Investment treaties and general international law

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INVESTMENT TREATIES AND GENERAL INTERNATIONAL LAW

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Abstract The huge rise in the settlement of investment disputes by treaty has provoked an underlying question of great practical and theoretical importance: the relationship between the substantive standards protected in such treaties and general international law. This paper argues that the relationship is symbiotic: custom informing the content of the treay right; and State practice under investment treaties contributing to the development of general international law. It is the structured process of treaty interpretation which determines when and how reference to general international law may be made. Practice in this field supports a broader modern phenomenon, in which 'general principles of law common to civilized nations' may be informed not only by common principles of domestic law, but also by general principles of international law itself.

> International law . . . may not contain, and generally does not contain, express rules decisive of particular cases; but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provisions of law, the corollaries of general principles, and so to find . . . the solution of the problem.[1]

I. THE CONCEPT OF INTERNATIONAL INVESTMENT LAW

A. Has Lex Specialis *Become the General Law?*

Delivering its recent judgment in the *Diallo Case*, the International Court of Justice noted that:

> . . . in contemporary international law, the protection of the rights of companies and the rights of their shareholders, and the settlement of the

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[1] *Eastern Extension, Australasia and China Telegraph Co Ltd Case* (British–United States Claims Arbitral Tribunal) (1923) VI RIAA 112, 114.

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> associated disputes, are essentially governed by bilateral or multilateral agreements . . . In that context, the role of diplomatic protection somewhat faded . . .[2]

The point is illustrated starkly by the docket of the International Court itself. *Diallo* is the first occasion on which the customary international law on the treatment of the property of an alien investor has reached the International Court since *Barcelona Traction* in 1970.[3] The International Law Commission also drew attention to the greater importance of treaty law in this field when it concluded its work on diplomatic protection in 2006.[4] Is it then the case, as the Tribunal in *CMS v Argentina* suggested, that '[t]he fact is that *lex specialis* in this respect is so prevalent that it can now be considered the general rule.'?[5]

The enormous proliferation of bilateral investment treaties (BITs), and of arbitrations under them, has masked a more fundamental issue as to the relationship between the primary substantive protections in investment treaties and general international law.[6] This question has two aspects. First, to what extent may or must the arbitral tribunal in an investment treaty dispute refer to general international law in interpreting the treaty before it? Secondly, to what extent has the elaboration and application of investment treaties itself contributed to the development of general international law?

It cannot be said that there is as yet any clear consensus on the matter in arbitral practice. Some tribunals continue to take as their point of departure the autonomous position of each BIT, pointing out, in the terms of the International Tribunal for the Law of the Sea, that:

> . . . the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results,

[2] *Case concerning Ahmadou Sadio Diallo (Guinea v Congo) (Preliminary Objections)* (ICJ General List No 103, 24 May 2007) para 88.

[3] *Barcelona Traction, Light and Power Co Ltd Case (New Application: 1962) (Belgium v Spain)* (Second Phase) [1970] ICJ Rep 3. The decision of a Chamber of the Court in *Case concerning Elettronica Sicula SpA (ELSI) (United States of America v Italy)* [1989] ICJ Rep 15; 84 ILR 311 was based on a treaty of friendship, commerce and navigation between Italy and the US.

[4] ILC, 'Diplomatic Protection: Text of the Draft Articles with Commentaries thereto' (Dugard, Special Rapporteur) in *Report of the International Law Commission on its Fifty-eighth Session (1 May–9 June, 3 July–11 August 2006) Official Records of the General Assembly Sixty-first Session*, Supplement No 10, UN Doc A/61/10, 22, 89 ('ILC Diplomatic Protection Report'). Article 17 of the Draft Articles provides: 'The present draft articles do not apply to the extent that they are inconsistent with special rules of international law, such as treaty provisions for the protection of investments.'

[5] *CMS Gas Transmission Co v Republic of Argentina* (Jurisdiction) 7 ICSID Rep 492, 504 (ICSID, 2003, Orrego Vicuña P, Lalonde & Rezek).

[6] For the relationship between treaty and custom in the *procedure* of investment treaty arbitration see Z Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (2003) 74 British Ybk Intl L 151.

> having regard to, *inter alia*, differences in the respective contexts, objects and purposes, subsequent practice of parties and *travaux préparatoires*.[7]

From this, they draw the inference that:

> Each tribunal is sovereign, and may retain . . . a different solution for resolving the same problem . . .[8]

The consequent licence to decide each case differently has notoriously led to differently constituted tribunals reaching diametrically opposite conclusions on the same facts.[9] It has also led to tribunals coming to diametrically opposite conclusions on the same issue, even where they share members in common.[10]

One of the most serious divisions of view between tribunals to emerge to date crystallized in September 2007 with the publication of the Annulment Committee's decision in *CMS v Argentina*.[11] The Committee found that the Tribunal had applied the treaty to Argentina's defence of necessity 'cryptically and defectively,'[12] but there was no manifest excess of powers, and therefore no basis on which it could intervene. In the result, therefore, wholly inconsistent awards against the same State on the same issue remain undisturbed. In the process, the Committee may have lit a touch-paper under the current operation of the investment arbitration system as a whole.

Quite apart from the practical urgency of the issue, there are other reasons why an evaluation at this stage of the place of investment treaty law within the larger frame of general international law may be both possible and timely. It is 20 years since the first arbitration claim under an investment treaty was registered.[13] The substantial volume of litigation since then has given rise to a 'first wave' of investment-treaty jurisprudence, making it possible to begin to analyse and distill the common principles which emerge

[7] *The MOX Plant Case (Ireland v United Kingdom)* (ITLOS, Provisional Measures, Order of 3 December 2001) (2002) 41 ILM 405, 413, referred to with approval in *Compañia de Aguas del Aconquija SA v Argentine Republic* (Award) ICSID Case No ARB/97/3 (ICSID, 20 August 2007, Rowley P, Kaufmann-Kohler & Bernal Verea) para 7.4.3.

[8] *AES Corp v Argentine Republic* (Jurisdiction) ICSID Case No ARB/02/17 (ICSID, 2005, Dupuy P, Böckstiegel & Janeiro) para 30.

[9] *Lauder v Czech Republic* (Final Award) 9 ICSID Rep 62 (UNCITRAL, 2001, Briner C, Cutler & Klein); cf *CME Czech Republic BV (The Netherlands) v Czech Republic* (Partial Award) 9 ICSID Rep 121 (UNCITRAL, 2001, Kühn C, Schwebel & Hàndl).

[10] *L G & E Energy Corp v Argentine Republic* (Decision on Liability) (2006) 18 World Trade & Arb Mat 199 (ICSID, 2006, de Maekelt P, Rezek & van den Berg); cf *Enron Corp v Argentine Republic* (Award) ICSID Case No ARB/01/3 (ICSID, 2007, Orrego Vicuña P, van den Berg & Tschanz).

[11] *CMS Gas Transmission Co v Republic of Argentina* (Decision on Annulment) ICSID Case No ARB/01/8/ (ICSID, 25 September 2007, Guillaume P, Elaraby & Crawford).

[12] ibid para 136.

[13] *Asian Agricultural Products Ltd ('AAPL') v Republic of Sri Lanka* (Award) (ICSID, 1990, El-Kosheri P, Goldman & Asante) 4 ICSID Rep 245.

from various fact patterns confronted in the modern case law, and to restate them.[14]

At the same time, responding to a wider concern about the fragmentation of international law, the International Law Commission delivered in 2006 its seminal report offering both a theoretical construct and a set of practical techniques aimed at harmonizing the disparate parts of international law.[15] A key element of that report was the adoption and elaboration of a principle of 'systemic integration' in treaty interpretation.[16] This report (in which the author collaborated) provides a framework of legal reasoning, which may be applied to the particular context of investment law.

This article advances three insights into the relationship between the primary substantive rules of investment treaties and general international law. The first point is that the relationship is symbiotic. The obligations owed by States as a matter of custom are not necessarily identical to the related obligation undertaken by treaty, but nor is the treaty to be regarded as inhabiting its own watertight compartment. Rather the content of the treaty obligation may be informed by general international law. In turn, the promulgation of the treaty obligation, and its application by arbitral tribunals, may inform the progressive development of general international law. Thus, it is here contended that the current debate about the need for a doctrine of precedent in investment arbitration is misguided.[17] The question is not one of a binding obligation to achieve consistency of awards inter se. Rather it is that of the proper relationship between the treaty obligation under consideration and general international law. This relationship is not static. It is part of the dynamic process of the evolution of international law.

Secondly, merely to identify the law applicable to an obligation as international law will not suffice. Rather, the extent and manner in which general international law is applied in the context of a treaty obligation will be determined by a structured process of treaty interpretation. Thirdly, the main route through which practice under investment treaties contributes to the development of general international law is through the elucidation of general principles of international law, which illuminate the province of international

[14] The principal purpose of C McLachlan, L Shore and M Weiniger, *International Investment Arbitration: Substantive Principles* (OUP, Oxford, 2007).

[15] ILC, 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission' (C Koskenniemi) UN Doc A/CN.4/L682, 13 April 2006 ('ILC Fragmentation Report'); UN Doc A/CN.4/L702, 18 July 2006 ('ILC Fragmentation Conclusions'). The author assisted the Study Group, in particular in its work on Article 31(3)(c) of the Vienna Convention on the Law of Treaties, as to which see generally: C McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 279.

[16] ILC Fragmentation Conclusions, ibid para (17); ILC Fragmentation Report, ibid paras 410–23; McLachlan, ibid.

[17] See, eg, *Saipem SpA v Bangladesh* (Jurisdiction) ICSID Case No ARB/05/07 (ICSID, 2007, Kaufmann-Kohler P, Schreuer & Otton); T-H Cheng, 'Precedent and Control in Investment Treaty Arbitration' (2007) 30 Fordham Intl L J 1014.

law in its supervision of the conduct of national State officials. The consequence is to dress that rather neglected third source of international law, 'general principles of law common to civilised nations' in the new garb of general principles of international law.

In order to make good each of these propositions, it will be necessary to do three things: (a) to explore and apply the principle of systemic integration to the interpretation of the substantive obligations in investment treaties (Part I); (b) to examine the evidence for the emergence of general principles in the specific context of the key fair and equitable treatment standard and to demonstrate the fallacy of an approach based solely upon applicable law rather than interpretation, by reference to the recent 'doctrine of necessity cases (Part II); and (c) to consider the wider contribution of investment treaty practice by reference to the classical sources of international law (Part III). But first it is necessary to say a little more about the development of international investment law, since that provides an essential context for what is to follow.

B. Dissent in the Development of Investment Law

The historical context reveals three deep-rooted problems in the relationship between investment treaties and general international law. First, the essentially contested nature of so many of the rights in custom, even at their pre-War High Noon; secondly, the fact that States often entered into investment treaties precisely in order to remedy perceived limitations in the protections afforded by custom; and thirdly, the fact that the overwhelming majority of State practice in this field in the last few decades has been through the medium of treaty-making, starving custom of independent progressive development.

Until the advent after the Second World War of the modern BIT, with its rights of direct recourse for investors in investor-State arbitration, the primary means by which the protection of the property and investments of aliens was achieved was through inter-State claims made upon the exercise of diplomatic protection. In this, the origin of the rights claimed is found in general international law, namely in the:

> . . . general requirements of customary international law, such as those which impose on a state international responsibility for denial of justice to aliens, or which require it to observe in its treatment of aliens certain minimum international standards.[18]

In the latter part of the 19th century and the first half of the 20th century, a very extensive body of jurisprudence and doctrine built up concerning

[18] R Jennings and A Watts (eds), *Oppenheim's International Law* (9th edn, Longman, London, 1992) 909.

the minimum standard for the treatment of aliens generally, and the standard of denial of justice in particular.[19] The high-water mark of this analysis may be found in the Harvard Draft of 1929 on 'The Law of Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners.'[20]

The evolution of the standard through diplomatic protection had the consequence that it could only be successfully invoked by the home State if the affected person had himself first exhausted local remedies,[21] and then under strict rules as to nationality of claims. In practice, save in cases of a refusal to investigate or prosecute, the cases on the international minimum standard and denial of justice were almost always concerned with alleged failures in the judicial system of the host State. Any failures in administrative decision-making would not give rise themselves to an international claim, since they would first have had to be tested by the investor in the local courts.

