a breach of fair and equitable treatment.

(3) Protection of legitimate expectations

While the principle of legality is closely related to the idea that the executive and the judicial branch of government have to obey the law enacted by the legislator, legal rules are only able to have a stabilizing function for social relationships and create the basis of an environment conducive to long-term investment when they are applied in a way in which a reasonable investor would expect them to be applied. The ordering function of law therefore requires that the perceptions of the law's subjects and their expectations vis-à-vis government activity be taken into account.

Accordingly, the concept of legitimate expectations is another prominent sub-element of fair and equitable treatment. The tribunal in *Saluka v Czech Republic* (p. 164) referred to the concept of legitimate expectations even as ‘the dominant element of that standard’.⁶⁶ Its existence can also be traced as an element of the rule of law in domestic legal systems⁶⁷ and as a concept of general international law.⁶⁸ Its main thrust is the protection of confidence against administrative and legislative conduct. In this sense, the tribunal in *Tecmed v Mexico* held that fair and equitable treatment requires ‘provid[ing] to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investors to make the investment’.⁶⁹ Similarly, the tribunal in *International Thunderbird*

Gaming Corporation v Mexico explained that ‘the concept of “legitimate expectations” relates...to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the [state] to honour those expectations could cause the investor (or investment) to suffer damages’.⁷⁰

Legitimate expectations can result from a number of actions that are attributable to the host state.⁷¹ In the first place, a breach of legitimate expectations will come into play if there is conduct ‘in breach of representations made by the host State which were reasonably relied on by the [investor].’⁷² They can result, for (p. 165) example, from opinions and statements released by administrative agencies about the application of domestic law.⁷³

It is, however, not necessary that expectations were induced by conduct that was individually directed towards a foreign investor. Legitimate expectations can also originate from the provisions of the general regulatory framework that a host state has put into place,⁷⁴ as long as the confidence the framework generated is sufficiently specific. In this context, the concept of legitimate expectations as an element of the rule of law may even restrict the domestic legislator in making changes to the regulatory framework in place. This was the case in several of the Argentine disputes, where the regulatory framework the foreign investor relied on was permanently and fundamentally altered after investments were made.⁷⁵

The concept entails, however, the danger that domestic legal orders and the actions of host states are exclusively measured against the expectations of foreign investors.⁷⁶ Although the legitimacy of expectations already limits the scope of the concept,⁷⁷ it should not be handled as an inflexible and absolute yardstick. Instead, tribunals should allow for a certain flexibility for host states to react, for instance, to emergency situations. Accordingly, the tribunal in *Eureka v Poland* suggested that the breach of basic expectations was not a violation of fair and equitable treatment if good reasons existed why the expectations of the investor could not be met.⁷⁸ Likewise, the tribunal in *Saluka v Czech Republic* specifically warned of the danger of taking the idea of the investor's expectation too literally since this would ‘impose upon host States’ [sic] obligations which would be inappropriate and unrealistic’.⁷⁹ Instead, the tribunal set out to balance the ‘[investor's] legitimate and reasonable expectations on the one hand and the [host

state's] legitimate regulatory interests on the other'.⁸⁰ An investor could only:

...expect that the [host state] implements its policies *bona fide* by conduct that is, as far as it affects the investors' investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and non-discrimination. In particular, any differential treatment of a foreign investor must not be based on unreasonable distinctions and demands, and must be justified by showing that it bears a reasonable relationship to rational policies not motivated by a preference for other investments over the foreign-owned investment.⁸¹

(p. 166)

Overall, the concept of legitimate expectations therefore offers sufficient flexibility to reconcile the interests of foreign investors and host states.

(4) Administrative due process and denial of justice

Several cases interpreted fair and equitable treatment as enshrining the concept of due process. Due process, in this context, mainly comes in two forms: administrative and judicial due process. It is closely connected to the proper administration of administrative, civil, and criminal justice.⁸² This is also reflected in recent US treaty practice. Article 10.5(2)(a) of the Dominican Republic-Central America-United States Free Trade Agreement, for instance, stipulates that 'fair and equitable treatment includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world'.⁸³ Investment tribunals also have interpreted fair and equitable treatment in this way. The tribunal in *Waste Management v Mexico*, for instance, defined a violation of fair and equitable treatment as 'involv[ing] 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 candour in an administrative process'.⁸⁴

The main thrust of the due process requirement in investment treaty arbitration is to establish procedural rights for investors in administrative proceedings. This was emphasized by the tribunal in *International Thunderbird Gaming v Mexico* that held that the proceedings of a

government agency 'should be tested against the standards of due process and procedural fairness applicable to administrative officials'.⁸⁵

Fair and equitable treatment, however, is equally relevant for the discharge of judicial proceedings.⁸⁶ In this context the standard can be violated 'if Claimants were denied access to [domestic] courts...or if the Claimants were treated unfairly in (p. 167) those courts (denial of procedural justice) or if the judgment of those courts were substantively unfair (denial of substantive justice)'.⁸⁷

(5) Protection against arbitrariness and discrimination

The protection of foreign investors against arbitrary and discriminatory treatment also plays a major role in the arbitral jurisprudence on fair and equitable treatment. While investment treaties sometimes contain specific provisions prohibiting such treatment, arbitral tribunals also consider the prohibition of arbitrary and discriminatory treatment as part of fair and equitable treatment.⁸⁸ The connection between arbitrariness and the concept of the rule of law also has been explicitly drawn by the International Court of Justice in the *ELSI* case. Dealing with the government's requisition of a foreign-owned factory in order to prevent its closure and the lay-off of workers, the Court observed that:

Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. This idea was expressed by the Court in the *Asylum* case, when it spoke of 'arbitrary action' being 'substituted for the rule of law'. It is wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.⁸⁹

Although the case arose under a Friendship, Commerce and Navigation Treaty, the decision has been accepted widely as being relevant for the interpretation of fair and equitable treatment under investment treaties.⁹⁰ The reason for this may be that arbitrary conduct constitutes a qualified violation of the requirement to act in accordance with domestic law. Arbitrary conduct can be seen as a sufficient but not necessary requirement for breach of fair and equitable treatment. It can also be linked to the requirement under fair and equitable treatment to act in good faith.⁹¹

The nexus between fair and equitable treatment and the prohibition of discriminatory treatment has been emphasized in *Loewen v United States*. In that case, the tribunal stated that fair and equitable treatment is violated by '[a] decision which is in breach of municipal law and is discriminatory against

the foreign litigant'.⁹² Similarly, the tribunal in *Waste Management v Mexico* elaborated that 'fair and equitable treatment is infringed...if the conduct is arbitrary, grossly (p. 168) unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice'.⁹³

Other tribunals suggest drawing a clearer distinction between fair and equitable treatment and the prohibition of discriminatory conduct. They emphasize that: '[c]ustomary international law does not...require that a state treat all aliens (and alien property) equally, or that it treats aliens as favourably as nationals'.⁹⁴ They only consider a violation of fair and equitable treatment if the investor was 'specifically targeted' or if the differential treatment amounted to bad faith.⁹⁵

(6) Transparency

Some cases have based a violation of fair and equitable treatment on a lack of transparency. The tribunal in *Metalclad v Mexico*, for instance, found that the host state breached Article 1105(1) of NAFTA because it 'failed to ensure a *transparent* and predictable framework for Metalclad's business planning and investment'.⁹⁶ Similarly, the tribunal in *Tecmed v Mexico* connected the element of legitimate expectations to the requirement of transparency by stating that: '[t]he foreign investor expects the host State to act...totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives'.⁹⁷

The decision in *Metalclad v Mexico*, in particular, has received major critique for interpreting fair and equitable treatment as including a transparency requirement and has been set aside for this reason by the Supreme Court of Columbia, exercising jurisdiction under the British Columbia International Arbitration Act.⁹⁸ Indeed, if transparency is considered to mean 'that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments...should be capable of being readily known to all affected investors' and requires the host state 'to ensure that the correct position is promptly determined and clearly stated so that investors can proceed with all appropriate expedition (p. 169) in the confident belief that they are acting in accordance with all relevant laws',⁹⁹ such an onerous standard threatens to 'overstretch the position and function of administrative agencies by developing them into consultative units and insurers for the implementation of foreign investment projects'.¹⁰⁰

Yet, a more restrictive reading of the transparency requirement seems equally possible and more closely related to the concept of the rule of law. In *Tecmed v Mexico*, for example, transparency mainly referred to procedural aspects of administrative law, such as the requirement to give sufficient reasons and the obligation to act in a comprehensible and predictable way.¹⁰¹ Essentially, these statements only reiterate more general requirements of the concept of the rule of law that relate to the procedural position of foreign investors in administrative proceedings. Transparency therefore does not necessarily have to be viewed as an additional substantive requirement, but rather as an instrument for procedurally resolving uncertainty in the domestic law, which closely interacts with the burden of proof. As a matter of procedural fairness, complete uncertainties of domestic law should not be held against a foreign investor who is less accustomed to the general legal and political culture of the host state. In that sense it is fully compatible with a procedural understanding of the rule of law and does not impose obligations upon host states to counsel foreign investors or to provide them with comprehensive legal advice.

