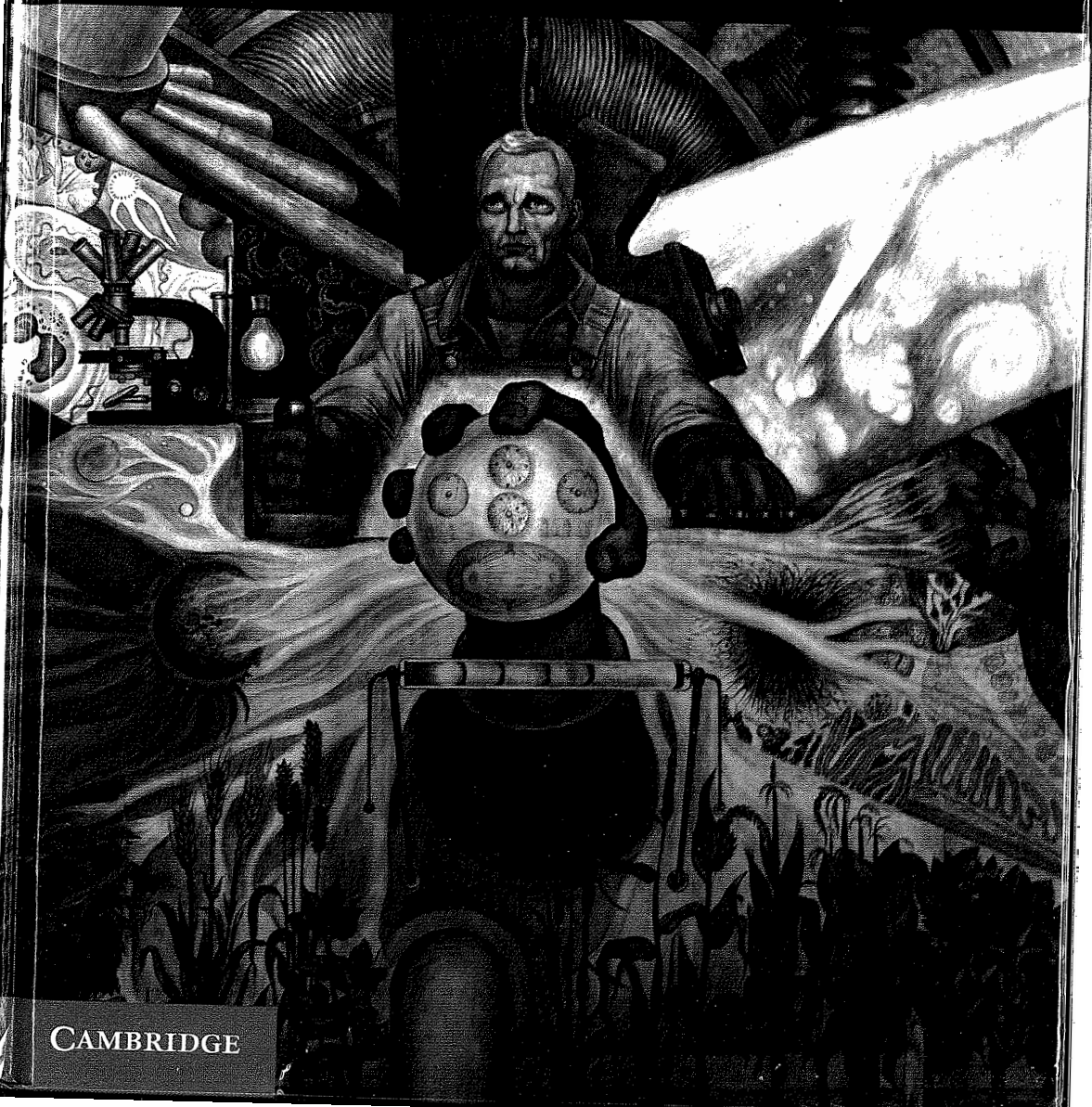
ROLAND KLÄGER

CAMBRIDGE STUDIES IN INTERNATIONAL AND COMPARATIVE LAW

'Fair and Equitable Treatment' in International Investment Law



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'Fair and Equitable Treatment' in International Investment Law

A breach of fair and equitable treatment is alleged in almost every investor-state dispute. It has therefore become a controversial norm, which touches many questions at the heart of general international law. Roland Kläger sheds light on these controversies by exploring the deeper doctrinal foundations of fair and equitable treatment and reviewing its contentious relationship with the international minimum standard. The norm is also discussed in light of the fragmentation of international law, theories of international justice and rational balancing, and the idea of constitutionalism in international law. In this vein, a shift in the way of addressing fair and equitable treatment is proposed by focusing on the process of justificatory reasoning.

ROLAND KLÄGER is currently a law clerk at the Higher Regional Court of Frankfurt and a research assistant with Clifford Chance, Frankfurt. After his legal studies at the University of Freiburg, he received a Dr. iur. from the University of Tübingen. He was also a research fellow at the Institute for Public Law, University of Freiburg, and a visiting fellow at the Lauterpacht Centre for International Law, University of Cambridge.

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'Fair and Equitable Treatment' in International Investment Law

Roland Kläger

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Foreword

International investment law has grown considerably in importance in recent years, as evidenced by the great increase in the number of international investment agreements, in the scholarly literature and even in the number of awards. Nevertheless, the doctrinal foundations of international investment law have remained highly contested: it is easier to draw up a list of disputed than agreed propositions. Dr Kläger's work seeks to address this problem in respect of fair and equitable treatment, a central norm of international investment law. In doing so he discusses fair and equitable treatment in relation to general theories of international law, legal method and even international justice.

In Part I he argues that exploring these doctrinal foundations gives a broader justificatory basis to the fair and equitable treatment standard and thereby conduces to greater consistency and legal certainty. This contrasts with a persistent trend of opinion that fair and equitable treatment is irreducibly vague, and that it authorises international tribunals to conduct an 'all things considered' examination of host State action or inaction. On this view, arguments derived from the general rules of interpretation are of little use in the application of fair and equitable treatment: the only important question is what the current tribunal decides happened and whether it was – at some adjectival level – unfair or inequitable to the investor. By way of reaction, other tribunals (notably in *Glamis Gold*) have constricted the meaning of the formula to an outdated and excessively rigid version of an international minimum standard, based on cases (especially *Neer*) involving a distinct factual matrix. The oversimplification of traditional approaches towards fair and equitable treatment highlights the growing disunity of the law.

The discussion of 'fragmentation', as it has come to be called (as if international law had once been unfragmented and immaculate),

justification for this approach is given by reference to the object and purpose of investment agreements, aiming at the protection and promotion of foreign investment flows and therefore at the stimulation of economic growth.[495] The close connection between the rule of law and a favourable investment climate producing economic growth is finally substantiated by recourse to institutional economics buttressing such interpretation.[496]

Altogether, Schill's conceptual suggestion provides a valuable attempt providing guidance for the discussion on fair and equitable treatment. The similitude between the *topoi* of fair and equitable treatment and the various elements that are habitually linked to the concept of the rule of law is striking and also acknowledged by others.[497] To such an extent, the rule of law approach invites the carrying out of further comparative research in order to analyse the different concepts of the rule of law and the extent to which these concepts may enrich the quality of legal reasoning in the case of fair and equitable treatment. Schill rightly points out that this research should not be limited to domestic legal conceptions, but should also take into account international legal regimes which already display a sophisticated conception of the rule of law.[498] Although not explicitly emphasised by Schill, looking beyond the international investment law backyard also represents a suitable way of mitigating frictions which might arise out of an increasing fragmentation of international law. As a comparative analysis in this sense is capable of considering legal processes in related sub-systems and of contributing to a desirable cross-fertilisation in the international legal system, Schill's approach appears very much complementary to the ideas discussed earlier in this respect.[499]

[495] Ibid., pp. 63–64. [496] Ibid., pp. 64–69.

[497] See, e.g. P. Behrens, 'Towards the Constitutionalization of International Investment Protection', ArchVR 45 (2007), p. 153 at p. 175; McLachlan, Shore and Weininger (above fn. 63), p. 260; on investment rules and the rule of law more generally, see D. Schneiderman, 'Investment Rules and the Rule of Law', *Constellations* 8 (2001), issue 4, p. 521; and S. D. Franck, 'Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law', Pac. McGeorge Bus. & Dev. L.J. 19 (2007), p. 337.

[498] Schill (above fn. 2), p. 62; he thereby refers to the jurisprudence of the WTO Appellate Body and the ECtHR and also the principles of European administrative law; on the latter see especially J. Schwarze, *European Administrative Law*, rev. 1st edn (2006).