In any event, even at the time this standard was being developed and refined through the mixed claims commissions of the inter-war period, it was attracting increasing dissent, notably from Latin American States who opposed the imposition of a standard beyond that of national treatment,[22] and who would have limited a denial of justice to the refusal of access to a court.[23]

Since the Second World War, it has proved even more difficult to achieve multilateral consensus on the content of these principles as a matter of custom. In part this is as a result of the extent of the disagreement between States which arose in the specific context of investment law. But it is also a reflection of the general difficulty of reaching a consensus on the primary rules of the delictual responsibility of States. This led to their exclusion from the International Law Commission's work on Draft Articles on State Responsibility. The Commission abandoned the earlier 'enormously ambitious'[24] draft code of Garcia Amador on the protection of aliens as unlikely

[19] See EM Borchard, *The Diplomatic Protection of Citizens Abroad, or, The Law of International Claims* (Banks Law Publishing, New York, 1916); and AV Freeman, *The International Responsibility of States for Denial of Justice* (Longmans Green, London, 1938).

[20] 'The Law of Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners' (1929) 23 AJIL 133, 134 (Special Supplement). The leading post-War reformulation by American scholars was prepared in 1961 by Sohn and Baxter as part of a Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, in LB Sohn & RR Baxter, 'Responsibilities of States for Economic Injuries to Aliens' (1961) 55 AJIL 545, reprinted in FV García Amador, LB Sohn & RR Baxter, *Recent codification of the Law of State responsibility for injuries to aliens* (Oceano, Dobhs Ferry, New York, 1974) arts 5–8, 179–99.

[21] As to which see ILC, 'Second Report on Diplomatic Protection' (23 April–1June, 2 July–18 August 2001) UN Doc A/CN 4/514; CF Amerasinghe, *Local Remedies in International Law* (2nd edn, CUP, Cambridge, 2004).

[22] Eg Montevideo Convention on the Rights and Duties of States (signed 26 December 1933) 165 LNTS 19; USTS 881 (1935) art 9; and generally Borchard (n 19).

[23] Guerrero Draft, cited in the Harvard Draft (n 20) 174.

[24] J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP, Cambridge, 2002) 15.

to achieve a sufficient degree of agreement by States. Similarly, the more recent work of the International Law Commission on diplomatic protection has been expressly limited to secondary rules.[25]

However, these limitations on the development of custom have always been expressed to be without prejudice to the right of States to accept binding standards by treaty. Thus the International Law Commission's draft articles on both State responsibility[26] and diplomatic protection are expressed to be without prejudice to the right of States to develop special rules of international law in particular areas. These include, in the case of diplomatic protection, treaty provisions concerning the protection of investments.[27] Despite, or perhaps rather because of, the huge rise in BITs, the customary international law rules relating to the non-contingent standards of treatment of investments have not developed in the post-War period to the same extent through the practice of diplomatic protection.

No better progress has been achieved with any attempt to achieve multilateral agreement by treaty on the content of such standards.[28] The best that could be done at Havana in 1948 was a draft agreement to make recommendations for subsequent multilateral or bilateral agreements for just and equitable treatment of investments. The Havana Charter itself never came into force. The General Agreement on Tariffs and Trade 1947 (the GATT), which then formed the cornerstone of world trade law, never extended to investments, until the (very limited) Agreement on Trade-Related Investment Measures (or 'TRIMS') was concluded some 50 years later in 1994.[29]

It was against this background that Hermann Abs and Lord Shawcross developed in 1959 the template for a bilateral investment treaty, which came to have so much impact on subsequent treaty practice.[30] In so doing, the drafters sought to steer a careful path on the substantive standards. They proposed a text which might be acceptable as derived from the consensus represented by customary international law, but clothed in language which avoided reigniting some of the pre-War controversies by offering new scope for flexibility. Nowhere is this more apparent than in the new language of the non-contingent

[25] ILC, 'Diplomatic Protection: Report of the Working Group' (20 April–12 June, 27 July–14 August 1998) A/CN 4/L553, para 2.

[26] Art 55 ILC Draft Articles on Responsibilities of States for Internationally Wrongful Acts (2001) Supp No 10, UN Doc A/56/10, 43.

[27] Art 17 ILC Draft Articles and ILC Diplomatic Protection Report (n 4) 89–90.

[28] Accounts of the failure of multilateral investment law are given in P Muchlinski, *Multinational Enterprises and the Law* (2nd edn, OUP, Oxford, 2007); AF Lowenfeld, *International Economic Law* (OUP, Oxford, 2002) 391–415.

[29] WTO, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (CUP, Cambridge, 1999) 143.

[30] H Abs & H Shawcross, 'Draft Convention on Investments Abroad' (1960) J Public L 115. The first modern BIT is Treaty for the Promotion and Protection of Investments, with Protocol and Exchange of Notes (Germany–Pakistan) (signed 25 November 1959, entry into force 28 April 1962) 457 UNTS 23, 1961 BGBl II 793.

standard. Gone is the old language of minimum standard of treatment and denial of justice. In its place is found:

> Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties. Such property shall be accorded the most constant protection and security within the territories of the other Parties and the management, use and enjoyment thereof shall not in any way be impaired by unreasonable or discriminatory measures.[31]

The result, as Schwarzenberger observed at the time, 'presents an imaginative attempt to combine the minimum standard with the standard of equitable treatment.'[32]

But attempts to translate these formulations into multilateral agreement were still-born. The OECD draft Convention on the Protection of Foreign Property of 1967[33] contained, in Article 1(a), substantially the same text. The drafters of this Convention were in no doubt that:

> The phrase 'fair and equitable treatment', customary in relevant bilateral agreements, indicates the standard set by international law for the treatment due by each State with regard to the property of foreign nationals . . . The standard required conforms in effect to the 'minimum standard' which forms part of customary international law.[34]

However, the Convention was never opened for signature, and came to be seen as embodying the perspective of capital-exporting countries. Two decades later, the Draft United Nations Code of Conduct on Transnational Corporations reached no consensus on the content of the non-contingent standards. The last negotiating text of 1983 contained more un-agreed text in square brackets than finalized text.[35]

The Multilateral Agreement on Investment (MAI), proposed by the OECD in 1995, would have provided a general protection of 'fair and equitable treatment and full and constant security. In no case shall a Contracting Party accord treatment less favourable than that required by international law.' The

[31] Abs & Shawcross, ibid 116, Art I.

[32] G Schwarzenberger, 'The Abs-Shawcross Draft Convention on Investments Abroad; a Critical Commentary' (1960) 9 J Public L 147, 152, repeated in his *Foreign Investments and International Law* (Stevens and Sons, London, 1969) 114.

[33] OECD, *Draft Convention on the Protection of Foreign Property and Resolution of the Council of the OECD on the Draft Convention* (1967).

[34] ibid 9.

[35] 'Transnational corporations should receive [fair and] equitable [and non-discriminatory] treatment [under] [in accordance with] the laws, regulations and administrative practices of the countries in which they operate [as well as intergovernmental obligations to which the Governments of these countries have freely subscribed] [consistent with their international obligations] [consistent with international law]': Draft United Nations Code of Conduct on Transnational Corporations (1983 version), text in UNCTC, *The United Nations Code of Conduct on Transnational Corporations*, Current Studies, Series A (1986), UN Doc ST/CTC/SER A/4, Annex 1, reprinted in UNCTAD, *International Investment Instruments: A Compendium* vol I (1996) 161, 172–73.

MAI was seen by the OECD as largely a harmonization exercise, and an attempt to address the fragmented nature of investment protection through BITs. However, it provoked intense opposition from NGOs on the grounds that it would weaken the regulatory capacity of host States in favour of investor protections.[36] Efforts to conclude it collapsed in 1998.

This picture of the failure to reach multilateral agreement on an acceptable content of investors' rights is to some extent qualified by the emergence of significant pluri-lateral agreements, involving both capital-exporting and capital-importing States, which do contain such protections. Prominent amongst these are NAFTA[37] and the Energy Charter Treaty.[38] The Lomé IV Treaty of 1990, between ACP and European Union States,[39] and the ASEAN Treaty of 1987[40] also contain mutual guarantees of fair and equitable treatment. The World Bank adopted such a standard in its Guidelines on the Treatment of Foreign Direct Investment of 1992.[41]

Nevertheless, bilateral treaties remain the overwhelmingly dominant mode of investor protection. The extent of State practice represented by such treaties is both connected to, and a development from, the earlier position reached in custom. Today, at least, if there is to be a meaningful consideration of international law in relation to the treatment of aliens, it can only be done by reference to a continuum of development from the pre-War custom into post-War treaty negotiation and application. So it remains of vital importance to consider how such treaties fit, and fall to be interpreted, within the general framework of international law.

C. Systemic Interpretation of Investment Treaties

This article starts from the proposition that investment treaties are not self-contained regimes.[42] International law is a legal system, and investment treaties are creatures of it and governed by it.[43] The Tribunal in the first ICSID

[36] See JE Salzman, 'Decentralized Administrative Law in the Organization for Economic Cooperation and Development' (2005) 68 Law & Contemporary Problems 189, 196–200.

[37] Chap 11 North American Free Trade Agreement (NAFTA) (adopted 17 December 1992, entry into force 1 January 1994) 107 Stat 2057; CTS 1994 No 2, (1993) 32 ILM 289.

[38] Energy Charter Treaty (ECT) (signed 17 December 1994, entry into force 16 April 1998) 2080 UNTS 100.

[39] Art 258(b), UNCTAD, *International Investment Instruments: A Compendium* vol II (1996) 385, 419.

[40] Art IV, An Agreement among the Governments of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments 1987, UNCTAD, *International Investment Instruments: A Compendium* vol II (1996) 293, 295.

[41] Art III(2), UNCTAD, *International Investment Instruments: A Compendium* vol I (1996) 247, 249.

[42] ILC Fragmentation Report (n 15) para 414; ILC Fragmentation Conclusions (1); a point earlier developed in McLachlan (n 15) 280.

[43] Vienna Convention of the Law of Treaties (VCLT) 1969, 1155 UNTS 331, Art 2(1)(a).

treaty arbitration, *Asian Agricultural Products Ltd v Republic of Sri Lanka*,[44] explained that a BIT:

> . . . is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature.[45]

At least in the context of investment law, however, it is not sufficient simply to determine international law as the applicable law. There are difficult issues of choice of law in investment cases, as between host State law, the law applicable to the parties' private law obligations, and public international law. Article 42 of the ICSID Convention[46] notoriously defers these difficult questions by requiring the tribunal, in the absence of express choice, to apply host State law '*and such rules of international law as may be applicable*.' But, where the obligations in question are those created under international law, as in the case of treaty obligations, there is no doubt that the applicable law is potentially international law *as a whole*. As the Annulment Committee in *MTD v Chile* put it: '. . . the Tribunal had to apply international law as a whole to the claim, and not the provisions of the BIT in isolation.'[47]

Thus, investment law stands at the outset as in a different position from trade law, where the hermetically sealed nature of the system prior to the Marrakesh Agreements made it important to make the case for a broader set of potentially applicable norms.[48] To be sure, the distinction between jurisdiction and applicable law (a key distinction in both private and public international law) still remains important in investment arbitration. Investment tribunals, like many public international arbitral tribunals,[49] do not have plenary jurisdiction. They only have as much jurisdiction as has been vouchsafed to them by the parties. Where the source of that consent on the part of the host State is an investment treaty, it will be the dispute resolution clause in the treaty itself which will delimit the extent of the matters which the tribunal is competent to decide. But that does not of course proscribe the law which the tribunal may

[44] *AAPL v Sri Lanka* (n 13).

[45] ibid 257.

[46] Art 42 Convention on the Settlement of Investment Disputes between States and Nationals of other States 1965, 575 UNTS 159 ('ICSID Convention').

[47] *MTD Equity Sdn Bhd v Chile* (Decision on Annulment) ICSID Case No ARB/01/7 (ICSID, 2007, Guillaume P, Crawford & Noriega).

[48] cf L Bartels, 'Applicable Law in WTO Dispute Proceedings' (2001) 35 J World Trade 499; J Pauwleyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (CUP, Cambridge, 2003); ILC Fragmentation Report (n 15) paras 165–71.

[49] *Channel Tunnel Group Ltd v Secretary of State for Transport of the United Kingdom of Great Britain and Northern Ireland* Award under Treaty of Canterbury 1986 (2007, Crawford, Fortier, Guillaume, Millett and Paulsson, available at <http://www.pca-cpa.org>) para 151.

apply to determine those issues. The requirement of Article 42 to have regard to the whole of international law thus operates at the applicable law stage, whatever may be the limitation on the tribunal's jurisdiction.

