State Responsibility for Omissions: Establishing a Breach of the Full Protection and Security Obligation by Omissions

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Abstract

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The full protection and security obligation traditionally requires a State to exercise due diligence to prevent physical damage from being inflicted on foreign investments within its territory, and to provide a means of redress for aggrieved foreign investors. Recently, tribunals have expanded this application of the obligation such that States are obliged to exercise due diligence to afford legal or regulatory protection to foreign investments.

Establishing a breach of the obligation involves establishing a State's responsibility for its omissions. The law of State responsibility has nuances in respect of establishing a breach of non-absolute positive obligations, such as this one. Evidence of the State's knowledge of the need to act, and of its capacity to act, provide the basis on which a breach of the obligation may be established. Causation is also an element of the proof of a breach, and is to be established by reference to an adequate counter-factual. The standard to which one must establish a breach is contested – as between an objective and subjective standard, or a hybrid – albeit an objective standard of due diligence is preferable.

In this context, recent tribunals have fashioned diagnostics for determining a breach of the obligation which invoke concepts of legitimate expectations, and reasonableness and rationality. Using these diagnostics means that the objective standard of proof is satisfied when an investor's legitimate expectations are frustrated by the conduct of the State, or when the State fails to act reasonably and in order to achieve rational public policy goals. These diagnostics offer a useful and workable development in the articulation of the standard of proof in relation to a breach of the full protection and security obligation.

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CHAPTER ONE: INTRODUCTION

1(1) The full protection and security obligation: *la mise en scène*

On 28 and 29 December 2012, five separate Notices of Intent to submit disputes to arbitration under various free trade or bilateral investment treaties were served on the United States Department of State.[1] In each dispute, the claimant or claimants are foreign nationals from Latin American countries who had invested funds in the Stanford Financial Group, headquartered in Houston, Texas. Each asserts that the United States "failed to provide even a rudimentary level of protection or legal security to [them] as … investors in the Houston, Texas-based Stanford Financial group of companies, which directly led [them] to lose [their] investments as the victims of a massive United States based Ponzi scheme" operated by the Stanford Financial Group.[2] This failure, they argue, violated the United States' duty under the applicable free trade and bilateral investment treaties "to provide protection and security to foreign investors and their investments".[3]

The claims, which are yet to be determined, on their surface do not appear to be a surprising use of international investment law. They seek compensation in respect of notorious activities of the Stanford Financial Group, which they allege caused them significant economic damage and in respect of which United States officials were

[1] *Guatemalan, Costa Rican and Dominican Victims of the Stanford Ponzi Scheme v The Government of the United States of America*, Notice of Intent, 29 December 2012; *Nationals of Peru Victimized by the Stanford Ponzi Scheme v The Government of the United States of America*, Notice of Intent, 28 December 2012; *Peruvian Victims of the Stanford Ponzi Scheme v The Government of the United States of America*, Notice of Intent, 29 December 2012; *Gregorio Anibal Sanabria Fleitas v The Government of the United States of America*, Notice of Intent, 28 December 2012; and *Mordehai Moor v The Government of the United States of America*, Notice of Intent, 28 December 2012. See discussion in Maupin, "Differentiating Among International Investment Disputes" in Douglas, Pauwelyn and Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory Into Practice* (OUP, 2014) 467, 472-474.

[2] The various claimants are represented by overlapping counsel, and the five Notices of Intent are virtually identical, amended *mutatis mutandis* for each claim. This assertion appears in paragraph 4 of each Notice of Intent.

[3] This assertion appears in paragraph 27 or 28 of each Notice of Intent.

contemporaneously aware and failed to take any preventative measures. At such a level of analysis, the claims seem to advance an obvious allegation that the United States failed within its territory to provide to investments by foreigners protection and security from damage inflicted on them by resident non-State actors.

However, far from being a commonplace invocation of the full protection and security obligation under international investment law, the claims are likely to test the outer limits of the scope *ratione materiae* of the obligation. The classic full protection and security claim alleges a host State's international responsibility for a failure to use its police powers to prevent physical damage from being inflicted on foreign investments by local non-State actors,[4] such as insurgents,[5] participants in a revolution,[6] civic demonstrators[7] or disgruntled employees.[8] Claims have also alleged responsibility for a failure to prevent physical damage by State actors,[9] such as military officials,[10] police forces[11] or employees of a State-owned company.[12] Claims have also traditionally been founded on the basis of a failure by the State to provide a means of redress for damage

[4] See Section 3(2)(a)(i) below.

[5] *Asian Agricultural Products Ltd. v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990.

[6] *Pantechniki S.A. Contractors & Engineers v Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009; *Karmer Marble Tourism Construction Industry and Commerce Limited Liability Company v Georgia*, ICSID Case No. ARB/08/19, Award, 9 August 2012.

[7] *Tecnicas Medioambientales Tecmed SA v Mexico*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003.

[8] *Noble Ventures, Inc. v Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005. See also *Elettronica Sicula S.p.A. (ELSI) (United States of America v Italy) (Judgment)* [1989] ICJ Reports 15.

[9] See Section 3(2)(a)(ii) below.

[10] *American Manufacturing & Trading, Inc. v Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997.

[11] *Waguih Elie George Siag and Clorinda Vecchi v Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009.

[12] *Wena Hotels Ltd v Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000.

suffered by foreign investors.[13] Claims of these kinds are familiar in this area of international investment law, and a significant proportion of those alleging a failure to prevent physical damage have succeeded.[14]

In recent years, this traditional application of the obligation has been challenged by numerous claims which have asserted that the obligation requires of host States more than the provision of physical protection and security from damage or of a means of redress for aggrieved foreign investors. These claims allege that host States have breached the obligation by pursuing regulatory conduct which undermines the economic protection and security of the foreign investment. The damage suffered in such situations has been variously expressed as the undermining of "legal protection",[15] of the "stability afforded by a secure investment environment"[16] or of "the normal ability of the investor's business to function".[17] A number of these claims have succeeded, though at least as many have failed.[18]

A trend in such claims is that they predominantly impugn positive State action rather than omission – that is, the implementation of regulatory or administrative measures which allegedly cause economic damage to the foreign investment. This is so despite, as is

[13] See Section 3(2)(b) below.

[14] See Section 3(2)(a) below.

[15] See, for example, Schreuer, "Full Protection and Security" (2010) 1(2) *Journal of International Dispute Settlement* 353, 6.

[16] See, for example, *Azurix Corporation v Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006, [408].

[17] See, for example, Wälde, "Energy Charter Treaty-based Investment Arbitration: Controversial Issues" (2004) *Journal of World Investment and Trade* 373, 391.

[18] See Section 3(2)(c) below.

occasionally clarified,[19] the basis of responsibility being the failure to forestall the alleged damage – that is, the State's failure to refrain from taking the relevant regulatory actions. Accordingly, while a State's omissions are sometimes a part of a broader totality of regulatory conduct impugned in a claim,[20] it is rare that a dispute relates solely to a failure by a State to exercise its regulatory powers to protect and secure a foreign investment from economic damage done to it in its private transactions with non-State actors in the host State's territory. After one abortive attempt to establish the responsibility of a State on this basis (over which the tribunal declined jurisdiction),[21] the five Notices of Intent filed in the Stanford Financial Group cases directly question whether the scope *ratione materiae* of the obligation extends to such a duty.

1(2) Analyses in literature and jurisprudence: State responsibility for omissions vis-à-vis the full protection and security obligation

Despite the regularity with which full protection and security obligations are in issue in investment treaty arbitrations, there is a paucity of focused analysis of the obligation in scholarship and in jurisprudence. The status of the literature is described in Section 1(2)(a). Moreover, this scarcity, as discussed in Section 1(2)(b), exists in a context where the literature and case law discussing principles of State responsibility for a State's actions has generally avoided analysing the elements of breach of an international obligation by a State's omissions.

[19] See *Electrabel S.A. v Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, [7.81].

[20] See, for example: *Antoine Goetz et consorts v Burundi*, ICSID Case No. ARB/95/3, Sentence, 10 February 1999; *Lauder v Czech Republic*, UNCITRAL, Final Award, 3 September 2001; *CME Czech Republic B.V. v Czech Republic*, UNCITRAL, Final Award, 13 September 2001; *Parkerings-Compagniet AS v Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007.

[21] *Alasdair Ross Anderson and others v Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award, 19 May 2010.

1(2)(a) The full protection and security obligation

Although "the obligation to provide foreign investment 'full protection and security' is a standard of protection contained in nearly all investment treaties",[22] extended discussions of the obligation are rare. No monograph-length analysis of the obligation exists, and the most common treatment given to it by the literature is as a segment in treatises covering a range of topics in international investment law.[23]

The most detailed analyses of the obligation are Zeitler's. In an article of 2005,[24] Zeitler reviewed the case law and principles relating to the duty to provide protection and security from physical damage done by non-State actors, explaining its connection with customary international law, the nature of the due diligence standard and how damage to foreign investments by private actors can engage the responsibility of a host State. The article became a common reference point in subsequent discussions of the obligation,[25] even though it predated most of the case law considering the obligation and thus did not address any of the developments in relation to the obligation's coverage of a duty to provide a means of redress and, more contentiously, to provide regulatory protection from

[22] Rubins and Kinsella, *International Investment, Political Risk and Dispute Resolution* (Oceana, 2005) 217. See also: Schreuer, "Full Protection and Security" (2010) 1(2) *Journal of International Dispute Settlement* 353, 353; Lamm, Giorgetti and Uran-Bidegain, "International Centre for Settlement of Investment Disputes" in Giorgetti (ed.), *The Rules, Practice and Jurisprudence of International Courts and Tribunals* (Nijhoff, 2012) 77, 104.

[23] See: Dolzer and Schreuer, *Principles of International Investment Law* (OUP, 2012) 160-166; McLachlan, Shore and Weiniger, *International Investment Arbitration: Substantive Principles* (OUP, 2007) 247-250; Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer, 2009), 309-310; Sornarajah, *The International Law on Foreign Investment* (3rd ed., CUP, 2010) 205, 359-360; Rubins and Kinsella, *International Investment, Political Risk and Dispute Resolution* (Oceana, 2005) 217-225; Fathallah, "International Law in Investment Arbitration Agreements" (DPhil thesis, University of Oxford, 2006) 156-159.

[24] Zeitler, "The Guarantee of "Full Protection and Security" in Investment Treaties Regarding Harm Caused by Private Actors" (2005) 3 *Stockholm International Arbitration Review* 959.

[25] See, for example: Schreuer, "Full Protection and Security" (2010) 1(2) *Journal of International Dispute Settlement* 353, 355; *Frontier Petroleum Services Ltd v Czech Republic*, UNCITRAL, Final Award, 12 November 2010, [261]; Schill, *The Multilateralization of International Investment Law* (CUP, 2009) 81; Herdegen, *Principles of International Economic Law* (OUP, 2013) 403.

economic damage. Zeitler provided an updated analysis in a contribution to a collection of essays in 2010.[26] While her focus remained on the duty to provide protection and security from physical damage and the application of the due diligence standard, Zeitler also noted the new case law which found in the obligation the duty to provide a means of redress and, in some decisions, the duty to protect, through a State's regulatory conduct, foreign investments from economic damage.

Other discussions of the obligation are more compact. Thus, for example, Moss and Schreuer provide overviews of the case law considering the various issues relevant to the obligation.[27] Collins analyses the application of the obligation to a particular issue, namely, the protection of an investor's digital assets (such as websites and computer systems in the context of cyber attacks).[28] Titi considers the inclusion and likely scope of application of the obligation in the draft model bilateral investment treaty of the European Union currently being prepared by the European Commission.[29]

Jurisprudence has also tended not to engage in long analyses of the obligation. As Schreuer observes, the obligation of "full protection and security has been used sparingly by investment tribunals".[30] While there are a number of cases in which an alleged breach of the obligation is the primary head of claim,[31] it is commonplace for such a breach to be

[26] Zeitler, "Full Protection and Security" in Schill, *International Investment Law and Comparative Public Law* (OUP, 2010) 183.

[27] Moss, "Full Protection and Security" in Reinisch (ed.), *Standards of Investment Protection* (OUP, 2008) 131; Schreuer, "Full Protection and Security" (2010) 1(2) *Journal of International Dispute Settlement* 353.

[28] Collins, "Applying the Full Protection and Security Standard of International Investment Law to Digital Assets" (2011) 12 *The Journal of World Investment & Trade* 225.

[29] Titi, "Full Protection and Security, Arbitrary or Discriminatory Treatment and the Invisible EU Model BIT" (2014) 15 *The Journal of World Investment & Trade* 534.

[30] Schreuer, "Full Protection and Security" (2010) 1(2) *Journal of International Dispute Settlement* 353, 369.

[31] See, for example: *Asian Agricultural Products Ltd. v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990; *Wena Hotels Ltd v Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000.

alleged as an auxiliary claim in the context of disputes which primarily relate to, for example, unlawful expropriation or a breach of the fair and equitable treatment obligation.[32] At least partly as a result of this matter of litigation strategy, full protection and security claims are typically considered at the end of a tribunal's decision and receive comparatively sparse treatment.[33] A consequence of this tendency is that principles pertaining to the full protection and security obligation are under-explained in comparison with, for instance, those pertaining to the fair and equitable treatment obligation.[34]

This tendency is not, however, a rule. A number of recent decisions have assiduously addressed full protection and security claims, including when advanced only in an auxiliary manner.[35] Claims instituted in respect of alleged damages to foreign investments in the context of the so-called "Arab Spring" also provided new opportunities to analyse the obligation in detail.[36] Equally, the Stanford Financial Group cases will also require close analysis of the obligation and whether and how it applies to the United States' impugned conduct.

[32] See, for example: *Marion Unglaube and Reinhard Unglaube v Costa Rica*, ICSID Case No. ARB/08/1 and ICSID Case No. ARB/09/20, Award, 16 May 2012.

[33] Thus, it is unexceptional for the claim to be resolved in a page or two of analysis. One recent decision opined that, "given its decisive findings" that the State had breached the applicable investment treaty's prohibition of unlawful expropriation and prescription of fair and equitable treatment, it was "unnecessary for the Tribunal to determine further whether Sri Lanka had breached the full protection and security provision" in the same treaty: *Deutsche Bank AG v Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, [538].

[34] Which latter principles, in contrast, one leading arbitrator has previously described as "the alpha and omega" of investor-State arbitration, at least under Chapter 11 of the NAFTA: Brower, "Fair and Equitable Treatment under NAFTA's Investment Chapter" (2002) 96 *American Society of International Law Proceedings* 9, 9.

[35] See, for example: *Marion Unglaube and Reinhard Unglaube v Costa Rica*, ICSID Case No. ARB/08/1 and ICSID Case No. ARB/09/20, Award, 16 May 2012; *Waguih Elie George Siag and Clorinda Vecchi v Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009.

[36] See, for example, *Indorama International Finance Limited v Egypt*, ICSID Case No. ARB/11/32.

1(2)(b) State responsibility for omissions

As with the lack of analysis in commentary and case law of the full protection and security obligation, so too has there been a lack of analysis of the responsibility of States for internationally wrongful omissions (as distinct from wrongful actions).

Important consequences of the distinction between wrongful actions and wrongful omissions may be overlooked when one appreciates that "there is no difference in principle" in the attribution of acts and omissions to a State.[37] For instance, the distinction generates important legal and evidentiary consequences in international law.[38] The lack of attention given to the distinction has been long-standing, as little has altered since Ago noted in 1939 that "in the field of international law, the distinction is generally neglected by the doctrine".[39] While the debate about fault or *culpa* as a putative condition of wrongful omissions both pre- and post-dates Ago's observation,[40] it remains true that only a modicum of scholarship has grappled directly with the consequences of the distinction *per se*. A recent contribution on the issue was made by Latty in 2010. In that piece, Latty emphasised the consequences of the distinction both for matters of evidence and proof and

[37] See Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (OUP, 2002), 82. Stern goes further and says the distinction "does not seem to be particularly important, given that any obligation may be expressed both positively and negatively": Stern, "Responsabilité international" in *Répertoire de droit international public* (2nd ed., Dalloz, Paris, 2004), Vol III, [62].

[38] See Section 2(2) below. See also, in particular: Brownlie, *System of the Law of Nations, State Responsibility – Part I* (OUP, 1983), 45; García Amador, *Yearbook of the International Law Commission*, 1960, vol. II, UN Doc. A/CN.4/SER.A/1960/Add.l, 63; Ago, "Le délit international" (1939-II) 68 *Recueil des Cours* 415, 501; and Latty, "Actions and Omissions" in Crawford, Pellet, Olleson and Parlett (eds.), *The Law of International Responsibility* (OUP, 2010) 355.

[39] Ago, "Le délit international" (1939-II) 68 *Recueil des Cours* 415, 501 ("*Dans le domaine du droit international, la distinction est généralement négligée par la doctrine*").

[40] See Section 2(4)(a)(ii) below.

also for discerning the "content" of the obligation in issue[41] – matters which in turn hold significant implications for the issue of causation.[42]

Even if the consequences of the distinction have to date attracted little focused attention, they have proved a necessary part of other discussions primarily directed to other issues in the law of State responsibility. There are many examples of this type of oblique approach to the discussion of responsibility for omissions – most of the sources relied upon in Chapter Two below fall into this category. Thus, to identify just a few, Brownlie and others touch upon the issue when discussing the role of fault in State responsibility,[43] García Amador and Schwarzenberger when examining the role of knowledge and intention,[44] Crawford when outlining principles of attribution,[45] and Cheng and Brownlie again when expounding principles of causation.[46] The doctrine relating to State responsibility for omissions is thus one that is assembled from this variety of contributions.

Nor does jurisprudence typically expound the doctrinal basis of international responsibility for omissions. Although "[c]ases in which the international responsibility of a State has been invoked on the basis of an omission are at least as numerous as those

[41] Latty, "Actions and Omissions" in Crawford, Pellet, Olleson and Parlett (eds.), *The Law of International Responsibility* (OUP, 2010) 355.

[42] See Section 2(2)(c) below.

[43] Brownlie, *System of the Law of Nations, State Responsibility – Part I* (OUP, 1983), 45. Other authors are cited in Section 2(4)(a)(ii) below.

[44] Schwarzenberger, *International Law* (3rd ed., Stevens, 1957) vol. II, 632; García Amador, *Yearbook of International Law Commission*, 1960, vol. II, UN Doc. A/CN.4/SER.A/1960/Add.l, 63.

[45] Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (OUP, 2002), 81-82.

[46] Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (CUP, 1953), 241-253; Brownlie, *System of the Law of Nations, State Responsibility – Part I* (OUP, 1983), 225-226.

based on positive acts,"[47] tribunals have generally not explained the evidentiary or legal consequences deriving from the allegation of responsibility based on the former instead of the latter. This is not to say that tribunals refuse to apply a "due diligence" standard,[48] an "appropriate steps" standard,[49] or some other standard.[50] Rather, tribunals tend to apply the relevant standard without elaborating on the precise elements of breach of a positive obligation or how key principles, such as those concerning causation, operate in such cases. This is so even though, in cases regarding "a lack of proper care on the part of state organs", it is typical that "the issue becomes one of causation."[51]

1(3) The purpose, content and approach of this study

The purpose of this study is to analyse the full protection and security obligation in international investment law, with particular reference to the responsibility of States for a breach of the obligation through wrongful omissions.[52]

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[47] Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (OUP, 2002), 82.

[48] See Section 2(3)(b)(i) below.

[49] See Section 2(3)(b)(ii) below.

[50] See, for example, the discussion in Section 4(2)(b) below of the "modified objective standard" applied in *Pantechniki S.A. Contractors & Engineers v Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009.

[51] Brownlie, *System of the Law of Nations, State Responsibility – Part I* (OUP, 1983), 45. This judicial reserve is evident in some of the best known cases finding State responsibility for wrongful omissions. For instance, no lengthy exposition of such doctrine was provided by the ICJ in the *Corfu Channel* or *Tehran Hostages* cases (as discussed in Sections 2(4)(a)(i)-(ii) below), which permitted much debate about how exactly the basis for international responsibility was, or was coming to be, structured (as discussed in Section 2(4)(a)(ii) below). Similar reticence also remains evident in modern arbitral decisions on the full protection and security obligation. With the exception of a few tribunals (see *Asian Agricultural Products Ltd. v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990), most do not analyse the basis of responsibility for omissions or the elements of proof of such responsibility. An example of this is the rarity with which the existence, or not, of a causal link between the impugned omission and the alleged damage is examined by such tribunals, although again exceptions exists (see: *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case No. ARB/05/08, Award, 24 July 2008, [785]; *Marion Unglaube and Reinhard Unglaube v Costa Rica*, ICSID Case No. ARB/08/1 and ICSID Case No. ARB/09/20, Award, 16 May 2012, [283]).

[52] A study of the intersection of the law of State responsibility and international investment law, including the extent to which arbitral tribunals use the former in their decisions, is timely in light of the burgeoning scholarly interest in the issue: Crawford, "Investment Arbitration and the ILC Articles on State Responsibility" (2010) 25 *ICSID Review – Foreign Investment Law Journal* 127, 136; Sassoon, *Substantive*

Given the state of the literature on the obligation and on the responsibility of States for omissions, this study has two objectives. Its first goal is to elucidate the basis of international responsibility for a State's wrongful omissions. As Chapter Two discusses, while international law does not draw a distinction between a State's acts and omissions when it imposes obligations or when it attributes conduct to that State, these instances of parity do not mean that the difference between acts and omissions is without consequence in international law. Rather, the distinction has important legal and evidentiary consequences, which in turn can affect the determination of the wrongfulness of a State's conduct. Establishing State responsibility for omissions is markedly different to establishing State responsibility for acts. Matters such a State's knowledge, its capacity to act to forestall impending damage, the standard to which proof of wrongfulness must be shown, and the existence of a causal link between the impugned conduct and the alleged damage take on different, and more complex, dimensions when a wrongful omission rather than act is at issue. By engaging in a focused analysis of the basis of international responsibility for omissions, Chapter Two seeks to lay the doctrinal groundwork for this study's subsequent analysis of the full protection and security obligation, and to provide an analysis of the topic of State responsibility for omissions that has been largely overlooked to date.

Law in Investment Treaty Arbitration: The Unsettled Relationship between International and Municipal Law (Kluwer, 2010) 1; Paparinskis, "Investment Treaty Arbitration and the (New) Law of State Responsibility" (2013) 24 *European Journal of International Law* 617; Smutny, "State Responsibility and Attribution: When is a State Responsible for Acts of State Enterprises? *Emilio Agustín Maffezini v The Kingdom of Spain*" in Weiler (ed) International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law (Cameron May, 2005); Hobér; "State Responsibility and Investment Arbitration" in Moser (ed) *Investor-State Arbitration – Lessons for Asia* (Juris, 2008) 227; Hobér, "State Responsibility and Investment Arbitration" (2008) 25 *Journal of International Arbitration* 545; Malumfashi, "State Responsibility in Investment Arbitration: To What Extent is the State Responsible for Contracts Concluded By State Enterprises and Sub-National Authorities?" (2005) 1 *Transnational Dispute Management* 1. See also the literature specifically considering the interaction between principles of State responsibility relating to necessity and investment law cited in Section 2(4)(b) below.

The way in which State responsibility for omissions is established – that is, how one establishes the elements of a breach of a positive obligation – is most clearly demonstrated by a close analysis of one such obligation. This gives rise to the second objective of this study, namely, to expound both the underlying principles of the full protection and security obligation in international investment law, and the elements of a breach of that obligation.

Chapters Three and Four seek to attain this goal. Chapter Three engages in a thorough review of both the history of the full protection and security obligation and its modern-day scope *ratione materiae*. It identifies the duties which the obligation imposes on States and highlights key themes which run through the jurisprudence and which are relevant to establishing the responsibility of host States for failures to act with due diligence when discharging the obligation. It is intended that Chapter Three be comprehensive, seeking to identify every public decision rendered pursuant to an investment protection treaty which meaningfully addresses the obligation, and evaluating its contribution to this area of international law.

With the doctrinal foundation of State responsibility for omissions and the content of the full protection and security obligation thus explained, Chapter Four analyses the elements of a breach of the obligation. It identifies the characteristics of the host State's knowledge which jurisprudence has regarded as relevant to a determination of breach of the obligation, and the degree to which a State's capacity (or lack thereof) to take action to forestall the alleged damage militates in favour or against a determination of wrongfulness. Chapter Four also considers how principles of causation operate, and to what standard proof of wrongfulness must be shown, in respect of allegations of failures to provide full protection and security in breach of the obligation.

Before turning to this substantive discussion, however, the approach adopted by this study must briefly be noted. There are two points. The first relates to the methodological outlook which has been adopted. As is evident from the foregoing overview of the purpose and content of the study, it adopts a positivist approach to its analysis. This perspective is a product of the state of the literature in this area, which means this study necessarily verifies its reasoning and conclusions chiefly by reference to the findings of arbitral tribunals which have decided full protection and security claims, and the normative rules of law stated or reflected therein. Support for particular conclusions is thus sought in the decisions of those tribunals, rather than in any broader theoretical structure of which they are a part.

The second point of methodology flows from the first. The research for this study has been conducted in the usual manner when researching issues of international investment law, namely, by drawing on decentralised sources available across a series of databases. In seeking comprehensive knowledge of its topic (which is particularly true of Chapter Three), this study has cross-checked research results against several sources. These sources are largely electronic databases, and have included all of the well-known sources.[53] Research on these databases has then been supplemented in the usual fashion with depository library research.

The law is stated as at 1 March 2016. References to "the obligation" in this study are, unless otherwise apparent, references to "the full protection and security obligation". Where quotations from non-English language sources are the author's translation, the original source and text is provided in the corresponding footnote.

[53] These include the databases of University of Victoria's "ITA Law", the Oxford University Press's "Investment Claims", the privately-owned "Investor-State Law Guide", the United Nations Conference on Trade and Development's review of investment treaty cases, and other less prominent or more regionally-focused sources (including, where possible, Spanish and French language decisions and materials).

CHAPTER TWO: VIOLATION OF INTERNATIONAL LAW BY OMISSION

2(1) Distinction between acts and omissions in international law

At two key points in the allocation of responsibility to a State for its internationally wrongful conduct, international law does not distinguish between the acts of a State and its omissions. The first point is when international law imposes an obligation. Through both customary international law and treaties, international law imposes obligations on a State in given circumstances to act or to refrain from acting. The second point is when international law attributes conduct to a State. A State's wrongful failure to act is not less attributable to it than its wrongful actions. A State's international responsibility is therefore established equally on the bases of wrongful acts and wrongful omissions. This parity is broadly endorsed in commentary and case law.[54] Amerasinghe describes it as a point "too obvious to require developing",[55] while Ago states:

> "the conduct which must be susceptible of being considered as conduct of the State ... can be either positive (action) or negative (omission). It can even be said that cases in which the international responsibility of a State has been invoked on the basis of an omission are perhaps more numerous than those based on action taken by a State."[56]

The modern consensus on this parity does not, however, mean that the difference between acts and omissions is without consequence in international law. On the contrary,

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[54] See, for example: Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (OUP, 2002), 82; Ago, *Yearbook of International Law Commission*, 1971, vol. II, UN Doc. A/CN.4/SER.A/1971/Add.1 (Part 1), 216-217; Shaw, *International Law* (6th ed., CUP, 2008), 781-782; Hall, *A Treatise on International Law* (1924) (Higgins ed., 8th ed., Hein & Co., 2001) 64-65; *Corfu Channel (United Kingdom v Albania) (Merits: Dissenting Opinion of Judge Winiarski)* [1949] ICJ Rep 4, 52; *Tippetts, Abbett, McCarthy, Stratton v TAMS-AFFA* (1984) 6 Iran-USCTR 219, 225; *Velásquez Rodríguez v Honduras* (1989) I-ACHR, Ser. C, No.4, [170]; *CME Czech Republic v Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, [605]; *Eureko BV v Poland*, *ad hoc* arbitration, Partial Award, 19 August 2005, [186]-[189].

[55] Amerasinghe, *State Responsibility for Injuries to Aliens* (Clarendon, 1967), 38.

[56] Ago, *Yearbook of International Law Commission*, 1971, vol. II, UN Doc. A/CN.4/SER.A/1971/Add.1(Part 1), 216.

the difference between acts and omissions generates important consequences. These consequences can in turn affect whether a State's conduct is internationally wrongful and therefore attracts international responsibility.

An appreciation of how the distinction between acts and omissions is connected to such consequences begins with an examination of the content of the relevant obligation. The content of an international obligation determines what a State must or must not do for its conduct to be lawful. The obligation can be prescriptive or proscriptive: its content can require of a State either prescribed action, or it can forbid action in conformity with a proscription. Reuter describes this as the ability of States to create "negative obligations by which a State prohibits itself from acting ... [or] positive obligations by which a State obliges itself to act."[57] The content of an obligation is thus discerned, at least in part, by identifying the conduct which breaches the obligation. Wrongful omissions breach positive obligations, whereas wrongful acts breach negative obligations.

Discerning the content of an obligation is different to discerning how an obligation, or responsibility for its breach, arises. While there is no difference in the way in which international law imposes negative and positive obligations (through treaty, custom or general principles), and no difference in the way in which it imposes international responsibility for breach of those obligations (attributable conduct plus breach of an obligation), the content of the obligation and the requirement of specified conduct differs

[57] Reuter, *Droit International Public* (6th ed., PUF, 1983) 253 ("*les obligations passives par lesquelles l'Etat s'interdit d'agir ... [ou] les obligations actives par lesquelles il s'oblige à le faire*"). Others summarise the distinction more prosaically as requiring a State either "to do" or "not to do": Abi-Saab, "Whither the International Community?" (1998) 9 *European Journal of International Law* 248, 253; Latty, "Actions and Omissions" in Crawford, Pellet, Olleson and Parlett (eds.), *The Law of International Responsibility* (OUP, 2010) 355, 360.

markedly between an obligation "to do" and an obligation "not to do". This difference is the definitive distinction between acts and omissions in international law.[58]

Ago calls the distinction a "legal" (i.e., "conceptual") distinction, given that no "material" difference in the attribution of conduct or allocation of responsibility results from it.[59] But "legal" distinctions matter. Quite apart from the need for States to know the content of their obligations so that they know how lawfully to conduct themselves, "legal" distinctions can be crucial when States bring disputes before international tribunals.[60] The distinction between acts and omissions is no exception, making its importance felt on issues such as how a State establishes that the elements of a breach of the obligation exist and the standard of proof which it must satisfy when doing so.

2(2) Legal consequences of the distinction

2(2)(a) Discerning and satisfying the standard of proof in international law

The standard of proof in international law is often described as being variable.[61] In some instances, tribunals accept proof to the standard of the "balance of probabilities",[62] while at

[58] See generally Economides, "Content of the Obligation" in Crawford, Pellet, Olleson and Parlett (eds.), *The Law of International Responsibility* (OUP, 2010), 371.

[59] Ago, "Le délit international" (1939-II) 68 *Recueil des Cours* 415, 501 ("*Il convient donc avant tout de souligner que la différence entre deux types de délit, dans le droit des gens comme dans tout autre droit, n'est pas une différence matérielle, mais une différence juridique*").

[60] An example is the "legal" distinction between objections to admissibility and objections to jurisdiction in international arbitration, the success of which each has different consequences: Paulsson, "Jurisdiction and Admissibility" in Aksen *et al.* (eds.), *Global Reflections on International Law, Commerce and Dispute Resolution* (ICC, 2005) 601.

[61] Reviews of the standard of proof in international law include: Amerasinghe, *Evidence in International Litigation* (Nijhoff, 2005), 232-261; Riddell and Plant, *Evidence before the International Court of Justice* (BIICL, 2009), 123-137; Kinsch, "On the Uncertainties Surrounding the Standard of Proof in Proceedings Before International Courts and Tribunals" in Venturini and Bariatti (eds.), *Diritti Individuali e Giustizia Internazionale* (Giuffrè, 2009) 427.

[62] *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras) (Judgment)* [1992] ICJ Rep 351, [248] (the boundary is to be drawn "on the balance of probabilities, there being no great abundance of evidence either way"); *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (New Application: 1962) (Second Phase) (Separate Opinion of Judge Fitzmaurice)* [1970] ICJ Reports 3, [58];

other times the expected standard is akin to the higher standard of "beyond reasonable doubt".[63] "Generally speaking, the standard of proof varies with the character of the particular issue of fact",[64] with the result that "a higher than ordinary standard",[65] to be satisfied by "conclusive evidence",[66] may be demanded in order to prove a "charge of ... exceptional gravity against a State".[67] While this view is not universal, and some tribunals have held that it is not the standard that varies but rather what might constitute sufficiently persuasive evidence for a tribunal on the basis of the case before it,[68] variation in the standard of proof has repeatedly been said to be a part of litigation before international tribunals.[69]

Kasikili/Sedudu Island (Botswana v Namibia) (Judgment), Dissenting Opinion of Judge Rezek, [1999] ICJ Rep 1233, [HN] and [10].

[63] See: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 17, [208]-[209]; Amerasinghe, *Evidence in International Litigation* (Nijhoff, 2005), 235-239; Gattini, "Evidentiary Issues in the ICJ's *Genocide* Judgment" (2007) 5(4) *Journal of International Criminal Justice* 889, 889.

[64] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain) (Jurisdiction and Admissibility: Dissenting Opinion of Judge Shahabuddeen)* [1995] ICJ Rep 6, 63.

[65] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain) (Jurisdiction and Admissibility: Dissenting Opinion of Judge Shahabuddeen)* [1995] ICJ Rep 6, 63.

[66] *Corfu Channel (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4, 17; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 17, [209].

[67] *Corfu Channel (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4, 17.

[68] See *Libananco Holdings Co. Limited v Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011, [125] ("… the Tribunal accepts that fraud is a serious allegation, but it does not consider that this (without more) requires it to apply a heightened standard of proof. … It may simply require more persuasive evidence, in the case of a fact that is inherently improbable, in order for the Tribunal to be satisfied that the burden of proof has been discharged"). Compare, endorsing the dominant view that such allegations involve a higher standard of proof: *Energoalians SARL v Moldova*, UNCITRAL, Award, 23 October 2013, [261]; *EDF (Services) Limited v Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, [221]; *Waguih Elie George Siag v Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, [325]-[326].

[69] One jurist even describes the selection of the standard of proof as a matter of "discretion": Kazazi, *Burden of Proof and Related Issues: A Study on Evidence before International Tribunals* (Nijhoff, 1995) 350-352. See also: Riddell and Plant, *Evidence before the International Court of Justice* (BIICL, 2009), 134; Amerasinghe, *Evidence in International Litigation* (Nijhoff, 2005), 232 ("The standard of proof applied is really based on the principle that tribunals have authority and duties in respect of evidence in matters before them, one of its duties being to decide whether or not the proponent of a claimant has succeeded in proving his claim to the satisfaction of the tribunal").

The content of an obligation therefore has consequences for how one establishes that the elements of a breach of that obligation exist. The applicable standard of proof depends on what "character" the contested "issue of fact" exhibits.[70] Equally, the legal existence of a fact depends on whether the applicable standard of proof is satisfied. There is an embedded reflexivity here. The content of the obligation at issue affects the selection of the standard of proof, while the choice of standard affects the determination of whether that same obligation has been breached. The result of this reflexivity is that the distinction between the content of an obligation "to do" and an obligation "not to do" creates and necessitates different standards of proof. To articulate it alternatively, one simply does not establish a breach of a positive obligation in the same way one establishes a breach of a negative obligation.

2(2)(b) Establishing a breach of a negative obligation

The means by which one establishes a breach of a negative obligation can be demonstrated by way of example. A prominent negative obligation in international law is the prohibition of the threat or use of force. Coextensive rules in Article 2(4) of the UN Charter and customary international law oblige States to refrain from the threat or use of force against the territorial integrity or political independence of another State.[71] A State which engages in such a threat or use of force will have breached this negative obligation. For instance, the Court in *Nicaragua* found that the United States had breached the obligation by laying

[70] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain) (Jurisdiction and Admissibility: Dissenting Opinion of Judge Shahabuddeen)* [1995] ICJ Rep 6, 63.

[71] That the Charter and customary rules are coextensive is supported by "the great majority of international lawyers": ILC, *Yearbook of International Law Commission*, 1966, vol. II, UN Doc. A/CN.4/SER.A/1966/Add.l, 247. See also: Shaw, *International Law* (6th ed., CUP, 2008), 1123; Henkin *et al.*, *International Law: Cases and Materials* (3rd ed., St Paul, 1993); Randelzhofer, "Article 2(4)" in Simma (ed.), *The Charter of the United Nations: A Commentary* (2nd ed., OUP, 2002) 112; Skubiszewski, "Use of Force by States, Collective Security, Law of War and Neutrality" in Sørensen (ed.), *Manual of Public International Law* (Macmillan, 1968) 745.

mines in Nicaraguan internal or territorial waters, attacking Nicaraguan ports, oil installations and naval bases, and supporting similar attacks by the *contras*.[72] Although the Court did not identify explicitly the standard of proof it would apply to determine a breach of the obligation – or, more precisely, to ascertain the relevant facts that would establish by their existence the United States' failure to conform to the positive duty – it reviewed the evidence adduced by Nicaragua[73] and then "appraise[d] the facts in relation to the legal rules applicable" in order to decide whether the United States' actions "constitute[d] violations of the relevant rules of law".[74] On the basis of its appraisal, the Court held that Nicaragua had satisfied the standard of proof, even despite its lack of "adequate or direct proof that all or a great majority of *contra* activities" had received the United States' support.[75]

As illustrated by the Court's reasoning in *Nicaragua*, establishing a breach of a negative obligation to the requisite standard necessitates an "appraisal of the facts" to discern whether their existence engages the "applicable legal rules" to an extent that responsibility follows.[76] When considering whether the elements of a breach are established in this way, a tribunal may be more or less rigorous in its appraisal of the facts.

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[72] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, [227]-[228].

[73] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, [76]-[78] (mining Nicaraguan waters); [82]-[84], [88]-[89] (attacking Nicaraguan ports, oil installations and naval bases); [93]-[104], [117]-[121] (supporting attacks by the *contras*).

[74] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, [226].

[75] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, [111].

[76] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, [226].

As in *Nicaragua*, it may not require "direct proof ... in every respect" of the claim.[77] Yet, as in other cases, the tribunal may demand "conclusive evidence" commensurate with the gravity of the alleged breach.[78] A breach therefore exists where evidence is supplied of facts that by their existence establish that the respondent State engaged in action contrary to its duty to refrain from such action.

2(2)(c) Establishing a breach of a positive obligation

Establishing a breach of a positive obligation is virtually always an exercise in proof by inference because of the conceptual difficulty of evidencing an omission.[79] Although direct proof of a wrongful omission is possible, Brownlie is correct to observe that "looking for specific evidence of a lack of proper care on the part of state organs is often a fruitless task".[80] The result of this reality is that establishing a breach of a positive obligation typically relies on establishing the circumstances in which the omission occurred. A claimant seeking to establish the breach must do more than simply identify actions which the State failed to take.[81] Rather, it must demonstrate how, in the prevailing circumstances, the character of the State's omission was less a mere absence of action and

[77] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, [111].

[78] *Corfu Channel (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4, 17; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 17, [209]; Riddell and Plant, *Evidence before the International Court of Justice* (BIICL, 2009), 134; Amerasinghe, *Evidence in International Litigation* (Nijhoff, 2005), 235-239.

[79] The inference is in fact a "positive inference", which, as discussed further in Section 4(3)(a) below, allows the tribunal to infer from the circumstances "that a State intended its actions [and omissions] and their consequences": Riddell and Plant, *Evidence before the International Court of Justice* (BIICL, 2009), 114.

[80] Brownlie, *System of the Law of Nations, State Responsibility – Part I* (OUP, 1983), 45.

[81] The only exception to this is where the omission is *per se* a breach of international law, such as those discussed in Section 2(3)(a) below.

more a failure to exercise due diligence or take appropriate steps when such conduct was objectively expected of it.[82]

The need to establish a breach of a positive obligation in this way implicates two key issues. The first is the role of "damage". Whenever a State breaches a positive obligation, it causes some kind of damage. "Damage" in this context encompasses not only material damage but also the purely legal damage contained in the non-fulfilment of an obligation and corresponding violation of a right.[83] As Tanzi explains, it is "self-evident that any violation of a legal obligation entails in itself a damage, irrespective of the occurrence of a 'visible' injury".[84] This is not to say that damage is a self-standing condition of State responsibility. That proposition has been rejected by the ILC[85] and broader scholarship,[86]

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[82] See: *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Judgment)* [1980] ICJ Rep 3, [63], [68]; Ago, *Yearbook of International Law Commission*, 1971, vol. II, UN Doc. A/CN.4/SER.A/1971/Add.1(Part 1), 216; Shaw, *International Law* (6th ed., CUP, 2008), 855; Ago, "Le délit international" (1939-II) 68 *Recueil des Cours* 415, 503; Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (OUP, 2002), 82.

[83] Others adopting or referring to this inclusive conception of "damage" include: Tanzi, "Is Damage a Distinct Condition for the Existence of an Internationally Wrongful Act?" in Spinedi and Simma (eds.) *United Nations Codification of State Responsibility* (Oceana, 1987) 3, 10; Report of the Commission to the General Assembly, *Yearbook of International Law Commission*, 1973, vol. II, UN Doc. A/CN.4/SER.A/1973/Add.l, 183; Ago, *Yearbook of International Law Commission*, 1971, vol. II, UN Doc. A/CN.4/SER.A/1971/Add.1(Part 1), 223; Graefrath, "Responsibility and Damages Caused: Relationship between Responsibility and Damages" (1984-II) 185 *Recueil des Cours* 9, 35; Fauchille, *Traité de droit international public* (8th ed., Paris, 1921) vol. I, 515. Note also Anzilotti's early position on this point, that "*le dommage se trouve compris implicitement dans le caractère antijuridique de l'acte. ... la violation de la règle est effectivement toujours un dérangement de l'intérêt qu'elle protège, et, par voie de conséquence, aussi du droit subjectif de la personne à laquelle l'intérêt appartient*": Anzilotti, "La responsabilité internationale des Etats à raison des dommages soufferts par des étrangers" (1906) *RGDIP* 13.

[84] Tanzi, "Is Damage a Distinct Condition for the Existence of an Internationally Wrongful Act?" in Spinedi and Simma (eds.) *United Nations Codification of State Responsibility* (Oceana, 1987) 3, 10.

[85] Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (OUP, 2002), 84, 203. See also: ILC discussion of Ago's Second Report, *Yearbook of International Law Commission*, 1970, UN Doc. A/CN.4/SER.A/1970, vol. I, 226; ILC discussion of Ago's Third Report, *Yearbook of International Law Commission*, 1973, UN Doc. A/CN.4/SER.A/1973, vol. I, 27.

[86] Graefrath, "Responsibility and Damages Caused: Relationship between Responsibility and Damages" (1984-II) 185 *Recueil des Cours* 9, 123 (the modern position "show[s] far reaching conformity so that one cannot speak of a serious opposition against the thesis that damage is no constituent element of responsibility under international law"). Note, however, that the proposition that damage is a self-standing condition of State responsibility was championed by some. See: Reuter, *Yearbook of International Law Commission*, 1973, vol. I, UN Doc. A/CN.4/SER.A/1973, 23 (excluding damage as a condition for State responsibility

with the result that the existence of damage as a condition of responsibility "is a matter which is determined by the relevant primary rule".[87]

The type of damage occasioned by a breach of a positive obligation can affect whether and how one can establish that the elements of the breach exist. On the one hand, where the omission is a failure to comply with an obligation of result and legal (but no material) damage is caused by the non-performance, then the tribunal need not analyse the circumstances of the omission to determine whether it was wrongful.[88] In such cases, the obligation is breached purely through the non-attainment of the result, and responsibility attaches on the basis that the legal damage was caused by what García Amador describes as the "objective fact" of the failure to fulfil the obligation.[89] On the other hand, where the omission is a failure to comply with an obligation of conduct and material damage ensues, the tribunal will need to identify some circumstantial connection between the respondent's failure to act and the damage caused to the claimant. Without that connection, the omission cannot be more than a mere absence of action, and the tribunal will be unable to

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"would mean adhering to something like the criminal machinery of international law"); Freeman, *The International Responsibility of States for Denial of Justice* (Longmans, 1938) 22; Ross, *A Textbook of International Law: General Part* (Longmans, 1947) 242, 255; Jiménez de Aréchaga, "International Responsibility" in Sørensen (ed.), *Manual of Public International Law* (Macmillan, 1968) 534, 534.

[87] Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (OUP, 2002), 84, 203. See also: Crawford, "Revising the Draft Articles on State Responsibility" (1999) 10 *European Journal of International Law* 435, 438; Anzilotti, *Corso di Diritto Internazionale* (3rd ed., Athenaeum, 1928) 443-444 cited in García Amador, *Yearbook of International Law Commission*, 1960, vol. II, UN Doc. A/CN.4/SER.A/1960/Add.l, 62; Starke, "Imputability in International Delinquencies" (1938) *British Yearbook of International Law* 114; Ross, *A Textbook of International Law: General Part* (Longmans, 1947) 257-258; Statement of the Netherlands, *Yearbook of International Law Commission*, 1980, vol. II, UN Doc. A/CN.4/SER.A/1980/Add.l(Part 1), 102.

[88] See Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (OUP, 2002), 84 ("the obligation under a treaty to enact a uniform law is breached by the failure to enact the law, and it is not necessary for another State party to point to any specific damage it has suffered by reason of that failure").

[89] See García Amador, *Yearbook of International Law Commission*, 1960, vol. II, UN Doc. A/CN.4/SER.A/1960/Add.l, 63 ("in the case of ... some omissions which give rise to the direct responsibility of the State ... the imputation of responsibility depends on the existence of an injury and on the equally objective fact that the injury was caused through the non-performance of an international obligation").

infer that a breach of the positive obligation has occurred.[90] Thus it is that, depending on the type of damage alleged, the tribunal will to varying degrees need to analyse the circumstances of the omission to see whether it constitutes a breach of the relevant positive obligation.

The second issue that arises when proving a breach of a positive obligation is the issue of causation. Commentators have emphasised the importance of this issue in the context of positive obligations. Brownlie writes realistically on the point, observing that the usual lack of specific evidence of a wrongful omission means that the debate will focus on whether the omission caused the damage.[91] Ago reaches the same conclusion after conducting an examination of particular examples of wrongful omissions (chiefly, a State's failure to "intervene" to prevent injury to aliens in its territory).[92] García Amador also stresses the importance of causation when proving a breach of a positive obligation, although his remarks appear limited to positive obligations of result rather than conduct.[93]

Crawford explains that the reason why causation becomes a vexed matter when proving a breach of a positive obligation is because wrongful omissions are necessarily bound up with the circumstances in which they occur. Unlike acts, "it may be difficult to isolate an 'omission' from the surrounding circumstances which are relevant to the determination of responsibility".[94] The result of this difference, as Ago explains, is that:

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[90] See: Ago, "Le délit international" (1939-II) 68 *Recueil des Cours* 415, 503; Brownlie, *Principles of Public International Law* (7th ed., OUP, 2008), 455; Crawford, *Brownlie's Principles of Public International Law* (8th ed., OUP, 2012) 552; Shaw, *International Law* (6th ed., CUP, 2008), 855.

[91] Brownlie, *System of the Law of Nations, State Responsibility – Part I* (OUP, 1983), 45.

[92] Ago, "Le délit international" (1939-II) 68 *Recueil des Cours* 415, 503

[93] García Amador, *Yearbook of International Law Commission*, 1960, vol. II, UN Doc. A/CN.4/SER.A/1960/Add.l, 63.

[94] Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (OUP, 2002), 82.

> "whereas for actions it is simply a case of establishing whether a natural relationship of cause and effect exists between the subject's action and the event, for delicts by omission on the contrary it is necessary to judge whether a possible intervention of the expected action of the subject in the concrete case could have prevented the event".[95]

Proof by inference thus requires an assessment of the circumstances surrounding the failure to act and a consideration of the counterfactual which would have existed in the absence of the wrongful omission.[96] Accordingly, establishing a causal link between a wrongful omission and the damage is essentially a "but for" exercise, even if, as discussed in section 2(5) below, the precise nature of the "but for" reasoning differs according to the precise content of the positive obligation.

The existence of "but for" causal link is thus one of the elements of breach of a positive obligation. It is an example of how the content of the obligation at issue affects the means by which the applicable standard is satisfied. Given the way in which the content of the obligation dictates such significant legal consequences, it is important to understand the different types of obligations in international law which can be violated by a State's omissions.[97]

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[95] Ago, "Le délit international" (1939-II) 68 *Recueil des Cours* 415, 503 ("*Tandis que dans les fait d'action il s'agira simplement d'établir si une relation naturelle de cause à effet subsiste entre l'action du sujet et l'événement, dans les délits d'omission au contraire il sera nécessaire de juger d'abord si une intervention éventuelle de l'action attendue du sujet dans le cas concret aurait pu éviter l'événement*").

[96] See: Ago, "Le délit international" (1939-II) 68 *Recueil des Cours* 415, 503; Latty, "Actions and Omissions" in Crawford, Pellet, Olleson and Parlett (eds.), *The Law of International Responsibility* (OUP, 2010) 355, 361.

[97] See, primarily in relation to wrongful acts, Dupuy, "Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility" (1999) 10(2) *European Journal of International Law* 371.

2(3) Categories of obligations which are violable by an omission

All obligations violable by an omission are positive obligations. However, positive obligations can be divided into two categories: absolute positive obligations and non-absolute positive obligations.

2(3)(a) Absolute positive obligations

The first category of obligations violable by omission is absolute positive obligations. These are obligations which require a State to attain a specified objective irrespective of any obstacles to attainment. They are "obligations of result". If the State for any reason does not achieve the objective, it will breach the obligation and bear international responsibility.[98]

Normatively, such obligations demand a minimum of conduct, in circumstances where the conduct can be objectively measured, without which the result would not otherwise be attained. If the objective minimum is not achieved, the State breaches the obligation. Three examples illustrate this.

The first example is found in the criminalisation obligations in human rights treaties. Article 4 of the CAT, for instance, reads:

> "(1) Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
>
> (2) Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature."

[98] See Robbins, "The Emergence of Positive Obligations in Bilateral Investment Treaties" (2005) 13 *University of Miami International and Comparative Law Review* 403, 427; Abi-Saab, "Whither the International Community?" (1998) 9 *European Journal of International Law* 248, 253.

As Nowak and McArthur note, this provision is an obligation both positive and absolute. It requires without exception the criminalisation and punishment of all acts of torture under the domestic laws of the State.[99] While there is some flexibility in the means by which a State achieves this (the choice of wording of the law, for instance), the result must always be the same. The offence must exist as an explicit and discrete offence in domestic law (and not as one implied or subsumed within another offence).[100] If a State fails to introduce the offence, it will breach the obligation.[101]

The same absolute positive character exists in respect of obligations outside the human rights context. Article XI:1 of the GATT demands that WTO Members eliminate quantitative import and export restrictions (such as quotas) between themselves, unless certain exceptions apply.[102] The provision reads:

> "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party."

[99] Nowak and McArthur, *The United Nations Convention against Torture: A Commentary* (OUP, 2008) 233. See also: Committee against Torture: Conclusions on Sweden, UN Doc. CAT/C/CR/28/6, [8]; Committee against Torture: Conclusions on Austria, UN Doc. CAT/C/AUT/CO/3, [6]; Committee against Torture: Conclusions on Qatar, UN Doc. CAT/C/QAT/CO/1, [10]; Committee against Torture: Conclusions on Saudi Arabia, UN Doc. CAT/C/CR/28/5, [4(a)].

[100] Nowak and McArthur, *The United Nations Convention against Torture: A Commentary* (OUP, 2008) 248-249; Burgers and Danelius, *The United Nations Convention against Torture: A Handbook on the Convention* (Nijhoff, 1989) 129; Ingelse, *The UN Committee against Torture: An Assessment* (Kluwer, 2001) 337ff.

[101] Nowak and McArthur, *The United Nations Convention against Torture: A Commentary* (OUP, 2008) 229, 233, 248-249. See also, on obligations to enact domestic laws, Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (OUP, 2002), 84.

[102] The exceptions relate chiefly to limited measures of necessity in Article XI:2(a)-(c) of the GATT, and the general exceptions in Article XX of the GATT.

This obligation contains both positive and negative elements.[103] The negative element is to refrain from introducing prohibited quantitative restrictions.[104] The positive element is to eliminate existing restrictions.[105] In both respects the obligation is absolute, which is why Zedalis describes it as a "condemnation" of infringing measures.[106] Like the obligation in Article 4 of the CAT, a State bound by Article XI:1 of the GATT must achieve a minimum standard of conduct. Either it eliminates the quantitative restrictions in place, or it breaches the obligation. Unlike the CAT obligation, however, there is little flexibility in the means by which the State achieves the result. Elimination of an infringing measure is both the result and the means of compliance with the obligation. This difference between the CAT and GATT obligations emphasises the nature of absolute positive obligations as obligations of result. States may or may not have discretion in the means of compliance, but the objective must be attained whatever the means employed.

An example of an absolute positive obligation which, though inflexible in the outcome it obliges States to achieve, affords States significant discretion in the means to achieve it, is the obligation to extradite or prosecute (*aut dedere aut judicare*). Although the obligation is expressed variously in treaties,[107] and has uncertain scope in customary

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[103] *WTO Analytical Index: Guide to WTO Law and Practice* (online source).

[104] See *Argentina – Leather*, Panel Report, 19 December 2000, WT/DS155/R, [11.21].

[105] See: *Turkey – Textiles*, Panel Report, 31 May 1999, WT/DS34/R, [9.63]-[9.65]; *EEC – Quantitative Restrictions*, GATT Panel Report, 12 July 1983, BISD 30S/129; *Canada – Periodicals*, Panel Report, 14 March 1997, WT/DS31/R, [5.5].

[106] Zedalis, "The United States/European Communities *Biotech Products* Case" (2004) 38(4) *Journal of World Trade* 647, 648. See also: Van den Bossche, *The Law and Policy of the World Trade Organization* (CUP, 2005) 445; Matsushita *et al.*, *The World Trade Organization: Law, Practice, and Policy* (2nd ed., OUP, 2006) 270; WTO, *WTO Analytical Index: Guide to WTO Law and Practice* (2nd ed., CUP, 2007) 208-209.

[107] See: Bassiouni and Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Nijhoff, 1995) 73, 75-302 (classifying the various expressions of the obligation by the crimes they cover); Mitchell, *Aut Dedere, Aut Judicare: The Extradite or Prosecute Clause in International Law* (The Graduate Institute, 2009) [1]-[13] (classifying by groupings of extradition treaties and multilateral treaties); ILC Secretariat, "Survey of multilateral conventions which may be of relevance for the work of the

international law,[108] a classic formulation of the obligation is in Article 7 of the Convention for the Suppression of Unlawful Seizure of Aircraft:[109]

> "The Contracting State in the territory of which the alleged offender is found, shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution."

Like Article 4 of the CAT and Article XI:1 of the GATT, this obligation is both positive ("shall be obliged to") and absolute ("without exception"). That it "is constructed in the alternative, giving a State the choice to decide which part of this obligation to fulfil",[110] does not alter its absolute positive character.[111] To the contrary, it only means, as the

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International Law Commission on the topic 'The obligation to extradite or prosecute (*aut dedere aut judicare*)'", 18 June 2010, UN Doc. A/CN.4/630, 4-63 (classifying by subject matter); Amnesty International, *Universal Jurisdiction: The duty of States to enact and implement legislation* (Amnesty, 2001) ch.15; Amnesty International, *International Law Commission: The obligation to extradite or prosecute (aut dedere aut judicare)* (Amnesty, 2009) 29-31; Amnesty International, *Universal Jurisdiction: UN General Assembly Should Support This Essential International Justice Tool* (Amnesty, 2010) 9-13 (classifying, respectively, by chronology, by the auspices under which they were concluded, and by number of ratifications).

[108] Roht-Arriaza, "State responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law" (1990) 78 *California Law Review* 451, 466; Enache-Brown and Fried, "Universal Crime, Jurisdiction and Duty: The Obligation of *Aut Dedere Aut Judicare* in International Law" (1998) 43 *McGill Law Journal* 613, 628-629; Broomhall, "Towards the Development of an Effective System of Universal Jurisdiction for Crimes under International law" (2001) 35 *New England Law Review* 399, 406; Scharf, "*Aut dedere aut judicare*" in Wolfrum (ed.), *Max Planck Encyclopaedia of Public International Law* (OUP, 2008); Galicki, "Preliminary report on the obligation to extradite or prosecute ("*aut dedere aut judicare*")", 7 June 2006, UN Doc. A/CN.4/571, [40]-[42]; Galicki, "Fourth report on the obligation to extradite or prosecute (*aut dedere aut judicare*)", 31 May 2011, UN Doc. A/CN.4/648, [74]-[94]; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)*, Provisional Measures, Order of 14 April 1992 [1992] ICJ Reports 3, 51 (Dissenting Opinion of Judge Weeramantry), 82 (Dissenting Opinion of Judge Ajibola); *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, ICJ, Judgment of 20 July 2012, [54].

[109] 860 UNTS 105, signed on 16 December 1970, entered into force 14 October 1971.

[110] Galicki, "Preliminary report on the obligation to extradite or prosecute ("*aut dedere aut judicare*")", 7 June 2006, UN Doc. A/CN.4/571, [49]. See also Galicki, "Third report on the obligation to extradite or prosecute (*aut dedere aut judicare*)", 10 June 2008, UN Doc. A/CN.4/603, [104].

[111] International Law Commission, *Yearbook of International Law Commission*, 1996, vol. II, UN Doc. A/CN.4/SER.A/1996/Add.l (Part 2), 31 ("The custodial State has an obligation to take action to ensure that such an individual is prosecuted either by the national authorities of that State or by another State which indicates that it is willing to prosecute the case by requesting extradition. The custodial State is in a unique position to ensure the implementation of [the obligation]. Therefore the custodial State has an obligation to take the necessary and reasonable steps to apprehend an alleged offender and to ensure the prosecution and

International Court of Justice recently stated in relation to the equivalent obligation in the CAT, that "[e]xtradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State".[112] The obligation must be fulfilled, irrespective of obstacles such as financial constraints or the views of regional organisations with an interest in the case.[113] Nevertheless, the State retains a significant discretion not present in other absolute positive obligations. It can choose either to extradite or to prosecute, and if it chooses the latter its prosecuting authorities can exercise discretion as to the conduct of the prosecution.[114] A positive obligation in this category can thus permit significant flexibility in the means by which it is fulfilled by the State, without subverting its status as an obligation of result.[115]

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trial of such an individual by a competent jurisdiction").

