Comparative Law in International Investment Law

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Abstract

In the area of foreign investment protection, international law can, and sometimes should, draw upon domestic legal concepts and principles derived from comparative law analysis. When properly employed, comparative law may not only help to fill 'gaps' in international rules, but may also ameliorate the tension between international law's claim to universality and the importance of respecting local diversity. Yet, in the history of international investment law, the process of borrowing from domestic laws has been controversial and has been criticised as being biased, arbitrary, and hegemonic.

The thesis aims to develop a principled approach to the use of comparative law in international investment law by analysing the legal bases for recourse to comparative law analysis and proposing the proper comparative law methods in the identification, interpretation, and application of international rules. As a first step, the thesis examines the entry points of domestic legal concepts and principles in international investment law based on the rules on sources. In determining the entry points, it highlights the significance of state intention regarding the relationship between international law and domestic laws on particular matters. In particular, this part of the thesis investigates the extent to which the substantive standards and legal concepts in IIAs are aligned with, or diverge from, relevant institutions in domestic laws. As a second step, the thesis suggests the proper comparative law methodology in international investment law. Following the sources doctrine, it develops the appropriate comparative law methods in the interpretation of IIAs based on different legal grounds, with case studies demonstrating the feasibility of the suggested comparative method. Ultimately, the thesis builds a bridge between international investment law and comparative law. This bridge offers a solid legal basis for arbitral decisions, and ensures that the international rules are representative of the diversity of the world community.

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Table of Abbreviations

AJCL	American Journal of Comparative Law
AJIL	American Journal of International Law
ASEAN	Association of Southeast Asian Nations
ASIL	American Society of International Law
BIT	Bilateral Investment Treaty
British Ybk Intl L	British Yearbook of International Law
CAFTA-DR	Free Trade Agreement between Central America, the Dominican Republic and the United States of America
CETA	Comprehensive Economic and Trade Agreement between Canada and the European Union
Chicago JIL	Chicago Journal of International Law
CJEU	Court of Justice of the European Union
CLP	Current Legal Problems
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CLJ	Cambridge Law Journal
CUP	Cambridge University Press
DSB	Dispute Settlement Body
ECJ	European Court of Justice
ECT	Energy Charter Treaty
ECtHR	European Court of Human Rights
EJIL	European Journal of International Law
EU	European Union
FCN	Treaty Friendship, Commerce and Navigation Treaty
FET	Fair and Equitable Treatment
FPS	Full Protection and Security
FTA	Free Trade Agreement
HILJ	Harvard International Law Journal
HLR	Harvard Law Review
HRLJ	Human Rights Law Journal

ICJ	International Court of Justice
ICLQ	International & Comparative Law Quarterly
ICSID	International Centre for Settlement of Investment Disputes
ICTY	International Criminal Tribunal for the Former Yugoslavia
IIA	International Investment Agreement
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
ILR	International Law Reports
ISDS	Investor-State Dispute Settlement
IUSCT	Iran-US Claims Tribunal
JIDS	Journal of International Dispute Settlement
JIEL	Journal of International Economic Law
JWIT	Journal of World Investment & Trade
LJIL	Leiden Journal of International Law
LR	Law Review
Michigan JIL	Michigan Journal of International Law
Michigan LR	Michigan Law Review
MLR	Modern Law Review
NAFTA	North American Free Trade Agreement
NIEO	New International Economic Order
NIOC	National Iranian Oil Company
OECD	Organisation for Economic Cooperation and Development
OUP	Oxford University Press
PACER-Plus	Pacific Agreement on Closer Economic Relations Plus
PCIJ	Permanent Court of International Justice
RCEP	Regional Comprehensive Economic Partnership
RIAA	Reports of International Arbitral Awards
TDM	Transnational Dispute Management
TPA	Trade Promotion Agreement

UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNTS	United Nations Treaty Series
US	United States
USMCA	The United States-Mexico-Canada Agreement
USSR	Union of Soviet Socialist Republics
WTO	World Trade Organization
YBILC	Yearbook of the International Law Commission
YLJ	Yale Law Journal

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Chapter 1. Introduction

While international law regulates domestic law, the relationship between these two legal orders is not a one-way street. Especially in 'inward-looking' international legal regimes governing areas that are also regulated in domestic laws,[1] the content of international rules can sometimes be enriched by the diverse legal concepts, principles, and solutions derived from domestic legal orders.[2] Comparative law, as a method of study whose primary function is to understand the differences and similarities of the laws of various domestic legal systems,[3] is a natural point of connection between international law and domestic laws.[4] In the international law on foreign investment protection, the process of borrowing from domestic laws has started since the international rules in this field began to emerge.[5] Yet, as discussed below, this process and the comparative law methodology employed in practice have proved controversial.

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[1] Antonios Tzanakopoulos, 'Domestic Courts as the "Natural Judge" of International Law: A Change in Physiognomy' in James Crawford and Sarah Nouwen (eds), *Select Proceedings of the European Society of International Law*, vol 3 (Hart 2012) 158-159.

[2] In positive international law, while general principles of law are the most widely-recognised source that permits international law to borrow from domestic laws, this borrowing process is also possible through customary international law and through treaty interpretation. For general principles of law, see ILC, 'Consolidated Text of Draft Conclusions 1 to 11 Provisionally Adopted by the Drafting Committee on General Principles of Law' (21 July 2022) A/CN.4/L.971, Draft Conclusions 3, 4; Jaye Ellis, 'General Principles and Comparative Law' (2011) 22 EJIL 949; Rudolf B Schlesinger, 'Research on the General Principles of Law Recognized by Civilized Nations' (1957) 51 AJIL 734. For customary international law, see ILC, 'Draft Conclusions on Identification of Customary International Law' (2018) YBILC 2018, vol II, Part Two, Conclusions 6 and 10. For treaty interpretation, see ILC, 'Draft Conclusions on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties' (2018) YBILC 2018, vol II, Part Two, Conclusion 4 and its commentary para 18, Conclusion 5(1); Daniel Peat, *Comparative Reasoning in International Courts and Tribunals* (CUP 2019) 214-220.

[3] Rodolfo Sacco, 'Legal Formant: A Dynamic Approach to Comparative Law (Instalment I of II)' (1991) 39 AJCL 1, 1-6; Uwe Kischel, *Comparative Law* (OUP 2019) 45-86.

[4] For different views on the potential contribution of comparative law to international law, see eg Ellis (n 2); Schlesinger (n 2); Paul Mahoney and Rachael Kondak, 'Common Ground: A Starting Point or Destination for Comparative Law Analysis by the European Court of Human Rights?' in Mads Andenas and Duncan Fairgrieve (eds), *Courts and Comparative Law* (OUP 2015); Peat, *Comparative Reasoning* (n 2); David Kennedy, 'New Approaches to Comparative Law: Comparativism and International Governance' (1997) 2 Utah LR 545; Anthea Roberts, Paul B Stephan, Pierre-Hugues Verdier, and Mila Versteeg, 'Comparative International Law: Framing the Field' (2015) 109 AJIL 467.

[5] See Bin Cheng, 'Justice and Equity in International Law' (1955) 8 CLP 185; Georg Schwarzenberger, 'The Standard of Civilisation in International Law' (1955) 8 CLP 212, 227. This will be discussed further in Chapter 2.

In the past few decades, the surge in investment arbitration cases under IIAs, in which the IIAs often contain very vague legal standards, has renewed the scholarly interest in the relevance of domestic legal norms in this field.[6] Special attention has been given to the (potential) contribution of comparative public law to international investment law.[7] As argued by some commentators, relying on domestic legal principles derived from comparative law analysis may help to constrain arbitrators' discretion, and by aligning the standards in IIAs with those existing in domestic laws, the legitimacy of the international investment legal regime can be enhanced.[8] In fact, as more and more states now seek to formulate IIA rules in ways that are consistent with their own domestic laws so as to ensure a level playing field for domestic and foreign investors,[9] having recourse to domestic legal concepts and principles in interpreting IIAs seems a welcoming exercise.

However, the reliance on comparative law reasoning has been questioned. First, it was cautioned that the 'amateur comparativism' which is often displayed in arbitration practice may actually extend the discretion of arbitrators instead of constraining it, may encourage cherry-picking, and may aggravate prejudice.[10] Indeed,

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[6] See eg Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010); Valentina Vadi, *Analogies in International Investment Law and Arbitration* (CUP 2015); Daniel Peat, 'International Investment Law and the Public Law Analogy: The Fallacies of the General Principles Method' (2018) 9 JIDS 654; Andrea Gattini, Attila Tanzi, and Filippo Fontanelli (eds), *General Principles of Law and International Investment Arbitration* (Brill 2018); Patrick Dumberry, *A Guide to General Principles of Law in International Investment Arbitration* (OUP 2020).

[7] Ibid and see further Gus van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2008); Santiago Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (Hart 2009).

[8] See Schill, *International Investment Law and Comparative Public law* (n 6) 36-37; Jan Kleinheisterkamp, 'Investment Treaty Law and the Fear for Sovereignty: Transnational Challenges and Solutions' (2015) 78 MLR 793; Steven R Ratner, 'International Investment Law and Domestic Investment Rules: Tracing the Upstream and Downstream Flows' (2020) 21 JWIT 7, 25-27.

[9] Ratner (n 8) 21-25, 30-32; Kleinheisterkamp (n 8); Wenhua Shan, 'From North-South Divide to Private-Public Debate: Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law' (2007) 27 Northwestern Journal of International Law&Business 631.

[10] See José E Alvarez, 'Is Investor-State Arbitration "Public"?' (2016) 7 JIDS 534, 567.

international law's borrowing from domestic laws in the area of foreign investment protection has long been criticised as evidencing an Euro-centric bias.[11] This has been a major cause of mistrust on the part of many developing states towards international investment law throughout its history.[12] On the other hand, it was observed that a more comprehensive comparative law analysis may excessively burden arbitral tribunals and would not be feasible in practice.[13] Moreover, and perhaps more fundamentally, even if the result of a comparative law analysis may truly reflect and be representative of the legal positions in all jurisdictions of the world, there remains the concern that such an approach may lead to excessive deference to domestic laws, which may undermine the value and purpose of the international rules concerned.[14]

That being said, as with several other 'inward-looking' areas of international law, the international law on foreign investment protection mediates between the two poles of excessive assertiveness and apologetic deference vis-à-vis domestic authorities.[15] In this balancing exercise, reliance on comparative law can pull the decision in either direction.[16] Comparative law simply refers to the comparison of legal

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[11] Kate Miles, *The Origins of International Investment law: Empire, Environment, and the Safeguarding of Capital* (CUP 2013) 84; Alvarez, 'Is Investor-State Arbitration "Public"?' (n 10) 568-569; Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (OUP 2013) 173.

[12] For more detail in this regard, see Chapter 2.

[13] Alvarez, 'Is Investor-State Arbitration "Public"?' (n 10) 568-569.

[14] See Paparinskis, *Minimum Standard* (n 11) 174. Such concern was also expressed regarding the 'consensus doctrine' in the jurisprudence of the ECtHR, see George Letsas, 'Strasbourg's Interpretative Ethic: Lessons for the International Lawyer' (2010) 21 EJIL 509, 540.

[15] For a study of the deference to state authorities by international adjudicative bodies in relation to private property, see Esmé Shirlow, *Judging at the Interface: Deference to State Decision-Making Authority in International Adjudication* (CUP 2021).

[16] For instance, in the ECtHR's jurisprudence, comparative analysis of the laws of member states has led to both the narrowing and the broadening of the margin of appreciation. See Paolo G Garozza, 'Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights (1998) 73 Notre Dame LR 1217; Luzius Wildhaber, Arnaldur Hjartarson, and Stephen Donnelly, 'No Consensus on Consensus? The Practice of the European Court of Human Rights' (2013) 33 HRLJ 248.

norms in different jurisdictions.[17] Selection of the specific comparative law method, and how the result of such comparison may be put to use, depend on the purpose that the comparative law exercise seeks to serve.[18] In international investment law, these matters have to be considered within the framework of the rules on the sources of international law. As with comparative law analysis, the identification, interpretation and application of the sources of international law inevitably involve certain subjective judgements. But the concerns about 'amateur comparativism' may not necessarily be a reason for outright rejection of the use of comparative law in all circumstances. To the extent that recourse to comparative law is required or at least permitted under the rules on sources, the methodological inadequacies in comparative law analysis in practice should be tackled by looking for ways to improve the methodology and to address practical difficulties, rather than by denying the utility or relevance of comparative law *tout court*.

In substance, the appropriateness of relying on comparative law analysis and the identification of the proper comparative law methodology in international investment law ultimately depend on the relationship between international and domestic rules in this area. As illustrated throughout the thesis, this relationship is fundamental to international investment law. Obviously, domestic laws are subject to international rules and a state cannot invoke its internal law as an excuse for its failure to perform its international obligations.[19] But this does not preclude international law's borrowing from domestic laws or at least deferring to the latter. Indeed, the

[17] Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998) 2.

[18] Vadi (n 6) 30.

[19] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (2001) YBILC 2001, vol II, Part Two, Article 3.

international law on foreign investment protection has always been in a complex relationship with domestic laws. This body of international rules has been fraught with the opposition between states demanding the 'international minimum standard' which is rooted in Western notions of property, contract, and administration of justice, and those insisting on the Calvo doctrine which requires nothing more than national treatment under the law of the capital-importing state.[20] Throughout the twentieth century and up to the present day, both the international standard and the standards of protection under domestic legal systems worldwide have been evolving, and the relative relationship between them has also gone through changes.[21] This relationship can be seen as a barometer of power dynamics in international relations, and several shifts in this relationship have taken place in part through the interactions between treaties, customary international law, and general principles of law.

In colonial times, colonial laws and extraterritorial consular jurisdiction were imposed by colonial powers to replace local laws of the colonised territories for the protection of the nationals and commercial interests of colonial powers.[22] As to the relationship between independent states, before the customary rules on the treatment of aliens were crystalised, certain domestic legal notions on the functioning of the judiciary and the protection of property were introduced into international law as 'standards of civilization' or 'principles of civilized nations'.[23] These principles were

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[20] Donald R Shea, *Calvo Clause: A Problem of Inter-American and International Law and Diplomacy* (University of Minnesota Press 1955); Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (CUP 2021) 50-52; Ursula Kriebaum, Christoph H Schreuer, and Rudolf Dolzer, *Principles of International Investment Law* (OUP 2022) 2-13.

[21] Ratner (n 8) 10-12.

[22] See Miles (n 11) 19-70; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2005) 32-114; Karen J Alter, 'From Colonial to Multilateral International Law: A Global Capitalism and Law Investigation' (2021) 19 International Journal of Constitutional Law 798; Shea (n 20) 9.

[23] See Cheng 'Justice and Equity' (n 5); Schwarzenberger (n 5). For more detail, see Chapter 2.

some of the early examples of general principles of law. They laid the foundation for the customary rules in this area, many of which are still relevant today. As customary rules emerged from diplomatic interactions, the role of domestic legal principles and concepts gradually diminished. But in the mid-to-late twentieth century, developing states began to advocate for permanent sovereignty over natural resources and the Calvo doctrine,[24] posing a challenge to the traditional rules on the treatment of aliens. During that period, general principles of law were relied upon again on crucial matters in some of the state contract arbitration cases.[25] In the late twentieth century, in the shadow of the failure to reach a multilateral agreement on the protection of foreign investment, the 'treatification' of international investment law took place largely on a bilateral basis, driven by developed states.[26] While these treaties incorporate the traditional customary rules on certain matters, they also diverge from the customary rules in a number of ways.[27] It was against this background that some principles of domestic public laws, which were largely absent in the previous legal discourse, entered into international investment law and some commentators began to speak of 'good governance'.[28] Reliance on these public law principles has resulted in a standard of

[24] Sornarajah, *The International Law on Foreign Investment* (n 20) 3; Kriebaum, Schreuer, and Dolzer (n 20) 6-7.

[25] See eg *Saudi Arabia v. Arabian American Oil Company (Aramco)* (1963) 27 ILR 117; *Libyan American Oil Company (LIAMCO) v. Libya* (1981) 20 ILM 1; *Texaco Overseas Petroleum Company v. The Government of the Libyan Arab Republic* (1978) 17 ILM 1.

[26] See eg Jeswald W Salacuse, 'The Treatification of International Investment Law' (2007) 13(1) Law and Business Review of the Americas 155; José E Alvarez, 'A BIT on Custom' (2009) 42 NYU Journal of International Law and Politics 17, 71.

[27] Martins Paparinskis, 'Investment Arbitration and the Law of Countermeasures' (2008) 79 British Ybk Intl L 264, 265; Steffen Hindelang, 'Bilateral IIAs, Custom and a Healthy Investment Climate: The Question of Whether BITs Influence Customary International Law Revisited' 5 JWIT (2004) 789, 809; Patrick Dumberry, 'Are BITs Representing the "New" Customary International Law in International Investment Law?' 28 Penn State International LR (2010) 675, 694-696.

[28] See eg Nico Krisch and Benedict Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order' (2006) 17 EJIL 1; Michele Potestà, 'Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept' (2013) 28 ICSID Review 88; Alec Stone Sweet and Giacinto della Cananea, 'Proportionality, General Principles of Law, and Investor-State Arbitration: A Response to José Alvarez' (2014) 46 NYU Journal of International Law and Politics 911.

investment protection that is even higher than what existed before.[29] But the appropriateness of recourse to these principles was, and still is, contested.[30]

Thus, in contemporary international investment law, the decision on whether to resort to comparative law in the interpretation of IIAs carries significant consequences. Clearly, reliance on comparative public law when interpreting substantive IIA standards affects the degree of flexibility enjoyed by state authorities at the domestic level. But this is not the only area where recourse to comparative law can be consequential. Reliance on, or departure from, domestic legal notions in the interpretation of certain legal concepts in IIAs may also have significant implications. As an example, in investment arbitration, the refusal to consider domestic rules on corporate legal personality when interpreting the term 'shares' as an element of 'investments' protected under IIAs may impinge on the structure of corporate governance and the functioning of domestic corporate laws.[31] In a word, decisions on whether to resort to comparative law analysis in interpreting IIAs may have important legal as well as political consequences, as such decisions determine the extent to which international rules may exert constraining, and even distortive, effect on domestic laws.

Against this background, my thesis seeks to answer two questions: First, to what extent are domestic legal concepts and principles derived from comparative law analysis relevant in international investment law? Second, when such domestic legal

[29] For the benchmarks of the minimum standard existing at the beginning of the twentieth century, see *L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States* (1926) 4 RIAA 60, 61-2.

[30] See Paparinskis, *Minimum Standard* (n 11) 172-174; Alvarez, 'Is Investor-State Arbitration "Public"?' (n 10) 567-569; Sornarajah, *The International Law on Foreign Investment* (n 20) 110-111.

[31] Julian Arato, 'The Private Law Critique of International Investment Law' (2019) 113 AJIL 1, 32-39; David Gaukrodger, 'Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law' (2014) OECD Working Papers on International Investment 2014/02 <https://www.oecd.org/industry/inv/investment-policy/WP-2014_02.pdf> (accessed 1 November 2022).

concepts and principles are relevant and can be relied upon in the interpretation of IIA rules, what comparative law method(s) should be employed to derive these legal concepts and principles from domestic legal systems? My approach to these questions is premised on the understanding that the relevance of domestic legal materials in international investment law, as well as the appropriate comparative law methodology, ultimately depend on the intention of states regarding the relative relationship between international law and domestic laws. This intention is translated through the sources of international law. Accordingly, the analysis in the thesis is undertaken in light of the rules on sources. It aims to bridge the gap between international investment law and comparative law scholarship, and to develop a principled approach to the reliance on domestic legal concepts and principles in contemporary international investment law.

Part I of the thesis, entitled 'entry points of comparative law in international investment law', examines the legal bases for recourse to domestic legal concepts and principles derived from comparative law analysis in international investment law. Given the importance of general principles of law as a channel through which domestic legal norms can be introduced into international law, a major portion of this part is devoted to the role of this source at different stages of development of the international law on foreign investment protection.

Chapter 2 introduces the foundational role played by general principles of law in the early stages of international investment law. By reviewing the practice during the pre-BIT era, it shows the mistrust on the part of developing states caused by the bias and arbitrariness in the use of general principles. This period of history also illustrates the significance of the rejection of the distinction between 'civilized nations' and 'uncivilized nations'. The implications of rejecting this distinction are spelled out in the rest of the thesis.

Chapter 3 examines law-making in contemporary international investment law and the legal bases for recourse to domestic legal norms when interpreting substantive IIA standards. It explains that in the late twentieth century, several shifts in international investment law, including its relative relationship with domestic laws, were brought about through the interactions between IIAs and customary international law. Through these treaty-custom interactions, the role of general principles of law in this area has also changed. Based on an analysis guided by the rules on sources and treaty interpretation, Chapter 3 concludes that comparative law analysis can be relied on when interpreting substantive IIA standards mainly through general principles of law and supplementary means of interpretation.

In light of the conclusions in Chapter 3, Chapter 4 examines the role of particular general principles of law in the interpretation of substantive IIA provisions, including the FET clause, the FPS clause, and the expropriation clause. It shows specifically how the relative relationship between international and domestic legal standards in this area, as well as their different or similar rationales, affect the relevance of general principles when interpreting particular IIA standards. For instance, it reveals that the minimum standard under customary international law is akin to the 'bottom line' of the protection in domestic laws and as such, an FET standard incorporating the minimum standard allows very limited role for general principles of law. On the other hand, an FET clause diverging from the customary minimum standard brings the international standard closer to an 'alternative' to domestic legal protection. This opens new space for general principles derived from domestic public laws.

Besides substantive IIA standards, certain legal concepts contained in IIAs may also need to be interpreted in light of domestic legal notions. Chapter 5 examines the relevance of comparative law analysis in the interpretation of IIA concepts that have a

parallel in domestic laws. This matter has been relatively overlooked in the commentaries. In arbitration practice, certain IIA concepts have been interpreted in ways that are overly detached from the basic notions in domestic laws. This sometimes has damaging consequences at both the domestic and the international levels. Chapter 5 explains that through various legal channels under the rules of treaty interpretation, including the ordinary meaning of treaty terms, general principles of law, and supplementary means of interpretation, comparative law can help to bridge the gap between international law and domestic laws in the interpretation of IIA concepts.

Based on the conclusions reached in Part I, Part II, entitled 'comparative law methodology', examines the comparative law methods to be employed in the interpretation of IIAs. Given the important role of general principles of law in bringing comparative law analysis into international investment law, Chapters 6 and 7 are devoted to this source. Chapter 8 then focuses on the comparative law analysis in interpreting IIA standards and concepts on the grounds of ordinary meaning of treaty terms and supplementary means of interpretation.

Chapter 6 explains the rules on the identification of general principles of law and the comparative law method in the process of identification. First and foremost, it emphasises that to move beyond the anachronistic 'civilized/uncivilized' distinction, the comparative law analysis should be wide and representative, and that the approach of selecting domestic legal systems based on political criteria should be rejected. Second, this chapter highlights that the basic comparative law method for identifying general principles is the functional method, and the starting point and main focus of the comparison should be concrete problems instead of abstract principles. The essential purpose of the comparative law analysis in that context is not to *insulate* the 'essence' of legal norms from their domestic legal contexts. Instead, one should aim to

understand the solutions in their domestic contexts as well as the reasons behind the differences across various jurisdictions. By understanding the relevant norms in their domestic contexts, one would be able to determine whether the apparent differences among various jurisdictions can be reconciled, in the process of 'transposing' the domestic legal solutions to the international level. In contemporary international investment law, the purpose of this analysis is to identify an international solution in light of the structure and the object and purpose of the IIA legal regime.

To demonstrate the feasibility of the method discussed in Chapter 6 and to illustrate some of the problems and their solutions in the use of general principles of law in arbitration practice, Chapter 7 presents case studies of deriving general principles through comparative law analysis. It focuses on three key issues that frequently arise in investment arbitration, namely general legislative or regulatory change, breach of lawful representations for policy reasons, and withdrawal of unlawful representations. The case studies illustrate that via the source of general principles, comparative law offers not only an analytical framework, but also concrete benchmarks for interpreting IIA standards. The proposed comparative law method forces arbitrators to explain their reasoning and to take seriously the considerations expressed in various domestic jurisdictions.

Finally, Chapter 8 examines the comparative law methods in relation to the 'ordinary meaning' and 'supplementary means' in the interpretation of IIA concepts and standards. As discussed in this chapter, in both cases, the comparative law analysis should still follow the functional approach, albeit adopting different criteria. Regarding the ordinary meaning of treaty terms, one needs to identify the common denominator of the positive rules in the jurisdictions under comparison, guided by the IIA's context and object and purpose. As a supplementary means of interpretation under Article 32

of the VCLT, comparative law analysis can be more flexible, with greater space for policy-oriented considerations. In this regard, for instance, comparative law analysis may help to reveal the 'ceilings' of IIA standards. However, the role of the more flexible and more policy-oriented comparative law analysis is limited to that of a 'supplementary means', and it cannot be deployed to circumvent the legal requirements under Article 31 of the VCLT.

Lastly, it bears clarifying that 'rules', 'principles', and 'norms' are used interchangeably in the thesis. Admittedly, considerable scholarly attention has been given to the distinction between 'rules' and 'principles'.[32] Especially in relation to general principles of law, there is an enduring debate on the implications of the term 'principles' on the nature of this source.[33] Yet, during the drafting of the PCIJ Statute, 'rules' and 'principles' were used interchangeably in relation to the third source.[34] In Article 38 of the ICJ Statute, the phrase 'rules of law' in paragraph 1(d) clearly includes general principles of law.[35] The ICJ has also taken the position in *Gulf of Maine* that the terms 'rules' and 'principles' 'convey one and the same idea', although 'principles' may be 'more general and more fundamental' in character.[36] More importantly, as explained in Chapter 6, the identification and application of general principles of law

[32] See eg Ronald Dworkin, *Taking Rights Seriously* (Bloomsbury 2013) 40-42; Gerald Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law' (1957) 92 Recueil des Cours de l'Académie de Droit International 5, 7; Samantha Besson, 'General Principles in International Law – Whose Principles' in Samantha Besson and Pascal Pichonnaz (eds), *Les principes en droit européen* (Schulthess 2011); Géza Herczegh, *General Principles of Law and the International Legal Order* (Akadémiai Kiadó 1969) 43; *Pulp Mills on the River of Uruguay (Argentina v. Uruguay)* (Judgment, Separate Opinion of Judge Cançado Trindade) [2010] ICJ Rep 14, 210, paras 201-217.

[33] See Marcelo Vázquez-Bermúdez, 'First Report on General Principles of Law' (5 April 2019) UN Doc A/CN.4/732 (First Report) paras 146-152.

[34] Ibid para 150.

[35] Ibid; Sienho Yee, 'Article 38 of the ICJ Statute and Applicable law: Selected Issues in Recent Cases' (2016) 7 JIDS 472, 488-489.

[36] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* (Judgment) [1984] ICJ Rep 246, 288-290 para 79.

are essentially the search for a solution to a concrete problem, instead of a process of moving from the abstract to the specific. The belief that one can and should try to insulate the ‘essence’ or ‘underlying principle’ from the national characteristics of specific rules in various domestic jurisdictions, as is often held in the literature, is misplaced.

Part I Entry Points of Comparative Law in International Investment Law

Chapter 2. The Role of General Principles of Law in the Pre-BIT era

When the international rules on the protection of the property of aliens began to emerge, these rules were developed primarily through assertions by powerful capital-exporting states, responses thereto, forcible enforcement, and sometimes through inter-state adjudication.[37] In this process, principles of domestic law, primarily those of Western capital-exporting states, entered into the international legal discourse as 'standards of civilization' or 'principles of civilized nations'.[38] These were some of the early examples of the use of general principles of law. While these principles laid the foundation for the international law in this field, their usage was also a source of misgivings on the part of developing states. This chapter examines the role played by general principles of law during the period before states began to conclude BITs.

Before discussing the substance, Section I offers a brief introduction to general principles of law as a source of international law. In doing so, it highlights that this source has gone through a shift from the situation where only 'civilized nations' had law-making capacity to the current rejection of the 'civilized/uncivilized' distinction. Against this backdrop, Sections II and III examine the role of general principles of law in the development of the minimum standard of treatment of aliens and as part of the law applicable to state contracts. Then, Section IV considers the implications of the removal of the 'civilized/uncivilized' distinction, setting the stage for the discussion of the entry of domestic legal principles in contemporary international investment law in

[37] Sornarajah, *The International Law on Foreign Investment* (n 20) 27-30; Kriebaum, Schreuer, and Dolzer (n 20) 1-6; Miles (n 11) 19-70.

[38] See Cheng 'Justice and Equity' (n 5); Schwarzenberger (n 5).

the following chapters.

I. General principles of law: An introduction

Article 38(1)(c) of the ICJ Statute, which replicates its predecessor, Article 38(3) of the PCIJ Statute, is the obvious starting point for discussing general principles of law in contemporary international law scholarship.[39] Whether or not Article 38 of the PCIJ Statute 'codified' the existing rules at that time,[40] the practice before 1920 inspired the drafting of that article, which set the paradigm for analysing the sources of international law from then on.[41] From the drafting history of the PCIJ Statute and the practice leading up to it, it emerges that the inclusion of general principles of law as a source of law was primarily driven by the need to fill 'gaps' in the other sources of international law and to prevent *non liquet* by the Court.[42]

In international law, although sovereign states are unwilling to be subject to norms that they have not consented to, rules based on direct consent of states, in and of themselves, are insufficient to allow international law to function properly as a legal

[39] See Hugh Thirlway, *The Sources of International Law* (OUP 2019) 106-107; Catherine Redgwell, 'General Principles of International Law' in Stefan Vogenauer and Stephen Weatherill (eds), *General Principles of Law: European and Comparative Perspectives* (Hart 2017) 5-6; Ellis (n 2) 949-950; M Cherif Bassiouni, 'A Functional Approach to "General Principles of International Law"' (1990) 11 Michigan JIL 768, 768; Schlesinger (n 2) 734; Vázquez-Bermúdez, 'First Report' (n 33) para 15.

[40] For those who believe Article 38(3) codified the law, see Alain Pellet and Daniel Müller, 'Article 38' in Andreas Zimmermann, Christian J Tams, Karin Oellers-Frahm, and Christian Tomuschat (eds), *The Statute of the International Court of Justice: A Commentary* (OUP 2019) 923; Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law*, vol 1 (Longman 1996) 38-39; Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (CUP 1953) 19-20. For a different view, see Jean d'Aspremont, 'What Was not Meant to Be: General Principles of Law as A Source of International Law' in Riccardo Pisillo Mazzeschi and Pasquale de Sena (eds), *Global Justice, Human Rights and the Modernization of International Law* (Springer 2018).

[41] See Mark W Janis, 'Sources in the Meta-History of International Law: A Little Meta-Theory – Paradigms, Article 38, and the Sources of International Law' in Samantha Besson and Jean d'Aspremont (eds), *The Oxford Handbook of the Sources of International Law* (OUP 2017).

[42] *Procès-verbaux of the Proceedings of the Advisory Committee of Jurists, June 16th – July 24th 1920* (Van Langenhuysen 1920) 307, 311-313, 317-318, 338. See also Vázquez-Bermúdez, 'First Report' (n 33) 30.

system. For one thing, strictly consent-based rules like those in treaties and custom struggle to explain the binding force of themselves.[43] For another, due to the inability for states to foresee and agree on every issue, treaties and customary rules would necessarily be silent on many questions that call for a legal answer. They may also not contain necessary rules to resolve the conflicts among themselves. Such concerns, which are sometimes called 'gaps' in the law, led to the inclusion of Article 38(3) in the PCIJ Statute, and underpin the rules on the identification of general principles of law and their relationship with the other two sources.

In relation to what ultimately became Article 38(3) of the PCIJ Statute, the discussion in the Advisory Committee of Jurists, tasked with the drafting of the PCIJ Statute, revolved around the need to avoid *non liquet* and the concern over judicial law-making. Despite the need for norms to serve a gap-filling function, some members were concerned about giving excessive discretion to the Court.[44] Ultimately, a compromise was reached between those who believed that judges should be allowed to apply 'objective justice'[45] and those who insisted that sources of international law should be limited to 'rules contained in Conventions and positive international law'.[46] The compromise was what was called 'the general principles of law recognized by civilized nations'.[47] The idea embodied in this compromise solution was that 'gaps' in treaty and

[43] See Gerald Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law' in Jan Hendrik Willem Verzijl (ed), *Symbolae Verzijl: présentées au professeur J.H.W. Verzijl à l'occasion de son LXX-ème anniversaire* (Martinus Nijhoff 1958) 163; Olufemi Elias and Chin Lim, '"General Principles of Law", "Soft" Law and the Identification of International Law' (2009) 28 Netherlands Ybk Intl L 3; Mehrdad Payandeh, 'The Concept of International Law in the Jurisprudence of H.L.A. Hart' (2011) 21 EJIL 967, 975-7; Xuan Shao, 'What We Talk about when We Talk about General Principles of Law' (2021) 20 Chinese Journal of International Law 219, 224-225.

[44] *Procès-verbaux of the Proceedings of the Advisory Committee of Jurists* (n 42) 293-295.

[45] Ibid 323.

[46] Ibid 294.

[47] Ibid 331.

customary norms can be filled, but only by norms that are objectively identifiable rather than by norms based on the judges' subjective understandings of justice.[48]

Nowadays, the prevailing view on this source, as reflected in the recent work of the ILC on general principles of law, is that 'recognition' by states is key to the identification of general principles, and that this requirement can at least be fulfilled where a principle is common to the various legal systems of the world and is transposable to the international legal system.[49] As such, the identification of general principles of law is based on objective conditions, and the 'gap-filling' function can be satisfied without giving judges legislative power.

Still, the 'recognition' by states for the purposes of general principles of law is distinct from more direct state consent to international rules as embodied in treaties and customary international law. In particular, *opinio juris* for the purposes of identifying customary international law refers to the conviction of states that by undertaking a practice, they are bound by certain legal obligations or entitled to certain rights under international law.[50] Even where *opinio juris* is evidenced by failure to react to a practice pertaining to the state's international rights or obligations, there must be circumstances calling for some reaction and the state must have been in a position to react.[51] As such, *opinio juris* must be directed at an international rule. On the other hand, when 'recognizing' a principle in domestic law, a state may not be aware of its implications at the international level and the position taken in domestic law cannot be understood

[48] See ibid 308-311, 331, 335; Vázquez-Bermúdez, 'First Report' (n 33) 27, 30.

[49] ILC, 'Report of the International Law Commission on the Seventy-First Session' (29 April-7 June and 8 July-9 August 2019) UN Doc A/74/10, 335; ILC, 'Report of the International Law Commission on the Seventy-Second Session' (26 April-4 June and 5 July-6 August 2021) UN Doc A/76/10, 155-156.

[50] ILC, 'Draft Conclusions on Identification of Customary International Law' (n 2) Conclusion 9 and its commentary.

[51] Ibid Conclusion 10(3) and its commentary.

as addressing 'circumstances call[ing] for some reaction' on the international plane.[52] In other words, 'recognition' for the purposes of identifying a general principle of law cannot be understood as being directed at an international rule. The content of what has been 'recognized' by states has to be deduced from the positions taken in their domestic laws in light of the conditions in the international legal order.[53] This 'recognition' is a kind of state consent that is less directly connected to the international rule. This means that general principles of law give greater space for subjective judgement and are more easily manipulated, compared with the other two sources. That being said, this 'indirect consent' basis is consistent with the gap-filling function of general principles – they were included in the PCIJ Statute and the ICJ Statute precisely to remedy the inadequacy of the rules based on more direct state consent.

In areas of international law that overlap with or directly relate to relevant domestic laws, the relevance of general principles of law in the absence of clear treaty or customary rules seems only natural.[54] On the treatment of aliens, international law did not create its own notions of property, contract, and proper administration of justice from scratch. As discussed below, the international law on the treatment of aliens has drawn extensively on domestic laws. Based on what was just mentioned, it can be said that through general principles of law, domestic legal notions and principles helped to indicate what states might have intended regarding the treatment of aliens, before more direct instructions were indicated in treaties or customary international law.

However, in practice, this seemingly sound and logical solution was fraught

[52] Ibid.

[53] Marcelo Vázquez-Bermúdez, 'Third Report on General Principles of Law' (18 April 2022) UN Doc A/CN.4/753 (Third Report).

[54] See Ellis (n 2) 950-953; Schlesinger (n 2).

with tension and controversy. In relation to the treatment of aliens, while international law *borrows from* domestic legal concepts and principles, it in turn *regulates* the acts of states, including their domestic laws. From this dual-faced, and perhaps even paradoxical, relationship springs an inevitable question: *whose* legal standards dominate the international rules. This is especially important at a time when large discrepancies existed among domestic legal systems. The dispute between those who seek to impose the standards of capital-exporting states as the international standard and those who insist on national treatment under the local laws permeates the discourse in this area from the very beginning to the present day.[55]

Grown together with the expansion of Western capital all over the world since the colonial era, the international rules on the treatment of aliens have been one of the mechanisms, alongside colonial laws and extraterritorial consular jurisdiction, used to constrain or replace the local laws and to protect the nationals and commercial interests of capital-exporting powers overseas.[56] On the other hand, the Calvo doctrine was invoked time and again to defend the application of local laws, initially by Latin American states in the nineteenth century, then by the newly independent states in the twentieth century,[57] and recently by both developing and developed states in the backlash against the international investment legal regime.[58]

Against this backdrop, in order to appreciate the substantive role of general principles of law in the development of the international standard in this area, one must not lose sight of the significance of the phrase 'civilized nations' in the text of Article

[55] Kriebaum, Schreuer, and Dolzer (n 20) 3-16; Shan (n 9); Kleinheisterkamp (n 8).

[56] See Miles (n 11) 19-70; Anghie (n 22) 32-114; Alter (n 22); Shea (n 20) 9.

[57] Shea (n 20) 9-32; Miles (n 11) 51-52.

[58] Kleinheisterkamp (n 8) 798-802; Shan (n 9).

38(3) of the PCIJ Statute and Article 38(1)(c) of the ICJ Statute. Despite the lack of clear criteria for determining whether a state is 'civilized' or not,[59] this notion was fundamental to international law up to the early twentieth century. For instance, in Oppenheim's treatise published in 1920, he observed that the basis of the law of nations was the consent of 'civilized nations'.[60] At that time, it was still disputed whether certain non-Western states could be deemed 'civilized'.[61]

Thus, when the PCIJ Statute was drafted, the term 'civilized nations' carried a substantive meaning. In his first speech delivered as the President of the Advisory Committee of Jurists, Descamps observed that it was the mission of the Committee to contribute 'to the progress of international justice and universal civilization.'[62] His proposal on what finally became Article 38(3) of the PCIJ Statute, 'rules of international law as recognized by the legal conscience of civilized nations',[63] should be understood in this light. During the drafting of the PCIJ Statute, despite the disagreement among the drafters on many issues, no substantive objection was raised regarding the reference to 'civilized nations'. Only de Lapradelle opposed this phrase, but the reason for this was that 'civilized nations' was superfluous 'because law implies civilization'.[64] As will be discussed in section III, a prejudice among international

[59] For instance, Schwarzenberger observed that '[t]he test whether a State was civilised and, thus, entitled to full recognition as an international personality was, as a rule, merely whether its government was sufficiently stable to undertake binding commitments under international law and whether it was able and willing to protect adequately the life, liberty and property of foreigners.' Schwarzenberger (n 5) 220. But what protection is 'adequate' in terms of the life, liberty and property of foreigners is precisely the question one seeks to answer by reference to principles recognized by 'civilized' states.

[60] Lassa Oppenheim, *International Law: A Treatise* (Longmans 1920) 32.

[61] See Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law* (CUP 2002) 98-178; James Sloan, 'Civilized Nations', *Max Planck Encyclopedia of International Law* (2011).

[62] *Procès-verbaux of the Proceedings of the Advisory Committee of Jurists* (n 42) 19.

[63] Ibid 306.

[64] Ibid 335.

lawyers against the law of certain states of the developing world still existed in the mid-twentieth century.

Yet, structural changes took place in international law after 1920. After the Second World War, with the entry into force of the UN Charter, the decolonisation process, the NIEO movement, and the adoption of the UN Friendly Relations Declaration, the distinction between 'civilized nations' and 'uncivilized nations' was challenged and is nowadays widely rejected.[65] There is now a consensus that the phrase 'civilized nations' in Article 38(1)(c) of the ICJ Statute should be abandoned. In fact, this is one of the few points that have garnered full support by all members of the ILC and all the states at the Sixth Committee commenting on the ILC's work on general principles of law.[66]

However, to dispense with the implications of the civilized/uncivilized distinction requires more than a change of term. As illustrated in the following, the removal of this distinction is not a single act but a gradual process. In the field of foreign investment protection, a (re)consideration of the proper role of general principles of law is only possible with the appreciation of the meaning and impact of 'civilized nations' in the past.

[65] See Martti Koskenniemi and Ville Kari, 'Sovereign Equality' in Jorge E Viñuales (ed), *The UN Friendly Relations Declaration at 50: An Assessment of the Fundamental Principles of International Law* (CUP 2020); Sloan (n 61).

[66] ILC, 'Report of the International Law Commission on the Seventy-First Session' (n 49) 336; ILC, 'Report of the International Law Commission on the Seventy-Second Session' (n 49) 154; ILC, 'Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly during its Seventy-Fourth Session, Prepared by the Secretariat' (12 February 2020) UN Doc A/CN.4/734, 9-10; UNGA, Sixth Committee Seventy-Sixth Session, Summary Record of the 23rd Meeting, UN Doc A/C.6/76/SR.23; Summary Record of the 24th Meeting, UN Doc A/C.6/76/SR.24; Summary Record of the 25th Meeting, UN Doc A/C.6/76/SR.25.

II. General principles of law in the development of the international minimum standard of the treatment of aliens

In relation to the treatment of aliens, given that colonial and semi-colonial territories were generally governed by colonial laws or extraterritorial consular jurisdiction, the international rules as we know them today were developed primarily from the interactions among European states, the US, and Latin American states since the nineteenth century.[67] As a corollary to the principle of state sovereignty in modern international law, national treatment was the starting point and the default position in this area.[68] Yet, as powerful capital-exporting states deemed the treatment offered by capital-importing states inadequate, they started to assert the existence of an international minimum standard. In doing so, they frequently relied on general principles derived from domestic laws to buttress their assertions.[69] Disputes pertaining to the treatment of aliens were sometimes submitted to adjudicative bodies, and such submissions were at times occasioned by use or threat of force.[70] At a time when an elaborate body of customary rules had yet to emerge, adjudicators relied on 'the laws of civilized nations' or 'standards of civilization' in their decisions.[71] This section gives an overview of the use of general principles in this period. It illustrates the foundational

[67] See Miles (n 11) 55; Sornarajah, *The International Law on Foreign Investment* (n 20) 27-28.

[68] See Henry N Neufeld, *The International Protection of Private Creditors from the Treaties of Westphalia to the Congress of Vienna (1648-1815): A Contribution to the History of the Law of Nations* (Sijthoff 1971) 100-3. See also Jan Paulsson, *Denial of Justice in International Law* (CUP 2005) 14-15.

[69] See eg *No. Viscount Palmerston to Sir Edmund Lyons, Foreign Office* (7 August 1846) 39 British and Foreign State Papers 432; Secretary of State Frelinghuysen to Mr Morgan (17 February 1885) in John Bassett Moore, *A Digest of International Law*, vol VI (US Government Printing Office 1906) 312; Instructions of Secretary of State Marcy to his charge at Vienna (6 April 1855) in Moore ibid vol VI 275; *The Secretary of State Mr Hull to the Mexican Ambassador (Castillo Nájera)* (22 August 1938 Washington) in Foreign Relations of the United States Diplomatic Papers (The American Republics 1938) vol V, 686.

[70] Miles (n 11) 19-70; Anghie (n 22) 32-114; Shea (n 20) 9-32.

[71] See eg *Harry Roberts (U.S.A.) v. United Mexican States* (1926) 4 RIAA 80; *William T. Way v. United Mexican States* (1928) 4 RIAA 400. See also Elihu Root, 'The Basis of Protection to Citizens Residing Abroad' (1910) 4 AJIL 517.

role played by these principles in the formative stages of the minimum standard.

The minimum standard governs both the procedural and substantive protection of aliens.[72] For a time, despite the assertions of a minimum standard, the specific criteria were somewhere between ambiguous and non-existent. In 1850, Lord Palmerston, then Foreign Secretary of Great Britain, made his famous statement in the *Don Pacifico* affair and stressed that maltreatment of foreign nationals could not be justified by the fact that the same treatment was received by locals:

> We shall be told, perhaps, as we have already been told, that if the people of the country are liable to have heavy stones placed upon their breasts, and police officers to dance upon them; if they are liable to have their heads tied to their knees, and to be left for hours in that state; or to be swung like a pendulum, and to be bastinadoed as they swing, foreigners have no right to be better treated than the natives, and have no business to complain if the same things are practiced upon them. We may be told this, but that is not my opinion, nor do I believe it is the opinion of any reasonable man.[73]

This statement was subsequently cited by Elihu Root as attesting to the existence of 'a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the

[72] See eg Text of Articles adopted in First Reading by the Third Committee of the Conference for the Codification of International Law (The Hague 1930) League of Nations publication, V. Legal, 1930.V.17 (document C.351(c).M.145(c).929.V) reproduced in Martins Paparinskis (ed), *Basic Documents on International Investment Protection* (Hart 2019) (Draft Articles adopted at the Hague Codification Conference (1930)); Francisco V García-Amador, 'Sixth Report on State Responsibility: Revised Draft on International Responsibility of the State for Injuries Caused in Its Territory to the Person or Property of Aliens' (1961) YBILC 1961, vol II (García-Amador's Revised Draft on State Responsibility (1961)); 'Harvard Draft Convention on the Responsibility of States for Damages Done in their Territory to the Persons or Property of Foreigners' (1929) 23 AJIL Special Supp 133 (1929 Harvard Draft Convention).

[73] Quoted in Paulsson, *Denial of Justice* (n 68) 16. See also Root (n 71) 522.

world.'[74]

Such claims were sometimes tempered by considerations of the practical constraints and specific circumstances of different states. In 1855, five years after the *Don Pacifico* affair, the US Secretary of State stated, in relation to the judicial system of Australia, that normal operations of a judicial system usually do not entitle another state to an international claim.[75] He pointed out that a state 'cannot be asked to modify her mode of proceedings to suit our views, or to extend to our citizens all the advantages which her subjects would have under our better and more humane system of criminal jurisprudence', even though he considered that the Australian judicial system had 'many harsh features and is deficient in many safeguards'.[76]

Yet, such considerations did not stop capital-exporting states from finding the standard and practice prevailing in some states inadequate in other circumstances. This at times prompted the exercise of diplomatic protection, sometimes involving threat or use of force.[77] It was in this context that Latin American states, who were often victims of such 'gunboat diplomacy', advocated for the Calvo doctrine, whereby foreigners are not entitled to any better treatment than nationals.[78] Unsurprisingly, this position was opposed by Western capital-exporting states, who regarded it as *doctrina*

[74] Root (n 71) 521.

[75] *Instructions of Secretary of State Marcy to his charge at Vienna* (6 April 1855) in Moore (n 69) vol VI, 275.

[76] Ibid. This might be considered as consistent with the Monroe doctrine in the US foreign policy prevailing at that time.

[77] Miles (n 11) 19-70; Anghie (n 22) 32-114; Sornarajah, *The International Law on Foreign Investment* (n 20) 27-28.

[78] In the First International Conference of American States held in 1889-90, the *ad hoc* commission for international law recommended the adoption of the principle that '[a] nation has not, nor recognizes in favour of foreigners, any other obligations or responsibilities than those which in favour of the natives are established in like cases by the constitution and the laws.' See Francisco V García-Amador, 'State Responsibility – Some New Problems' (1958) 94 Collective Courses of the Hague Academy of International Law 369, 432

hispanoamericana and not part of international law.[79]

The conflicting positions were obstacles to the emergence of an elaborate body of customary rules. In the meantime, there developed a growing preference for peaceful means of dispute resolution, as evidenced by the adoption of the Conventions for the Pacific Settlement of International Disputes of 1899 and 1907.[80] Still, a sense of coercion often loomed in the background, and in some instances, claims commissions were established under the threat of force by capital-exporting states.[81] When establishing these adjudicative bodies, in the absence of settled rules of customary international law, states included 'principles of international law, justice, and equity' or 'general principles of the law of nations' in the applicable law clause of the constitutive instruments.[82] A wealth of international jurisprudence sprang from such arrangements, which laid the foundation for the customary rules on the treatment of aliens that are still relevant today.

The *Fabiani* case decided in 1896 is one such example.[83] The case concerned the delay and ultimate failure to execute a foreign award. The applicable law in that case was 'the laws of Venezuela, the general principles of the law of nations, and the convention in force between the two contracting powers'. The applicable 1885 French-

[79] See Paulsson, *Denial of Justice* (n 68) 22; Shea (n 20) 20; Miles (n 11) 51-52.

[80] See Tjaco T van den Hout, 'Resolution of International Disputes: The Role of the Permanent Court of Arbitration – Reflections on the Centenary of the 1907 Convention for the Pacific Settlement of International Disputes' (2008) 21 LJIL 643; George W Scott, 'Hague Convention Restricting the Use of Force to Recover Contract Claims' (1908) 2 AJIL 78.

[81] Miles (n 11) 19-70.

[82] See eg Mexico-United States General Claims Convention of September 8, 1923, Article I; France-Venezuela Protocol of 27 February 1903, Article I; France-Venezuela Convention of 26 November 1885.

[83] *Antoine Fabiani (France v Venezuela)*, Award of the President of the Swiss Confederation (30 December 1896) The award is originally in French. Excerpts of it were translated by the French-Venezuelan Claims Commission in 1905. See *Antoine Fabiani* (1905) 10 RIAA 83.

Venezuelan convention prohibited 'denials of justice'.[84] But, as the Convention did not define 'denial of justice', the arbitrator resorted to general principles of law:

> By reference to the general principles of the law of nations on the denial of justice, ie to the rules common to most legislations or taught by doctrines, one comes to decide the denial of justice comprises not only the refusal of a judicial authority to exercise its duties, and especially to render a decision on the petitions submitted to it, but also the obstinate delays on its part in rendering its sentences.[85]

That decision subsequently became an authority on the international standard on refusal of access to justice and unreasonable delay, and is still relied upon in contemporary investment arbitration cases.[86]

General principles of law were also applied to pre-trial procedures. In the *Harry Roberts* case decided by the Mexico-US General Claims Commission in 1926, the claim concerned the ill-treatment of the claimant in jail, pending his prosecution which allegedly was unduly delayed.[87] The Commission considered that the ill-treatment of the claimant, including the 'unreasonably long detention' and the 'inhumane treatment' in jail, made Mexico responsible.[88] According to the Commission, although local Mexicans were treated in the same manner, it had to decide 'whether aliens are treated

[84] *Antoine Fabiani* (1905) ibid 84.

[85] Ibid 117.

[86] See eg *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No ARB/10/7, Award (8 July 2016) para 557; *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador (I)*, UNCITRAL, PCA Case No 2007-02/AA277, Partial Award (30 March 2010) para 183. See also Carlo Focarelli, 'Denial of Justice', *Max Planck Encyclopedia of Public International Law* (2020) para 14.

[87] *Harry Roberts* (n 71) 77-8.

[88] Ibid 79-80.

in accordance with ordinary standards of civilization'.[89]

The *William T. Way* case decided by the Mexico-US General Claims Commission concerned the death of the claimant during the arrest.[90] The arrest warrant in question was found to be void under Mexican law for failure to state any charge against the accused. In finding the existence of denial of justice, the Commission observed that according to rules 'recognized by the laws of Mexico, the laws of the United States and under the laws of civilized countries generally, and also under international law', there must be legitimate grounds for deprivation of liberty, everyone is entitled to be informed of the charges against them, and gross treatment in connection with arrest and imprisonment is prohibited.[91]

General principles of law were also applied to the administration of justice during judicial proceedings. The *Robert E. Brown* arbitration between the US and Britain arose out of the alleged denial of justice pertaining to the property owned by a US national in South Africa.[92] The tribunal considered that the unconstitutional acts of the executive and the Volksraad (the legislative body in South Africa) and the subjection of the judiciary to the determined policy of the executive, taken as a whole, were in breach of 'those principles of justice and fair dealing which prevail in every country' and 'fundamental principles of justice recognized in every enlightened community'.[93]

In the aforementioned cases, general principles of law were used to 'fill the gaps'

[89] Ibid 80.

[90] *William T. Way* (n 71).

[91] Ibid 400.

[92] *Robert E. Brown (United States) v. Great Britain*, Decision (1923) 4 RIAA 120.

[93] Ibid 129.

when clear rules of customary international law did not exist. The use of general principles in such cases laid the groundwork for several codification projects. Yet, as evidenced in these works, disagreement among states persisted. In 1926, a narrow view of denial of justice was presented in the report of the subcommittee of the League of Nations Committee of Experts for the Progressive Codification of International Law (Guerrero Report), which was considered as typifying the Latin-American attitude on that matter.[94] While it recognised that a refusal to allow foreigners to access the courts constitutes a denial of justice, that was qualified by what is available under the host state's national law.[95] The Report did not discuss further the manner of judicial proceedings, the content of judgments, or the enforcement of judgments. Instead, it stipulated that 'a judicial decision, whatever it may be, and even if vitiated by error or injustice, does not involve the international responsibility of the state'.[96]

This narrow view was criticised by several states and commentators.[97] In many respects, it also contrasted with the draft conventions prepared by Harvard scholars and the Institute of International Law. For instance, the Resolution adopted by the Institute of International Law in 1927 included the obligation to 'offer the guaranties which are indispensable to the proper administration of justice'.[98] It also provided that states

[94] See eg Paulsson, *Denial of Justice* (n 68) 26; Alwyn V Freeman, *The International Responsibility of States for Denial of Justice* (Longmans, Green and Co. 1938) 122-3.

[95] Conclusions of a sub-committee, communicated to various Governments by the League of Nations Committee of Experts for the Progressive Codification of International Law, with Questionnaire No. 4 (29 January 1926) League of Nations Document C.196.M.1927.V, 104 (The rapporteur, Gustavo Guerrero, was a national of El Salvador) reproduced in (1929) 23 AJIL Special Supp 133 (Guerrero Report) para 7.

[96] Ibid para 6(2).

[97] Responses of Various Governments to Questionnaire No 4 of the League of Nations Committee of Experts for the Progressive Codification of International Law, League of Nations Document C.196.M.70.1927.V, 177-8 (Norway); 195-6 (Portugal); 250-1 (Switzerland); Freeman (n 94) 122-3; Paulsson, *Denial of Justice* (n 68) 25-26.

[98] Institute of International Law, 'Resolution on the International Responsibility of States for Injuries on Their Territory to the Person or Property of Foreigners' (1928) 22 AJIL Special Supp 330, 331 (Institute of International Law, Resolution on State Responsibility) Article V(3).

would be responsible if 'the procedure or the judgment is manifestly unjust'.[99] Similarly, under the 1929 Harvard Draft Convention, '[d]enial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guaranties which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment'.[100]

Given the different views of stakeholders, the 1930 Hague Conference for the Codification of International Law failed to produce a convention on the treatment of aliens, and the draft text of the articles adopted on first reading by the Third Committee was vague and unclear in many respects.[101] Under Article 9 of the draft text adopted on first reading, a state will incur responsibility by the fact:

> (1) That a judicial decision, which is not subject to appeal, is clearly incompatible with the international obligations of the State;
>
> (2) That, in a manner incompatible with the said obligations, the foreigner has been hindered by the judicial authorities in the exercise of his right to pursue judicial remedies or has encountered in the proceedings unjustifiable obstacles or delays implying a refusal to do justice.[102]

The 'international obligations of the States' remained undefined,[103] and it was unclear in what circumstances a foreigner should be considered as having been 'hindered by the judicial authorities' or having encountered 'unjustifiable obstacles or

[99] Ibid Article VI.

[100] 1929 Harvard Draft Convention (n 72) Article 9.

[101] See Edwin M Borchard, '"Responsibility of States" at the Hague Codification Conference' (1930) 24 AJIL 517.

[102] Draft Articles adopted at the Hague Codification Conference (1930) (n 72) Article 9.

[103] Ibid Article 2.

delays' in pursuing judicial remedies.

In the absence of settled rules, recourse to general principles of law remained the natural response when disputes arose. This was reflected in the 1961 Harvard Draft Convention on the Responsibility of States,[104] which has been relied upon even in contemporary investment arbitral decisions.[105] In this Draft Convention, while the authors aimed to 'codify with some particularity the standards established by international law for the protection of aliens and thereby to obviate, as far as possible, the necessity of looking to customary international law', they admitted that 'it has been necessary in some cases, however, to incorporate by reference to international standards of the principles of law or of justice recognized by the principal legal systems of the world.'[106] For instance, the Draft Convention referred to principles 'recognized by the principal legal systems of the world' when defining denial of access to justice and denial of a fair hearing.[107]

Similar to the case of denial of justice, general principles of law also played a foundational role in shaping the international rules on the substantive protection of aliens' property. As in the cases discussed above, states have relied on the positions taken in domestic laws to back up their assertions. For instance, in the *Finlay* dispute in the 1840s between the British government and the Greek government regarding the infringement of a British national's property by the latter, Viscount Palmerston claimed

[104] Louis B Sohn and Richard R Baxter, 'Responsibility of States for Injuries to the Economic Interests of Aliens' (1961) 55 AJIL 545 (1961 Harvard Draft Convention).

[105] See eg *Mondev International Ltd. v. United States of America*, ICSID Case No ARB(AF)/99/2, Award (5 October 2002) para 127; *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award (17 March 2006) paras 256-7; *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Interim Award (26 June 2000) para 102; *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No UNCT/02/1, Award on Jurisdiction (22 November 2002) paras 89-91; *Tokios Tokelés v. Ukraine*, ICSID Case No ARB/02/18, Award on Jurisdiction (29 April 2004) para 92.

[106] 1961 Harvard Draft Convention (n 104) 547.

[107] Ibid Articles 6(b) and 7(f).

that:

> Now *in all countries* it is understood that when land belonging to a private individual is required for purposes of great public utility or of national defence, private right must so far yield to public interest, that the individual is compelled by law to give up his land to the public, provided always that he shall receive for it from the public its full and fair value. But *in all countries* a marked distinction in this respect has been drawn between necessities of public service and the convenience and accommodation of the Sovereign.[108]

Accordingly, he contended that 'compensations equally inadequate have been accepted by natives or by subjects of other states' was no reason for justifying similar treatment of British subjects.[109]

Another example is the *Religious Properties* case, which concerned the seizure of properties belonging to religious associations by the Portuguese government.[110] In response to that, the British, French, and Spanish governments reached an agreement with Portugal to submit the dispute to a PCA tribunal. The applicable law in that case was 'the applicable treaty law and, failing that, the provisions and general principles of law and equity'.[111] During the proceedings, the British government submitted that:

> Respect of property, respect of acquired rights, *these are the legal principles of all civilized countries*. It is upon the security which they assure and the confidence they inspire that the relations entertained by nations with each other

[108] *No. Viscount Palmerston to Sir Edmund Lyons* (n 69) 432 (emphasis added).

[109] Ibid.

[110] *Affaire des propriétés religieuses (France, Royaume-Uni, Espagne contre Portugal)* (1920) 1 RIAA 7.

[111] Translated by the author. The original text was 'le droit conventionnel éventuellement applicable, et, à défaut, d'après les dispositions et les principes généraux du droit et de l'équité'. Ibid 9.

are based.[112]

The French and Spanish governments argued in the same vein. Importantly, Portugal observed that 'far from contesting the legal principles upon which the three Governments base these arguments, [it] approve[s] them without reserve, respectful of law and equity.'[113]

That case was one of the early authorities on the principle of acquired rights, which was subsequently affirmed by the PCIJ, holding that 'the principle of respect for vested rights … forms part of generally accepted international law'.[114] The tribunal in *Aramco* also described this principle as 'one of the fundamental principles both of Public international law and of the municipal law of most civilized States'.[115] This principle formed the foundation of the international rules on expropriation.

Nonetheless, the scope of protected rights remained to be clarified,[116] which led the tribunal in *Norwegian Shipowners' Claims* to resort to general principles of law. When holding that contracts were 'property' and were protected against expropriation, the tribunal noted that this was the case 'under the municipal law of the United States, as well as under the law of Norway and other States', and therefore '[i]t is common ground that, in the absence of any treaty, the Norwegian owners of these contracts were protected … [against] any expropriation not necessary for public use, and that they are entitled to just compensation if expropriation occurs.'[117]

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[112] Quoted in Alexander P Fachiri, 'Expropriation and International Law' (1925) 6 British Ybk Intl L 159, 168 (emphasis added).

[113] Ibid 168-169.

[114] *Certain German Interests in Polish Upper Silesia* (Merits) PCIJ Rep Series A No 7, 42.

[115] *Aramco* (n 25) 206.

[116] John H Herz, 'Expropriation of Foreign Property' (1941) 35 AJIL 243, 244.

[117] *Norwegian Shipowners' Claims (Norway v. United States of America)* (1922) 6 RIAA 307, 334.

Perhaps the most crucial yet controversial questions in this area are what constitutes an expropriation and whether full compensation is required when it occurs.[118] Competing views existed in the early twentieth century, culminating in the agrarian reforms in Eastern Europe and the land reforms in Mexico.[119] The 1926 Guerrero Report took the position that when property belonging to foreigners was 'seized or confiscated in time of war or revolution … by the lawful Government', the state would be responsible.[120] But Finland considered that this scope of protection was too narrow and may preclude remedies for the loss caused by general legislative acts such as those in agrarian reform. For Finland, a state would become internationally responsible if it caused damage to foreigners by *bona fide* legislation and refused to pay full compensation for the loss suffered, even if locals do not receive such compensation.[121]

The rules on the compensation for damages caused by general legislative acts were contested in the Mexican agrarian reforms, which resulted in the expropriation of properties owned by US nationals.[122] Responding to the protests by the US, Mexico contented that

> there is in international law no rule universally accepted in theory nor carried out in practice, which makes obligatory the payment of immediate compensation, nor even of deferred compensation, for expropriations of a general and impersonal character like those which Mexico has carried out for

[118] See eg Herz (n 116) 258-60.

[119] See Herz (n 116) 258-60; Miles (n 11) 71-78.

[120] Guerrero Report (n 95) para 9.

[121] Responses to Questionnaire No 4 (n 97) 163 (Finland).

[122] 'The Secretary of State of the United States to the Mexican Ambassador at Washington (21 July 1938)' (1938) 32 AJIL Special Supp 181, 183-184.

the purpose of the redistribution of land.[123]

In response, Mr Hull, then the Secretary of State of the US, advanced the famous 'Hull formula' of 'adequate, effective and prompt' compensation.[124] In his statement, he observed that Mexico's position 'runs counter to the basic precepts of international law and of the law of every American republic, as well as to every principle of right and justice upon which the institutions of the American republics are founded.'[125] He also observed that 'the applicable precedents and recognized authorities on international law' support the doctrine of prompt, adequate, and effective compensation, and that '[i]n addition, clauses appearing in the constitutions of almost all nations today, and in particular in the constitutions of the American republics, embody the principle of just compensation.'[126]

Whether or not Mr Hull's statement on 'the law of every American republic' genuinely reflected the reality, it was the position of Mexico that 'the time and manner of such payment must be determined by her own laws'.[127] This and some other examples discussed above show how general principles of law were employed by capital-exporting states to buttress assertions on the content of the international standard, when the customary status of certain requirements was controversial at best.

Against this background, it was hardly a surprise that the inclusion of general principles of law as a source of international obligations of states was strongly opposed

[123] 'Translation of Note from the Minister of Foreign Affairs of Mexico to the American Ambassador at Mexico City, Ministry of Foreign Relations, United Mexican States (3 August 1938)' ibid 186.

[124] 'The Secretary of State Mr Hull to the Mexican Ambassador (Castillo Nájera) (22 August, 1938 Washington)' ibid 191, 193.

[125] Ibid 192.

[126] Ibid 193.

[127] 'Note from the Foreign Minister of Mexico to the American Ambassador (3 August 1938)' ibid 186.

by delegates from certain states at the Hague Codification Conference in 1930. Cautioning against the abuse of the international standard, Guerrero, delegate from El Salvador, and Sipsom, delegate from Romania, emphasised the need to provide a precise definition of the international standard.[128] Guerrero insisted that international rules in this respect must be 'indisputably admitted' by states, and that other sources such as general principles of law, judicial decisions, as well as doctrines of jurists, which were susceptible to abuse, should not be sources of states' international obligations.[129] This position was opposed by delegates from capital-exporting states. They contended that to limit the sources of obligations to treaties and customary international law would produce a discrepancy between the sources of obligations under the intended convention and the applicable law of the PCIJ, and that it would also be inconsistent with the development of international law up to that point.[130] While the Hague Codification Conference did not lead to a convention on state responsibility, general principles of law continued to be relied upon in state and judicial practice afterwards.

III. General principles of law applied to state contracts

General principles of law have also been applied to the dealings between corporations and sovereign states, especially in the energy sector. The international rules governing state contracts differ from the traditional minimum standard discussed above in that the former directly govern the contractual relationship between states and investors while

[128] Shabtai Rosenne, *League of Nations Conference for the Codification of International Law (1930)*, vol 2 (Oceana Publications 1975) 1460-1461.

[129] Ibid 1470-1472.

[130] Ibid 1473-1480.

the latter operates on the inter-state plane.[131] Yet, overlaps exist in the substance of these two bodies of law. In state contract disputes, general principles of law can be seen as a middle ground between the law of the state party to the contract, on the one hand, and the law of the foreign investor's home state, on the other. Similar to the case of the minimum standard, the use of general principles of law in state contract disputes has been criticised for the tendency to favour the interests of capital exporters.[132]

In practice, general principles of law have become applicable to state contracts by virtue of the explicit or implicit choice of law by the contracting parties, the 'international character' of the state contract, or the perceived inadequacy of the applicable domestic law. In some of the state contracts, the applicable law clause refers to general principles of law using terms such as: 'the juridical principles contained in Article 38 of the Statutes [*sic*] of the Permanent Court of International Justice',[133] 'the principles of law common to [the laws of both parties] and, in the absence of such principles, according to the principles of law recognized as normal by civilized nations, in particular such principles as have already been applied by the International Tribunals',[134] and 'the principles of the law of [the host state] common to the principles of international law and in the absence of such common principles then by and in accordance with the general principles of law, including these principles as may have been applied by international tribunals.'[135] Even in the absence of a specific agreement between the parties, arbitral tribunals have applied general principles of law based on

[131] Arnold McNair, 'The General Principles of Law Recognized by Civilized Nations' (1957) 33 British Ybk Intl L 1, 10.

[132] Charles N Brower and Jeremy K Sharpe, 'International Arbitration and the Islamic World: The Third Phase' (2001) 97 AJIL 643, 644-645; Miles (n 11) 28-29.

[133] See McNair (n 131) 8.

[134] See Edward H Wall, 'The Iranian-Italian Oil Agreement of 1957' (1958) 7 ICLQ 736, 739.