But international law must be introduced into the analysis of a claim under an investment treaty in the first place through the medium of treaty interpretation. The framework for such an exercise is provided by Articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969.[50] These articles state rules of customary international law on treaty interpretation.[51] They have also been repeatedly accepted by investment arbitral tribunals as constituting rules of interpretation which are binding on them in the interpretation of investment treaties, whether by virtue of being directly binding on the parties to the BIT as treaty rules, or as customary international law.[52] They of course include, in Article 31(3)(c), a requirement to refer to 'relevant rules of international law applicable in the relations between the parties.'

Nevertheless, the starting point of any analysis must be the ordinary meaning of the terms, as required by Article 31(1). Sometimes this may indicate a particular formulation as *lex specialis*, which requires direct application.[53] But, in the case of the general test for fair and equitable treatment, it may result in little more than an exchange of synonyms. Thus, the Tribunal in *MTD* began by quoting the Oxford Concise English Dictionary and observed: 'In their ordinary meaning, the terms "fair" and "equitable" . . . mean "just", "even-handed", "unbiased", "legitimate".'[54]

Determination of object and purpose may be deceptive. Investment treaties commonly contain preambular statements that their purpose is to promote investment. But this cannot simply be conflated with a general preference for the interests of the investor over those of the host State.[55] The overall objective in fact requires a balanced approach since:

> . . . an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties' mutual economic relations.[56]

[50] note 43.

[51] Eg *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya v Chad)* [1994] ICJ Rep 6; WTO, *United States—Standards for Reformulated and Conventional Gasoline* (29 April 1996) (1 WT/DS2/AB/R) 16, DSR 1996:I.

[52] Eg *Saluka Investments BV (The Netherlands) v Czech Republic* (Partial Award) (UNICTRAL, 2006, Watts C, Fortier & Behrens) para 296.

[53] See, eg the discussion below of the doctrine of necessity 385–391.

[54] *MTD Equity Sdn Bhd & anor v Chile* (Award) (2005) 44 ILM 91 (ICSID, 2004, Sureda P, Lalonde & Oreamuno Blanco) 105.

[55] Z Douglas 'Nothing if not critical for investment treaty arbitration: *Occidental, Eureko and Methanex*' (2006) 22 Arbitration Intl 27, 51.

[56] *Saluka* (n 52) para 300. But see the more detailed provisions as to object and purpose in NAFTA (n 56), Preamble and Chapter 1 and the ECT (n 56), Preamble and Article 2.

Reference to *travaux préparatoires* under Article 32 is unlikely to assist in this field. It is rare for bilateral negotiations to produce the kind of explanatory reports, or official records of plenary debates which are characteristic of multilateral negotiation.[57] When the confidential working papers on the negotiation of NAFTA were produced in *Pope & Talbot*, they did little to illuminate the matters in dispute.[58] The transmittal statements by which domestic approval for such treaties is sought by the signatory States, to which reference is sometimes made,[59] are merely unilateral statements and not *travuax préparatoires*.[60] They are therefore more likely to be relevant as evidence of State practice for the purposes of a customary rule, than as to the meaning of a treaty text.[61]

The parties to investment treaties rarely create a mechanism through which they may make binding subsequent interpretative decisions.[62] Further, the hybrid character of investment treaties, which gives the prime role in enforcement to private investors, leaves little room for subsequent inter-State practice in their application.[63]

Thus the assistance to be gleaned from the requirement in Article 31(3)(c) to take into account 'other rules of international law applicable in the relations between the parties' becomes of some importance. On one level, this requirement states little more than a truism—no treaty can exist in isolation from general international law.[64] But, in the case of BITs, there may be particularly compelling reasons to refer to general international law in interpretation. The treaty framers often consciously sought not to go beyond obligations which were thought to reflect the current state of international law.[65] Their purpose was to enhance the mechanisms for the protection of rights, rather than to extend the rights themselves.

Article 31(3)(c), as the author has submitted previously in the *Quarterly*,[66] embodies a principle of systemic integration in treaty interpretation,

[57] The Tribunal in *AAPL v Sri Lanka* (n 13) 270, referred to the difficulty of ascertaining what may have been within the parties' contemplation in including particular terms in a BIT 'in the absence of *travaux préparatoires* in the proper sense'.

[58] *Pope & Talbot Inc v Canada* (Award on Damages) 7 ICSID Rep 43 (NAFTA/UNCITRAL, 2002, Dervaird P, Greenberg & Belman).

[59] *Case concerning Oil Platforms (Islamic Republic of Iran v United States of America) (Preliminary Objections)* [1996] ICJ Rep 803, 814–15.

[60] *Mondev Int'l Ltd v United States of America* (Award) 6 ICSID Rep 181 (NAFTA/ICSID (AF), 2002, Stephen P, Crawford & Schwebel) 220.

[61] ibid 221.

[62] VCLT Art 31(3)(a). The exception is NAFTA, which provides for the issue of an interpretation of a provision by the Free Trade Commission, which is binding upon NAFTA tribunals pursuant to Article 1131(2).

[63] VCLT Art 31(3)(b).

[64] See the comments of R Higgins, 'A Babel of Judicial Voices? Ruminations from the Bench' (2006) 55 ICLQ 791.

[65] See, eg, E Denza & S Brooks, 'Investment Protection Treaties: United Kingdom Experience' (1987) 36 ICLQ 908, 912.

[66] McLachlan (n 15).

which may be articulated as a presumption with both positive and negative aspects:[67]

(a) *positively* that the parties are to taken 'to refer to general principles of international law for all questions which [the treaty] does not itself resolve in express terms or in a different way';[68] and
(b) *negatively* that, in entering into treaty obligations, the parties intend not to act inconsistently with generally recognised principles of international law or with previous treaty obligations towards third states.[69]

Most of the cases in the investment field where tribunals have looked beyond the four corners of the treaty have involved the application of principles of general international law. This may also be seen as an application of the notion of 'special meaning' in Article 31(4). As Judge Higgins observed in *Oil Platforms*, 'the key terms "fair and equitable treatment to nationals and companies" . . . are legal terms of art well known in the field of overseas investment protection.'[70] In this context, a special meaning attributed to the term, which the parties can be taken to have intended to employ, would itself derive from a general international law practice, unless it could be established that the parties to the particular treaty had a specific and different meaning in mind.

The importance of general principles of international law in this process is not because of their overriding character, since international law reserves for overriding customary rules the special category of *jus cogens*. Otherwise, it must be accepted that a treaty can of course derogate from custom, provided that it does so expressly. Rather, the significance of such rules is that they perform a systemic or constitutional function in describing the operation of the international legal order, and in establishing a common set of underlying principles which inform it.

Further, BITs normally say little about the secondary rules as to the conduct of States which are traditionally the province of the law of State responsibility: attribution; the nature and breach of an international obligation; and circumstances which may preclude wrongfulness. Investment treaties are typically restricted to a short catalogue of primary rules of investment protection, together with the provision for dispute resolution through arbitration. Part One of the ILC Draft Articles on State Responsibility applies generally to the international responsibility of a State, whether owed to other States, or where

[67] This formulation, developed in McLachlan (n 15) 311, was adopted in the ILC Fragmentation Conclusions (n 15) para 19.
[68] *Georges Pinson (France) v United Mexican States* (1928) V RIAA 327 (Original French text) (1927–8) AD Case No 292 (English Note) (French-Mexican Claims Commission, Verzijl P).
[69] *Rights of Passage over Indian Territory (Preliminary Objections) (Portugal v India) Case* [1957] ICJ Rep 142; Jennings & Watts (n 18) 1275.
[70] *Case concerning Oil Platforms (Iran v United States of America)* [1996] ICJ Rep 803, 858 (Separate Opinion of Judge Higgins).

the primary beneficiary is not a State. Its provisions may therefore apply to breaches of investment treaties, even where claimed at the suit of a private investor.[71] In contrast, then, to a complex multilateral treaty in other spheres of international law,[72] BITs appear more than usually dependant upon their wider context.

The tribunal's task in this regard is to establish the *contemporary* content of international law, which may therefore be influenced by both older doctrine and more recent developments.[73] Given the relatively recent conclusion of most investment treaties, it has not been necessary in this field to deal to the same extent with the problem of inter-temporality in treaty interpretation.[74] However, the central concepts in investment treaties are mobile, in the sense that, by using the generally adopted terms, the parties' intention is to submit to the evolving meaning in international law, and not to confine themselves to their own idiosyncratic definition, fixed at the time of conclusion of the treaty.

To what extent, then, is a coherent jurisprudence interpreting the primary rules of investment treaty law actually emerging? It is to this issue that this article now turns.

II. GENERAL INTERNATIONAL LAW IN INVESTMENT ARBITRATION

In examining the impact of custom on the application of investment treaties, this paper draws primarily on the construction of the key non-contingent standard of 'fair and equitable treatment'. A similar investigation could be undertaken in relation to expropriation, where the treaty language commonly follows closely the international law standard.[75] But fair and equitable treatment offers some particular insights for the theme of this paper. As shown above, the *term* is undoubtedly the product of the bilateral investment treaty process, adopting consciously new language to what had gone before. But its *function* has, from the start, been linked to the pre-existing general international law. The almost universal adoption of the standard in investment treaties, and its application to a wide range of claims in arbitration in the last ten years, makes it an object lesson in the interplay between treaty and custom.

[71] See the Commentary to Article 28, ILC 'Responsibilities of States for Internationally Wrongful Acts: Text of the Draft Articles with Commentaries thereto' (Crawford, Special Rapporteur) in *Report of the International Law Commission of its Fifty-third Session (23 April–1 June and 2 July–10 August 2001) Official Records of the General Assembly Fifty-sixth Session*, Supplement No 10, UN Doc A/56/10, 59, 214 ('ILC State Responsibility Report'). This draws a sharp distinction between the general applicability of Part One, and the more restricted application of Parts Two and Three of the Draft Articles, which apply principally to inter-State claims: Art 33(2).

[72] See, eg Arts 3(7) & 22, WTO Dispute Settlement Understanding.

[73] *Mondev* (n 60) 222.

[74] As to which see note 15: McLachlan (n 14) 316–18 and ILC Fragmentation Report (n 14) paras 475–78.

[75] See McLachlan, Shore & Weiniger (n 14) ch 8.

A. Emergence of a Body of Concordant Practice

1. The process of contemporary jurisprudence

The practical application of the right to fair and equitable treatment under BITs is a very modern story. As recently as 1999, Vasciannie concluded an exhaustive study of this treaty standard by bemoaning 'the paucity of jurisprudence'.[76] BITs, he observed, 'are yet to generate a substantial flow of international litigation, and even where litigation has occurred, the fair and equitable standard has not been decisive in the proceedings.'[77] In these circumstances, the most that could be said on content of the standard was that it barred 'host countries from treating foreign investors unfairly and inequitably.'[78]

The experience of the last decade has turned this position on its head. Not only has the standard been frequently the subject of litigation, it has also been outcome-decisive in many such cases, eclipsing in the result the more established right of protection against expropriation.[79] The cases decided so far fall into two broad categories: (a) treatment of investors by the court of the host State (denial of justice cases); and (b) a much more numerous set of cases dealing with administrative decision-making.

The 'denial of justice' cases display an explicit debt to custom.[80] All three of the cases dealing with the conduct of the host State courts have referred back to formulations of the concept developed in earlier doctrine and jurisprudence and codifications.[81] Indeed, the formulations of denial of justice found in the Harvard drafts on the responsibilities of States for injuries to aliens proved particularly influential in all three cases. On one level, this is unsurprising. As suggested earlier, the development of custom in this field was shaped particularly by complaints in relation to judicial process, because diplomatic protection was available as a remedy only once local remedies had been exhausted. Therefore the treatment accorded in the course of seeking such remedies became itself the prime focus of complaint once the case had reached the international level. The case

[76] S Vasciannie, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice' (1999) 70 British Ybk Intl L 99, 162–63.

[77] ibid.

[78] ibid.

[79] An analysis of leading cases as at 1 September 2007 by Jeffrey Commission notes no less than 33 leading investment treaty awards on fair and equitable treatment: Commission, 'An Analysis of a Developing Jurisprudence in International Investment Law' Paper to BIICL Investment Treaty Forum, 14 September 2007.

