The International Minimum Standard and Fair and Equitable Treatment

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of departure,[52] the post-1910 practice decidedly moved away from the framework of indefinable exceptions and in the direction of systematized and increasingly specific principles and rules. To situate equity of fair and equitable treatment at the lower level of density suggests an effective rejection of the last century of development.

The argument would also go against the prevalent practice of States, Tribunals, and writers to identify generally relevant standards from case-by-case developments or require the showing of State practice and *opinio juris*,[53] but certainly not to see '[t]he judge [as] effectively given the task of lawmaker'.[54] The *ad hoc* nature of the equitable results that proved unsatisfactory even for the one-off maritime delimitations should be *a fortiori* inappropriate for identifying the content of a continuously binding obligation regarding multiple actors and situations. Moreover, the lower degree of normative density would be unhelpful outside the formalized dispute settlement. If equities of each particular case provide the only benchmark, States would be hard pressed to *ex ante* formulate generally applicable rules and procedures that would ensure compliance with international obligations. Also, if the density of the law is so low as to cast no normatively perceptible shadow, it will be provide little assistance in the negotiations between investors and States.[55]

The argument of equity, albeit of lower normative density but still within the boundaries of law, may also be approached from the very different perspective of *ex aequo et bono*.[56] To say that an adjudicator is concerned solely about fairness and unfairness of the particular situation and that the conclusion is reached solely by reference to personal disapproval and particular facts, without articulating principles and rules,[57] is to describe a decision *ex aequo et bono*.[58] This argument might be presented as a criticism of blatant misapplication of legal rules;[59] however, it might also mean in positive terms

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

[53] Part II nn 1–7.

[54] E Lauterpacht, *Aspects of the Administration of International Justice* (Grotius Publications Limited, Cambridge 1991) 119.

[55] See the classic analysis, RH Mnookin and L Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 Yale L J 950, particularly 975–6.

[56] D Katsikis, 'Fair and Equitable Treatment as *Ex Aequo et Bono*' (BCL thesis, University of Oxford 2011). On the distinction between equity within the law and *ex aequo et bono* see *North Sea Continental Shelf Cases (Germany/Denmark; Germany/Netherlands)* [1969] ICJ Rep 3 [88]; *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* [1970] ICJ Rep 3, Separate Opinion of President Rivero 54 [36]; *Continental Shelf (Tunisia/Libya)* [1982] ICJ Rep 18 [71]; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/US)* [1984] ICJ Rep 246 [59]; *Continental Shelf (Libya v Malta)* [1985] ICJ Rep 13 [45].

[57] nn 48–50.

[58] M Habicht, 'Le pouvoir du juge international de statuer "ex aequo et bono"' (1934) 49 Recueil des Cours de l'Académie de Droit International 277. Generally see H Lauterpacht, *The Development of International Law by the International Court* (Stevens & Sons Limited, London 1958) 213; LB Sohn, 'The Function of International Arbitration Today' (1960) 108 Recueil des Cours de l'Académie de Droit International 9, Ch III; Thirlway 1960–1989 (n 34) 50–1. As Abi-Saab stated (albeit in a different context), 'both the language ("it would be unfair") and the stance of the argument, are those of a tribunal judging *ex aequo et bono*', *Abaclat and others v Argentina*, ICSID Case no ARB/07/5, Decision on Jurisdiction and Admissibility, Dissenting Opinion of Abi-Saab, 28 October 2011 [32].

[59] *Judgments of the Administrative Tribunal of the I.L.O. upon Complaints Made against the UNESCO* (Advisory Opinion) [1956] ICJ Rep 77, Dissenting Opinion of Judge Read 143, 153; *Temple of Preah Vihear (Cambodia v Thailand)* (Merits) [1962] ICJ Rep 6, Dissenting Opinion of Judge Spender 101, 131; *Continental Shelf (Tunisia/Libya)* [1982] ICJ Rep 18, Dissenting Opinion of Judge Mosler 114, 114; ibid Dissenting Opinion of Judge Gros 143 [19]; ibid Dissenting Opinion of Judge Ago 157 [1]; ibid Dissenting Opinion of Judge Evensen 278 [12], [14], 319; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/US)* [1984] ICJ Rep 246, Dissenting Opinion of Judge Gros 360 [37]; *Maritime Delimitation and Territorial Questions between Qatar and*

but rather become part of the ongoing process of the subsequent development itself. The circularity of the argument is qualitatively different from the relatively one-directional generic terms, and would probably be a distortion of the traditional understanding of this concept.