[112] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, ICJ, Judgment of 20 July 2012, [95].

[113] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, ICJ, Judgment of 20 July 2012, [112].

[114] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, ICJ, Judgment of 20 July 2012, [90]; Galicki, "Second report on the obligation to extradite or prosecute (*aut dedere aut judicare*)", 11 June 2007, UN Doc. A/CN.4/585, [11].

[115] This study takes absolute positive obligations in a limited sense. This study does not take as examples of this type of obligation duties relating to procedural matters such as notification and depositing, even though they often use the language of result: see, for example, Article 110(2) of the Charter of the United Nations ("The ratifications shall be deposited with the Government of the United States of America, which shall notify all the signatory states of each deposit as well as the Secretary-General of the Organization when he has been appointed"). It is an open question as to whether such duties can rightly be called obligations. This may in practical terms be because their purpose is to promote the orderly flow of information necessary for the conduct of international relations, rather than to prescribe minimum conduct requirements the breach of which will result in sanction: see, regarding Article 110(2) of the Charter: Vedder, "Article 110" in Simma *et al.* (eds), *The Charter of the United Nations: A Commentary* (2nd ed., OUP, 2002) 1373, 1374-1375; Bentwich and Martin, *A Commentary on the Charter of the United Nations* (Routledge, 1951) 190-191. While a failure to provide the requested required information for any reason breaches the obligation *qua* obligation, it is questionable whether they can be rightly understood as obligations in the absence of punishment for a breach. As Hart recognised, even while not regarding international law as conditioning the existence of an obligation on the existence of a corollary sanction, it "is crucial for the understanding of the idea of obligation to see that in individual cases the statement that a person has an obligation under some rule and the prediction that he is likely to suffer for disobedience may diverge": Hart, *The Concept of Law* (3rd ed., OUP, 2012) 85, 217-218.

Flexibility may also exist in the structure of the obligation. Not all absolute positive obligations are structured in the same way. Some are self-standing, whereas others are contingent on the existence of the State's prior conduct.

All the absolute positive obligations discussed above are examples of non-contingent absolute positive obligations. This means that they are obligations which bind the State without the need for that State to take any prior action (other than consent to be bound by the obligation). But not all absolute positive obligations are self-standing in this way. Some such obligations only arise as a consequence of some action taken by the obliged State. These are contingent absolute positive obligations.

An example of an absolute positive obligation which is thus structured is Article 4 of the 1907 Hague Convention (VIII) Relative to the Laying of Automatic Submarine Contact Mines:

> "Neutral Powers which lay automatic contact mines off their coasts ... must inform ship owners, by a notice issued in advance, where automatic contact mines have been laid. This notice must be communicated at once to the Governments through the diplomatic channel."[116]

Article 4 is an obligation of notification.[117] However, unlike the obligation of notification in Article 110(2) of the UN Charter, this obligation to notify arises only once the obliged State has taken certain prior conduct (laying mines).[118] That the obligation is contingent in this manner does not reduce its positive or its absolute character. The contingency only affects the structure of the obligation and the point at which the State is bound to act.

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[116] Article 4 the 1907 Hague Convention (VIII) Relative to the Laying of Automatic Submarine Contact Mines 36 Stat. 2332, signed 18 October 1907, entered into force 26 January 1910.

[117] See section 2(3)(a) above.

[118] Reed, "'Damn the Torpedoes': International Standards Regarding Use of Automatic Submarine Mines" (1984) 8(2) *Fordham International Law Journal* 286, 298, 300-301. See also Oppenheim, *International Law: A Treatise* (Lauterpacht ed., 7th ed., 1954) vol. II, [319]-[319a].

Absolute positive obligations can be similarly contingent upon the taking of an action by a State other than the obliged State. Article 18 of the United Nations Convention against Transnational Organized Crime provides an example of this.[119] Article 18 concerns requests by one State for the provision of "mutual legal assistance" from another State. The assistance requested can come in many forms, but one specific category contemplated by Article 18(3)(f) is government documents and records. Article 18(29) then provides that:

> "The requested State Party … shall provide to the requesting State Party copies of government records, documents or information in its possession that under its domestic law are available to the general public".

As with Article 4 of the Hague Convention, this obligation only requires the obliged State to act contingent upon the occurrence of a prior action. Unlike Article 4, however, this prior action is one taken by a State other than the obliged State. Again, the contingency of the obligation only affects the structure of the obligation and the point at which the State is bound to act, leaving the absolute and positive nature of the obligation unchanged.

One further point about absolute positive obligations arises. Irrespective of the content and structure of a given absolute positive obligation, it is distinguishable from obligations of absolute liability. Responsibility for breach of an absolute positive obligation is different from regimes for the allocation of absolute liability.[120]

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[119] 2225 UNTS 209, signed 15 November 2000, entered into force 29 September 2003.

[120] Discussions of absolute liability regimes include: Hurwitz, *State Liability for Outer Space Activities in Accordance with the 1972 Convention on International Liability for Damage Caused by Space Objects* (Nijhoff, 1992) 147ff; Akehurst, *Modern Introduction to International Law* (Malanczuk ed., 7th ed., HarperCollins, 1997) 205; Shaw, *International Law* (6th ed., CUP, 2008), 546, 854, 888; Cheng, *Studies in International Space Law* (Clarendon, 1997) ch.17-18; Christol, "International Liability for Damage Caused by Space Objects" (1980) 74 *American Journal of International Law* 346.

The clearest example of a regime of absolute liability is Article 2 of the 1972 Convention on International Liability for Damage Caused by Space Objects.[121] That Article provides that a "launching State shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the Earth or to aircraft in flight". While some commentary has identified precursors to Article 2,[122] the prevailing view attributes to it a unique place among regimes of international responsibility. Malanczuk calls it "truly an innovation",[123] while Forteau's summary is also typical:

> "The regime governing international responsibility for outer space is something of an exception amongst the various regimes on responsibility. It is the only system which expressly imposes an absolute obligation of reparation ... in the absence of any wrongful conduct. ... The obligation to make reparation binds the 'launching State' of the space objects which caused the damage."[124]

In this regime, liability is "absolute" because, once the factual conditions precedent are established (the identity of the launching State plus damage caused by the launched object), liability is allocated.[125] The regime does not compel States to engage in any action whatsoever. It only demands that, if a State chooses to engage in certain conduct, which it

[121] 961 UNTS 187, signed 29 March 1972, entered into force 1 September 1972.

[122] The literature identifies prototype absolute liability regimes in Article 22(3) of the Convention on the High Seas, 450 UNTS 6465, signed 29 April 1958, entered into force 30 September 1962 and Article 2 of the Convention relating to Damage Caused by Foreign Aircraft to Third Parties on the Surface, 310 UNTS 181, signed 7 October 1952, entered into force 4 February 1958. See: Akehurst, *Modern Introduction to International Law* (Malanczuk ed., 7th ed., HarperCollins, 1997) 205, fn 79; Jabbari-Gharabagh, "Types of State Responsibility for Environmental Matters in International Law" (1999) 33 *Revue Juridique Thémis* 59, 73-74.

[123] Akehurst, *Modern Introduction to International Law* (Malanczuk ed., 7th ed., HarperCollins, 1997) 205.

[124] Forteau, "Space Law" in Crawford, Pellet, Olleson and Parlett (eds.), *The Law of International Responsibility* (OUP, 2010), 903, 903-904. The uniqueness is due to the "victim-oriented" purpose of the regime: Condorelli, "La réparation des dommages catastrophiques causés par les activités spatiales" in *La réparation des dommages catastrophiques: Les risques technologiques majeurs en droit international et en droit communautaire (Travaux des XIIIes Journées d'études juridiques Jean Dabin organisées par le Département de droit international Charles De Visscher, Université Catholique de Louvain)* (Bruylant, 1990) 262, 265.

[125] Graefrath, "Responsibility and Damages Caused: Relationship between Responsibility and Damages" (1984-II) 185 *Recueil des Cours* 9, 106.

neither requires nor prohibits, then the State will bear entirely the liability for any damage which occurs as a result of that conduct. By contrast, responsibility for breach of an absolute positive obligation arises even if the obliged State takes no action at all. While an absolute positive obligation does not specify the means by which the State is to fulfil the obligation, it is inherent that the State must take some action in order to do so.

The difference between the two situations is manifest. Some have expressed the distinction as one of primary and secondary rules of international law. On that basis Quentin-Baxter concludes that "[o]bligations arising in respect of acts not prohibited are the product of particular 'primary' rules: the violation of those or any other 'primary' rules brings into play the 'secondary' rules of State responsibility for wrongful acts."[126] Similarly Graefrath maintains:

> "obligations concerning international liability are always primary norms in which certain obligations as consequences of certain actions or events are agreed upon, that would not occur without such agreement. On the contrary, in the case of international responsibility we are always faced with legal consequences due to a violation of existing obligations under primary norms."[127]

The distinction can also be articulated by reference to the content of the obligation imposed. Responsibility for breach of an absolute positive obligation arises if a State fails to act either at all or sufficiently, whereas a regime of absolute liability allocates responsibility only after a State has chosen to engage in an act which is neither required nor prohibited by that regime. Accordingly, in the former a State is obliged to act in order

[126] Quentin-Baxter, *Yearbook of International Law Commission*, 1980, vol. II, UN Doc. A/CN.4/SER.A/1980/Add.l(Part 1), 253.

[127] Graefrath, "Responsibility and Damages Caused: Relationship between Responsibility and Damages" (1984-II) 185 *Recueil des Cours* 9, 106.

to achieve a stated outcome by whatever means it chooses, while in the latter a State is not required to act but, if it does, is obliged to bear liability for any resulting damage.

2(3)(b) Non-absolute positive obligations

The second category of obligations violable by omission is non-absolute positive obligations. These are obligations which require a State to take sufficient action in an effort to achieve a desired outcome, but do not require the State to ensure that the outcome is in fact achieved. They are "obligations of conduct", rather than obligations of result, even though the conduct is pursued always in an effort to attain the result. If a State fails to act sufficiently to fulfil the relevant positive obligation, then the State will have breached the obligation. Conversely, if a State does act sufficiently, it will, even if it did not ultimately achieve the desired result, fulfil its obligation.

Non-absolute positive obligations can be framed in different ways. At times they are framed as obligations to exercise "due diligence". At other times they are framed as obligations to take "appropriate steps". Each of these framings is discussed in sections 2(3)(b)(i) and 2(3)(b)(ii) respectively. The potential differences between the two framings are discussed in section 2(3)(b)(iii).

2(3)(b)(i) The framing of due diligence

The first way in which non-absolute positive obligations are framed is as obligations of "due diligence". These obligations do not require that the State guarantee that the desired outcome be achieved. They rather require that the State conduct itself with due diligence in its efforts to realise that outcome. An example demonstrates how this operates.

The obligation of a host State to afford the investment of a foreign investor in its territory full protection and security is a non-absolute positive obligation. It is "widely recognised" that the obligation is "not a guarantee against all injuries that might befall an

investment" and "only require[s] a host country to exercise due diligence" in protection of the investment.[128] The obligation therefore does not require that the State ensure absolutely the protection of the investment.[129] Rather, the obligation is one of conduct. The State must exercise "vigilance, in the sense that [it] shall take all measures necessary to ensure the full enjoyment of protection and security of [the] investment".[130] As Moss summarises, if the State exercises due diligence, then it will "have discharged its obligation even if the measures taken to protect the investment have not achieved the desired protection".[131]

The full protection and security obligation is thus framed as an obligation of due diligence. That is the standard to which the State must conform its conduct when fulfilling the obligation. The task which arises, then, is to define what exactly "due diligence" means in general international law.

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[128] *Suez, Sociedad General de Aguas v Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, [157]-[158], citing as evidence of "wide recognition": *Saluka Investments BV v Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, [483]; *Rumeli Telekom A.S v Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, [688]; *Waguih Elie George Siag v Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, [447].

[129] Robbins, "The Emergence of Positive Obligations in Bilateral Investment Treaties" (2005) 13 *University of Miami International and Comparative Law Review* 403, 427.

[130] *American Manufacturing & Trading, Inc. v Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997, [6.05]; *Saluka Investments BV v Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, [484].

[131] Moss, "Full Protection and Security" in Reinisch (ed.), *Standards of Investment Protection* (OUP, 2008) 131, 139. See also *Frontier Petroleum Services Ltd v Czech Republic*, UNCITRAL, Final Award, 12 November 2010, [261]. One may still question whether the obligation is limited by reference to the resources available to the host State, which is discussed further in Section 4(4) below. As to authorities on the point, see: *British Claims in the Spanish Zone of Morocco* (1925) 2 UNRIAA 639, 644 (a State is "obliged to exercise only that degree of vigilance which corresponds to the means at its disposal", which "vigilance ... may be characterized as *diligentia quam in suis*"); *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Judgment)* [1980] ICJ Rep 3, [68]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 17, [430]; *Pantechniki S.A. v Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, [81]; Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer, 2009), 310; Schreuer, "Full Protection and Security" (2010) 1(2) *Journal of International Dispute Settlement* 353, 367-369.

The question is difficult to answer. No clear agreed definition of the term exists in case law or commentary. Despite significant attention being devoted to the concept,[132] the most widely-cited attempt at a general definition of the term is Freeman's, from 60 years ago:

> "'due diligence' is nothing more nor less than the reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances".[133]

This definition has the advantage of clarity. However, while scholars and tribunals often cite it,[134] those citations also regularly add that there is no "single, agreed-upon definition"[135] and that it would be inappropriate to develop one.[136]

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[132] See: Freeman, "Responsibility of States for the Unlawful Acts of their Armed Forces" (1956) 88 *Recueil des Cours* 263; Brownlie, *System of the Law of Nations, State Responsibility – Part I* (OUP, 1983), 161ff; Koivurova, "Due Diligence" in Wolfrum (ed.), *Max Planck Encyclopaedia of Public International Law* (OUP, 2008) ch.32; Blomeyer-Bartenstein, "Due Diligence" in Bernhardt (ed.), *Encyclopaedia of Public International Law* (Elsevier Science, 1987) vol.10, 138; Dupuy, "Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility" (1999) 10(2) *European Journal of International Law* 371, 379; Dupuy, "Due Diligence in the International Law of Liability" in OECD, *Legal Aspects of Transfrontier Pollution* (OECD, 1977) 369; Pisillo-Mazzeschi, "The Due Diligence Rule and the Nature of the International Responsibility of States" (1992) 35 *German Yearbook of International Law* 9; Chinkin, "A Critique of the Public/Private Dimension" (1999) 10(2) *European Journal of International Law* 387; Hessbruegge, "The Historical Development of the Doctrines of Attribution and Due Diligence in International Law" (2004) 36 *New York University Journal of International Law and Policy* 265; Barnbridge, "The Due Diligence Principle Under International Law" (2006) 8(1) *International Community Law Review* 81.

[133] Freeman, "Responsibility of States for the Unlawful Acts of their Armed Forces" (1956) 88 *Recueil des Cours* 263, 277-278.

[134] For example: Shelton, "Private Violence, Public Wrongs, and the Responsibility of States" (1990) 13(1) *Fordham International Law Journal* 1, 21-22; Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer, 2009), 310; *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, [77]; *Suez, Sociedad General de Aguas v Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, [157]; *El Paso Energy International Company v Argentina*, ICSID Case No. ARB/03/5, Award, 31 October 2011, [522]; *Hesham T. M. Al Warraq v Republic of Indonesia*, UNCITRAL, Award, 15 April 2014, [625].

[135] Frey, *Prevention of human rights violations committed with small arms and light weapons*, 25 June 2003, UN Doc. E/CN.4/Sub.2/2003/29, [39]; Duffy, *The 'War on Terror' and the Framework of International Law* (CUP, 2005) 57. Cf Barnbridge, "The Due Diligence Principle Under International Law" (2006) 8(1) *International Community Law Review* 81, 118.

[136] *Suez, Sociedad General de Aguas v Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, [157].

A recent decision of the International Court of Justice has offered another definition of the term. In the *Pulp Mills* case, the Court described a due diligence obligation as:

> "an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators".[137]

This definition is arguably an improvement on Freeman's in light of its clarification that due diligence requires both adoption of measures and vigilance in their enforcement. It is a clarification that draws on a wealth of arbitral practice which post-dates Freeman's definition, and which focuses on the degree of vigilance which the State has demonstrated in enforcing the relevant measures of protection.[138] However, like Freeman's, the International Court of Justice's definition of "due diligence" has not met with uniform adoption and application. In its subsequent Advisory Opinion, for example, the Seabed Disputes Chamber emphasised that the definition given by the Court was in the context of "a specific treaty obligation".[139]

This definitional uncertainty is no accident. Rather, as Shaw suggests, it is the result of the flexibility inherent in the concept of due diligence.[140] The notion that a State must respond diligently to a potential breach of its positive obligations, and yet is not

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[137] *Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment*), ICJ, 20 April 2010, [197].

[138] See *American Manufacturing & Trading, Inc. v Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997, [6.05]; *Saluka Investments BV v Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, [484]; *El Paso Energy International Company v Argentina*, ICSID Case No. ARB/03/15, Award, 31 October 2011, [522]-[523].

[139] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Advisory Opinion)*, Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, 1 February 2011, [115]. See also: Anton, "Case Concerning *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep (20 April 2010)" (2010) 17 *Australian International Law Journal* 213, 223; Boyle, "Pulp Mills Case: A Commentary", speech at the British Institute of International and Comparative Law, 26 October 2010, 3.

[140] Shaw, *International Law* (6th ed., CUP, 2008), 855 ("The test of due diligence undoubtedly imports an element of flexibility into the equation and must be tested in light of the circumstances of the case in question.").

obliged to provide a guarantee against all potential damage, is the determining standard in respect of numerous international legal problems – many of which concern obligations that are significant variations of a State's core due diligence obligation "to protect within [its own] territory the rights of other States".[141] Due diligence as a standard has thus been treated as determining, *inter alia*: whether a State has "take[n] all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide";[142] whether a State has "take[n] all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof";[143] and whether a State has acted sufficiently to protect within its territory the diplomatic and consular missions and staff of a foreign State.[144]

If the standard of due diligence is to retain broad utility, flexibility in its definition is crucial. That is why Brownlie concludes that "obviously no very dogmatic definition would be appropriate, since what is involved is a standard which will vary according to the circumstances".[145] It is also why the Seabed Disputes Chamber opined:

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[141] Commentary links the due diligence concept with Huber's recognition of this positive obligation, which he regarded as "corollary" to States' territorial sovereignty and the result of the reality that "[t]erritorial sovereignty cannot limit itself to its negative side": *Island of Palmas* (1928) 2 UNRIAA 829, 839.

[142] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 17, [430].

[143] Articles on Prevention of Transboundary Harm from Hazardous Activities, Article 3, *Report of the ILC on the Work of its Fifty-Third Session* UN Doc. A/56/10 Supp.No.10 (2001), 370, 393 (Article 3 imposes a due diligence obligation requiring "reasonable efforts by a State to inform itself of factual and legal components that relate foreseeably to a contemplated procedure and to take appropriate measures ... to address them.") See also: Barnbridge, "The Due Diligence Principle Under International Law" (2006) 8(1) *International Community Law Review* 81, 117; *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Advisory Opinion)*, Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, 1 February 2011, [116].

[144] *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Judgment)* [1980] ICJ Rep 3, [61]-[63].

[145] Brownlie, *Principles of Public International Law* (7th ed., OUP, 2008), 455. The quotation appeared in Brownlie's text in and since its first edition: Brownlie, *Principles of Public International Law* (OUP, 1966), 374. In the latest edition, however, being the first not edited by Brownlie, the observation is rephrased as

> "The content of "due diligence" obligations may not easily be described in precise terms. Among the factors that make such a description difficult is the fact that "due diligence" is a variable concept. It may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge."[146]

The result of this necessary flexibility, however, extends beyond difficulties of definition. It also, as Brownlie observes, results in a "sliding scale of liability related to the standard of due diligence".[147] This "sliding scale" means that in some circumstances States will have done enough to satisfy the standard, and in other circumstances they will not. The concept of due diligence itself never makes it clear at the time of the breach whether the State's actions to satisfy its positive obligation in the given circumstances were sufficient or not. Rather, due diligence is a concept that tribunals, operating with hindsight, can use to determine whether the State acted with sufficient diligence to fulfil its obligation in all the circumstances.

2(3)(b)(ii) The framing of appropriate steps

The second way in which non-absolute positive obligations are framed is as obligations of "appropriate steps". Like obligations of due diligence, obligations framed in this second way do not require States to guarantee that the desired outcome will be achieved. They instead require that States take appropriate steps in order to bring about that outcome. An example illustrates the point.

"No doubt the application of this standard will vary according to the circumstances": Crawford, *Brownlie's Principles of Public International Law* (8th ed., OUP, 2012) 552.

[146] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Advisory Opinion)*, Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, 1 February 2011, [117].

[147] Brownlie, *System of the Law of Nations, State Responsibility – Part I* (OUP, 1983), 168.

Article 2 of the European Convention on Human Rights is known popularly as the "right to life".[148] The first sentence of Article 2(1) provides that "[e]veryone's right to life shall be protected by law". The rest of Article 2 sets out the permitted exception to,[149] and the justifications for what would otherwise breach, this rule. The first sentence of Article 2(1) contains both a negative and a positive obligation for States.[150] As the European Court of Human Rights has confirmed, "Article 2§1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction".[151] The court's view of the positive component of Article 2 reflects its view on positive obligations generally:

> "[i]n the view of the European Court, the prime characteristic of positive obligations is that they in practice require national authorities to take the necessary measures to safeguard a right or, more precisely ... to adopt reasonable and suitable measures to protect the rights of the individual."[152]

In implementing this view, the court has identified measures which, as a matter of general principle, constitute appropriate steps by which a State might safeguard the lives of

[148] Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222, Article 2, signed 4 November 1950, entered into force 3 September 1953.

[149] The sole exception (lawful executions) has been restricted by Protocols 6 and 13.

[150] Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart, 2004) 4; Starmer, "Positive Obligations Under the Convention" in Jowell and Cooper (eds.), *Understanding Human Rights Principles* (Hart, 2001) 159; Starmer, *European Human Rights Law* (Legal Action, 1999) ch.5; Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd ed., OUP, 2002) 53-55; McBride, "Protecting Life: A Positive Obligation to Help" (1999) 24 *European Law Review Human Rights Survey* 43, 54.

[151] *LCB v United Kingdom* (1998) 27 EHRR 212, [36]. See also: *Osman v United Kingdom* (1998) 29 EHRR 245, [115]-[116]; *Keenan v United Kingdom* (2001) 33 EHRR 913, [88]-[90]; *Edwards v United Kingdom* (2002) 35 EHRR 487, [54].

[152] Akandji-Kombe, *Positive obligations under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights*, Council of Europe Human Rights Handbook No. 7, January 2007 (footnotes omitted). See also: *Gul v Switzerland* (1996) 22 EHRR 93, Dissenting Opinion of Judge Martens; Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart, 2004) 2.

those within its jurisdiction.[153] The court has also identified measures which, in the circumstances of a particular case, would have constituted steps appropriate to fulfil the obligation.[154] The result is that the compiled "appropriate steps" by which a State might positively "safeguard the lives of those within its jurisdiction"[155] reads something like a checklist. Thus a State can seek to fulfil its obligation by implementing effective criminal laws to deter the commission of offences against the person, providing law enforcement machinery to prevent and punish breaches, and taking preventative measures appropriate to the circumstances of an individual whose life is at risk.[156]

At this point, the analysis of whether a State has fulfilled an obligation of appropriate steps is virtually identical to the analysis of whether it has fulfilled an obligation of due diligence. Thus, if a State bound by Article 2 of the European Convention on Human Rights performs each of the items on the above "checklist", and even if it was not able to prevent the loss of life, the State may nevertheless be deemed to have taken sufficient "appropriate steps" to satisfy its obligation. Conversely, even where the State does perform each item, the circumstances of the case may be regarded as demanding additional steps before the obligation is fulfilled. Like the concept of due diligence, the notion of

[153] *Osman v United Kingdom* (1998) 29 EHRR 245, [115] (implementing effective criminal provisions to deter the commission of offences against the person; providing law enforcement machinery for prevention, suppression and sanctioning of breaches; and, in certain circumstances, taking preventive measures to protect an individual whose life is at risk from another). See also: Singh, *The Future of Human Rights in the United Kingdom: Essays on Law and Practice* (Hart, 1997) 54; Mowbray, "Duties of Investigation Under the European Convention on Human Rights" (2002) 51 *International and Comparative Law Quarterly* 435; Marks and Azizi, "Responsibility for Violations of Human Rights Obligations: International Mechanisms" in Crawford, Pellet, Olleson and Parlett (eds.), *The Law of International Responsibility* (OUP, 2010), 725, 726-732.

[154] *Makaratzis v Greece* (2005) 41 EHRR 49, [58] (implementing regulations on the proper use of firearms by law enforcement agencies); *Öneryıldız v Turkey*, (2005) 41 EHRR 20, [90] (implementing regulations for the licensing, operation and security of dangerous activities by public authorities); *Osman v United Kingdom* (1998) 29 EHRR 245, [116] (taking reasonable measures to counter a risk, if known or ought to be known, of damage being occasioned against an individual previously threatened by the perpetrator).

[155] *LCB v United Kingdom* (1998) 27 EHRR 212, [36].

[156] See *Osman v United Kingdom* (1998) 29 EHRR 245, [115].

appropriate steps does not allow a State to know, at the time of performance of its obligation, whether it has taken sufficient "appropriate steps" to discharge its obligation. The notion instead allows tribunals to analyse the circumstances retrospectively and decide whether the State took the necessary steps to satisfy its obligation in the circumstances as they prevailed at the time.

2(3)(b)(iii) The difference between the two framings

As the preceding sections indicate, there is undoubtedly a significant overlap between framing non-absolute positive obligations as obligations to exercise due diligence and as obligations to take appropriate steps. Some authors draw no distinction between the terms and treat them as coextensive.[157] Tribunals also tend not to distinguish between the two framings. Instances that are regarded as applications of the due diligence standard deploy language which closely parallels that used, for example, by the European Court of Human Rights in its appropriate steps analyses. Thus the International Court of Justice in *Tehran Hostages* held that Iran had breached its obligations by failing to take "appropriate steps" to protect the premises, staff and archives of the United States' mission.[158] Similarly the tribunal in *AMT v Zaire* concluded that fulfilment of the full protection and security obligation required the State to "take all measures necessary to ensure the full enjoyment of protection and security of its investments".[159] In practice, therefore, the

[157] See, for example: Barnbridge, "The Due Diligence Principle Under International Law" (2006) 8(1) *International Community Law Review* 81; Shaw, *International Law* (6th ed., CUP, 2008), 855.

[158] *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Judgment)* [1980] ICJ Rep 3, [63]. See also *Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment*), ICJ, 20 April 2010, [187], [197].

[159] *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997, [6.05]. See also *Saluka Investments BV v Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, [484].

language used for due diligence analyses is often interchangeable with that used for appropriate steps analyses.

In addition to an overlap in practice, it is possible to identify points of conceptual overlap. Thus the taking of no appropriate steps whatsoever in relation to a non-absolute positive obligation must also constitute an absence of duly diligent conduct. Further, a State that takes all possible appropriate steps in order to fulfil its non-absolute positive obligation must, conceptually, be acting with due diligence in that endeavour.

Where the overlap finishes, and the two standards practically and conceptually diverge, will not be delineable with precision. Certainly the blurring of one standard into the other makes it impossible neatly to carve out any category of non-absolute positive obligations the breach of which could only be determined by the application of one or other of the standards. However, as Marks and Azizi have illustrated, the close connection between the two standards does not necessarily mean they are perfectly equivalent.[160] That non-absolute positive obligations can be variously "framed" as obligations to exercise due diligence or to take appropriate steps suggests that a subdivision may be tenable.[161]

One might tentatively draw a line – though not a bright one – between the types of non-absolute positive obligations that lend themselves better to determination by the due diligence standard and those that lend themselves better to determination by the appropriate steps standard. Such a taxonomy would maintain that non-absolute positive

[160] Marks and Azizi, "Responsibility for Violations of Human Rights Obligations: International Mechanisms" in Crawford, Pellet, Olleson and Parlett (eds.), *The Law of International Responsibility* (OUP, 2010), 725, 729-731. See also *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Advisory Opinion)*, Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, 1 February 2011, [111]-[112].

[161] See Marks and Azizi, "Responsibility for Violations of Human Rights Obligations: International Mechanisms" in Crawford, Pellet, Olleson and Parlett (eds.), *The Law of International Responsibility* (OUP, 2010), 725, 731.

obligations which require a State to act in order to promote the realisation of a desired outcome which does not already exist would be better determined by an appropriate steps analysis, while non-absolute positive obligations which require a State to act in order to maintain a desired situation which is already in existence would be better determined by a due diligence analysis. Accordingly, an appropriate steps analysis will be more suitable in cases where the tribunal needs to peg the items of conduct which would have bridged the gap between what insufficient steps the State did take and what would have constituted "appropriate steps".[162] Correspondingly, the application of the due diligence standard will be more suitable in cases where the tribunal will need to identify the moments when the State's failure to act, or act sufficiently, permitted a rift to develop in the (lawful and desired) *status quo*.[163] Such a division would tally broadly with the examples discussed above. The fulfilment of obligations requiring States to promote and realise human rights is assessed by an appropriate steps analysis, while the fulfilment of obligations enjoining States to maintain the inviolability of a foreign mission, to maintain the right of innocent passage through territorial waters or to maintain an investment's protection and security is gauged by the due diligence standard.

The distinction can only be tentative. The interchangeable language with which tribunals conduct their due diligence and appropriate steps analyses makes this so. However, the fact that the nature of the omission – a failure to promote the realisation of an outcome not yet achieved versus a failure to preserve a situation already in existence – can influence the reasoning used to determine whether the omission is wrongful indicates the importance of discerning not just the different categories of obligations which are

[162] For example, *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Judgment)* [1980] ICJ Rep 3, [68].

[163] For example, *Velásquez Rodríguez v Honduras* (1989) I-ACHR, Ser.C, No.4, [172]-[174].

violable by an omission, but also the different categories of omissions which can violate an obligation.

2(4) Categories of omissions which can violate an obligation

Omissions which violate positive obligations come in several forms. Which form an omission takes depends on the capacity of the obliged State to take action, and the extent to which the State exercises that capacity. There are three forms of omissions. The first is where the State is obliged to act, has the capacity to act, but does not act. The second is where the State is obliged to act, but is unable to do so due to some fetter upon its capacity. The final form of omission is where the State is obliged to act, has the capacity to act, but does not exercise that capacity to the extent required.

2(4)(a) Omissions when the State could have acted but does not act

The first category of omissions that violate positive obligations is where the State is obliged to act, has the capacity to act, but does not act. There are two types of omissions that fall within this category.

As discussed in section 2(4)(a)(i), the first type is when the omission occurs because the State knowingly chooses to take no action to fulfil its obligation. Linked to this type of knowing omission is the role that the State's intent plays in the wrongfulness of the omission.

As discussed in section 2(4)(a)(ii), the second type is when the omission occurs because the State (at least allegedly) did not know that it needed to act to fulfil its obligation. A related issue for this type of unknowing omission is the role that the State's fault plays in the wrongfulness of the omission.

2(4)(a)(i) Omissions with knowledge, and the role of the State's intent

A State may have capacity to fulfil a positive obligation but, with knowledge of the need to act, choose not to do so. The known need to act may arise as a result of conduct of non-State actors or of the State itself. While one must guard against unduly broad notions of the State as a monolithic entity that would result in legal conceptions not reflecting or responding to reality, as discussed further below,[164] two examples illustrate each of the foregoing instances respectively.

The first example is the omissions in the *Tehran Hostages* case. In that case, non-State actors attacked the United States embassy and its diplomatic and consular staff. As a consequence, Iran was obliged "to protect the premises of the United States Embassy and its diplomatic and consular staff from any attack and from any infringement of their inviolability … to ensure the security of such other persons as might be present on the said premises", and to put an end to any situation contrary to such protection and security.[165] This obligation arose under the Vienna Convention on Diplomatic Relations,[166] the Vienna Convention on Consular Relations[167] and general international law.[168] In light of appeals for help from the United States and its own earlier assurances that it would help, Iran was aware of both its obligation and the need for action.[169] Iran also had the capacity to take

[164] See Section 4(1) below.

[165] *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Judgment)* [1980] ICJ Rep 3, [68]-[69]. See also Frouville, "Attribution of Conduct to the State: Private Individuals" in Crawford, Pellet, Olleson and Parlett (eds.), *The Law of International Responsibility* (OUP, 2010), 257, 274.

[166] 500 UNTS 95, signed 18 April 1961, entered into force 24 April 1964.

[167] 596 UNTS 261, Signed 24 April 1963, entered into force 19 March 1967.

[168] *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Judgment)* [1980] ICJ Rep 3, [68]-[69].

[169] *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Judgment)* [1980] ICJ Rep 3, [66], [68]. See also Shaw, *International Law* (6th ed., CUP, 2008), 755, 793.

the necessary actions. It had demonstrated as much in its previous operations to protect foreign States' diplomatic and consular rights.[170] Nevertheless, despite its obligation to act, its knowledge of that obligation and the need to act, and its capacity to take the necessary actions, Iran took no action. Iran's failure was a clear example of a wrongful omission which occurred because the State knowingly chose to take no action to fulfil its obligation.[171]

Omissions of this kind do not only occur when the State fails to respond as required to actions of non-State actors. They also occur when a State fails to act as required in response to its own prior conduct.[172] This was the structure of Uganda's wrongful omissions in *Armed Activities in the Congo – Uganda*. In that case, the Court found first that Uganda, through the conduct of its armed forces, had breached its international human rights and humanitarian law obligations. The breaches were Uganda's "killing, torture and other forms of inhumane treatment of the civilian population", its destruction of "villages and civilian buildings" and its "incitement of ethnic conflict".[173] Having thus found Uganda in breach of its negative obligations, the Court then held that Uganda had breached its positive obligations by taking "no steps to put an end to such conflicts" or "to ensure respect for human rights and international humanitarian law in the

[170] *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Judgment)* [1980] ICJ Rep 3, [64]-[65], [68].

[171] See: Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (OUP, 2002), 82; Dugard, "Diplomatic Protection" in Crawford, Pellet, Olleson and Parlett (eds.), *The Law of International Responsibility* (OUP, 2010), 1051, 1063.

[172] This is sometimes overlooked due to the focus of commentary on whether conduct of private individuals can be attributed to the State. See: Meron, "Classification of Armed Conflicts in the Former Yugoslavia: Nicaragua's Fallout" (1998) 92 *American Journal of International Law* 236; Shaw, *International Law* (6th ed., CUP, 2008), 789-793; Anzilotti, "La responsabilité internationale des Etats à raison des dommages soufferts par des étrangers" (1906) *RGDIP* 13; Frouville, "Attribution of Conduct to the State: Private Individuals" in Crawford, Pellet, Olleson and Parlett (eds.), *The Law of International Responsibility* (OUP, 2010), 257.

[173] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICJ Rep 168, [211].

occupied territories".[174] The Court did not explicitly state either that Uganda knew of the circumstances requiring it to act, or that Uganda had capacity to take such action. Rather, the Court simply stated that, as the acts and omissions were done by Uganda's armed forces, they were "clearly attributable" to it.[175] Uganda's knowledge of its obligations and the need to fulfil them, and Uganda's capacity to take the necessary actions, were presumed. By failing to do so, Uganda knowingly chose not to act in accordance with its positive obligation.

When a State knows that it must and can act to fulfil a positive obligation, but refrains from doing so, the necessary implication is that the State intends not to fulfil its obligation. While this does not make intention a condition of responsibility for this type of omission, it does alter the usual relationship between the State's intent and its responsibility. The modern position is that, absent a primary rule to the contrary, intention is irrelevant to the allocation of responsibility to the State.[176] This is a key consequence of, to use the old language, the "principle of objective responsibility".[177] Thus an action will be wrongful regardless of the intention of the State, provided that it is done in breach of an

[174] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICJ Rep 168, [211]. See also Latty, "Actions and Omissions" in Crawford, Pellet, Olleson and Parlett (eds.), *The Law of International Responsibility* (OUP, 2010) 355, 359.

[175] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICJ Rep 168, [213]. See also Stern, "The Elements of an Internationally Wrongful Act" in Crawford, Pellet, Olleson and Parlett (eds.), *The Law of International Responsibility* (OUP, 2010), 193, 204.

[176] Brownlie, *System of the Law of Nations, State Responsibility – Part I* (OUP, 1983), 46-47; Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (OUP, 2002), 81-82; Meron, "International Responsibility of States for Unauthorized Acts of their Officials" (1957) 33 *British Yearbook of International Law* 88, 95-96.

[177] Brownlie, *System of the Law of Nations, State Responsibility – Part I* (OUP, 1983), 46; Report of the Commission to the General Assembly, *Yearbook of International Law Commission*, 1973, vol. II, UN Doc. A/CN.4/SER.A/1973/Add.l, 179-182.

obligation and is attributable to that State.[178] However, when the wrongful conduct is an omission done in the knowledge that it will breach an obligation, knowledge and intention will both be present. This will be so irrespective of what conditions for responsibility might be required by the primary rule. Unlike responsibility for wrongful actions, for which intention may or may not be present, responsibility for knowingly wrongful omissions will always be factually based on the presence of intent.

The proper categorisation of omissions, and the proper identification of the role of the State's intention within those categories, allows some controversies in this area of the law to be resolved. For example, Schwarzenberger complained that the International Court of Justice's decision in *Corfu Channel* confused the law of responsibility by suggesting that intent could be a condition of responsibility, contrary to unambiguous prior practice in the PCIJ.[179] García Amador sought to gloss the point by observing that the Court's decision did not clearly endorse such a change in the law, and thus should not be read to do so.[180] The distortion of principle which both Schwarzenberger and García Amador seek to redress is not, however, a true implication of *Corfu Channel*. Rather, that case should be read as an affirmation that, once a State knowingly fails to act in fulfilment of an obligation, its intention to engage in that wrong is necessarily part of the factual (rather than legal) basis of its responsibility. Perhaps the matter is complicated by the Court's need in that case, against Albania's submission, to find that Albania had

[178] Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (OUP, 2002), 81-82.

[179] Schwarzenberger, *International Law* (3rd ed., Stevens, 1957) vol. II, 632.

[180] García Amador, *Yearbook of International Law Commission*, 1960, vol. II, UN Doc. A/CN.4/SER.A/1960/Add.l, 63.

knowledge of its wrongful omission.[181] But once knowledge was established, the role of Albania's intent became as discussed above.

2(4)(a)(ii) Omissions without knowledge, and the role of the State's fault

A State may, irrespective of its capacity to fulfil a positive obligation, be (at least allegedly) unaware of the need to act and so take none of the required actions. The circumstances giving rise to the need to act would necessarily not involve the State. Any other situation in which the State was involved could not credibly then support an argument by the State that it was unaware of the circumstances giving rise to the need to act. The case of *Corfu Channel* continues to be instructive.

Albania maintained that it was unaware that mines had been laid in its territorial waters.[182] This was the reason Albania cited for its failure to notify States, as required, of "the existence of a minefield in Albanian territorial waters and ... warn[] the approaching British warships of the imminent danger".[183] Given that it regarded knowledge as the basis of Albania's potential responsibility,[184] the Court devoted extensive discussion to whether Albania knew of the minefield. The Court accepted that "the mere fact of the control exercised by a State over its territory and waters [does not mean] that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein".[185] However, the

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[181] *Corfu Channel (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4, 18, 22.

[182] *Corfu Channel (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4, 20.

[183] *Corfu Channel (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4, 22.

[184] *Corfu Channel (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4, 18-22. On this point, see: Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (CUP, 1953), 231-232; Jiménez de Aréchaga, "International Responsibility" in Sørensen (ed.), *Manual of Public International Law* (Macmillan, 1968) 534, 537; Schwarzenberger, *International Law* (3rd ed., Stevens, 1957) vol. II, 632; García Amador, *Yearbook of International Law Commission*, 1960, vol. II, UN Doc. A/CN.4/SER.A/1960/Add.l, 62-63; Brownlie, *System of the Law of Nations, State Responsibility – Part I* (OUP, 1983), 43.

[185] *Corfu Channel (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4, 18.

Court continued by holding that, in the circumstances, "the laying of the minefield ... could not have been accomplished without the knowledge of the Albanian Government."[186] With such knowledge, it was within Albania's capacity to notify the existence of the minefield or, at least, to warn the approaching British ships.[187] Despite its deemed knowledge of the need to act and its capacity to do so, Albania failed to take any action in fulfilment of its obligation. The Court thus ruled that "these grave omissions involve the international responsibility of Albania."[188] A lack of knowledge would not alter the objective basis of Albania's responsibility, namely, its failure to notify when obliged to do so. As Crawford explains it, irrespective of its alleged ignorance, Albania's "responsibility in the circumstances was original and not derived from the wrongfulness of the conduct of any other State".[189] Albania's omission was therefore an example of an omission that was wrongful, even though it occurred because the State (allegedly) did not know that it needed to act to fulfil its obligation.

The *Corfu Channel* decision prompted significant scholarly discussion. One issue of concern was whether the Court's desire to establish Albania's knowledge of the mines effectively meant that intention or fault were conditions of State responsibility. The role of intention in the law of responsibility had a history of consistent doctrine, as Schwarzenberger describes,[190] and *Corfu Channel* is reconcilable with that history in the

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[186] *Corfu Channel (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4, 22. See also: Shaw, *International Law* (6th ed., CUP, 2008), 784-786; Brownlie, *Principles of Public International Law* (7th ed., OUP, 2008), 439; Crawford, *Brownlie's Principles of Public International Law* (8th ed., OUP, 2012) 541-542.

[187] *Corfu Channel (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4, 22-23.

[188] *Corfu Channel (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4, 23.

[189] See Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (OUP, 2002), 146.

[190] Schwarzenberger, *International Law* (3rd ed., Stevens, 1957) vol. II, 632.

way explained above. By contrast, the role of fault in the law of responsibility was far less settled in the period leading up to *Corfu Channel*.

Grotius is regarded as the first to introduce fault into the law of responsibility, including in respect of wrongful omissions.[191] In *De Jure Belli ac Pacis*, he writes that:

> "if any one be bound to make Reparation for what his Minister or Servant does without his Fault, it is not according to the Law of Nations. … No civil Society, or other publick Body, is accountable for the Faults of its particular Members, unless it has concurred with them, or has been negligent in attending to its Charge."[192]

This position was accepted as doctrine,[193] and it was not until Anzilotti in the early twentieth century that it was eventually rejected. Anzilotti initially proposed a theory of complete objective responsibility, with no role for fault (or intention) whatsoever.[194] Later, however, Anzilotti revised his position to that which presently prevails: fault can be a condition of responsibility, but only when the primary rule so provides.[195] This position gained both distinguished adherents[196] and opponents.[197]

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[191] See García Amador, *Yearbook of International Law Commission*, 1960, vol. II, UN Doc. A/CN.4/SER.A/1960/Add.l, 61; Brownlie, *System of the Law of Nations, State Responsibility – Part I* (OUP, 1983), 46.

[192] Grotius, *De Jure Belli ac Pacis* (1625) (edited by Tuck, Liberty Fund, 2005) L.ii.c.17,s.20 and L.ii.c.21,s.5.2.

[193] See Nys, *Les origines du droit international* (Castaigne, 1894) 62.

[194] Anzilotti, *Teoria generale della responsabilità dello stato nel diritto internazionale* (Lumachi, 1902) 172-173.

[195] Anzilotti, *Corso di Diritto Internazionale* (3rd ed., 1928) 443-444.

[196] Starke, "Imputability in International Delinquencies" (1938) *British Yearbook of International Law* 114; Ross, *A Textbook of International Law: General Part* (Longmans, 1947) 257-258; Brownlie, *System of the Law of Nations, State Responsibility – Part I* (OUP, 1983), 41-44.

[197] Lauterpacht, *Private Law Sources and Analogies* (Lawbook, 1927) 135-137; Lauterpacht, "Règles générales du droit de la paix" (1937-IV) 62 *Recueil des Cours* 99, 359-364; Lauterpacht, *Collected Papers* (CUP, 1970) vol. I, 398-400; Eagleton, *The Responsibility of States in International Law* (NYUP, 1928) 209; Ago, "Le délit international" (1939-II) 68 *Recueil des Cours* 415, 476ff.

A particular line of argument advanced by those advocating the fault theory related specifically to wrongful omissions. Strupp, Schoen, de Visscher and Guggenheim each maintained that fault was required for cases that alleged responsibility on the basis of the State's failure to exercise diligence.[198] This view waxed with the delivery of the International Court of Justice's judgment in *Corfu Channel*, which Lauterpacht called an "affirmation of the principle that there is no liability without fault".[199] However, in the decades that followed, consensus emerged that the basis of responsibility in *Corfu Channel* was Albania's knowledge of the minefield.[200] Noting how the "fault for omissions" argument had faded, Brownlie in 1983 stated unequivocally that:

> "to require fault on the part of state organs in the case of 'wrongs of omission' … is a fundamental error which consists in thinking that the existence of a duty to act (by way of control or prevention), and a degree of advertence consistent with the concept of a duty of control or prevention, are consistent *only* with the principle of fault."[201]

With this centrepiece of the fault theory waning, the broader notion that fault was a condition of responsibility was "gradually abandoned".[202] Brownlie added to his above

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[198] Strupp, *Éléments du Droit International Public Universel, Européen et Américain* (2nd ed., PUF, 1930) vol. I, 330; de Visscher, "La Responsabilité des Etats", *Bibliotheca Visseriana* (Brill, 1924) vol. I, 87ff; Schoen, *Die völkerrechtliche Haftung der Staaten* (Anhang, 1917) cited in Eagleton, *The Responsibility of States in International Law* (NYUP, 1928) 212; Guggenheim, "Les principes de droit international public" (1952-I) 80 *Recueil des Cours* 1, 147-148, cited in Brownlie, *System of the Law of Nations, State Responsibility – Part I* (OUP, 1983), 43.

[199] Oppenheim, *International Law: A Treatise* (8th ed., McKay, 1967) (edited by Lauterpacht) vol. I, 343.

[200] Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (CUP, 1953), 231-232; Jiménez de Aréchaga, "International Responsibility" in Sørensen (ed.), *Manual of Public International Law* (Macmillan, 1968) 534, 537; Schwarzenberger, *International Law* (3rd ed., Stevens, 1957) vol. II, 632; García Amador, *Yearbook of International Law Commission*, 1960, vol. II, UN Doc. A/CN.4/SER.A/1960/Add.l, 62-63; Brownlie, *System of the Law of Nations, State Responsibility – Part I* (OUP, 1983), 43.

[201] Brownlie, *System of the Law of Nations, State Responsibility – Part I* (OUP, 1983), 43.

[202] García Amador, *Yearbook of International Law Commission*, 1960, vol. II, UN Doc. A/CN.4/SER.A/1960/Add.l, 62.

comment the blanket statement that "*culpa* is not a general condition of liability".[203] Scholarship supported this view,[204] and by 1990 the tribunal in *AAPL v Sri Lanka* was comfortable holding that:

> "According to modern doctrine, the violation of international law entailing the State's responsibility has to be considered constituted by 'the mere lack or want of diligence', without any need to establish malice or negligence".[205]

Fault therefore plays no role in the allocation of responsibility to a State, whether that responsibility be based on a wrongful omission or wrongful act.[206] The high water mark of this position was tested during the scholarly discussion of *Corfu Channel*. The circumstances of that case, involving a wrongful omission where Albania was allegedly unaware of the need to act, were the most conducive to the acceptance of the fault theory. The Court's reliance on knowledge rather than fault as the basis of responsibility in that case presaged the end of the fault theory. At no point, therefore, in the allocation of responsibility for wrongful omissions will the fault or faultlessness of the State be a consideration, with the only exception being if the primary rule provides otherwise.

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[203] Brownlie, *System of the Law of Nations, State Responsibility – Part I* (OUP, 1983), 43; Brownlie, *Principles of Public International Law* (7th ed., OUP, 2008), 440.

[204] Amerasinghe, *State Responsibility for Injuries to Aliens* (Clarendon, 1967), 281-282; Schwarzenberger, *International Law* (3rd ed., Stevens, 1957) vol. II, 632-641; Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (CUP, 1953), 218-232; Starke, "Imputability in International Delinquencies" (1938) *British Yearbook of International Law* 115; Anzilotti, *Teoria generale della responsabilità dello stato nel diritto internazionale* (Lumachi, 1902) 14, 172-173; García Amador, *The Changing Law of International Claims* (1984) 115-118; Bedjaoui, "Responsibility of States, Fault and Strict Liability" in Bernhardt (ed), *Encyclopedia of Public International Law* (Max Planck, 1987) vol. 10, 358, 359.

[205] *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, [77].

[206] Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (OUP, 2002), 142; Latty, "Actions and Omissions" in Crawford, Pellet, Olleson and Parlett (eds.), *The Law of International Responsibility* (OUP, 2010) 355, 361; cf Gattini, "Smoking/No Smoking: Some Remarks on the Current Place of Fault in the I.L.C. Draft Articles on State Responsibility" (1999) 10 *European Journal of International Law* 397.

2(4)(b) Omissions when the State is unable to act

The second category of omissions that violate positive obligations is where the State is unable to act in order to fulfil its obligation. Such omissions result from an impairment of the State's capacity to act which may be due to events over which the State has more or less control. This is an important factor when determining whether the omission is wrongful or whether any wrongfulness is precluded.

A State may be aware of an obligation to act, but find that the circumstances prevent it from taking the required actions. The "necessity" of the situation may leave the State with no choice other than to breach its positive obligation, and may thus preclude the wrongfulness of that omission.[207]

As numerous authors have discussed, an event which was a prolific source of necessity arguments before international tribunals was Argentina's economic crisis in the late 1990s.[208] In several arbitrations concerning Argentina's alleged breaches of investment treaties during that crisis, Argentina maintained that the wrongfulness of its conduct was precluded because, in the circumstances, the conduct was "necessary"

[207] On the justification of necessity, see: Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (OUP, 2002), 178ff; Boed, "State of Necessity as a Justification for Internationally Wrongful Conduct" (2000) 3 *Yale Human Rights & Development Law Journal* 1; Crawford and Olleson, "The Nature and Forms of International Responsibility" in Evans (ed), *International Law* (OUP, 2003) 446, 464; Simma, "The Work of the International Law Commission at its Fifty-First Session" (1999) 68 *Nordic Journal of International Law* 293; Brownlie, *Principles of Public International Law* (7th ed., OUP, 2008), 465-467; Crawford, *Brownlie's Principles of Public International Law* (8th ed., OUP, 2012) 563-565; Jiménez de Aréchaga, "International Responsibility" in Sørensen (ed.), *Manual of Public International Law* (Macmillan, 1968) 534, 542-543; Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (CUP, 1953), 69ff; Heathcote, "Necessity" in Crawford, Pellet, Olleson and Parlett (eds.), *The Law of International Responsibility* (OUP, 2010), 491; *Gabčikovo-Nagymaros Project (Hungary v Slovakia) (Judgment)* [1997] ICJ Rep 7.

[208] Burke-White, "The Argentine Financial Crises: State Liability under BITs and the Legitimacy of the ICSID system" (2008) 3 *Asian Journal of WTO and International Health Law and Policy* 199; Bishop and Luzi, "Investment Claims: First Lessons from Argentina" in Weiler (ed.), *International Investment Law and Arbitration* (Cameron May, 2005) 425; Waibel, "Two Worlds of Necessity in ICSID Arbitration: CMS and LS&E" (2007) 20 *LJIL* 637; Luzi, "BITs & Economic Crises: Do States Have Carte Blanche?" in Weiler (ed.), *Investment Treaty Arbitration and International Law* (Juris, 2008) 165; Martinez, "Invoking State Defenses in Investment Treaty Arbitration" in Waibel (ed.), *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer, 2010) 315; Mayeda, "Playing Fair" (2007) 41 *Journal of World Trade* 273.

according to customary international law and the "security provisions" contained in the applicable treaties.[209] This argument extended to Argentina's failures to fulfil its positive obligations under the treaties, such as the duty to fulfil pledges it had given in relation to particular investments (for example, pledges given in an investment agreement).[210] Argentina maintained that, if it had in fact failed to honour the pledges, those omissions were the result of its incapacity to act in any way other than it did.[211] Its incapacity, argued Argentina, was the result not of "its own actions but [of] the [economic] crises that had previously struck other parts of the world",[212] which were circumstances precluding the wrongfulness of its omissions.

However, a State's incapacity to fulfil a positive obligation may arise in a manner not connected to the principle of necessity.

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[209] See Argentina's arguments in: *CMS Gas Transmission Company v Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005; *LG&E Energy Corp. v Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006; *Enron Corporation and Ponderosa Assets, L.P. v Argentina*, ICSID Case No. ARB/01/3, Award, 22 May 2007; *Continental Casualty Company v Argentina*, ICSID Case No. ARB/03/9, Award, 5 September 2008; *Suez, Sociedad General de Aguas v Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010. See also Martinez, "Invoking State Defenses in Investment Treaty Arbitration" in Waibel (ed.), *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer, 2010) 315, 320-326; Burke-White and von Staden, "Investment Protection in Extra-Ordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties" (2008) 48 *Virginia Journal of International Law* 307.

[210] See: *CMS Gas Transmission Company v Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005; *LG&E Energy Corp. v Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006; *Continental Casualty Company v Argentina*, ICSID Case No. ARB/03/9, Award, 5 September 2008. On such "umbrella clauses" in investment treaties, see: Schreuer, "Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road" (2004) 5(2) *Journal of World Investment & Trade* 231; Dolzer and Schreuer, *Principles of International Investment Law* (OUP, 2008) 153ff; Mann, "British Treaties for the Promotion and Protection of Investments" (1981) *British Yearbook of International Law* 241, 246; Dolzer and Stevens, *Bilateral Investment Treaties* (Nijhoff, 1995) 81.

[211] *CMS Gas Transmission Company v Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, [304]ff; *LG&E Energy Corp. v Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, [201]ff; *Suez, Sociedad General de Aguas v Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, [249]ff.

[212] *Suez, Sociedad General de Aguas v Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, [230].

An example of this kind of incapacity relates to conflicts of treaties. It arises when a State signs a treaty the performance of which may, in certain circumstances, breach a separate and prevailing treaty obligation. Article 103 of the UN Charter is a touchstone here. It provides:

> "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

By giving such primacy to the performance of obligations under the UN Charter,[213] Article 103 limits a State's capacity to fulfil a positive obligation which it assumes in another treaty if the performance of that obligation conflicts with the fulfilment of its Charter obligations. For instance, if a State is obliged to implement a Chapter VII Security Council Resolution by freezing assets in its territory which are owned or controlled by a foreign government, and it duly freezes assets of a company the ultimate shareholder of which is that foreign government, then it is likely to breach positive obligations that would typically be included in any investment treaty between the two States. Nevertheless, the freezing State, pursuant to Article 103, has only one course open to it. As the International Court of Justice[214] and scholarship[215] confirm, it must fulfil its Charter obligations. It must omit to take any conflicting actions under the investment treaty, such as payment to the company of funds pursuant to a signed investment agreement. As in Argentina's

[213] On the nature of Article 103, and whether it establishes a hierarchy of obligations, see: Bernhardt, "Article 103" in Simma (ed.), *The Charter of the United Nations: A Commentary* (2nd ed., OUP, 2002) 1292; Seidl-Hohenvelden, "Hierarchy of Treaties" in Klabbers and Lefeber (ed.), *Essays on the Law of Treaties: A Collection of Essays in Honour of Bert Vierdag* (Nijhoff, 1998) 7, 16-18; Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (2003) 351; Karl, "Conflicts between Treaties" in Bernhardt (ed.), *Encyclopaedia of Public International Law* (1984) vol.7, 468, 471.

[214] *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom) (Provisional Measures)* [1992] ICJ Rep 1, 15.

[215] Shaw, *International Law* (6th ed., CUP, 2008), 1025, 1270.

predicament, albeit for different reasons, the State here has an obligation and is aware of the actions it must take to fulfil that obligation, but is constrained in its capacity to do so.

2(4)(c) Omissions when the State acts, but does not act sufficiently

The final category of omissions that violate positive obligations is where a State knows it must act, and does in fact take some action pursuant to that knowledge, but nevertheless fails to do enough to satisfy the relevant positive obligation. This is an omission of sufficiency.

There is no need to explain here how such omissions operate and are structured. This is because a failure to take sufficient action is identical to a failure to discharge a non-absolute positive obligation, already discussed in section 2(3)(b) above. An omission of sufficiency means that the State has not taken adequate actions to satisfy the standard for the discharge of a non-absolute positive obligation. This is true no matter how the standard is framed, whether as an obligation to exercise due diligence or to take appropriate steps.

This category of omission has no relevance to absolute positive obligations. This is because, given that a State either complies with such an obligation by achieving the required objective or breaches it by not doing so, it is never to the point to enquire whether it has acted "sufficiently" in attempting to realise that objective.

2(5) Causality, and categories of counterfactual

The focus thus far has been on the categories of obligations which are violable by omission and the categories of omissions which can violate an obligation. However, implicit in any analysis of how an omission can be wrongful in international law is the issue of

causation.[216] While not all omissions that cause damage are wrongful, all omissions that are wrongful must have caused some variety of damage. The causation of damage, as defined inclusively in section 2(2)(c) above, is thus necessary but not sufficient for the existence of a wrongful omission.[217]

"[T]he requirement of a causal link is not necessarily the same in relation to every breach of an international obligation."[218] As discussed in section 2(2) above, this is particularly true in relation to wrongful actions as compared to wrongful omissions. The difference in the proof of a causal link between action and damage, and between omission and damage, is a key consequence of the distinction between acts and omissions in international law generally. However, even when analysis is confined to breaches of positive obligations, flexibility in the requirement of a causal link is discernible. While proof of a causal link between omission and damage is, as Riddell and Plant note, always a matter of drawing supportable inferences from the circumstances in which the omission occurred,[219] what varies is the nature of the counterfactual that would have existed in the

[216] See: section 2(2)(c); Brownlie, *System of the Law of Nations, State Responsibility – Part I* (OUP, 1983), 45; Ago, "Le délit international" (1939-II) 68 *Recueil des Cours* 415, 503; García Amador, *Yearbook of International Law Commission*, 1960, vol. II, UN Doc. A/CN.4/SER.A/1960/Add.l, 63; Latty, "Actions and Omissions" in Crawford, Pellet, Olleson and Parlett (eds.), *The Law of International Responsibility* (OUP, 2010) 355, 361.

