The Rule of Law and Fair and Equitable Treatment

Martins Paparinskis*

I. Introduction[1]

The rule of law is a contested concept, possibly even in an essentially contested one.[2] Fair and equitable treatment is, in a structural sense, a rule of much more modest ambition: merely a legal term of art regarding a primary rule well known in the field of overseas investment protection.[3] However, what the primary obligation of fair and equitable treatment lacks in conceptual importance,[4] it makes up in the considerable practical effect in international dispute settlement on the basis of investment treaties. Judging from publicly available awards, this is the obligation that investment treaty tribunals are most likely to find to have been breached.[5] Of course, to suggest that a contested concept and a specific primary obligation occupy different places in the architecture of the international legal order is not particularly original—one could make a similar point about many, if not all, concepts, principles and rules. But there may be something more that catches the eye in the particular instance, which makes it an important topic for analysis.

The starting point of this chapter is that there is a certain amount of State practice and a significant amount of materials falling under subsidiary means for determination of rules of law, particularly legal writings but also some arbitral practice, that explicitly link fair and equitable treatment to the rule of law. A plausible positive and normative claim can be made regarding fair and equitable treatment as a positive expression of the rule of law more generally. Jeremy Waldron makes the point briskly in 'The Rule of Law' entry of the *Stanford Encyclopaedia of Philosophy* that '[t]heorists of the Rule of Law are fond of producing laundry lists of the principles it comprises

* Reader in Public International Law, University College London. Email: m.paparinskis@ucl.ac.uk.

[1] This chapter draws upon earlier writing on the topic, including *The International Minimum Standard and Fair and Equitable Treatment* (OUP 2013).

[2] J Waldron, 'Is the Rule of Law an Essentially Contested Concept (In Florida)?' (2002) 21 Law and Philosophy 137; D Collier et al, 'Essentially Contested Concepts: Debates and Applications' (2006) 11 J Political Ideologies 211, 228-33; J Waldron, 'The Rule of Law' (22 June 2016) Stanford Encyclopaedia of Philosophy <https://plato.stanford.edu/entries/rule-of-law/> Section 2.

[3] *Oil Platforms (Iran v US) (Preliminary Objections)* [1996] ICJ Rep 803, 847 para 39 (Judge Higgins).

[4] The reading of fair and equitable treatment as a conceptually unremarkable primary obligation is not shared by everyone. For example, an argument for viewing fair and equitable treatment as a gateway for systemic integration of other sources of international law appears in Roland Kläger, *'Fair and Equitable Treatment' in International Investment Law* (CUP 2011) ch 4.

[5] UNCTAD, 'Investor–State Dispute Settlement Cases Pass the 1,000 Mark: Cases and Outcomes in 2019' IIA Issues Note 2/2020 <https://unctad.org/system/files/official-document/diaepcbinf2020d6.pdf> 5 ('In the decisions holding the State liable, tribunals most frequently found breaches of the fair and equitable treatment (FET) provision').

…, which may loosely be divided into principles that address the formal aspects of governance by law; principles that address its procedural aspects; and principles that embrace certain substantive values'.[6] Many entries on the laundry list regarding the formal and procedural aspects of the rule of law (also known as 'thin', as opposed to the 'thick' rule of law that engages with substantive values), such as publicity, prospectivity, intelligibility, consistency, and stability, and the right to a hearing by an impartial tribunal,[7] parallel the language and concepts in the laundry lists compiled for fair and equitable treatment.[8] It is not a particular stretch to build upon the similarities and argue for rule of law as an explanatory framework for fair and equitable treatment, fair and equitable treatment as a positivized expression of rule of law, or even speak, as one tribunal recently did in passing, of 'rule of law-elements flowing from fair and equitable treatment'.[9]

This chapter takes a more qualified position. Some people will think that explicit conceptualisation of fair and equitable treatment (decisions) as the rule of law is either unpersuasive or superfluous, and that explicit reliance on concepts drawn from it has limited long-term effects. Interpretation and application of fair and equitable treatment certainly raises hard questions of sources and interpretation. Ordinary meaning of particular treaty terms is, in the technical sense of principles of interpretation, vague; arbitral decisions are occasionally sub-optimal on the nature of relationship between treaties and customary law on the issue; subsidiary means for determination of custom are mostly constituted by archaic arbitral decisions; and many modern decisions leave something to be desired. But these are perfectly normal challenges for international legal reasoning and international dispute settlement, which can be resolved by diligent engagement with rules on sources and interpretation, with an eye to the judicial function in a substantively and procedurally decentralised field of international law. Not every field of international law comes pre-equipped with detailed rules and thick institutions – indeed, most do not – so there is no obvious reason for setting aside usual techniques of legal reasoning for this particular challenge. Reliance on rule of law language familiar from domestic law and regional economic orders may provide *an* answer to hard legal questions besetting those tasked with

[6] Waldron 'The Rule of Law' (n 2) Section 5.
[7] Ibid Sections 5.1, 5.2.
[8] See e..g. *Glencore International AG and CI Prodeco SA v Colombia,* ICSID Case No. ARB/16/6, Award, 27 August 2019 para 1310; *Belenergia SA v Italy,* ICSID Case No. ARB/15/40, Award, 6 August 2019 para 570; *Joshua Dean Nelson and Jorge Blanco v. Mexico,* ICSID Case no UNCT/17/1, Award, 5 June 2020 para 322 ('State misconduct that is (i) arbitrary, (ii) grossly unfair, unjust or idiosyncratic; (iii) discriminatory or; (iv) absent of due process'); *ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v Italy,* ICSID Case no ARB/16/5, Award, 14 September 2020 paras 443-444 ('FET is made up of several components, including the duty to create stable conditions, to act in a transparent and consistent manner (with due process and in good faith), and to refrain from taking arbitrary or discriminatory measures or from frustrating investors' legitimate expectations regarding the legal, regulatory, and legislative framework and adversely affecting their investments. … the FET standard includes multiple sub-standards, including the protection of legitimate expectations, consistency and transparency, and good faith.').
[9] *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaf v Argentina,* ICSID Case no ARB/14/32, Decision on Jurisdiction, 29 June 2018 para 243.

interpreting and applying rules on fair and equitable treatment, but it is less clear that it is *the* answer called for by the international legal vocabulary of sources and interpretation. For some, rule of law will seem to have played, for investment law, the role of Ian Brownlie's metaphorical bank of fog on a still day, obscuring rather than illuminating – or perhaps even falsely illuminating what the technical law purposefully left ambiguous.[10]

I will make my argument in two steps. First, I will introduce the concept of fair and equitable treatment, identify the elements in practice that support the argument for reading it in rule of law terms, and distinguish various ways of making that argument (Section II).[11] Secondly, I will address in turn the more important instances of its application – arbitrariness (Section III.A), protection of expectations (Section III.B), and due process (Section III.C) – and show how the rule of law(-inspired) notions have been articulated in their regard (I will be brief in description and selective in examples since impact on the judiciary and protection of expectations is dealt with by other authors in this volume in greater detail).[12] The main claim is that reading fair and equitable treatment through rule of law lenses is plausible but may be conflating positive and normative claims as well as understating the potential and benefits for answering public international law questions in public international law terms. In short, this is an optimistic chapter about what international law can do, even without dipping into the rich reservoir of domestic, regional, and jurisprudential debates on rule of law.