The third argument relates to the broader effect of arbitral decisions. 'That a special jurisprudence is developing from the leading awards in the domain of investment arbitration can only be denied by those determined to close their eyes',[91] and the importance of cases dealing with *pari materia* matters for arbitral reasoning is undeniable in empirical terms.[92] However, apart from the empirical accuracy of the observation, it has been suggested that case law possesses some inherent normative quality, with Tribunals 'subject to compelling contrary grounds [having] a duty to adopt solutions established in a series of consistent cases'.[93] While this may be the most radical version of the argument, case law has been described as a source[94] or as capable of acquiring the character of customary law,[95] or as constituting *jurisprudence contante* to be followed.[96] There certainly are shades of difference between these arguments, but at least *sub silentio* they seem to be underlined by assumptions that the empirical importance leads to or is justified by some normative law-creating considerations.

If this proposition is correct, then situating fair and equitable treatment within the sources framework should not only be unproblematic but almost superfluous. The legal relevance of cases would be a given and the debate would shift to the persuasive force of the argumentation, identification of the rationale, and the possibility of distinguishing between the factual and legal issues in different cases.[97] Vasciannie's study of fair and equitable treatment seemed to hint at such a possibility when he noted that 'difficulties of interpretation may also arise from the fact that the words "fair and equitable treatment", in their plain meaning, do not refer to an established body of law *or* to existing legal precedents'.[98]

De lege lata, it does not seem possible to maintain that arbitral and judicial decisions possess law-creating capacities. Awards are the storehouses from which the content of

[91] J Paulsson, 'International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law' (2006) 3 (5) Transnational Dispute Management 13.

[92] JP Commission, 'Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence' (2007) 24 J Intl Arbitration 129, 129–58; OK Fauchald, 'The Legal Reasoning of ICSID Tribunals: An Empirical Analysis' (2008) 19 EJIL 301, 333–43.

[93] *Saipem S.p.A. v Bangladesh*, ICSID Case no ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007 (2007) 22 ICSID Rev—Foreign Investment L J 100 [67]; *Victor Pey Casado and President Allende Foundation v Chile*, ICSID Case no ARB/98/2, Award, 8 May 2008 [119]; G Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse?' (2007) 24 J Intl Arbitration 129, 373; T-H Cheng, 'Precedent and Control in Investment Treaty Arbitration' (2007) 30 Fordham Intl L J 1014.

[94] *ADF v United States of America*, ICSID Additional Facility Case no ARB(AF)/00/1, Award, 9 January 2003 (2003) 18 ICSID Rev—Foreign Inv L J 195 [184].

[95] *International Thunderbird Gaming Corporation v Mexico*, UNCITRAL Case, Final Award, 26 January 2006, Separate Opinion of Arbitrator Waelde [16].

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

[97] J Paulsson, 'Awards—and Awards' in AK Bjorklund and others (eds), *Investment Treaty Law: Current Issues III* (BIICL, London 2009) 97–9.

[98] S Vasciannie, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice' (1999) 70 BYIL 99, 103 (emphasis added).

the binding obligations get extracted.[99] While being extremely useful for this purpose, in structural terms awards only illuminate the content of treaties, customary law or general principles. The real question to be asked is about the relevance of the treaties and customary law that have been illuminated in these awards to the particular obligations in question.[100] The adjudicative pronouncements that illuminate the content of specific obligations are relevant for interpretation if and to the extent that the rule of law interpreted is itself relevant for the particular issue (leaving aside the accuracy of the illumination). The point was clearly appreciated in the discussion of the IUSCT, where the distinction was drawn between awards explaining customary law (and therefore having general relevance) and awards explaining the particular treaty (and therefore in principle not having it).[101]

The fact that in formal terms '[international tribunals] state what the law is' does not detract from the enormous practical impact of the awards because '[i]t is of little import whether the pronouncements of the Court are in the nature of evidence or of a source of international law so long as it is clear that in so far as they show what are the rules of international law they are largely identical with it'.[102] As Fitzmaurice famously observed in his contribution to *Symbolae Verzijl,* despite the theoretical limitations of the judgments to the particular dispute between particular States, '[i]n practice, it is obvious that neither the United Kingdom nor any other country could now successfully contest the general *principle* of straight base-lines'.[103] However, the practical influence is limited by the particular rule that is authoritatively explained. As Fitzmaurice added in a footnote, 'decisions turning on the *interpretation* of treaties or other instruments would not always readily lend themselves to this process'.[104] Even if the content of a rule is taken from the award, it still relates to the particular rule, and its broader relevance has to be derived not from its existence but from the relationship of the underlying rules and sources.