(7) Reasonableness and proportionality

Finally, arbitral tribunals often link fair and equitable treatment to the concepts of reasonableness and proportionality. Such criteria also play an important role as part of the rule of law in many domestic legal systems, the law of the European Union and the jurisprudence of the European Court of Human Rights (ECtHR).¹⁰² Its function mainly consists of controlling the extent to which interferences of host states with foreign investments are permitted. In this light, the tribunal in *Pope & Talbot v Canada* repeatedly referred to the reasonableness of the conduct of an administrative agency in order to decline a violation of fair and (p. 170) equitable treatment.¹⁰³ The mitigating role of the principle of proportionality has also been applied in the decision in *Saluka v Czech Republic* as a way to balance the host state's interest with the expectations of the foreign investor.¹⁰⁴

Although integrating proportionality into the principle of fair and equitable treatment allows, to a certain extent, for a substantive control of host state conduct, the proportionality requirement also clarifies that fair and equitable treatment is not an inflexible standard, but allows for the balancing of the interests of host states and foreign investors. As long as sufficient leeway is provided for the implementation of domestic policies and as long as tribunals refrain from using intrusive standards of review, proportionality constitutes

a concept that can help to counter fears about the dominance of investors' rights over the interests of host states.

B. Contextualization of Fair and Equitable Treatment in the Separation of Powers Framework

Although the sub-elements arbitral tribunals have developed to concretize fair and equitable treatment are of a fairly general nature, they can be further concretized in regard of the discharge of public power by domestic administration, in domestic legal proceedings, and national legislation. Fair and equitable treatment, thus, imposes increasingly specific requirements that national legal systems have to live up to. Fair and equitable treatment, in consequence, assumes a function that is comparable to that of domestic constitutional law, however with two modifications: it only constitutes a special regime for foreign investors and, only entitling to damages in case of violation, does not assume normative supremacy over domestic law.

(1) Fair and equitable treatment and domestic administrative law

National administrative law is particularly prone to the influence of fair and equitable treatment as foreign investors are affected by administrative proceedings at various stages during the life of an investment project, ranging from the application for and issuance of operating licences to general regulatory control and supervision of their undertaking. In this context, several sub-elements of fair and equitable treatment establish rule of law components that serve as a yardstick for domestic administrative law. The rule of law elements that mainly influence domestic administrative law are the principle of legality, the protection of confidence, due process, and proportionality. (p. 171)

(a) Administrative procedure

With respect to administrative procedure, in particular concerning the granting, renunciation, or renewal of operating licences, fair and equitable treatment requires domestic administrations to grant foreign investors a fair hearing, conduct proceedings in a comprehensible way, and give reasons for their decisions. The right to a fair hearing and the right to participation in administrative proceedings played a role in *Metalclad v Mexico* where the tribunal found a breach of fair and equitable treatment because the investor was not properly involved. According to the tribunal, the investor should have been given the chance to participate in a meeting

of a local town council that discussed whether to issue a construction permit for the investor's waste landfill.¹⁰⁵ Similarly, the tribunal in *Tecmed v Mexico* emphasized the right to a fair hearing as part of fair and equitable treatment in the context of an administrative proceeding concerning the non-prolongation of an operating licence for a waste landfill.¹⁰⁶

Fair and equitable treatment further obliges domestic administrations to give reasons for their decisions and base them on sufficient factual evidence. The purpose of this requirement is to rationalize the decision-making process and to secure that decisions are taken in accordance with the legal requirements contained in domestic law. Against this backdrop, the Tribunal in *Metalclad v Mexico* determined that Mexico had breached fair and equitable treatment because the Town Council's decision to deny the construction permit was not grounded in considerations about 'construction aspects or flaws of the physical facility',¹⁰⁷ but was mainly motivated by political considerations and not supported by evidence pertaining to legitimate criteria under the municipal law.

The requirement to supply sufficient evidence also results in a duty to conduct fact-finding and to verify evidence before a final decision is taken. Furthermore, the requirement to give reasons aims at facilitating the legal review of an administrative decision.¹⁰⁸ Overall, fair and equitable treatment therefore requires that domestic administrative proceedings conform to standards that are derived from a process-oriented understanding of the rule of law.¹⁰⁹ (p. 172)

(b) Exercise of administrative discretion

Fair and equitable treatment can also restrict or channel the exercise of the administration's discretionary powers. The standard requires administrative agencies to take into account sufficiently the effect of their decisions on foreign investors. In addition, the element of consistency and the protection of legitimate expectations play an important role regarding the exercise of administrative discretion.

*Middle East Cement Shipping and Handling v Egypt*¹¹⁰ involved the seizure and auctioning of the investor's vessel in order to recover debts owed to a state entity. The decision focused on the question of whether the procedural implementation of the auction was valid, in particular whether sufficient notice of seizure was given. The tribunal considered that the agency wrongly had exercised its discretion by using an *in absentia* notification instead

of notifying the claimant directly at his local address, even though both procedures were arguably available and legal under Egyptian law.¹¹¹

The exercise of administrative discretion can also be limited by the principle of consistency and in view of the protection of legitimate expectations. Consistency requires that administrative agencies exercise their discretion according to uniform standards and do not deviate from standard procedures or the usual assessment of comparable circumstances. Consistency may not only influence administrative decision-making with respect to the granting of licences,¹¹² but can also restrict intervention by administrative agencies in order to enforce domestic law. If, for example, an administrative agency has consistently tolerated a specific unlawful conduct, fair and equitable treatment may prevent it from intervening against a foreign investor who engaged in the same conduct. Similarly, acting contrary to representations made by government officials can constitute a breach of fair and equitable treatment.¹¹³

(2) Fair and equitable treatment and domestic judicial proceedings

The rule of law elements derived from fair and equitable treatment also influence the institutional structure of the host state's judiciary and the procedural law domestic courts apply. Fair and equitable treatment requires that host states provide a fair and efficient system of justice,¹¹⁴ including effective judicial dispute settlement procedures for the review of administrative acts¹¹⁵ and dispute settlement between private parties.¹¹⁶ In *Mondev v United States*, for example, the tribunal (p. 173) entertained the possibility that 'the conferral of a general immunity from suit for conduct of a public authority affecting a NAFTA investment could amount to a breach of Article 1105(1) of NAFTA'.¹¹⁷ Accordingly, fair and equitable treatment grants a right to access to domestic courts for foreign investors. In addition, fair and equitable treatment also requires the outcome of a court decision to conform to substantive rule of law standards, in particular the lack of arbitrariness.¹¹⁸

Similarly, the procedural law applied by domestic courts has to conform to the rule of law requirements stemming from fair and equitable treatment. This requires courts to entertain suits in a timely fashion,¹¹⁹ to give a fair hearing to the foreign investor on all essential questions, not to base a decision on unexpected legal grounds, and to give reasons for the decisions reached.¹²⁰

(3) Fair and equitable treatment and domestic legislation

Finally, fair and equitable treatment also restricts the leeway of the national legislator vis-à-vis foreign investors. Although domestic legislation is relatively rarely subject to the assessment of investment tribunals, mainly due to the fact that it often requires specific implementation by administrative or judicial decisions,¹²¹ fair and equitable treatment can result in significant restrictions of the domestic legislator, mainly based on the protection of legitimate expectations.

In *CMS v Argentina*, the tribunal specified that transparency, consistency in the governmental decision-making process, orderly process, and predictability constituted the core elements of fair and equitable treatment also with respect to national legislation.¹²² Measures that entirely converted the existing legal framework, such as the fundamental change in the US dollar-based tariff calculation that the investor relied upon when making its investment, were found to breach fair and equitable treatment. Arguably, the key factor in this context was the permanent abrogation of the existing tariff system that completely eviscerated expectations of foreign investors, which were deliberately induced by Argentina so that the investors would make their investments. Several other tribunals sitting in disputes against Argentina involving almost identical facts followed the approach of the tribunal in *CMS v Argentina* and equally found that the fair and equitable treatment standard could prevent the domestic legislator from making (p. 174) fundamental changes to a regulatory framework the stability of which investors could legitimately rely on when making their investment.¹²³

Yet, the protection of confidence should not be interpreted as an absolute guarantee. First, the concept of legitimate expectations is limited to protecting what an investor, based on objective government conduct and based on the circumstances prevailing in the host state, can legitimately expect at the time of investing abroad.¹²⁴ Secondly, one cannot presume that, although the stability of the legal framework is an essential factor for the investment decision of foreign investors, host states intended to entirely denounce their right to legislate and change domestic legal rules by entering into investment treaties.¹²⁵

In this context, it seems appropriate to draw a distinction between situations where a host state has induced specific confidence in the stability of certain regulations and situations where an investor merely relied on the domestic regulatory framework in a more general way. In the first case, the concept

of legitimate expectations will find its genuine application. In this context, the host state deliberately acted in order to make a foreign investor rely on the regulatory framework when making its investment decision. In the second case, where a foreign investor merely relied on the general legal framework without any specific commitments on behalf of the host state to attract foreign investors, the concept of legitimate expectations may only have a more limited scope of application. It might come into play, however, with respect to legislation with a retroactive effect.¹²⁶ Thus, only in specific circumstances will fair and equitable treatment restrict the host state's power to regulate and introduce changes to existing regulation and legislation.