[135] *Texaco v. Libya* (n 25) 11.

the 'international' character of the contract. To support the findings of international character, tribunals have considered the involvement of certain governmental bodies, the terms of the contract, references to international law in the contract, and the choice of international arbitrator(s).[136]

Another perhaps notorious reason for the application of general principles of law, instead of the law of the host state, was the perceived inadequacy of the latter. In the (in)famous *Abu Dhabi Petroleum* arbitration, the arbitrator commented on the law of Abu Dhabi, the proper law of the contract, that 'it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments.'[137] Following that observation, the arbitrator proceeded to apply principles of English law, which he considered as representing 'a sort of "modern law of nature"', even though the contract was not governed by English law.[138] Similarly, in *Ruler of Qatar v. International Marine Oil Company*, the tribunal applied general principles of law based on the finding that 'there is no settled body of legal principles in Qatar applicable to the construction of modern commercial instruments'.[139] In *Aramco,* the tribunal held that whenever Aramco's rights could not be 'secured in an unquestionable manner by the law in force in Saudi Arabia', Saudi laws must be 'interpreted or supplemented by the general principles of law, by the custom and practice in the oil business, and by notions of pure

[136] *Lena Goldfields, Ltd., v. Soviet Government* Award (3 September 1930) para 22 (quoted in Arthur Nussbaum, 'Arbitration between the Lena Goldfields Ltd. and the Soviet Government' (1950) 36 Cornell LR 31, 50; *Sapphire International Petroleums Ltd. v. National Iranian Oil Company*, Award (15 March 1963) (1963) 35 ILR 136, 171-5.

[137] *Petroleum Development (Trucial Coast) Ltd v. Sheikh of Abu Dhabi*, Award (28 August 1951) (1952) 1(2) ICLQ 247, 251 (*Abu Dhabi Petroleum* arbitration).

[138] Ibid.

[139] *Ruler of Qatar v. International Marine Oil Co.*, Award (June 1953) 20 ILR 534, 544-5.

jurisprudence.'[140] The strong language used in these arbitral decisions regarding Islamic legal systems has caused lasting hostility in the Arab world against international arbitration.[141]

On the merits, general principles of both public and private law have been applied. They were applied in the interpretation of contracts. For instance, in the *Abu Dhabi Petroleum* arbitration, the arbitrator applied the principle *expressio unius est exclusio alterius* (the express mention of one thing excludes all others) in English law, which he considered as a general principle of law, to interpret the contract.[142] In *Aramco*, the tribunal determined the legal nature of the state contract by reference to French law, Swiss law, German law, English law, together with Saudi Arabian law.[143]

General principles of law also played an important role in determining the consequences of breach or revocation of contract by the government. In *Sapphire v. NIOC*, with respect to the failure of NIOC to perform its contractual obligations, the tribunal applied the general principle that a failure by one contracting party to perform its obligations releases the other party from its obligations and gives rise to the right to claim damages.[144] To vindicate this principle, the arbitrator referred to French law and German law as representatives of civil law systems, and to English and American law as representatives of Anglo-Saxon legal systems, as well as Canadian and Iranian law

[140] *Aramco* (n 25) 169. The applicable law clause stipulates that the tribunal 'shall decide this dispute: (a) In accordance with the Saudi Arabian law as hereinafter defined in so far as matters within the jurisdiction of Saudi Arabia are concerned; (b) In accordance with the law deemed by the Arbitration Tribunal to be applicable, in so far as matters beyond the jurisdiction of Saudi Arabia are concerned.'

[141] Ahmed Sadek El-Kosheri, 'Is There a Growing International Arbitration Culture in the Arab-Islamic Judicial Culture' in Albert Jan van den Berg (ed), *International Dispute Resolution: Towards An International Arbitration Culture* (Kluwer Law International 1998); Arthur J Gemmell, 'Commercial Arbitration in the Islamic Middle East' (2006) 5 Santa Clara Journal of International Law 168, 179.

[142] *Abu Dhabi Petroleum* arbitration (n 137).

[143] *Aramco* (n 25) 158-66.

[144] *Sapphire* (n 136) 182.

(which were the national laws of the parties).[145]

Another example is the *Lena Goldfields* arbitration, which arose out of the USSR's seizure of the enterprise of Lena operating under a concession granted by the Soviet Government.[146] According to the tribunal, although the performance of the concession agreement was governed by Soviet law, other aspects of the dispute were governed by international principles, including the general principle of unjust enrichment.[147] To justify the recourse to that principle, the tribunal made reference to its presence in continental law, including German law, French law, Scottish law, and the law of Soviet Russia. It also pointed out that although (at that time) the unjust enrichment principle was not recognised fully in English law, 'the English right of action "for money had and received" on "total failure of consideration" often leads to the same result'.[148] Accordingly, damages were calculated based on the principle of unjust enrichment.[149]

Apart from the unjust enrichment principle, other principles such as acquired rights and *pacta sunt servanda* have been applied with similar effect. In *Aramco,* in relation to Saudi Arabia's alleged infringement on the exclusive right of Aramco under the contract, the tribunal applied the principle of acquired rights as a general principle of law.[150] It specifically mentioned that '[i]n the Hanbali School of Islamic Law, respect for previously acquired private rights, and specially for contractual rights, is a principle

[145] Ibid.

[146] Nussbaum (n 136) 32.

[147] Ibid 50-1.

[148] Ibid 51.

[149] Ibid 50-53.

[150] *Aramco* (n 25) 205-6.

just as fundamental as it is in other legal systems of civilized States.'[151]

In *Texaco v. Libya*, the arbitrator found that the state contract was 'internationalised' and thus the dispute was governed by international law.[152] In terms of customary international law, the arbitrator refused to find that the General Assembly resolutions adopted in the NIEO movement had affected the rules on expropriation.[153] He then laid emphasis on the principle of *pacta sunt servanda*, holding that the nationalisation by Libya was unlawful[154] and that the principle of restitution (*restitutio in integrum*) applied.[155] In *LIAMCO v. Libya*, on the similar facts as in *Texaco*, the arbitrator enumerated several applicable general principles: 'the principle of the sanctity of property and contracts, the respect of acquired vested rights, the prohibition of unjust enrichment, the obligation of compensation in cases of expropriation and wrongful damage etc'.[156]

The *LIAMCO* arbitrator also relied on general principles on damages. One question in that case was whether, and to what extent, loss of profit under concession agreements should be compensated in cases of lawful nationalisation.[157] On that issue, the arbitrator found that the case law invoked by parties was too vague, the international rules were inconclusive, and state practice failed to give clear guidance.[158] He also noted that the classic doctrine of 'prompt, adequate and effective' compensation for

[151] Ibid.

[152] *Texaco v. Libya* (n 25) 11-18.

[153] Ibid 21-31.

[154] Ibid 17-31.

[155] Ibid 31-7.

[156] *LIAMCO* (n 25) 37.

[157] Ibid 70.

[158] Ibid 71-72.

expropriation was under challenge at that time.[159] These findings led to the conclusion that 'there is no conclusive evidence of the existence of community or uniformity' in international law on that matter.[160] It was in this context that the arbitrator considered it 'necessary to refer therefore to the general principles of law'.[161] He then found that the principle of equity was such a commonly recognised general principle, and adopted the formula of 'equitable compensation' in calculating the damages.[162]

IV. Moving beyond the civilized/uncivilized distinction in the use of general principles of law

As illustrated in the sections above, general principles of law played a foundational role in the development of the international rules on the protection of the property of aliens. In the decisions of adjudicative bodies and in states' assertions on the international standard, general principles were used to fill the 'gaps' when the customary standard was either non-existent or overly ambiguous for lack of consensus among states. When the minimum standard on the treatment of aliens began to develop, general principles of law supplied basic notions and principles. At a time when the customary minimum standard was under the challenge by capital-importing states, general principles were invoked again both in the assertions of capital-exporting states and in judicial/arbitral decisions. General principles of law were also applied in state contract disputes where the local law was perceived as inadequate.

The legal reasoning in the identification and application of general principles

[159] Ibid 72-73.

[160] Ibid 76.

[161] Ibid 75.

[162] Ibid.

suffered from crucial drawbacks and has prompted criticisms and backlash. The process of deriving general principles displayed an evident bias in favour of the legal notions of Western capital-exporting states. Terms such as 'ordinary standards of civilization', 'principles of justice recognized in every enlightened community', and 'legal principles of all civilized countries', while seemingly giving these principles a moral high ground, were nonetheless a source of misgivings and mistrust on the part of developing states. At a time when the distinction between 'civilized' and 'uncivilized' nations was fundamental in international law, general principles were essentially a channel through which the legal standards prevailing in Western capital-exporting states were imposed onto the rest of the world. Even after the conclusion of the UN Charter, which formally recognised the principle of sovereign equality, the prejudice against legal systems of the developing world could still sometimes be discerned, both in arbitral awards and in the literature. As Schwarzenberger observed in 1955, the term 'civilized nations' carried a meaning which was by and large 'identical with the maintenance of the rule of law in the Anglo-Saxon meaning of the term in favour of foreign nationals'.[163] Admittedly, when deriving general principles, adjudicators in more recent cases began to consult the laws of developing states, at least the law of the state party to the dispute. Yet, such instances were sporadic, and the legal reasoning in these decisions was also strongly criticised.[164] Some tribunals paid little more than lip service to the specific rules of the contracting state's law, not to mention the laws of states in other (non-European) regions.

Moreover, the abstract character of general principles makes them easy to manipulate and prone to abuse, which had led to developing states' objection to this

[163] Schwarzenberger (n 5) 227-228.

[164] See eg Sornarajah, *The International Law on Foreign Investment* (n 20) 110-111; Miles (n 11) 80-82.

source at the Hague Codification Conference.[165] The highly malleable character of general principles was evidenced in state contract disputes, where different general principles, of both public and private law, were applied to similar matters with similar effects. It was questioned why it was the principles protecting the sanctity of contract that were applied. Why not apply principles such as those applicable to the *contrat administratif* in French law, which leave more space for unilateral change of contract in the public interest?[166] One may wonder to what extent these principles were genuinely decisive to the outcome of the case, or whether they were 'merely used to add an appearance of broad general justice'.[167] Such decisions have led to the observation that general principles of law were one of the legal techniques employed to enhance foreign investment protection and to favour the interests of capital-exporting states.[168]

In the mid-to-late twentieth century, developing states made significant efforts to challenge and reshape the traditional rules under the rubric of NIEO.[169] As is well known, these efforts failed to achieve the intended goal largely due to the financial difficulties experienced by developing states and the prevalence of neoliberalism with the end of the Cold War.[170] Nonetheless, while the NIEO movement failed to shake the foundations of the rules on foreign investment, developing states managed to underscore the importance of sovereign equality and to acquire a stronger voice in

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[165] See text to fn 128-129.

[166] Sornarajah, *The International Law on Foreign Investment* (n 20) 110.

[167] Christopher H Schreuer, 'Unjustified Enrichment in International Law' (1974) 22 AJIL 281, 289; Sornarajah, *The International Law on Foreign Investment* (n 20) 109-110.

[168] See Sornarajah, *The International Law on Foreign Investment* (n 20) 110-111. See also Miles (n 11) 80-84.

[169] Sornarajah, *The International Law on Foreign Investment* (n 20) 3; Kriebaum, Schreuer, and Dolzer (n 20) 6-7.

[170] Sornarajah, *The International Law on Foreign Investment* (n 20) 3-4; Kriebaum, Schreuer, and Dolzer (n 20) 7-8.

international fora.[171] Structural changes in international relations brought about a significant shift in international law. As much as the 'civilizing mission' was very much in vogue in the nineteenth and early twentieth century, it is safe to say that respect for diversity and equality is the aspiration of the present time.[172] Hence the full support for the removal of the term 'civilized nations' at the ILC and the Sixth Committee during the discussions on the topic of general principles of law.[173]

At the same time, the landscape of domestic legal systems worldwide also changed during the twentieth century. Despite the criticisms of the role played by colonisation and imperialism in the transformation of legal systems of the developing world, in which the enforcement of the international minimum standard undoubtedly played a part, it is a fact that most non-Western legal systems have been (re)shaped by legal notions such as property and contract, as well as Western legal principles of the administration of justice.[174] As a result, the divergence among domestic legal systems nowadays is not as wide as it was at the beginning of the twentieth century. As will be shown in Chapter 7, despite the differences in terms of national policy and legal culture, most legal systems of the world nowadays are modelled on several European legal systems both in legal structure and in basic notions. This change is another reason for taking a fresh look at the use of domestic legal principles in contemporary international

[171] Of course, the change brought by *formal* equality is limited. See Koskenniemi and Kari (n 65) 167.

[172] The need to improve diversity and equal representation is reflected in the work on ISDS reform at the UNCITRAL Working Group III. See Note by the Secretariat, 'Standing Multilateral Mechanism: Selection and Appointment of ISDS Tribunal Members and Related Matters' (8 December 2021) UN Doc A/CN.9/WG.III/WP.213 <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V21/092/76/PDF/V2109276.pdf?OpenElement> (accessed 2 November 2022).

[173] See fn 66.

[174] See Anghie (n 22) 86; Miles (n 11) 24, 31; John Braithwaite and Peter Drahos, *Global Business Regulation* (CUP 2000) 39-87; Bhupinder S Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 International Community LR 3, 8-9.

investment law.

Koskenniemi and Kari have observed that in the absence of a universal moral truth, sovereign equality is 'both necessary and impossible'.[175] However, with greater importance attached to sovereign equality and the convergence of domestic legal systems in the globalised world, a more impartial and more inclusive approach to the borrowing from domestic laws become both necessary and possible. Besides the (in)equality among states in the identification of formal sources, problems of substantive bias in this body of international law perhaps carry even greater significance.[176] All of these factors underline the importance to improve the rigour in legal reasoning, including the comparative law methodology, in the identification and application of the sources of law, which will be the focus of the rest of this study.

[175] Koskenniemi and Kari (n 65) 168.

[176] Amr A Shalakany, 'Arbitration and the Third World: A Plea for Reassessing Bias under the Specter of Neoliberalism' (2000) 41 HILJ 419; Muthucumaraswamy Sornarajah, 'The Fair and Equitable Standard of Treatment: Whose Fairness? Whose Equity?' in Federico Ortino, Lahra Liberti, Audley Sheppard, and Hugo Warner (eds), *Investment Treaty Law: Current Issues II* (BIICL 2007) 176-180.

Chapter 3. Comparative Law and Substantive Standards in Contemporary International Investment Law: The Interplay between Sources

The transition from the twentieth to the twenty-first century witnessed significant shifts in both domestic and international legal landscapes. The relative relationship between domestic standards of protection and the minimum standard has also evolved. The transformation of legal systems of developing states, together with the improved government efficiency brought about by economic development, makes the procedural aspects of the international *minimum* standard more deserving of its name. From the contemporary perspective, the benchmarks set forth in the famous *Neer* decision[177] are far from demanding compared with the standards enshrined in domestic laws of most states of the world. The same is true with respect to the procedural requirements applied in most of the cases mentioned in Chapter 2. These criteria can now be properly regarded as the 'bottom line' in terms of the administration of justice within states. Things are slightly different regarding the rules on compensation for expropriation, which are more related to the distribution of wealth between states. In the second half of the twentieth century, the ideological rivalry and the advocacy of newly-independent states for permanent sovereignty over natural resources rendered the international rules on expropriation a battleground.[178] While the Hull formula of 'adequate, effective and prompt' compensation was challenged in the NIEO movement,[179] it was included in numerous IIAs and, with the end of the Cold War, it was increasingly regarded as representing a customary rule.[180] However, even from the current perspective, the Hull

[177] '[T]he treatment of an alien … 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.' See *Neer* (n 29) 61-2.

[178] Kriebaum, Schreuer, and Dolzer (n 20) 6-8; Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) 18-33.

[179] Kriebaum, Schreuer, and Dolzer (n 20) 6-8; Newcombe and Paradell (m 178) 31-32.

[180] See eg *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Final Award (14 March 2003)

formula can still be more onerous than the requirements in the takings laws in many domestic legal systems.[181] In any event, recourse to domestic legal principles in contemporary international investment law should be understood against the general background of the relative relationship between domestic legal standards and the contemporary international standards.

In contemporary international investment law, domestic legal norms that were almost absent in the pre-BIT era began to enter into international law, mainly through decisions of investment tribunals.[182] The entry of these principles results in an international standard that is above and beyond those discussed earlier. In the pre-BIT era, the discourse on the minimum standard mainly focused on the very basic requirements for foreign nationals and enterprises living and operating abroad.[183] Nowadays, the principles of modern public law referred to in investment arbitration intrude deeper into the mode of governance and public administration of states. Contemporary arbitral decisions and commentaries began to speak of 'good

paras 497-498; Jack J Coe, Jr and Noah Rubins, 'Regulatory Expropriation and the Tecmed Case: Context and Contributions' in Todd Weiler (ed), *International Investment Law and Practice: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May 2005) 629; Stephen M Schwebel, 'The Influence of Bilateral Investment Treaties on Customary International Law' (2004) 98 Proceedings of the Annual Meeting of ASIL 27, 28-30. For a different view, see eg August Reinisch, 'Legality of Expropriation' in August Reinisch (ed), *Standards of Investment Protection* (OUP 2008) 194-195.

[181] See Matthew C Porterfield, 'State Practice and (Purported) Obligation under Customary International Law to Provide Compensation for Regulatory Expropriation' (2011) 37 North Carolina Journal of International Law 159, 171 (Based on a comparative survey of several jurisdictions, the author concluded that a 'general and consistent practice' is hard to find, and in fact, what is frequently characterised as the customary requirement is 'significantly more expansive than comparable doctrines under the domestic laws of most nations.')

[182] See eg Potestà (n 28); Stone Sweet and della Cananea (n 28). See also Schill, *International Investment Law and Comparative Public law* (n 6).

[183] See John Westlake, *The Collected Papers of John Westlake on Public International Law* (CUP 1914) 103-104 ('The common civilisation … contains the principle that the institutions, whether of government or of justice, which the inhabitants of a state find suitable to themselves, must normally be accepted as sufficient for the protection of foreigners among them. Those foreigners are subject to the local courts and authorities, and not to separate jurisdictions, and their own governments will not, normally, interfere for their protection so long as they enjoy equal treatment with natives.') See also Frederick Sherwood Dunn, 'International Law and Private Property Rights' (1928) 28 Columbia LR 166, 170.

governance'. [184] While some applauded this new development as evidencing the emergence of global administrative law,[185] others considered it as a continuation of the hegemonic legal reasoning developed from the colonial era right through to the modern day.[186] For present purposes, a crucial question is what, if anything, happened to the sources of law since the beginning of the BIT era that may justify the introduction of new domestic legal norms into international investment law. The answer to this question not only affects the relative relationship between domestic law and international law in this area, but it also determines the extent to which the international legal standard erodes the flexibility and diversity at the domestic level.

Against this background, this chapter examines the potential legal bases for the recourse to domestic legal principles in the interpretation of IIA standards, including customary international law, general principles of law, and other elements of treaty interpretation. It will focus on three frequently invoked investment treaty provisions: the expropriation clause, the FET standard, and the FPS standard. Section I sets the stage by introducing the law-making process in modern international investment law, focusing on the interrelationship between different sources. Section II examines the potential entry points of domestic legal principles through different elements of treaty

[184] See eg Catharine Titi, 'International Investment Law and Good Governance' in Marc Bungenberg, Jörn Griebel, Stephan Hobe, August Reinisch, and Yun-I Kim (eds), *International Investment Law* (Nomos 2015); Mavluda Sattorova, *The Impact of Investment Treaty Law on Host States: Enabling Good Governance?* (Hart 2018) 1-20; Kirsch and Kingsbury, 'Introduction' (n 28); *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Separate Opinion of Thomas Wälde (1 December 2005) paras 4, 13, 33, 123. It was observed that the standard applied in some arbitral decisions 'is actually not a standard at all; it is rather a description of perfect public regulation in a perfect world, to which all states should aspire but very few (if any) will ever attain.' See Zachary Douglas, 'Nothing if Not Critical for Investment Treaty Arbitration: *Occidental*, *Eureko* and *Methanex*' (2006) 22 Arbitration International 27, 28.

[185] See Benedict Kingsbury and Stephan W Schill, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law' (2011) 2 TDM; Gus van Harten and Martin Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17 EJIL 121.

[186] See Miles (n 11) 77; Sornarajah, *The International Law on Foreign Investment* (n 20) 110-111.

interpretation, except for general principles of law. Based on the conclusions reached in sections I and II, section III addresses the legal basis for the recourse to general principles of law in interpreting the IIA standards. This chapter lays the groundwork for Chapter 4, which investigates the role of particular general principles in the interpretation of specific IIA provisions, including the FET clause, the FPS clause, and the expropriation clause.

I. Law-making in contemporary international investment law

I.A. Avoiding the criticism of 'assertion' and 'imposition'

As discussed in Chapter 2, the decolonisation process and the strengthening of sovereign equality of states in the second half of the twentieth century call for a fresh look into the use of sources of international law in the area of foreign investment protection. Yet, as pointed out by some, the hegemonic approach developed in the pre-BIT era continued.[187] The criticism centred on the 'arbitral law-making' favouring the interests of foreign investors, without sufficient regard to the perspectives of host states.[188] For instance, Miles argued that:

> Once an historical perspective is taken, it becomes clear that parallel methodologies were employed in the emergences of rules of foreign investment protection in the nineteenth century, the development of the doctrine of internationalized contracts in the twentieth, the recent manifestations of the fair

[187] See Chimni (n 174) 16 (He described the discourse on 'good governance' as 'not only seek[ing] to retrospectively justify colonialism but also to legitimize increasing intrusiveness of the present era'.) See also Miles (n 11) 84, 120-121; Alter (n 22) 840-841; Sornarajah, 'Whose Fairness' (n 176) 165, 174, 176.

[188] Sornarajah, *The International Law on Foreign Investment* (n 20) 433, 515-516; Miles (n 11) 82.

> and equitable treatment standard, and the current utilization of human rights language to create investor claims – that is, the construction of rules, asserted as international law, and ultimately applied by arbitral tribunals as established rules of international investment law. In this way, the origins of imposition continued to manifest throughout the twentieth century into the twenty-first.[189]

Such criticism is grave and compelling, and in light of the importance of sovereign equality, it should be taken seriously. To address the problem of 'assertion' and 'imposition', a more cautious, thorough, and balanced approach needs to be taken regarding the intention of states expressed through the sources of international law. Despite the aforementioned criticism, the rules on sources encapsulated in Article 38 of the ICJ Statute remain the framework that has garnered the broadest acceptance and thus are still the most viable basis for dealing with questions of international law.[190] Nowadays, with the global rejection of the phrase 'civilized nations' in the context of general principles of law,[191] major problems lie with the application of the sources doctrine in practice, rather than with the sources doctrine *per se*. The following analysis is premised on this understanding.

Regarding the use of domestic legal principles in investment arbitration, a major issue is the excessive reliance by arbitral tribunals on prior awards without adequate legal justification. It is not unusual that a tribunal cites a few prior awards referring to

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[189] Miles (n 11) 84.

[190] See eg Thirlway (n 39) 9-10; Janis (n 41) 275-276; Vladimir D Degan, *Sources of International Law* (Brill 1997) 3-4; Anthea Roberts and Sandesh Sivakumaran, 'The Theory and Reality of the Sources of International Law' in Malcolm Evans (ed), *International Law* (OUP 2018) 89-91. The general acceptance is also reflected in the ILC's works on sources. See ILC, 'Draft Conclusions on Identification of Customary International Law' (n 2) General Commentary, para 3; ILC, 'Report of the International Law Commission on the Seventy-First Session' (n 49) 333, para 231; Marcelo Vázquez-Bermúdez, 'Second Report on General Principles of Law' (9 April 2020) A/CN.4/741 (Second Report) paras 2-3.

[191] See text to fn 66.

the principle of proportionality or legitimate expectations to justify a similar approach, and the legal basis for doing so is often unexplained.[192] As noted by Roberts, the case law developed by arbitral tribunals resembles 'a house of cards built largely by reference to other tribunal awards and academic opinions, with little consideration of the views and practices of states in general or the treaty parties in particular', and this 'increases prospects for dissonance between states and tribunals about interpretation'.[193] As evidenced in Chapter 2, a similar pattern already existed in the jurisprudence of the pre-BIT era, which was a source of misgivings of the global south. Under Article 38(1)(d) of the ICJ Statute, arbitral decisions can serve as nothing more than a subsidiary means for the determination of the rules of law.[194] Admittedly, tribunals entrusted to apply the law undertake the 'final assessment' of the evidence for identifying non-written norms and the interpretation of treaty norms.[195] Yet, this is different from allowing them to exercise law-making powers and to impose legal obligations on states against their will. Arbitral precedent cannot be used as the sole authority for the reliance on certain principles.

Another implication of arbitral tribunals' lack of law-making power is the need to be alert to the 'fact-based' approach to the interpretation of IIAs, as apparently

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[192] See eg *Azurix Corp.* v. *The Argentine Republic*, ICSID Case No ARB/01/12, Award (14 July 2006) paras 311-2; *Pawlowski AG and Project Sever s.r.o v. Czech Republic*, ICSID Case No ARB/17/11, Award (1 November 2021) paras 611-613; *Sevilla Beheer B.V. and others v. Kingdom of Spain*, ICSID Case No ARB/16/27, Decision on Jurisdiction, Liability and Principles of Quantum (11 February 2022) paras 793-804.

[193] Anthea Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (2010) 104 AJIL 179, 189.

[194] Statute of the International Court of Justice (adopted 24 October 1945, entered into force 18 April 1946), Article 38(1)(d).

[195] See eg *Merrill and Ring Forestry L.P. v. Canada*, ICSID Case No UNCT/07/1, Award (31 March 2010) para 188; Patrick Dumberry, 'Has the Fair and Equitable Treatment Standard Become a Rule of Customary International Law?' (2017) 8 JIDS 155, 165; Tarcisio Gazzini, 'The Role of Customary International Law in the Field of Foreign Investment' (2011) 8 JWIT 691, 695; Mohamed Shahabuddeen, *Precedent in the World Court* (CUP 2010) 71.

adopted by many tribunals. Due to the vagueness of various treaty standards, the ambiguity of their relationship with customary rules, as well as the controversy surrounding the customary rules' content, tribunals sometimes consider that the treaty standards are fact-specific, and that these standards should be applied on a case-by-case basis in terms of 'fairness, equitableness and reasonableness'.[196] Such an approach may effectively equate treaty standards with pure equity or judgement *ex aequo et bono.* But to the extent that this was not the intention of treaty parties,[197] it is the duty of the tribunal to carefully follow the rules of treaty interpretation so as to ascertain the content of treaty rules. Otherwise, the tribunal may elude the responsibility of applying the law and displace the intention of treaty parties with its own subjective judgement.

In a word, to move beyond the old patterns of 'assertion' and 'imposition' prevailing in the nineteenth and twentieth century, the sources doctrine must be taken seriously, and the positions of states of different regions and at different development stages need to be equally respected and given due consideration. Arbitral decisions referring to certain principles, in and of themselves, do not create or change the rules of international law. The same applies when ascertaining the entry points of domestic legal principles.

I.B. The relationship between IIAs and customary international law

The substantive standards applied in modern investment arbitration are mainly those contained in IIAs. A natural starting point for understanding the entry points of domestic legal principles in contemporary international investment law is the nature of

[196] See eg *Mondev* (n 105) Award (5 October 2002) para 118; *Merrill and Ring* (n 195) para 210.

[197] The fact that states frequently appear before arbitral tribunals arguing based on the VCLT and customary rules suggests that they do not consider that the treaty standards allow arbitral tribunals to make decisions *ex aequo et bono*.

IIAs and their relationship with customary international law. In the second half of the twentieth century, the clash between developing and developed states regarding the rules on compensation for expropriation took place mainly in multilateral fora.[198] At the same time, the 'treatification' of international investment law started on a bilateral basis, driven by developed states.[199] The overlap between these two processes and the different intentions of developing and developed states in joining these treaties are a source of controversy regarding the interrelationship between treaty and customary rules in this area.[200] As explained below, most IIAs incorporate customary rules in some provisions, establish new rules in other provisions, and remain ambiguous in yet others. [201] Before discussing the specific relationship between particular treaty provisions and the customary rules, some general remarks on the characteristics of IIAs are needed.

The intentions behind the conclusion of IIAs often differ for developing and developed states. For developed states, the main reasons for launching BIT programmes in the mid-to-late twentieth century were three-fold: First, to reinforce their position of 'prompt, adequate and effective' compensation in response to the NIEO movement; second, to ensure a favourable environment for their existing and future outbound investment; third, to promote globally a liberal form of government.[202] For developing

[198] See Newcombe and Paradell (n 178) 18-27; Kriebaum, Schreuer, and Dolzer (n 20) 6-8.

[199] See eg Salacuse, 'Treatification' (n 26); Alvarez, 'A BIT on Custom' (n 26) 71.

[200] See eg Andreas F Lowenfeld, 'Investment Agreements and International Law' (2003) 42 Columbia Journal of Transnational Law 123; Alvarez, 'A BIT on Custom' (n 26); Andrew T Guzman, 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral IIAs' (1998) 38 Berkeley Law Scholarship Repository 639.

[201] Paparinskis, 'Countermeasures' (n 27) 265; Hindelang (n 27) 789, 809; Dumberry, '"New" Customary International Law' (n 27) 694-696.

[202] See Kenneth J Vandevelde, 'The Bilateral Investment Treaty Program of the United States' (1988) 21(2) Cornell International Law Journal 201, 231; Kenneth J Vandevelde, 'Sustainable Liberalism and the International Investment Regime' (1998) 19 Michigan Journal of International Law 373; Jarrod Hepburn, Martins Paparinskis, Lauge N Skovgaard Poulsen, and Michael Waibel, 'Investment Law before Arbitration' (2020) 23 JIEL 929, 932-935, 940-941.

states, on the other hand, their acceptance of the 'Hull formula' in IIAs contrasted with their position in the NIEO movement during the same period of time,[203] the main reason being their dire need for foreign capital.[204] The different intentions of developing and developed states can explain some of the important characteristics of IIAs that set them apart from the traditional customary rules on foreign investment.

First, most IIAs are bilateral, which allows powerful states to set the terms.[205] In bilateral contexts, states with weaker negotiating power may concede to conditions that they oppose in multilateral settings for economic or political reasons. As a result, certain IIA provisions, such as the umbrella clause and the clause on free transfer of capital, extend the obligations beyond those existing under customary international law.[206] The same dynamics undercut the potential of these IIAs to bring changes to customary international law.

It is well recognised that for customary rules to emerge, both general practice and *opinio juris* are indispensable.[207] This means that for IIAs to affect the content of customary rules, aside from widespread, representative, and consistent treaty practice, there must also be evidence that these treaties were concluded with the belief that the treaty standards were obligatory as a matter of general international law.[208] Some seem to take the view that the abundance of state practice may ease the requirement of

[203] Guzman (n 200); Alvarez, 'A BIT on Custom' (n 26).

[204] Guzman (n 200) 658-75; Sornarajah, *The International Law on Foreign Investment* (n 20) 3-4; Kriebaum, Schreuer, and Dolzer (n 20) 7-8.

[205] See John Ruggie, 'Multilateralism: The Anatomy of An Institution' (1992) 46 International Organization 561, 568-569.

[206] See Vandevelde, 'The Bilateral Investment Treaty Program of the United States' (n 202).

[207] ILC, 'Draft Conclusions on Identification of Customary International Law' (n 2) Conclusion 2; *North Sea Continental Shelf (Federal Republic of Germany/Netherlands) (Federal Republic of Germany/Denmark)* (Judgment) [1969] ICJ Rep 3, 44 para 77; *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (Merits) [1985] ICJ Rep 13, 29-30 para 27

[208] ILC, 'Draft Conclusions on Identification of Customary International Law' (n 2) Conclusions 8 and 9; *North Sea Continental Shelf* (n 207) para 77.

proving *opinio juris*.[209] However, loosening this requirement risks privileging those with greater negotiating power in bilateral settings, and overstating states' genuine commitment under general international law.[210] In line with the latter position, the ICJ has observed in *Diallo* that IIAs are 'special legal régimes governing investment protection' and as such, they are 'not sufficient to show that there has been a change in the customary rules' in relation to diplomatic protection.[211]

That said, there is nothing inherent in these bilateral treaties that deprives them of the potential to influence customary international law. *Opinio juris* can be evidenced in the language used in the treaty, statements made by states in connection with the treaty, or subsequent agreement by treaty parties.[212] For instance, if a treaty expressly links 'fair and equitable treatment' and 'full protection and security' to the customary minimum standard, and then specifies the content of these terms in greater detail,[213] that can be seen as state practice accompanied by *opinio juris* with the potential to affect the customary rules. But absent evidence of the treaty parties' intention to engage international obligations outside of the treaty, one cannot simply make assumptions about the contribution of IIAs, as well as arbitral decisions interpreting them, to the

[209] See eg ILA, 'Final Report of the Committee on the Formation of Customary (General) International Law' (2000) <https://www.law.umich.edu/facultyhome/drwcasebook/Documents/Documents/ILA%20Report%20on%20Formation%20of%20Customary%20International%20Law.pdf> (accessed 2 November 2022) 40-42; Maurice H Mendelson, 'The Formation of Customary International Law' (1998) 272 Collective Courses of the Hague Academy of International Law 155, 292-293. See also Alvarez, 'A BIT on Custom' (n 26) 41-44.

[210] See Chimni (n 174) 7; Theodore Kill, 'Don't Cross the Streams: Past and Present Overstatement of Customary International Law in Connection with Conventional Fair and Equitable Treatment Obligations' (2008) 106 Michigan LR 853, 858.

[211] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (Preliminary Objections) [2007] ICJ Rep 582, 615 para 90.

[212] See Patrick Dumberry, 'Has the Fair and Equitable Treatment Standard Become a Rule of Customary International Law?' (n 195).

[213] See eg USMCA (adopted 30 November 2018, entered into force 1 July 2020) Article 14.6; CPTPP (adopted 8 March 2018, entered into force 30 December 2018) Article 9.6.

substance of the customary rules.

Another feature of IIAs that sets them apart from the customary rules is that they grant investors direct access to arbitration to claim against host states.[214] The customary rules on the treatment of aliens were developed within an inter-state framework through diplomatic protection, with the interests of the relevant states at stake.[215] In contrast, the mechanism of 'arbitration without privity' under IIAs allows investors to claim against host states on their own motion,[216] often without the need to exhaust local remedies as required under the customary rules of diplomatic protection.[217] This represents an attempt to insulate investor-state dispute settlement from the diplomatic relationship between the states concerned.[218] By separating the interest of foreign investors from that of their home state and reducing the latter's involvement in dispute settlement, IIAs sought to alleviate the problem of inefficiency and arbitrariness in the traditional rules, and to provide a more favourable environment for foreign investment.[219]

Still, different interpretations exist regarding the primary right-holders under IIAs. This affects the structural relationship between the treaty rules and traditional

[214] See Jan Paulsson, 'Arbitration Without Privity' (1995) 10 ICSID Review 232; Charles Leben, *The Advancement of International Law* (Hart 2010) 49.

[215] See *Mavrommatis Palestine Concessions* (Judgment) PCIJ Rep Series A No 02, 11-12; *Barcelona Traction, Light and Power Company, Limited* Second Phase (Preliminary Objections) [1970] ICJ Rep 3, 44 para 78.

[216] Paulsson, 'Arbitration Without Privity' (n 214).

[217] See ICSID Convention (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 Article 26; Christoph H Schreuer, 'Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration' (2005) 5 The Law and Practice of International Courts and Tribunals 1, 1.

[218] See Ibrahim F I Shihata, 'Towards A Greater Depoliticization of Investment Disputes: The Role of ICSID and MIGA' 1986 1 ICSID Review 1; Sergio Puig, 'Emergence & Dynamism in International Organizations: ICSID, Investor-State Arbitration & International Investment Law' Jean Monnet Working Paper 17/13 <https://jeanmonnetprogram.org/wp-content/uploads/2014/12/Puig.pdf> (accessed 2 November 2022) 16-8.

[219] Vandevelde, 'The Bilateral Investment Treaty Program of the United States' (n 202) 258.

customary rules.[220] Some consider that the substantive treaty obligations are owed to the home state instead of investors, and investors act only as an agent of their home state when invoking the responsibility of the host state.[221] However, in view of the following features of the operation of investment arbitration, which have not been questioned by treaty parties to the author's knowledge, it is more sensible to interpret IIAs as granting direct substantive rights to investors.

First, investors are pursuing their own interest when launching arbitral proceedings under IIAs, and there is little evidence that they would consider the implications on the diplomatic relationship between their home state and the host state when pursuing these claims.[222] In fact, home states of investors have time and again intervened in arbitral proceedings, holding a position against the interest of the investor.[223] There is also no sign that either states or arbitral tribunals believe that the interests of the home state should be taken into account when calculating the damages.[224] During arbitral proceedings, it is common that investors settle the disputes with the host state without any participation of the home state. This is in stark contrast with diplomatic protection, where compensation is usually negotiated between two

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[220] See Martins Paparinskis, 'Investment Treaty Arbitration and the (New) Law of State Responsibility' (2013) 24 EJIL 617, 621-627.

[221] See *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No ARB(AF)/98/3, Award (26 June 2003) para 233; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v. Mexico*, ICSID AF Case No. ARB/(AF)/04/5, Award (21 November 2007) paras 176-179; Anastasios Gourgourinis, 'The Nature of Investor's Rights under IIAs: A Comment on Paparinskis' "Investment Treaty Arbitration and the (New) Law of State Responsibility"' EJIL: Talk! (22 October 2013) <https://www.ejiltalk.org/the-nature-of-investors-rights-under-investment-treaties-a-comment-on-paparinskis-investment-treaty-arbitration-and-the-new-law-of-state-responsibility/> (accessed on 8 April 2020).

[222] Zachary Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (2003) 74 British Ybk Intl L 151, 169-7; Paparinskis, '(New) Law of State Responsibility' (n 220) 626.

[223] See eg *GAMI Investment Inc. v. Mexico*, UNCITRAL, Submission of the United States of America (30 June 2003); *Mondev* (n 105) Canada's 1128 Submission (7 July 2001); *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No ARB/11/33, United States Article 10.19(2) Submission, para 9; *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No ARB/07/23, Submission of the Republic of El Salvador (1 January 2012).

[224] Douglas, 'Hybrid Foundations' (n 222) 180.

states and sometimes ends up as a lump-sum compensation (usually at a lower value than the actual injury) to be distributed to the aliens by their home state at the latter's discretion.[225] In arbitral awards rendered under IIAs, damages are always awarded directly to the investor instead of its home state, and there is nothing suggesting that the home state has any direct entitlement to the damages. Also, under most IIAs, arbitral awards are binding on *disputing* parties, which do not include the home state of the investor.[226]

In a word, since IIAs allow investors to claim on their own motion, at their own costs, and for their own benefit, it is artificial to construe investors' claims as vindicating rights of their home states and for the latter's interest.[227] Accordingly, a typical IIA turns the inter-state paradigm under the traditional customary rules into an investor-state paradigm. This structural shift is an important factor when considering recourse to general principles of public law, which will be discussed in Chapter 4.

Based on the foregoing, modern IIAs are distinguished from the traditional customary rules in several ways. Not only does the relationship of *quid pro quo* between state parties to IIAs, often bilateral ones, allow higher standards of protection compared

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[225] See David J Bederman, 'Interim Report on "Lump Sum Agreements and Diplomatic Protection"', International Law Association New Delhi Conference (2002) Committee on Diplomatic Protection of Persons and Property <https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1098&StorageFileGuid=63d9d704-5de7-4f32-8a86-3d5fccd427b5> (accessed 5 June 2022); Mohamed Bennouna, 'Preliminary Report on Diplomatic Protection' (4 February 1998) UN Doc A/CN.4/484, para 20.

[226] See eg NAFTA (signed 17 December 1992, entered into force 1 January 1994, terminated 1 July 2020) Article 1167(7); ECT (adopted 17 December 1994, entered into force April 1998) 2080 UNTS 95, Article 26(8); US-Argentina BIT (signed 14 November 1991, entered into force 1994) Article VII (6); US-Ecuador BIT (signed 27 August 1993, entered into force 11 May 1997, terminated 18 May 2018) Article VI (6); Switzerland-Philippines BIT (signed 31 March 1997, entered into force 23 April 1999) Article VIII (6). See also Douglas, 'Hybrid Foundations' (n 222) 181.

[227] This is despite the fact that the home state retains its rights (to have investors of its nationality protected in the prescribed manner) under an investment treaty and is capable of invoking the host state's responsibility pursuant to the procedures provided in the treaty. See Paparinskis, '(New) Law of State Responsibility' (n 220) 640-1.

with those under the customary rules, it also limits the potential of these IIAs, being 'special regimes', to influence the customary rules. By granting direct rights to investors, the rules under the IIAs are also structurally different from the customary rules on the treatment of aliens, which operate in an inter-state paradigm. That said, these treaties may still incorporate customary rules, or certain aspects of the customary rules, either by express stipulation,[228] subsequent agreement,[229] or by using terms with an established meaning under customary international law.[230] The specific relationship between a particular treaty provision and customary international law has to be analysed on a case-by-case basis, and this relationship can be decisive on whether certain domestic legal norms are relevant in interpreting the IIA standard.

I.C. Treaty-custom relationship under specific provisions

In the case of the rules on expropriation, the underlying tension between developing and developed states in the second half of the twentieth century centred on the standard of compensation.[231] Developed states took advantage of their stronger negotiating power to insert the requirement of full compensation for expropriation in IIAs, leaving open the question of whether the treaty rules have affected the customary rules' content.[232]

At the same time, perhaps surprisingly, the definition of 'taking' or 'expropriation' did not seem to be the centre of attention in the debate between

[228] See USMCA (n 213) Article 14.6, Annex 14-A; CPTPP (n 213) Article 9.6, Annex 9-A.

[229] See eg NAFTA Free Trade Commission, 'Notes of Interpretation of Certain Chapter 11 Provisions' (31 July 2001).

[230] See Paparinskis, *Minimum Standard* (n 11) 158-159.

[231] Kriebaum, Schreuer, and Dolzer (n 20) 6-8; Newcombe and Paradell (n 178) 31-32; Rudolf Dolzer, 'Indirect Expropriation: New Developments' (2002) 11 NYU Environmental Law Journal 64, 64-65.

[232] See Johanne M Cox, *Expropriation in Investment Treaty Arbitration* (OUP 2019) 294-300.

developing and developed states, despite the long-standing controversy regarding the customary content of these notions.[233] This is reflected in the consistency in the use of terms in the debate on compensation. For instance, the expressions of '[n]ationalization, expropriation or requisition' and 'nationalize, expropriate or transfer of ownership of foreign property' were included without further elaboration in Resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources and the Charter of Economic Rights and Duties of States.[234] Generally, these terms were also consistently used in IIAs.[235]

By virtue of the consistent usage of these terms in the debate on customary international law, it is safe to say that 'taking', 'expropriation', and 'measures tantamount to expropriation' have become legal terms of art.[236] Thus, irrespective of whether the requirement of 'full compensation' represents customary international law, the terms 'expropriation', 'taking', and 'tantamount to expropriation' in IIAs, in their ordinary meaning, should be taken as a reference to the customary rules on expropriation,[237] subject to possible modifications in the treaty.[238] The relevance of domestic legal principles in the interpretation of the expropriation clause has to be

[233] See George C Christie, 'What Constitutes A Taking of Property under International Law' (1962) 38 British Ybk Intl L 38; Rosalyn Higgins, 'The Taking of Property by the State: Recent Developments in International Law' (1982) 176 Collected Courses of the Hague Academy of International Law 267.

[234] UNGA Res 1803 (XVII) of 14 December 1962, para 4; UNGA Res 3281 (XXIX) of 12 December 1974 UN Doc A/RES/29/3281, Article 2.2(c).

[235] See eg US-Argentina BIT (n 226) Article IV; US-Ecuador BIT (n 226) Article III; NAFTA (n 226) Article 1110; Switzerland-Uruguay BIT (adopted 7 October 1988, entered into force 22 April 1991), Article 5; Italy-Bangladesh BIT (adopted 20 March 1990, entered into force 20 September 1994), Article 5.

[236] See eg Dolzer, 'New Developments' (n 231) 73; *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Final Award (30 December 2002) para 280 ('[T]he term "expropriation" in Article 1110 must be interpreted in light of the whole body of State practice, treaties and judicial interpretations of that term in international cases.'); *Saluka* (n 105) para 254.

[237] Admittedly, the definition of expropriation, especially indirect expropriation, has long been controversial in customary international law. But whether the provision refers to the customary rules is a different matter from the (un)clarity of the customary rules.

[238] With modifications to the 'ordinary meaning', a 'special meaning' in the sense of Article 31(4), VCLT, can be given to the term.

analysed on this basis.

In comparison, the FET standard and the FPS standard pose a greater interpretative challenge. Unlike the expropriation clause, 'fair and equitable treatment' and 'full protection and security' were not commonly used in a technical sense in the discourse on the customary minimum standard. In the context of the customary rules on the treatment of aliens, although these and similar terms have been mentioned occasionally,[239] their usage was far from common and consistent compared with the concepts such as 'denial of justice', 'minimum standard of treatment', and 'expropriation'. Thus, it cannot be assumed as a matter of course that by 'ordinary meaning', FET and FPS denote the customary rules on the treatment of aliens. It was even pointed out that had treaty parties intended to refer to the customary rules, they would have used the less ambiguous expression of 'minimum standard of treatment in customary international law'.[240]

The concepts of 'fair and equitable treatment' and 'most constant protection and security' started to appear as technical terms primarily in treaty context, first in post-Second World War FCN treaties,[241] then in draft multilateral conventions that failed to

[239] See Paparinskis, *Minimum Standard* (n 11) 161.

[240] Christoph H Schreuer, 'Fair and Equitable Treatment (FET): Interactions with Other Standards' (2007) 4 TDM 10; *AWG Group Ltd v. The Argentine Republic*, UNCITRAL, Decision on Liability (30 July 2010) para 184.

[241] See Ethiopia-US FCN Treaty (signed and entered into force 7 September 1951) Article VIII(1) and (2); Ireland-US FCN Treaty (signed 21 January 1950, entered into force 14 September 1950) Articles V and VIII(2); Israel-US FCN Treaty (signed and entered into force 23 August 1951) Articles I, VI(1), VI(4); Pakistan-US FCN Treaty (signed and entered into force 12 November 1959) Articles I, VI(1), VI(3); Japan-US FCN Treaty (signed 9 April 1953, entered into force 30 October 1953) Articles V(1), VI(1), XVII(2). See also Vandevelde, 'The Bilateral Investment Treaty Program of the United States' (n 202) 218.

enter into force,[242] and then in modern BITs.[243] Although FET and FPS gradually became commonly used terms of art during the post-Second World War period, the attention they received in the preparation and negotiation of early BITs was surprisingly limited.[244] This contrasts with the situation of the expropriation clause, which was the focal point of the debate during that period. As a result, the contents of FET and FPS were largely left unclarified in most of the early BITs. Where no explanation is given, the relationship between the FET and FPS standards and the customary minimum standard may be subject to multiple interpretations.[245]

Indeed, despite the rich jurisprudence of the past two decades and the efforts by states and scholars to bring greater clarity to these terms,[246] different understandings among states persist up to the present day. Some recent IIAs expressly tie the FET and FPS standards to the minimum standard,[247] while others include these standards without mentioning the minimum standard.[248] The different approaches seem to entail differences in the standards' content. In the CPTPP and the RCEP, which follow the

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[242] Abs-Shawcross Draft Convention on Investments Abroad (1960) reproduced in UNCTAD, *International Investment Instruments: A Compendium* vol 14 (United Nations 2005) Article I; OECD, 'Draft Convention on the Protection of Property' (1963) 2 ILM 241 Article 1(a); OECD, '1967 OECD Draft Convention on the Protection of Foreign Property' <https://www.oecd.org/daf/inv/investment-policy/39286571.pdf > (accessed 2 November 2022) Article 1(a).

[243] Vandevelde, 'The Bilateral Investment Treaty Program of the United States' (n 202) 202; Hepburn, Paparinskis, Poulsen, and Waibel (n 202) 945-947.

[244] See Hepburn, Paparinskis, Poulsen, and Waibel (n 202) 945.

[245] See OECD, 'Fair and Equitable Treatment Standard in International Investment Law' (September 2004) Working Paper on International Investment 2004/3 <https://www.oecd.org/daf/inv/investment-policy/WP-2004_3.pdf> (accessed 2 November 2022) 8; UNCTAD, 'Fair and Equitable Treatment' (2012) UNCTAD Series on Issues in International Investment Agreements II <https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf> (accessed 2 November 2022) 57-60; Christoph H Schreuer, 'Full Protection and Security' (2010) 1 JIDS 353.

[246] In general, see Paparinskis, *Minimum Standard* (n 11); Ioana Tudor, *The Fair and Equitable Treatment in the International Law of Foreign Investment* (OUP 2008); Roland Kläger, *'Fair and Equitable Treatment' in International Investment Law* (CUP 2011); Sebastián Mantilla Blanco, *Full Protection and Security in International Investment Law* (Springer 2019).

[247] See CPTPP (n 213) Article 9.6(2); RCEP (adopted 15 November 2020, entered into force 1 January 2022) Article 10.5(2)(c).

[248] See eg CETA (signed 30 October 2016, not in force) Article 8.10(1); EU-Vietnam Investment Protection Agreement (signed 30 June 2019) Article 2.5.

approach of incorporation, investors' expectations are not protected under the FET standard.[249] On the other hand, the CETA, which establishes no link to the minimum standard, requires adjudicators to consider whether legitimate expectations were induced by specific representations when deciding on FET claims.[250]

In a word, both understandings of the FET and FPS standards seem to exist in parallel. Some IIAs incorporate the minimum standard while others stipulate standards that are autonomous, and the contents of these standards may differ in these two scenarios. The specific interpretation depends on the circumstances of the treaty, including subsequent clarifications made by state parties. For present purposes, the entry points of domestic legal principles are subject to different analyses in the two scenarios. Where the treaty standard incorporates the minimum standard, the analysis should revolve around customary international law and its relationship with general principles of law. Where the treaty standard is an autonomous standard, the analysis should focus on different elements of treaty interpretation, independent from the customary rules.

II. Recourse to comparative law via various elements of treaty interpretation (except for general principles of law)

As already mentioned, in contemporary investment arbitration, recourse was sometimes had to domestic laws when interpreting substantive IIA standards. Although a detailed explanation has not always been given, a number of different approaches can be discerned. When interpreting the FET standard, for instance, recourse to domestic

[249] RCEP (n 247) Article 10.5(2)(a), (c); CPTPP (n 213) Article 9.6(4).
[250] CETA (n 248) Article 8.10(4).

laws was most often based on general principles of law.[251] Besides general principles, customary international law has also been a ground for recourse to domestic laws.[252] In yet other cases, tribunals resorted to domestic laws without much explanation. For instance, claims for breach of the FET standard have been dismissed because, *inter alia*, the challenged measure existed 'in all legal systems',[253] or was 'similar to practices in other European countries and emerging economies'.[254] On the other hand, the tribunal in *Pope & Talbot v. Canada* seemed to believe that only the laws of treaty parties were relevant. It interpreted the FET standard in the NAFTA as providing 'the benefits of the fairness elements under ordinary standards applied in the NAFTA countries'.[255]

When interpreting the expropriation clause, reliance has been placed on public law principles such as legitimate expectations and proportionality, although tribunals usually do not explain whether the reliance was based on general principles of law.[256] Recourse to domestic laws has also been made on other grounds. In *Saar Papier v. Poland*, when determining what constitutes 'a measure equivalent to expropriation' under the Germany-Poland BIT, the tribunal resorted to the administrative laws of Germany and Poland.[257] In the literature, when ascertaining what constitutes a

[251] See *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No ARB/06/11, Award (5 October 2012) paras 402-4; *Total S.A. v. The Argentine Republic*, ICSID Case No ARB/04/01, Decision on Liability (27 December 2010) paras 111, 128; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/09/1, Award (22 September 2014) paras 575-576.

[252] See *Apotex Holdings Inc. and Apotex Inc. v. United States*, ICSID Case No ARB/(AF)/12/1, Award (25 August 2014) paras 9.15, 9.27-9.36.

[253] *Noble Ventures, Inc. v. Romania*, ICSID Case No ARB/01/11, Award (12 October 2005) para 178.

[254] *AES Corporation and Tau Power B.V. v. Republic of Kazakhstan*, ICSID Case No ARB/10/16, Award (1 November 2013) para 317.

[255] *Pope & Talbot* (n 105) Award on the Merits of Phase 2 (10 April 2001) para 118.

[256] See *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No ARB (AF)/00/2, Award (29 May 2003) paras 122; *Philip Morris* (n 86) Award (8 July 2016) para 305; *Azurix* (n 192) para. 311-312; *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award (12 January 2011) paras 127, 140.

[257] *Saar Papier Vertriebs GmbH v. Poland*, UNCITRAL, Final Award (16 October 1995) paras 78-79.

'regulatory taking', recourse to comparative law analysis has been made on the ground of customary international law.[258] In light of the variety of practice, this and the next sections will examine the potential legal bases for resorting to comparative law analysis in the interpretation of IIA standards.

To begin with, in light of the conclusions reached in section I, the approach of relying on the laws of *treaty parties* when interpreting these IIA standards does not seem to be tenable. Admittedly, as a general matter, recourse to the laws of treaty parties in treaty interpretation can be based on the 'ordinary meaning' of the treaty term, or on 'subsequent practice' in the application of the treaty.[259] Yet, neither of those grounds seems to be a plausible basis for giving particular weight to the treaty parties' laws when interpreting the expropriation clause and the FET and FPS standards. These clauses all have an established meaning in international investment law, whether as a reference to customary rules or not.

In the case of the expropriation clause, as discussed in section I of this chapter, terms such as 'expropriation', 'taking', or 'measures tantamount to expropriation' should be understood as a *renvoi* to customary international law.[260] A survey of the administrative laws of the parties to the IIA, as undertaken by the tribunal in *Saar Papier*, is no substitute for a diligent study of what constitutes a 'regulatory taking' under customary international law. Also, the rules of domestic administrative laws of treaty parties, which generally apply to nationals and foreigners alike, cannot be deemed as 'subsequent practice' *in the application of the treaty*.[261] The subjective

[258] See Porterfield (n 181).

[259] ILC, 'Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties' (n 2) Conclusion 4 and its commentary para 18, Conclusion 5(1).

[260] Section I, text to fn 233-238.

[261] VCLT (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331 Article 31(3)(b).

element is lacking in these administrative laws. For the same reasons, where the FET clause or the FPS clause is interpreted as a *renvoi* to the customary minimum standard, the approach of relying on the laws of treaty parties should also be rejected.

Things seem more complicated where the FET or FPS standard is interpreted as an autonomous standard, independent from the customary rules. Despite the similarity of the language used in different IIAs, theoretically, the meaning of the FET and the FPS standards can still differ in different treaties.[262] Following this understanding, it seems plausible that these standards can be interpreted in light of what is 'fair' and 'equitable' and what level of protection is adequate under the laws of treaty parties. The tribunal in *Pope & Talbot* apparently adopted this approach.[263] However, a closer look at the broad context of IIAs and their application in practice suggests that this approach is untenable.

Although various IIAs may include different standards, and the language of the FET and FPS clauses differs across treaties, it does not seem to be most states' intention to have different standards for investors from different treaty partners.[264] For major capital-exporting states, the drivers of the BIT programmes, their initial goal in BIT negotiations was partly to establish a legal framework that they failed to achieve in multilateral settings, and they often use the same model BIT in different negotiations.[265]

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[262] See *The MOX Plant Case (Ireland v. United Kingdom)* (Provisional Measures, Order of 3 December 2001) ITLOS Reports 2001, 41.

[263] *Pope & Talbot* (n 105) Award on the Merits of Phase 2 (10 April 2001) para 118.

[264] The differences in the treaty standards, including in the approach to the relationship between the FET and FPS standards and the minimum standard, are an inevitable result of bilateral or small-group negotiations of these IIAs. The underlying disagreement among states on the desirable standard of protection explains why the IIA programmes were pursued largely on a bilateral, instead of multilateral, basis. In this context, states have to concede to the different preferences of their treaty partners from time to time. But this does not mean that it was these states' initial intention to have discrete standards with different partners.

[265] See Vandevelde, 'The Bilateral Investment Treaty Program of the United States' (n 202) 231; Hepburn, Paparinskis, Poulsen, and Waibel (n 202) 940-941; José E Alvarez, 'The Evolving BIT' (2010)

For capital-importing states, it is also not practical to keep different standards for investors from different states. Not only do these treaties regulate general measures applicable to investors of different nationalities, but the broad treaty definition of protected 'investors' and the practice of forum shopping by investors make it hard for regulators to determine their nationality.[266] Moreover, due to the almost invariable presence of the MFN clause in IIAs, to insist that the FET and FPS standards carry different meanings in different treaties makes little practical sense. In addition, the widespread and consistent usage of both standards in numerous IIAs has made them legal terms of art,[267] even if these terms do not incorporate customary international law. Against this background, it is more sensible to consider that, by including these treaty standards using similar language, states have intended that these standards have the same content across different IIAs.[268] Thus, the FET and FPS standards cannot be interpreted based on the laws of the particular treaty parties only.

The remaining question, then, is what are the possible entry points of domestic legal principles derived from legal systems on a global scale. The most obvious candidates are customary international law and general principles of law. As already mentioned, when interpreting treaty standards by reference to domestic legal principles, both sources have been relied on as a legal basis.[269] Yet, the distinction between these two sources was not always made clear. For instance, when Alvarez argued for the

1 TDM.

[266] Stephan W Schill, 'Sources of International Investment Law: Multilateralization, Arbitral Precedent, Comparativism, Soft Law' in Samantha Besson and Jean d'Aspremont (eds), *The Oxford Handbook of the Sources of International Law* (OUP 2017) 1102.

[267] See *Oil Platforms (Islamic Republic of Iran v. United States of America)* (Preliminary Objection) [1996] ICJ Rep 803, Separate Opinion of Judge Higgins 858. (She maintained that 'the key terms "fair and equitable treatment to nationals and companies" … are legal terms of art well known in the field of overseas investment protection', and that the FET standard has a 'well-known meaning'.)

[268] With the caveat that some of the FET and FPS standards incorporate customary international law whereas others are independent from the latter.

[269] See text to fn 251-258.

contribution of BIT-conforming domestic laws to the evolution of the general rules, he justified this by reference to 'customary law and/or general principles of law'.[270] However, the distinction is important, especially for present purposes. Not only do the rules on identification differ for these two sources, but customs and general principles play different roles in interpreting treaty standards.

As mentioned in Chapter 2, general principles of law can only be understood as being based on a sort of indirect or 'construed' consent of states: When adopting certain rules in their domestic laws, states have not directly indicated their intention on how to deal with an international problem; and the content of a general principle is only implied in the solutions offered in domestic legal systems and the conditions in the international legal order.[271] This is different from customary international law, where states' consent is directed at a certain international rule.[272] In other words, whether domestic laws are referred to based on general principles or customary international law entails different criteria for identifying the norms concerned. Furthermore, as will be explained in section III below, due to fact that general principles of law are grounded on state consent that is implied in domestic laws and is less directly addressed to the international circumstances, the role of this source is limited to complementing the other two sources.[273] The present section will only focus on customary international law.

It is widely recognised that domestic laws can be evidence of customary rules.[274] Yet, with respect to the rules on foreign investment, the major difficulty in

[270] Alvarez, 'A BIT on Custom' (n 26) 54.

[271] Chapter 2, text to fn 50-53.

[272] Ibid.

[273] See section III, text to fn 308-321.

[274] See ILC, 'Draft Conclusions on Identification of Customary International Law' (n 2) Conclusions 6,

relying on domestic laws lies with the requirement of *opinio juris*. Admittedly, domestic laws such as constitutional law, administrative law, and commercial law may contain norms similar to the international rules on foreign investment protection, and many of the former may actually have been affected by the latter.[275] Yet, unless there is evidence of a sense of international legal obligation, these domestic laws, in and of themselves, cannot directly evidence the content of customary rules. For instance, when defining 'regulatory takings' in public law, states usually do not do so because of their international obligations. Rules of domestic public law are often underpinned by considerations that are different from those behind the international rules protecting foreign investment. This will be further illustrated in Chapter 4.

On the other hand, it seems likely that *opinio juris* may be found in domestic foreign investment laws, which are enacted specifically for the protection and promotion of foreign investment and sometimes even contain a clause permitting international arbitration.[276] States started to enact foreign investment laws during a similar period as they began to conclude BITs.[277] Most foreign investment laws with substantive provisions on the treatment of foreign investors were enacted by developing states, as developed states generally lack the incentive to attract foreign capital by committing themselves to certain favourable conditions.[278] In the late twentieth century,

10; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (Judgment) [2012] ICJ Rep 99, 122 para 55.

[275] Domestic legal systems may internalise international investment law in different ways, implicitly or explicitly, 'consubstantially' or beyond the international norms. See Antonios Tzanakopoulos, 'Domestic Courts in International Law: The International Judicial Function of National Courts' (2011) 34 Loyola of Los Angeles International and Comparative LR 133, 142-144.

[276] See Jarrod Hepburn, 'Domestic Investment Statutes in International Law' (2018) 112 AJIL 658, 658-659.

[277] See UNCTAD, Investment Laws Navigator <https://investmentpolicy.unctad.org/investment-laws> (accessed 8 June 2022).

[278] See Antonio R Parra, 'Principles Governing Foreign Investment, as Reflected in National Investment Codes' (1992) 7 ICSID Review 428.

foreign investment laws and domestic legal reforms in developing states were also encouraged by international financial institutions under the influence of the Washington Consensus.[279] In line with the pro-investment policy, such domestic legislation sometimes paved the way for the conclusion of BITs. As observed by a former US negotiator, BITs served to stabilise or 'lock in' the domestic policies and prevent subsequent changes by later governments.[280]

Yet, in the absence of evidence of *opinio juris*, a stabilisation clause, or treaty provisions with a similar effect, the intention of states to bind themselves to the policy in foreign investment laws at a given time cannot be taken for granted. States may include pro-investment commitments in their domestic legislation for a variety of policy reasons, and not necessarily (only) out of the need to comply with international obligations.[281] The protection under foreign investment laws may well go beyond the states' international obligations. Moreover, national policies on foreign investment have been in constant change. Following the relatively short period of liberalisation and promotion of free flow of capital after the end of the Cold War, governments of both developing and developed states have been tightening investment control and restrictions.[282] Despite the capability of customary rules to evolve over time, to interpret states' foreign investment policy in foreign investment laws at a given time as evidencing their consent to a customary rule may significantly constrain their flexibility in the ever-changing internal and external environments. The fact that many states have

[279] Hepburn, 'Domestic Investment Statutes' (n 276) 663; Alvarez, 'A BIT on Custom' (n 26) 53-60; Parra (n 278) 434.

[280] Kenneth J Vandevelde, 'U.S. Bilateral Investment Treaties: The Second Wave' (1993) 14 Michigan JIL 621, 634; Kenneth J Vandevelde, 'Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties' (1998) 36 Columbia JTL 501, 523. See also Hepburn, 'Domestic Investment Statutes' (n 276) 663.

[281] Jeswald W Salacuse, *The Three Laws of International Investment: National, Contractual, and International Framework for Foreign Capital* (OUP 2013) 51-52.

[282] See Harlan Grant Cohen, 'Multilateralism's Life Cycle' (2018) 112 AJIL 47; Salacuse (n 281) 91.

started to review and reassess their policy under IIAs and foreign investment laws, which sometimes led to renegotiation or termination of IIAs and domestic legal reforms, casts doubt on the assumption that they have intended to create customary obligations by adopting certain provisions in their domestic legislation, even where the latter resemble provisions in IIAs.[283] By default, foreign investment laws implement national foreign investment policy and the existence of *opinio juris* cannot be assumed. To determine whether a provision in a piece of legislation contributes to the content of customary international law, a careful, case-by-case analysis is necessary.

On closer inspection, the language used in most foreign investment laws weighs against their direct contribution to customary international law. For the rules on expropriation, some of the laws contain a provision on expropriation or nationalisation, and sometimes the requirements even resemble those provided in IIAs, albeit with some variations.[284] However, the expropriation clause in foreign investment laws is usually not linked to IIAs or general international law.[285] It cannot be ruled out, and indeed it

[283] For instance, after a review of its IIA policy, South Africa, in order to regain control over its investment policy, renegotiated or terminated some 'first generation' IIAs and started to implement investment encouragement policy by adopting domestic legislation granting protection comparable to that under IIAs. Such domestic legislation served to *replace*, rather than *implement*, the international obligations, even if it contains provisions similar to that of IIAs. See Christian Vidal-León, 'A New Approach to the Law of Foreign Investments: The South African Case' in Andrea K Bjorklund (ed), *Yearbook on International Investment Law and Policy 2014-2015* (OUP 2016).

[284] See Azerbaijan Law on Investment Activity (1995) Articles 11, 12; Bangladesh Foreign Private Investment Promotion and Protection Act (1980) s 7; Belarus Law on Investment (2013) Article 12; Burkina Faso Investment Code (2018) Article 8; Burundi Investment Code (2008) Article 13; Cabo Verde Investment Code (1993) Article 8; Central African Republic Investment Law (2001) s 10; Egypt Investment Law (2017) Article 4; Guinea-Bissau Investment Code (2011) Article 4; Seychelles Investment Act (2010) s 5; Sierra Leone Investment Law (2004) s 11; Somalia Foreign Investment Law (1987) Article 18; South Sudan Investment Law (2009) Article 34; Palestine Law on Investment (1998) Article 8; Syria Investment Law (2007) Article 3; Tajikistan Investment Law (2007) Article 11; Tanzania Investment Act (1997) Article 22; Turkey Foreign Investment Law (2003) Article 3(b); Uganda Investment Code (2019) Article 24; Law of Ukraine on the Regime of Foreign Investments (1996) Articles 9 and 10; Uzbekistan Law on Investments and Investment Activity (2019) Article 21; Yemen Investment Law (2010) Article 8; Zambia Development Agency Act (2006) Article 19; Zimbabwe Investment and Development Agency Act (2020) Article 17.

[285] See Albania Foreign Investment Act (1990) Article 10; Angola Private Investment Law (2018) Article 20(2); Azerbaijan Law on Investment Activity (1995) Articles 11, 12; Bangladesh Foreign Private Investment Promotion and Protection Act (1980) s 7; Belarus Law on Investment (2013) Article 12; Burkina Faso Investment Code (2018) Article 8; Burundi Investment Code (2008) Article 13; Cabo

is very likely, that in order to encourage foreign investment, states chose to grant greater protection in foreign investment laws than what they believed they were obliged to accord under customary international law. Only a few foreign investment laws expressly provide that expropriation and compensation should be consistent with international law.[286] Yet, these foreign investment laws simply incorporate the international rules without clarifying their content,[287] which was probably due to the uncertainty of the customary rules themselves. In any event, a comparative survey of the expropriation clause in the few foreign investment laws can hardly illuminate the customary rules on expropriation.

Regarding the FET standard and the FPS standard, most foreign investment laws do not mention these notions at all.[288] In the few foreign investment laws that include these standards and refer to international law, no further clarification on their content is given.[289] Thus, provisions of foreign investment laws also cannot help to

Verde Investment Code (1993) Article 8; Central African Republic Investment Law (2001) s 10; Foreign Investment Law of the People's Republic of China (2019) Article 20; Djibouti Investment Code (1984) Article 39; Egypt Investment Law (2017) Article 4; El Salvador Investment Law (1999) Article 8; Moldova Investment Law (2004) Article 10; Guinea-Bissau Investment Code (2011) Article 4; Serbia Law on Investment (2015) Article 6; Seychelles Investment Act (2010) s 5; Sierra Leone Investment Law (2004) s 11; Somalia Foreign Investment Law (1987) Article 18; South Sudan Investment Law (2009) Article 34; Palestine Law on Investment (1998) Article 8; Syria Investment Law (2007) Article 3; Tajikistan Investment Law (2007) Article 11; Tanzania Investment Act (1997) Article 22; Tonga Foreign Investment Act (2002) Article 16(3); Tunisie Loi de l'investissement (2016) s 8; Turkey Foreign Investment Law (2003) Article 3(b); Uganda Investment Code (2019) Article 24; Law of Ukraine on the Regime of Foreign Investments (1996) Articles 9 and 10; United Arab Emirates Federal Law by Decree No. (19) of 2018 regarding Foreign Direct Investment Article 9; Uzbekistan Law on Investments and Investment Activity (2019) Article 21; Vanuatu Foreign Investment Act no. 25 of 2019 (2021) Article 52; Yemen Investment Law (2010) Article 8; Zambia Development Agency Act (2006) Article 19; Zimbabwe Investment and Development Agency Act (2020) Article 17.