The view that judgments have no law-making effect was taken at the drafting of the PCIJ Statute and accurately reflects contemporary law.[105] The fact that the international legal order has experienced important changes during the twentieth century does not suggest a modification to the underlying model of law-making in this regard. Article 38(1) of the ICJ Statute is sufficiently flexible to accommodate situations in which the content of treaty and custom is largely or even exclusively determined through the lenses of judicial decisions. The structurally subsidiary role of judicial decisions does not mean

[99] S Rosenne, *The Law and Procedure of the International Court, 1920–2005* (Martinus Nijhoff, Leiden 2006) 1551.

[100] C McLachlan, 'Investment Treaties and General International Law' (2008) 57 ICLQ 361, 364.

[101] Even if disagreeing whether particular propositions turned on custom or treaty, G Abi-Saab 'Permanent Sovereignty over Natural Resources and Economic Activities' in M Bedjaoui (ed), *International Law: Achievements and Prospects* (UNESCO, Paris 1991) 613; D Magraw, 'The Iran–US Claims Tribunal: Its Contributions to International Law and Practice: Remarks' in *Contemporary International Law Issues: Opportunities at a Time of Momentous Change* (Martinus Nijhoff, Dordrecht 1994) 2–3; J Crook, ibid 6; D Caron, ibid 6–9; M Pellonpää, ibid 13–14; A Mouri, ibid 19–20; CN Brower and JD Brueseckhe, *The Iran–United States Claims Tribunal* (Martinus Nijhoff, The Hague 1998) 645–8.

[102] Lauterpacht *Development* (n 58) 21; A Pellet, 'Article 38' in A Zimmermann, C Tomuschat, and K Oellers-Frahm (eds), *The Statute of the International Court of Justice: A Commentary* (OUP, Oxford 2006) 789.

[103] G Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law' in *Symbolae Verzijl* (Martinus Nijhoff, The Hague 1958) 170. It is now known that after the *Norwegian Fisheries* judgment, the UK carried out a general re-examination of its territorial sea claims, *Sovereignty over Pedra Branca/Pulau Batu Puten, Middle Rocks and South Ledge (Malaysia/Singapore)* [2008] ICJ Rep 12 [225].

[104] Fitzmaurice, ibid 171 fn 1 (emphasis in the original).

[105] Spierman 'Attempts' (n 63) 212–18; Thirlway 2005 (n 34) 114–17.

the grain of the classical approaches, confirming the appropriateness of the methodology and applying it in a structural context broadly similar to investment law (or at least less dissimilar than any other international legal regime in existence). Modern case law and State practice present the most recent statement on the issue, even if the considerable uncertainty about the pedigree and rationale of the standard make clear conclusions problematic.

It was suggested in Part II that fair and equitable treatment refers to, or at least heavily draws upon, customary law, impacting the weight of recent practice. At one end of the spectrum, decisions of Tribunals that explicitly apply customary law would carry the greatest weight; decisions of Tribunals that accept the similarity of the treaty rule and customary law would also carry considerable weight; further along the line, decisions of Tribunals that implicitly adopt the methodology of identifying customary law *inter alia* by reference to other decisions could be taken into account; finally, decisions that neither explicitly nor implicitly apply customary law would carry least weight. Of course, explicit invocation by States of criteria of awards may contribute to customary law as State practice.

2. Modern standard of protection of property

The *Waste Management II* Tribunal elaborated the standard as an obligation not to engage in:

> conduct [that is] ... arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candor in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.[188]

Taking *Waste Management II* as the point of departure, the following sections will consider in turn different elements that have been alleged to constitute the modern