II. '[R]ule of law-elements flowing from fair and equitable treatment'

The 2018 decision on jurisdiction in *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaf v Argentina*, from which the quote in the title of section is taken, provides a helpful entry point for discussion of fair and equitable treatment and rule of law:

> 242. Fair and equitable treatment has been interpreted, *inter alia*, to protect covered investors and their investments against the arbitrary exercise of public powers, as well as against harassment by public authorities, to require public authorities to administer the

[10] I Brownlie, 'Recognition in Theory and Practice' (1982) 53 BYBIL 197, 197.

[11] I caveat one aspect of rule of law perspective that I will not discuss in the chapter, which would limit its impact to describing the content of applicable customary law or aspects of application of treaty obligations. I will leave open the question of whether this is a concern for the rule of law, even in the broadest sense – perhaps compliance of law with the secondary rules of recognition acts necessarily precedes engagement with the formal aspects of rules of law. The concern, however, is a different one: is there anything more to it than the proposition that fair and equitable treatment is a primary rule of international law, to be interpreted, identified, and applied in accordance with meta-rules on sources and interpretation? As far as I can see, no actor in the international legal process has ever challenged this position (whatever their views may have been about the quality with which interpreters have carried out their mandate), so the argument leaves itself open to the charge of superfluity.

[12] See chapters by Henckels and Kriebaum in this volume.

> applicable law in good faith, to entitle foreign investors and their investments to due process, and to protect an investor's legitimate expectations.
>
> 243. These rule of law-elements flowing from fair and equitable treatment have been found to apply not only to action taken directly vis-à-vis the claimant-investor, but also to action the host State has taken in relation to a company in which the investor is a shareholder. In such situations, the shareholder-investor has been considered to have a right, and consequently standing, under the fair and equitable treatment standard that the company in which she has invested is treated in accordance with the above mentioned rule of law-elements.[13]

Casinos Austria is not the only case to have explicitly connected fair and equitable treatment with rule of law. In the early 2005 award in the *Petrobart Limited v Kyrgyzstan* case, the Tribunal noted that '[g]overnment intervention in judicial proceedings is not in conformity with the rule of law in a democratic society and that it shows a lack of respect for Petrobart's rights as an investor having an investment under the Treaty' and accordingly found a breach of fair and equitable treatment.[14] More recently, arbitrator Gary Born's 2016 dissenting opinion to the Award in *Philip Morris Brands Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v Uruguay* repeatedly referred to rule of law when discussing denial of justice as part of fair and equitable treatment:

> 40. … this amounted to "Heads, I win; tails, you lose" treatment, without affording Abal the possibility of subsequent judicial recourse, which is contrary to Article 3(2)'s guarantee of fair and equitable treatment and the rule of law.
>
> 42. The rule of law serves to ensure predictability, stability, neutrality, and objectivity; it ensures that generally applicable legal rules, rather than personal or political expedience, govern human affairs. Where different courts within a single legal system adopt contradictory interpretations for the same law, the rule of law is undermined, exposing individuals to inconsistent, unpredictable, and arbitrary treatment.
>
> 51. … The concept of the rule of law implies regularity, stability, and lack of arbitrariness.
>
> 57. In my view, it is something very different for the law to be interpreted in diametrically opposed ways in the *same* dispute, involving the *same* party. This latter result involves a state, through its courts, holding that the same law means exactly opposite things as applied to the same litigant in the same dispute. That is the antithesis of the rule of law: it constitutes a much more direct and immediate instance of arbitrariness, incapable of

[13] *Casinos Austria* (n 9) paras 242-243 (footnotes omitted). The decision was adopted by a majority but the dissenting arbitrator did not comment on rule of law aspects and indeed seemed to accept the substance of the decision on the point of fair and equitable treatment, Dissenting Opinion on Respondent's Second Preliminary Objection and Declaration of Dissent concerning its First and Third Preliminary Objections of Arbitrator Santiago Torres Bernárdez, 20 June 2018, para 217.

[14] *Petrobart Limited v Kyrgyzstan*, SCC Case no 126/2003, 29 March 2005 75. It may be that the language was used in response to the State's earlier argument to the effect '[t]hat Petrobart, an allegedly foreign investor, was able to obtain a judgment against a state-owned company testifies to the Republic's adherence to the rule of law', 38.

> explanation by differences in the identities of the litigants, the circumstances of the parties or their dispute or the parties' litigation conduct.
>
> 61. … I find it very difficult to avoid concluding that these contradictory decisions, rendered against the same party in closely-related proceedings, violate guarantees of access to justice and adherence to the rule of law.
>
> 62. … that is arbitrary and irrational, denying parties the basic legal certainty, predictability and the fundamental fairness that the rule of law serves to ensure.
>
> 69. … That is not consistent with either Uruguay's commitment to the rule of law or rules of international law.
>
> 81. … That denial of access to a judicial forum is a denial of justice, which both the BIT and Uruguay's commitment to the rule of law proscribe.
>
> 133. One of the central elements of the guarantee of "fair and equitable treatment" is a protection against arbitrary treatment. This guarantee reflects a fundamental aspect of the rule of law: citizens are entitled to treatment, by their government, which is rational and proportionate. Irrational or arbitrary governmental measures, which are unrelated to any legitimate governmental objective, or which are gravely disproportionate to the achievement of such an objective, are neither fair nor equitable, and they betray, rather than advance, the rule of law.[15]

There is also a number of examples where the rule of law has been considered, as it were, contiguously to fair and equitable treatment. The OECD 1967 Draft Convention on the Protection of Foreign Property, which provided the starting point for many of the bilateral investment treaty (BIT) programmes, makes the following point regarding due process of law in takings, which in its own turn trails the language used in description of fair and equitable treatment:

> In essence, the contents of the notion of due process of law making it akin to the requirements of the "Rule of Law", and Anglo-Saxon notion, or of the "Rechsstaat", as understood in continental law. … whenever a State seizes property, the measures taken must be free from arbitrariness. Safeguards existing in its Constitution or other laws or established by judicial precedent must be fully observed; administrative or judicial machinery used or available must correspond at least to the minimum standard required by international law. Thus, the term contains both substantive procedural elements. [16]

The International Court of Justice (ICJ) in the *ELSI* case also, famously, explained arbitrariness as 'not so much something opposed to a rule of law, as something opposed to the rule of law';[17] a