[217] See: Tanzi, "Is Damage a Distinct Condition for the Existence of an Internationally Wrongful Act?" in Spinedi and Simma (eds.) *United Nations Codification of State Responsibility* (Oceana, 1987) 3, 10-11; Graefrath, "Responsibility and Damages Caused: Relationship between Responsibility and Damages" (1984-II) 185 *Recueil des Cours* 9, 34-36; Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (OUP, 2002), 204; Brownlie, *System of the Law of Nations, State Responsibility – Part I* (OUP, 1983), 45, 225-226; Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (CUP, 1953), 241-253.

[218] Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (OUP, 2002), 204-205.

[219] Riddell and Plant, *Evidence before the International Court of Justice* (BIICL, 2009), 114.

absence of the wrongful omission.[220] Thus, while causation ultimately reduces to a 'but for' exercise, the conduct of the causation analysis will differ depending on the content of the positive obligation at issue and what the injured party alleges would have been the counterfactual.

Three categories of counterfactual exist. As discussed in section 2(5)(a), the first counterfactual is where, but for the wrongful omission, the damage would not have occurred. As discussed in section 2(5)(b), the second is where, but for the wrongful omission, the damage would have been less likely to occur. The final counterfactual, discussed in section 2(5)(c), is where, irrespective of any wrongful omission, the damage would still have occurred.

2(5)(a) But for the omission, the damage would not have occurred

The first category of counterfactual posits that, in the absence of the wrongful omission, the damage would not have occurred. For the tribunal to accept this counterfactual, it must accept that the wrongful omission was not merely a cause of the damage, but rather the exclusive cause.

International law requires this type of exclusive causality between omission and damage in respect of only a limited category of positive obligations. Such obligations are those for which a failure to attain a specified outcome will immediately constitute a breach. Where an obligation requires a State to ensure that an outcome is achieved, irrespective of the means by which it does so, then any failure to secure that outcome will, *per se* and without more, establish the necessary causal link between that omission and the damage suffered. In these circumstances, the omission is itself both the breach and the

[220] See: Ago, "Le délit international" (1939-II) 68 *Recueil des Cours* 415, 503; Latty, "Actions and Omissions" in Crawford, Pellet, Olleson and Parlett (eds.), *The Law of International Responsibility* (OUP, 2010) 355, 361.

damage – a failure to notify (omission) is, for instance, coextensive with an absence of notification (damage). Once the omission is established, nothing further is necessary in order to show that the damage was the fact or the result of the omission. All other potential causal factors are excluded.

This discussion highlights the important, and even determinative, role which the content of the obligation plays in defining the character of the causal relationship between the wrongful omission and the damage.[221] The type of obligation which gives rise to this exclusive causal relationship is an absolute positive obligation.[222] Because the content of these obligations is always to achieve an end rather than pursue a line of conduct, this first category of counterfactual is applied when assessing a State's failure to satisfy the obligation. Either a State completes the actions necessary to fulfil its absolute positive obligation and prevent the damage of its non-fulfilment, or it does not act and breaches the obligation and causes the damage. The counterfactual in this scenario is rigid. But for the omission, the absolute positive obligation would have been satisfied and the damage would not have occurred.

An example demonstrates the reasoning. Article XI:1 of the GATT, quoted in section 2(3)(a) above, requires States to eliminate existing quantitative import and export restrictions. When establishing a breach of this obligation, the causal link between the omission and the damage is exclusive. Once a failure to eliminate a quantitative restriction

[221] See also: García Amador, *Yearbook of International Law Commission*, 1960, vol. II, UN Doc. A/CN.4/SER.A/1960/Add.l, 63; Ago, "Le délit international" (1939-II) 68 *Recueil des Cours* 415, 503. See also: Brownlie, *System of the Law of Nations, State Responsibility – Part I* (OUP, 1983), 45; Latty, "Actions and Omissions" in Crawford, Pellet, Olleson and Parlett (eds.), *The Law of International Responsibility* (OUP, 2010) 355, 361.

[222] It is this category of positive obligation implicated by García Amador's reference to "some omissions", quoted in section 2(2) above: García Amador, *Yearbook of International Law Commission*, 1960, vol. II, UN Doc. A/CN.4/SER.A/1960/Add.l, 63.

is demonstrated, the damage of its maintenance is regarded as being caused solely by that failure.

The blunt approach to causation in respect of this absolute positive obligation is borne out in the jurisprudence concerning Article XI:1. When considering alleged failures by States to eliminate existing quantitative restrictions, WTO Panels have sought only to establish that the failure to eliminate existed, before immediately concluding that the State's omission had breached the provision and caused the damage.[223] Thus the Panel in *Canada – Periodicals*, when considering Canada's ban on imports of certain periodicals containing advertisements directed at its markets, concluded simply that "[s]ince the importation of certain foreign products into Canada is completely denied ... this provision by its terms is inconsistent with Article XI:1 of the GATT".[224] Canada's failure to eliminate the measure was wrongful, and no further finessing of the causal link between omission and damage was required. No less blunt was the approach in *India – Automobiles*. The Panel found that India's failure to eliminate a quantitative restriction was "inconsistent" with Article XI:1, and engaged in no greater analysis of the causal link between omission and damage.[225] The approach in *Canada – Periodicals* and *India – Automobiles* contrasts with the Panel's approach in *Argentina – Leather*. In that case, Argentina's conduct was alleged to breach the negative obligation in Article XI:1. Reflecting the different content of the obligation at issue, the Panel held that it was "necessary for a complaining party to establish a causal link between the contested

[223] See Zedalis, "The United States/European Communities *Biotech Products* Case" (2004) 38(4) *Journal of World Trade* 647.

[224] *Canada – Periodicals*, Panel Report, 14 March 1997, WT/DS31/R, [5.5]. This conclusion was not challenged on appeal: *Canada – Periodicals*, Appellate Body Report, 30 June 1997, WT/DS31/AB/R, 16.

[225] *India – Automobiles*, Panel Report, 21 December 2001, WT/DS175/R, [7.322]. India filed but withdrew an appeal: *India – Automobiles*, Appellate Body Report, 19 March 2002, WT/DS175/AB/R, [15].

measure and the low level of exports" before the measure could be deemed non-compliant.[226]

The acceptance of the causal links in *Canada – Periodicals* and *India – Automobiles* is unsurprising. Because the content of the obligation at issue in those cases was both positive and absolute, the Panels were able to attribute the complained of damage exclusively to the breach of the obligation. The counterfactual was accordingly self-evident. But for the wrongful failures to eliminate the identified quantitative restrictions, the damage to other WTO Member States would not have occurred. In respect of no other type of obligation is this first category of counterfactual appropriate or even possible.

2(5)(b) But for the omission, the damage would have been less likely to occur

The second category of counterfactual posits that, in the absence of the wrongful omission, the damage would have been, while not certainly prevented, certainly less likely to occur. In using this counterfactual, the tribunal accepts that the wrongful omission was a contributing, but not exclusive, cause of the damage. There is a flexibility in this form of causal reasoning which accepts that a State's omission may be just one of several events which together constitute the full causal prompt for the damage, and that a legal finding of causation may still be reached despite the causal contributions made by events other than the omission.

International law uses this flexible approach to causality in connection with those obligations that require States not to achieve a desired outcome, but rather to act sufficiently to facilitate that outcome. For these non-absolute positive obligations, the link between omission and damage will need to be established despite causal contributions by other (non-attributable) conduct. Causation of damage from breach of such an obligation

[226] *Argentina – Leather*, Panel Report, 19 December 2000, WT/DS155/R, [11.21].

is therefore not established simply by proving the existence of the omission.[227] A State may fail to take certain action in pursuit of the desired outcome and thereby contribute to the occasioning of the damage, but this may nevertheless not result in a legal finding of causation. Rather, any finding of causation will be based on the circumstances surrounding the omission, and in particular the other causal contributions to the damage.[228]

As a result of the relevance of the circumstances in which the omission occurs, no single clear formulation of the requisite causal link is agreed.[229] To the contrary, tribunals have tended to avoid explicitly explaining the causal link, although they have often relied on the State's awareness of a need to act[230] as a means of establishing what Cheng calls a "proximate" or "effective" causality between the wrongful omission and the damage suffered.[231] Ultimately, the search for a single definition of causation in this context is most likely futile. As noted by Brownlie, "[v]erbal formulas nearly always simply restate

[227] For this reason, "damage" resulting from breaches of non-absolute positive obligations, even if understood broadly in principle, is likely in practice always to involve material and/or moral damage accruing from the circumstances of the wrongful omission, and is unlikely to be solely the legal damage inherent within a breach of the obligation. See section 2(2) above.

[228] See: Shaw, *International Law* (6th ed., CUP, 2008), 855; Ago, "Le délit international" (1939-II) 68 *Recueil des Cours* 415, 503; Brownlie, *Principles of Public International Law* (7th ed., OUP, 2008), 455; Crawford, *Brownlie's Principles of Public International Law* (8th ed., OUP, 2012) 552.

[229] See (on causality of both acts and omissions): Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (OUP, 2002), 82, 204-205; Brownlie, *System of the Law of Nations, State Responsibility – Part I* (OUP, 1983), 225-226; Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (CUP, 1953), 241ff; Jiménez de Aréchaga, "International Responsibility" in Sørensen (ed.), *Manual of Public International Law* (Macmillan, 1968) 534, 568; Yntema, "Treaties with Germany and Compensation for War Damages" (1924) 24 *Columbia Law Review* 134, 151-153; García Amador, *Yearbook of International Law Commission*, 1961, vol. II, UN Doc. A/CN.4/SER.A/1961/Add.l, 40-42.

[230] Brownlie, *System of the Law of Nations, State Responsibility – Part I* (OUP, 1983), 45.

[231] Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (CUP, 1953), 241, 253.

the problem"[232] and, in any event, all "formulations concerning causation ... can only be given substance by reference to the jurisprudence of international tribunals."[233]

Upon a review of jurisprudence, however, discerning extensive common "substance" in the approaches to causation used by tribunals considering breaches of non-absolute positive obligations is a trying task. What is most striking is the way in which each tribunal's formulation of and reasoning in relation to the causal link between wrongful omission and damage is case-specific, and often conducted briefly and without reference to general principles of causation. Such case-specific reasoning, it seems, is a response to the diversity of wrongful omissions and damage that has come before international tribunals. Brownlie has described this phenomenon previously, noting that causation principles "are not constants and must be related to the substantive principles of law which have generated responsibility in the first place".[234] Thus the connection between Mexico's wrongful omissions and the damage suffered in the *Venable* arbitration are simply factually different to the connection between Iran's wrongful omissions and the damage in *Tehran Hostages*. Tribunals, in truth, do not conduct detailed studies of previous examples of causal connections between wrongful omissions and damage. Their focus is instead on whether, in the present circumstances, the factual relationship between omission and damage evinces a causal link between them, howsoever the language describing that link is formulated.

Nevertheless, despite this casuistic approach to causation, some "substance" which is common to any proof of a causal link between a State's breach of its non-absolute positive

[232] Brownlie, *System of the Law of Nations, State Responsibility – Part I* (OUP, 1983), 226. See also Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (OUP, 2002), 205.

[233] Brownlie, *System of the Law of Nations, State Responsibility – Part I* (OUP, 1983), 225.

[234] Brownlie, *System of the Law of Nations, State Responsibility – Part I* (OUP, 1983), 226.

obligation and the damage suffered can be discerned. That minimum common substance is, first, that tribunals as a baseline regard the wrongful omission as a contributing cause in the occasioning of the damage, and secondly, that the counterfactual to the occasioning of the damage is not that the damage would not have occurred but rather that it would have been less likely to occur.[235] Two examples from jurisprudence – Brownlie's source for the "substance" that underpins causation principles – illustrates this minimum commonality.

Tehran Hostages is a key reference point in many discussions of the causation of damage by omission.[236] As already noted in section 2(4)(a)(i), Iran in that case was obliged to take "appropriate steps" to protect the premises, staff and archives of various United States' missions in its territory, but failed to do so.[237] When finding that Iran had breached its non-absolute positive obligations, the International Court of Justice did not explicitly discuss principles of causation, or consider how causal links had been established in earlier jurisprudence. Through several of its statements, however, the Court disclosed some of the assumptions it made in relation to causation.

The Court drew particular attention to the "very stark" contrast between Iran's "total inaction" in relation to its obligation to protect the United States' missions on 4-5 November 1979 from attacks by militants, and its actions on several other occasions to

[235] This minimum common substance is an expression of García Amador's key "problem" in any causation analysis, namely, the extent to which the complained of "damage or prejudice is linked by a claim of causation to the earlier act or omission": García Amador, *Yearbook of International Law Commission*, 1961, vol. II, UN Doc. A/CN.4/SER.A/1961/Add.l, 40.

[236] See: Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (OUP, 2002), 82, 205-206; Brownlie, *System of the Law of Nations, State Responsibility – Part I* (OUP, 1983), 454; Triggs, *International Law: Contemporary Practices and Principles* (LexisNexis, 2006) 422, 436.

[237] *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Judgment)* [1980] ICJ Rep 3, [63].

"frustrate[] or speedily terminate[]" similar attacks.[238] The Court also emphasised that Iran "had the means at [its] disposal" to act as required, but instead chose to take "no such step" and refused "to order the [militants] to put an end to their occupation of the Embassy", with the result that the militants were "fortified in their action".[239] In making such observations, the Court, while not ignoring the causal contribution to the damage of the militants' own (initially non-attributable) conduct, ascribed a contributory causal role to Iran's inaction. In the absence of Iran's tolerance of the militants' actions, the causes of the damage would have taken on a different character. Those causes would have had to procure the damage in the absence of Iran's tolerance and in spite of positive actions by Iran to protect the missions. While such actions might not have frustrated the militants' attacks, the Court's reasoning proceeded on the basis that Iran's inaction facilitated the damage and made it a more likely result in the circumstances. In thus (implicitly) acknowledging the causal link between Iran's failure to fulfil its obligation and the damage suffered by the United States, the Court (again implicitly) accepted that Iran's wrongful omission was a contributing cause of the damage, and that the prevailing counterfactual was one whereby, but for the omission, the damage would have been less likely to occur.

The existence of this minimum common substance in respect of causation in cases concerning breaches of non-absolute positive obligations is also evident in the *Venable* arbitration.[240] In that case, a question which the Commission had to answer was whether Mexico had wrongfully failed to prevent the dismantling and piecemeal theft of three locomotives which were owned by Venable, which had been incorrectly attached as a

[238] *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Judgment)* [1980] ICJ Rep 3, [64].

[239] *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Judgment)* [1980] ICJ Rep 3, [68]-[72].

[240] Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (CUP, 1953), 241.

result of Mexican bankruptcy proceedings against a debtor other than Venable, and which were being detained in Mexico under the control of a judicially appointed trustee ("*síndico*"). Each Commissioner held that Mexico had failed in its duty to prevent the destruction of the locomotives, and awarded compensation to Venable.[241]

In reaching their conclusion, the Commissioners refrained from explicitly analysing principles of causation, and instead focused on whether and how Mexico's omission had, in the circumstances, contributed to the damage suffered.[242] The President of the Commission concluded that the damage accrued in a context where the court appointing the *síndico* "could execute its control on the acts" of that appointee, and could have done so at "a time when everybody could see and know that the three engines were deteriorating rapidly because of theft".[243] The result of the local court's lack of "vigilance against crimes" and "insufficiency of ... action" was to "allow[] unknown men to spoil and destroy this property".[244] The Commission thus ascribed a contributory causal role to Mexico's inaction, notwithstanding the existence of other conduct by "unknown" persons which also contributed to the damage. Absent the indifference of the Mexican court, the sum causes of the damage would necessarily have been different. The "unknown" persons would have needed to bring about the damage without the assistance of the court's apathy, and in the face of its protective intervention. Although judicial intervention may not have prevented

[241] *H.G. Venable (USA) v Mexico* (1927) 4 UNRIAA 219, 229 (van Vollenhoven), 245 (Nielson), 256-257 (Fernández-MacGregor).

[242] Compare van Vollenhoven's discussion (in relation to a separate issue) of the need for an "immediate and direct" causal link between a wrongful act of a Mexican official and the damage suffered: *H.G. Venable (USA) v Mexico* (1927) 4 UNRIAA 219, 225.

[243] *H.G. Venable (USA) v Mexico* (1927) 4 UNRIAA 219, 229.

[244] *H.G. Venable (USA) v Mexico* (1927) 4 UNRIAA 219, 229.

the dismantlement and theft, the Commission regarded the court's lack of action as "allowing" the perpetration of, and thus increasing the likelihood of, that damage.

The treatment of causation in *Venable* thus exhibited the same minimum commonality of substance as the treatment of causation in *Tehran Hostages*. In each case, the wrongful omission of the State was regarded as a cause which contributed to the damage, and did so in a way that, but for the omission, the damage would have been less likely to occur. Both of these elements must be present if a causal link between an omission which breaches a non-absolute positive obligation and the damage suffered is to exist.

2(5)(c) Irrespective of the omission, the damage would have occurred

The final category of counterfactual posits that the presence or absence of the allegedly wrongful omission has no impact on the prevention of the damage. In this category, the allegedly wrongful omission may have contributed factually in some way to the damage, but cannot be regarded as legally causative of it. The counterfactual collapses in this instance, so that, irrespective of the omission, the damage would still have occurred. Once the counterfactual collapses in this way, the tribunal must find that the omission was not wrongful and did not cause the damage.[245]

An example of this category of counterfactual exists in *Noble Ventures v Romania*. The claimant alleged that Romania, through several omissions, had failed to afford its investment full protection and security. The investment was the purchase of a formerly State-owned and heavily indebted local company. According to the claimant, Romania's first wrongful omission was its failure to obtain a government decision restructuring the

[245] This category of counterfactual only applies in respect of alleged breaches of non-absolute positive obligations, given that the damage resulting from a breach of an absolute positive obligation can occur solely when a wrongful omission on the part of the State exists (as discussed in section 2(5)(a) above).

company's debts in a more favourable way. This inaction, it was argued, was a main cause of subsequent protests, thefts, plant occupations and intimidation by the staff of the company.[246] Romania's refusal to protect the claimant's investment from damage caused by the staff was the second alleged wrongful omission.[247] Romania responded to these arguments in several ways, in particular emphasising that it acted sufficiently to quell the conduct of the staff when the claimant brought that issue to its attention.[248] Romania also argued that the labour unrest was caused not by any alleged failure to restructure the company's debt, but by the claimant's own failure to pay outstanding wages to the staff.[249]

The tribunal's position on the causative contribution of Romania's alleged omissions was succinct. It rejected the claimant's allegations, and concluded that the claimant had not "prove[d] that its alleged injuries and losses could have been prevented had the Respondent exercised due diligence".[250] The Tribunal further held that even if the Respondent's omissions did constitute a wrongful lack of due diligence "it has not been established that non-compliance with the obligation prejudiced the Claimant".[251] For the purposes of the tribunal's reasoning on causation, it did not matter whether Romania's alleged omissions were present or absent, were wrongful or not wrongful. As a matter of causation, Romania's failure to act was not of such causal significance that it could be regarded as contributing to a failure to prevent the damage. Although Romania's

[246] *Noble Ventures, Inc. v Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, [161].

[247] *Noble Ventures, Inc. v Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, [161].

[248] *Noble Ventures, Inc. v Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, [163].

[249] *Noble Ventures, Inc. v Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, [163]. See also Barnbridge, "The Due Diligence Principle under International Law" (2006) 8 *International Community Law Review* 81, 116.

[250] *Noble Ventures, Inc. v Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, [166].

[251] *Noble Ventures, Inc. v Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, [166]. See also Dolzer and Schreuer, *Principles of International Investment Law* (OUP, 2008) 151.

omissions may have contributed in some way to the factual causality of the damage, it was not legally causative of it. A counterfactual of any legal significance did not exist. Having accepted the collapse of the counterfactual in this way, the tribunal was necessarily bound to dismiss the claim.[252]

This final category of counterfactual is not uncommon. Whenever a tribunal holds that a State's inaction did not breach one of its non-absolute positive obligations, this category of counterfactual is likely to be implicated in that causal reasoning. The language by which the collapse of the counterfactual is indicated may vary.[253] Tribunals have articulated it variously as remoteness, indirectness, lack of proximity or lack of foreseeability.[254] In whatever way it is expressed, however, it remains an affirmation that neither the presence nor the absence of the omission would have had any impact on the occurrence or prevention of the damage.

[252] *Noble Ventures, Inc. v Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, [167].

[253] See: Brownlie, *System of the Law of Nations, State Responsibility – Part I* (OUP, 1983), 226; Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (CUP, 1953), 242-244; Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (OUP, 2002), 204-205; García Amador, *Yearbook of International Law Commission*, 1961, vol. II, UN Doc. A/CN.4/SER.A/1961/Add.l, 40-42.

[254] See Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (OUP, 2002), 172, 204-205, and the cases cited therein.

CHAPTER THREE: THE FULL PROTECTION AND SECURITY OBLIGATION IN INTERNATIONAL INVESTMENT LAW

The previous Chapter discussed how a State bears international responsibility for its wrongful omissions. One international obligation violable by omission is the full protection and security obligation. This non-absolute positive obligation requires a host State to provide protection and security to a foreign investor's investment pursuant to an investment treaty between it and the investor's State of nationality.

The obligation has its historical roots in some of the earliest international obligations relating to the protection of foreign investments. Section 3(1) reviews this history, tracing it from its roots through FCN treaties and to the modern BITs, and analysing its present-day relationship with general international law. Having explained the obligation's historical development, Section 3(2) outlines the modern-day scope *ratione materiae* of the obligation. It reviews and comments upon the investment treaty jurisprudence which has considered the various duties imposed by the obligation: the duty to protect from, and punish perpetrators of, physical damage; the duty to provide a means of redress; and the duty to provide regulatory protection and security.

3(1) Development of the treaty obligation and its relationship with general international law

The obligation included in treaties for host States to provide protection and security to foreign investments has developed over time. Section 3(1)(a) reviews the history of the obligation as a treaty obligation, covering its emergence in early FCN treaties, refinement in twentieth century FCN treaties, and modern articulation in BITs. Section 3(1)(b) discusses the relationship between the treaty obligation with general international law.

The significance of the historical development of the obligation is not merely one of curiosity or a general desire to identify precursors to this prominent investment protection.

Rather, it has a substantive role to play in appreciating the modern scope *ratione materiae* of the obligation. This is because, as is evident in several decisions discussed in Section 3(2) below, tribunals often justify limiting the scope of the obligation to protection from physical damage by reference to its "historical" or "traditional" origins.[255] Whether one agrees with that limitation or not, a proper understanding of the modern scope of the obligation necessitates an understanding of its development over time.

3(1)(a) Protection and security as a treaty obligation

3(1)(a)(i) The early FCN treaties

The origins of the protection and security obligation in treaties lie in the early bilateral treaties of friendship, commerce and navigation. These FCN treaties "were the principal legal instrument used by [nations] in the eighteenth and nineteenth centuries to establish commercial relations with other nations."[256] FCN treaties, however, did not concern the protection of "investments". It was rare for any treaty before the latter half of the twentieth century to address that topic directly.[257] They instead included provisions for the protection of the property of nationals of the other State party. FCN treaties were the main

[255] See, for example: *BG Group Plc v Argentina*, UNCITRAL, Final Award, 24 December 2007, [324]-[325]; *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, [669]; *Saluka Investments BV v Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, [483]; *Gemplus S.A., SLP S.A. and Gemplus Industrial S.A. de C.V. v Mexico* and *Talsud S.A. v Mexico*, ICSID Case No. ARB(AF)/04/3 and ICSID Case No. ARB(AF)/04/4, Award, 16 June 2010, [9-12]; *Suez, Sociedad General de Aguas v Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, [162]-[165]; *El Paso Energy International Company v Argentina*, ICSID Case No. ARB/03/15, Award, 31 October 2011, [522]. Cf *PSEG Global, Inc. and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, [258].

[256] Vandevelde, *United States Investment Treaties: Policy and Practice* (Kluwer, 1992) 19.

[257] Vandevelde, "A Brief History of International Investment Agreements" (2005) 12 *University of California Davis Journal of International Law and Policy* 157, 158.

source of this obligation in treaties, although other types of treaties,[258] such as peace treaties, sometimes contained provisions relating to the protection of private property.[259]

When identifying early examples of FCN treaties containing provisions regarding the protection of property, the well-known Jay Treaty of 1794 is regularly cited.[260] Although this treaty was ground-breaking in other respects, including its establishment of "a commission to decide claims regarding the treatment of British and US nationals during and after the American Revolution",[261] the earliest forms of the treaty obligation to protect foreigners' persons and property predate it.

In 1667, for instance, the Treaty of Peace and Friendship between Great Britain and Spain contained provisions relating to protection by the host State of the persons and property of nationals of the other State. It prohibited the State from compelling such nationals "to sell their merchandise for brass-metal coin, or exchange them for other coin or things, against their will".[262] It required that certain nationals of the other State be able to "remain freely and securely" in the host State.[263] It also required the protection of

[258] Vandevelde, "A Brief History of International Investment Agreements" (2005) 12 *University of California Davis Journal of International Law and Policy* 157, 158-159.

[259] Wilson, "Property-Protection Provisions in United States Commercial Treaties" (1951) 45 *American Journal of International Law* 83, 91-92.

[260] British-US Treaty of Amity, Commerce and Navigation, 8 Stat. 116, signed 19 November 1794, entered into force 28 October 1795. See citation in: Wilson, "Property-Protection Provisions in United States Commercial Treaties" (1951) 45 *American Journal of International Law* 83, 91 (apparently classifying it as a peace treaty); Robbins, "The Emergence of Positive Obligations in Bilateral Investment Treaties" (2005) 13 *University of Miami International and Comparative Law Review* 403, 426.

[261] Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer, 2009), 7; Legum, "The Innovation of Investor-State Arbitration Under NAFTA" (2002) 43 *Harvard Journal of International Law* 534. On the commission's work, see: Stuyt, *Survey of International Arbitrations, 1794-1989* (3rd ed., Nijhoff, 1990) 1-4; Johnston, *The Historical Foundations of World Order: The Tower and the Arena* (Nijhoff, 2008) 636.

[262] British-Spanish Treaty of Peace and Friendship, 1841 BFSP 563, signed 23 May 1667, entered into force 23 May 1667, art XXIX.

[263] British-Spanish Treaty of Peace and Friendship, 1841 BFSP 563, signed 23 May 1667, entered into force 23 May 1667, art XXX.

"books of account, traffic and correspondence" and of "goods and estates" of nationals who die in the host State.[264]

As the 1667 Treaty of Peace and Friendship illustrates, early iterations of the treaty obligation were specific to particular types of property and people. For example, after 1667, a common treaty obligation was the protection of vessels and cargo owned by nationals of the other State.[265] For example, the United States 1776 Model Treaty of alliance and commerce,[266] drafted at the same time as the Declaration of Independence,[267] emphasised the "protection of ... property at sea".[268] The Model Treaty was used as a basis for the 1778 Treaty of Amity and Commerce between France and the United States,[269] Article 6 of which obliged the French King to:

> "endeavour by all the means in his Power to protect and defend all Vessels and the Effects belonging to the Subjects, People or Inhabitants of the said United States, or any of them, being in his Ports Havens or Roads or on the Sea near to his Countries, Islands Cities or Towns and to recover and restore to the right owners, their agents or Attornies all such Vessel & Effects, which shall be taken within his Jurisdiction".[270]

With the protection of property and persons emerging as a common obligation in early FCN treaties, the Jay Treaty included provisions of similar effect. Among other

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[264] British-Spanish Treaty of Peace and Friendship, 1841 BFSP 563, signed 23 May 1667, entered into force 23 May 1667, arts XXXIII-XXXIV.

[265] See Wilson, "Property-Protection Provisions in United States Commercial Treaties" (1951) 45 *American Journal of International Law* 83, 94.

[266] 1776 model treaty of alliance and commerce, approved by the Continental Congress on 17 September 1776, *Journals of the Continental Congress*, vol V, 768.

[267] Vandevelde, *United States Investment Treaties: Policy and Practice* (Kluwer, 1992) 19.

[268] Wilson, "Property-Protection Provisions in United States Commercial Treaties" (1951) 45 *American Journal of International Law* 83, 94.

[269] Treaty of Amity and Commerce, 8 Stat. 12, signed on 6 February 1778, entered into force 17 July 1778.

[270] Article 7 of the Treaty contained the equivalent obligation for the United States.

provisions protecting vessels and merchandise of nationals of the State parties,[271] a notable provision was Article 14. It provided that "the Merchants and Traders on each side, shall enjoy the most complete protection and Security for their Commerce".[272] The Jay Treaty was thus one of the earliest treaties to use the phrase "protection and security" when articulating the protection which the host State must extend to foreign nationals and their businesses.

Clauses for the "protection and security" of foreigners' property and persons became a staple of FCN treaties. As Vandevelde notes:

> "Provisions to protect property owned by nationals of each party appeared regularly in early nineteenth-century FCNs and in successor treaties. Typical provisions guaranteed to such property 'full and perfect protection'".[273]

Wilson records that the United States signed 22 FCN treaties between 1824 and 1887.[274] Fourteen of these obliged host States to afford foreigners' property "special protection",[275] and the other eight obliged them to afford "full and perfect protection".[276] These provisions were often accompanied by others ensuring access to courts and to attorneys of one's choosing.[277] The protection afforded by these provisions was independent of the

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[271] See, for example, British-US Treaty of Amity, Commerce and Navigation, 8 Stat. 116, signed 19 November 1794, entered into force 28 October 1795, arts 12-13.

[272] British-US Treaty of Amity, Commerce and Navigation, 8 Stat. 116, signed 19 November 1794, entered into force 28 October 1795, art 14.

[273] Vandevelde, *United States Investment Treaties: Policy and Practice* (Kluwer, 1992) 11.

[274] The figures are provided in: Wilson, "Property-Protection Provisions in United States Commercial Treaties" (1951) 45 *American Journal of International Law* 83, 92.

[275] See, for example, Bolivian-US Treaty of Peace, Friendship, Commerce and Navigation, 12 Stat, 1003, signed on 13 May 1858, entered into force 9 November 1862, art 13.

[276] See, for example, Paraguayan-US Treaty of Friendship, Commerce and Navigation, 12 Stat 1091, signed on 4 February 1859, entered into force 7 March 1860, art IX.

[277] Wilson, "Property-Protection Provisions in United States Commercial Treaties" (1951) 45 *American Journal of International Law* 83, 92; Vandevelde, *United States Investment Treaties: Policy and Practice* (Kluwer, 1992) 20-21.

protection offered to nationals of third States – no national or most-favoured nation treatment obligations were connected to the protection obligations. It is for this reason that the standard of protection in these early FCN treaties has been called "absolute".[278]

3(1)(a)(ii) The twentieth century FCN treaties

While FCN treaties of the eighteenth and nineteenth centuries introduced the protection and security obligation, twentieth century FCN treaties refined the obligation into a recognisable precursor to the modern BIT obligation. In the period following the First World War, two refinements were particularly noteworthy.

The first was the inclusion of a reference to "international law" in the wording of the obligation. A host State was obliged to afford "protection and security" and to provide the level of protection "required by international law". For example, a clause which appeared regularly in inter-bellum FCN treaties concluded by the United States read:

> "The nationals of each High Contracting Party shall receive within the territories of the other, upon submitting to conditions imposed upon its nationals, the most constant protection of their persons and properties, and shall enjoy in this respect that degree of protection that is required by international law."[279]

Wilson describes the connection to the standard of international law as "[p]erhaps the greatest innovation" in relation to property-protection obligations in inter-bellum FCN

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[278] Vandevelde, *United States Investment Treaties: Policy and Practice* (Kluwer, 1992) 20.

[279] See: German-US Treaty of Friendship, Commerce and Consular Rights, 54 LNTS 134, signed on 8 December 1923, entered into force on 14 October 1925; Hungarian-US Treaty of Friendship, Commerce and Consular Rights, 44 Stat 2441, signed on 24 June 1925, entered into force on 4 October 1926; Estonian-US Treaty of Friendship, Commerce and Consular Rights, 44 Stat 2379, signed on 23 December 1925, entered into force on 22 May 1926; Honduran-US Treaty of Friendship, Commerce and Consular Rights, 42 Stat 2618, signed on 7 December 1927, entered into force on 19 July 1928; Latvian-US Treaty of Friendship, Commerce and Consular Rights, 45 Stat 2641, signed on 20 April 1928, entered into force 25 July 1928; Norwegian-US Treaty of Friendship, Commerce and Consular Rights, 47 Stat 2135, signed on 5 June 1928, entered into force 13 September 1932; Austrian-US Treaty of Friendship, Commerce and Consular Rights, 47 Stat 1876, signed on 19 June 1928, entered into force 27 May 1931; Finnish-US Treaty of Friendship, Commerce and Consular Rights, 49 Stat 1876, signed on 13 February 1934, entered into force on 10 August 1934; and Liberian-US Treaty of Friendship, Commerce and Navigation, 54 Stat 1739, signed on 8 August 1938, entered into force 21 November 1939.

treaties,[280] although Vandevelde notes that it nevertheless did not alter the "absolute" nature of the obligation.[281] Wilson also elsewhere emphasises that FCN treaties during this period typically extended the obligation, including the reference to international law, to the protection of the persons (rather than just the property) of foreign nationals,[282] thus entrenching a practice which had begun to emerge in the nineteenth century.[283]

The second refinement was the inclusion of provisions dealing with juridical persons. Whereas prior FCN treaties referred only to "nationals" or "citizens",[284] inter-bellum treaties expressly extended rights to corporations and other juridical persons. The 1923 Treaty of Friendship, Commerce and Consular Rights between the United States and Germany was an early example.[285] Article XII of that treaty entitled juridical persons to be recognised by, to be allowed to operate in and to have free access to courts of the host State. Although it was posited that these provisions could be interpreted as expanding the meaning of a "national" generally to include juridical persons and thereby grant them full

[280] Wilson, "Property-Protection Provisions in United States Commercial Treaties" (1951) 45 *American Journal of International Law* 83, 98.

[281] Vandevelde, *United States Investment Treaties: Policy and Practice* (Kluwer, 1992) 22.

[282] Wilson, "A Decade of New Commercial Treaties" (1956) 50 *American Journal of International Law* 927, 931. See also Wilson's interpretation of this wording: Wilson, *The International Law Standard in Treaties of the United States* (HUP, 1953) 92-105.

[283] A latterly example of this practice is the Japan-US Treaty of Friendship, Commerce and Navigation, 29 Stat 848, signed on 22 November 1894, entered into force 21 March 1895, art 1.

[284] Proper interpretation of earlier treaties probably excluded the bestowal of rights on juridical persons, although there may have been scope to dispute that point: see Wilson, "Property-Protection Provisions in United States Commercial Treaties" (1951) 45 *American Journal of International Law* 83, 100; Vandevelde, *United States Investment Treaties: Policy and Practice* (Kluwer, 1992) 24; Walker, "Provisions on Companies in US Commercial Treaties" (1956) 50 *American Journal of International Law* 373, 377-378; Hawkins, *Commercial Treaties and Agreements: Principles and Practice* (Rinehart, 1951) 4-5.

[285] Treaty of Friendship, Commerce and Consular Rights, 54 LNTS 134, signed on 8 December 1923, entered into force on 14 October 1925.

protection rights under the treaty,[286] such provisions were more accurately a first step towards such equivalence of natural and juridical persons.

Both refinements subsisted in FCN treaties concluded after the Second World War. For instance, of the 16 FCN treaties concluded by the United States between 1946 and 1956,[287] half stated that the "most constant protection and security" required a degree of protection "in no case less than that required by international law".[288] Although one scholar opined that an absence of a reference to international law "would not appear to make international law any the less applicable to protection of both persons and property",[289] the scope of obligation was to become closely influenced by the inclusion or exclusion of such a reference.[290]

Almost uniform in the post-bellum FCN treaties was the treatment of juridical persons vis-à-vis the protection and security obligation. Treaties regularly stated that the protection extended to both individuals and companies. An example of this was the FCN treaty between China and the United States. Article VI(1) of that treaty required the host State to afford "full protection and security" to nationals of the other State and confirmed that "in so far as the term 'national' where used in this paragraph is applicable in relation

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[286] Hearings before the Committee on Patents, House of Representatives on HR 73, 77th Congress, 1st Session, 64.

[287] Walker, "The Post-War Commercial Treaty Program of the United States" (1958) 73 *Political Science Quarterly* 57.

[288] Wilson, "A Decade of New Commercial Treaties" (1956) 50 *American Journal of International Law* 927, 931. Note that only two of these FCN treaties, however, drew this connection with the international law standard in respect of both the persons and property of the foreign national. The other six draw the connection only in relation to the persons of the foreign national. See also: Vandevelde, *United States Investment Treaties: Policy and Practice* (Kluwer, 1992) 23; Wilson, "Postwar Commercial Treaties of the United States" (1949) 43 *American Journal of International Law* 262, 266-267.

[289] Wilson, "A Decade of New Commercial Treaties" (1956) 50 *American Journal of International Law* 927, 931.

[290] See Section 3(1) below.

to property it shall be construed to include corporations and associations."[291] This inclusion of juridical persons within the scope of the protection was described as "perhaps the most striking advance" of the post-bellum FCN treaties,[292] and became a fundamental part of future investment treaties.

Thus it was in the 1940s and 1950s that FCN treaties routinely included provisions requiring a host State to afford "most constant" or "full" protection and security to foreign natural and juridical persons, and their property, within its territory. However, the protection of foreigners' investments was not long to be regulated under FCN treaties. Just as some consistency was emerging in the property protection provisions in these treaties, States stopped concluding FCN treaties altogether. A reason for this was the rise of a different legal instrument tailored exclusively to the protection of foreign investments, separate from any other commercial issues that might fall within the scope of an FCN treaty.

3(1)(a)(iii) The modern BITs

In the 1960s, States began to conclude a new form of legal instrument for the protection of their nationals' foreign investments. This instrument was the bilateral investment protection agreement, which the United States later designated (in an appellation that became a popular way of describing the instrument) the bilateral investment treaty.[293]

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[291] China-US, Treaty of Friendship, Commerce and Navigation, 63 Stat. 1299, signed on 4 November 1946, entered into force 30 November 1948.

[292] Walker, "Provisions on Companies in US Commercial Treaties" (1956) 50 *American Journal of International Law* 373, 373. See also Vandevelde, "A Brief History of International Investment Agreements" (2005) 12 *University of California Davis Journal of International Law and Policy* 157, 164.

[293] The change in name was prompted by the United States treaty program: Vandevelde, *United States Investment Treaties: Policy and Practice* (Kluwer, 1992) 24.

Prior attention has been devoted to explaining how the content of the early BITs drew on the property protection provisions in the late FCN treaties, and why States so rapidly and comprehensively moved away from FCN treaties to BITs.[294] Reiteration is unnecessary. It suffices to note that BITs contained investment protections similar to those in post-bellum FCN treaties, and that a key reason for the emergence of BITs was "the uncertainties and inadequacies of the customary international law of State responsibility for injuries to aliens and their property".[295] The latter was a particular motivation for capital exporting States, who expressed concern over both uncompensated expropriations in parts of Latin America and the Soviet Union during the 1960s and 1970s[296] and their perception that "customary international law was changing in a direction decidedly less sympathetic to the investor".[297]

Even in the earliest BITs, protection and security of foreign investments and investors was a mainstay obligation for host States. Like post-bellum FCN treaties, the negotiating point in early BITs was not whether to include a protection and security

[294] Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer, 2009), 41-44; Vandevelde, *United States Investment Treaties: Policy and Practice* (Kluwer, 1992) 24-26; Vandevelde, "A Brief History of International Investment Agreements" (2005) 12 *University of California Davis Journal of International Law and Policy* 157, 166-173; Gann, "The U.S. Bilateral Investment Treaty Program" (1985) 21 *Stanford Journal of International Law* 373, 376-430; Dolzer and Stevens, *Bilateral Investment Treaties* (Nijhoff, 1995) 19; Salacuse, "BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries" (1990) 24 *International Lawyer* 655, 656-657.

[295] Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer, 2009), 41.

[296] It has been calculated that there were 87 instances of expropriation during two years in the early 1970s: Gantz, "The Maricona Settlement: New Forms of Negotiation and Compensation" (1977) 71 *American Journal of International Law* 474, fn 2. See also Vandevelde, "A Brief History of International Investment Agreements" (2005) 12 *University of California Davis Journal of International Law and Policy* 157, 166-168.

[297] Vandevelde, *United States Investment Treaties: Policy and Practice* (Kluwer, 1992) 25. This "change" was evident in the requirement of the Charter of Economic Rights and Duties of States that compensation for expropriated property "should" (rather than "must") be paid: Charter of Economic Rights and Duties of States, UNGA Res 3281 (XXIX), 29 UNGAOR Supp (No. 31), art 2.2(c), UN Doc. A/9631 (1975).

obligation, but whether it should be linked to other standards of protection, such as obligations to afford fair and equitable treatment or treatment not less than that required by international law. In the first BIT, signed by Germany and Pakistan in 1959, Article 3(1) provided that "[i]nvestments by nationals or companies of either Party shall enjoy protection and security in the territory of the other Party."[298] This use of a protection and security obligation unconnected to another standard of protection set the tone for early German BIT practice. Of the 10 BITs signed by Germany between 1960 and 1962, seven included a self-standing protection and security provision[299] and two lacked any reference to "protection and security".[300] The exception was the BIT between Germany and Thailand, in which the protection and security obligation was imposed conjunctively with the obligation to afford fair and equitable treatment. Article 3(3) of that BIT provided:

> "each Contracting Party shall in its territory in any case accord such investments by investors of the other Contracting Party and their returns fair and equitable treatment and full protection".[301]

This was the first BIT to link a protection and security obligation to another standard of treatment – a formulation which became popular in later BITs.

By contrast with German BIT practice, none of the other six BITs signed during 1960 to 1962,[302] all of which involved Switzerland,[303] contained a protection and security

[298] Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments, signed on 25 November 1959, entered into force 28 April 1962, 457 UNTS 24.

[299] These are the BITs Germany signed with: Greece (signed 27 March 1961, entered into force 15 July 1963); Togo (signed 16 May 1961, entered into force 21 December 1964); Morocco (signed 31 August 1961, entered into force 21 January 1968); Liberia (signed 12 December 1961, entered into force 22 October 1967); Turkey (signed 20 June 1962, entered into force 16 December 1965); Cameroon (signed 29 June 1962, entered into force 21 November 1963); and Madagascar (signed 21 September 1962, entered into force 21 March 1966).

[300] These are the BITs Germany signed with: Malaysia (signed 22 December 1960; entered into force 6 July 1963); and Guinea (signed 19 April 1962, entered into force 13 March 1965).

[301] Germany-Thailand BIT (signed 13 December 1961, entered into force 10 April 1965).

provision of any formulation. Indeed, as more capital exporting States started to conclude BITs – with, *inter alia*, the Netherlands, Italy, Sweden, Norway and the Belgo-Luxembourg Economic Union all signing their first BITs between 1963 and 1966 – practice regarding the protection and security obligation diversified. Of the 29 publicly-available BITs signed in this period and later ratified,[304] 19 contained a protection and security obligation. Of these, 15 utilised a self-standing protection and security provision. Germany was a party to 14 of these 15 BITs, each of which replicated the provision from the initial Germany-Pakistan BIT.[305]

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[302] This figure excludes the three BITs which France signed with Chad, the Central African Republic and the Congo on 11, 13 and 15 August 1960 respectively, none of which entered into force, were deposited with the United Nations or are generally cited as France's first batch of BITs: see Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer, 2009), 43; cf Vandevelde, "A Brief History of International Investment Agreements" (2005) 12 *University of California Davis Journal of International Law and Policy* 157, 169 (who wrongly records that France "concluded" – as in ratified – these treaties). Their existence is recorded in UNCTAD, *Bilateral Investment Treaties: 1959-1999*, New York and Geneva, 2000, UNCTAD/ITE/IIA/2, 53.

[303] These are the BITs Switzerland signed with: Tunisia (signed 2 December 1961, entered into force 19 January 1964); Niger (signed 28 March 1962, entered into force 17 November 1962); Guinea (signed 26 April 1962, entered into force 29 July 1963); Cote D'Ivoire (signed 26 June 1962, entered into force 18 November 1962); Senegal (signed 16 August 1962, entered into force 13 August 1964); and Congo (signed 18 October 1962, entered into force 11 July 1964).

[304] There are four BITs which are recorded but not publicly-available, and apparently not deposited with the United Nations: Switzerland-Rwanda (signed 15 October 1963, entered into force 15 October 1963); Germany-Republic of Korea (signed 4 February 1964, entered into force 15 January 1967); Egypt-Kuwait (signed 2 May 1966, entered into force 9 August 1966); and Norway-Madagascar (signed 13 May 1966, entered into force 28 September 1967). Note that two other BITs were signed during this period but did not enter into force, namely: Germany-Ethiopia (signed 21 April 1964); and Kuwait-United Arab Emirates (signed 12 February 1966). The existence of these BITs is recorded in UNCTAD, *Bilateral Investment Treaties: 1959-1999*, New York and Geneva, 2000, UNCTAD/ITE/IIA/2, 25ff.

[305] These BITs were those Germany signed with: Sudan (signed 7 February 1963, entered into force 24 November 1967); Sri Lanka (signed 8 November 1963, entered into force 7 December 1966); Tunisia (signed 20 December 1963, entered into force 6 February 1966); Senegal (signed 24 January 1964, entered into force 16 January 1966); Niger (signed 29 October 1964, entered into force 10 January 1966); Tanzania (signed 30 January 1965, entered into force 12 July 1968); Sierra Leone (signed 8 April 1965, entered into force 10 December 1966); Ecuador (signed 28 June 1965, entered into force 30 November 1966); Central African Republic (signed 23 August 1965, entered into force 21 January 1968); Congo (signed 13 September 1965, entered into force 14 October 1967); Iran (signed 11 November 1965, entered into force 6 April 1968); Côte d'Ivoire (signed 27 October 1966, entered into force 10 June 1968); Uganda (signed 29 November 1966, entered into force 19 August 1968); and Zambia (signed 10 December 1966, entered into force 25 August 1972).

The protection and security obligation in the other four (non-German) BITs did not, however, follow the Germany-Pakistan formulation. Rather, they linked the obligation to other required standards of treatment. The Iraq-Kuwait BIT formulated the obligation conjunctively with the fair and equitable treatment obligation, requiring that both standards of treatment be satisfied "in accordance with" the BIT.[306] The Switzerland-Costa Rica BIT formulated the obligation conjunctively with the prohibition of unreasonable and discriminatory measures, before stipulating that this conglomerated protection required "in particular" fair and equitable treatment.[307] The Switzerland-Liberia BIT required protection and security in the context of "judicial, administrative or other procedures".[308] Finally, the Belgo-Luxembourg Economic Union-Morocco BIT was the first to link the protection and security obligation with general international law, recalling the formulation of post-bellum FCN treaties and standing as precedent for numerous later BITs.[309] In a formulation of the obligation unique in the first seven years of BIT practice, Article 3(3) provided:

> "Subject to measures necessary to maintain public order, investments shall enjoy security and continuous protection, which is at least equal to that enjoyed by investors of the most favoured nation, and in compliance with generally accepted principles of international law."[310]

The variety of formulations of the obligation in these early BITs presaged the variety of modern formulations. Moss identifies numerous formulations of the obligation in

[306] Iraq-Kuwait BIT (signed 25 October 1964, entered into force 7 June 1966).

[307] Switzerland-Costa Rica BIT (signed 1 September 1965, entered into force 18 August 1966).

[308] Switzerland-Liberia BIT (signed 23 July 1963, entered into force 22 September 1964).

[309] Belgo-Luxembourg Economic Union-Morocco BIT (signed 28 April 1965, entered into force 18 October 1967).

[310] "*Sous réserve des mesures nécessaires au maintien de l'ordre public, ces investissements jouissent d'une sécurité et d'une protection constantes, qui sont au moins égales à celles dont jouissent les investisseurs de la nation la plus favorisée et conformes aux principes de Droit International généralément reconnus.*"

modern BITs.[311] In the more general formulations, the obligation is worded variously as, *inter alia*, "full protection and security", "full legal protection and security", "most constant protection and security" or "protection and security".[312] More detailed or intricate variations also exist. Whereas some treaties contain a self-standing protection and security obligation, others link the obligation to, and sometimes cast it as a "more particular" form of, the obligations to afford fair and equitable treatment and refrain from unreasonable and discriminatory measures.[313] This divergence reflects the contrast between the initial Germany-Pakistan BIT and other early BITs which linked the various obligations, such as the Germany-Thailand BIT and the Switzerland-Costa Rica BIT. Equally substantive was the link occasionally established between the protection and security obligation and the legal environment in which it operates. Included first in the Switzerland-Liberia BIT, the connection now often arises when the obligation is formulated as "full legal security and protection".[314] Finally, drawing on practice started in inter-bellum FCN treaties and continued in the Belgo-Luxembourg Economic Union-Morocco BIT, the obligation is sometimes formulated by reference to "international law".[315] In such cases, "international

[311] Moss, "Full Protection and Security" in Reinisch (ed.), *Standards of Investment Protection* (OUP, 2008) 131, 133-136.

[312] See Moss, "Full Protection and Security" in Reinisch (ed.), *Standards of Investment Protection* (OUP, 2008) 131, 133-134 (and the BITs there cited).

[313] See, for example, the Czech-Republic-Netherlands BIT (signed 29 April 1991, entered into force 1 October 1992) invoked in *Saluka Investments BV v Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, discussed in Sections 3(2)(a)(i) and 3(2)(c)(i) below.

[314] See, for example, the Argentina-Germany BIT (signed 9 April 1991, entered into force 8 November 1993) invoked in *Siemens AG v Argentina*, ICSID Case No. ARB/02/08, Award, 6 February 2007, discussed in Section 3(2)(c)(i) below.

[315] Moss, "Full Protection and Security" in Reinisch (ed.), *Standards of Investment Protection* (OUP, 2008) 131, 133-136.

law" has been variously treated as a ceiling above which the obligation cannot rise,[316] a floor below which it cannot fall,[317] or a comparator with which it is coextensive.[318]

Diversity is thus a feature of modern formulations of the full protection and security obligation. And it is likely to remain so, given the increasing divergence in the formulations adopted in the model BITs of some of the world's leading BIT "empire" builders.[319]

Consistent with its practice since the inter-bellum FCN treaties[320] and throughout its BIT history,[321] the United States in its 2012 model BIT linked the obligation to international law.[322] Article 5(1) obliges host States to "accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security." Article 5(2) clarifies that the international minimum standard is a ceiling, so that the obligation does "not require treatment in addition to or beyond that which is required by that standard, and do[es] not create additional substantive rights". Although there was previously some uncertainty as to

[316] See the interpretation of Article 1105(1) of the NAFTA, discussed in Section 3(1)(c) below, and cases interpreting that provision as establishing international law as a ceiling, such as *S.D. Myers v Canada*, UNCITRAL, Partial Award, 13 November 2000, [263].

[317] See *Azurix Corporation v Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006, [361].

[318] *Asian Agricultural Products Ltd. v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, [46]-[53]; *Noble Ventures, Inc. v Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, [164].

[319] The number of BITs concluded by some capital exporting States has prompted one author to call the process "empire" building: Malik, "The Legal Monster that Lets Companies Sue Countries", *The Guardian*, 4 November 2011, accessed 3 March 2013, http://www.guardian.co.uk/commentisfree/2011/nov/04/bilateral-investment-treaties.

[320] See both Section 3(1)(b)(ii) above and the discussion of the NAFTA Free Trade Commission's Note of Interpretation in Section 3(1)(c) below.

[321] Moss, "Full Protection and Security" in Reinisch (ed.), *Standards of Investment Protection* (OUP, 2008) 131, 134.

[322] Several leading model BITs are reproduced as appendices in Douglas, *The International Law of Investment Claims* (CUP, 2009).

whether similar linkages in United States treaties rendered international law a ceiling above which the protection offered by the obligation could not rise,[323] the 2012 model BIT confirms that the international minimum standard defines the upper limit of the protection offered by the obligation.

The Canadian 2004 model BIT is similar. Article 5(1) requires that States "accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security." Article 5(2) clarifies that the obligation does "not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens." As in its United States counterpart, the reference to international law in the Canadian model BIT renders the international minimum standard a ceiling above which the protection offered by the obligation cannot rise.

By contrast with the North American approach, the Dutch 2004 model BIT contains no reference to international law. Article 3(1) provides:

> "Each Contracting Party shall ensure fair and equitable treatment of the investments of nationals of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals. Each Contracting Party shall accord to such investments full physical security and protection."

The inclusion of a provision requiring a State to ensure full protection and security alongside other protective treatment is a common modern formulation. Both the United Kingdom 2004 model BIT and Turkish 2000 model BIT, for instance, articulate

[323] See, for example: *Pope & Talbot Inc. v Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001, [111]; *Metalclad Corp v Mexico*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, [75]-[76]; *S.D. Myers v Canada*, UNCITRAL, Partial Award, 13 November 2000, [259]; *Methanex Corporation v United States*, UNCITRAL, Second Opinion of Professor Sir Robert Jennings, Q.C., 5 November 2002.

conjunctive obligations, though neither limits the protection and security element to "physical" protection. Although this formulation does not exclude interpreting the protection and security obligation as a self-standing obligation,[324] some tribunals have regarded the conjunction of the obligation with other protective obligations as a matter affecting whether, and how, the obligation is breached.[325] Such an interpretation arises most commonly when the obligation is expressed as a "more particular" form of the fair and equitable treatment obligation[326] – wording which the Dutch, United Kingdom and Turkish model BITs avoid.

Unlike the foregoing model BITs, the German 2008 model BIT contains a self-standing protection and security provision. Article 4(1) provides that "[i]nvestments by investors of either Contracting State shall enjoy full protection and security in the territory of the other Contracting State". Consistent with German BIT practice since the initial 1959 Germany-Pakistan BIT, this formulation does not qualify the obligation by reference to international law or any other standard of protection. Such a formulation has been popular. For example, both the Chinese 1997 model BIT and the French 2006 model BIT adopt it, although the former phrases it as an obligation of "constant" protection and security, while the latter clarifies that the host State's "territory" includes its maritime zone.

The obligation is therefore formulated variously. Rules of treaty interpretation indicate that variation of language should produce variation of the obligation's scope. This

[324] See *Eureko B.V. v Poland*, UNCITRAL, Partial Award, 19 August 2005, [236]-[237]; *SAUR International S.A. v Argentina*, ICSID Case No. ARB/04/4, Décision sur la Compétence et sur la Responsabilité, 6 June 2012, [510]-[511].

[325] See *Occidental Exploration and Production Company v Republic of Ecuador*, LCIA Case No. UN3467, Final Award, 1 July 2004, [187]; *Azurix Corporation v Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006, [408]; *National Grid plc v Argentina*, UNCITRAL, Award, 3 November 2008, [189].

[326] See, for example, *Saluka Investments BV v Czech Republic*, UNCITRAL, Partial Award, 17 March 2006.

strict approach to interpretation has not, however, been generally adopted by tribunals. To the contrary, senior scholars and tribunals have suggested the opposite. Schreuer observes that "variations in language do not appear to carry any substantive significance",[327] while Rubins and Kinsella maintain that "[i]t is generally accepted … that such variations in language do not make a significant difference in the level of protection a host State is to provide to qualifying foreign investors and their property".[328] Similarly, the tribunal in *Parkerings v Lithuania* held that it "is generally accepted that the variation of language between the formulation '*protection*' and '*full protection and security*' does not make a significant difference in the level of protection a host State is to provide."[329]

These scholars and tribunals oversimplify reality. Tribunals regularly use the wording of the obligation in the applicable BIT to justify a restrictive or expansive interpretation. In *Azurix v Argentina*, the applicable BIT referred to "full protection and security", and the tribunal held that "when the terms 'protection and security' are qualified by 'full' and no other adjective or explanation, they extend, in their ordinary meaning, the content of this standard beyond physical security."[330] The tribunal in *Biwater v Tanzania* concurred, holding that, when the word "full" is included in the obligation, it "would ... be unduly artificial to confine the notion of '*full security*' only to one aspect of security".[331]

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[327] Schreuer, "Full Protection and Security" (2010) 1(2) *Journal of International Dispute Settlement* 353, 353. Note, however, Schreuer's earlier opinion that inclusion of the word "legal" before the word "security" in the applicable BIT in *Siemens v Argentina* constituted "a strong indication that the provision, as contained in the BIT, goes beyond mere physical violence and extends to the investor's legal position": *Siemens AG v Argentina*, ICSID Case No. ARB/02/08, Award, 6 February 2007, [286].

[328] Rubins and Kinsella, *International Investment, Political Risk and Dispute Resolution* (Oceana, 2005) 219.

[329] *Parkerings-Compagniet AS v Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, [354] (emphasis in original). See also *Frontier Petroleum Services Ltd v Czech Republic*, UNCITRAL, Final Award, 12 November 2010, [260].

[330] *Azurix Corporation v Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006, [408].

[331] *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case No. ARB/05/08, Award, 24 July 2008, [729] (emphasis in original).

Similar attention to wording was evident in *Siemens v Argentina*. The applicable BIT referred to "full protection and legal security". The tribunal focused on the meaning of "legal security", which it construed as "the quality of the legal system which implies certainty in its norms and, consequently, their foreseeable application", before holding that it "is clear that in the context of this meaning the Treaty refers to security that it is not [only] physical."[332]

Each of these tribunals relied on precise wording in the applicable BIT to help justify an expansive interpretation of the obligation. In *Suez v Argentina*, however, the tribunal invoked wording to support a restrictive interpretation. One of the applicable BITs provided that the host State "shall protect" investments. A part of its justification for limiting the scope of the protection afforded, the tribunal held that "the absence of the word 'full' or 'fully' ... supports this view of an obligation limited to providing physical protection and related legal remedies".[333]

Given these approaches, the view that the precise formulation of the obligation carries no "substantive significance" or is "generally accepted" to be inconsequential is inaccurate.[334] Rather, these examples illustrate that, while no tribunal to date has treated the wording of the obligation as decisive *per se*, the precise formulation of the obligation can contribute to the reasoning of tribunals that seeks to justify a particular interpretation. Moss agrees:

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[332] *Siemens AG v Argentina*, ICSID Case No. ARB/02/08, Award, 6 February 2007, [303].

[333] *Suez, Sociedad General de Aguas v Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, [169].