[188] *Waste Management II* Award (n 15) [98], accepted as accurate by Tribunals that explicitly apply the customary minimum standard, *GAMI* Award (n 104) [95]–[97]; *Methanex Corporation v US,* UNCITRAL Case, Final Award, 3 August 2005 16 ICSID Rep 40 Part IV Ch C [12]; *Glamis Gold Ltd v US,* UNCITRAL Case, Award, 8 June 2009 (2009) 48 ILM 1038 [559]; *Chemtura Corporation v Canada,* UNCITRAL Case, Award, 2 August 2010 [215]; *Railroad Development Corporation (RDC) v Guatemala,* ICSID Case no ARB/07/23, Award, 29 June 2012 [219], by Tribunals that accept some similarity between treaty and custom, *BG Group Plc v Argentina,* UNCITRAL Case, Final Award, 24 December 2007 [292] (set aside for an unrelated reason); *Victor Pey Casado and President Allende Foundation v Chile,* ICSID Case no ARB/98/2, Award, 8 May 2008 fn 611, [670]; *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case no ARB/05/22, Award, 24 July 2008 [597]; *Rumeli* Award (n 31) [609]; *Jan de Nul N.V. and Dredging International N.V. v Egypt,* ICSID Case no ARB/04/13, Award, 6 November 2008 15 ICSID Rep 437 [187]; *Total S.A. v Argentina*, ICSID Case no ARB/04/1, Decision on Liability, 21 December 2010 [110]; by Tribunals that do not explicitly engage with customary law, *Frontier Petroleum Services Ltd v Czech Republic,* UNCITRAL Case, Final Award, 12 November 2010 [290]. It has also been invoked by States: Argentina (*Azurix Corp. v Argentina,* ICSID Case no ARB/01/12, Award, 14 July 2006 14 ICSID Rep 374 [350]; *Continental Casualty v Argentina,* ICSID Case no ARB/03/9, Award, 5 September 2008 [253]), Canada (*Chemtura Corporation v Canada,* UNCITRAL Case, Counter-Memorial of Canada, 20 October 2008 <http://naftaclaims.com> [680]), Ecuador (*Ulysseas, Inc v Ecuador,* UNCITRAL Case, Final Award, 12 June 2012 [206]), India (*White Industries Australia Limited v India,* UNCITRAL Case, Final Award, 30 November 2011 [5.2.2]), Kazakhstan (*Rumeli* Award (n 31) [592]), Mexico (*Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. and Talsud S.A. v Mexico,* ICSID Additional Facility Cases no ARB(AF)/04/3 and ARB(AF)/04/3, Award, 16 June 2010 [6–19]) and the US (*Chemtura,* Award ibid [115]).

has taken place.[216] The *Railroad Development Corporation (RDC) v Guatemala* (*RDC*) award shows how this approach could be applied. After identifying the substantive ambiguity and lack of procedural safeguards in the regime as such, the Tribunal demonstrated how it had been abused for inappropriate purposes, 'under a cloak of formal correctness in defense of the rule of law, in fact for exacting concessions unrelated to the finding'.[217] Classical law, human rights practice, and the leading authorities of modern law point in the same direction: international law defers to the legitimacy of the purpose and means chosen to pursue it as such (unless they are entirely indefensible), but scrutinizes the formal and procedural safeguards against abuse in their implementation (the absence of which permits a more critical engagement with the ends and means).

Classical law had also generated special rules regarding arbitrariness of contractual breaches, in most instances focusing on the inappropriate reliance on, rather than inappropriate use of, public powers, and the broader formal and procedural propriety.[218] The modern cases have largely accepted that a breach of a contract is not *per se* a breach of international law,[219] and the availability of judicial remedies weighs against inappropriateness of the breach.[220] For most authorities, the criterion of wrongfulness is the character of the extra-contractual public power by which the breach has been committed.[221]

[216] *Pope* Merits (n 204) [156]–[181]; *Tecmed* Award (n 192) [163]; *Azurix* Award (n 188) [390]–[393]; *Tokios Tokelès v Ukraine*, ICSID Case no ARB/01/3, Award, 26 July 2007 [123]; ibid Dissenting Opinion of Arbitrator Price [2]; *Desert Line Projects L.L.C. v Yemen*, ICSID Case no ARB/05/17, Award, 6 February 2008 (2009) 48 ILM 82 [179].

[217] *RDC* Award (n 188) [220]–[235]. The *Renta 4* Tribunal sought to distinguish what appears to have been a similar kind of reasoning from that practised by the ECtHR under the aegis of the margin of discretion, (n 86) [158]. However, the comparative experience calls precisely for such an examination of substantive and procedural arbitrariness so as to identify the abusive intention behind the measures, and the differences between *Renta 4* and *Yukos* are better explained either by reference to the peculiar legal standard of intentional abuse brought in by Article 18 of the ECHR, or by plausibly different appreciations of complex facts, see n 86.

[218] nn 72–82.