[15] *Philip Morris Brands Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v Uruguay,* ICSID Case no ARB/10/7, Award, 8 July 2016, Concurring and Dissenting Opinion of Arbitrator Born, 28 June 2016 (emphasis in the original).
[16] <https://www.oecd.org/investment/internationalinvestmentagreements/39286571.pdf> art 3 Commentary 5(a), (b), art 1 Commentary 4(a).
[17] *Elettronica Sicula SpA (ELSI) (US v Italy) (Judgment)* [1989] ICJ Rep 15 para 128.

proposition that was used in a number of decisions by investment treaty tribunals to interpret and apply fair and equitable treatment (or obligation regarding arbitrary and unreasonable conduct, which is treated for the purposes of this chapter as being equivalent in this respect).[18] In the 2008 award in *Amto v Ukraine,* the Tribunal discussed the 'effective means' obligation in the Energy Charter Treaty, often read as somewhat similar to denial of justice as part of fair and equitable treatment, and noted that '[t]he fundamental criteria of an 'effective means' for the assertion of claims and the enforcement of rights within the meaning of Article 10(2) is law and the rule of law' and 'Article 10(12) is not only a rule of law standard, but also a qualitative standard'.[19]

Finally, there is the harder-to-determine relationship between fair and equitable treatment and the rule of law in a looser sense, whether as a tool for conceptualising and systematising seemingly disparate arbitral practice, most prominently made in academic setting by Stephan Schill[20] and Kenneth Vandevelde,[21] or as a source of inspiration for arbitrators facing the infuriatingly vague language of fairness and equity. As August Reinisch and Christoph Schreuer put it, '[w]hile express references to the concept of the rule of law may be limited in arbitral practice, the more specific jurisprudence on the due process element of FET … , demonstrates that investment tribunals are often taking inspiration from rule of law concepts'.[22] In short, some actors in investment law draw the connection explicitly, others may have adopted the framing by necessary implication, and at a certain degree of loose abstraction both concepts may be responding to similar normative instincts. What relates to rule of law itself seems to be somewhat uncertain: by the lights of the *Casino Austria* tribunal, a list of cases relied upon by the investor illustrate application of rule of law-elements (even though they don't mention 'rule of law' once).[23]

---

[18] See e.g. *Noble Ventures v Romania,* ICSID Case no ARB/01/11, Award, 12 October 2005 para 176; *Duke Energy v Ecuador,* ICSID Case no ARB/05/19, Award, 18 August 2008 para 378; *Algahim v Jordan,* ICSID Case no ARB/13/38, Award, 14 December 2017 para 277; *Mercer v Canada,* ICSID Case no ARB(AF)/12/3, Award, 6 March 2018 para 778.

[19] *Amto v Ukraine,* SCC Arbitration no 080/2005, Award, 26 March 2008, para 87.

[20] In various places, including B Kingsbury and S Schill, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law' (2009); S Schill, 'International Investment Law and Comparative Public Law' in S Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010).

[21] K Vandevelde, 'A Unified Theory of Fair and Equitable Treatment' (2010) 43 NYU J Int'l L Politics 43.

[22] A Reinisch and C Schreuer, *International Protection of Investments: The Substantive Standards* (Cambridge: Cambridge University Press, 2020) 344.

[23] *Casino Austria* (n 9) fn 223 ('*El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011), para. 348 (CL-016); *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012) part VII, para. 7.75 (CL-020); *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award (13 September 2001), para. 611 (CL-021); *Saluka Investments B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award (17 March 2006), para. 309 (CL-018); *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (27 August 2008), paras. 175, 176 (CL-118); *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000), para. 99 (CL-011); *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003), para. 153 (CL-008); *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award (1 June 2009), para. 450 (CL-024); *Frontier Petroleum Services Ltd. v. The Czech Republic*, UNCITRAL, Final Award (12 November 2010), para. 300 (CL-025); *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award (6 February 2007), para. 308 (CL-034); *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004), para. 98 (AL RA 119); *Eureko B.V. v. Republic*

In short, rule of law plays a role in and around fair and equitable treatment *and* it may be doing quite a lot of different things. It is helpful to spell that difference out.

First, the rule of law is one of the ideals of political morality, conceived and primarily contested in relation to domestic political communities. Arbitrator Gary Born's opinion in *Philip Morris v Uruguay* may have employed the notion of the rule of law in this sense, as a related but ultimately different benchmark from fair and equitable treatment under public international law, for example by speaking about 'Uruguay's commitment to the rule of law or rules of international law' and 'a denial of justice, which both the BIT and Uruguay's commitment to the rule of law proscribe'.[24] Secondly, 'rule of law' may be a drafting shorthand for describing the content of a primary obligation as requiring the quality of domestic law and practice to correspond to a particular conception of political morality. The OECD Draft Convention's introduction of 'rule of law' seems to have served that role, and the other way of reading Born's opinion may be as suggesting that fair and equitable treatment necessarily requires conduct in line with the rule of law (elaborated in that case by reference to regional judgments on human rights under the auspices of Council of Europe). Thirdly, the rule of law is employed in an *ex post facto* explanatory manner, bringing order to the decentralised arbitral practice on fair and equitable treatment that in a fit of absent-mindedness disperses itself around roughly the same laundry list categories. The *Casinos Austria* decision may be read consistently with this argument, first identifying on the basis of arbitral practice what protections '[f]air and equitable treatment has been interpreted' as entailing, and then describing them as 'rule of law-elements flowing from fair and equitable treatment'.[25] The fourth argument, the flipside of the third, is inspiration by the rule of law, plausibly suggested by Reinisch and Schreuer.[26] Finally, the 'rule of law' may be a descriptive shorthand for the complex legal argument of identification of general principles of law, either derived from national legal systems in the field of public law or formed within the international legal system,[27] and then taken into account in interpretation of investment treaties.[28] Perhaps this is what *Casinos Austria* language of 'rule of law-elements flowing from fair and equitable treatment' is really getting at.[29] In short, while I would not want to overstate the separateness of these arguments, perhaps better to be read

of Poland, Partial Award (19 August 2005), paras. 231-233 (AL RA 30); *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008), paras. 597-599 (CL-031); *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award (28 March 2011), paras. 158, 159 (CL-090)'). Others would, no doubt, disagree with this taxonomy, at least if the language suggests more self-conscious engagement of arbitrators than in the case of Molière's Mr Jourdain.

[24] *Philip Morris* Born (n 15) paras 69, 81

[25] *Casino Austria* (n 9) paras 242, 243.

[26] Reinisch and Schreuer (n 22) 344.

[27] M Vázquez-Bermúdez, 'Second report on general principles of law' (9 April 2020) UN Doc A/CN.4/741 59, Draft conclusion 3.