[334] See, respectively: Schreuer, "Full Protection and Security" (2010) 1(2) *Journal of International Dispute Settlement* 353, 353; *Parkerings-Compagniet AS v Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, [354].

> "The wording of the treaty is often the starting point for the tribunal's reasoning, but it does not seem to play a decisive role in the result. ... It may thus be concluded that arbitral practice does not deem the wording of the treaty as decisive for the scope of application of the standard of full protection and security – not even when the analysis of the question starts from the formulation of the treaty."[335]

Accordingly, important though its exact formulation is, tribunals interpreting the obligation generally avoid a Jesuitical application of rules of treaty interpretation. This may partly be due to a desire to elucidate core principles of the obligation without being fettered by minor linguistic variations between treaties. It may also partly be due to a sensitivity to the context of the obligation more broadly, including in particular its long history in both FCN treaties and general international law.

3(1)(b) The relationship of the treaty obligation with general international law

One issue which has occupied attention irrespective of the formulation of the obligation is its relationship with international law and, particularly, with the international minimum standard of treatment of aliens under customary international law. The question is whether the treaty obligation is a reflection of the international minimum standard or is instead an independent standard to be interpreted and applied without reference to customary international law.

The starting point for analyses of this question is usually Article 1105(1) of the NAFTA and the "Notes of Interpretation of Certain Chapter 11 Provisions" issued by the NAFTA Free Trade Commission on 31 July 2001.[336] Article 1105(1) provides:

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[335] Moss, "Full Protection and Security" in Reinisch (ed.), *Standards of Investment Protection* (OUP, 2008) 131, 134-135.

[336] See: Moss, "Full Protection and Security" in Reinisch (ed.), *Standards of Investment Protection* (OUP, 2008) 131, 136-137; Schreuer, "Full Protection and Security" (2010) 1(2) *Journal of International Dispute Settlement* 353, 363-366; Malik, "The Full Protection and Security Standard Comes of Age: Yet another challenge for states in investment treaty arbitration?", International Institute for Sustainable Development, *Best Practices Series*, November 2011, 9.

> "Article 1105: Minimum Standard of Treatment
>
> 1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."

Early NAFTA tribunals diverged on whether the duty in this provision to accord investments "fair and equitable treatment" required a standard of protection independent of, and potentially greater than, the international minimum standard.[337] Whereas *S.D. Myers v Canada* equated the standard in Article 1105(1) with the minimum standard,[338] *Pope & Talbot v Canada* held that the former must be "ascertained free of any threshold that might be applicable to the evaluation of measures under the minimum standard of international law".[339]

In response to this divergence, the Free Trade Commission sought to "clarify and reaffirm the meaning" of Article 1105(1), stating that the provision "prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party" and that the "concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens." Although some questioned the Free Trade Commission's ability to issue "Notes of Interpretation",[340] tribunals have

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[337] See Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer, 2009), 272-273.

[338] *S.D. Myers v Canada*, UNCITRAL, Partial Award, 13 November 2000, [263].

[339] *Pope & Talbot Inc. v Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001, [111].

[340] For example, Jennings opined that "the Free Trade Commission, far from interpreting Article 1105(1), simply tries to substitute for the express terms of Article 1105(1) an altogether different standard. ... [I]f the three governments are suggesting that NAFTA ... does *not* require a State to provide fair and equitable treatment, the suggestion is preposterous ... [and] the Tribunal should treat the 'interpretation' as an attempted amendment that has no binding effect": *Methanex Corporation v United States*, UNCITRAL, Second Opinion of Professor Sir Robert Jennings, Q.C., 5 November 2002. See also Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer, 2009), 274.

since treated it as binding[341] and United States and Canadian BIT practice has conformed to it.[342] The result is the certainty "that Article 1105 of the NAFTA reflects the international minimum standard rather than an autonomous standard."[343]

Outside the NAFTA context, however, the position is less certain. The treatment of "full protection and security" as an autonomous standard has been inconsistent. Some tribunals have hesitated to construe the obligation as requiring conduct beyond that required by the minimum standard. In *Noble Ventures v Romania*, the applicable BIT stated:

> "Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law."[344]

Despite the BIT indicating that international law should be regarded as a floor below which the protection should not fall, the tribunal doubted whether this would widen the scope of the treaty standard beyond the scope of the minimum standard:

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[341] See: *Pope & Talbot Inc v Canada*, UNCITRAL, Award in Respect of Damages, 31 May 2002, [17]-[69]; *Mondev International Limited v United States*, ICSID Case No ARB(AF)/99/2, Award, 11 October 2002, [120]; *United Parcel Service of America Inc v Canada*, UNCITRAL, Award on Jurisdiction, 22 November 2002, [97]; *ADF Group Inc v United States*, ICSID Case No ARB(AF)/00/1, Award, 9 January 2003, [176]-[178]; *Loewen Group, Inc and Raymond Loewen v United States*, ICSID Case No ARB(AF)/98/3, Award, 26 June 2003, [126]-[128]; *Waste Management, Inc v Mexico*, ICSID Case No ARB(AF)/00/3, Award, 30 April 2004, [90]-[91]; *Methanex Corporation v United States*, UNCITRAL, Award, 9 August 2005, Part IV, Chapter C, [18]-[20]; *International Thunderbird Gaming Corporation v Mexico*, UNCITRAL, Award, 26 January 2006, [192].

[342] See the model BITs discussed in Section 3(1)(b)(iii) above.

[343] Haeri, "A Tale of Two Standards: 'Fair and Equitable Treatment' and the Minimum Standard in International Law" (2011) 27 *Arbitration International* 27, 30. See also: Schreuer, "Full Protection and Security" (2010) 1(2) *Journal of International Dispute Settlement* 353, 364; Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer, 2009), 272-275; Moss, "Full Protection and Security" in Reinisch (ed.), *Standards of Investment Protection* (OUP, 2008) 131, 136; Yannaca-Small, "Fair and Equitable Treatment Standard: Recent Developments" in Reinisch (ed.), *Standards of Investment Protection* (OUP, 2008) 111, 114; Kläger, '*Fair and Equitable Treatment' in International Investment Law* (CUP, 2011) chapter 3.

[344] Article II(2)(a) of the US-Romanian BIT, signed 28 May 1992, entered into force 15 January 1994.

> "With regard to the Claimant's argument that the Respondent breached Art. II (2)(a) of the BIT which stipulates that the "*Investment shall ... enjoy full protection and security*", the Tribunal notes: that it seems doubtful whether that provision can be understood as being wider in scope than the general duty to provide for protection and security of foreign nationals found in the customary international law of aliens."[345]

The tribunal in *Azurix v Argentina* was similarly equivocal. The applicable BIT had an identical clause to that in *Noble Ventures v Romania*.[346] The tribunal acknowledged that the "clause, as drafted, permits [it] to interpret fair and equitable treatment and full protection and security as higher standards than required by international law."[347] However, it then observed that this conclusion was of no "material significance" because:

> "the minimum requirement to satisfy this standard has evolved and the Tribunal considers that its content is substantially similar whether the terms are interpreted in their ordinary meaning, as required by the Vienna Convention, or in accordance with customary international law."[348]

While one could gloss this observation as applying only to fair and equitable treatment and not to full protection and security, such a limitation is not explicit in the tribunal's reasoning and sits oddly with its earlier parallel treatment of the obligations. In any event, the tribunal continued by holding that it was:

> "persuaded of the interrelationship of fair and equitable treatment and the obligation to afford the investor full protection and security. ... [F]ull protection and security ... go[es] beyond protection and security ensured by the police. It is not only a matter of physical security; the stability afforded by a secure investment environment is as important from an investor's point of view. ... However, when the terms "protection and security"

[345] *Noble Ventures, Inc. v Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, [164] (emphasis in original).

[346] Article II(2)(a) of the US-Argentinean BIT, signed 14 November 1991, entered into force 20 October 1994.

[347] *Azurix Corporation v Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006, [361].

[348] *Azurix Corporation v Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006, [361].

> are qualified by "full" and no other adjective or explanation, they extend, in their ordinary meaning, the content of this standard beyond physical security. To conclude, the Tribunal, having held that the Respondent failed to provide fair and equitable treatment to the investment, finds that the Respondent also breached the standard of full protection and security under the BIT."[349]

These two statements are difficult to reconcile. One attempt to do so would interpret the tribunal's analysis as stating that the full protection and security standard is "substantially similar" to the international minimum standard. This, however, produces the contentious result that the latter requires States to offer protection beyond that physically "ensured by the police". Another attempt at reconciliation would interpret the tribunal as stating that only the fair and equitable treatment standard is equivalent to the minimum standard, whereas the full protection and security standard is broader. This, however, would involve a schizophrenic reading of the conjunctive formulation of the obligations in the applicable BIT. Both options are unattractive, and ultimately *Azurix v Argentina* confuses rather than clarifies the relationship between the treaty obligation and international law – a point which Argentina raised in its application to annul the tribunal's decision.[350]

AMT v Zaire also hesitated to define the treaty standard more broadly than customary international law. The applicable BIT required full protection and security and added that the "protection and security ... may not be less than that recognized by international law".[351] While the tribunal arguably left room for the treaty standard to be

[349] *Azurix Corporation v Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006, [408].

[350] *Azurix Corp v Argentina*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, 1 September 2009, [134(p)]. The annulment committee held that this issue fell outside the scope of its review: *Azurix Corp v Argentina*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, 1 September 2009, [175]-[176].

[351] United States-Zaire BIT, signed on 3 August 1984, entered into force 28 July 1989.

interpreted more broadly than the minimum standard,[352] it found Zaire in breach of the treaty obligation because it had "manifestly failed to respect the minimum standard required of it by international law."[353] The tribunal thus treated the two standards as functionally equivalent.[354]

By contrast, other tribunals have treated the treaty standard as an independent standard requiring protection different to, and greater than, the international minimum standard. *ELSI* and *AAPL v Sri Lanka* both addressed the relationship of the two standards. They did so only in *obiter dicta*, given their respective rulings that Italy's conduct did not fall below, and Sri Lanka's did not rise above, either standard. The Chamber in *ELSI* commented that it was "called upon to apply the provisions of a treaty which sets standards ... which may go further in protecting nationals of the High Contracting Parties than general international law".[355] Similarly the tribunal in *AAPL v Sri Lanka*, while clarifying that the treaty standard did not create strict liability for host States, opined that:

> "[i]n the opinion of the present Arbitral Tribunal, the addition of words like 'constant' or 'full' to strengthen the required standards of 'protection and security' could justifiably indicate the Parties' intention to require within their treaty relationship a standard of 'due diligence' higher than the 'minimum standard' of general international law."[356]

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[352] *American Manufacturing & Trading, Inc. v Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997, [6.06].

[353] *American Manufacturing & Trading, Inc. v Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997, [6.10].

[354] As Moss agrees: Moss, "Full Protection and Security" in Reinisch (ed.), *Standards of Investment Protection* (OUP, 2008) 131, 137. See also *Railroad Development Corporation v Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012, [238].

[355] *Elettronica Sicula S.p.A. (ELSI) (United States of America v Italy) (Judgment)* [1989] ICJ Reports 15, [111].

[356] *Asian Agricultural Products Ltd. v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, [50].

Numerous tribunals have also implicitly abandoned the notion that the treaty standard equates to the international minimum standard. They have done so by applying it to matters beyond physical protection and security. For example, tribunals have held that a State's regulatory conduct can violate the treaty standard.[357] Such an interpretation of the treaty standard necessarily divorces it from the minimum standard. The minimum standard sets a high threshold for breach.[358] No commentator has suggested that it requires the exercise of due diligence vis-à-vis the effect of the State's regulatory conduct upon an investment. Even decisions which hold that the minimum standard has evolved and now sets a threshold lower than the *Neer* formulation do not suggest that regulatory conduct can, absent unusual circumstances, constitute an outrage, bad faith, wilful neglect of duty or objectively insufficient governmental conduct.[359] Indeed, to hold that regulatory conduct can breach the minimum standard would likely confound Brownlie's prescription that:

> "it is not possible to postulate an international minimum standard which in effect supports a particular philosophy of economic life at the expense of the host state."[360]

As these tribunals explicitly or implicitly indicate, the lower threshold and broader material scope of the treaty standard deems it different to, and more onerous than, the

[357] See Section 3(2)(c) below.

[358] See, for example: *S.D. Myers, Inc. v Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, [263]; *TECO Guatemala Holdings, LLC v Republic of Guatemala*, ICSID Case No. ARB/10/23, Award, 19 December 2013, [587]; *Abengoa, S.A. y COFIDES, S.A. v United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award, 18 April 2013, [642].

[359] As the Commission in the *Neer* case stated, the minimum standard is breached by conduct that "amount[s] 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": *L.F.H. Neer and Pauline Neer (U.S.A.) v United Mexican States*, 15 October 1926, UNRIAA, Vol. IV, p. 60 at pp. 61-62.

[360] Brownlie, *Principles of Public International Law* (7th ed., OUP, 2008), 527. The quotation appeared in Brownlie's text in and since its first edition: Brownlie, *Principles of Public International Law* (OUP, 1966), 428. In the latest edition, however, being the first not edited by Brownlie, this observation is excluded: Crawford, *Brownlie's Principles of Public International Law* (8th ed., OUP, 2012) 615-616.

international minimum standard. It is on the basis of this repeated implicit rejection of the equivalence of the treaty and customary standards that literature correctly states that "the bulk of authority suggests that arbitral tribunals will not necessarily apply a customary international law standard" when deciding a full protection and security claim.[361] The supplementary point that treaty drafters could have chosen words other than "full protection and security" to indicate that the obligation imposed was no more than the minimum standard – as the drafters, and FTC Commission, did for the NAFTA – is correct.[362] But it is also a facile point, given the divergence between tribunals which have discussed the relationship between the two standards.[363]

Understanding the two standards as mutually independent thus better reflects doctrine. The exception is when the treaty's terms expressly prescribe otherwise, as in the NAFTA and the United States and Canadian model BITs. Absent such wording, the autonomous treaty standard imposes a greater obligation and has a broader material scope than the international minimum standard. It cannot be understood solely by reference to the protection and security obligation under international law. Rather, a fuller analysis of the modern-day scope *ratione materiae* of the treaty obligation is required.

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[361] Malik, "The Full Protection and Security Standard Comes of Age: Yet another challenge for states in investment treaty arbitration?", International Institute for Sustainable Development, *Best Practices Series*, November 2011, 9.

[362] Schreuer, "Full Protection and Security" (2010) 1(2) *Journal of International Dispute Settlement* 353, 365; Malik, "The Full Protection and Security Standard Comes of Age: Yet another challenge for states in investment treaty arbitration?", International Institute for Sustainable Development, *Best Practices Series*, November 2011, 9.

[363] Compare, discussed above: *Elettronica Sicula S.p.A. (ELSI) (United States of America v Italy) (Judgment)* [1989] ICJ Reports 15, [103]-[111]; *Noble Ventures, Inc. v Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, [164].

3(2) The modern-day scope *ratione materiae* of the obligation

The scope *ratione materiae* of the modern-day "full protection and security" treaty obligation is expounded in decisions of tribunals constituted to resolve disputes under investment treaties. This Section 3(2) reviews and comments upon that jurisprudence. Section 3(2)(a) discusses the requirement of the treaty obligation that States protect foreign investors and investments from physical damage, and punish perpetrators of such damage. Section 3(2)(b) discusses how the treaty standard also demands that the State provide a means of redress for damage suffered by foreign investors. Finally, Section 3(2)(c) explains how regulatory conduct by the host State may also breach the treaty obligation.

3(2)(a) Duty to protect from, and punish perpetrators of, physical damage

The treaty obligation requires that host States provide physical protection and security, and punish perpetrators of physical damage. This obligation applies to damage by both non-State and State actors. Cases concerning failures to protect against damage done by the former are reviewed in Section 3(2)(a)(i), while cases concerning failures to protect against damage done by the latter are reviewed in Section 3(2)(a)(ii). Section 3(2)(a)(iii) concludes by identifying in summary the key aspects of proving a breach of the obligation in relation to physical damage.

3(2)(a)(i) Cases concerning damage done by non-State actors

The full protection and security obligation undoubtedly requires States to exercise due diligence in affording protection to foreign investments from physical damage inflicted by non-State actors.[364] Numerous cases have considered this situation.

[364] This category of breach of the obligation is discussed in: Schreuer, "Full Protection and Security" (2010) 1(2) *Journal of International Dispute Settlement* 353, 365-367; Schreuer, "The Protection of Investments in Armed Conflicts" (2012) 9(3) *Transnational Dispute Management* 1, 6-8; Malik, "The Full Protection and Security Standard Comes of Age: Yet another challenge for states in investment treaty arbitration?", International Institute for Sustainable Development, *Best Practices Series*, November 2011, 5; Zeitler, "The

An early consideration was by a Chamber of the International Court of Justice in *ELSI*. The applicable treaty was the post-bellum Italy-United States FCN treaty. It obliged the host State to provide "most constant protection and security for [the other State's nationals'] persons and property ... [as] required by international law". It also stated that the protection be no less than that provided to the State's own nationals or nationals of third States. This protection explicitly extended to "corporations and associations".

A United States company acquired, directly and indirectly through a subsidiary, the full shareholding of an Italian company, ELSI, specialising in the manufacture of electronic parts. ELSI encountered difficulties, running at a loss, suffering labour unrest and moving towards liquidation. When liquidation started, Italian authorities objected that such an option was not available under Italian law, and that in any event they wished ELSI to continue operating. As liquidation plans were proceeding and shortly after the workforce had been dismissed, the Mayor of Palermo requisitioned ELSI's assets. Around the time of the requisition, ELSI's employees occupied the plant. While the occupation was peaceful, the United States alleged that it caused deterioration to the plant and impeded the efforts of the trustee in bankruptcy.

The Chamber held that the protection and security obligation in the FCN treaty could not "be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed".[365] Noting that dismissal of the workforce "could not reasonably be expected to pass without some protest", the Chamber found that "it was

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Guarantee of "Full Protection and Security" in Investment Treaties Regarding Harm Caused by Private Actors" (2005) 3 *Stockholm International Arbitration Review* 959; Moss, "Full Protection and Security" in Reinisch (ed.), *Standards of Investment Protection* (OUP, 2008) 131, 138-142; Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer, 2009), 309-310.

[365] *Elettronica Sicula S.p.A. (ELSI) (United States of America v Italy) (Judgment)* [1989] ICJ Reports 15, [108].

difficult to accept that the occupation seriously harmed the interests of ELSI", that the United States had "not established that any deterioration in the plant and machinery was due to the presence of the workers", and that the Italian "authorities were able not merely to protect the plant but even in some measure to continue production".[366] Given these findings, the Chamber concluded that Italy had not breached any aspect of the protection and security obligation.

The Chamber's analysis of the obligation was sparse. After confirming that the obligation did not impose strict liability, the decision turned on the United States' inability to demonstrate that ELSI suffered compensable damage due to the occupation or that Italy's attempt to forestall such damage was insufficient. By taking positive actions to maintain the plant's operations and ensure it did not fall into desuetude during the occupation, Italy satisfied the obligation. Unlike many decisions subsequent to *ELSI*, it stands as a rare example where a State simply took sufficient steps to discharge its obligation.

The first decision under a bilateral investment treaty which applied the full protection and security obligation was *AAPL v Sri Lanka*. The applicable treaty stated that investments "shall enjoy full protection and security". During a counter-insurgency operation by the Sri Lankan military, the claimant's investment was damaged and members of its staff killed. The tribunal confirmed that the treaty imposed an obligation of due diligence rather than one of strict liability.[367] The tribunal further held that there was no "conclusive evidence" that the damage was done by Sri Lanka's military forces (as

[366] *Elettronica Sicula S.p.A. (ELSI) (United States of America v Italy) (Judgment)* [1989] ICJ Reports 15, [107]-[108].

[367] *Asian Agricultural Products Ltd. v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, [49]-[50].

opposed to "terrorist action"),[368] but that a State could nevertheless be responsible for damage caused during an insurrection if it failed to provide the standard of protection required by treaty or customary international law.[369] Finding it in breach of the obligation, the tribunal noted that Sri Lanka had knowledge of the potential for damage. State representatives, including its President and military officers,[370] knew that rebels were conducting an armed insurgency, that they were doing so around the investment's location, and that the project's managers were willing to help with counter-insurgency investigations.[371] The tribunal also accepted that the State had capacity to liaise with the project's managers, as it had done previously, in order to prevent or minimise the damage.[372] The "legitimate expected course of action" for the State was to take protective measures, such as identifying insurgents and removing them from the location.[373] Although the tribunal did not explicitly discuss causation, the implicit causal link between the damage and the State's inaction was that the failure to act as "expected" was a contributing factor which made the damage more likely to occur. The tribunal's assessment of Sri Lanka's responsibility relied on Freeman's definition of "due

[368] *Asian Agricultural Products Ltd. v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, [85(d)].

[369] *Asian Agricultural Products Ltd. v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, [72] and [85(b)].

[370] *Asian Agricultural Products Ltd. v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, [85(b)].

[371] *Asian Agricultural Products Ltd. v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, [85(a)-(b)].

[372] *Asian Agricultural Products Ltd. v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, [85(b)].

[373] *Asian Agricultural Products Ltd. v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, [85(d)].

diligence",[374] and found that "diligence" in the circumstances required the State's "normal exercise of governmental inherent powers".[375]

Many of the key points arising out of the tribunal's analysis in *AAPL v Sri Lanka* thus drew on aspects of the responsibility for omissions highlighted in Chapter Two above. The tribunal addressed the State's knowledge of the need to act, its capacity to act, the causal link between the damage and its failure to act, and the application of the "due diligence" standard. These indicia of a wrongful omission recur in later decisions concerning alleged breaches of the full protection and security obligation.

The next decision regarding a breach of the obligation in the context of damage by non-State actors was *Tecmed v Mexico*. The applicable BIT provided that "[e]ach Contracting Party shall accord full protection and security to investments ... in accordance with International Law." The claimant won a licence to operate a landfill, but met with opposition from the local population, which was allegedly encouraged by the local government. When the claimant sought to renew the licence, the relevant federal agency refused.

The tribunal rejected the claimant's argument that the Mexican authorities had failed sufficiently to act against the civil demonstrations at the landfill site. It did so on the basis that the claimant had not furnished sufficient evidence to prove either that the authorities had "encouraged, fostered, or contributed their support" to the demonstrations,[376] or had

[374] *Asian Agricultural Products Ltd. v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, [77]. Freeman's definition is quoted in section 2(3)(b)(i) above.

[375] *Asian Agricultural Products Ltd. v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, [85(b)].

[376] *Tecnicas Medioambientales Tecmed SA v Mexico*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, [176].

failed to "react[] reasonably, in accordance with the parameters inherent in a democratic state," to them.[377]

Unlike *AAPL v Sri Lanka*, the tribunal in *Tecmed v Mexico* did not rely on an analysis of Mexico's knowledge or capacity to act, of the existence of a causal link or of whether the due diligence standard had been satisfied. Rather, it rejected the claim on the basis of another aspect of the responsibility of States for omissions – proof. The tribunal found no "specific evidence" of a lack of proper care,[378] meaning that the circumstances did not warrant an inference that Mexico's omission constituted more than a mere absence of action.[379] In this context, the tribunal used an objective approach to determining responsibility for omissions, assessing Mexico's conduct against the conduct one would expect within the "parameters inherent in a democratic state".[380]

The importance of sufficient evidence is reiterated by later tribunals that also rejected claims of breach of the obligation in the context of damage done by non-State actors. *Noble Ventures v Romania* is an example.[381] The applicable treaty stated that the "[i]nvestment shall ... enjoy full protection and security". The claimant alleged a breach of the obligation because, upon its acquisition from the State of a company, Romania failed to allow it to restructure the company's debts, which led to staff protests and plant

[377] *Tecnicas Medioambientales Tecmed SA v Mexico*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, [177].

[378] Brownlie, *System of the Law of Nations, State Responsibility – Part I* (OUP, 1983), 45. See also Section 2(2)(c) above.

[379] See Riddell and Plant, *Evidence before the International Court of Justice* (BIICL, 2009), 114. See also Section 2(2)(c) above.

[380] *Tecnicas Medioambientales Tecmed SA v Mexico*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, [177].

[381] This case in discussed further in Section 2(5)(c) above.

occupations.[382] Romania argued that the labour unrest was caused by non-payment of wages, and that, in any event, it had acted sufficiently to quell the unrest.[383]

Having found that the circumstances were similar to those in *ELSI*, in which no breach was found, the tribunal dismissed the claim on the basis that neither breach of the obligation nor prejudice to the claimant had been proven.[384] As explained in Section 2(5)(c) above, no counterfactual existed in which Romania's actions could have prevented the damage or in which the damage could have been causally linked to Romania's omissions. Absence of proof was thus not limited to absence of circumstantial evidence justifying an inference that Romania's omissions constituted a failure to exercise due diligence. In addition, and going beyond the reasoning in *Tecmed v Mexico*, the absence included a lack of evidence as to how the omissions, if wrongful, were legally causative of the damage.[385]

The next case in this category is *Parkerings v Lithuania*. The treaty in issue required States to "accord [investments] ... protection". The parties treated it as a "full protection and security" obligation, and the tribunal held that the variation of language did not vary the level of protection required.[386] The claimant's subsidiary signed a contract with the Municipality of Vilnius to build and operate parking lots. Subsequent to a change in federal law, which stated that municipalities could not enter into such contracts, the Municipality tried to renegotiate the contract and, when negotiations failed, it terminated the contract on the basis of alleged breaches by the claimant's subsidiary. During this

[382] *Noble Ventures, Inc. v Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, [161].

[383] *Noble Ventures, Inc. v Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, [163].

[384] *Noble Ventures, Inc. v Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, [166].

[385] *Parkerings-Compagniet AS v Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, [354].

[386] *Parkerings-Compagniet AS v Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, [354].

process, private individuals damaged parking meters which had been installed by the claimant's subsidiary. Lithuanian police investigated those incidents, but did not identify or charge any individuals.

The alleged breach of the obligation was twofold: that the State had failed to accord protection from the conduct of the Municipality, and that the State had failed to protect the claimant's property from damage.[387] The former is discussed in Section 3(2)(c) below. As to the latter, the tribunal held that Lithuania's failure to prevent the vandalism did not breach the obligation. The tribunal found that damage by State or non-State actors can give rise to a breach if there is a "failure of the State to prevent the damage, to restore the previous situation or to punish the author of the injury".[388] Noting that the obligation did not create strict liability,[389] the tribunal concluded that the claimant had not shown that the "vandalism would have been prevented if the authorities had acted differently".[390] That the police investigations did not identify the culprits was not in itself a breach of the obligation.[391]

As in *Tecmed v Mexico* and *Noble Ventures v Romania*, the tribunal in *Parkerings v Lithuania* focused on the absence of sufficient evidence of a breach of the obligation. The fact of the damage was not contested. The absence of proof therefore related to the lack of any legally causative connection between the State's conduct and the damage. The result was that the claimant was unable to identify any counterfactual in which Lithuania's failures would have prevented the damage, and the claim was thus dismissed.

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[387] *Parkerings-Compagniet AS v Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, [348].

[388] *Parkerings-Compagniet AS v Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, [355].

[389] *Parkerings-Compagniet AS v Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, [357].

[390] *Parkerings-Compagniet AS v Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, [356].

[391] *Parkerings-Compagniet AS v Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, [357].

Rumeli v Kazakhstan was the next case in which damage by non-State actors founded a claim for breach of the obligation. The applicable treaty required that investments "shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law". Pursuant to a privatisation contract, the claimant established a local business in Kazakh telecommunications, of its shares in which it claimed it was illegally deprived by Kazakh officials (in their capacity as staff of the local partner which held the remaining shares) and by Kazakh courts. The claimants also alleged that, during this dispute, they were physically prevented by a privately-hired security team from entering their offices.

The tribunal held that the obligation required due diligence in protecting investments from physical harm, and not from the State's regulatory conduct or the domestic judicature's actions.[392] The tribunal held that the only physical damage suffered was inflicted by the hired security team, which did not take instructions from the State or from any entity the conduct of which was attributable to the State.[393] The tribunal held that evidence had not established that State officials were present at, and were thus aware of, the altercation with the security team.[394] The due diligence standard did not oblige the State to intervene in the altercation in this case, and the tribunal held that, "given the factual circumstances of the case, there was no … violation" of the obligation.[395]

[392] *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, [662], [668].

[393] *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, [669]-[670].

[394] *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, [670].

[395] *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, [669].

Like several preceding cases, the tribunal in *Rumeli v Kazakhstan* rejected the allegation of breach of the obligation on the basis that the claimant had not proved a counterfactual by which duly diligent action on the part of Kazakhstan would have prevented the damage. The circumstances did not justify an inference that Kazakhstan's omissions amounted to a failure to act with due diligence when such conduct was expected of it.

A reconsideration of the obligation in circumstances of damage inflicted by non-State actors came in the decision of the sole arbitrator in *Pantechniki v Albania*. The applicable treaty stated that "[i]nvestments by investors of either Contracting Party shall enjoy full protection and security in the other Contracting Party". In that case, public riots during a time of severe civil unrest in Albania overran the claimant's road construction project. The claimant's equipment was stolen or destroyed, and it sought compensation under its contract with the Albanian Ministry of Public Works. While that Ministry agreed to pay an assessed sum, the Ministry of Finance subsequently refused to release the sum from the State treasury. The stalemate persisted, and the claimant's local litigation was to no avail.

In deciding the claim for breach of the obligation, the arbitrator engaged in an analysis which had no precedent and, to date, has had no affirmation in case law. Having noted that an objective minimum standard of conduct is appropriate in denial of justice cases[396] – a topic to which he had made a previous scholarly contribution[397] – the arbitrator used a "relativistic standard" when dealing with the full protection and security

[396] *Pantechniki S.A. Contractors & Engineers v Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, [76].

[397] Paulsson, *Denial of Justice in International Law* (CUP, 2005).

obligation.[398] Such a standard was deemed to take into account the "capacity" of the respondent State, at the time of the alleged breach, to forestall the damage.[399] While the arbitrator regarded such a standard as inappropriate in denial of justice claims (because the burden in such cases of abiding by a "minimum requirement is not high in light of the great value placed on the rule of law"[400]), an element of proportionality was appropriate when deciding protection and security claims because they are more "likely to arise in an unpredictable instance of civic disorder which could have readily been controlled by a powerful state but which overwhelms the limited capacities of one which is poor and fragile".[401]

The arbitrator supported this analysis by reference to Arbitrator Huber's statement in *Spanish Zones of Morocco* and a selective reading of O'Connell's analysis of the protection and security obligation under general international law.[402] Ultimately, the arbitrator endorsed a "modified objective standard" as the standard for a breach of the obligation, according to which tribunals must take into account a State's "resources ... [and] level of development and stability" when deciding whether it exercised the diligence expected of it in the circumstances to prevent the damage.[403] Applying this standard, the

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[398] *Pantechniki S.A. Contractors & Engineers v Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, [76]-[77].

[399] *Pantechniki S.A. Contractors & Engineers v Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, [76].

[400] *Pantechniki S.A. Contractors & Engineers v Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, [77].

[401] *Pantechniki S.A. Contractors & Engineers v Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, [77].

[402] *Pantechniki S.A. Contractors & Engineers v Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, [79]-[80].

[403] *Pantechniki S.A. Contractors & Engineers v Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, [81], citing Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer, 2009), 310.

arbitrator found that the "Albanian authorities were powerless in the face of social unrest" – that they were unable to respond rather than unwilling to do so – and that Albania had thus not breached the obligation.[404]

The reasoning in *Pantechniki v Albania* stands alone. Neither before nor since has a tribunal adopted its "modified objective standard". Unlike previous cases rejecting claims of breach of the obligation, the arbitrator did not question the claimant's proof of the damage inflicted by non-State actors, nor did he question that the State's inaction contributed to the occasioning of that damage. Rather, the rejection of the claim was founded entirely on the basis that Albanian authorities were overwhelmed by the public disorder and could not in the circumstances be expected to provide protection and security.

Following this reconsideration of the obligation, the rejection of the full protection and security claim in *GEA v Ukraine* was more orthodox. The applicable treaty provided that investments "shall enjoy full protection and security". The claimant acquired the right to supply a formerly State-owned Ukrainian company with fuel. When the claimant struggled to obtain payment for deliveries, Ukrainian officials allegedly assured it that payments under the supply contract would be made. They were not. The claimant sought to establish the State's responsibility for this non-payment. It also alleged that the State failed to investigate and punish thefts of the claimant's products, failed to punish an individual responsible for shooting the claimant's representative in the kneecap, and failed to prevent or punish the unauthorised signature of a repayment contract by an individual purporting to be the chief executive of the formerly State-owned company.

The tribunal rejected the alleged breach of the obligation without any reference to a "modified objective standard". It held that the claimant's failure to complain to criminal

[404] *Pantechniki S.A. Contractors & Engineers v Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, [82].

authorities regarding the thefts introduced "a fundamental double standard" into its claim that Ukraine was responsible for a failure to investigate and punish those thefts.[405] Combined with evidence that the Vice President, when later informed of the thefts, advised the claimant to make such complaints, the tribunal held that Ukraine had not violated the obligation in this regard.[406] The tribunal also held that Ukraine had not violated the obligation in respect of the shooting of the claimant's representative. It held that the State had investigated the shooting and that, despite its inability to identify the perpetrator, this was sufficient to dismiss the claim.[407] Finally, the tribunal rejected the claim that Ukraine had breached the obligation by failing to prevent the unauthorised signing of the repayment contract on the basis that this was a matter unconnected with the State.[408]

Key to the reasoning in *GEA v Ukraine* was the State's lack of knowledge that it needed to act to prevent the damage. By noting the "double standard" in the claimant's argument regarding the thefts, the tribunal strayed close to establishing State intention as a condition precedent for breach of the obligation. This, as explained in Sections 2(4)(a)(i) and 2(4)(a)(ii) above, is not how responsibility for omissions operates. However, to the extent that the tribunal was highlighting that a State's knowledge of the need to act is an indicator of the wrongfulness of the impugned omission, it was correct. Furthermore, the tribunal's ruling that Ukraine did not breach the obligation when it investigated a crime, but was unable to identify and punish the culprit, confirms that the obligation entails a duty

[405] *GEA Group Aktiengesellschaft v Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011, [247].

[406] *GEA Group Aktiengesellschaft v Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011, [248]-[249].

[407] *GEA Group Aktiengesellschaft v Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011, [253]-[254].

[408] *GEA Group Aktiengesellschaft v Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011, [265].

of investigation or punishment. This ruling, commensurate with the status of the obligation as one of conduct rather than result, is correct.

The next case in this category is *Toto v Lebanon*. The treaty in that case provided that "investments ... shall enjoy full protection and security". The claimant signed a contract with the State for the construction of a highway from Beirut to Syria. The project was delayed, and the claimant sought additional compensation to cover extra-contractual works, including costs associated with the intrusion of Syrian troops into the worksite and the resistance by local communities to the expropriation of land needed for the construction of the highway.

The tribunal held that there was a strong overlap between the obligations in the treaty to afford protection and security and to refrain from impairing the investment by unreasonable and discriminatory measures. The tribunal stated that "the finding that a claim is not covered by [the latter] will also entail that is not covered by [the former]."[409] The tribunal then held that Lebanon's failure to remove the Syrian troops from the worksite did not breach the latter obligation,[410] and did not elaborate on whether that failure breached the former.[411] On the obstruction by the local communities, the tribunal noted that the full protection and security obligation did not create strict liability, and held that:

> "In the present case, the temporary obstructions of some expropriated owners did not amount to an impairment which affected the physical integrity of the investment. Moreover, [the claimant] did not demonstrate that Lebanon could have taken

[409] *Toto Costruzioni Generali S.p.A. v Lebanon*, ICSID Case No. ARB/07/12, Award, 7 June 2012, [171].

[410] *Toto Costruzioni Generali S.p.A. v Lebanon*, ICSID Case No. ARB/07/12, Award, 7 June 2012, [200].

[411] The claimant did not press this submission in the case: *Toto Costruzioni Generali S.p.A. v Lebanon*, ICSID Case No. ARB/07/12, Award, 7 June 2012, [171].

> preventative or remedial action that it failed to take, and that it acted negligently in relation to the obstructions."[412]

This analysis recalls the reasoning in earlier decisions such as *Tecmed v Mexico*, *Noble Ventures v Romania* and *Parkerings v Lithuania*. The tribunal accepted that the obstructions occurred, but indicated that no legally causative connection between the State's omissions and these obstructions had been shown. Evidence of circumstances justifying an inference that Lebanon's omissions amounted to a lack of the duly diligent conduct expected of it was not supplied. As a result, the claimant could not identify a counterfactual in which Lebanon's conduct would have prevented the damage. Its arguments were rejected.

The next case considering the obligation in the context of damage inflicted by non-State actors is *Railroad Development v Guatemala*. The applicable treaty requires States to "accord treatment in accordance with customary international law, including fair and equitable treatment and full protection and security". The claimant invoked the obligation in respect of obstruction by squatters of a right of way it had obtained. The tribunal ultimately declined to decide the issue, but it opined that, under the treaty's terms, the obligation entitled the claimant to protection no greater than that granted by the international minimum standard.[413]

The penultimate case in this category is *Karmer v Georgia*. The applicable treaty provided that the State "shall accord to ... investments full physical protection and security". The claimant signed a contract with Adjara, a semi-autonomous region in Georgia, to construct a highway and renovate and operate a hotel. After the Rose

[412] *Toto Costruzioni Generali S.p.A. v Lebanon*, ICSID Case No. ARB/07/12, Award, 7 June 2012, [227].

[413] *Railroad Development Corporation v Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012, [238].

Revolution in Georgia, unknown individuals assaulted and robbed the claimant's staff, interfered with its worksite and damaged its equipment.

The tribunal held that there was no breach of the obligation. The tribunal noted that the obligation in the treaty was limited to physical protection only, and that it imposed a standard of due diligence.[414] The tribunal held that Georgia had not breached the obligation because, while there was "no doubt that, in the context of a revolution, incidents of violence will occur, ... not all such incidents will be so serious or widespread as to result in a treaty breach."[415] The tribunal distinguished the seriousness of the presently alleged damage from the damage alleged in *AAPL v Sri Lanka* and *Wena Hotels v Egypt*, before concluding that "[i]n the present dispute, there is no evidence that the State either instigated or had prior knowledge of similar events or that State officials were involved."[416]

As in several preceding cases rejecting claims of breach of the obligation, the tribunal in *Karmer v Georgia* regarded insufficiency of evidence as a key reason to dismiss the claim in this case. The claimant was unable to show a causal connection between the omissions of the State and the damage, and was unable to establish a counterfactual in which alternative conduct by the State would have prevented the damage. In rejecting the claim, the tribunal emphasised that a lack of knowledge of the impending events which would cause the damage militated against the existence of a breach. In addition, the tribunal suggested that the acts of the perpetrator of the damage needed to cross a threshold

[414] *Karmer Marble Tourism Construction Industry and Commerce Limited Liability Company v Georgia*, ICSID Case No. ARB/08/19, Award, 9 August 2012, [290], [292].

[415] *Karmer Marble Tourism Construction Industry and Commerce Limited Liability Company v Georgia*, ICSID Case No. ARB/08/19, Award, 9 August 2012, [291].

[416] *Karmer Marble Tourism Construction Industry and Commerce Limited Liability Company v Georgia*, ICSID Case No. ARB/08/19, Award, 9 August 2012, [291].

of "seriousness" before a State could breach the obligation by not affording protection from those acts. While the infliction of trifling injuries by non-State actors would no doubt hinder an argument that a State has not been duly diligent in affording protection from such injuries, imposing a general threshold of seriousness, even if only in circumstances of "revolution", is inappropriate. This is because the obligation applies in the circumstances of the case, in which minor injuries may have significant consequences, the prevention of which falls within the scope of the duly diligent protection which the State must provide. It is also because such a threshold sits uneasily with the principle that the obligation contains a duty to investigate and punish, the performance of which is not circumscribed by an assessment of whether a criminal act is serious or not.

The final case in this category is *von Pezold v Zimbabwe*. The applicable treaties both provided that investments "shall enjoy full protection and security". The case concerned the occupation of private land by non-State actors described as "settlers", in a context where the State had instituted land ownership policies less favourable to foreigners (such as the claimant landowners) and more favourable to the domestic ethnic majority (of which the "settlers" were a part).

The tribunal held that the State had breached the obligation. It noted that the obligation was one of due diligence, and recorded its view that it pertained to protections from physical damage.[417] The failure of the State to prevent or terminate the occupation of the land by the settlers, or to respond to reported acts of violence, constituted a failure to take "all reasonable measures" to forestall the damage.[418] In a finding that recalled but did

[417] *Bernhard von Pezold and Others v Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, [596].

[418] *Bernhard von Pezold and Others v Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, [596]-[597]. The case was conjoined with another arbitration, the Award in which is not public: see *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v Republic of Zimbabwe*, ICSID Case No. ARB/10/25.

not take a view on the correctness of the reasoning in *Pantechniki v Albania*, the tribunal held that the State's "defences that the police were overwhelmed, or that intervention would have required disproportional force, were also unconvincing".[419]

The sparseness of the exposition of principles in *von Pezold v Zimbabwe* means that it contributes little to the elucidation of the means by which the obligation can be breached. The impression conveyed by the tribunal is that the alleged breach was an auxiliary part of the claim, and was obviously established given the stark disregard by the State of any efforts to prevent or terminate the damage done to the claimant's investment by the non-State actors.

The foregoing cases highlight that numerous aspects of the responsibility of States for omissions are evident in the reasoning of tribunals deciding claims that a State has breached the full protection and security obligation by failing to protect investments from damage inflicted by non-State actors. These aspects are identified, and their treatment analysed, in Section 3(2)(a)(iii) below.

3(2)(a)(ii) Cases concerning damage done by State actors

The next category of cases regarding the obligation to provide protection and security from physical damage concerns damage inflicted by State actors.[420] Several cases have considered this situation.

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[419] *Bernhard von Pezold and Others v Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, [598].

[420] This category of breach of the obligation is discussed in Schreuer, "Full Protection and Security" (2010) 1(2) *Journal of International Dispute Settlement* 353, 367-368; Schreuer, "The Protection of Investments in Armed Conflicts" (2012) 9(3) *Transnational Dispute Management* 1, 4-6; Malik, "The Full Protection and Security Standard Comes of Age: Yet another challenge for states in investment treaty arbitration?", International Institute for Sustainable Development, *Best Practices Series*, November 2011, 5; Moss, "Full Protection and Security" in Reinisch (ed.), *Standards of Investment Protection* (OUP, 2008) 131, 138-142; Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer, 2009), 309-310.

The first was *AMT v Zaire*. The applicable treaty provided that investments "shall at all times ... enjoy protection and security in the territory of the other Party", which "shall be in accordance with applicable national laws, and may not be less than that recognized by international law." Members of Zaire's armed forces twice looted the claimant's investment, which was a factory for the production of batteries located near the barracks where the looters had been stationed. Zaire acknowledged that it was aware that the factory had been the target of looting, which had also been prevalent elsewhere in the country.

The tribunal held that Zaire had breached the obligation. It held that the obligation was one of vigilance, requiring States to "take all measures necessary to ensure the full enjoyment of protection and security".[421] The tribunal stated that there was no need to decide whether the obligation was one of conduct or result because, on either construction, Zaire's complete lack of "precaution to protect" the investment breached the obligation.[422] It mattered not, as Zaire contended, that the treatment given to the claimant's investment was no less favourable than that extended to Zairian nationals or nationals of other States.[423] The failure to take any measure to prevent the damage breached the obligation.

AMT v Zaire is an early confirmation that the full protection and security obligation can be breached in circumstances where physical damage is inflicted by State actors. Importantly, the tribunal based Zaire's responsibility on its failure to act, rather than on the acts of its armed forces which were attributable to it. The obligation was a positive one,

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[421] *American Manufacturing & Trading, Inc. v Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997, [6.05].

[422] *American Manufacturing & Trading, Inc. v Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997, [6.07].

[423] *American Manufacturing & Trading, Inc. v Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997, [6.09]-[6.10].

which Zaire breached by its omissions. The tribunal did not discuss the extent of Zaire's knowledge of the circumstances requiring action, likely in part because Zaire acknowledged it was aware of the looting and in part because knowledge could be presumed as it was Zairian officials who perpetrated the looting. Nor did the tribunal discuss the causal link between the damage and the omissions. The complete lack of action to prevent the damage, when the State knew of the need to act, was sufficient to show that the omissions were legally causative of the damage. The counterfactual which the claimant had shown in this instance was that, but for those omissions, the damage would have been less likely to occur.

Unlike the early discussion in *AAPL v Sri Lanka* of the obligation in the context of damage by non-State actors, the decision in *AMT v Zaire* did not expatiate on aspects of the responsibility for omissions highlighted in Chapter Two above. However, in its finding of Zaire's breach of the obligation, the tribunal implicitly relied on the State's knowledge of the need to act, its capacity to act, and the causal link between its failure to act and the damage.

The next case in this category is *Wena Hotels v Egypt*.[424] The treaty at issue stated that investments "shall enjoy full protection and security". The claimant leased two hotels in Luxor, Egypt. Its investment was damaged when the lessor, a State-owned company, seized the hotels. Damage was done to the hotels and the claimant's staff as a result of violence and force used by the lessor's employees during the seizure.

[424] Schreuer categorises this case as one in which non-State actors perpetrated the damage. That categorisation is not followed here because the perpetrators of the damage were employees of a State-owned company and, while nice question of attribution might arise in such circumstances, the facts of this case indicate that it is better treated as one in which State actors inflicted the damage. See Schreuer, "Full Protection and Security" (2010) 1(2) *Journal of International Dispute Settlement* 353, 365-367; Schreuer, "The Protection of Investments in Armed Conflicts" (2012) 9(3) *Transnational Dispute Management* 1, 6-8.

The tribunal found that Egypt had breached the obligation. After confirming that the obligation was one of conduct rather than result,[425] the tribunal emphasised that the relevant Egyptian ministry had repeatedly been made aware of the intention of the lessor to seize the hotels and, "despite these warnings, took no action to protect Wena's investment".[426] The tribunal accepted that the Egyptian Minister with responsibility for the State-owned company had the capacity to "coordinate" with the company about the need for protection.[427] In addition, the tribunal held that Egypt failed to take sufficient steps to investigate the seizures, punish the perpetrators and restore the hotels to the claimant.[428] The tribunal held that Egypt had therefore breached the obligation because it failed both to exercise due diligence to prevent the damage and to investigate and punish the perpetrators of that damage.

In its reasoning, the tribunal in *Wena Hotels v Egypt* considered aspects of the responsibility for omissions discussed in Chapter Two above. That the relevant Egyptian ministry had knowledge of the intended seizures, and had capacity to act in relation to them, was central to the tribunal's decision that Egypt's failure to prevent or redress the seizures constituted a wrongful omission. As in *AMT v Zaire*, the basis of Egypt's responsibility was its failure to act – it was not that the acts inflicting the damage were potentially attributable to it under international law. In this context, the tribunal, although it did not expressly discuss causation, in effect accepted the existence of a causal connection between the State's omissions and the damage. The implicitly accepted

[425] *Wena Hotels Ltd v Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, [84].

[426] *Wena Hotels Ltd v Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, [84]-[88].

[427] *Wena Hotels Ltd v Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, [87].

[428] *Wena Hotels Ltd v Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, [89]-[90], [94].

counterfactual was that Egypt's failures to act made the occasioning of the damage more likely.

Eureko v Poland is the next case in this category. The treaty articulated an obligation of fair and equitable treatment, before adding that "[m]ore particularly, each Contracting Party shall accord to such investments full protection and security". The claimant was one of two entities which acquired, through a privatisation process, an interest in a formerly State-owned insurance company. The claimant alleged that its representatives were harassed by Polish authorities and that the State Treasury failed to make a necessary share transfer to it.

The tribunal held that Poland had not breached the obligation. The impugned actions of the State actors were undoubtedly attributable to Poland.[429] However, without recounting any details of the alleged harassment, the tribunal held that it was not satisfied that they breached the obligation, even if they were "disturbing and appear to come close to the line of Treaty breach."[430] This unhelpful explanation was compounded by the tribunal's statement that:

> "in any event, there is no clear evidence ... that the RoP was the author or instigator of the actions in question. If such actions were to be repeated and sustained, it may be that the responsibility of Government of Poland would be incurred by a failure to prevent them."[431]

Putting aside the incautious phraseology that suggests a government rather than a State bears responsibility under international law, this statement suffers from at least two difficulties. First, the tribunal had previously confirmed that the harassment was done by

[429] *Eureko B.V. v Poland*, UNCITRAL, Partial Award, 19 August 2005, [134].

[430] *Eureko B.V. v Poland*, UNCITRAL, Partial Award, 19 August 2005, [236].

[431] *Eureko B.V. v Poland*, UNCITRAL, Partial Award, 19 August 2005, [237].

Polish authorities,[432] but then states that there was "no clear evidence" that the harassment was the result of the State's authorship or instigation. The suggestion that attribution of conduct may be vitiated by an absence of State "authorship or instigation" is plainly wrong under the law of responsibility. Conduct may be attributable to the State even when it is not *intra vires*,[433] and responsibility may ensue even when the State takes no action whatsoever.[434] Secondly, the suggestion that a breach of the full protection and security obligation can be proven either on the basis of positive conduct done at the State's authorship or instigation, or on the basis of inaction in the face of "repeated or sustained" actions by non-State actors, is an unfortunate conflation. As *Wena Hotels v Egypt* clarified, responsibility for breach of the obligation is predicated on a failure to act with due diligence. If a State authors or instigates conduct which causes damage, then that will constitute persuasive evidence that it has failed to act with due diligence. Similarly, if a State takes no steps, in circumstances where it should have acted, to prevent or terminate conduct of non-State actors causing damage, then, irrespective of whether or not that conduct is "repeated and sustained", the State will have failed to act with due diligence. These are not, as the tribunal suggests, alternative categories of breach of the obligation. Rather, they are two sets of circumstances from which a tribunal can draw the inference that the State failed to act as it was expected to act. They are evidence of the breach, rather than the breach itself. The correct basis on which the claimant's allegation in *Eureko v Poland* ought to have been rejected, therefore, is that the evidence was not sufficient to justify the inference that the State failed to act with due diligence, and that no

[432] *Eureko B.V. v Poland*, UNCITRAL, Partial Award, 19 August 2005, [227].

[433] See Section 2(3) above on the breach of obligations by omission.

[434] See Section 3(2)(a)(i) above on the breach of the full protection and security obligation by State inaction in the face of damage done by non-State actors.

counterfactual existed whereby the damage would have been less likely to occur had the State acted with such diligence.

Saluka v Czech Republic is the next case in this category. The treaty in issue articulated a fair and equitable treatment obligation before adding that "more particularly ... each Contracting Party shall accord to investments of investors of the other Contracting Party full protection and security". A Czech court suspended trading in a bank in which the claimant held shares. Appeals against this suspension failed. The Czech Republic enacted legislation so that shareholders could not appeal suspension orders, and its Public Investigator's Office prohibited the transfer of the claimant's shareholding. Czech police also searched the offices and seized the documents of a company related to, and treated by the parties during the case as indistinguishable from, the claimant.

The tribunal rejected the claim that the Czech Republic had breached the obligation.[435] On the physical damage sustained during the police search and seizure operation, the tribunal held that the claimant's (successful) claim in Czech courts, and its receipt there of the relief it sought, meant that it could "no longer be aggrieved" on this point.[436]

The tribunal's reasoning in *Saluka v Czech Republic*, though brief, highlighted an aspect of the obligation not commonly encountered in cases alleging damage by State actors. By giving through its courts relief for the wrongful conduct of its police, the Czech Republic fulfilled the obligation not by preventing the damage but rather by providing redress for it. As discussed in Section 3(2)(b) below, the making available of a legal system in which the investor can assert its legal rights is a means by which a State can

[435] *Saluka Investments BV v Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, [496].

[436] *Saluka Investments BV v Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, [495]-[496].

comply with the obligation in certain circumstances. It is on that basis, rather than on its diligence in preventing the damage, that the Czech Republic discharged its obligation in this case.

Siag v Egypt was the next case to consider breach of the obligation in the context of damage inflicted by State actors. The treaty provided that the "[i]nvestment ... shall enjoy full protection". The claimants owned property in Egypt on which they were to develop tourist facilities. After difficulties progressing the project, the Egyptian Minister for Tourism issued a decree expropriating the property. The claimants challenged the expropriation in Egyptian courts and sought police protection from the impending seizure. Despite court decisions in the claimants' favour, the police seized the property. The claimants' attempts to repossess the property pursuant to the court order were resisted by security forces enlisted by an agency of the Ministry of Tourism. Further court decisions in the claimants' favour were ignored, as first the President issued a decree expropriating the property and then the Prime Minister issued a decree confirming the expropriation and assigning the property to another company. Additional applications by the claimants to Egyptian courts, though successful, did not result in restoration of the property.

The tribunal held that Egypt had breached the obligation. Noting that the obligation was one of conduct, the tribunal relied on evidence of Egypt's foreknowledge of the seizure of the property when finding it in breach of the obligation.[437] The tribunal also emphasised that the investment had not been restored to the claimants,[438] before concluding that:

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[437] *Waguih Elie George Siag and Clorinda Vecchi v Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, [446].

[438] *Waguih Elie George Siag and Clorinda Vecchi v Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, [447].

> "the conduct of Egypt fell well below the standard of protection that the Claimants could reasonably have expected, both in allowing the expropriation to occur and in subsequently failing to take steps to return the investment to [the] Claimants following repeated rulings of Egypt's own courts that the expropriation was illegal."[439]

Unlike the problematic reasoning in *Eureko v Poland*, the reasoning in *Siag v Egypt* is cogent. The finding of responsibility is based on Egypt's failure to act. Egypt's knowledge of the impending damage and the need to act in order to forestall it were explicitly treated as key evidence of the breach. The tribunal used an objective understanding of the standard of conduct required of Egypt, namely, diligence which accorded with the reasonable expectations of an investor. The circumstances in which the damage occurred justified the inference that Egypt's omissions were legally causative of that damage. The counterfactual that alternative action by Egypt would have made the damage less likely to occur was clear, particularly given the foreknowledge of the damage possessed by Egyptian police and the capacity of Egyptian authorities to have refrained from facilitating, and instead to have forestalled, the seizure of the property. Each of these elements of the reasoning in *Siag v Egypt* applies with orthodoxy the central aspects of the law of responsibility for omissions.

The decision in *Al Bahloul v Tajikistan* was rendered shortly after that in *Siag v Egypt*. The applicable treaty was the Energy Treaty Charter, which provided that "investments shall … enjoy the most constant protection and security". The claimant's company entered into a joint venture with the Tajik State Committee relating to oil and gas exploration and production. Soon after exploration had begun, difficulties hindered the project, including the lack of relevant licences to carry out work. Exploration ceased. The

[439] *Waguih Elie George Siag and Clorinda Vecchi v Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, [448].

Tajik directors on the joint venture insisted that its shareholding be restructured to reduce the claimant's company's share because it had not paid in sufficient capital. The claimant alleged that one of the Tajik directors told one its representatives that his safety could not be assured unless he agreed to the restructuring, and that Tajik security forces demanded from the claimant payment of debts which the joint venture's predecessor owed. Ultimately, the restructuring of shareholdings was approved by a Tajik court, and subsequent litigation did not change this position.

The tribunal held that Tajikistan had not breached the obligation. On the alleged threats and demands made by the Tajik director and security forces, the tribunal stated that there was "a lack of substantiating evidence to support ... [the] bare allegations". Without elaboration, it rejected these claims.[440] The absence of evidence thus obviated any need for the tribunal to consider the contested "arbitrability" of the claims against the State Committee pursuant to the regulation of State enterprises under Article 22 of the Energy Charter Treaty,[441] even though the conduct of the Committee was undoubtedly attributable to the State.[442]

Similar to several cases discussed in Section 3(2)(a)(i) above, the tribunal in *Al Bahloul v Tajikistan* emphasised the insufficiency of evidence when finding that the claimants had not proved a breach of the obligation. Beyond making "bare allegations", the claimant failed to establish a causal connection between the damage and the impugned omissions. It also failed to establish a counterfactual in which alternative conduct by

[440] *Mohammad Ammar Al-Bahloul v Tajikistan*, SCC, Partial Award on Jurisdiction and Liability, 2 September 2009, [244]-[245].

[441] *Mohammad Ammar Al-Bahloul v Tajikistan*, SCC, Partial Award on Jurisdiction and Liability, 2 September 2009, [173]-[174].

[442] *Mohammad Ammar Al-Bahloul v Tajikistan*, SCC, Partial Award on Jurisdiction and Liability, 2 September 2009, [169].

Tajikistan would have made the damage less likely to occur. In the absence of this proof, the tribunal's rejection of the allegations concerning threats and demands for money was inevitable.

The next case in this category is *SAUR v Argentina*. The applicable treaty provided "[l]es investissements ... bénéficient ... d'une protection et d'une sécurité pleines et entières, en application du principe de traitement juste et équitable". The claimant contracted with a provincial government of Argentina to acquire a minority shareholding in a company owned by the province, in return for which the claimant provided technical and operational services for the company's production of drinking water, sanitation and sewerage. The claimant alleged that the provincial government then engaged in conduct, contrary to the concession contract and Argentinean law, which limited the rates which the claimant could charge. This ultimately led to termination of the contract and possession of the company being taken by the province. The taking of possession was done in the presence of Argentinean police, who the claimant alleged acted violently.

The tribunal rejected the allegation that the State had breached the obligation. It held that a police presence was entirely proper in the conduct of such a "transition", and that it did not appear that they had acted violently.[443] The tribunal added that allegations that the police had hindered communication between the claimant and its staff, and had confiscated property of the staff, had not been proven, and would not in any event have been "serious enough" to constitute breaches of the obligation.[444]

[443] *SAUR International S.A. v Argentina*, ICSID Case No. ARB/04/4, Décision sur la Compétence et sur la Responsabilité, 6 June 2012, [510].

[444] *SAUR International S.A. v Argentina*, ICSID Case No. ARB/04/4, Décision sur la Compétence et sur la Responsabilité, 6 June 2012, [511].

As in *Al Bahloul v Tajikistan*, the decision in *SAUR v Argentina* turned on the insufficiency of evidence proving a breach of the obligation. In part, the tribunal rejected the existence of damage – in particular, the alleged police violence during the transition. On the hindrance of communication and confiscation of property, the claimant was unable to supply sufficient evidence to prove a causal link between that damage and Argentina's omissions, or a counterfactual in which different conduct on the part of Argentina would have lessened the likelihood of the damage. While the tribunal's aside that any such conduct by the police would not have been "serious enough" to breach the obligation encounters the same difficulty evident in *Karmer v Georgia*, the distortion of doctrine is arguably less in this case given that the statement is made alongside the more orthodox rejection of the allegations on the basis of a lack of evidence.