[219] See, among others, *Robert Azinian and others v Mexico*, ICSID Additional Facility Case no ARB(AF)/97/2, Award, 1 November 1999 (1999) 14 ICSID Rev—Foreign Investment L J 538 [87]; *Waste Management II* Award (n 15) [114]; *Parkerings Compagniet AS v Lithuania*, ICSID Case no ARB/05/8, Award on Jurisdiction and Merits, 14 August 2007 [316], [341]–[345]; *Impregilo S.p.A. v Pakistan*, ICSID Case no ARB/03/3, Decision on Jurisdiction, 22 April 2005 12 ICSID Rep 245 [260]; *Biwater* Award (n 188) [457]–[460]; *Bayindir Insaat Turizm Ticaret ve Sanayi A Ş v Pakistan*, ICSID Case no ARB/03/29, Award, 24 August 2009 [180]; *Gustav F W Hamester GmbH & Co. KG v Ghana*, ICSID Case no ARB/07/24, Award, 18 June 2010 [328]. While not without uncertainty, some authorities might conflate both breaches, *Iurii Bogdanov and others v Moldova*, SCC Case, Award, 22 September 2005 15 ICSID Rep 49 [76]; *Eureko* (n 38) [232]; *Rumeli* Award (n 31) [615]; *Walter Bau v Thailand*, UNCITRAL Case, Award, 1 July 2009 [12.31]. The *Azurix* Tribunal seemed to follow both approaches simultaneously, finding breaches of fair and equitable treatment because of a factually indefensible contractual conduct, *Azurix* Award (n 188) [374], and politicization, ibid [375] (the *Azurix* annulment committee noted the latter point, refusing to infer, however, that in the former situation the basis of breach was merely domestic law, *Azurix Corp. v Argentina*, ICSID Case no ARB/01/12, Decision on the Application of Annulment, 1 September 2009 [166], [171]).

[220] *Waste Management II* Award (n 15) [116]; *Parkerings*, ibid [316]–[320].

[221] *Mondev* Award (n 192) [134] ('a governmental prerogative to violate investment contracts'); *Consortium R.F.C.C.* Award (n 39) [3.2.2.1] ('*puissance publique*'); *Waste Management II* Award (n 15) [115] ('outright and unjustified repudiation'); *Impregilo v Pakistan* (n 219) [260] ('the State in the exercise of its sovereign authority ("*puissance publique*")'); *Continental Casualty* Award (n 188) [261.iii] ('unilateral modification of contractual undertakings by governments'); *Duke Energy Electroquil Partners & Electroquil S.A. v Ecuador*, ICSID Case no ARB/04/19, Award, 18 August 2008 [354] ('any use of sovereign power'), [355] ('use of the State's "*imperium*"'); *Biwater* Award (n 188) [497]–[502], [615], [627], [636]; *LLC Amto v Ukraine*, SCC Case no 80/2005, Final Award, 26 March 2008 [108]. The *Impregilo* Tribunal may also be included in this category in the broadest sense: even though responsibility was based on a contractual breach to restore equilibrium, it had been upset by governmental measures in the first place, *Impregilo S.p.A. v Argentina*, ICSID Case no ARB/07/17, Award, 21 June 2011 [325]–[331].

The final aspect of lawfulness identified by the ECtHR case law relates to consistency of conduct.[297] Even though the inconsistency of proclaimed purposes, means, pronouncements and conduct has been at issue in a number of investment cases,[298] it has usually been rationalized in terms of frustration of expectations. The comparative analysis suggests that it is preferable to minimize the importance of the theoretically somewhat uncertain perspective of expectations in favour of an objective formal criterion of consistency of conduct of authorities in relation to the investor. The measures below the *de minimis* level of consistency preclude any meaningful foreseeability and understanding of the legal position.

v. Due process

The focus on procedural aspects has a strong pedigree in the interpretation of the international standard, particularly denial of justice. The law of indirect expropriation addressed the procedural elements in two ways, with either the expropriation itself taking place through denial of justice, or, as illustrated by the *de Sabla* case, the absence of procedural remedies supplementing the general picture of arbitrariness.[299] The practice regarding due process as a criterion of lawfulness for expropriation has similarly recognized both the direct relevance of procedural propriety (particularly regarding advance notices) and the indirect requirement of access to justice.[300] Finally, the case law of the ECtHR has required either access to court or significant procedural safeguards when interference with property rights takes place.[301] The position of modern investment protection law will also be addressed from the dual perspective of procedural safeguards as such and the indirect relevance of access to justice.