[28] Vienna Convention on the Law of Treaties art 31(3)(c).

[29] *Casino Austria* (n 9) para 243.

as imprecise points on a spectrum rather than neatly distinct categories, they are nevertheless different and stand and fall against different benchmarks.

It is helpful to consider counter-arguments or at least explicitly identify the costs for these claims. At the philosophical end of the spectrum, the concern is about conflation of distinct intellectual inquiries. Similarities in language should not disguise the extent to which debates are fundamentally different, in terms of substance and focus and also in terms of basic disciplinary assumptions and techniques. That a recent ICSID decision and Aristoteles used similar language does not guarantee that they are both speaking to the same issue. Another hurdle is justifying the rule of law in public international investment law. Jeremy Waldron, for example, has famously doubted whether the ideal of rule of law, formulated against the background of overreaching public authority from which individuals need protection, fits within the classically horizontal inter-State model of public international law.[30] There is reasonable debate to be had about various aspects of the argument[31] -- is it affected by the great material inequalities between the juridically equal sovereigns? Are the multilateral elements of the international legal order reflective of a gradual emergence of a properly public international law? Is the procedural role of non-State actors the qualitative difference for fields like investment law – but it suggests that a number of legal and normative propositions need to be established in the first place for the rule of law to be defensible as a relevant perspective for discussing fair and equitable treatment.

At the lawyerly end of the spectrum, some will be concerned that 'rule of law' language sidesteps hard questions about identification of public international law. A brisk nod to 'investors' expectations', Vienna Convention on the Law of Treaties or 'international law' will not impress everybody,[32] and even on general principles a demonstration of commonalities rather than their assertion is expected.[33] Why should 'rule of law' be treated any more gently? The least charitable take is that either invocation of rule of law adds something to what vocabulary of sources and interpretation does not usually provide, in which case it raises hard questions about proper applicable law, or it does not, in which case it is a harmless metaphor, to be evaluated solely in aesthetic terms and without any legal relevance. Indeed, the rule of law approaches may raise normative concerns precisely due to their apparent tension with the universalist assumptions underpinning (however imperfectly) the doctrine of sources and interpretation – the conceptual

[30] J Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (2011) 22 EJIL 315.
[31] J Waldron, 'Response: The Perils of Exaggeration' (2011) 22 EJIL 389.
[32] Respectively *MTD Equity Sdn. Bhd. And MTD Chile SA v Chile,* ICSID Case no ARB/01/7, Decision on annulment, 21 March 2007 para 67; *Industria Nacional de Alimentos, S.A. (previously Empresas Lucchetti, S.A.) and Indalsa Perú, S.A. (previously Lucchetti Perú, S.A.) v Peru,* ICSID Case no ARB/03/4, Decision on annulment, Dissenting opinion of member Berman, 13 August 2007; *Venezuela Holdings BV and Ors v Venezuela,* ICSID Case no ARB/07/27, Decision on annulment, 9 March 2017 paras 155-160.
[33] Vázquez-Bermúdez's Second Report (n 27) para 44.

framework and particular authorities of rule of law seem to pull away from the search for general consensus in international or domestic legal traditions and towards one particular regional approach.[34]

III. Rule of law-inspired application of fair and equitable treatment

Explicit reliance and hard-to-determine inspiration by rule of law sometimes seems to be driven by seemingly insolvable queries raised by the vagueness of fair and equitable treatment. There is nothing wrong by the international legal process being inspired by arguments from domestic legal orders or other fields of international law. Significant parts of the contemporary law of treaties, State responsibility, and territorial title have been inspired by shared assumptions and approaches in domestic law.[35] But ultimately the question is not where the inspirations came from but whether the solution proved helpful and was endorsed by international law – or was rather qualified or rejected in the normal international legal process. Vagueness of applicable law is not a reason for moving beyond the usual canons of legal reasoning but a perfectly ordinary challenge in various fields, perhaps most obviously maritime delimitation and equitable and reasonable utilization in the law of international watercourses.[36] In short, the relevant question is what States, international organizations, review institutions in dispute settlement, and inter-State tribunals made of the inspiration of investor-State arbitration tribunals in the 2000s.

There is ground for reasonable disagreement about the precise legal character of arbitral statements on fair and equitable treatment – arbitral awards can be plausibly read as relating to treaty interpretation, identification of customary law, or identification of general principles. In my view, these cases are best read as related to application of rules, rather than determination of their content, and the key methodological question is identifying the good examples of application of the relevant considerations. Reasonable people may disagree which of the efforts to capture the elusive essence of fair and equitable treatment has been most successful, but the award in *Waste Management v Mexico (II)* is certainly one of the most cited on this point, and its description of

[34] As one tribunal noted, in the particular context of expropriation but with a sentiment similarly applicable to fair equitable treatment: 'this factor [the proportionality between the means employed and the aim sought to be realized] was relied upon in *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, at ¶ 122 *et seq*., available at: http://ita.law.uvic.ca/ documents/Tecnicas_001.pdf. The factor is used by the European Court of Human Rights, *id.* at n. 140, and *it may be questioned whether it is a viable source of interpreting Article 1110 of the NAFTA*', *Fireman's Fund Insurance Company v Mexico,* ICSID Case no ARB(AF)/02/1, Award, 17 July 2006 fn 161 (emphasis added).

[35] H Lauterpacht, *Private Law Sources and Analogies of International Law* (Longmans 1927).

[36] M Lando, *Maritime Delimitation as a Judicial Process* (CUP 2019); L Caflisch, 'Equitable and Reasonable Utilization and Factors Relevant to Determining Such Utilization (Articles 5 and 6)' in L Boisson de Chazournes and Ors (eds), *The UN Convention on the Law of Non-Navigational Uses of International Watercourses: A Commentary* (OUP 2019); S McCaffrey, *The Law of International Watercourses* (3rd edn, OUP 2019) Chapter 9.

conduct breaching the fair and equitable treatment standard will be taken as a convenient point of departure of traditional position in 2004:

> conduct [that] is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.[37]

The 2018 Investment Protection Agreement between the European Union (EU) and Singapore is a recent example of State practice that is broadly in line with this arbitral statement, identifying instances of proper application of fair and equitable treatment as

(a) denial of justice in criminal, civil and administrative proceedings;
(b) a fundamental breach of due process;
(c) manifestly arbitrary conduct;
(d) harassment, coercion, abuse of power or similar bad faith conduct.[38]

The next sections will consider in turn the temptation of fair and equitable treatment by the rule of law in relation to arbitrariness (A), protection of expectations (B), and due process (C). (I will not address transparency because it has had attracted less attention both in arbitral decisions and State practice.)[39]