Ulysseas v Ecuador is the next case in this category. The applicable treaty stated that investments "shall enjoy full protection and security". Through Ecuador's privatisation of its electricity sector, the claimant acquired rights to generate and supply electricity, the exercise of which was subject to detailed regulations on matters such as what price could be charged and how it could be collected. To complete the project, the claimant imported and installed two power barges. However, worsening economic conditions and failed attempts to agree alternative arrangements meant that the project showed no prospects of profit. The claimant thus terminated its contracts, citing *force majeure*. The relevant Ecuadorian agency fined the claimant, took control of one barge, and appointed a third party "delegate" to operate it pursuant to the terms of the contract initially extended to the claimant. After some time, control of the barge was restored to the claimant, but only, it alleged, after serious damage had been done to the engines.

The tribunal dismissed the claim that Ecuador had breached the obligation. Rejecting the proposition that breach of the obligation was automatically established upon proof of a breach of the fair and equitable treatment obligation, the tribunal held that the two obligations were distinct.[445] On the former, the tribunal held that it was:

> "an obligation of vigilance and care by the State under international law comprising a duty of due diligence for the prevention of wrongful injuries inflicted by third parties to persons or property of aliens in its territory or, if not successful, for the repression and punishment of such injuries."[446]

The tribunal added that any damage to the barge was by the third party, operating the barge pursuant to the licence contract, under which any claim for damage should be settled.[447]

The tribunal's reasoning is problematic. The above summary of principle is accurate, except insofar as it suggests that the obligation does not require due diligence in the prevention of damage by State actors. More troublesome, however, is the conclusion that the claimant's treaty claim for damage to its barge was somehow ousted by its purported ability to claim under the licence contract. In the absence of a waiver of treaty rights in the licence contract, an exhaustion of local remedies requirement or an applicable fork in the road provision – to none of which the tribunal referred – the claimant's right to invoke the full protection and security obligation subsists. The tribunal's failure to apply the principles that determine whether a breach of the obligation has occurred is unexplained. Because of this failure, *Ulysseas v Ecuador* stands as a decision in which it is impossible to ascertain why, or in fact whether, Ecuador avoided breaching the obligation.

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[445] *Ulysseas, Inc. v Ecuador*, UNCITRAL, Final Award, 12 June 2012, [272].

[446] *Ulysseas, Inc. v Ecuador*, UNCITRAL, Final Award, 12 June 2012, [272].

[447] *Ulysseas, Inc. v Ecuador*, UNCITRAL, Final Award, 12 June 2012, [273].

The penultimate case in this category is *Tulip v Turkey*. The applicable treaty stated that the host State "shall accord to … investments full physical security and protection". The case relevantly related to the actions of an entity the conduct of which claimant said was attributable to the State (as the tribunal assumed arguendo for in relation to the alleged breach of the obligation[448]), and particularly the forcible repossession of a construction site on which the investment was located after the termination of a contract that gave the investor rights to that land.

The tribunal held that this conduct did not breach the obligation. It stated the basic precept that the obligation was not one of strict liability,[449] but then went on to dismiss the claim on two bases. One of those bases was that the force used by the entity, including through the State's police force and other armed security personnel, did not "rise to the level of generalised violence",[450] with the implicit result that any physical damage caused by the force was not sufficient to establish factual causality. The tribunal's finding that "there is no evidence that the Turkish police violated the FPS clause by either assisting [the entity] through use of force or being inactive"[451] thus effectively held that there was no basis on which the tribunal could draw the positive inference that, but for the State's failure to exert some additional or different control over its police forces, the damage would have been less likely to occur. The other basis on which the claim was dismissed, however, was less in conformity with doctrine. The tribunal held that:

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[448] *Tulip Real Estate and Development Netherlands B.V. v Republic of Turkey*, ICSID Case No. ARB/11/28, Award, 10 March 2014, [433].

[449] *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, 10 March 2014, [430].

[450] *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, 10 March 2014, [434].

[451] *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, 10 March 2014, [435].

> "the Tribunal considers it relevant that [the entity] came to the site in the belief that, having terminated the Contract, it could exercise its contractual rights to repossess the site in circumstances where it was the owner of the land. While [the entity] may have been mistaken, there is no indication that it acted with pre-determined intention to seize the site illegally and through organised violent action.
>
> There is, therefore, no basis on which to conclude that the State … planned to engage in an unlawful seizure of land belonging to a foreign investor or, alternatively, that State organs failed to exercise due diligence and to prevent the planned unlawful action by a private party"[452]

The notion that a subjective belief by a State could be relevant to determining whether it had violated a positive obligation is unorthodox. It strays close to reintroducing a requirement of fault for the violation of a positive obligation, despite any such requirement having long been excluded from the doctrine of State responsibility.[453] To the extent that this tribunal did rely on the belief of the State in its determination of the claim, that would properly be understood as an observational basis on which to doubt the existence of a breach rather than a legal one.

The final case in this category is *OI European Group v Venezuela*. The applicable treaty stated that the host State "shall accord to … investments full physical security and protection". The case related to a direct expropriation by Presidential Decree of two glass container manufacturing plants that comprised virtually the entire business of the Owens-

[452] *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, 10 March 2014, [432]-[433].

[453] See Section 2(4)(ii). See also: Amerasinghe, *State Responsibility for Injuries to Aliens* (Clarendon, 1967), 281-282; Schwarzenberger, *International Law* (3rd ed., Stevens, 1957) vol. II, 632-641; Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (CUP, 1953), 218-232; Starke, "Imputability in International Delinquencies" (1938) *British Yearbook of International Law* 115; Anzilotti, *Teoria generale della responsabilità dello stato nel diritto internazionale* (Lumachi, 1902) 14, 172-173; García Amador, *The Changing Law of International Claims* (1984) 115-118; Bedjaoui, "Responsibility of States, Fault and Strict Liability" in Bernhardt (ed), *Encyclopedia of Public International Law* (Max Planck, 1987) vol. 10, 358, 359; García Amador, *Yearbook of International Law Commission*, 1960, vol. II, UN Doc. A/CN.4/SER.A/1960/Add.l, 62; Brownlie, *System of the Law of Nations, State Responsibility – Part I* (OUP, 1983), 43; Brownlie, *Principles of Public International Law* (7th ed., OUP, 2008), 440; *Asian Agricultural Products Ltd. v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, [77].

Illinois group in Venezuela. To effect its expropriation of the plants, the State ordered that its armed military forces occupy the sites of the two plants, control protests that were occurring there and remain on site for several weeks after the moment of expropriation.[454]

This conduct, the tribunal found, did not breach the obligation. It held first that the duty was limited to providing protection against physical damage, because the language of the applicable treaty referred to "physical security and protection", and was described as a more "particular[]" type of protection than the broader scope of protection encompassed by the fair and equitable treatment obligation.[455] The tribunal then held that the deployment of military forces, far from constituting a breach of the obligation, was in fact characteristic of compliance with it:

> "The mere presence of the [soldiers] during the takeover of the Companies is a component of the precautionary measures a government authority legitimately can and should take to ensure that control is assumed in an orderly manner, precisely for the purpose of guaranteeing [full protection and security] of the investment."[456]

The reasoning in *OI European Group v Venezuela* is one of the more fulsome examples of consideration of the obligation in very recent times. Curiously, however, it does not treat any of the usual diagnostics relating to knowledge, capacity and the counter-factual as core to its determination of the claim. Rather, the claim was dismissed on the basis that no damage in fact occurred. This is not the same as a finding that factual

[454] *OI European Group B.V. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015, [561]-[566].

[455] *OI European Group B.V. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015, [576]. A claim based on identical facts, and including alleged liability for breach of the full protection and security obligation, is advanced in the as yet undecided case of *Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/21.

[456] *OI European Group B.V. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015, [580].

causality was absent, but rather simply a statement that conduct by a State to intervene in events constituting the alleged basis of a breach can in fact be the source of compliance with the obligation. The counter-factual that exists in this situation, though not one relevant to establishing causality, is that, but for the conduct of the State, damage which did not occur would have been more likely to occur. A potentially problematic strand of this reasoning, however, is that it gives traction to the notion, which had greater attention in *Tulip v Turkey*, that the intention of the State is relevant to establishing whether or not it had engaged in a wrongful omission. By intending to ensure the protection of the plants during the takeover, so the tribunal suggests, the State betters its ability to defend the claim of breach of the obligation. This suggestion in the reasoning of *OI European Group v Venezuela* encounters the same difficulties that the similar suggestion in *Tulip v Turkey* encountered. In this case, the tribunal would have better applied doctrine if it had simply held in clearer terms that no damage of any variety existed, with the result that there could be no breach of this positive obligation.[457]

The above cases highlight that numerous aspects of the responsibility of States for omissions are evident in the reasoning of tribunals deciding claims that a State has breached the full protection and security obligation by failing to protect investments from damage inflicted by State actors. These aspects are identified, and their treatment analysed, in Section 3(2)(a)(iii) below.

[457] See Section 2(2)(c) above. On the point that a positive obligation can, as a primary obligation in international law, require the existence of damage, see: Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (OUP, 2002), 84, 203. See also: Crawford, "Revising the Draft Articles on State Responsibility" (1999) 10 *European Journal of International Law* 435, 438; Anzilotti, *Corso di Diritto Internazionale* (3rd ed., Athenaeum, 1928) 443-444 cited in García Amador, *Yearbook of International Law Commission*, 1960, vol. II, UN Doc. A/CN.4/SER.A/1960/Add.l, 62; Starke, "Imputability in International Delinquencies" (1938) *British Yearbook of International Law* 114; Ross, *A Textbook of International Law: General Part* (Longmans, 1947) 257-258; Statement of the Netherlands, *Yearbook of International Law Commission*, 1980, vol. II, UN Doc. A/CN.4/SER.A/1980/Add.l(Part 1), 102.

3(2)(a)(iii) Key aspects of proving a breach of the obligation in relation to physical damage

The foregoing review of jurisprudence indicates that numerous elements of the law of State responsibility for omissions are implicated in claims that foreign investors have suffered physical damage in breach of the full security and protection obligation. While Chapter Four below provides a full discussion and analysis of proving a breach of the obligation by omission, some preliminary observations about the jurisprudence can be made now.

First, the State's knowledge of the circumstances in which the damage occurred is an important element of its responsibility for this type of breach of the obligation. Cases in which a State is held to have breached the obligation by failing to act sufficiently to forestall damage inflicted by non-State actors tend to rely more heavily on the existence of knowledge than cases where the damage was inflicted by State actors. Doubtless this is in part because knowledge is established when conduct of the State's own officials is at issue. Thus in cases such *AAPL v Sri Lanka* and *GEA v Ukraine*, the State's degree of foreknowledge of the circumstances in which the damage occurred was key evidence in the analysis of whether the State had acted duly diligently to forestall damage by non-State actors. Knowledge as evidence can also be identified in *Wena Hotels v Egypt* and *Siag v Egypt*, in which State officials perpetrated the damage. But on the whole, establishing the State's knowledge is less important in such cases, and knowledge is sometimes freely admitted by the State (as in *AMT v Zaire*).

Secondly, the State's capacity to act to forestall the physical damage is also important evidence on which a tribunal can base a finding of a State's responsibility for this category of breach of the obligation. That the State was able to act was relied on as

evidence in this way in *AAPL v Sri Lanka* and *Wena Hotels v Egypt*. However, one decision went further, and treated capacity as pivotal in its finding that the State was "unable" to respond to the circumstances in which the damage occurred (of which it had knowledge) and thus did not breach the obligation. This "modified objective standard" articulated in *Pantechniki v Albania* effectively prioritised the State's capacity to act as the most important – indeed, decisive – evidence in determining the existence of a breach of the obligation.

Thirdly, causation is a major theme in relation to breaches of the obligation by failure to prevent physical damage. It is common for tribunals to hold that, even when damage has been suffered, claimants must still establish that the State's conduct was legally causative of that damage. An inability to establish a causal link appears at times due to the claimant's own contribution to the damage (as in *Noble Ventures v Romania*), and at other times due to the remoteness of the damage from the State's impugned conduct (as in *Parkerings v Lithuania*). The inability of claimants to establish a counterfactual in which the State's alternative conduct would have prevented the damage is especially evident in cases rejecting claims based on damage inflicted by non-State actors. Where State actors have inflicted the damage, the issue of causation is sometimes elided altogether. This reflects a principle that the causing of damage entails in itself a breach of an positive obligation to prevent it, albeit in practical terms tribunals tend to treat causation as established (often implicitly) as a result of the clarity of the evidence of the State's knowledge of the circumstances requiring action and its capacity to take that action (as in *AMT v Zaire*), or of the fact of the damage itself had not been proven to exist (as in *Al Bahloul v Tajikistan* and *SAUR v Argentina*).

Fourthly, the standard applied by tribunals in determining a breach of the obligation is described reasonably consistently throughout the case law. Almost by rote do tribunals, in respect of claims relating to damage by both non-State and State actors, confirm that the standard is one of due diligence. However, beneath this mantra, tribunals are also consistent in regarding the due diligence standard as an objective one, even if their articulation of this position varies. Thus, while applying an objective standard of responsibility, tribunals have articulated the standard by reference to "expectations" of State conduct evident (as in *AAPL v Egypt* and *Siag v Egypt*), to parameters of a democratic State (as in *Tecmed v Mexico*), and to the measures necessary to forestall the damage (as in *AMT v Zaire*). On its own, again, in this regard is *Pantechniki v Albania*. Its application of a "modified objective standard" is a departure from the application of an objective standard, howsoever articulated. Indeed, by being so flexible and so contingent on the capacity of the State, the standard in *Pantechniki v Albania* is in effect no standard at all.[458]

3(2)(b) Duty to provide a means of redress

The full protection and security obligation also requires a host State to provide a means of redress in its domestic legal system which foreign investors can pursue in respect of damage suffered within the State's territory. Section 3(2)(b)(i) reviews the cases dealing with this category of breach. Section 3(2)(b)(ii) concludes by identifying in summary the key aspects of proving a breach of the obligation in relation to a lack of a means of redress.

[458] This point, and others relating to *Pantechniki v Albania*, are discussed in detail in Section 4(2)(b) below.

3(2)(b)(i) Cases concerning a failure to provide a means of redress

While several cases have noted in passing that the obligation can be breached by a failure to provide a means of redress,[459] several cases have specifically considered this situation.[460]

Al Bahloul v Tajikistan, the facts of which are summarised in Section 3(2)(a)(ii) above, considered the point. The issue was whether the approval by Tajik courts of the reduction in the claimant's shareholding breached the obligation. The tribunal, while recalling that the obligation did not create strict liability, held that it "could arguably cover a situation in which there has been a demonstrated miscarriage of justice".[461] Relying on its earlier analysis of an alleged denial of justice by the Tajik courts in which it confirmed that it was not sitting as an appellate court on Tajik law,[462] the tribunal held that it was "unable to find that the Tajik courts could not legitimately reach the substantive law conclusions which they did".[463] The tribunal thus rejected the alleged breach of the obligation on the basis of the courts' decisions.

Although the analysis of the obligation in relation to providing a means of redress in *Al Bahloul v Tajikistan* was not extensive, some bedrock observations about this category

[459] See: *Tecnicas Medioambientales Tecmed SA v Mexico*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, [177]; *Lauder v Czech Republic*, UNCITRAL, Final Award, 3 September 2001, [314]; *Saluka Investments BV v The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, [493], [496]; *Gemplus S.A., SLP S.A. and Gemplus Industrial S.A. de C.V. v Mexico*, ICSID Case No. ARB(AF)/04/3 and ICSID Case No. ARB(AF)/04/4, Award, 16 June 2010, [9-9].

[460] This category of breach of the obligation is discussed in: Schreuer, "Full Protection and Security" (2010) 1(2) *Journal of International Dispute Settlement* 353, 368-372; Moss, "Full Protection and Security" in Reinisch (ed.), *Standards of Investment Protection* (OUP, 2008) 131, 144.

[461] *Mohammad Ammar Al-Bahloul v Tajikistan*, SCC, Partial Award on Jurisdiction and Liability, 2 September 2009, [246].

[462] *Mohammad Ammar Al-Bahloul v Tajikistan*, SCC, Partial Award on Jurisdiction and Liability, 2 September 2009, [237].

[463] *Mohammad Ammar Al-Bahloul v Tajikistan*, SCC, Partial Award on Jurisdiction and Liability, 2 September 2009, [247].

of breach can be made. The first is that few of the aspects of State responsibility for omissions are evident in the tribunal's reasoning. In particular, the State's knowledge and capacity to act were presumed in respect of the determination by its court of a dispute. The tribunal at no point referred to the Tajik courts' knowledge of the case before them, the procedures involved in deciding it or the need to take the necessary decisions. Nor was their capacity to decide the case ever mentioned. A second observation is that breach of the obligation on this basis is established according to an objective analysis. The tribunal does not subjectively reconsider the case before it or act as an appellate court. That fundamental principle was clear in *Al Bahloul v Tajikistan*, pursuant to which "legitimate" conclusions would satisfy the objective standard of review.

Several characteristics of responsibility for this category of breach of the obligation were analysed in later decisions. The next case in this category was *Frontier Petroleum v Czech Republic*. The applicable treaty provided that "[i]nvestments ... shall enjoy full protection and security". The claimant entered into a joint venture with a Czech company to purchase a bankrupt State-owned aircraft manufacturing company. The two companies signed a shareholders' agreement and incorporated a company to hold the acquired assets. Following alleged breaches of the shareholders' agreement by its joint venture partner, the claimant initiated criminal proceedings against members of the boards of the partner and the newly incorporated subsidiary. It also started civil proceedings in respect of other conduct of those two companies, including the eventual bankruptcy of the subsidiary. In an attempt to protect its investment in the subsidiary in the face of the local bankruptcy proceedings, the claimant obtained two favourable arbitral awards in Stockholm. It sought recognition and enforcement of the awards in Czech courts but, with the courts characterising the awards as no more than post-bankruptcy securities, the subsidiary's assets were liquidated.

The tribunal held that the Czech Republic, acting through its judiciary, had not violated the full protection and security obligation. Opining that the formulation of the obligation did "not appear to carry any substantive significance",[464] the tribunal held that it was an obligation of due diligence requiring "the host state ... to take active measures to protect the investment from adverse effects that stem from private parties or from the host state and its organs."[465] The tribunal reviewed jurisprudence on the obligation, noted that some cases had interpreted it as extending beyond the requirement to afford physical protection, and held that the treaty in issue did not equate the obligation with the international minimum standard.[466] Mirroring the latitude which it identified in the case law, the tribunal held that the obligation included a requirement to provide a minimum means of redress. It stated:

> "where the acts of the host state's judiciary are at stake, 'full protection and security' means that the state is under an obligation to make a functioning system of courts and legal remedies available to the investor. On the other hand, not every failure to obtain redress is a violation of the principle of full protection and security. Even a decision that in the eyes of an outside observer, such as an international tribunal, is 'wrong' would not automatically lead to state responsibility as long as the courts have acted *in good faith* and have reached decisions that are *reasonably tenable*. In particular, the fact that protection could have been more effective, procedurally or substantively, does not automatically mean that the full protection and security standard has been violated."[467]

[464] *Frontier Petroleum Services Ltd v Czech Republic*, UNCITRAL, Final Award, 12 November 2010, [260].

[465] *Frontier Petroleum Services Ltd v Czech Republic*, UNCITRAL, Final Award, 12 November 2010, [261], [270].

[466] *Frontier Petroleum Services Ltd v Czech Republic*, UNCITRAL, Final Award, 12 November 2010, [262]-[272].

[467] *Frontier Petroleum Services Ltd v Czech Republic*, UNCITRAL, Final Award, 12 November 2010, [273] (emphasis in original).

Applying this principle, the tribunal concluded that the Czech court's refusal to recognise and enforce the Stockholm awards on public policy grounds concerning the equal treatment of creditors was done in good faith and was a reasonably tenable conclusion.[468]

The decision in *Frontier Petroleum v Czech Republic* was a significant moment in the interpretation of the scope of the obligation. While other cases had stated that "full protection and security" included providing a means of redress,[469] this tribunal articulated the standard expected of a State's judiciary in greater detail than any of its predecessors. The standard requires that a court's decision be in "good faith" and "reasonably tenable" when objectively reviewed by the "outside observer" that is the tribunal. The decision may be "wrong" and less than fully "effective", but can exhibit neither of these (or any other) shortcomings to such an extent that it is no longer objectively reasonably tenable. This minimum standard applies both to the substance of the decision and the procedure by which it is reached.

However, while the endorsement of an objective standard conforms to principle, the tribunal's explanation of when a domestic court falls short of that standard is unclear. The lack of clarity arises from the absence of explanation of the content of "good faith" and "reasonable tenability" requirements. Given the tribunal's view that the treaty standard does not equate to the international minimum standard,[470] the content of these requirements must be autochthonous to the treaty and cannot be defined by reference to customary international law. However, without the tribunal's explanation of the meaning

[468] *Frontier Petroleum Services Ltd v Czech Republic*, UNCITRAL, Final Award, 12 November 2010, [527]-[530].

[469] *Parkerings-Compagniet AS v Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, [360]-[361]; *Mohammad Ammar Al-Bahloul v Tajikistan*, SCC, Partial Award on Jurisdiction and Liability, 2 September 2009, [246].

[470] *Frontier Petroleum Services Ltd v Czech Republic*, UNCITRAL, Final Award, 12 November 2010, [262]-[272].

given to these terms by the treaty, it is difficult to discern what conduct by a domestic court might be deemed as good faith and reasonably tenable. Since the tribunal regards the linguistic formulation of the obligation in the treaty as making no difference to its substance, one suspects that the tribunal has in effect endorsed a "know it when I see it" diagnostic. Such an approach lacks sufficient substance to be useful to future analyses of whether a domestic court decision breaches the obligation.

The conduct of domestic courts was again at issue in *Spyridon v Romania*. The applicable treaty provided that "investments … shall enjoy full protection and security". The claimant alleged that the Romanian Supreme Court violated the obligation when, at the request of the Prosecutor General (who in turn was acting on a request from the State entity defending the litigation), it reopened and vacated a lower court's decision in favour of the claimant's locally incorporated company.

Finding that Romania had not breached the obligation, the tribunal held that the obligation was one of due diligence, and observed that some tribunals had applied the obligation to matters beyond protection from physical damage.[471] The tribunal also held that the Supreme Court had legitimately and transparently applied a vacation provision in Romanian law, and that considerations of *res judicata* and legal certainty did not alter this conclusion.[472]

The reasoning in *Spyridon v Romania* exhibited aspects of the reasoning in *Al Bahloul v Tajikistan*. As in that case, the tribunal did not discuss whether the Romanian courts knew of the case before them, knew of the procedures necessary to resolve it, knew of the need to take the required decision or had the capacity to decide the case.

[471] *Spyridon Roussalis v Romania*, ICSID Case No. ARB/06/1, Award, 7 December 2011, [321]-[322].

[472] *Spyridon Roussalis v Romania*, ICSID Case No. ARB/06/1, Award, 7 December 2011, [359].

Knowledge and capacity, being key aspects of State responsibility for omissions, were presumed to attach to the domestic court. For the tribunal, the fundamental basis of responsibility for failure to provide a means of redress was the objective assessment of the availability of the court's legal conclusions. That the Romanian court's conclusions were "legitimate" was sufficient to establish that there had been no breach of the obligation. That the court's conduct may have breached principles of *res judicata* and legal certainty was not a matter into which the tribunal needed to enquire once the objective standard had been satisfied.

The next case in this category was *Unglaube v Costa Rica*. The applicable treaty provided that "investments ... shall receive full protection and security". The claimants owned property in an area of environmental importance in Costa Rica. They had negotiated an agreement with the State about the ownership of land and the receipt of permits to develop parts of it. In return for permits, the claimant gifted land to the abutting national park. This arrangement persisted without incident for several years, before the Costa Rican Environment Ministry sought to expropriate a part of the land still held by the claimants. When the expropriation attempts were blocked by domestic law, the Ministry and the National Environmental Technical Secretariat issued decrees seeking to freeze development on part of the claimant's land. In response to a challenge to the decrees, Costa Rican courts required that development on the land be halted until an environmental impact study was completed. This in effect froze development on all of the land, as the Technical Secretariat simply took no action vis-à-vis the claimants' development application. The Technical Secretariat's inaction continued even after the environmental impact study was completed and concluded that humans could dwell on the land and develop it appropriately. The claimants alleged that Costa Rica failed to provide legal

redress, failed to provide a climate of legal and commercial certainty and security, and thus breached the obligation.[473]

While accepting that the obligation may require State conduct beyond providing protection from physical damage,[474] the tribunal rejected the claimant's claim. In relation to the alleged lack of legal redress, the tribunal held that the court proceedings were conducted according to Costa Rican law and involved no "impropriety, corruption or discrimination against the Claimants".[475] The tribunal also found that the claimants had recourse to Costa Rican courts, were successful in some applications to them, and could not ask the tribunal to substitute its views on matters of Costa Rican law.[476] This was enough to demonstrate that the obligation had not been breached, and that no causal connection existed between any such breach and the alleged damage.[477]

As in previous cases, the domestic courts' knowledge of the claimant's complaint and their capacity to resolve it were not analysed in *Unglaube v Costa Rica*. Rather, the decisive issue was whether the courts' conclusions were objectively open to them under the applicable law, and in circumstances where the substantive obligation to compensate for the taking was not contested. In this context and unlike previous cases, the tribunal focused on the procedural availability of the courts' conclusions. It did not require the substance of the conclusions to be "legitimate" or "reasonably tenable", as in *Al Bahloul v*

[473] *Marion Unglaube and Reinhard Unglaube v Costa Rica*, ICSID Case No. ARB/08/1 and ICSID Case No. ARB/09/20, Award, 16 May 2012, [97(d)].

[474] *Marion Unglaube and Reinhard Unglaube v Costa Rica*, ICSID Case No. ARB/08/1 and ICSID Case No. ARB/09/20, Award, 16 May 2012, [281].

[475] *Marion Unglaube and Reinhard Unglaube v Costa Rica*, ICSID Case No. ARB/08/1 and ICSID Case No. ARB/09/20, Award, 16 May 2012, [286].

[476] *Marion Unglaube and Reinhard Unglaube v Costa Rica*, ICSID Case No. ARB/08/1 and ICSID Case No. ARB/09/20, Award, 16 May 2012, [253].

[477] *Marion Unglaube and Reinhard Unglaube v Costa Rica*, ICSID Case No. ARB/08/1 and ICSID Case No. ARB/09/20, Award, 16 May 2012, [283], [286].

Tajikistan, *Frontier Petroluem v Czech Republic* and *Spyridon v Romania*. The tribunal instead focused on the lack of impropriety, corruption or discrimination in the courts' procedure.[478] Further, the tribunal also noted a point relevant to State responsibility for omissions which had not previously been discussed in this category of cases. Though in passing, the tribunal confirmed that a causal link must exist between the alleged violation of the obligation and the damage. As in decisions concerning the failure to prevent physical damage, a claimant alleging breach of the obligation by failure to provide a means of redress must still establish a counterfactual in which the damage would not have occurred but for that failure. This statement indicates that, even when a domestic court decision fails to meet the objective standard (say, because it is not reasonably tenable), a claimant will also need to show that such a failure by the courts caused the damage of which it complains. While this is undoubtedly correct as a matter of principle, no decision has yet encountered facts in respect of which this nuance of doctrine has applied.

EDF v Argentina is the final case in this category. The treaty at issue provided that investments "shall enjoy full protection and security ... in application of fair and equitable treatment". The claimants alleged that Argentina had overridden and repudiated rights they possessed under a concession agreement signed with a State entity, and then failed to provide it with "a meaningful opportunity to resolve its contractual claims before fair administrative and judicial bodies".[479] In a brief analysis of this claim, the tribunal rejected it and held that the treaty did not impose on host States "a duty to maintain a

[478] *Marion Unglaube and Reinhard Unglaube v Costa Rica*, ICSID Case No. ARB/08/1 and ICSID Case No. ARB/09/20, Award, 16 May 2012, [253], [286].

[479] *EDF International S.A., SAUR International S.A. and Leon Participaciones Argentinas S.A. v Argentina*, ICSID Case No. ARB/03/23, Award, 11 June 2012, [403].

stable legal and commercial environment, apart from the impact that such an environment may have in connection with fulfilment of other treaty obligations."[480]

The decision in *EDF v Argentina* adds little to the doctrine emerging from this category of cases. It neither endorses nor rejects the use of an objective standard of review when a State allegedly fails to provide a means of redress. It adds no substance to the discussion about the role of knowledge, capacity and causation in this category of responsibility for a State's omissions. Its reasoning on the alleged duty to maintain a stable legal environment is equivocal, confirming that the duty is not expressed in the treaty but leaving open the potential that it may be implicit. Finally, it does not discuss the relationship between the obligation and the fair and equitable treatment obligation, despite the treaty expressing the former as an "application of" the latter.

Unlike cases concerning protection from physical damage, cases in this category do not involve many of the aspects of State responsibility for omissions discussed in Chapter Two above.[481] Rather, the key diagnostic for a breach of the full protection and security obligation through a failure to provide a means of redress is whether the impugned domestic court decision falls below an objective standard of review.

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[480] *EDF International S.A., SAUR International S.A. and Leon Participaciones Argentinas S.A. v Argentina*, ICSID Case No. ARB/03/23, Award, 11 June 2012, [1109].

[481] One case not discussed in this Section is *Levi v Peru*. In that case, the tribunal considered a claim for breach of the obligation, but provided virtually no analysis of the scope of the obligation or the means by which it could be breached. The tribunal accepted that the obligation "has gone from referring to mere physical security and has evolved to include, more generally, the rights of investors". However, having done so, it then embarked on an analysis of whether the claimant had been subjected to a denial of justice at the hands of the State and its courts, and did not discuss further how that discussion constituted a failure to afford full protection and security – indeed, the tribunal ultimately did not make an explicit finding on the issue of whether the State had breached the relevant provision of the applicable treaty. Given this inadequacy of reasoning, this case, though potentially one in which the obligation could be breached by a lack of a means of redress, offers nothing to the doctrine on this obligation. See *Renée Rose Levy de Levi v Republic of Peru*, ICSID Case No. ARB/10/17, Award, 26 February 2014, [406]-[443].

3(2)(b)(ii) Key aspects of proving a breach of the obligation in relation to a lack of a means of redress

In its manner of reliance on aspects of the law of State responsibility for omissions, case law in this category differs from case law concerning protection from physical harm. Some aspects which are crucial to establishing a breach in the latter category are not discussed at all in this category. While Chapter Four below analyses the proof of a breach of the obligation in full, some preliminary observations about this category of cases can presently be made.

First, knowledge and capacity play no role in tribunals' analyses of whether a State has breached the obligation by failing to provide a means of redress. This is obvious, because the action in issue is systemic, not *ad casum*, and any other approach would nonsensically require the State to intervene in the judicial process. One can take this point on the language of presumption, in that the conclusion reflects a presumption at two levels. The first is that the State, as a matter of fact, knows of a dispute before its own judiciary, knows the juridical procedures by which that dispute will be resolved, knows of the need to act (by rendering a judgment) and has the capacity to do so. The second presumption is that the State will have established some form of domestic judiciary, with the result that knowledge of the need to take such an initial step in order to provide a means of redress has already been acted upon by the State.

Secondly, cases in this category discuss at length the standard of conduct demanded by the duty to provide a means of redress. *Frontier Petroleum v Czech Republic* confirmed that the standard of due diligence which applies to the obligation as a whole applies to cases concerning the duty to provide a means of redress. However, the way in which the due diligence standard operated in this specific context has been variously

expressed. While tribunals consistently held that the standard required an objective review of domestic court decisions, they explained the operation of such an objective due diligence standard as requiring that the substance of domestic court conclusions must be "legitimate" (as in *Al Bahloul v Tajikistan* and *Spyridon v Romania*), that they must be "reasonably tenable" and "in good faith" (as in *Frontier Petroleum v Czech Republic*), or that the procedure by which they are reached must be free of "impropriety, corruption or discrimination" (as in *Unglaube v Costa Rica*). Ultimately, these are variations on a theme, the common element of which is that tribunals are entitled to review a court's conduct in order to decide whether it met an objective minimum standard, but not to judge local law questions or to find that the court's decision was wrong in law. Too few cases have yet been decided to discern which articulation of the objective standard is likely to be generally adopted and applied.

Thirdly, causation is an important aspect of breach of the obligation by failure to provide a means of redress. Only *Unglaube v Costa Rica* addressed this point directly. It confirmed the need to establish a causal connection between the failure to provide a means of redress and the alleged damage. Other decisions did not contradict this. The result is that, even if a decision fails to meet the objective standard, an investor may nevertheless fail to establish that it suffered compensable damage.

3(2)(c) Duty to provide protection and security through regulation

The obligation arguably also requires States to provide regulatory protection and security to foreign investments insofar as regulation ensures the stability of the domestic administrative environment in which the investment is made. Section 3(2)(c)(i) reviews the case law on this topical aspect of the obligation. Section 3(2)(c)(ii) concludes by

identifying in summary the key aspects of proving a breach of the obligation in relation to regulatory conduct.

3(2)(c)(i) Cases concerning a failure to provide protection and security through regulation

Numerous cases have considered whether the obligation requires States to pursue or eschew conduct in the regulation of domestic affairs in order to avoid causing damage, or allowing damage to be caused by others, to foreign investments. Tribunals have diverged on this issue.

Early analyses of the issue occurred in the well-known *Lauder v Czech Republic* and *CME v Czech Republic*.[482] In the former, the applicable treaty stated that "investments ... shall enjoy full protection and security". The claimant had indirect voting control over a non-Czech company which was the "contractual partner" of a Czech company which had been awarded a radio and television broadcasting licence by the Czech government's Media Council. The two companies jointly created a local subsidiary, through which they launched a new television station called Nova TV. The station became very successful. However, some time later, a committee of the Czech Parliament stated that the Media Council had permitted broadcasting by an unauthorised entity, namely the subsidiary company (as distinct from the original Czech licensee). Over the course of the year following this statement, the Media Council was reconstituted and the Czech Parliament

[482] One can find an earlier brief consideration of the issue in *Goetz v Burundi*, in which the claimant alleged that, by withdrawing a free zone certificate and refusing to grant indemnity for losses suffered by that withdrawal, Burundi effectively halted its activities and thereby breached the prohibition on unlawful expropriation and the protection and security obligation. The tribunal held that the certificate withdrawal and indemnity refusal breached the obligation, and that Burundi thus had to terminate the withdrawal or provide the indemnity. The tribunal did not provide meaningful reasoning for its conclusions on the protection and security obligation, and focused instead on the arguments relating to expropriation. Nevertheless, the decision confirms that both the regulatory act of withdrawing the certificate and the regulatory omission of refusing the indemnity breached the obligation: *Antoine Goetz et consorts v Burundi*, ICSID Case No. ARB/95/3, Sentence, 10 February 1999, [125].

amended its legislation to narrow the definition of a "broadcaster" and remove the Media Council's power to impose conditions on licences. The Media Council subsequently investigated the licence arrangements and met with the licensee. In the context of increasing public scrutiny of the licence arrangement, the Media Council commenced legal proceedings against the subsidiary broadcasting company. Relations between the Czech licensee, the claimant's company and the subsidiary broadcaster deteriorated. The licensee sought to dismantle its dealings with the claimant's company and the subsidiary. The claimant alleged in the arbitration that the State breached the treaty by altering its regulatory environment (for example, amending its media legislation) and failing to prevent the licensee from dismantling its relations with his company and the subsidiary broadcaster. Full protection and security, said the claimant, necessitated such favourable regulatory conduct on the part of the State.

The tribunal rejected this argument. It accepted that a State must exercise due diligence in fulfilment of the obligation, but not that the State must "protect foreign investment against any possible loss of value".[483] It held that altering Czech media law did not "constitute a danger for the Claimant's investment", and indeed had been viewed favourably at the time by entities operating TV Nova.[484] The tribunal found that it was not the State's role to halt the licensee's dismantling of dealings with the claimant's company and subsidiary broadcaster,[485] and that the State's obligation in this regard was "to keep its judicial system available" so that the dispute could be "properly examined and decided in accordance with domestic and international law".[486] In addition, the tribunal held that

[483] *Lauder v Czech Republic*, UNCITRAL, Final Award, 3 September 2001, [308].

[484] *Lauder v Czech Republic*, UNCITRAL, Final Award, 3 September 2001, [311].

[485] *Lauder v Czech Republic*, UNCITRAL, Final Award, 3 September 2001, [312].

[486] *Lauder v Czech Republic*, UNCITRAL, Final Award, 3 September 2001, [314].

none of the State's conduct caused the alleged damage, which had been inflicted by the licensee.[487] The State's conduct cited by the claimant was "too remote to qualify as the relevant cause for the harm caused", while the licensee's conduct was the "immediate", "superseding" and "real" cause.[488]

Although *Lauder v Czech Republic* was an early assessment of the responsibility of a State for its regulatory conduct vis-à-vis the full protection and security obligation, several points in the decision are noteworthy. First, while the tribunal held that the State's alteration of its media legislation did not damage the claimant's investment, its finding was limited to the circumstances before it. The tribunal did not preclude the possibility that a State's regulatory conduct could breach the obligation. Indeed, by grounding its finding on the absence of causation between the legislative amendment and the alleged damage, the tribunal implicitly anticipated that regulatory conduct which does cause harm could breach the obligation. A second point emerging from the decision is that a State's failure to forestall damage caused in a private dispute between an investor and another party does not amount to a breach of the obligation. The capacity to regulate its own territory did not imply that a State is obliged to intervene through regulation in transactions of private parties which may result in economic damage to a foreign investor. Such a duty is not part of the material scope of the obligation. Thirdly, even when regulatory conduct arguably does fall within the scope of the obligation, causation must still be shown. Regulatory conduct which breaches the obligation is not compensable unless the claimant demonstrates that, but for the wrongful conduct, the damage would not have occurred or would have been less likely to occur. The final point of note in the decision is that the role

[487] *Lauder v Czech Republic*, UNCITRAL, Final Award, 3 September 2001, [313].

[488] *Lauder v Czech Republic*, UNCITRAL, Final Award, 3 September 2001, [234]-[235].

of the State's knowledge and capacity to act to prevent the damage was not addressed. This, no doubt, was partly because the absence of a causal link was sufficient to dispose of the dispute. However, it must also be in part because the impugned regulatory conduct comprised positive actions by the State, in which its knowledge of the circumstances in which its actions occurred and its capacity to control its own actions are inherent.

As is well-known, *CME v Czech Republic* concerned the same facts as *Lauder v Czech Republic*, but was decided by another tribunal which rendered a decision partly inconsistent with *Lauder v Czech Republic*. The claimant in *CME v Czech Republic* was the foreign company indirectly controlled by the claimant in *Lauder v Czech Republic*. The treaty in *CME v Czech Republic* articulated a fair and equitable treatment and non-impairment obligation, before continuing that "[m]ore particularly, each Contracting Party shall accord to such investments full security and protection". The claims in *CME v Czech Republic* relating to the obligation were very similar to those advanced in *Lauder v Czech Republic*.

Contrary to the finding in *Lauder v Czech Republic*, the tribunal in *CME v Czech Republic* held that the Czech Republic had breached the obligation. The tribunal noted the Media Council's reversal of its support for the licence and the partnership between the Czech company and the claimant.[489] The tribunal also noted the Media Council's support for the Czech company's dismantling of relations with the claimant and subsidiary broadcaster.[490] The Media Council's conduct in relation to these events, the tribunal held, was "targeted to remove the security and legal protection of the Claimant's investment".[491]

[489] *CME Czech Republic B.V. v Czech Republic*, UNCITRAL, Final Award, 13 September 2001, [613].

[490] *CME Czech Republic B.V. v Czech Republic*, UNCITRAL, Final Award, 13 September 2001, [613].

[491] *CME Czech Republic B.V. v Czech Republic*, UNCITRAL, Final Award, 13 September 2001, [613].

This breached the obligation because the Czech Republic was "obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor's investment withdrawn or devalued".[492] As in *Lauder v Czech Republic*, the tribunal reached its conclusions without any discussion of the role of knowledge or capacity in the assessment of whether a breach of the obligation had occurred.

The *Lauder*/*CME* conflict is acute. While at a basic level *CME* expressly endorsed that which was implicit in *Lauder* – namely, that regulatory conduct of a State can breach the full protection and security obligation – the decisions diverged in numerous other respects. *CME* held that the State breached the obligation because it did not forestall damage done to the claimant in its private transactions with its local partner company. *Lauder* expressly rejected this claim. *CME* did not discuss causation but found that the State's conduct had breached the obligation and was compensable. *Lauder* held that there was no causal link between the State's conduct and the damage. *CME* found that the State's conduct in reversing its support for the licence and partnership was wrongful. *Lauder* found the reverse. The result of this divergence was uncertainty around how a State's regulatory conduct may breach the obligation. That the obligation *could* be breached by regulatory conduct was explicit in *CME* and implicit in *Lauder*. That point, however, though an important development of doctrine, made little impact amidst the confusion generated by two otherwise contradictory decisions.

Immediately subsequent cases did little to clarify the situation. Several tribunals, when considering allegations that a State's regulatory conduct breached the obligation, either elided or expressly avoided the issue. This was true of *Occidental v Ecuador*, *CSOB*

[492] *CME Czech Republic B.V. v Czech Republic*, UNCITRAL, Final Award, 13 September 2001, [613].

v Slovak Republic and *Saluka v Czech Republic*. In part this avoidance was due to claimants' pleading choices, but in part it was also due to the apparent reluctance of tribunals to address the issue. That these three tribunals decided the full protection and security claims before them without any reference to the treatment which the obligation received in *Lauder* and *CME* is indicative of their disinclination in the wake of the controversy to decide whether regulatory conduct could breach the obligation. In *Occidental v Ecuador*, which concerned Ecuador's refusal to remit VAT rebates, Ecuador's impugned regulatory conduct was held to breach the obligation simply because it also breached the fair and equitable treatment obligation (which "automatically entail[ed]" a breach of the full protection and security obligation).[493] A similarly awkward elision was evident in *CSOB v Slovak Republic*. That case concerned the State's refusal, contrary to its earlier practice, to cover losses under a "consolidation agreement" concluded pursuant to a privatisation. The State's change of position was deemed wrongful under the agreement, which wrongfulness was extended without further analysis to the obligation in the treaty.[494] Reluctance of tribunals of this period to address the issue reached its zenith, however, in *Saluka v Czech Republic*. While *Occidental v Ecuador* and *CSOB v Slovak Republic* elided the issue, *Saluka v Czech Republic* expressly, and tortuously, avoided deciding it. On the one hand, the tribunal insisted that, vis-à-vis allegations that regulatory conduct breached the obligation, it would not decide whether the obligation covered such conduct. However, on the other hand, immediately after demurring, the tribunal rejected the allegations on the basis that the State's measures were "justifiable on regulatory grounds" and did not "transcend the limits of a legislator's

[493] *Occidental Exploration and Production Company v Republic of Ecuador*, LCIA Case No. UN3467, Final Award, 1 July 2004, [187].

[494] *Ceskoslovenska Obchodni Banka, A.S. v Slovak Republic*, ICSID Case No. ARB/97/4, Award, 29 December 2004, [170].

discretion".[495] Like *Occidental v Ecuador* and *CSOB v Slovak Republic*, albeit with less subtlety, *Saluka v Czech Republic* evaded addressing the key issue in the *Lauder*/*CME* controversy in respect of full protection and security.

The question of whether the obligation extended to regulatory conduct proved too persistent to be elided from the authorities for very long. In *Azurix v Argentina*, the point was squarely in issue. The treaty provided that an "[i]nvestment ... shall enjoy full protection and security". The claimant was the indirect 100% shareholder in an Argentinean company which acquired in a privatisation a concession for distribution of potable water and treatment and disposal of sewerage in Buenos Aires. After the concession agreement was signed, the State took various regulatory measures which the claimant alleged breached the treaty. These measures included: passing resolutions which reduced the project's income; altering the methodology by which the value of land relevant to the project would be calculated; refusing to revise the retail price index by which water and sewerage service charges were calculated; refusing compensation for damages caused by the State's failure to remove algae from a water processing plant; and refusing to return an initial "canon payment" to the claimant upon termination of the contract. The claimant alleged that the measures breached the obligation, and expressly relied on the reasoning in *CME v Czech Republic*.

The tribunal accepted the claimant's contentions. After noting the "interrelationship" between the full protection and security and the fair and equitable treatment obligations, the tribunal held that the former "go[es] beyond protection and security ensured by the police ... [and] the stability afforded by a secure investment

[495] *Saluka Investments BV v Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, [490].

environment is as important from an investor's point of view."[496] As noted in Section 3(1)(b)(iii) above, the tribunal added that the inclusion of the word "full" before the words "protection and security" confirmed the extension of the obligation's scope to matters beyond physical security, such as stability of the regulatory environment. The State's regulatory conduct in this case failed to provide that stability and thus violated the obligation.

While the reasoning in *Azurix v Argentina* was not extensive, it held that the scope of the obligation included a requirement that host States provide a stable regulatory environment in which the investment could operate. What constitutes "stability" was not explained. However, given that the tribunal discerned a close connection between the full protection and security and the fair and equitable treatment obligations, it is likely that regulatory conduct which breached the latter would also breach the former. To the extent that the tribunal endorsed simultaneity of breach of the two obligations, it risked straying into the same elision as in *Occidental v Ecuador*. This potential for substantive overlap of the two obligations and for the simultaneity of their breach would receive significant discussion in later decisions. On other points emerging out of early decisions on this issue, *Azurix v Argentina* was largely silent. It did not address the argument that the obligation to ensure regulatory stability required the State to forestall damage in the context of private contractual dealings between the investor and a third party.[497] Nor did it address issues of causation. Those bones of contention in the *Lauder*/*CME* controversy continued unresolved. In addition, as in those two decisions, the tribunal also refrained from

[496] *Azurix Corporation v Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006, [408].

[497] This was despite Argentina's submission that the dispute was in fact merely a contractual dispute between the claimant and the Province of Buenos Aires: *Azurix Corporation v Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006, [398].

discussing the role of the State's capacity and knowledge of the need to regulate in a way which did not harm the investor.

With *CME v Czech Republic* and *Azurix v Argentina* as two clear authorities for the proposition that regulatory conduct can breach the full protection and security obligation, a flurry of cases addressing the point ensued. The first was *PSEG v Turkey*. The applicable treaty provided that "[i]nvestments ... shall enjoy full protection and security in a manner consistent with international law." In this case, the claimants won a concession to build and operate an electricity power plant. The claimants alleged that decisions by the relevant Turkish Ministry reduced the concession entitlements they had negotiated. These included, *inter alia*, reducing the generation capacity of the power plant, refusing to pay guarantees and prejudicially amending domestic law relating to the development of "build-operate-transfer" projects. This regulatory conduct, the claimants argued, breached the obligation either because, following *CME v Czech Republic*, it devalued the agreed and approved security and protection of the foreign investor's investment, or because, following *Occidental v Ecuador*, its breach is automatically established once a breach of the fair and equitable treatment obligation is established.

The tribunal rejected the claimant's argument. It held that the obligation "developed in the context of physical safety and installations, and only exceptionally will it relate to the broader ambit noted in *CME*."[498] It added that, when such exceptional circumstances exist, there will be a very close connection between the two obligations.[499] The tribunal then held that there had been no threat to physical safety and that the facts before it did not

[498] *PSEG Global, Inc. and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, [258].

[499] *PSEG Global, Inc. and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, [258].

evidence a sufficiently "exceptional situation that could qualify under this standard as a separate heading of liability".[500]

PSEG v Turkey is the first decision in which a tribunal clearly stated that there may be limits to the inclusion of a State's regulatory conduct within the material scope of the obligation. In doing so, it rejected the wholesale extension of that scope endorsed by *CME v Czech Republic* and *Azurix v Argentina*. However, *PSEG v Turkey* is not without uncertainty. Its failure to explain what constitutes "exceptional" circumstances in which regulatory conduct breaches the obligation opens many possibilities. Is regulatory conduct exceptional when it somehow causes or contributes to physical damage? If so, then the exception is not meaningfully different from the rule, and the impugned regulatory conduct would more easily be analysed through the lens of a State's obligation to act with due diligence in forestalling damage.[501] Is regulatory conduct exceptional when the same conduct exhibits egregious elements of unfair and inequitable treatment, such as coercive or bad faith conduct? The tribunal's statements regarding the connection between the two obligations arguably suggest such a test, but they do not endorse it clearly. Is regulatory conduct exceptional when the State knows of the particular circumstances in which the investment operates, knows of the likely consequences of its change in regulation, is capable of altering (or not) its regulatory matrix to forestall that damage, and in fact causes the damage? Such a test may be workable, but it is far from clear that it was intended by the tribunal (and is in any event tailored to proving wrongful omissions, rather than actions). *PSEG v Turkey* offers no clarity in relation to these questions. Equally, the decision does not discuss the State's knowledge and capacity to act which are prominent in

[500] *PSEG Global, Inc. and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, [259].

[501] See Section 3(2)(a) above.

decisions regarding other categories of breach of the obligation. *PSEG v Turkey* thus provided little guidance for future decisions on whether regulatory conduct can breach the full protection and security obligation.

The next case in this category was *Siemens v Argentina*. The treaty at issue provided that investments shall receive "full protection and legal security". The claimant through a locally-incorporated company contracted with the State to provide and maintain information systems for immigration, personal identification and electoral matters. Argentina postponed and then suspended the claimant's performance of the contract. It also refused to allow the claimant to correct errors in the systems, established a governmental committee to review the contract and then renegotiated the contract. Finally, a newly-elected Minister of the Interior refused to recognise the renegotiated contract and insisted on yet newer contractual terms. The claimant alleged that this conduct breached the obligation.

The tribunal accepted the claimant's submission. It held that the obligation requires more than the provision of physical security. After observing that the treaty protection covered both tangible and intangible assets, the tribunal observed that it "is difficult to understand how the physical security of an intangible asset would be achieved".[502] It added that the correctness of limiting the protection to physical security was undermined by the formulation of the obligation which afforded "legal security".[503] On this basis, the tribunal concluded that Argentina's "renegotiation of the Contract for the sole purpose of

[502] *Siemens AG v Argentina*, ICSID Case No. ARB/02/08, Award, 6 February 2007, [303].

[503] *Siemens AG v Argentina*, ICSID Case No. ARB/02/08, Award, 6 February 2007, [303].

reducing its costs, unsupported by any declaration of public interest, affected the legal security of Siemens' investment", and therefore breached the obligation.[504]

In its reasoning on the scope of the obligation, *Siemens v Argentina* did not refer to the preceding controversy about the inclusion of regulatory conduct within that scope. For the tribunal, that intangible assets are not susceptible to physical protection, and that the treaty's wording extending to "legal security", provided sufficient basis on which to confirm that the obligation required non-physical protection. The tribunal did not indicate whether the scope of the obligation might extend so far as to require a State to intervene, through regulation, to forestall damage being done to an investment in the context of transactions with private parties. Nor did the tribunal articulate what role, if any, knowledge, capacity and causation would play in finding a State responsible on the basis of its wrongful regulatory conduct. Rather, the tribunal based its finding of breach chiefly on the egregiousness of Argentina's conduct, and in particular its pursuit of regulation for the "sole purpose of reducing its costs" at the expense of the claimant's investment.

The next case meaningfully to consider the obligation in the context of regulatory conduct was *Aguas/Vivendi v Argentina*.[505] The treaty in issue provided that "investments ... shall enjoy … protection and full security in accordance with the principle of fair and equitable treatment". The claimants were two of several parties who signed a concession agreement with the Tucumán Province in Argentina to provide water and sewerage services in the province. The claimants began operations. However, after provincial

[504] *Siemens AG v Argentina*, ICSID Case No. ARB/02/08, Award, 6 February 2007, [308].

[505] *Eastern Sugar v Czech Republic* also considered an alleged breach of the obligation due to the regulatory conduct of the State. However, the tribunal in that case rejected the allegations because it believed the obligation was limited to protecting foreign investments from damage done by third parties: *Eastern Sugar B.V.(Netherlands) v Czech Republic*, SCC Case No.088/2004, Final Award, 31 April 2007, [203]. As numerous cases and authors have confirmed (see Section 3(2)(a)(ii) above), this position is manifestly wrong – the obligation is not thus limited, and undoubtedly includes a duty to protect from damage caused by State actors.

elections took place and newly-elected officials took office, support for the project deteriorated. The new Governor campaigned on the basis that he would not respect the concession and threatened to dismantle the water regulator which had been established to oversee the operations. The claimants lost the support of the regulator, and local officials made public statements against the prices being charged. The regulator brought charges against the project operators for breaches of water quality controls and "put pressure" on the concessionaires to renegotiate prices. Renegotiations failed, and the Province terminated the concession. The claimants argued that this breached the obligation.

The tribunal agreed. It held that the obligation was not limited to providing protection from physical interferences, particularly in the absence of any such limitation in the text of the treaty.[506] It continued by finding that:

> "the scope of the [obligation] should be interpreted to apply to reach any act or measure which deprives an investor's investment of protection and full security, providing, in accordance with the Treaty's specific wording, the act or measure also constitutes unfair and inequitable treatment. Such actions or measures need not threaten physical possession or the legally protected terms of operation of the investment."[507]

The tribunal supported this finding by reference to other cases which had held that regulatory conduct could breach the obligation, including *CME v Czech Republic, CSOB v Slovak Republic* and *Azurix v Argentina*.[508] The tribunal concluded that the conduct of Argentinean officials, and in particular the water regulator, "were anything but … normal 'regulatory' proceedings", and that the conduct was instead "a blatant misuse of the

[506] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentina*, ICSID Case No. ARB/97/3, Award, 20 August 2007, [7.4.15].

[507] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentina*, ICSID Case No. ARB/97/3, Award, 20 August 2007, [7.4.15].

[508] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentina*, ICSID Case No. ARB/97/3, Award, 20 August 2007, [7.4.16].

Province's regulatory powers for illegitimate purposes".[509] Accordingly, this regulatory conduct violated both the fair and equitable treatment and full protection and security obligations.

Like several decisions before it, this decision extended the scope of the obligation to cover the State's regulatory conduct. However, self-standing though that principle is in *Aguas/Vivendi v Argentina*, it must be understood in a context where the treaty made the obligation contingent on the application of the fair and equitable treatment obligation. Because the conduct in this case breached the latter obligation, it also breached the former. This decision should not be equated to *Occidental v Ecuador*, in which the obligation was deemed contingent on the fair and equitable treatment obligation in the absence of any textual requirement in the treaty. Further, the tribunal, in finding a breach of both obligations, did not discuss the State's knowledge, capacity or causation. That the State was aware of the circumstances giving rise to the breach, had the capacity to act to prevent the damage but ultimately caused the damage to the claimant was presumed in the tribunal's focus on the "illegitimate" and "blatant misuse" by the State of its regulatory powers.

Parkerings v Lithuania was the next case in this category. The facts are recounted in Section 3(2)(a)(i) above. The essence of the claimant's allegation that the State's regulatory conduct breached the obligation was that the State, and in particular its Prime Minister, failed to intervene to protect its investment against the adverse conduct of the Municipality of Vilnius, with which the claimant had been transacting. The tribunal rejected this submission. It held that the treaty "created no duty of due diligence on the

[509] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentina*, ICSID Case No. ARB/97/3, Award, 20 August 2007, [7.4.24].

part of the [State] to intervene in the dispute between the Claimant and the City of Vilnius".[510]

Although the tribunal did not expressly address whether a State's regulatory conduct can breach the obligation, its decision stands as an example of a State's regulatory omission being held to fall outside the material scope of the obligation. The omission at issue, as in *Lauder v Czech Republic*, relates to a failure to intervene in transactions passing between two entities which were treated by all parties as separate from the State in order to forestall damage accruing from those transactions to the investor. The tribunal, perhaps unaware it was on contentious ground, did not address any points arising out of the *Lauder*/*CME* conflict or subsequent cases, or any issues which typically arise in determinations of responsibility for wrongful omissions, such as knowledge, capacity and causation. For this tribunal, the scope of the obligation simply did not extend to a State's failure to use regulatory powers to intervene in private transactions to prevent them causing damage to an investor.

While *Parkerings v Lithuania* suggested that the exercise (or not) of some regulatory powers would not fall within the scope of the obligation, and while *PSEG v Turkey* stated that the scope would be extended only in "exceptional situations", *BG Group v Argentina* was the first decision expressly to state that the obligation was limited to affording protection from physical damage and that regulatory conduct could never breach the obligation. The treaty in issue stated that "[i]nvestments ... shall enjoy protection and constant security". The claimant acquired through its locally incorporated subsidiary a shareholding in MetroGAS, a formerly State-owned gas distribution company privatised by Argentina. When the Argentinean economic crisis began at the end of the twentieth

[510] *Parkerings-Compagniet AS v Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, [359].

century, the State took several measures to address it. These measures included repeatedly suspending the application of adjustments to gas distribution prices in accordance with the United States' Produce Price Index, banning withdrawals of cash from accounts in an effort to curb capital flight, adopting its Emergency Law (which, *inter alia*, converted dollar-denominated tariffs for licensees such as Metro GAS into peso-denominated tariffs and prohibited licensees from suspending their contractual obligations), and attempting to renegotiate gas licences such as MetroGAS's. The claimant alleged that these regulatory measures breached the obligation. In particular, it argued that

> "the duty of protection and security of investments is infringed by government measures that fail to apply the rules specifically designed to govern and protect the investment by withdrawing protection and security previously granted to an investment, regardless of whether property is physically destroyed or whether judicial remedies may be available."[511]

The tribunal rejected this claim outright. It regarded the obligation as "traditionally … associated with situations where physical security of the investor or its investment is compromised",[512] citing in support several cases discussed in Section 3(2)(a) above. Citing (only) *Azurix v Argentina* and *Siemens v Argentina*, the tribunal then held that cases which found that the obligation also "encompasses stability of the legal framework applicable to the investment" did so by "relating the standards of 'protection and constant security' and 'fair and equitable treatment'".[513] The tribunal held that it was "inappropriate" for the scope of the obligation to be understood in this broader way.[514] As

[511] *BG Group Plc v Argentina*, UNCITRAL, Final Award, 24 December 2007, [314].