The necessary procedural safeguards may be addressed on three levels. The law of denial of justice is entirely devoted to procedural safeguards within administration of justice.[302] Conversely, within a contractual context, the usual contractual procedures and remedies, rather than due process, provide the benchmark.[303] The interesting case relates to the matters that fall in between denial of judicial justice and contractual remedies, mainly regarding different kinds of administrative proceedings. While the particular requirements of judicial conduct cannot be applied *verbatim* to conduct outside judicial proceedings, some of them may be taken as a starting point of analysis, accepting that they are likely to be less demanding than in the judicial process.[304] The *Thunderbird v Mexico* and *Genin v Estonia* awards are consistent with this approach, addressing the due process of administrative decision-making by using the vernacular of denial of justice, and not finding the breach of the international standard despite procedural irregularities that had taken place.[305] The issues addressed are mostly analogous to the 'irregularities in the conduct of proceedings' aspect of the administration of justice, considering the

directed at problems with foreseeability and predictability of the conduct of the municipality, (n 192) [162]–[164]; see similarly *Metalclad* Award (n 38) [81], [85]–[86].

[297] nn 161–3, 170.

[298] *Genin* Award (n 94) [351]–[357]; *MTD* Award (n 289) [166]–[167]; *Saluka* (n 46) [417]–[419]; *PSEG* Award (n 215) [250]–[254].

[299] nn 28–9. [300] Ch 3 n 69. [301] nn 160–8. [302] Ch 8.

[303] *Bayindir* Award (n 219) [345]–[346].

[304] *Thunderbird* Award (n 231) [200]. The *Lemire* Tribunal seemed to transpose elements of judicial independence to its analysis of improper influences on independent decision-makers, (n 260) [345], [356].

[305] *Thunderbird* Award (n 231) [197]–[201]; *Genin* Award (n 94) [357], [364]–[373]; *Bayindir* Award (n 219) [344].

adequacy of notification,[306] effectiveness of participation,[307] and minimal requirements of impartiality and integrity.[308] Overall, the best analytical approach would be to consider the functional and structural similarity of the particular proceedings with issues dealt with by the better-developed law of denial of justice, so as to appropriately either transpose the solutions *verbatim* or *mutatis mutandis* or *a contrario* reject them.

The second procedural aspect relates to the indirect relevance of the opportunity to access court. The *De Sabla* case accepted the importance of access to efficient judicial proceedings in balancing substantive irregularities.[309] In the contractual context, the *Parkerings v Lithuania* Tribunal also relied on the availability of access to court in rejecting a fair and equitable treatment claim.[310] Conversely, absence of judicial review might supplement the picture of general arbitrariness.[311] This type of reasoning has been increasingly employed in the recent ECtHR case law.[312] Overall, the different approaches are in line with *ELSI,* taking a comprehensive view of the formal and procedural safeguards that the legal system provides.[313]

Finally, one might question the appropriateness of the earlier reliance on inter-State and human rights dispute settlement regimes where domestic remedies have to be exhausted, with the danger that the explicitly removed exhaustion requirement might be *sub silentio* reintroduced in investment law.[314] However, exhaustion was not required to make the claim admissible in *de Sabla,* therefore the lack of procedural remedies relates to the primary rule.[315] More broadly, primary rules are autonomous from secondary rules of invocation, and, while their substance may overlap, the techniques for creation or suspension of these rules are different.[316]

vi. Expectations

The legitimate or reasonable expectations of the investors have been accepted in case law as a key and probably the most far-reaching element of the international standard.[317] Unlike arbitrariness, discrimination, and procedural propriety, anchored in the traditional practice, the source of the rules on expectations is less obvious. The analysis

[306] *Genin* Award (n 94) [364]; *Middle East Cement Shipping* Award (n 69) [143]; *Tecmed* Award (n 192) [162], [173]; *Thunderbird* Award (n 231) [198].

[307] Opportunity to be present and produce evidence would satisfy this requirement, *Thunderbird* Award (n 231) [200]; *EDF* Award (n 207) [275]–[278]; *Chemtura* Award (n 188) [147]; while lack of communication, *Genin* Award (n 94) [357], [364]; *Saluka* (n 46) [426]–[432]; or opportunity to comment, *Glamis* Award (n 188) [771]; an invitation made in circumstances *de facto* obstructing effective participation, *Metalclad* Award (n 38) [91]; *Rumeli* Award (n 31) [617], or mishandling of negotiations in an arbitrary and non-transparent manner could lead to a breach, *PSEG* Award (n 215) [246]; *Ioannis Kardassopoulos and Ron Fuchs v Georgia*, ICSID Cases nos ARB/05/18 and ARB/07/15, Award, 3 March 2010 [446]–[447].