A. Arbitrariness

The leading modern case on the obligation of non-arbitrariness in the treatment of foreign investment is the *ELSI* case, where arbitrariness was described as 'not so much opposed to a rule of law, as something opposed to *the* rule of law. … a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety'.[40] The examination of appropriateness and reasonableness was limited to the very deferential statement that '[i]t cannot be said to have been unreasonable or merely capricious'.[41] The availability of the formal and procedural safeguards—recitation of reasons and legal bases, existence of broader competence,

[37] *Waste Management v Mexico (II),* ICSID Case no ARB(AF)/00/3, Award, 30 April 2004 para 98.
[38] <https://trade.ec.europa.eu/doclib/press/index.cfm?id=961> art 2.4(2).
[39] See further Reinisch and Schreuer (n 21) 453-461, and the chapter by Chi Manjao in this volume.
[40] *ELSI* (n 17) para 1282
[41] *ELSI* (n 17) para 129.

availability of functioning remedies—were decisive in rejecting the US claim.[42] *ELSI* provides methodology for approaching the claim of arbitrariness, identifying topics that should be considered (first) – formal and procedural safeguards in particular – and those that are less relevant or to be considered in a deferential manner – legitimacy of purpose and appropriateness of means chosen. *ELSI* is in line with the post-War position of the ICJ's *Asylum* judgment (explicitly referred to in *ELSI*), which had been elaborated in an intra-Latin American dispute with reference to denial of justice, a rule historically not focused on substantive merits or commensurability of policy choices but procedural safeguards, and even then applied in a markedly deferential manner.[43] The methodology and leading examples of its application in international law were distinctly unfavourable to an inquiry into merits and means and ends. *ELSI* is instructive as well for the limited effects that rule of law language had on standard legal reasoning: the Chamber did not derive international standards on arbitrariness from analysis of domestic or regional traditions but instead applied a vague international law rule to particular factual circumstances. There is no obvious reason why investment arbitration tribunals, equipped with much richer arbitral practice of the last two decades, should not be able to approach the question in a similar manner.

Recent practice is mixed and there is support for the traditional approach.[44] The award in *Philip Morris v Uruguay* may be read consistently with *ELSI*, taking it as the explicit starting point, leaving aside policy choices, and focusing on the formal and evidentiary aspects relating to particular measures.[45] Still, as Reinisch and Schreuer note, 'more and more often tribunals resort to a proportionality analysis', building on concepts developed mostly in continental European legal doctrine and jurisprudence and then spread within regional European regimes and constitutional courts internationally.[46] An interesting intermediate example is *RREFF v Spain,* which also takes *ELSI* as the starting point but then reads reasonableness and proportionality as closely related, with proportionality even providing the main test for reasonableness.[47] The clearest case of rule of law-inspired proportionality derived from domestic and regional traditions is *Occidental v Ecuador*. In that case, the Tribunal challenged not only the traditional approach to the issue in general but also the special rule that international wrongfulness of contractual breaches is to be judged by

[42] *ELSI* (n 17) paras 128, 129, and more generally 123–130. While decided on the obligation of arbitrariness, it has been endorsed in arbitral practice as an authority for approaching arbitrariness in application of fair and equitable treatment, Reinisch and Schreuer (n 22) 441.
[43] *Colombian-Peruvian Asylum Case (Colombia/Peru)* [1950] ICJ Rep 266 284 ('in the guise of justice, arbitrary action is substituted for the rule of law. Such would be the case if the administration of justice were corrupted by measures clearly prompted by political aims.')
[44] *Anglo American Plc v Venezuela,* ICSID Case no ARB(AF)/14/1, Award, 18 January 2019 para 470.
[45] *Philip Morris* (n 15) paras 389-420.
[46] Reinisch and Schreuer (n 22) 446, further 447-451.
[47] *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v Spain,* ICSID Case no ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018, paras 460-464.

reference to its character, rather than its content and extent, by basing Ecuador's responsibility on the lack of proportionality in its conduct.[48] *Occidental* is a complex case, both at the level of domestic law as well as primary and secondary rules of international law,[49] and one should evaluate its reasoning with great care, but there is something to be said for pausing before one substitutes and rewrites contractual terms and consequences by reference to such a general and vague standard as proportionality.[50] A caution against proportionality review, particularly of an intrusive character, applies also more generally: investment obligations are not directed at disciplining policy debates and choices, but at the manner in which these policies are formulated and applied; it is by elaboration of requirements that non-arbitrariness imposes on form and procedure that this can be best achieved, as leading arbitral decisions have done.[51]

The approach of *Occidental* has not been endorsed by State practice. The United States, a leading participant in the customary law-making in the area, has explicitly reacted to invocations of *Occidental* by arguing against the general obligation of proportionality.[52] The EU – familiar with proportionality from its own legal order – has studiously avoided that language and instead apparently endorsed in its treaty practice the 'arbitrariness' of *ELSI,* further buttressed by qualification of 'manifest' nature.[53] In short, rule of law-inspired reasoning on this point has been received in a lukewarm manner, unevenly among the tribunals and resisted explicitly or by necessary implication by States and the EU.

B. Expectations

The first case to put forward the claim about legitimate expectations and fair and equitable treatment was *Técnicas Medioambientales Tecmed, S.A. v. Mexico* (*Tecmed*):

---

[48] *Occidental Petroleum Corporation, Occidental Exploration and Production Company v Ecuador*, ICSID Case no ARB/06/11, Award, 5 October 2012 paras 384-452.
[49] Ibid paras 297-452, 662-687.
[50] This is a loose paraphrase of a well-known passage that makes a similar point regarding legitimate expectations: '[r]eference to a general and vague standard of legitimate expectations is no substitute for contractual rights. The relevance of legitimate expectations is not a licence to arbitral tribunals to rewrite the freely negotiated terms of investment contracts', J Crawford, 'Treaty and Contract in Investment Arbitration' (2008) 24 Arbitration Intl 351, 372.
[51] See e.g. *Achmea BV v Slovakia,* PCA Case no 2008-13, Final Award, 7 December 2012 [294] ('The Contracting Parties are free to adopt the policies that they choose. The Treaty focuses on the manner in which policies may be changed and implemented, not on the policies themselves.'); *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case no ARB/14/3, Final Award, 27 December 2016 para 318; *Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG v. Czech Republic*, PCA Case no 2014-03, Final Award, 11 October 2017 paras 43–46.
[52] *Al Tamimi v Oman,* ICSID Case no ARB/11/33, Award, 3 November 2015 para 261.
[53] EU-Singapore Investment Protection Agreement (n 38) art 2.4(2)(c).