[80] For an excellent recent study of the concept of denial of justice see J Paulsson, *Denial of Justice in International Law* (CUP, Cambridge, 2005).

[81] *Azinian v United Mexican States* (Award) 5 ICSID Rep 269 (NAFTA/ ICSID (AF), 1998, Paulsson P, Civiletti & von Wobeser) 290; *Mondev Int'l Ltd v United States of America* (Award) 6 ICSID Rep 181 (NAFTA/ICSID (AF), 2002, Stephen P, Crawford & Schwebel) 225–26; *Loewen Group Inc v United States of America* (Award) 7 ICSID Rep 421 (NAFTA/ICSID (AF), 2003, Mason P, Mikva & Mustill) 465–67.

books thus provide a rich source of jurisprudence on the working out of the concept.

To some extent this heritage is valuable. It has shown that a 'governmental authority cannot be faulted for acting in a manner validated by its courts, unless the courts themselves are disavowed at the international level.'[82] If a national court is to be found to have breached the international standard, it must be for a lack of due process, and not merely for a substantive error in the way in which the law has been applied.[83] As Paulsson puts it: 'In international law, denial of justice is about due process, nothing else—and that is plenty.'[84] But, in other respects, the reference in the cases to pre-Second World War custom, developed in the context of diplomatic protection, has proved curiously inhibiting. There has been a reluctance to refer to international human rights law developed since 1945.[85] This is despite the fact that the civil and political rights standards speak directly to the concept of fair trial, and have themselves a good claim to customary law status. Moreover, the Tribunal in *Loewen* was content to include in the substantive standard a requirement to exhaust local remedies,[86] which it is submitted makes no sense outside the context of diplomatic protection.[87]

In the field of review of administrative decision-making, tribunals have had to develop the scope of the standard without specific guidance from the old law on the treatment of aliens, since claims of this kind could not previously have been brought directly before an international tribunal. Thus far, two types of factors have influenced tribunals. The first set of cases has been concerned with the protection of an investor's legitimate expectations by reference to the law of the host State at the time of investment, together with any specific assurances which the investor received from the agencies of the host State upon which he relied in deciding to invest. The second set of cases is concerned directly with due process in decision-making.

Where does the concept of legitimate expectations come from? The most frequently cited authority for it is a formulation in *Tecmed v Mexico*.[88] The dictum imposes a lengthy list of desiderata including that:

> The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments . . . to be able to plan its investment . . .[89]

[82] *Azinian* ibid 289–90, citing Jiménez de Aréchaga (1978) 159 Recueil des Cours 1.
[83] *Loewen* (n 81) 467.
[84] n 80, 7.
[85] In *Mondev* (n 80) 231, the Tribunal was prepared to consider the case law of the European Court of Human Rights on whether immunities from suit may breach the right to a court by way of analogy only.
[86] n 81, 475.
[87] See further 383–5 below.
[88] *Tecnicas Medioambientales Tecmed SA v United Mexican States* (Award) (2004) 43 ILM 133, 173 (ICSID (AF), 2003, Grigera Naon P, Fernandez Rozas & Bernal Verea).
[89] ibid.

As one commentator points out:

> The *Tecmed* 'standard' is actually not a standard at all; it is rather a description of perfect public regulation in a perfect world, to which all states should aspire but very few (if any) will ever attain. But in the aftermath of the tribunal's correct finding of liability in *Tecmed*, the quoted *obiter dictum* in that award, unsupported by any authority, is now frequently cited by tribunals as the *only* and therefore *definitive* authority for the requirements of fair and equitable treatment.[90]

The notion of legitimate expectations has, of course, had a particular life within the administrative law of Common Law countries.[91] It is important to ensure that Anglo-American doctrine alone does not form the basis for a rule of international law.[92] But the Tribunal in *Tecmed* was composed of civilian lawyers. On further analysis, the doctrine may in fact express a less extravagant idea than the dictum may suggest. As the Annulment Committee recently reminded us in *MTD v Chile*,[93] the concept of legitimate expectations is not an independent concept. It is relevant only to the extent that it applies to the investment treaty's guarantee of fair and equitable treatment. Seen in this way, the idea of legitimate expectations does not in fact impose its own substantive requirement. In fact, it supports the application of host State law, and the liberty of the host State to determine the content of that law.[94] Rather, it is concerned with due process in administrative decision-making—ensuring the consistent application of the law and enforcing representations by the host State only where these were made specifically enough to the particular investor to justify reliance.[95]

The central concept of due process may also be seen at work in the cases which have applied fair and equitable treatment to other aspects of administrative decision-making:[96] in prohibiting discrimination between foreign and local investors;[97] the use of powers for improper purposes;[98] inconsistency of treatment by different government agencies;[99] coercion and harassment by

[90] Douglas (n 55) 28 (emphasis in original).

[91] See W Wade and CF Forsyth *Administrative Law* (9th edn, OUP, Oxford, 2004) 372–76, 500–5; PP Craig *Administrative Law* (5th edn, Sweet and Maxwell, London, 2003) 639–80.

[92] M Koskenniemi 'The Pull of the Mainstream' (1989–90) 88 Michigan L Rev 1946, 1950.

[93] *MTD Equity Sdn Bhd v Chile* (Decision on Annulment) ICSID Case No ARB/01/7 (ICSID, 2007, Guillaume P, Crawford & Ordōñez Noriega) paras 67–71.

[94] *GAMI Investments Inc v United Mexican States* (Award) (2005) 44 ILM 545,560 (NAFTA/UNCITRAL, 2004, Paulsson P, Muró & Reisman).

[95] *International Thunderbird Gaming Corp v United Mexican States* (Award) (NAFTA/UNCITRAL, 2006, van den Berg P, Ariosa & Wälde) para 147.

[96] These cases are analysed in McLachlan, Shore & Weiniger (n 14) paras 7.115–7.140.

[97] *S D Myers Inc v Canada* 8 ICSID Rep 3 (NAFTA/UNCITRAL, 2000, Hunter P, Schwartz & Chiasson).

[98] *Tecmed* (n 88).

[99] *MTD v Chile* (n 93).

State authorities;[100] and bad faith;[101] and in requiring some degree of transparency.[102]

None of these factors have been treated by tribunals as a *sine qua non*. On the contrary, their presence or absence will take on greater or lesser relevance, depending on the facts of the particular case. In this way, the operationalization of the general test in its application to the modern fact patterns presented to tribunals may be compared to the development of the law of civil wrongs, whether in the Common Law after *Donoghue v Stevenson*[103] or under the very general provisions of the civil codes.[104] No one doubts that the legal rule remains that which is stated shortly in terms of great generality. But the case law sheds the considerable light of experience upon how the general rule applies, by isolating the factors which may be relevant in different fact situations. In this way, the law is not simply applied; it is elucidated in ways which assist the work of subsequent tribunals.

By the same token, the cases have begun to identify factors where balancing equitably the legitimate public interests of the State may indicate that the standard has not been breached: in preserving a legitimate scope for regulatory flexibility;[105] in denying claims where the alleged right is not found in either host State law or international law;[106] and in upholding administrative decisions which have an objective basis[107] and do not have a disproportionate impact on the foreign investor.[108] Tribunals have recognized that they must take the investor's conduct into account as well: BITs 'are not insurance policies against bad business decisions';[109] and the investor has its own duty to investigate the host State's applicable law.[110]

Thus far, the jurisprudence of investment protection may be envisaged as an elaborative enterprise: the working out of the application of the general test in the myriad of different specific contexts which the cases have presented to tribunals. The development of such a common law of a legislative text is a familiar one to lawyers—albeit that in the case of BITs the concern is rather with the common language of numerous separate texts. This is *not* to say that every award is reconcilable, as the doctrine of necessity cases discussed below demonstrate. But treaty arbitration has, on the whole, resisted the temptation of extreme compartmentalization. Instead, tribunals have

[100] *Pope & Talbot Inc v Canada* (Award) 7 ICSID Rep 43 (ICSID/UNCITRAL, 2002, Dervaird P, Greenberg & Belman) *sed quaere* whether that was such a case.

[101] *Waste Management Inc v United Mexican States* (Award) ('*Waste Management II*') (2004) 43 ILM 967, 994 (NAFTA/ICSID (AF), 2004, Crawford P, Civiletti & Gómez).

[102] *S D Myers* (n 97), Separate Opinion of Schwartz 114.

[103] [1932] AC 562.

[104] Eg Art 1382 French Civil Code.

[105] *Saluka* (n 52) para 305.

[106] *United Parcel Service of America Inc v Canada* (Award on Jurisdiction) 7 ICSID Rep 285 (NAFTA/UNCITRAL, 2002, Keith P, Cass & Fortier).

[107] *Genin v Estonia* (Award) 6 ICSID Rep 236 (ICSID, 2001, Fortier P, Heth & van den Berg).

[108] *Pope & Talbot Inc v Canada* (Award on the Merits of Phase 2) 7 ICSID Rep 43, 102 (NAFTA/UNCITRAL, 2001, Dervaird P, Greenberg & Belman) 130–38.

[109] *International Thunderbird* (n 95) 433.

[110] *MTD v Chile* (n 93).

regularly borrowed reasoning and interpretations adopted by tribunals hearing cases under different treaties, but with similar language. Schreuer observes: 'Fortunately the problem of inconsistency is not pervasive. Most tribunals carefully examine earlier decisions and accept these as authority most of the time.'[111] As a result, an increasingly detailed body of jurisprudence is developing.

What larger significance is to be given to this phenomenon? The tribunal in *AES v Argentina* gave this explanation:

> Each tribunal remains sovereign and may retain, as it is confirmed by ICSID practice, a different solution for resolving the same problem; but decisions on jurisdiction dealing with the same or very similar issues may at least indicate some lines of reasoning of real interest; this Tribunal may consider them in order to compare its own position with those already adopted by its predecessors and, if it shares the views already expressed by one or more of these tribunals on a specific point of law, it is free to adopt the same solution . . . precedents may also be rightly considered, at least as a matter of comparison and, if so considered by the Tribunal, of inspiration.[112]

One tribunal has recently gone further and suggested that arbitrators have:

> . . . a duty to adopt solutions established in a consistent series of cases . . . . [and] a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards the certainty of the rule of law.[113]

The extensive exchange of ideas between tribunals has been facilitated by the wide publication of awards, as well as by scholarly journals[114] and committees.[115] Further, it is no accident that this new jurisprudence has developed in the era of the internet, which has rapidly built a global community of scholars, practitioners and arbitrators exchanging ideas about current developments in the field as they arise.[116]

[111] CH Schreuer, 'Diversity and Harmonization of Treaty Interpretation in Investment Arbitration' (April 2006) 3 Transnational Dispute Management 1, 17.

[112] *AES Corp v Argentine Republic* (Jurisdiction) ICSID Case No ARB/02/17 (ICSID, 2005, Dupuy P, Böckstiegel & Janeiro) paras 30–31.

[113] *Saipem SpA v Bangladesh* (Jurisdiction) ICSID Case No ARB/05/07 (ICSID, 2007, Kaufmann-Kohler P, Schreuer & Otton).

[114] Notably *ICSID Review—Foreign Investment Law Journal*, and *Journal of World Investment and Trade*.

[115] Notably, the British Institute of International & Comparative Law Investment Treaty Forum (est 2004), as to which see F Ortino, A Sheppard and H Warner, *Investment Treaty Law: Current Issues Volume 1* (BIICL, London, 2006); and the International Law Association Committee on International Law on Foreign Investment (est 2003).

[116] Notably the OGEMID Discussion List established by the Center for Energy Petroleum and Mineral Law and Policy at the University of Dundee, together with its online subscription service: <www.transnational-dispute-management.com>.