[308] *Saluka* (n 46) [408]–[416].

[309] nn 28–9. [310] *Parkerings* Award (n 219) [315]–[319]. [311] *Lemire* Award (n 260) [418].

[312] nn 173–8. [313] *ELSI* (n 14) [129]; nn 193–4.

[314] CH Schreuer, 'Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration' (2005) 4 L Practice Intl Courts Tribunals 1, 13–17.

[315] Claims Convention between the United States of America and Panama (adopted 28 July 1926, entered into force 3 October 1931) 138 LNTS 120 art 5; *James Perry (US v Panama)* (1933) 6 RIAA 315, 317.

[316] See regarding denial of justice and local remedies, Ch 8 nn 15–20, 240–5.

[317] McLachlan and others *International Investment Arbitration* (n 255) 235–9; Dolzer and Schreuer *Principles* (n 228) 133–40; I Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (OUP, Oxford 2008) 163–9; Newcombe and Paradell *Law and Practice* (n 40) 279; Kläger *Fair and Equitable Treatment* (n 201) 164–87.

of delay of justice, does not attribute legal relevance to expectation about particular circumstances of the host State.[331]

The position of the classical law of property protection on the expectations of aliens is complicated to identify with absolute certainty because protests and arguments rarely focused solely on the suddenness of the change. One can point to practice both accepting[332] and rejecting the legal relevance of radical changes,[333] and the broader principle seems to be focused on precluding retroactive developments, requiring 'important changes [to be] usually prospective in their operation, so that they might have no injurious effect on previous transactions'.[334] Indeed, the PCIJ noted in a markedly fatalistic spirit that '[f]avourable business conditions . . . are . . . subject to inevitable change'.[335] In structural terms, the traditional position seems best reflected in authorities such as *Jesse Lewis,* where the Tribunal was primarily focused on the propriety of form and process and availability of judicial remedies, and only identified suddenness of change as possibly a supporting consideration of wrongfulness.[336] With all due caution, human rights practice goes with the grain of this proposition, not scrutinizing the dynamic elements of restrictions, and rather approaching the question from the perspective of foreseeability and consistency of the restrictive rules.[337] Of course, even if general customary law does not contain a rule on legitimate expectations, a special customary rule may be created to the effect, as the States explicitly recognizing the legal relevance of legitimate expectations might have done.[338]

In the law of State contracts, the 'incursion of international law into this kind of situation' protects, as Jennings put it, 'precisely the reasonable expectation and will of

[331] Ch 8 nn 228–34, 287–90. [332] nn 19, 61.

[333] nn 20, 25, 60. In the Hague Conference, Poland noted that '[a] foreign national who voluntarily enters into relations with the State should consider beforehand the risk of legislative change', Rosenne *Hague II* (n 43) 454.

[334] Fish to Lopez Roberts (n 63) 752. In the *Jesse Lewis* case, the Tribunal rejected the US argument about suddenness of legal change because the alien had neither been already engaged in transactions nor acted *bona fide*, and the public proclamations by States meant that there was no sudden surprise, *Jesse Lewis* (n 63) 92.

[335] *Oscar Chinn* Judgment (n 22) 88. While the UK claim about the mistreatment of Mr Chinn was rejected by six votes to five, the Court was unanimous in rejecting the argument about acquired rights, see *Chinn* Hurst (n 76) 121–2. In a later case, the roles were partly reversed and Belgium itself presented a claim about a breach of acquired rights, this time regarding a Greek non-compliance with an arbitral award. With a silent but unmistakable nod to *Oscar Chinn*, Belgium argued that only completely and irrevocably acquired rights could be protected, as opposed to mere aspirations, reliant on the revocable will of the legislature or third parties, *The 'Société Commerciale de Belgique' (Belgium v Greece)* PCIJ Series C No 87 23 (Memorial), 174–5 (Levy Morelle). Greece argued that it had not breached acquired rights because of the exceptional financial considerations, but did not directly challenge the Belgian argument about acquired rights, ibid 101–2 (Counter-Memorial), 222 (Youpis). Since Greece accepted that it was under an obligation to comply with the award, the Court did not directly address the limited reading of acquired rights suggested by Belgium, but it must be considered necessarily implicit in its reasoning, *The 'Société Commerciale de Belgique' (Belgium v Greece)* [1939] PCIJ Series No A/B 78 160, 174–8.