[512] *BG Group Plc v Argentina*, UNCITRAL, Final Award, 24 December 2007, [324]-[325].

[513] *BG Group Plc v Argentina*, UNCITRAL, Final Award, 24 December 2007, [326].

[514] *BG Group Plc v Argentina*, UNCITRAL, Final Award, 24 December 2007, [326].

the claimant had alleged no physical damage to its investment, the tribunal held that Argentina's conduct could not have breached the obligation.[515]

Given the basis of this rejection of the claimant's argument, the tribunal had no need to discuss the type of regulatory conduct which might fall within the scope of the obligation or any issues of knowledge, capacity or causation that might be involved in its breach. In this context, the most significant aspect of the decision in *BG Group v Argentina* was its assertion that regulatory conduct had previously been found to breach the obligation only when it had also been found to breach the fair and equitable treatment obligation. Such a connection was "inappropriate" and rejecting its existence assisted the tribunal to reach its unprecedented conclusion that regulatory conduct could never breach the obligation. However, as the above indicates, the tribunal's summary of the position in previous decisions is inaccurate. In both the decisions cited by the tribunal – *Azurix v Argentina* and *Siemens v Argentina* – the tribunals relied less on the connection between the two obligations and more on the language of the applicable treaties. The former held that the qualifier "full" necessarily extended the obligation beyond physical protection, while the latter noted that the treaty afforded "legal security" and observed that it would be difficult to discern what benefit merely physical protection would have for the "intangible" assets protected by the treaty. The summary of case law offered by *BG Group v Argentina* reflects accurately only the truncated reasoning in *Occidental v Ecuador* – which this tribunal did not cite. Moreover, the tribunal's summary of previous case law also ignores the initial complexities in the *CME*/*Lauder* controversy, in which the former explicitly held that regulatory conduct could breach the (self-standing) full protection and security obligation, while the latter did not decide that issue when finding that there had been no

[515] *BG Group Plc v Argentina*, UNCITRAL, Final Award, 24 December 2007, [327]-[328].

breach of the obligation in the circumstances before it. Given these inaccuracies, the tribunal's ruling that physical protection was the "traditional" and "original" scope of the protection, while being a credible conclusion in light of some previous case law and the historical origins of the obligation discussed in Section 3(1) above, rings more hollow than it should.

The reasoning in *BG Group v Argentina* was not immediately endorsed by later tribunals. The first subsequent case was *Biwater v Tanzania*. The applicable treaty provided that "investments shall at all times ... enjoy full protection and security". The claimant's parent company won a privatisation tender for the repair, upgrade and expansion of the Dar es Salaam water and sewerage services. The claimant held a majority shareholding in the locally-incorporated project company. The local subsidiary performed the contracted works for a period of time before Tanzanian authorities took various measures detrimental to the project. The authorities: called on the entirety of the performance bond posted by the local subsidiary; issued a cure notice demanding the subsidiary's replenishment of the bond funds; withdrew a VAT exemption extended to the subsidiary; terminated the contract on the basis that the cure notice had not been fulfilled; deported the subsidiary's senior management; and seized the subsidiary's assets, installed new management and took over its operations. The claimant alleged that the Respondent's physical interference with the project, as well as its regulatory conduct preceding the seizure, breached the full protection and security obligation.

The tribunal agreed. As in *Azurix v Argentina*, the tribunal noted that the protection and security required was "full",[516] and held that the obligation "may extend to matters

[516] The tribunal's discussion of the language of the obligation is covered in Section 3(1)(b)(iii) above: *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case No. ARB/05/08, Award, 24 July 2008, [729].

other than physical security".[517] It held that the obligation "implies a State's guarantee of stability in a secure environment, both physical, commercial and legal", and that it would be "unduly artificial" to confine the obligation to physical security, particularly when the treaty was "directed at the protection of commercial and financial investments."[518] The tribunal also clarified that the obligation was not limited to protection from third parties, but also from organs of the State itself.[519] It held that the conduct invoked by the claimant – in particular, the seizure of the subsidiary's assets and installation of a State authority as controller of the business – breached the obligation.[520] However, it also held that the claimant had not proved that this or any other breach of the treaty had caused the alleged damage, observing that proof of causation requires "a sufficient link between the wrongful act and the damage in question, and ... a threshold beyond which damage, albeit linked to the wrongful act, is considered too indirect or remote."[521] The tribunal then found that, prior to Tanzania's first breach of the treaty, the subsidiary was a loss-making enterprise, the investment was of negative value, and the "normal contractual termination process was underway".[522] Such underperformance meant that, by the time Tanzania breached the treaty, the investment was of no economic value and any subsequent losses were not legally caused by the breaches.[523] As the tribunal concluded, "none of [Tanzania's]

[517] *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case No. ARB/05/08, Award, 24 July 2008, [729].

[518] *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case No. ARB/05/08, Award, 24 July 2008, [729].

[519] *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case No. ARB/05/08, Award, 24 July 2008, [730].

[520] *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case No. ARB/05/08, Award, 24 July 2008, [731].

[521] *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case No. ARB/05/08, Award, 24 July 2008, [785].

[522] *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case No. ARB/05/08, Award, 24 July 2008, [790].

[523] *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case No. ARB/05/08, Award, 24 July 2008, [788]-[798].

violations of the BIT ... in fact caused the loss and damage in question, or broke the chain of causation that was already in place."[524]

The reasoning in *Biwater v Tanzania* addressed (at least indirectly) several of the key issues in this category of cases. The first was the role which proof of a breach of the fair and equitable treatment obligation plays in proof of a breach of the full protection and security obligation. Contrary to *BG Group v Argentina*, the breach of the latter obligation found in *Biwater v Tanzania* was entirely independent of the breach of the former. Violation of the full protection and security obligation in relation to both a failure to prevent physical damage (by State actors) and the State's regulatory conduct was a self-standing analysis. As in *CME v Czech Republic*, a violation was established without "relating" that obligation in some way to the fair and equitable treatment obligation. The second key issue was the suggestion that the obligation includes a duty to exercise regulatory due diligence in respect of the conduct of private parties. The tribunal stated that the obligation imposed a regulatory duty to "guarantee" the "stability" of the "commercial and legal" environment, and that the obligation as a whole included a requirement to forestall damage "by third parties". These findings can be understood as an endorsement of the position in *CME v Lauder* that a State can breach the obligation by failing to preclude damage done to the claimant in its private transactions with non-State parties. In the absence of explicit confirmation, however, caution should be exercised before ascribing that conclusion to this tribunal. The third issue is that, unlike its silence on the role of knowledge and capacity in the responsibility of the State for breach of the obligation, the tribunal discussed in detail the role of causation. Its finding that the breach, though proven, was not the proximate cause of the loss meant that the claimant had not

[524] *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case No. ARB/05/08, Award, 24 July 2008, [798].

established a counterfactual whereby, but for the breach, the damage would have been less likely to occur. As in *Noble Ventures v Romania*, the tribunal held that Tanzania's conduct, while possibly contributing in some way to the factual causality of the damage, was not legally causative of it. Such analysis highlights an important part of the proof of a breach of the obligation by regulatory conduct, namely, that while the conduct may conceivably contribute to damage suffered by an investment, proof that the conduct was legally causative of the damage is still necessary. That is an issue not taken up by many cases in this category, but which may come to define future attempts to prove a breach of the obligation by regulatory omission.[525]

The next two cases in this category conducted only sparse analysis of the obligation. In *Rumeli v Kazakhstan*, the facts of which are summarised in Section 3(2)(a)(i) above, the tribunal stated without elaboration that the State's regulatory conduct impugned by the claimant could not fall within the scope of the obligation.[526] Albeit without citing it, *Rumeli v Kazakhstan* was the first case to endorse the finding of *BG Group v Argentina* on this issue. Similarly brief was the analysis in *Jan de Nul v Egypt*. In that case, the claimant impugned the State's regulatory conduct, in particular the means by which the privatisation tender was conducted and the effective overturning of court decisions by governmental authorities. The tribunal held that "irrespective of the precise scope of the standard", no breach of the full protection and security (or any other) obligation had been established.[527]

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[525] See Chapter Four below.

[526] *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, [669].

[527] *Jan de Nul N.V. and Dredging International N.V. v Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, [270]-[271].

The next case in which the relationship between the host State's regulatory conduct and the scope of the obligation received attention was *National Grid v Argentina*. The applicable treaty stated that "[i]nvestments of investors ... shall enjoy protection and constant security". A subsidiary of the claimant participated in a consortium which won a privatisation tender by the State to purchase shares in a State-owned electricity transmission network company. In response to its economic crisis at the turn of the century, Argentina converted public utility tariffs from dollar-denominated tariffs into peso-denominated tariffs, forbade public utility companies (such as the company through which the consortium held its concession) from suspending or modifying obligations under their respective licences, and sought to renegotiate those licences. Each of these acts, argued the claimant, detrimentally affected its investment and constituted a breach of the obligation.

The tribunal agreed. It held that:

> "the phrase 'protection and constant security' as related to the subject matter of the Treaty does not carry with it the implication that this protection is inherently limited to protection and security of physical assets."[528]

In support of this conclusion, the tribunal held that case law adduced by Argentina (such as *AAPL v Sri Lanka* and *AMT v Zaire*) was inapposite because it considered only situations of physical damage, which were not at issue in the present case and to which the scope of the obligation was not limited.[529] It also held that the articulation of the obligation in the treaty alongside the fair and equitable treatment obligation evinced an "association" between the two obligations, from which one could infer that the orthodox inclusion of non-physical damage within the scope of the fair and equitable treatment obligation

[528] *National Grid plc v Argentina*, UNCITRAL, Award, 3 November 2008, [189].

[529] *National Grid plc v Argentina*, UNCITRAL, Award, 3 November 2008, [188].

suggested that it was also included in the scope of the full protection and security obligation.[530] The tribunal noted that the treaty's definition of "investment" included intangible assets, and that limiting the obligation to the prevention of damage to physical assets would run contrary to the purpose of the treaty.[531] The tribunal concluded that Argentina, by pursuing the impugned regulatory conduct, had "effectively dismantled" the regulatory regime governing the investment and replaced it with "uncertainty", which violated the obligation.[532]

The tribunal's analysis touched on several contentious points relating to whether the obligation extends to regulatory conduct. It emphasised an association between the obligation and the fair and equitable treatment standard. In doing so it recalled (and rejected) the criticism of such a connection in *BG Group v Argentina*, justifying its position by reference to the terms of the treaty, and in particular the observation that the obligations were imposed conjunctively in the treaty provision and thus should not be dramatically different in scope. The tribunal also limited its finding to the breach of the obligation by the regulatory actions of the relevant State authorities. It did not discuss whether wrongful regulatory conduct includes a failure to intervene in private transactions between the investor and a non-State actor – a point which had received only indirect attention since the initial *CME*/*Lauder* conflict. Furthermore, like several decisions before it, the tribunal did not discuss the role of the State's knowledge and capacity, or the role of causation, in finding a compensable breach of the obligation. As in *Aguas/Vivendi v Argentina*, the tribunal presumed the existence of these factors when finding that Argentina's actions had "effectively dismantled" the regulatory framework in which the

[530] *National Grid plc v Argentina*, UNCITRAL, Award, 3 November 2008, [187], [189].

[531] *National Grid plc v Argentina*, UNCITRAL, Award, 3 November 2008, [187].

[532] *National Grid plc v Argentina*, UNCITRAL, Award, 3 November 2008, [189].

investment had been made. Once it was clear that the obligation extended to regulatory conduct, the egregiousness of Argentina's regulatory decisions vis-à-vis the investment meant that, irrespective of the precise standard of conduct required, it had breached the obligation.

The next case in this category is *Bogdanov v Moldova*. The treaty in issue required the host State to "guarantee[] under its legislation a complete and unconditional legal protection of the capital investments of the investors". The claimant owned a shareholding in a Moldovan company which operated a chemicals import and export business from a free economic zone in Chişinău. A stabilisation clause in Moldovan legislation guaranteed the "stability of legal norms" within the zone for ten years, including the applicable customs regime. The investment was made when customs regulations required the company to obtain a single annual permit. However, part way through the ten year period, the Moldovan Parliament enacted new legislation to collect a fee upon the issue of each customs declaration for each instance of import and export. This amendment imposed greater financial burdens on the company, and the claimant alleged that it breached the obligation.

The sole arbitrator agreed. The arbitrator held that a stabilisation clause could not be construed so narrowly as to allow Moldova simply to enact additional legislation (as distinct from amending the existing legislation containing the clause) in a way which, as a matter of substance, undercut the benefit of the stabilisation clause to the investor.[533] The new charges introduced by the additional legislation could not, due to their size and apparent purpose (that is, the regulation of trade and generation of revenue), be understood

[533] *Yury Bogdanov v Moldova*, SCC, Final Arbitral Award, 30 March 2010, [84].

merely as the levying of administrative charges in the exercise of regulatory autonomy.[534] Rather, they constituted a substantive amendment to the customs regime in place at the time of the claimant's investment.[535] The levies were thus a breach of both the stabilisation clause in the original legislation and the obligation in the treaty.[536]

Bogdanov v Moldova is not a typical case on full protection and security. It did not discuss any prior decisions, nor did it discuss any of the contentious points raised above. The treaty language was distinctive and, for the arbitrator, a breach of the domestic stabilisation clause was coextensive with a breach of the treaty. However, despite its unusual context, the decision is interesting with regard to the relationship between the obligation and States' regulatory conduct. The arbitrator was clear that, if regulation were to breach the obligation, one must look to the substance or effect of the impugned measure rather than to the intent of the State or the mere face of the legislation. The inclusion by Moldova of the impugned regulatory measure in a statute unconnected to the original legislation, the stability of which had been guaranteed, was irrelevant to the analysis. The effect was to undermine the stability of the regulatory regime, and the breach was therefore established.

The decision in *Bogdanov v Moldova* proceeds on the basis that there is a spectrum of regulatory conduct, ranging from the obviously anodyne to the obviously wrongful. At the former end of the spectrum, small administrative changes, including the levying of additional charges, are an appropriate exercise of regulatory powers by a State and will not breach the obligation. By contrast, effectively replacing an existing customs regime with a

[534] *Yury Bogdanov v Moldova*, SCC, Final Arbitral Award, 30 March 2010, [83].

[535] *Yury Bogdanov v Moldova*, SCC, Final Arbitral Award, 30 March 2010, [83].

[536] *Yury Bogdanov v Moldova*, SCC, Final Arbitral Award, 30 March 2010, [85].

significantly more onerous regime will, no matter how much the State highlights the otherwise acceptable intention behind the replacement regime, breach the obligation. Host States thus have some leeway to exercise regulatory autonomy without breaching their protection and security obligations, but they do not have plenary powers. The difficulty lies in discerning where, along this spectrum, justifiable regulatory autonomy gives way to regulatory conduct which impinges wrongfully on the protection and security of the investment. On that difficult issue, *Bogdanov v Moldova* offers a contribution. The purpose of stabilisation clauses is to provide stability on which its beneficiaries can rely. In other words, given that such a clause benefits investors, its purpose is to enshrine the expectations which the investor will have in relation to the content and continuity of the relevant governing law. By altering the substantive effect of the law on the claimant, Moldova not only violated the treaty obligation and its own original legislation – it also, more clearly than any preceding case, confounded the legitimate expectations of the investor. Such an underlying rationale for the ruling in *Bogdanov v Moldova* suggests that it provides a diagnostic for deciding when regulatory conduct breaches the obligation, namely, when the legitimate expectations of an investor upon making its investment have been frustrated by that conduct. The emergence of a diagnostic of this kind would constitute a significant development in the understanding of the obligation, and start to define with precision when the obligation may be breached by regulatory conduct. The existence and utility of such a diagnostic is considered further below.[537]

The next case in which regulatory conduct was alleged to breach the obligation was *Gemplus v Mexico*. The two applicable treaties stated that "[e]ach Contracting Party ... shall provide full legal protection to those investors and investments" and "[i]nvestments

[537] See Section 4(4) and Chapter Five.

... shall benefit from full and complete protection and security". The claimants were part of a consortium which won a concession to operate a national vehicle registry in Mexico. Over time, the project met political and popular opposition, culminating in the revocation of the concession agreement by the Mexican Secretariat of Commerce and Industrial Development and the requisition of the operations of the registry. The claimants alleged that Mexico's regulatory conduct, including the Secretariat's decrees of revocation and requisition, violated the obligation.

The tribunal rejected this argument. It held that the two applicable treaty provisions were "materially similar",[538] but that the obligations they imposed were different to those in other treaty provisions because they required protection from damage done by non-State actors.[539] It held that the obligation did not extend to the conduct of the State itself, and that in any event the obligation was limited to affording protection from physical damage and providing a means of redress for such damage.[540] The damage alleged in the case concerned neither of these, and so the tribunal found that Mexico had not breached the obligation.[541]

The decision in *Gemplus v Mexico* is problematic. It rests on statements of principle that ignore swathes of the jurisprudence discussed above (and placed before the tribunal[542]). Its finding that only damage done by third parties is covered by the obligation

[538] *Gemplus S.A., SLP S.A. and Gemplus Industrial S.A. de C.V. v Mexico* and *Talsud S.A. v Mexico*, ICSID Case No. ARB(AF)/04/3 and ICSID Case No. ARB(AF)/04/4, Award, 16 June 2010, [9-9].

[539] *Gemplus S.A., SLP S.A. and Gemplus Industrial S.A. de C.V. v Mexico* and *Talsud S.A. v Mexico*, ICSID Case No. ARB(AF)/04/3 and ICSID Case No. ARB(AF)/04/4, Award, 16 June 2010, [9-11].

[540] *Gemplus S.A., SLP S.A. and Gemplus Industrial S.A. de C.V. v Mexico* and *Talsud S.A. v Mexico*, ICSID Case No. ARB(AF)/04/3 and ICSID Case No. ARB(AF)/04/4, Award, 16 June 2010, [9-12].

[541] *Gemplus S.A., SLP S.A. and Gemplus Industrial S.A. de C.V. v Mexico* and *Talsud S.A. v Mexico*, ICSID Case No. ARB(AF)/04/3 and ICSID Case No. ARB(AF)/04/4, Award, 16 June 2010, [9-12]-[9-13].

[542] *Gemplus S.A., SLP S.A. and Gemplus Industrial S.A. de C.V. v Mexico* and *Talsud S.A. v Mexico*, ICSID Case No. ARB(AF)/04/3 and ICSID Case No. ARB(AF)/04/4, Award, 16 June 2010, [9-3]-[9-6].

contradicts numerous decisions, and its limitation of the protection afforded by the obligation to physical damage only, without any analysis of previous decisions extending it to the State's regulatory conduct, was ill-informed. The tribunal's findings on this point were thus even blunter than those of the watershed decision in *BG Group v Argentina*, the result of which it echoed. The decision in *BG Group v Argentina* noted the existence of the controversy about the type of damage from which the obligation protected investors, and based its conclusion chiefly on its perception that earlier attempts to extend the obligation to regulatory conduct involved inappropriately "relating" the obligation to the fair and equitable treatment obligation. By contrast, the decision in *Gemplus v Mexico* failed even to note the controversy, treated the two obligations as distinct, and regarded the full protection and security obligation as *per se* incapable of covering damage caused by a State's regulatory conduct. As a result, the decision stands as a largely unexplained rejection of the proposition that regulatory conduct could breached the obligation.

Unexplained as the decision in *Gemplus v Mexico* was, it was at the van of several decisions endorsing the result which it, and *BG Group v Argentina*, had reached. The next was *Suez v Argentina*.[543] The three treaties invoked in that case provided that investments "shall be fully and completely protected and safeguarded ... in accordance with the principle of just and equitable treatment", "shall enjoy protection and constant security" and "shall [be] protect[ed]" by the State. The claimants won a privatisation bid to provide water distribution and sewerage services in Buenos Aires. Through a locally-incorporated company they began providing the services and making necessary investments. Argentina

[543] *Suez, Sociedad General de Aguas v Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010. Shortly before this decision were the two decisions in *Liman v Kazakhstan* and *AWG v Argentina*. Those decisions did not contribute to the doctrine in the area because the tribunal in each decided the claim in one paragraph, by which both tribunals limited the scope of the obligation to protection from physical harm, noted that no such harm was in issue in the case, and thus rejected the claim: *Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan*, ICSID Case No. ARB/07/14, [289]; and *AWG Group Ltd. v The Argentine Republic*, UNCITRAL, Decision on Liability, 30 June 2010, [179].

suffered its economic crisis and, as was in issue in *National Grid v Argentina*, converted public utility tariffs from dollar-denominated tariffs into peso-denominated tariffs, forbade public utility companies from suspending or modifying obligations under their licences, and sought to renegotiate those licences. The claimants' operations were subject to these measures, and renegotiations with the State failed. Argentina eventually alleged there were high nitrate levels in the water provided by the claimants' operation, and on that basis terminated the concession and took possession of the water distribution and sewerage system. The claimants alleged that this regulatory conduct breached the obligation.

The tribunal disagreed. After a short summary of the history of the obligation,[544] the tribunal noted that the obligation had "traditionally" been extended to physical protection, and that it was a due diligence obligation (rather than strict liability).[545] The tribunal cited several cases in which a State's regulatory conduct had been held to breach the obligation, and noted in particular the breadth of the applicable treaty language in those cases.[546] The tribunal also observed that some decisions held that the full protection and security and the fair and equitable treatment obligations were breached simultaneously.[547] Against this background, the tribunal held that the two obligations should be treated as distinct,[548] and added that:

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[544] *Suez, Sociedad General de Aguas v Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, [161].

[545] *Suez, Sociedad General de Aguas v Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, [162]-[165].

[546] *Suez, Sociedad General de Aguas v Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, [166]-[168].

[547] *Suez, Sociedad General de Aguas v Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, [170].

[548] *Suez, Sociedad General de Aguas v Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, [172].

> "the stability of the business environment and legal security are more characteristic of the standard of fair and equitable treatment, while the full protection and security standard primarily seeks to protect investment from physical harm. That said, this latter standard may also include an obligation to provide adequate mechanisms and legal remedies for prosecuting the State organs or private parties responsible for the injury caused to the investor."[549]

Having rejected the broader scope of the obligation asserted by the claimants, the tribunal opined that overlaps between the full protection and security obligation and other investment treaty obligations was "neither necessary nor desirable".[550] It concluded by insisting that the limitation of the scope of the obligation was supported by both its interpretation of the applicable treaties and its view of the history of the obligation.[551]

The analysis of the obligation in *Suez v Argentina* is fulsome. It stands as the high watermark for decisions that deem regulatory conduct to fall outside of the scope of the obligation, irrespective of what that conduct is and what damage it causes. Indeed, issues such as causation and the State's knowledge and capacity to forestall the damage, are not discussed by the tribunal because they are entirely irrelevant if the conduct falls outside that scope. The textual formulation of the obligation in the applicable treaties, its previous application in case law, and the "desire" to treat various obligations in the treaties as mutually independent, were sufficient reasons for this tribunal to hold that Argentina's conduct could not be impugned pursuant to this obligation. However, the reasoning in *Suez v Argentina* is not without difficulties. As it was in *BG Group v Argentina*, the assertion that the obligation "traditionally" applied to failures to prevent physical damage

[549] *Suez, Sociedad General de Aguas v Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, [173].

[550] *Suez, Sociedad General de Aguas v Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, [174].

[551] *Suez, Sociedad General de Aguas v Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, [177].

is not to the point. The classic case law cited by the tribunal – *ELSI*, *AAPL v Sri Lanka*, *AMT v Zaire* – sought to apply the obligation to the allegations before them concerning physical damage. Those cases did not state that the obligation could not, in different circumstances, require a State to engage in conduct other than the provision of physical protection. To infer from them a circumscription of the scope of the obligation is therefore incorrect. Moreover, the tribunal's blunt insistence in *Suez v Argentina* that the full protection and security and fair and equitable treatment obligations should not overlap and must be mutually independent seems doctrinaire and arguably targeted at bolstering the perception that earlier extensions of the former obligation to a State's regulatory conduct have relied on establishing a "relationship" between the two. The tribunal's position is hard to reconcile with treaty text which makes the former obligation contingent upon the latter, as one treaty did in this case. It also, as discussed in Chapter Four below, frustrates without explanation sensible development of doctrine necessary to delineate the scope of the full protection and security obligation.

Perhaps sensing the disadvantages of such an approach, the next case in this category acknowledged that a broader understanding of the scope of the obligation may be appropriate, albeit in limited circumstances. In *AES v Hungary*, the treaty provided that investments shall "enjoy the most constant protection and security". The two claimants were a local project company and its shareholder, which together won a privatisation tender for the purchase of three power stations in Hungary. The tariffs to be charged by the operator of the stations were to be determined by administrative decree, or, if the administrative pricing regime were terminated, by a schedule in the concession contract. Several years after the privatisation, and after the claimants retrofitted the stations at significant cost, the administrative pricing regime was terminated, and the contractual schedule governed pricing. However, soon after this development, public and political

discussion arose regarding profit levels in the energy sector. The Hungarian Energy Office asked the claimants to cap their profits. When no agreement was reached, the Hungarian Parliament passed legislation reintroducing an administrative pricing regime, thereby overriding the contractual pricing schedule. The claimants alleged that this instability of the investment environment breached the obligation.

The tribunal rejected this argument. It held that the obligation required host States to "take reasonable steps to protect its investors (or to enable its investors to protect themselves) against harassment by third parties and/or state actors".[552] It added that, while the obligation:

> "can, in appropriate circumstances, extend beyond a protection of physical security, it certainly does not protect against a state's right (as was the case here) to legislate or regulate in a manner which may negatively affect a claimant's investment, provided that the state acts reasonably in the circumstances and with a view to achieving objectively rational public policy goals."[553]

While recognising the potential for a broader scope of obligation, the tribunal held that Hungary's regulatory conduct had nonetheless not breached the obligation. This was because the amendment of its laws did not meet the above standard, especially given that a return to an administrative pricing regime had never been foreclosed by the parties.[554] To treat the amendment of legislation in these circumstances as a breach of the obligation

[552] *AES Summit Generation Limited and AES-Tisza Erömü Kft. v Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, [13.3.2].

[553] *AES Summit Generation Limited and AES-Tisza Erömü Kft. v Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, [13.3.2].

[554] *AES Summit Generation Limited and AES-Tisza Erömü Kft. v Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, [13.3.4].

would in effect "recognis[e] the existence of a non-existent stability agreement as a consequence of the full protection and security standard".[555]

The most striking aspect of the tribunal's reasoning is its attempt to delineate when regulatory conduct breaches the obligation as distinct from when it constitutes an exercise of the "state's right ... to legislate or regulate".[556] The diagnostic it offers – that a State must act reasonably with a view to achieving objectively rational public policy goals – is the first explicit attempt by a tribunal to delineate wrongful from lawful regulatory conduct vis-à-vis the obligation. In doing so, the tribunal draws on strains of discussion in earlier cases. First, the test is an objective one. As confirmed in cases concerning failure to provide physical security or a means of redress, and as was evident in *Bogdanov v Moldova,* this tribunal regarded the measure of wrongfulness as being entirely divorced from the State's subjective intentions. Considerations of "reasonableness" and "rationality" may take into account the circumstances in which the conduct occurred, but they do not defer to the State's individual judgment in pursuing that conduct.

Secondly, the tribunal's diagnostic presumes a position on important issues of State responsibility. These include knowledge and capacity. A diagnostic of wrongfulness which requires regulatory action to be "reasonable" and "rational" inherently presumes that the State has knowledge of the circumstances in which its actions occurred and the capacity to control those actions. This presumption is not contentious. It was evident not only in the early case of *CME v Czech Republic*, but also in later decisions which held that regulatory conduct can breach the obligation. The diagnostic also has consequences for

[555] *AES Summit Generation Limited and AES-Tisza Erömü Kft. v Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, [13.3.5].

[556] *AES Summit Generation Limited and AES-Tisza Erömü Kft. v Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, [13.3.2].

regulatory omissions. For instance, it would be challenging to cast an omission as objectively unreasonable or irrational if the State is unaware of the need to act, or is incapable of acting, to forestall the damage – that is, if it does not know of the actual or potential impact of its omission on a protected foreign investment. The diagnostic in *AES v Hungary* thus treats knowledge and capacity as prime evidence of the wrongfulness of an impugned regulatory omission.

The next four decisions in this category dealt with the obligation in summary fashion, albeit with some variety. The first two cases decided allegations of breach of the obligation in conjunction with parallel allegations that the State had breached the fair and equitable treatment obligation. In *Total v Argentina* and *Impregilo v Argentina*, the claimants won concessions to provide, respectively, gas transportation services and water and sewerage services. These concessions were allegedly subjected to various breaches of the applicable treaties by measures taken by Argentina during its economic crisis.[557] In the former, the tribunal noted that the obligation in the applicable treaty was formulated as an "application of the principle of fair and equitable treatment", and held that it extended beyond the protection of the physical security of the investment.[558] The tribunal then held that it was "unnecessary" to examine the matter further because it had already found a breach of the fair and equitable treatment obligation, and that, pursuant to the treaty's terms, this established a breach of the full protection and security obligation.[559] Similarly, *Impregilo v Argentina* held that it did not need to consider whether Argentina's regulatory

[557] More detail on such measures is given in the discussion of *BG Group Plc v Argentina*, UNCITRAL, Final Award, 24 December 2007, *National Grid plc v Argentina*, UNCITRAL, Award, 3 November 2008, and *Suez, Sociedad General de Aguas v Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010 above.

[558] *Total S.A. v Argentina*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, [343].

[559] *Total S.A. v Argentina*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, [343].

conduct breached the obligation because it had already established a breach of the fair and equitable treatment obligation.[560] Unlike in *Total v Argentina*, however, the tribunal in *Impregilo v Argentina* reached its conclusion even though the full protection and security obligation was not contingent on the fair and equitable treatment obligation in the applicable treaty.

The third case dealing summarily with the obligation is *El Paso v Argentina*. As in *Total v Argentina* and *Impregilo v Argentina*, the claimant alleged that its investments in Argentinean subsidiaries operating in the oil and gas sector were impaired by measures taken by the State in the context of its economic crisis. The tribunal dismissed the allegation on the basis that the obligation in the treaty "is no more than the traditional obligation to protect aliens under international customary law", and that in any event it was limited to providing physical protection from third parties (rather than from the conduct of the State itself).[561] The final decision in this phase of summary treatment of the obligation is *EDF v Argentina*. The claimants alleged that Argentina had overridden or repudiated rights which their locally-incorporated subsidiary had gained under a concession agreement relating to the transmission and distribution of electricity. The tribunal followed *BG Group v Argentina* in finding that this conduct did not breach the obligation because the scope of the obligation did not impose on the State "a duty to maintain a stable legal and commercial environment".[562]

In each of these four decisions, the reasoning of the tribunals was abbreviated. None discussed issues of knowledge, capacity or causation. They add little substance to the

[560] *Impregilo S.p.A. v Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011, [334].

[561] *El Paso Energy International Company v Argentina*, ICSID Case No. ARB/03/15, Award, 31 October 2011, [522].

[562] *EDF International S.A., SAUR International S.A. and Leon Participaciones Argentinas S.A. v Argentina*, ICSID Case No. ARB/03/23, Award, 11 June 2012, [1109].

debate surrounding the content of the obligation and how it can be breached, and are testament to the variety of approaches adopted by tribunals in deciding full protection and security claims.

The next case which provided meaningful commentary on the obligation was *Paushok v Mongolia*. The treaty required States to afford "full legal protection to investments". After the claimant had made its investment, Mongolia introduced a windfall profits tax, which the claimant alleged undermined the "stable and secure" investment environment in breach of the obligation. The tribunal noted that the obligation was one of due diligence, requiring a State to "take reasonable actions within its power to avoid injury when it is, or should be, aware that there is a risk of injury", which applied vis-à-vis "action taken by third parties" and "actions of the State or its agents".[563] It then held that there was no reason to limit the obligation to "mere physical protection", but that Mongolia's regulatory conduct had not breached the obligation in this instance (irrespective of whether the obligation imposed an "objective requirement of stability certainty or foreseeability" or a "subjective standard reduced to protection of Claimants' specific expectations").[564]

The analysis in *Paushok v Mongolia* touches on various points of doctrine. Of note was its view that the obligation extended to regulatory conduct and was violable by a failure to protect against actions of both the State and third parties. The natural extension of this position is that the obligation could be breached by regulatory conduct consisting of either State actions which cause the damage or State omissions which allow the damage to

[563] *Sergei Paushok, CJSC Golden East Company, CJSC Vostokneftegaz Company v Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, [325]-[327].

[564] *Sergei Paushok, CJSC Golden East Company, CJSC Vostokneftegaz Company v Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, [327].

be caused by third parties in private transactions with the investor. The tribunal's openness to the latter proposition follows *CME v Czech Republic* (and arguably *Biwater v Tanzania*) rather than *Lauder v Czech Republic* and *Parkerings v Lithuania*. In addition, the tribunal's refusal to be drawn on whether the standard was objective or subjective is noteworthy. While prior case law regarded the obligation as objective, the tribunal refrained from confirming this view. Potentially this is because the parties presented submissions which divorced the concept of an objective standard from the concept of legitimate expectations. As evident in *Bogdanov v Moldova*, this divorce is unnecessary. The diagnostic of wrongfulness in that case relied on the frustration of an investor's expectations as proof that the State's conduct had fallen short of the objective standard required by the obligation. By refusing to accept the divorce of the two concepts presented by the parties before it, the tribunal in *Paushok v Mongolia* refrained from impairing the credibility of the diagnostic in *Bogdanov v Moldova*.

Unglaube v Costa Rica produced the next decision on breach of the obligation by way of the State's regulation. The facts are summarised in Section 3(2)(b)(i) above. In addition to alleging that the obligation had been breached by a failure to provide a means of redress, the claimants also alleged that Costa Rica, through its administrative actions in relation to the land, breached the obligation by creating a climate of legal and commercial uncertainty and insecurity. The tribunal held that, while the scope of the obligation extended beyond physical protection,[565] Costa Rica's administrative actions had nevertheless not breached the obligation. The tribunal stated:

> "If Claimants had succeeded in establishing by appropriate evidence that they possessed certain specific development rights regarding the remainder of Phase II or their Phase I properties

[565] *Marion Unglaube and Reinhard Unglaube v Costa Rica*, ICSID Case No. ARB/08/1 and ICSID Case No. ARB/09/20, Award, 16 May 2012, [281].

> and that, as a result, the Respondent had assumed corresponding legal obligations, then failure of Respondent to accord protection to those rights might have constituted a valid claim based on failure to provide full protection and security".[566]

However, the claimants were unable to establish that they possessed such rights, and their argument was consequently dismissed.[567]

As the tribunal indicated, it was crucial for the claimants to show that they possessed rights, and the State obligations, in respect of the contested land. Once those rights and obligations were evidenced, a breach of the obligation on the basis of Costa Rica's regulatory conduct may have been arguable. Given the context of the claimants' complaints (especially regarding the lack of a means of redress), it is possible that the obligation would have been fulfilled if Costa Rica's courts abided by the standard discussed in Section 3(2)(b)(i) above, irrespective of whether the regulatory conduct caused the damage. However, one may also discern in the tribunal's reasoning an indication that regulatory conduct which undermines rights held by a claimant, in respect of which the State bears corresponding obligations, will fall within the scope of the obligation and may thus be wrongful. The regulatory conduct would thus need specifically to concern the vested rights, and causation would still need to be established,[568] but Costa Rica's administrative actions could be legitimately impugned as diminishing commercial certainty and security and violating the obligation. It is too much to say that *Unglaube v Costa Rica* requires this outcome, but the decision clearly anticipates that, in the right circumstances, regulatory conduct can breach the obligation.

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[566] *Marion Unglaube and Reinhard Unglaube v Costa Rica*, ICSID Case No. ARB/08/1 and ICSID Case No. ARB/09/20, Award, 16 May 2012, [287].

[567] *Marion Unglaube and Reinhard Unglaube v Costa Rica*, ICSID Case No. ARB/08/1 and ICSID Case No. ARB/09/20, Award, 16 May 2012, [287].

[568] *Marion Unglaube and Reinhard Unglaube v Costa Rica*, ICSID Case No. ARB/08/1 and ICSID Case No. ARB/09/20, Award, 16 May 2012, [283].

The next case in this category is *Electrabel v Hungary*. The applicable Energy Charter Treaty provided that investments "shall … enjoy the most constant protection and security". The claimant acquired a shareholding in a power generation station called Dunamenti from which, pursuant to a power purchasing agreement with a Hungarian agency, it was obliged to supply a minimum power capacity in return for a fee. After Hungary joined the European Union, it took various actions which the claimant alleged undermined its investment. Chief among these was the imposition of a significant reduction in the fee payable to Dunamenti by the Hungarian agency, and the eventual termination of the power purchasing agreement with insufficient compensation. The claimant alleged that the reduction in the fee breached the obligation because "Hungary failed to take positive steps to protect [its] investment and to prevent infringements of [its] rights by the operation of law."[569] The claimant's argument thus impugned Hungary's regulatory omissions, even though the alleged damage resulted from the acts of a State agency.

The tribunal dismissed this argument. It found that the obligation was distinct from the fair and equitable treatment obligation,[570] and that it obliged Hungary to "create and maintain measures that promote security ... [and] must be capable of protecting the covered investment against adverse actions by private parties."[571] It then held, while assuming *arguendo* that the Hungarian agency which signed the power purchasing agreement was a private party, that Hungary had provided the claimant with the "tools for

[569] *Electrabel S.A. v Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, [7.81].

[570] *Electrabel S.A. v Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, [7.83].

[571] *Electrabel S.A. v Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, [7.145].

obtaining redress" by providing it with dispute resolution options in the agreement and access to the dispute resolution mechanism under the Energy Charter Treaty.[572] This was sufficient for Hungary to have satisfied the obligation.[573]

Aspects of the decision in *Electrabel v Hungary* are problematic. Foremost, it holds that a State satisfies its protection and security obligation, at least in respect of its own regulatory conduct, if it concludes an investment protection treaty and offers dispute resolution options under the applicable investment agreement. This cannot be correct. An investment treaty is the source of the obligation, and thus cannot simultaneously be the means of compliance with it. Thus the provision of alternative dispute resolution mechanisms under the investment agreement becomes crucial. However, the provision of a means of redress will not satisfy the obligation simply by its existence, but rather must satisfy the duty discussed in Section 3(2)(b) above. On no construction of the obligation, however narrow, has the evidence relied upon by the tribunal demonstrated Hungary's compliance with it – the simple existence of the treaty and the dispute resolution clause in the investment agreement are not sufficient. In addition, the tribunal's reasoning does not address the arguments before it. While the provision of a means of redress is central to the obligation, stating that Hungary had satisfied that duty provides no insight into whether, as the claimant argued, its regulatory omissions breached the claimant's right to protection and security. The tribunal's position on this is thus unclear. On the one hand, its pivot to the availability of a means of redress may suggest that it regards regulatory conduct as falling outside the scope of the obligation. On the other hand, it may suggest that the duty to provide means of redress applies to a State's regulatory conduct because, no less than

[572] *Electrabel S.A. v Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, [7.146].

[573] *Electrabel S.A. v Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, [7.147].

failures to prevent physical damage, failures to regulate which cause damage fall within the scope of the obligation. That these questions went unanswered by the tribunal, despite being squarely before it, means that an opportunity to analyse whether and how the obligation relates to a State's regulatory omissions was lost.

The final case in this category is *Mamidoil v Albania*. As in *Electrabel v Hungary*, the applicable articulation of the obligation was that in the Energy Charter Treaty. In this case, the investor complained of regulatory acts and omissions by the State in connection with its construction and operation of an oil container terminal at an Albanian port and the conduct of its petrol station business. The impugned conduct was the failure of the State to curb fuel smuggling and quality adulteration that impaired the business, and the failure of the State to stop the tax evasion practices to which such smuggling and adulteration were directed.

The tribunal held that there was no breach of the obligation by this conduct. It treated the notion that the obligation was a due diligence obligation as one established by a *jurisprudence constante*.[574] The tribunal's rejection of the claim was then done on two key bases. The first was that the fuel smuggling and quality adulteration had subsisted at the time the investor made its investment.[575] The second was that the claimant's market share and exports of oil in fact grew after it made its investment and after the time when it claimed the State should have acted to curb the fuel smuggling and quality adulteration.[576] The tribunal further noted the policies implemented by the State in an effort to curb the

[574] *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, [821].

[575] *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, [823]-[824].

[576] *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, [825]-[826].

practices.[577] In such a context, the tribunal acknowledged the State's "due diligence in its general customs policy and its specific measures",[578] which was sufficient for it to reject the claim.

The core discussion point that arises out of the analysis in *Mamidoil v Albania* is one of causation. Factual causality can hardly exist where the complained of omissions not only did not prevent the investment from improving, but also were not introduced after the investment was initiated. Even if better regulation by the State would have rendered the damage less likely to occur, such that legal causality may have been possible to establish in this case, the fact that the failure to regulate was not part of the concatenation of events resulting in the degradation of protection previously afforded the investment means factual causality cannot be proven, and no breach of the obligation arises. In this way, *Mamidoil v Albania* is one of the few cases in this category that decide the claim by reference to causation principles relevant to prove of a breach of positive obligations.

3(2)(c)(ii) Key aspects of proving a breach of the obligation in relation to a failure to provide protection and security through regulation

The elements of State responsibility for omissions receive attention in some cases in this category, but are not treated consistently. In part this is because the impugned conduct of States is not only their failure to act, but also their actions. It is intuitively odd to speak of a State's failure to exercise due diligence to forestall damage which is the result of the State's own actions. This instinct is evident in tribunals' reasoning, even though the duty to afford full protection and security remains a positive obligation and is uniformly

[577] *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, [827]-[828].

[578] *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, [829].

described as an obligation of due diligence. Nonetheless, preliminary observations about the role of the elements of responsibility for omissions in this category of cases can be made now, before they receive fuller analysis in Chapter Four below.

First, the knowledge of the State of the circumstances in which the damage occurs and its capacity to forestall that damage are rarely discussed. Even where the impugned conduct involves a State's regulatory omissions, these elements of responsibility receive little attention. They are either overlooked or presumed to be present. A presumption of knowledge and capacity may occur because the State has been intimately involved in the circumstances in which the damage occurred, either by seeking to influence it directly through regulatory actions or by having indirect involvement in a dispute between private parties. Ultimately, however, discussion of knowledge and capacity as indicators of a breach is underdeveloped because of persistent uncertainties as to not only what standard that evidence must reach in order to prove that a State's regulatory conduct has breached the obligation and but also whether regulatory conduct falls within the scope of the obligation at all.

Secondly, causation is a significant issue in proving a State has breached the obligation through its regulatory conduct. Where a claimant cannot demonstrate that, but for the State's wrongful regulatory conduct, the damage would not have occurred or would have been less likely to occur, the State will not be required to compensate that claimant for the damage. *Lauder v Czech Republic* confirmed this point early in the case law. That case also illustrated how difficult causation would be to prove when the impugned conduct is a failure to intervene in transactions between private parties which cause damage to the claimant, while *Mamidoil v Albania* achieved the same result in relation to State omissions that subsisted at the time the investment was made. Other cases, such as *Unglaube v Costa*

Rica and *Biwater v Tanzania*, also confirmed that proof of causation would be necessary when the State's own regulatory actions are impugned.

Thirdly, the standard of proof for a breach of the obligation by regulatory conduct is unclear. Some tribunals described the standard simply as one of due diligence (as in *Lauder v Czech Republic*) without explaining further what duly diligent regulatory conduct might be. Later tribunals were slightly more forthcoming and sought to identify key facts before them which rendered the regulatory conduct lawful or unlawful. Tribunals thus found a lack of due diligence and a breach of the obligation in regulatory conduct which: was "targeted" at the investor;[579] "dismantled" or eroded the "stability" of the investment environment;[580] had an ulterior "sole purpose" unrelated to the public interest;[581] constituted a "blatant misuse" of public powers;[582] was not "reasonable" and not in pursuit of "objectively rational public policy goals";[583] and violated an investor's "certain specific rights" in breach of the State's corresponding "obligations".[584] Despite this variety of approach, the standard remained an objective one. Only occasionally did tribunals expressly confirm that the conduct must be "objectively" wrong in order to breach the obligation (as in *AES v Hungary*) – but, equally, no tribunal ever stepped into the shoes of

[579] *CME Czech Republic B.V. v Czech Republic*, UNCITRAL, Final Award, 13 September 2001, [613].

[580] *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case No. ARB/05/08, Award, 24 July 2008, [729]; *Azurix Corporation v Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006, [408]; *National Grid plc v Argentina*, UNCITRAL, Award, 3 November 2008, [187].

[581] *Siemens AG v Argentina*, ICSID Case No. ARB/02/08, Award, 6 February 2007, [308].

[582] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentina*, ICSID Case No. ARB/97/3, Award, 20 August 2007, [7.4.24].

[583] *AES Summit Generation Limited and AES-Tisza Erömü Kft. v Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, [13.3.2].

[584] *Marion Unglaube and Reinhard Unglaube v Costa Rica*, ICSID Case No. ARB/08/1 and ICSID Case No. ARB/09/20, Award, 16 May 2012, [287].

the regulator and held that its conduct was wrongful based on the subjective considerations underlying that conduct.

A final point emerging from this category of cases, though not concerning any of the elements of State responsibility for wrongful omissions, is the uncertainty over the scope of the obligation. While the weight of jurisprudence accepts that regulatory acts and omissions may breach the full protection and security obligation, some cases hold that such conduct can never breach the obligation – that is, a State's power to regulate falls wholesale outside the scope of the obligation[585] – or that, even if regulatory conduct falls within the scope of the obligation, a State cannot be obliged to use regulatory powers to intervene in the investor's transactions with third parties to forestall damage resulting from those transactions.[586]

Each of these issues is discussed fully in Chapter Four below.

[585] *BG Group Plc v Argentina*, UNCITRAL, Final Award, 24 December 2007, [324]-[325]; *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, [669]; *Gemplus S.A., SLP S.A. and Gemplus Industrial S.A. de C.V. v Mexico* and *Talsud S.A. v Mexico*, ICSID Case No. ARB(AF)/04/3 and ICSID Case No. ARB(AF)/04/4, Award, 16 June 2010, [9-12]; *Suez, Sociedad General de Aguas v Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, [173]-[174]; *EDF International S.A., SAUR International S.A. and Leon Participaciones Argentinas S.A. v Argentina*, ICSID Case No. ARB/03/23, Award, 11 June 2012, [1109].

[586] *Parkerings-Compagniet AS v Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, [359].

CHAPTER FOUR: STATE RESPONSIBILITY FOR VIOLATION OF THE FULL PROTECTION AND SECURITY OBLIGATION BY OMISSION

The previous Chapter reviewed the historical development and modern-day scope *ratione materiae* of the full protection and security obligation in international investment law. One feature of the case law discussed in that Chapter is the inconsistency with which tribunals deciding alleged breaches of the obligation have invoked the constituent elements of a State's responsibility for wrongful omissions in international law. It is true that knowledge, capacity, causation and the standard of required conduct are themes in the case law. However, beyond indicating that they are relevant to establishing whether the State has acted with "due diligence", the case law generally refrains from explaining when, or how, proof of such matters contributes to a finding that the State has breached the obligation through one of the categories of conduct identified in Sections 3(2)(a) to 3(2)(c) above.

This Chapter analyses the roles which the elements of State responsibility for wrongful omissions play when establishing a violation of the obligation. Section 4(1) discusses the role which a State's knowledge of the circumstances giving rise to the need to act plays in establishing a violation of the obligation, including the relevance of: the content of the State's knowledge; the identity of the State actor who acquires the knowledge; and the timing of the State's acquisition of the knowledge. Section 4(2) examines the role which a State's capacity to act to forestall the damage plays in establishing a violation of the obligation, including its capacity to provide protection and security: from physical damage done by non-State and State actors; and from economic damage done by the State's regulatory conduct and by third parties in private transactions. Section 4(3) considers the role which proof of a legally causative link between the State's

omission and the alleged damage plays in establishing a violation of the obligation, including: how the existence of such a causal link is different to the existence of factual causality, relies on circumstantial evidence and positive inferences and uses a "but for" counterfactual; and how the absence of such a causal link exists when there is a contribution to factual causality by the investor, an absence of factual causality irrespective of the investor's conduct or a remoteness of the damage from the wrongful omission. Section 4(4) concludes with a discussion of the role which the standard of proof for a wrongful omission plays in establishing a violation of the obligation.

4(1) Knowledge of the State

Knowledge is one of the key indicators of a wrongful omission in the law of State responsibility. As discussed in Section 2(4)(a) above, the knowledge of a State of the circumstances giving rise to the need to act can be the factual basis on which the State's failure to act is held to be wrongful.

However, when considering the contribution which knowledge makes to the factual basis of a State's responsibility in a particular case, one must beware of monolithic conceptions of "the State" and its "knowledge". Such conceptions would treat information acquired by a junior customs official as being no less the "knowledge" of "the State" than information acquired by a Cabinet Minister or head of the State's armed forces. Using knowledge as an indicator of the wrongfulness of a State's breach of the obligation is more subtle than that. As discussed in Section 4(1)(a), the content of the State's knowledge of the circumstances giving rise to the need to act will be relevant to the determination of the wrongfulness of its conduct. So too will the identity of the State entity or official who acquires the knowledge, and the timing of that acquisition, as examined in Sections 4(1)(b)

and 4(1)(c) respectively. Finally, Section 4(1)(d) provides a brief conclusion about the role of knowledge in a State's responsibility for violation of the obligation.

4(1)(a) Content of the State's knowledge of the circumstances giving rise to the need to act

Brownlie observed that when "the responsibility of the state … depend[s] on a failure to control … knowledge may be relevant in establishing the omission or, more properly, responsibility for failure to act."[587] However, the existence of "knowledge" is not in itself relevant;[588] it is rather the content of the knowledge that is relevant. By establishing what exactly the State knew, one identifies the factual matrix in which the State's failure to act occurred. Establishing this factual matrix, beyond the mere observation of the State's inaction, is the basis on which wrongfulness and responsibility can be decided. The function of "knowledge" is thus to construct the basis on which the positive inference of wrongfulness and responsibility can be drawn. It is not to determine or condition such wrongfulness and responsibility. As Brownlie states, the "relevance [of knowledge] goes to the *actus reus*, as it were, and is not necessarily related to … *culpa*".[589]

Given that the precise content of a State's knowledge of the circumstances giving rise to the need to act is an important indicator of a wrongful omission by that State, the present analysis focuses on the nature of the knowledge which places a State's inactions in a context in which they breach the full protection and security obligation. As for so many aspects of due diligence obligations, there is no bright line test. However, the

[587] Brownlie, *System of the Law of Nations, State Responsibility – Part I* (OUP, 1983), 45.

[588] Which is why it is not sufficient *per se* to show that a foreign investor made a specific request for protection: Zeitler, "The Guarantee of "Full Protection and Security" in Investment Treaties Regarding Harm Caused by Private Actors" (2005) 3 *Stockholm International Arbitration Review* 959, 974, citing de Beus, *The Jurisprudence of the General Claims Commission, United States and Mexico* (Nijhoff, 1923) 213-214.

[589] Brownlie, *System of the Law of Nations, State Responsibility – Part I* (OUP, 1983), 45.

treatment of knowledge in the case law to date, reviewed in the previous Chapter, provides some guidance as to what form of knowledge best establishes a breach of the obligation.

4(1)(a)(i) No knowledge

A host State which has no knowledge of the circumstances giving rise to a need to act will likely not be held responsible for a failure to protect foreign investors from physical damage by non-State actors. The inability of a claimant to adduce evidence of the State's knowledge translates, in effect, into an inability to demonstrate a breach of that aspect of the obligation. As a result, tribunals focus on whether the State breached the duty to punish perpetrators of the damage – a duty which is normally readily discharged, given that it requires duly diligent investigatory efforts rather than guaranteed arrest and conviction.[590] In *Parkerings v Lithuania*, for example, the officials of neither the Municipality nor the State knew of the damage done to the claimant's parking station facilities. Nor were they aware of the circumstances giving rise to any need to act, which were the product of random vandalism and unrelated to Lithuania's conduct which was otherwise alleged to have breached the applicable treaty.[591] Investigations by Lithuanian police, though not resulting in an arrest, satisfied the obligation.[592] Knowledge as an indicator of wrongfulness was not proven and thus could not undermine such a conclusion.

The absence of knowledge may militate even more strongly against wrongfulness if the investor itself knew of the circumstances requiring the State's protective action at the time of the damage but did not provide it to the State. In *GEA v*

[590] See: *Parkerings-Compagniet AS v Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, [357]; *GEA Group Aktiengesellschaft v Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011, [247].

[591] *Parkerings-Compagniet AS v Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, [356].

[592] *Parkerings-Compagniet AS v Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, [357].

Ukraine, the State was not aware of alleged thefts of the claimant's property, and the claimant did not report them to Ukrainian police. The tribunal rejected the alleged breach of the obligation on the basis that the State did not have knowledge of the circumstances giving rise to its need to act and that it was a "fundamental double standard" to alleged wrongful conduct on the part of the State when the claimant alone possessed the relevant knowledge.[593] Accordingly, when a State has no knowledge of the circumstances requiring it to act, evidence of that ignorance will undermine the claimant's allegations of wrongfulness.

Nor have other circumstances in which international responsibility attaches to a State for breach of a due diligence obligation despite its lack of knowledge yet been evident in the case law. Unlike the situation in *Corfu Channel*, no tribunal has treated as an indicator of wrongfulness a host State's constructive knowledge, or knowledge which it ought to have possessed, of the circumstances giving rise to a need to act. Similarly, no tribunal has yet cited as evidence of the wrongfulness of a State's failure to provide protection and security any knowledge which the State acquired through the adoption of conduct previously not attributable to it, as in *Tehran Hostages*. The nature of the knowledge which establishes a wrongful breach of the obligation has therefore been limited to actual knowledge.

4(1)(a)(ii) Knowledge of circumstances in which the damage occurred

In reviewing the role of the content of the knowledge in establishing wrongfulness, categories of breaches of the obligation other than a failure to prevent physical damage by non-State actors are relevant. This is because all other categories involve actions by State officials, such as damage done by State actors, the provision of a means of redress by the

[593] *GEA Group Aktiengesellschaft v Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011, [247].

State's courts or damage done by the State's regulatory conduct. In each, that the State has knowledge can be presumed; however, the content of that knowledge and the extent to which it plays a role in establishing wrongfulness cannot and so must be analysed casuistically.

The minimum scope of knowledge which can contribute to establishing a breach of the obligation is when the State is aware of the circumstances in which the damage occurred. This is distinct from knowledge of the circumstances giving rise to the need to act, discussed in section 4(1)(a)(iii) below. The distinction lies in knowledge which the State possesses of how the circumstances may result in damage to the particular investment at issue – which a State does not necessarily possess when it is simply aware of the circumstances in which the damage occurred. Typically, evidence of the State's possession of only the latter will not constitute a strong indicator of wrongfulness.

In the context of physical damage by non-State actors, *Karmer v Georgia* highlights the point. In that case, the State was undoubtedly aware of the revolution which was prevailing at the time at which, and in the region in which, the damage to the claimant's highway construction project occurred.[594] However, this knowledge was not in itself sufficient to establish the wrongfulness of the State's failure to prevent the damage which was inflicted by unknown individuals on the claimant's property. The tribunal reasoned that the broader context in which damage occurs is not equivalent to "knowledge of similar events" causing damage or knowledge deriving from the "involvement" of State officials in the damage.[595] In those latter circumstances, a need to act to forestall the

[594] *Karmer Marble Tourism Construction Industry and Commerce Limited Liability Company v Georgia*, ICSID Case No. ARB/08/19, Award, 9 August 2012, [291].

[595] *Karmer Marble Tourism Construction Industry and Commerce Limited Liability Company v Georgia*, ICSID Case No. ARB/08/19, Award, 9 August 2012, [291].

damage exists. As the tribunal in *Karmer v Georgia* noted, such were the circumstances which warranted findings that host States had breached the obligation in *AAPL v Sri Lanka* and *Wena Hotels v Egypt*. However, where the State's knowledge is not related specifically to the damage suffered by the claimant and relates only to circumstances which are prevailing generally, such knowledge will only contribute weakly to establishing the wrongfulness of the State's inaction.

This weakness of "general knowledge" is confirmed in other categories of cases in which a breach of the obligation is alleged. In the context of physical damage by State actors, a number of tribunals dismissing claims of a breach have highlighted the limitations of the State's "knowledge" of the circumstances in which the alleged damaged occurred. In *Eureko v Poland*, the tribunal dismissed the allegation of a breach because there was no "clear evidence" that State officials "authored or instigated" the conduct causing the damage.[596] While this finding is not without its problems vis-à-vis the law of State responsibility for omissions,[597] it highlights that the State's knowledge must reach a certain threshold if it is to play a role in establishing the wrongfulness of its failure to act. Similarly in *Ulysseas v Ecuador* the tribunal highlighted that the alleged damage was inflicted by a "delegate" of the State and that any claim for damage must proceed under the contractual arrangements in place with that delegate.[598] Even though the impugned conduct was arguably attributable to the State, the actual knowledge of the State was insufficient to establish the wrongfulness of its failure to forestall the damage allegedly done by the delegate. The legal fiction of the monolithic State in which the knowledge of

[596] *Eureko B.V. v Poland*, UNCITRAL, Partial Award, 19 August 2005, [237].

[597] See section 3(2)(a)(ii) above.

[598] *Ulysseas, Inc. v Ecuador*, UNCITRAL, Final Award, 12 June 2012, [273].

each official is knowledge of the State breaks down in this analysis. When viewed from the perspective of a State's need to act duly diligently to avoid engaging in wrongful omissions, it is not sufficient that some State officials have some knowledge of (or even an active hand in creating) the circumstances in which the damage occurred. As discussed in section 4(1)(a)(iii) below, an additional element to the content of the knowledge is required in order to afford knowledge a role in establishing that a failure to act is wrongful – namely, knowledge of circumstances which require the State to take protective action.