[499] See Chapter 4, 'The role of international law in the construction of fair and equitable treatment'.

Nevertheless, there are also some difficulties in the application of a comparative rule of law approach. This is not only because the introduction of the concept of the rule of law into the context of fair and equitable treatment requires a well-reasoned justification, but also because it brings with it a raft of different ideas. Arguably, only some of these ideas are suitable for international investment law, while others are inappropriate or contested. However, a legal transplant of the concept of the rule of law, at first, would incorporate all of these ideas and controversies into the investment law context and would thereby create new and unexpected problems.[500] Moreover, the existence of a whole range of different concepts of the rule of law, influenced by the particular domestic law background, involves a laborious search for common elements among the various perceptions.[501] Due to the controversial discussions, also within the domestic legal systems, it seems not without difficulty to deduce common elements that could constitute an international rule of law.[502] Although problems of this kind are increasingly discussed under the broader topic of a global administrative law[503] or a growing international administrative law for foreign investment,[504] the state of research on this point remains in its infancy.[505]

[500] For general criticism on legal transplants, see P. Legrand, 'The Impossibility of Legal Transplants', Maastricht J. Europ. & Comp. L. 4 (1997), p. 111.

[501] For a comparative analysis at the European level, see A. von Bogdandy and P. Cruz Villalón (eds.), *Handbuch Ius Publicum Europaeum* (2007) , Vol. 1.

[502] This is also admitted by Schill (above fn. 2), p. 41.

[503] On the rapidly growing literature on global administrative law, see, e.g. B. Kingsbury, N. Krisch and R. B. Stewart, 'The Emergence of Global Administrative Law', Law & Contemp. Probs. 68 (2005), p. 15; N. Krisch and B. Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order', EJIL 17 (2006), p. 1; E. Schmidt-Aßmann, 'Die Herausforderung der Verwaltungsrechtswissenschaft durch die Internationalisierung der Verwaltungsrechtsbeziehungen', *Der Staat* (2006), p. 315; D. C. Esty, 'Good Governance at the Supranational Scale', Yale L.J. 115 (2006), p. 1490; and M. Ruffert, 'Perspektiven des Internationalen Verwaltungsrechts', in C. Möllers, A. Voßkuhle and C. Walter (eds.), *Internationales Verwaltungsrecht* (2007); see also G. Van Harten and M. Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law', EJIL 17 (2006), p. 121, considering international investment arbitration as the clearest example of global administrative law; for a special focus on the rule of law, see D. Dyzenhaus, 'The Rule of (Administrative) Law in International Law', Law & Contemp. Probs. 68 (2005), p. 127; and C. Harlow, 'Global Administrative Law', EJIL 17 (2006), p. 187.

[504] See Dolzer (above fn. 73), p. 970.

[505] See also McLachlan, Shore and Weininger (above fn. 63), pp. 205–206.

Further problems result from the practice that a comparative approach draws primarily from legal systems having a strong rule of law tradition – thus mainly ideas originating from European or American legal thinking. Would it, in this case, be legitimate to apply such ideas in a dispute between an investor and a host country of a very different legal background or a weak rule of law tradition? Would it rather be appropriate to base a decision in such a dispute on the perceptions of the legal traditions actually involved? What rule of law perception should ultimately be applied if the home and the host country possess contradicting concepts of the rule of law? Of course, these questions would be dispensable if national rule of law traditions produced universally applicable general principles of law in the sense of Article 38(1)(c) of the ICJ Statute.[506] Then, such general principles of law would be directly applicable in an investment dispute and would not need to be referred to as an argumentative tool for the construction of a norm like fair and equitable treatment.

In summary, it appears that the concept of the rule of law, at least at the international level, is still relatively indeterminate in itself and is therefore incapable of alleviating the burden of arbitral tribunals to provide a comprehensively reasoned justification for their decisions.

[506] Thereon, see Brownlie (above fn. 129), pp. 16–17.

6 Fair and equitable treatment and justice

A Fair and equitable treatment as an embodiment of justice

The following observations endeavour to discuss and evaluate the concept of fair and equitable treatment based on the supposition that fair and equitable treatment is often considered as an embodiment of justice.[507] That is to say that the concept of fair and equitable treatment expresses ideas of justice and moral ethics and that, therefore, the application of the norm aims to establish a just relationship between the host state and the foreign investor. To this end, an attempt is made to disclose the interrelatedness of fair and equitable treatment and different concepts of justice, before turning more generally to the rise of the idea of justice in international law and providing a brief survey of selected theories of justice in international relations.

1 *Connections between fair and equitable treatment and justice*

A connection between fair and equitable treatment and justice emanates, at first, from the literal sense of the notions of 'fair' and 'equitable', which are frequently circumscribed by terms such as 'impartial', 'just', 'free from bias or prejudice' and 'conformable to principles of justice and right'.[508] Of course, such commonplaces are insufficient for the formulation of a doctrinal concept, but they do give an initial hint at the connectedness between fair and equitable treatment and justice. Due to the choice of treaty-makers in favour of such wording, it may be

[507] Similarly, see, e.g. Frick (above fn. 201), p. 92; and Muchlinski (above fn. 51), pp. 635–636; see also the tribunal's reasoning in *Sempra Energy International* v. *Argentina* (above fn. 303), considering, at para. 300, fair and equitable treatment as 'a standard which serves the purpose of justice'.

[508] Garner (ed.) (above fn. 134).

presumed that it was intended to relate fair and equitable treatment to ideas of justice in order to integrate these ideas into the investor–state relationship.

Another, much stronger hint in this direction is given by the fact that fair and equitable treatment, on various occasions, has been associated with notions of equity.[509] Thereby, fair and equitable treatment may be considered to be an explicit stipulation of equity, forming then part of fair and equitable treatment as a legal norm.[510] Alongside the controversy on the notion of equity in international law,[511] it appears universally accepted that equity belongs to a wider conception of justice.[512] In the context of fair and equitable treatment, different uses of equity may materialise in a number of ways:[513] first, the frequently emphasised fact-specific nature of fair and equitable treatment and the need to carry out a case-by-case analysis represent forms of individualised justice, adapting the investment regime to the needs of the specific fact situation. Fair and equitable treatment also introduces notions of fairness and reasonableness into the process of legal reasoning, which are expressed by principles such as good faith, estoppel and abuse of rights. Furthermore, fair and equitable treatment makes use of

[509] See Schwarzenberger (above fn. 201), p. 221; E. Lauterpacht, *Aspects of the Administration of International Justice* (1991), p. 122; Vasciannie (above fn. 2), pp. 145–147; Schreuer (above fn. 455), p. 365; Klein Bronfman (above fn. 2), pp. 663–664; Lowe (above fn. 323), p. 73; Muchlinski (above fn. 2), pp. 531–532; A. von Walter, 'The Investor's Expectations in International Investment Law', in A. Reinisch and C. Knahr (eds.), *International Investment Law in Context* (2008), p. 175 at pp. 194–195; and F. Francioni, 'Equity in International Law', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, 2nd edn (Online Publication) (2009), mn. 21. However, this does not indicate that arbitrators are entitled to decide *ex aequo et bono*. The latter is unanimously accepted: see, e.g. Yannaca-Small (above fn. 2), p. 40; Schreuer (above fn. 455), p. 365; Kreindler (above fn. 2), p. 1; and Dolzer and Schreuer (above fn. 54), p. 148. It has been declared by the ICJ that there exists a distinction between a decision *ex aequo et bono* and one in which equity plays a part in *North Sea Continental Shelf Cases (Federal Republic of Germany* v. *Denmark; Federal Republic of Germany* v. *Netherlands)*, ICJ (Judgment of 20 February 1969), at para. 88; see also Franck (above fn. 345), pp. 54–56. On decisions *ex aequo et bono* generally, see Lauterpacht (above fn. 509), pp. 117–152.

[510] See *North Sea Continental Shelf Cases (Federal Republic of Germany* v. *Denmark; Federal Republic of Germany* v. *Netherlands)* (above fn. 509), at para. 88; see also Jennings and Watts (above fn. 124), p. 44.

[511] See, e.g. Schachter (above fn. 119), pp. 55–91; and M. W. Janis, 'Equity in International Law', in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Consolidated Library Edition (1995) , Vol. II/V, p. 109 at p. 112.

[512] See already, in the sense of a corrective justice, Aristotle, *Nicomachean Ethics*, Book V, Chapter 14.

[513] On the different uses of equity, see Schachter (above fn. 119), pp. 55–56.

equity in a sense of distributive justice, since it aims to promote and protect investments so as to create wealth for all parties involved in the investment process.