[286] Law N°90-002 dated 9th May 1990 relating to the Code of Investments (Benin) Article 14; Law on the Policy of Foreign Direct Investment in Bosnia and Herzegovina (1998) Article 16(c); Cuban Foreign Investment Act (2014) Article 20; Togo Investment Code (2012) s 7.

[287] Ibid.

[288] In a 2017 study by Dumberry of 165 domestic investment legislations of 160 states, only 15 of them have an FPS clause and 10 of them have an FET clause. See Patrick Dumberry, 'The Practice of States as Evidence of Custom: An Analysis of Fair and Equitable Treatment Standard Clauses in States' Foreign Investment Laws' (2016) 2 McGill Journal of Dispute Resolution 66, 71-72.

[289] See Democratic Republic of the Congo, Code des investissements, Loi n°004/2002 (21 February 2002) Article 25; Venezuela, Decreto con Rango y Fuerza de Ley de Promocion y Proteccion de Inversiones

clarify the FET and FPS standards.

That being said, for foreign investment law provisions expressly referring to international law, domestic court decisions interpreting and applying these provisions can be considered as evidence of the customary rules or as the state's interpretation of the treaty rules. Even if the legislation does not expressly mention international law, domestic courts may still rely on international law when interpreting domestic laws and thereby contribute to the development of international law.[290] Moreover, some constitutional courts have pronounced upon the content of IIA standards when reviewing the constitutionality of the treaty.[291] However, such examples are few and far between. The fact that most IIAs do not require exhaustion of local remedies,[292] and the fork-in-the-road clause in some IIAs,[293] undercut foreign investors' incentive to resort to domestic courts to assert their rights under international law. In short, while certain domestic court decisions may be evidence of customary international law or may help to illuminate the content of treaty standards, publicly available decisions in this regard are rather few. Most such evidence should still be found on the international

No 356, 3 October 1999 Article 6; Equatorial Guinea, Ley de Regimen de Inversiones (30 April 1992) Article 12(1). Some legislations provide that the treatment under these standards shall not be less favourable than those under international law. See Kosovo Law No. 04/L-220 on Foreign Investment Article 3(1)-(3); Uzbekistan Law on Foreign Investments (30 April 1998) Article 9.

[290] See Tzanakopoulos 'Domestic Courts in International Law' (n 275) 155-162. See also Antonios Tzanakopoulos and Christian J Tams, 'Introduction: Domestic Courts as Agents of Development of International Law' (2013) 26 LJIL 531.

[291] See eg Colombian Constitutional Court, Constitutionality of the Colombian-France Bilateral Investment Treaty, Judgment C-252/2019 (translated by Magdalena Correa, Enrique Prieto-Ríos, and José Manuel Álvarez). See also CJEU Opinion (C-1/17) *Accord ECG UE-Canada* (30 April 2019).

[292] Gabrielle Kaufmann-Kohler and Michele Potestà, *Investor-State Dispute Settlement and National Courts: Current Framework and Reform Options* (Springer 2020) 44-50; ILC, 'Draft Articles on Diplomatic Protection with commentaries' (2006) YBILC 2006, vol II, Part Two, commentary to Article 17, para 1.

[293] Kaufmann-Kohler and Potestà (n 292) 39-40. Although some tribunals interpret typical fork-in-the-road clauses narrowly, precluding only claims based on the same law, a broader interpretation adopted by some may prevent an investor from pursuing international claims even if its prior claims before domestic courts were based on domestic law. See Serena Lee and Myron Phua, 'Supervision y Control v Costa Rica: Developing the Pantechniki v Albania Standard for "Fork in the Road" Provisions in Investment Treaties' (2019) 34 ICSID Review 203.

plane.

Before moving to general principles of law, it is worth noting that domestic laws may also be considered as a supplementary means of interpretation, to 'confirm the meaning resulting from the application of article 31' or to 'determine the meaning' if the interpretation according to article 31 leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable.[294] Supplementary means are not listed exhaustively under Article 32 of the VCLT,[295] which leaves enough room for considering domestic laws, including those of non-treaty parties, in treaty interpretation. For instance, as already mentioned, some tribunals have rejected claims for breach of the FET standard on the grounds that the challenged measure existed 'in all legal systems',[296] or was 'similar to practices in other European countries and emerging economies'.[297] For the following reasons, such an approach can in principle be justified under Article 32 of the VCLT, as long as it does not contradict the conclusion reached under Article 31 (so that it either *confirms* the interpretation under Article 31 or *determines* the interpretation within the zone of ambiguity left by the application of Article 31).

The broad context of IIA drafting and negotiation practice weighs against interpreting IIA standards as exceeding those under domestic laws, at least under the laws of developed states. As revealed in a recent study, when negotiating early BITs, the British and German negotiators took care to ensure that the treaty would not grant

[294] VCLT (n 261) Article 32.

[295] Richard K Gardiner, *Treaty Interpretation* (OUP 2016) 404-409; Anthony Aust, *Modern Treaty Law and Practice* (CUP 2013) 220-221.

[296] *Noble Ventures, Inc.* (n 253) para 178.

[297] *AES Corporation* (n 254) para 317.

preferential treatment to foreign investors.[298] The US also did not intend to have the treaty standards go beyond what was provided for by its own laws. In a bill enacted in 2002 regarding the executive's authority to negotiate trade and investment treaties, it was stipulated that 'the principal negotiating objectives' were to ensure that foreign investors in the US 'are not accorded greater substantive rights' than US investors, while 'important rights comparable to those that would be available under United States legal principles and practice' are secured in the treaty partners.[299] In an opinion by the ECJ, the Court found that an IIA would be consistent with EU law to the extent that, *inter alia*, the substantive provisions in the IIA does not go beyond the protection under EU law and thus would not adversely affect the autonomy of the EU legal order.[300] Furthermore, perhaps resulting from the change of attitude by developed states in recent years, the Calvo clause, which has been opposed by developed states, reappeared in the preambles of some IIAs.[301] In 2019, the Colombian Constitutional Court also ruled that, in order for an IIA concluded by the government to be constitutional, it is necessary to guarantee equality between foreign investors and national investors.[302]

Against this background, under Article 32 of the VCLT, a comparative survey

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[298] Hepburn, Paparinskis, Poulsen, and Waibel (n 202) 943-945,

[299] Trade Act of 2002 (US), Public Law No 107-210, 116 Stat 995, s 2102 (b)(3).

[300] CJEU Opinion (C-1/17) (n 291) paras 149-161.

[301] See Peru-US TPA (signed 12 August 2006, entered into force 1 February 2009) Preamble ('AGREE that foreign investors are not hereby accorded greater substantive rights with respect to investment protections than domestic investors under domestic law where, as in the United States, protections of investor rights under domestic law equal or exceed those set forth in this Agreement; RECOGNIZE that Article 63 of Peru's Political Constitution provides that "domestic and foreign investment are subject to the same conditions".') Colombia-US TPA (signed 22 November 2006, entered into force 15 May 2012) Preamble ('AGREE that foreign investors are not hereby accorded greater substantive rights with respect to investment protections than domestic investors under domestic law where, as in the United States, protections of investor rights under domestic law equal or exceed those set forth in this Agreement; … RECOGNIZE that Articles 13 and 100 of the Colombian Constitution provide that foreigners and nationals are protected under the general principle of equality of treatment.') See also Panama-US FTA (signed 28 June 2007, entered into force 31 October 2012) Preamble; South Korea-US FTA (signed 28 June 2007, entered into force 31 October 2012) Preamble.

[302] Colombian Constitutional Court, Judgment C-252/2019 (n 291) paras 113.

of domestic laws may help to reveal the 'ceilings' of IIA standards. Nonetheless, these being 'supplementary means', the position taken in domestic laws cannot override clear evidence of other elements listed in Article 31 of the VCLT. For instance, assuming, for the purposes of argumentation, that the customary requirement of full compensation for expropriation is more demanding than that existing in many domestic legal systems,[303] the customary rule prevails. The comparative law method under Article 32 will be discussed in Chapter 8.

III. Recourse to comparative law via general principles of law

The aforementioned elements of treaty interpretation under Articles 31 and 32 of the VCLT have limited potential in introducing domestic legal norms into the substantive standards in international investment law. The remaining legal channel for this purpose is general principles of law, which can be considered under Article 31(3)(c) of the VCLT. As discussed in section II of this chapter, the main reason why domestic laws usually cannot evidence the customary rules on foreign investment protection is the difficulty in identifying *opinio juris*. This problem is somewhat assuaged with respect to general principles of law, which can be identified based on less direct state consent evidenced in the position taken in domestic laws and the conditions in the international legal system.[304] This inevitably raises the concern that general principles of law may become a sort of 'custom-lite', creating obligations for states where none exist in customary international law.[305] Still, given that the *raison d'être* of general principles

[303] See Porterfield (n 181).

[304] See ILC, 'Consolidated Text of Draft Conclusions 1 to 11 Provisionally Adopted by the Drafting Committee on General Principles of Law' (n 2) Draft Conclusions 4-6; Vázquez-Bermúdez, 'Second Report' (n 190) 6-34. For further discussion of the identification of general principles of law, see Chapter 6, section I.

[305] See eg Statement of Mr Wood, UN Doc A/CN.4/SR.3490, 5; Statement of Mr Tladi, UN Doc

of law is precisely to address the potential inadequacy of treaties and customary international law,[306] it is not a surprise that they can be identified where the requirements for identifying customary norms are not fulfilled. As discussed in the following, due to the fact that general principles of law are based on less direct state consent, they are in a residual, complementary position in relation to the other two sources. This limited role of general principles partly mitigates the concerns arising from the reliance on this source, some of which were illustrated in Chapter 2. After all, the existence of this very source is underpinned by a compromise between the need for 'gap-filling' norms and the fundamental requirement that international law is based on state consent. Given the controversy associated with the use of general principles of law and the ambiguity of what 'gap-filling' means, it is worth taking some time to explain the relationship between general principles of law and the other two sources.

There is a general agreement that no normative hierarchy exists among the three sources listed in Article 38(1) of the ICJ Statute.[307] The main legal reason for the 'gap-filling' role of general principles is the principle of *lex specialis*.[308] As explained by the ILC Study Group on fragmentation of international law, the priority given to special

A/CN.4/SR.3489, 4-5; Statement of Mr Rajput, UN Doc A/CN.4/ SR.3490, 17; Statement of China, UN Doc A/C.6/74/SR.27, 16, para 96.

[306] Chapter 2, text to fn 42-53.

[307] 'Normative hierarchy' means that certain norms trump others and make others invalid due to their normative supremacy, eg *jus cogens* norms prevail over other norms. See Antonios Tzanakopoulos, 'Collective Security and Human Rights' in Erika de Wet and Jure Vidmar (eds), *Hierarchy in International Law: the Place of Human Rights* (OUP 2012) 47. For the absence of hierarchy, see ILC, 'Consolidated Text of Draft Conclusions 1 to 11 Provisionally Adopted by the Drafting Committee on General Principles of Law' (n 2) Draft Conclusion 11(1); Vázquez-Bermúdez, 'Third Report' (n 53) para 76-82; Pellet and Müller (n 40) 932.

[308] As explained in the ILC report on fragmentation: 'The maxim *lex specialis derogat legi generali* is a generally accepted technique of interpretation and conflict resolution in international law. It suggests that whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific.' See ILC, 'Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (2006) YBILC 2006, vol II, Part Two, Conclusion 5; Vázquez-Bermúdez, 'Third Report' (n 53) paras 95-107.

law over general law is because 'such special law, being more concrete, often takes better account of the particular features of the context in which it is to be applied' and 'may often better reflect the intent of the legal subjects'.[309] As already mentioned, when identifying general principles of law derived from domestic laws, the 'recognition' by states is ascertained based on the existence of a principle common to domestic legal systems and its transposition to the international legal order.[310] The inductive and deductive reasonings involved in this identification process inevitably mean that a general principle would less directly reflect the intention of states compared with a treaty or customary rule on how to deal with a particular subject matter.[311] This makes a general principle naturally more 'general' than the relevant treaty or customary rule.

In the area of foreign investment protection, general principles are usually derived from domestic laws that are generally applicable to foreigners and nationals alike. Whenever there is a treaty or customary norm on that matter, the treaty or customary norm would necessarily more directly and more specifically reflect the states' intention on how to deal with foreign investors at the international level. Hence the status of the general principles of law as the 'general law' relative to the treaty or customary norm. Thus, general principles of law recede into the background when there are applicable treaty or customary rules.

However, the 'gap-filling' role does not mean that general principles of law become irrelevant whenever there is an applicable treaty or customary rule. As explained by the ILC Study Group on fragmentation regarding the *lex specialis*

[309] ILC, 'Conclusions of the Work of the Study Group on the Fragmentation of International Law' (n 308) Conclusion 7.

[310] Vázquez-Bermúdez, 'Second Report' (n 190) 6-34.

[311] Vázquez-Bermúdez, 'Third Report' (n 53); Shao (n 43) 248-249.

principle,

> The application of the special law does not normally extinguish the relevant general law. That general law will remain valid and applicable and will, in accordance with the principle of harmonization …, continue to give direction for the interpretation and application of the relevant special law and will become fully applicable in situations not provided for by the latter.[312]

Indeed, being the 'general law', general principles of law may continue to play an interpretative or complementary role in relation to treaties and customary international law. For instance, in *Golder v. United Kingdom*, the ECtHR interpreted Article 6 of the European Convention by reference to general principles, and decided that the right to a fair trial includes the right to access to a court or a tribunal, despite the lack of express language suggesting so.[313] In that case, the reliance on general principles of law was based on Article 31(3)(c) of the VCLT.[314] Under that article, the relevance and weight of general principles of law must be determined in light of other elements of treaty interpretation under the rules of the VCLT.[315]

In a similar vein, general principles of law may play a complementary role in relation to customary international law, helping to clarify certain aspects of the customary rules where the latter are too ambiguous to resolve the problem at hand. For instance, in *LIAMCO v. Libya*, the arbitrator had to decide whether compensation for a lawful expropriation should include loss of profits (*lucrum cessans*).[316] In view of the

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[312] ILC, 'Conclusions of the Work of the Study Group on the Fragmentation of International Law' (n 308) Conclusion 9.

[313] *Golder v. the United Kingdom* App No 4451/70 (ECtHR, 21 February 1974) paras 28, 35.

[314] Ibid para 35.

[315] See ILC, 'Draft Articles on the Law of Treaties with Commentaries' (1966) YBILC 1966, Vol II, 222; Gardiner (n 295) 298.

[316] *LIAMCO* (n 25) 70.

vague and inconsistent practice, as well as the uncertainty brought by the NIEO movement,[317] the arbitrator found that the (customary) international law was in a 'confused state'.[318] In that context, he considered it 'necessary to refer therefore to the general principles of law', one of which was the principle of equity.[319] The complementary role of general principles of law also suggests that the use of general principles must be consistent with the general thrust of the customary rule and that the customary rule prevails in cases of conflict.

Thus, in contemporary international investment law, where the treaty standard incorporates customary international law, general principles of law can only be employed to clarify certain ambiguous aspects of the customary rule. In such cases, recourse to general principles of law should be based on a careful examination of the customary rule's content, instead of serving as an outright substitute for the latter. Questions such as whether and which general principles are relevant, and what role the general principles should play, depend on the substance of the customary rule as well as the customary rule's relative relationship with the pertinent domestic legal norms from which the general principles are derived.

IV. Interim conclusion

In contemporary international investment arbitration and in the literature, domestic legal norms have sometimes been (selectively) used as a shortcut for interpreting IIAs and identifying customary international law, and excessive reliance on arbitral precedents has covered up the lack of clear legal basis in some of the decisions. This

[317] Ibid 70-73.
[318] Ibid 73, 76.
[319] Ibid 76-77.

may prompt the criticism that the old patterns of legal reasoning developed in the colonial times continue to be in use. To avoid such criticisms, the entry points of domestic legal principles in contemporary international investment law must be carefully examined following the rules on sources, in light of the particular characters of modern IIAs. Under the rules on sources, a major point of entry for domestic legal principles in contemporary investment law is general principles of law, and the relevance of other elements of treaty interpretation in this regard is rather limited.

As the positions taken in domestic laws pertaining to foreign investment are seldom accompanied by a sense of legal obligation, these domestic laws can rarely be considered as evidence of customary international law or as subsequent practice in the application of IIAs. Indeed, this is so for good reasons. Since national policies on foreign investment are sensitive to the ever-changing political and economic environment both externally and internally, states are understandably reluctant to internationally bind themselves to their policy expressed in legislation at a given time. Although domestic courts may occasionally elaborate on the international rules, publicly available domestic court decisions are not usually widespread enough to make a substantive contribution to the formation of customary international law.

At the same time, references to domestic legal norms can still be justified as reflecting state consent, even if expressed less directly. General principles of law are the most important channel in this regard. The flip side of the fact that general principles are based on state consent indirectly expressed in domestic laws is that these general principles can only play a limited, complementary role in relation to the other two sources. General principles of law may help to interpret or complement certain aspects of treaty or customary rules, without overriding the latter. The relevance of particular general principles in the interpretation of an IIA standard is contingent on the specific

circumstances of the standard, especially whether the IIA standard is a reference to customary international law.

Domestic laws can also be considered as a supplementary means of treaty interpretation. For instance, they can help to reveal the 'ceilings' of the IIA standards. This is because, in light of the general context and attitudes of the states driving the IIA programmes, it can be assumed that they have not intended that the IIA standards exceed what exist in their own domestic laws. But the supplementary status of this use of domestic laws should be borne in mind when interpreting the treaty.

At a general level, the entry of general principles of law that were rarely mentioned in the pre-BIT era, particularly general principles of public law, occurred in the context of the 'treatification' of international investment law. Shifting from the debate on customary rules in multilateral fora to bilateral negotiations of IIAs, developed states managed to insert standards of protection exceeding what developing states may agree to as a matter of customary international law. These IIAs also enabled direct access by foreign investors to international arbitration, often without having to exhaust local remedies. All of these factors bring the protection under IIAs closer to an 'alternative' to domestic public laws, diverging from the traditional customary rules on the protection of aliens and their property. The latter historically were developed and operated on the inter-state plane and nowadays are more akin to the 'bottom line' of domestic legal protection. The shift from that created a new space for general principles of law in international investment law.

Chapter 4. The Role of Particular General Principles in the Interpretation of Substantive Standards in IIAs

As discussed in Chapter 3, in contemporary international investment law, general principles of law are a major entry point for domestic legal norms derived from comparative law analysis. Given their complementary role in relation to the other two sources, the relevance of general principles of law in interpreting IIA standards is contingent on the relationship between the particular treaty provision and customary international law. In substance, since reliance on general principles of law practically involves recourse to domestic legal norms in order to give content to IIA standards, whether such reliance is appropriate depends on what is the relative relationship, as intended by the treaty parties, between the particular IIA standard and the requirements in the relevant domestic laws. This relationship has to be fleshed out through treaty interpretation, and where the treaty provision incorporates customary international law, by ascertaining the content of the customary rule. Against the general background introduced in Chapter 3, this chapter examines the role of particular general principles in interpreting the substantive standards in IIA provisions, namely the FET clause (I), the FPS clause (II), and the expropriation clause (III).

Before discussing the substance, it must be clarified that this chapter concerns *whether and to what extent* general principles can be relied upon when interpreting IIA provisions. The comparative law method used to identify their contents will be examined in Chapters 6 and 7. However, as will be illustrated below, decisions on the *relevance* of general principles of law in treaty interpretation are inseparable from the identification of the *contents* of such principles. It is for the convenience of analysis that these issues are discussed separately. To use the metaphor of gap-filling, the present chapter will identify the 'gaps' to be filled by general principles of law, and

Chapter 7 will discuss how to fill these 'gaps' through comparative law analysis.

I. Interpretation of the FET standard

Where the FET clause incorporates the customary minimum standard, the extent to which general principles of law can be relied upon when interpreting the FET standard depends on the content of the customary rules and whether general principles may serve to complement these rules. On the other hand, where the FET standard is an autonomous standard, independent from the minimum standard, the relevance of general principles should be determined by taking into account the elements listed in the interpretation rules under the VCLT. The following will discuss the relevance of general principles of law in these two scenarios respectively.

I.A. FET Standard incorporating the customary minimum standard

The FET standard in some IIAs incorporates the customary minimum standard. This, for instance, might result from explicit stipulation in the treaty,[320] or subsequent agreement between treaty parties.[321] When interpreting such an FET provision, general principles of law can only help to clarify certain aspects of the minimum standard where the latter is too vague to give a clear answer to the problem at hand; and the use of general principles for such purposes should be consistent with the general thrust of the customary rules.[322] In this context, the consideration of the relevance of general principles must begin with the content of the customary minimum standard. As shown

[320] See eg CAFTA-DR (signed 5 August 2004, entered into force 1 January 2009) Article 10.5.2(a); US-Rwanda BIT (signed 19 February 2008, entered into force 1 January 2012) Article 5.2(a); PACER-Plus (14 June 2017, 13 December 2020) Chapter 9, Article 9.2(a); CPTPP (n 213) Article 9.2(a).

[321] See NAFTA Free Trade Commission, 'Notes of Interpretation of Certain Chapter 11 Provisions' (31 July 2001).

[322] Chapter 3, text to fn 316-319.

in the following, the minimum standard, as reflected in state practice and in several codification efforts, leaves little room for the general principles of public law that are often mentioned in arbitration decisions and in the literature, such as the principles of proportionality and legitimate expectations.

When discussing the minimum standard in contemporary international investment law, the *Neer* case decided in 1926 is an important starting point.[323] As decided in that case, to breach the minimum standard,

> the treatment of an alien … 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.[324]

At a broad level, these criteria appear to fall below the level of protection offered in modern public laws in most jurisdictions. The general principles that are often relied upon in investment arbitration decisions, such as the principle of proportionality and the principle of legitimate expectations,[325] seem to demand a higher standard of protection than what was required in *Neer*. A crucial question, then, is whether and to what extent the customary minimum standard has evolved since the

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[323] Although that case concerned the murder of an American national instead of commercial transactions, frequent references to this case in contemporary international law by states, arbitral tribunals and commentators make it an important authority on the minimum standard of the treatment of aliens. See eg *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award (8 June 2009) paras 598-616; *ADF Group Inc. v. US*, ICSID Case No ARB(AF)/00/1, Second Submission of Canada Pursuant to NAFTA Article 1128 (19 July 2002) para 30-34; Award (9 January 2003) para 121; *Pope & Talbot* (n 105) Canada's Counter-Memorial (Phase Two) (25 October 2000) para 237; Mexico's Submission on the Interpretation of Article 1105 of NAFTA (5 November 2000); *Azurix Corp* (n 192) para 365; James Crawford, *Brownlie's Principles of Public International Law* (OUP 2019) 598; Surya P Subedi, 'International Investment Law' in Malcolm Evans (ed), *International Law* (OUP 2018) 737-738; *Alejandro Diego Díaz Gaspar v. Republic of Costa Rica*, ICSID Case No ARB/19/13, Award (29 June 2022) para 357.

[324] *Neer* (n 29) 61-2.

[325] For more details on the substance of these principles, see Chapter 7.

1920s.

In investment arbitration, some states insisted that the *Neer* standard still reflects the minimum standard or the minimum standard has not evolved much beyond *Neer*. For instance, India has argued repeatedly that the contemporary minimum standard equates to the *Neer* standard.[326] In relation to Article 1105(1) of the NAFTA, both Mexico and Canada also stated that the *Neer* standard remains the contemporary minimum standard, although what is 'shocking' or 'egregious' nowadays might differ from that in the 1920s.[327] On the other hand, investment tribunals have frequently found that the minimum standard has evolved and risen above the *Neer* standard.[328] But to what extent it has evolved was rarely made clear. For instance, El Salvador has observed that the minimum standard articulated in *Neer* 'has not changed significantly over time'.[329] A major argument in support of a higher minimum standard is that the vast number of investment treaties, together with the interpretations of the treaty standards by arbitral tribunals, 'necessarily have influenced' the customary rules protecting foreign investment.[330] However, in light of the conclusions reached in Chapter 3, this argument should be taken with a grain of salt.

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[326] See *Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India*, PCA Case No 2016-7, Final Award (21 December 2020) para 883; *Deutsche Telekom AG v. the Republic of India*, PCA Case No 2014-10, Interim Award (13 December 2017) para 294; *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. India*, PCA Case No 2013-09, Award on Jurisdiction and Merits (25 July 2016) para 455.

[327] *ADF Group Inc.* (n 323) Canada's Second Submission, paras 31-34; second article 1128 submission by Mexico, 11. See also *Pope & Talbot* (n 105) Canada's Counter-Memorial (Phase Two) (25 October 2000) para 237, Mexico's Submission on the Interpretation of Article 1105 of the NAFTA (5 November 2000) 4.

[328] See *Mondev* (n 105) Award (5 October 2002) para 115; *Merrill and Ring* (n 195) para 365; *GAMI* (n 223) Final Award (15 November 2004) paras 95-97; *CC/Devas (Mauritius) Ltd v. India* (n 326) para 457; *Railroad Development* (n 223) Award (29 June 2012) para 218.

[329] *Railroad Development* (n 223) Non-Disputing Party submission by El Salvador under CAFTA Article 10.20.2 (1 January 2012) para 9.

[330] See *Mondev* (n 105) Award (5 October 2002) para 117; *ADF Group Inc.* (n 323) Award (9 January 2003) para 183-184.

As discussed in Chapter 3, the IIAs concluded since the late-twentieth century were primarily driven by the need to facilitate free flow of capital rather than a sense of legal conviction; and bilateral negotiations allowed developed states to include standards higher than what developing states may have agreed to as a matter of customary international law.[331] IIAs established 'special legal régimes governing investment protection' and were 'not sufficient to show that there has been a change in the customary rules', and the arbitral decisions interpreting these treaties were also 'special cases'.[332] Therefore, while the ideological rivalry in the mid-to-late twentieth century was an obvious obstacle to the development of the customary rules protecting foreign investment, thousands of IIAs, mostly BITs, may not have brought substantive changes to the minimum standard either. At the same time, several codification initiatives that were undertaken over that time suggest that the threshold for breaching the minimum standard remains high, and that there has not been a radical shift in the customary standard since *Neer*.[333] This was confirmed by more recent statements of states, including in arbitral pleadings, joint interpretations, and non-party interventions.[334] To the extent that this observation is correct, the high threshold for breach under the minimum standard would weigh against the relevance of general principles derived from modern public laws to supplement the minimum standard. As shown below, this is confirmed by a more detailed comparison between the content of the minimum standard and the general standard of protection under modern public law.

[331] Chapter 3, text to fn 202-206.

[332] *Diallo* (n 211) para 90.

[333] See 1961 Harvard Draft Convention (n 104); García-Amador's Revised Draft on State Responsibility (1961) (n 72); Draft Articles adopted at the Hague Codification Conference (1930) (n 72) Article 9(2).

[334] See eg *A Hamadi Al Tamimi* (n 223) United States Article 10.19(2) Submission (22 September 2014) para 9; *ADF Group Inc.* (n 323) Mexico's Second Article 1128 Submission (22 April 2002); *Railroad Development* (n 223) Submission of the Republic of El Salvador (1 January 2012).

Before moving to details, it is worth pointing out that at a fundamental level, both the rationale of the minimum standard and the relationship regulated by it differ from those in domestic public laws. As such, general principles of public law tend to be incompatible with the broad scheme of the minimum standard. First and foremost, the minimum standard was developed in the context of an inter-state framework, with the interests of two states at stake.[335] Thus, different from domestic public laws, which regulate the *vertical* relationship between individuals and the government, the minimum standard regulates the *horizontal* relationship between states. Moreover, as its name suggests, the minimum standard serves to safeguard the *basic* requirements for foreign nationals and enterprises living and operating abroad,[336] functioning as the 'bottom-line' regarding the laws of host states without interfering with the normal operation of government and the diverse approaches taken in various jurisdictions. This explains the high threshold for breach in *Neer*. On the other hand, domestic public laws are embedded in national communities, serve the interests of each state, and need to draw a balance between private interests of individuals and the general public interest. The incongruence between the rationale of the minimum standard and that of domestic public laws further weighs against the use of general principles of public law to supplement the minimum standard, and this is not altered by the fact that the minimum standard is incorporated in an IIA. Although IIAs may allow investors to invoke the minimum standard directly against host states and thereby bring the minimum standard onto the investor-state plane, the incorporation *per se* does not change the substance of the minimum standard. These general remarks are confirmed when comparing the specific aspects of the minimum standard with the general principles of public law as

[335] See *Mavrommatis Palestine Concessions* (n 215) 11-12; *Barcelona Traction* (n 215) para 78.

[336] See Westlake (n 183) 103-104; Dunn (n 183) 170.

applied in arbitral cases.

As regards the principle of proportionality, it is usually understood as requiring that the burden caused by a measure be proportional to the public interest it seeks to protect, taking into account the balance between the competing interests, and that the measure must not be more drastic than what is necessary for achieving the desired ends.[337] These requirements broadly correspond to the 'arbitrariness' aspect of the minimum standard,[338] which was elaborated by the ICJ in the *ELSI* case.[339] Both in arbitral decisions[340] and in states' pleadings,[341] the *ELSI* standard of arbitrariness has been regarded as forming part of the minimum standard. Yet, a closer look at the *ELSI* decision reveals more lenient and deferential criteria than the aforementioned proportionality principle.

In *ELSI*, one question was whether the requisition decree issued by the mayor, which was subsequently declared as unlawful by the local prefect, was 'arbitrary' under international law and thus breached the FCN treaty between Italy and the US.[342] For

[337] See *Tecmed* (n 256) para 122; *Occidental Petroleum Corporation and Occidental Exploration and Production Compan* (n 251) paras 402-9; Stone Sweet and della Cananea (n 28) 917.

[338] See eg Paparinskis, *Minimum Standard* (n 11) 239-245; Paulsson, *Denial of Justice* (n 68) 196-198.

[339] *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)* (Judgment) [1989] ICJ Rep 15, 76 para 128.

[340] See *Mondev* (n 105) Award (5 October 2002) para 127; *Loewen* (n 221) para 131; *Chevron Corporation and Texaco Petroleum Corporation v. Ecuador (II)*, PCA Case No 2009-23, Second Partial Award on Track II (30 August 2018) para 8.38; *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No ARB(AF)/15/2, Award (20 September 2021) paras 287-292.

[341] For instance, in *Philip Morris v. Uruguay*, Uruguay argued that 'the ELSI judgment is most commonly referred to by investment tribunals' decisions as the standard definition of "arbitrariness" under international law.' *Philip Morris* (n 86) Award (8 July 2016) para 390; in *Alghanim v. Jordan*, Jordan also argued that the customary standard is equivalent to the ELSI standard of what constitutes 'arbitrary'. *Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan*, ICSID Case No ARB/13/38, Award (14 December 2017) para 225; In *IC Power v. Guatemala*, Guatemala also claimed that ELSI set the standard of arbitrariness under international law. See *IC Power Asia Development Ltd. v. Republic of Guatemala*, PCA Case No 2019-43, Award (7 October 2020) para 483; *ADF Group Inc.* (n 323) Mexico's Second Article 1128 Submission (22 April 2002) para 9-10.

[342] *Elettronica Sicula S.p.A. (ELSI)* (n 339) paras 120-122.

the prefect, the requisition was unlawful despite the public necessity and urgency to adopt certain measures, because the requisition could not achieve its intended purpose, and it was driven by the pressure of local public opinion.[343] This appears to be a clear case of breach of the proportionality principle mentioned above, as the measure taken was neither effective nor helpful, not to mention the least restrictive one, in order to achieve the alleged public purpose. Yet, the ICJ did not consider this 'arbitrary' and in breach of international law.[344] According to the Court, although the requisition might not be helpful in advancing the public interest it sought to protect, it was

> understandable that the Mayor, as a public official, should have made his order, in some measure, as a response to local public pressure, and the Chamber does not see, in this passage of the Prefect's decision, any ground on which it might be suggested that the order was therefore arbitrary.[345]

Such a lenient approach was consistent with the Court's narrow conception of arbitrariness, which is 'not so much something opposed to a rule of law, as something opposed to the rule of law'.[346] For the Court, a measure is arbitrary only when there is 'a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety.'[347] This high threshold for breach would preclude the relevance of the proportionality principle.

This conclusion has been further confirmed in state practice. For instance, in recent IIAs that provide greater detail on the content of the minimum standard, no

[343] Ibid paras 125-6.
[344] Ibid para 126.
[345] Ibid para 126.
[346] Ibid para 128.
[347] Ibid.

reference has been made to the principle of proportionality.[348] In fact, as a traditional capital-exporting state, the US has stated that 'State practice and *opinio juris* do not establish that the minimum standard of treatment of aliens imposes a general obligation of proportionality on States'[349] and that 'the principle of proportionality is not an independent source of obligation within the minimum standard of treatment'.[350]

For similar reasons, when interpreting an FET clause incorporating the minimum standard, references to the principle of legitimate expectations should also be rejected. While a variety of conceptions of 'legitimate expectations' appeared in arbitration practice,[351] a representative statement on this principle described it as protecting the reliance interests of an investor 'where a [state's] conduct creates reasonable and justifiable expectations on the part of [the] investor (or [its] investment) to act in reliance on said conduct, such that a failure … to honour those expectations could cause the investor (or investment) to suffer damages.'[352] This principle has been invoked in relation to breach of contract,[353] breach of unilateral representations,[354] and radical changes of legislative or regulatory framework.[355] Under customary

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[348] See eg CPTPP (n 213) Article 9.6; RCEP (n 247) Article 10.5; USMCA (n 213) Article 14.6.

[349] *Adel A Hamadi Al Tamimi* (n 223) United States Article 10.19(2) Submission' para 9.

[350] Ibid fn 10. See also *ADF Group Inc.* (n 323) Mexico's Second Article 1128 Submission (22 April 2002) 10-18 (Observing that the standard applied in *ELSI* was 'as indicative of the kind of State action that could amount to a departure from internationally accepted legal norms and in appropriate circumstances attract State responsibility'. This can be seen as an indirect rejection of the proportionality principle.) *Railroad Development* (n 223) Submission of the Republic of El Salvador. (Maintaining that the customary rules have not changed significantly from *Neer* over time, and that a measure must be 'sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process of law, evident discrimination, or a manifest lack of reasons' to constitute a breach of the minimum standard.)

[351] The specific content of this principle will be discussed in Chapter 7.

[352] *Thunderbird* (n 184) Award (26 January 2006) para 147.

[353] Claimants in investment arbitration often invoke legitimate expectations in relation to contract breaches, but such arguments are often rejected by arbitral tribunals. See Potestà (n 28) 100-103.

[354] *Waste Management, Inc v United Mexican States ("Number 2")*, ICSID Case No ARB(AF)/00/3, Award (30 April 2004) para 98; *Sempra Energy International v. The Argentine Republic*, ICSID Case No ARB/02/16, Award (28 September 2007) para 298.

[355] *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case

international law, however, these circumstances are regulated by the rules on state contract, denial of justice, and acquired rights. A closer look at these rules reveals a higher threshold for breach than what is often held under the rubric of 'legitimate expectations'.

As discussed in Chapter 2, breach of contract by states has long been regulated under international law, and state contract disputes in the early-to-mid twentieth century made a substantial contribution to the international rules in this regard.[356] Under these rules, a breach of contract by a state, in and of itself, is not internationally wrongful only because it frustrates an investor's expectations. As revealed in several codification efforts, there is broad consensus that although there may be scenarios in which a breach of contract could give rise to state responsibility, not every breach of contract leads to this.[357]

For instance, in the 1961 Harvard Draft Convention, the drafters pointed out that unless the contract itself is governed by international law, a normal breach of contract would lead to liability only under municipal law;[358] and a breach of contract may give rise to international responsibility only if there is a denial of justice in litigation concerning the breach, or if the state breaches the contract in an 'arbitrary' way.[359] Similarly, the revised draft articles on the responsibility of states presented by the ILC Special Rapporteur García-Amador in 1961 provided that a state is responsible

No ARB/13/36, Final Award (4 May 2017) para 282; *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No ARB/15/38, Award (31 July 2019) para 315; *Philip Morris* (n 86) Award (8 July 2016) para 423.

[356] Chapter 2, Section III.

[357] Draft Articles adopted at the Hague Codification Conference (1930) (n 72) Article 8; 1961 Harvard Draft Convention (n 104), Article 12 and its explanatory note; García-Amador's Revised Draft on State Responsibility (1961) (n 72) Article 10 and commentary.

[358] 1961 Harvard Draft Convention (n 104) 569 commentary to Article 12.

[359] Ibid 570 Article 12(1) and its commentary.

for non-performance of a contract only if 'the non-performance is not justified on grounds of public interest or of the economic necessity of the State, or if there is imputable to the State a "denial of justice"'.[360] It is also recognised in the literature that under general international law, international responsibility is not engaged unless the breach of contract involves arbitrariness or denial of justice.[361] This position was also accepted by capital-exporting states. The US position recorded in Hackworth's *Digest of International Law* of 1943 was that: 'Generally speaking, the Department of State does not intervene in cases involving breaches of contract between a foreign state and a national of the United States in the absence of showing a denial of justice.'[362] In light of the above, in the absence of arbitrariness or denial of justice in connection with the breach of contract, one cannot rely on the principle of legitimate expectations as a new basis of obligation whereby an ordinary non-performance of contract may lead to state responsibility.

Beyond the contractual scenario, there is little evidence in state practice and in the case law that mere 'expectations' arising from unilateral representations or general regulatory framework are protected under the minimum standard. Under customary international law, property interests of aliens are protected to the extent that they have 'acquired rights'.[363] In several codification works, besides the protection against denial of justice and the due diligence obligations regarding the acts of private third parties, property interests of aliens are mainly protected under the rules on expropriation and

[360] García-Amador's Revised Draft on State Responsibility (1961) (n 72) 47.

[361] See eg Stephen M Schwebel, 'On Whether the Breach by A State of A Contract with An Alien Is A Breach of International Law' in Stephen M Schwebel (ed), *Justice in International Law* (CUP 2009); Paparinskis, *Minimum Standard* (n 11) 242-243.

[362] Green H Hackworth, *Digest of International Law* vol 5 (US Government Printing Office 1943) 611.

[363] See Georges Kaeckenbeeck, 'The Protection of Vested Rights in International Law' (1936) 17 British Ybk Intl L 1; Pierre Lalive, 'The Doctrine of Acquired Rights' in International and Comparative Law Center (ed), *Rights and Duties of Private Investors Abroad* (Matthew Bender & Co 1965).

state contract.[364] Unless the loss caused by the measure is so severe that the rules on expropriation are engaged, which will be discussed in Section III, mere 'expectations' arising from unilateral representations or general regulatory framework, which are distinct from acquired rights, are not protected.

In early decisions, claims arising from the unilateral representations by state authorities have been rejected. In *George W Cook*, the Mexican authorities promised not to levy real estate tax against Mr Cook but subsequently enacted legislation imposing a different tax on him.[365] In this context, the Mexico-US General Claims Commission considered that in the area of tax law,

> the liberality of a State in granting an exemption is essentially revocable for the reason that *it creates no vested rights in him who enjoys it*. It is well established that an exemption granted merely for reasons of policy, where the state and the citizen have no agreement to their mutual advantage, must be regarded only as an expression of the pleasure of the said state and of the citizen; and the law which grants it, as all general laws, is subject to amendment or repeal at the option of the legislature, and it is immaterial whether during the time it has been in force the parties in interest have acted in reliance thereon.[366]

In essence, the Commission rejected the idea that state responsibility may arise from frustration of expectations in the absence of acquired rights.

For similar reasons, claims arising from general regulatory changes have also been rejected. In *Oscar Chinn*, the PCIJ dealt with the loss suffered by a British investor

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[364] 1929 Harvard Draft Convention (n 72) Article 8; 1961 Harvard Draft Convention (n 104) Articles 9, 10, 12; García-Amador's Revised Draft on State Responsibility (1961) (n 72) Articles 9, 10.

[365] *George W. Cook (USA) v. United Mexican States* (1930) 4 RIAA 539.

[366] Ibid 596.

due to the measures adopted by the Belgian government favouring local businesses in response to the depression.[367] In that case, the Court refused to consider the regulatory environment of a given time in the state as creating vested rights:

> The Court, though not failing to recognize the change that had led him to wind up his transport and shipbuilding businesses, is unable to see in his original position – which was characterized by the possession of customers and the possibility of making a profit – *anything in the nature of a genuine vested right*. Favourable business conditions and goodwill are transient circumstances, subject to inevitable changes; the interests of undertakings may well have suffered as a result of the general trade depression and the measures taken to combat it.[368]

Moreover, the oft-quoted Restatement (Third) of Foreign Relations Law of the US also took the position that a state is not responsible for the economic disadvantages resulting from *bona fide* general regulation within the state's police power 'if it is not discriminatory …, and is not designed to cause the alien to abandon the property to the state or sell it at a distress price.'[369]

In light of these authorities, customary international law does not impose on states a self-standing obligation to respect mere expectations, as opposed to acquired rights, arising from representations or general regulation. That said, it is still possible that circumstances in a regulatory change or a breach of representation can give rise to claims of arbitrariness, unlawful expropriation, or denial of justice. But these issues

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[367] *The Oscar Chinn Case (Britain v. Belgium)* (Judgment) PCIJ Rep Series A/B No 63.

[368] Ibid 88 (emphasis added).

[369] *Restatement of the Law (Third) of the Foreign Relations Law of the United* States (American law Institute 1987) § 712, comment g.

should be addressed under the relevant customary rules, which are distinct from the principle of legitimate expectations.

Furthermore, both in recent IIAs and in state practice, the idea of protecting legitimate expectations under the minimum standard has also been rejected. For instance, in the CPTPP, where the FET standard is tied to the minimum standard, it is provided that

> the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.[370]

In *Railroad v. Guatemala*, El Salvador maintained in its non-party intervention that to breach the minimum standard mentioned in the CAFTA-DR, a measure 'must be sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons.'[371] El Salvador further stressed that 'the reference to the investor's legitimate expectations is unnecessary and is not part of the obligation to provide "Fair and Equitable Treatment" as part of the minimum standard of treatment.'[372] Similarly, the US has also stated that it 'is aware of no general and consistent state practice and *opinio juris* establishing an obligation under the minimum standard of treatment not to frustrate investors' expectations; instead, something more is required, such as a complete repudiation of a contract.'[373]

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[370] CPTPP (n 213) Article 9.6(4).

[371] *Railroad Development* (n 223) Submission of the Republic of El Salvador, para 6 (citing *Glamis Gold. Ltd.* (n 323) para 627).

[372] *Railroad Development* (n 223) Submission of the Republic of El Salvador, fn 3.

[373] *Italba Corporation v. Oriental Republic of Uruguay*, ICSID Case No ARB/16/9, Submission of the United States of America (11 September 2017) para 25. See also *Merrill and Ring* (n 195) Counter Memorial by Canada (31 May 2008) paras 508-9.

Thus, where the FET standard incorporates the minimum standard, neither the principle of proportionality nor the principle of legitimate expectations can be relied upon to supplement its content. A substantive comparison of the content of the minimum standard and the general requirements under these principles confirms the observations discussed above: The minimum standard served and continues to serve as the 'bottom line' vis-à-vis the protection offered in domestic laws, it is not meant to regulate the relationship between individuals and the government or to permit a judicial review comparable to that exercised by domestic courts.

That being said, the role of general principles of law is not completely precluded where the FET clause incorporates the minimum standard. For instance, in several IIAs where the FET standard is tied to the minimum standard, reference is made to 'principles of due process embodied in the principal legal systems of the world'.[374] This can be regarded as an implicit recognition by states of the complementary role of general principles of law. Indeed, a closer look at the customary rules on denial of justice suggests that general principles have a role to play in limited circumstances.

The customary rules on denial of justice broadly cover refusal of access to justice, undue delay, irregularities in procedure, and failure to execute a judgment.[375] As regards the specific criteria, the threshold for breach is high. It is widely accepted that to constitute a breach, there must be 'an act which shocks, or at least surprises, a sense of judicial propriety'.[376] While more detailed rules have been developed to

[374] See CAFTA-DR (n 320) Article 10.5(2)(a); US-Rwanda BIT (n 320) Article 5(2)(a); USMCA (n 213) 14.6(4); CPTPP (n 213) Article 9.6(4). See also China-New Zealand FTA (signed 7 April 2008, entered into force 1 October 2008) Article 143(2).

[375] See in general Freeman (n 94); Paulsson, *Denial of Justice* (n 68). While it has been pointed out that gross defect in the substance of the judgment can also constitute denial of justice, judicial practice suggests that the content of a judgment could demonstrate a denial of justice only to the extent that it proves bad faith or arbitrariness.

[376] See *Elettronica Sicula S.p.A. (ELSI)* (n 339) para 128; *Barcelona Traction* (n 215) Separation Opinion

substantiate this abstract standard, the rules remain vague in certain respects and are unable to exhaust all eventualities. This is understandable given the variety of situations that may arise in practice.

For instance, while there is a consensus that a refusal of access to justice may constitute a breach,[377] it is unclear to what extent such an access should exist. The Guerrero Report of 1926 provided that states are obliged to allow 'foreigners access to the national courts and freedom to institute the necessary proceedings whenever they need to defend their rights.'[378] The text provisionally adopted on first reading at the 1930 the Hague Codification Conference stipulated that state responsibility arises where 'the foreigner has been hindered by the judicial authorities in the exercise of his right to pursue judicial remedies or has encountered unjustifiable obstacles or delays implying a refusal to do justice.'[379] In the 1961 Draft Articles by the ILC Special Rapporteur García-Amador, a denial of justice occurs if foreigners are deprived of '[t]he right to apply to the courts of justice or to the competent organs of the State, by means of remedies and proceedings which offered adequate and effective redress for violations of this rights and freedoms'.[380] From these authorities, it remains unclear to what extent such an access should exist and what 'rights' a foreigner must be able to assert before the courts. While the particular rights are defined under the law of the host state, the scope of such rights must be subject to international rules, otherwise states would be allowed to avoid international responsibility by invoking their internal

of Judge Tanaka, 144; *Loewen* (n 221) paras 132-3.

[377] See Guerrero Report (n 95) para 7; 1929 Harvard Draft Convention (n 72) Article 9; Draft Articles adopted at the Hague Codification Conference (1930) (n 72) Article 9.

[378] Guerrero Report (n 95) para 6.

[379] Draft Articles adopted at the Hague Codification Conference (1930) (n 72) Article 9(2).

[380] García-Amador's Revised Draft on State Responsibility (1961) (n 72) Article 1(2)(c).

laws.[381]

Perhaps for this reason, the 1961 Harvard Draft Convention resorted to general principles of law to supplement the rules on denial of justice:

> The denial to an alien of the right to initiate, or to participate in, proceedings of a tribunal or an administrative authority to determine his civil rights or obligations is wrongful:
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> …
>
> (b) *if it unreasonably departs from those rules of access to tribunals or administrative authorities which are recognized by the principal legal systems of the world*; or
>
> …[382]

In *Mondev v. US*, one of the claims was that the tort immunity granted to the Boston Redevelopment Authority under the Massachusetts Tort Claims Act constituted a denial of justice and was in breach of Article 1105(1) of the NAFTA.[383] In response, the US relied on a comparative study of domestic laws on the immunities of state authorities in tort, highlighting the lack of international consensus in that regard.[384] In that context, while the tribunal did not address whether, to what extent, and on what basis the comparative law analysis was relevant in its decision, it ultimately sided with the US and held that 'the extent to which a State decides to immunise regulatory authorities from suit for interference with contractual relations is a matter for the

[381] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (n 19) Article 2.
[382] 1961 Harvard Draft Convention (n 104) Article 6 (emphasis added).
[383] *Mondev* (n 105) Award (11 October 2002) para 139-140.
[384] *Mondev* (n 105) US Rejoinder on Competence and Liability (1 October 2001) 22

competent organs of the State to decide.'[385] In that case, the US did not explain the legal basis for the use of a comparative law survey either, and the comparative methodology therein may not have been adequate for identifying general principles of law, an issue to be addressed in Chapter 6. Nonetheless, in light of what was discussed above, it is reasonable in this particular context to rely on general principles of law to determine the extent to which states are obliged to ensure access to justice.

I.B. FET standard as an autonomous treaty standard

In certain circumstances, especially in the absence of an express link to the minimum standard in the treaty text or subsequent agreement between state parties, the FET provision has been interpreted as stipulating a requirement that is autonomous from the minimum standard and is more demanding than the latter.[386] As discussed in Chapter 3, the autonomous FET clause emerged from the process of 'treatification' of international investment law in the late twentieth century, primarily through bilateral negotiations between developed and developing states.[387] The IIA boom contrasted with the deadlock in multilateral negotiations, which explains several differences between the IIA rules and the customary rules on foreign investment protection.[388] The distinguishing features of these IIAs, in turn, affect the interpretation of IIA standards

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[385] *Mondev* (n 105) Award (11 October 2002) para 154.

[386] See eg *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No ARB/97/3, Award (20 August 2007) para 7.4.7; *Franck Charles Arif v. Republic of Moldova*, ICSID Case No ARB/11/23, Award (8 April 2013) para 529; *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No ARB/11/2, Award (4 April 2016) para 530; Francis A Mann, 'British Treaties for the Promotion and Protection of Investments' (1981) 52 British Ybk Intl L 241, 244; UNCTAD, 'Fair and equitable treatment' (1999) UNCTAD series on issues in international investment agreements, UNCTAD/ITE/IIT/11 (vol III) <https://unctad.org/system/files/official-document/psiteiitd11v3.en.pdf> (accessed 3 November 2022) 40; Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (Kluwer Academic Publishers Group 1995) 60.

[387] Chapter 3, text to fn 239-245.

[388] Ibid.

when they are autonomous from the customary rules.

First, while the customary minimum standard safeguards the *basic* conditions for cross-border movement and transactions,[389] the object and purpose of most IIAs – as often indicated in the preamble – is to promote development by stimulating free flow of capital.[390] Due to developing states' need for foreign capital and developed states' stronger negotiating powers in bilateral settings, standards that are higher than those under customary international law were inserted into IIAs.[391] While the rationale behind the minimum standard may preclude the relevance of certain general principles of public law, it is more reasonable to resort to such general principles when interpreting autonomous IIA standards that are vague and cannot be interpreted by reference to customary international law.

Indeed, as mentioned in Chapter 3, as the higher standard of protection under IIAs began to threaten the regulatory power of even developed states, these states started to stress that the IIA standards are comparable to the requirements under their domestic laws and do not exceed the latter.[392] Emphasis on the equal treatment of foreign and domestic investors also started to appear in the preambles of IIAs.[393] This

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[389] See Westlake (n 183) 103-104; Dunn (n 183) 170.

[390] See eg US-Argentina BIT (n 226) Preamble; UK-Philippines BIT (signed 3 December 1980, entered into force 2 January 1981) Preamble; Germany-Pakistan BIT (signed 25 November 1959, entered into force 28 April 1962) Preamble. See also Kenneth J Vandevelde, 'A Brief History of International Investment Agreements' in Karl P Sauvant and Lisa E Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (OUP 2009) 27.

[391] See Chapter 3, text to fn 205-206. See also Vandevelde, 'The Bilateral Investment Treaty Program of the United States' (n 202); Alvarez, 'The Evolving BIT' (n 265) 6.

[392] See Trade Act of 2002 (US) (n 299); Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party [2014] OJ L 257/121 (28 August 2014) Recital 4; CJEU Opinion (C-1/17) (n 291) paras 149-161.

[393] See eg Peru-US TPA (n 301) Preamble; Colombia-US TPA (n 301) Preamble; Panama-US FTA (n 301) Preamble; South Korea-US FTA (n 301) Preamble.

phenomenon has been regarded as a 'revival of the Calvo doctrine'.[394] The emphasis on domestic legal standards as benchmarks for the protection under IIAs weighs in favour of the relevance of general principles of law in interpreting the autonomous IIA standards.

Second, since IIAs allow investors to claim directly against host states on their own motion, at their own costs, and for their own benefit, it is more reasonable to construe the IIAs as granting direct rights to foreign investors.[395] As such, IIAs become functionally more analogous to domestic public laws, and it is more appropriate to interpret the autonomous IIA standards in terms of the balancing between foreign investors' private interests and public interests of host states.[396] In this context, as the content of the autonomous FET standard has to be fleshed out in its own right,[397] general principles derived from domestic public laws can be particularly helpful.[398]

Admittedly, the public law analogy has been contested, as the conditions in international investment law differ from those in domestic legal systems in many

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[394] See eg Kleinheisterkamp (n 8) 798-802; Shan (n 9).

[395] Chapter 3, text to fn 214-227.

[396] Stephan W Schill, 'International Investment Law and Comparative Public Law – An Introduction' in Schill, *International Investment Law and Comparative Public law* (n 6) 28; Gus van Harten, 'The Public-Private Distinction in the International Arbitration of Individual Claims against the State' (2008) 56 ICLQ 371. While the same applies to the minimum standard incorporated in the IIAs, the incorporation *per se* does not change the substance of the minimum standard, which was developed in the context of customary international law.

[397] The ordinary meaning of the terms 'fair and equitable', ie 'just', 'even-handed', 'unbiased', 'legitimate', does not seem to take an arbitral tribunal very far. See *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No ARB/01/7, Award (25 May 2004) para 113; *Siemens A.G. v. The Argentine Republic*, ICSID Case No ARB/02/8, Award (6 February 2007) para 290.

[398] The 'two assumptions' in treaty interpretation advanced by the ILC Study Group on Fragmentation of International law would make general principles of law particularly relevant when interpreting treaty provisions as vague as the FET standard. See Study Group of the International Law Commission, 'Fragmentation of International Law: Difficulties Arising from Diversification and Expansion of International Law' (13 April 2006) UN Doc A/CN.4/L.682 and Add.1, para 465. ('(a) According to the positive presumption, parties are taken "to refer to general principles of international law for all questions which [the treaty] does not itself resolve in express terms or in a different way"; (b) According to the negative presumption, in entering into treaty obligations, the parties intend not to act inconsistently with generally recognized principles of international law or with previous treaty obligations towards third States.') (footnote omitted)

respects. For instance, it has been argued that the separation of powers, which is the foundation of public laws in many states, does not exist in international law, and that justifications for the judiciary to review the acts of the other branches of government are also inapplicable in investment arbitration.[399] However, the structural difference between international and domestic legal systems does not necessarily preclude the transposition of general principles to the international level or their relevance in treaty interpretation. For instance, international criminal tribunals faced a comparable problem when determining the applicability of the principle of legality and the principle that a tribunal must be 'established by law'.[400] Instead of refusing to apply these principles on the international plane due to the absence of the separation of powers as in domestic legal systems, the ICTY adjusted these principles in light of the different conditions in international law while keeping the essential elements of them.[401] Similarly, in the context of international investment law, the structural difference between international and domestic legal systems can be addressed when transposing general principles to the international level, an issue to be discussed in Chapter 7.

In light of the foregoing, when interpreting the autonomous FET standard, the recourse to general principles derived from domestic public laws is *prima facie* justifiable. In practice, when determining which general principle to rely on, the particular factual situation is another relevant factor. In arbitration cases, the task of an

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[399] See eg Prabhash Ranjan, 'Using the Public Law Concept of Proportionality to Balance Investment Protection with Regulation in International Investment Law: A Critical Appraisal' (2014) 3 Cambridge Journal of International and Comparative Law 853, 862; Benedikt Pirker, 'Seeing the Forest without the Trees – the Doubtful Case for Proportionality Analysis in International Investment Arbitration', Highly Commended Essay, Society of International Economic Law/Cambridge University Press Essay Prize 2011 (12 September 2011) <https://ssrn.com/abstract=1926166> (accessed 3 November 2022) 8-9.

[400] See *Prosecutor v. Duško Tadić a/k/a "DULE"* (Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-A (2 October 1995) para 41; *Prosecutor v. Delalić et al.* (Trial Chamber Judgment) IT-96-21-T (16 November 1998) para 403.

[401] *Tadić* (n 400) paras 42-5; *Delalić* (n 400) paras 403-5.

arbitral tribunal is to clarify the aspect of the FET standard that is pertinent to the case at hand, instead of thoroughly elucidating the standard's content in all respects. When interpreting the FET standard in a particular case, a tribunal would naturally look for the principle that governs similar situations in domestic laws.

In this connection, it bears repeating that the *relevance* of certain general principles in treaty interpretation and the *identification of their content* are discussed separately here only for the sake of convenience. In practice, the ascertainment of the content of general principles of law and the determination of their relevance when interpreting a treaty cannot be separated from one another.[402] As discussed in Chapter 2, general principles derived from domestic laws should be understood as being based on the indirect consent of states as regards the legal solution to an international problem; and the identification process is essentially to ascertain this solution based on the legal approaches taken in various domestic legal systems and the conditions existing in international law.[403] In light of this, it is a misunderstanding that general principles of law are some pre-made norms existing in the abstract, and one only needs to look at their content to determine whether they are 'relevant' when interpreting the treaty and applying it to a particular problem. Instead, the search for a 'relevant' general principle in treaty interpretation and the identification of the general principle's content are practically a *single* process. With this in mind, the conclusions on the relevance of certain 'principles' when interpreting IIA standards discussed here mainly concern the general direction to look at when searching for a general principle applicable in a particular case.[404]

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[402] For a more detailed analysis of this process, see Chapter 6, Section II.

[403] Chapter 2, text to fn 50-53.

[404] As will be explained in Chapter 7, Section I.A, concepts such as 'the *principle* of legitimate

In arbitration practice, perhaps the most notable example of a general principle invoked when interpreting the FET standard is the principle of legitimate expectations.[405] Albeit less frequently, the principle of proportionality has also been relied upon.[406] Based on what was just discussed, the reliance on these principles can be justified where the FET standard is autonomous from the minimum standard. In domestic laws, it is generally understood that the principle of proportionality protects private persons from undue interference with their rights by the government seeking to achieve a public purpose.[407] The idea underpinning this principle is consistent with the broad scheme of the IIA programme, which was designed to protect foreign investors from the abuse of regulatory powers by host states and was agreed to by capital-importing states as a means to attract foreign capital.[408]

The same is true with the protection of 'legitimate expectations'. In domestic laws, the principle of legitimate expectations is usually linked to the notions of trust and legal certainty.[409] In general, it safeguards the reliance interest of private persons in cases of breach of promises or representations by the government or changes of policy which was previously relied upon by the private persons.[410] In the context of

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expectations' or 'the *principle* of proportionality' should not overshadow the fact that they may yield different solutions in different circumstances, and more importantly, the comparative law analysis for the identification of these general principles should focus on the specific solutions to particular problems in domestic legal systems, instead of some overarching principles.

[405] See eg *Total S.A.* (n 251) paras 128; *Thunderbird* (n 184) Separate Opinion of Thomas Wälde (1 December 2005) para 27.

[406] *Occidental Petroleum Corporation and Occidental Exploration and Production Company* (n 251) paras 402-9.

[407] See eg Stone Sweet and della Cananea (n 28) 916-7; Paul Craig, *Administrative Law* (Sweet & Maxwell 2016) 1156; Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 Columbia Journal of Transnational Law 72, 88-92.

[408] Alvarez, 'The Evolving BIT' (n 265) 5; Jeswald W Salacuse, 'The Treatification of International Investment Law: A Victory of Form Over Life? A Crossroads Crossed?' (2006) 3 TDM.

[409] See Soren Schønberg, *Legitimate Expectations in Administrative Law* (OUP 2000) 2; Paul Craig, 'Substantive Legitimate Expectations in Domestic and Community Law' (1996) 55 CLJ 289, 299; Paul Craig, *EU Administrative Law* (OUP 2018) 605-607.

[410] See Chester Brown, 'The Protection of Legitimate Expectations as a "General Principle of Law":

foreign investment, a key concern of investors investing abroad is that once a significant amount of money is spent on a project, they would bear considerable 'sunk costs' and become particularly vulnerable to subsequent change of position by the government.[411] For this reason, language such as 'maintain a stable framework for investment' often appears in the preamble of IIAs.[412]

In arbitration cases, tribunals have relied on both principles when interpreting the FET standard, drawing upon the treaty's object and purpose reflected in the preamble,[413] the context of the provision,[414] as well as the treaty's preparatory work.[415] In light of the foregoing, this approach can be justified where the FET standard is autonomous from the minimum standard.

In addition, regarding the protection of legitimate expectations, it bears noting the ICJ's observation in the *Obligation to Negotiate Access to the Pacific Ocean* case:

> references to legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment. It does not follow from such references that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation.[416]

Some Preliminary Thoughts' (2009) 6 TDM, 2; Potestà (n 28) 94-8.

[411] Guzman (n 200) 665; Liesbeth Colen, Damiaan Persyn, and Andrea Guariso, 'Bilateral Investment Treaties and FDI: Does the Sector Matter?' (2016) 83 World Development 193, 194.

[412] See US-Ecuador BIT (n 226) Preamble; US-Argentina BIT (n 226) Preamble; US-Uruguay BIT (signed 4 November 2005, entered into force 31 October 2006) Preamble; Rwanda-United Arab Emirates BIT (signed 1 November 2017, not in force) Preamble.

[413] See *Total S.A.* (n 251) para 116; *Eiser Infrastructure Limited* (n 355) para 377-378.

[414] *Eiser Infrastructure Limited* (n 355) para 380.

[415] *Eiser Infrastructure Limited* (n 355) para 378.

[416] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)* (Merits) [2018] ICJ Rep 507, 559 para 162.

Yet, the denial of a principle as a direct source of obligation is distinct from denying the principle's status as part of international law. Indeed, it is perfectly normal that a general principle of law can be considered when interpreting a treaty or complementing customary international law but does not in itself function as an independent ground of obligation. For instance, as regards the principle of good faith, the ICJ has observed that although it is '"one of the basic principles governing the creation and performance of legal obligations" … it is not in itself a source of obligation where none would otherwise exist.'[417] Similarly, although it is uncontroversial that criminalisation of rape in domestic criminal laws worldwide does not in itself create a standalone international crime of rape, the ICTY has considered general principles of law on the definition of rape when ascertaining relevant aspects of the international crimes.[418]

Thus, the statement of the ICJ does not in itself preclude the reliance on the principle of legitimate expectations when interpreting IIAs. Indeed, this principle continued to be relied upon by investment arbitral tribunals even after the ICJ decision.[419] When interpreting an IIA provision taking into account certain general principles, the source of obligations remains the IIA, and general principles only help to clarify the content of the treaty provision.[420]

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[417] *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Judgment (Jurisdiction and Admissibility) [1988] ICJ Rep 69, 105 para 94.

[418] *Prosecutor v. Furundžija* (Trial Chamber Judgment) IT-95-17/1-T (10 December 1998) paras 172-186; *Prosecutor v. Kunarac et al.* (Trial Chamber Judgment) IT-96-23 & 23/1-T (22 February 2001) paras 436-460.

[419] See eg *SolEs Badajoz GmbH* (n 355) paras 315-6; CFF *Energy BV v. Italian Republic*, SCC Case No 158/2015, Award (16 January 2019) paras 183-185; *Indian Metals & Ferro Alloys Limited (India) v. The Government of the Republic of Indonesia*, PCA Case No 2015-40, Award (29 March 2019) paras 224-256.

[420] See *MTD Equity Sdn. Bhd.* (n 397) Decision of Annulment (21 April 2007) paras 67-9.

II. Interpretation of the FPS standard

Similar to the FET standard, a tribunal interpreting the FPS standard has to grapple with the question of its relationship with the minimum standard.[421] As with the FET standard, the relevance of general principles of law in the interpretation of the FPS standard hinges on whether the FPS standard is an autonomous standard or a direct reference to the minimum standard. Before discussing these two eventualities, it is necessary first to sketch out the scope of the FPS standard.

While most arbitral tribunals have interpreted the FPS standard narrowly, limiting its scope to the physical security of foreign investments,[422] a few tribunals have adopted a broader approach. For instance, some tribunals drew on the adjective 'full' and concluded that this standard also protects the *legal* security of covered investments.[423] However, where the latter approach is adopted, it is hard to distinguish the 'legal security' aspect of the FPS standard from the FET standard.

For instance, the tribunal in *Siemens v. Argentina* deemed that 'legal security' under the FPS standard denotes 'the quality of the legal system which implies certainty in its norms and, consequently, their foreseeable application.'[424] For the tribunal in *CME v. Czech Republic*, the FPS standard requires that 'the agreed and approved security and protection of the foreign investor's investment' should not be withdrawn

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[421] See eg Kriebaum, Schreuer, and Dolzer (n 20) 238-239; Schreuer, 'Full Protection and Security' (n 245).

[422] *Tecmed* (n 256) para 177; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No ARB/05/16, Award (29 July 2008) para 668; *Noble Ventures, Inc.* (n 253) para 164; *Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No ARB/03/19, Award (30 July 2010) para 173; *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award (24 December 2007) paras 323-8.

[423] *Azurix* (n 192) para 408; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No ARB 05/22, Award (24 July 2008) para 729.

[424] *Siemens A.G.* (n 397) para 303.

or devalued by amendment of the law or by actions of the administrative bodies.[425] The tribunal in *Lauder v. Czech Republic* considered that the FPS standard requires states 'to keep its judicial system available' for investors to seek remedies, and 'for such claims to be properly examined and decided in accordance with domestic and international law'.[426]

All of these requirements correspond to certain aspects of the FET standard,[427] and the reasons for upholding or rejecting the claims thereunder would be identical to those under the FET standard.[428] In most IIAs, the FPS standard is stipulated in parallel with the FET standard.[429] It is thus more natural and more consistent with the *effet utile* principle to interpret the FPS standard narrowly, distinguishing from the FET standard.[430] As such, the FPS standard protects the *physical* security of investments only.[431] Indeed, some recent IIAs expressly define the FPS standard by reference to physical security.[432]

As far as physical security of investments is concerned, it does not matter whether the harm is caused by private actors or by the state itself.[433] In terms of the

[425] *CME Czech Republic B.V.* (n 180) Partial Award (13 September 2001) para 613.

[426] *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Award (3 September 2001) para 314.

[427] See Section I of this chapter.

[428] See *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No ARB/01/3, Award (22 May 2007) para 286; *Anglo American PLC v. Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/14/1, Final Award (18 January 2019) paras 482-5.

[429] See eg US-Argentina BIT (n 226) Article II(2)(a); US-Ecuador BIT (n 226) Article II(3)(a); ECT (n 226) Article 10(1); CETA (n 248) Article 8(10)(1).

[430] See *Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A.* (n 422) paras 172-173; *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No ARB/04/13, Award (6 November 2008) para 269.

[431] Even if the FPS standard is interpreted narrowly, the distinction between it and the FET standard can still be blurry in certain cases. For instance, on the prosecution of private actors causing physical harm to the investor's investment, both physical security and legal security of the investment are engaged.

[432] See eg CETA (n 248) Article 8.10(5); CPTPP (n 213) Article 9.6.2(b); Peru-US TPA (n 301) Article 10.5.2(b).

[433] *Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A.* (n 422) para 173;

latter, it is uncontroversial that physical damages caused to foreign investments by the state may entail state responsibility,[434] unless *lex specialis* applies or circumstances precluding wrongfulness exist. There are also few, if any, examples of reference to general principles in this context. For these reasons, the present section will focus on the positive obligation of states to protect foreign investments from harm caused by private actors.