> The Arbitral Tribunal considers that this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. 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, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation. In fact, failure by the host State to comply with such pattern of conduct with respect to the foreign investor or its investments affects the investor's ability to measure the treatment and protection awarded by the host State and to determine whether the actions of the host State conform to the fair and equitable treatment principle. [54]

It is fair to say that the *Tecmed* tribunal did not link the particular passage with rule of law considerations, and rather bracketed it by nods to good faith in public international law and *ELSI*.[55] But it did refer to the European Court of Human Rights elsewhere in the Award,[56] and the ascertainment of legitimate expectations by a comparative law method was employed in a number of well-known subsequent decisions, including by the dissenting arbitrator in *Thunderbird v Mexico* and the tribunals in *Total v Argentina* and *Gold Reserve v Venezuela.*[57]

Other chapters in this volume address protection of expectations and stability in greater detail[58] so I will not go into the minutiae of various decisions that have addressed the concept. Taking stock of recent practice, there is broad consensus among tribunals that frustration of an investment made in reliance upon representations can breach fair and equitable treatment.[59] There is somewhat less agreement regarding the scope and meaning of particular elements of this

---

[54] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case no ARB (AF)/00/2, 29 May 2003 para 154.

[55] Ibid paras 153-154.

[56] Ibid paras 116, 122.

[57] See respectively *International Thunderbird Gaming Corporation v Mexico*, UNCITRAL Case, Award, 26 January 2006, Separate Opinion Thomas Wälde, 1 December 2005 paras 27-30; *Total SA v Argentina*, ICSID Case no ARB/04/1, Decision on Liability, 27 December 2010 paras 128-129; *Gold Reserve Inc v Venezuela,* ICSID Case no ARB(AF)/09/1, Award, 22 September 2014, para 576. As to the scholarly version of the argument, see E Snodgrass, 'Protecting Investors' Legitimate Expectations – Recognizing and Delimiting a General Principle' (2006) 21 ICSID Review – FILJ 1; M Potestá, 'Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept' (2013) 28 ICSID Review – FILJ 88.

[58] See chapter by Henckels in this volume.

[59] *United Utilities (Tallinn) BV and Or v Estonia,* ICSID Case No. ARB/14/14, Award, 21 June 2019 paras 575-579; *Glencore* (n 8) paras 1310, 1368.

proposition,[60] and considerable divergence regarding a broader principle that would call for general stability of the legal order in the absence of specific representations.[61] The interesting question for the present purpose is how these developments have been received by the international legal process. In short, what was the ultimate reception of this rule of law-inspired innovations in dispute settlement review institutions (annulment committees), inter-State tribunals, and treaty-making?

In that setting, the reaction has been mixed. The *MTD v Chile* annulment committee had this to say about the fit of *Tecmed* within the traditional structure of sources:

> 66. According to the Respondent, 'the TecMed programme for good governance' is extreme and does not reflect international law. The *TECMED* dictum is also subject to strenuous criticism from the Respondent's experts, Mr. Jan Paulsson and Sir Arthur Watts. They note, *inter alia*, the difference between the TECMED standard and that adopted in other cases, including one the Tribunal also cited in a footnote but without comment.
>
> 67. The Committee can appreciate some aspects of these criticisms. For example the *TECMED* Tribunal's apparent reliance on the foreign investor's expectations as the source of the host State's obligations (such as the obligation to compensate for expropriation) is questionable. The obligations of the host State towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have. A tribunal which sought to generate from such expectations a set of rights different from those contained in or enforceable under the BIT might well exceed its powers, and if the difference were material might do so manifestly.[62]

The ICJ in the recent *Obligation to Negotiate Access to the Pacific Ocean* judgment (having one member of the *MTD* annulment committee now as a Judge) did not seem overly impressed either:

> The Court notes that references to legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment. It does not follow from such references that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation. Bolivia's argument based on legitimate expectations thus cannot be sustained.[63]

State practice is mixed but generally unenthusiastic. The 2018 EU-Singapore Investment Agreement provides that:

---

60 *Greentech Energy Systems A/S and Ors v Italy,* SCC Arbitration V (2015/095), Final Award, 23 December 2018 paras 445-455; ibid Dissenting Opinion of Arbitrator Sacerdoti, 5 December 2018; *SolEs Badajoz GmbH v Spain,* ICSID Case No. ARB/15/38, Award, 31 July 2019 paras 312-313.

61 *South American Silver Limited (Bermuda) v Bolivia,* Award, PCA Case no 2013-15, 22 November 2018 para 650; *Voltaic Network GmbH v Czech Republic,* PCA Case No. 2014-20, Award, 15 May 2019 paras 487-488; *Glencore* (n 8) paras 1310, 1368.

62 *MTD* annulment (n 32) paras 66-67.

63 *Obligation to Negotiate Access to the Pacific ocean (Bolivia v Chile)* [2018] ICJ Rep 507 para 161.

> In determining whether the fair and equitable treatment obligation, as set out in paragraph 2, has been breached, a Tribunal may take into account, where applicable, whether a Party made specific or unambiguous representations to an investor so as to induce the investment, that created legitimate expectations of a covered investor and which were reasonably relied upon by the covered investor, but that the Party subsequently frustrated.[64]

The 2018 Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) states that:

> For greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.[65]

The 2020 Regional Comprehensive Economic Partnership (RCEP) adopts a very narrow reading of fair and equitable treatment, seemingly limiting it to denial of justice.[66] Finally, in a 2020 non-disputing party submission, the United States suggested, by reference to its long-standing practice, that:

> The concept of 'legitimate expectations' is not a component element of 'fair and equitable treatment' under customary international law that gives rise to an independent host State obligation. The United States is aware of no general and consistent State practice and *opinio juri*s establishing an obligation under the minimum standard of treatment not to frustrate investors' expectations. An investor may develop its own expectations about the legal regime governing its investment, but those expectations impose no obligations on the State under the minimum standard of treatment. The mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.[67]

These instances of practice speak to different instruments and are often carefully crafted not to prejudge positions on broader questions of treaty or customary law. Still, the common thread running through is suspicion about rule of law-inspired notions, either rejecting them wholesale or confining within extremely narrow boundaries. There is nothing wrong about legal arguments failing to be endorsed *verbatim* by the international legal process – the messy transposition and

---

[64] EU-Singapore Investment Protection Agreement (n 38) art 2.4(3). A footnote adds that, '[f]or greater certainty, the frustration of legitimate expectations as described in this paragraph does not, by itself, amount to a breach of paragraph 2, and such frustration of legitimate expectations must arise out of the same events or circumstances that give rise to the breach of paragraph 2'.

[65] 2018 Comprehensive and Progressive Agreement on Trans-Pacific Partnership <https://www.mfat.govt.nz/assets/Trade-agreements/TPP/Text-ENGLISH/9.-Investment-Chapter.pdf> art 9.6(4).

[66] 2020 Regional Comprehensive Economic Partnership <https://www.dfat.gov.au/sites/default/files/rcep-chapter-10.pdf> art 10.5(2)(a), (c). Cf. art 10.5(2)(a) ('fair and equitable treatment *requires* each Party not to deny justice in any legal or administrative proceedings') (emphasis added) with CPTPP ibid art 9.6(2)(a) ("'fair and equitable treatment" *includes* the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world') (emphasis added).