Among these examples, the principle of good faith has met with wide recognition in the discussion regarding the concept of fair and equitable treatment. In their analysis of a possible breach of fair and equitable treatment, arbitral tribunals frequently highlight good faith as a guiding principle in the relationship between the investor and the host state.[514] Similarly, scholars have adverted to good faith as an underlying scheme that orientates the construction and application of fair and equitable treatment.[515] Thereby, the notion of good faith is referred to in at least two distinct functions:[516] on the one hand, a more subjective function of good faith requires the parties to a treaty to comply with their obligations in a candid and loyal manner. A more objective function of good faith, on the other hand, rather concerns the process of decision-making being committed – while not distinguishable from the concept of equity – to general considerations of justice.[517] In the context

[514] See, e.g. *S.D. Myers Inc.* v. *Canada* (above fn. 95), at para. 134; *Técnicas Medioambientales, TECMED SA* v. *Mexico* (above fn. 98), at para. 153; *Saluka Investments BV* v. *Czech Republic* (above fn. 132); and *Sempra Energy International* v. *Argentina* (above fn. 303), stating at para. 291 that fair and equitable treatment 'originates in the obligation of good faith' and at para. 298 that 'the principle of good faith . . . is at the heart of the concept of fair and equitable treatment'.

[515] See Weiler (above fn. 104), pp. 82–84; Dolzer (above fn. 2), p. 91; A. Kolo, 'Investor Protection vs Host State Regulatory Autonomy during Economic Crisis', JWIT 8 (2007), p. 457 at p. 502; and von Walter (above fn. 509), pp. 195–197.

[516] On the different functions of good faith, see J. F. O'Connor, *Good Faith in International Law* (1991), pp. 122–124; D. Looschelders and D. Olzen, '§ 242 BGB', in D. Looschelders and M. Martinek (eds.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch* (2005), mn. 1078; and R. Kolb, 'Principles as Sources of International Law', NILR 53 (2006), p. 1 at pp. 13 et seq. On good faith in international law, see also B. Cheng, *General Principles of Law* (1953), pp. 105 et seq.; E. Zoller, *La Bonne Foi en Droit International Public* (1977); Verdross and Simma (above fn. 182), pp. 46–48; and T. Cottier and K. N. Schefer, 'Good Faith and the Protection of Legitimate Expectations in the WTO', *New Directions in International Economic Law* (2000), p. 47. In international law, the subjective function of good faith traditionally stands in the foreground, which does not mean that the more objective function is non-existent.

[517] See O'Connor (above fn. 516), pp. 122–123. There exists no uniform understanding of the notions of good faith and equity, neither in international law nor in the different domestic legal traditions. Both notions show considerable functional intersections, especially in what is called here the objective function. For a comparative analysis of good faith in European contract law, see, e.g. J. Stapleton, 'Good Faith in Private Law', *Current Legal Problems* (1999), p. 1; R. Zimmermann and S. Whittaker (eds.), *Good Faith in European Contract Law* (2004); and Looschelders and Olzen (above fn. 516), mn. 1076–1141.

of fair and equitable treatment, the latter function is especially connected with the approach of balancing the interests between host states and foreign investors.

In summary, fair and equitable treatment is indeed closely related to the concepts of equity, good faith and, therefore, justice. This finding may hardly be revealing, for the simple reason that the notions of justice or equity are, by no means, less indeterminate than fair and equitable treatment. Nevertheless, the various connections between fair and equitable treatment and justice underline the idea of justice in the context of international investment law. However, since arbitral tribunals are not entitled to decide *ex aequo et bono*, a construction of fair and equitable treatment, as an embodiment of justice, does not imply that any kind of justice-based argumentation is able to legitimise a particular decision on fair and equitable treatment. Rather, the concept of fair and equitable treatment has to identify particular aspects of the idea of justice which may be of relevance in the application of this norm. This idea of justice has a fickle history in international legal relations.

2 *The rise of justice in international legal relations*

In various ancient and medieval perceptions of international law, the idea of justice was deeply rooted in conceptions of a universal natural or divine order as the fount of moral and legal norms regulating the international relations of that time.[518] This order provided for behavioural standards guiding the actions of sovereigns and states as exemplified by the doctrine of *bellum iustum*[519] – a doctrine that also exposed the shortcomings of such an idea of justice and its susceptibility to political and ideological instrumentalisation. With the dawn of the modern system of nation states, a school of positivist thought emerged that focused on the empirical analysis of the practice of sovereign states, gradually eclipsing the idea of natural justice.[520]

[518] On the history of international law and justice, see, e.g. A. Nussbaum, *A Concise History of the Law of Nations*, rev. edn (1954); Graf Vitzthum (above fn. 129), pp. 43 et seq.; and A. Orakhelashvili, 'Natural Law and Justice', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, 2nd edn (Online Publication) (2009); for a comprehensive historical survey of justice-related political thinking in international relations, see T. L. Pangle and P. J. Ahrensdorf, *Justice Among Nations* (1999).

[519] On this doctrine, see Nussbaum (above fn. 518), especially pp. 36 et seq.; and Pangle and Ahrensdorf (above fn. 518), pp. 73 et seq.

[520] See Shaw (above fn. 125), pp. 25–26.

The analysis of the behaviour and the will of states became the dominant method in the description of international legal relations. This traditional conception of international law is mainly related to a realist understanding of international politics drawing a sceptical picture of anarchical relations between states struggling for survival and power that leaves little room for ideas of justice at an international level.[521] Such an understanding reduced international law to a legal frame for the coordination of national spheres of activity and interest in order to achieve a peaceful coexistence of nation states based on the guiding principles of sovereignty, equality and reciprocity.[522] According to the latter, the validity of international law was considered to emanate exclusively from the 'free will' of sovereign states, and '[r]estrictions upon the independence of states cannot ... be presumed'.[523] Therefore, this international law of coordination and coexistence served the national interests of each state, rather than expressing more far-reaching aims or interests common to all states or human beings.

Beyond this coordinative function, another layer of international law developed that was concerned with the cooperation of states in addressing common needs and interests primarily through the creation of international institutions.[524] International law in this sense is founded on political insights that the cooperation of interdependent states is capable of optimising parallel state interests and that thereby international welfare effects may be generated.[525] While this understanding of international relations places emphasis on a – functional or general – process of integration, it does not challenge the basic perceptions of

[521] For some of the main representatives of political (neo-)realism, see H. J. Morgenthau, *Politics Among Nations*, 2nd edn (1954); G. Schwarzenberger, *Power Politics*, 3rd edn (1964); and K. N. Waltz, *Theory of International Politics* (1979).

[522] See W. Friedmann, *The Changing Structure of International Law* (1964), p. 60; L. Henkin, *International Law* (1995), p. 100; and M. Nettesheim, 'Das kommunitäre Völkerrecht', JZ (2002), p. 569 at pp. 570–571.

[523] *The Case of the S.S. 'Lotus' (France* v. *Turkey)*, Permanent Court of International Justice (Judgment of 7 September 1927), at 18.

[524] On the development from coordinative to cooperative international law, see especially Friedmann (above fn. 522), writing at p. 68: '[T]he term "cooperative international law" is tentatively chosen to describe the growing of international legal relationships and organisations which are ... concerned with the regulation of experiments in positive international collaboration. The legal and institutional problems posed by this developing and increasingly important branch of international law are essentially of a different character from those posed by traditional international law.' See also G. Abi-Saab, 'Whither the International Community?', EJIL 9 (1998), p. 248; and C. Tomuschat, 'International Law', RdC 281 (1999), p. 9 at pp. 56 et seq.