C. Methodological Implications of the Rule of Law Approach

Understanding fair and equitable treatment as an embodiment of the rule of law does not only clarify its normative content, it also suggests a specific methodology investment tribunals should follow in concretizing the standard and in solving conflicts between the sometimes competing interests of host states and foreign (p. 175) investors. Instead of primarily relying on prior arbitral decisions, an approach that is of little help in particular when disputes concern novel circumstances, and instead of positing the content of fair and equitable treatment in an abstract way without sufficient justification, tribunals should use a comparative methodology that draws on domestic and international law regarding the concept of the rule of law. These bodies of law can elucidate the meaning and implications of specific rule of law requirements and thereby concretize the meaning of fair and equitable treatment.

(1) Comparative analysis of domestic legal systems

A first approach would rely on a comparative approach to rule of law standards contained in the major domestic legal systems that adhere to a liberal tradition. This approach essentially relies on the attempt to extract general principles of law in order to concretize fair and equitable treatment. This approach has already been proposed earlier in order to concretize the concept of indirect expropriation under international law and to distinguish it from non-compensable regulation.¹²⁷ Such an approach can be made equally fruitful for the application of fair and equitable treatment when viewed analogously to the concept of the rule of law. Arbitral tribunals therefore should engage in a comparative analysis of the implications of the concept of

the rule of law in the major domestic legal systems in order to grasp common features those legal systems set up for the exercise of public power.

A comparative analysis may influence the interpretation of fair and equitable treatment mainly in two respects. First, it may enable investment tribunals to positively deduce institutional and procedural requirements from the domestic rule of law standards for a context-specific interpretation of fair and equitable treatment. A comparative analysis of domestic legal systems and their understanding of the rule of law may, for example, be used to justify the standards administrative proceedings affecting foreign investors have to live up to.¹²⁸ Secondly, a comparative analysis of the implications of the rule of law under domestic law may be used to justify the conduct of a state vis-à-vis a foreign investor under the fair and equitable treatment standard. If similar conduct, for instance the repudiation of an investor-state contract in an emergency situation, is generally accepted by domestic legal systems as being in conformity with their understanding of the (national) concept of the rule of law, investment tribunals can transpose such findings to the level of investment treaties as an expression of a general principle of law.¹²⁹ This (p. 176) may have the effect not only of developing *minimum* standards of treatment for foreign investors, but also *maximum* standards in that fair and equitable treatment does not impose restraints on domestic legislators, administrations, and the judiciary that are more onerous than those imposed, in a comparative perspective, by the respective principles of domestic public law.¹³⁰

(2) Comparative analysis of international legal regimes

The second approach would rely on a cross-regime comparison with other international law regimes that incorporate rule of law standards. A particularly promising field for such an approach is the comparative evaluation of the jurisprudence developed by international courts in the human rights context, which address specific elements of the concept of the rule of law. One example in this context is the jurisprudence of the ECtHR concerning Article 6 of the European Convention on Human Rights. This provision can be viewed as an expression of a more general standard of an institutional and procedural understanding of the rule of law.¹³¹ The rich jurisprudence of the ECtHR could thus be used to further concretize fair and equitable treatment, for example with respect to the timely administration of justice or the right to a fair trial.¹³² Similarly, comparative recourse could be had to the emerging principles of European administrative law¹³³ or the jurisprudence of the WTO Appellate Body in order to further develop the

rule of law requirements with respect to the exercise of public power.¹³⁴ The comparative analysis of rule of law understandings under both domestic legal systems and other international law regimes can give examples for concrete implications of the rule of law, and for the scope of restrictions it imposes on states, and thus inform the content of fair and equitable treatment in international investment law. Yet, it will always be necessary to keep in mind the specific context of investment treaties which aim at protecting and promoting foreign investment between the contracting parties.

III. A Normative Justification of the Rule of Law Approach

Explaining fair and equitable treatment as an embodiment of the rule of law can, however, not only serve as a reconstructive exercise of the existing arbitral (p. 177) jurisprudence. As argued in this part, it is possible to ground such an understanding in investment treaties themselves. The argument draws on the importance institutional economics attribute to the concept of the rule of law for the promotion of foreign investment and, more generally, for economic growth and development.

A. The Teleology of International Investment Treaties

As expressed in their preambles, investment treaties aim not only at protecting but also at promoting foreign investment.¹³⁵ Investment flows, however, will depend on the decision of foreign investors to invest in a certain country. One critical factor for this investment decision is the political risk of the host country.¹³⁶ Consequently, investment treaties intend to establish a legal regime that reduces the political risk associated with foreign investment in order to increase investment flows.¹³⁷

The mechanisms for the protection and promotion of foreign investment, however, are not an end in themselves. Instead, they are closely related to the goals of inciting economic growth and development, in particular in developing countries. This was explicitly mentioned as an objective of the ICSID Convention, which recognized ‘the need for international cooperation for economic development, and the role of private international investment therein’.¹³⁸ The implementation of an investor-state dispute settlement mechanism under the ICSID Convention aimed, in the interest of growth and development, at reducing the political risk connected with investing in a developing country with weaker domestic institutions and a less stable legal and political infrastructure. Accordingly, foreign investment is perceived

as 'a supplement to a necessarily limited volume of public development finance'.¹³⁹

B. Institutional Economics and the Role of the Rule of Law

Institutional economics help to explain the function of the rule of law with respect to both objectives of international investment treaties, ie the promotion of foreign investment, on the one hand, and economic growth and development, on the other. Institutional economics analyse the relationship between institutions, markets, and growth. Institutions, in this context, are 'rules of the game in a society or, more formally, are the humanly devised constraints that shape human interaction'.¹⁴⁰ (p. 178) Institutions are characterized by constraints with a certain permanence and durability that are imposed on social actors.¹⁴¹ They comprise legal rules that impose restrictions on the behaviour of individuals as well as legal requirements that concern the exercise of public power. Institutions thus have a double thrust in avoiding private disorder, on the one hand, as well as public dictatorship, on the other.¹⁴² They are essential for the functioning of markets as they 'structure incentives in human exchange, whether political, social, or economic'.¹⁴³ In this sense, the rule of law as a concept of restricting public power can be understood as an institution that constitutes one of the bases of market economies.

With respect to the immediate objectives of investment treaties, the concept of the rule of law is important in the context of attracting investment into foreign, particularly developing countries. This becomes clear from an empirical perspective. According to a World Bank survey, investors primarily make their decision to invest dependent on the credibility of states to ensure a predictable and stable legal framework, ie to effectively implement the rule of law.¹⁴⁴ Conversely, government activity and domestic legal procedures that do not conform to the concept of the rule of law deter investment.

Yet, the rule of law does not only influence the investor's microeconomic perspective. Institutional economics also suggest a link between the rule of law and the broader objective of investment treaties, ie economic growth and development: 'Economic institutions matter for economic growth because they shape the incentives of key economic actors in society, in particular, they influence investments in physical and human capital and technology, and the organization of production.'¹⁴⁵

The importance of the rule of law in the decision-making process of economic actors has been highlighted in economic literature since its earliest days. Max Weber was among the first to perceive the interdependence of modern forms of growth-creating market economies in Western civilizations and a modern legal system based on rational and predictable rules.¹⁴⁶ For him, the core explanation for economic growth in Europe was the rationality of the legal institutions, including the existence and enforcement of contracts and property rights, which had emerged in the socio-legal discourse in the eighteenth and nineteenth centuries and subsequently paved the way for the development of modern market economies.¹⁴⁷ (p. 179)

Although Weber primarily focused on the function of legal institutions to create horizontal order between private individuals by enabling them to use private law institutions, institutions are also critical in the relationship between the state and society. In this context, the rule of law is the primary and, at the same time, most general expression for the predictability of the exercise of public power. This aspect complements the function of the rule of law as an institution that aims at not only avoiding private disorder but also public dictatorship.¹⁴⁸ It is this aspect of the rule of law that grasps the public law understanding of the concept and its function of limiting the exercise of public power.