[336] See *Jesse Lewis* (n 63) 92.

[337] nn 159–72. In a recent Grand Chamber judgment, where the applicant company had been unable to operate in television broadcasting for ten years despite its license, the Court took into account the legitimate expectations in defining the object of protection but found the breach in the unforeseeability of the rules, *Europa 7 S.r.l.* (n 169) [144]–[158], [185]–[189].

[338] In recent cases, a number of States seem to have explicitly accepted legitimate expectations as a legally relevant criterion of fair and equitable treatment: for example, Bulgaria (*Plama Consortium Limited v Bulgaria,* ICSID Case no ARB/03/24, Award, 27 August 2008 [175]), Chile (*MTD* Annulment (n 282) [69]); Czech Republic (*Frontier Petroleum Services* Award (n 188) [279]–[282]). In technical terms, special custom is opposable only between the States that have opted into the regime, therefore—assuming that legitimate expectations do not exist as a general rule—it would be applicable when both the home State and host State have approvingly invoked it.

at least one of the parties'.[339] However, the expectation is only that the State would not breach the contract by stepping outside the contractual framework and employing extra-contractual public or governmental powers.[340] To say that contractual rights are expectations protected under international law[341] is not entirely persuasive: it would simply be a restatement of the rejected extreme position that every breach of a contract is a breach of international law; it does not support expectations either regarding contracts or more broadly because it accepts their relevance as a given; finally, the international wrongfulness of contractual breaches, if genuinely intended by States and investors, may be achieved by appropriately drafted stabilization clauses in contracts or umbrella clauses in treaties.

More broadly, the law of contractual breaches may suggest that international law protects expectations in general, provided that they are expressed in sufficiently certain terms. The *Glamis Gold v US* Tribunal required a showing of a quantitative 'threshold circumstance, at least a quasi-contractual relationship between the State and the investor, whereby the State has purposely and specifically induced the investment'.[342] However, the rationale of the law of State contracts is not to protect quantitative certainty or inducement but to preclude the disruption of the contractual equilibrium by public powers.[343] Even perfectly clear contracts concluded on the initiative of the State may be breached without incurring international responsibility; conversely, breaches of vague clauses in contracts suggested by the investor may be internationally wrongful when committed by *puissance publique*. The better view is that the focus of the law of State contract on the impermissibility of abusing the dual powers by one contracting party makes any generalizations regarding protection of expectations outside this peculiar normative framework complicated.

Third, the argument of legitimate expectations could be made in terms of general principles of international law, relying on similarities of domestic approaches on the issue,[344] and may be addressed both in terms of existence of such principles and their admissibility in construing the particular rule. The *de facto* internationalization of rules of a limited number of developed States during the foundational debate led to a normative backlash, suggesting that similar arguments in light of this historical pedigree should be employed with great caution.[345] While the research into expectations may be quantitatively more extensive than that underlying the debates in the 1920s, in qualitative terms it seems vulnerable to precisely the same objection: legal approaches of a limited number of developed traditionally home States are attributed direct legal influence on international law that the traditional approaches to sources *prima facie* do not support.[346] Even among the unrepresentative sample of legal systems of the traditional claimant States considered,

[339] Jennings 'State Contracts in International Law' (n 72) 181–2; SM Schwebel, *International Arbitration: Three Salient Problems* (Grotius Publications Limited, Cambridge 1987) 409, 413; A von Walter 'The Investor's Expectations' (n 228) 185–6.

[340] nn 210–16.

[341] Possibly *Eureko* (n 38) [232], *Vivendi II* Award (n 224) [7.4.42] fn 355, although the holdings may perhaps be justifiable as respectively finding wrongfulness in the breach for non-commercial reasons of discriminatory character, and arbitrary frustration of contractual execution by public powers.

[342] *Glamis* Award (n 188) [766]; the *Continental Casualty* Tribunal considered expectations from the perspective of specificity, (n 188) [261.i].

[343] As the *Glamis* Tribunal itself accepted, ibid [620].

[344] Ch 7 nn 14–15; *Total* (n 188) [128]–[130].

[345] Ch 7 nn 7–21.

[346] See generally Ch 7 11–24. A legal argument deriving the principle of legitimate expectations from a limited number of legal systems, for example, French and German law, might be appropriate in a regional legal order, P Craig, *EU Administrative Law* (2nd edn OUP, Oxford 2012) 589, but not in general international law, Ch 7 n 20.