[525] See R. O. Keohane and J. S. Nye, *Power and Interdependence* (1977).

traditional international law.[526] In spite of the tremendous augmentation of international law through the formation of manifold international organisations and the pertaining international agreements, the structure of this international law of cooperation remained a voluntaristic system of independent states committed to the traditional values of international law.[527]

A more fundamental change of international law is said to emanate from the increasingly communitarian character of the international legal system.[528] This character is displayed by far-reaching developments in various fields of international law in which a minimum consensus on certain values is deemed to exist, being acknowledged across cultural and political boundaries.[529] It is observed that beneath these developments, which have taken place especially in the fields of human rights protection, environmental law or international economic law, a misty idea of justice is beginning to materialise and is infusing international law with moral elements.[530] However, the extent to which this rise of justice is, in fact, reflected in the current status of international law, or whether it is a mere expression of aspirations and beliefs, is of course open to debate. While to some, this development signifies a shift from traditional paradigms of public international law to a radical vision of Kantian world law ('*Weltrecht*'),[531] others detect profound frictions within the global society and doom to failure any endeavour of finding common values or over-arching rationalities.[532] Such controversies notwithstanding, it appears indeed possible to search for the moral foundations of the

[526] See Nettesheim (above fn. 522), p. 571.
[527] See also Henkin (above fn. 522), pp. 106–107.
[528] On the concept of the international community, see, e.g. R.-J. Dupuy, 'Communauté internationale et disparités de développement', RdC 165 (1979 IV), p. 9; H. Mosler, *The International Society as a Legal Community* (1980); Tomuschat (above fn. 524), pp. 72 et seq.; A. L. Paulus, *Die internationale Gemeinschaft im Völkerrecht* (2001); and C. Warbrick and S. Tierney, *Towards an 'International Legal Community'?* (2006).
[529] See B. Simma and A. L. Paulus, 'The "International Community"', EJIL 9 (1998), p. 266 at pp. 272–276; and especially Nettesheim (above fn. 522), pp. 571 et seq., referring to this layer of international law as 'communitarian international law' ('*kommunitäres Völkerrecht*').
[530] See D. Thürer, 'Modernes Völkerrecht', ZaöRV (2000), p. 557; see also A. Bleckmann, *Grundprobleme und Methoden des Völkerrechts* (1982), pp. 270 et seq., who is already attributing these changes in the understanding of international justice to the layer of cooperative international law.
[531] See the copious study undertaken by A. Emmerich-Fritsche, *Vom Völkerrecht zum Weltrecht* (2007).
[532] See A. Fischer-Lescano and G. Teubner, 'Fragmentierung des Weltrechts', in M. Albert and R. Stichweh (eds.), *Weltstaat und Weltstaatlichkeit* (2007), p. 37; from the perspective

international legal system and to identify at least a minimum of shared values. Before such an attempt is undertaken in the context of fair and equitable treatment, various core elements of international justice theories will be adumbrated below.

3 *Theories of international justice*

'What is Justice?'[533] This is, of course, an extremely far-reaching and fundamental question that is discussed in a series of academic fields and the scope of which is by far not reduced when transposing it to the international level.[534] This is why, in the following, only a very limited survey of theories addressing the question of international justice can be presented. Thereby, a certain emphasis is placed on the ideas of John Rawls, who has especially influenced the discussion on international justice within political philosophy.

(a) Cosmopolitanism

As a basic presumption, cosmopolitanism considers all humanity to be part of a global community which is able to share a common idea of morality and justice.[535] A liberal variant of cosmopolitanism endeavours to apply the principles of Rawls' *Theory of Justice*[536] at a global level. In this book, Rawls proposes that, in a fictitious original position, every member of society decides general principles of justice from behind a veil of ignorance, which blinds them inter alia about their place in society, their social status, their religion or the distribution of natural assets and abilities, in order to agree on principles that are fair to all.[537] Rawls argues that this original decision process would yield two principles of justice: first, 'each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others';[538] and second, social and economic inequalities are to be arranged so that (a) offices and positions must be open to everyone under conditions of fair

of critical legal studies, see A. Carty, 'Critical International Law', EJIL 2 (1991), p. 66 at pp. 68–70.
[533] See H. Kelsen, *Was ist Gerechtigkeit?* (1953).
[534] For an overview, see, e.g. A. Tschentscher, *Prozedurale Theorien der Gerechtigkeit* (2000); the essays in K. Ballestrem (ed.), *Internationale Gerechtigkeit* (2001); and T. Pogge and D. Moellendorf (eds.), *Global Justice* (2008).
[535] Most cosmopolitans thereby refer to the idea expressed in the Third Definitive Article of Kant (above fn. 161), stipulating that a law of world citizenship shall exist that is grounded on universal hospitality.
[536] J. Rawls, *A Theory of Justice* (1971). [537] Ibid., pp. 136 et seq. [538] Ibid., p. 60.

equality of opportunity, and (b) they are to be of the greatest benefit to the least-advantaged members of society ('difference principle').[539] In connection with these principles of justice, Rawls also establishes priority relations to ensure that greater equality is not achieved on the account of liberty and that inequalities are only justified if they are to the benefit of the least well off.[540]

While Rawls designed his theory for a society within the relatively closed system of a nation-state, some cosmopolitans question why representatives of countries would not choose the same principles of justice for the global society.[541] Thereby, it is claimed that nationality, like race, gender or social class, is just one further inescapable contingency that cannot be influenced by the individual, and which therefore must be blanked out by a global veil of ignorance.[542] In this vein, the growing interdependence of states and the emergence of other international actors and institutions are conceived to form an open and interdependent system of global cooperation, in which Rawls' principles of justice can and should apply.[543] In particular, the difference principle is attempted to be transposed to the global level, according to which distributive obligations would be established among persons of diverse citizenship analogous to those of citizens of the same state.[544] However, while the point concerning the arbitrariness of nationality has some persuasive clout, it appears hardly possible to imagine global institutions that are actually able to realise such a vision of justice.

Another strand of cosmopolitanism seeks to establish a global order of world citizens through a community of communication in which a free discourse leads to a consensus regarding global rules and institutions.[545] However, it is also acknowledged that the political culture of the world society has not yet developed so far that a global society- and identity-building, in the sense of world internal politics ('*Weltinnenpolitik*'), appears possible.[546] A cosmopolitan vision of a law of world citizens is thus dependent on international institutions committed to the democratisation

[539] Ibid., p. 302; on the difference principle, see especially pp. 76 et seq.
[540] See ibid., pp. 302–303. [541] See B. Barry, *Theories of Justice* (1989), Vol. 1, p. 189.
[542] T. W. Pogge, *Realizing Rawls* (1989), p. 247.
[543] See C. R. Beitz, *Political Theory and International Relations* (1979), p. 132; and Pogge (above fn. 542), pp. 255 et seq.
[544] Beitz (above fn. 543), p. 128; and Pogge (above fn. 542), pp. 246 et seq.
[545] See K.-O. Apel, 'Diskursethik als Verantwortungsethik', in G. Schönrich and Y. Kato (eds.), *Kant in der Diskussion der Moderne* (1996), p. 326 at pp. 350 et seq.
[546] See J. Habermas, *Die postnationale Konstellation* (1998), p. 163.

of states and the existence of a real global discourse involving a global public and an international civil society.[547] Nevertheless, there exists a growing awareness and discussion about the way in which discourse ethics and the pertaining communicative techniques are able to broaden the legitimatory basis of international relations and institutions.[548]

(b) Communitarism

Communitarism, in contrast, rejects the cosmopolitan vision of a world of individuals sharing universal principles of justice merely because they belong to a global community of humankind.[549] Rather, communitarism emphasises the embeddedness of the individual in concrete social, ethnic, linguistic, historic and cultural structures, from which the ability to act as a moral agent flows.[550] Therefore, the starting point of Rawlsian cosmopolitanism is already criticised:

> [T]he question most likely to arise in the minds of the members of the political community is not, what would rational individuals choose under universalising conditions of such-and-such sort? But rather, what would individuals like us choose, who we are situated as we are, who share a culture and are determined to go on sharing it?[551]

While communitarians accordingly emphasise that the domain of justice remains foremost within a particular community, it is contentious as to what kind of community – from small neighbourhoods, to states, or even transnational networks – is conceived as constitutive for the development of shared principles of justice.[552] Apart from that, at least some proponents of communitarism do not generally deny that moral obligations may exist also at the global level, but they propose different priorities claiming that the moral connections to fellow citizens are usually stronger than those to others.[553] To such an extent, a differentiation between 'thick' and 'thin' justice is proposed.[554]

[547] See Paulus (above fn. 528), p. 138.
[548] See the articles in P. Niesen and B. Herborth (eds.), *Anarchie der kommunikativen Freiheit* (2007); comprehensively on justice and justification processes, see R. Forst, *Das Recht auf Rechtfertigung* (2007).
[549] For a general communitarian critique on the theory of Rawls, see, e.g. M. J. Sandel, *Liberalism and the Limits of Justice* (1982).
[550] See, e.g. A. MacIntyre, *After Virtue* (1981), pp. 6–11.
[551] M. Walzer, *Spheres of Justice* (1983), p. 5. [552] See Paulus (above fn. 528), pp. 36–38.
[553] See M. J. Sandel, *Democracy's Discontent* (1996), p. 343.
[554] See M. Walzer, *Thick and Thin* (1994), especially pp. 63 et seq.