Likewise, Adam Smith already noted: 'Commerce and manufacturers... can seldom flourish in any state in which there is not a certain degree of confidence in the justice of government.'¹⁴⁹ Similarly, Friedrich A Hayek underscored the importance of the rule of law's restraining function with respect to public authority for modern market economies: 'Nothing distinguishes more clearly conditions in a free country from those in a country under arbitrary government than the observance in the former of the great principles known as the Rule of Law.'¹⁵⁰ In his understanding, market economies are based on the initiatives and decision-making of individuals who, in order to be able to plan their efforts, require governmental action to be restricted according to rules 'made in advance, in the shape of formal rules which do not aim at the wants and needs of particular people [but] are intended to be merely instrumental in the pursuit of people's various individual ends'.¹⁵¹

While the function of legal institutions was initially mainly of interest in explaining the economic development of industrialized nations and was debated in the ideological conflict between liberalism and socialism, lawyers and social scientists took an interest in institutional economics

after decolonization gained momentum following the Second World War in order to explain and remedy the economic weaknesses of many developing countries. In this context, the 'law and development' movement focused on the function of law in the developing world and its possible impact on sustainable economic growth.¹⁵² The movement viewed 'modern law... as a functional prerequisite of an industrial economy'¹⁵³ and accorded a prominent importance to the concept of the rule of law.¹⁵⁴ **(p. 180)**

More recently, the linkage between institutions, growth, and development has been analysed by new institutional economics. Scholars in this field particularly emphasize the significance for economic growth and development of a well-functioning legal system that embodies the rule of law. Richard Posner, for instance, points to the 'empirical evidence showing that the rule of law does contribute to a nation's wealth and its rate of economic growth'.¹⁵⁵ This evidence is also buttressed by theoretic analyses.¹⁵⁶

The findings of new institutional economics have also been at the core of the development strategy of the World Bank. The linkage between the rule of law and economic development, in particular, has materialized in the Bank's legal reform programme¹⁵⁷ and has been reiterated in the World Bank's good governance agenda, which comprises, as one of the core concepts that should help to establish good government in developing countries, the rule of law.¹⁵⁸

While the economic literature consistently points to parallels and interdependencies between economic development and the emergence of stable and reliable institutions, the nature of the relationship between institutions and economic growth is debated—in particular to what extent, if any, a causal relationship exists between institutions and growth.¹⁵⁹ From this perspective it is unclear whether the development of legal institutions, including the rule of law, will **(p. 181)** result in economic growth or whether, in turn, legal institutions are a result of prior economic development and the pressure exercised by the respective interests in society. Yet, even if institutions do not trump all other factors in the quest for economic growth,¹⁶⁰ they certainly constitute one influential factor. In addition, the debate about a causal relationship between institutions and growth seems to be mitigated in the context of foreign investment by the fact that a certain institutional infrastructure that reduces the investment risk is necessary to attract foreign investment. Therefore the critique concerning the causality

between institutions and growth seems to be less material than in a setting where growth should result solely from endogenous economic activity.

Although the rule of law certainly is not the only variable that influences economic growth,¹⁶¹ institutional economics show the importance of the concept for growth and development. Consequently, it seems appropriate to draw a connection between the institutional economics of growth, its emphasis on the importance of the rule of law, and the normative framework of investment treaties, in particular fair and equitable treatment.¹⁶² This provides a normative foundation for interpreting fair and equitable treatment as an embodiment of the rule of law, as states can be presumed to have intended the establishment of institutions that effectively contribute to the object and purpose of investment treaties.

IV. Conclusion

Fair and equitable treatment has become one of the standard guarantees of protection in international investment treaties and is regularly applied by arbitral tribunals. Restricting the host state's exercise of sovereign power, the scope given to fair and equitable treatment in recent jurisprudence is increasingly wide, covering restrictions of domestic courts, domestic administrative bodies, and even the national legislator. Fair and equitable treatment, thus, can be understood as a public law concept with quasi-constitutional ramifications that restricts the conduct of states vis-à-vis foreign investors. In consequence, this chapter, in attempting to grasp the normative content of fair and equitable treatment, has submitted that the standard can be understood as an embodiment of the rule of law as it is familiar from numerous domestic and international legal regimes. Thus, investment tribunals have interpreted fair and equitable treatment as encompassing sub-elements the rule of law is associated with in various domestic legal systems, including stability and predictability of the legal framework, consistency in **(p. 182)** decision-making, the principle of legality, the protection of confidence, due process, the prohibition of denial of justice, transparency, and proportionality.

In its core, the rule of law understanding underlying the jurisprudence of investment tribunals can be described as primarily procedural and institutional in nature. Accordingly, the control exercised by investment tribunals over the conduct of host states mainly is concerned with the institutional structure and the procedural implementation of law and policy affecting foreign investors. Fair and equitable treatment, for example,

requires the existence of a minimal separation of powers in host states, the possibility of recourse to courts for the adjudication of private rights and for the review of acts of public authorities, legal security, protection of legitimate expectations, and the observance of procedural rights in administrative and judicial proceedings.

Such an understanding of fair and equitable treatment also can be supported by an economic analysis of investment treaties. This is particularly true considering the treaties' object and purpose to protect and to promote foreign investment flows and ultimately to lead to economic growth and development. This purposive link between the protection standards contained in the treaties and the promotion of investment justifies drawing a parallel to the economic literature that expands on the relationship between the rule of law and economic growth. The positive economic impacts that are linked to the rule of law and the incentive structure necessary for foreign investors to invest in a specific country suggest that such an understanding of fair and equitable treatment is appropriate in the context of investment treaties.

Finally, this chapter suggested that tribunals should draw—in a comparative approach—on the jurisprudence of domestic and international courts applying and interpreting elements of the rule of law in order to concretize further the normative content of fair and equitable treatment and to operationalize the standard in concrete cases. This would help convincingly to justify and apply fair and equitable treatment in various context-specific fields of economic activity.

At the same time, the reference to rule of law concepts under domestic and international legal regimes illustrates that the rule of law is not an absolute guarantee but rather allows for a balance between the interests of host states and of foreign investors. In this context, one should keep in mind the words of Joseph Raz, who concluded his seminal article, 'The Rule of Law and its Virtue', by recalling:

After all the rule of law is meant to enable the law to promote social good, and should not be lightly used to show that it should not do so. Sacrificing too many social goals on the altar of the rule of law may make the law barren and empty.¹⁶³

Notes:

(*) The present chapter draws on S Schill, 'Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law', IILJ Working Paper 2006/6 (Global Administrative Law Series), available at <http://www.iilj.org/publications/documents/2006-6-GAL-Schill-web.pdf#>.

(1) It also figured in the Friendship, Commerce, and Navigation Treaties the US concluded with numerous countries and played a role in all multilateral projects relating to the protection of foreign investment. See S Vasciannie, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice' (1999) 70 BYBIL 99; C Yannaca-Small, 'Fair and Equitable Treatment Standard in International Investment Law', OECD Working Papers on International Investment, Number 2004/3, 3 *et seq*, available at <http://www.oecd.org/dataoecd/22/53/33776498.pdf#>.

(2) R Dolzer, 'The Impact of International Investment Treaties on Domestic Administrative Law' (2005) 37 NYU JILP 953, 964.

(3) See Yannaca-Small (n 1 above) 40; C Schreuer, 'Fair and Equitable Treatment in Arbitral Practice' (2005) 6 JWIT 357, 365; *Saluka Investments BV v Czech Republic* UNCITRAL, Partial Award, 17 March 2006, para 284; *MCI Power Group LC and New Turbine Inc v Republic of Ecuador* ICSID Case No ARB/03/6, Award, 31 July 2007, para 370; see also *Oil Platforms (Islamic Republic of Iran v US)* Judgment, 12 December 1996, ICJ Reports 1996, 803 *et seq*, Separate Opinion of Judge Higgins, para 39.

(4) On the different types of framing fair and equitable treatment clauses, see I Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (2008) 15–52.

(5) See *Parkerings-Compagniet AS v Republic of Lithuania* ICSID Case No ARB/05/8, Award, 11 September 2007, para 277.

(6) See R Dolzer, 'Fair and Equitable Treatment: A Key Standard in Investment Treaties' (2005) 39 International Lawyer 87, 90; see also UNCTAD, *Fair and Equitable Treatment* (1999) 10 *et seq*, available at <http://www.unctad.org/en/docs/psiteitd11v3.en.pdf#>.

(7) See eg A Newcombe and L Paradell, *Law and Practice of Investment Treaties—Standards of Protection* (2009) 264–75; A Orakhelashvili, 'The

Normative Basis of “Fair and Equitable Treatment” (2008) 46 *Archiv für Völkerrecht* 74.

(8) NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions* (31 July 2001), available at #<http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp#>.

(9) *LFH Neer and Pauline E Neer (US) v Mexico* Opinion, 15 October 1926, 4 UNRIAA 61-2.

(10) See *Glamis Gold Ltd v US* UNCITRAL/NAFTA, Award, 8 June 2009, paras 598-616, insisting on the difference between an autonomous interpretation of fair and equitable treatment and the customary international minimum standard and deducing from that difference that the customary basis of fair and equitable treatment in Art 1105(1) of NAFTA requires a claimant to show state practice supported by *opinio juris* in order to impose concrete restrictions on certain state conduct going beyond what the standard required in the 1920s. For a critique of that approach, see S Schill, ‘Case Note—*Glamis Gold, Ltd. and United States of America*’ (2010) 104 *AJIL* 253, 258-9.