2. The significance of underlying principle

Are there, nevertheless, general principles of international law which may properly be said to animate and guide the application of the fair and equitable treatment rule, taking the exercise beyond a mere comparative review of solutions adopted by other arbitral tribunals? At this fundamental level, the awards are in disarray. In one view, '[t]he terms are to be understood and applied independently and autonomously'[117] and 'envisage conduct which goes far beyond the minimum standard'[118] of the treatment of aliens at customary international law level. Even where the treaty language expressly refers to 'fair and equitable treatment *in conformity* with the principles of international law,' one recent tribunal has found it possible to maintain that this merely sets a floor and not a ceiling on the applicable treaty standard.[119]

The alternative view is that fair and equitable treatment is synonymous with a customary concept of the minimum standard. Sometimes this is made express in the treaty language. Thus, for example, the French prototype guarantees: '*traitement juste et équitable, conformément aux principes du Droit international*'.[120] The 2004 US model BIT enshrines 'the customary international law minimum standard of treatment of aliens',[121] defining customary international law as resulting from 'a general and consistent practice of States that they follow from a sense of legal obligation'.[122] NAFTA Article 1105 requires that: '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.' Controversy amongst arbitral tribunals as to whether that form of words left room for a more

[117] FA Mann, 'British Treaties for the Promotion and Protection of Investments' (1981) 52 British Ybk Intl L 241, 244. But cf the considered view which he subsequently expressed in the 5th edition of *The Legal Aspect of Money* (Clarendon, Oxford, 1992) 526, referring to '... the overriding principle of "fair and equitable treatment", which, it must be repeated, in turn is perhaps no more than a (welcome) contractual recognition and affirmation of that principle of customary international law which requires States to act in good faith, reasonably, without abuse, arbitrariness, or discrimination.' The formulation is in substance repeated in the 6th edition: C Proctor, *Mann on the Legal Aspect of Money* (OUP, Oxford, 2005) para 22.53. See JC Thomas, 'Reflections on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators' (2002) 17 ICSID Rev–FILJ 21, 57.

[118] ibid.

[119] *Compañia de Aguas del Aconquija SA & anor v Argentina* (Award) ICSID Case No ARB/97/3 (ICSID, 20 August 2007, Rowley P, Kaufmann-Kohler & Bernal Verea) ('*Vivendi II*') para 7.4.6. The Tribunal relied upon *Azurix Corp v Argentina* (Award) ICSID Case No ARB/01/12 (ICSID, 14 July 2006, Sureda P, Lalonde & Martens) para 361. However, the *Azurix* tribunal was interpreting a provision which accorded investors fair and equitable treatment 'and shall in no case be accorded treatment less than required by international law.' Such a provision by its terms sets a floor. In any event the *Azurix* tribunal found that the applicable standards of custom and treaty 'may in substance be the same' (para 364).

[120] 'Just and equitable treatment in conformity with principles of international law', France model BIT, art 4. (McLachlan, Shore & Weiniger (n 14) Appendix 10).

[121] US Model BIT 2004, art 5 (McLachlan, Shore & Weiniger (n 14) Appendix 6).

[122] ibid Annex A.

expansive reading of 'fair and equitable treatment'[123] was settled by the NAFTA Free Trade Commission, which issued an interpretation of the article, providing that it 'prescribes the customary international law minimum standard of treatment of aliens' and not more.[124] A similar view has also been taken by States as to the interpretation of other BITs which do not have an express reference to an external international law standard.[125]

However, the symbiotic relationship between investment treaties and general international law does not require a black-and-white choice between complete discretion on the one hand, and the application of a conception of customary international law 'frozen in amber'[126] at some time in the past. It is submitted that it is both possible and necessary to reconcile the particular treaty language with general international law. This is not simply because, as it was put in one recent award, '. . . the difference between the Treaty standard . . . and the customary minimum standard, when applied to the specific facts of a case, may well be more apparent than real'.[127] More fundamentally, it is because the legal protection afforded by the guarantee of fair and equitable treatment cannot be understood without a conception of the proper *function* of international law in assessing the standards of justice achieved by national systems of law and administration. It is this function which the protection shares with the minimum standard.

Elihu Root, speaking on the appropriate treatment to be accorded to aliens in 1910, concluded that:

> There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own citizens is that its system of law and administration shall conform to this general standard.[128]

Seen in this light, the fair and equitable standard gives modern expression to a *general principle of due process* in its application to the treatment of investors.[129] The foundation of this principle is that, by agreeing to extend such treatment to nationals of a reciprocating country, States have accepted that there is an objective standard of treatment by which their own legal and administrative system may be judged. The overarching concept is that of the rule

[123] *Pope & Talbot Inc v Government of Canada* (Award on the Merits of Phase 2) 7 ICSID Rep 43 (NAFTA/UNICTRAL, 2001, Dervaird P, Greenberg & Belman).

[124] NAFTA Free Trade Commission (FTC), Interpretation of NAFTA Chapter 11 (31 July 2001) 6 ICSID Rep 567, 568.

[125] Eg Statement by Swiss Foreign Office [1980] Annuaire Suisse de droit international 178.

[126] *ADF Group Inc v United States of America*, Second Submission of Canada pursuant to NAFTA Article 1128, 19 July 2002, para 33.

[127] *Saluka* (n 52) para 291.

[128] E Root, 'The Basis of Protection to Citizens Residing Abroad' (1910) 4 AJIL 517, 521–22.

[129] Paulsson (n 80) 5–6.

of law. A Chamber of the International Court of Justice expressed this idea by contrasting due process with arbitrariness:

> Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. This idea was expressed by the Court in the *Asylum* case, when it spoke of 'arbitrary action' being 'substituted for the rule of law' (*Asylum Judgment, ICJ Reports 1950*, p 284). It is a wilful disregard of due process of law . . .[130]

Reference to 'general principles of law common to civilized nations'[131] will assist in giving content to that concept. Here, modern international law presents a substantial advantage over the position in the early 20th century as a result of the elaboration of relevant international human rights standards, and of the gradual emergence of global administrative law.[132]

Importantly, however, and unlike the earlier customary international law standard, the protection is not simply concerned with 'fair' or 'just' treatment to investors. Appropriate weight and meaning must also be given to the requirement of 'equitable treatment.' This additional element consciously takes the minimum standard in a different direction to that of the earlier law. Schwarzenberger observed on the first emergence of this formula, this addition:

> . . . is well justified on two grounds. The experiences of the last forty years suggest that whenever, in fact, an agreed settlement has been reached, the creditors have consented to temper the application of the minimum standard by the introduction of an equitable element in the form of considerable concessions on their part. Thus, it appears wise to anticipate—and limit—such contingencies. Moreover, in relations between heterogeneous communities—in varying stages of technological advancement, social structure and political organization—and in an age of rapid change, the standard of equitable treatment provides equality on a footing of commendable elasticity.[133]

The concept of equitable treatment thus provides not merely a means of doing equity as between different classes of investors, whether natives or equally favoured foreigners. That is something which the concomitant rights of national treatment and most-favoured-nation treatment will secure in any event. The inclusion of the reference to equitable treatment also provides a means by which an appropriate balance may be struck between the protection of the investor and the public interest which the host State may properly seek

[130] *Case concerning Elettronica Sicula SpA (ELSI) (United States of America v Italy)* [1989] ICJ Rep 15, 76; 84 ILR 311, 382.

[131] *Statute of the International Court of Justice* (26 June 1945, annexed to the *Charter of the United Nations*) Art 38(1)(c). G Schwarzenberger, *International Law* (3rd edn, Stevens and Sons, London, 1957) vol I, 200, cited (with apparent approval) in *ADF Group Inc v United States of America* (Award) 6 ICSID Rep 449, 530 fn 176 (NAFTA/ICSID (AF), 2003, Feliciano P, de Mestral & Lamm).

[132] B Kingsbury et al (eds), 'The Emergence of Global Administrative Law' (2005) 68(3) Law & Contemporary Problems 15.

[133] Schwarzenberger (n 32).

to protect in the light of the particular circumstances then prevailing. The editors of *Oppenheim* put it in this way: 'The requirements of international law in this field . . . represent an attempt at accommodation between the conflicting interests involved.'[134] This process involves, as was observed in the *Saluka* award, 'a weighing of the [investor's] legitimate and reasonable expectations on the one hand and the [host State's] legitimate regulatory interests on the other.'[135]

Having examined the lines of convergence in the application of investment treaty standards, it is now necessary to look at where the specific solutions adopted by treaty may diverge from custom and require a different approach. Here, the arbitral practice provides some salient case studies of what happens where the application of general international law is not considered through the lens of the rules of treaty interpretation.

B. Restoration of the Place of the Treaty

1. The curative function of treaties

In considering the potential impact of custom as a source of interpretation of treaties, it should not be forgotten that the blind transposition of customary international law rules into treaty cases may in fact subvert some of the very purposes for which States negotiated specific treaty arrangements. There is a paradox at the heart of this field: despite their reliance on general international law in framing the substantive provisions of investment treaties, States had to negotiate on a predominantly bilateral basis in the face of widely perceived shortcomings in method by which custom protected such rights, namely diplomatic protection.

This point is well made by the International Law Commission itself in its report on Diplomatic Protection in discussing the advantages presented by investment treaties as contrasted with the customary rules of diplomatic protection:

> Such treaties abandon or relax the conditions relating to the exercise of diplomatic protection, particularly the rules relating to the nationality of claims and the exhaustion of local remedies . . . The dispute settlement procedures provided for in BITs and ICSID offer greater advantages to the investor than the customary international law system of diplomatic protection, as they give the investor direct access to international arbitration, avoid the political uncertainty inherent in the very nature of diplomatic protection and dispense with the conditions necessary for the exercise of diplomatic protection.[136]

[134] Jennings and Watts (n 18) 933.
[135] *Saluka* (n 52) para 306.
[136] ILC Diplomatic Protection Report (n 4) 89–90.

The obverse of this point was made by the International Court in *Diallo* when it stated, in considering the nationality requirements for the exercise of diplomatic protection:

> The fact invoked by Guinea that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal regimes governing investment protection . . . is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary.[137]

It was a failure to consider the impact of the respects in which investment treaties consciously depart from the strictures of the old law which led the Tribunal in *Loewen* [138] into error in applying the fair and equitable standard to the treatment accorded to a Canadian investor by the Mississippi court system. The Tribunal in effect imposed a requirement to exhaust local remedies, not as a procedural bar, but as a part of the substantive requirement for breach of the standard of fair and equitable treatment. In this way, a very serious miscarriage of justice against a foreign national was dismissed as a local error, which could not be remedied by the international tribunal.

An international tribunal is of course concerned to see whether there has been a failure in the operation of the judicial system as a whole. As a general proposition, 'an aberrant decision by an official lower in the hierarchy, which is capable of being reconsidered, does not of itself amount to an unlawful act.'[139] But it is quite another matter to import the full rigour of the local-remedies rule into investment arbitration on the ground that, in the absence of evidence of full exhaustion, there could be no breach of the treaty standard. Where the responsibility of a State vis-à-vis another State is engaged as a result of the treatment of an alien in the State's courts, it is only to be expected that the individual should first exhaust local remedies before the dispute is elevated to that of an international wrong between States. It was in the context of just such an inter-State claim in *ELSI* that a Chamber of the ICJ emphasized the continuing importance of the rule. But to insist on a strict application of this requirement in investor-State arbitration is simply inconsistent with the creation of a right of arbitration by investors directly, as an alternative to host State court litigation. As Bennouna observed in his preliminary report to the International Law Commission on Diplomatic Protection:

> In consenting to arbitration, the parties to a dispute waive all other remedies. In this way, both the demand of the host State that local remedies be exhausted

[137] (n 2) para 90.

[138] *Loewen Group Inc and Raymond L Loewen v United States of America* (Award) 7 ICSID Rep 421 (NAFTA/ICSID (AF), 2003, Mason P, Mikva & Mustill).

[139] ILC, 'Second Report on State Responsibility' (3 May–23 July 1999) UN Doc A/CN 4/498 34.

> and the exercise of diplomatic protection by the State of nationality are put aside.[140]

All of this suggests that an uncritical application of custom may be as damaging as its exclusion. The guiding principles of interpretation remain those set by the template of Article 31 of the Vienna Convention. This requires the Tribunal to begin by considering the treaty's terms 'in their context and in the light of their object and purpose'. The treaty's terms or object may well militate against incorporation of particular rules of international law or indicate their own direction in the construction of the treaty.[141] It was a failure to start with the treaty text, and to work out from it to the relevant rules of international law, which led the tribunals in *CMS*, *Enron* and *Sempra* into error in their consideration of the proper place of the doctrine of necessity in investment treaty law. It is to an examination of that issue to which this article must now turn.