Arguably, communitarians are right in reminding us about the importance and responsibility of domestic communities as main entities regarding the means of achieving justice in reality. Beyond that, however, they tell us very little about international justice, or even about the particular aspects of international justice that could be relevant for the application of international investment norms like fair and equitable treatment. The latter is at least true if communitarians do not want to be understood in the way that international justice is inexistent and that, therefore, economic activities of foreigners should not be protected at all. Anyway, possible considerations as to the non-protection of international economic activities subside if a state has accepted legally binding obligations guaranteeing such rights of foreigners. However, although a growing number of such international legal obligations exists, cosmopolitan one-world visions have also not yet materialised to the extent that any distinction between foreign and domestic investors would be impermissible per se. A theory that presents, to some extent, a compromise between both conflicting views is presented by Rawls' own advancement of his theory at the international level.

(c) Rawls' *Law of Peoples*

In *The Law of Peoples*,[555] Rawls developed his own notions of international law and justice by applying a methodology similar to, but more general than, the approach he developed in *A Theory of Justice*. Rawls offers a 'realistic utopia'[556] of the international relations in which peoples would convene in an original position (this is a second original position additional to the original position at the domestic level)[557] so as to identify common principles of justice from behind a veil of ignorance. Thereby, he chooses peoples and not states as international actors in order to dissociate his theory from extreme notions of sovereignty granting states unrestricted autonomy, and because peoples in contrast to states possess a moral nature.[558] In order to be realistic, Rawls takes peoples as

[555] J. Rawls, *The Law of Peoples* (1999); for a comprehensive discussion of the theory, see, e.g. R. Martin and D. A. Reidy (eds.), *Rawls's Law of Peoples* (2006).
[556] Rawls (above fn. 555), pp. 11 et seq. [557] See ibid., p. 32.
[558] See ibid., pp. 23 et seq. See, however, H.-J. Cremer, 'John Rawls' "The Law of Peoples"', in H.-J. Cremer *et al.* (eds.), *Tradition und Weltoffenheit des Rechts* (2002), p. 97 at pp. 121–122, arguing that Rawls could have based his theory just as well on the notion of states if he had taken notice of the changed understanding of sovereignty in international law. On the notion of sovereignty, see also Chapter 7, section A, '1(a) Meaning of sovereignty in the context of international investment law'.

they are and distinguishes mainly three types of peoples.[559] The first type are 'reasonable liberal peoples' who have adopted, in a first original position, principles of domestic justice like the ones outlined in Rawls' earlier writings. The second type are 'decent hierarchical peoples' who, while not being liberal and democratic, are not aggressive, reveal a common idea of justice and adhere to basic human rights.[560] A third category of non-well-ordered states comprises aggressive 'outlaw states' and 'burdened societies', whose political, social and economic circumstances make their achieving a well-ordered regime, at the very least, difficult.[561]

In an ideal theory, Rawls then enquires which principles of justice reasonable peoples would adopt. He lists the following eight principles as the basic charter of the Law of Peoples: (1) peoples are free and independent; (2) peoples are to observe treaties and undertakings; (3) peoples are equal; (4) peoples are to observe the duty of non-intervention; (5) peoples have the right of self-defence; (6) peoples are to honour human rights; (7) peoples are to observe certain specified restrictions in the conduct of war; and (8) peoples have a duty to assist other peoples living under unfavourable conditions.[562] In a second step, Rawls construes his ideal theory not as a closed club of reasonable peoples, but argues that decent societies, due to their basic structure as rational peoples moved by appropriate reasons, would also agree to the same principles.[563] While the relationship between reasonable and decent societies is characterised by mutual respect and the adherence to the principles of the Law of Peoples, the relationship to outlaw states and burdened societies is discussed in a non-ideal theory describing how to deal with such non-well-ordered peoples.[564]

Altogether, Rawls tries to provide a non-ethnocentric notion of international justice that seeks to establish an overlapping consensus within a pluralistic society of peoples.[565] The international society, as described by Rawls, is a liberal society that leaves room for a number of diverging

[559] See Rawls (above fn. 555), pp. 4 and 63, proposing in total five types of domestic societies.
[560] See ibid., pp. 67 and 88. [561] Ibid., p. 90. [562] Ibid., p. 37. [563] Ibid., p. 63.
[564] Ibid., pp. 89 et seq. This *modus vivendi* with non-well-ordered societies especially includes differentiated criteria for military interventions in order to protect human rights as well as a duty to assist burdened societies.
[565] Ibid., pp. 121 et seq.; see also Paulus (above fn. 528), pp. 157–158.

priorities and values, although they are not themselves liberal and democratic. Therefore, reasonable liberal peoples need to tolerate and respect other well-ordered societies as long as a consensus of overlapping political values exists, upon which the Law of Peoples can be based. Nevertheless, such consensus represents a minimum consensus among peoples and not a community of individuals, and it does not involve a system of distributive justice, as demanded in the domestic context.[566] On the one hand, Rawls accordingly sustains the distinction between international and domestic justice, but, on the other hand, does not deny that a minimum consensus on principles of international justice is possible.[567]

With regard to fair and equitable treatment, the latter reveals that the search for common principles does not imply the streamlining of every domestic legal and economic system, but only the identification of an overlapping consensus. To some extent, such a minimum consensus seems to exist as regards the *topoi* of fair and equitable treatment that are frequently invoked in arbitral decisions. However, what kind of further principles of justice might be of relevance and how all of this affects the application of fair and equitable treatment will be described with reference to another theory of international justice.

B Franck's theory on fairness in international law

Thomas M. Franck presented a theory on 'Fairness in International Law and Institutions'[568] that is, not only linguistically, apt to describe more deeply the link between fair and equitable treatment and justice.[569] For him, the concept of fairness comprises two aspects – one of which is more procedural, related to 'right process' as a means of achieving legitimacy within a system, the other of which is a more substantive aspect of fairness, especially related to the ideas of distributive justice

[566] Rawls (above fn. 555), pp. 113 et seq.; Rawls thereby expressly rejects the proposals from liberal cosmopolitans which try to achieve distributive justice among the individuals of the world.

[567] In this sense, the first point delineates Rawls' theory from cosmopolitanism, the second point from communitarism.

[568] Franck (above fn. 345); the book is based on a previously held lecture at The Hague Academy of International Law, T. M. Franck, 'Fairness in the International Legal and Institutional System', RdC 240 (1993 III), p. 9.

[569] For an application of Franck's theory on the provision of fair and equitable treatment, see also R. Kläger, 'Fair and Equitable Treatment', JWIT 11 (2010), p. 435.

and equity.[570] These aspects may not always pull in the same direction, because the aspect of legitimacy is deemed to tend towards stability and order within a legal system, while the aspect of equitable justice favours redistributive change within that system.[571] According to Franck, although legitimacy may coincide with justice, 'fairness is the rubric under which this tension is discursively managed'.[572]

1 *Legitimacy*

Turning to legitimacy as one aspect of fairness, Franck emphasises that legitimacy is an attribute of a norm or judgment which conduces to the belief that it is fair, since it was made and is applied in accordance with 'right process', and which therefore promotes voluntary compliance.[573] Franck offers four indicators – determinacy, symbolic validation, coherence and adherence – by means of which the legitimacy of a norm may be assessed.[574] In terms of fair and equitable treatment, questions of legitimacy may arise in two different respects, described in the following.

First, one could question the legitimacy of fair and equitable treatment as a norm and, connected with that, the legitimacy of the whole investment regime in which fair and equitable treatment plays a part. Thereby, a legitimacy crisis of the international investment regime may be attested, due to inequalities in bargaining power at the negotiating stage of an investment treaty and, especially, due to textual indeterminacies and inconsistencies in the application and interpretation of treaty norms.[575] A similar critique attacks fair and equitable treatment itself and denies its legitimacy because of its lack of a clearly defined meaning: '[g]iven the indeterminacy of the standard, it cannot constitute a legitimate norm because it does not provide governments with specific guidance concerning what type of treatment of foreign investors is prohibited'.[576]

In Franck's terminology, these points of criticism relate mainly to the determinacy and coherence of fair and equitable treatment. Thereby, the textual determinacy is considered to display the ability of a text to convey a clear message.[577] To be legitimate, a norm should communicate

[570] Franck (above fn. 345), pp. 7–9. [571] Ibid., p. 7. [572] Ibid.

[573] Ibid., p. 26. On legitimacy in international law, see also comprehensively T. M. Franck, *The Power of Legitimacy among Nations* (1990).

[574] Ibid., pp. 25–46. [575] See especially Franck (above fn. 369), pp. 1584–1587.