(11) *Saluka v Czech Republic* (n 3 above) para 291. Similarly also *Azurix Corp v Argentine Republic* ICSID Case No ARB/01/12, Award, 14 July 2006, para 361; *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* ICSID Case No ARB/05/22, Award, 24 July 2008, para 592; *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Kazakhstan* ICSID Case No ARB/05/16, Award, 29 July 2008, para 611.

(12) See eg *Pope & Talbot v Canada* UNCITRAL/NAFTA, Award in Respect of Damages, 31 May 2002, para 62; similarly *Mondev International Ltd v US* ICSID Case No ARB(AF)/99/2 (NAFTA), Award, 11 October 2002, para 125; see also S Hindelang, ‘Bilateral Investment Treaties, Custom and a Healthy Investment Climate—The Question of Whether BITs Influence Customary International Law Revisited’ (2004) 5 *JWIT* 789.

(13) See *Pope & Talbot* (n 12 above) paras 58 *et seq*; *Mondev v US* (n 12 above) para 125; *ADF Group Inc v US* ICSID Case No ARB(AF)/00/1 (NAFTA), Final Award, 9 January 2003, para 179; see also B Choudhury, ‘Evolution or Devolution?—Defining Fair and Equitable Treatment in International Investment Law’ (2005) 6 *JWIT* 297.

(14) See S Montt, *State Liability in Investment Treaty Arbitration* (2009) 62–74.

(15) cf *Sempra Energy International v Argentine Republic* ICSID Case No ARB/02/16, Award, 28 September 2007, para 302, observing that: '[o]n many occasions, the issue will not even be whether the fair and equitable treatment standard is different or more demanding than the customary standard, but only whether it is more specific, less generic and spelled out in a contemporary fashion so that its application is more appropriate to the case under consideration'. Again, the tribunal in *Glamis Gold v US* adopted a different approach, see n 10 above.

(16) See also Montt (n 14 above) 298–310.

(17) For presentations summing up the jurisprudence in more detail, see Newcombe and Paradell (n 7 above) 279–96; R Dolzer and C Schreuer, *Principles of International Investment Law* (2008) 133–49; C McLachlan et al, *International Investment Arbitration—Substantive Principles* (2007) 226–47.

(18) See *Alex Genin, Eastern Credit Ltd, Inc and AS Baltoil v Republic of Estonia* ICSID Case No ARB/99/2, Award, 25 June 2001, para 367; *Consortium RFCC v Royaume du Maroc* ICSID Case No ARB/00/6, Sentence Arbitrale, 22 December 2003, para 51; *Ronald S Lauder v Czech Republic* UNCITRAL, Final Award, 2 September 2001, para 292; *CMS Gas Transmission Co v Argentine Republic* ICSID Case No ARB/01/8, Award, 12 May 2005, para 273.

(19) cf eg M Kantor, 'Fair and Equitable Treatment: Echoes of FDR's Court-Packing Plan in the International Law Approach Towards Regulatory Expropriation' (2006) 5 LPICT 231.

(20) 1155 UNTS 331. The rules of interpretation under the Vienna Convention also constitute customary international law. See eg *Case Concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* ICJ, Judgment, 13 July 2009, para 47, available at #<http://www.icj-cij.org>#.

(21) cf *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile* ICSID Case No ARB/01/7, Award, 25 May 2004, para 113; *Siemens AG v Argentine Republic* ICSID Case No ARB/02/8, Award, 6 February 2007, para 290; *Azurix v Argentina* (n 11 above) para 360; *National Grid plc v Argentine Republic* UNCITRAL, Award, 3 November 2008, para 168.

(22) cf *Saluka v Czech Republic* (n 3 above) para 297.

(23) See Dolzer (n 6 above) 93 *et seq.*

(24) From the early arbitral jurisprudence, see eg *Mondev v US* (n 12 above) para 118; similarly *Eastern Sugar BV v Czech Republic SCC Case No 88/2004*, Partial Award, 27 March 2007, paras 222–343.

(25) From the early arbitral jurisprudence, see eg *SD Myers Inc v Government of Canada UNCITRAL/NAFTA*, Partial Award, 13 November 2000, para 134.

(26) From the early arbitral jurisprudence, see eg *Waste Management Inc v United Mexican States ICSID Case No ARB(AF)/00/3 (NAFTA)*, Award, 30 April 2004, paras 89 *et seq.* Meanwhile virtually all tribunals define and apply fair and equitable treatment in relation to the statements contained in earlier arbitral jurisprudence.

(27) On the importance of precedent in the development of arbitral jurisprudence, see S Schill, *The Multilateralization of International Investment Law* (2009) 321–57; G Kaufmann-Kohler, ‘Arbitral Precedent: Dream, Necessity or Excuse?’ (2007) 23 *Arb Int* 357. For empirical analyses of the impact of precedent, see J Commission, ‘Precedent in Investment Treaty Arbitration—A Citation Analysis of a Developing Jurisprudence’ (2007) 24 *Jl Arb* 129; OK Fauchald, ‘The Legal Reasoning of ICSID Tribunals—An Empirical Analysis’ (2008) 19 *EJIL* 301.

(28) See CH Brower, ‘Investor-State Disputes under NAFTA: The Empire Strikes Back’ (2003) 40 *Col JTL* 43, 56, suggesting that fair and equitable treatment constitutes ‘an intentionally vague term, designed to give adjudicators a quasi-legislative authority to articulate a variety of rules necessary to achieve the treaty’s object and purpose in particular disputes’. Similarly SD Franck, ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions’ (2005) 73 *Ford LR* 1521, 1589; KJ Vandeveld, *United States Investment Treaties: Policy and Practice* (1992) 76; Dolzer (n 6 above) 89.

(29) See eg *Técnicas Medioambientales Tecmed SA v United Mexican States ICSID Case No ARB(AF)/00/2*, Award, 29 May 2003, para 154, quoting the decision of the International Court of Justice in *Elettronica Sicula SpA (ELSI) (US v Italy)* Judgment, 20 July 1989, ICJ Reports 1989, 15, para 128.

(30) See UNCTAD (n 6 above) 10; Yannaca-Small (n 1 above) 2 *et seq.*

(31) *Biwater v Tanzania* (n 11 above) paras 593–595 (emphasis in the original); similarly *Rumeli v Kazakhstan* (n 11 above) para 610.

(32) See H Schulze-Fielitz, in H Dreier (ed), *Grundgesetz—Kommentar* (2nd edn, 2006) Vol II, Article 20, paras 1–33, describing the development of the concept of the rule of law as a central principle of constitutionalism. See also the contributions in R Hofmann *et al* (eds), *Rechtsstaatlichkeit in Europa* (1996); A von Bogdandy *et al* (eds), *Ius Publicum Europaeum* (2007), Vol I; M Sellers and T Tomaszewski (eds), *The Rule of Law in Comparative Perspective* (2010).

(33) On the development of the rule of law in its politico-philosophical background, see B Tamanaha, *On the Rule of Law—History, Politics, Theory* (2004). For the thesis that the rule of law is a concept common to civil and common law see also D Zolo, ‘The Rule of Law: A Critical Appraisal’ in P Costa and D Zolo (eds), *The Rule of Law* (2007) 3.

(34) Zolo (n 33 above) 21–2.

(35) D Dyzenhaus, ‘The Rule of (Administrative) Law in International Law’ (2005) 68 L & CP 127, 130; similarly J Waldron, ‘Is the Rule of Law an Essentially Contested Concept (in Florida)?’ (2002) 21 *Law & Philosophy* 137, 158; K Hesse, ‘Der Rechtsstaat im Verfassungssystem des Grundgesetzes’ in E Forsthoff (ed), *Rechtsstaatlichkeit und Sozialstaatlichkeit* (1968) 557, 560 *et seq*; Zolo (n 33 above) 24–5.

(36) cf also FA Hayek, *The Road to Serfdom* (1944) 54; Zolo (n 33 above) 24–5.

(37) See R Fallon, ‘“The Rule of Law” as a Concept in Constitutional Discourse’ (1997) 97 Col LR 1, 14 *et seq*, on the formalist ideal in the rule of law.

(38) *ibid* 18 *et seq*, on the legal process ideal understanding of the rule of law.

(39) Dyzenhaus (n 35 above) 129.

(40) See n 102 below.

(102) See eg Schulze-Fielitz (n 32 above) Article 20, paras 179 *et seq*, on German constitutional law where the proportionality principle arguably finds its origins in modern constitutional law. See further E Ellis (ed), *The Principle*

of Proportionality in the Laws of Europe (1999); N Emiliou, *The Principle of Proportionality in European Law* (1996) 23 *et seq*; G Nolte, 'General Principles of German and European Administrative Law—A Comparison in Historic Perspective' (1994) 191 *MLR* 191; TJ Gunn, 'Deconstructing Proportionality in Limitations Analysis' (2005) 19 *Emory ILR* 465; P van Dijk and F van Hoof, *Theory and Practice of the European Convention on Human Rights* (1998) 80 *et seq*.