II.A. FPS standard incorporating the customary minimum standard

Compared with the FET standard, the FPS standard is often treated even more succinctly in arbitration cases. Usually, arbitral tribunals simply rely on prior arbitral decisions to give substance to this standard, without explaining whether it is understood as an autonomous standard or not.[435] Whether an FPS clause refers to the minimum standard depends on the particular circumstances of the treaty and that is not the focus of the present study. But when this is the case, the relevance of general principles of law will depend on the content of the minimum standard.

In arbitral cases concerning the FPS clause, one major issue is whether this standard envisages an absolute, universal criterion, or whether it is a relative standard whose content depends on the specific circumstances of the particular state.[436] Some

Biwater Gauff (Tanzania) Ltd. (n 423) para 730.

[434] *Estate of Jean-Baptiste Caire (France) v. United Mexican States* (1929) 5 RIAA 516; *D. Earnshaw and Others (Great Britain) v. United States* (1925) 6 RIAA 160; *Kunhardt & Co. Case* (1903) 9 RIAA 171.

[435] See eg *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No ARB/98/4, Award (8 December 2000) para 84; *Rumeli Telekom A.S.* (n 422) para 668; *Noble Ventures, Inc.* (n 253) paras 164-5; *Jan de Nul N.V.* (n 430) paras 267-71; *South American Silver Limited v. Bolivia*, PCA Case No 2013-15, Award (22 November 2018) paras 685-87.

[436] *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No ARB/87/3, Award (27 July 1990) para 77 ('A number of other contemporary international authorities noticed the 'sliding scale', from the old 'subjective' criteria that takes [*sic*] into consideration the relatively limited existing possibilities of local authorities in a given context, towards an 'objective' standard of vigilance in assessing the required degree of protection and security with regard to what should be legitimately

tribunals followed the former approach and interpreted the FPS standard as requiring states to act 'reasonably, in accordance with the parameters inherent in a democratic state',[437] or held that states need to 'take all measures necessary to ensure the full enjoyment of protection and security of its investments'.[438] If such an approach is required under the minimum standard, it seems that there would be some space for recourse to general principles of law derived from domestic legal systems worldwide, where certain aspects of this absolute standard are ambiguous. On the other hand, some tribunals laid particular importance on the development status and the level of stability of the host state, limiting the scrutiny to what 'the claimants could reasonably expect' in the circumstances of the state.[439] This suggests a relative standard which, as discussed below, in its extreme form is close to national treatment. If the minimum standard adopts this latter approach, references to general principles derived from the laws of states other than the particular host state would be *prima facie* inappropriate.

As shown below, while the requirement under the minimum standard on the physical protection of aliens goes beyond national treatment and has an absolute element in it, it gives significant deference to the particular circumstances of the host state. In fact, as the minimum standard in this respect concerns positive, as opposed to negative, obligations of states, it is reasonable that it accommodates the differences in the amounts of resources and levels of control held by governments of various states. As revealed from the classic authorities, the threshold for breach under the minimum

expected to be secured for foreign investors by a reasonably well organized modern State.')

[437] *Tecmed* (n 256) para 177.

[438] *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No ARB/93/1, Award (31 February 1997) para 6.05.

[439] See eg *Waguih Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No ARB/05/15, Award (1 June 2009) para 448.

standard is higher than those under many domestic legal systems.

As discussed in section I.A, the *Neer* decision, which concerned the alleged lack of diligence by the Mexican authorities in investigating a murder case,[440] is the starting point for clarifying the minimum standard.[441] As mentioned, the Mexico-US General Claims Commission held in that case that to give rise to international responsibility, an act must 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.'[442] Importantly, the Commission stressed that '[i]t is not for an international tribunal such as this Commission to decide, whether another course of procedure taken by the local authorities … might have been more effective.'[443] Accordingly, despite the Mexican authorities' failure to convict the wrongdoers and the fact that 'better methods might have been used', the Commission was satisfied that the investigations conducted by the authorities fulfilled the required level of diligence under international law.[444]

The position in *Neer* was followed in *Mecham*, where the Mexico-US General Claims Commission held that:

> Even though more efficacious measures might perhaps have been employed to apprehend the murderers of Mecham, that is not the question, but rather whether what was done shows such a degree of negligence, defective administration of justice, or bad faith, that the procedure falls below the standards of international

[440] *Neer* (n 29) 60-1.

[441] Section I of this chapter, text to fn 323-330.

[442] *Neer* (n 29) 61-2.

[443] Ibid 62.

[444] Ibid.

law.[445]

In these decisions, the minimum standard could only be breached by 'bad faith', 'wilful neglect of duty' and the like. Mere lack of efficiency in the state's response to a situation threatening the physical security of aliens is not sufficient to constitute a violation, unless the inadequacy is outrageous. When analysing whether outrageous inadequacy exists, the circumstances of the state are crucial.

According to the 1927 Resolution adopted by the Institute of International Law on the international responsibility of states, a state is not responsible for injurious acts by individuals unless the injury results from omissions of the state 'to take the measures to which, *under the circumstances*, it was proper *normally* to resort to in order to prevent or check such actions';[446] a state is also not responsible for the injuries caused by mobs, or in riots, insurrections or civil war,

> unless it has not sought to prevent the injurious acts with the diligence proper to employ *normally in such circumstances*, or unless it has not acted with *like diligence* against these acts or unless it does not apply to foreigners *the same measures of protection as to nationals*.[447]

In the articles adopted in first reading at the Hague Codification Conference in 1930, a state is responsible for the damages caused by private persons only if it 'has failed to take such measures as *in the circumstances should normally have been taken* to prevent, redress, or inflict punishment for the acts causing the damage.'[448] In the

[445] *Laura A. Mecham and Lucian Mecham, Jr. (U.S.A.) v. United Mexican States* (1929) 4 RIAA 440, 443.

[446] Institute of International Law, Resolution on State Responsibility (n 98) Article III (emphasis added).

[447] Ibid Article VII (emphasis added).

[448] Draft Articles adopted at the Hague Codification Conference (1930) (n 72) Article 10 (emphasis added).

same vein, under the 1961 Draft Articles on the Responsibility of States presented by the ILC Special Rapporteur García-Amador, a state becomes internationally responsible if the authorities are '*manifestly* negligent in taking the measures which, *in view of the circumstances*, are *normally* taken to prevent the commission of [the damaging acts by individuals causing injuries to aliens].'[449] The same article explained that 'the circumstances' to consider include 'the extent to which the injurious act could have been foreseen and the physical possibility of preventing its commission with resources available to the State'.[450] In the same vein, in the *G L Solis* case, the Mexico-US General Claims Commission stated that when analysing whether a state has fulfilled its due diligence obligations, important factors in the assessment include 'the capacity [of the authorities] to give protection, and the disposition of authorities to employ proper, available measures to do so.'[451] In a word, the minimum standard does not dictate some overarching criteria of diligence applicable across the globe in terms of the protection of aliens and their assets from physical harm by private actors. Instead, the required level of diligence depends on the particular circumstances of the state. Important benchmarks in this regard are how the state itself normally responds to the situations and how it treats its nationals in similar cases.

In *British Property in Spanish Morocco*, arbitrator Max Huber pointed out that the obligation of vigilance under international law could be characterised by the Roman law notion of *diligentia quam in suis* (diligence that the obligor customarily exhibits in his own affairs) instead of *diligens paterfamilias* (diligence of the reasonable man).[452]

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[449] García-Amador's Revised Draft on State Responsibility (1961) (n 72) Article 7(1) (emphasis added).

[450] Ibid Article 7(2).

[451] *G L Solis (USA) v. United Mexican States* (1928) 4 RRIA 358, 362.

[452] See *British Claims in the Spanish Zone of Morocco (Great Britain/Spain)* (1925) 2 RIAA 615, 644.

As he explained:

> This rule, consistent with the overriding principle of the independence of states in their internal affairs, in fact offers states, for their nationals, the degree of security which they can *reasonably expect*. As long as the vigilance exercised *manifestly* falls below this level in relation to nationals of a foreign state, the latter is entitled to consider this to be an injury of its interests which should enjoy the protection of international law.[453]

As can be extrapolated from these authorities, to find a breach of the minimum standard, there must be evidence of bad faith or wilful neglect of duty or, in the circumstances of the host state, there is a manifest lack of diligence in protecting the physical security of aliens and their assets; and the availability of more effective alternative measures does not in itself lead to state responsibility. The level of diligence required of the state is contingent on the circumstances of the state, which include the government's capacity and the resources available to it. This standard has been aptly described as a standard of 'modified objectivity'.[454]

In *Pantechniki*, the investor's road work in Albania was overrun and ransacked by looters during severe civil disturbances in 1997.[455] In the context of the nationwide turbulence with waves of riots battering the country, the governmental authorities were overwhelmed. In this context, the arbitrator cited in agreement the observation made by Newcombe and Paradell:

> Although the host state is required to exercise an objective minimum standard

[453] Ibid (translated by the author and emphasis added).

[454] Newcombe and Paradell (n 178) 310; *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No ARB/07/21, Award (30 July 2009) para 81.

[455] *Pantechniki* (n 454) para 1.

> of due diligence, the standard of due diligence is that of a host state in the circumstances and with the resources of the state in question. This suggests that due diligence is a modified objective standard – the host state must exercise the level of due diligence of a host state in its particular circumstances. In practice, tribunals will likely consider the state's level of development and stability as relevant circumstances in determining whether there has been due diligence. An investor investing in an area with endemic civil strife and poor governance cannot have the same expectation of physical security as one investing in London, New York or Tokyo.[456]

Thus, in the light of the magnitude of the social unrest in Albania and the powerlessness of the Albanian authorities, the arbitrator drew a distinction between the state being *unable* to act and it *refusing* to act.[457] According to him, while a state would be responsible if it is capable of acting but refuses to act, Albania was unable to intervene effectively in that particular situation and thus was not in breach of the FPS standard.[458] This is consistent with the approach discussed above. Similarly deferential criteria were applied in the other cases, and tribunals have held that delays and insufficiencies *per se* may not breach the FPS standard.[459]

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[456] Ibid para 81; Newcombe and Paradell (n 178) 310.

[457] *Pantechniki* (n 454) para 82.

[458] Ibid.

[459] See *South American Silver Limited* (n 435) paras 689-698; Damien Charlotin, 'Analysis: Tribunal in Guris v. Libya Award Draws Contrast with Gengiz Award on FPS Interpretation and Sides with Majority of Prior Libya Awards with Respect to War Losses Clause' IA Reporter (5 March 2020) <https://iareporter.com/articles/analysis-tribunal-in-guris-v-libya-award-draws-contrast-with-cengiz-award-on-fps-interpretation-and-sides-with-majority-of-prior-libya-awards-with-respect-to-war-losses-clause/> (accessed 19 May 2020); Luke Eric Peterson, 'Way2B v. Libya Tribunal Finds That BIT's War-Losses Clause Does Not Exclude Operation of Other BIT Protections (Including Full Protection & Security), But Foreign Investor Fails to Meet Evidentiary Burdens' IA Reporter (8 June 2019) <https://iareporter.com/articles/tribunal-finds-that-bits-war-losses-clause-does-not-exclude-operation-of-other-bit-protections-including-full-protection-security-but-foreign-investor-fails-to-meet-evidentiary-burdens/> (accessed 25 May 2020).

The deferential criteria under the minimum standard and their relative character can be explained by the fact that states' ability to perform positive obligations is constrained by the resources they have and the particular circumstances. In addition, as pointed out by Huber, this is also due to the importance attached to the principle of the independence of states to regulate their internal affairs.[460] These considerations make it inappropriate to draw upon the standards in various legal systems of the world in a general manner. The higher standards of protection applied in certain developed states or certain regions are inappropriate to be considered as benchmarks for this international *minimum* standard, which is often applied to states suffering from severe lack of resources and/or significant instability.

For instance, states subject to the European Convention on Human Rights and EU law are obligated to adopt a higher standard of protection than what is required under the minimum standard. The ECtHR has expressly rejected the position that a measure must be 'tantamount to gross negligence or wilful disregard of the duty' in order to constitute a breach of the Convention.[461] Instead, it considered that a state might violate the obligations under the Convention if 'the authorities knew or ought to have known at the time of the existence of a real and immediate risk … and failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.'[462] Accordingly, shortcomings in the co-operation and communications between different governmental agencies and the availability of more efficient measures that could have avoided the injury were reasons for findings of

[460] *British Claims in the Spanish Zone of Morocco* (n 452) 644.

[461] *Osman v. The United Kingdom* App no 87/1997/871/1083 (ECtHR, 28 October 1998) para 116.

[462] Ibid. See also *E and others v. The United Kingdom* App no 33218/96 (ECtHR, 26 November 2002) para 100.

breach under the Convention.[463] Similarly, the minimum standard also falls below the duty of care standard under EU law, which requires states to 'adopt all necessary and proportionate measures.'[464]

Therefore, where the FPS standard directly incorporates the minimum standard, references to general principles of law would generally be inappropriate. As with the FET clause discussed in section I.A, the minimum standard incorporated by the FPS clause serves as the 'bottom line' regarding domestic legal protection and is not intended to interfere with the normal functioning of domestic legal orders. Moreover, compared with the *negative* obligations under other IIA standards, the *positive* obligations under the FPS standard require a greater degree of deference to the circumstances of the host state and thus a relative element is inherent in this standard. This further weighs against the relevance of general principles of law.

II.B. FPS standard as an autonomous treaty standard

Similar to the FET standard, in a few cases, arbitral tribunals expressly considered that the FPS standard was autonomous from and more demanding than the minimum standard.[465] In some cases, while the tribunals did not expressly mention general principles of law in the interpretation of the FPS standard, they referred to 'the parameters inherent in a democratic state' or what an investor would reasonably expect from a 'well organized modern state'.[466] Such language represents a departure from the 'modified objectivity' under the minimum standard discussed above. For similar

[463] *E and others* (n 462).

[464] Case C-265/95 *Commission v France* [1997] ECR I-6959, Judgment (9 December 1997) para 66.

[465] See eg *Frontier Petroleum Services Ltd. v. The Czech Republic*, UNCITRAL, Award (12 November 2010) para 268; *Azurix* (n 192) para 361.

[466] *Tecmed* (n 256) para 177; *Asian Agricultural Products Ltd.* (n 436) para 77.

reasons as discussed in relation to the FET standard,[467] where the FPS standard is autonomous from the minimum standard and the abstract treaty texts need to be filled with substance, there would be more space for recourse to general principles derived from domestic laws. That being said, the reliance on general principles does not preclude considerations of the specific circumstances of the host state. Due to the similarity with the case of autonomous FET standard, the justifications for referring to general principles in the interpretation of an autonomous FPS standard will not be discussed in detail here.

III. Interpretation of the expropriation clause

Different from the terms 'fair and equitable treatment' and 'full protection and security', which originated mainly in the treaty practice after the Second World War,[468] the concept 'expropriation' has a longer history of usage and has acquired an established meaning in customary international law.[469] Therefore, when an investment treaty prescribes that a state shall not 'expropriate either directly or indirectly' without compensation,[470] that provision should be taken as incorporating the customary definition of expropriation.[471] Accordingly, the relevance of certain general principles in interpreting the expropriation clause depends on whether these principles are

[467] Section I.B of this chapter.

[468] Chapter 3, Section I.C, text to fn 241-245.

[469] Ibid, text to fn 233-238.

[470] See eg US-Argentina BIT (n 226) Article IV; US-Ecuador BIT (n 226) Article III; NAFTA (n 226) Article 1110; Switzerland-Uruguay BIT (n 235) Article 5; Italy-Bangladesh BIT (n 235) Article 5. As will be explained below, more recent investment treaties tend to add more detailed clarifications to the definition of expropriation, with some minor variations. But the general approach taken by these clarified expropriation clauses is in tune with customary international law.

[471] *Philip Morris* (n 86) Award (8 July 2016) para 290; *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No ARB/05/07, Award (30 June 2009) para 99.

compatible with the general framework of the customary rules.

In contemporary international investment law, it is uncontroversial that a direct expropriation of foreign investors' property without compensation is unlawful.[472] Yet, in recent practice, disputes often arise from expropriation conducted in an indirect manner, which deprives investors of the use or economic value of their investment without an explicit transfer of title.[473] Such an indirect expropriation can be undertaken via legislation, regulatory actions, or even judicial decisions.[474] In arbitration cases, a crucial yet thorny question is how to distinguish an indirect expropriation from a non-compensable governmental act causing loss to investors.[475] To ascertain this distinction, tribunals have at times resorted to the principle of proportionality and the principle of legitimate expectations.[476] The relevance of these general principles in supplementing the customary rules distinguishing non-compensable regulation from indirect expropriation will be the focus of this section. To this end, the following will first elaborate on the customary rules on this distinction (III.A) before analysing the relevance of general principles (III.B).

[472] 1961 Harvard Draft Convention (n 104) 553; Cox (n 232) 99-141.

[473] W Michael Reisman and Robert D Sloane, 'Indirect Expropriation and Its Valuation in the BIT Generation' (2004) 74 British Ybk Intl L 115, 118-22; Cox (n 232) 152-210.

[474] Cox (n 232) 152-253.

[475] Vaughan Lowe, 'Regulation or Expropriation?' (2002) 55 CLP 447; Dolzer, 'New Developments' (n 231); Ursula Kriebaum, 'Indirect Expropriation: A Comparative Approach' in Andrea Gattini, Attila Tanzi and Filippo Fontanelli (eds), *General Principles of Law and International Investment Arbitration* (Brill 2018) 430; L Yves Fortier QC and Stephen L Drymer, 'Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor' (2005) 13 Asian Pacific LR 79.

[476] See *Tecmed* (n 256) paras 122, 154; *Philip Morris* (n 86) Award (8 July 2016) para 305; *Azurix* (n 192) para 311; *Grand River* (n 256) paras 127, 140.

III.A. The distinction between non-compensable regulation and indirect expropriation under customary international law

While indirect expropriation takes a different form from direct expropriation, a common element that unites both is the requirement of a substantial or near-total deprivation of the use or economic value of the investment.[477] This also distinguishes the rules on expropriation from other IIA standards.[478] Beyond the required effect of an expropriation, a recurring question both in the pre-BIT era and in contemporary international investment law is whether other factors, such as the purpose and character of the state measure, may affect the decision on whether the measure constitutes an indirect expropriation that is lawful only upon full compensation.[479]

Arbitral decisions on indirect expropriation can be broadly divided into those following the 'sole effect' approach and those following the 'police powers' approach.[480] One of the most oft-cited statements representing the 'sole effect' approach was pronounced in *Santa Elena v. Costa Rica*:

> Expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property

[477] *Sempra Energy International* (n 354) Award (28 September 2007) para 285; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No ARB/02/1, Decision on Liability (3 October 2006) para 191; *Enkev Beheer BV v. Republic of Poland*, PCA Case No 2013-01, First Partial Award (29 April 2014) para 344; *Metalclad Corporation v. United Mexican States*, ICSID Case No ARB(AF)/97/1, Award (30 August 2000) para 103; *Glamis Gold. Ltd.* (n 323) para 536. See also Cox (n 232) 254.

[478] Cox (n 232) 254.

[479] Christie (n 233); Higgins (n 233); Fortier and Drymer (n 475); Jan Paulsson, 'Indirect Expropriation: Is the Right to Regulate at Risk?' Symposium Co-organized by ICSID, OECD and UNCTAD (12 December 2005) <https://www.oecd.org/investment/internationalinvestmentagreements/36055332.pdf> (accessed 3 November 2022).

[480] Fortier and Drymer (n 475) 85-6; Ben Mostafa, 'The Sole Effect Doctrine, Police Powers and Indirect Expropriation under International Law' (2008) 15 Australian International Law Journal 267; Noam Zamir, 'The Police Powers Doctrine in International Investment Law' (2017) 14 Manchester Journal of International Economic Law 318; Ying Zhu, 'Do Clarified Indirect Expropriation Clauses in International Investment Treaties Preserve Environmental Regulatory Space?' (2019) 60 HJIL 377, 382.

> is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains.[481]

Following such an approach, the purpose and method of the taking are irrelevant in deciding whether an indirect expropriation has occurred – the only relevant factor is the measure's effect.[482] However, the sweeping statements as the one in *Santa Elena*, which were often deemed as authorities on the 'sole effect' approach,[483] cannot be taken at face value. In fact, in the cases where tribunals seemingly adopted the 'sole effect' approach, other factors may have contributed to the findings on expropriation, which undermines the credibility of this absolute approach.[484] In *Santa Elena*, since the impugned measure was undertaken via an expropriation decree and Costa Rica did not contest the existence of an expropriation, the question of whether the measure was a compensable expropriation did not actually arise.[485]

On the other hand, the more nuanced 'police powers' approach[486] garners stronger support in case law and in several codification efforts, and is better grounded as a matter of policy. Under the 'police powers' doctrine, normal exercise of certain regulatory functions by states, which are sometimes referred to as the 'police

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[481] *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No ARB/96/1, Award (17 February 2000) para 72. See also *Metalclad* (n 477) paras 102-12.

[482] See also *Biloune v Ghana Investment Centre* Award on Jurisdiction and Liability (27 October 1989) (1993) 95 ILR 183, 209; *Metalclad* (n 477) para 111.

[483] Fortier and Drymer (n 475) 96-97; Mostafa (n 480) 280-282; Zamir (n 480) 323-324; Zhu (n 480) 383.

[484] For instance, the *Biloune* case involved a stop-work order, as well as the demolition, summons, arrest, detention, and deportation of the investor without possibility of re-entry. See *Biloune* (n 482) para 81. In *Metalclad*, the arbitrariness of the impugned measure identified by the tribunal also undermined the conclusion that the effect of the measure was the sole factor leading to the decision on the existence of indirect expropriation. *Metalclad* (n 477) paras 104-7.

[485] *Santa Elena* (n 481) paras 17-9, 34.

[486] It is usually called the 'police powers' approach because the police powers doctrine in customary international law was significant influenced by its parallel developed in the jurisprudence of the US Supreme Court. See David Schneiderman, 'NAFTA's Takings Rule: American Constitutionalism Comes to Canada' (1996) 46 The University of Toronto Law Journal 499; Mostafa (n 480).

powers',[487] does not constitute compensable expropriation.[488] As discussed in section I.A, it is well-established in customary international law that not every state measure causing loss to foreign investors would engage state responsibility.[489] The IUSCT also recognised that certain measures do not constitute an expropriation despite their damaging effects on the investment.[490] In *Too v. Greater Modesto Insurance Associates*, the IUSCT took the position that:

> [A] State is not responsible for loss of property or for other economic disadvantage resulting from *bona fide* general taxation or any other action that is commonly accepted as within the police power of States, provided it is not discriminatory and is not designed to cause the alien to abandon the property to the State or to sell it at a distress price.[491]

This position was also endorsed in codification efforts. For instance, the 1961 Harvard Draft Convention provides that:

> An uncompensated taking of property of an alien or a deprivation of the use or enjoyment of property of an alien which results from the execution of the tax laws; from a general change in the value of currency; from the action of the competent authorities of the State in the maintenance of public order, health, or morality; or from the valid exercise of belligerent rights; or is otherwise

[487] *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

[488] Mostafa (n 480) 272-9; Zamir (n 480).

[489] Section I.A of this chapter, text to fn 367-369.

[490] See eg *Sedco Inc. v. National Iranian Oil Co*., IUSCT Interlocutory Award (Award No. ITL 55-129-3) (17 September 1985) para 91. See also Maurizio Brunetti, 'The Iran-United State Claims Tribunal, NAFTA Chapter 11, and the Doctrine of Indirect Expropriation' (2001) 2 Chicago Journal of International Law 203; Hassan Sedigh, 'The Contribution of the Iran-United States Claims Tribunal to the Development of the Standard of Compensation for Nationalized Property' (2001) 2 JWTI 284.

[491] *Emanuel Too v. Greater Modesto Insurance Associates and the United States of America,* IUSCT Award (Award No. 460-880-2) (29 December 1989) para 26.

identical to the normal operation of the laws of the State shall not be considered wrongful… [492]

The Convention Establishing the Multilateral Investment Guarantee Agency, with more than 180 states parties, defines the insurable event of expropriation as 'any legislative or administrative action or omission attributable to the host government which has the effect of depriving the holder of a guarantee of his ownership or control of, or a substantial benefit from, his investment.'[493] This definition is immediately followed by an exception: 'non-discriminatory measures of general application which governments normally take for the purpose of regulating economic activity in their territories.'[494] A working paper of the OECD also provided that '[i]t is an accepted principle of customary international law that where economic injury results from a *bona fide* non-discriminatory regulation within the police powers of the state, compensation is not required.'[495]

Besides these authorities, the adoption of the 'police powers' approach, as opposed to the 'sole effect' approach, is also supported by policy. For instance, the intrinsic nature of taxation and criminal law measures means that the very purpose of these measures would be defeated if compensation is required. For general legislation or regulation, changes may become impossible if states have to compensate for every individual loss resulting from them.[496]

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[492] 1961 Harvard Draft Convention (n 104) Article 10(5).

[493] Convention Establishing the Multilateral Investment Guarantee Agency (adopted 11 October 1985, entered into force 12 April 1988) 1508 UNTS 99, Article 11(a)(ii).

[494] Ibid.

[495] OECD, '"Indirect Expropriation" and the "Right to Regulate" in International Investment Law' OECD Working Papers on International Investment 2004/4 (September 2004) <https://www.oecd.org/daf/inv/investment-policy/WP-2004_4.pdf> (accessed 3 November 2022) 5, fn 10.

[496] Glenn H Reynolds and David B Kopel, 'The Evolving Police Power: Some Observations for a New

That being said, although the 'police powers' approach is well-grounded both in law and in policy, the challenging question remains as regards how to distinguish non-compensable state measures on the one hand, and compensable expropriation on the other. Apparently, public purpose of the measure *per se* is insufficient to draw this distinction – public purpose is a condition for *lawful* expropriation and it cannot simultaneously be a reason for precluding a measure from being an expropriation.[497] As the tribunal in *Azurix v. Argentina* rightly pointed out,

> the issue is not so much whether the measure concerned is legitimate and serves a public purpose, but whether it is a measure that, being legitimate and serving a public purpose, should give rise to a compensation claim.[498]

Both in domestic law and in international law, the attempts to identify a 'magical formula' for deciding claims of indirect expropriation have foundered.[499] As observed in *Saluka v. the Czech Republic*, customary international law 'has yet to draw a bright and distinguishable line' between non-compensable regulation and indirect expropriation.[500] Indeed, it is doubtful whether 'a bright and distinguishable line' in this regard can ever be drawn. Property theorists have emphasised that property rights, being by no means absolute, are in a dialogic, interdependent relationship with regulations, and this relationship evolves over time.[501] The frontiers between private

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Century' (2000) 27 Hastings Constitutional Law Quarterly 511; William B Stoebuck, 'Police Power, Takings, and Due Process' (1980) 37 Washington and Lee LR 1957; Zamir (n 480); *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No ARB(AF)/99/1, Award (16 December 2002) para 103.

[497] Higgins (n 233) 331.

[498] *Azurix* (n 192) para 310.

[499] See Paulsson, 'Indirect Expropriation' (n 479).

[500] *Saluka* (n 105) para 263.

[501] See eg Thomas W Merrill, 'The Landscape of Constitutional Property' (2000) 86 Virginia LR 885, 945; Marc R Poirier, 'The Virtue of Vagueness in Takings Doctrine' (2002-2003) 24 Cardozo LR 93, 116, 179.

property and regulatory power are renegotiated over time, following new circumstances such as technological advancement, new scientific findings, and the evolution of social structure.[502] The distinction between compensable expropriation and non-compensable regulation cannot be defined by a steadfast rule. Instead, it calls for a case-by-case analysis.[503] In international law, the different positions of states and the dynamics in international relations further compound the complexity of this matter.

As a result, while the customary rules on indirect expropriation have settled on the 'police powers' approach, these rules remain 'very sketchy and rough', with 'large lacunae', and understandably so.[504] In this context, it seems appropriate and, indeed, necessary to have recourse to general principles of law to fill the 'gaps' in customary international law.

III.B. The relevance of general principles of law in supplementing the customary rules on indirect expropriation

Within the general framework of customary rules discussed above, the next step is to determine whether general principles of law can be relied upon to supplement the customary rules, and if so, which general principles are relevant. In light of the rules elaborated in section III.A, the following will focus on two main issues: First, what types of measures fall under the commonly recognised exercises of regulatory powers that do not require compensation (III.B.i); second, what are the requirements in terms of the method and manner of the measure that distinguish non-compensable regulation

[502] Ibid; Marc R Poirier, 'The NAFTA Chapter 11 Expropriation Debate Through the Eyes of a Property Theorist' (2003) 33 Environmental Law 851, 858-9.

[503] Paulsson, 'Indirect Expropriation' (n 479). See also Frank I Michelman, 'A Skeptical View of "Property Rights" Legislation' (1995) 6 Fordham Environmental law Journal 409, 416-20.

[504] Rudolf Dolzer, 'Indirect Expropriation of Alien Property' (1986) 1 ICSID Review 41, 59; Fortier and Drymer (n 475) 109.

from compensable expropriation (III.B.ii).

III.B.i. Commonly recognised non-compensable regulatory measures

One factor that distinguishes non-compensable regulation from compensable expropriation lies in the purpose of the measure.[505] Although both expropriation and non-compensable measures are in pursuit of public purposes,[506] a distinction can be drawn among these public purposes. Some of them cannot be lawfully pursued without compensation, because the cost incurred in the advancement of public interests should not be individually borne by the affected person. But in other cases, the public purpose cannot be achieved if compensation is required.

Some examples of commonly recognised non-compensable measures exist in criminal law.[507] In *Sedco*, the IUSCT held that forfeiture for crime fell outside the ambit of expropriation, because the affected persons do not 'rightfully possess title to the property in question'. [508] In *Quiborax v. Bolivia*, the tribunal also held that 'a legitimate exercise of [a state's] sovereign right to sanction violations of the law in its territory' was within the state's police powers and was not compensable.[509] Such conclusions seem commonsensical and uncontroversial.

Another similar example is taxation.[510] As pointed out in the literature, although

[505] See Christie (n 233) 331. ('The conclusion that a particular interference is an expropriation might also be avoided if the State whose actions are the subject of complaint had a purpose in mind which is recognized in international law as justifying even severe, although by no means complete, restrictions on the use of property.')

[506] Higgins (n 233) 331.

[507] *Sedco* (n 490) para 91; 1961 Harvard Draft Convention (n 104) 562; Fischer Williams, 'International Law and the Property of Aliens' (1928) 9 British Ybk Intl L 1, 28.

[508] *Sedco* (n 490) para 91.

[509] *Quiborax SA and Non Metallic Minerals SA v. Bolivia*, ICSID Case No ARB/06/2, Award (16 September 2015) para 202.

[510] *Emanuel Too* (n 491) para 26; 1961 Harvard Draft Convention (n 104) 562; The US Restatement of

the power of taxation may be used by a State with collectivist leanings in such a way that it deprives owners of a large part of their profits, if the tax rule is enacted in good faith and applied indiscriminately, it can hardly violate international law.[511] In investment arbitration, tribunals generally took the position that taxation is *prima facie* precluded from the scope of expropriation, unless the tax is levied in a discriminatory or arbitrary manner.[512] Other examples such as currency and financial regulations also generally do not constitute expropriation.[513]

There is no closed list of commonly recognised regulatory measures that are *prima facie* not expropriatory. In several codification efforts, non-compensable regulatory measures are broadly referred to as 'the normal operation of the laws of the State',[514] 'regulation within the police powers of the State',[515] or those 'commonly accepted as within the police powers of States',[516] leaving the specific criteria unclarified. In view of the uncertainty left by the customary rules, the recourse to general principles can be justified in certain cases. On the boundaries between private property and regulatory powers, there does not seem to be compelling reasons why international law cannot draw upon domestic legal principles.

One pertinent general principle is the principle that one cannot use their property in a way that causes injury to others, which is recognised both in civil law and

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the Foreign Relations Law (n 369) § 712, comment g.

[511] See Williams (n 507) 28.

[512] See *RosInvest Co UK Ltd v. The Russian Federation*, SCC Case No V079/2005, Final Award (12 September 2010) para 628; *Valeri Belokon v. the Kyrgyz Republic*, UNCITRAL Award (24 October 2014) paras 198-9.

[513] See 1961 Harvard Draft Convention (n 104); *Total S.A.* (n 251) paras 315-35.

[514] 1961 Harvard Draft Convention (n 104) Article 10(5).

[515] OECD, '"Indirect Expropriation" and the "Right to Regulate" (n 495) 5, fn 10.

[516] The US Restatement of the Foreign Relations Law (n 369) § 712, comment g. See also *Saluka* (n 105) para 262.

common law systems and is sometimes referred to as the principle of *sic utere tuo ut alienum non laedas* (hereinafter referred to as 'the principle of *sic utere tuo*').[517] In domestic laws, this principle plays a crucial role in defining the frontiers between private property and regulatory powers.[518] For instance, it forms part of the foundations for the police powers doctrine in US constitutional law.[519] In an early case decided by the US Supreme Court, it was stated that:

> A prohibition simply upon the use of property for purposes that are declared by valid legislation to be injurious to the health, morals, or safety of the community, cannot, in any just sense be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes…[520]

In another case, the Court pointed out that where the government prevents the use of property that is harmful to the public, the government is not required to compensate, because under the principles of property and nuisance,

> the use of these properties for what are now expressly prohibited purposes was *always* unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of

[517] See Jutta Brunnée, 'Sic utere tuo ut alienum non laedas', *Max Planck Encyclopedia of International Law* (2022). In the context of inter-state relations, this principle has acquired the status of customary international law. It requires that one state shall not exercise its sovereign rights within its jurisdiction in a way that causes injury to other states. However, the rules on expropriation of aliens' property concern a different matter, and there does not seem to be evidence that this principle has achieved the customary status in the context of expropriation. Accordingly, the present author takes the position that the principle of *sic utere tuo* in relation to the expropriation should be treated as a general principle of law.

[518] Elmer E Smead, 'Sic Utere Tuo Ut Alienum Non Laedas: A Basis of the State Police Power' (1936) 21 Cornell LR 276; Christopher G Tiedeman, *A Treatise on the Limitations of Police Power in the United States* (Da Capo Press 1886) 4-5; Thomas M Cooley, *The General Principles of Constitutional Law in the United States of America* (Little, Brown and Co. 1880) 310-327.

[519] Tiedeman (n 518) 4-5; Cooley (n 518) 310-27.

[520] *Mugler v. Kansas*, 123 U.S. 623 (1887) 668-669.

nuisance and property law explicit.[521]

In this way, the principle of *sic utere tuo* distinguishes cases where the investor's exercise of property rights is injurious to the general public and justifies restrictions, from cases where the investor is forced to bear the burden for public interests and thus deserves compensation. Obviously, the same matter may be regulated by different norms in other jurisdictions, and the quotes above are not meant to suggest that the expropriation clause should be interpreted following the approach taken by the US Supreme Court. The general principle ultimately identified may also differ from its parallel in domestic laws.[522] For present purposes, it suffices to observe that for those who seek to rely on general principles of law to decide on indirect expropriation, recourse can be made to the general principle of law corresponding to the principle of *sic utere tuo* (or the principle of public nuisance and the like) applied in domestic legal systems.

This principle can be crucial in certain cases. One leading example in this regard is *Methanex v. US*. The dispute in that case concerned California's ban of a gasoline additive called MTBE, which, it was found, may pollute surface water and groundwater.[523] The claimant alleged, *inter alia*, that the ban of MTBE was politically motivated, deprived it of a substantial portion of its investment, and therefore constituted an expropriation.[524] Yet, the tribunal held that such a measure, which was pursuing a legitimate public purpose, was non-discriminatory, and was adopted in

[521] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) 1030 (emphasis in the original).

[522] Chapter 6, Section II.

[523] *Methanex Corporation v. United States of America*, UNCITRAL Award (3 August 2005) Part II, Chapter D, paras 1-23.

[524] Ibid paras 24-8.

accordance with due process, did not constitute a compensable expropriation.[525] While the tribunal did not expressly rely on general principles of law, the decision could have been justified by the principle of *sic utere tuo.* The harmful effects of MTBE are crucial in distinguishing the measure in that case from measures such as a planning decision preventing the manufacturing activities of a factory for urban development purposes.

A similar situation occurred in *Chemtura v. Canada.* In that case, the claimant alleged that Canada's ban of the chemical 'lindane', which was deemed by the government as a threat to public health and the environment, constituted an indirect expropriation of its investment.[526] In that regard, the tribunal noted that the use of lindane has raised serious concerns both within states and at the international level, and that lindane was banned in several states and enlisted for elimination under the Stockholm Convention on Persistent Organic Pollutants.[527] In this context, the tribunal held that the measure was 'motivated by the increasing awareness of the dangers presented by lindane for human health and the environment.'[528] Accordingly, after finding that the measure was carried out in good faith and in a non-discriminatory manner,[529] the tribunal concluded that the impugned measure was 'a valid exercise of the state's police powers' and was not expropriatory.[530]

In *Philip Morris v. Uruguay*, one of the challenged measures was the restrictions imposed on the use of the trademarks owned by the claimants in order to

[525] Ibid Part IV, Chapter D, paras. 7-15.

[526] *Chemtura Corporation v. Canada*, UNCITRAL Award (2 August 2010) paras 6-49.

[527] Ibid paras 135-6.

[528] Ibid para 266.

[529] Ibid paras 138, 266.

[530] Ibid para 266.

mitigate the public health risks associated with tobacco consumption.[531] When deciding whether the restrictions on the trademarks constituted an indirect expropriation of the claimants' intellectual property rights, the tribunal drew attention to the inherent limits of property rights, and stressed that a trademark holder 'does not enjoy an absolute right of use, free of regulation.'[532] It observed that the BIT 'does not prevent Uruguay, in the exercise of its sovereign powers, from *regulating harmful products in order to protect public health* after investments in the field have been admitted.'[533] As an example, the tribunal pointed out that: 'If a food additive is, subsequent to the grant of a trademark, shown to cause cancer, it must be possible for the government to legislate so as to prevent or control its sale notwithstanding the trademark.'[534]

Although the tribunals in these cases did not explain whether they were relying on general principles of law, the *sic utere tuo* principle could have been invoked to justify the decisions. Other legal principles relating to the limits of property rights may also be relevant in defining the lawful grounds for restricting property rights without compensation, especially as the customary rules do not give a clear answer in this respect.

III.B.ii. The method and manner of the regulatory measure

The purpose of the measure is not the sole factor in the consideration of whether a regulatory measure constitutes a compensable expropriation. Instead, it is widely accepted that regulatory measures falling under the 'police powers' of the state, if

[531] *Philip Morris* (n 86) Award (8 July 2016) paras 74-132.

[532] Ibid paras 255-271.

[533] Ibid para 288 (emphasis added).

[534] Ibid para 269.

conducted in a discriminatory or manifestly arbitrary manner, can still constitute an expropriation when they cause significant loss to investors.[535] For instance, if a tax is imposed in such an arbitrary manner that it is clearly a pretext, and if it has the effect equivalent to a taking, the taxation would still constitute an expropriation. However, beyond such straightforward cases, the customary rules are less clear on whether there are other circumstances that may render a regulation a compensable expropriation. For this reason, the 1961 Harvard Draft Convention provides that a regulatory measure depriving an alien of the use or enjoyment of their property without compensation can be lawful only if the measure is, *inter alia*, 'not an unreasonable departure from the principles of justice recognized by the principal legal systems of the world.'[536]

In this context, it is worth examining whether and to what extent general principles of law can be relied upon to supplement the customary rules on expropriation regarding the method and manner of regulatory measures. In investment arbitration, tribunals have resorted to general principles of law, including the principle of legitimate expectations and the principle of proportionality, when determining whether the measure constitutes an indirect expropriation.[537] The discussion below will focus on these principles.

In this connection, it is worth recalling that the FET standard also deals with the method and manner of regulatory measures.[538] It bears asking to what extent the conclusions reached in section I.A regarding the minimum standard are relevant here.

[535] *RosInvest Co UK Ltd v. The Russian Federation* (n 512) para 628; *Valeri Belokon* (n 512) paras 198-9; Christie (n 233) 338; Paulsson, 'Indirect Expropriation' (n 479).

[536] 1961 Harvard Draft Convention (n 104) Article 10(5).

[537] See *Tecmed* (n 256) paras 122, 154; *Philip Morris* (n 86) Award (8 July 2016) para 305; *Azurix* (n 192) para 311; *Grand River* (n 256) paras 127, 140.

[538] Section I of this chapter.

However, expropriation was conventionally treated as a separate matter under customary international law and, given the severity of the interference with property rights in cases of expropriation, it is likely that legal requirements that are inapplicable under the minimum standard nonetheless apply under the rules on expropriation.[539] Thus, despite the conclusions reached in Section I.A, the relevance of the principle of legitimate expectations and the principle of proportionality deserves separate scrutiny when determining whether a regulatory measure constitutes an expropriation.

1. Legitimate expectations

Regarding the principle of legitimate expectations, there are some authorities supporting its relevance in supplementing the customary rules on indirect expropriation. In the 1967 OECD Draft Convention on the Protection of Foreign Property, states are required to observe 'undertakings given by it in relation to property of nationals of any other Party.'[540] In the commentary, it is explained that an undertaking can be either consensual or unilateral, but it must relate to the property concerned.[541] Importantly, it is also clarified that this obligation does not apply 'in respect of undertakings incidentally affecting the property of a foreign national.'[542] The authors of the Draft Convention did not make clear whether by precluding 'undertakings incidentally affecting the property', the protection of legitimate expectations only applies to measures whose effect is equivalent to an expropriation. Yet, in light of the conclusion reached in Section I.A, ie that the minimum standard does not protect legitimate expectations *per se*, the position taken in the Draft Convention is better understood as

[539] See Paparinskis, *Minimum Standard* (n 11) 227-228.

[540] 1967 OECD Draft Convention on the Protection of Foreign Property (n 242) Article 2.

[541] Ibid commentary to Article 2, para 3(a).

[542] Ibid commentary to Article 2, para 3(b).

recognising the complementary role of the legitimate expectations principle in relation to the customary rules on indirect expropriation.

The relevance of legitimate expectations when deciding claims of expropriation finds support in the *Shufeldt* case between the US and Guatemala, which concerned a government contract between Shufeldt, a US citizen, and Guatemala. Under that contract, Shufeldt was entitled to extract and export chicle from Guatemala for a period of time.[543] After several years of operation under the contract, the Guatemalan authorities passed a decree 'disapproving' the contract as it was invalid under Guatemalan law.[544] During the intervening period, Shufeldt had expended large sums to sustain the operation, which was put to a halt by the decree. The US claimed for pecuniary indemnification for the loss caused to Shufeldt.[545] In particular, the US claimed that:

> [T]he Guatemala Government having recognized the validity of the contract for six years and received all the benefits to which they were entitled under the contract and allowed Shufeldt to go on spending money on the concession, is precluded from denying its validity, even if the approval of the Legislature had not been given to it.[546]

This argument was accepted by the tribunal as 'sound and in keeping with the principles of international law', without elaborating on the particular source it relied upon.[547] Without prejudging the proper content of the general principle following the

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[543] *Shufeldt Claim (Guatemala, USA)* (1930) 2 RIAA 1079, 1083-5.

[544] Ibid 1094.

[545] Ibid 1083.

[546] Ibid 1094.

[547] Ibid.

identification rules to be discussed in Chapter 7, this decision broadly corresponds to the protection of legitimate expectations arising from governmental acts that are void *ab initio* under domestic laws.[548]

Moreover, in view of the uncertainty caused by the ambiguous rules on indirect expropriation under customary international law, states started to give more detailed clarifications in more recent IIAs. One factor that often appears in these clarifications is 'the extent to which the government action interferes with distinct, reasonable investment-backed expectations'.[549] In light of the aforementioned authorities and practice, as well as the ambiguity of the customary rules, it seems appropriate to resort to the general principle derived from domestic legal systems regarding the protection of 'legitimate expectations' when deciding whether an indirect expropriation has occurred.

2. Proportionality

Another general principle that has been referred to in determining the existence of an indirect expropriation is the principle of proportionality.[550] In doing so, some tribunals have drawn on the jurisprudence of the ECtHR.[551] Yet, compared with the case of

[548] For relevant discussion of this principle, see Chapter 7, Sections I.B, text to fn 905-909.

[549] Canada-Korea FTA (signed 22 September 2014, adopted 1 January 2015) Annex 8-B (c)(ii); CAFTA-DR (n 320) Annex 10-C (4)(a)(ii); Canada-Côte d'Ivoire BIT (signed 30 November 2014, entered into force 14 December 2015) Annex B.10(2)(b); Canada-Czech Republic BIT (signed 6 May 2009, entered into force 22 January 2012) Annex A(b)(ii); CETA (n 248) Annex 8-A (2)(c); Korea-Vietnam FTA (signed 5 May 2015, entered into force 20 December 2015) Annex 9-V (c)(i)(B); Korea-Colombia FTA (signed 21 February 2013, entered into force 15 July 2016) Annex 8-B (3)(a)(ii); Hong Kong-Chile BIT (signed 18 November 2016, entered into force 14 July 2019) Annex 1(3)(a)(ii); India-Senegal BIT (signed 3 July 2008, entered into force 17 October 2009) Annexure 5.1(2)(iii); India-Syrian Arab Republic BIT (signed 18 June 2008, entered into force 2009, terminated 20 June 2020) Annex 2(iii); CPTPP (n 213) Annex 9-B, 3(a)(ii); USMCA (n 213) Annex 14-B, 2(a)(ii).

[550] *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No ARB/03/15, Award (31 October 2011) para 241; *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No ARB/09/2, Award (31 October 2012) para 522; *LG&E* (n 477) Decision on Liability (3 October 2006) paras 194-5; *Azurix* (n 192) para 311; *Tecmed* (n 256) para 122.

[551] *Tecmed* (n 256) para 122; *Occidental Petroleum Corporation and Occidental Exploration and*

legitimate expectations, the relevance of the proportionality principle finds less support. Uncertainty in this regard might be cleared if the IIA provides some guidance.

A few IIAs expressly stipulate that tribunals should consider the degree of correlation between the measure adopted and the public purpose pursued when determining whether the measure constitutes an expropriation. But the required degree of correlation and the standard of review differ in these IIAs. At one end of the spectrum, some IIAs expressly refer to the notion of proportionality, requiring tribunals to consider whether the measure 'is proportionate to its objectives'.[552] At the other end of the spectrum, some IIAs provide that general regulations do not constitute expropriation unless the measure 'is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith'.[553] As a middle ground, some IIAs, notably those concluded by India, require 'reasonableness' of the measure, in the sense that there must be 'a reasonable nexus' between the measure and the aim pursued.[554]

Such clarifications would certainly ease the difficulty faced by tribunals when

Production Company (n 251) paras 402-9; *Azurix* (n 192) para 311. See also Stone Sweet and della Cananea (n 28) 917.

[552] China-Japan-Republic of Korea Trilateral Investment Agreement (signed 13 May 2012, entered into force 17 May 2014) Protocol, para 2(b)(3); China-Republic of Korea FTA (signed 1 June 2015, entered into force 20 December 2015) Annex 12-B, 3(a)(iii); ASEAN-India Investment Agreement (signed 12 November 2014, not in force) Article 8(3); Cabo Verde-Hungary BIT (signed 28 March 2019, entered into force 2 May 2020) Article 6(c); Belarus-Hungary BIT (signed 14 January, entered into force 28 September 2019) Article 6(2)(c).

[553] Canada-Moldova BIT (signed 12 June 2018, entered into force 23 August 2019) Annex B, 10(c); Austria-Nigeria BIT (signed 8 April 2013, not in force) Article 7(4). See also India-Syrian Arab Republic BIT (n 549) Annex 3. See also 2012 US Model BIT, Annex B 4(b); EU-Singapore FTA (signed 15 October 2018) Annex 1.2; Korea-Vietnam FTA (n 549) Annex 8-B; Canada-Jordan BIT (signed 28 June 2009, entered into force 14 December 2009) Annex B.13; Canada-Peru BIT (signed 14 November 2006, entered into force 20 June 2007) Annex B.13; CAFTA-DR (n 320) Annex 10-C.

[554] India-Jordan BIT (signed 30 November 2006, entered into force 22 January 2009, terminated 21 March 2020) Annexure-A 2(iv); India-Lithuania BIT (signed 31 March 2011, entered into force 1 December 2011) Annex 2(iv); India-Nepal BIT (signed 21 October 2011, terminated 22 March 2017) Article 5(2)(b)(iv); India-Senegal BIT (n 549) Annexure 5.1; India-Seychelles BIT (signed 2 June 2010, terminated 22 March 2017) Annex 2(iv); India-Syrian Arab Republic BIT (n 549) Annex 2(iv).

deciding on indirect expropriation. Where the IIA expressly mentions proportionality of the measure as a relevant factor, the principle of proportionality would obviously be relevant. Conversely, an expropriation clause requiring bad faith as a condition for 'regulatory takings' would preclude the relevance of that principle. Under an expropriation clause requiring 'reasonableness' of the measure, a tribunal is likely to apply a 'reductionist' version of the proportionality test, limiting the scrutiny to the legitimacy of the purpose and the logical connection between the measure and the purpose.[555]

That being said, most IIAs in existence do not clarify the required method and standard of review, and tribunals applying these IIAs have to rely on general international law and the text of the IIA. As shown below, there is no evidence in the classic authorities that the customary rules on expropriation require a relationship of proportionality between the measure and its purpose for that measure to be non-compensable. Instead, a more deferential standard has been adopted to prevent states from avoiding international responsibility by taking aliens' property *in the guise of* exercising police powers.[556] More fundamentally, the proportionality test does not seem to fit in with the structure of the expropriation rules under most IIAs. In particular, the balancing element in the proportionality analysis is not compatible with the 'all or nothing' approach to compensation under these rules.[557]

As discussed in Chapter 3, one of the major objectives of the BIT programmes launched by capital-exporting states in the second half of the twentieth century was to

[555] For different versions of the principle of proportionality, see Chapter 7, Section I.B.

[556] See eg 1961 Harvard Draft Convention (n 104) 562; Christie (n 233) 338.

[557] See Ursula Kriebaum, 'Regulatory Takings: Balancing the Interests of the Investor and the State' (2007) 8 JWTI 717, 719-20.

reinforce their position of full compensation for expropriation, in response to the NIEO movement.[558] As a result, in most IIAs, the Hull formula of full compensation was adopted, and for an expropriation to be lawful, the expropriating state must compensate the 'fair/genuine market value' of the property taken.[559] Accordingly, under the expropriation clause of most IIAs, full compensation must be paid whenever a regulatory measure constitutes an indirect expropriation, whereas no compensation is required if it is a legitimate exercise of police powers.[560]

On the other hand, the principle of proportionality requires adjudicators to 'establish what part of the deprivation represents the gap between the actual loss and the threshold of tolerable proportionality.'[561] While the rationale behind the proportionality principle is to safeguard private rights against undue interference by the government,[562] a proportionality analysis may also allow the government to justify the interference based on public interest.[563] Thus, public interest may justify compensating in an amount less than the fair market value of the property taken.[564] Irrespective of

[558] See Chapter 3, Section I.B, text to fn 202. That said, it remains uncertain whether the requirement of 'full compensation' represents customary international law. See Cox (n 232) 299-300; Reinisch, 'Legality of Expropriation' (180) 194-195; Oscar Schachter, 'Compensation for Expropriation' (1984) 78 AJIL 121.

[559] See eg US-Argentina BIT (n 226) Article IV(1); US-Ecuador BIT (n 226) Article III(1); UK-Egypt BIT (signed 11 June 1975, entered into force 24 February 1976) Article 5; UK-Angola BIT (signed 4 July 2000) Article 5(1); UK-India BIT (signed 14 March 1994, entered into force 6 January 1995, terminated 22 March 2017) Article 5(1); ECT (n 226) Article 13(1); ASEAN Comprehensive Investment Agreement (signed 26 February 2009, entered into force 24 February 2012) Article 14(b); CAFTA-DR (n 320) Article 10(7)(2)(b). See also Cox (n 232) 295-297.

[560] See Kriebaum 'Regulatory Takings' (n 557) 719-20. It remains possible that a measure that does not constitute an expropriation may breach other treaty provisions such as the FET clause and give rise to state responsibility by virtue of these other provisions.

[561] Paulsson, 'Indirect Expropriation' (n 479).

[562] Robert Alexy, *A Theory of Constitutional Rights* (OUP 2002) 100-5; Stone Sweet and Mathews (n 407).

[563] Ranjan (n 399) 870.

[564] *James and Others v. the United Kingdom* App no 8793/79 (ECtHR, 21 February 1986) para 54; *Lithgow and Others v. The United Kingdom* App no 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81 (ECtHR, 8 July 1986) para 121.

what analytical structure and what standard of review are adopted in the proportionality analysis,[565] it is incompatible with the 'all or nothing' approach under the expropriation rules in most IIAs.

In essence, this incompatibility can be explained by the different underpinnings of the rules applicable to *aliens* and those applicable to *nationals* in terms of sacrificing or bearing the costs for public interests of the state. This is illustrated in the jurisprudence of the ECtHR. When determining the lawfulness of interferences with private property under Article 1, Protocol No 1 of the European Convention, the ECtHR draws a distinction between nationals and non-nationals.[566] As regards the interference with private property of nationals, the Court applied the proportionality analysis and examined whether the loss incurred, *taken together with the compensation paid*, is proportionate to the legitimate aims pursued.[567] As a result, according to the Court, the protection accorded to nationals under Article 1, Protocol No 1 does not guarantee a right to full compensation in all circumstances: 'Legitimate objectives of "public interest", such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for *less than reimbursement of the full market value*.'[568] On the other hand, for the Court, different rules apply to aliens because:

> To begin with, non-nationals are more vulnerable to domestic legislation: unlike nationals, they will generally have played no part in the election or designation of its authors nor have been consulted on its adoption. Secondly,

[565] In practice and in the literature, a variety of approaches have been taken in this respect. See Chapter 7, Section I.B.

[566] *James and Others* (n 564) paras 58-66; *Lithgow and Others* (n 564) paras 111-119.

[567] *James and Others* (n 564) para 54; *Case of Matos e Silva, Lda. and Others v. Portugal* App no 15777/89 (ECtHR, 16 September 1996) paras 91-3.

[568] *James and Others* (n 564) para 54; *Lithgow and Others* (n 564) para 121 (emphasis added).

> although a taking of property must always be effected in the public interest, different considerations may apply to nationals and non-nationals and *there may well be legitimate reason for requiring nationals to bear a greater burden in the public interest than non-nationals*.[569]

The Court further pointed out that it has not been demonstrated that state practice has developed to the point where it can be said that the parties to Protocol No 1 regard the protection accorded to aliens under 'general principles of international law' equally applies to nationals.[570] Whether the policy reasons offered by the ECtHR are valid or not, when treaty parties to IIAs included the 'full compensation' clause, they certainly entertained considerations that are different from those behind their domestic takings law. Indeed, domestic laws of many states require less than full compensation in cases of expropriation for public purposes.[571]

For these reasons, the proportionality analysis, which originates in domestic public laws and was applied by the ECtHR regarding the property rights of nationals, cannot be relied upon when deciding expropriation claims under a typical IIA demanding 'full compensation'. When deciding under such an IIA, the relevant question is not whether the interference with property rights, considered together with the amount of compensation, is proportionate to the public purpose pursued, but whether the financial burden *should be borne* by the foreign investor or not. This turns on whether the measure constitutes a legitimate exercise of police powers that are commonly recognised as non-compensable, as already discussed in Section III.B.i.

That being said, a state cannot escape the obligation to compensate for

[569] *James and Others* (n 564) para 63; *Lithgow and Others* (n 564) para 116 (emphasis added).
[570] *James and Others* (n 564) para 65; *Lithgow and Others* (n 564) para 118.
[571] Porterfield (n 181).

expropriating foreign investors' property simply by alleging that the measure was in exercise of police powers.[572] Where there is clear evidence of an expropriatory intention, bad faith, or abuse of power, the police powers doctrine cannot be invoked to preclude the finding of an expropriation.[573] As explained in the 1961 Harvard Draft Convention, when determining whether a regulatory measure is a compensable 'taking', one must ensure that 'the judicial, fiscal, and police powers of the State not be used to cloak an uncompensated seizure of an alien's property'.[574] As examples, the authors of the Draft Convention mentioned acts such as confiscatory taxes whose real intention is to take the property from an alien, and an unattainably high standard of conduct imposed on an alien as a pretext to take their property.[575] But the 'real intention' of the government behind the measures might be hard to ascertain, which may pose evidential difficulty in practice. In light of such considerations, the test mentioned by Christie seems appropriate when deciding on indirect expropriation. According to him, 'if the reasons given are valid and bear some *plausible relationship* to the action taken, no attempt may be made to search deeper to see whether the State was activated by some illicit motive.'[576] Applying this 'reasonable connection' test, the tribunal should not review the balance struck by the government and whether less restrictive options are available.

Indeed, in investment arbitration cases where the tribunal expressly relied on the proportionality principle to decide on expropriation, the decision often could have

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[572] See 1961 Harvard Draft Convention (n 104) 562; *Quasar de Valores SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. and ALOS 34 S.L. v. The Russian Federation*, SCC Case No. 24/2007, Award (20 July 2012) paras 177-185; *Valeri Belokon* (n 512) paras 199-210.

[573] Ibid.

[574] 1961 Harvard Draft Convention (n 104) 562.

[575] Ibid.

[576] Christie (n 233) 338 (emphasis added).

been reached on other grounds. In most of these cases, either the impugned measure did not cause a sufficiently severe loss to warrant a finding of expropriation,[577] or there was manifest arbitrariness on the part of the state.[578] A similar situation appeared in *Tecmed v. Mexico*, one of the most cited authorities on the relevance of the principle of proportionality in decisions on expropriation.

In *Tecmed*, the challenged measure was Mexico's refusal to renew the claimant's landfill permit, which neutralised the latter's investment while no compensation was paid.[579] In response, Mexico argued that the refusal to renew the permit fell within its police powers to protect the environment and public health.[580] In this context, the tribunal relied on the proportionality principle to determine the existence of an indirect expropriation.[581] On the facts of the case, the tribunal found that the claimant's landfill business 'never compromised the ecological balance, the protection of the environment or the health of the people, and all the infringements committed were either remediable or remediated or subject to minor penalties.'[582] For the tribunal, it was the political circumstances, instead of concerns about the environment or public health, that have led to the government's refusal to grant renewal.[583] In particular, there were socio-political tensions surrounding the claimant's landfill business and the government was under community pressure to remove the landfill site,[584] but these circumstances were not caused by the shortcomings in the

[577] *El Paso* (n 550) para 255; *LG&E* (n 477) Decision on Liability (3 October 2006) para 191.

[578] *Deutsche Bank* (n 550) paras 522-4.

[579] *Tecmed* (n 256) para 39.

[580] Ibid para 97.

[581] Ibid para 122.

[582] Ibid para 148.

[583] Ibid para 127.

[584] Ibid paras 128-9.

operation of the business.[585] In light of these findings, the tribunal decided that the refusal of renewal was not a proportionate response to the concerns invoked by Mexico and it therefore constituted an expropriation.[586]

In view of the facts of the case and the findings by the tribunal, *Tecmed* could have been decided without relying on the proportionality principle. Applying the 'reasonable connection' test, it could have been held in that case that no *plausible relationship* existed between the measure taken and the alleged public purpose, ie protecting public health and the environment. In such a case, a tribunal need not and should not investigate further on whether the government has struck the right balance between competing interests and whether there are other options that interfere less with the investor's rights.

IV. Interim conclusion

Through a substantive analysis of the relevance of general principles of law in interpreting the FET, FPS and expropriation clauses, the present chapter confirmed and substantiated the conclusions reached in Chapter 3. In the transition from the pre-BIT legal regime to modern investment treaty law, the interactions between IIAs and customary international law were translated into a changed relationship between the international and domestic legal standards in this area. This change, in turn, affected the relevance of general principles of law, particularly those derived from domestic public laws, in the interpretation of the substantive IIA standards.

When interpreting the IIA standards, the rationale behind them, which often

[585] Ibid paras 137-8, 147.

[586] Ibid paras 132-151.

differs from that of the relevant domestic rules, can explain the limited role of general principles in certain cases. The minimum standard incorporated in some of the FET and FPS clauses can roughly be considered as serving as the 'bottom line' vis-à-vis the protection under domestic laws. As such, the high threshold for breach under the minimum standard often precludes the relevance of general principles derived from domestic public laws, as the latter usually dictate more protective criteria. For the expropriation clause in IIAs, the reasons behind this clause, particularly the 'full compensation' requirement, are also distinct in crucial ways from the considerations behind domestic takings law. This explains the structural difference between the international and domestic rules, and makes it inappropriate to rely on the proportionality principle when interpreting the expropriation clause. That said, where certain aspects of the customary rules are overly ambiguous, recourse can still sometimes be had to general principles, such as the principle on the scope of access to justice and the principle of *sic utere tuo*.

On the other hand, where the IIA diverges from the customary rules, establishing autonomous standards of protection, there can be greater room for references to general principles of law. For the FET and FPS clauses, this is not only because the general context and the object and purpose of an IIA may justify a higher standard of protection compared to the minimum standard, but also because the legal relationship under an IIA is usually more analogous to that under domestic public laws. Therefore, the principle of proportionality and the principle of legitimate expectations, which cannot be relied upon when interpreting an FET clause incorporating the minimum standard, may nevertheless help to give substance to an FET clause when it is autonomous from the customary rules. If, in the future, states choose to loosen the

'full compensation' requirement in the expropriation clause,[587] that may bring the international rule closer to the corresponding domestic rules and may allow for a greater role of general principles of law.

[587] See eg SADC Model BIT (2012) <https://edit.wti.org/document/show/904957c4-fcdd-49e9-ac81-3e7f1c090feb> (accessed 3 November 2022) Article 6.2 (Options 1 and 2); COMESA Common Investment Area Agreement (signed in 2007, not in force yet) Article 20(3).

Chapter 5. Comparative Law and Autonomous Concepts in IIAs

Concepts are the 'backbones' to which the regulatory 'flesh' is attached. In international investment law, although concepts received less attention than substantive standards, the normative implications of certain legal concepts in IIAs are no less far-reaching and fundamental. However, problems in the interpretation of IIA concepts, especially regarding their relationship with domestic laws, are more insidious compared with substantive standards.

As with substantive standards, the interpretation of IIA concepts is faced with the dilemma between the supremacy of international law over domestic law, on the one hand, and the need for international law to draw on domestic laws, on the other. As illustrated in previous chapters, when interpreting substantive standards, legal principles derived from comparative law analysis may play an important role in tackling the issue at hand by bridging the gap between domestic and international norms. As discussed below, comparative law can and should sometimes play a similar role when interpreting 'autonomous' treaty concepts[588] that have a parallel in domestic law, through legal channels including the 'ordinary meaning' of treaty terms, general principles of law, and supplementary means of treaty interpretation (Section I). However, the relationship between legal concepts in IIAs and their counterparts in domestic laws has not received enough attention in investment arbitration. Tribunals have at times interpreted treaty concepts in ways that are overly detached from basic legal notions in domestic laws. As explained in Section II, this sometimes has far-reaching implications, including undermining the legal principles in domestic laws and

[588] For 'autonomous interpretation', see Gardiner (n 295) 32-3; Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2009) 335-8.

unduly constraining the policy space of states.

I. Autonomous concepts in international law: Entry points of comparative law

As discussed in Chapter 3, when dealing with questions of the treatment of aliens that were also regulated under domestic laws, international law did not create its own legal vocabulary from scratch. Instead, it has drawn extensively on domestic laws, primarily through general principles of law.[589] Besides general principles, in treaty context, the borrowing from domestic laws can also be based on other elements of treaty interpretation.[590] Indeed, it is sometimes *necessary* for international law to borrow from domestic legal institutions, especially where the international rules overlap with, or are directly related to, certain norms in domestic laws. In such areas, where the international rule leaves a certain notion undefined and that notion has a parallel in domestic laws, it is sometimes natural to fall back on the corresponding domestic norms.

This broad view was echoed in the ICJ's decision in *Barcelona Traction*, where the Court had to decide whether a state could exercise diplomatic protection over shareholders of a company in relation to the injury suffered by that company.[591] On the issue of legal standing, the Court observed that it must

> start from the fact that the present case essentially involves factors derived from municipal law – the distinction and the community between the company and the shareholder – which the Parties, however widely their interpretations may differ, each take as the point of departure of their reasoning. If the Court were

[589] Chapter 3, Section III.

[590] Chapter 3, Section II.

[591] *Barcelona Traction* (n 215).

> to decide the case in disregard of the relevant institutions of municipal law it would, without justification, invite serious legal difficulties. *It would lose touch with reality, for there are no corresponding institutions of international law to which the Court could resort*. Thus the Court has, as indicated, not only to take cognizance of municipal law but also to refer to it. It is to rules generally accepted by municipal legal systems which recognize the limited company whose capital is represented by shares, and not to the municipal law of a particular State, that international law refers. In referring to such rules, the Court cannot modify, still less deform them.[592]

Importantly, the Court did not apply the law of any particular state, as that would practically subject international law to domestic law. If the matter is handled by way of a *renvoi* to a particular domestic law, the right of a state to exercise diplomatic protection would be dependent either on its own national law or the law of another state: neither would be acceptable.[593] Instead, by referring to the 'rules generally accepted by municipal legal systems', the Court followed the general approach taken at the domestic level without subjecting the international rule to any particular domestic legal system.

In treaty context, where a treaty concept has a parallel in domestic laws and is undefined in international settings, it is also natural to take into account the relevant domestic legal institutions. The interpretation of such a concept also faces the question of whether to interpret it through a *renvoi* to a particular domestic law or to interpret it by reference to the general consensus among states. This matter is governed by the rules of treaty interpretation under the VCLT. In some cases, the object and purpose of the

[592] Ibid para 50 (emphasis added).

[593] See ibid Separate Opinion of Judge Gros (translation) 272.

treaty may preclude *renvoi* to the law of a particular state.

For instance, in *Exchange of Greek and Turkish Populations* before the PCIJ, Turkey sought to interpret the term 'established' in Article 2 of the Convention of Lausanne of January 30th, 1923 by reference to Turkish law, in order to determine the persons that would be exempt from the population exchange between Greece and Turkey. The Court rejected that position.[594] For the Court, although the idea of 'establishment' is akin to the concept of domicile in several domestic legal systems,[595] the application of Turkish or Greek law to the case would result in a division of population that is differently implemented in the two states. That would be inconsistent with 'the spirit of the Convention, the intention of which is undoubtedly to ensure, by means of the application of identical and reciprocal measures in the territory of the two States, that the same treatment is accorded to the Greek and Turkish populations.'[596]

Where similar considerations apply, yet the treaty concept is inherently linked to domestic legal notions, comparative law can be a crucial interpretative aid. This applies especially when interpreting treaties that overlap with or regulate domestic laws, including human rights treaties and treaties serving unification or harmonisation purposes.[597] Where concepts in these treaties have a parallel in domestic laws, to treat such concepts as a *renvoi* to a particular domestic law would sometimes effectively allow the state to determine the scope of its own international obligation, and it may

[594] *Exchange of Greek and Turkish Populations* (Advisory Opinion) PCIJ Rep Series B No 10, 19-23.

[595] Ibid 19.

[596] Ibid 20.

[597] Gardiner (n 295) 33-34; Orakhelashvili (n 588) 335-338; Franco Ferrari, 'Homeward Trend and Lex Forism Despite Uniform Sales Law' (2009) 13 Vindobona Journal of International Commercial Law and Arbitration 15; Jürgen Basedow, 'International Economic Law and Commercial Contracts: Promoting Cross-Border Trade by Uniform Law Conventions' (2018) 23 Uniform LR 1.

lead to inconsistent results for different treaty parties, defeating the very purpose of the treaty. Such considerations have led to what was sometimes called 'the principle of autonomous interpretation', which requires that the treaty term be interpreted as having an autonomous, international meaning, independent from the legal conception in each state party to the treaty.[598] In this context, adjudicators may resort to the commonality among the laws of treaty parties to give substance to a treaty concept.