That general knowledge will only weakly contribute to establishing wrongfulness is also evident in cases in which a breach of the obligation is alleged on the basis of the State's regulatory conduct. In virtually all of the cases reviewed in section 3(2)(c)(i) above, a State's regulatory actions were at least part of the impugned conduct. In cases where a breach of the obligation was dismissed, the knowledge that host States had of the regulatory measures they were implementing was never regarded as relevant to the claimant's attempt to establish the wrongfulness of the State's failure to provide protection and security from the damage allegedly done by those measures. In cases such as *Lauder v Czech Republic* and *PSEG v Turkey*, the States' regulatory conduct was deeply involved in the underlying factual background. In the former the Czech Media Council regulated the contentious licensing arrangements, while in the latter the Turkish Ministry of Energy and Natural Resources regulated build-operate-transfer projects such as the claimant's. Similarly, in some cases where a breach of the obligation was established, the knowledge of the State regulators was not discussed. In *CME v Czech Republic* and *Azurix v Argentina*, the States' regulators were no less involved in the factual matrix from which the dispute emerged. The former referred to the same regulatory conduct by the

Media Council as in *Lauder v Czech Republic*, while a variety of Argentinean regulatory authorities took the measures affecting the claimant's water and sewerage project.

In each of these decisions, the regulatory measures of the States were part of the circumstances in which the alleged damage occurred. However, the tribunals did not rely on the States' knowledge of their own actions when deciding whether their conduct was wrongful. This could be explained by casting the decisions of these tribunals as erroneous insofar as they treat the obligation as a negative obligation and evaluate the State's positive actions against a standard which is breached by a State's failure to act. However, the better view, which accords with tribunals' uniform recognition that the obligation is one of due diligence, is that the decisions confirm that the possession of knowledge by State regulators of the general circumstances in which the alleged damage occurred is not in itself sufficient to establish the wrongfulness of the State's conduct, even when their own regulation is part of those circumstances. As in cases where physical damage is done by its own actors, some additional element to the content of the State's knowledge is necessary if it is to contribute to establishing that the State's failure to take any or alternative regulatory measures is a wrongful omission in breach of the obligation.

4(1)(a)(iii) Knowledge of circumstances giving rise to the need to act

Where a claimant is able to demonstrate that the State possessed knowledge not merely of the circumstances in which the alleged damage occurred, but particularly of circumstances which gave rise to a need to take duly diligent action to forestall that damage, then such knowledge will be a strong indicator of the wrongfulness of any failure by the State to take that action. This additional element to the content of the knowledge required to establish a breach of the full protection and security obligation is evident in each category discussed in Chapter Three above.

As explained in the previous section, the significance of evidence of a State's knowledge of the circumstances giving rise to a need to act was apparent in the reasoning of the tribunal in *Karmer v Georgia*. While Georgia of course knew of the prevailing revolution in its territory, it was not further aware of the circumstances specific to the claimant's investment which gave rise to a need to take duly diligent steps to protect that investment. Georgia's lack of knowledge of previous similar events inflicting damage, and of knowledge deriving from the involvement of its own officials in those events, was central to the tribunal's decision that it had not breached the obligation.[599] The importance of such evidence was evident also in the only case in which a State breached the obligation by failure to prevent physical damage by non-State actors. In *AAPL v Sri Lanka*, the tribunal emphasised the specific knowledge possessed by senior Sri Lankan officials in relation to physical damage to be inflicted by identified non-State actors.[600] The content of Sri Lanka's knowledge was different to the content of Georgia's knowledge. Sri Lanka knew not merely of the general circumstances of the insurgency, but also of the specific circumstances leading to the damage suffered by the investment and the nature of the damage to be inflicted by the insurgency (and its repression by the Sri Lankan military). This additional element in Sri Lanka's knowledge made it a potent indicator of wrongfulness for the tribunal, and was part of the evidentiary basis on which the tribunal held that the State had failed to act with due diligence.

The existence of this additional element is also evident in cases in which a State breached the obligation by failing to protect investments from physical damage done by

[599] *Karmer Marble Tourism Construction Industry and Commerce Limited Liability Company v Georgia*, ICSID Case No. ARB/08/19, Award, 9 August 2012, [291].

[600] *Asian Agricultural Products Ltd. v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, [85(a)-(b)].

State actors. In *Wena Hotels v Egypt*, the tribunal expressly noted Egypt's foreknowledge of the intention of representatives of the State-owned lessor company to seize the hotels which were the subject of the claimant's investment.[601] Similarly, in *Siag v Egypt* the Egyptian police and attorney-general had specific foreknowledge of the impending damage to the investment project and the protection which was needed.[602] In both cases, the tribunals relied expressly on Egypt's knowledge as an evidentiary foundation on which they could base a conclusion that it had failed to act as obliged. That Egypt's knowledge was pivotal in this way for these tribunals highlights the difference when establishing a breach of the obligation between a State's general knowledge of circumstances in which the damage occurs and its specific knowledge of circumstances which give rise to a need for it to act with due diligence to forestall the damage. The content of Egypt's knowledge in both cases was specific to the investment, reflected exactly the damage ultimately inflicted and would have informed the scope and nature of any protective actions taken by the State. That the State had such knowledge and took no action was evidence which indicated strongly that its omissions were wrongful and in breach of the obligation.

As discussed in the previous section, tribunals generally do not rely on a State's knowledge of the circumstances of which its regulatory conduct is a part when deciding whether such conduct constitutes a failure to protect an investment from economic damage and a breach of the obligation. Tribunals have both rejected and allowed such claims without analysing the State's knowledge. However, in a number of cases where a violation has been established, tribunals have resolved these claims in a way which implies a position on how knowledge might operate as an indicator of wrongfulness. In *Siemens v*

[601] *Wena Hotels Ltd v Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, [84]-[88].

[602] *Waguih Elie George Siag and Clorinda Vecchi v Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, [446].

Argentina, for instance, the tribunal emphasised that the "sole purpose" of Argentina's conduct, regardless of any "public interest" that might be supported or frustrated by it, was to reduce the costs incurred by it pursuant to the investment contract, which was a breach of the obligation.[603] Implicit in such a finding is the use of Argentina's knowing pursuit of an ulterior purpose (the reduction of costs), rather than a stated legitimate purpose (public interest regulation), to help establish the wrongfulness of its conduct. Such a use of knowledge also exists in *Aguas/Vivendi v Argentina*. There the tribunal held that Argentina's conduct, including the renegotiation and termination of the investment contract, constituted "a blatant misuse of … regulatory powers for illegitimate purposes" and violated the obligation.[604] The tribunal's finding again implicitly relies on Argentina's knowing pursuit of an illegitimate goal (pressuring the investor to renegotiate, and then terminating the contract) as an indicator of the breach of the obligation.

These decisions indicate that the content of the knowledge necessary to establish a wrongful failure to protect an investment from economic damage is more than the State being aware of the circumstances in which the damage occurs (even when its own regulatory conduct is part of those circumstances). Rather, where a State pursues regulatory conduct for illegitimate purposes, a basis on which a tribunal may find a breach of the obligation arises. In such circumstances, the State has knowledge not only of the regulatory context but also of the illegitimate objective to which that context was directing the specific investment. The failure of the State to act to forestall damage caused in such circumstances contributes to establishing the wrongfulness of its failure.

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[603] *Siemens AG v Argentina*, ICSID Case No. ARB/02/08, Award, 6 February 2007, [308].

[604] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentina*, ICSID Case No. ARB/97/3, Award, 20 August 2007, [7.4.24].

To date, no decision has expressly considered the content of knowledge which a State should have in order to establish a wrongful failure to intervene through the exercise of its regulatory powers to forestall economic damage from being caused to a foreign investor in the context of its private transactions with a non-State entity. The closest the jurisprudence comes to providing guidance on this point is *AES v Hungary*. As discussed above, one may infer from the reasoning in that case that a regulatory omission is only wrongful if it is an objectively unreasonable or irrational omission in circumstances where the State is aware of the need to act to forestall the damage.[605] Such awareness, one would expect, would need to be something more than a general awareness of the circumstances in which the damage occurred – it would need to extend to awareness of at least some details of the private transactions in issue. Should the *Stanford Financial Ponzi* cases not suffer the same fate as *Anderson v Costa Rica*, as discussed in Chapter One above, the tribunals in those cases will almost certainly have to consider this issue. In light of the above analysis, the likelihood is that the tribunals will reflect on the degree of knowledge which the United States possessed in relation to the activities of Stanford Financial, and will treat it as a basis on which a finding of breach may be grounded only if it is knowledge which is specific to the claimants' investments, reflects the damage ultimately inflicted on them and would have informed the scope and nature of any protective actions taken by the State. Such would be knowledge of circumstances giving rise to the need to act on the part of the United States, thus establishing the wrongfulness of any failure to do so.

4(1)(b) Acquirer of the State's knowledge of the circumstances giving rise to the need to act

Neither scholarship nor jurisprudence have discussed at any length the relevance of the status or position of the State official who acquires the knowledge of the circumstances

[605] See Section 3(2)(c)(i) above.

giving rise to a need to act. The legal fiction of the monolithic State is generally maintained in this respect, so that whichever official acquires such knowledge, it is regarded as "knowledge" of the State. Zeitler's analysis of the role of knowledge in the breach of the full protection and security obligation is typical. If the claimant demonstrates that "proof that facts were either publicly known or were brought to the knowledge of the authorities", then that is sufficient to render it knowledge of the State, in response to which "the authorities [will] have to destroy this *prima facie* evidence by proving their actions".[606]

However, the facts of a given dispute can undermine the presumption that the State has knowledge upon the receipt of information by its (generic and monolithic) "authorities". Although a request "for protection is not an essential condition" for a State's responsibility,[607] an unequivocal request for protection from physical damage by a foreign investor to the host State's police or armed forces will obviously contribute more to establishing the wrongfulness of that State's failure to provide protection than if the investor made the request of a junior customs official of the State. The identity and position of the official acquiring the "knowledge of the State" can thus have an impact upon the persuasiveness of the evidence of the State's knowing failure to act. Accordingly, while tribunals have not to date relied expressly on the identity of the official acquiring the knowledge as part of their reasoning that accepts or rejects the wrongfulness

[606] Zeitler, "The Guarantee of "Full Protection and Security" in Investment Treaties Regarding Harm Caused by Private Actors" (2005) 3 *Stockholm International Arbitration Review* 959, 974. See also *Mexico City Bombardment Claims (Great Britain) v Mexico* (1930) 5 UNRIAA 76, 80.

[607] Zeitler, "The Guarantee of "Full Protection and Security" in Investment Treaties Regarding Harm Caused by Private Actors" (2005) 3 *Stockholm International Arbitration Review* 959, 974. However, a failure to make a request can tell against a claimant: see *GEA Group Aktiengesellschaft v Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011, [247]-[250].

of the State's omission, some observations on this point can still be drawn from the case law.

The first trend is that, while the seniority of the official acquiring the knowledge can be important in assessing the weight to be given to the evidence of the State's awareness of the need to act, it is not decisive. This is true in respect of failures to prevent both physical damage and economic damage. Thus in *AAPL v Sri Lanka*, the Sri Lankan President and senior military officials possessed the knowledge of the need to act to protect the investment from physical damage in the context of the counter-insurgency, a factor to which the tribunal referred when evaluating the evidence of the State's knowledge.[608] By contrast, the knowledge of impending physical damage in *Noble Ventures v Romania* was held by a local prefect (that is, a mayor), a Minister and the office of the Prime Minister[609] – and yet the tribunal did not refer to this factor in its discussion of the obligation and did not treat it as a persuasive element of its assessment of the wrongfulness of the State's failure to prevent the damage.[610]

The same role for the seniority of the official exists in cases concerning economic damage. That officials in the Argentinean Ministry of the Interior, including its Minister, knew of the ulterior purpose for which the investment contract in *Siemens v Argentina* was renegotiated and terminated was noted by the tribunal,[611] even though it did not treat the involvement of senior officials as decisive *per se* in determining the wrongfulness of Argentina's failure to prevent the economic damage suffered by the

[608] *Asian Agricultural Products Ltd. v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, [85(b)].

[609] *Noble Ventures, Inc. v Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, [9(15)], [161].

[610] *Noble Ventures, Inc. v Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, [164]-[167].

[611] *Siemens AG v Argentina*, ICSID Case No. ARB/02/08, Award, 6 February 2007, [94]-[95].

claimant. However, the knowledge of impending economic damage to foreign investors held by senior officials in other cases was not deemed relevant to the determination. The tribunal in *Parkerings v Lithuania*, for instance, did not refer to the fact that the Prime Minister acquired knowledge of the alleged forthcoming economic damage to the claimant when determining whether Lithuania's failure to take action was wrongful.[612]

The seniority of the official acquiring knowledge of the circumstances giving rise for a need for the State to act can affect the determination of the evidentiary weight to be given to that "knowledge of the State", although it is not decisive. Perhaps more important than seniority is whether the circumstances in which damage occurs are related to the duties which the official fulfils within the State. The same cases in relation to a State's failure to prevent physical damage are illustrative. In *AAPL v Sri Lanka*, the knowledge of the State was held by military officials and the highest public official. Given that the impending damage was to arise in the context of an armed battle between State and insurrection forces, the provision of physical protection fell within the purview of these officials. Possession of the knowledge by officials who were empowered to take the necessary action was thus a relevant piece of evidence to which the tribunal could refer when accepting the wrongfulness of Sri Lanka's failure to provide protection and security.[613] By contrast, in *Noble Ventures v Romania*, the foreknowledge of the damage was held by senior officials who had no direct duties in the conduct of local police or the regulation of labour disputes. The damage in that case, arising out of labour unrest at the project site, directly invoked the duties of officials well below those of Mayors, Ministers

[612] *Parkerings-Compagniet AS v Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, [358]-[361].

[613] *Asian Agricultural Products Ltd. v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, [85(b)].

and the Prime Minister. The focus of the claimant's evidence on the knowledge of these senior officials who were not directly empowered to intervene in events and forestall the damage was thus of little weight before the tribunal, which rejected the existence of a breach of the full protection and security obligation.[614]

As with the seniority of the knowing official, the scope of his or her powers to act plays a similar role in cases concerning economic damage. Where the knowledge of the circumstances giving rise to a need to act is held by an official who has regulatory powers in respect of those circumstances, evidence of that knowledge will militate in favour of the failure to act being wrongful. In *Aguas/Vivendi v Argentina*, the conduct of the water regulator charged with overseeing the project was central to the tribunal's ruling that the State had breached the obligation.[615] While the tribunal did not discuss the significance of the identity of the knowledge-holder within the State, its focus on the failure of the water regulator to use its regulatory powers for "legitimate" purposes[616] highlights how the knowledge of the officials whose duties are most directly related to the circumstances giving rise to a need to act will be a persuasive element in an attempt to establish the wrongfulness of that omission. Such a focus on a knowingly "illegitimate" use of regulatory powers by officials whose duties are implicated in the circumstances requiring the State to forestall economic damage is evident in several other decisions

[614] *Noble Ventures, Inc. v Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, [164]-[167].

[615] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentina*, ICSID Case No. ARB/97/3, Award, 20 August 2007, [7.4.38].

[616] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentina*, ICSID Case No. ARB/97/3, Award, 20 August 2007, [7.4.24].

finding a breach of the obligation, including *Siemens v Argentina* and *National Grid v Argentina*.[617]

Both the seniority, and especially the scope of the duties, of the official who acquires knowledge of circumstances giving rise to a State's need to act to forestall damage in compliance with the full protection and security obligation can play a role in establishing a breach of that obligation. For the reasons explained in Section 2(4)(a) above, it is irrelevant whether or not the knowledge of senior or empowered officials evidences the State's fault or intention in its omissions. Rather, such knowledge by such officials is relevant insofar as it contributes, in an objective system of State responsibility, to the determination that the State wrongfully failed to take action in circumstances which gave rise to a need to do so.

4(1)(c) Timing of the State's acquisition of knowledge of the circumstances giving rise to the need to act

Scholarship and jurisprudence have also been sparse in their analyses of the relevance of the time at which a State acquires knowledge of circumstances giving rise to a need for action to establishing a breach of the obligation. Some simple observations are, however, prompted by the case law.

The first is that evidence of a State's foreknowledge of such circumstances is a key indicator of the wrongfulness of any failure by it to forestall damage (physical or regulatory) resulting from those circumstances. While it is tempting to conclude that the persuasiveness of any evidence of foreknowledge increases the longer a State possesses knowledge of circumstances giving rise to the need to act, foreknowledge as a matter of

[617] *Siemens AG v Argentina*, ICSID Case No. ARB/02/08, Award, 6 February 2007, [308]; *National Grid plc v Argentina*, UNCITRAL, Award, 3 November 2008, [187].

principle can exist only shortly before the damage occurs. In *AMT v Zaire* the State knew of the circumstances giving rise to a need to forestall damage at least from the date of the first looting event, almost 18 months before the second looting event.[618] Similarly, in numerous cases where a State failed to forestall economic damage through use of its regulatory powers, the State possessed foreknowledge of the circumstances giving rise to the need to act for a long period of time before the complained of damage occurred.[619] A shorter duration of foreknowledge did not, however, preclude the success of the claim in *Siag v Egypt*, in which the State's police forces were made aware of the impending physical seizure of the property only shortly before it occurred.[620] Further, foreknowledge of the circumstances giving rise to the need to act is, as with all other aspects of knowledge, not decisive. In *Tecmed v Mexico*, the State was aware of the demonstrations for a long time, and allegedly encouraged them, before the damage of which the claimant complained occurred, while several decisions rejecting a breach of the obligation for economic damage did so despite the State's significant foreknowledge of the economic damage being suffered by the foreign investor.[621]

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[618] *American Manufacturing & Trading, Inc. v Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997, [1.04(2)].

[619] See, for example: *CME Czech Republic B.V. v Czech Republic*, UNCITRAL, Final Award, 13 September 2001; *Azurix Corporation v Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentina*, ICSID Case No. ARB/97/3, Award, 20 August 2007; *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case No. ARB/05/08, Award, 24 July 2008; *National Grid plc v Argentina*, UNCITRAL, Award, 3 November 2008.

[620] *Waguih Elie George Siag and Clorinda Vecchi v Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, [446].

[621] See, for example: *Lauder v Czech Republic*, UNCITRAL, Final Award, 3 September 2001; *PSEG Global, Inc. and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007; *BG Group Plc v Argentina*, UNCITRAL, Final Award, 24 December 2007; *Gemplus S.A., SLP S.A. and Gemplus Industrial S.A. de C.V. v Mexico* and *Talsud S.A. v Mexico*, ICSID Case No. ARB(AF)/04/3 and ICSID Case No. ARB(AF)/04/4, Award, 16 June 2010; *Suez, Sociedad General de Aguas v Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010; *AES Summit Generation Limited and AES-Tisza Erömü Kft. v Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010; *Marion Unglaube and Reinhard Unglaube v Costa Rica*, ICSID Case No. ARB/08/1 and

The jurisprudence is clear that knowledge acquired by the State after the damage occurs is not relevant to a failure to forestall damage, but may be relevant to a failure to fulfil its duty of repression. Thus in *GEA v Ukraine*, the fact that the State only became aware of the damage after it had occurred was sufficient basis on which the tribunal could reject the claim that Ukraine failed to forestall the damage.[622] *Parkerings v Lithuania* reasoned similarly,[623] and in both cases the question then became whether the State had fulfilled its duty of repression with adequate investigation and enforcement.

4(1)(d) Conclusion: the role of knowledge as evidence in the State responsibility for violation of the obligation

As the foregoing has illustrated, knowledge can play an important role in establishing the wrongfulness of a State's failure to afford a foreign investment protection and security, and its consequent breach of the obligation and international responsibility. The strongest form of knowledge arises when the State knows of the circumstances which gave rise to a need to take duly diligent action to forestall that damage, acquires that knowledge through one of its officials who is empowered to take action in those circumstances, and becomes thus aware well ahead of the time at which the damage occurs.

However, it is not always necessary to prove detailed foreknowledge when alleging a wrongful omission by the State. Ultimately, as with all matters of evidence, it is a balancing exercise as to what can be proven and whether it establishes a breach. Not all cases which find a breach of the obligation do so on the same strong evidence of knowledge found in *AAPL v Sri Lanka*. Cases such as *Siag v Egypt*, in which knowledge

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ICSID Case No. ARB/09/20, Award, 16 May 2012; *Electrabel S.A. v Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012.

[622] *GEA Group Aktiengesellschaft v Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011, [247].

[623] *Parkerings-Compagniet AS v Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, [357].

was acquired by the State shortly before the damage, for example, can still contribute to the establishment of a State's wrongful omission.

Such a balancing exercise extends beyond the various aspects of knowledge discussed above. It also requires balancing other considerations, such as the capacity of the State to act. Thus, for instance, in *Pantechniki v Albania* the State's police forces clearly had advance knowledge of the circumstances giving rise to the need to act to forestall the damage to the foreign investment, but the lack of the State's capacity to take the necessary actions to provide protection and security was a countervailing consideration which led the sole arbitrator in that case to dismiss the claim for breach of the obligation. A State's capacity to act is, therefore, no less significant than its knowledge when a tribunal is to determine whether its omission was wrongful.

4(2) Capacity of the State to act

The capacity of the State to take action to forestall the relevant damage can constitute another indicator of a wrongful omission in the law of State responsibility. As discussed in Section 2(4)(b) above, evidence of incapacity can at times preclude the wrongfulness of the State's inaction. However, as numerous cases discussed in Section 3(2) above indicate, evidence of a State's capacity to act in the context of its failure to do so can constitute a persuasive basis for a finding of wrongfulness, while failure to furnish such evidence may encourage (or, on one analysis, require) the rejection of the claim.

The capacity of the State to act to forestall damage and provide protection and security to foreign investment can thus play multiple, slightly different roles in the proof of a breach of the obligation. As discussed in Section 4(2)(a), its most common role in decisions relating to the obligation is its role as evidence contributing to a basis on which the tribunal can deem the State's omission wrongful. However, as discussed in Section

4(2)(b), a minority view is that evidence of the incapacity of a State necessitates a finding that no breach had occurred. It is also the case that a State's lack of capacity can play a role outside establishing a breach of the obligation by an investor claimant, and instead, as discussed in Section 4(2)(c), underpin a host State's argument that any wrongfulness putatively deriving from its omissions is precluded by circumstances such as necessity. Finally, Section 4(2)(d) provides a brief conclusion about the role of capacity in the State responsibility for violation of the obligation.

4(2)(a) Capacity as evidence contributing to a basis on which the tribunal can deem the State's omission wrongful

In cases which concern allegations of failure to provide protection and security from physical and economic damage, the capacity of the State to take some action, or alternative action, to forestall that damage has been regarded as evidence contributing to the basis on which the tribunal has deemed the State's omission wrongful. While the allegedly un- or under-utilised capacity of the State is closely connected with the factual circumstances in which the omission occurs, a review of the jurisprudence can elicit some understanding of the type of capacity which, if the State does not exercise it, militates in favour of finding a breach of the obligation.

Several decisions concerning a failure to afford protection and security to a foreign investment from physical damage have emphasised the "capacity" or "ability" of the State to take either some action when it took none, or alternative or greater action when it took some, when determining the wrongfulness of its omissions. In *AAPL v Sri Lanka*, the tribunal referred to the "evidence" of the ability of Sri Lankan authorities to liaise with the managers of the investment project in order to "minimize the risks of killings and

destruction" arising out of the insurrection and its suppression.[624] Such a "high level channel of communication" was "available" and had been used previously to address concerns about the presence of insurgents in the area, and even in the employ, of the investment project.[625] The capacity of Sri Lanka to take actions minimising the risks of damage to the investment was thus predicated on the availability of alternative actions to the State, and its previous experience in pursuing those actions. The existence of such capacity was therefore treated by the tribunal as evidence that contributed to its finding that Sri Lanka's omission breached the obligation.

A similar understanding of the role of capacity in establishing wrongfulness exists in cases concerning protection from physical damage by State actors. In *Wena Hotels v Egypt*, "sufficient evidence" existed that the State's Ministry of Tourism, and in particular its Minister, had a line of communication open with the project's managers, had met with them previously and had corresponded with the State actor which ultimately inflicted the physical damage on the investment.[626] The Minister himself also acknowledged that he had the ability to "immediately stop" the State actor from inflicting the damage.[627] Egypt's capacity to take actions to forestall the damage to the investment was thus predicated not only on, as in *AAPL v Sri Lanka*, the availability of alternative actions and the State's prior experience in pursuing those actions, but also on an acknowledged authority on the part of the relevant State official to act in a manner which

[624] *Asian Agricultural Products Ltd. v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, [85(b)].

[625] *Asian Agricultural Products Ltd. v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, [85(b)].

[626] *Wena Hotels Ltd v Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, [85]-[87].

[627] *Wena Hotels Ltd v Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, [88].

would prevent the damage. Such capacity having existed but not being used thus provided evidence on which the tribunal could rely to establish Egypt's breach of the obligation.

Reliance on evidence of a State's capacity is also evident in cases concerning a failure to prevent economic damage. In *Aguas/Vivendi v Argentina*, the tribunal recounted the grant to,[628] and the supportive exercise by,[629] the water regulator of powers to oversee the project during the early days of the project. The tribunal also recorded how, in light of political opposition to the project, the regulator rapidly became less supportive, performing an "about-face" in its position vis-à-vis the project, and ultimately resorting to a "blatant misuse" of its powers.[630] The tribunal did not explicitly cite the regulator's capacity to cease its misuse of powers, but did emphasise that its use of power for "illegitimate purposes" was a wrongful change of position.[631] If only indirectly, the tribunal relied on evidence of the State's capacity to take alternative action to forestall the economic damage to the investment, which capacity was predicated on both the existence of regulatory powers and their prior exercise for legitimate ends. That Argentina possessed this capacity but failed to exercise it after the early days of the investment provided evidence on which a finding of the wrongfulness of that failure could be predicated.[632]

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[628] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentina*, ICSID Case No. ARB/97/3, Award, 20 August 2007, [4.6.10]-[4.6.12].

[629] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentina*, ICSID Case No. ARB/97/3, Award, 20 August 2007, [4.10.4], [4.11.3] and [4.12.7].

[630] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentina*, ICSID Case No. ARB/97/3, Award, 20 August 2007, section 4.13 (facts), [7.4.22] and [7.4.24] (misuse).

[631] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentina*, ICSID Case No. ARB/97/3, Award, 20 August 2007, [7.4.24].

[632] Similar implicit reliance on evidence of a State's unexercised capacity to pursue alternative regulatory actions for illegitimate purposes can be located in *Siemens AG v Argentina*, ICSID Case No. ARB/02/08, Award, 6 February 2007, [308]; *National Grid plc v Argentina*, UNCITRAL, Award, 3 November 2008, [189].

Finally, no tribunal has directly relied on an absence of capacity in order to establish that a State has not breached the obligation. The closest examples in which an absence of capacity has been regarded as evidence on which a finding of lawfulness could be based is found in the reasoning of those tribunals which rely on a State's absence of any knowledge of the circumstances giving rise to a need to act to forestall damage of some kind. In such cases, discussed in Section 4(1)(a)(i) above, the absence of knowledge is such strong evidence that it carries with it the implication that there is an absence of capacity. A State is unable to forestall damage if its knowledge does not even extend to the circumstances in which the damage occurs, as discussed in Section 4(1)(a)(ii) above.

From the above analysis, it is possible to generate an understanding of the role that capacity, if the State does not exercise it, plays in establishing a breach of the obligation. Thus, evidence of a State's un- or under-utilised capacity will exist where: some, or some alternative, action is available to the State which it does not take to forestall damage (as in *AAPL v Sri Lanka* and *Wena Hotels v Egypt*); action which the State has previously taken in order to forestall damage in the past is not taken (as in *AAPL v Sri Lanka* and *Wena Hotels v Egypt*); the State has granted authority to an official to act in a manner which would prevent the damage, but he or she did not (as acknowledged by a State official in *Wena Hotels v Egypt* and evident in *Aguas/Vivendi v Argentina*); and State officials have previously exercised regulatory powers for legitimate purposes, but refrain from doing so again (as in *Aguas/Vivendi v Argentina*). Proof of such facts will, consistent with the above, constitute a persuasive evidentiary basis on which the wrongfulness of the State's failure to provide protection and security can be established.

4(2)(b) "Relativism"/"Proportionality" and capacity as a condition of wrongfulness of a failure to provide protection and security

Using a State's unused capacity as evidence on which a tribunal can find a breach of the full protection and security obligation is by far the dominant approach. However, one decision, decided by a sole arbitrator, articulates a different role for capacity. The decision is *Pantechniki v Albania*, and it in effect establishes proof of capacity to act as a condition of wrongfulness in respect of a State's failure to protect and secure foreign investments from physical damage inflicted by non-State actors – or, phrased alternatively, that evidence of the incapacity of a State necessitates a finding that no breach had occurred.[633]

The rarity with which subsequent decisions concerning the obligation have touched on the relevant ruling in *Pantechniki v Albania*,[634] and the consistency with which commentary notes its exceptionality,[635] is an indication of the unlikelihood that that ruling will imminently be affirmed. However, despite (or because of) the consensus that the decision occupies a position outside current doctrine, a review of the obligation must consider the inherent worth of that position and whether doctrine is likely to expand to encompass it in the future.

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[633] *Pantechniki S.A. Contractors & Engineers v Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009. The facts of the case, and the exceptional legal conclusions endorsed by the sole arbitrator in relation to the obligation, are summarised in Section 3(2)(a)(i) above.

[634] Only one decision has referred to it: *Frontier Petroleum Services Ltd v Czech Republic*, UNCITRAL, Final Award, 12 November 2010, [271].

[635] See: Malik, "The Full Protection and Security Standard Comes of Age: Yet another challenge for states in investment treaty arbitration?", International Institute for Sustainable Development, *Best Practices Series*, November 2011, 9; Schreuer, "Full Protection and Security" (2010) 1(2) *Journal of International Dispute Settlement* 353, 368-369; Gallus, "The 'fair and equitable treatment' standard and the circumstances of the host State" in Brown and Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (CUP, 2011) 223, 232-233; Lamm, Giorgetti and Uran-Bidegain, "International Centre for Settlement of Investment Disputes" in Giorgetti (ed.), *The Rules, Practice and Jurisprudence of International Courts and Tribunals* (Nijhoff, 2012) 77, 105.

Undeniably, the "modified objective standard" proposed in *Pantechniki v Albania* has its attractions. It is impossible, for instance, to cavil at its observation that the capacity of a "powerful state" to quell "unforeseen breakdowns of public order" is greater than that of "one which is poor and fragile".[636] To the extent that such a State is easily overwhelmed by riots, it feels detached from reality to increase its troubles by requiring it to protect and secure foreign investments no less in those circumstances than in others. Further, the decision is correct to highlight the practical falsity of the belief that a State's police resources are infinite and can be deployed whenever and to whatever extent necessary to satisfy the obligation.[637] That pragmatic reality is evergreen, as accurate in modern times as it was in O'Connell's,[638] and is evident in modern cases in which police attended disturbances but did not intervene at least purportedly because of the paucity of their resources.[639]

However, these merits of the decision in *Pantechniki v Albania* derive from the broadest of considerations. By contrast, its demerits are rooted in specific points of doctrine. First, the ruling confines its applicability to breakdowns in public order, a category of damage which is a relatively limited subset of the broader category of damage done by non-State actors. While such breakdowns provide the sternest test of a State's ability to afford foreign investments physical protection and security, it is difficult to

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[636] *Pantechniki S.A. Contractors & Engineers v Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, [80].

[637] *Pantechniki S.A. Contractors & Engineers v Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, [77].

[638] O'Connell, *International Law* (Stevens, 1970) 967, cited in *Pantechniki S.A. Contractors & Engineers v Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, [79]-[80].

[639] See: *Noble Ventures, Inc. v Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, [162]; *Indorama International Finance Limited v Egypt*, ICSID Case No. ARB/11/32, Memorial, 17 December 2012, [124].

discern why they should be differentiated and resolved in a way unlike other situations in which physical damage is done by non-State actors. Certainly the due diligence standard has resolved claims for breach of the obligation in the context of damage during a militarised insurgency,[640] significant worker revolts,[641] regional revolutions,[642] localised civic protests,[643] acts of looting[644] and physical seizures of investment sites.[645] If the differentiator *Pantechniki v Albania* proposes is the scale of the unrest in which the damage occurs, distinctions between case patterns are likely to be arbitrarily drawn.

Secondly, as noted in Section 3(2)(a)(iii) above, the "modified objective standard" articulated in the decision is of such flexibility that it is, in effect, no "standard" at all. Resolution of claims pursuant to it depends entirely on the State's own capacity to quell disorder. This is an empty diagnostic. It defines both the scope of the obligation and the degree of compliance by reference to the State's own conduct. Deciding a breach of the obligation is thus done not by applying any standard of required conduct, but by entrusting a tribunal to "know incapacity when it sees it". Such a test would require tribunals to make *ad hoc* decisions based entirely on their own assessments of capacity of a State at a particular point in time. Quite apart from the difficulty of this task, it is also one

[640] *Asian Agricultural Products Ltd. v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990.

[641] *Noble Ventures, Inc. v Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005.

[642] *Karmer Marble Tourism Construction Industry and Commerce Limited Liability Company v Georgia*, ICSID Case No. ARB/08/19, Award, 9 August 2012.

[643] *Tecnicas Medioambientales Tecmed SA v Mexico*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003.

[644] *American Manufacturing & Trading, Inc. v Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997.

[645] *Wena Hotels Ltd v Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000; *Waguih Elie George Siag and Clorinda Vecchi v Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009.

which encourages the determination of State responsibility on the basis of the predilections of individual arbitrators.

Thirdly, accepting the reasoning of *Pantechniki v Albania* would entail not only redefining the law relating to the full protection and security obligation, and in particular its treatment to date of a State's capacity to act as a matter of evidence, but also redefining the law of State responsibility for omissions. Treating a State's capacity as a condition of wrongfulness in the way the sole arbitrator did would mean that a State would only breach the obligation where it had capacity to act to forestall the damage but did not do so. Such a position reintroduces fault as a prerequisite for a wrongful omission. As explained in Section 2(4)(a)(ii), this proposition has been thoroughly debated over more than a century, and the modern consensus entirely rejects any role of fault in the allocation of responsibility to a State for its wrongful omissions.[646] The case for revision of that position is hardly evident in the circumstances of *Pantechniki v Albania*. The claim for breach of a full protection and security obligation was unexceptional, was readily resolvable by application of modern doctrine, and did not warrant a significant amendment to the law of State responsibility.

Finally, the distinction in *Pantechniki v Albania* between the need for an objective standard in respect of alleged breaches of the fair and equitable treatment

[646] Brownlie, *System of the Law of Nations, State Responsibility – Part I* (OUP, 1983), 43; Brownlie, *Principles of Public International Law* (7th ed., OUP, 2008), 440; Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (OUP, 2002), 142; García Amador, *Yearbook of International Law Commission*, 1960, vol. II, UN Doc. A/CN.4/SER.A/1960/Add.l, 62; Amerasinghe, *State Responsibility for Injuries to Aliens* (Clarendon, 1967), 281-282; Schwarzenberger, *International Law* (3rd ed., Stevens, 1957) vol. II, 632-641; Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (CUP, 1953), 218-232; Starke, "Imputability in International Delinquencies" (1938) *British Yearbook of International Law* 115; Anzilotti, *Teoria generale della responsabilità dello stato nel diritto internazionale* (Lumachi, 1902) 14, 172-173; García Amador, *The Changing Law of International Claims* (1984) 115-118; Bedjaoui, "Responsibility of States, Fault and Strict Liability" in Bernhardt (ed), *Encyclopedia of Public International Law* (Max Planck, 1987) vol. 10, 358, 359; Latty, "Actions and Omissions" in Crawford, Pellet, Olleson and Parlett (eds.), *The Law of International Responsibility* (OUP, 2010) 355, 361.

obligation resulting from a denial of justice and a "modified objective standard" in respect of alleged breaches of the full protection and security obligation is inelegant. The sole arbitrator drew the distinction on two bases. The first basis was that an objective minimum requirement of conduct, which does not allocate responsibility to an extent "relative" or "proportional" to a State's resources, is appropriate for denial of justice claims "in light of the great value placed on the rule of law".[647] This basis is weak. It would be parlous to insist that, by contrast to the rule of law, less value is placed on physical human safety and the security of property. If this is a reason to reject a relativistic standard in denial of justice claims, it is an equally cogent reason to reject the same standard in full protection and security claims. Further, as the sole arbitrator noted in respect of denial of justice claims, an objective standard incentivises improvement in a State's capacity by encouraging it to "devote … resources to its judiciary".[648] Similar reasoning can again be applied to the full protection and security obligation. By requiring a minimum of conduct on the part of a State's police forces, the obligation incentivises their improvement. While large-scale breakdowns in public order may still overwhelm even States with great capacity for police protection, just as exceptional cases before domestic courts can highlight flaws in the procedural and substantive safeguards in domestic jurisdictions exhibiting a strong rule of law, this practical reality cannot in itself be a reason to abandon established principle. If incentivising improvement is a reason to use an objective standard to decide denial of justice claims, then the same reason applies with equal force to the use of an objective standard to decide full protection and security claims.

[647] *Pantechniki S.A. Contractors & Engineers v Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, [76]-[77].

[648] *Pantechniki S.A. Contractors & Engineers v Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, [76].

The unorthodoxy of the position of the sole arbitrator in *Pantechniki v Albania* has marked it out as exceptional in the law on full protection and security. However, as the foregoing analysis demonstrates, it is unorthodoxy born not of a natural (if precocious) extension of the state of the law, but rather of a distortion of applicable legal principle. The capacity of a State to take action to forestall damage is not properly understood as a condition of the wrongfulness of that omission. Rather, as discussed in Section 4(2)(a) above, it remains only one part of the evidentiary basis on which the wrongfulness of the State's failure to provide protection and security can be established.

4(2)(c) Incapacity and circumstances precluding the wrongfulness of a failure to provide protection and security

Although the treatment of a State's capacity to act in *Pantechniki v Albania* is flawed, there are circumstances when capacity plays a role other than to act as evidence on which a finding of wrongfulness may be founded. That situation arises when a State seeks to preclude the wrongfulness of its omissions by reference to circumstances of necessity, discussed in Section 2(4)(b) above. In these cases, proof of its lack of capacity to act can constitute proof of the existence of circumstances precluding wrongfulness, albeit international law accepts only certain types of incapacity for such purposes. Proof of the relevant incapacity is an element in establishing the State's defence, rather than an element in establishing the wrongfulness of a failure to act.

To date, responses to allegations of breaches of investment treaties have relied on only one category of circumstances precluding wrongfulness – necessity.[649] Argentina

[649] See the cases cited in Section 2(4)(b) above. Note, however, in Argentina's early invocations of necessity the linguistic slippage between invocations of necessity and invocations of other circumstances precluding wrongfulness, such as *force majeure*: *CMS Gas Transmission Company v Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, [304]. *Force majeure* was also invoked in *Himpurna v PT*, but this arbitration was not commenced pursuant to an investment treaty: *Himpurna California Energy Ltd v PT. PLN (Persero)*, UNCITRAL, Final Award, 4 May 1999.

is the only State to have advanced this response, and only in *Suez v Argentina* did it do so in respect of an allegation of breach of the full protection and security obligation.[650] The necessity of its actions, it argued, was a defence which precluded the wrongfulness of any alleged breach of the applicable investment treaty.[651] Argentina asserted that it took the measures which the claimants alleged breached the obligation because of "the necessity of dealing with the financial crisis in order to safeguard essential interests of the State", which crisis "did not result from its own actions but from the crises that had previously struck other parts of the world".[652] This fetter on Argentina's capacity relating to economic issues necessitated its taking "the various measures that it did [because] no other means of protecting those interests were available to it".[653]

The tribunal rejected Argentina's arguments, although not on the basis that Argentina had failed to produce evidence of the limitation of its capacity. The tribunal noted that Argentina's prevailing economic crisis was "undoubtedly one of the most severe in its history", "extreme", and of significant "severity".[654] Nonetheless, evidence of circumscribed capacity was "not sufficient to allow a plea of necessity to relieve [Argentina] of its treaty obligations".[655] The tribunal's *ratio decidendi* was thus not

[650] The allegations and findings in *Suez, Sociedad General de Aguas v Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010 are summarised in Section 3(2)(c)(i) above.

[651] *Suez, Sociedad General de Aguas v Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, [229].

[652] *Suez, Sociedad General de Aguas v Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, [230].

[653] *Suez, Sociedad General de Aguas v Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, [230].

[654] *Suez, Sociedad General de Aguas v Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, [235].

[655] *Suez, Sociedad General de Aguas v Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, [236].

whether alternative actions were available to Argentina, or whether Argentinean officials failed to exercise powers in a manner which would have prevented the damage;[656] rather, it was whether the elements of "the defence of necessity" were satisfied.[657] Evidence relating to capacity indicated *per se* neither the lawfulness of Argentina's conduct under the applicable treaty, nor the existence of circumstances precluding such wrongfulness under customary international law. Incapacity was instead the legal conclusion to which evidence of the conditions of the defence was directed – the object, rather than the subject, of the relevant exercise in proof.

4(2)(d) Conclusion: the role of capacity in the State responsibility for violation of the obligation

The capacity of a State to take action to prevent damage can be an important indicator of wrongfulness of a State's failure to afford a foreign investment protection and security, and its consequent breach of the obligation and international responsibility. The way in which evidence of capacity or incapacity contributes to a finding of wrongfulness or lawfulness can vary, however. Evidence of a State's un- or under-utilised capacity may include its failure to take any or alternative action to forestall the damage, its failure to take action similar to that it took previously to forestall similar damage in similar circumstances, the failure of its officials to exercise their relevant authority to forestall the damage, and the failure of its officials to exercise regulatory powers for legitimate purposes.

As when using knowledge as evidence contributing to a basis on which an omission can be deemed wrongful, using a State's capacity to act as evidence to the same

[656] See Section 4(2)(a) above.

[657] *Suez, Sociedad General de Aguas v Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, [237].

end is a balancing exercise. Not all decisions finding a State in breach of the obligation rely on evidence of that State's un- or under-utilised capacity to act. While such evidence existed and was persuasive in *AAPL v Sri Lanka* and *Wena Hotels v Egypt*, breaches of the obligation have been established in decisions which have not emphasised the State's ability to take specific alternative actions or exercise powers in a way it had done previously.[658] Moreover, when evidence of a State's unexercised capacity to act does exist, and even when it exists alongside evidence of the State's knowledge of the need to act, these indicators must still be balanced against another, crucial element of a breach of a positive obligation – causation.

4(3) Causation

When establishing State responsibility for omissions, principles of causation play an important role. As Brownlie observes, the difficulty of obtaining "specific evidence of a lack of proper care on the part of state organs" means that, in the proof of a wrongful omission, "the issue becomes one of causation."[659] Correspondingly (and as explained in Section 2(2) above), proof of a causal link between wrongful omission and damage is relevant not simply to a determination of whether reparation is due, but also, and as a logically anterior point, to whether there has been a breach of the relevant positive obligation.[660] Proof of such a link will thus, in the context of allegations of a wrongful failure to provide full protection and security, usually establish both the host State's lack of

[658] See, for example, the almost exclusive focus on the content and timing of the State's knowledge of the circumstances giving rise to the need to act in *Waguih Elie George Siag and Clorinda Vecchi v Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, [446].

[659] Brownlie, *System of the Law of Nations, State Responsibility – Part I* (OUP, 1983), 45.

[660] See: Brownlie, *System of the Law of Nations, State Responsibility – Part I* (OUP, 1983), 45; Ago, "Le délit international" (1939-II) 68 *Recueil des Cours* 415, 503; García Amador, *Yearbook of International Law Commission*, 1960, vol. II, UN Doc. A/CN.4/SER.A/1960/Add.l, 63; Latty, "Actions and Omissions" in Crawford, Pellet, Olleson and Parlett (eds.), *The Law of International Responsibility* (OUP, 2010) 355, 361.

due diligence and its duty to make full reparation. While tribunals on occasion determine a breach of due diligence separately from whether the damage was caused by that breach, such an approach is in the minority and concerns instances where positive actions by the State itself inflict the damage from which the claimant was not fully protected.[661]

Despite the significance of establishing a causal link between a wrongful omission and the alleged damage, tribunals considering alleged breaches of this and other non-absolute positive obligations typically provide only sparse reasoning on causation, and causation principles are more commonly expounded in literature.[662] This Section analyses the role of causation in the decisions of tribunals considering alleged breaches of the full protection and security obligation – or, more precisely, the role of cause and effect of fact (factual causality) and legal consequence (legal causality) in establishing causation for the purpose of finding a breach of the obligation. Section 4(3)(a) discusses aspects of tribunals' reasoning on the existence of causality when proving a wrongful failure to provide protection and security, while Section 4(3)(b) discusses aspects of tribunals' reasoning on the absence of such causality.

[661] See *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case No. ARB/05/08, Award, 24 July 2008, discussed in Section 4(3)(b)(i) below.

[662] See (on causality of both acts and omissions): Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (OUP, 2002), 82, 204-205; Brownlie, *System of the Law of Nations, State Responsibility – Part I* (OUP, 1983), 225-226; Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (CUP, 1953), 241ff; Jiménez de Aréchaga, "International Responsibility" in Sørensen (ed.), *Manual of Public International Law* (Macmillan, 1968) 534, 568; Yntema, "Treaties with Germany and Compensation for War Damages" (1924) 24 *Columbia Law Review* 134, 151-153; García Amador, *Yearbook of International Law Commission*, 1961, vol. II, UN Doc. A/CN.4/SER.A/1961/Add.l, 40-42; Castellanos-Jankiewicz, "Causation and International State Responsibility", Amsterdam Law School Legal Studies Research Paper No.2012-56; Straus, "Causation as an Element of State Responsibility" (1984) 16 *Law and Policy of International Business* 893; Alexandrov and Robbins, "Proximate Causation in International Investment Disputes" in Sauvant (ed.) *Yearbook on International Investment Law and Policy 2008/2009* (OUP, 2009) 317.

4(3)(a) Existence of (legal) causality when proving a wrongful failure to provide protection and security

Various aspects of the proof of the existence of causality when proving a wrongful failure to provide protection and security emerge from the jurisprudence. Section 4(3)(a)(i) identifies the difference between factual and legal causality in this context. Section 4(3)(a)(ii) reviews tribunals' reliance on circumstantial evidence and positive inferences. Section 4(3)(a)(iii) then assesses the use of a "but for" counterfactual in causation reasoning which treats the wrongful omission as a contributing cause of the damage, but for which that damage would have been less likely to occur.

4(3)(a)(i) Factual and legal causality

In the absence of "specific evidence",[663] proving a wrongful failure to afford full protection and security involves establishing both factual and legal causality.[664] Factual causality means that the omission was part of the concatenation of events which led to the event occasioning the damage. Legal causality means that the omission was a contributing cause of the damage, but for which that damage would have been less likely to occur.

The distinction is fundamental. It pervades the literature dealing with the duty to make full reparation.[665] Cheng describes the distinction as the difference between "proximate causality" concerning the factual "sequence of events" and "effective causality" concerning "the nexus between an act and all its consequences in legal contemplation", although he acknowledges that "[a]s long as the meaning of the terms is

[663] Brownlie, *System of the Law of Nations, State Responsibility – Part I* (OUP, 1983), 45.

[664] See the discussion in *Quiborax S.A. and Non Metallic Minerals S.A. v Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, [382]-[383].

[665] See, for example: Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (OUP, 2002), 204; Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (CUP, 1953), 241ff; García Amador, *Yearbook of International Law Commission*, 1961, vol. II, UN Doc. A/CN.4/SER.A/1961/Add.l, 40-42.

properly understood, the choice of name is of little importance".[666] Crawford infers the distinction between factual and legal causality from the way in which case law preconditions the requirement of legal causality, howsoever it is formulated, upon the existence of factual causality.[667] The distinction is also evident in jurisprudential discussions of causation. Arguably best known is the statement of the German-United States Mixed Claims Commission when it rejected the United States' submission that Germany was liable to compensate "all damage or loss in consequence of the [First World] War, no matter what act or whose act was the immediate cause of the injury",[668] and held that reparation was to be made only where the "proximate cause of the loss" (factual causality) was also "in legal contemplation the act of Germany" (legal causality).[669] The position of the United States effectively elided the distinction, and such "confusion" of the factual and legal elements of causation can be terminal to a claim.[670]

When proving omissions to be wrongful, factual causality must be established.[671] Thus in *Noble Ventures v Romania* the tribunal did not question that Romania failed to facilitate the restructuring the company's debts and to protect the mill

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[666] Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (CUP, 1953), 253.

[667] Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (OUP, 2002), 204. Other authors cite extensively jurisprudence which draws the distinctions: García Amador, *Yearbook of International Law Commission*, 1961, vol. II, UN Doc. A/CN.4/SER.A/1961/Add.l, 40-41; Brownlie, *System of the Law of Nations, State Responsibility – Part I* (OUP, 1983), 226.

[668] *Administrative Decision No. II* (1923) 7 UNRIAA 23, 28.

[669] *Administrative Decision No. II* (1923) 7 UNRIAA 23, 29. See commentary on this reasoning in: Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (CUP, 1953), 242-245; Straus, "Causation as an Element of State Responsibility" (1984) 16 *Law and Policy of International Business* 893, 904-906; Brownlie, *System of the Law of Nations, State Responsibility – Part I* (OUP, 1983), 226-227.

[670] See the Commission's decision rendered alongside the above administrative decision in *War Risk Insurance Premium Claims* (1923) 7 UNRIAA 44, 56.

[671] It must also exist for any wrongful conduct to require reparation: Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (OUP, 2002), 204.

from the employees. This inaction was part of the concatenation of events leading to the damage. Such factual causality, however, was not sufficient to render Romania's inaction wrongful. The additional element of legal causality was absent. The absence of a lack of due diligence in Romania's conduct meant that it had not breached the full protection and security obligation, and that its international responsibility had not been established.[672] In such circumstances, despite the existence of at least a degree of factual causality, Romania was not internationally responsible (and, accordingly, not obliged to make any reparation). Similar situations in which a State's omission may have contributed to an impairment of an investor's security for the purposes of factual but not legal causality exist in other decisions.[673]

In the context of wrongful failures to prevent damage to foreign investors by either State or non-State actors, it is a rare case in which a claimant will not be able credibly to argue that factual causality exists. Where the State has any knowledge of the circumstances giving rise to the need to act, its inaction can likely be cast as part of the concatenation of events leading to the damage. The additional element of legal causality is thus of increased importance, as the debate regarding the existence of a causal link will centre on this aspect.

The relationship between legal causality and the duty to make reparation focuses, in general terms, on "the exclusion of injury that is too 'remote' or

[672] *Noble Ventures, Inc. v Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, [166]. See also Section 2(5)(c) above.

[673] See, for example: *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case No. ARB/05/08, Award, 24 July 2008, [731]; and *Parkerings-Compagniet AS v Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, [358]-[361].

'consequential' to be the subject of reparation"[674] as it is not sufficiently "direct", "foreseeable" or "proximate".[675] However, when assessing causation in respect of a wrongful omission, the degree to which a tribunal must scrutinise whether the damage is unacceptably remote from the breach is reduced. This is because the object of causal reasoning varies between wrongful acts and omissions. Given that the legal issue in contest is whether the damage would have occurred if the State had taken action, proof of remoteness of damage from a wrongful omission does not have the same centrality as it does for damage from a wrongful act. For the latter, if a State has a negative obligation and takes an action contrary to it, causation is established upon proof that the action was part of the context of the damage (factual causality) and that the damage was not so remote from the action that it could not be said to flow from it (legal causality). For omissions, however, a State can be bound by a non-absolute positive obligation, fail to take any action to fulfil that obligation, thereby facilitate circumstances in which damage is suffered (factual causality) as a proximate result of the omission (legal causality), but still not have caused that damage. This is because proof of legal causality in respect of wrongful omissions requires more than simply establishing proximity. It also requires a claimant to evidence factual circumstances in which the damage occurred to an extent that allows the

[674] Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (OUP, 2002), 204.

[675] The interchangeability in practice of these diagnostics for the presence or absence of causation is noted in *S.D. Myers v Canada*, UNCITRAL, Second Partial Award, 21 October 2002, [140]. See also Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (OUP, 2002), 204. Decisions emphasising the criterion of directness include: *BG Group Plc v Argentina*, UNCITRAL, Final Award, 24 December 2007, [428]; *GAMI Investments, Inc v Mexico*, UNCITRAL, Final Award, 15 November 2004, [33]; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v Mexico*, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007, [282]; *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case No. ARB/05/08, Award, 24 July 2008, [785]. Decisions emphasising the criterion of foreseeability include: *Lemire v Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, [170]; *Quiborax S.A. and Non Metallic Minerals S.A. v Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, [383], and Partially Dissenting Opinion of Brigitte Stern, [90]-[99]. Decisions emphasising the criterion of proximity include: *S.D. Myers v Canada*, UNCITRAL, Second Partial Award, 21 October 2002, [122]; *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v Argentina*, ICSID Case No. ARB/02/1, Award, 25 July 200, [50]; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentina*, ICSID Case No. ARB/97/3, Award, 20 August 2007, [7.6.2].

positive inference that, but for the omission which contributed to those circumstances, the damage would have been less likely to occur. The overlap between the proof of a breach of a non-absolute positive obligation and the proof of legal causality of damage resulting from that breach is obvious. It is the substance which underpins Brownlie's observation that, absent "specific evidence" of a wrongful omission, the issue "becomes one of causation".[676]

Factual and legal causality are each necessary for a finding of causation, but they are different to one another in content and importance. In the context of wrongful omissions, the latter will be of greater significance to whether or not a causal link exists. In attempting to elucidate how tribunals approach the proof of legal causality in cases of alleged failures to provide full protection and security, two aspects of the topic are central. The first concerns how tribunals rely on circumstantial evidence to substantiate the positive inference they must draw to hold a host State in breach of this obligation. The second concerns how tribunals rely on a "but for" counterfactual as the means of determining whether the wrongful omission contributed to the circumstances in a manner which, without that contribution, the damage would have been less likely to occur.

4(3)(a)(ii) Circumstantial evidence and the positive inference

As noted in Section 2(2)(c) above, proof of a breach of a positive obligation is an exercise in proof by inference. More specifically, it is a "positive inference", by which a tribunal infers that the consequences of a State's conduct are such that they are legally caused by that conduct.[677] Given the rarity of "specific evidence of a lack of proper care" by a

[676] Brownlie, *System of the Law of Nations, State Responsibility – Part I* (OUP, 1983), 45.

[677] See the analysis at Riddell and Plant, *Evidence before the International Court of Justice* (BIICL, 2009), 114 (albeit one which is obscured slightly by the opinion that a positive inference by a tribunal allows it to

State,[678] proof of a wrongful omission typically relies on circumstantial evidence. "[C]ircumstantial evidence means facts which, while not supplying immediate proof of the charge, yet make the charge probable with assistance of reasoning".[679] Positive inferences, which "are often very closely linked to circumstantial evidence, … are the means of moving from reason to proof".[680] As the International Court of Justice has stated, "recourse to inferences of fact and circumstantial evidence … is admitted in all systems of law … [and] must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion".[681]

Proof by inference is not, however, without difficulty. International tribunals do not adopt such methods of proof lightly. For instance, inferences of fact will only be drawn when the evidence supporting the inference "leaves *no room* for reasonable doubt",[682] and negative inferences against a State on the basis that it has refused to produce documents are never drawn lightly[683] (even if there is little doubt of tribunals' power to do

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conclude that the State "intended" the consequences of its conduct – a requirement which does not play any role in the modern law of State responsibility: see Section 2(4)(a)(i) above).

[678] Brownlie, *System of the Law of Nations, State Responsibility – Part I* (OUP, 1983), 45.

[679] *Corfu Channel (United Kingdom v Albania) (Merits: Dissenting Opinion of Judge Badawi Pasha)* [1949] ICJ Rep 4, 59.

[680] Riddell and Plant, *Evidence before the International Court of Justice* (BIICL, 2009), 113.

[681] *Corfu Channel (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4, 18.

[682] *Corfu Channel (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4, 18 (emphasis in original). See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 17, [373] ("the *dolus specialis* [of genocide] ... has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent").

[683] The ICJ's unwillingness to draw adverse inferences against Serbia for refusing to produce its non-redacted war council minutes is a well-known example, not least because it was criticised by Vice-President Al-Khasawneh: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 17, [206] (Judgment), [35] (Dissenting Opinion of Vice-President Al-Khasawneh). Other tribunals have been less reluctant to draw

so[684]). Accordingly, while tribunals have "not shied away from drawing positive inferences",[685] demonstrating that a tribunal should infer that a State's failure to act was wrongful requires more than simply identifying certain actions which the State failed to take. Rather, it involves demonstrating how the State's omission amounted to, more than a mere absence of action, a failure to exercise due diligence or take appropriate steps when such conduct was expected of it.[686]

No tribunal which has found a breach of the full protection and security obligation has done so on the basis of "specific evidence".[687] In the context of the obligation, such evidence would be a record of the host State's knowledge of the circumstances requiring it to act, of its capacity to do so and of its failure to act despite that knowledge and capacity. In the absence of this type of conclusive evidence, tribunals finding a breach of the obligation have done so by drawing a positive inference that the host State had failed to exercise due diligence in light of circumstantial evidence of that State's knowledge and capacity.

Siag v Egypt is a succinct example of this reasoning process.[688] The tribunal decided the full protection and security claim in four paragraphs.[689] In the first, it quoted

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such inferences: *Kling (USA) v Mexico* (1930) 4 UNRIAA 575, 581-582, 585; *INA Corporation v Iran* (1985) 8 Iran-USCTR 373; *Levitt v Iran* (1991) 27 Iran-USCTR 145.

[684] *Parker (USA) v Mexico* (1926) 4 UNRIAA 35, 39-40; Amerasinghe, *Evidence in International Litigation* (Nijhoff, 2005), 133; Nielsen, *International Law Applied to Reclamations* (John Byrne, 1933) 66-67.

[685] Riddell and Plant, *Evidence before the International Court of Justice* (BIICL, 2009), 114.

[686] See: *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Judgment)* [1980] ICJ Rep 3, [63], [68]; Ago, *Yearbook of International Law Commission*, 1971, vol. II, UN Doc. A/CN.4/SER.A/1971/Add.1(Part 1), 216; Shaw, *International Law* (6th ed., CUP, 2008), 855; Ago, "Le délit international" (1939-II) 68 *Recueil des Cours* 415, 503; Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (OUP, 2002), 82.

[687] Brownlie, *System of the Law of Nations, State Responsibility – Part I* (OUP, 1983), 45.