On the hesitance in US constitutional law to accept proportionality as a general principle, see VC Jackson, 'Ambivalent Resistance and Comparative Constitutionalism: Opening up the Conversation on "Proportionality", Rights and Federalism' (1999) 1 *UPa J Const L* 583.

(41) Dyzenhaus (n 35 above) 130 *et seq*.

(42) See eg Schulze-Fielitz (n 32 above) Article 20, paras 13 *et seq*, with respect to the German tradition; see also Kantor (n 19 above) with respect to the development of the understanding of due process in US Supreme Court jurisprudence.

(43) See only Waldron (n 34 above).

(44) See *Consortium RFCC v Royaume du Maroc* ICSID Case No ARB/00/6, Award, 22 December 2003, para 51: 'Pour que la violation alléguée du contrat constitue un traitement injuste ou inéquitable au sens de l'Accord bilatéral, il faut qu'elle résulte d'un comportement exorbitant de celui qu'un contractant ordinaire pourrait adopter. Seul l'Etat, en tant que puissance publique, et non comme contractant, a assumé des obligations au titre de l'Accord bilatéral.' See also *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan* ICSID Case No ARB/03/29, Award, 27 August 2009, para 180, with further references. On the difference between treaty claims and contract claims, see S Schill, 'Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties' (2009) 18 *Minn JIL* 1, 27–31, with further references.

(45) Notwithstanding the difference between contract claims and treaty claims, interferences with investor-state contracts by sovereign conduct are judged against the fair and equitable treatment standard. See *Bayindir v Pakistan* (n 44 above) para 180, with further references.

(46) The proposed categorization differs slightly from the one followed by other treatises on international investment law. In substance, however, the differences are nominal.

(47) N Rubins and S Kinsella, *International Investment, Political Risk and Dispute Resolution* (2005) 1 *et seq.*

(48) *CMS v Argentina* (n 18 above) para 274. See further *Occidental Exploration and Production Company (OEPC) v Republic of Ecuador*, UNCITRAL, LCIA Case No UN3467, Final Award, 1 July 2004, para 183; *LG&E Energy Corp, LG&E Capital Corp, LG&E International Inc v Argentine Republic* ICSID Case No ARB/02/1, Decision on Liability, 3 October 2006, para 124; *Enron Corp and Ponderosa Assets LP v Argentine Republic* ICSID Case No ARB/01/3, Award, 22 May 2007, paras 259–260.

(49) *PSEG Global Inc, The North American Coal Corp, and Konya Ingin Elektrik Uretim ve Ticaret Ltd Sirketi v Republic of Turkey* ICSID Case No ARB/02/5, Award, 19 January 2007, para 250.

(50) [ibid para 254](#).

(51) See *Metalclad Corp v United Mexican States* ICSID Case No ARB(AF)/97/1 (NAFTA), Award, 30 August 2000, para 99. See further *BG Group plc v Republic of Argentina*, Final Award, 24 December 2007, para 307; *Parkerings v Lithuania* (n 5 above) para 333; *Duke Energy Electroquil Partners & Electroquil SA v Republic of Ecuador* ICSID Case No ARB/04/19, Award, 18 August 2008, para 347.

(52) *Tecmed v Mexico* (n 29 above) para 154.

(53) *cf OEPC v Ecuador* (n 48 above) para 184.

(54) *Lauder v Czech Republic* (n 18 above) paras 292 *et seq.*

(55) *MTD v Chile* (n 21 above) para 163. Similarly, *Tecmed v Mexico* (n 29 above) paras 154 and 162 *et seq.* See also *OEPC v Ecuador* (n 48 above) para 184; *PSEG v Turkey* (n 49 above) paras 246 and 248; *LG&E v Argentina* (n 48 above) para 131; *Biwater v Tanzania* (n 11 above) para 602.

(56) As such it is recognized, mostly as a constitutional standard, in many domestic legal systems. See for its implementation in the German Constitution Schulze-Fielitz (n 32 above) Article 20, paras 129 *et seq*; see Fallon (n 37 above) 14 *et seq*, with references to US constitutional practice;

more generally, see also J Raz, 'The Rule of Law and its Virtue' (1977) 93 LQR 195, 198. On legal certainty as a principle of EU law, see T Tridimas, *The General Principles of EU Law* (2006) 242–51.

(57) In this sense, see also Dolzer (n 6 above) 105. See also *Enron v Argentina* (n 48 above) para 261; *CMS v Argentina* (n 18 above) para 277; *Continental Casualty Co v Argentine Republic* ICSID Case No ARB/03/9, Award, 5 September 2008, para 258.

(58) See only *Emilio Agustín Maffezini v Kingdom of Spain* ICSID Case No ARB/97/7, Award, 13 November 2000, para 64; *Marvin Roy Feldman Karpa v United Mexican States* ICSID Case No ARB(AF)/99/1 (NAFTA), Award, 16 December 2002, para 112.

(59) cf *ELSI* case (n 29 above) para 74; *National Grid v Argentina* (n 21 above) para 180.

(60) See *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic* ICSID Case No ARB/97/3, Award, 20 August 2007, para 7.4.23; *Azurix v Argentina* (n 11 above) para 376; *Rumeli v Kazakhstan* (n 11 above) para 653; *Bayindir v Pakistan* (n 44 above) paras 223–258. *MCI Power Group LC and New Turbine Inc v Republic of Ecuador* ICSID Case No ARB/03/6, Award, 31 July 2007, para 369. Note, however, that it is consistent arbitral jurisprudence that bad faith is not required to breach fair and equitable treatment. See eg *National Grid v Argentina* (n 21 above) para 185.

(61) *Pope & Talbot Inc v Government of Canada* UNCITRAL/NAFTA, Award on the Merits of Phase 2, 10 April 2001, paras 174 *et seq* (quotation at para 181).

(62) cf *GAMI Investments Inc v Government of the United Mexican States* UNCITRAL/NAFTA, Final Award, 15 November 2004, para 91.

(63) *Tecmed v Mexico* (n 29 above) para 154.

(64) *Noble Ventures Inc v Romania* ICSID Case No ARB/01/11, Award, 12 October 2005, para 178. Similarly, *Lauder v Czech Republic* (n 18 above) para 297.

(65) In the German constitutional tradition this element of the rule of law is designated as 'Gesetzmaßigkeit der Verwaltung' and 'Vorrang des Gesetzes'. See Schulze-Fielitz (n 32 above) Article 20, paras 92 *et seq*. The same

concept can be found, *inter alia*, in English, French, Italian, Polish, Spanish, and EU law; see T von Danwitz, *Europäisches Verwaltungsrecht* (2008), 32 *et seq*, 48 *et seq*, 70 *et seq*, 86 *et seq*, 104 *et seq*, 346 *et seq*, 503 *et seq*.

(66) *Saluka v Czech Republic* (n 3 above) 301.

(67) See Dyzenhaus (n 35 above) 133 *et seq*; Schulze-Fielitz (n 32 above) Article 20, paras 146 *et seq*; S Schønberg, *Legitimate Expectations in Administrative Law* (2000); see also J-M Woehrling, 'Le Principe de Confiance Légitime dans la Jurisprudence des Tribunaux' in JW Bridge (ed), *Comparative Law Facing the 21st Century* (1998) 815 *et seq*.

(68) See JP Müller, *Vertrauensschutz im Völkerrecht* (1971). See more specifically in the context of the law of expropriation of aliens, R Dolzer, 'New Foundations of the Law of Expropriation of Alien Property' (1981) 75 AJIL 553, 579 *et seq*.

(69) *Tecmed v Mexico* (n 29 above) para 154.

(70) *International Thunderbird Gaming Corp v United Mexican States* UNCITRAL/NAFTA, Arbitral Award, 26 January 2006, para 147 (internal citation omitted). On the protection of legitimate expectations as part of fair and equitable treatment, see also *ADF v US* (n 13 above) para 189; *MTD v Chile* (n 21 above) paras 114 *et seq*; *OEPC v Ecuador* (n 48 above) para 185; *CMS v Argentina* (n 18 above) para 279; *Eureko BV v Republic of Poland Partial Award*, 19 August 2005, paras 235 and 241; *Enron v Argentina* (n 48 above) para 262; *Metalpar SA and Buen Aire SA v Argentine Republic* ICSID Case No ARB/03/5, Award on the Merits, 6 June 2008, paras 182–185; *MCI Power v Ecuador* (n 60 above) paras 279 and 325; *Compañía de Aguas del Aconquija v Argentina* (n 60 above) para 7.4.42; *Parkerings v Lithuania* (n 5 above) paras 329 *et seq*; *BG v Argentina* (n 51 above) para 310; *Biwater v Tanzania* (n 11 above) para 602; *Rumeli v Kazakhstan* (n 11 above) para 609; *Duke Energy v Ecuador* (n 51 above) para 347; *MTD Equity Sdn Bhd & MTD Chile SA v Republic of Chile* ICSID Case No ARB/01/7, Decision on Annulment, 21 March 2007, para 69; *National Grid v Argentina* (n 21 above) paras 173–175; *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt* ICSID Case No ARB/04/13, Award, 6 November 2008, para 186; *Glamis Gold v US* (n 10 above) para 766; *Bayindir v Pakistan* (n 44 above) para 179.