[67] *Omega Engineering LLC and Oscar Rivera v Panama*, ICSID Case no ARB/16/42, Third Submission of the US, 3 February 2020, para 24.

refinement of domestic notions into a rule suited to public international law, crafted with an eye to properly international practice and techniques (e.g. estoppel),[68] is precisely how one expects the legal process to work. But to the extent that the intellectual inquiry is into how rule of law-inspired decisions have fared, legitimate expectations, just as proportionality in the previous sub-section, is probably not the most successful example.

C. Due process

Unlike arbitrariness and protection of expectations with their apparent tension between rule of law-inspired approaches in arbitral practice and a significantly more qualified attitude by States, reliance on domestic and international standards seems to give rise to less tension on due process. A recent example on the arbitral side is the Award in the well-known *Chevron v Ecuador (II)* case:

> 8.56 … the Tribunal has found that Judge Zambrano acted corruptly, in return for a bribe promised to him by certain of the Lago Agrio Plaintiffs' representatives. Judge Zambrano's collusive conduct in the 'ghostwriting' of the Lago Agrio Judgment was not authorised under Ecuadorian law. Nor was it under judicial standards long established under international law. He was far from acting as an independent or impartial judge deciding the Lago Agrio Litigation fairly between the parties, under minimum standards for judicial conduct long recognized under international law.
>
> 8.57 Article 10 of the Universal Declaration of Human Rights, adopted by the UN General Assembly on 10 December 1948, provides: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and any criminal charges against him". Article 14 of the International Covenant on Civil and Political Rights, adopted by the UN General Assembly on 16 December 1966 (in force from 23 March 1976), to which the Respondent is a party, provides, in material part: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." Article 2 of the UN Basic Principles on the Independence of the Judiciary, adopted by the UN General Assembly in November-December 1985, provides: "The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason." Article 6 of these Basic Principles provides: "The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected."
>
> 8.58 The Tribunal does not understand from the Parties' respective submissions that these international standards for judicial conduct are materially disputed between them. Moreover, in addition to the Universal Declaration of 1948 and the International Covenant of 1966, the Constitutional Court's Judgment cites Article 8 of the American Convention

[68] *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, PCA Case no 2011-03, Award, 18 March 2015, XXXI U.N.R.I.A.A. 359 (2015) paras 435–38.

> on Human Rights of 1969 on the right to a fair trial "by a competent, independent and impartial tribunal." As to Ecuadorian law, the Constitutional Court's Judgment also cites the constitutional rights under Articles 75 and 76(7)(k) of the Respondent's Constitution "to the effective, impartial and speedy protection of his or her rights and interests" and "to be tried by an independent, impartial and competent judge."[69]

This is not an isolated case. For example, in the 2002 award in *Mondev v United States,* the Tribunal repeatedly referred to the case law of the European Court of Human Rights by analogy to inform its reasoning on fair and equitable treatment regarding an alleged denial of justice by denial of access to court due to immunity.[70] In the 2008 award in *Victor Pey Casado and President Allende Foundation v Chile (I),* the Tribunal again relied on the European Court's case law to confirm its reasoning on denial of justice by excessive length of proceedings.[71] In general terms, Reinisch and Schreuer have recently noted that '[d]ue process corresponds to domestic law concepts, often guaranteed on the level of constitutional law or at least civil and administrative procedural law. Because of this, it is legitimate for investment tribunals to identify and assess the due process requirements on a comparative basis'.[72]

How did States react to these developments? The difference between at best lukewarm State practice on appropriateness of comparative public law inspiration regarding arbitrariness and legitimate expectations, considered above, and the broadly positive endorsement regarding due process is striking. Indeed, the contrasting dynamic was evident in the very first serious engagement in *Mondev* case, where the United States invoked by analogy the practice of the European Court of Human Rights, and it was the tribunal that emphasized the various differences between investment law and regional human rights that limited the usefulness of such claims:

> 141. The parties sought to draw analogies for the present case from the field of foreign State immunity. … in a series of decisions the European Court of Human Rights has held that the conferral of immunity in ways recognised in international practice does not involve a denial of access to a court, contrary to Article 6(1) of the European Convention of Human Rights. By analogy, the United States argued, the recognition of a limited statutory immunity for certain torts could not be considered a violation of the international minimum standard or a denial of justice, given the lack of any clear or consistent State practice requiring the denial of immunity.
>
> 144. These decisions concern the "right to a court", an aspect of the human rights conferred on all persons by the major human rights conventions and interpreted by the European Court in an evolutionary way. They emanate from a different region, and are not

[69] *Chevron Corporation and Texaco Petroleum Company v Ecuador,* PCA Case no 2009-23, Second Partial Award on Track II, 30 August 2018 paras 8.56-8.58.
[70] *Mondev International Ltd v US,* ICSID Case no ARB(AF)/99/2, Award, 11 October 2002 paras 138, 141, 143-4.
[71] *Victor Pey Casado and President Allende Foundation v Chile (I),* ICSID Case no ARB/98/2, Award, 8 May 2008, para 662. *Pey Casado (I)* was partially annulled but not on this point, Decision on the Application for Annulment, 18 December 2012 paras 281-287.
[72] Reinisch and Schreuer (n 22) 377.

> concerned, as Article 1105(1) of NAFTA is concerned, specifically with investment protection. At most, they provide guidance by analogy as to the possible scope of NAFTA's guarantee of "treatment in accordance with international law, including fair and equitable treatment and full protection and security". But the Tribunal would observe that, as soon as it was decided that BRA was covered by the statutory immunity (a matter for Massachusetts law), then the existence of the immunity was arguably to be classified as a matter of substance rather than procedure in terms of the distinction under Article 6(1) of the European Convention.[73]

Treaty practice has not sought to challenge the arbitral approaches either. The EU-Singapore Investment Protection Agreement lists 'denial of justice in criminal, civil and administrative proceedings' as one example of the breach of fair and equitable treatment (with the uncontroversial footnote that 'the sole fact that the covered investor's claim has been rejected, dismissed or unsuccessful does not in itself constitute a denial of justice').[74] RCEP seems to make a similar point from the perspective of obligation, rather than breach: 'fair and equitable treatment requires each Party not to deny justice in any legal or administrative proceedings'.[75] CPTPP directly points the interpreter to comparative engagement with domestic law, explaining that fair and equitable treatment 'includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings *in accordance with the principle of due process embodied in the principal legal systems of the world*'.[76] This is very different from the treatment of other aspects of fair and equitable treatment in State practice, where every further 'for greater certainty' footnote and sub-paragraph nods disapprovingly towards particular bits of arbitral practice, often precisely those inspired by the rule of law. With a veil of ignorance drawn over the last two decades of investment law, one might have expected that claims about due process would be, just as they had been since times immemorial, the most controversial aspect of the field. Why has this plausible expectation not materialized?