[688] The facts and reasoning of the tribunal in this case are discussed in Section 3(2)(a)(ii) above.

the applicable treaty. In the second, it reviewed the evidence pertaining to the circumstances in which Egyptian police and prosecutors gained knowledge of the need to act to forestall the impending seizure of the claimants' property. It noted which Egyptian officials possessed that knowledge, what knowledge they acquired and when they acquired it. In the third paragraph, the tribunal noted that Egypt was required to exercise due diligence in preventing the damage. In the final paragraph, the tribunal concluded that Egypt had failed to exercise due diligence. The tribunal, in effect, inferred from the evidence it had reviewed that Egypt's conduct was not merely an absence of action, but a failure to act in order to forestall damage in circumstances where it ought to have so acted. This inference of a legally causative link between the relevant circumstances in which the omission occurred and the damage suffered by the claimant meant that Egypt had breached its obligation and bore responsibility. Nor is *Siag v Egypt* alone in this type of reasoning. Similar analyses can be conducted of the reasoning in other decisions finding a breach of the obligation for physical damage, with several decisions reviewing more extensively the circumstantial evidence on which their ultimate inference of legal causality is based.[690]

The use of inferential reasoning to establish legal causality is also evident in decisions concerning States' failures to provide protection and security through regulation. Even though such cases are usually considering a mix of regulatory action and inaction rather than inaction alone – the Stanford Financial Group cases and *Anderson v Costa Rica* being exceptions[691] – the inference is still required, in the absence of specific evidence, to

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[689] *Waguih Elie George Siag and Clorinda Vecchi v Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, [445]-[448].

[690] See, for example, *Wena Hotels Ltd v Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, [84]-[95] and *Asian Agricultural Products Ltd. v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, [72]-[86].

[691] These cases are discussed in Chapter One above.

establish a breach of the positive obligation. The need for such an inference was evident in the finding of a breach in *Aguas/Vivendi v Argentina*.[692] In that case, the tribunal reviewed the evidence of the water regulator's knowing subversion of the claimant's water treatment project in Tucumán,[693] and on the basis of these circumstances held that its conduct was a "misuse of the Province's regulatory powers for illegitimate purposes" and in breach of the obligation.[694] As in *Siag v Egypt*, this finding of a breach required an inference, based on the evidence reviewed, that Argentina's conduct constituted a failure to act in order to forestall the relevant damage in circumstances where it ought to have acted otherwise. The finding of a legally causative link between the circumstances in which Argentina failed to act and the damage suffered by the claimant led to the conclusion that Argentina had breached its due diligence obligation. Such reliance on proof by inference in *Aguas/Vivendi v Argentina* is also evident in other cases finding a breach of the obligation on the basis of a failure to provide protection and security through regulation, some of which similarly rely on evidence of a State's knowing regulatory subversion of a foreign investment.[695]

The reliance on circumstantial evidence to substantiate the inference that a host State's failure to act is legally causative of the alleged damage is thus a feature – albeit often embedded rather than express – of any tribunal's reasoning that a State has breached

[692] The facts and reasoning of the tribunal in this case are discussed in Section 3(2)(c)(i) above.

[693] See the tribunal's extensive analysis of the breach of the obligation and the fair and equitable treatment obligation: *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentina*, ICSID Case No. ARB/97/3, Award, 20 August 2007, Section 7.4. The role of knowledge as evidence in this case is discussed in Section 4(1)(a)(iii) above.

[694] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentina*, ICSID Case No. ARB/97/3, Award, 20 August 2007, [7.4.24].

[695] See, in particular, *Siemens AG v Argentina*, ICSID Case No. ARB/02/08, Award, 6 February 2007, [308] (also discussed in Section 4(1)(a)(iii) above).

its full protection and security obligation. It is not, however, a stand-alone feature. Alongside it runs another equally necessary aspect of a finding of a breach of the obligation, namely, that the wrongful omission must have been a contributing cause of the damage, but for which contribution the damage would have been less likely to occur.

4(3)(a)(iii) The "but for" counterfactual: the wrongful omission as a contributing cause, but for which the damage would have been less likely to occur

If circumstantial evidence and the use of inferential reasoning are the means or subject of causal reasoning, the establishment (or not) of a "but for" counterfactual is its object. As noted in Section 2(5)(b) above, while tribunals adopt case-specific reasoning when deciding whether the counterfactual exists in a given case, that reasoning will contain some basic "substance" which is common to any finding of a breach of a non-positive obligation.[696] That common substance is that the wrongful omission was a contributing cause to the damage, and that without the omission the damage would have been less likely to occur. This is evident in cases concerning alleged breaches of the full protection and security obligation.

Section 2(5)(c) above explains how the absence of the counterfactual in *Noble Ventures v Romania* meant that a breach of the obligation could not be established in respect of damage done by non-State actors. In the tribunal's view, it did not matter whether Romania's alleged omissions were wrongful or not because it had "not been established that non-compliance with the obligation prejudiced the Claimant".[697] Romania's failure to act was not of such significance that, but for its occurrence, the

[696] See, discussed in Section 2(5)(b) above: Brownlie, *System of the Law of Nations, State Responsibility – Part I* (OUP, 1983), 225-226; García Amador, *Yearbook of International Law Commission*, 1961, vol. II, UN Doc. A/CN.4/SER.A/1961/Add.l, 40.

[697] *Noble Ventures, Inc. v Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, [166]. See also Dolzer and Schreuer, *Principles of International Investment Law* (OUP, 2008) 151.

damage would have been less likely to occur. Thus, although the omissions may have contributed in some way to the factual causality of the damage, it did not legally cause it. The "but for" counterfactual did not exist, and so the tribunal held that there had been no breach of the obligation.[698]

This basic commonality of substance in causal reasoning exists in other categories of cases considering a breach of the obligation. *Wena v Egypt* concerned damage by State actors, in which the tribunal held that Egypt had breached the obligation. It did so on the basis that, even if the Ministry of Tourism had not instigated seizures of the two hotels by a State-owned company, the evidence showed that Egypt's knowing inaction prior to the seizures contributed to and made more likely the occasioning of the damage.[699] In accepting the existence of this "but for" counterfactual, the tribunal cited extensively evidence of Egypt's foreknowledge and capacity,[700] from which it drew the inference that Egypt had failed to exercise necessary vigilance and thus had violated the obligation.[701]

In the context of the duty to provide a means of redress, *Unglaube v Costa Rica* illustrates that the counterfactual still operates. The tribunal confirmed that, even when considering the conduct of a judicial entity charged with providing a means of redress, a claimant "must demonstrate a causal connection between an improper action or failure to act of [that] State entity" and the damage to the claimant.[702] Because the courts' alleged

[698] *Noble Ventures, Inc. v Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, [167].

[699] *Wena Hotels Ltd v Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, [85].

[700] *Wena Hotels Ltd v Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, [85]-[89].

[701] *Wena Hotels Ltd v Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, [84] and [95].

[702] *Marion Unglaube and Reinhard Unglaube v Costa Rica*, ICSID Case No. ARB/08/1 and ICSID Case No. ARB/09/20, Award, 16 May 2012, [283].

failure to provide a means of redress was both the omission and the sole cause of the alleged damage, the claimants needed only establish that, but for the courts' failure, the damage they suffered would not have occurred (that is, they needed to establish the counterfactual). As the court proceedings complied with Costa Rican law and involved no "impropriety, corruption or discrimination",[703] the tribunal concluded the claimants had not established the requisite counterfactual. No breach of the obligation had occurred, in that there was no damage to which the Costa Rican courts could be said to have contributed through their omissions.

As these cases illustrate, the "but for" counterfactual is an important aspect of the proof of causation – and especially legal causality – in respect of a wrongful failure to provide protection and security. A good causal argument is therefore one which marshals sufficient circumstantial evidence to ground an inference that an omission is legally causative of the alleged damage because, but for that omission, the damage would have been less likely to occur. Certainly the reverse is also true – an inadequate causal argument will be one which fails to establish these matters. However, that is not the only way in which a tribunal may find that legal causality is absent. In addition, there are aspects of the causal reasoning in the case law which, if present, can only retard a claim for breach of the obligation and, if absent, do little to assist it.

4(3)(b) Absence of a legally causative link between wrongful omissions and damage

Having discussed aspects of tribunals' reasoning on the existence of a legally causative link between a wrongful omission and damage, Section 4(3)(b) discusses aspects of tribunals' reasoning on the absence of such a link. These include reasoning which denies a

[703] *Marion Unglaube and Reinhard Unglaube v Costa Rica*, ICSID Case No. ARB/08/1 and ICSID Case No. ARB/09/20, Award, 16 May 2012, [286].

link on the basis of: a contribution to the factual causality of the damage by the investor, as discussed in Section 4(3)(b)(i); the absence of factual causality irrespective of the conduct of the investor, as discussed in Section 4(3)(b)(ii); and the remoteness of damage from the wrongful omission, as discussed in Section 4(3)(b)(iii).

4(3)(b)(i) Contribution to factual causality by the investor

While claimants typically establish factual causality between an allegedly wrongful omission more easily than they do legal causality,[704] their own conduct can introduce difficulties into this aspect of the causal reasoning. As a respondent State's failure to act can be part of Cheng's "sequence of events" which renders that conduct the "proximate" cause of the damage,[705] so too can a claimant's conduct contribute to this factual causality. Dilution of the State's contribution to factual causality can attract close review by a tribunal, and can break the causal connection.

Biwater v Tanzania is a clear example of this. The claimant's claim failed in this case not because Tanzania was duly diligent in affording protection and security,[706] but because the claimant failed to establish factual causality.[707] As of the moment when Tanzania first arguably breached the obligation, the claimant's investment was of negative value, and the "normal contractual termination process [for the investment contract] was underway".[708] Such was the degree of the claimant's contribution to the concatenation of events occasioning its losses that "none" of Tanzania's conduct "in fact caused the loss

[704] See Section 4(3)(a)(i) above.

[705] Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (CUP, 1953), 253.

[706] *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case No. ARB/05/08, Award, 24 July 2008, [731].

[707] *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case No. ARB/05/08, Award, 24 July 2008, [798].

[708] *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case No. ARB/05/08, Award, 24 July 2008, [790].

and damage in question, or broke the chain of causation that was already in place."[709] No "factual link"[710] existed, and the State's conduct was not the "actual and proximate cause".[711] The claimant's own conduct meant that it could not prove the necessary factual "link between the wrongful act and the damage in question". Even before the tribunal considered whether legal causality existed – that is, whether the claim exceeded the "threshold beyond which damage, albeit linked to the wrongful act, is considered too indirect or remote"[712] – it rejected the claim for want of factual causality.[713]

The more difficult situation, however, is where the claimant's contribution to factual causality is not as complete as in *Biwater v Tanzania*. It is common for a claimant to have contributed to a lesser extent to the concatenation of events leading to the damage. This does not instantly prompt a finding that factual causality does not exist. In *AAPL v Sri Lanka*, evidence that the managers of the shrimp farm may have had a relationship with the rebels did not lead to such a finding. Nor in *Siemens v Argentina* did the claimant's errors in performing the contract outweigh the causal contribution of Argentina's use of its regulatory powers for purposes "ulterior" to advancing the public interest.

In contrast are the claimants' conduct in *Ulysseas v Ecuador* and *AES v Hungary*. In the former, the damage was done to the claimant's electricity barge only after

[709] *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case No. ARB/05/08, Award, 24 July 2008, [798].

[710] *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case No. ARB/05/08, Award, 24 July 2008, [786].

[711] *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case No. ARB/05/08, Award, 24 July 2008, [787]. The tribunal thus invoked the same language Cheng uses to describe factual causality: Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (CUP, 1953), 253.

[712] *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case No. ARB/05/08, Award, 24 July 2008, [785].

[713] *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case No. ARB/05/08, Award, 24 July 2008, [785]-[786]. The decision is thus a good example of how the need to decide whether legal causality exists is predicated on the prior proof of factual causality, in the sense implicit in Crawford's discussion of the topic (as noted in Section 4(3)(a)(i) above): Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (OUP, 2002), 204.

the claimant had refused to perform the contract due to the project's lack of profitability, and a State authority had exercised its contractual right to appoint a "delegate" to operate the barge.[714] Although the tribunal's reasoning was sparse and unsatisfactory,[715] it focused on the fact that the damage had been done during this contractually permitted delegation period. While the delegate's handling the barge during this period was potentially attributable to the State,[716] no damage could have occurred had the claimant not initially refused to operate the barge. The claimant's conduct thus contributed to – even initiated – the damage. In *AES v Hungary*, the claimant made a similar contribution to factual causality. The claimant complained that the Hungarian Parliament reintroduced administrative pricing and limited the profitability of its investment. But, as the tribunal noted, this occurred only after the claimant had maximised profits despite public outcry and efforts by Hungarian authorities to agree price reductions.[717] The lost profitability was undisputed, but the claimant's own conduct was again a contributor to or originator of the ultimate damage.

While the presence of the claimants' contributions to the damage was significant in both decisions, the role of factual causality was not discussed explicitly in either of *Ulysseas v Ecuador* or *AES v Hungary*. A significant but not exclusive contribution to factual causality does not prompt a tribunal to analyse the extent of that contribution vis-à-vis the extent of the State's contribution. Indeed, such an analysis would be of limited

[714] *Ulysseas, Inc. v Ecuador*, UNCITRAL, Final Award, 12 June 2012, [273].

[715] See Section 3(2)(a)(ii) above.

[716] *Ulysseas, Inc. v Ecuador*, UNCITRAL, Final Award, 12 June 2012, [139]. The tribunal ultimately held that the actions of the delegate, because done pursuant to an action of an Ecuadorian authority which was contractual in nature and not done *puissance publique*, was not attributable in this case: *Ulysseas, Inc. v Ecuador*, UNCITRAL, Final Award, 12 June 2012, [174]-[179].

[717] *AES Summit Generation Limited and AES-Tisza Erömü Kft. v Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, [4.15]-[4.20].

utility. Given that legal causality for a wrongful omission is established where the State's conduct is part of the contributing circumstances, but for which the damage would have been less likely to occur, causation can exist where the State's contribution to factual causality is less than or subsequent to the claimant's. Accordingly, where a claimant and the State have mutually contributed to factual causality, the question of causation will not be resolved by reference only to that first limb, but not the second limb of legal causality, of Crawford's two-limb test[718] – unlike where the claimant's contribution is so complete that contribution by the State is irrelevant, as in *Biwater v Tanzania*. Tribunals in such cases may be discomforted by evidence that claimants have contributed to their own damage, but they tend to dismiss the claim not on that basis but by reference to other flaws in the claimant's argument. Thus in *AES v Hungary* the tribunal dismissed the claim because the State's conduct had not breached the diagnostic it had formulated for a regulatory breach of the obligation (standard of proof), while the claim in *Ulysseas v Ecuador* was dismissed on the basis of principles of attribution (subject of proof).

4(3)(b)(ii) Absence of factual causality, irrespective of the conduct of the investor

The absence of a causal link may also be established without any reliance on the conduct of the investor, no matter whether it is contributory or not. In such cases, factual causality is absent because, while the State may have engaged in some conduct, that conduct cannot be said to have a connection with – that is, to be part of the "sequence of events"[719] leading to – the damage alleged.

[718] Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (OUP, 2002), 204.

[719] Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (CUP, 1953), 253.

Such a matter is a factual analysis, with the ultimately decisive consideration being whether the State acted as it ought to have acted in the circumstances. A lack of factual causality may thus be found where the event causing the damage is sudden and unpredictable, such that the State could not have acted, duly diligently or at all, to forestall that event before it happened. Thus in *Karmer v Georgia*, the State's police authorities were not characterised as having, or held to have, any factual connection to the occasioning of the damage to the claimant's personnel and property in the context of a revolution.[720] A similar lack of factual causality exists in *Pantechniki v Albania*, where the events causing the damage occurred during riots.[721] While these cases provide minimal or no reasoning on causation, and use dubious reasoning on the full protection and security obligation generally,[722] they illustrate how tribunals will dismiss claims for breach of the obligation *in limine* in the absence of factual causality. In the same way that most claimants are able to establish some form of factual causality, claimants that cannot meet the low threshold of demonstrating how the State's failure to act contributed in some manner to the occasioning of the damage will inevitably fail to establish a causal link.

Decisions more orthodox in their analyses of the obligation also highlight the point. The tribunal in *GEA v Ukraine* (as the tribunal in *Karmer v Georgia* ought to have done) considered whether factual causality existed, if not in the State's conduct vis-à-vis its duty to prevent then in its conduct vis-à-vis its duty to repress. It did not. That Ukrainian authorities diligently investigated the kneecap shooting of a representative of the

[720] *Karmer Marble Tourism Construction Industry and Commerce Limited Liability Company v Georgia*, ICSID Case No. ARB/08/19, Award, 9 August 2012, [291].

[721] *Pantechniki S.A. Contractors & Engineers v Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, [13].

[722] See Section 3(2)(a)(i) above.

claimant meant, despite their inability to identify the perpetrator, that the investigations were not part of the sequence of events that led or contributed to the damage suffered by the claimant.[723] Had the authorities conducted an investigation that was desultory, or exhibited no intent to interrogate or prosecute identified individuals, then the connection between that conduct and the damage to the claimant of not having its right to repression respected would likely be sufficient to establish the necessary factual causality.[724]

An equivalent approach to factual causality exists also in decisions not considering physical damage. As noted in Section 3(2)(c)(i) above, *Lauder v Czech Republic* considered whether private transactions between investors and third parties might result in a breach of the full protection and security obligation as a result of the host State's failure to regulate in a manner that forestalled damage to the investor flowing from those transactions.[725] The discussion of causality in that case was focused on the absence of factual causality. The tribunal held that the alleged damage was caused by the conduct of the third party with whom the claimant was transacting – that is, the licensee.[726] As the tribunal held, "[t]he action which actually caused the Claimant to lose part of his investment was the termination by [the licensee] of its contractual relationship with [the

[723] See *GEA Group Aktiengesellschaft v Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011, [253]-[254].

[724] This line of reasoning was in issue in *Indorama International Finance Limited v Egypt*, ICSID Case No. ARB/11/32, which settled prior to any decision being rendered. For historical analyses of the duty of repression under customary international law, see: *Thomas H. Youmans (U.S.A.) v United Mexican States*, 23 November 1926, IV UNRIAA 110, [11]-[12]; *Richard A. Newman (U.S.A.) v United Mexican States*, 6 May 1929, IV UNRIAA 518, 519; *S.J. Stallings (U.S.A.) v United Mexican States*, 22 April 1929, IV UNRIAA 478, 479-480.

[725] See *Lauder v Czech Republic*, UNCITRAL, Final Award, 3 September 2001, [308]-[313]. See also on a similar scenario, although decided on a finding regarding the scope *ratione materiae* of the full protection and security obligation, *Parkerings-Compagniet AS v Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, [359]-[360].

[726] *Lauder v Czech Republic*, UNCITRAL, Final Award, 3 September 2001, [313]. The facts of this case, including the relationship between the claimant and the licensee, are recounted in Section 3(2)(c)(i) above.

Claimant's company] in 1999".[727] Accordingly, while the Czech Media Council undoubtedly had (and had previously exercised) powers to regulate television licensing, its failure to intervene in the 1999 conduct of the licensee was not part of the sequence of events leading to the cited damage. In such circumstances, factual causality simply cannot exist, and no analysis of the investor's conduct is needed.

The conclusion in *Lauder v Czech Republic* stands in contrast to the conclusion that the investors invite the tribunal to reach in the *Stanford Financial Ponzi* cases.[728] There, the investors claim that the United States "failed to provide even a rudimentary level of protection or legal security", such that this failure "directly led [the investors] to lose [their] investments".[729] The distinguishing feature, apparently, between the claim in those cases and the unsuccessful claim in *Lauder v Czech Republic* is the degree of the host State's failure to intervene. The Czech Media Council's failure to prevent the (lawful) change of position of the licensee in *Lauder v Czech Republic* is, say the victims of the Ponzi scheme, qualitatively different to the United States' Securities and Exchange Commission failure to prosecute the Stanford Financial Group for activities it had investigated on at least four occasions and regarded internally as ripe for such

[727] *Lauder v Czech Republic*, UNCITRAL, Final Award, 3 September 2001, [313].

[728] See: *Guatemalan, Costa Rican and Dominican Victims of the Stanford Ponzi Scheme v The Government of the United States of America*, Notice of Intent, 29 December 2012; *Nationals of Peru Victimized by the Stanford Ponzi Scheme v The Government of the United States of America*, Notice of Intent, 28 December 2012; *Peruvian Victims of the Stanford Ponzi Scheme v The Government of the United States of America*, Notice of Intent, 29 December 2012; *Gregorio Anibal Sanabria Fleitas v The Government of the United States of America*, Notice of Intent, 28 December 2012; and *Mordehai Moor v The Government of the United States of America*, Notice of Intent, 28 December 2012.

[729] The various claimants are represented by overlapping counsel, and the five Notices of Intent are virtually identical, amended *mutatis mutandis* for each claim. This assertion appears in paragraph 4 of each Notice of Intent.

prosecution.[730] While such a proposition is instinctively attractive, the existence of a factual basis for distinguishing situations like those in *Lauder v Czech Republic* is not enough. For the new claims to meet a different fate to the above cases, where claimants were unable to meet even the relatively low threshold for the existence of factual causality in respect of the alleged damage, the investors will need to show how the Securities and Exchange Commission's inactivity constituted part of the concatenations of circumstances resulting in the damage, rather than simply being an influence which, while unhelpful, was extrinsic to the economic transactions in which the investors privately entered with Stanford Financial Group.

4(3)(b)(iii) Remoteness of damage from the wrongful omission

The absence of a causal link may also be established even if factual causality is proven by the investor. The absent component in that situation is legal causality. The articulation of a lack of legal causality is variously expressed in the case law and literature. As noted above,[731] damage that is "too 'remote' or 'consequential'",[732] and therefore is not sufficiently "direct", "foreseeable" or "proximate",[733] will be excluded. In such case, the "nexus between an act and all its consequences in legal contemplation"[734] does not justify reparation.

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[730] See paragraphs 17-18 of each Notice of Intent. This point is also discussed in Maupin, "Differentiating among International Investment Disputes" in Douglas, Pauwelyn and Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP, 2014) 467, 472.

[731] See Section 4(3)(a)(i) above.

[732] Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (OUP, 2002), 204.

[733] The interchangeability in practice of these diagnostics for the presence or absence of causation is noted in *S.D. Myers v Canada*, UNCITRAL, Second Partial Award, 21 October 2002, [140]. See also Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (OUP, 2002), 204.

[734] Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (CUP, 1953), 253.

The terminal effect on a claim of a lack of legal causality preoccupies the literature on causation.[735] It is also the focus of the literature on principles of causation in investment treaty arbitrations specifically.[736] This is unsurprising given that the existence (or not) of factual causality is casuistic, and lends itself to commentary only where a significant analysis of the jurisprudence has been completed – as Brownlie notes.[737]

However, the casuistry in which tribunals deal when deciding claims for breach of the obligation has not prompted close analysis of rules of factual causality. The appropriate counterfactual is usually to be inferred from a tribunal's recitation of evidence showing the State's participation in the chain of factual events leading to the complained of damage. Rather, in part because of that practice and in part because of the low threshold for proof of factual causality, the focus of what analysis investment treaty tribunals do provide on causation is on legal causality. As such, references to the concepts

[735] See, for example: Ago, "Le délit international" (1939-II) 68 *Recueil des Cours* 415, 503; Latty, "Actions and Omissions" in Crawford, Pellet, Olleson and Parlett (eds.), *The Law of International Responsibility* (OUP, 2010) 355, 361; Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (OUP, 2002), 82, 204-205; Brownlie, *System of the Law of Nations, State Responsibility – Part I* (OUP, 1983), 225-226; Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (CUP, 1953), 241ff; Jiménez de Aréchaga, "International Responsibility" in Sørensen (ed.), *Manual of Public International Law* (Macmillan, 1968) 534, 568; Yntema, "Treaties with Germany and Compensation for War Damages" (1924) 24 *Columbia Law Review* 134, 151-153; García Amador, *Yearbook of International Law Commission*, 1961, vol. II, UN Doc. A/CN.4/SER.A/1961/Add.l, 40-42; Castellanos-Jankiewicz, "Causation and International State Responsibility", Amsterdam Law School Legal Studies Research Paper No.2012-56; Straus, "Causation as an Element of State Responsibility" (1984) 16 *Law and Policy of International Business* 893; Rovine and Hanessian, "Toward a Foreseeability Approach to Causation Questions at the United Nations Compensation Commission" in Lillich (ed.), *The United Nations Compensation Commission* (Transnational, 1995) 242; Schwarzenberger, *International Law* (3rd ed., Stevens, 1957) vol. I, 669.

[736] See, for example: Alexandrov and Robbins, "Proximate Causation in International Investment Disputes" in Sauvant (ed.) *Yearbook on International Investment Law and Policy 2008/2009* (OUP, 2009) 317; Sabahi, *Compensation and Restitution in Investor-State Arbitration* (OUP, 2011) 170-175; Ripinsky and Williams, *Damages in International Investment Law* (BIICL, 2008) 135-147.

[737] Brownlie, *System of the Law of Nations, State Responsibility – Part I* (OUP, 1983), 225.

of remoteness, foreseeability and proximity can be found in the jurisprudence, even if usually without significant exposition as to their meaning.[738]

In relation to the full protection and security obligation, the concepts are invoked as a means to decide (in the context of factual causality existing) or illustrate (in the context of factual causality not existing) that no legal causality and no duty of reparation arises. Thus in *Lauder v Czech Republic*, the remoteness of the impugned State conduct from the damage was, particularly in light of the intervening conduct of a private actor, too great to establish legal causality.[739] *Biwater v Tanzania* also noted how the concept of remoteness can make it more difficult for a claimant to prove causation in circumstances where the State had contributed to the chain of events that resulted in the damage – although, like *Lauder v Czech Republic*, factual causality was also not established in that case, due to the absence of a "sufficient link" between the impugned conduct and the damage.[740] In a similar treatment, *Pantechniki v Albania* doubted the legal causality between corruption of public officials and the civil riots that ultimately damaged the investment, given the "alleged chain of causation ha[d] so many links".[741] And in *Unglaube v Costa Rica* one detects an emphasis on the diminished proximity

[738] On directness, see: *BG Group Plc v Argentina*, UNCITRAL, Final Award, 24 December 2007, [428]; *GAMI Investments, Inc v Mexico*, UNCITRAL, Final Award, 15 November 2004, [33]; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v Mexico*, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007, [282]; *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case No. ARB/05/08, Award, 24 July 2008, [785]. On foreseeability, see: *Lemire v Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, [170]; *Quiborax S.A. and Non Metallic Minerals S.A. v Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, [383], and Partially Dissenting Opinion of Brigitte Stern, [90]-[99]. On proximity, see: *S.D. Myers v Canada*, UNCITRAL, Second Partial Award, 21 October 2002, [122]; *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v Argentina*, ICSID Case No. ARB/02/1, Award, 25 July 200, [50]; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentina*, ICSID Case No. ARB/97/3, Award, 20 August 2007, [7.6.2].

[739] *Lauder v Czech Republic*, UNCITRAL, Final Award, 3 September 2001, [232]-[235] and [313].

[740] *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case No. ARB/05/08, Award, 24 July 2008, [785]-[786].

[741] *Pantechniki S.A. Contractors & Engineers v Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, [83].

between the conduct of the domestic courts and the damage alleged, such that legal, rather than factual, causality was the limb of causation unproven.[742]

The principle that these cases illustrate in respect of causation of damage through a breach of the full protection and security is the standard one, as set out in Section 4(3)(a)(i) above. As the tribunal in *Quiborax v Bolivia* expressed it, albeit not in respect of a breach of this obligation:

> "The harm for which reparation is sought must be caused by the wrongful act. It is generally accepted that factual causation is not sufficient. An additional element linked to the nature of the cause, sometimes called 'cause in law' or adequate causation is required. … In other words, a wrongful act may cause a particular damage as a matter of fact. However, if the factual link between the act and the damage is composed of an atypical chain of events that could objectively not have been foreseen to ensue from the act, the damage may not be recoverable."[743]

4(4) Standard for proof of a wrongful omission

The foregoing sections in this Chapter Four have discussed various components that are part of establishing breach of the full protection and security obligation by omission. The standard of proof to which a claimant directs this material remains, however, open to some debate.

The traditional position, which persists in the weight of the authorities, is that the standard for breach of the full protection and security obligation is an objective one. The obligation is a non-absolute positive obligation, and host States fulfil it by exercising due diligence to forestall the occurrence of damage falling within the obligation's material scope. Meeting this objective standard of proof of breach of the obligation entails, to use

[742] See, for example: *Marion Unglaube and Reinhard Unglaube v Costa Rica*, ICSID Case No. ARB/08/1 and ICSID Case No. ARB/09/20, Award, 16 May 2012, [283].

[743] *Quiborax S.A. and Non Metallic Minerals S.A. v Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, [382]-[383] (internal footnotes omitted).

Freeman's words, proving an absence of "reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances".[744] Greater precision can be given to Freeman's directive as it applies to the modern international investment law of full protection and security. But before one can do so, the alternative formulation of the standard – one that is wholly or partially subjective – is to be noted.

The notion that a subjective standard is appropriate to assess whether a non-absolute positive obligation has been breached has been asserted for decades, including more recently in investment treaty arbitrations. The form that the proposal usually takes is that the assessment of whether a host State has exercised due diligence to fulfil an obligation such as the full protection and security obligation ought to be undertaken by reference to the resources available to that State to allow it to engage in the obligatory conduct.

An early statement of this proposition was in the *Spanish Zone of Morocco* case. Arbitrator Huber stated, when explaining the standard of conduct required of a State in respect of the protection of aliens, that it was "obliged to exercise only that degree of vigilance which corresponds to the means at its disposal", which "vigilance ... may be characterized as *diligentia quam in suis*".[745] Later hints of support for that position can be elicited from International Court of Justice jurisprudence. The Court noted, for instance, in the *Tehran Hostages* case that Iran "had the means at [its] disposal to perform [its]

[744] Freeman, "Responsibility of States for the Unlawful Acts of their Armed Forces" (1956) 88 *Recueil des Cours* 263, 277-278. See the reference to this formulation of the objective standard of proof for breach of non-absolute positive obligations in: *Asian Agricultural Products Ltd. v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, [77]; *Suez, Sociedad General de Aguas v Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, [157]; *El Paso Energy International Company v Argentina*, ICSID Case No. ARB/03/5, Award, 31 October 2011, [522].

[745] *British Claims in the Spanish Zone of Morocco* (1925) 2 UNRIAA 639, 644.

obligations" in respect of the protection of the United States consulates at Tabriz and Shiraz.[746] Similarly, in the *Genocide* case, the Court held that Serbia and Montenegro was obliged only "to employ all means reasonably available to them", rather than being "under an obligation to succeed", in preventing the commission of a genocide in its territory.[747]

In light of this foundation in broader public international law, a number of scholars consider the proposition in the specific context of the full protection and security obligation. Newcombe and Paradell endorsed it, concluding that the "applicable standard depends on the situation of the host State", including "in light of its resources".[748] Schreuer cited the issue as an "open question",[749] and Moss opined that support for the proposition could be drawn from *ELSI*.[750] In doing so, this scholarship built on previous commentary that a "sliding scale" may apply in respect of failures of due diligence that breach non-absolute positive obligations – a scale that permitted giving consideration to the nature of the State's resources and its subjective position depending on the "intensity"

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[746] *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Judgment)* [1980] ICJ Rep 3, [68].

[747] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 17, [430].

[748] Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer, 2009), 310. Curiously, this treatise goes on to say the "standard calls for an objective national treatment standard", but confirms that it is in fact endorsing a subjective standard given that its application, howsoever it is described, means the "extent of due diligence an investor may expect will vary … with local conditions": Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer, 2009), 310.

[749] Schreuer, "Full Protection and Security" (2010) 1(2) *Journal of International Dispute Settlement* 353, 367-369.

[750] Thus, Moss argues that the ICJ Chamber in *ELSI* prefers a subjective test for breach of the full protection and security obligation: Moss, "Full Protection and Security" in Reinisch (ed.), *Standards of Investment Protection* (OUP, 2008) 141. The better view is that the ICJ Chamber rejected allegations of breach of that obligation due to lack of a causal link ("considering that it is not established that any deterioration in the plant and machinery was due to the presence of the workers ... the protection provided by the authorities could not be regarded as falling below 'the full protection and security required by international law'": *Elettronica Sicula S.p.A. (ELSI) (United States of America v Italy) (Judgment)* [1989] ICJ Reports 15, 65).

of the events which were causing the damage and which it was required to countermand.[751] And finally, *Pantechniki v Albania*, as discussed in Sections 3(2)(a)(i) and 4(2)(b) above, adopted the proposition as part of its "modified objective standard".[752]

A doctrinal basis thus exists for a standard that determines breaches of the full protection and security standard by reference (at least in part) to subjective considerations. Modern jurisprudence, however, has gravitated away from this approach. *AAPL v Sri Lanka*, which considered many of the foregoing sources, described the "subjective criteria that takes into consideration the relatively limited existing possibilities of local authorities in a given context" as the "old" criteria, and observed the trend was "towards an objective standard of vigilance" of the kind Freeman described.[753] Subsequent to that decision, tribunals have, as described in Chapter Three above and with the exception of *Pantechniki v Albania*, deployed an objective standard when determining a breach of the obligation. For the reasons described in Section 4(2)(b), this orthodox approach is to be preferred.

On the basis of that preferred approach, then, decisions relating to the breach of the obligation by a State's omissions have sought to articulate how the objective standard can be satisfied. Despite the regularity with which the point has arisen, no single expression of how a claimant might satisfy the standard has emerged. Scholarship has thus

[751] See: Brownlie, *System of the Law of Nations, State Responsibility – Part I* (OUP, 1983), 168; *Asian Agricultural Products Ltd. v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, [77]. This concept is also discussed in Rigo Sureda, *Investment Treaty Arbitration: Judging Under Uncertainty* (CUP, 2012), 87-92.

[752] *Pantechniki S.A. Contractors & Engineers v Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, [81], citing Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer, 2009), 310.

[753] *Asian Agricultural Products Ltd. v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, [77].

noted that no such "single, agreed-upon definition"[754] of the standard exists, and one tribunal has applied the general point that it would be inappropriate to develop such a standard for all due diligence obligations, even to the specific and more limited content of the full protection and security obligation.[755]

Despite this juristic instinct to maintain the same flexibility in the expression of the standard for a breach of the full protection and security obligation that attaches generally to the due diligence standard in international law,[756] the reasoning of recent decisions suggests that certain objective criteria may be more influential than others in respect of giving content to the standard as it applies in the context of this particular obligation.

The first of these objective criteria is the concept of legitimate expectations. While this concept is rich in meaning in international investment law owing to its status as an indicator of breach of the fair and equitable treatment obligation,[757] it has received

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[754] See: Frey, *Prevention of human rights violations committed with small arms and light weapons*, 25 June 2003, UN Doc. E/CN.4/Sub.2/2003/29, [39]; Duffy, *The 'War on Terror' and the Framework of International Law* (CUP, 2005) 57.

[755] *Suez, Sociedad General de Aguas v Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, [157] (with Brownlie making the original point: Brownlie, *Principles of Public International Law* (7th ed., OUP, 2008), 455; cf Crawford, *Brownlie's Principles of Public International Law* (8th ed., OUP, 2012) 552).

[756] See: Shaw, *International Law* (6th ed., CUP, 2008), 855; Brownlie, *Principles of Public International Law* (7th ed., OUP, 2008), 455; Crawford, *Brownlie's Principles of Public International Law* (8th ed., OUP, 2012) 552; *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Advisory Opinion)*, Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, 1 February 2011, [117].

[757] See discussions of this role played by legitimate expectations in, for example: Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer, 2009), 279-289; Dumberry, "The Protection of Investors' Legitimate Expectations and the Fair and Equitable Treatment Standard under NAFTA Article 1105" (2014) 31 *Journal of International Arbitration* 47; Campbell, "House of Cards: The Relevance of Legitimate Expectations under Fair and Equitable Treatment Provisions in Investment Treaty Law" (2013) 30 *Journal of International Arbitration* 361; Schreuer, "Fair and Equitable Treatment in Arbitral Practice" (2005) 6 *The Journal of World Investment & Trade* 357, 374-380; Snodgrass, "Protecting Investors' Legitimate Expectations – Recognizing and Delimiting a General Principle" (2006) 21 *ICSID Review – Foreign Investment Law Journal* 1; Fietta, "The 'Legitimate Expectations' Principle under Article

minimal attention in the context of the full protection and security obligation. One case in which the concept was implicitly invoked was *Bogdanov v Moldova*, in which Moldova was found to have breached the full protection and security obligation through its enactment of a new customs regulations regime that contravened a stabilisation clause on which the claimant relied.[758] As discussed in Section 3(2)(c)(i) above, a diagnostic suggested by the reasoning in that decision is that the (objective) standard of proof for breach of the full protection and security obligation is met when the legitimate expectations of an investor are frustrated by the impugned conduct of the host State. Such a diagnostic operates by enabling one to decide whether conduct which allegedly breaches the obligation, but which is located on the spectrum between obviously acceptable and obviously wrongful, is in fact a breach.

The second objective criterion emerging from the case law that may give content to the standard of proof applicable to a breach of the full protection and security obligation is the reasonableness and rationality of the State's conduct. Again, these are concepts already familiar to international investment law through their role as indicators of compliance with the fair and equitable treatment obligation.[759] A key source of the

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1105 NAFTA – International Thunderbird Gaming Corporation v. The United Mexican States" (2006) 7 *The Journal of World Investment & Trade* 423; Walter, "The Investor's Expectations in International Investment Arbitration" in Reinisch and Knahr (eds.) *International Investment Law in Context* (Utrecht, 2008) 173; Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (OUP, 2008) 163; Kläger, *'Fair and Equitable Treatment' in International Investment Law* (CUP, 2011) 164-187; Vandevelde, "A Unified Theory of Fair and Equitable Treatment" (2010) *New York University Journal of International Law and Politics* 43, 66-68; and Dolzer, "Fair and Equitable Treatment: Today's Contours" (2014) 12 *Santa Clara Journal of International Law* 7, 20-29. Case law on selected components of the doctrine of legitimate expectations is noted in Chapter Five below.

[758] *Yury Bogdanov v Moldova*, SCC, Final Arbitral Award, 30 March 2010, [83]-[85].

[759] See discussions of this role played by reasonableness and rationality in, for example: Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer, 2009), 303-304; Vandevelde, "A Unified Theory of Fair and Equitable Treatment" (2010) *New York University Journal of International Law and Politics* 43, 54-63; and Vadi, "Proportionality, Reasonableness and Standards of Review in Investment Treaty Arbitration" in Bjorklund (ed.), *Yearbook on International Investment Law & Policy 2013-2014* (OUP, 2015) 201, 216-220.

criterion is *AES v Hungary*, in which a reintroduction of an administrative pricing regime in place of a contractual pricing schedule was held not to breach the obligation.[760] As discussed in Section 3(2)(c)(i) above, the reasoning in that case suggests a diagnostic that a breach of the full protection and security obligation is established if the State has not acted reasonably and with a view to achieving objectively rational public policy goals. Again the operation of this diagnostic allows one to decide whether conduct located at a point on a spectrum between clearly wrongful and clearly acceptable does in fact fall short of the standard of proof.

The utility of these diagnostics for proof of a breach of the obligation, including in respect of conduct that is not regulatory (which was the type of conduct in issue in *Bogdanov v Moldova* and *AES v Hungary*) and in light of the components of proof discussed in Sections 4(1) to 4(3) above, is analysed further in Chapter Five below. From an immediate review, however, the diagnostics contain beneficial elements in respect of defining the standard of proof required for breach of the obligation. Both draw on Freeman's definition of what constitutes duly diligent conduct, namely, the notions of what conduct is "expected" of a host State and what conduct constitutes "reasonable measures of prevention" by the State.[761] They both establish an objective standard for proof of breach of the obligation, and avoid reverting to "old subjective criteria" for that

[760] *AES Summit Generation Limited and AES-Tisza Erömü Kft. v Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010.

[761] Freeman, "Responsibility of States for the Unlawful Acts of their Armed Forces" (1956) 88 *Recueil des Cours* 263, 277-278. Using Freeman's definition as a touchstone is particularly beneficial given the jurisprudence has referred positively to that definition previously. See, for instance: *Asian Agricultural Products Ltd. v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, [77]; *Suez, Sociedad General de Aguas v Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, [157]; *El Paso Energy International Company v Argentina*, ICSID Case No. ARB/03/5, Award, 31 October 2011, [522]; *Hesham T. M. Al Warraq v Republic of Indonesia*, UNCITRAL, Award, 15 April 2014, [625].

purpose.[762] They use concepts already familiar to international investment law, which would therefore not involve an elaboration of principle that is unfamiliar to or untested in the jurisprudence. And they both contemplate a reality in which States have leeway to choose the measures that they will take to comply with the obligation, but do not have unfettered power in that choice.

As the foregoing illustrates, there is sparse modern dissent from the proposition that the standard of proof for breach of the full protection and security obligation is an objective one. While definitions of the general concept of due diligence have informed tribunals' analyses of the standard to be satisfied in proving a breach of the obligation, jurisprudence on the obligation itself indicates that a more detailed and tailored understanding of the content of the standard is desirable.

[762] *Asian Agricultural Products Ltd. v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, [77].

CHAPTER FIVE: CONCLUSION

How does one establish a breach of the full protection and security obligation by omission? The answer draws on both foundational principles of State responsibility relating to the violation of international law by omission, as well as nuances in the application of those principles to the specific circumstances pertaining to the obligation.

The foundational aspects of the law of State responsibility discussed in Chapter Two above inform how one establishes a breach of the obligation by omission. Brownlie's observation remains true in this regard: in the usual absence of "specific evidence of a lack of proper care on the part of state organs",[763] one needs to establish both an evidentiary and legal basis on which to draw the positive inference that, but for the State's omission, the breach of the full protection and security obligation would have been less likely to occur or would not have occurred.

The evidentiary basis for such an inference is drawn from the content, acquirer and timing of the State's knowledge of the circumstances giving rise to the need to act, and the capacity of the State to act on that knowledge.[764] When the State has the relevant knowledge, acquires it through an official who is empowered to take action in those circumstances, and does so prior to the damage occurring, the basis for the inference is strengthened.[765] It is also strengthened when a State fails to exercise its capacities by not taking any or alternative action to forestall the damage or not taking action similar to that it

[763] Brownlie, *System of the Law of Nations, State Responsibility – Part I* (OUP, 1983), 45.

[764] See Section 2(4) above.

[765] See Section 4(1)(d) above.

took previously to forestall similar damage in similar circumstances, or when its officials do not exercise their authority to forestall the damage or for legitimate purposes.[766]

Establishing causation in respect of a breach of the obligation involves establishing both evidentiary and legal elements. The proof of factual causality is the evidentiary element, albeit one that is coextensive with the evidentiary basis of knowledge and capacity noted above. If adequate proof of the latter is achieved, so too will be factual causality.[767] Proof of legal causality is achieved by evidencing factual circumstances in which the damage occurred to an extent that allows the positive inference that, but for the omission which contributed to those circumstances, the damage would have been less likely to occur.[768] This entails both the use of an appropriate "but for" test and establishing that the damage complained of is not excluded as a basis for breach by operation of the concepts of remoteness, foreseeability and proximity.

Aspects of these tenets of State responsibility for omissions operate with particular nuance in respect of the full protection and security obligation. These nuances stem from the fact that the protection and regulation of a foreign investment is typically indirect. With some exceptions, a State does not track each foreign investment that enters its territory and provide to that investment bespoke protections and regulations. Certainly a State does not – indeed, could not – fulfil a non-absolute positive obligation vis-à-vis individual foreign investments in this way. The State conduct in issue is usually part of a broader management by the State of investment flows and activities – it is expected to exert police and regulatory powers in its territory to protect those flows and activities to

[766] See Section 4(2)(d) above.

[767] See Sections 2(5) and 4(3)(a)(i) above.

[768] See Sections 2(5) and 4(3)(a)(i) above.

the standard of its international obligation, but does not know when or how those powers will need to be exercised. The way in which a State engages with foreign investment and extends to it full protection and security is therefore less direct than the way in which it abides by or breaches its non-absolute positive obligations in other international law contexts, such as the obligation to prevent a genocide by its own military during an armed conflict[769] or the obligation to protect civilians from being killed, tortured or subjected to inhumane treatment during an armed conflict in which it is participating.[770]

In relation to fulfilling this obligation, therefore, establishing that the State knew it needed to act, and had the necessary capacity to do so, typically relies heavily on proof of the surrounding circumstances. Knowledge of private individuals perpetrating physical damage that needs to be prevented by the State's enforcement authorities, or knowledge of private transactions that ought to be regulated by the State to ensure adequate protection to a foreign investor involved in them, is not as accessible by the State as knowledge of the conduct of its own officials, such as its military officers in an armed conflict. The evidence of the content, acquirer and timing of the State's knowledge of the circumstances giving rise to the need to act, and of the State's ability to take any or alternative action, thus needs to be stronger than when proving a breach of other non-absolute positive obligations in international law. Without that stronger evidentiary basis, a tribunal will be unlikely to draw the positive inference that a breach of the full protection and security obligation has been proven.

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[769] See, for example *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 17, [208]-[209]. See also Section 2(3)(b) above.

[770] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICJ Rep 168, [211]. See also Section 2(4)(a) above.

By contrast, the principles of causation applicable in relation to the obligation are transposed without modification from broader international law. This is in part because there is no nuance in the obligation that requires amendment of those principles. It is, however, also in part because sparse analysis has been given to how rules of causation operate in respect of this obligation (as is the case for non-absolute positive obligations in international law more generally). Factual causality is most often established with little or no analysis,[771] given that the State is pre-eminent in its territory through its police and regulatory power and claimants can on this basis allege that State conduct was involved in some degree in the concatenation of events leading to the alleged damage. It is also rare for decisions on the obligation to discuss in detail the principles of legal causality that apply, or to assess the utility of deciding whether the causality exists by reference to the various concepts of remoteness, foreseeability or proximity.[772] Proof of causation in relation to the obligation is thus usually done without a close review of the underlying doctrine, and certainly without departing from its precepts.

Where the treatment of the obligation does show signs of departing, and potentially significantly, from the position in broader international law is in relation to the standard of proof required to establish a breach. This is an issue in respect of which

[771] Exceptions where factual causality did not exist include: *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case No. ARB/05/08, Award, 24 July 2008; *Karmer Marble Tourism Construction Industry and Commerce Limited Liability Company v Georgia*, ICSID Case No. ARB/08/19, Award, 9 August 2012, [291]; *GEA Group Aktiengesellschaft v Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011, [253]-[254]. See Section 4(3)(b) above.

[772] As noted above, the interchangeability of these concepts is discussed in *S.D. Myers v Canada*, UNCITRAL, Second Partial Award, 21 October 2002, [140]. See also Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (OUP, 2002), 204 (citing different authorities for the different formulation). The conflation may be linguistically driven, as Crawford and Brownlie note: Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (OUP, 2002), 205 ("In international as in national law, the question of remoteness of damage 'is not a part of the law which can be satisfactorily solved by search for a single verbal formula'", quoting Atiyah, *An Introduction to the Law of Contract* (5th ed., OUP, 1995) 466); Brownlie, *System of the Law of Nations, State Responsibility – Part I* (OUP, 1983), 45 ("[v]erbal formulas nearly always simply restate the problem").

exegesis in the case law is minimal, but where indications point to a possible progressive development of how a due diligence standard is to be understood.

Section 2(3)(b) above analysed the applicable standard for breach of a non-absolute positive obligation in international law generally, while Section 4(4) noted the way in which that doctrine has been adopted in investment treaty arbitral decisions considering an alleged breach of the full protection and security obligation.[773] The default position in the case law is to note that the standard is one of due diligence, to confirm implicitly that the standard is objective, and to focus the analysis on whether the facts of the dispute satisfy the standard.[774] A handful of cases elaborate on the basis for the standard being objective,[775] while one goes so far as to interpolate a subjective element into the standard.[776]

The difficulty with the sparseness of this analysis in the case law, and the minority of dissent on core aspects of the standard, is that some ambiguity attends the articulation of the appropriate standard of proof, which in turn encourages tribunals to adopt casuistic reasoning in its application. No indication in the case law, for instance,

[773] See, for instance, the use of Freeman's definition: *Asian Agricultural Products Ltd. v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, [77]; *Suez, Sociedad General de Aguas v Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, [157]; *El Paso Energy International Company v Argentina*, ICSID Case No. ARB/03/5, Award, 31 October 2011, [522]; *Hesham T. M. Al Warraq v Republic of Indonesia*, UNCITRAL, Award, 15 April 2014, [625].

[774] See, for example: *Suez, Sociedad General de Aguas v Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, [157]-[158]; *Saluka Investments BV v Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, [483]; *Rumeli Telekom A.S v Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, [688]; *Waguih Elie George Siag v Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, [447]; *American Manufacturing & Trading, Inc. v Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997, [6.05]; and *Saluka Investments BV v Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, [484].

[775] *Asian Agricultural Products Ltd. v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, [77]; *Suez, Sociedad General de Aguas v Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, [157]; *El Paso Energy International Company v Argentina*, ICSID Case No. ARB/03/5, Award, 31 October 2011, [522].

[776] *Pantechniki S.A. Contractors & Engineers v Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009.

presaged the findings reached by the sole arbitrator in *Pantechniki v Albania*, regardless of how sympathetic one might instinctively feel to the notion that poor States faced with unprecedented civil strife ought not to be held to the same standard as a rich State with more expansive resources.[777] Variability in tribunals' approach to the standard that must be satisfied for breach of the obligation means claimants in effect do not know what standard they are required to meet, and may in fact need to be prepared to prove both how the omission fell short of what one objectively would have expected, and also how it was lacking if one takes into account the State's subjective position and the alternative options open to it.

Such a state of affairs is parlous. Recent case law has sensed this and has sought to articulate a standard that is both objective and more adept at resolving allegations of breach of the obligation in the modern context of investment treaty arbitrations. This progressive attitude has been most evident in cases that consider the application of the obligation to non-physical damage.[778] In that context tribunals have fashioned objective diagnostics for determining a breach of the standard that depend on concepts of legitimate expectations, and reasonableness and rationality.[779] Thus the diagnostics maintain that the objective standard of proof is satisfied when an investor's legitimate expectations are frustrated by the impugned conduct of the State, or when the State fails to act reasonably and with a view to achieving rational public policy goals.

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[777] *Pantechniki S.A. Contractors & Engineers v Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, [81]. See also: *British Claims in the Spanish Zone of Morocco* (1925) 2 UNRIAA 639, 644; Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer, 2009), 310; Schreuer, "Full Protection and Security" (2010) 1(2) *Journal of International Dispute Settlement* 353, 367-369.

[778] See, as discussed in Section 4(4) above: *Yury Bogdanov v Moldova*, SCC, Final Arbitral Award, 30 March 2010; *AES Summit Generation Limited and AES-Tisza Erömü Kft. v Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010.

[779] Discussed in detail in Sections 3(2)(c)(i) and 4(4) above.

The utility of these articulations of the standard, however, depends on whether they are able to take into account the components of a breach by omission of non-absolute positive obligations in the context of each of the different types of breaches of the full protection and security obligation reviewed in Chapter Three above.

Both of the diagnostics were suggested in the context of claims that the States had breached the obligations through regulatory conduct. In *Bogdanov v Moldova*, the conduct related to Moldova's change in its customs regime contrary to a stabilisation provision in its legislation. In *AES v Hungary*, the conduct related to the reintroduction by Hungary of an administrative rather than contractual pricing mechanism. While the diagnostics were thus by definition useful for determining whether the standard of proof had been satisfied in cases concerning breach of the obligation by way of regulatory actions, neither decision indicated whether the diagnostic it proposed would also be suitable for regulatory omissions, such as a failure to protect a foreign investment from economic damage done to it in its private transactions with non-State actors in the host State's territory.

Notwithstanding this, it appears that the diagnostics would provide a useful tool with which one could discern whether a regulatory omission was wrongful. The concept of legitimate expectations has previously been used as a means by which a tribunal could decide whether failures to exercise regulatory or administrative powers breached international investment law – in particular, the fair and equitable treatment obligation. In that context, the sources of the expectations concerning regulatory conduct were matters in respect of which the State would clearly have knowledge and capacity. They include

expectations arising from specific commitments by the State to an investor,[780] and expectations arising from the existing legislative or regulatory position of the State.[781] Further, the State's frustration of expectations through the subversion of its specific commitments or its legislative or regulatory position can readily be assessed by principles of causation relevant to a breach of the full protection and security obligation.[782] But for the failure to abide by the commitments or apply the existing legislative or regulatory position, the alleged damage to the investor would have been less likely to occur.

The use of the legitimate expectations diagnostic to determine alleged breaches of the full protection and security obligation by regulatory omission thus seems a natural fit, and generates a refined version of the doctrine of due diligence which applies in general international law but which is otherwise untailored to the specifics of modern international investment law. The reasonableness and rationality diagnostic also appears to meet this description. It has also been used to impeach State conduct in breach of the fair and equitable treatment obligation, and decisions on the topic have stressed the need for the assessment to be whether the conduct was objectively reasonable.[783] They also

[780] See, for example: *M.C.I. Power Group, L.C. and New Turbine, Inc. v Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, [278]; *Parkerings-Compagniet AS v Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, [331]-[338]; *Walter Bau v Thailand*, UNCITRAL, Award, 1 July 2009, [12.3]-[12.4]; *Ron Fuchs v Georgia*, ICSID Case No. ARB/07/15, Award, 3 March 2010, [317]-[340]; *Ioannis Kardassopoulos v Georgia*, ICSID Case No. ARB/05/18, Award, 3 March 2010, [317]-[349]; *Total S.A. v Argentina*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, [117]-[122]; and *Metalpar S.A. and Buen Aire S.A. v Argentina*, ICSID Case No. ARB/03/5, Award, 6 June 2008, [185]-[187].

[781] See, for example: *Ioannis Kardassopoulos v Georgia*, ICSID Case No. ARB/05/18, Award, 3 March 2010, [191]-[194]; *Total S.A. v Argentina*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, [309]; *Lemire v Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, [267]; *National Grid plc v Argentina*, UNCITRAL, Award, 3 November 2008, [84]; and *Charanne B.V. and Construction Investments S.A.R.L. v Spain*, SCC Case No. 062/2012, Dissenting Opinion, 21 January 2016, [12].

[782] Indeed, in *Biwater v Tanzania*, the reasoning on causation applied equally to the breaches of the fair and equitable treatment obligation found by the Tribunal: see, for example, *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case No. ARB/05/08, Award, 24 July 2008, [629].

[783] See, for example: *BG Group Plc v Argentina*, UNCITRAL, Final Award, 24 December 2007, [342]-[343]; *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case No. ARB/05/08, Award, 24 July 2008, [693]; *Rumeli Telekom A.S v Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, [609]; *Saluka*

emphasise the connection between unreasonableness and a lack of a public policy rationale for the conduct, thus establishing a link between the subject matter of the breach and the knowledge and capacity of the State to adopt alternative conduct, and recognising the causative way in which a failure to pursue that alternative conduct increases the likelihood of the damage occurring.

The diagnostics are also useful when the breach of the obligation that is alleged is based on conduct other than regulatory acts or omissions. For instance, one may view them as a more sophisticated articulation of the standard of proof for a breach of the obligation resulting from a failure to prevent physical harm. This is because a diagnostic that invokes an investor's legitimate expectations of physical protection, or the reasonableness of a host State in succeeding or failing to provide that protection, is not alien to the way in the standard has been discussed in the past. Thus Freeman's definition of due diligence refers to the "reasonable measures of protection" that the host State would be "expected" to take,[784] while *AAPL v Sri Lanka* noted how applying the concept of due diligence to the full protection and security obligation entailed "assessing the required degree of protection and security with regard to what should be legitimately expected to be secured for foreign investors by a reasonably well organized modern State."[785] Simply because the protection which the State fails to extend to the investor is physical rather than regulatory does mean that the role of its knowledge or capacity, or the reasoning required to establish factual and legal causality, changes when determining the breach. Certainly

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Investments BV v Czech Republic, UNCITRAL, Partial Award, 17 March 2006, [460]; and *Invesmart, B.V. v Czech Republic*, UNCITRAL, Award, 26 June 2009, [454] and [459].

[784] Freeman, "Responsibility of States for the Unlawful Acts of their Armed Forces" (1956) 88 *Recueil des Cours* 263, 277-278.

[785] *Asian Agricultural Products Ltd. v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, [77].

the tribunal in *AAPL v Sri Lanka*, having stated the above, used knowledge and capacity as evidence of Sri Lanka's responsibility for a breach of the obligation, and treated the State's conduct as increasing the causal likelihood of the alleged damage.[786]

Finally, the diagnostics may also be of use in relation to the third type of breach of the obligation, namely, the duty to provide a means of redress. While the notion of legitimate expectations has not featured in the case law on point, tribunals have noted that decisions that are not "legitimate" or "reasonably tenable" can constitute a breach of this obligation.[787] The utility of the diagnostic is nonetheless likely to be limited as a result of the circumscribed role that knowledge and capacity play in relation to a proof of breach of the duty to provide a means of redress, for the reasons explained in Section 3(2)(b)(ii) above. Given that part of the purpose of the diagnostics is to state the standard to which evidence relating to the State's knowledge and capacity is directed, the irrelevance of knowledge and capacity in respect of this type of breach means that the diagnostics do not make a contribution on this issue. Rather, their contribution is limited to offering assistance in defining what the concepts of objective legitimacy and reasonableness mean. That is in itself of assistance, but this category of violation of the obligation is unlikely to adopt the diagnostics in the future as the full articulation of the standard of proof required to show a breach on this basis.

As the foregoing has illustrated, if doctrine were to accept that the standard of proof of a breach of the full protection and security obligation is satisfied when an

[786] *Asian Agricultural Products Ltd. v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, [85].

[787] See: *Mohammad Ammar Al-Bahloul v Tajikistan*, SCC, Partial Award on Jurisdiction and Liability, 2 September 2009, [247]; *Spyridon Roussalis v Romania*, ICSID Case No. ARB/06/1, Award, 7 December 2011, [359]; and *Frontier Petroleum Services Ltd v Czech Republic*, UNCITRAL, Final Award, 12 November 2010, [273].

investor's legitimate expectations are frustrated by the impugned conduct of the State, or when the State fails to act reasonably in order to achieve rational public policy goals, those two diagnostics would provide a clearer basis on which a State's international responsibility for that breach is founded. The traditional doctrine of due diligence, so often invoked by the case law, remains the foundation of any refinement of the content of the standard. However, modern international investment law requires such a refinement. The breaches of the full protection and security obligation that are alleged before tribunals have a complexity that goes beyond asking whether a host State mobilised its police forces, and made available its judicial system, to an objective minimum international standard. In respect of at least failures to forestall physical and regulatory damage, the two diagnostics offer a useful and workable development in the articulation of the standard of proof in relation to that obligation.

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