(71) cf also *ADF v US* (n 13 above) para 189.

(72) *Waste Management v Mexico* (n 26 above) para 98. Similarly, *CME Czech Republic BV v Czech Republic* UNCITRAL, Partial Award, 13 September 2001, para 611; *Jan de Nul v Egypt* (n 70 above) para 263; *Duke Energy v Ecuador* (n 51 above) paras 351–352. See further H Mairal, ‘Legitimate Expectations and Informal Administrative Representations’, Chapter 13 below, 413.

(73) See *International Thunderbird Gaming v Mexico* (n 70 above) para 147. See also *Metalclad v Mexico* (n 51 above) paras 85 *et seq.*

(74) See *GAMI v Mexico* (n 62 above) para 100.

(75) See nn 122–126 below, and accompanying text.

(76) Similarly, *MTD v Chile* Annulment (n 70 above) para 67.

(77) See *Saluka v Czech Republic* (n 3 above) para 304.

(78) See *Eureko v Poland* (n 70 above) paras 232 *et seq.*

(79) *Saluka v Czech Republic* (n 3 above) para 304.

(80) *ibid* para 306.

(81) *ibid* paras 305 *et seq.*

(82) See comprehensively on the closely-related concept of denial of justice J Paulsson, *Denial of Justice in International Law* (2005).

(83) The Dominican Republic-Central America-United States Free Trade Agreement, signed 5 August 2004, available at #<http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta#>.

(84) *Waste Management v Mexico* (n 26 above) para 98; similarly, *SD Myers v Canada* (n 25 above) para 134; *Rumeli v Kazakhstan* (n 11 above) paras 609 and 617; *Jan de Nul v Egypt* (n 70 above) para 187; *Glamis Gold v US* (n 10 above) para 616; *Bayindir v Pakistan* (n 44 above) paras 178 and 344.

(85) *International Thunderbird Gaming v Mexico* (n 70 above) para 200.

(86) See *Compañía de Aguas del Aconquija SA & Compagnie Générale des Eaux v Argentine Republic* ICSID Case No ARB/97/3, Award, 21 November 2000, para 80; *The Loewen Group Inc and Raymond L Loewen v US* ICSID

Case No ARB(AF)/98/3 (NAFTA), Award, 26 June 2003, para 132; *Waste Management v Mexico* (n 26 above) para 132; *Rumeli v Kazakhstan* (n 11 above) para 651; *Victor Pey Casado and President Allende Foundation v Republic of Chile* ICSID Case No ARB/98/2, Award, 8 May 2008, paras 653–657; *Jan de Nul v Egypt* (n 70 above) para 188; *Glamis Gold v US* (n 10 above) para 616.

(87) *Aguas del Aconquija v Argentina* (n 86 above) para 80.

(88) See eg *Parkerings v Lithuania* (n 5 above) para 300; *Biwater v Tanzania* (n 11 above) para 602; *Rumeli v Kazakhstan* (n 11 above) para 609; *Glamis Gold v US* (n 10 above) para 616; *Bayindir v Pakistan* (n 44 above) para 178.

(89) *ELSI* case (n 29 above) para 128, quoting Columbian–Peruvian asylum case (*Columbia / Peru*) Judgment, 20 November 1950, ICJ Reports 1950, paras 266, 284.

(90) See eg *Alex Genin v Estonia* (n 18 above) para 371; *Waste Management v Mexico* (n 26 above) para 98; *Noble Ventures v Romania* (n 64 above) para 176.

(91) See *Waste Management v Mexico* (n 26 above) para 138; *Alex Genin v Estonia* (n 18 above) para 367; *Tecmed v Mexico* (n 29 above) para 154.

(92) *Loewen v US* (n 86 above) para 135.

(93) *Waste Management v Mexico* (n 26 above) para 98; similarly *Eureko v Poland* (n 70 above) para 233; *SD Myers v Canada* (n 25 above) para 266; *Parkerings v Lithuania* (n 5 above) paras 287–288; *Victor Pey Casado v Chile* (n 86 above) paras 670–673; *Biwater v Tanzania* (n 11 above) para 602; *Continental v Argentina* (n 57 above) para 261; *Rumeli v Kazakhstan* (n 11 above) para 609; *Glamis Gold v US* (n 10 above) para 616; *Bayindir v Pakistan* (n 44 above) para 178.

(94) *Alex Genin v Estonia* (n 18 above) para 368; similarly *Methanex Corp v US* UNCITRAL/NAFTA, Final Award, 3 August 2005, Part IV, Chapter C, para 25.

(95) *Alex Genin v Estonia* (n 18 above) paras 369 and 371.

(96) *Metalclad v Mexico* (n 51 above) para 99 (emphasis added).

(97) *Tecmed v Mexico* (n 29 above) para 154; similarly *Maffezini v Spain* (n 58 above) para 83; *LG&E v Argentina* (n 48 above) para 131; *Biwater v Tanzania* (n 11 above) para 602; *Rumeli v Kazakhstan* (n 11 above) paras 609 and 617; *Bayindir v Pakistan* (n 44 above) para 178.

(98) See Supreme Court of British Columbia, *United Mexican States v Metalclad Corp* 2001 BCSC 644. See also Brower (n 28 above) 43.

(99) *Metalclad v Mexico* (n 51 above) para 76 (for both citations).

(100) S Schill, 'Revisiting a Landmark: Indirect Expropriation and Fair and Equitable Treatment in the ICSID Case *Tecmed*' (2006) 3(2) *Trans Disp Man* 15.

(101) See *Tecmed v Mexico* (n 29 above) paras 123, 160, 164.

(103) See *Pope & Talbot v Canada* (n 61 above) paras 123, 125, 128, 155; see also *MTD v Chile* (n 21 above) para 109, with reference to an expert opinion by Schwebel.

(104) See *Saluka v Czech Republic* (n 3 above) paras 304 *et seq.* cf also *Tecmed v Mexico* (n 29 above) para 122, concerning the influence of proportionality on the concept of indirect expropriation. See also Schill (n 100 above) 9 *et seq.* For more details on proportionality analysis in international investment law, see B Kingsbury and S Schill, 'Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest—the Concept of Proportionality', Chapter 3 above, 75.

(105) See *Metalclad v Mexico* (n 51 above) para 91.

(106) See *Tecmed v Mexico* (n 29 above) paras 161 *et seq.*; similarly, *Rumeli v Kazakhstan* (n 11 above) para 617. cf also *Bayindir v Pakistan* (n 44 above) paras 344–348, noting that a hearing will not be necessary in contractual relations between investor and state. More specifically on the elements of a fair hearing required under fair and equitable treatment, see T Weiler, 'NAFTA Article 1105 and the Principles of International Economic Law' (2003) 42 *Col JTL* 35, 79 *et seq.*

(107) *Metalclad v Mexico* (n 51 above) para 93. On the requirement to give reasons as part of fair and equitable treatment, see also *Rumeli v Kazakhstan* (n 11 above) para 617; *Glamis Gold v US* (n 10 above) para 616.

(108) See *Tecmed v Mexico* (n 29 above) para 123.

(109) For parallel developments of administrative law in the context of administrative proceedings in the EU and similar developments under WTO law, see G della Cananea, 'Beyond the State: the Europeanization and Globalization of Procedural Administrative Law' (2003) 9 Eur Pub Law 563.

(110) *Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt* ICSID Case No ARB/99/6, Award, 12 April 2002.

(111) *ibid* para 143.

(112) See *MTD v Chile* (n 21 above) paras 107 *et seq*.

(113) See *International Thunderbird Gaming v Mexico* (n 70 above) paras 137 *et seq*; *Metalclad v Mexico* (n 51 above) paras 85 *et seq*. See further Mairal (n 72 above) 413.

(114) *Loewen v US* (n 86 above) para 153, with further references.

(115) cf also *Waste Management v Mexico* (n 26 above) para 116.

(116) *Loewen v US* (n 86 above) paras 123 and 129.

(117) See *Mondev v US* (n 12 above) para 151.

(118) *Rumeli v Kazakhstan* (n 11 above) para 653. cf also *Aguas del Aconquija v Argentina* (n 86 above) para 80. See further *Mondev v US* (n 12 above) para 144.

(119) See *Victor Pey Casado v Chile* (n 86 above) paras 659–663; cf also *Jan de Nul v Egypt* (n 70 above) paras 202–204.

(120) See *Robert Azinian, Kenneth Davitian and Ellen Baca v United Mexican States* ICSID Case No ARB(AF)/97/2 (NAFTA), Award, 1 November 1999, para 102.