Let me suggest a number of possible reasons. First, denial of justice is a comparatively robust rule, building on a great amount of 19th and early 20th century practice and well understood in the pre-World War II international law.[77] Debates about arbitrariness and protection of expectations do not seriously date to times before the 1990s, so perhaps contestation is something that is inevitable in the foundational decades, just as it was for denial of justice a century ago. The second and related point is that modern practice has closely followed early 20thcentury's

[73] *Mondev* (n 70) paras 141, 144.
[74] EU-Singapore Investment Protection Agreement (n 38) art 2.4(2)(a), fn 2.
[75] RCEP (n 66) art 10.5(2)(a).
[76] CPTPP (n 65) art 9.6(2)(a) (emphasis added). A footnote adds that, '[f]or greater certainty, the frustration of legitimate expectations as described in this paragraph does not, by itself, amount to a breach of paragraph 2, and such frustration of legitimate expectations must arise out of the same events or circumstances that give rise to the breach of paragraph 2'.
[77] AV Freeman, *International Responsibility of States for Denial of Justice* (1938).

approaches. The continuity is reflected in the routine footnoting authorities from 1910-1930s, not waved aside as odd anachronisms as would often be the case on other aspects of fair and equitable treatment.[78] The third point is the greater extent of global consensus on basic expectations regarding judicial conduct. It does not mean that human rights instruments can always be easily articulated as admissible interpretative materials[79] but, as the *Chevron* award quoted at the beginning of this section illustrates, there is a great deal of normative material at various levels and settings that address judicial conduct, unlike the highly uneven protection of property rights at the level of universal rules. The fourth point is an amalgam of the first three: if the basic structure of the rule is established, then States are content to see it fleshed out by reference to globally shared expectations. The final point will perhaps sound slightly cynical but even when States explicitly direct interpreters to domestic public law, it is not meant to be taken too seriously. A 2019 US non-disputing party submission is a good example, explaining 'the obligation not to deny justice … in accordance with the principle of due process embodied in the principal legal systems of the world' over three pages of extensively footnoted references to international law authorities *and* one sentence on US law.[80] The light effect of explicit pointers to domestic public law put into perspective how enthusiastically international legal process is likely to treat rule of law-inspired approaches flowing from rules silent on the matter.

IV. Conclusion

Fair and equitable treatment may be the strongest candidate for a positive expression of the rule of law in international investment law. For some, the proposition seems self-evidently true, like the *Casinos Austria* tribunal that recently spoke of the 'rule of law-elements flowing from fair and equitable treatment'.[81] As ever in a discussion conducted with an eye to a legal setting, it is helpful to be clear about what the argument is, how its validity may be tested, and what benefits and costs flow from accepting it. Section II argued that vagueness as well as intuitive normative appeal, even inevitability of the rule of law – one might as well argue against gravity and apple pie – may be leading to some conceptual looseness of the manner of its introduction into investment law

[78] *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v Peru,* ICSID Case no UNCT/18/2, Submission of the US, 21 June 2019 fns 74, 82 (Borchard, 1919), 78 (Harvard Draft, 1929), 85 (Baty, 1930; Freeman, 1938).
[79] *Toto Construzioni Generali Spa v Lebanon,* ICSID Case no ARB/07/12, Decision on Jurisdiction, 11 September 2009 para 157 ('Article 6 of the ECHR certainly covers the question to which extent lengthy court proceedings are a breach of the right to due process and to a fair and equitable trial. This matter has been extensively subject of decisions from domestic courts and from the European Court of Human Rights. However, as Lebanon is not party to the ECHR and lies outside the territorial scope of the ECHR, these decisions are not relevant in this case.') .
[80] Cf. *Gramercy* US (n 78) paras 42-47, fn 85.
[81] *Casinos Austria* (n 9) para 243.

debates. At the jurisprudential end of the spectrum, the rule of law is employed as a benchmark of political morality or a shorthand for describing the content of an international obligation complying with that benchmark. At the lawyerly end of the spectrum, the rule of law systematises the chaos of arbitral practice that roughly follows the laundry list from political morality treatises or refers to the legal argument of bringing general principles into the interpretative process.

There may be advantages for relying on rule of law: it inspires solutions where the usual vocabulary of international law seems unpromising and will, for some, provide a source of legitimacy. But there are also costs, and even if one is ultimately ready to bear them, it is important to acknowledge them. One cost is conflation of philosophical and legal inquiries, with the danger of producing bad philosophy and bad law. The other is erosion of trust in normal methods of public international law reasoning, which in investment law, just as in other specialist fields, are capable of providing answers to even hard questions. There is also the more basic concern about conflating very different debates: we know what rule of law-inspired institutions and debates look like regionally,[82] and that is very different indeed from the decentralised international investment law. Indeed, even consequentialists will wonder whether the right takeaway from the European experience of the last few years is that the implementation of the rule of law in an institutionalised setting will always be received by universal consensus in a spirit of perfect tranquillity.

The benefit of writing this chapter in 2020 is that the analysis can take into account how rule of law-inspired approaches to fair and equitable treatment have fared in the international legal process. What did States ultimately make of these elegantly written awards? Section III considered in turn three aspects of the application of fair and equitable treatment: arbitrariness, protection of expectations, and due process, which seemed to have been received in two distinct ways. For arbitrariness and protection of expectations, arguments explicitly or by necessary implication drawing upon domestic legal traditions – respectively proportionality and legitimate expectations – have been treated with considerable scepticism, with States and the EU rejecting or at the very least framing them in the narrowest possible terms. Conversely, the traditionally contentious arbitral practice denial of justice has been broadly endorsed, with States invoking human rights arguments by analogy and including references to domestic legal traditions in their treaties. It is hard to read this practice otherwise than suggesting a sceptical reception of rule of law-elements by positivist international investment law when it goes against or significantly beyond the grain of traditional rules and assumptions. It does not mean that rule of law inquiry has no role to play, either in normative terms or as providing a descriptively helpful taxonomy for this supremely

[82] See e.g. in Europe, in Council of Europe, <https://www.coe.int/en/web/portal/rule-of-law>, and the European Union, European Commission, *2020 Rule of law report* (30 September 2020) <https://ec.europa.eu/info/publications/2020-rule-law-report-communication-and-country-chapters_en>.

decentralised field of dispute settlement. But to the extent that it is employed to make a difference in a strictly legal debate, it has to explain why the rule of law is more than an ingenious solution to hard questions in the 2000s that was rejected by (the ultimate masters of) the international legal process as the 2010s unfolded. This chapter remains respectfully unpersuaded that such an explanation can be successfully provided.