2. The case of the doctrine of necessity

A series of cases, decided under the US–Argentina BIT,[142] have considered the question whether the Argentine fiscal and economic crisis of 2001–2 could give rise to a defence of necessity to a claim of breach of treaty. The reasoning adopted in these cases is potentially of great significance to the subject of the present article, since, in various ways, the tribunals all considered the doctrine of necessity as a matter of customary international law. This is now conveniently codified in Article 25 of the ILC Draft Articles on State Responsibility, as one of a number of circumstances precluding wrongfulness.[143]

Unfortunately, however, the tribunals which have so far considered the matter have come to very different conclusions on the application of the defence. In *CMS*,[144] *Enron*,[145] and *Sempra*[146] the tribunals (which all had the

[140] ILC, 'Preliminary Report on Diplomatic Protection' (20 April–12 June 1998, 27 July–14 August 1998) UN Doc A/CN 4/ 484, 12.

[141] A point made cogently, for example, by Weil in his dissenting opinion on the impact of the parties' object as regards origin of capital in interpretation of the nationality requirement for jurisdiction in *Tokios Tokeles v Ukraine* (Jurisdiction) (2005) 20 ICSID Rev-FILJ 205 (ICSID, 2004, Weil P, Price & Bernadini).

[142] Treaty concerning the Reciprocal Encouragement and Protection of Investment (US–Argentina) (signed 14 November 1991, entered into force 20 October 1994) Senate Treaty Doc 103–02. See generally on these cases J Fouret [2007] Revue de l'Arbitrage 249.

[143] ILC Draft Articles on State Responsibility and ILC State Responsibility Report (n 71) 194–206.

[144] *CMS Gas Transmission Co v Argentina* (Award) (2005) 44 ILM 1205 (ICSID, 2005, Orrego Vicuña P, Lalonde & Rezek).

[145] *Enron Corp & Ponderosa Assets LP v Argentina* (Award) ICSID Case No ARB/01/3 (ICSID, 2007, Orrego Vicuña P, van den Berg & Taschanz).

[146] *Sempra Energy Int'l v Argentina* (Award) ICSID Case No ARB/02/16 (ICSID, 2007, Orrego Vicuña P, Lalonde & Rico).

same President) considered that the defence was not available. In *LG&E*,[147] however, the tribunal decided that 'between 1 December 2001 and 26 April 2003, Argentina was in a state of necessity, for which reason it shall be exempted from the payment of compensation for damages incurred during that period.' Two members of the tribunal had also sat on tribunals which reached the contrary conclusion. Despite this, neither *LG&E* nor *Enron* refer to the opposing authority, and so it is not clear whether the arbitrators considered that it was to be distinguished, or merely not followed. In *Sempra*, the difference was said to be as to the respective tribunals' appreciation of the facts as to the severity of the crisis.[148]

The award in *CMS* was the subject of annulment proceedings. On 25 September 2007, the Annulment Committee delivered its decision.[149] It found manifest errors of law in the tribunal's treatment of necessity, but it declined to annul on this ground, holding that the errors did not amount to a manifest excess of powers or lack of reasoning, as would have been required for annulment.[150] The situation is one of considerable disarray, both for Argentina as judgment creditor on all of these awards, but also for the development of the doctrine. The resulting confusion appears to call into question the very utility of reference to general international law in investment treaty arbitration. In order to see what went wrong, it is necessary to look a little more closely at the reasoning in the awards and annulment decision.

The facts underlying each of the awards are substantially the same. In order to put an end to its economic and fiscal crisis of the 1980s, Argentina embarked in the early 1990s on a recovery programme, which involved both the privatization of a number of State-owned industries, and the pegging of the Argentine peso to the US dollar. The gas industry in particular was the subject of privatization under long-term supply contracts, pursuant to which the price at which gas would be purchased was calculated in US dollars in accordance with the US Producer Price Index (PPI) and then expressed in pesos. Towards the end of the 1990s another serious economic crisis hit Argentina: there were several deferrals of recalculation of the gas prices. On 6 January 2002, Argentina adopted a law declaring a public emergency, which terminated the right of public utilities to calculate tariffs by reference to the US PPI and to calculate tariffs in US dollars. A new government was elected in Argentina in April 2003, and a new period of economic and fiscal stabilization began.

All of the cases cited above concerned alleged losses suffered by American investors in the Argentine gas industry as a result of the changes to the calculation of gas prices made from the late 1990s and thereafter. In all of the

[147] *LG&E Energy Corp v Argentina* (Award) ICSID Case No ARB/02/1 (ICSID, 2006, de Maekelt P, Rezek and van den Berg).
[148] (n 146) para 346.
[149] *CMS Gas Transmission Co v Republic of Argentina* (Decision on Annulment) (ICSID, 25 September 2007, Guillaume P, Elaraby & Crawford).
[150] Art 52 ICSID Convention.

cases, the investors alleged, inter alia, that they had not received fair and equitable treatment, and the tribunal agreed. In all of the cases, however, Argentina alleged that it should be wholly or partly excused from liability by reason of the pendency of a state of emergency or necessity. In so doing, Argentina relied on both customary international law and on Article XI of the BIT which provides:

> This treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.[151]

In *CMS*, the Tribunal approached this defence by holding that it raised 'one fundamental issue.'[152] It addressed that issue by considering, first, whether each of the requirements imposed by Article 25 of the ILC Draft Articles on State Responsibility had been met. It found that they were not. It did not conduct a separate review of the requirements of Article XI of the BIT.[153] The tribunal then concluded, invoking Article 27 of the ILC Draft Articles, that: '[e]ven if the plea of necessity were accepted, compliance with the obligation would reemerge as soon as the circumstance precluding wrongfulness no longer existed, which is the case at present.'[154] Thus, such a plea would not obviate the obligation to pay compensation.

In *Enron*, the Tribunal also considered the application of Article 25 of the ILC Draft Articles first, and only subsequently Article XI of the BIT itself. On this occasion, Argentina's experts specifically opined that the treaty regime was different and separate from customary law as *lex specialis*. The Tribunal disposed of this argument in the following way:

> This is no doubt correct in terms that a treaty regime specifically dealing with a given matter will prevail over more general rules of customary law. Had this been the case here the Tribunal would have started out its considerations on the basis of the Treaty provisions and would have resorted to the Articles on State Responsibility only as a supplementary means. But the problem is that the Treaty itself did not deal with these elements. The Treaty thus becomes inseparable from the customary law standard insofar as the conditions for the operation of state of necessity are concerned.[155]

The *Enron* Tribunal maintained the same view as to the effect of any state of necessity on the requirement to pay compensation as had been adopted in *CMS*.[156]

[151] (n 142) Art XI.

[152] (n 144) para 308.

[153] As noted in the Annulment Decision (n 148) para 123, this may have been because both parties treated the issues raised under Article XI to be identical to those raised under customary international law.

[154] (n 144) para 382.

[155] (n 145) para 334 and, to like effect, para 339.

[156] ibid paras 343–45.

In *Sempra*, the Tribunal returned to the theme of the relationship between Article XI of the BIT and custom, holding that:

> The problem here, however, is that the Treaty itself did not deal with the legal elements necessary for the legitimate invocation of a state of necessity. The rule governing such questions will thus be found under customary law … International law is not a fragmented body of law as far as basic principles are concerned and necessity is no doubt one such basic principle.[157]

The approach of the Tribunal in *LG&E* stands in marked contrast to this line of reasoning. For this Tribunal, Article XI was the essential starting-point for its analysis:

> The Tribunal underscores that the claims and defenses mentioned derive from the Treaty and that, *to the extent required for the interpretation and application of its provisions*, the general international law shall be applied.[158] (emphasis added)

Like the other tribunals, the *LG&E* Tribunal rejected Argentina's argument that the test in Article XI was 'self-judging'. The Tribunal considered that it was entitled to conduct its own substantive review of whether the conditions for the application of Article XI had been met, and it did so. The Tribunal found that the conditions specified by Article XI had been met, since the measures taken were on the facts 'necessary for the maintenance of public order' and for the protection of Argentina's 'essential security interests'. The Tribunal then referred to Article 25 of the ILC Draft Articles, but only as additional support to a conclusion which it had already reached on the application of Article XI of the BIT.[159] Once this point had been reached, there could be no question of compensation for the period during which the necessary measures applied, as the application of Article XI precluded any finding of breach of treaty.[160]

This approach to the problem was in substance adopted by the Annulment Committee in *CMS* in finding that the Tribunal in that case was in error of law in its treatment of the state-of-necessity defence. The Committee held that both the function and the substantive conditions of BIT Article XI and of ILC Article 25 are different. On function, it pointed out that:

> … Article XI is a threshold requirement: if it applies, the substantive obligations under the Treaty do not apply. By contrast, Article 25 is an excuse which is only relevant once it has been decided that there has otherwise been a breach of those substantive obligations.[161]

[157] (n 146) para 378.
[158] (n 147) para 206.
[159] ibid paras 245–58.
[160] ibid paras 260–61.
[161] (n 149) para 129.

On substance, it said:

> Furthermore, Article XI and Article 25 are substantively different. The first covers measures necessary for the maintenance of public order or the protection of each Party's own essential security interests, without qualifying such measures. The second subordinates the state of necessity to four conditions. It requires for instance that the action taken 'does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole', a condition which is foreign to Article XI.[162]

The Committee concluded:

> Those two texts having a different operation and content, it was necessary for the Tribunal to take a position on their relationship and to decide whether they were both applicable in the present case. The Tribunal did not enter into such an analysis, simply assuming that Article XI and Article 25 are on the same footing.[163]

This led to a second error of law, namely the failure to consider whether each such rule was a primary or a secondary rule of international law. The Committee's view was that Article XI was a primary rule, in that, if it applied, there would have been no breach of the BIT.[164] In contrast, Article 25 was a secondary rule, and would only apply in the event that there had been a breach of a primary rule. The Committee concluded on the approach which the Tribunal ought to have taken:

> Only if it had concluded that there was conduct not in conformity with the Treaty would it have had to consider whether Argentina's responsibility could be precluded in whole or in part under customary international law.
>
> These two errors made by the Tribunal could have had a decisive impact on the operative part of the Award.[165]

Finally, the Tribunal found that a similar failure to put the Treaty first had led the Tribunal in its consideration of the question whether compensation would be due for the period of any state of necessity:

> The answer to that question is clear enough: Article XI, of and for so long as it applied, excluded the operation of the substantive provisions of the BIT. That being so, there could be no possibility of compensation being payable during that period.[166]

[162] ibid para 130.
[163] ibid para 131.
[164] ibid para 133.
[165] ibid paras 134–35.
[166] ibid para 146.

In formal terms, the decision of an annulment committee has no greater precedential effect than an award.[167] Nevertheless, the very opportunity of a second tier of review; the narrowly circumscribed limits of that review; and the eminent experience in public international law of the Committee,[168] suggest that great weight should be given to the Committee's categorical views on the central issues confronted in these cases. Their significance for the present study lies in two central tenets of the approach here advocated as to the relationship of general international law to investment treaties.

First, the mere identification of the applicable law as being international law as a whole (pursuant to Article 42 of the ICSID Convention) is insufficient to provide guidance to a tribunal as to how it should integrate the wider provisions of international law with the specific terms of the Treaty. Indeed, characterizing the question as being simply one of applicable law may, as the cases discussed above demonstrate, be positively dangerous. Treatment of the issue in this way does not imply any particular order for the consideration of the relevant sources of law. It was taking the customary doctrine first, and then conflating its test with that of the Treaty, without close consideration of the differences, which contributed to the errors of the *CMS* Tribunal, and those which followed it.

Secondly, once the issue is properly approached as one of treaty interpretation, the very structure of Articles 31–32 of the Vienna Convention suggests an orderly method of legal reasoning which would place the Treaty text in the centre of the enquiry. General international law would then be applied to assist in the interpretation of that text.[169] This is not to exclude the possible application of the secondary rules of State responsibility to provide an independent defence to liability under the Treaty. Necessity, as a circumstance precluding wrongfulness, is found within Part One of the ILC Draft Articles on State Responsibility. As such, it is potentially applicable to any breach of the responsibility of a State, whether or not the claimant is also a State.[170] But such rules would only be applicable to the extent to which they are have not been by implication necessarily excluded by the express words of the Treaty. Where, as here, the customary rule lays down a stricter test than the treaty language, it is unlikely that there will be a need for separate resort to custom.

[167] Art 52(4) of the ICSID Convention applies the provisions of Art 53 to annulment proceedings. Art 53 provides that: 'The award shall be binding on the parties . . .' This is commonly interpreted to mean that the award is binding on the parties and no-one else: CH Schreuer, *The ICSID Convention: A Commentary* (CUP, Cambridge, 2001) 1082; and see for further discussion McLachlan, Shore & Weiniger (n 14) paras 3.83–3.103.