(121) cf *Jahangir Mohtadi and ors v Iran* Award, 2 December 1996, 32 Iran-US CTR 124, 140 *et seq*; *Reza Said Malek v Iran* Award, 11 August 1992, 28 Iran-US CTR 246, 266 *et seq*.

(122) *CMS v Argentina* (n 18 above) paras 276 *et seq*, with further references.

(123) *LG&E v Argentina* (n 48 above) paras 119–139; *Enron v Argentina* (n 48 above) paras 251–268; *Sempra Energy v Argentina* (n 15 above) paras 290–

304; *BG v Argentina* (n 51 above) paras 289–310; *National Grid v Argentina* (n 21 above) paras 167–180.

(124) See *LG&E v Argentina* (n 48 above) para 130; *Duke Energy v Ecuador* (n 51 above) para 347; *Continental v Argentina* (n 57 above) para 261; *Parkerings v Lithuania* (n 5 above) para 331.

(125) See *CMS v Argentina* (n 18 above) para 277; *Saluka v Czech Republic* (n 3 above) para 305. *Parkerings v Lithuania* (n 5 above) paras 332–333; *BG v Argentina* (n 51 above) para 298.

(126) In principle, protection against retroactive legislation exists in most domestic legal systems, but the extent to which it is prohibited varies considerably. See eg Schulze-Fielitz (n 32 above) Article 20, paras 151 *et seq*, on German law; R Hofmann, *Die Bindung staatlicher Gewalt*, in Hofmann *et al* (n 32 above) 3, 16–17, summarizing the situation in Germany, Austria, Spain, Poland, Slovenia, the Czech Republic, and the Slovak Republic. For EU law see von Danwitz (n 65 above) 218; Tridimas (n 56 above) 252–73. On US law see AC Weiler, ‘Has Due Process Struck Out? The Judicial Rubberstamping of Retroactive Economic Laws’ (1993) 42 *Duke LJ* 1069.

(127) R Dolzer, *Eigentum, Enteignung und Entschädigung im geltenden Völkerrecht* (1985) 213 *et seq*; R Dolzer, ‘Indirect Expropriation of Alien Property’ (1986) 1 *ICSID Rev-FILJ* 41. Similarly J Salacuse and NP Sullivan, ‘Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain’ (2005) 46 *Harv ILJ* 67, 115. See also M Perkams, ‘The Concept of Indirect Expropriation in Comparative Public Law—Searching for Light in the Darkness’, Chapter 4 above, 107.

(128) See also della Cananea (n 109 above) 575.

(129) See also C Binder and A Reinisch, ‘Economic Emergency Powers: a Comparative Law Perspective’, Chapter 16 below, 503.

(130) See Montt (n 14 above) 21–3, 74–82, summarizing the normative claim of his study that investment treaty standards should not go beyond the limits developed countries establish for government conduct in their own domestic legal orders.

(131) cf *Mondev v US* (n 12 above) paras 138 and 141 *et seq*; *Tecmed v Mexico* (n 29 above) paras 166 and 122.

(132) See van Dijk and van Hoof (n 102 above) 391 *et seq.* See also A Ehsassi, 'Cain and Abel: Congruence and Conflict in the Application of the Denial of Justice Principle', Chapter 7 below, 213.

(133) See eg J Schwarze, *Europäisches Verwaltungsrecht* (2nd edn, 2005); P Craig, *EU Administrative Law* (2006); J-B Auby and J Dutheil de la Rochère, *Droit Administratif Européen* (2007); von Danwitz (n 65 above).

(134) See della Cananea (n 109 above) 575.

(135) See R Dolzer and M Stevens, *Bilateral Investment Treaties* (1995) 11 *et seq.*, 20 *et seq.* On the effects of BITs on actual investment flows, see eg E Neumayer and L Spess, 'Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?' (2005) 33 *World Development* 1567; Salacuse and Sullivan (n 127 above).

(136) On the connection between investment treaties and the reduction of political risk, see Rubins and Kinsella (n 47 above) 1.

(137) See KJ Vandeveld, 'The Economics of Bilateral Investment Treaties' (2000) 41 *Harv ILJ* 469, 478 *et seq.*

(138) Preamble to the ICSID Convention.

(139) A Broches, 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (1972-II) 136 *Recueil des Cours* 331, 343.

(140) DC North, *Institutions, Institutional Change, and Economic Performance* (1990) 3.

(141) EL Glaeser *et al.*, 'Do Institutions Cause Growth?' (2004) 9 *Journal of Economic Growth* 271, 275.

(142) S Djankov *et al.*, 'The New Comparative Economics' (2003) 31 *Journal of Comparative Economics* 595.

(143) North (n 140 above) 3.

(144) World Bank, *World Development Report—The State in a Changing World* 5 (1997) 34 *et seq.*

(145) D Acemoglu *et al*, 'Institutions as the Fundamental Cause of Economic Growth' in P Aghion and SN Durlauf (eds), *Handbook of Economic Growth* (2005) Vol 1A, 385, 389.

(146) M Weber, *Wirtschaft und Gesellschaft—Grundriss der verstehenden Soziologie* (Winckelmann, 4th edn, 1956).

(147) See D Trubek, 'Toward a Social Theory of Law: An Essay in the Study of Law and Development' (1972) 82 *Yale LJ* 1, 11 *et seq*.

(148) See Djankov *et al* (n 142 above).

(149) A Smith, cited in D Rodrik *et al*, 'Institutions Rule: The Primacy of Institutions Over Geography and Integration in Economic Development' (2004) 9 *Journal of Economic Growth* 131. See also DC North and B Weingast, 'Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England' (1989) 49 *Journal of Economic History* 803; JB De Long and A Shleifer, 'Princes and Merchants: European City Growth Before the Industrial Revolution' (1993) 36 *JL & Econ* 671.

(150) Hayek (n 36 above) 72.

(151) *ibid* 73.

(152) See Trubek (n 147 above).

(153) *ibid* 6 *et seq*.

(154) See D Trubek and M Galanter, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States' (1974) *Wisc LR* 1062, 1071; see also Trubek (n 147 above) 6 *et seq*, with further references. On the new law and development movement, see D Trubek (ed), *The New Law and Economic Development* (2006).

(155) RA Posner, 'Creating a Legal Framework for Economic Development' (1998) 13 *The World Bank Research Observer* 1, 3. See further H De Soto, *The Other Path* (1989); De Long and Shleifer (n 149 above); T Besley, 'Property Rights and Investment Incentives: Theory and Evidence from Ghana' (1995) 103 *Journal of Political Economy* 903; W Easterly and R Levine, 'Africa's Growth Tragedy: Policies and Ethnic Divisions' (1997) 112 *Quarterly Journal of Economics* 1203; W Easterly and R Levine, 'Tropics, Germs, and Crops: How Endowments Influence Economic

Development' (2003) 50 *Journal of Monetary Economics* 3; S Knack and P Keefer, 'Institutions and Economic Performance: Cross-Country Tests Using Alternative Institutional Measures' (1995) 7 *Economics & Politics* 207; D Acemoglu *et al*, 'The Colonial Origins of Comparative Development: An Empirical Investigation' (2001) 91 *American Economic Review* 1369; Rodrik *et al* (n 149 above).

(156) FA Hayek, *The Constitution of Liberty* (1960); M Olson, *The Logic of Collective Action* (1965); M Olson, *Power and Prosperity: Outgrowing Communist and Capitalist Dictatorships* (2000); H Demsetz, 'Towards a Theory of Property Rights' (1967) 57 *American Economic Review* 347; DC North, *Structure and Change in Economic History* (1981) 201 *et seq*; North (n 140 above) 3; RA Posner, 'Equality, Wealth, and Political Stability' (1997) 13 *JL Econ & Org* 344; RJ Barro, 'Economic Growth in a Cross Section of Countries' (1991) 106 *Quarterly Journal of Economics* 407; GW Scully, 'The Institutional Framework and Economic Development' (1988) 96 *Journal of Political Economy* 652.

(157) For a critical analysis of the economic underpinnings and the development strategy of the World Bank's law reform programme, see L Tshuma, 'The Political Economy of the World Bank's Legal Framework for Economic Development' (1999) 8 *Social & Legal Studies* 75.

(158) See World Bank, *Governance and Development* (1992) 28.

(159) See eg Glaeser *et al* (n 141 above), denying a causal relationship and emphasizing the importance of human capital. Easterly and Levine (n 155 above), emphasizing the importance of geography as the decisive factor for economic growth in developing countries. Arguing instead for a positive causal relationship, see Rodrik *et al* (n 149 above); Acemoglu *et al* (n 155 above) 1395.

(160) In this sense Rodrik *et al* (n 149 above).

(161) See DC North, 'Economic Performance Through Time' (1994) 84 *American Economic Review* 359, 366.

(162) See D Schneiderman, 'Investment Rules and the Rule of Law' (2001) 8 *Constellations* 521 *et seq*.

(163) Raz (n 56 above) 211.