For instance, in *Engel and others v. the Netherlands*, regarding the term 'criminal' in Articles 6 and 7 of the European Convention of Human Rights, the ECtHR first observed that if contracting states were allowed to determine at their discretion whether an offence should be classified as criminal or not, the operation of Articles 6 and 7 would be subordinate to their sovereign will, and that would be incompatible with the object and purpose of the Convention.[599] Following that, the Court found that when deciding whether the penalty was 'criminal' or purely 'disciplinary', it should consider '[t]he seriousness of what is at stake, *the traditions of the Contracting States* and the importance attached by the Convention to respect for the physical liberty of the person'.[600] Yet, the ECtHR did not specify the legal basis under the VCLT for considering 'the traditions of the Contracting States'.

Similarly, in *König v. Germany*, when considering the concept 'civil rights and obligations' in Article 6 of the Convention, the ECtHR observed that the meaning of that term was autonomous from a particular domestic law and any other solution might

[598] *R v Secretary of State for the Home Department, ex parte Adan* [2001] 2 AC 477, 515-517, per Lord Steyn; Gardiner (n 295) 31-35; Orakhelashvili (n 588) 335-8.

[599] *Engels and others v. the Netherlands* App no 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (ECtHR, 8 June 1976) para 81.

[600] Ibid paras 82-3 (emphasis added).

lead to results incompatible with the Convention's object and purpose.[601] However, the Court did not deny the relevance of domestic laws. To give meaning to the 'autonomous' concept of 'civil rights and obligations', it took into account 'the object and purpose of the Convention and … *the national legal systems of the other Contracting States*'.[602] Similar to its judgment in *Engel*, the Court did not specify the legal basis for the recourse to 'the national legal systems of the other Contracting States'.

Also in *König*, Judge Matscher explicitly grounded the recourse to domestic laws on 'the general principles which stem from the corpus of the national legal systems'.[603] According to him, the phrase 'civil rights and obligations' should be interpreted in accordance with the 'common denominator' of the relevant legal conceptions in the laws of the Contracting states.[604] This is not the place to expound on the proper legal basis for the reliance on domestic laws in *König*. Suffice it to say that general principles of law are one of the legal channels through which domestic laws can be taken into account, among several others.

Besides general principles, another obvious legal basis is the 'ordinary meaning' of the treaty term. Under Article 31(1) of the VCLT, 'the ordinary meaning' cannot be ascertained in isolation. It must be given in the treaty context and in light of its object and purpose.[605] The value of dictionary meanings is thus limited.[606] Instead, the

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[601] *König v. Germany* App no 6232/73 (ECtHR, 28 June 1978) para 88.

[602] Ibid para 89 (emphasis added).

[603] Ibid Separate Opinion of Judge Matscher. See also Case 29-76 *LTU Lufttransportunternehmen GmbH & Co. KG v Eurocontrol* [1976] ECR 01541 para 5.

[604] *König* (n 601) Separate Opinion of Judge Matscher.

[605] VCLT (n 261) Article 31(1).

[606] WTO, *United States Measures Affecting the Cross-Border Supply of Gambling and Betting Service – Report of the Appellate Body* (07 August 2005)WT/DS285/AB/, para 163; UN Conference on the Law of Treaties, Official Records of the First Session (26 March – 24 May 1968) A/CONF.39/C.1/SR.32, 184 (Mr Waldock).

ordinary meaning of a treaty term often needs to be ascertained by looking at the common usage of the term by treaty parties, guided by the treaty's object and purpose.[607] As observed by Koskenniemi, 'when States adopt a norm they must use the available legal-linguistic conventions which thus become constitutive of what the State can subjectively "intend".'[608] Indeed, in areas of international law that overlap with domestic laws, treaty parties often have in mind their domestic laws when drafting and negotiating the treaty.[609] Accordingly, domestic laws of the parties may sometimes help to supply the 'ordinary meaning' to treaty concepts, where this is consistent with the treaty's object and purpose.

Admittedly, in practice, the distinction between the recourse to comparative law analysis on the ground of 'ordinary meaning' and on the ground of 'general principles of law' may not be clearcut – they both are based on the commonalities among domestic legal systems. But 'ordinary meaning' implies a greater focus on the definition and characterisation of certain notions in domestic laws, whereas for general principles of law, as will be discussed in Chapter 6, their identification requires investigating the

[607] For instance, in *AAPL v. Sri Lanka*, when ascertaining the 'ordinary meaning' of the phrase 'full protection and security', the tribunal maintained that it needs 'to be construed according to the "common use which custom has affixed" to them, their "*usus loquendi*", "natural and obvious use", and "fair meaning"'. The tribunal then considered the common usage of this term in BITs in order to establish the ordinary meaning the phrase. See *Asian Agricultural Products Ltd.* (n 436) paras 47-8. In *Aguas v. Bolivia*, the tribunal considered the fact that 'the treaty negotiators likely possessed a sophisticated knowledge of business and law' and therefore, it attributed a legal, instead of factual, meaning to the term 'controlled'. See *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No ARB/02/3, Decision on Respondent's Objections to Jurisdiction (21 October 2005) para 230.

[608] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2005) 12.

[609] For example, during the drafting Article 16 of the ICCPR, the initial text '[n]o person shall be deprived of his judicial personality' was replaced by '[e]veryone shall have the right to recognition everywhere as a person before the law', because the notion of 'deprivation of judicial personality' was unknown to some systems of domestic law. See Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (N. P. Engle 2005) 371. Other examples include treaties whose purpose is to unify an area of law. See John Felemegas, *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law* (CUP 2007) 21.

underpinnings of the rules in various domestic legal systems and testing the suitability of these rules in the international context.[610] In other words, the ascertainment of the 'ordinary meaning' calls for a more 'surface' approach to the comparative law analysis than what is required for the identification of general principles.

Apart from ordinary meaning and general principles of law, as already discussed in Chapter 3, other possible channels for considering domestic laws include 'subsequent practice' in Article 31(3)(b) and 'supplementary means' in Article 32 of the VCLT.[611] For the former, the test of subsequent practice 'in the application of the treaty which establishes the agreement of the parties regarding its interpretation' must be satisfied.[612] For the latter, the requirement is more relaxed but the role of comparative law analysis is limited to a 'supplementary means'.[613]

II. Interpretation of concepts in IIAs with a parallel in domestic laws

In international investment law, as in other inward-looking legal regimes, many basic legal concepts have a parallel in domestic law and are closely related to the latter. The normative implications of these IIA concepts can be as important as those of the substantive standards discussed in previous chapters. For instance, IIAs usually define protected 'investments' by reference to concepts that are familiar in domestic law, such as 'tangible and intangible property', 'enterprise', and 'shares'.[614] These concepts

[610] Chapter 6, Section III.

[611] Chapter 3, Section II.

[612] VCLT (n 261) Article 31(3)(b).

[613] For greater detail in this regard, see Chapter 8, Section II.

[614] See eg US-Ecuador BIT (n 226) Article I(1)(a); India-United Arab Emirates BIT (signed 12 December 2013, entered into force 21 August 2014) Article 1(1); Canada-China BIT (signed 9 September 2012, entered into force 1 October 2014) Article 1(1); Japan-Peru BIT (signed 21 November 2008, entered into

delineate the scope of the rights protected under the IIA. When defining whether a legal person is protected as a 'foreign investor', some IIAs use terms such as 'seat', '*siège social*' and '*sede*',[615] which are also used to determine corporate nationality in domestic corporate law. Moreover, in general exception clauses, IIAs often make reference to 'national security' or 'essential security interests'.[616] These concepts also exist in domestic laws, and their importance has been underscored lately.[617]

When interpreting such concepts, their relationship with domestic laws is key. As discussed above, losing touch with basic notions in domestic laws may sometimes 'invite serious legal difficulties'.[618] Unfortunately, insufficient attention has been given to this matter in arbitration practice. In some cases, the tribunal brushed aside the relevant domestic legal institutions too easily, leading to consequences including disturbing the equilibrium of the legal relationship in domestic laws and even upending the fundamental principles of the latter.[619] The following examples illustrate that comparative law can and should play a greater role in interpreting some crucial IIA concepts.

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force 10 December 2009) Article 1(1); Morocco-Nigeria BIT (signed 3 December 2016) Article 1; USMCA (n 213) Article 14.1.

[615] See eg Cyprus-Serbia BIT (signed 21 July 2005, entered into force 23 December 2005) Article 1; BLEU (Belgium-Luxembourg Economic Union)-Venezuela of BIT (signed 17 March 1998, entered into force 29 April 2004) Article 1; Portugal-Venezuela BIT (signed 17 June 1994, entered into force 7 October 1995) Article 1.

[616] See eg US-Ecuador BIT (n 226) Article IX(1); US-Argentina BIT (n 226) Article XI; Japan-United Arab Emirates BIT (signed 30 April 2018, entered into force 26 August 2020) Article 18(a); India-Nepal BIT (n 554) Article 12(2); CETA (n 248) Article 28.6(b); Singapore-Rwanda BIT (signed 14 June 2018) Article 28(2).

[617] See Cheng Bian, 'Foreign Direct Investment Screening and National Security: Reducing Regulatory Hurdles to Investors through Induced Reciprocity' (2021) 22 JWIT 561; Georgios Dimitropoulos, 'National Security: The Role of Investment Screening Mechanisms' in Julien Chaisse, Leïla Choukroune, and Sufian Jusoh (eds), *Handbook of International Investment Law and Policy* (Springer 2021).

[618] *Barcelona Traction* (n 215) para 50.

[619] For a relevant discussion of this matter, see Arato (n 31).

A good example for the recourse to the laws of treaty parties appeared in the interpretation of corporate 'seat' for the purposes of defining the nationality of an 'investor' under an IIA. In *CEAC v. Montenegro*, the claimant argued that the term 'seat' in the Cyprus-Serbia BIT is a legal term of art in domestic law, and in that particular case, it should be interpreted by means of a *renvoi* to Cypriot law.[620] That position was opposed by Montenegro, who contended that the term 'seat' should be interpreted autonomously under the BIT,[621] because, *inter alia*, 'the overarching purpose of reciprocity of the BIT would be defeated' by the claimant's interpretation.[622] As Cyprus adopted the 'incorporation' theory while Montenegro adopted the 'real seat' theory regarding corporate nationality, to interpret 'seat' based on the law of a party would result in different scope of protection in the two states.[623] In that case, the tribunal avoided giving a precise meaning to that term, as none of the criteria proposed by the claimant was fulfilled anyway.[624]

A similar problem arose in *Tenaris v. Venezuela*, where the tribunal had to interpret '*siège social*' and '*sede*' in the Luxembourg-Venezuela BIT and the Portugal-Venezuela BIT respectively.[625] The claimants interpreted these terms following the 'registered seat' theory while the respondent followed the 'real seat' theory.[626] In the award, the tribunal started the analysis by acknowledging that 'neither term has been used in international law and practice as a consistent "legal term of art", with only one

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[620] *Central European Aluminium Company (CEAC) v. Montenegro*, ICSID Case No ARB/14/8, Award (26 July 2016) paras 51-61.

[621] Ibid para 98.

[622] Ibid para 101.

[623] Ibid.

[624] Ibid para 148.

[625] *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No ARB/11/26, Award (29 January 2016) para 135.

[626] Ibid.

meaning'.[627] It thus had to determine the terms' meanings in each treaty's context and object and purpose.[628] Ultimately, the tribunal resolved this matter relying on the principle of effective interpretation, since to interpret '*siège social*' and '*sede*' following the 'registered seat' theory would render the text 'constituted pursuant to/in accordance with the laws of …' redundant.[629]

Importantly for present purposes, in *Tenaris*, both parties made arguments on the laws of treaty parties.[630] In response, the tribunal observed that domestic laws of treaty parties could be considered as 'supplementary means of interpretation' under Article 32 of the VCLT, only to confirm the meaning reached under Article 31.[631] In reaching that conclusion, it noted that Article 31 did not refer to domestic law and the tribunal had to function within the confines of the treaty when interpreting these terms.[632] With this understanding, the tribunal analysed the rules on corporate seat in the law of Luxembourg, Portugal, and Venezuela, and concluded that nothing in these laws undermined its earlier conclusion.[633] In particular, both the law of Luxembourg and that of Portugal followed the 'real seat' theory, requiring actual or effective management for the purposes of corporate nationality.[634] In the case of Venezuelan law, the inadequacy of the expert's testimony rendered the matter inconclusive.[635] Nonetheless, it must be noted that the definition of corporate nationality in the Venezuelan Civil Code and Commercial Code referred to the place of administration

[627] Ibid para 144.
[628] Ibid.
[629] Ibid paras 148-154.
[630] Ibid para 163.
[631] Ibid para 170.
[632] Ibid.
[633] Ibid paras 171-195.
[634] Ibid paras 172-185.
[635] Ibid paras 186-195.

and main establishment.[636] Thus, it seems that the laws of all three states consistently adopt the 'real seat' theory.

Different from the position of the tribunal in *Tenaris,* in light of what was discussed in section I, the relevant laws of the three states are better considered as supplying the 'ordinary meaning' under Article 31 of the VCLT. This means they would carry greater weight than a 'supplementary means'. This is because the term 'seat' (as well as '*siège social*' and '*sede*') is a legal term of art in domestic laws, and it does not have an established meaning in international law. Thus, the common usage of the term in domestic laws is 'constitutive of what [state parties] can subjectively "intend"'.[637] At the same time, to interpret the term through a *renvoi* to the law of a particular party would practically allow each state to determine at its own discretion which investors are protected, and that is inappropriate in light of the importance of reciprocity embodied in the BITs. In this context, the 'ordinary meaning' of these terms should be understood in light of the consistent position in the domestic corporate laws of the treaty parties.

Indeed, although a *renvoi* to the law of a particular treaty party is inappropriate in this context, the rules on corporate nationality under domestic corporate law are closely related to the nationality of 'investors' under IIAs. At the domestic level, the rules on corporate nationality in corporate law decide in general which companies are subject to the state's regulation.[638] Inconsistency between the rules in domestic law and

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[636] See Código Civil, Gaceta Oficial de la República de Venezuela, lunes 26 de julio de 1982, Artículo 28°; Código de Comercio, Gaceta N° 475 Extraordinaria del 21 de diciembre de 1955, Artículo 203°. (The relevant terms are 'the place where its address or administration is situated' and 'the place of its main establishment') (translated by the author).

[637] Koskenniemi, *From Apology to Utopia* (n 608) 12.

[638] See Robert R Drury, 'The Regulation and Recognition of Foreign Corporations: Responses to the

the position under the IIA may lead to a discrepancy between the coverage of domestic jurisdiction and the scope of the state's international obligations. It may also make it difficult for state authorities to determine whether an investor is 'foreign' or not. Thus, states have good reasons to bear in mind the rules in their corporate law when formulating the criteria for investors' nationality in IIAs. For instance, the change in German company law from the seat theory (*Sitztheorie*) to the less restrictive incorporation theory (*Gründungstheorie*) led to the corresponding change in the German Model IIA in order to accommodate the new domestic rule.[639]

By relying on the consistent approach in the laws of treaty parties to determine the 'ordinary meaning' of the term 'seat', the rules on nationality under the IIA are aligned with the position taken at the domestic level. On the other hand, where the approaches taken in the treaty parties' domestic laws differ from one another, the domestic legal conceptions cannot satisfy the required 'ordinariness' for the purposes of Article 31(1), and the interpreter has to rely on other elements of interpretation.

Other examples of IIA concepts with parallels in domestic laws include the elements listed under the protected 'investments' in IIAs, which usually include tangible and intangible property, shares, security, and contract.[640] Obviously, the rights of investors are first established and defined under the applicable domestic law.[641] IIAs add another layer of protection at the international level. Yet, this does not mean that

"Delaware Syndrome"' (1998) 57 CLJ 165; 'The "Nationality" of International Corporations under Civil Law and Treaty' (1961) 74 HLR 1429.

[639] ILA German Branch, 'The Determination of the Nationality of Investors under Investment Protection Treaties' (2011) <https://opendata.uni-halle.de/bitstream/1981185920/78688/1/BeitraegeTWR_106.pdf> (accessed 21 June 2022) 17-9.

[640] See eg US-Ecuador BIT (n 226) Article I(1)(a); India-United Arab Emirates BIT (n 614) Article 1(1); Canada-China BIT (n 614) Article 1(1); Japan-Peru BIT (n 614) Article 1(1); Morocco-Nigeria BIT (n 614) Article 1; USMCA (n 213) Article 14.1.

[641] See Douglas, 'Hybrid Foundations' (n 222) 197-198.

the terms used in IIAs to enumerate and classify what 'investments' are covered should be defined purely by a *renvoi* to the law of the host state. That would practically allow the host state to preclude IIA protection through its own legislation. For similar reasons, the concept of 'possessions' in Article 1 of Protocol No 1 of the European Convention on Human Rights was interpreted as being autonomous from the formal classification in domestic laws of each member state,[642] although domestic law is relevant in ascertaining the content of the particular right in question.[643] Likewise, the concepts such as 'property', 'intellectual property', and 'shares' in IIAs should be interpreted as autonomous concepts, although the scope of the specific rights of the investor in each particular case is first defined under the applicable domestic law.

In most cases, the 'autonomy' of these treaty concepts does not cause problem. After all, it is usually uncontroversial and uncontested whether a company or a patent falls within the scope of 'enterprise' or 'intellectual property' under the IIA. Yet, problems arise in interpreting the concept of 'shares' as a covered investment. When interpreting this concept, tribunals have not only given it an autonomous meaning, but they have arguably gone too far in upholding the concept's autonomy. As a result, the term 'shares' as interpreted by arbitral tribunals ended up losing touch with the basic principles of domestic law, with perverse effects both at the international level and at the domestic level.

In most domestic legal systems of the world, shareholders are normally barred

[642] ECtHR, Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights, Protection of Property (31 August 2022) <https://www.echr.coe.int/Documents/Guide_Art_1_Protocol_1_ENG.pdf> (accessed 3 November) 7-8

[643] See eg *Broniowski v. Poland* App no 31443/96 (ECtHR, 22 June 2004) paras 130-133; *Pressos Compania Naviera S.A. and others v. Belgium* App no 17849/91 (ECtHR, 20 November 1995) para 31.

from directly claiming for the reflective loss resulting from injuries caused to their companies.[644] This is essential to the separate legal personality of a company. It safeguards the feasibility and efficiency of this modern legal form and protects the rights and interests of parties dealing with the company. In *Barcelona Traction*, the ICJ carefully ensured that its decision under international law was broadly consistent with that approach.[645] The ECtHR also respects the separate legal personality of companies from their shareholders.[646] Yet, relying on the inclusion of 'shares' as a protected investment under IIAs, most investment arbitral tribunals have chosen to diverge from that conventional approach, allowing shareholders to directly claim for reflective loss.[647]

The inclusion of 'shares' as protected investment may have been driven by the need to protect foreign investors investing through local entities (which is often required by the law of the host state).[648] Perhaps for that reason, investment tribunals have interpreted the term 'shares' as creating an independent right for shareholders to claim directly for the reduced value in shares arising from the injuries caused to their companies. Some tribunals have justified the departure from the decision in *Barcelona Traction* by the principle of *lex specialis*, contending that modern IIAs, by granting direct rights to investors, are distinct from the general rules of diplomatic protection.[649]

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[644] See OECD, 'Summary of the OECD Roundtable on Freedom of Investment 18' (20 March 2013) available at <https://www.oecd.org/daf/inv/investment-policy/18thFOIroundtableSummary.pdf> (accessed 3 November 2022); Gaukrodger (n 31) 13-17.

[645] See *Barcelona Traction* (n 215) 33-34.

[646] *Agrotexim Hellas S.A. and others v. Greece* App no 14807/89 (ECtHR, 24 October 1995) paras 59-71; *Géniteau v. France (No. 2)* App no 4069/02 (ECtHR, 8 November 2005) paras 21-25.

[647] See Gaukrodger (n 31) 7; Arato (n 31) 29.

[648] Arato (n 31) 29-30.

[649] *CMS Gas Transmission Company v. The Republic of Argentine*, ICSID Case No ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction (17 July 2003) paras 43-48; *Enron* (n 428) Decision on Jurisdiction (14 January 2004) para 46.

Emphasising the 'autonomy' of the shareholders' treaty rights both from general international law and from domestic laws, tribunals have developed a fairly consistent jurisprudence.[650] Some of them even claimed that this rule, being *lex specialis*, has become 'so prevalent that it can now be considered the general rule, certainly in respect of foreign investments.'[651]

The mainstream position by arbitral tribunals stands in stark contrast to the persistent objections by respondent states, who repeatedly argued in arbitral cases that shareholders cannot claim for the loss suffered by their companies and that allowing shareholders' direct claims for reflective loss is against the basic principles of both domestic and international law.[652] Indeed, despite the need to protect investors investing through local entities, from the inter-governmental discussions in multilateral fora, states do not seem to have clear policy reasons for a general acceptance of reflective loss claims by shareholders.[653] On the contrary, there are obvious risks associated with shareholders' direct claims.

First of all, in terms of procedure, allowing shareholders to claim for reflective loss may cause multiple claims for the same factual dispute, with the risks of double

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[650] See *CMS* (n 649) para 48; *Enron* (n 428) paras 46; *Güriş and others v. Syria*, ICC Case No. 21845/ZF/AYZ, Award (31 August 2020) paras 167-168; Gaukrodger (n 31) 7; Arato (n 31) 29.

[651] *CMS* (n 649) Decision on Jurisdiction (17 July 2003) para 48. For prevalence of this approach in contemporary practice, see also Note by the Secretariat, 'Shareholder Claims and Reflective Loss' UNCITRAL Working Group III (9 August 2019) A/CN.9/WG.III/WP.170.

[652] See eg *Clayton and Bilcon of Delaware Inc. v. Government of Canada*, PCA Case No 2009-04, Canada's Counter-Memorial on Damages (6 November 2017) paras 22-25; *Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No ARB/18/43, Respondent's Preliminary Objections under Article 10.20.5 of CAFTA-DR (16 August 2019) paras 6, 45; *Louis Dreyfus Armateurs SAS (France) v. Republic of India*, PCA Case No 2014-26, Award (11 September 2018) para 275; *Alghanim v. Jordan* (n 341) para 118; *Güriş and others v. Syria* (n 651) paras 161, 167.

[653] See OECD, 'Summary of the OECD Roundtable on Freedom of Investment 19' (15-16 October 2013) <https://www.oecd.org/daf/inv/investment-policy/19thFOIroundtableSummary.pdf> (accessed 4 November 2022) 18-19. See also OECD, 'Summary of the OECD Roundtable on Freedom of Investment 18' (n 644).

recovery and inconsistent decisions.[654] Although the use of consolidation, joinder, and coordination mechanisms can limit multiple proceedings resulting from shareholder claims, not all treaties and arbitration rules permit such arrangement.[655] Even if multiple proceedings are not actually launched, the possibility of such claims in themselves may hinder an efficient settlement of the dispute.[656]

Second, if shareholders can claim directly for reflective loss independently of the company's decision on how to settle the dispute with the host state, the structure of corporate management under domestic law would be under pressure.[657] Shareholders' reflective claims may also allow certain shareholders to strip assets from the company, to the detriment of creditors and other non-claimant shareholders. This may disturb the equilibrium between relevant parties under domestic law and may undermine the level playing field in the host state's market.[658]

In addition, given that investors and their investments only have rights rather than obligations under most IIAs,[659] to allow shareholders' reflective loss claims would

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[654] Arato (n 31) 33-34; Gaukrodger (n 31) 21; *Clayton v. Canada* (n 652) Canada's Counter-Memorial on Damages (6 November 2017) para 23; *Eskosol S.p.A. in Liquidazione v. Italian Republic*, ICSID Case No ARB/15/50, Decision on Respondent's Application Under Rule 41(5) (20 March 2017) para 170.

[655] Note by the Secretariat, 'Shareholder Claims and Reflective Loss' (n 651) 6.

[656] Ibid 6; Julian Arato, Kathleen Claussen, Jaemin Lee, and Giovanni Zarra, 'Reforming Shareholder Claims in ISDS' Academic Forum on ISDS Working Paper 2019/9 (17 September 2019) <http://bit.ly/ISDS_AF_SRL_2019> (accessed 4 November 2022) para 14.

[657] Vera Korzun, 'Shareholder Claims for Reflective Loss: How International Investment Law Changes Corporate Law and Governance' (2018) 40 University of Pennsylvania Journal of International Law 189; Gaukrodger (n 31) 23-24; *Clayton v. Canada* (n 652) Canada's Counter-Memorial on Damages (6 November 2017) para 24.

[658] *Clayton v. Canada* (n 652) Canada's Counter-Memorial on Damages (6 November 2017) para 22; OECD, 'Shareholder Claims for Reflective Loss in Investment State Dispute Settlement: A "Component-by-Component" Approach to Reform Proposals' Informal Discussion Paper (December 2021) <file:///C:/Users/lenovo/Desktop/files/autonomous%20concept/oecd_shareholder_claims_for_reflective_loss_in_isds_-_informal_discussion_paper_for_uncitral_wg_iii.pdf> (accessed 4 November 2022) 14.

[659] There are exceptions to this. See eg Morocco-Nigeria BIT (n 614) Article 14; Belarus-India BIT (signed 24 September 2018) Chapter III.

create an awkward situation where shareholders can avail themselves of the rights of their companies while being shielded from the latter's liability by virtue of the separate legal personality under the applicable domestic law.[660]

Claimant investors have been taking advantage of this prevailing legal position in investment arbitration.[661] This has caused serious problems at both the domestic and the international levels, procedurally and substantively. Unsurprisingly, states have been working to reform shareholders' claims through inter-governmental negotiations, including at the UNCITRAL Working Group III.[662] Yet, due to the decentralised character of the current international investment legal regime, which is composed of thousands of IIAs, the reform process can be slow and difficult.

Nonetheless, if we hark back to the initial question of how to interpret the inclusion of 'shares' as a protected 'investment', to allow shareholders' reflective loss claims is not the inevitable interpretative result. Foreign shareholders' interests could have been protected under IIAs through other means that are more consistent with the position in domestic corporate law. For instance, the protection of 'shares' can be interpreted as allowing shareholders to claim for their *direct* loss, eg loss arising from seizure of the shares or interference with dividends.[663] Or, as expressly adopted in some IIAs, a shareholder can protect its interests by making claims on behalf of the company

[660] OECD, 'Shareholder Claims for Reflective Loss' (n 658) 7-8; Gaukrodger (n 31) 15-23; *Clayton v. Canada* (n 652) Canada's Counter-Memorial on Damages (6 November 2017) para. 25.

[661] OECD, 'Shareholder Claims for Reflective Loss' (n 658) 10.

[662] Note by the Secretariat, 'Shareholder Claims and Reflective Loss' (n 651).

[663] *The Carlyle Group LP and others v. Kingdom of Morocco*, ICSID Case No ARB/18/29, Submission of the United States of America (4 December 2020) para 5.

it owns or controls, with the remedy still going to the company.[664]

As discussed in section I, the treaty interpretation rules may actually *require* such a domestic law-consistent approach. Under Article 31(3) of the VCLT, an interpreter '*shall* … take[] into account … any relevant rules of international law'.[665] Even though, as held by arbitral tribunals as well as the ICJ,[666] IIAs are *lex specialis* in relation to the customary rules of diplomatic protection, the general principle of separate legal personality of companies still holds and remains relevant in the interpretation of the concept of 'shares'. Arbitral tribunals should have taken into account this general principle and thereby should have avoided diverging from the prevailing position in domestic laws for no good reason. Had this approach been taken, the detrimental consequences discussed above would have been prevented.

Another example of IIA concepts with a parallel in domestic laws is 'national security' or 'essential security interests'. These concepts regularly appear in the exception clauses of IIAs. A typical national security clause provides that '[t]his treaty shall not preclude the application by either Party of measures necessary for … the protection of *its own essential security interests*.'[667] Some of the security exception clauses limit 'essential security interests' to those associated with military threats and

[664] US-Morocco FTA (signed 15 June 2004, entered into force 1 January 2006) Article 10.15.1(b); CAFTA-DR (n 320) Article 10.16(1); CETA (n 248) Article 8.23(1); CPTPP (n 213) Article 9.19(1); South Korea-US FTA (n 301) Article 11.16(1).

[665] VCLT (n 261) Article 31(3) (emphasis added).

[666] *Diallo* (n 211) para 90; *CMS* (n 649) Decision on Jurisdiction (17 July 2003) paras 43-48; *Enron* (n 428) Decision on Jurisdiction (14 January 2004) para 46; Christian J Tams and Antonios Tzanakopoulos, 'Barcelona Traction at 40: The ICJ as An Agent of Legal Development' (2010) 23 LJIL 781, 789-791.

[667] US-Argentina BIT (n 226) Article XI; USMCA (n 213) Article 32.2(1)(a); RCEP (n 247) Article 17.13(b) (emphasis added).

the likes,[668] while others keep this term undefined.[669] Similar to the above examples, there is an inherent correlation between the national security laws and policies at the domestic level and the security exceptions in IIAs. As argued below, tribunals need to take into account the positions taken in domestic laws when interpreting the treaty terms 'national security' and 'essential security interests', whose content evolves over time subject to the policy choices of states.

The term 'security' was conventionally associated with military security, but things get fuzzy beyond this uncontroversial core. In the Argentinian financial crisis cases, tribunals adopted a broader approach to the phrase 'essential security interests' under the US-Argentina BIT, allowing it to cover severe economic crisis.[670] Yet, a closer look at these decisions reveals different understandings of this concept. For instance, the tribunal in *Continental Casualty v. Argentina* held that the term 'essential security interests' covered not only political and military security, but also economic security.[671] In justifying this proposition, it observed that when including the security exception clause, the US may well have intended

> to protect first of all its own security interests in the light of geopolitical, strategic and defence concerns, typical of a world power, so as to be able to reserve the right to freeze assets of foreigners in the U.S. and to resort to

[668] See eg China-New Zealand FTA (n 374) Article 201; Canada-China BIT (n 614) Article 33(5)(b); CETA (n 248) Article 28.6(b).

[669] US-Ecuador BIT (n 226) Article IX(1); US-Argentina BIT (n 226) Article XI; India-Nepal BIT (n 554) Article 12(3); Singapore-Rwanda BIT (n 616) Article 28(2).

[670] *Continental Casualty Company v. The Argentine Republic*, ICSID Case No ARB/03/9, Award (5 September 2008) paras 175, 181; *Sempra Energy International* (n 354) para 374; *CMS* (n 649) Award (12 May 2005) para 360; *LG&E* (n 477) Decision on Liability (3 October 2006) para 238.

[671] *Continental Casualty* ibid Award (5 September 2008) para 175.

unilateral economic sanctions that may conflict with its BIT obligations.

Following that observation, the tribunal found that the measures seeking to tackle the financial crisis should also be covered.[672] This interpretation may potentially allow measures taken out of a broad range of strategic purposes, which are invoked more frequently recently.[673] On the other hand, although the tribunal in *LG&E v. Argentina* reached the same conclusion that a financial crisis may impinge on 'essential security interests', it seems to have taken a narrower and more conservative approach than that in *Continental Casualty*. For the *LG&E* tribunal, '[t]o conclude that such a severe economic crisis could not constitute an essential security interest is to diminish the havoc that the economy can wreak on the lives of an entire population and the ability of the Government to lead', and '[w]hen a State's economic foundation is under siege, the severity of the problem can equal that of any military invasion.'[674] This interpretation still focused on the conventional core aspect of national security concerns, ie immediate threats to the internal political and physical security of the state.

Uncertainties associated with the concept of 'essential security interests' persist, and lately, the rising geopolitical tension adds to the complexity of this matter. In recent years, in light of the changing circumstances both internationally and domestically, governments around the world started to invoke national security more frequently, in relation to a wider array of subjects, ranging from data protection, critical infrastructure, advanced technology, to supply chain security, public health, and climate change.[675]

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[672] Ibid para 181.

[673] See J Benton Heath, 'The New National Security Challenge to the Economic Order' (2020) 129 YLJ 1020; Harlan Grant Cohen, 'Nations and Markets' (2020) 32 JIEL 793.

[674] *LG&E* (n 477) Decision on Liability (3 October 2006) para 238.

[675] See Heath (n 673) 1024; Oliver Hailes, 'Lithium in International Law: Trade, Investment, and the Pursuit of Supply Chain Justice' (2022) 25 JIEL 148, 149-162; Congyan Cai, 'Enforcing A New National

Hence the increased possibility of investment disputes arising from security-related measures. For instance, the decisions by several states to preclude the Chinese telecom company, Huawei, from the rollout of the 5G network for national security reasons have prompted threats of arbitration claims by the Chinese company.[676] Tribunals in such cases face the challenge of ascertaining the coverage of the security exception clause. Clearly, abusive invocations of the security exception must be kept in check. The crucial question, however, is to what extent novel national security claims in good faith should be allowed.[677]

Such a problem occurred in the cases of *CC/Devas v. India* and *Deutsche Telekom v. India*, both of which arose from the same factual dispute concerning the Indian government's cancellation of a contract in the telecom sector.[678] In both cases, India invoked the security exception clause in the BIT, claiming that the cancellation of contract was 'for national needs, including the needs of defence, para-military forces and other public utility services as well as for societal needs'.[679] In the awards, despite the different language used in the treaties, both tribunals adopted a rather narrow,

Security? China's National Security Law and International Law' (2017) 10 Journal of East Asia and International Law 65, 66; OECD, 'Managing Access to AI Advances to Safeguard Countries' Essential Security Interests' in OECD, OECD Business and Finance Outlook 2021: AI in Business and Finance (2021) <https://www.oecd-ilibrary.org/sites/ba682899-en/1/3/6/index.html?itemId=/content/publication/ba682899-en&_csp_=02d27ef0d7308d76a010fd2a9882228f&itemIGO=oecd&itemContentType=book> (accessed 13 July 2022).

[676] See Cosmo Sanderson, 'Huawei Threatens Sweden over 5G Ban' (07 January 2021) <https://globalarbitrationreview.com/article/huawei-threatens-sweden-over-5g-ban> (accessed 17 July 2022); Jarrod Hepburn and Luke Eric Peterson, 'Analysis: As Huawei Invokes Investment Treaty Protections in Relation to 5G Network Security Controversy, What Scope Is There for Claims under Chinese Treaties with Czech Republic, Canada, Australia and New Zealand?' (11 February 2019) <https://www.iareporter.com/articles/analysis-as-huawei-invokes-investment-treaty-protections-in-relation-to-5g-network-security-controversy-what-scope-is-there-for-claims-under-chinese-treaties-with-czech-republic-canada-australia-a/> (accessed 12 July 2022).

[677] Heath (n 673) 1024.

[678] *CC/Devas (Mauritius) Ltd v. India* (n 326); *Deutsche Telekom v. India* (n 326).

[679] *CC/Devas (Mauritius) Ltd v. India* (n 326) paras 211-374; *Deutsche Telekom v. India* (n 326) paras 183-291.

conservative approach when interpreting the phrase 'essential security interests'. Regarding the reasons invoked by India, both tribunals accepted that the alleged purpose of preserving a part of the electromagnetic spectrum for the needs of defence and para-military forces was covered by the term 'essential security interests'.[680] At the same time, both tribunals refused to accept that broader 'social needs', such as the allocation of the electromagnetic spectrum for train-tracking, disaster management, tele-education, tele-health and rural communication, which were considered part of the 'strategic requirements of the nation' by India, could be covered.[681] In particular, the tribunal in *CC/Devas* distinguished 'strategic requirements' from 'essential security interests':

> [T]he expression 'strategic requirements' can cover a whole range of government activities; governments all over the world pursue a number of different policies which they describe as strategies essential to the attainment of public interest objectives (economic strategies, public health strategies, energy strategies, etc.) and the situation does not appear to be different in the case of the Respondent.[682]

For the tribunal, there is no indication that the 'strategic requirements' are all related to 'essential security interests'.[683] Yet, the boundaries between national security concerns and these 'strategic requirements', eg economy, public health, and energy strategies, are far from clear. In light of the expansive reading of 'security interests' by governments in recent years, this distinction is becoming even blurrier. For instance,

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[680] *Deutsche Telekom v. India* (n 326) para 281; *CC/Devas (Mauritius) Ltd v. India* (n 326) para 354.
[681] Ibid.
[682] *CC/Devas (Mauritius) Ltd v. India* (n 326) para 356.
[683] Ibid.

the COVID-19 pandemic has prompted several states to tighten foreign investment controls in the public health sector for national security reasons.[684] Energy security has long been addressed as part of the national security concerns by governments around the world,[685] and this was only reinforced by the Russia-Ukraine conflict.[686] In light of rising geopolitical tensions and the tendency of states to weaponise their economic ties, supply chain security and advanced technologies are also becoming more important national security concerns addressed in domestic legislation.[687]

Indeed, with the advancement of technology and the ever-changing domestic and international circumstances, what constitute 'essential security interests' to a state inevitably evolve over time.[688] Although contemporary international rules on trade and investment often separate 'ordinary' commercial matters from the 'exception' of national security policies, economic integration and national security were always deeply intertwined.[689] The post-Second World War international economic legal

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[684] See German Federal Government, Press Release on the 15th Amendment to the Außenwirtschaftsverordnung Protection for the Health System (20 May 2020) <https://www.concurrences.com/IMG/pdf/federal_government_service_schutz_fur_das_gesundheitssystem.pdf?59998/a5a1c2205e14dfce511edea2ecb9f3db5b2eee3482bd98eb2ca8b9acdbe8081e> (accessed 14 July 2022); UK Department for Business, Energy & Industrial Strategy and the Rt Hon Alok Sharma MP, 'Press release: New Protections for UK Business Key to National Security and Fight against Coronavirus' (21 June 2020) <https://www.gov.uk/government/news/new-protections-for-uk-businesses-key-to-national-security-and-fight-against-coronavirus> (accessed 14 July 2022); European Commission, Guidance to the Member States concerning Foreign Direct Investment and Free Movement of Capital from Third Countries, and the Protection of Europe's Strategic Assets, ahead of the Application of Regulation (EU) 2019/452.

[685] See OECD, 'Security-Related Terms in International Investment Law and in National Security Strategies' (May 2009) <https://www.oecd.org/daf/inv/investment-policy/42701587.pdf> (accessed 14 July 2022) 11; Anna-Alexandra Marhold, 'Unpacking the Concept of "Energy Security": Lessons from Recent WTO Case Law' (2021) 48 Legal Issues of Economic Integration 147; International Energy Agency, 'Energy Supply Security: Emergency Response of IEA Countries 2014' (OECD/IEA 2014) <https://iea.blob.core.windows.net/assets/73908149-4d6e-4f10-b626-d55c60ab3bd7/ENERGYSUPPLYSECURITY2014.pdf> (accessed 4 November 2022).

[686] See Benjamin Schmitt, 'European Energy Security Post-Russia', Center for European Policy Analysis (15 June 2022) <https://cepa.org/european-energy-security-post-russia> (accessed 14 July 2022).

[687] See Heath (n 673) 1022-1024; Hailes (n 675).

[688] See Heath (n 673).

[689] See Heath (n 673) 1031-133; Cohen, 'Nations and Markets' (n 673) 800-801.

regime was in fact justified by the idea that economic interdependence is a powerful means to ensure peace and security.[690] At the same time, trade and investment have at times been used as a weapon for defence purposes.[691] This does not mean, however, that a distinction cannot be drawn between areas of economic integration and matters of security that are reserved for states to determine at their discretion. Indeed, since businesses need a stable legal environment to thrive, a distinction has to be made. But the crucial point is, this distinction is ultimately a policy choice by states. Arbitral tribunals should be careful not to (re)make that decision by imposing a fixed definition of 'security interests' that is detached from states' policies.

In fact, driven by the concern that arbitral tribunals' decisions may excessively impinge on states' decision-making discretion on sensitive matters, some states have adopted a more cautious approach in recent IIAs. For instance, in order to prevent arbitral claims arising from foreign investment screening for national security reasons, some IIAs expressly list the national security screenings under the domestic foreign investment laws as a non-conforming measure.[692] Some states go even further in their recent IIAs, expressly precluding arbitral review of state parties' invocation of the security exception.[693] No attempt is made here to judge the wisdom of such treaty-drafting practice. All that this discussion is meant to suggest is that in light of this general trend, losing sight of states' policies regarding 'essential security interests' risks

[690] Ibid.

[691] Cohen, 'Nations and Markets' (n 673) 800.

[692] See eg Australia-China FTA (signed 17 June 2015, entered into force 20 December 2015) Annex III, Part 1: Schedule of Australia; CETA (n 248) Annex I (Canada) Reservation I-C-1; USMCA (n 213) Article 14.12.1, Annex I (Mexico), Annex I (Canada).

[693] Peru-US TPA (n 301) Article 22.2, fn 2; Brazil-India BIT (signed 25 January 2020) Annex I; South Korea-US FTA (n 301) Article 23.2(b), fn 2.

aggravating the backlash against the international investment law system.

Perhaps for similar reasons, a cautious approach has been taken in the context of the WTO by the DSB. Article XXI(b) of the GATT stipulates an exception permitting each member state to take action 'it considers necessary for the protection of its essential security interests'.[694] In *Russia-Measures Concerning Traffic in Transit*, although the panel refused to interpret this provision as 'self-judging',[695] it gave members broad discretion to define what constitutes their 'essential security interests':

> The specific interests that are considered directly relevant to the protection of a state from such external or internal threats will depend on the particular situation and perceptions of the state in question, and can be expected to vary with changing circumstances. For these reasons, it is left, in general, to every Member to define what it considers to be its essential security interests.[696]

Nonetheless, the panel noted that a member is not free to elevate any concern to an 'essential security interest'.[697] On the strength of the principle of good faith, the panel held that a member cannot

> release itself from the structure of 'reciprocal and mutually advantageous arrangements' that constitutes the multilateral trading system simply by re-labelling trade interests that it had agreed to protect and promote within the

[694] General Agreement on Tariffs and Trade (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 190, Article XXI(b).

[695] WTO, *Russia: Measures Concerning Traffic in Transit – Panel Report* (26 April 2019) WT/DS512/7, paras 7.62-7.104.

[696] Ibid para 7.131.

[697] Ibid para 7.132.

system, as 'essential security interests', falling outside the reach of that system.[698]

In other words, the key question is how to distinguish in good faith between 'trade interests' regulated under the agreement and 'essential security interests' reserved for member states to determine in the exercise of their discretion.

When making distinctions between 'economic matters' and 'security matters' in the interpretation of IIAs, domestic laws should be taken into account as indicators of states' policies, which may evolve over time. Although many contemporary investment arbitration cases arise under IIAs concluded in the 1990s, there is no reason to believe that when states entered into these treaties during and shortly after the Cold War, they intended the terms 'national security' and 'essential security interests' to have a fixed meaning, frozen in time. Such terms, when they are used without further qualification, should be considered 'generic terms' whose content is expected to change through time.[699] When interpreting these terms, domestic laws may be considered via 'ordinary meaning', general principles of law, or as supplementary means of interpretation. The different legal bases for relying on comparative analysis of domestic laws entail different comparative law methods and carry different weight when interpreting the treaty term. These matters will be discussed in Chapter 8.

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[698] Ibid para 7.133 (footnote omitted).

[699] *Kasikili/Sedudu Island (Botswana/Namibia)* (Judgment) [1999] ICJ Rep 1045, Declaration of Judge Higgins 1113. See also *Aegean Sea Continental Shelf (Greece v. Turkey)* (Judgment) [1978] ICJ Rep 3, 31-32.

Part II Comparative Law Methodology

Chapter 6. Comparative Law Method in the Identification of General Principles of Law

Part I has shown that general principles of law are a major channel through which domestic legal principles, derived through comparative law analysis, can be introduced into international investment law. This source can be relied upon and may play a crucial role in the interpretation of both substantive treaty standards[700] and autonomous concepts,[701] although the former occurs more frequently in practice and has received greater scrutiny both in case law and in the literature. Despite the importance of general principles of law in shaping the substance of international investment law, the method for their identification in practice has been fraught with problems.

As discussed in Chapter 2, in the pre-BIT era, the way general principles were used has caused charges of bias and backlash from developing states.[702] In contemporary international investment law, although the rejection of the distinction between 'civilized nations' and 'uncivilized nations' should have entailed a different approach,[703] many of the problems in the pre-BIT era persist. In investment arbitration, when relying on general principles of law, very few tribunals explain the criteria they applied to identify this source, and when they do, most of them do so '*en passant* without much (or any) analysis'.[704] The lack of methodological rigour in the identification of general principles has made states concerned that the treaty standards

[700] Chapter 4.

[701] Chapter 5.

[702] Chapter 2, text to fn 165-168.

[703] Chapter 2, text to fn 169-173.

[704] Patrick Dumberry, 'The Emergence of the Concept of "General Principles of International Law" in Investment Arbitration Case Law' (2020) 11 JIDS 194, 196.

determined *ex post* by arbitral tribunals may subject states to international obligations 'in an unlimited fashion',[705] or impose 'unexpected restrictions' on their regulatory power.[706] This echoes the concerns expressed by delegates from developing states in the 1930 Hague Codification Conference.[707]

Regarding this 'flexible' approach to the use of general principles in investment arbitration, Dumberry has observed that '[t]he reason is simple: this is a rather complicated and very time-consuming exercise.'[708] However, practical constraints incumbent upon arbitral tribunals are no reason for lowering the criteria for the identification of sources of law. Nor can practical constraints be invoked to reject a critical evaluation of the practice. This is especially so in light of the criticisms and problems caused by the use of general principles throughout the history of this source.[709] Against this background, it is important to develop a more rigorous and more principled approach to general principles of law, and to this end, it is of great value to bridge the gap between international law and comparative law scholarship. Being realistic about the limited prospects of arbitral tribunals engaging in an in-depth comparative analysis in arbitration cases, my aim is to show that it is not only desirable but also feasible for international investment lawyers to draw upon comparative law scholarship guided by the sources doctrine. Just as the European integration process has given life to a remarkable body of intra-EU comparative law literature, which has made a significant contribution to institution-building and rule-making within the

[705] Colombian Constitutional Court, Judgment C-252/2019 (n 291) para 208.

[706] Law Commission of India, 'Analysis of the 2015 Draft Model India Bilateral Investment Treaty' (August 2015) Report No 260, 16.

[707] Chapter 2, text to fn 128-129.

[708] Dumberry, 'General Principles of International Law' (n 704) 215-216.

[709] Chapter 2, text to fn 128-129, 165-168.

EU,[710] international investment law can benefit from a similar process.

This chapter seeks to provide guidance regarding the comparative law method to be followed in the identification of general principles of law, laying the groundwork for the comparative law analysis with respect to specific problems, which follows in Chapter 7. Based on what was already discussed in Chapter 2, Section I of this chapter will elaborate further on the requirements for the identification of general principles, emphasising that the comparative research for their identification must be representative. Section II explains that the 'distillation' of domestic legal principles and their 'transposition' to the international level are a single combined operation. It also explains that the 'identification' and 'application' of general principles are inseparable from one another. In practice, the identification and application of this source should be understood as a process of searching for solutions to the problems at the international level, based on the approaches taken in various domestic legal systems, while keeping in mind the particularities of the international legal regime. Section III discusses the comparative law method in the identification of general principles of law, drawing on comparative law scholarship. It argues that the basic comparative law method for the identification of general principles is the functional method. The starting point and the main focus of the comparison should be concrete problems rather than abstract concepts and principles. The comparative law analysis essentially serves to *understand* the approaches in domestic legal systems as well as their differences, based on which an international solution can be developed.

[710] Several research groups on intra-EU comparative law have been established with a view to supporting the development of EU law. See eg Research Network EU Administrative Law (http://www.reneual.eu/), European Group of Public Law (https://www1.eplo.int/). See also Koen Lenaerts, 'Interlocking Legal Orders in the European Union and Comparative Law' (2003) 52 ICLQ 873.

I. 'Recognized by civilized nations' and the requirement of representativeness

As discussed in Chapter 2, the inclusion of 'the general principles of law recognized by civilized nations' in the PCIJ Statute was a compromise solution between the need to avoid *non liquet*, on the one hand, and the required objectivity and representativeness of sources of international law, on the other.[711] When addressing the problem that treaties and customary international law may not always have a rule applicable to the question at hand, or the applicable treaty or customary rule may not be specific enough to yield a concrete answer, drafters of the PCIJ Statute avoided formulations such as 'general principles of law and equity' and 'justice and equity'.[712] Notably, this was because

> the world was prepared to accept the compulsory jurisdiction of a Court which applied the *universally recognized* rules of International Law. But [it was not] disposed to accept the compulsory jurisdiction of a Court which would apply principles, differently understood in different countries.[713]

In this context, the ultimate compromise centred on the requirement of principles being 'recognized by civilized nations'. This requirement reconciles two competing goals: On the one hand, by permitting general principles to arise from indirect state consent, it allows international law to be a coherent legal system; on the other hand, it requires general principles to be grounded on some objective facts, which

[711] See Chapter 2, Section I.

[712] Advisory Committee of Jurists, 'Documents Presented to the Committee Relating to Existing Plans for the Establishment of a Permanent Court of International Justice' (1920) 129; *Procès-verbaux of the Proceedings of the Advisory Committee of Jurists* (n 42) 295.

[713] *Procès-verbaux of the Proceedings of the Advisory Committee of Jurists* (n 42) 308 (emphasis added).

constrains the discretion of those who identify this source and prevents 'judicial law-making'.[714] In this sense, the requirement of 'recognition' is both permissive and restrictive. In essence, the commonalities among the laws of various states are meant to indicate what states *would have intended* when dealing with the international legal problem.[715] This requirement naturally connects general principles of law with comparative law. Indeed, 20 years before the PCIJ Statute was drafted, at the first international conference on comparative law, the 1900 Paris Congress, Raymond Saleilles observed that the principal objective of comparative law was the discovery of concepts and principles common to all 'civilized' legal systems.[716]

As already discussed, once the distinction between the 'civilized' and the 'uncivilized' was crucial and only the laws of 'civilized nations' were relevant in the identification of general principles.[717] But nowadays, this distinction has been firmly rejected as a criterion for identifying this source.[718] In light of the fundamental principle of sovereign equality enshrined in the UN Charter, it was rightly pointed out by Judge Ammoun that:

[T]he [text of Article 38(1)(c) of the ICJ Statute] cannot be interpreted

[714] Chapter 2, text to fn 42-53.

[715] Chapter 2, text to fn 50-53.

[716] Raymond Saleilles, 'Conception et objet de la science juridique du droit comparé' in International Congress of Comparative Law, *Congrès international de droit comparé tenu à Paris du 31 juillet au 4 août 1900: procès-verbaux des séances et documents* vol 1 (Librairie générale de droit et de jurisprudence 1905-1907) 173.

[717] Chapter 2, text to fn 59-61; Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (CUP 1953) 25; Antonio Cassese, 'The Contribution of the International Criminal Tribunal for the Former Yugoslavia to the Ascertainment of General Principles of Law Recognized by the Community of Nations', in Sienho Yee and Tieya Wang (eds), *International Law in the Post-Cold War World: Essays in Memory of Li Haopei* (Routledge 2001) 43.

[718] Chapter 2, text to fn 65-66; See Pellet and Müller (n 40) 927; UN Secretary General, 'Review of the Role of the International Court of Justice: Report of the Secretary-General' (15 September 1971) UN Doc A/8382, 23-5 (Guatemala and Mexico). See also the statements of states at the 74th session of General Assembly Sixth Committee in 2019: Croatia, Cuba, India, Iran, Ireland, Micronesia, Philippines, Portugal, Norway on behalf of the Nordic countries, Sierra Leone, the United Kingdom.

> otherwise than by attributing to it a universal scope involving no discrimination between the members of a single community based on sovereign equality. The criterion of the distinction between civilized nations and those which are allegedly not so has thus been a political criterion, – power politics, – and anything but an ethical or legal one.[719]

In the draft conclusions on general principles of law provisionally adopted by the ILC's Drafting Committee, it was stressed that in the identification of general principles of law, '[t]he comparative analysis [of national legal systems] must be wide and representative, including the different regions of the world.'[720] That position finds support in judicial and state practice.[721] As noted in a report by the International Law Association:

> [I]t is … not enough to 'identify' a general principle among the main legal systems if there is not enough geographical representation, eg a general principle shared by Civil Law countries in Europe should also be identified in other Civil Law countries located in different geographical areas and belonging

[719] *North Sea Continental Shelf* (n 207) Separate Opinion of Judge Ammoun 134.

[720] ILC, 'Consolidated Text of Draft Conclusions 1 to 11 Provisionally Adopted by the Drafting Committee on General Principles of Law' (n 2) Draft Conclusion 5(2).

[721] See eg *Right of Passage over Indian Territory (Portugal v. India)*, Reply of the Government of the Portuguese Republic (VII 58) 543 (Portugal surveyed 64 jurisdictions, including civil law systems, common law systems, Islamic law, Scandinavian law, Asian law, and others); *Certain Property (Liechtenstein v. Germany)*, Memorial of the Principality of Liechtenstein (28 March 2002) fn 148 (Liechtenstein consulted 48 legal systems, including common law and civil law systems, as well as legal systems in different regions including Europe, North America, Latin America, Asia-Pacific, Middle East and Africa); *Erdemović Case* (Appeals Chamber Judgment, Joint Separate Opinion of Judge McDonald and Judge Vohrah) IT-96-22-A (7 Oct 1997) (The judges consulted civil law systems, common law systems, and other systems, and these legal systems were from different regions of the world); *North Sea Continental Shelf* (n 207) Separate Opinion of Judge Ammoun 139-40 (He considered legal systems of Western Europe and Latin America, common law, Muslim law, Chinese law, Soviet law, Hindu law, and the laws of other Asian and African states).

to different civilizations.[722]

This is particularly important in the area of international investment law, where, as discussed in Chapter 4, general principles of public law play a significant role when interpreting substantive IIA standards.[723] Given that culture and development status have a significant bearing on the approach taken in the public law of a particular state, geographic representation is crucial when conducting the comparative survey. The history of international investment law further underscores this point.[724] In the discussions over ISDS reform, diversity and inclusiveness were given great importance in order to sustain the legitimacy of the system.[725] Thus, the comparative law analysis in the identification of general principles must be representative not only in terms of different legal families but also in terms of geographical representation.[726]

In this connection, it is worth mentioning (and rejecting) the following argument by Peat: Peat argues that comparative law analysis in investment arbitration pertaining to principles such as 'legitimate expectations' should not aim to be representative and comprehensive.[727] Instead, he maintains that the choice of legal systems should be guided by 'the fundamental values underpinning the investment

[722] ILA, 'Report of the Study Group on the Use of Domestic Law Principles in the Development of International Law' (2018) <https://www.ila-hq.org/en_GB/documents/conference-report-sydney-conference-2018> (accessed 5 November 2022) para 214.

[723] See Chapter 4, especially Sections I.B, II.B, III.B.

[724] For criticism caused by the bias and lack of objectivity and representativeness in the use of general principles, see Chapter 2, text to fn 128-129, 165-168.

[725] See eg Note by the Secretariat, 'Possible Reform of Investor-State Dispute Settlement (ISDS): Selection and Appointment of ISDS Tribunal Members' UNCITRAL Working Group III (31 July 2019), UN Doc A/CN.9/WG.III/WP.169.

[726] See Statement of Ms Patrícia Galvão Teles, the Chair of the Drafting Committee on General Principles of Law (3 August 2021) ILC Second-Second Session (Geneva, 26 April-4 June and 5 July-6 August 2021) 9-11; Vázquez-Bermúdez, 'Second Report' (n 190) Draft Conclusion 5(2). For further discussion of the notion of 'legal families', see Section III of this chapter.

[727] Peat, *Comparative Reasoning* (n 2) 133-135.

regime and whether the domestic jurisdictions live up to those ideals.'[728] Although this argument does not rest on the 'general principles method' but on the character of the treaty norms as 'standards',[729] it risks producing, or at least justifying, discriminatory selection of domestic legal systems based on political criteria, a practice that Judge Ammoun urged international lawyers to desist from.

To avoid confusion, this is not to suggest that subjective value judgements should (or can) be completely avoided.[730] Indeed, value judgement is part and parcel of the identification and application of general principles of law. However, it bears emphasising that value judgements need to be exercised *within* the confines of the rules on sources: as just discussed, the requirements in these rules have been adopted for good reasons. First and foremost, if the choice of domestic legal systems to be compared is guided by the 'fundamental values' of the investment legal regime, certain legal systems may be precluded pre-emptively because of their *supposed* incongruence with these 'fundamental values', even before any serious attempt is made to understand the approaches taken in these legal systems. Second, whereas the use of certain principles when interpreting IIA standards needs to be guided by the object and purpose of the treaty, reliance on the 'fundamental values' of the regime needs to be taken with caution – the conclusion of IIAs was in itself a result of the clash of different values.[731] Moreover, it is worth reemphasising that a major consideration behind the inclusion of general principles of law in Article 38(3) of the PCIJ Statute was the need to *limit* the

[728] Ibid 137.

[729] Ibid 133-135.

[730] For the role of values in treaty interpretation, see Antonios Tzanakopoulos, 'Book Symposium: Comparative Reasoning in International Courts and Tribunals' EJIL: Talk! (15 September 2020) <https://www.ejiltalk.org/book-symposium-comparative-reasoning-in-international-courts-and-tribunals-2/> (accessed 7 April 2021).

[731] See Guzman (n 200); Newcombe and Paradell (n 178) 18-27; Vandevelde, 'A Brief History of International Investment Agreements' (n 390).

discretion of judges in exercising value judgement, 'differently understood in different countries'.[732] To ignore the requirement of representativeness and select legal systems for comparison based on political criteria risks bringing back the anachronistic 'civilized/uncivilized' distinction through the back door.

That being said, beyond the general guideline that the comparative law analysis must represent different legal families and different regions of the world, no steadfast rule can be gleaned from existing judicial and state practice regarding the identification of general principles of law. Accordingly, adjudicators enjoy certain degree of flexibility in choosing the representative legal systems. Further, although classifying domestic legal systems into different legal families is a common method in comparative law studies, the criteria for such classification are a perennial problem.[733] While there is no 'correct' or 'perfect' classification in comparative law literature,[734] international lawyers can benefit from the insights of comparative lawyers in this regard. This will be discussed in greater detail in Section III.

II. 'Distillation', 'transposition', and 'application'

It has been recognised in the ILC's work that a two-step analysis is involved in the identification of general principles of law: The first step is identifying a principle common to different legal systems; the second step is transposing that principle to the

[732] *Procès-verbaux of the Proceedings of the Advisory Committee of Jurists* (n 42) 308.

[733] See Mariana Pargendler, 'The Rise and Decline of Legal Families' (2012) 60 AJCL 1043; H Patrick Glenn, 'Comparative Legal Families and Comparative Legal Traditions' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2019); Jaakko Husa, 'Classification of Legal Families Today: Is It Time for A Memorial Hymn?' (2004) 56 Revue internationale de droit comparé 11.

[734] Pargendler (n 733) 1047-1060; Glenn (n 733) 426.

international level.[735] The division between these two steps is convenient for analytical purposes. Practically, however, not only are the 'distillation' and 'transposition' processes a single combined operation, but the identification and application of general principles are inherently intertwined.

In practice, the application of a norm to concrete cases is inseparable from the ascertainment of the norm's content, and there is no clear-cut division between them. Guided by a narrow understanding of the concept of 'norm', every time a judge applies a norm to concrete cases, he or she essentially creates a 'new norm' for the specific case;[736] but if one adopts a broader understanding of the concept of 'norm', all considerations leading to the judge's final decision are part of the applicable norm, and all the legal reasoning involved in deciding the case is essentially to establish the content of that norm.[737] The difficulty in distinguishing identification from application is even more evident in the case of general principles of law. The phrase 'general principles of law' seems to suggest that their application is a process moving from the abstract to the specific. But in practice, the process of identifying general principles of law starts usually, if not always, from the specific problem at hand, rather than from a comparative study of domestic laws in the abstract.[738] Indeed, it cannot be the other way around. In comparative law studies, the point of departure has to be the same

[735] ILC, 'Consolidated Text of Draft Conclusions 1 to 11 Provisionally Adopted by the Drafting Committee on General Principles of Law' (n 2) Draft Conclusion 4; Vázquez-Bermúdez, 'Second Report' (n 190) 7-34.

[736] Hans Kelsen, 'International Peace – by Court or Government' (1941) 46 The American Journal of Sociology 571, 575; Antonios Tzanakopoulos, 'Domestic Judicial Lawmaking' in Catherine Brölmann and Yannick Radi (eds), *Research Handbook on the Theory and Practice of International Lawmaking* (Elgar 2016) 223-224.

[737] See Julie Dickson, 'Interpretation and Coherence in Legal Reasoning', *Stanford Encyclopedia of Philosophy* (2010) (on Dworkin's view).

[738] Frédéric G Sourgens and Michael D Nolan, 'Issues of Proof of General Principles of Law in International Arbitration' (2009) 3 World Arbitration and Meditation Review 505, 514.

factual problem, which serves as the *tertium comparationis*, or the neutral referent, for comparison. Then, various legal systems are compared as to how they address that problem.[739]

In a similar vein, when taking into account general principles in treaty interpretation under Article 31(3)(c) of the VCLT, it is artificial to separate the 'identification' of the general principle from its 'application' in interpreting the treaty. When interpreting a treaty, the reference to a particular general principle is guided not only by the object and purpose as well as the context of the treaty, but also by the particular factual situation at hand.[740] In practice, it is both artificial and unhelpful to speak of where the 'identification' of a general principle ends, and where its 'taking into account' in treaty interpretation begins. Therefore, for present purposes, when discussing the comparative law method in relation to general principles of law, 'identification' and 'application' are treated as part of the same process of ascertaining the content of the norm to resolve a specific problem. As will be discussed in Chapter 7, as the principles of legitimate expectations and proportionality are applied when interpreting investment treaties, this ascertainment process is guided by the object and purpose of the treaty as well as the particular problem at hand.

Furthermore, when discussing the processes of 'distilling' common principles and 'transposing' them to the international level in the identification of general principles of law, the ILC Special Rapporteur pointed out that '[t]he two-step analysis is a combined operation'.[741] As discussed, this is essentially a process of identifying a

[739] For further discussion, see Section III of this chapter.

[740] See relevant discussion in Chapter 4, Section II.B.

[741] Vázquez-Bermúdez, 'Second Report' (n 190) para 20.

solution to the international legal problem, based on the commonalities among the relevant rules in various domestic jurisdictions. When 'distilling' the 'common principle', the comparative law analysis starts from a particular problem in the international context and is guided by the particular conditions in the international legal system. This is also what 'transposition' is about. This 'combined operation' was described by Judge McNair as 'to regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions [to the international level].'[742] Still, although the 'distillation' and 'transposition' take place in a single process, it is helpful to speak of them as two key elements that guide the search for a legal solution to the international problem.

'Distillation' encapsulates the idea that general principles of law must be based on the commonalities among various legal systems of the world.[743] In this regard, there is a general agreement that the identification of general principles of law does not require 'unanimity' of the rules in different jurisdictions.[744] But beyond that, there are some nuances in the degree of convergence required for identifying general principles of law. According to the draft conclusions provisionally adopted by the ILC, the comparative law analysis should aim at identifying 'a principle common to the various legal systems of the world'.[745] This begs the question of what a 'common principle'

[742] *International Status of South West Africa* (Advisory Opinion) [1950] ICJ Rep 128, Separate Opinion by Sir Arnold McNair 148.

[743] ILC, 'Consolidated Text of Draft Conclusions 1 to 11 Provisionally Adopted by the Drafting Committee on General Principles of Law' (n 2) Drafting Conclusion 5; Vázquez-Bermúdez, 'Second Report' (n 190) paras 55-69.

[744] Vázquez-Bermúdez, 'Second Report' (n 190) para 57. See also *Right of Passage*, Reply of Portugal (n 721) para 328; *Certain Property*, Memorial of Liechtenstein (n 721) para 6.14.

[745] ILC, 'Consolidated Text of Draft Conclusions 1 to 11 Provisionally Adopted by the Drafting Committee on General Principles of Law' (n 2) Draft Conclusions 4(a), 5.

means and how to determine its existence. For Judge Ammoun, general principles are 'norms common to the different legislations of the world, united by the identity of the *legal reason* therefor, or the *ratio legis*, transposed from the internal legal system to the international legal system.'[746] In the *Furundžija* case, the Trial Chamber of the ICTY spoke of the 'common denominators' among different legal systems.[747] For Kotuby and Sobota, the object of the comparative law research is the 'core aspect' or the 'essence' of the norms in various domestic jurisdictions.[748] While these observations convey the same broad idea that general principles of law have to be based on the commonalities among domestic legal systems, the common 'legal reason', the 'core aspects', and the 'common denominator' of the rules in different domestic legal systems are not exactly the same thing. Regarding this issue, international judicial decisions and state practice provide very little guidance. Yet, as will be discussed in Section III, comparative law scholarship has much to offer in this respect.

Furthermore, it is widely recognised that concepts and institutions in domestic laws are not imported into international law 'lock, stock and barrel',[749] and that sometimes 'amendments' are needed for them 'to play a constructive role also at the international level.'[750] Therefore, when comparing different legal systems with a view to identifying some commonalities, one also needs to ascertain whether, and to what

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[746] *North Sea Continental Shelf* (n 207) Separate Opinion of Judge Ammoun 135 (emphasis added).

[747] *Furundžija* (n 418) para 178.

[748] Charles T Kotuby and Luke A Sobota Jr, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* (OUP 2017) 19-20.

[749] *International Status of South-West Africa* (n 742) Separate Opinion of Judge McNair 148.

[750] *Application of the Interim Accord of 13 September 1995 (the Former Yugoslav Republic of Macedonia v. Greece)* (Judgment) [2011] ICJ Rep 644, Separate Opinion of Judge Simma 700 para 13. See also *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)* PCA Case No 2011-03, Award (18 March 2015) para 436; *Argentine-Chile Frontier Case* (1966) 16 RIAA 109, 164 (suggesting that the concepts of 'estoppel' and 'preclusion' in international law are not to be understood in the same sense as they are in municipal law).

extent, the approaches taken at the domestic level are compatible with the conditions in international law. When 'transposing' general principles, a crucial factor to consider is the structural difference between international law and domestic law.[751] This is especially the case with general principles of public law. In this regard, the experience of international criminal tribunals is useful, especially as criminal tribunals have exhibited a greater willingness to elaborate on their comparative reasoning when deriving general principles.

In several cases decided by the ICTY, the principle that is common to domestic legal systems has to be amended or adjusted for international application, as certain elements of the principle are incompatible with the architecture of the international legal order. In *Tadić,* when addressing the argument that a criminal charge must be determined by a tribunal 'established by law',[752] the Appeals Chamber took into account the institutional difference between the UN and domestic legal systems, and decided that 'the separation of powers element of the requirement that a tribunal be "established by law" finds no application in an international law setting.'[753] Following that finding, it adapted the requirements in domestic laws for the international legal context, and ultimately decided that 'established by law' at the international level requires the tribunal to be established 'in accordance with the rule of law', which means that the tribunal 'must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments.'[754]

[751] Vázquez-Bermúdez, 'Second Report' (n 190) para 85.
[752] *Tadić* (n 400) para 41.
[753] Ibid para 43.
[754] Ibid para 45.