[576] Porterfield (above fn. 169), p. 113. [577] Franck (above fn. 345), p. 30.

to its addressees what conduct is permitted and what conduct is out of bounds.[578] Coherence, as another indicator of legitimacy, initially demands that, in the application of a norm, similar cases are generally treated alike.[579] Coherence demands furthermore that a norm being part of a legal system is connected and applied consistently in accordance with the general principles of this legal system.[580] Although the critique appears not to be without reason, it is submitted that the legitimacy deficits of fair and equitable treatment are due to the norm's special characteristics as a flexible and dynamic general clause. Problems of textual indeterminacy and incoherence are only to be resolved by a doctrinal concept that constitutes a solid justificatory foundation for the scope and application of the norm in question. This is exactly what the present analysis is attempting to address by reviewing different arguments for the construction of such a concept.

Second, the legitimacy of norms, executive orders or court decisions is also at stake if the host state is exercising sovereign power against the foreign investor. Since legitimacy covers the procedural aspects of fairness, the question as to the legitimacy of the host state's acts also involves these acts being issued and applied in accordance with the right process. Consequently, one important element of fair and equitable treatment relates to the fair procedures and associated requirements with which an act of the host state has to comply in order to be legitimate. In this sense, fair procedure is also recognised by arbitral jurisprudence as one of the *topoi* of fair and equitable treatment.[581] The importance of fair procedures does not, however, entail that 'the principle of fairness should not have substantive content' and that, therefore, the standard of fair and equitable treatment should only provide procedural and not substantive protection to foreign investors.[582] Such understanding would fail to take into account the second component of fairness – equity – that is considered by Franck to cover the substantive aspects of fairness.[583]

2 *Equity*

Equity has already been described above as being closely related to the concept of fair and equitable treatment. Similarly, Franck highlights

[578] Franck (above fn. 573), p. 57. [579] Franck (above fn. 345), p. 38.
[580] Ibid., p. 41. Coherence in this sense overlaps with Dworkin's notion of 'integrity': see R. Dworkin, *Law's Empire* (1986), pp. 176 et seq.
[581] See Chapter 5, section A, '1 *Topoi* in arbitral jurisprudence'.
[582] See, however, Mayeda (above fn. 2), p. 284. [583] Franck (above fn. 345), p. 7.

equity to be more than a licence for the exercise of judicial caprice and perceives equity as law's justice, expressing such important principles as unjust enrichment, good faith or acquiescence, and considering it as a mode of introducing justice into resource allocation.[584] He also points out:

> Justice, as an augmentation of law, is also needed to protect those interests not ordinarily recognised by traditional law, such as the well-being of future generations and the 'interests' of the biosphere. Finally, justice has a tempering role to play when the apportionment of goods ... occurs in the context of an almost infinite number of possible geographical, geological, topographical, economic, political, strategic, demographic, and scientific variables. In such cases 'hard and fast' rules of apportionment can be applied only at the risk of achieving results which lead to moral outrage and law's *reductio ad absurdum*. In that sense, fairness discourse which aims to temper the imperative of legitimacy with that of justice serves not to undermine but to redeem the law.[585]

Franck thus insinuates that especially general clauses, in comparison to hard and fast rules, are of a multi-layered complexity that, on the one hand, leaves more room in the application of such a norm, but, on the other hand, allows producing more reasonable and just answers by directly invoking equitable standards.[586] In relation to fair and equitable treatment this means that the norm's determinacy defects do not necessarily lead to its illegitimacy, but rather provide the possibility of introducing notions of justice and fairness into its concept as a norm.[587] The tension between legitimacy and equity appears, therefore, to be an element that is inherent in the very nature of fair and equitable treatment.

Accordingly, it is not only the textual precision of a rule that counts, but also its ability to achieve just results. This flexibility of a norm is of special importance in fields of law that are coined by their high complexity and the intricacy of the interests involved, as is the case with international investment law. However, Franck reminds us, '[t]he power of a court to do justice depends ... on the persuasiveness of the judges' discourse, persuasive in the sense that it reflects not their own, but society's value preferences'.[588] Fair and equitable treatment invites

[584] See ibid., pp. 47 et seq. [585] Ibid., p. 79.
[586] To such an extent Franck also differentiates between 'sophist norms' and 'idiot norms': see Franck (above fn. 573), pp. 74–75.
[587] See also Franck (above fn. 345), p. 33. [588] Ibid., p. 34.

arbitrators 'to do justice', but thereby also discloses the tension that relates to the legitimacy of their decisions. According to Franck, such tension is to be managed within a fairness discourse.

3 *Fairness discourse*

Based on Rawlsian ideas, Franck describes his fairness discourse as a process of reasoning and negotiation that seeks to balance the tension between stability (expressed by the struggle for legitimacy, right process, good order and security) and change (favouring a just redistribution of wealth and resources).[589] Franck establishes two preconditions for any fairness discourse:[590] the first one is the moderate scarcity of the world's resources that are to be distributed. He explains that only when everybody can expect to have a share, but no one can expect to have all that is desired, does the question of fairness in the allocation of this resource arise.[591] The second precondition is the existence of a global community sharing some basic perceptions of what is unconditionally unfair.[592] These preconditions appear to be fulfilled in the case of fair and equitable treatment, since the resources at stake are not inexhaustible, but exist in moderate scarcity. The relevant resources in international investment law are: capital on the one hand and, for example, natural resources, cheap employees and purchasing power on the other. Furthermore, although the existence of a real community remains contentious at the international level, international investment law seems to have developed basic perceptions of what is to be considered as clearly unfair. Such perceptions are reflected, for instance, in the *topoi* as developed by arbitral jurisprudence. Even if these *topoi* merely represent a minimum overlapping consensus, they allow for a meaningful scrutiny of whether or not a certain type of conduct is ultimately fair. Therefore, it appears indeed possible to initiate a fairness discourse on fair and equitable treatment.

Franck furthermore acknowledges that the fairness discourse may take place in different fora, of which international investment law is one where the pull to stability and the push for change is

[589] Ibid., p. 7; on the tension between order and justice in international law, see similarly H. Bull, *The Anarchical Society* (1977), pp. 77 et seq.; and M. Koskenniemi, 'The Police in the Tempel', EJIL 6 (1995), p. 325 at pp. 328–330; on stability and change in international law, see also H. Lauterpacht, *The Function of Law in the International Community* (1933), pp. 245 et seq.

[590] Franck (above fn. 345), pp. 9–22. [591] Ibid., p. 10. [592] Ibid., pp. 10–11.

becoming exceptionally apparent.[593] Franck describes important characteristics of such a discourse in international investment law as follows:

> The discourse may be dispute-specific or it may be general and normative. In either instance, however, it will be about the tension between change and stability, as also about the extent to which law should reflect political or economic imperatives. It will also be about balancing the social need to induce capital growth against political claims to redistributive justice. However intense the dispute, there is more at stake for the system than the specific interests of the disputing parties. The most important source of development capital for poor countries is the private sector of rich ones. That makes it an essential global priority that a transnational compact between investors and host governments be built – investment agreement by investment agreement, treaty by treaty, and state practice by state practice – and that its perceived fairness in text and in operation give it the elasticity needed to accommodate the inevitable tension between the political pull to change and the economic rationale for stability.[594]

To shape the fairness discourse further, Franck has introduced two 'gatekeepers' of the fairness discourse serving as indicators of what is considered to be unconditionally unfair.[595] The first gatekeeper is described as a 'no-trumping' condition, meaning that no participant of the fairness discourse can make claims which automatically trump the claims made by other participants.[596] This gatekeeper is necessary because any automatic trumping entitlement would vitiate, *a priori*, any attempt to balance the tension between elements of stability and change. The second gatekeeper aims at delineating the broad notion of distributive justice and is called the 'maximin' condition[597] – an adaptation of Rawls' controversial 'difference principle'. This condition means that inequalities in the distribution of goods are only justifiable if the inequality has advantages not only for its beneficiaries, but also for everyone else.[598] While the reach of a possible obligation of maximising wealth and resources is deeply contested among cosmopolitans and communitarians, it must be noted that investment agreements are based on the idea that foreign investments are able to further the just distribution of capital, know-how, labour and natural resources in order

[593] Ibid., pp. 438 et seq. [594] Ibid., p. 441. [595] See ibid., pp. 14 et seq.

[596] Ibid., pp. 16–18. [597] Thereto see ibid., pp. 18–22.

[598] Ibid., p. 18. For a critical discussion of Franck's maximin condition, see J. Tasioulas, 'International Law and the Limits of Fairness', EJIL 13 (2002), p. 993 at pp. 1014 et seq.

to create welfare effects on all sides.[599] Nevertheless, it seems that welfare considerations in this sense should not hastily be excluded from a fairness discourse, but rather be considered in the pertinent process of balancing.