[168] A former president and judge of the International Court of Justice (Guillaume and Elaraby), together with the Whewell Professor of International Law in the University of Cambridge (Crawford).

[169] M Huber, (1952) 1 Annuaire 200–1.

[170] See (n 71).

Applied in this way, general international law in investment treaty cases does not become the juridical equivalent of a bag of liquorice allsorts, in which the Tribunal may pick and choose at will those doctrines which suit its decision. Rather, its primary role is the progressive illumination of the parties' intentions, as expressed in their treaty text; or its application to issues not expressly addressed in the Treaty in a different way.

III. IMPLICATIONS FOR THE MAKING OF INTERNATIONAL LAW

A. Arbitral Awards as an Elucidation of the Law

What, then, may be the implications of the investment treaty phenomenon for more general theories of the way in which international law is created and developed? The issue here is to what extent the practice by or under particular international conventions contributes to the development of *general* international law under the other heads of Article 38 of the Statute of the ICJ: custom 'as evidence of a general practice accepted as law'; 'general principles of law common to civilised nations'; and judicial decisions 'as subsidiary means for the determination of rules of law'.[171]

This question is not simply to be disposed of as a matter of the weight to be accorded to arbitral awards themselves. The jurisprudence of international tribunals is a means of the elucidation of the law, not as a source of law in its own right. Thus, in the debates in 1920, which led to the formulation of what is now Article 38(1)(d) of the ICJ Statute, Baron Descamps said:

> Doctrine and jurisprudence no doubt do not create law; but they assist in determining rules which exist. A judge should make use of both jurisprudence and doctrine, but they should serve only as elucidation.[172]

For that reason, judgments of the International Court were given no binding effect, save upon the disputing parties.

What is true of the judgments of the International Court of Justice is true a fortiori of arbitral awards. As Brownlie puts it:

> The literature of the law contains frequent reference to decisions of arbitral tribunals. The quality of arbitral tribunals has varied considerably, but there have been a number of awards which contain notable contributions to the development of the law by eminent jurists sitting as arbitrators . . .[173]

[171] For commentary see Article 38 (Pellet) in A Zimmermann et al, *The Statute of the International Court of Justice: A Commentary* (OUP, Oxford, 2006) 677.

[172] PCIJ, Advisory Committee of Jurists, *Procès-Verbaux* of the Proceedings of the Committee, 16 June–24 July (The Hague, 1920) 336.

[173] I Brownlie, *Principles of Public International Law* (6th edn, OUP, Oxford, 2003) 19.

To some extent, of course, the distinction between elucidation of norms found elsewhere and the ability to make law is a legal fiction maintained to preserve the control of States over the development of the international legal system. As Paulsson rightly observes:

> Just as jealous sovereigns may be averse to any suggestion that compacts other than those to which they have consented may be invoked against them, so too, they are often disinclined to submit to the elaboration of international law by anything resembling the accretion of binding precedents known as common law.[174]

The formal distinction is belied by practice in the extent to which international tribunals do refer to the previous decisions of other tribunals as authority for propositions of law, and are engaged in the process of developing the law.[175] Nevertheless, the distinction is an important one. The extent to which any particular tribunal decision deserves currency as a precedent depends on whether it correctly expounds international law, and not upon any a priori weight to be attached to the decision per se.

B. Custom

The potential contribution of investment treaties and awards to custom is more problematic. Standard approaches to the formation of custom would give a largely negative account of the potential contribution of bilateral treaties. Thus, the influential report of the ILA Committee on the Formation of Customary (General) International Law[176] adopted a principle that: 'there is no presumption that a succession of similar treaty provisions gives rise to a new customary rule with the same content.'[177] The Commentary deals specifically with the case of bilateral investment treaties, stating:

> Some have argued that provisions of bilateral investment protection treaties (especially the arrangements about compensation or damages for expropriation) are declaratory of, or have come to constitute, customary law. But . . . there seems to be no special reason to *assume* that this is the case, unless it can be shown that these provisions demonstrate a widespread acceptance of the rules set out in these treaties *outside the treaty framework*.[178]

It is of course correct that no easy assumption can be made as to the binding character in custom of the treaty obligations. State practice in concluding such treaties is widespread. The number of such treaties is impressive, and the

[174] J Paulsson, 'International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law' Paper given at the Ninth Public Conference of the BIICL Investment Treaty Forum, 14 September 2007, 2.

[175] See Part II A above, and generally A Boyle and C Chinkin, *The Making of International Law* (OUP, Oxford, 2007) ch 6: 'Law-Making by International Courts and Tribunals.'

[176] International Law Association, *Report of the Sixty-ninth Conference* (London, 2000) 712.

[177] ibid 758.

[178] ibid 759 [emphasis in original].

similarity in their language is striking. But, nevertheless, the total tally falls considerably short of anything approaching universality.[179] Some important States have concluded few of them. There are relatively few such agreements between developed countries (with the important exceptions of the Energy Charter Treaty, NAFTA and recent free trade agreements). There are numerous important differences between the treaty texts as a result of bilateral negotiation.

Further, the mere conclusion of numerous similarly worded treaties does not necessarily provide an indication of *opinio juris*, namely that the State considers that the standard is binding upon it as a matter of the general law, irrespective of its agreement by treaty. As it was put by the Tribunal in *UPS v Canada*:

> . . . the many bilateral treaties for the protection of investment . . . vary in their substantive obligations; while they are large in number, their coverage is limited; and in terms of opinio juris there is no indication that they reflect a general sense of obligation.[180]

FA Mann gave an initial response to the proposition that the investment treaty practice could not contribute to the development of custom some 25 years ago. Whilst accepting the general point made by the International Court of Justice in the *North Sea Continental Shelf Cases*,[181] that it is difficult to deduce a rule of international law from a treaty, he continued that the significance of that decision should not be overrated, at least in the context of investment treaties:

> There is, in the first place, the very large number of treaties the scope of which is increased by the operation of the most-favoured-nation clause. There is, secondly, the fact that many States which have purported to reject the traditional conceptions and standards included in these treaties have accepted them, when (if the colloquial phrase may be permitted) it came to the crunch. There is, thirdly, the most important fact that these treaties establish and accept and thus enlarge the force of traditional conceptions. Is it possible for a State to reject the rule according to which alien property may be expropriated only on certain terms long believed to be required by customary international law, yet to accept it for the purpose of these treaties? The paramount duty of States imposed by international law is to observe and act in accordance with the requirements of good faith. From this point of view it follows that, where these treaties express a duty which customary international law imposes or is widely believed to impose, they give very strong support to the existence of such a duty and preclude the Contracting States from denying its existence.[182]

[179] T Gazzini, 'The Role of Customary International Law in the field of Foreign Investment' (2007) 8 J World Investment & Trade 691 makes the point that BITs cover only about 13 per cent of the bilateral relationships between states comprising the international community.

[180] (n 106) para 97; and see Gazzini, ibid.

[181] *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands)* [1969] ICJ Rep 3.

[182] FA Mann, *Further Studies in International Law* (Clarendon, Oxford, 1990) 245.

Mann's point may be taken a step further in the light of the practice adopted in many States of promulgating model investment treaties.[183] This practice is not confined to traditional capital-exporting States, but includes many developing countries as well. The publication of a model treaty is of course a piece of State practice. It is a statement of what that State considers to be an acceptable basis for bilateral negotiations. Nevertheless, the practice may have no greater significance in the case of those obligations which can only operate reciprocally between two States when given conventional force, such as national treatment and most-favoured-nation treatment.

But the inclusion in such prototype treaties of the non-contingent standards, such as expropriation and fair and equitable treatment, has wider implications. As has been seen, there is a remarkable uniformity in the treaty language used to enshrine these standards. There is also a prior history of non-contingent standards being regarded as applicable by custom. Their inclusion in model treaties 'represents the set of norms that the relevant state holds out to be both reasonable and acceptable as a legal basis for the protection of foreign investment in its own economy.'[184]

In the case of expropriation, it is perhaps possible still to interpret such a statement as merely an offer to provide compensation for State takings of property to the nationals of *reciprocating* States. The fair and equitable treatment standard, on the other hand, applies generally to decision-making by all manner of State officials: judges, government ministers and bureaucrats. It is not possible to imagine the offer of the application of such a standard being made unless the State making the offer was satisfied that its national legal system already met such a standard, and that it would continue to be applied in the making of decisions regarding investments. By its nature such a standard cannot be applied selectively only to investors from particular foreign States. Rather, it is a general undertaking of due process and the rule of law. Seen in this light, its standing inclusion in a model treaty does represent something more than a mere offer to treat. Rather, it is submitted that it indicates the acceptance of a general obligation to accord treatment, judged according to such a standard. The inclusion of such a standard in the model treaties of many States in different parts of the world, with vastly differing legal systems and economic conditions, lends considerable weight to its candidacy as the modern expression of a rule of custom.

The result is a convergence, on these issues, between treaty practice and custom, in which the modern understanding of the content of the customary right is being elaborated primarily through the treaty jurisprudence. Indeed, an application of the classic test for the formation of a rule of custom in this area would have little meaning, given the paucity of any State practice outside the treaties' reach.

[183] These are collected in UNCTAD, *International Investment Instruments: A Compendium*.
[184] Douglas (n 6) 159.

This process of cross-fertilization in the development of the customary standards through the treaty jurisprudence saves general international law from being cast in aspic at some earlier point in time; and saves treaty tribunals from isolation and inconsistency. It reflects the fact that the general standards are in their nature evolutionary.[185] The Tribunal in *Mondev*[186] described this process in the following way. It was responding to a submission advanced by Canada that the customary international law standard incorporated into NAFTA Article 1105 was to be determined by reference to Claims Commission awards of the inter-war years, in particular the *Neer* case.[187] It held:

> On a remarkably widespread basis, States have repeatedly obliged themselves to accord foreign investment such treatment. In the Tribunal's view, such a body of concordant practice will necessarily have influenced the content of rules governing the treatment of foreign investment in current international law.[188]

One may ask the question rhetorically: what is the alternative for custom? If the extensive practice under treaties is to be excluded, a court considering the matter would have only two other possible alternatives. The first would be to treat custom as frozen in time circa 1945 before State practice shifted to the elaboration of BITs. This would, in any event, face the considerable problem of the degree of dissent over the basic rules which then existed. The second would be simply to find that custom afforded no minimum standard of protection to foreign investors at all. This question will have to be confronted by the International Court when it reaches the merits in *Diallo*,[189] where the binding character of such rules outside the treaty context will take centre stage. However, for the most part in the investment field, this problem is the exception rather than the rule. In most cases the question will be one of *content* rather than binding character.

C. General Principles of International Law

The elaboration of norms in this field may share more with the way in which 'general principles of law common to civilized nations' are used as a source of law in international law.[190] It has been seen above that the content of the principle of 'fair and equitable treatment' is to be derived in part by reference to such general principles. An international tribunal has to be sure that the standards for judicial or administrative decision-making which it exacts from

[185] McLachlan (n 15) 317; ILC Fragmentation Report (n 15) 16–17; *Case concerning the Gabčikovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7, 67–68.

[186] *Mondev International Ltd v United States of America* (Award) 6 ICSID Rep 181 (NAFTA/ICSID(AF), 2002, Stephen P, Crawford & Schwebel).

[187] *LFH Neer & Pauline Neer (USA) v United Mexican States* (1926) IV RIAA 60.

[188] *Mondev* (n 186) 222.

[189] (n 2).

[190] See Pellet (n 171) 764.

municipal courts and administrators are general principles of law common to civilized nations, and not rules of law specific only to some national legal systems, but rejected by others.

Yet here too, the analogy, though valuable, is inexact. The original idea animating Article 38(1)(c) of the Statute was to avoid the risk of a *non liquet* by permitting the International Court to borrow principles from domestic law, provided that they were sufficiently established as to command common acceptance.[191] In practice, the category is perhaps the least well-understood in the catalogue of sources, and examples of its express use by the International Court are rare.

Reference to general principles of national law in the investment context may indeed be required to supply interstitial rules which are not referred to in, or required by, the treaty, but which may be regarded by a tribunal as essential for the proper operation of the investment treaty system as a whole. An example of this would be the consideration of the general principles of *res judicata* and *lis pendens*, where the parallel claims meet the conditions for the application of the doctrines.[192] But the reference to general principles of law in the investment context more commonly serves a rather different function, namely to inform the content of an existing, but open-textured treaty norm.