In *Delalić*, when elaborating on the principle of legality, the ICTY Trial Chamber took into account 'the different methods of criminalisation of conduct in national and international criminal justice systems' and 'the objective of maintaining a balance between the preservation of justice and fairness towards the accused and taking into account the preservation of world order'.[755] Based on these considerations, the Trial Chamber concluded that the principle of legality in international criminal law differs from that in domestic law.[756] To determine the requirements of this principle in international law, according to the Trial Chamber, one must consider, *inter alia*, 'the nature of international law; the absence of international legislative policies and standards; the *ad hoc* processes of technical drafting; and the basic assumption that international criminal law norms will be embodied into the national criminal law of the various states.'[757]

Similar considerations should also be applied in the context of international investment law. When deriving general principles from domestic laws in the interpretation of an IIA, interpreters need to consider not only the object and purpose of the IIA, but also the structural difference between the legal relationship under the treaty and that in domestic legal systems, especially domestic public laws. The particularities of the international legal regime should be considered throughout the comparative study of the rules in various jurisdictions. In the 'combined operation' of distillation and transposition, the international conditions not only define the research problem in the comparative survey, but also determine which elements of the domestic

[755] *Delalić* (n 400) paras 403-405.

[756] Ibid para 405.

[757] Ibid.

solutions are transposable to international law.

III. Comparative law method

Although various comparative law methods have been employed for different research purposes,[758] the functional method is the main comparative method that was used in unification and harmonisation projects, and in the context of international law.[759] The basic approach of the functional method, the critiques of it, and the responses in comparative law scholarship are particularly valuable for better understanding and improving the approach to the identification of general principles of law.

The basic idea that underpins the functional method, as expounded by Zweigert and Kötz, is that:

> Incomparables cannot usefully be compared, and in law the only things which are comparable are those which fulfil the same function … The proposition rests on what every comparatist learns, namely that the legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results.[760]

Although the conception of 'function', as well as the possibility of detaching it

[758] See Kischel (n 3) 87-200.

[759] Mathias Reimann, 'The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century' (2002) 50 AJCL 671, 691 ff; Anne Peters and Heiner Schwenke, 'Comparative Law beyond Post-Modernism' (2000) 49 ICLQ 800, 806-810. See also Rudolf B Schlesinger, Hans W Baade, Mirjan R Damaška, and Peter E Herzog (eds), *Comparative Law: Cases, Text, Materials* (The Foundation Press 1988) 34-35.

[760] Zweigert and Kötz (n 17) 34.

from the national context, has been contested in the literature,[761] the thrust of this proposition still holds true today. Comparison has to be conducted between functionally comparable rules that address the same issue. It is hard to find another neutral referent for a meaningful comparison.

Although the position just mentioned appears straightforward and uncontroversial, in practice, there is often a temptation to focus on abstract concepts instead of practical functions. This is especially the case in the identification of general principles of law. In some cases, the 'accidental parallels in legal terminology' can be deceptive, and linguistically similar concepts can have different meanings and address different situations in different legal systems.[762] For instance, whereas the concept of 'legitimate expectations', which originated in German law, was first mentioned in English law by Lord Denning in *Schmidt v. Secretary of State for Home Affairs*, Lord Denning subsequently explained that he felt 'sure the idea came out of my own head and not from any continental or other source.'[763] As explained in Chapter 7, the concept 'legitimate expectations' indeed carries a different meaning and is underpinned by different considerations in English law compared to German law.[764] To find a 'common recognition' of the principle of legitimate expectations based on the presence of this concept in both jurisdictions, ignoring the differences in its functions in these jurisdictions, risks rendering misleading results.

For Zweigert and Kötz, functionality is the thread running through the process

[761] See Peters and Schwenke (n 759) 808-810, 812; Kischel (n 3) 91.

[762] Kischel (n 3) 167.

[763] See Christopher Forsyth, 'Legitimate Expectations Revisited' (2011) 16 Judicial Review 429, 430 (referring to *Schmidt v. Secretary of State for Home Affairs* [1969] 1 All ER 904).

[764] Chapter 7, Section I.

of comparison. In terms of the starting point, according to them, '[t]he question to which any comparative study is devoted must be posed in purely functional terms; the problem must be stated without any reference to the concept of one's own legal system.'[765] Furthermore, the process of comparison must also follow the principle of functionality: 'the solutions we find in the different jurisdictions must be cut loose from their conceptual context and stripped of their national doctrinal overtones so that they may be seen purely in the light of their function, as an attempt to satisfy a particular legal need.'[766] This approach, however, is certainly not beyond criticism. Among these criticisms, some are more fundamental and consequential than others.[767] For present purposes, two strands of critiques are particularly worthy of discussion: One targets 'function' (the *tertium comparationis*), the other targets the handling of similar or different 'solutions'.

Different conceptions of 'function' have been used and debated in the literature. A 'thick' conception of 'function' may indicate the social function or purpose of a legal norm or concept. Such a conception has been challenged as being highly context-dependent, and thus incapable of serving as an 'anational', neutral *tertium comparationis*.[768] Moreover, if a broad notion of 'function' is adopted, a legal institution often serves many instead of a single function,[769] and these functions may

[765] Zweigert and Kötz (n 17) 34.

[766] Ibid 44.

[767] Many of these criticisms do not really target functionalism as such, but concern rather the errors that are sometimes committed by functionalists, eg limiting the research to black-letter law, ignoring the different interpretations in practice, or overly focusing on Western legal systems. See Michael Bogdan, 'Book Review: *Comparative Law (The Law in Context Series)* by Mathias Siems' (2015) 79 Journal of Comparative and International Private Law 213, 213.

[768] See Oliver Brand, 'Conceptual Comparison: Towards A Coherent Methodology of Comparative Legal Studies' (2007) 32 Brooklyn Journal of International Law 405, 419-421.

[769] Peters and Schwenke (n 759) 828.

evolve over time.[770] Even in a single jurisdiction, it is not uncommon that practitioners and judges disagree on the social function or purpose of a rule.[771] These considerations are especially true in public law. As suggested by Bell, 'there are not generic social functions that administrative law serves, but rather institutionally situated functions.'[772] It is even harder to speak of the 'function' or purpose of constitutional rules independent from the national context.

Therefore, a 'thin' conception of 'function', limiting its scope to the value-neutral, factual problem, appears to be preferable. Indeed, this seems to be what was in the minds of Zweigert and Kötz, who considered that the 'function' 'must be stated without any reference to the concept of one's own legal system.'[773] When identifying general principles of law, the factual problem for the comparative survey is largely determined at the international level. Analogy is involved in identifying general principles from private law when dealing with inter-state legal matters.[774] But in international investment law, one needs to look at domestic legal institutions addressing the same factual problem as that arises in investment arbitration, except that in the latter case, the applicant can only be a foreign investor. When formulating the comparative research question to identify general principles, what was discussed above seems to suggest that the problem should be framed in purely factual terms, without reference to legal concepts. However, as pointed out by Kischel, this is rarely possible and generally

[770] Kischel (n 3) 91; Brand (n 768) 415ff.

[771] For instance, there are different understandings of the purpose served by the protection of legitimate expectations in English law. See Forsyth, 'Legitimate Expectations Revisited' (n 763).

[772] See John S Bell, 'Comparative Administrative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2012) 1269.

[773] Zweigert and Kötz (n 17) 34.

[774] See Hersch Lauterpacht, *Private Law Sources and Analogies of International Law: With Special Reference to International Arbitration* (Longmans, Green and Co 1970).

unnecessary.[775] For instance, it is hard to frame a research question on monetary disputes without referring to concepts such as 'property' or 'contract'. The formulation of a problem is in itself a constructive move rather than a purely empirical one,[776] as researchers always have to generalise the particular problem at hand to connect it to general legal rules. As explained by Schlag, 'the context and the legal unconscious already perform normative work in selecting, establishing, and organizing the so-called "descriptive" categories deployed in legal thought.'[777] Therefore, there is always a risk that a national bias rooted in the researcher's legal education would infiltrate the comparative study already at the point of description of the research problem.

Take the following example: The government decides to change its immigration policy and criteria, and circulates a relevant manual. This may cause problems to certain applicants for visas or other relevant permits. Some jurisdictions treat this as a frustration of expectations whereas others treat it as a matter of procedural irregularity. To mitigate the risk of neglecting solutions provided in certain jurisdictions in the comparative study, the researcher often has to move back and forth between the research question, or the 'function' of the rules under comparison, and the solutions provided in different legal systems, to ensure that the comparative survey is as inclusive as possible.[778] In other words, recognising that an absolutely neutral referent is perhaps unattainable,[779] researchers need to broaden their perspectives during the process of learning and understanding the similarities and differences of various legal systems.

[775] Kischel (n 3) 167, 170.

[776] Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 368-369.

[777] Pierre Schlag, 'Normativity and the Politics of Form' (1991) 139 University of Pennsylvania LR 801, 812.

[778] Kischel (n 3) 167.

[779] Günter Frankenberg, 'Critical Comparisons: Re-thinking Comparative Law' (1985) 26 HJIL 411, 441.

This corresponds to the central idea of the functional method: Researchers must free themselves from the narrow conceptual framework that they are familiar with.[780] They are thus 'forced' to broaden their legal horizon, much like a traveller getting to know new and 'strange' civilisations.

Another strand of criticism of the functional method focuses on its handling of different or similar solutions in various legal systems, ie the proposition that 'the solutions we find in the different jurisdictions must be cut loose from their conceptual context and stripped of their national doctrinal overtones so that they may be seen purely in the light of their function, as an attempt to satisfy a particular legal need.'[781] This approach seems to resonate with the aspiration embodied in Article 38(1)(c) of the ICJ Statute, at least as understood by some. For instance, it has been observed that the 'distillation' of the 'core aspect' or the 'essence' of the norms in different legal systems involves discarding the 'idiosyncrasies of local law',[782] and that 'it is only once the national particularities and specificities of a rule existing under different domestic laws have been left aside that one is able to discover what is truly common about such a rule.'[783] However, the feasibility of such an approach has been called into question. In comparative law scholarship, the practicality of 'solutions' being 'cut loose from their conceptual context and stripped of their national doctrinal overtones' has been questioned.[784] In relation to general principles of law, Ellis has observed:

[780] Kischel (n 3) 167-168.

[781] Zweigert and Kötz (n 17) 44.

[782] See Kotuby and Sobota (n 748) 19-20.

[783] Dumberry, *A Guide to General Principles of Law* (n 6) 122.

[784] See Frankenberg (n 779) 440. ('How solutions can be "cut loose" from their context and at the same time be related to their environment, how law can be "seen purely" as function satisfying a "particular" need, escapes me. It seems to require two contradictory operations: first, suppressing the context and considering it; and then moving from the general (function) to the specific without knowing what makes

> [D]oubts have arisen regarding the possibility of isolating *the* essence of a legal rule or institution. Consider the various ways in which different legal systems determine when compensation must be paid. How are we to identify *the* essence of these norms? … In short, a rule has many different 'essences', which advance or recede as a function of the perspectives and purposes of observers.[785]

Perhaps this is even more true in public law, which is particularly context-dependent and driven by cultural and other social values of a particular society. It is difficult, if not impossible, to speak of the 'essence' of a rule of administrative or constitutional law without reference to the institutional structure and ideological context of a particular state. Thus, to pursue the comparative law analysis with the aim of distilling the 'essence' of the norms by discarding their 'national particularities' is misguided. As aptly observed by Weil as regards such an approach to general principles of law,

> [a]s long as it consists of looking for the similarities between national laws by stripping them of their non-essential particularities in order to identify the essential, the process of abstraction-generalisation leads to focusing on an increasingly disembodied essential … In a way, the process of abstraction-generalization is self-destructive.[786]

Further, even if one is capable of finding a 'common denominator' of the

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the specific specific. The functionalist negates the interaction between legal institutions and provisions by stripping them from their systemic context and integrating them in an artificially universal typology of "solutions." In this way, "function" is reified as a principle of reality and not taken as an analytical principle that orders the real world.')

[785] Ellis (n 2) 959-960 (emphasis in the original).

[786] Prosper Weil, 'Le droit international en quête de son identité' (1992) 237 Collected Courses of the Hague Academy of International Law 11, 146 (translated by the author).

principles underlying different rules, and deems it as 'the common essence' of the rules that is recognised in various states, this conclusion can hardly be helpful in supplying a ready-made solution to the international problem. In the area of public law, it is likely that only principles such as 'the rule of law' can be derived if one seeks to find the lowest common denominator of underlying principles. But even the phrase 'the rule of law' carries different meanings in different constitutional structures,[787] and such a generic notion can hardly be helpful in resolving concrete legal problems. This approach would only cover up, rather than constrain, the discretion exercised by adjudicators.

As concluded above, the process of identifying general principles is aimed at finding a solution to the international legal problem based on the 'consent' of states as implied in their domestic laws. Although adaptations may be needed when 'transposing' principles from domestic to international law, to satisfy this 'indirect consent' requirement, one must ensure that '[one] will not be doing violence to the fundamental concepts of any of those systems.'[788] Since the solutions offered in domestic laws cannot be meaningfully separated from their context, when trying to find a solution in international law, what is first required is not to *insulate* the rules from their national particularities and contexts, but to *understand* them within their national contexts. The primary function of comparative law is, above all, to understand differences.[789]

In light of the foregoing, it is submitted that, instead of trying to find 'the essence' of different rules, the comparative study in the single combined operation of

[787] Bell (n 772) 1271-1272.

[788] See Harold C Gutteridge, *Comparative Law* (CUP 1949) 65.

[789] Kennedy (n 4); Reimann, 'The Progress and Failure' (n 759) 675-676.

'distillation' and 'transposition' should aim at ascertaining whether the differences in the solutions provided in various jurisdictions can be resolved in order to find an international solution. As shown in the following, the differences in domestic legal solutions can be resolved either by understanding these solutions in their particular contexts, or by considering whether the reasons behind these differences are applicable at the international level and which elements of the domestic solutions can be 'transposed' to the international setting.

When conducting comparative surveys with a view to finding an international solution, apparent differences in the solutions offered in various jurisdictions can sometimes be reduced when the content of the rules, and the rationale behind them, are understood in the context of the domestic legal systems to which they belong.[790] Rules that are structurally different from one another may yield substantially similar results when they are understood in context, and the convergence in the substantive legal consequences can be sufficient for an international solution to be developed. For instance, in the analysis by Ellis of the general principle pertaining to the definition of rape examined by the ICTY in the *Furundžija* case, she pointed out that although in certain jurisdictions oral penetration is categorised as sexual assault instead of rape, rape has been abolished and sexual assault could be as serious an offence as rape is in some of these jurisdictions.[791] In this example, the doctrinal context of and the reasons behind the different definitions of 'rape' could have explained away some of the differences between certain jurisdictions.

This insight also applies to general principles of administrative law and

[790] Kischel (n 3) 167.

[791] Ellis (n 2) 968.

constitutional law, which are particularly relevant in the area of international investment law. In these areas of law, the differences in the rules of various jurisdictions are largely explicable by the doctrinal and institutional environment in which they operate.[792] At a general level, however, due to the global spread of constitutionalism and legal transplant, there has been a gradual convergence in the substantive norms of constitutional and administrative laws of various states.[793] A number of developments have given major impetus to this convergence, which include the development of international human rights law and the dissemination of human rights ideas, the establishment of regional organisations such as the EU, and the work of economic and financial institutions such as the IMF and the WTO.[794] As a result, the most fundamental differences among various jurisdictions do not exist in substantive rules but exist in institutions, procedures, and techniques.[795] As will be shown in Chapter 7, although the rules dealing with similar problems can be structurally different and have diverse doctrinal underpinnings, the legal consequences, when understood in context, are often less divergent than at first sight.

Alternatively, even where the differences cannot be resolved, to the extent that the reasons behind these differences are inapplicable at the international level, these differences would not prevent the identification of a solution to the international problem. Assume *solution a* offered in state A differs from *solution b* offered in state B, and the difference centres on *element x* in *solution b*. To the extent that the

[792] Janina Boughey, 'Administrative Law: The Next Frontier for Comparative Law' (2013) 62 ICLQ 55, 65-68.

[793] Ibid 71; Julian Go, 'Globalizing Constitutionalism? Views from the Postcolony, 1945–2000' (2003) 18 International Sociology 71, 91; Tom Ginsburg, 'Written Constitutions and the Administrative State: On the Constitutional Character of Administrative Law' in Susan Rose-Ackerman, Peter Lindseth, and Blake Emerson (eds), *Comparative Administrative Law* (Elgar 2017) 119.

[794] Boughey, 'Administrative Law' (n 792) 73-79.

[795] Reimann, 'The Progress and Failure' (n 759) 677.

considerations behind *element x* are incompatible with the structure and the object and purpose of the international legal regime at issue, the key question would be if *solution b* is purged of *element x,* whether a common solution (with adjustments where necessary) to the international problem can be identified between these two legal systems. This approach echoes the findings by Bothe and Ress, according to whom the comparative study for the purposes of identifying general principles 'has to penetrate deeper in order to extract all *relevant elements* of the principle or right involved', and '[t]he crucial question, which from a methodological point of view can be answered only through evaluation and synopsis, remains: *which elements are really "relevant" and constitute, therefore, a part of the principle [to be applied at the international level]*?' [796] In the area of public law, it is often that the reasons behind major disagreements between various jurisdictions, albeit important at the domestic level, are inapplicable in the international setting. In such cases, a common solution to the international problem can still be found without 'doing violence to the fundamental concepts of any of these systems'. In this regard, the approach taken by Judge Stephen in *Erdemović* in resolving the differences between civil law systems and common law systems provides some valuable insights.

In *Erdemović*, the Appeals Chamber faced the question of whether duress is an available defence to charges of international crimes. Civil law jurisdictions and common law jurisdictions adopt different approaches to that matter: Whereas duress is available as a defence to murder in civil law systems, this is not the case in English law and those common law jurisdictions following the English law approach. Faced with

[796] Michael Bothe and Georg Ress, 'The Comparative Method and Public International Law' in William Butler (ed), *International Law in Comparative Perspective* (Springer 1980) 53 (emphasis added).

this division, Judge Stephen delved deeper into the reasons behind and the debate surrounding the approach taken in English law, based on which he concluded that certain elements in the English approach are inapplicable to the international problem at hand. For instance, he traced the origin of the English approach back to the *Pleas of the Crown* written by Lord Hale in 1800.[797] In this regard, he pointed out, *inter alia*, that the reason for denying duress as a defence to murder (ie 'the law hath provided a sufficient remedy against such fears by applying himself to the courts and officers of justice for a writ or precept *de securitate pacis*') 'if ever a sound one for the adoption of a rule of domestic law, can be no sound basis for any rule of international law applicable to a situation of armed conflict.'[798] Moreover, Judge Stephen distinguished the factual situation based on which the English approach was taken, ie the defendant had to choose between one life or another, from the situation in the case at hand, ie the appellant had to choose between one life or both lives.[799] He thus found that '[i]n such a case the foundation upon which rests the exception at common law to its otherwise well-accepted recognition of duress as a defence disappears and what remains is the role of duress in freeing an accused from criminal responsibility when the stringent conditions for its application are satisfied.'[800] Thus, Judge Stephen concluded that duress should be available as a defence in that case based on the general principle of law on duress, and '[n]o violence is done to the fundamental concepts of the common law' by such a decision.[801] In this way, he avoided rendering the identification of

[797] *Erdemović* (n 721) Separate and Dissenting Opinion of Judge Stephen, para 31.
[798] Ibid.
[799] Ibid paras 33, 47, 64.
[800] Ibid para 64.
[801] Ibid.

general principles of law 'a contest' between different legal systems.[802]

Such an approach can also be applied in the context of international investment law. As elaborated in greater detail in Chapter 7 below, in the example of legitimate expectations, a major substantive division among various legal systems lies on whether, aside from procedural expectations, substantive expectations are also protected. In this regard, several common law jurisdictions inherited a particular notion of separation of powers from English law and are reluctant to grant substantive protection to individuals' expectations. It is concerned in these jurisdictions that the protection of substantive expectations may allow the judiciary to unduly fetter the discretion of the legislature and the executive.[803] However, this particular notion of separation of powers, albeit important in constitutional laws of certain states, is inapplicable in the context of international investment law. Therefore, the element associated with this particular notion of separation of powers in the rules on legitimate expectations is not transposable to the international level, and the non-recognition of substantive expectations in these common law jurisdictions, in and of itself, does not preclude the protection of substantive expectations in international investment law.[804]

In a nutshell, the comparative survey of different jurisdictions does not aim at identifying the 'common essence' or the 'common underlying principle' of different

[802] See *Erdemović* (n 721) Separate Opinion of Judge McDonald and Judge Vohrah, para 72.

[803] See Paul Craig and Søren Schønberg, 'Substantive Legitimate Expectations after Coughlan' (2000) Public Law 687; Swati Jhaveri, 'Contrasting Responses to the "*Coughlan* Moment": Legitimate Expectations in Hong Kong and Singapore' in Matthew Groves and Greg Weeks (eds) *Legitimate Expectations in the Common Law World* (Hart 2017); Matthew Groves, 'Legitimate Expectations in Australia: Overtaken by Formalism and Pragmatism' in Groves and Weeks (eds) ibid; Chintan Chandrachud, 'The (Fictitious) Doctrine of Substantive Legitimate Expectations in India' in Groves and Weeks (eds) ibid; Cora Hoexter, 'The Unruly Horse and the Gordian Knot: Legitimate Expectations in South Africa' in Groves and Weeks (eds) ibid; Qaisar Abbas, 'Doctrine of Legitimate Expectations: Prospects and Problems in Pakistan' (2008) Pakistan Law Journal 448.

[804] For more detail, see Chapter 7, Sections II.B, III.B.

rules. Instead, the key question is, despite the differences in the legal structure, techniques and underlying principles, whether the solutions offered in different legal systems yield similar substantive consequences that can be transposed to the international level. Where differences in the substantive solutions are identified among domestic legal systems, the next question is whether these differences, when understood in light of the broader contexts of various jurisdictions and in light of particularities of the international legal regime, can actually be resolved.

On the other hand, when the divergence cannot be resolved, one has to conclude that international law has not reached the point of limiting the freedom of states.[805] In other words, international law should defer to the different choices made by states, instead of reducing the comparative law research to a 'contest' between various legal systems with a view to finding the 'best practice'. That would be inconsistent with the principle of sovereign equality that underpins the rules on sources. As has been said, the role played by comparative law in the process of identification of general principles is essentially to *understand* the approaches taken in various jurisdictions, based on which an international solution can be developed. Such a role of comparative law is reminiscent of what Kennedy described as 'the diversity department', uncovering whether cultural differences can be accommodated in the global governance project.[806] In his words, '[c]omparativist study can return the internationalist to the project of governance a wiser fellow: an international lawyer must be careful to limit ambitions in the face of the exotic or the unstable, but may proceed elsewhere.'[807] As illustrated further in Chapter 7, by guiding the specific solutions and controlling the degree of

[805] See *The Case of S.S. "Lotus", France v Turkey* (Judgment) PCIJ Rep Series A No 10, 18.
[806] Kennedy (n 4) 614.
[807] Ibid 618.

deference to domestic authorities, comparative law analysis can provide a solid foundation for the approach taken by arbitral tribunals.

The last issue to be addressed is classification. As discussed in section I.A of this chapter, the comparative law survey in the identification of general principles needs to be representative in terms of major legal families and geographic distribution.[808] Nonetheless, caution needs to be taken as regards 'legal families', especially in the field of public law. In the field of comparative law, the grouping of jurisdictions into several legal families is not so much a precise depiction of the reality as an understandable attempt to make wide-ranging comparative research feasible in light of the limited resources.[809] Given that various classifications of 'legal families' have been proposed based on different criteria and considerations (eg history, ideology, legal style), there is no universal and clear-cut definition of 'legal family'.[810] '[A]n often-used categorization' mentioned by the ILC Special Rapporteur, for instance, is Anglo-American law, Far Eastern law, Germanic law, Hindu law, Islamic law, Nordic law, and Romanic law.[811] Yet, classifications like that suffer inevitable limitations and unsurprisingly, have been criticised on many fronts.[812] Furthermore, it has also been pointed out that the classification should evolve as the law evolves.[813] Therefore, the classifications proposed in the literature can only be a general guide, which is far from

[808] See Section I.A of this chapter, text to fn 717-726.

[809] Pargendler (n 733) 1043; Kischel (n 3) 208; Reimann, 'The Progress and Failure' (n 759) 677.

[810] See Pargendler (n 733); Jaakko Husa, 'Legal Families', in Jan M. Smits (ed) *Elgar Encyclopedia of Comparative Law* (2006).

[811] Vázquez-Bermúdez, 'Second Report' (n 190) para 52.

[812] Pargendler (n 733); Husa, 'Legal Families' (n 810).

[813] Husa, 'Legal Families' (n 810) 383; Herwig C H Hofmann, 'Research Frameworks in Comparative Public Law: Law as Category, as Source and as Variable' University of Luxembourg Law Working Paper No. 2020-013 (9 July 2020) <https://orbilu.uni.lu/handle/10993/45613> (accessed 5 November 2022) 8-9.

perfect. 'Legal families' are only 'an analytical structure which provides a rough first-step approach for more detailed comparative studies.'[814] Researchers still need to be as comprehensive as possible in their research, taking into account the particularities of the problem they seek to address.

Moreover, extra care needs to be taken when comparing administrative and constitutional laws. Some of the most influential classifications in the literature, such the ones proposed by René David[815] and Zweigert and Kötz[816], were conducted from the perspectives of private law.[817] Comparative studies of public law, on the other hand, have gained popularity only relatively recently.[818] In the area of public law, certain jurisdictions that are traditionally categorised as belonging to a single legal family may exhibit greater divergence than when they are compared with jurisdictions of other legal families. For instance, although, broadly speaking, both the US and the UK belong to the common law tradition, US constitutional law perhaps has more in common with German constitutional law – they both have a written constitution and a robust system of constitutional judicial review, unlike the UK. While Argentina is generally classified as belonging to Romanic law, its constitutional law is heavily influenced by the US constitution.[819] Therefore, the conventional classifications need to be re-evaluated before being applied to comparative research in public law.

In the area of public law, it is helpful to consider the history and effect of legal

[814] Husa, 'Legal Families' (n 810) 384.
[815] René David and Camille Jauffret-Spinosi, *Les grands systèmes de droit contemporains* (Dalloz 1982).
[816] Zweigert and Kötz (n 17).
[817] Husa, 'Legal Families' (n 810) 386-387.
[818] Husa, 'Legal Families' (n 810) 389-390.
[819] Kischel (n 3) 207.

borrowing and legal transplant. Colonisation has contributed to the spread of the French, Spanish, English, and Dutch systems of law across Asia, Africa and Latin America.[820] For instance, several common law jurisdictions, such as Australia, Canada, Hong Kong, India, and Singapore, were influenced by the English style of judicial review.[821] In other cases, some jurisdictions built on the models of more developed legal systems in undertaking their own legal reforms. For instance, throughout the nineteenth and the twentieth centuries, some Eastern Asian states, such as Japan and China, have borrowed heavily from, among others, German and US administrative law.[822] Similarly, several Middle Eastern states, such as Turkey, Egypt, and Lebanon, have been influenced by French administrative law.[823]

In comparative law scholarship, much has been written about public laws of jurisdictions such as Germany, France, the UK, and the US. This is partly because the legal materials of these jurisdictions are more accessible and their respective languages are more familiar to comparative lawyers. In light of the history of legal transplant and legal borrowing, to learn about these jurisdictions as a starting point of the comparative research can be justified. That being said, the approaches taken in public laws are also affected by local culture, ideology, and development policies. These factors need to be taken seriously when selecting legal systems for comparison. It bears reemphasising that the comparative research for purposes of identifying general principles needs to be

[820] See eg Jean-Michel Galabert, 'The Influence of the Conseil D'Etat outside France' (2000) 49 ICLQ 700, 704-5; John Ohnesorge, 'Administrative Law in East Asia: A Comparative Historical Analysis' in Rose-Ackerman, Lindseth, and Emerson (n 793) 79-82.

[821] See eg Edward McWhinney, 'Constitutional Review in Canada and Commonwealth Countries' (1974) 35 Ohio State Law Journal 900.

[822] Ohnesorge (n 820).

[823] See Esin Örücü, 'Conseil D'Etat: The French Layer of Turkish Administrative Law' (2000) 49 ICLQ 679; Galabert (n 820) 3

representative not only in terms of legal families, but also in terms of geographical diversity.

Chapter 7. Application of the Comparative Law Method in the Use of General Principles of Law

To demonstrate the feasibility of the method discussed in Chapter 6 and to illustrate some of the problems and their solutions in the use of general principles of law in investment arbitration, this chapter presents examples of how the comparative law method established above can be applied. As discussed in Chapter 4, the principles of 'proportionality' and 'legitimate expectations' can be, and actually have frequently been, applied as general principles of law in investment arbitration when interpreting substantive standards in IIAs.[824] Given the importance of these two principles in shaping the content of contemporary international investment law, they will be the focus of the present chapter.

As a starting point, section I of this chapter critically examines the approaches in which these two principles have been used and discussed. It also clarifies the relevant concepts, which define various factual scenarios and divide them into several categories for the purposes of comparative law analysis. Based on that categorisation, the rest of this chapter focuses on three selective issues and seeks international solutions through comparative law analysis. In particular, section II deals with general legislative and regulatory changes, section III deals with breach of lawful representations for policy reasons, and section IV deals with breach of unlawful representations.

In this regard, although I strive to be as comprehensive as possible in the

[824] Chapter 4, Sections I.B, III.B; For the principle of proportionality: *Occidental Petroleum Corporation and Occidental Exploration and Production Company* (n 251) paras 402-4; Gebhard Bücheler, *Proportionality in Investor-State Arbitration* (OUP 2015) 30-34, 82-83; Stone Sweet and Mathews (n 407) 74, 109; Stone Sweet and della Cananea (n 28); Dumberry, *A Guide to General Principles of Law* (n 6) 294. For the principle of legitimate expectations: *Total S.A.* (n 251) para 128; *Gold Reserve* (n 251) paras 575-576; Elizabeth Snodgrass, 'Protecting Investors' Legitimate Expectations: Recognizing and Delimiting a General Principle' (2006) 21 ICSID Review 1; Potestà (n 28).

comparative surveys, covering various legal families and regions of the world, I am aware of the limits in my linguistic knowledge and access to legal materials. Again, the following is an attempt to illustrate the problems and solutions in comparative law analysis in the context of investment arbitration. It is acknowledged that the content of the international norms applicable in these scenarios can continue to be refined and complemented by further comparative studies. Both in comparative law and in international law, international co-operation is crucial to the enrichment of knowledge.[825] Similar to the process in which the co-operation among many scientists brings science closer to objectivity, collaboration by lawyers around the world can contribute to the representativeness of international rules.

I. 'Proportionality' and 'legitimate expectations' in investment arbitration: A critical appraisal

When discussing general principles in investment arbitration, it is almost impossible to avoid mentioning the principles of proportionality and legitimate expectations. Despite their frequent appearance in investment awards, their normative contents remain relatively vague. Indeed, the fact that these principles can be central to the lawfulness of governmental measures with billions of dollars at stake throws into sharp relief the shockingly thin doctrinal basis arbitral tribunals have relied upon when ascertaining their contents. As argued below, the lack of clarity in the contents of these principles and charges of arbitrariness in their use stem from the methodological weakness in the

[825] See Ernst Rabel, 'Deutsches und amerikanisches Recht' (1951) 16 Zeitschrift für ausländisches und internationales Privatrecht 340, cited and translated in Peters and Schwenke (n 759) 831. As observed by Ernest Rabel, '[w]hat remains of the coloring of the picture by origin and education of the scholar, will be corrected by international co-operation.' (translated by Peters and Schwenke).

identification of these principles. In the following, I will first critically examine the method(s) for the identification of these two principles in practice and in the literature, revealing two major methodological problems (I.A). Building on that, I will then propose an analytical framework by clarifying relevant concepts and dividing various factual scenarios into several categories (I.B). That will lay the groundwork for the comparative studies in the next three sections.

I.A. Methodological problems

Despite the importance of the principles of proportionality and legitimate expectations in investment arbitration, some of the methodological problems mentioned in Chapter 2, which have prompted objections by developing states, still persist today. In light of the conclusions reached in Chapter 6, the following shows that the identification of these principles suffers from two major methodological problems. First, the comparative surveys in their identification often limit the coverage to a few European jurisdictions and cannot be said to reflect the diversity across different regions and cultures. Second, when conducting comparative law studies for their identification, there is a tendency of starting from and focusing solely on abstract concepts instead of concrete solutions to the problems.

Lack of representativeness is a problem in the identification of both principles. As regards the proportionality principle, its identification in practice exhibits a strong Euro-centric tendency. In *Tecmed*, the tribunal relied on the jurisprudence of the ECtHR on proportionality, without reasoned justification.[826] Tribunals in subsequent

[826] *Tecmed* (n 256) para 122.

cases followed suit, and relied on the elements in ECtHR jurisprudence for guidance.[827] For instance, the tribunal in *Occidental* v. *Ecuador*, when interpreting the US-Ecuador BIT and Ecuadorian law, observed that 'the most developed body of jurisprudence [on proportionality] is in Europe', implying that the reliance on the ECJ's and the ECtHR's jurisprudence could thus be justified.[828]

Similarly, in the few instances where a comparative law analysis was conducted for identifying the principle of legitimate expectations, the surveys were again inadequate in terms of their coverage. In the award in *Total v. Argentina*, on the principle of legitimate expectations, the sources cited included Argentinian law, French law, English law, and EU law.[829] In *Gold Reserve v. Venezuela*, the tribunal referred to German law, French law, English law, Argentinian law, and Venezuelan law.[830] In his separate opinion in *Thunderbird v. Mexico*, arbitrator Wälde referred to the case law of the ECJ and the ECtHR, as well as 'several developed systems of administrative law'.[831]

In these examples, the comparative surveys not only failed to include legal systems in Asia and Africa, but also displayed a lack of balance between civil law and common law jurisdictions. Although European legal systems had a profound influence on legal systems in other regions, different cultures, ideologies, and development status are also crucial factors affecting the approach taken in public law. This Euro-centric

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[827] *Azurix* (n 192) paras 311-2. See also *EDF (Services) Limited v. Romania*, ICSID Case No ARB/05/13, Award (8 October 2009) para 293; *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd* v. *Kazakhstan*, SCC Case No V 116/2010, Award (19 December 2013) paras 1162-67.

[828] *Occidental Petroleum Corporation and Occidental Exploration and Production Company* (n 251) para 403.

[829] *Total S.A.* (n 251) paras 128.

[830] *Gold Reserve* (n 251) para 576.

[831] *Thunderbird* (n 184) Separate Opinion of Thomas Wälde (1 December 2005) paras 27-8.

tendency in the aforementioned decisions ran counter to the requirement of geographic representativeness discussed in Chapter 6.[832] Although decisions of the ECtHR and the ECJ can be considered as a subsidiary means for determining the content of this principle, they themselves cannot satisfy the requirements for identifying a general principle applicable on a global scale. Unsurprisingly, the method for identifying general principles in arbitration practice has prompted trenchant criticism,[833] which echoes developing states' opposition to the use of this source in the twentieth century.[834]

More fundamentally, the comparative analysis for the purposes of identifying these principles focused primarily on abstract concepts, paying limited attention to the concrete factual situations the norms seek to address and the different contexts in which they were applied. As pointed out in Chapter 6, neglecting concrete factual contexts in comparative studies runs the risk of comparing the incomparable and misconstruing the substantive meaning of relevant norms.[835] Such an approach may reduce the comparative law analysis to mere window dressing that can neither offer a doctrinal basis for evaluating investors' claims nor constrain the discretion exercised by arbitrators.

As regards the proportionality principle, it has been invoked in a variety of circumstances, ranging from revocation of contract,[836] emergency measures affecting

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[832] Chapter 6, Section I, text to fn 717-726.

[833] See eg Sornarajah, *The International Law on Foreign Investment* (n 20) 109-10; José E Alvarez, 'Beware: Boundary Crossings - A Critical Appraisal of Public Law Approaches to International Investment Law' (2016) 17 JWIT 171, 220-222; Paparinskis, *Minimum Standard* (n 11) 173-4.

[834] Chapter 2, text to fn 128-129, 165-168.

[835] Chapter 6, Section III.

[836] *Occidental Petroleum Corporation and Occidental Exploration and Production Company* (n 251) paras 402-452.

property interests,[837] to general legislative or regulatory change.[838] Despite its frequent appearance in practice, this principle's content remains unclear.[839] In domestic laws, although the proportionality principle is often considered applicable primarily to 'rights claims',[840] its scope of application varies across different jurisdictions and is contested even within a single jurisdiction.[841] In investment arbitration, the circumstances where the proportionality principle has been invoked seem to go beyond rights claims, but the scope of its application remains uncertain and inconsistency persists in practice. Perhaps for this reason, it has been generally observed that in investment arbitration, the proportionality principle deals with 'tensions between rights and/or interests'.[842]

The specific test required by this principle is also subject to multiple interpretations. The proportionality test is often understood as encompassing a four-step analysis: first, whether the measure serves a legitimate purpose; second, whether the measure is suitable for the alleged purpose; third, whether it is the least restrictive means to achieve that purpose; and fourth, whether the public interest served by the measure is proportionate *stricto sensu* to the private interest compromised.[843] A three-

[837] See *LG&E* (n 477) Decision on Liability (3 October 2006) paras 185-197; Bücheler (n 824) 211-252; Stone Sweet and della Cananea (n 28) 937-938.

[838] See eg *Charanne and Construction Investments v. Spain*, SCC Case No V062/2012, Award (21 January 2016) (unofficial English translation by Mena Chambers) paras 514-539; *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, SCC Case No 2015/063, Final Award (15 February 2018) paras 643-712; *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No ARB/14/3, Final Award (27 December 2016) paras 319, 342, 372.

[839] See Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration* (CUP 2015) 69-124.

[840] See Stone Sweet and Mathews (n 407) 73; Kotuby and Sabota (n 748) 116.

[841] See Paul Craig, 'Proportionality, Rationality and Review' (2010) New Zealand LR 265; Tom Hickman, 'Problems for Proportionality' (2010) New Zealand LR 303; Jeff King, 'Proportionality: A Halfway House' (2010) New Zealand LR 327; Stone Sweet and Mathews (n 407) 163-165.

[842] Eric De Brabandere and Paula Baldini Miranda da Cruz, 'The Role of Proportionality in International Investment Law and Arbitration: A System-Specific Perspective' (2020) 89 Nordic Journal of International Law 471, 472.

[843] See Sweet Stone and Mathews (n 407) 75; Henckels, *Proportionality and Deference* (n 839) 24; Bücheler (n 824) 37; Hermann Punder and Anika Klafki, 'Administrative Law in Germany' in René

step analysis has also been adopted on some occasions, leaving out one of the aforementioned four steps.[844] In arbitration practice, while the proportionality test is sometimes used as a rigorous method of judicial review, on other occasions, it is reduced to a mere balancing exercise between public interests and private interests.[845]

Indeed, in view of the different factors and considerations in play in different factual scenarios, it seems unhelpful to try to find an overarching principle applicable across the board. In domestic laws, despite the different conceptions of 'proportionality' in various jurisdictions,[846] it is generally agreed that the principle should be applied differently in different cases.[847] The manner of the balancing exercise and the intensity of review depend on the particular norms and rights/interests at stake, as well as the role of the adjudicative body in the normative environment it is embedded in.[848] The 'general principle of proportionality', in and of itself, does not dictate a specific criterion and level of deference in the balancing between rights and interests.[849]

Even if the proportionality test is treated as a 'structured analysis', [850] not every element in this analytical structure (of four steps or three steps) is appropriate in all cases. For instance, regarding step four, proportionality *stricto sensu*, some have

Seerden (ed), *Comparative Administrative Law* (Intersentia 2018) 76.

[844] See Erlend M Leonhardsen, 'Looking for Legitimacy: Exploring Proportionality Analysis in Investment Treaty Arbitration' (2012) 3 JIDS 95, 112-113; Henckels, *Proportionality and Deference* (n 839) 69-124. For instance, step four (proportionality stricto sensu) may not be appropriate in all circumstances, and a very deferential 'necessity' analysis (step three) tends to merge with the 'suitability' analysis. See fn 852. See also Jan H Jans, 'Proportionality Revisited' (2000) 27 Legal Issues of Economic Integration 239, 240-41; Craig, *Administrative Law* (n 407) 1107.

[845] For a rather comprehensive case study, see Henckels, *Proportionality and Deference* (n 839) 69-124.

[846] Stone Sweet and Mathews (n 407) 162

[847] Craig, 'Proportionality, Rationality and Review' (n 841) 268-269; Hickman (n 841) 303; King (n 841) 327; Janina Boughey, 'Proportionality and Legitimate Expectations' in Matthew Groves and Greg Weeks (eds), *Legitimate Expectations in the Common Law World* (Hart 2017).

[848] Ibid; De Brabandere and da Cruz (n 842) 477-478; Stone Sweet and Mathews (n 407).

[849] Ibid.

[850] Craig, *Administrative Law* (n 407) 1156; Stone Sweet and Mathews (n 407) 88-92.

considered that it should not be applied to measures falling within the discretion of the public authority, since that would allow the judiciary to substitute its own view for that of the proper authority.[851] Moreover, at an extreme, a very deferential 'necessity' analysis (step three) would practically merge with the 'suitability' analysis (step two).[852] While the level of deference in each step of analysis can vary in different contexts, it may sometimes be artificial to maintain the analytical structure while adjusting the degree of deference. In short, both the analytical approach and the intensity of review, which implicate the applicability of the 'proportionality test(s)', should not be examined in the abstract.

Thus, in investment arbitration, the analysis pertaining to 'proportionality' should start from identifying the concrete problem and the nature of the allegedly infringed right or interest. Otherwise, merely finding the existence of 'the principle of proportionality' in various domestic legal systems, without considering the contexts of its application, can hardly provide useful guidance. If the three-step or four-step analysis is applied in an across-the-board fashion, without distinguishing different types of claims, arbitral tribunals may risk applying more restrictive criteria than what are accepted in many domestic jurisdictions.

When conducting comparative law analysis, the applicability of the proportionality test(s), the specific type of test to use, and the intensity of review have

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[851] See King (n 841); Henckels, *Proportionality and Deference* (n 839) 164-168.

[852] In some investment arbitration cases, the urgency of the situation and the unforeseeability of the measure's consequences were taken into account. Accordingly, the government was accorded greater deference at the 'necessity' stage, to the effect that the measure would be lawful as long as it falls within a range of decisions that a reasonable government could have adopted. See *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No ARB/03/17, Separate Opinion of Arbitrator Nikken (30 July 2010) paras 37, 42; *AWG Group* (n 240) Separate Opinion of Arbitrator Nikken, paras 37, 42; *LG&E* (n 477) para 239. When such a deferential necessity test is employed, it is hard to be distinguished from a suitability analysis.

to be considered in conjunction with other doctrines pertinent to the specific problem at hand, such as expropriation, breach of contract in exercise of governmental power, and frustration of 'legitimate expectations'. Of course, this is not to deny that there are cross-cutting themes when determining the method and standard of review in investment arbitration, which include the international, as opposed to domestic, context of investment arbitration, its institutional set-up, and the object and purpose of investment treaties.[853] These elements will be considered in conjunction with other factors in the following sections.

A similar problem exists in the use of 'the principle of legitimate expectations', whose scope and content have been even more confusing and controversial. Since it was first introduced into the realm of investment arbitration via the principle of good faith, various versions of 'legitimate expectations' have been adopted, ranging from the 'catchall conception' mentioned in *Tecmed*,[854] to the narrow conception limiting its scope of application to cases where a specific commitment has been given.[855] There is even a circular notion of that principle, to the effect that investors have a legitimate expectation to be treated fairly and equitably.[856] The variety of conceptions of 'legitimate expectations' has reached such a point that it was cautioned that 'the multiplication of legitimate expectations may create a "moving target" for a respondent

[853] See eg Henckels, *Proportionality and Deference* (n 839) 126-171; De Brabandere and da Cruz (n 842); Pirker (n 399).

[854] Teerawat Wongkaew, *Protection of Legitimate Expectations in Investment Treaty Arbitration: A Theory of Detrimental Reliance* (CUP 2019) 188; *Tecmed* (n 256) para 154.

[855] See Snodgrass (n 824) 56-57; *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No ARB/05/8, Award (11 September 2007) para 332; *Suez and InterAguas* (n 852) Separate Opinion of Arbitrator Pedro Nikken (30 July 2010) paras 28-31.

[856] For this problem, see Josef Ostřansky, 'An Exercise in Equivocation: A Critique of Legitimate Expectations as A General Principle of Law under the Fair and Equitable Treatment Standard' in Andrea Gattini, Attila Tanzi, and Filippo Fontanelli (eds), *General Principles of Law and International Investment Arbitration* (Brill 2018) 369.

that in an extreme case might raise issues of due process.'[857]

Similar to the case of 'proportionality', the lack of clarity regarding 'legitimate expectations' is rooted in the fixation on abstract concepts (or their 'essence'), and in the lack of attention to concrete problems. Indeed, the efforts so far in identifying the 'essence' or the common underpinnings of various usages of 'legitimate expectations' appear to be fruitless, and, in light of the conclusions reached in Chapter 6, this is unsurprising. For instance, the *Tecmed* tribunal and many others justified the protection of legitimate expectations by reference to the principle of good faith.[858] Yet, the principle of good faith cannot explain why a *bone fide* change of government policy may cause a breach of legitimate expectations in certain cases.[859] Based on the notion of the rule of law, Henckels argued that legal certainty is the 'most convincing rationale for the protection of legitimate expectations.'[860] But this view was rejected by Ostřansky. According to him, '[l]egal certainty demands predictability and regularity of the legal system overall, not ad hoc expectations to statutory and other general legal prescriptions, which is precisely what protection of [legitimate expectations] requires in its application.'[861] For Ostřansky, the proper 'justificatory principle' should be the protection of trust or *Vertrauensschutz*.[862]

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[857] *Franck Charles Arif* (n 386) para 534.

[858] *Tecmed* (n 256) para 154; *Thunderbird* (n 184) Award (26 January 2006) paras 147-48; *Sempra* (n 354) para 298; *Waguih Elie George Siag* (n 439) para 450; *Total S.A.* (n 251) paras 128, 130; *El Paso* (n 550) para 348; *Gold Reserve* (n 251) paras 576-577; *CC/Devas (Mauritius) Ltd v. India* (n 326) para 458.

[859] See eg *LG&E* (n 477) paras 132-139, 162; Jonathan Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (CUP 2014) 164.

[860] Caroline Henckels, 'Legitimate Expectations and the Rule of Law in International Investment Law' Monash University Faculty of Law Legal Studies Research Paper No. 349086 (24 August, 2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3409086> (9 November 2022) 9.

[861] Ostřansky (n 856) 365.

[862] Ibid.

However, as revealed in the comparative surveys that will be introduced in greater detail in the following sections, individual rights and interests affected by the revocation of administrative decisions, breach of promises, and regulatory changes are often protected by different rules in domestic laws, and these rules are often underpinned by different principles and considerations depending on the constitutional structure and legal tradition of each jurisdiction. For instance, the protection of legitimate expectations in German law is underpinned by the principle of legal certainty (*Rechtssicherheit*) and the protection of trust (*Vertrauensschutz*),[863] whereas in French law, comparable protection derives from the principle of legal certainty and the principle of acquired rights (*droits acquis*).[864] In English law, such cases are regulated both by procedural justice stemming from the ultra vires principle, and, in terms of substantive protection, by the irrevocability of administrative decisions and the legitimate expectations doctrine, even though the underpinnings of the legitimate expectations doctrine have been contested.[865] In Chinese law and Japanese law, the protection of legitimate expectations is undergirded by the principle of good faith.[866] In

[863] Georg Nolte, 'General Principles of German and European Administrative Law: A Comparison in Historical Perspectives' (1994) 57 MLR 191; Dieter Grimm, Mattias Wendel, Tobias Reinbacher, 'European Constitutionalism and the German Basic Law' in Anneli Albi, Samo Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (Springer 2019) 431-435; Klaus Rennert, 'The Protection of Legitimate Expectations under German Administrative Law' Paper given on the seminar on the protection of legitimate expectations of the Association of Councils of State and Supreme Administrative Jurisdictions of the European Union on 21 April 2016 in Vilnius, Lithuania <https://www.bverwg.de/en/medien/pdf/rede_20160421_en.pdf> (accessed 14 April 2021).

[864] Jürgen Schwarze, *European Administrative Law* (Sweet & Maxwell 1992) 869, 874; Paul Reynolds, 'Legitimate Expectations and the Protection of Trust in Public Officials' (2011) Public Law 330, 345.

[865] See Forsyth, 'Legitimate Expectations Revisited' (n 763); Farrah Ahmed and Adam Perry, 'The Coherence of the Doctrine of Legitimate Expectations' (2014) 73 CLJ 61, 62; Mark Elliott, 'Legitimate Expectations: Procedure, Substance, Policy and Proportionality' (2006) 65 Cambridge LR 254.

[866] 国务院 (Chinese State Council), 《全面推进依法行政实施纲要》 国发[2004]10 号, (Guideline on Comprehensively Promoting Administration According to Law) (22 March 2004) § 3(5); Shotaro Hamamoto, 'Protection of the Investor's Legitimate Expectations: Intersection of A Treaty Obligation and A General Principle of Law' in Wenhua Shan and Jinyuan Su (eds), *China and International Investment Law* (Brill 2014) 160-161.

US law, although the protection of legitimate expectations is not recognised as a standalone constitutional principle, comparable results are achieved by the takings rule and the due process rule in constitutional law.[867]

In view of the diversity of the conceptual structures and underpinnings of pertinent rules in various jurisdictions, it seems futile to search for a common 'essence', or a single 'underlying principle', of the protection of 'legitimate expectations' in various jurisdictions. In fact, the underpinnings of a specific rule can be disputed even within a single jurisdiction.[868] Moreover, even if one claims to be able to identify a 'common core' of the underlying principles, such a result, be it 'the rule of law' or 'good governance', can hardly be a useful guide in concrete cases. This is why 'the comparative surveys adduced failed to shape meaningfully the Tribunals' approach to FET or legitimate expectations, or to determine the outcome of the case'.[869]

As pointed out in Chapter 6, one should compare concrete solutions to specific problems, instead of abstract concepts and principles. The differences in the concepts used and their various underpinnings in domestic legal systems may not prevent the finding of an international solution to the problem at hand. At the same time, legal concepts are indispensable in defining and categorising various factual scenarios for the purposes of comparative analysis.[870] One has to understand the different legal concepts and their underpinnings in various jurisdictions in order to undertake a proper

[867] See Snodgrass (n 824) 28; L Harold Levinson, 'The Legitimate Expectation that Public Officials Will Act Consistently' (1998) 46 AJCL 549; *Penn Central Transportation Co.* (n 487).

[868] See eg Forsyth, 'Legitimate Expectations Revisited' (n 763); Ahmed and Perry (n 865) 62; Jing Wang, 'On Non-retroactive Operation Principle of Administrative Law' (2007) 3 Constitutional and Administrative LR 337 (in Chinese).

[869] Peat, *Comparative Reasoning* (n 2) 123.

[870] Chapter 6, Section III, text to fn 773-777.

initial categorisation of the factual scenarios or problems. These matters will be examined in the following, with a view to sketching out an outline for the discussions in sections II-IV. The next sub-section will focus on the different scenarios surrounding the notion of 'legitimate expectations'.

I.B. Relevant concepts and categorisation of different factual scenarios

In investment arbitration, the notion of 'legitimate expectations' has been applied to a variety of situations, ranging from breach of contract, to breach of informal representations, to general regulatory changes.[871] In *Blusun v. Italy*, the tribunal drew distinctions among these scenarios:

> It is … true that a representation as to future conduct of the state could be made in the form of a law, sufficiently clearly expressed. But there is still a clear distinction between a law, ie a norm of greater or lesser generality creating rights and obligations while it remains in force, and a promise or contractual commitment. There is a further distinction between contractual commitments and expectations underlying a given relationship: however legitimate, the latter are more matters to be taken into account in applying other norms than they are norms in their own right.[872]

In *Crystallex v. Venezuela*, the tribunal distinguished general laws from specific representations, stating that:

[871] Potestà (n 28) 100-117.

[872] *Blusun* (n 838) para 371.

> Laws are general and impersonal in nature; they will usually leave some degree of discretion to the state agencies for the making of their case-specific decisions and, in fact, are rarely unconditional in their provisions so that the investor would have difficulty founding an actual expectation akin to a vested right.[873]

In these excerpts, different acts were distinguished from one another by concepts such as 'expectations', 'vested rights', and legitimate exercise of 'discretion', all of which originate in domestic laws. To define and classify different factual scenarios would require a better understanding of these and related concepts. As pointed out in Chapter 6, in comparative law studies, one has to move back and forth between the conceptualisation of the research problem and the solutions offered in various jurisdictions.[874] Some of the concepts discussed below will be articulated in greater detail in sections II-IV of this chapter.

Among the broad range of scenarios pertaining to 'legitimate expectations', boundaries can generally be drawn based on two grounds: first, the type of act giving rise to the alleged 'expectation'; second, the lawfulness of the act in question. On the first matter, most domestic legal systems surveyed draw distinctions among legislation, general administrative regulations, specific administrative acts creating rights, and representations and assurances.

In German law, the principle of legitimate expectations is a constitutional principle.[875] Its scope of application is broad, covering not only administrative acts and

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[873] *Crystallex* (n 386) para 552.

[874] Chapter 6, Section III, text to fn 773-780.

[875] Schwarze (n 864) 886-887.

assurances, but also legislation.[876] That being said, different acts are subject to different conditions for generating legitimate expectations and demand different levels of deference in judicial review. Whereas private parties can rarely reasonably expect legislation and general regulations to be frozen in time, assurances and administrative acts conferring benefits can in principle give rise to legitimate expectations.[877] Under the German Administrative Procedure Act, assurances and other administrative acts are subject to similar rules in their revocation and withdrawal.[878] Yet, in order for an assurance to have legal effect, it must be given in writing and by the competent authority.[879] Also, the bindingness of assurances is conditioned on an unchanged factual and legal situation.[880]

The German approach to the protection of legitimate expectations has influenced many other civil law systems,[881] with alterations in light of different constitutional structures and policy preferences of various jurisdictions. For instance, in Chinese law, although the principle of legitimate expectations applies to administrative acts and assurances, it does not extend to legislation.[882] Although legislation and general administrative regulations are subject to the principle of non-

[876] Ibid; German Administrative Procedure Act (Verwaltungsverfahrensgesetz, VwVfG) §§ 38 (2), 48, 49; Germany's Answers to the Questionnaire on 'the Protection of Legitimate Expectations in Administrative Law and EU Law', Seminar Organised by the Supreme Administrative Court of Lithuania and ACA-Europe (Vilnius, 21-22 April 2016) (Germany's Answers) 7.

[877] Schwarze (n 864) 886-887; VwVfG (n 875) §§ 38, 48, 49.

[878] Ibid.

[879] Ibid § 38(1).

[880] Ibid § 38(3).

[881] See eg General Report on the Protection of Legitimate Expectations in Administrative Law and EU Law, Seminar Organised by the Supreme Administrative Court of Lithuania and ACA-Europe (Vilnius, 21-22 April 2016) (European Report on Legitimate Expectations) (Particularly the position in the laws of Poland, Germany, Lithuania, Belgium, and the Czech Republic).

[882] See Wang (n 868).

retroactivity,[883] judicial review does not cover legislation and is very limited regarding administrative regulations.[884]

The term 'legitimate expectations' has a much narrower meaning in English law than in German law and several other civil law systems. Given that the judiciary has limited power to review legislation enacted by Parliament,[885] and given that the revocation and modification of administrative acts creating or affecting legal rights are governed by other rules, the doctrine of legitimate expectations applies only to administrative acts that do not in themselves create rights, such as promises, consistent practice, or policies promulgated by the government.[886] Whereas administrative acts creating or affecting rights are in principle irrevocable,[887] acts and representations made by the administration in the exercise of its discretion can generally be revoked or modified, subject to the requirement of respecting legitimate expectations.[888] It is often considered that the protection of legitimate expectations is rooted in the notion of fairness and courts traditionally adjudicate such claims as a matter of abuse of power.[889] The intensity of judicial review varies depending on the context of the case and the nature of the act in question.[890] Due to the broad impact of general policy changes, the

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[883] 《中华人民共和国立法法》(Legislative Law of the People's Republic of China) (adopted 15 March 2000, entered into force 1 July 2000, amended 15 March 2015) Article 93.

[884] See 《中华人民共和国行政诉讼法》 (Administrative Litigation Law of the People's Republic of China) (2017 Revision) Article 53.

[885] Although the courts may declare incompatibility of legislation with the Human Rights Act, that declaration does not affect the continuing operation or enforcement of the legislation in question, nor does it bind parties to the proceedings. See Human Rights Act 1998, s 4.

[886] Schønberg (n 409); Ahmed and Perry (n 865).

[887] Schønberg (n 409) 66.

[888] Schønberg (n 409) 67-69.

[889] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 415; *R v North and East Devon Health Authority ex p. Coughlan* [2001] QB 213, 214.

[890] See Mark Elliott, 'Legitimate Expectations and the Search for Principle: Reflections on Abdi & Nadarajah' (2006) 11 Judicial Review 281, 286; Boughey, 'Proportionality and Legitimate Expectations' (n 847).

level of deference to the administration is greater in such cases than in cases of breach of specific representations.[891] Several other common law jurisdictions follow a similar conceptual structure and categorisation of cases.[892]

In French law, another legal system that has influenced many other jurisdictions, the principle of legitimate expectations is not recognised except in the implementation of EU law.[893] But a similar effect is achieved through the doctrines of acquired rights (*droits acquis*) and legal certainty.[894] Substantively, French law differs from German law in that the former focuses more on the objective features and legal basis of the act, rather than subjective expectations or reliance by individuals.[895] Yet, the categorisation of different scenarios is similar to the jurisdictions discussed above. According to the acquired rights doctrine, administrative acts creating rights are usually irrevocable (*intangible*).[896] Individualised administrative acts conferring benefits, such as granting building permits, licences, entering into procurement contracts, and granting financial aids, are usually deemed as 'creating rights' in French law.[897] On the other hand, legislation and general regulations usually are not deemed to create subjective rights for individuals directly,[898] although the principle of legal certainty may prohibit

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[891] Boughey, 'Proportionality and Legitimate Expectations' (n 847) 131; *R. (on the application of Niazi) v The Secretary of State* [2008] EWCA Civ 755 [35], [41]; *R. v. Secretary of State for Education and Employment Ex p. Begbie* [2000] 1 WLR 1115 [80]-[81].

[892] Jhaveri (n 803); Groves (n 803); Chandrachud (n 803); Hoexter (n 803); Abbas (n 803).

[893] See Conseil d'État, Assemblée, du 5 mars 1999, N° 194658 196116, Rec Lebon 370.

[894] Schwarze (n 864) 869, 874; Schønberg (n 409) 46-8, 70, 114.

[895] Schwarze (n 864) 869.

[896] Schønberg (n 409) 70-71.

[897] Conseil d'État, 3 novembre 1922, Dame Cachet, N° 74010, Rec Lebon 790; Conseil d'État, Assemblée, du 1 juin 1973, N° 85804, Rec Lebon 390; Conseil d'Etat, 6/2 SSR, du 3 décembre 1982, N° 20865, Rec Lebon 409; Conseil d'État, 6ème - 5ème chambres réunies, 10/02/2022, N° 455465, Rec Lebon 595; Conseil d'Etat, 7/9 SSR, du 25 juillet 1986, N° 22692, mentionné aux tables du recueil Lebon 454; Conseil d'Etat, 2/6 SSR, du 25 avril 1990, N° 93916, mentionné aux tables du recueil Lebon 641; Schønberg (n 409) 70-71.

[898] Schwarze (n 864) 882.

retroactive effect of legislation and regulations and may require transitional arrangements.[899] Moreover, informal representations in principle do not create rights or bind public authorities. Individuals have limited recourse to remedies in cases of breach of informal representations by public authorities.[900]

Based on the foregoing, the concepts of 'legitimate expectations', 'acquired rights', 'irrevocability', and 'abuse of power' as used in different legal systems focus on different aspects of protection and differ in their scope of application. In German law, due to the importance attached to substantive protection of rights and interests of individuals,[901] the principle of legitimate expectations has a broad scope of application and legitimate expectations can be generated by a variety of acts, ranging from legislation to administrative assurances. This is despite the fact that the extent to which legitimate expectations may arise and the degree of protection accorded differ in different cases. In comparison, French law lays greater emphasis on the objectivity of the law and the legal character of an act, rather than subjective expectations of individuals. Thus, this area of French law is defined by what types of acts can be deemed as 'creating rights' and general irrevocability applies to such acts. On the other hand, in line with the common law's inclination to emphasise procedural justice, the protection of legitimate expectations in English law was traditionally subsumed under the broad notion of procedural fairness and relevant claims have been adjudicated as a matter of abuse of power. English courts expressly recognised substantive protection of legitimate expectations only relatively recently.[902]

[899] European Report on Legitimate Expectations (n 881) 11.

[900] Schønberg (n 409) 131.

[901] Grimm, Wendel, and Reinbacher (n 863) 431-435; Nolte (n 863) 191.

[902] *Coughlan* (n 889).

Despite the conceptual differences, the categorisations of factual scenarios are similar across various legal systems. Although parliamentary legislation may be the 'supreme' law and is not susceptible to review by other organs within the state in certain jurisdictions, such legislation, as acts of the state concerned, remains regulated by international law, including international investment law.[903] Beyond that, changes in legislation and general administrative regulations are subject to similar rules in the jurisdictions surveyed – broad discretion is reserved for their authors to make changes and individuals have limited grounds to challenge a change or seek remedies. On the other hand, individuals' interests are more protected when they are affected by a change of specific administrative acts creating rights or conferring benefits, although different jurisdictions focus on different aspects of protection. As for representations by public bodies, their bindingness is usually subject to strict conditions and their legal effect is weaker than that of formal administrative decisions.[904] Therefore, a general distinction can be drawn between, first, legislation and general regulations, second, formal administrative decisions creating rights, and third, representations and assurances.

Apart from the type of act inducing reliance or expectations, another factor dividing different cases is the lawfulness of the act. In several jurisdictions, where the administrative authorities revoke or modify their *lawful* decisions in the exercise of discretion, the principle of legality and the principle of legal certainty militate in favour of maintaining the *status quo* and protecting the legitimate expectations of the affected. On the other hand, when it comes to revocation or modification of *unlawful* decisions

[903] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (n 19) Article 12 and its commentary, para 12.

[904] See VwVfG (n 875) § 38; Schwarze (n 864) 891; See Forsyth, 'Legitimate Expectations Revisited' (n 763) 436-439; see also *Coughlan* (n 889) [59]; *Reprotech (Pebsham) Ltd v East Sussex County Council* [2003] 1 WLR 348; Schønberg (n 409) Chapter 4.

or representations, the protection of interests based on reliance needs to be weighed against the principles of legality, and the separation of powers within certain constitutional structures prevents the judiciary from enforcing an ultra vires act. Thus, change or withdrawal of unlawful acts deserves separate analysis from that of lawful acts.

In certain jurisdictions, change or withdrawal of unlawful decisions 'creating rights' is treated differently from change, withdrawal or 'breach' of unlawful representations. But in other jurisdictions, these are regulated on the same basis. For instance, in German law, withdrawal of unlawful administrative acts and withdrawal of unlawful assurances are subject to similar rules,[905] although the reasonableness of expectations arising from them may differ. In Chinese law, which was influenced by German law, withdrawal and invalidity of unlawful assurances are also subject to similar rules as withdrawal and invalidity of unlawful administrative acts.[906] In English law, unlawful decisions and unlawful representations are also treated in a similar fashion: Due to the ultra vires doctrine, both decisions and representations that contradict statutory law will be annulled and it is not up to the judiciary to compel the executive to act against the will of Parliament.[907]

On the other hand, in French law, which attaches greater importance to legal formality, unlawful decisions creating rights can only be withdrawn under stringent requirements, whereas unlawful representations are in principle without binding

[905] VwVfG (n 875) §§ 38(2), 48.

[906] Luping Zhang, 'The Nature of Administrative Promise and Judicial Review: An Empirical Analysis Based on Court Verdict' (2016) 18 Journal of Southwest University of Political Science & Law 48 (in Chinese) 54-55; Yifang Du, 'Legal Responsibility of Administrative Promise' (2011) (4) Legal Forum 121 (in Chinese).

[907] See eg Schønberg (n 409) 104-106; Forsyth, 'Legitimate Expectations Revisited' (n 763) 435.

force.[908] Similarly, in EU law, whereas the principle of legitimate expectations applies to unlawful formal decisions, it does not apply regarding assurances that do not comply with the applicable rules.[909] In view of the different approaches in these jurisdictions, it is preferable to discuss unlawful representations separately from unlawful administrative decisions.

Based on the distinctions introduced above, the following sections will focus on three selective scenarios that often arise in investment arbitration: general legislative or regulatory change (II), breach of lawful representations for policy reasons (III), and withdrawal of unlawful representations (IV).

II. General legislative or regulatory change

A major type of investor-state disputes concerns general legislative or regulatory change causing loss to foreign investors. Tribunals have relied heavily on the principle of legitimate expectations when deciding such cases. However, the extent to which an investor can expect stability of the legal framework has been a 'grey area' and a major cause for disagreement in arbitral decisions and in the literature.[910] The following will first elaborate on the problems that arise in investment arbitration cases (II.A), and then will present a comparative analysis of the solutions in various domestic legal systems, based on which an international solution will be developed in light of the structure and

[908] See Schønberg (n 409) 114.

[909] Case T-145/06 *Omya AG v Commission* [2009] ECR II-145, para 117.

[910] Florian Dupuy and Pierre-Marie Dupuy, 'What to Expect from Legitimate Expectations? A Critical Appraisal and Look into the Future of the "Legitimate Expectations" Doctrine in International Investment Law' in Mohamed Abdel Raouf, Philippe Leboulanger, and Nassib G Ziadé (eds), *Festschrift Ahmed Sadek El-Kosheri: From the Arab World to the Globalization of International Law and Arbitration* (Kluwer Law International 2015) 291.

object and purpose of investment treaty law (II.B).

II.A. Problems in investment arbitration

In investment arbitration, there is a general consensus that a state bears no obligation to freeze its domestic legislation and regulations to protect financial interests of foreign investors.[911] But tribunals also generally consider that in certain circumstances, a treaty breach can be triggered by general legislative or regulatory changes. In arbitral decisions, tribunals have found that legitimate expectations can be breached where the regulatory change affects investors' rights in a disproportionate manner,[912] where there are 'unreasonable modifications of [the] legal framework',[913] where 'a drastic or discriminatory change in the essential features of the transaction' occurs,[914] where the authorities 'drastically and abruptly revise the regime, on which [the investors'] investment depended, in a way that destroy[s] its value',[915] and where the measures 'entirely transform and alter the legal business environment under which the investment was made'.[916] Some nuances can be discerned in the aforementioned expressions, and the substantive criteria adopted in practice have not been consistent. Disputes arising from the reforms in the Spanish renewable energy regime offer a good example to

[911] See eg *Blusun* (n 838) para 372; *Charanne and Construction Investments* (n 838) para 493; *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No ARB/07/17, Award (21 June 2011) para 291; *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No UN3467, Final Award (1 July 2004) para 184; *Saluka* (n 105) paras 305, 351; *Total S.A.* (n 251) para 122; *El Paso* (n 550) para 374.

[912] *Blusun* (n 838) para 372.

[913] *Impregilo* (n 911) para 291. See also *Parkerings* (n 855) para 332.

[914] *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*, ICSID Case No ARB/07/12, Award (7 June 2012) para 244.

[915] *Eiser Infrastructure Limited* (n 355) para 387.

[916] *CMS* (n 649) Award (12 May 2005) para 275. See also *El Paso* (n 550) para 374.

illustrate this.