C Fairness discourse on fair and equitable treatment

Fair and equitable treatment, with its explicit reference to notions of fairness and equity, may be considered as an invitation by international treaty-makers to proceed by way of a fairness discourse. Such a discoursive approach is already inspired by basic Socratic ideas that practical questions should be dealt with within a free discourse, which is deemed crucial for the justification of normative power and the establishment of a just legal system.[600] The following remarks try to identify elements of a model of a fairness discourse on fair and equitable treatment based on the already discussed notions of international justice. Such discourse aims to increase the legitimacy of arbitral decisions on fair and equitable treatment by making them rationally revisable. In this sense, the fairness discourse has to structure the arguments, which are advanced in order to justify particular decisions, and to discover ways that are capable of resolving the tension between differing arguments.

1 *Stages of a legal discourse*

A differentiation is needed between distinct stages of a fairness discourse. At the very least, a distinction is to be made between a discourse on the establishment of just norms and one on the just application of norms.[601] In this vein, Franck alludes that the discourse may be general and normative, or dispute-specific.[602] This entails that a discourse may take place at the stage of norm-creation, which aims at the establishment of fair norms for the global regulation of international

[599] See, e.g. the preamble of the 2005 Germany Model BIT. To what extent investments agreements are, in fact, able to attract foreign investment flows is contentious: see Chapter 2, section B, '2 The effectiveness of international investment agreements'.

[600] See Habermas (above fn. 116); for an overview and a critical discussion on different discourse theories, see, e.g. A. Engländer, *Diskurs als Rechtsquelle?* (2002); and B. Rüthers, *Rechtstheorie*, 3rd edn (2007), pp. 352 et seq.

[601] Thereon, see generally Alexy (above fn. 117), pp. 52–70.

[602] Franck (above fn. 345), p. 441.

investments. Nevertheless, a discourse may also take place at a subsequent stage in which an already established norm is applied to specific fact situations. As fair and equitable treatment is not concerned with the creation of norms, but represents itself a norm that is to be applied, the respective fairness discourse takes place at this subsequent stage. However, as the example of fair and equitable treatment reveals, both stages of a discourse are not fully separable, since, due to the relative indeterminacy of its language, a part of the discourse has been shifted from the first to the second stage.

Franck recognises this second stage of discourse by highlighting 'process determinacy' as a means of overcoming textual indeterminacy through a clarifying process that enlightens the ambiguous meaning of a norm.[603] This clarifying process must be governed by a court or other authority which is recognised as legitimate by the addressees of the norm and which applies coherent argumentative principles.[604] However, as the legitimacy of the decision-maker is ultimately dependent on the quality of the issued decisions, the legal discourse at the application stage of a norm also affects the decision-maker itself.[605]

The discourse on the application of a norm is, above all, an analysis of the rationality of the judicial decisions that have applied this norm. The rationality of a judicial decision presupposes that the arguments, upon which the decision is built, are true, correct and acceptable and that the particular decision may be deduced from these arguments.[606] Therefore, to make a decision revisable on a rational basis, it is necessary that the decision unfolds all relevant arguments and the relevant reasons why some arguments are allocated more weight than others. Thus, the discourse has to provide convincing reasons that justify a particular decision. This is unproblematic if the discourse at the norm-creation stage has already generated a simple structured rule that features a clear-cut literal meaning. Usually, however, and especially when considering general clauses like fair and equitable treatment, the literal

[603] Franck (above fn. 573), pp. 61 et seq.

[604] Ibid., pp. 61 and 64.

[605] On the rationality of review, see also Chapter 7, section C, '3 Rationality deficits'.

[606] See R. Alexy, 'Die logische Analyse juristischer Entscheidungen', in R. Alexy *et al.* (eds.), *Elemente einer juristischen Begründungslehre* (2003), p. 9 at p. 12. Moreover, Alexy distinguishes between an internal justification, concerning the logical deduction from the premises, and an external justification, concerning the trueness of the premises. The discourse on the rationality of a decision mainly concerns the external justification. On internal and external justification, see also J. Wróblewski, 'Legal Decision and its Justification', in H. Hubien (ed.), *Legal Reasoning* (1971), p. 409 at p. 414; and Alexy (above fn. 445), pp. 273 et seq.

meaning of a norm is not absolutely clear in this sense, but reveals a 'penumbra of uncertainty' giving a certain leeway to the decision-maker.[607] In that case, the legal discourse at the stage of the application of this norm has to search for other second-order arguments that sustain a certain decision. Arguably, such discourse delivers manifold arguments that are to be considered in deciding a case, but which do not always point in the same direction. In the sense of a fairness discourse, the arguments may be attributed to one of the conflicting poles of stability and change, and the tension resulting therefrom has to be balanced in the individual case. To be able to carry out such a balancing operation, it must first be determined which elements of fair and equitable treatment stand for stability and which stand for change.

2 *Aspects of stability and change*

Arguments that can be introduced into the discourse on fair and equitable treatment may be of different kinds. The forms of arguments may especially relate to the relevant text of an investment agreement, to precedents and doctrine, as well as to certain legal objectives.[608] However, as a consequence of the gateway character of fair and equitable treatment within the relatively fragmented international legal system, these arguments are not necessarily limited to the text of the particular investment agreement in dispute. Rather, systemic arguments may also derive from other legal texts or objectives of other sub-systems of international law if they can be systemically integrated into the concept of fair and equitable treatment.[609] In the present discussion on fair and equitable treatment, alongside the interpretation of a specific investment treaty text, arguments relating to precedents have played a dominant role. To such an extent, the *topoi*, as identified by arbitral tribunals, are apt to provide valuable arguments for the discourse. However, the *topoi* do not describe merely a conglomeration of past cases, but are also representative of a deeper 'overlapping consensus' on objectives that are commonly pursued by all parties to investment agreements.

[607] See Hart (above fn. 464), p. 12; in the context of European law, see also Nettesheim (above fn. 118), mnn. 64 et seq.

[608] Thereon, see Alexy (above fn. 445), pp. 285 et seq.; see also Nettesheim (above fn. 118), mn. 63.

[609] Thereon, see Chapter 4, 'The role of international law in the construction of fair and equitable treatment'.

However, these objectives are not the only relevant sources of arguments in international investment law, but they compete against other objectives of the international legal system. In particular, they also compete against the traditional objective of sovereignty of states that is inherent in the international legal system and against other already established or emerging objectives of other sub-systems, such as international human rights or international environmental law. Further arguments could be extracted from the idea that fair and equitable treatment represents an embodiment of the rule of law or from the discussion on the emergence of a global administrative law.[610] Similarly, arguments could emanate from the identification of principles of international economic law in general,[611] which would also have an impact on the application of fair and equitable treatment. In order to be legitimate, a decision on fair and equitable treatment needs to establish a certain level of coherence between the arguments deriving from all of these competing principles or objectives if they are to be relevant for the particular case.

The model of a fairness discourse helps to describe the tension between these arguments and enables a certain structuring by assigning each objective to one of the two above-mentioned aspects of fairness. The meaning of these aspects – stability and change – in international investment law is once again recounted by Franck.[612] He assumes that a global capital market exists that is essential for the development and growth of national economies, but which does not benefit rich and poor equally. Thereby, this capital market is operating within a national political system that presumably tries to mitigate the gap between rich and poor or to attenuate other negative impacts of foreign capital by state intervention. However, such intervention may clash with the investor's expectations and his reliance on the stability of the political parameters. Nevertheless, the change in the legal framework may not be considered illegitimate per se if the change is conducted in accordance with a right and publicly known process. To such an extent, a fairness discourse on fair and equitable treatment

[610] See also Chapter 5, section B, '2 Fair and equitable treatment as an embodiment of the rule of law'.

[611] On principles of international economic law, see, e.g. G. Schwarzenberger, 'The Principles and Standards of International Economic Law', RdC 117 (1966 I), p. 1; Weiler (above fn. 105); and Weiler (above fn. 104).

[612] See Franck (above fn. 345), pp. 438–441.

needs to 'accommodate the inevitable tension between the political pull to change and the economic rationale for stability'.[613]

Arguments that call for stability or the legitimacy of state action are therefore to be found mainly in the lines of jurisprudence of arbitral tribunals, such as fair procedure, non-discrimination, the protection of the investor's legitimate expectations and transparency. Arguments that call for redistributive change are often not explicitly mentioned, but mostly may be subsumed under the notion of state sovereignty, entitling a state to pursue different tax, currency, labour, social or other policies. Further arguments for change may derive from social or ecological considerations and may be embraced by the label of sustainable development. Although these examples certainly do not depict an exhaustive list,[614] each of these elements represents one aspect of either stability or change and may therefore provide for valuable arguments that may be introduced into the fairness discourse. In summary, six easily identifiable elements of stability and change have to play a role in the fairness discourse: fair procedure, non-discrimination, transparency and the protection of the investor's legitimate expectations, on the stability side; sovereignty and sustainable development, on the change side. In contrast to these objectives, proportionality is considered to be an element to structure further the arguments derived from the mentioned objectives.