There is, however, a certain incongruity in the seeking to fit the development of common international principles within a category designed for the adaptation for international use of *national law* principles. Whilst tribunals have occasionally accepted that one of the relevant developments in international law has been in 'the substantive and procedural rights of the individual',[193] it is regrettable that, to date, no notable effort has been made in the investment arbitration jurisprudence to link the concept of 'fair and equitable treatment' with the specific standards of international human rights law. Reference to these sources would facilitate the application of standards which may be seen as genuinely common to civilized nations. It is not, as has sometimes been suggested, that the emergence of international human rights norms would subsume and render obsolete both the international minimum standard and the standard of national treatment.[194] Rather, some elements of human rights law may furnish a source of general principle from which the obligation of fair and equitable treatment may be given contemporary

[191] Pellet (n 171) 765. The classic study is B Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (CUP, Cambridge, 1953, reprinted 2006).

[192] This is developed further in McLachlan, Shore & Weiniger (n 14) ch 4: 'Parallel Proceedings'. For examples of the application of these principles in arbitral practice see: *Waste Management Inc v Mexico (No 2)* (Preliminary Objections) 6 ICSID Rep 538 (NAFTA/ICSID (AF), 2002, Crawford P, Civiletti & Magallón Gómez) (as to *res judicata*); and *Southern Pacific Properties (Middle East) Ltd v Egypt* (First Jurisdiction) 3 ICSID Rep 101, 129 (ICSID, 1985, Jiménez de Aréchaga P, El Mahdi & Pietrowski) (as to *lis pendens*).

[193] *Mondev* (n 186) para 116.

[194] FV García-Amador, First Report on State Responsibility, UN Doc A/CN 4/96 [1956] 2 Ybk Intl L Comm'n 173, 200–3.

content.[195] In this way, investment law may meet, in modern clothes, the objective which Elihu Root identified, of simply providing an effective avenue of redress for a set of principles common to humanity.

So the final possibility is that the emergence of this 'body of concordant practice', which serves as the central, and defining, feature of modern investment law is in fact a process which is not fully explained by a list of sources of international law originally developed in 1920 for the Permanent Court of International Justice. Indeed, the way in which international law develops has changed utterly since that time. One consequence of the relentless rise in the use of treaties as a means for ordering international civil society[196] is that the dynamic process of the development of international law now takes place in no small measure through the continuous progressive development of treaties. Thus, for example, in the *Myers* case,[197] the arbitral tribunal was invited to consider numerous international instruments in the field of environmental protection—each one building upon those that had come before.

A similar process may be observed in the framing of bilateral investment treaties themselves. Each State brings to the negotiating table a lexicon which is derived from prior treaties (bilateral or multilateral) into which it has entered with other States. The resulting text in each case may be different. It is, after all, the product of a specific negotiation. But it will inevitably share common elements with what has gone before, and, as Mann observed, the almost invariable addition of a most-favoured-nation clause reinforces this already strong tendency towards homogeneity.

In making this observation about the nature of the modern treaty-making process, it is not always necessary to go so far as to contend that such common elements may point to the emergence of a binding rule of customary international law. The important point is that this everyday reality in the practice of foreign ministries has the inevitable consequence that treaties are developed in an iterative process in which many normative elements are shared. From having been a series of distinct conversations in separate rooms, the process of treaty-making is now better seen as akin to a continuous dialogue within an open-plan office.[198] This is no mere matter of drafting convenience. Rather, it is suggested here that, at least in the field of investment, the negotiation of treaties has been animated by a set of general principles which inform the content of particular norms.

The emergence of over-arching common principles as the unifying feature of international investment law finds parallels in other areas of

[195] Brownlie (n 173) 504–5; American Law Institute, *Restatement of the Law, Third, Foreign Relations Law of the United States* (1987) § 711(a), 184–96; Paulsson (n 80) 133–34.

[196] C Ku, 'Global Governance and the Changing Face of International Law' ACUNS Repts and Papers 2001 No 2.

[197] (n 97).

[198] The writer is indebted to William Mansfield for this metaphor.

international law as well: in international criminal law;[199] and in environmental law.[200]

If an observable phenomenon in the actual practice of States on such a scale emerges, which is not adequately explained by the existing legal categories, it may be time to ask whether those categories ought to be developed. It is, of course, still of vital importance to be able to distinguish between law and non-law. All legal systems need formal mechanisms to enable them to determine the binding character of norms. But, equally, all legal systems contain norms at different levels of generality, and some of the most important such norms are stated at the highest level of abstraction. It is these which then qualify for constitutional significance within the system.[201] International law is no exception.[202]

International tribunals frequently rely on such principles. As the ILC Study Group puts it:

> . . . fragmentation takes place against the background and often by express reference to not only the VCLT but to something called 'general international law'. However, there is no well-articulated or uniform understanding of what this might mean. 'General international law' clearly refers to general customary law as well as 'general principles of law recognized by civilized nations'. . . *But it might also refer to principles of international law proper* . . . In the practice of international tribunals . . . reference is constantly made to various kinds of 'principles' sometimes drawn from domestic law, sometimes from international practice but often in a way that leaves their authority unspecified.[203]

D. Conclusions

The results of the enquiry in this article may be expressed in the following ten conclusions:

(1) *The investment treaty as a creature of international law*: The primary obligations assumed by States towards foreign investors and enshrined in

[199] See, eg, *Prosecutor v Kunarac* (ICTY, IT-96-23 and IT-6-23/1, judgment of 22 February 2001, para 439 and R O'Keefe, 'Recourse by the *Ad Hoc* Tribunals to General Principles of Law and to Human Rights Law' in M Delmas-Marty, E Fronza and E Lambert-Abdelgawad, *Les Sources du Droit Pénal* (Sociétéde Législation Comparée, Paris, 2004) 297, 299.

[200] See Boyle and Chinkin (n 175) 222–25; and P Sands, *Principles of International Environmental Law* (2nd edn, CUP, Cambridge, 2003) ch 6. For a recent example in practice see the ILC's Draft Principles on the Allocation of Loss in the case of Transboundary Harm arising out of Hazardous Activities 2006 (PS Rac, Special Rapporteur) in International Law Commission, Report on the work of its fifty-eighth session (1 May to 9 June and 3 July to 11 August 2006), UNDOC A/61/10, paras 66–7.

[201] The point made by Dworkin as to the role of principles within a domestic legal system: R Dworkin, *Taking Rights Seriously* (Harvard University Press, Cambridge, MA, 1977).

[202] See also AV Lowe, *International Law* (OUP, Oxford, 2007) ch 3.

[203] ILC Fragmentation Report (n 15) 254 (emphasis added). Sands (n 200) 232, makes this point in relation to the status of general principles in international environmental law.

investment treaties are governed by public international law. This flows from the elementary fact that such treaties are themselves creatures of international law. This general proposition is particularly significant in the case of investment treaties, since their terms and structure make them particularly dependant upon the wider context of general international law.

(2) *International law as a whole applicable to treaty obligations*: Thus, when, by virtue of Article 42 of the ICSID Convention or otherwise, tribunals are directed that the applicable law to the particular issue before them is international law, that is a reference to the whole of international law, and not merely the specific treaty before them. (That does not of course exclude the possibility of the application of national law, and in particular host-State law, to other issues in the case. Article 42 so provides, and this would follow in any event from the hybrid character of investment arbitration.)

(3) *Treaty interpretation as the process for its application*: The identification of the international legal system as a whole as the applicable law is not the end of the enquiry. The means by which the applicable norms of international law are determined is primarily supplied by the process of treaty interpretation encapsulated in Articles 31 and 32 of the VCLT. This process envisages a specific role for other rules of international law applicable in the relations between the parties (Article 31(3)(c)) and for shared understandings between the parties as to the meanings of specific terms (Article 31(4)).

(4) *Central place of the treaty text*: The application of such other rules is subject to the general rule of interpretation, which starts with the ordinary meaning of the words and their object and purpose (Article 31(1)). If the specific words of the treaty supply an answer to the problem which is different to that otherwise applicable in general international law, that solution must prevail. For this reason, the new hybrid procedures of the investment treaties render the restrictions of the general law of diplomatic protection largely inapplicable. Further, as in the doctrine of necessity cases, the treaty may supply a primary rule which takes precedence over a different test provided in custom.

(5) *Application of custom through interpretation*: Nevertheless, custom may be more directly applicable:

   (a) to determine the content of a primary treaty rule where the language, purpose or context of the particular treaty provision indicates that the parties intended to invoke the customary rule, and where there is a developed body of customary law to which reference may be made. Examples of this include expropriation, and that part of the fair and equitable treatment standard which in concerned with denial of justice; and

(b) where the treaty is silent as to the issue, and the answer is supplied by other rules of international law. This has been characterized here as a positive presumption of interpretation. But it may equally be seen simply as a consequence of international law being the applicable law. Thus, for example, general secondary rules of State responsibility relating to attribution and circumstances precluding wrongfulness may be applied if the treaty language, properly interpreted, permits.

(6) *Guidance through general principles*: Where the investment treaty poses new questions not previously addressed by custom (as, for example, in the application of the fair and equitable treatment standard to administrative decision-making), reference to general international law may still illuminate the rule to the extent that it reveals general principles which guide the application of the rule.

(7) *General principles applicable to fair and equitable treatment*: In the case of fair and equitable treatment, the general principles informing the standard flow from its character as an instrument of supervision at the international law level of the processes of governmental decision-making at national level. The standard is concerned with due process in decision-making, and not with substantive outcomes. It requires the application of fundamental rule-of-law values in decision-making: predictability; accessibility; impartiality; and natural justice, as contrasted with arbitrary action. The standard shares these concerns with international human rights law. The addition of the concept of equity also requires due weight to be given to the proper public purposes of the host State—performing a similar function to that of proportionality in the application of human rights standards.

(8) *Arbitral awards as elucidation of international law not precedent*: The contribution of the treaty practice to general international law is not a matter of the weight to be accorded to arbitral awards as precedents. Like all other judicial decisions in international law, investment arbitral awards can only serve as an elucidation of the law, not as a binding source of it. The weight to be accorded to such awards is rather a matter of their consistency within the general framework of international law.

(9) *Treaty rules as custom*: The mere prevalence of similarly worded treaty language, however numerous, will not, without more, give rise to a binding obligation in custom. Many obligations contained in investment treaties can only ever operate as conventional obligations differing from the general law (national treatment, most-favoured-nation treatment, and indeed the provision for investor-State arbitration itself). Fair and equitable treatment, however, may stand in a distinct position in view of the substantial body of evidence for the prior existence of a minimum standard of treatment as a matter of custom; the almost universal inclusion of

the standard in modern times in very similar terms; and its inclusion in many model treaties published by states. The last point supports *opinio juris* connoting the State's view that such a standard is internationally acceptable; and that it is one which its legal system already meets, and should continue to meet in its treatment of investors generally.

(10) *The organic and dynamic character of general principles of international law*: The relationship between general international law and investment treaties is properly characterized as conducted at the level of general principles of international law. Such principles inform the content of the specific treaty norm and of States' obligations more generally. The consequence of this is that, at this level, the relationship is symbiotic. Developments in custom may, indeed should, influence the content of the treaty rule (an example being the development of international human rights standards). By the same token, the developments in the treaty rule (as with the addition of equitable treatment) may influence custom.

As the *Eastern Extension* Tribunal put it in the dictum with which the article opened,[204] such a reference to general principles may indeed be integral to the very 'function of jurisprudence', in international law as much as in any domestic legal system.

If the practice of investment arbitral tribunals helps to explain the operation of the larger system of international law better, it may be because it exposes to view the essential dependence of the system as a process of reasoning upon a set of norms which are not fully explained as either custom or general principles of domestic law. Rather, they are general principles of international law. The ongoing challenge, then, is to articulate those principles in a way which both connects investment treaty law to the vast hinterland of international law on the treatment of aliens, but which also recognizes the progressive nature of the treaty-making programme itself, and the dynamic qualities of general international law as a 'living and expanding code.'[205] In this way, investment treaty law may finally come of age, and take its proper place within the modern international legal system.

[204] n 1.

[205] *In re Piracy Jure Gentium* [1934] AC 586, 592 (PC).