To better explain the divided opinions expressed in the Spanish renewable energy cases, it is worth briefly explaining the relevant legal regime. The Spanish legal regime on the electric power sector was initially grounded on Law 54/1997 of 27 November 1997, under which renewable energy generators were regulated by a 'special regime' and benefitted from a premium on top of the wholesale market price. This special regime was implemented by a series of Royal Decrees (RDs), including RD 661/2007. That latter decree provided that renewable energy producers could receive either a feed-in tariff or a fixed premium. Under article 44(3) of the decree, the feed-in tariff granted could be revised, whilst facilities registered with the RAIPRE (Administrative Register for Production Facilities under the Special Regime) would not be affected.[917] The incentives under RD 661/2007 proved fruitful and attracted many investors. But these incentives soon became unsustainable after the 2008 financial crisis. From 2010, the Spanish authorities implemented several regulatory changes, amending and ultimately repudiating the incentives under RD 661/2007, as well as the distinction between the 'special regime' and 'ordinary regime' under Law 54/1993. As a result, renewable energy producers that were heavily dependent on the incentives under the previous regime suffered a great loss. A considerable number of investment arbitration proceedings were launched against Spain.[918] A crucial question for arbitral tribunals in these cases was to what extent these investors could legitimately expect the previous incentives regime to continue, and accordingly, whether Spain was responsible for the

[917] See Carmen Otero García-Castrillón, 'Spain and Investment Arbitration: The Renewable Energy Explosion' CIGI Investor-State Arbitration Series Paper No. 17 (November 2016) <https://www.cigionline.org/static/documents/documents/ISA%20Paper%20No.17.pdf> (accessed 11 November 2022) 2-3.

[918] Ibid 4-6.

losses suffered by these investors. Arbitrators were divided in this regard.

In several cases, tribunals decided that the investors could not expect that the 2007 regime would not change, and instead, what they could legitimately expect was a 'reasonable rate of return' on their investment.[919] For instance, the tribunal in *RREEF v. Spain* maintained that although stability does not equate with immutability, the state was obligated to refrain from adopting 'unpredictable radical transformation in the conditions of the investments'.[920] Thus, for the *RREEF* tribunal, 'the guarantee of "reasonable return" or "reasonable profitability"' was the main obligation of Spain vis-à-vis the investors under the Special Regime.[921] Similarly, the tribunal in *Cavalum v. Spain* held that the investors could only legitimately expect a reasonable return on their investment, instead of the specific incentives.[922] These decisions are reminiscent of some of the decisions connected to the Argentinian financial crisis. For instance, in *Total v. Argentina*, the tribunal, after observing that general regulations are not shielded from subsequent changes, stated that 'a claim to stability can be based on the inherently prospective nature of the regulation at issue aimed at providing a defined framework for future operations'.[923] In that regard, it considered the conditions for long-term investment, as well as 'commonly recognized and applied financial and economic principles'.[924] Based on these factors, the tribunal decided that 'when a State is

[919] See eg *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No ARB/13/30, Decision on Responsibility and on the Principles of Quantum (30 November 2018) para 386; *Cavalum SGPS, S.A. v. Kingdom of Spain*, ICSID Case No ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum (31 August 2020) paras 599-601, 642; *Isolux Netherlands, BV v. Kingdom of Spain*, SCC Case No V2013/153, Final Award (17 July 2016) para 787.

[920] *RREEF* (n 919) para 315.

[921] Ibid para 384.

[922] *Cavalum* (n 919) paras 599-601.

[923] *Total S.A.* (n 251) para 122.

[924] Ibid.

empowered to fix the tariffs of a public utility it must do so in such a way that the concessionaire is able to recover its operations costs, amortize its investments and make a reasonable return over time, as indeed Argentina's gas regime provided.'[925]

On the other hand, some tribunals and arbitrators considered that the incentives under the previous regime constituted specific commitments to investors, and investors meeting the stipulated conditions had legitimate expectations to benefit from the specific tariff rates as 'promised'. Both in *Isolux v. Spain* and in *Charanne v. Spain*, arbitrator Guido Tawil maintained that the provisions on incentives under the previous regime were specific enough to generate legitimate expectations.[926] According to him, once the claimants made the investment complying with all the requirements under the relevant rules, it would not be legally acceptable for the state to modify or eliminate these benefits without some legal consequences.[927] For arbitrator Tawil, although a state could not be required to freeze its legal system, when it affected vested rights or legitimate expectations even in the valid exercise of regulatory powers, it must compensate for the damages caused.[928] The tribunal in *Novenergia v. Spain* and arbitrator David Haigh in *Cavalum v. Spain* also regarded the incentives under RD 2007 as specific promises intended to induce investment, and they therefore considered that it was unlawful for Spain to revoke these benefits without compensation.[929] Similarly, for the tribunal in *Masdar v. Spain*, the provisions granting incentives under RD 661/2007 constituted 'a very specific unilateral offer from the State, which an investor

[925] Ibid.

[926] *Charanne* (n 838) Guido Santiago Tawil's Partial Dissenting Opinion (21 January 2016) para 9; *Isolux* (n 919) Dissenting opinion of Arbitrator Guido Santiago Tawil (6 July 2016).

[927] *Charanne* (n 838) Guido Santiago Tawil's Partial Dissenting Opinion, para 10.

[928] Ibid para 11.

[929] *Novenergia* (n 838) paras 665-667; *Cavalum* (n 919) Dissenting Opinion of Arbitrator David R Haigh QC.

would be deemed to have accepted, once it had fulfilled the substantial condition of construction of the plant and the formal condition of registration within the prescribed "window".'[930]

As reflected in these cases, major uncertainty exists regarding the criteria of legal stability under investment treaties. Although the different opinions in the Spanish renewable energy cases were partly due to the different interpretations of the Spanish energy regime, the disagreement on a state's general obligation vis-à-vis investors who suffered losses due to a regime change was also significant. To the extent that the scope of this obligation should be determined by referring to general principles of law, a comparative law analysis is required.

II.B. Comparative law analysis

Domestic jurisdictions adopt a variety of legal techniques regarding losses caused by legislative and regulatory changes. These techniques are underpinned by different legal principles depending on the legal cultures and constitutional structures of various legal systems. For instance, in several civil law jurisdictions, this matter is regulated by the principle of legitimate expectations and/or legal certainty,[931] which sometimes require

[930] *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No ARB/14/1, Award (16 May 2018) para 512.

[931] Examples in this respect include: German law (both the principle of legal certainty and the principle of legitimate expectations are constitutional principles), see Schwarze (n 864) 886-887, 898-900; Chinese law (the principle of legitimate expectations is a principle of administrative law), see Chinese State Council, Guideline on Comprehensively Promoting Administration According to Law) (2004) (n 866) § 3(5); Colombian law, see Colombian Constitutional Court, Judgment C-252/2019 (n 291) para 210; Camilo A Rodriguez Young, 'Enhanced Legal Certainty in Colombia: The Role of the Andean Community' (2008) 17 Michigan State University College of Law Journal of International Law 407, 421-423; Spanish law (legal certainly is a constitutional principle in Spanish law) see the Spanish Constitution of 1978, Article 9(3); Latvian law, see European Report on Legitimate Expectations (n 881) 3; Latvia Administrative Procedure Law (2001) § 10; Lithuanian law, see Lithuania's Answers to the Questionnaire on 'the Protection of Legitimate Expectations in Administrative Law and EU Law', Seminar organised by the Supreme Administrative Court of Lithuania and ACA-Europe (Vilnius, 21-22

a balancing between the burden imposed on private parties and the public interest advanced by the change.[932] In other jurisdictions, legislative and regulatory changes are limited by the protection of vested rights.[933] In some common law jurisdictions influenced by English law, although legitimate expectations are protected, the substantive protection granted to individuals in general policy changes is usually very limited.[934] In Islamic law, the notion of trust[935] and the protection of property rights[936] are enshrined in the Qur'an, and the principle of non-retroactivity in law is also recognised;[937] but the protection of property rights is limited by the 'doctrine of necessity' (*ḍarūra*) and public interests (*masalih mursala*).[938]

April 2016) ('Lithuania's Answers') 3; Estonian law, see Judgment of the Constitutional Review Chamber of the Estonian Supreme Court of 30 September 1994, No III-4/1-5/94. See also EU law: Craig, *EU Administrative Law* (n 409) 600; Case 120/86 *J. Mulder v. Minister van Landbouw en Visserij* [1988] ECR-02321.

[932] For instance, in German law, a proportionality analysis applies. See Federal Constitutional Court (BVerfGE) 43, 242 (1977) 288; BVerfGE 36, 73 (1973) 82; BVerfGE 63, 312 (1983) 329; BVerfGE 67, 1 (1984) 15; see also BVerfGE 71, 255 (1985) 273. In Spanish law, courts would also balance between the public interest and the loss incurred to a private party, especially in light of the foreseeability of the change to a prudent agent and whether the private party made a special sacrifice. See Judgment of the Supreme Court (Administrative Law Chamber) of 5 March 1993 (RC 1318/1990); Judgment of the Supreme Court (Administrative Law Chamber) of 17 February 1998 (RC 327/1993); Constitutional Court of Spain, STC Judgment 270/2015, 17 December (BOE No 19, 22 January 2016). In Estonian law, it is also required that the legislature may give retroactive force to the law, provided that it does not cause disproportionate harm to legitimate expectations and the law is not surprising for the person concerned. See Judgment of the Administrative Law Chamber of the Estonian Supreme Court of 17 March 2003, No 3-3-1-11-03, para 33.

[933] Examples in this respect include: French law, see Schwarze (n 864) 874-875; Italian law, see Schwarze (n 864) 917-918; Brazilian law, see Constitution of the Federative Republic of Brazil (2010) Article 5 (XXXVI) (translated by Brazilian Chamber of Deputies, Documentation and Information Centre).

[934] For English law, see *Niazi* (n 891) [35], [41]; *Begbie* (n 891) [80]-[81]. For Indian law, see Chandrachud (n 803). For Pakistani law, see Abbas (n 803). For Hong Kong law and Singaporean law, see Jhaveri (n 803). For South African law, see Hoexter (n 803).

[935] Mohammad Hashim Kamali, 'Constitutionalism and Democracy: An Islamic Perspective' (2010) 2 Islam and Civilisational Renewal 18, 22-23. ('In a Qur'ānic passage known as the āyat al-umarā' or the rulers' verse, the text provides: "God commands you to render the trusts (al-amānāt) to whom they are due, and when you judge among people, you judge with justice" (4:58).')

[936] Arash Nazhad, 'The Link between Islamic Law and Hydrocarbon Agreements' (2008) 10 Journal of Islamic Law & Culture 166, 168; Saba Habachy, 'Property, Right, and Contract in Muslim Law' (1962) 62(3) Columbia LR 450, 452.

[937] Hossein Esmaeili, 'The Nature and Development of Law in Islam and the Rule of Law Challenge in the Middle East and the Muslim World' (2011) 26 Connecticut Journal of International Law 329, 358.

[938] Nagla Nassar, 'Book Review: Walid El-Malik, *Minerals Investment under the Shari'a Law* (Graham

Despite the variety of legal techniques, for present purposes, the question is whether the substantive solutions in various legal systems are similar, and if not, whether, after considering the reasons behind their differences, an international solution can nevertheless be developed. As explained in Chapter 6, differences in the doctrinal approaches and principles underpinning the solutions offered in various legal systems, in and of themselves, do not necessarily prevent the finding of an international solution.[939]

In domestic legal systems accessible to the author, there is common ground that legislation and general regulations can evolve without causing state liability, although a stable legal framework needs to be maintained.[940] But the substantive rules in various jurisdictions differ both in the scope of application and in the standard of judicial review. In terms of the scope of the relevant rules, for instance, the protection of legitimate expectations is a constitutional principle in states such as Germany, Spain, and Estonia, and it governs both legislation and administrative regulations.[941] On the other hand, in Chinese law, the principle of legitimate expectations is only a principle of

& Trotman, 1992)' (1994) 9 ICSID Review 330, 359, 362.

[939] Chapter 6, Section III.

[940] Schwarze (n 864) 886-887, 898-900 (German); Luis Arroyo Jiménez and Gabriel Doménech Pascual, 'The Europeanisation of Spanish Administrative Law through the Principle of Legitimate Expectations' (2020) 2 Review of European Administrative Law 55 (Spain); European Report on Legitimate Expectations (n 881) 12-13, 16-17 (Latvia, Cyprus, Estonia, Finland, the Netherlands, France, and Sweden); Rodriguez Young (n 931) 421-423 (Colombia); Wang (n 868) (China); Craig and Schønberg (n 803) (England and Wales); Jhaveri (n 803) (Hong Kong and Singapore); Chandrachud (n 803) (India); Abbas (n 803) (Pakistan); Hoexter (n 803) (South Africa); *FHA v. The Darlington*, 358 U.S. 84 (1958) 91; *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) 15-16; *Concrete Pipe and Products of California, Inc v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 (1999) 645-46 (US); Haftu Tekleab Alema, 'Reflections on Legitimate Expectations of Foreign Investors in Ethiopia' (2017) 9 Jimma University Journal of Law 29 (Ethiopia); Joined Cases C-120/06 P and 121/06 P *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Others v. Council and Commission* and *Giorgio Fedon & Figli SpA and Others v. Concil and Commission* [2008] ECR I-6513 (EU).

[941] See Schwarze (n 864) 886-887; The Spanish Constitution (1978) Article 9(3); Constitutional Court of Spain, STC Judgment 270/2015 (n 932); Judgment of the Constitutional Review Chamber of the Supreme Court of Estonia of 30 September 1994 (n 931).

administrative law and only applies to administrative acts;[942] and the lack of judicial review gives the legislature great leeway in making changes.[943] Similarly, in English law, judicial review on the ground of legitimate expectations covers administrative acts only, and the legislature is not bound by the legitimate expectations principle.[944]

The differences in the scope of legal constraint and judicial review, albeit important at the domestic level, are not transposable to international law. The preclusion of statutory law from judicial review in certain jurisdictions is due to the allocation of powers under the particular constitutional system. But international law, including investment treaties, applies to the state as a unitary actor, and investment tribunals exercise jurisdiction over all three branches of the state as a whole. Although in English law the doctrine of parliamentary sovereignty limits judicial review when it comes to statutes, this doctrine cannot be asserted before a tribunal applying international law. Moreover, in jurisdictions where legislative changes are beyond judicial review, transitional arrangements are often enacted to soften the blow when the legislative change may cause severe loss to private parties.[945] Thus, both legislation and regulations should be governed by the rules of international investment law, subject to the deference to domestic decision-makers as discussed below.

Among various jurisdictions, another major difference lies in the standard of protection, which is often manifested in judicial review. The following are some of the

[942] Chinese State Council, Guideline on Comprehensively Promoting Administration According to Law (n 866) (2004) § 3(5).

[943] Legislative Law of the People's Republic of China (15 March 2015) (n 883) Article 93.

[944] See Forsyth, 'Legitimate Expectations Revisited' (n 763) 435.

[945] See eg Wang (n 868) (China); Ethiopia Investment Proclamation No. 37/1996, Article 41(1)(b); Ethiopia Investment Proclamation No. 1180/2020, Article 57 (Ethiopia). See also European Report on Legitimate Expectations (n 881) 11 (France).

representative examples of the various approaches taken in domestic legal systems in terms of the method and the intensity of judicial review over legislative and/or regulatory changes. On the deferential end of the spectrum, in Chinese law, only certain administrative regulations can be incidentally reviewed by courts in terms of their legality.[946] In the absence of circumstances of illegality, such as ultra vires or deviation from statutory law, general regulatory changes are exclusively within the discretion of the competent authority.[947] Although the principle of legitimate expectations is recognised as a principle of administrative law, losses caused to individuals through regulatory changes would not lead to state liability or allow the decision to be quashed by courts.[948]

In several common law jurisdictions, although judicial review on the ground of legitimate expectations is allowed regarding general policy changes, the standard of review is also very deferential. In English law, the *Wednesbury* unreasonableness test, which only inquires whether it is 'so unreasonable that no reasonable authority could ever have come to [that decision]', is applied.[949] Some other common law jurisdictions also take a very deferential approach. In Hong Kong, the Court of Final Appeal has emphasised that while the adoption of an alternative policy does not absolve the government of the duty 'to *take account of* a legitimate expectation', the government must be free to change its policy.[950] In Indian law, the Supreme Court has observed in relation to a change in the regulatory regime on export incentives and quotas that '[i]n

[946] Administrative Litigation Law of the People's Republic of China (n 884) Article 53.

[947] Ibid; Zhang, 'The Nature of Administrative Promise and Judicial Review' (n 906).

[948] Wang (n 868).

[949] See *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223, 230; *Niazi* (n 891) [35], [46]; *Begbie* (n 891) [80]-[81]; *Coughlan* (n 889) [57].

[950] *Ng Siu Tung and Others v. The Director of Immigration* [2002] 5 HKCFAR 1 [93] (emphasis added).

matters of economic policy, it is a settled law that the court gives a large leeway to the executive and the legislature.'[951] Thus, '[t]he doctrine of legitimate expectations plays no role when the appropriate authority is empowered to take [the] decision' unless 'it is by *mala fide* exercise of power or the decision or action taken is in abuse of power.'[952] In Pakistan and South Africa, public authorities are also generally free to make regulatory or legislative changes, and the judiciary would rarely, if ever, intervene in their decisions.[953] In South Africa, it remains controversial whether the protection of legitimate expectations goes beyond procedural protection,[954] and a retroactive application of tax law has been held constitutional as the means chosen was rationally connected to the ends sought to be achieved.[955]

A deferential approach is also taken in the US. In US constitutional law, under the due process clause, legislative and regulatory changes are reviewed based on a rationality test, whereby a change only needs to be a rational measure to achieve the intended purpose.[956] Under the takings clause, although the 'investment-backed expectations' are a relevant consideration,[957] the Supreme Court has refused to find a

[951] *PTR Exports v Union of India*, AIR 1996 SC 3461 [2].

[952] Ibid. See also Chandrachud (n 803).

[953] Abbas (n 803); Hoexter (n 803).

[954] The South African Constitution recognises the supremacy of the rule of law and protects the right to 'administrative action that is lawful, reasonable and procedurally fair'. The Promotion of Administrative Justice Act, which implements the constitution, recognises the protection of legitimate expectations. But the specified protection is only procedural in nature. See Constitution of the Republic of South Africa (1996) §§ 1, 33(1); South African Promotion of Administrative Justice Act 3 of 2000, § 3(1). Hoexter (n 803) 178. See also Geo Quinot, 'Substantive Legitimate Expectations in South African and European Administrative Law' (2004) 5 German Law Journal 65.

[955] *Pienaar Brothers (Pty) Ltd v Commissioner for the South African Revenue Service and Another* (87760/2014) [2017] ZAGPPHC 231.

[956] It was held that 'legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.' *Concrete Pipe and Products of California* (n 940) 637. See also *Usery* (n 940) 18-19 (Holding that retroactive imposition of liability 'is justified as a *rational measure* to spread the costs of the employees' disabilities to those who have profited from the fruit of their labour.')

[957] *Penn Central Transportation Co.* (n 487); *Pennsylvania Coal Co*. v. *Mahon*, 260 U.S. 393 (1922).

breach where, although the regulatory change had adverse effects on the claimant's property, the claimant could still 'obtain a "reasonable return"' on the investment'.[958] In practice, if the claimant failed in the due process claim, 'it would be surprising indeed to discover' that the challenged measure violated the takings clause.[959]

German law and several other civil law jurisdictions influenced by it seem to have adopted a more stringent approach, requiring the application of the proportionality test when a legislative or regulatory change affects legitimate expectations of private parties. But on closer inspection, there is also a significant measure of deference to public authorities and the standards of review do not seem to differ dramatically from those in the common law jurisdictions mentioned above. For instance, in the decision by the German Federal Constitutional Court regarding the nuclear power phase-out, the authorities' revocation, without compensation, of the prolongation of the nuclear power plants' operational lifetimes, which had been statutorily sanctioned, was found to be constitutional.[960] According to the Court, the legislature was generally not precluded from amending a rule favouring the use of nuclear energy and nuclear power plant owners could not generally expect that the output allowances would remain unaltered.[961] As an exception, the Court held that the residual electricity volumes allocated under the Phase-Out Amendment Act, which were 'the core matter of a transitional provision',[962] established 'a special situation of legitimate expectations' such that revoking them required proving that 'keeping the applicable transitional

[958] *Penn Central Transportation Co.* (n 487) 136.

[959] *Concrete Pipe and Products of California* (n 940) 641; *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 221(1986) 223.

[960] BVerfGE 143, 246 (2016) para 305-309.

[961] Ibid paras 303-309.

[962] Ibid para 334.

provision in force must be expected to cause serious detriment to important common interests.'[963] For the Court, although the legislature can amend the law to the detriment of private parties without compensation, 'if the legislature *directly suppresses or significantly restricts* the further use of property', the legitimate expectations arising from the legal framework 'call for *appropriate consideration*, under the principle of proportionality'. [964] Regarding the settlement measures including possible compensation, 'the legislature has broad leeway in designing transitions for existing legal situations, entitlements, and legal relationships.'[965]

Similar to German courts, Spanish courts also intervene only exceptionally, such as when the regulatory change removes the core basis relied on by investors in making the investment. As decided by the Spanish Constitutional Court, the protection of legitimate expectations only requires that a 'reasonable return on the investment' is guaranteed in regulatory changes.[966]

This general approach echoes the position in EU law, where deference is generally given to the primary decision-maker and a breach of legitimate expectations is found only exceptionally.[967] An example of such an exceptional case arose in *Mulder*. In that case, the applicant participated in a regulatory scheme designed to reduce the excess of milk production. In doing so, he ceased milk production for five years. Yet, five years later, when he planned to resume production and applied for a reference quantity under a new levy system, his application was rejected on the ground that he

[963] Ibid para 336.

[964] Ibid para 372 (emphasis added).

[965] Ibid.

[966] See Constitutional Court of Spain, STC Judgment 270/2015 (n 932).

[967] *FIAMM* (n 940) para 171; Case T-155/99 *Dieckmann & Hansen GmbH v Commission of the European Communities* [2001] ECR II-03143, paras 80-81.

could not prove milk production during the preceding years. In that case, the ECJ found in the applicant's favour, holding that a producer encouraged by a regulation to suspend producing milk could legitimately expect not to be denied the benefits under a new regulation because of his actions in reliance on the previous regulation.[968]

In some developing states, special consideration is sometimes given to the need to leave enough space for legislative and regulatory changes, so as to cater for the development policies of these states. For instance, in Ethiopia, when drafting the Commercial Code, the drafters bore in mind that 'the future Commercial Code of Ethiopia must be able to adapt itself easily to the unplanned transformations, which will probably take place in the commercial and economic life of the country at a rapid rate during the course of at least a generation, if not a half-century.'[969] But the need for flexibility is balanced against the requirement of legal certainty, which is equally essential for economic development. In Ethiopia, the regulatory regime governing foreign investment is based on a series of investment proclamations.[970] Although the foreign investment law in Ethiopia has undergone several amendments through the enactment of new investment proclamations in light of changes of policy,[971] a transitional provision is inserted in each of these proclamations to preserve the benefits granted under the previous regime.[972]

On the other hand, some developing states protect legitimate expectations to a

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[968] *J. Mulder* (n 931).

[969] Peter Winship (ed and tr), *Background Documents of the Ethiopian Commercial Code of 1960* (Haile Selassie I University 1974) iv.

[970] See Tekleab Alema (n 940) 43.

[971] See Tekleab Alema (n 940) 43ff.

[972] See Ethiopia Investment Proclamation No 37/1996, Article 41(1)(b); Ethiopia Investment Proclamation No 1180/2020, Article 57; Tekleab Alema (n 940) 43-45.

greater extent in cases of general legislative or regulatory changes. For instance, in Estonia, the Supreme Court has held that an act granting a five-year tax exemption had created the legitimate expectations that the tax exemption would be effective during that period, and the abolition of the exemption was thus unlawful.[973] Such a decision in effect treats legislation granting specific benefit as binding legal commitment. But this 'progressive' approach in protecting legitimate expectations may have been influenced by the historical and political background of the 1990s.[974] Later decisions appear to be more reserved in that regard.[975]

Therefore, in most of the jurisdictions surveyed by the author, public authorities generally enjoy broad discretion to make legislative and regulatory changes, even though such changes may cause damages to private parties. This is because, in the nature of things, general rules have to evolve in response to changing social needs and that would be impossible if the state has to compensate for every loss caused by such changes. Thus, in most of the jurisdictions surveyed, the judiciary only intervenes exceptionally, ie where special circumstances exist and make it clearly unfair to let the individual bear the costs for the legislative or regulatory change in the public interest. In assessing whether such unfair circumstances exist and warrant compensation or make the change unlawful, courts in most jurisdictions give significant deference to the

[973] Judgment of the Constitutional Review Chamber of the Estonian Supreme Court of 30 September 1994 (n 931). See also Lithuania's Answers (n 931) 7.

[974] Herman Schwartz, 'The New East European Constitutional Courts' (1992) 13 Michigan Journal of International Law 741; Wojciech Sadurski, 'Judicial Review in Central and Eastern Europe: Rationales or Rationalizations?' (2009) 42 Israel LR 500, 508; David Landau, 'Political Institutions and Judicial Role in Comparative Constitutional Law' (2010) 51 HILJ 319.

[975] The Estonian Supreme Court has ruled that restrictions on individuals' rights and withdrawal of benefits through regulatory changes are permissible, as long as these do not cause disproportionate harm to legitimate expectations and the law is not surprising for the person concerned. See Madis Ernits, Carri Ginter, Saale Laos, Marje Allikmets, Paloma Krõõt Tupay, René Värk, and Andra Laurand, 'The Constitution of Estonia: The Unexpected Challenges of Unlimited Primacy of EU law' in Anneli Albi and Samo Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (Springer 2019) 908-910.

public body. This is primarily because the judiciary should not overstep its powers and substitute its own judgment for that of the competent authorities, especially in macro level policy-making.[976] Still, some jurisdictions take a different and even more deferential approach, such as the 'legality' test in Chinese law and the requirement of 'good faith' in Indian law, whereby public authorities are almost never liable for losses caused by *bona fide* regulatory changes made within their authority.

The question, then, is what is the appropriate degree of deference to the discretion of state authorities in making legislative and regulatory changes without compensating affected investors, in international investment law. From the comparative law survey, the divergence in domestic laws in this regard is partly due to the different constitutional structures, and partly due to the different development policies. Both of these considerations should be taken into account in determining the appropriate international solution. Given the cross-cutting nature of some of these considerations, the discussion below is in part also relevant to sections III and IV.

In domestic laws, the degree of deference accorded to public authorities is contingent on the role attributed to the judiciary under the constitution. For instance, in German law, the greater restrictions on the powers of state authorities are explicable by the constitutional reform in the aftermath of the Second World War.[977] Thus, the discretion of the administration is recognised only where it is expressly and formally granted; and the judiciary is empowered to review public authorities' substantive decision-making and is less affected by considerations of non-fettering as in English

[976] See eg *Begbie* (n 891) [80]-[81]; *Usery* (n 940) 18-19.

[977] See eg Peter L Lindseth, 'The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s' (2004) 113 YLJ 1341; Nolte (n 863) 191.

law, particularly for the protection of fundamental rights.[978] On the other hand, in China, despite the substantial influence of German law, a different political philosophy is followed, which underpins the limited judicial review both in scope and in degree. In Chinese law, the strong position of the administrative branch in the political architecture explains the limited role of the judiciary regarding administrative regulations.[979] In English law, the principle of parliamentary sovereignty reigns,[980] and the function of the judiciary is primarily to enforce Parliament's intention by overseeing whether administrative bodies are operating within the bounds of their competence.[981] This explains the restrained approach in English law and in several other common law jurisdictions influenced by English law, whereby courts take care not to interfere with the discretionary decision-making of the executive as authorised by the statute. Nonetheless, the content of international rules on this matter should not depend on the unique political and historical background of any particular state. We need to identify factors behind the domestic rules that are relevant in the international context.

In international investment law, there is obviously no constitution delineating the powers allocated to arbitral tribunals and to the different public bodies of states. But the considerations behind the functions of domestic courts and their deference to the other branches of government are, to a certain degree, transposable to international settings. Judicial review is a crucial part of the scheme of checks and balances in the separation of powers under many domestic constitutions, and this holds true across various constitutional arrangements. The primary function of judicial review is to

[978] Nolte (n 863) 196.

[979] See Haitao Sun and Zhixiang Zhang, 'Adaptive Reform of Judicial Review of Administrative Normative Documents' (2020) 1 Political Science and Law 33 (in Chinese).

[980] Lindseth (n 977) 1351.

[981] Craig, 'Substantive Legitimate Expectations' (n 409).

ensure compliance with the law by the other branches of government and to help to limit arbitrariness.[982] At the international level, despite the different legal basis of jurisdiction, it can be said that an analogous function is served by investment arbitration, with adaptations catering for the particularities of the international investment legal regime.

The power of investment arbitral tribunals to review decisions by state authorities derives from IIAs, which reflect a relationship of exchange: In order to obtain the benefits that foreign investors may bring, the host state promises to treat these investors in a certain manner and gives consent to arbitration to make these promises reliable. In this context, investment arbitration can be seen as helping to meet the demands for inclusion (of foreign investors) that may not otherwise be 'sustained by national laws alone'.[983] In this sense, investment arbitration may be viewed as helping to complement the constitutional order of the host state. This is especially so considering that it is arguably less justified to let foreign investors bear the burdens of the public interests of the host state.[984] Along this line of reasoning, Schneiderman has observed that investment arbitration practically acts as 'a means of checking the influence of pluralist competition on self-governing majorities'.[985] To the extent that investment arbitration serves to check the exercise of discretion within the law, it is functionally comparable to that of domestic courts.[986] Indeed, in light of what was

[982] See Christoph Moellers, *The Three Branches: A Comparative Model of Separation of Powers* (OUP 2013) 41; Martin Shapiro, 'Judicial Review in Developed Democracies' (2003) 10 Democratization 7.

[983] See Chris Thornhill, *A Sociology of Transnational Constitutions: Social Foundations of the Post-National Legal Structure* (CUP 2016) 25.

[984] See *James and Others* (n 564) para 63.

[985] David Schneiderman, 'Investment Arbitration as Constitutional Law: Constitutional Analogies, Linkages, and Absences' in Thomas Schultz and Federico Ortino (eds), *The Oxford Handbook of International Arbitration* (OUP 2020) 441.

[986] Obviously, the function of investment arbitration is 'comparable' to, but is still different from, that of domestic courts. For instance, under the international rules prohibiting denial of justice, arbitral tribunals

discussed in Chapter 3, given that investors are given direct access to arbitration and exhaustion of local remedies is no longer required in most cases, investment arbitration often operates as an alternative to domestic courts.[987] Thus, despite the absence of formal separation of powers at the international level, some of the considerations behind judicial review in domestic laws can be taken into account together with the unique features of investment arbitration.

Regarding legislative and regulatory changes, given the 'foreignness' of the investors in the host state as well as the *raison d'être* of investment arbitration in guarding against unfair treatment by the host state, it is inappropriate to leave 'the [state] authority to decide its full range of choice within the executive or legislative power'.[988] Arbitral tribunals should be allowed to review whether the burden imposed on the foreign investor in a regulatory or legislative change is unfair and thus unlawful. It remains to be decided to what extend arbitral tribunals should review the decisions by state authorities and how much deference should be given to the latter. In this regard, the reasons for domestic courts deferring to state authorities should also be taken into account. Indeed, the unique features of investment arbitration further strengthen the need for deference. Obviously, different domestic jurisdictions approach the question of judicial deference differently. But there are cross-cutting factors that generally

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can review the procedure of domestic court proceedings and the state may be held responsible if its courts deny justice to foreign investors. There is usually no counterpart to this in domestic laws. See Paulsson, *Denial of Justice* (n 68) 4-5. This difference is partly due to the fact that in international law, the state is treated as a single entity and domestic courts are part of its instrumentality. But this does not undermine the basic point discussed here: Investment arbitration is designed to check the decision-making by state authorities that may negatively impinge on the rights of foreign investors. The reviewing power of international arbitral tribunals over domestic court proceedings also in part derives from the concern that domestic courts may be unduly influenced by the other branches of the government.

[987] Chapter 3, Section I.B, text to fn 214-227. See also Kaufmann-Kohler and Potestà (n 292) 35-43.

[988] This is the approach practically adopted in Indian law. See *PTR Exports v Union of India* (n 951) [2]. The approach in Chinese law has a similar effect.

influence their approaches.

First and foremost, due to their relatively weak democratic foundation, courts are not the primary body for identifying what the countervailing public interest might be and the importance to be attributed to it vis-à-vis private interests. To allow 'unelected and unaccountable judges' to make policy decisions risks 'disenfranchis[ing] ordinary citizens'.[989] Second, compared with the relevant legislative or administrative body, the judiciary usually lacks the knowledge and expertise for decision-making in a wide range of policy areas.[990] Third, in terms of procedure, the bilateral and adversarial structure of court proceedings makes courts 'ill equipped to examine or to address polycentric or policy questions which necessarily involve the weighing of multiple interests'.[991]

The structure and features of investment arbitration only compound these concerns. Members of investment arbitral tribunals are usually foreign to the host state and are less proximate to the local situations than domestic decision-makers are.[992] International arbitrators' distance from and lack of knowledge about local culture and political situations make them ill-equipped to make policy decisions for the host state.[993] The democratic deficit in investment arbitral tribunals is even more

[989] Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 YLJ 1346, 1353.

[990] See eg Shirlow (n 15) 23.

[991] Ibid; Eoin Carolan, *The New Separation of Powers* (OUP 2009) 154; Bruce V Harris, 'Judicial Review, Justiciability and the Prerogative of Mercy' (2003) 62(3) CLJ 641.

[992] Caroline Henckels, 'The Role of the Standard of Review and the Importance of Deference in Investor-State Arbitration' in Lukasz Gruszczynski, and Wouter Werner (eds), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (OUP 2014) 123; Shirlow (n 15) 24.

[993] Caroline Henckels, 'Balancing Investment Protection and the Public Interest: The Role of the Standard of Review and the Importance of Deference in Investor-State Arbitration' (2013) 4 JIDS 197, 205; Yuval Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?' (2015) 16 EJIL 907, 918; Stephan W Schill, 'Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review' (2012) 3 JIDS 577, 602-603; Shirlow (n 15) 24.

pronounced than that in domestic courts.[994] In terms of procedure, the *ad hoc* basis of the appointment of arbitrators raises accountability concerns,[995] although this particular issue may be ameliorated through procedural reform, such as by establishing a standing investment court.[996] These considerations, taken together, weigh against allowing international arbitrators to remake the policy decisions of local authorities.

The development policy of states is another reason for the different approaches revealed in the comparative law survey. This is equally relevant in international investment law. Indeed, one of the most important purposes of a typical investment treaty is to boost the economic development of treaty parties by encouraging foreign investment.[997] To this end, the need to maintain a stable legal framework is often expressly mentioned in the preamble or in operative provisions.[998] In practice, arbitral tribunals have relied on such terms to support the finding that a radical change in the regulatory regime may constitute a treaty breach.[999]

In domestic laws, national development policies may affect the degree of flexibility permitted in legislative and regulatory changes. But the correlation between the development stage and policy, on the one hand, and the standard of protection, on

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[994] See Andreas von Staden, 'The Democratic Legitimacy of Judicial Review beyond the State: Normative Subsidiarity and Judicial Standards of Review' (2012) 10 International Journal of Constitutional Law 1023; Schill, 'Deference in Investment Treaty Arbitration' ibid 600-602; Shirlow (n 15) 29.

[995] William W Burke-White and Andreas von Staden, 'Private Litigation in a Public Law Sphere: The Standard of Review in Investment Arbitration' (2009) 35 Yale Journal of International Law 283.

[996] Note by the Secretariat, 'Possible Reform of Investor-State Dispute Settlement (ISDS): Appellate and Multilateral Court Mechanisms' UNCITRAL Working Group III (29 November 2019) A/CN.9/WG.III/WP.185.

[997] See eg US-Argentina BIT (n 226) Preamble; US-Ecuador BIT (n 226) Preamble; CETA (n 248) Preamble.

[998] See eg US-Argentina BIT (n 226) Preamble; US-Ecuador BIT (n 226) Preamble; ECT (n 226) Preamble, Article 10.

[999] See eg *Eiser Infrastructure Limited* (n 355) paras 377-382.

the other, is less straightforward than it may appear at first sight. For instance, some developing states adopt a flexible approach to give decision-makers sufficient leeway to adapt to the changing requirements in social and economic relations.[1000] Other developing states are driven by the need to foster economic growth by ensuring a stable legal environment. As seen from the comparative survey, while developing states such as India, Iran, and South Africa have adopted a relatively flexible and relaxed approach to legal certainty and legitimate expectations,[1001] other states, such as Ethiopia and Colombia, have sought to send signals of investment-friendly policies and have made efforts to ensure a higher level of legal certainty in legislation or court decisions.[1002] Eastern European courts also adopted a rather protective approach with respect to legitimate expectations during the transitional period after the dissolution of the Soviet Union.[1003]

These different approaches in legal solutions correspond to different development strategies. Given the differences, decisions of states to retain a broad degree of flexibility for legislative and regulatory changes to cater for their development needs should be given adequate weight. The pledge to maintain 'a stable legal framework' to foster development in IIAs should be interpreted bearing in mind the variety and complexity of particular conditions and development needs of states, especially developing states.

Moreover, one must consider differences between international investment law

[1000] See Winship (n 969).

[1001] Chandrachud (n 803); Hoexter (n 803); Nima Nasrollahi Shahri and Erfan Nourmohammadi, 'An Update on the Status of Petroleum Related Laws and Contractual Frameworks in Iran: A Century of Oil in Persia' (2015) 13 Oil, Gas & Energy Law Intelligence 1.

[1002] Tekleab Alema (n 940); Rodriguez Young (n 931).

[1003] Sadurski (n 974); Landau (n 974).

and domestic public laws in terms of legal remedies. In domestic public laws, the primary remedy for an unlawful administrative or legislative act is to annul that act or to request amendment, and the competent authority generally enjoys the discretion to introduce or rearrange a transitional mechanism in light of the judicial decision. Damages are ordered only on rare occasions, owing to considerations such as the floodgate effect of a damages order and the potential regulatory chill.[1004] On the other hand, in international investment law, treaty breach entails the obligation of full reparation, which is usually realised through compensation.[1005] This may impose even greater financial burden on states undertaking legislative or regulatory changes than they would usually bear under domestic laws. The harsh consequences reinforce the necessity to defer to the development needs of states when deciding on such cases.

In light of the solutions adopted in domestic legal systems, as well as the particularities of the international investment legal regime discussed above, the approach of treating legislation or regulations granting benefits as 'specific commitments' that cannot be altered without compensation should be rejected; and although investment tribunals should be allowed to review the fairness of the loss caused to foreign investors in legislative and regulatory changes, considerable deference needs to be given to state authorities. The deference is not only due to the fact that arbitral tribunals are generally not in a good position to make policy decisions

[1004] See eg Schønberg (n 409) 183, 213-216.

[1005] Although restitution is the primary form of reparation under the ILC Articles on state responsibility, investment tribunals often refrain from ordering restitution as that often means requesting the state to set aside the legislative, executive or judicial act, which is often deemed as a disproportionate interference with the state's sovereign power. As a practical matter, non-compensatory remedies in the context of investment arbitration would also face greater difficulty in enforcement. See Charles N Brower and Michael Ottolenghi, 'Damages in Investor-State Arbitration' (2007) 4 TDM 1, 3-13; Irmgard Marboe, *Calculation of Compensation and Damages in International Investment Law* (OUP 2017) 75-83; Mark W Friedman, and Floriane Lavaud, 'Damages Principles in Investment Arbitration' in John A Trenor (ed), *The Guide to Damages in International Arbitration* (Law Business Research Ltd 2018).

for host states, compared with local authorities, but it is also underpinned by the flexibility required for states, especially developing states, to make legislative or regulatory reforms to meet their changing development needs.

Moreover, since legislation and general regulations are not usually specifically addressed to particular investors, decisions on whether such measures breach the treaty may have broader implications than the dispute at hand. Thus, even if the treaty includes preambular terms promising a 'stable legal framework', arbitral tribunals should defer to the policy choice made by the host state and refrain from second-guessing that choice. Thus, the proportionality test sometimes applied in certain jurisdictions, which requires the tribunal to assess whether the change is 'necessary' and 'proportionate *stricto sensu*',[1006] is inappropriate in this context. On balance, it is more appropriate to adopt the rationality test, whereby a breach occurs only where the burden imposed on the investor is manifestly unreasonable or lacks a rational basis.

Following this approach, general legislative or regulatory changes for policy reasons, albeit causing losses to foreign investors without compensation, would normally not lead to treaty breach. Such changes may incur state responsibility only in exceptional circumstances. For instance, the state may have induced an investor to invest by granting specific benefits through a general act, and these benefits constituted the core conditions for the profitability of the investment, which was foreseeable to the state authorities. If the state then abruptly enacts a new regulation cancelling the core benefits of the regulation, making the investor's business unviable, a treaty breach could be said to have occurred. In this circumstance, the finding of breach is not only

[1006] See Stone Sweet and Mathews (n 407) 75; Henckels, *Proportionality and Deference* (n 839) 24; Bücheler (n 824) 37; Punder and Klafki (n 843) 76.

consistent with the solutions adopted in most of the domestic jurisdictions discussed above, but is also supported by the 'foreignness' of investors, on whom it is less justified to impose the cost of the abrupt decision in the host state's public interest. That being said, the fact that legislation and regulations may evolve over time should be factored in when calculating the damages under the rules of state responsibility requiring 'full reparation'.[1007]

III. Breach of lawful representations for policy reasons

III.A. Problems in investment arbitration

Breach of representations by state authorities is another important basis for investment treaty claims.[1008] A representative statement of the relevant rule is that:

> A legitimate expectation may arise in cases where the Administration has made a promise or representation to an investor as to a substantive benefit, on which the investor has relied in making its investment, and which later was frustrated by the conduct of the Administration. To be able to give rise to such legitimate expectations, such promise or representation – addressed to the individual investor – must be sufficiently specific, ie it must be precise as to its content and clear as to its form.[1009]

[1007] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (n 19) Article 31 and its commentary, Article 36 and its commentary.

[1008] See eg Potestà (n 28) 103-110; Hector A Mairal, 'Legitimate Expectations and Informal Administrative Representations' in Schill, *International Investment Law and Comparative Public law* (n 6); Ostřansky (n 856) 350.

[1009] *Crystallex* (n 386) para 546.

While this general observation does not seem controversial, uncertainty exits regarding the specific requirements for a representation to generate legitimate expectations, as well as regarding the legal consequences. As regards the types of representations capable of producing legitimate expectations, some investment tribunals adopted a more lenient test than others. For some tribunals, legitimate expectations can be created by both explicit and implicit promises.[1010] And, according to arbitrator Wälde in *Thunderbird*, a broad range of acts, including 'conduct, informal, oral or general assurances', can 'give rise to or support the existence of a legitimate expectation.'[1011] Although Wälde acknowledged that 'the threshold for such informal and general representations is quite high',[1012] he left open the possibility that informal and general representations may be relied upon as a basis for claims in certain circumstances. Moreover, in *Thunderbird*, although for the majority of the tribunal legitimate expectations could only be generated by clear, unconditional, and unreserved representations, arbitrator Wälde held that the risk of ambiguity should be borne by the state. For him, 'a government agency cannot rely on intentionally inserted obfuscation to extract itself from the key message the investor relied upon … the drafter and the public authority in a position of superiority over the foreign investor has to be clear, unambiguous and consistent'.[1013] Thus, ambiguous representations should be read in favour of the investor.[1014] Wälde justified this approach by noting that 'ambiguity is the name of the game in dealing with governments',[1015] and that one of the functions of the

[1010] *Parkerings* (n 855) paras 331, 334; *Frontier Petroleum Services* (n 465) para 285.

[1011] *Thunderbird* (n 184) Separate Opinion of Thomas Wälde, para 32.

[1012] Ibid.

[1013] Ibid para 88.

[1014] Ibid.

[1015] Ibid para 87.

investment treaty is 'improving good governance'.[1016]

Other tribunals adopted a far more restrictive standard in that regard, requiring that the representation must be clear and specific in content and directed specifically at the investor, and that it must be made in writing. In *Glamis Gold v. United States*, the tribunal required 'as a threshold circumstance, at least a quasi-contractual relationship between the state and the investor, whereby the state has purposely and specifically induced the investment.'[1017] Similarly, in *Continental Casualty v. Argentina*, the tribunal underscored that the assurance must not only be specific in content, but needs to be directed at the investor, and serve as the basis on which the investor has made its investment.[1018] As such, it is unlikely that an 'implicit' assurance or a general or ambiguous representation can generate legitimate expectations.

In the Argentinian financial crisis cases, legitimate expectations claims based on political statements were rejected due to the lack of specificity and of a sense of legal commitment.[1019] In *Crystallex v. Venezuela*, assurances given by high-level Venezuelan Government officials were considered 'too general and intermediate to found a claim of legitimate expectations under the Treaty'.[1020] On the other hand, the tribunal found that legitimate expectations were produced by a letter of the Ministry of Environment promising that the permit would be given after Crystallex posted a bond and paid environmental taxes.[1021] For the tribunal, the terms in the letter, such as '[the

[1016] Ibid paras 4, 13, 33, 123

[1017] *Glamis Gold. Ltd.* (n 323) para 766.

[1018] *Continental Casualty* (n 670) Award (22 February 2008) paras 258-261.

[1019] Ibid paras 252, 261-262; *El Paso* (n 550) paras 395-396.

[1020] *Crystallex* (n 386) paras 553-555.

[1021] Ibid paras 549-550, 557-575.

proposed measures] have been analysed and approved by this Office' and '[the Permit] will be handed over', were clear and precise enough to generate legitimate expectations.[1022]

Moreover, whereas arbitrator Wälde considered that oral assurances could generate legitimate expectations,[1023] the tribunal in *Mamidoil v. Albania* seemed to reject this position. In that case, while the investor claimed to have relied on the assurances made by high-ranking governmental officials in several meetings, the tribunal observed that 'all of these friendly discussions remained on the level of verbal exchanges; none resulted in an agreed letter of intent, in any type of formal representations or in recorded minutes of meetings'.[1024]

Apart from the question of what types of acts can generate legitimate expectations, where legitimate expectations can be established, the content of legal protection also calls for clarification. Whether the protection is substantive or procedural can have significant impact on the calculation of damages. Following the rules on state responsibility, reparation should effectively 'wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed'.[1025] Thus, if the treaty rule, through interpretation by reference to general principles of law, substantively protects the legitimate expectations by requiring the state to keep its promises, a violation of that rule by breaching a promise may incur the obligation to compensate for the totality

[1022] Ibid paras 561-564.

[1023] *Thunderbird* (n 184) Separate Opinion of Thomas Wälde, para 32.

[1024] *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No ARB/11/24, Award (30 March 2015) para 409.

[1025] *Factory at Chorzów* (Merits) PCIJ Rep Series A No 17, 47.

of the investor's loss, including the lost profits the investor could have made if the promise were kept. If the rule only protects the investor against detrimental reliance, the host state breaching its promise would only be required to compensate the actual loss suffered by the investor due to the reliance on the promise. On the other hand, if the protection is procedural in nature and the host state can lawfully revoke or breach its promises in a change of policy as long as this is done in a procedurally fair manner, the compensation an investor is entitled to would be limited to the damages caused by the procedural misconduct. Obviously, the level of protection is contingent on the particular circumstances of the case, but the rule needs further clarification.

In some cases, the tribunal focused on substantive protection. In *MTD v. Chile*, the claimants' investment was approved by the Foreign Investment Commission (FIC) of Chile and they were assured by governmental officials that the land secured for the investment project would be rezoned to allow the project's operation. However, after the claimants made the investment, they learned that the rezoning would not take place because that would be contrary to Chile's urban development and environmental policy. In this regard, Chile argued that the FIC merely approved the inflow of capital, and such an approval was without prejudice to the chance of obtaining the necessary approvals from other agencies.[1026] But the tribunal treated the state as a unity and held that it had 'an obligation to act coherently and apply its policies consistently, independent of how diligent an investor is'.[1027] For the tribunal, Chile, by approving an investment that was against the urban policy and regulations and by making the assurance, violated the claimant's legitimate expectations.[1028] But due to the lack of due

[1026] *MTD Equity Sdn Bhd* (n 397) Award (25 May 2004) paras 76, 119-122.

[1027] Ibid para 165.

[1028] Ibid paras 163-166.

diligence on the part of the claimant, damages were reduced to 50% of the actual expenditures the investor made on the project (minus the remaining value of the investment).[1029] Thus, the compensation was calculated in terms of detrimental reliance.

In *Crystallex v. Venezuela*, the tribunal found that a letter by the Ministry of Environment created the legitimate expectation that the claimant would receive a permit.[1030] That expectation was frustrated when the respondent refused to issue a permit, as promised in the letter, on environmental grounds.[1031] The tribunal acknowledged that the investor was not 'entitled' to a 'right' to a permit.[1032] It observed that '[i]t is not for an investor-state tribunal to second-guess the *substantive correctness* of the reasons which an administration were to put forward in its decisions, or to question the importance assigned by the administration to certain policy objectives over others.'[1033] But that did not prevent the tribunal from finding that the *procedure* in which a permit was denied was 'arbitrary, lacking transparency or consistency'.[1034] In particular, the denial of a permit was not accompanied by adequate explanation and prior notice, and the claimant was not given an opportunity to challenge the denial or to remedy the deficiencies.[1035] The denial letter also did not consider the materials submitted by the investor and did not elaborate on the specific studies the authority relied on in rendering its decision.[1036] Accordingly, the tribunal found that the denial of a permit frustrated the legitimate expectations arising from the promise contained in

[1029] Ibid paras 242-243.
[1030] *Crystallex* (n 386) paras 549-550, 557-575.
[1031] Ibid para 590.
[1032] Ibid para 581.
[1033] Ibid para 583 (emphasis added).
[1034] Ibid paras 581, 585.
[1035] Ibid paras 592-593.
[1036] Ibid paras 593-594, 597.

the letter.[1037] From that reasoning, the tribunal seems to have considered that a state could lawfully renege on its promise to the detriment of an investor, provided that it is procedurally fair. In other words, the protection of legitimate expectations, at least in that case, was procedural rather than substantive.

In the *Crystallex* award, the denial of a permit was combined with other actions of the respondent, including the termination of the mining operation contract, to establish an indirect expropriation and a breach of the FET standard.[1038] On damages, the tribunal rejected the respondent's backward-looking calculation method, which would limit the damages to the investor's actual expenditure, and chose to follow a forward-looking approach, which covered the lost profits.[1039] Given that the denial of a permit was only part of the conduct which constituted the treaty breach, the significance of the breach of promise in the quantum decision was not clear. Presumably, without other grounds of treaty breach, if the frustration of legitimate expectations was procedural only and the same substantive decision could have been reached without the procedural flaws, the amount of damages would have been much less.

In light of this cursory review, two key issues merit careful consideration through comparative law study: First, the threshold requirements for a representation to generate legitimate expectations; second, the types of remedies available in case of breach.

[1037] Ibid.

[1038] Ibid para 623, 708-718.

[1039] Ibid paras 881-885.

III.B. Comparative law analysis

Depending on the circumstances, breach of representations is subject to different standards of judicial review and different remedies in various jurisdictions. As shown below, despite the different legal approaches in domestic legal systems, the substantive solutions ultimately all come down to a balancing exercise between the public interest and the private interest at stake. As a result of the balancing exercise, some representations require specific performance, some entitle the addressee to compensation, while others call for certain procedural protection and should be taken into account in decision-making. On this matter, a threshold question is what types of representations can generate legitimate expectations worthy of legal protection.

In the comparative survey, there is a general consensus that a representation must be specific enough to warrant legal protection. But disagreement exists regarding whether informal representations can create legitimate expectations. In certain jurisdictions, informal or verbal representations are unlikely to generate legitimate expectations or bind state authorities.[1040] In other jurisdictions, the form is less important, and informal representations may still generate legitimate expectations and in exceptional circumstances, may bind the authority; but the interests affected by the reliance on informal representations are generally less protected than those based on formal ones.[1041]

[1040] For French law, see Schønberg (n 409) 131 (French law attaches greater importance to formality and objectivity of the law, and individualised representations in principle do not generate acquired rights and do not bind public authorities.) For Lithuanian law, see Lithuania's Answers (n 931) 14 (In an answer given by the Supreme Administrative Court of Lithuania, it said that it is unlikely for informal representations (eg verbal promises, intentions, correspondence etc) to bind public authorities or generate legitimate expectations.)

[1041] Jurisdictions adopting this approach include: German law, see Germany's Answers (n 875) 7 (According to the answers by the German Federal Administrative Supreme Court, informal acts such as (mis)information, albeit not legally binding in themselves, can cause claims of state liability.) For Dutch

Despite the differences among various jurisdictions, the special context of international investment law militates against relying solely on informal or verbal representations. As revealed from the comparative law survey, reasonableness of the reliance is key to determining whether the expectations are worthy of protection.[1042] In the context of domestic law, the claimants in cases involving informal representations are often ordinary citizens dealing with the government. Depending on the subject matter at issue and the usual practice of the administration, reliance on informal representations can be reasonable in certain circumstances. However, in investment arbitration, the claimant is usually a multinational corporation or an experienced businessperson investing a significant amount of money into a foreign state. Considering both the financial interests at stake and foreign investors' lack of familiarity with the local culture, it would be reckless and a lack of due diligence for foreign investors to rely solely on an informal or verbal representation made by governmental officials.[1043] Therefore, although certain domestic laws provide otherwise, an informal or verbal representation, in and of itself, should not be held

law, see Gio ten Berge and Rob Widdershoven, 'The Principle of Legitimate Expectations in Dutch Constitutional and Administrative Law' Netherlands Report to the Fifteenth International Congress of Comparative Law (1998) 421 <https://dspace.library.uu.nl/handle/1874/43885> (access 12 November 2022) 446; European Report on Legitimate Expectations (n 881) 22 (In Dutch law, informal representations in principle do not bind the authorities. But exceptional circumstances exist where they may become binding.) For Latvian law, see Latvia's Answers to the Questionnaire on 'the Protection of Legitimate Expectations in Administrative Law and EU Law', Seminar organised by the Supreme Administrative Court of Lithuania and ACA-Europe (Vilnius, 21-22 April 2016) (Latvia's Answers) 7-8 (In Latvian law, the form of action or a decision establishing the expectations does not play a crucial role. Instead, importance is attached to the reasonableness of the expectations and the actual reliance by the person.) For EU law, see Schønberg (n 409) 120-122; Joined Cases T-66/96 and T-221/97 *Mellett v Court of Justice* [1998] ECR-SC I-A-449 and II-1305, para 107 (In EU law, informal and oral representations can create legitimate expectations, although they carry less weight than formal, written statements.) For English law, Schønberg (n 409) 108-114.

[1042] See eg Berge and Widdershoven (n 1041) 446; Latvia's Answers (n 1041) 7-8; Schønberg (n 409) 127. See also Willard L Boyd III and Robert K Huffman, 'The Treatment of Implied-in-Law and Implied-in-Fact Contracts and Promissory Estoppel in the United States Claims Court' (1991) 40 Catholic University LR 605, 622-623; Phuong N Pham, 'Waning of Promissory Estoppel' (1993-1994) 79 Cornell LR 1263, 1282.

[1043] Mairal (n 1007) 435.

capable of creating legitimate expectations in investment arbitration.

As mentioned above, arbitrator Wälde contended that the risk of ambiguity in representations should be borne by the state instead of investors, because of, *inter alia*, the role of investment treaties in 'improving good governance'.[1044] However, the comparative survey demonstrates that in various domestic legal systems, including both common law and civil law, legitimate expectations can only be generated by unambiguous representations.[1045] In Hong Kong, the Court of Final Appeal even expressly rejected the position that ambiguity should be read in favour of the person claiming legitimate expectations, and held that the interpretation given by the authority should be adopted unless it meets the *Wednesbury* unreasonableness test.[1046] Similarly, the Singaporean High Court has held that the interpretation adopted by the public authority should prevail.[1047] In US law, in order for a promise to bind the government in its exercise of public powers, it must be given in 'unmistakable terms'.[1048] The reason behind the requirement of clarity and specificity is that if the government is held to ambiguous representations too easily, this may significantly constrain its regulatory

[1044] *Thunderbird* (n 184) Separate Opinion of Thomas Wälde, paras 4, 13, 33, 88, 123.

[1045] For Dutch law, see European Report on Legitimate Expectations (n 881) 22; Berge and Widdershoven (n 1041) 446. For Colombian law, see Colombian Constitutional Court, Judgment C-252/2019 (n 291) para 212. For EU law, see Case T-20/03 *Kahla Thüringen Porzellan GmbH v Commission* [2008] ECR II-2305, para 146; *Mellett v Court of Justice* (n 1041) paras 104, 107. (To generate legitimate expectations, the assurance must be 'precise, unconditional and consistent and [come] from an authorised and reliable source'.) For English law, see *R v Inland Revenue Commissioners, ex parte MFK Underwriting Agencies Ltd* [1990] 1 WLR 1545, 1569; *R v Inland Revenue Commissioners, ex p Unilever* [1996] STC 681, 693; see also *R v Home Secretary, ex parte Hargreaves* [1997] 1 WLR 906, 922. (For a representation to induce legitimate expectations, it must be 'clear, unambiguous, and devoid of relevant qualification.') For South African law, see *South African Veterinary Council v Szymanski* (79/2001) [2003] ZASCA 11 [19]-[20]; *National Director of Public Prosecutions v Phillips*, 2002 (4) SA 60 (W) [28]. (To generate legitimate expectations, the representation must be, *inter alia*, 'clear, unambiguous and devoid of qualification'.)

[1046] *Ng Siu Tung* (n 950) [104].

[1047] *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority*, [2014] 1 SLR 1047 [119].

[1048] See *United States v. Winstar Corp.*, 518 U.S. 839 (1996) 872; Alan R Burch, 'Purchasing the Right to Govern: Winstar and the Need to Reconceptualize the Law of Regulatory Agreements' (2000) 88 Kentucky Law Journal 245, 248. For claims of promissory estoppel, see Pham (n 1042) 1282.

discretion, and in turn may cause a chilling effect on its performance of the duty to provide information and give guidance.[1049] In view of the common position taken in various jurisdictions, the approach suggested by arbitrator Wälde must be rejected.

Where the basic requirement of a specific, formal, and unambiguous representation is met, the next question is what kind of protection is appropriate. In various domestic legal systems, whether to bind the authority to its promise or to compensate for the loss suffered by the addressee generally depends on the balancing between the public interest at stake and the private interest affected. In several civil law jurisdictions, courts may hold the authority to its specific and unambiguous promise where the private interest in keeping the promise outweighs the public interest at stake. In other cases, although it is inappropriate to bind the government to its promise, individuals relying on the promise should be compensated for the loss caused by such reliance.

For instance, in German law, administrative assurances made in writing are binding and can be enforced *in natura* under section 38 of the German Administrative Procedure Act.[1050] But different from other administrative acts, assurances conferring benefits lose binding effect in the event of a change in either the circumstances or the applicable law, from the moment when the authorities, had the subsequent changes been known to them, would not have promised these benefits or would not have been legally allowed to make the promise.[1051] Apart from that, an assurance can be revoked

[1049] See eg Berge and Widdershoven (n 1041) 446; Lise Johnson and Oleksandr Volkov, 'Investor-State Contracts, Host-State "Commitments" and the Myth of Stability in International Law' (2013) 24 The American Review of International Arbitration 361, 407-408.

[1050] VwVfG (n 875) § 38; Germany's Answers (n 875) 10.

[1051] VwVfG (n 875) § 38(3); Schwarze (n 864) 891.

in order to prevent or remove serious harm to the common good.[1052] But the phrase 'serious harm to the common good' has been interpreted restrictively and has been invoked only exceptionally.[1053] Where a lawful, beneficial administrative assurance is revoked on that ground, the authority shall upon application make good the disadvantage to the affected person due to his or her reliance on the assurance, to the extent that the reliance merits protection.[1054] Moreover, procedural rules play an 'auxiliary function' in enforcing substantive law.[1055] If the decision is lawful in terms of the substance and only the rules on procedure or formalities were breached, courts cannot quash the decision if the flaws in procedure or formalities had no influence on the substantive decision.[1056]

Several other jurisdictions adopt a similar approach, whereby formal representations made by competent authorities are in principle binding, but an overriding public interest may justify a change of position; and in the latter case, compensation may be required subject to a balancing exercise between the public interest and private interest.[1057]

In French law, individualised representations do not in principle generate acquired rights and do not bind public authorities, subject to exceptions, such as special

[1052] VwVfG (n 875) § 49(2).

[1053] Schwarze (n 864) 891.

[1054] VwVfG (n 875) § 49(6).

[1055] Punder and Klafki (n 843) 75.

[1056] VwVfG (n 875) § 46; Punder and Klafki (n 843) 75.

[1057] See eg Dutch law: Berge and Widdershoven (n 1041) 446; Latvian law: Latvia's Answers (n 1041) 2, 7-8; Lithuanian law: Lithuania's Answers (n 931) 14-16; Chinese law: Zhang, 'The Nature of Administrative Promise and Judicial Review' (n 906); Jiansheng Zhang, 'Definition and Adjudication of Administrative Commitment: Review of Case Huang Yinyou etc vs. Daye City Government and Bao'an Town Government of Hubei Province' 2016 (2) SJTU Law Review 169; Colombian law: Colombian Constitutional Court, Judgment T-475/92 of 1992, paras 12-13; Colombian Constitutional Court, Judgment C-252/2019 (n 291) para 212; EU law: Schønberg (n 409) 117-119, 223.

provisions giving binding effect to certain representations.[1058] Yet, a state authority may be liable for the loss caused to the addressees when it breaches specific promises, and the amount of compensation depends on the balancing between the public interest and private interest.[1059]

In common law systems, the substantive protection of the interests, or legitimate expectations, arising from representations is sometimes influenced by the doctrine of promissory estoppel.[1060] When deciding whether to hold the authority to its promise, as well as the intensity of judicial review, importance is sometimes attached to whether there is a quasi-contractual relationship between the authority making the representation and the addressee.

In English law, the default position is that the government can change its policy, subject to the protection of procedural legitimate expectations and the very deferential *Wednesbury* criteria.[1061] English law formally recognised the substantive protection of legitimate expectations in *Coughlan*. In that case, the Court of Appeal adopted a more intrusive review of the government's decision than would be required under *Wednesbury*, and it substantively reviewed the balance struck in the decision.[1062] To justify that approach, the Court of Appeal distinguished general policy changes from promises addressed to 'one person or a few people' with 'the character of a contract'.[1063] Given the quasi-contractual character of the representation in *Coughlan*,

[1058] See Schønberg (n 409) 114-117, 131-133.

[1059] Schønberg (n 409) 224-226.

[1060] See Schønberg (n 409) 108-109; Paul Craig, 'Legitimate Expectations: A Conceptual Analysis' (1992) 108 Law Quarterly Review 79, 84-89.

[1061] Craig, 'Legitimate Expectations: A Conceptual Analysis' (n 1060) 93-94; Schønberg (n 409) 49-56, 112.

[1062] *Coughlan* (n 889) [57]-[58], [66], [89].

[1063] Ibid para [59].

the *Wednesbury* test was insufficient as it would allow the authority to be a 'judge in its own case'.[1064] In another case, Laws LJ explained that a more intrusive review can be justified where few individuals were affected by the representation, and '[t]he more the decision challenged lies in what may inelegantly be called the macro-political field, the less intrusive will be the court's supervision.'[1065] It has been suggested that the proportionality test should be applied at least in cases like *Coughlan*, where a quasi-contractual relationship is at stake.[1066] But that position remains debated.[1067] Besides seeking to enforce the representation, an addressee may also claim for damages. However, where the public authority breaches its representation due to a change of policy, it can only be held liable where the authority owes a duty of care to the person concerned and the frustration of legitimate expectations is *Wednesbury* unreasonable.[1068]

In US law, promises and representations lie at the intersection between the law of contract and promissory estoppel, especially as the dividing line between them is not clearcut.[1069] Subject to the sovereign acts doctrine and the 'unmistakability' doctrine mentioned above,[1070] a contractual relationship can be deemed to have arisen between the government and a private party if a promise by the former induced 'significant action by the latter in reliance thereon', which equals an offer accepted by

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[1064] Ibid para [66].

[1065] *Begbie* (n 891) [82].

[1066] See Elliott, 'Procedure, Substance, Policy and Proportionality' (n 865) 256.

[1067] See eg Craig, *Administrative Law* (n 407)1161-1164; Philip Sales, 'Legitimate Expectations' (2006) 11 Judicial Review 186; Elliott, 'Reflections on Abdi & Nadarajah' (n 890); Boughey, 'Proportionality and Legitimate Expectations' (n 847).

[1068] Schønberg (n 409) 222-223.

[1069] See Boyd III and Huffman (n 1042); Stanley D Henderson, 'Promissory Estoppel and Traditional Contract Doctrine' (1969) 78 YLJ 343.

[1070] Text to fn 1048.

performance.[1071] An addressee of a representation may also claim for promissory estoppel, if they can prove that: First, a credible representation has been made; second, the representation was relied upon by them in such a manner as to change their position for the worse; and third, the reliance was reasonable.[1072] However, there is a general aversion on the part of courts to apply promissory estoppel to the government.[1073] Where the promise impinges on the government's sovereign powers, courts would apply the reasonableness requirement restrictively.[1074] Also, estoppel would not be applied against the government if to do so would compromise 'a strong rule of policy, adopted for the [public] benefit'.[1075] Thus, '[a]bsent an unusual factual situation, estoppel is not available against a governmental agency engaging in the exercise of its governmental functions.'[1076] Where such an 'unusual factual situation' does occur, remedies would usually be granted based on detrimental reliance, and lost profits are generally not recoverable.[1077] Moreover, procedural protection is guaranteed under the due process clause,[1078] but a successful claim requires establishing that the act is 'arbitrary and irrational'.[1079]

Principles of contract law have also been relied upon in civil law jurisdictions.

[1071] *National Rural Utilities Cooperative Finance Corp. v. the United States*, 14 C1. Ct. 130 (1988) 137; *Restatement (Second) of Contracts* (American Law Institute 1981) § 45.

[1072] See *Law Mathematics and Technology, Inc. v. United States*, 779 F.2d 675 (1985) 678; Boyd III and Huffman (n 1042) 622-623.

[1073] Pham (n 1042) 1282.

[1074] Ibid.

[1075] *City of Long Beach v. John E. Mansell*, 3 Cal.3d 462 (1970) 493; Pham (n 1042) 1283.

[1076] *Advanced Refractory Technology v. Power Authority of State of NY*, 568 N.Y.S.2d 986 (1991) 987; *D'Angelo v Triborough Bridge & Tunnel Auth*., 65 N.Y.2d 714 (1985) 716.

[1077] Boyd III and Huffman (n 1042) 626; Henderson (n 1069) 379; *Restatement (Second) of Contracts* (n 1071) § 90, illustrations 8, 10.

[1078] Rowland Richards II, 'Promissory Estoppel and Property in the Due Process Clause: Toward a Consistent Rationale' (1996) 20 Vermont LR 847; *Perry v. Sindermann*, 408 U.S. 593 (1972).

[1079] *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) 500; *United States v. Carlton*, 512 U.S. 26 (1994) 35; Johnson and Volkov (n 1049) 405-406.