While it is not precluded to introduce further elements into the fairness discourse, the following remarks will be limited to these elements for reasons of convenience. For the present purposes, it also appears unnecessary to discuss whether these aspects should be referred to as '*topoi*', 'objectives' or 'principles', since all of these legal concepts are able to act as sources of arguments that are capable of justifying a particular decision. Nevertheless, the notion of principles will be preferred in the following, since it has already been employed by others[615]

[613] Ibid., p. 441.

[614] For instance, further arguments could be derived from human rights obligations: see van Aaken (above fn. 357), pp. 117 et seq. In the dichotomy of stability and change, however, human rights arguments reveal a certain ambivalence because property-related rights would stand for stability while, e.g. social rights could stand for change. Therefore, human rights arguments, insofar as they stand for change, are deemed here to be embraced by the principles of sovereignty and sustainable development. Insofar as they stand for stability, they are considered to be contained in the other principles of fair and equitable treatment.

[615] See, e.g. Schill (above fn. 2), p. 41; and more generally Douglas (above fn. 135), pp. 85 et seq. Others refer to fair and equitable treatment itself as a principle; however, this parlance is not adopted here because it may lead to confusion in the description of the position of fair and equitable treatment in the system of international law sources – thereon see Chapter 8, 'Fair and equitable treatment in the system of international law sources'.

and because it is a bone of contention in describing the general structure of law that will be discussed at a later stage.

3 *The imperative of balancing*

After the identification of the aspects of stability and change, the discourse at the application stage of fair and equitable treatment has to solve the tension that exists between those elements. Accordingly, if in a specific fact situation some arguments favour stability while others strive for change, it is to be decided which ones will ultimately prevail. Thereby, it has already been alluded to that the process of decision-making, connected with a general clause like fair and equitable treatment, is characterised by a process of balancing and weighing.[616] The importance of balancing is also acknowledged by some investment tribunals stating, for example, that '[t]he determination of a breach of [fair and equitable treatment] therefore requires a weighing of the claimant's legitimate and reasonable expectations on the one hand and the respondent's legitimate regulatory interests on the other'.[617]

The process of balancing represents an integral part of the fairness discourse.[618] As an important prerequisite of a balancing of aspects of stability and change, especially Franck's 'no-trumping' condition comes into play, assuring that no argument derived from any particular aspect of the discourse automatically trumps another or even all other arguments at stake.[619] In this sense, a fairness discourse demands that arguments related to the sovereignty of states, to the stability of investor–state relations or to any of the other principles of fair and equitable

[616] See Chapter 5, section B, '1 Fair and equitable treatment as a "standard"'.

[617] *Saluka Investments BV* v. *Czech Republic* (above fn. 132), at para. 306; see also *International Thunderbird Gaming Corp.* v. *Mexico* (above fn. 444), at paras. 30 and 102; on the balance between investment protection and host state regulatory freedom, see, e.g. F. O. Vicuña, 'Regulatory Authority and Legitimate Expectations', *International Law Forum* 5 (2003), p. 188; M. Krajewski and J. Ceyssens, 'Internationaler Investitionsschutz und innerstaatliche Regulierung', ArchVR 45 (2007), p. 180; T. Grierson-Weiler and I. A. Laird, 'Standards of Treatment', in P. Muchlinski *et al.* (eds.), *The Oxford Handbook of International Investment Law* (2008), p. 259 at pp. 299–301; and on the balancing in public international law generally, see P. Hector, *Das völkerrechtliche Abwägungsgebot* (1992), pp. 173 et seq.

[618] See, however, Tudor (above fn. 2), p. 205, denying the possibility of a balancing operation at the liability phase.

[619] See Franck (above fn. 345), p. 16.

treatment do not automatically precede other arguments. Accordingly, the principles underlying fair and equitable treatment and the arguments derived therefrom are not absolute but relative, and the relations of precedence between these arguments are not predetermined, but vary in accordance with the circumstances of the specific case.

Which particular argument or principle prevails in the discourse is ultimately a question that relates to the 'dimension of weight'[620] of each principle. Similar to the identification of the relevant *topoi* or principles that influence the application of fair and equitable treatment, the relative weight of the pertaining arguments is also to be based on an overlapping consensus established in a discoursive way. To such an extent, arbitral tribunals need to justify their particular weight allocation by explaining why, according to the facts of the particular case, one argument outweighs another. In addition to the facts of a case, such justification has to correspond to preference relations already established in the texts of relevant agreements and precedents as well as by a comparative law methodology.[621] In most cases, the weight of a particular argument will not demand that another principle is pushed aside as a whole, but will only claim validity to a certain extent that is determined by the specific weight allocation in the particular case.[622] This means that arbitrators should attempt to achieve a reconciliation of all conflicting principles in a way that each principle, in accordance with its relative weight, is brought to bear as far as possible.[623]

Arguably, a decision that achieves such a balance between conflicting principles and arguments has to be considered as fair because it favours stability and change at the same time. Nevertheless, in light of the considerable disparities among domestic legal traditions and the (still) quite different attitudes towards foreign investment, it is also to be conceded that the identified principles hardly represent more than a minimum consensus at a relatively high level of generality. To such an

[620] Dworkin (above fn. 116), p. 26; see also R. Alexy, *A Theory of Constitutional Rights* (trans. Julian Rivers) (2002), p. 50.

[621] In the context of European law, see, e.g. Nettesheim (above fn. 118), mnn. 87 et seq.

[622] See the 'law of balancing' as proposed by Alexy (above fn. 620), p. 102, stipulating: '[t]he greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other'.

[623] This approach is well known in German constitutional law under the notion of '*praktische Konkordanz*', which was coined by K. Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 20th edn (1995), p. 28.

extent, the acceptance of such overlapping consensus does not mark the end of a discourse, but rather the beginning of a fairness discourse on the reasonable concretisation and application of these principles in the context of fair and equitable treatment.[624] This discourse on the right balance between stability and change is, of course, not free from arbitrators' personal assessments, especially in the process of determining the specific weight of each principle at stake. Thereby, it also appears possible that a variety of particular weight allocations remain which may reasonably be taken. Arbitrators then have to choose a particular decision and justify this by providing reasons. The criteria according to which arbitrators then decide – by applying the maxim of *in dubio mitius*,[625] defining areas of judicial self-restraint or favouring a dynamic pro-investor approach – are again to be justified by an adequate process of reasoning.

In conclusion, the foregoing has attempted to show that fair and equitable treatment may be considered as an embodiment of justice within the system of international investment law. This search for justice arises from the increasing breadth and complexity of international investment law that is almost naturally accompanied by growing concerns about the fairness of that legal system.[626] Only if international investment law is generally perceived as fair and if it demonstrates an ability to produce fair results even in critical situations, will it meet with the sustained acceptance of its actors. Perceived fairness of a legal system depends on its capacity to unite claims to the redistribution of wealth and resources, and those to order and legitimacy. It is thus submitted that the described concept of fair and equitable treatment, as a concept of balancing arguments related to stability and change, represents a step in the direction of an increased quality of legal reasoning and decision-making.

[624] The need to concretise further the overlapping consensus on certain principles of justice is also acknowledged by Rawls (above fn. 555), p. 37.

[625] Thereto see Jennings and Watts (above fn. 124), pp. 1278–1279; on the limited relevance of this maxim, see Tomuschat (above fn. 524), pp. 170–171.

[626] See also Franck (above fn. 345), p. 6.

CAMBRIDGE STUDIES IN INTERNATIONAL AND COMPARATIVE LAW

A breach of fair and equitable treatment is alleged in almost every investor–state dispute. It has therefore become a controversial norm, which touches many questions at the heart of general international law. Roland Kläger sheds light on these controversies by exploring the deeper doctrinal foundations of fair and equitable treatment and reviewing its contentious relationship with the international minimum standard. The norm is also discussed in light of the fragmentation of international law, theories of international justice and rational balancing, and the idea of constitutionalism in international law. In this vein, a shift in the way of addressing fair and equitable treatment is proposed by focusing on the process of justificatory reasoning.

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