In Chinese law, courts, including the Supreme People's Court, have held that administrative assurances conferring benefits on condition that the addressee undertakes certain acts have a legal effect akin to that of an offer in an administrative contract, and as such, the government would be bound by such an assurance once the addressee has fulfilled the specified conditions.[1080] A typical case in that regard is where the government makes a promise to grant certain rewards if a person brings foreign investment to the city.[1081] In other cases, an administrative assurance has been treated as binding in a way similar to that of other administrative acts,[1082] and thus it binds the authority even if the addressee had no knowledge of it and its withdrawal is not subject to the consent of both parties.[1083] This latter approach resembles the one in German law discussed earlier.[1084] But Chinese courts have yet to clarify the distinction between this type of assurances and the contract-like assurances, and some of the decisions remain contradictory.[1085] Still, in Chinese law, a promise cannot be enforced if there are compelling reasons of public concern against its enforcement.[1086]

Compared with the approach taken in English law, in other common law

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[1080] 张炽脉、裘爱玲诉浙江省绍兴市人民政府不履行招商引资奖励行政职责案 (*Zhimai Zhang and Others v. Shaoxing Government of Zhejiang Province*) in Supreme People's Court Administrative Law Division (ed), *Guiding Cases on Chinese Administrative Law Proceedings*, vol 2 (China Legal Publishing House 2011) (in Chinese); 崔龙书诉丰县人民政府行政允诺案 (*Longshu Cui v. Feng County*) (2017) 11 Supreme People's Court Gazette (in Chinese); 《最高人民法院关于审理行政协议案件若干问题的规定》(Guidelines by the Supreme People's Court on Several Issues on Cases concerning Administrative Agreements) No. 17 [2019].

[1081] *Zhimai Zhang and Others v. Shaoxing Government of Zhejiang Province* (n 1080); *Longshu Cui v. Feng County* (n 1080).

[1082] See Zhang, 'The Nature of Administrative Promise and Judicial Review' (n 906); Zhang, 'Definition and Adjudication of Administrative Commitment' (n 1057).

[1083] See Dongni Yan, 'Judicial Review of Administrative Assurances: A Study of the Supreme People's Court's Case Law' (2020) 23 Journal of the East China University of Politics & Law 178, 187-188; Zhang, 'Definition and Adjudication of Administrative Commitment' (n 1057) 172-173.

[1084] Text to fn 1050-1054.

[1085] Yan (n 1083) 188.

[1086] Ibid.

jurisdictions where legitimate expectations are also protected both procedurally and substantively, sometimes even greater deference is given to public authorities. In Indian law, in relation to the legitimate expectations arising from representations, the *Wednesbury* criteria are applied in cases of frustration of the expectations in a change of policy.[1087] The Indian Supreme Court has held that the protection of legitimate expectations only permits the courts to assess 'if the change in policy … is irrational or perverse or one which no reasonable person could have made.'[1088] In Hong Kong law, as in English law, specific representations held out to induce certain actions by the addressee have stronger force than general statements.[1089] Yet, although breach of representations without taking into account legitimate expectations may constitute an abuse of power and allow the decision to be quashed by the courts, the government 'remain[s] free to change its policy' and 'its undertakings are open to modification or abandonment' as long as the legitimate expectations are taken into account.[1090] In Singaporean law, substantive protection of legitimate expectations is only granted if, *inter alia*, the addressee has relied on the representation and has suffered a detriment as a result, and the enforcement of the representation is not contrary to domestic law or to the state's international obligations, does not infringe the rights of others, and is not against an overriding public interest.[1091]

In the law of South Africa, the protection of legitimate expectations focuses mainly on the procedural aspect.[1092] Although substantive protection seems to have

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[1087] Chandrachud (n 803); *Punjab Communications v Union of India*, AIR 1999 SC 1801 [38]-[44]; *Sethi Auto Service Station v Delhi Development Authority*, AIR 2009 SC 904.

[1088] *Sethi Auto Service Station* (n 1087) [25].

[1089] *Ng Siu Tung* (n 950) [105]-[106].

[1090] Ibid [93], [140].

[1091] *Chiu Teng @ Kallang Pte Ltd* (n 1047) [119]; Jhaveri (n 803).

[1092] South African Promotion of Administrative Justice Act 3 of 2000, § 3(1). See also Hoexter (n 803)

been granted on other grounds, such as through interpreting the underlying statute, the Constitutional Court has yet to officially recognise the substantive protection and the jurisprudence in this regard remains unsettled.[1093] A similar situation appears in the law of Botswana, which protects legitimate expectations arising from representations mainly procedurally, requiring the addressees to be given the opportunity to be heard.[1094]

In light of the foregoing, cases concerning representations by the government can be divided into three typical scenarios:[1095] First, the representation made to the investor is formally binding according to the legislation of the state; second, while the representation is not formally binding, the representation created a quasi-contractual relationship between the investor and the government; third, in the absence of such a quasi-contractual relationship, the investor relied on an informal representation by the government and suffered loss.

The first scenario is relatively straightforward. In the comparative survey, some domestic jurisdictions have specific legal provisions giving binding effect to certain representations by state authorities, and the revocation of such representations is subject to specific conditions.[1096] In the context of investment arbitration, if the law of the host state has specific provisions making certain representations by the authorities binding,

170-171.

[1093] Hoexter (n 803) 178; Quinot (n 954).

[1094] *Government Security Officers v. The Attorney-General*, [1997] BLR 646 (HC); Christopher Forsyth, 'The Protection of Legitimate Expectations: Some Pitfalls for Botswana to Avoid' (2006) 3 Botswana Law Journal 5, 8-9; Bonolo Ramadi Dinokopila, 'The Justiciability of Socio-Economic Rights in Botswana' (2013) 57 Journal of African Law 108.

[1095] As shown in the comparative law survey, different jurisdictions draw the distinction differently. The present categorisation is made based on a synthesis of the key features distinguishing different scenarios adopted in most of the jurisdictions surveyed. Admittedly, there can be overlaps between these categories.

[1096] See eg German law: VwVfG (n 875) §§ 38, 49; Schwarze (n 864) 891; French law: Schønberg (n 409) 131.

such provisions should be given effect. In such cases, the relevant law usually would also have particular rules on the requirements of binding representations, the conditions for their revocation, and the legal consequences for breach. Where such rules exist, investment arbitral tribunals should apply these rules to decide the rights and obligations of parties to the dispute in a way similar to applying domestic law to define the scope of property rights or to resolve contractual issues.[1097]

In the absence of specific provisions giving binding force to the promise or representation, legitimate expectations arising from representations creating a quasi-contractual relationship between the addressee and the government tend to receive greater protection than those generated by other representations.[1098] In such cases, the representation or promise is usually intended to induce, and has actually induced, certain conduct by the addressee. However, the degree of protection differs in different jurisdictions. At one end of the spectrum, the representation is binding unless a significant change of circumstances occurs or unless there is compelling public interest justifying the revocation of the representation; and in the latter case, losses caused to the addressee due to its reliance on the representation need to be compensated.[1099] At the other end of the spectrum, the government is free to change its position stated in a previous representation for policy reasons, as long as the change of position is procedurally fair (eg the addressee is given prior notice and is offered the opportunity to be heard) and is not so unreasonable that no reasonable person could have made such

[1097] For this matter, see Jarrod Hepburn, *Domestic Law in International Investment Arbitration* (OUP 2017) 106-107.

[1098] While some jurisdictions do not expressly draw distinction between these representations, others do so. Even in legal systems that do not distinguish these representations, the existence of a quasi-contractual relationship would be an important factor affecting the reasonableness of the reliance and the weight to be attributed to the addressee's private interest in the balancing assessment.

[1099] See eg VwVfG (n 875) §§ 38(3), 49; Schwarze (n 864) 891; Berge and Widdershoven (n 1041) 446.

a decision.[1100] As a middle ground approach, the government is permitted to change its position as stated in the representation, but the substantive decision and the balance struck by the government are subject to judicial review.[1101]

These different approaches should be considered in light of the particular context of international investment law. As discussed in section II.B of this chapter, investment arbitration is underpinned by a relationship of exchange between foreign investors and the host state: In return for the benefits brought by investors, the host state promises to treat them in a certain manner and gives consent to arbitration to make these promises reliable. The main object and purpose of investment treaties is to foster development by encouraging foreign investment, and it is less justified to let foreign investors, compared with nationals, sacrifice for the public interest of the host state.[1102] At the same time, although investment arbitral tribunals are entrusted to assess whether the state has treated the investor fairly and equitably, given the structural limitations and democratic deficit in investment arbitration, arbitral tribunals are relatively ill-equipped to intervene into the policy area of public decision-making in the host state.[1103]

Where the host state makes a clear and specific representation to one or a limited number of foreign investors, promising certain benefits to induce the investors to invest, a quasi-contractual relationship can be said to exist once the investment is made following the required conditions in the representation. In this context, to avoid making the host state the 'sole judge in its own case', ie in its relationship with the foreign

[1100] *Punjab Communications* (n 1087) [38]-[44]; *Sethi Auto Service Station* (n 1087) [25].

[1101] *Coughlan* (n 889).

[1102] See the discussion in Section II.B of this chapter.

[1103] Ibid, text to fn 992-996.

investors, arbitral tribunals should be allowed to substantively review the balance struck between the legitimate expectation and the public interest. This is consistent with the approach taken in most domestic jurisdictions discussed above. At the same time, it must be borne in mind that to hold the state to its promise and to enforce the promised benefits, or to achieve the equivalent result through full reparation, may have significant implications on the regulatory discretion of the host state; and arbitrators are not in a good position to substitute their own subjective judgement for the policy decisions by the authorities of the host state.

On balance, it seems appropriate to apply the proportionality test where the host state invokes policy reasons to justify its breach of specific representations creating a quasi-contractual relationship. In other words, the breach of the representation should be suitable and necessary to achieve a public purpose, and the loss suffered by the investor must be proportionate to the public interest served.[1104] In evaluating the policy justifications invoked by the state, arbitral tribunals should defer to the local authorities, to the extent that the latter have a better knowledge of the local circumstances, and are likely to be better equipped to make the policy decisions. Moreover, in line with the position taken in several domestic jurisdictions and in view of the fact that it is less justified to let foreign investors suffer for the host state's public interest, where the breach of representation is justified by public interest, the foreign investor should be compensated for the loss caused by detrimental reliance.

However, where a quasi-contractual relationship does not exist, the protection given to the investor's legitimate expectations should be weaker, and the government

[1104] See Stone Sweet and Mathews (n 407) 75; Henckels, *Proportionality and Deference* (n 839) 24; Bücheler (n 824) 37; Punder and Klafki (n 843) 76.

should enjoy greater freedom to change its mind. In such cases, while civil law jurisdictions tend to protect legitimate expectations substantively, common law jurisdictions focus more on the procedural protection, eg guaranteeing the right to be heard, with the availability of substantive remedies being limited. What various domestic legal systems have in common is that the degree of protection varies depending on the specific circumstances of the case. In investment arbitration, a typical scenario is that the government made a representation about certain future policy or regulation pertaining to the foreign investor's investment, and the government subsequently changed its position due to a policy change or a change of circumstances.

As discussed above, in several jurisdictions, even if the administrative assurance is binding under the legislation, it may lose binding effect if the actual or legal circumstances have changed such that if the new circumstances existed at the time when the assurance was issued, the authority may not have issued the assurance.[1105] A change of position in such circumstances should also be allowed in investment arbitration without making the state liable for the investor's loss. Where the breach of representation is due to a policy change, the effect of the policy change often extends beyond the addressee of the representation. In such cases, not only does the decision tend to fall under the 'macro-political field', but the principle of equality in public law would weigh against special treatment of the addressee.[1106] In view of these circumstances, and also due to the absence of a special circumstance justifying a more intrusive standard of review, as with representations creating a quasi-contractual relationship, investment tribunals should refrain from wading into the macro-policies

[1105] See VwVfG (n 875) § 38(3); Schwarze (n 864) 891; Latvia Administrative Procedure Law (2001) § 85(2).

[1106] *Begbie* (n 891) [82]; Schønberg (n 409) 130-131, 134-137.

of the host state and risking hindering the latter's policy-making. Therefore, it is more appropriate to adopt the rationality test, whereby the government is allowed to breach the promise without compensation as long as this is not manifestly unreasonable. At the same time, most domestic legal systems accord procedural protection to the addressees of representations, such as prior notification and the right to be heard. In investment arbitration, it seems appropriate to retain the basic requirements of procedural protection, such as the requirement of notification and respecting the right to be heard, especially as the procedural protection is less intrusive in terms of state authorities' substantive decision-making.

IV. Withdrawal of unlawful representations

IV.A. Problems in investment arbitration

Before investing a significant amount of capital into a foreign state, investors often seek the opinions of the government about the lawfulness of the investment and potential legal barriers. In some cases, the assurance given by the government subsequently turns out to be outside of the issuing body's competence, or is contrary to the applicable law. As a result, the investment made in reliance on the assurance subsequently becomes unviable, resulting in losses to the investor. While section III focused on the breach of representations for policy reasons, the present section will discuss the legal consequences of unlawful representations. As shown in the brief survey below, due to the principle that a state cannot escape international responsibility by invoking its internal laws, in most cases, arbitral tribunals attach limited importance to the illegality of the representation alleged by the respondent state, and focus instead on whether the

investor's reliance was reasonable.

In *SPP v. Egypt*, although the unlawfulness of formal decisions rather than representations was at stake, the principles applied by the tribunal were relied on in subsequent cases concerning unlawful representations. In that case, the state argued that several acts permitting the investor to develop a tourist project were illegal and void, and should not be given effect in investment arbitration.[1107] However, for the tribunal, even though these acts were possibly null and void in Egyptian law, they 'were cloaked with the mantle of Governmental authority and communicated as such to foreign investors who relied on them in making their investments.'[1108] Thus, these acts were deemed to have 'created expectations protected by established principles of international law'.[1109] The tribunal further relied on the principle that a state cannot avoid international responsibility by alleging that the relevant act is ultra vires or otherwise unlawful under its domestic law, and dismissed the argument by the respondent.[1110]

The *SPP* decision was relied upon in some subsequent cases involving alleged unlawfulness of representations by the government.[1111] In *Ioannis Kardassopoulos v. Georgia*, the investor entered into several agreements with state entities and was granted a concession. [1112] Georgian officials made several assurances that the

[1107] *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt*, ICSID Case No ARB/84/3, Award and Dissenting Opinion of Mohamed Amin El Mahdi (20 May 1992) para 81.

[1108] Ibid para 83.

[1109] Ibid.

[1110] Ibid para 85.

[1111] See eg *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No ARB/05/18, Decision on Jurisdiction (6 July 2007) para 193; *Thunderbird* (n 184) Separate Opinion of Thomas Wälde, para 31.

[1112] *Ioannis Kardassopoulos* (n 1111) paras 13-28.

agreements were properly entered into in compliance with Georgian law and enjoyed full government approval.[1113] In the view of the tribunal, the assurances and endorsement by the government as to the validity of the joint venture agreement and the concession had created legitimate expectations for the investor.[1114] In reaching that conclusion, the tribunal underlined the fact that in the years following the conclusion of the joint venture agreement and the concession, Georgia never protested nor claimed that these agreements were illegal.[1115] It must nonetheless be noted that this analysis was conducted during the jurisdictional phase, and the tribunal held that the respondent was estopped from contesting the tribunal's jurisdiction based on the invalidity of the joint venture agreement and the concession.[1116]

Another example is *OKO Pankki Oyj v. Estonia*. The case involved a payment agreement between the claimants and Ookean, a state enterprise, accompanied by a letter from the Estonian Ministry of Economy guaranteeing that Ookean would be able to comply with the agreement.[1117] Approximately two years after the conclusion of the payment agreement, Ookean launched court proceedings and obtained a ruling that it had exceeded its capacity in entering into the payment agreement and the agreement was thus invalid.[1118] As observed by the tribunal, the state tolerated and encouraged Ookean's bad faith effort to render the agreement invalid, despite the state's previous letter guaranteeing Ookean's compliance with the agreement.[1119] Notwithstanding the

[1113] Ibid paras 68, 97, 191.

[1114] Ibid paras 191-192.

[1115] Ibid para 192.

[1116] Ibid para 194.

[1117] *Oko Pankki Oyj, VTB Bank (Deutschland) AG and Sampo Bank Plc v. The Republic of Estonia*, ICSID Case No ARB/04/6, Award (19 November 2007) paras 37-39.

[1118] Ibid paras 89-109.

[1119] Ibid paras 282-283.

findings of illegality of the agreement by local courts, the breach of assurance by the state was considered by the tribunal as arbitrary and in violation of the legitimate expectation created by the letter.[1120]

In *Thunderbird v. Mexico*, the claimant received a formal confirmation (*oficio*) from the government that its business would be lawful.[1121] Relying on that confirmation, the claimant made the investment and operated its business. However, after several months, the authority issued a closure order for the claimant's enterprise, on the ground that the business was illegal under Mexican law.[1122] According to the majority of the tribunal, the assurance given by the government was induced by the incomplete information provided by the investor,[1123] who knew when it chose to invest in gaming activities in Mexico that gambling was illegal under Mexican law.[1124] The majority also refused to see the lack of action by the state authorities for six months from the issuance of the *Oficio* as evidencing the state's acceptance of Thunderbird's operations. 'Six months under the circumstances is by any standard a reasonable period for a government to seek enforcement of local gambling legislation.'[1125] On the other hand, arbitrator Wälde found that the formal confirmation assuring the lawfulness of the claimant's business created a legitimate expectation.[1126] He considered that in such a case, the investor should be compensated for the expenditure it has undertaken in reliance on the government's assurance.[1127] But he also noted that compensation should

[1120] Ibid para 283.
[1121] *Thunderbird* (n 184) Award (26 January 2006) para 55.
[1122] Ibid para 73.
[1123] Ibid paras 151-166.
[1124] Ibid para 164.
[1125] Ibid para 165.
[1126] Ibid Separate Opinion of Thomas Wälde, para 21.
[1127] Ibid para 121.

be reduced due to the negligence of the investor.[1128] The disagreement between the majority and arbitrator Wälde seemed to lie mainly in their different readings of the facts, rather than divided opinions on whether an assurance whose content is unlawful can generate legitimate expectations.

In the few examples mentioned above, the tribunals gave limited weight to assertions of illegality by host states, especially where the investor's business had operated for a considerable period of time with no objection from the government. Instead, their focus was on whether the investor had acted diligently and whether its reliance was reasonable. Obviously, states cannot be allowed to use domestic illegality of governmental action as a pretext for denying protection to investors. That would violate the principle of good faith. But where the representation relied on by the investor is genuinely contrary to the domestic law or is given by state officials acting in excess of their competence, to bind the state to such a representation or to require full reparation to the investor may have significant implications for the host state. In such cases, it is important to note that the principle that a state cannot avoid international responsibility by invoking its internal laws is a distinct matter from whether the state has breached its primary obligations under the IIA in the first place. To the extent that the legal consequences of unlawful representations fall to be decided through interpretation of IIA standards by reference to general principles of law, solutions should be developed by looking at various domestic legal systems. This will be the focus of the following section. The criteria for ascertaining the lawfulness of an act under the law of the host state in investment arbitration merit separate analysis,[1129] and

[1128] Ibid para 122.

[1129] For this matter, see Hepburn, *Domestic Law in International Investment Arbitration* (n 1097).

they will not be addressed here. Also, given that the threshold requirements for a representation to generate legitimate expectations have been discussed in section III,[1130] the following will focus only on the legal consequences of unlawful representations.

IV.B. Comparative law analysis

What different legal systems have in common is that expectations are protected only where the addressee has acted in good faith and with due diligence. As already discussed before, expectations must be reasonable in order to be protected.[1131] In the domestic legal systems surveyed, legitimate expectations would not arise if the addressee obtained the representation or assurance through improper conduct, misleading or incomplete information, or if the addressee was aware of the illegality or was unaware thereof due to negligence.[1132] In investment arbitration, the same approach should be followed.

On the other hand, there are substantial differences among different legal systems regarding the legal consequences of unlawful representations. In most civil law jurisdictions, legitimate expectations can arise from unlawful representations, and the relevant rules usually involve a balancing between the principle of legality and the protection of legitimate expectations. In these jurisdictions, as a result of the balancing between the reliance interest of the addressee and the public interest in having the law complied with, legitimate expectations can be protected either by holding the authority

[1130] Section III.B of this chapter, text to fn 1040-1049.

[1131] Section III.B of this chapter, text to fn 1042.

[1132] See eg German law, see VwVfG (n 875) § 48(2); Dutch law, see Berge and Widdershoven (n 1041) 447; Lithuanian law, see Lithuania's Answers (n 931) 10-11,14; English law, see Julien Chaisse and Ruby Ng, 'The Doctrine of Legitimate Expectations: International Law, Common Law and Lessons for Hong Kong' (2018) 48 Hong Kong Law Journal 79, 94.

to its promise or by compensation; and the amount of compensation may also depend on the balancing between public interests and private interests.[1133] In some jurisdictions, there is a time limit for revoking unlawful representations or assurances, whereby an unlawful representation or assurance may become binding after a certain period of time has elapsed since the government knew or should have known the existence of illegality.[1134] Even where the public interest in having the promise revoked outweighs the legitimate expectation of the addressee, the authority may still need to compensate for the loss caused to the addressee due to the reliance on the representation, or be held liable for it.[1135]

Various strategies are used to limit the amount of compensation or the liability borne by public authorities for unlawful representations. For instance, in German law, where an unlawful administrative assurance is withdrawn, the authority shall upon application compensate the damage caused to the addressee *to the extent that their reliance merits protection having regard to the public interest*; the amount is to be determined by the authority and the application must be made within a year of the

[1133] Examples in this regard include: German law, see VwVfG (n 875) §§ 38(2), 48; Schwarze (n 864) 893; Punder and Klafki (n 843) 71; Dutch law, see Berge and Widdershoven (n 1041) 446-447; Lithuanian law, see Lithuania's Answers (n 931) 10, 12-15; The Supreme Administrative Court of Lithuania, Administrative Case No A-62-1119/2011 (15 December 2011); Chinese law, see Administrative Litigation Law of the People's Republic of China (n 884) Articles 70, 74, 75; Zhang, 'The Nature of Administrative Promise and Judicial Review' (n 906)) 54-55; Du (n 906) 121-128. In French law, unlawful representations in principle do not bind the authorities. But authorities may be held liable for the damages caused by unlawful representations, albeit often to a limited extent. See Schønberg (n 409) 114-115, 195.

[1134] For example, German law, see VwVfG (n 875) § 48(4); Lithuanian law, see the Supreme Administrative Court of Lithuania, Administrative Case No A-575-1576/2008, 26 September 2008. See also Joined Cases C-7/56 and C-3/57 to C-7/57 *Algera and Others v. Common Assembly of the European Coal and Steel Community* [1957] ECR 39, 56.

[1135] For example, German law, see VwVfG (n 875) § 48(3); Dutch law, see Berge and Widdershoven (n 1041) 447; Lithuanian law, see Lithuania's Answers (n 931) 14-15; The Supreme Administrative Court of Lithuania, Administrative Case No A-62-1119/2011 (n 1133); Chinese law, see Administrative Litigation Law of the People's Republic of China (n 884) Article 76; Zhang, 'The Nature of Administrative Promise and Judicial Review' (n 906) 54-55; Du (n 906) 121-128; French law, see Schønberg (n 409) 114-115.

addressee being informed of the withdrawal by the authority.[1136] In Chinese law, in the decisions of Chinese courts, although legitimate expectations can arise from unlawful assurances, where the benefits to be accorded under the assurances are themselves unlawful, detrimental reliance can be hard to prove.[1137] In French law, courts may hold a *prima facie* unlawful act to be lawful where similar results could have been reached without the legal flaws;[1138] and lack of direct causation, as well as contributory fault by the claimant, can be grounds for reducing the amount of damages.[1139] Such strategies are usually driven by the concern that large compensation for representations by public authorities may strain the state's budget and hinder the authorities' performance of their duties.

In common law jurisdictions, expectations arising from unlawful representations are generally less protected compared with civil law jurisdictions. In several common law jurisdictions such as Hong Kong, India, Pakistan, South Africa, and Botswana, ultra vires and unlawful representations cannot give rise to legitimate expectations.[1140] English law recognised only recently that expectance interest can be

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[1136] VwVfG (n 875) § 48(3).

[1137] 陈德素、李雪松等与重庆市北碚区静观镇人民政府二审行政判决书 (*Desu Chen and Others v. Jingguan Town Government of Beipei, Chongqing Province*, Appeals Judgment)（2016）渝 01 行赔终 29 号; 上诉人周某某与长沙市岳麓区洋湖街道办事处行政允诺纠纷二审行政判决书 (*Zhou v. Yanghu District Office of Yueli, Changsha City*, Appeals Judgment)（2016）湘 01 行终 721 号.

[1138] Schønberg (n 409) 195.

[1139] Ibid 200-202, 204-207.

[1140] For Hong Kong law, see *Yook Tong Electric Company Limited v. Commissioner for Transport*, [2003] HCAL 94/2002 [45]; Chaisse and Ng (n 1132) 95. For Indian law, see *Bannari Amman Sugars Limited v Commercial Tax Officer and others*, (2005) 1 SCC 625 [14]; *Express Newspapers and Others v. Union of India and Others*, AIR 1986 SC 872. For Pakistani law, see *Zaman Cement Company (PvT.) Ltd. v. Central Board of Revenue*, 2002 SCMR 312. For South African law, see *Gibbs v Minister of Justice and Constitutional Development*, [2009] ZASCA 73 [26]; *National Director of Public v Premier, Vrystaat*, 1999 (2) SA 863 (O); Hoexter (n 803) 172. For Botswanan law, see *Limpopo Safaris (Pty) Ltdv Director of Wild Life and National Parks*, 9 [1996] BLR 441 (HC) per Nganunu J, cited in Forsyth, 'Botswana' (n 1094) 5.

protected when it arises from ultra vires representations, under the influence of ECtHR jurisprudence.[1141] Yet, even where legitimate expectations have arisen, it is still impossible for English courts to enforce something ultra vires, and the administration enjoys considerable discretion in choosing the means to redress the damages caused to the addressee.[1142] Furthermore, although it is possible in English law for individuals affected by unlawful representations to seek damages on the ground of negligence, *Wednesbury* unreasonableness needs to be present for such claims to be successful.[1143] Courts are generally reluctant to hold the government liable for its misrepresentations, because that may inhibit the government's exercise of its statutory functions.[1144]

Yet, in common law, lack of authority is distinguished from lack of capacity, with only the latter covered by the ultra vires doctrine.[1145] Where a governmental official acts within the powers that could have been delegated to him or her yet no delegation has actually taken place, the official can be considered as exercising 'apparent or ostensible authority', which could bind the governmental body on whose behalf he or she has acted.[1146] However, claimants need to meet a high evidential threshold to rely on apparent authority,[1147] and such reliance is further restricted by statutory limitations and the Crown's need to preserve the 'freedom of action to do its public duty'.[1148] As a result, the 'apparent or ostensible authority' doctrine has limited

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[1141] See *Rowland v. Environmental Agency*, [2004] 3 WLR 249. See also *Stretch v. United Kingdom* App no 44277/98 (ECtHR, 24 June 2003).

[1142] *Rowland* (n 1141) para 85.

[1143] Schønberg (n 409) 223.

[1144] See Schønberg (n 409) 219.

[1145] See *Marubeni Hong Kong and South China Ltd v. Mongolia* [2004] EWHC 472 (Comm) [94]-[96]; David Blundell, 'Ultra Vires Legitimate Expectations' (2005) 10 Judicial Review 147, 149; Schønberg (n 409) 90-91.

[1146] Ibid.

[1147] Schønberg (n 409).

[1148] *Marubeni* (n 1145) [124].

application in practice.[1149]

In US law, estoppel cannot be used compel the executive to act contrary to statutes, or to justify a monetary remedy not authorised by the legislature.[1150] This is not only because the executive must comply with the law,[1151] but also because payment of money from the US Treasury must be authorised by a statute, rather than by some (mis)statements of governmental officials.[1152] Moreover, there is also the concern that applying estoppel in such cases may impose significant financial burden on the government and may hinder the government's performance of its functions.[1153] That being said, the blanket rejection of estoppel claims against public bodies, and the lack of other remedies, have been criticised,[1154] and it has been suggested that a more balanced approach should be adopted.[1155]

As with the situations discussed in sections II and III, a major reason for the restrained approach in these common law jurisdictions lies in the allocation of powers: For one thing, the judiciary should not be allowed to enforce something contrary to the law; for another, the executive should not be allowed to extend its powers by making unlawful promises. Admittedly, such a strict separation of powers does not directly

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[1149] See Schønberg (n 409) 91

[1150] *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990) 423. See also *Heckler v. Community Health Services of Crawford County, Inc*., 467 U.S. 51 (1984); Dorit Rubinstein Reiss, 'Relying on Government in Comparison: What Can the United States Learn from Abroad in Relation to Administrative Estoppel' (2015) 38 Hastings International Law and Comparative LR 75.

[1151] Reiss (n 1150) 79. In *Heckler*, the Court explained that '[w]hen the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined.' *Heckler* (n 1150) 58.

[1152] *Richmond* (n 1150) 424.

[1153] *Heckler* (n 1150) 58; *Richmond* (n 1150) 433; Reiss (n 1150) 79.

[1154] See Reiss (n 1150); Peter Raven-Hansen, 'Regulatory Estoppel: When Agencies Break Their Own "Laws"' (1985) 64 Texas LR 1; Joshua I Schwartz, 'The Irresistible Force Meets the Immovable Object: Estoppel Remedies for an Agency's Violation of its own Regulations or Other Misconduct' (1992) 44 Administrative LR 653.

[1155] Raven-Hansen (n 1154) 5.

apply in international law, which treats a state as a single entity. The application of international law is not contingent on the lawfulness of an act under domestic law. But still the international approach should take into account the concerns reflected in domestic legal systems. In particular, international investment law should not be indifferent about the potentially perverse consequence of allowing investors and state officials to take advantage of the unlawful bargains at the cost of public interests of the host state. Concerns about this have been expressed in domestic legal systems.[1156]

At the same time, to preclude any remedies to foreign investors for damages caused by unlawful representations or to leave such matters completely to the discretion of the host state seems equally inappropriate. Given the relationship of exchange between foreign investors and the host state, which underpins international investment law, it is unfair to let foreign investors bear all the negative consequences of the mistakes made by the administration.

Therefore, in cases where the foreign investor has relied upon a representation that is contrary to the law of the host state, a proper balance can be struck by allowing compensation for the investor's actual loss, or the sunk costs, incurred by reason of the unlawful representation, provided that the investor has acted diligently and in good faith. To the extent that, under investment treaty law, unlawful representations only incur the obligation to compensate the actual damage instead of specific performance, the requirement of full reparation under the law of state responsibility would not cover lost profits or the promised benefits. Indeed, in most of the domestic jurisdictions permitting compensation in cases of unlawful representations, claimants are usually

[1156] See eg *Stretch v. West Dorset District Council* [1999] 77 P & CR 342, 353; *Heckler* (n 1150); *Richmond* (n 1150).

unable to recover lost profits or to demand performance or the delivery of the benefits promised.[1157] To the extent that compensation in such cases is limited to redressing detrimental reliance, concerns of enforcing unlawful acts or extending the executive's powers by means of making unlawful promises can be assuaged.

Furthermore, most domestic legal systems are alive to the concerns that compensation for unlawful representation may strain the public budget and may have a chilling effect on the government's performance of its duties.[1158] Apparently, whether such issues may arise depends on the specific context of the case. In certain legal systems, such concerns are mitigated, for example, by adopting a narrow reading of the expectation's reasonableness and by applying a stringent criterion when determining the causal link between the unlawful representation and the investor's loss.[1159] To the extent that the aforementioned concerns arise in investment arbitration cases, the general rules on state responsibility are flexible enough to permit some of the legal techniques used in domestic laws to limit damages.

On the other hand, where the legal flaws in the representation are trivial relative to the investor's interests affected by the reliance, and the same substantive result could have been achieved without the legal flaws, it is more appropriate to hold the host state to the representation, as do several domestic jurisdictions.[1160] In such cases, the issues of ultra vires and of enforcement of something contrary to the law would not arise.

[1157] See Schønberg (n 409) 147; Mairal (n 1007) 429; *Desu Chen and Others v. Jingguan Town Government of Beipei, Chongqing Province*, Appeals Judgment (n 1137).

[1158] See eg Schønberg (n 409) 195, 219; Reiss (n 1150) 119; See *Welton* (n 1144).

[1159] See eg Schønberg (n 409) 200-202, 204-207. See also *Desu Chen and Others v. Jingguan Town Government of Beipei, Chongqing Province*, Appeals Judgment (n 1137); *Zhou v. Yanghu District Office of Yueli, Changsha City*, Appeals Judgment (n 1137).

[1160] See VwVfG (n 875) § 48(2); Berge and Widdershoven (n 1041) 447; Lithuania's Answers (n 931) 15; Administrative Litigation Law of the People's Republic of China (n 884) Article 74.

Lastly, it bears reemphasising that all of the above is subject to the requirements of legitimate expectations discussed in section III, ie that the representation must be specific, unambiguous, and formally made.[1161]

V. Interim conclusion

As shown in this chapter, it is possible to develop international solutions to thorny questions arising in investment arbitration through employing the aforementioned comparative law method in order to distil general principles of law. The differences in the rules of different jurisdictions may be reconciled by understanding the reasons behind the different rules when transposing the domestic legal solutions to the international level.

Even though a certain degree of subjective appreciation is unavoidable, the comparative law method applied in this chapter helps to develop a more principled approach to elaborating international rules. Such comparative law analysis offers not only an analytical framework, but also benchmarks for interpreting the international rules. It compels adjudicators, lawyers, and commentators to take seriously the considerations expressed in a diversity of domestic legal systems, and to give reasons for their decisions or claims. It also helps to narrow the gap between the standards in international investment law and those in domestic laws, and to reduce the chances of a clash between these two legal orders when no such clash appears to have been intended by states. Indeed, as illustrated in sections II-IV of this chapter, in some cases, the solutions adopted in investment arbitration protect investors' interests to an even

[1161] Section III.B of this chapter, text to fn 1040-1049.

greater extent and intrude even deeper into the legislative or administrative discretion than most domestic courts do. Such decisions risk causing backlash from states and the reliance on comparative law analysis may help to alleviate such risks. Certain legal techniques used in domestic laws can also be an aid to arbitrators when grappling with similar problems in investment arbitration.

As acknowledged at the outset, although the comparative law analysis in this chapter covers different legal traditions, different regions, and states at different development stages, it does not and cannot aim or claim to be comprehensive. Instead, it is an invitation for further study by comparative law scholars around the world, especially from jurisdictions where the legal materials are less accessible to non-speakers of the local language, to contribute to the process of making international investment law a more coherent and more representative body of international law.

Chapter 8. Comparative Law Methods in relation to Other Elements of Treaty Interpretation

As explained in Chapters 3 and 5, comparative law analysis can be used on the basis of various elements of treaty interpretation, including but not limited to interpretation by reference to general principles of law.[1162] Besides general principles of law, when interpreting IIAs, comparative law may play a substantive role through other elements of interpretation.[1163] This chapter examines the comparative law methods pertaining to the elements of interpretation other than general principles of law, focusing on the 'ordinary meaning' and 'supplementary means of interpretation'.[1164]

I. Ordinary meaning

As discussed in Chapter 5, where the treaty uses a domestic legal concept in formulating rules, especially if that legal concept does not have an established meaning in international law, relevant domestic legal institutions can be the starting point for interpreting the treaty concept. When interpreting an IIA concept with a parallel in domestic law, domestic legal concepts can be 'constitutive of what the State can subjectively "intend"',[1165] and as such, they may shed light on the 'ordinary meaning' of the treaty concept.[1166] Examples in this regard include corporate 'seat' for determining an investor's nationality, and 'shares', 'contract', and 'intellectual property'

[1162] Chapter 3, Sections II, III; Chapter 5, text to fn 603-613.

[1163] Chapter 3, Section II; Chapter 5, text to fn 605-613.

[1164] As explained in Chapter 3, while recourse to comparative law analysis when interpreting IIAs may also be justified on the ground of subsequent practice or customary international law, the substantive relevance of these legal grounds is limited. This is because there is usually little evidence that states enacted domestic laws to implement their treaty or customary law obligation. Chapter 3, Section II.

[1165] Koskenniemi, *From Apology to Utopia* (n 608) 12.

[1166] Chapter 5, Section II, text to fn 605-609.

as protected investments.[1167] As states are adjusting and upgrading their model IIAs by formulating more detailed rules catering to their investment policies,[1168] it is likely that an increasing number of domestic legal concepts might be employed to delineate the scope of new rules in the future. This is especially so, given that states have exhibited a greater awareness of the potential impact of IIAs on their internal legal orders and many of them are now seeking to reduce inconsistency between IIAs and their domestic laws.[1169]

As regards the comparative law method in the ascertainment of a treaty term's 'ordinary meaning', a threshold question is the laws of which states should be consulted. It seems straightforward that the meaning of a treaty term should, first and foremost, be 'ordinary' for the treaty parties. Nonetheless, depending on the circumstances, laws other than those of treaty parties may also need to be studied. Given that the scope of protected investors and investments is usually specific to each particular IIA, there is no reason to believe that, when interpreting terms such as 'seat' and 'control' for defining the protected investors, one needs to look beyond the laws of treaty parties. Yet, if a legal concept is repeatedly used in multiple treaties to define a substantive standard or an exception clause, the comparative law survey may need to extend beyond the laws of treaty parties.

For instance, the terms 'national security' or 'essential security interests' are present in exception clauses of many IIAs. Similar to the case of the FET standard, unless these terms are given a 'special meaning' with a detailed definition in the

[1167] Chapter 5, Section II.

[1168] See eg Wolfgang Alschner and Dmitriy Skougarevskiy, 'Mapping the Universe of International Investment Agreement' (2016) 19 JIEL 561.

[1169] Ratner (n 8) 21-27; Shan (n 9).

particular treaty,[1170] the repetitive use of these terms may make them a legal term of art with the same 'ordinary meaning' across treaties.[1171] More importantly, due to the usual MFN clause in most IIAs,[1172] to insist that similarly worded standards carry different meanings in different treaties makes little practical sense.[1173] Furthermore, both 'foreign investors' and 'foreign investments' are usually defined broadly in most IIAs and investors often seek to benefit from different IIAs through forum shopping. Also, both substantive standards and exception clauses apply to general measures regulating investors of different nationalities. All of these factors make it difficult for state authorities to distinguish investors and investments protected under different IIAs. These considerations, taken together, weigh in favour of the argument that where similarly worded concepts are repeatedly used in IIAs to define substantive standards or exceptions, such concepts should have the same 'ordinary meaning' across different treaties. If such a concept has a parallel in domestic laws, and it has yet to acquire an established meaning in the international legal discourse on foreign investment protection, a comparative survey of domestic laws worldwide is needed to illuminate its 'ordinary meaning'.

After determining the scope of comparison, the next question concerns the objective of comparison. In this regard, there is an apparent difference between the

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[1170] VCLT (n 261) Article 31(4).

[1171] See Chapter 3, Section II, text to fn 264-268.

[1172] The MFN clause in most IIAs does not preclude exception clauses in its application.

[1173] Even if the narrow interpretation of an MFN clause is adopted to the effect that it does not 'import' substantive standards or exception clauses from other treaties, and it only targets particular measures 'in like circumstances', (see Simon Batifort and J Benton Heath, 'The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization' (2018) 111 AJIL 873), such an MFN clause still prevents states from discriminating against certain investors based on their nationality. For instance, even if a state uses different definitions of 'national security' in different IIAs, an MFN clause, to the extent it applies, may prevent the state from using different criteria in its foreign investment screening/review procedures solely based on the investor's nationality.

comparative method in ascertaining ordinary meaning and that in identifying general principles of law. Distinct from general principles of law, the 'ordinary meaning' of treaty terms has to be based on the consistency among domestic laws in the *normative content of the relevant concept*.[1174] As discussed in Chapters 6 and 7, inconsistency in the rules of various jurisdictions does not necessarily prevent the identification of a general principle of law: One must investigate the reasons behind the different legal solutions in various jurisdictions to see if the differences can be resolved when 'transposing' the domestic solutions to the international level. On the other hand, since the 'ordinary meaning' of treaty terms depends on the legal-linguistic conventions of relevant states, it can only be identified based on the common denominator of the positive rules in various jurisdictions. For instance, if data security is commonly regarded as a national security issue in domestic laws worldwide, the concept of 'national security' in IIAs, in its ordinary meaning, should be interpreted as including data security. However, if supply chain security is treated as part of national security concerns only in a fraction of the world, it cannot be concluded in a straightforward manner that the ordinary meaning of the term 'national security' would necessarily cover supply chain security. At most, it can be argued that supply chain security is among one of the many meanings of the term 'national security' as used in practice. In this case, other elements of treaty interpretation, including the treaty's object and purpose, relevant rules of international law, as well as supplementary means of interpretation, need to be consulted in order to resolve the problem.

Thus, it seems that the comparative law method for identifying general principles of law focuses on *problems and solutions,* whereas the one for ascertaining

[1174] Chapter 5, Section II, the paragraph to fn 610.

ordinary meaning focuses on *concepts*. Still, a closer look at the general rule of treaty interpretation suggests that the comparative law method pertaining to ordinary meaning remains consistent with the basic logic of functionalism discussed in Chapter 6.[1175] According to Article 31(1) of the VCLT, when ascertaining the ordinary meaning of a treaty term, the subject matter of the law under comparison depends on the term's context and the treaty's object and purpose.[1176] Thus, for instance, in *CEAC v. Montenegro*, it was rightly argued by Montenegro that even if the term 'seat' is to be interpreted in light of domestic laws, the interpreter needs to identify 'those laws and regulations that serve the object and purpose comparable to that of the Treaty'.[1177] Similarly, when determining whether the claimant was a legal person 'controlled directly or indirectly' by nationals of a contracting party to the BIT, the tribunal in *Aguas v. Bolivia* refused to use the criteria of 'control' in domestic legislation such as tax law.[1178] The tribunal warned that '[i]t is perilous to transfer meaning from one regulatory framework to another where the motivations underlying the choice of terminology often will be decisive'.[1179] In other words, although *concepts* are the main object of comparison, the concepts must be chosen from domestic legal institutions whose objective or 'function' is consistent with that of the IIA term subject to interpretation.

When comparing domestic legal concepts that are both textually and functionally similar, the basic tenets of the functional comparison discussed in Chapter

[1175] Chapter 6, Section III.

[1176] VCLT (n 261) Article 31(1).

[1177] *CEAC v. Montenegro* (n 626) para 128.

[1178] *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No ARB/02/3, Decision on Respondent's Objections to Jurisdiction (21 October 2005) paras 225-235, fn 214.

[1179] Ibid.

6 still apply. With the aim of identifying the common denominator of the relevant concepts' normative contents in various jurisdictions, one needs to understand the concepts in their *domestic context*.[1180] In comparative law scholarship, it is often stressed that similar concepts or provisions can be interpreted and applied differently in different legal systems.[1181] Also, even within a single legal system, the positions under different sources of law (eg statute or case law) and in scholarship may not necessarily be consistent with one another.[1182] Thus, to grasp the substance of a legal concept in a particular jurisdiction, a researcher should not rest content with the definition in a single piece of legislation or in an isolated case. They have to take into account the relevant rules stemming from all legal sources recognised within each domestic legal system, including not only formal texts but also their actual application.[1183] In doing so, the researcher should also bear in mind questions such as whether there is a hierarchy between different rules or rules of different sources, how much weight should be given to each source, and how to deal with inconsistent positions of different authorities.

These considerations equally apply in the identification of general principles of law. Yet, due to the particular focus on the 'surface' consistency of legal concepts when ascertaining ordinary meaning, there is a greater risk that one may fail to grasp the nuances in various jurisdictions or that certain legal authorities, albeit relevant, may be neglected in the comparative survey. In a word, when an interpreter tries to identify the

[1180] See Chapter 6, Section III, text to fn 773-759.

[1181] See eg Mauro Bussani, 'Current Trends in European Comparative Law: The Common Core Approach' (1998) 21 Hastings International and Comparative LR 785, 791-792.

[1182] Bussani (n 1181) 792-793; Sacco (n 3) 21-24.

[1183] Sacco (n 3); Ulrich Drobnig, 'Methods of Sociological Research in Comparative Law' (1971) 35 The Rabel Journal of Comparative and International Private Law 496, 497-499.

common denominator among various jurisdictions in order to ascertain the ordinary meaning of a treaty term, great care needs to be taken to ensure that in the comparative law analysis, the relevant legal concept is understood in a way that is embedded in the totality of each domestic legal system.

II. Supplementary means of interpretation

As discussed in Chapters 3 and 5, comparative analysis of domestic laws may also assist the interpretation of IIAs as a supplementary means of interpretation, under Article 32 of the VCLT.[1184] As a supplementary means, comparative law can only be used to 'confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable'.[1185] The words '[r]ecourse may be had' in Article 32 also reveal the discretionary, as opposed to mandatory, character of recourse to supplementary means. The flip side of the secondary position of supplementary means, compared with those elements listed in Article 31, is that the former allows for greater flexibility in the comparative law analysis.

That being said, Articles 31 and 32 'constitute an integrated framework for the interpretation of treaties',[1186] and they must be read and applied as a whole. According to the ILC in its commentary to draft article 28 on the law of treaties (now Article 32

[1184] Chapter 3, Section II, text to fn 294-303; Chapter 5, Section I, 611-613.

[1185] VCLT (n 261) Article 32.

[1186] ILC, 'Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties' (n 2) commentary to Conclusion 2, para 3.

of the VCLT), the word 'supplementary' indicates that article 28 'does not provide for alternative, autonomous means of interpretation but only for means to aid an interpretation governed by the principles contained in article 27 (now Article 31 of the VCLT).'[1187] Thus, the comparative law analysis under the rubric of supplementary means of interpretation must also be guided by the context and the treaty's object and purpose.

In its work on the topic of 'subsequent agreements and subsequent practice in relation to interpretation of treaties', the ILC concluded that subsequent practice relating to the treaty, including domestic laws, that does not satisfy the stringent requirements in Article 31(3)(b) of the VCLT may nevertheless be considered as supplementary means of interpretation.[1188] As examples, the ILC mentioned cases where international bodies took into account the laws of some, but not all, of the contracting states when interpreting the treaty,[1189] including in the cases of the ECtHR,[1190] the IACtHR,[1191] and the Human Rights Committee.[1192] In these cases, although the domestic laws consulted may not necessarily be 'in the application of the

[1187] ILC, 'Draft Articles on the Law of Treaties with Commentaries' (n 315) commentary to Article 28, para 19.

[1188] ILC, 'Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties' (n 2) Conclusion 2(4) and its commentary. See also ILC, 'Report of the International Law Commission Covering the Work of Its Sixteenth Session' (11 May – 24 July 1964) UN Doc A/5809, 204, para 13.

[1189] ILC, 'Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties' (n 2) commentary to Conclusion 4, paras 27-29.

[1190] *Demir and Baykara v. Turkey* App no 34503/97 (ECtHR, 12 November 2008) para 52.

[1191] *Artavia Murillo et al. ("*In vitro *fertilization") v. Costa Rica*, Judgment (Preliminary Objections, Merits, Reparations and Cost), Inter-American Court of Human Rights Series C No 257 (28 November 2012) paras 245-256. See also *Hilaire, Constantine and Benjamin et al. V. Trinidad and Tobago*, Judgment (Merits, Reparations and Costs), Inter-American Court of Human Rights Series C No 94 (21 June 2002) Concurring Separate Opinion of Judge Sergio García Ramírez, para 12.

[1192] *Jong-Cheol v. The Republic of Korea*, Views, Human Rights Committee Communication No 968/2001 (27 July 2005) UN Doc CCPR/C/84/D/968/2001, para 8.3; *Yeo-Bum Yoon and Myung-Jin Choi v. The Republic of Korea*, Views, Human Rights Committee Communication Nos 1321/2004 and 1322/2004 (3 November 2006) UN Doc CCPR/C/88/D/1321-1322/2004, para 8.4.

treaty', and although they could not reflect the agreement of *all* treaty parties, they may nevertheless aid the interpretation, being considered together with other elements listed in Article 31.

The comparative law analysis under Article 32 of the VCLT is also more flexible than that in the identification of general principles of law. As discussed in Chapter 6, the comparative law survey for the identification of general principles of law must be wide and representative, and one must try to reconcile the differences among various legal systems by understanding the reasons behind these differences.[1193] On the other hand, when conducting comparative law analysis under the rubric of Article 32 of the VCLT, the requirement of representativeness can be more relaxed, and there is even greater space for policy-oriented considerations.[1194]

Accordingly, the comparative law methods sometimes used in practice and mentioned in the literature fit better under Article 32 of the VCLT, and interpreters should be mindful of their 'supplementary' status as a means of interpretation. For instance, it was observed that the comparative law analysis used in investment arbitration practice mainly served 'to substantiate treaty standards or to confirm an

[1193] Chapter 6, Sections I and III.

[1194] For this reason, for instance, the comparative law analysis under the 'consensus doctrine' developed by the ECtHR is better attributed to Article 32 of the VCLT, as suggested in the ILC's work, rather than some general principles at the European level. See ILC, 'Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties' (n 2) commentary to Conclusion 4, para 27. In the ECtHR's jurisprudence on the consensus doctrine, the Court has at times relied on 'the distinct tendency' or 'the ever growing consensus' of the member states. See *Mazurek v. France* App no 34406/97 (ECtHR, 1 February 2000) para 52; *L and V v. Austria* App nos 39392/98 and 39829/98 (ECtHR, 9 January 2003) para 50. Commentators observed that this flexible, and at times inconsistent, approach allowed the Court to improve the acceptability of its judgments while safeguarding the fundamental values embodied in the European Convention. See Peat, *Comparative Reasoning* (n 2) 140-177; Kanstantsin Dzehtsiarou, 'Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights' (2011) 3 Public Law 534; Mahoney and Kondak (n 4); Christos L Rozakis, 'The European Judge as Comparatist' (2005) 80 Tulane LR 257.

interpretation made on other grounds',[1195] and that comparative law 'can be an eye-opener raising awareness of possible interpretations of investment treaties without controlling that interpretation.'[1196] It was also argued that representativeness is not the main objective in such a comparative law analysis; instead, it should be informed by 'the fundamental values underpinning the investment regime'.[1197] Although such approaches cannot be justified under Article 31 of the VCLT, they might be permissible under Article 32.

At the same time, such a more flexible and more policy-oriented comparative law analysis, being a 'supplementary means', cannot be used to override the conclusions resulting from the application of Article 31 of the VCLT. For instance, it cannot be used to justify a deviation from the criteria of indirect expropriation under customary international law incorporated in the treaty or from an autonomous FET standard interpreted by reference to general principles of law. As argued throughout the previous chapters, to avoid unwarranted departure from the intention of treaty parties and to fend off charges of bias and hegemony, the use of comparative law analysis must strictly follow the rules on sources, including the rules on the relationship between IIAs, customary international law, and general principles of law, as well as the rules on the identification of the non-written sources. One must be cautious not to let a supplementary means of interpretation cancel out the requirements discussed in the previous chapters.

The significance of this point can be illustrated by the *Philip Morris v. Uruguay*

[1195] Peat, *Comparative Reasoning* (n 2) 138.

[1196] Schill, *International Investment Law and Comparative Public law* (n 6) 26.

[1197] Peat, *Comparative Reasoning* (n 2) 137-139.

case. In that case, the claimant argued, *inter alia*, that the 'single presentation requirement' in Uruguayan law, which precluded tobacco manufacturers from marketing more than one variant of cigarette per brand family, breached several provisions of the BIT.[1198] Arbitrator Born disagreed with the majority of the tribunal and found a breach of the FET standard based on, *inter alia*, the 'unprecedented' character of the single presentation requirement and the absence of similar regulation in the laws of other states.[1199] Among other things, he emphasised that the measure was 'internationally unique – not required by the Framework Convention on Tobacco Control and not adopted by any other country in the world.'[1200] For him,

> claims that a governmental action is arbitrary, disproportionate, or not rationally related to any stated government objective are more plausible with respect to an unprecedented regulatory measure, adopted without any meaningful prior study, discussion, or consultation, which departs from a widespread and comprehensive international regulatory regime, than with respect to measures that have been adopted by other states, recommended by international bodies, or developed through careful domestic or other study, discussion, and consultation.[1201]

Notably, Uruguay argued that other states have also considered adopting an single presentation requirement, but they might have been deterred by the pendency of the arbitration in question.[1202] This argument was dismissed by arbitrator Born for lack

[1198] *Philip Morris* (n 86) Award (8 July 2016) paras 9-12.

[1199] *Philip Morris* (n 86) Concurring and Dissenting Opinion of Co-Arbitrator Gary Born (8 July 2016) para 126.

[1200] Ibid para 86.

[1201] Ibid para 126.

[1202] Ibid 25, fn 101.

of evidentiary support.[1203]

On closer inspection, the reasoning by arbitrator Born is flawed. The absence of a certain regulation in a domestic legal system is distinct from a *prohibition* of that regulation. Thus, arbitrator Born's approach cannot be justified on the ground of general principles of law,[1204] since a prohibition or limitation of the single presentation requirement is *not* the position taken in various domestic legal systems. Even though Article 32 permits a more flexible and more policy-oriented comparative law analysis, it cannot be used as a shortcut to treaty interpretation. Whether the IIA standard incorporates the minimum standard or is an autonomous standard to be interpreted in light of general principles of law, to find treaty breach by virtue of the absence of a similar measure in a few other states risks raising the IIA standard beyond what was intended by treaty parties and unjustifiably hampering states' regulatory space. Indeed, while the interpretation by arbitrator Born set a presumption against the lawfulness of novel measures restricting foreign investors' rights, some of the recent IIAs indicate the contrary. For instance, some IIAs expressly stipulate that '[n]othing in this Treaty shall be construed to prevent a Party from adopting … any measure otherwise consistent with this Treaty that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.'[1205] Against this background, the interpretation by the majority in *Philip*

[1203] Ibid.

[1204] The FET clause in the BIT in question did not contain a reference to customary international law or the minimum standard, and both the majority and arbitrator Born interpreted the FET clause as being autonomous from the minimum standard. *Philip Morris* (n 86) Award (8 July 2016) para 316; Concurring and Dissenting Opinion of Co-Arbitrator Gary Born (8 July 2016) paras 130-132.

[1205] See USMCA (n 213) Article 14.16; CPTPP (n 213) Article 9.16; Morocco-Nigeria BIT (n 614) Article 14(4); Belarus-India BIT (n 659) Article 32(2).

Morris is more appropriate:

> Provisions such as [the FET clause] of the BIT do not preclude governments from enacting novel rules, even if these are in advance of international practice, provided these have some rational basis and are not discriminatory. Article 3(2) does not guarantee that nothing should be done by the host State for the first time .[1206]

In an era of change, unprecedented circumstances, be it climate change, a pandemic or food crisis, may spur novel actions and innovations in regulation. Without clear treaty provisions suggesting otherwise, relying on the regulatory approaches taken by a few, even most, states at a given time to substantiate the international standard may unwarrantedly constrain states' regulatory powers and spur backlash.

In a word, the substantive standards in IIAs still have to be interpreted mainly by reference to customary international law and/or general principles of law, together with the other elements listed in Article 31 of the VCLT. A more flexible comparative law analysis can only play a *supplementary* role. Such a comparative law analysis, being more policy-oriented, should be guided by a balanced understanding of the object and purpose of the IIA, and be sensitive to the broader context of the international investment legal regime.

Within these confines, where the elements listed in Article 31 of the VCLT are incapable of resolving the case, comparative law analysis under Article 32 may play an important role. For instance, where an adjudicator cannot decide, by reference to the

[1206] *Philip Morris* (n 86) Award (8 July 2016) para 430.

ordinary meaning and relevant rules of international law, whether an issue invoked by the state is a matter of 'national security' or 'essential security interests' under the exception clause of the IIA, an 'emerging trend' among the domestic laws of various states can be an interpretative aid.[1207] Moreover, comparative law analysis may help to reveal the 'ceilings' of investment treaty standards.

As already discussed in Chapter 3, whether or not the standard in a typical IIA is autonomous from customary international law, it can be assumed that states did not intend to make the standard higher than those prevailing in most developed legal systems.[1208] Still, this assumption may be reversed by specific text of the treaty or customary international law, if the latter demands a higher standard of protection. This is indeed possible, given the special status of foreign investors in the host state.[1209] For the limited purposes of confirming the interpretation or determining the meaning in case of ambiguity, the comparative law analysis may not necessarily be comprehensive or representative of different legal systems of the world. It may help to bring perspectives from specialised areas of domestic laws, such as competition law, patent law, and the law on government procurement, into the interpretation of IIAs. This can be illustrated in arbitration practice.

In some cases, tribunals confirmed the conclusion that the impugned measure did not violate the treaty standards relying on the fact that similar measures existed in

[1207] A similar approach is reflected in the 'consensus doctrine' by the ECtHR. See eg *Mazurek* (n 1194) para 52; *Konstantin Markin v. Russia* App no 30078/06 (ECtHR, 22 March 2012) para 140; *MC v. Bulgaria* App no 39272/98 (ECtHR, 4 December 2003) para 166; *L and V* (n 1194) para 50.

[1208] Chapter 3, Section II, text to fn 294-303.

[1209] See for instance the discussion on expropriation in Chapter 4, Section III.B.ii, text to fn 558-571.

'all legal systems',[1210] 'in many countries',[1211] or 'in the administrative practice of many States'.[1212] In other cases, the dismissal of the alleged breach seemed to be based on a smaller sample of domestic laws.[1213] In view of the flexibility permitted under Article 32 of the VCLT, a more selective comparison is in principle permitted. In some cases, certain domestic legal systems are more sensitive than others when it comes to the issue at hand. This may influence the selection of legal systems for comparison. Adjudicators also enjoy certain freedom to choose domestic legal systems that are more accessible to them. In practice, the comparative studies adduced by disputing parties may play an important role.[1214]

For instance, the *Apotex v. US* case arose from the issuance of an 'import alert' by the US Food and Drug Administration on drugs manufactured by two factories owned by Apotex Inc.[1215] In light of the interpretation by the NAFTA Free Trade Commission, the tribunal accepted that Article 1105(1) of the NAFTA refers to the customary minimum standard.[1216] On the merits, one of the claimants' claims was that the procedure adopted by the US authorities pertaining to the import alert violated the due process obligation under the minimum standard.[1217] In response, the US noted that when blocking or restricting importation of Apotex drugs or similar drugs, the authorities of Canada, New Zealand, Australia, the Netherlands, and the EU also did

[1210] *Noble Ventures, Inc.* (n 253) paras 176-178.

[1211] *Joseph Charles Lemire v. Ukraine*, ICSID Case No ARB/06/08, Decision on Jurisdiction and Liability (14 January 2010) paras 501-506.

[1212] *ADF Group Inc.* (n 323) Award (9 January 2003) para 188.

[1213] See *AES Corporation* (n 254) para 317; *Apotex* (n 252) Award (25 August 2014) paras 9.27-9.36.

[1214] See *ADF Group Inc.* (n 323) US Counter-Memorial on Competence and Liability (29 November 2001) 29-31; Award (9 January 2003) para 188; *Apotex* (n 252) US Rejoinder on Merits (27 September 2013) paras 299-301; Award (25 August 2014) paras 9.27-9.35.

[1215] *Apotex* (n 252) Award (25 August 2014) paras 2.1-2.75.

[1216] Ibid paras 9.3-9.4.

[1217] Ibid paras 9.7-9.11.

not adopt the procedure asserted by the claimants.[1218] The tribunal sided with the US and found that the practice in these jurisdictions 'weigh[s] heavily against the assertion that the claimed protections are required by customary international law'.[1219] In particular, the tribunal observed that

> these actions by several state regulators, from countries with legal systems sensitive to due process, cast still further doubt on the Claimants' contention that customary international law bars a State's regulatory decisions that block imports of adulterated foreign drug products, unless that State's regulator accords to the alien prior notice, a hearing and other procedural safeguards.[1220]

Although neither the tribunal nor the US explained the choice of jurisdictions under the comparative law analysis, the reasons for this choice are not very hard to estimate. First, the languages of the legal materials of these jurisdictions might have been more accessible to the lawyers of the disputing parties and to the tribunal. Second, the jurisdictions surveyed had all issued an import ban or restrictions on Apotex drugs or similar drugs and thus were particularly relevant to the case at hand. Third, in the words of the tribunal, these legal systems were 'sensitive to due process'.[1221] Although that observation may not have been based on rigorous empirical analysis, it can safely be assumed that the minimum standard, being the 'bottom line' as discussed in Chapters 3 and 4, would not be breached if the impugned measure is lawful in developed legal systems such as the ones surveyed. This approach is appropriate for the limited

[1218] Ibid US Rejoinder on Merits (27 September 2013) paras 299-301; Award (25 August 2014) paras 9.27-9.35.

[1219] Ibid.

[1220] Ibid para 9.36.

[1221] Ibid.

purposes of a supplementary means.

In *AES v. Kazakhstan*, one of the claimants' claims was that Kazakhstan, in the changes in its competition law, failed to maintain a 'transparent, stable and predictable legal framework' as required under the FET standard.[1222] The tribunal rejected that claim, mainly because: First, the changes were reasonable in view of the evolution of Kazakhstan's economy; and second, the changes only concerned specific elements and the general approach of the competition legislation remained the same.[1223] In addition, the tribunal took into account the evidence provided by the respondent's expert, which suggested that 'the nature of the changes made and the approach adopted by Kazakhstan were similar to practices in other European countries and emerging economies.'[1224] Such findings supported the tribunal's conclusion that Kazakhstan did not breach the FET standard.[1225] Recourse to the positions taken in 'other European countries and emerging economies' was made to confirm the conclusion reached by the tribunal on other grounds. Within the space for policy considerations permitted under Article 32 of the VCLT, taking into account the laws of states whose political, economic, and cultural environments are similar to that in the host state shows the tribunal's sensitivity to the host state's local circumstances and allows the decision to better accommodate these circumstances.

III. Interim conclusion

[1222] *AES Corporation* (n 254) paras 316-317.
[1223] Ibid para 317.
[1224] Ibid.
[1225] Ibid.

As shown in this chapter, when conducting comparative law analysis in treaty interpretation under the rubrics of 'ordinary meaning' and 'supplementary means of interpretation', the functional approach should still be followed, albeit adopting different criteria. As regards the 'ordinary meaning' of treaty terms, one needs to identify the common denominator of positive rules in the jurisdictions under comparison. In this regard, the required 'ordinariness' may set a high threshold in practice, especially where, in light of the IIA's context and object and purpose, the comparison should cover domestic laws worldwide, as opposed to those of treaty parties. As a supplementary means of interpretation under Article 32 of the VCLT, comparative law analysis can be more flexible, leaving greater space for policy-oriented considerations. In this regard, for instance, comparative law analysis may help to reveal the 'ceilings' of IIA standards. Yet, one must be mindful of the fact that the role of such a more flexible and more policy-oriented comparative law analysis is limited to that of a 'supplementary means', and it cannot be deployed to overturn the conclusions reached through the application of Article 31 of the VCLT.

Chapter 9. Conclusion

In the field of comparative law, to claim that comparison serves to bring uniformity and foster peaceful co-existence of nations runs the risk of being ridiculed as 'sentimentalist'.[1226] To a certain degree, there is a tension between the universalist aspiration prevailing in mainstream international law scholarship and the greater inclination to embrace pluralism in comparative law. Still, it is undeniable that comparative law, whose primary function is to acquire knowledge of the laws of various jurisdictions, can contribute to unification of law projects and facilitate the settlement of international disputes.[1227] And in public international law, comparative law may help to ameliorate the perennial opposition between universalism and relativism by enriching our understanding of different domestic legal systems in this pluralist world. Indeed, comparative law has made significant contributions to the substance of international law in several inward-looking fields, including international human rights law, international criminal law, and, as discussed throughout the thesis, international investment law.

That being said, to utilise comparative law in international law is easier said than done, and in practice, it is fraught with pitfalls. In international investment law, there is a considerable body of literature arguing both for and against recourse to comparative law when interpreting IIA rules. But, perhaps surprisingly, limited attention has been paid to a preceding question, ie what is the relative relationship between international and domestic legal norms in the field of foreign investment protection.

[1226] Sacco (n 3) 2.

[1227] For instance, comparative law has served as a basis for the efforts to develop the uniform law for the international sale of goods.

As revealed in Part I of the thesis, this relative relationship differs on different matters and has been evolving over time. On certain issues, by virtue of the intention expressed by states either directly or indirectly though the sources of law, the international rules should be aligned with the prevailing position in domestic laws. That may make comparative law particularly relevant in giving substance to the international rules. Such examples include the interpretation of IIA concepts with a parallel in domestic laws and the interpretation of certain substantive IIA standards that are autonomous from customary international law. On other matters, states have intentionally taken a position diverging from the approaches in domestic laws, which inevitably undercuts the potential of comparative law. This is the case for the IIA standards incorporating the customary minimum standard and the rules on expropriation, whose rationales differ from those of the corresponding domestic norms.

Ultimately, the relationship between international law and domestic laws has to be fleshed out based on the rules on sources. Yet, this matter has not been treated with enough caution in arbitration practice. As uncovered in the thesis, in some cases, tribunals relied on comparative law where the IIA rules should have been interpreted as diverging from domestic laws. In other cases, tribunals lost touch with basic notions of domestic laws where the IIA rules should have been consistent with them. Such decisions not only distort the intention of states but may carry severe legal and political consequences, both domestically and internationally. It is thus crucial for practitioners to sharpen their awareness of the relationship between international law and domestic laws, and to adopt a more rigorous approach to the rules on sources.

Where domestic legal principles or concepts derived through comparative law analysis are relevant and should be relied upon in interpreting IIA rules, a major methodological issue is the representativeness of the comparative law analysis. The

international law on foreign investment has a long history, from the colonial era, post-Second World War development, decolonisation and the NIEO movement, the Washington Consensus, up until today's increased questioning of neoliberalism. Despite various shifts in the relationship between international law and domestic laws in this area throughout different periods, a persistent problem in the borrowing from domestic laws is the criticism of bias in favour of Western legal notions and of foreign investors' commercial interests. The history of the use of general principles of law in this field underscores the importance of adopting a more balanced approach in interpreting the international rules and of taking the requirement of representativeness more seriously. Indeed, if, in the future, a standing investment court or an appellate system is established to enhance the consistency of decisions interpreting IIA norms,[1228] it is crucial to make sure that the consolidated jurisprudence thereby developed would avoid, rather than perpetuate, the bias and arbitrariness prevailing in prior practice. Part II of the thesis proposed the appropriate comparative law methodology in relation to different elements of treaty interpretation, with a view to ensuring the representativeness of the comparative law analysis while also providing a solid basis for arbitral decisions.

The requirement of representativeness inevitably increases the difficulty in reconciling the differences among diverse legal systems. This has led to the belief that when identifying general principles of law, one needs to identify the common principle underlying the rules in various jurisdictions. It is argued in Part II that this approach is misguided, and as a result, it practically covers up, instead of constraining, arbitrariness in the reliance on general principles of law. As proposed in the thesis, rather than

[1228] Note by the Secretariat, 'Possible Reform of Investor-State Dispute Settlement (ISDS): Appellate and Multilateral Court Mechanisms' (n 996).

concentrating on abstract ‘underlying principles’, comparative law analysis should follow the functional approach, focusing on concrete solutions to specific problems. Comparative law analysis should aim to *understand* the rules in their domestic legal environments, rather than *insulating* them from their contexts. The basic tenets of the functional approach should also be followed in the comparative law analysis based on other elements of treaty interpretation, albeit with different criteria and different scopes of comparison. Taken together, the comparative law methodology proposed in the thesis helps to ground the IIA rules on the considerations expressed directly or indirectly in states’ domestic legal systems, and compels arbitral tribunals to elaborate on their reasonings in their decisions.

Looking forward, the relationship between international and domestic laws will undoubtedly keep evolving. Novel legal questions will certainly arise. In international investment law, the contribution of comparative law can be particularly important in times of change. In this context, the problems and solutions in the use of comparative law in this field may acquire a heightened significance, and a more principled yet nuanced approach of comparative law analysis may take on an increasingly crucial role for navigating complex legal issues in the future.

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