



Swansea University
Prifysgol Abertawe



Cronfa - Swansea University Open Access Repository

This is an author produced version of a paper published in:
Manchester Journal of International Economic Law

Cronfa URL for this paper:
<http://cronfa.swan.ac.uk/Record/cronfa46240>

Paper:

Davies, A. Investment Law Treaty Interpretation, fair and equitable treatment and legitimate expectations. *Manchester Journal of International Economic Law*, 15(3), 314`-353.

This item is brought to you by Swansea University. Any person downloading material is agreeing to abide by the terms of the repository licence. Copies of full text items may be used or reproduced in any format or medium, without prior permission for personal research or study, educational or non-commercial purposes only. The copyright for any work remains with the original author unless otherwise specified. The full-text must not be sold in any format or medium without the formal permission of the copyright holder.

Permission for multiple reproductions should be obtained from the original author.

Authors are personally responsible for adhering to copyright and publisher restrictions when uploading content to the repository.

<http://www.swansea.ac.uk/library/researchsupport/ris-support/>

INVESTMENT LAW TREATY INTERPRETATION, FAIR AND EQUITABLE TREATMENT AND LEGITIMATE EXPECTATIONS

Concerns about investor state dispute settlement have been attributed, in part, to the interpretation of fair and equitable treatment obligations as protecting the legitimate expectations of investors. This article offers a view on this development using an analytical framework described as 'holistic but tailored' treaty interpretation. Particular attention is given to accommodating comparative insights, and taking account of subsequent state agreement and practice, under the interpretive principles set out in Articles 31 and 32 of the Vienna Convention. Given that some fair and equitable treatment standards are tethered to the customary international law minimum standard of treatment, while others may be described as autonomous, attention is also given to the required extent of differentiation in terms of ascertaining the content and meaning of these norms. The article refutes the view that analysing fair and equitable treatment provisions with reference to legitimate expectations should be rejected. Rather, the position advanced is that the role of legitimate expectations in any given dispute should depend on a range of factors. These include the extent of recognition of legitimate expectations in the domestic legal systems of the state parties to the treaty in question, and the positions advanced by states whether through formal agreed interpretations of the treaty, or in the context of individual disputes.

CONTENTS

- I Introduction
- II The Development of Legitimate Expectations under FET Standards
 - A Legitimate Expectations Protected Without Clear and Express Undertakings
 - B Absence of Clear and Express Undertakings Reduce Prospect of Successful Claim
 - C Legitimate Expectations Require Clear and Express Assurances
 - D Concluding Observations
- III VCLT Article 31(3)(C) and ICJ Statue Article 38(1)(C)
 - A Legal Basis for a Comparative Method
 - B Legitimate Expectations as a General Principle of Law?
 - C Main Comparative Insight
 - D A More Expansive Doctrine in Investment Law?
- IV VCLT Article 31(3)(A)&(B) – Subsequent Agreement and Practice
 - A Use of Treaty Based Mechanisms
 - B Non-disputing Party and Respondent State Submissions
 - 1 Interpretive Weight of State Submissions
 - 2 Application
- V Determining the Content of the CIL MST as It Applies To Foreign Investors

VI Conclusion

I INTRODUCTION

What constitutes “legitimate expectations” has been the core issue in a number of different investment disputes and certain interpretations are responsible for much of the criticism against ISDS in general and against the article on “fair and equitable treatment” in particular.¹

Interpreting fair and equitable treatment (FET) standards as protecting the legitimate expectations of investors is an established but highly contested aspect of international investment law. The concept finds no expression in any investment treaty currently in force. Yet it has been elevated by some investor state dispute settlement (ISDS) tribunals to ‘the most important function’ of the FET standard.² This protection holds a strong appeal for investors. The state conduct which may give rise to legitimate expectations provides predictability or ‘calculability’³ in relation to stability in the legal and business environment. Investors are able to more securely predict the level of return on investments over an extended period and are understandably aggrieved when these expectations are frustrated by changes in government policy. In contrast, state actors view the emerging doctrine as an unwarranted extension of FET standards which curtails much needed flexibility when responding to regulatory challenges from public health or environmental concerns, to financial crises. New treaties comprising CETA⁴ and CPTPP,⁵ have clearly been drafted with this perceived threat in mind.

¹ “The Right to Regulate” in the Trade Agreement between the EU and Canada – and its implications for the Agreement with the USA, National Board of Trade (Sweden), Sep. 2015 – First Edition 22-23, available at <http://www.kommers.se/Documents/dokumentarkiv/publikationer/2015/Publ-The-right-to-regulate.pdf>.

² *Electrabel S.A. v. Republic of Hungary*, ICSID Case No ARB/07/19, Jurisdiction, Applicable Law and Liability 30 Nov 2012) para 7.75. The notion of legitimate expectations has also been described as the ‘dominant element’ of the FET standard. *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award 17 Mar 2006 para 302. A further tribunal was content to analyse the alleged FET violation ‘primarily through the prism of legitimate expectations’. *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award 8 Apr 2013 para 557 [Arif].

³ The *Vivendi* tribunal attributed this term to Max Weber’s work: ‘The theoretical basis [for legitimate expectations] no doubt is found in the work of the eminent scholar Max Weber, who advanced the idea that one of the main contributions of law to any social system is to make economic life more calculable and also argued that capitalism arose in Europe because European law demonstrated a high degree of “calculability”.’ *Suez, Sociedad General de Aguas de Barcelona S.A., Vivendi Universal S.A., AWG Group v Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability 30 July 2010) para 222. Wongkaew identifies this passage as the sole exception to the tendency of tribunals not to identify the theoretical underpinnings for legitimate expectations. Teerawat Wongkaew ‘The Transplantation of Legitimate Expectations in Investment Treaty Arbitration’ in Shaheez Lalani, Rodrigo Polanco Lazo (eds) *The Role of the State in Investor-State Arbitration* (Brill Nijhoff The Netherlands 2015) 69 at 80.

⁴ EU-Canada Comprehensive Economic and Trade Agreement, text available at http://ec.europa.eu/trade/policy/in-focus/ceta/index_en.htm.

This article develops a position on the role of legitimate expectations under FET standards with reference to what may be termed ‘holistic but tailored’ treaty interpretation as envisaged by Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT).⁶ The basic idea here is that the process of attributing meaning and content to treaty provisions is enriched via application of the different VCLT interpretive elements, and that over-reliance on any particular element should be avoided. More specifically, the term ‘holistic’ captures the non-hierarchical relationship between the VCLT interpretive elements,⁷ while the ‘tailored’ nature of the process means that the weight of the various elements will vary as between different FET provisions.⁸ For example, as a new generation of treaties attempt to further specify the content of FET standards, some referring specifically to the expectations of investors, the ‘ordinary meaning’ of the terms used, as referred to in VCLT Article 31(1), may gain more prominence. Additionally, while Article 31(3) requires consideration of subsequent state party agreement, available evidence will be more abundant in relation to some treaties than others. Finally, the trend towards tethering FET standards to the customary international law minimum standard of treatment (CIL MST), raises questions about ascertaining the content of this norm and whether this process is an aspect of, or separate from, the VCLT interpretive framework. The various interpretive strands will therefore have varying relevance depending on the language, maturity, and basis of the particular FET standard at issue. It is a matter of placing, ‘appropriate emphasis on the various means of interpretation’.⁹

This approach differs from what can be observed in the cases and academic literature. Investment tribunals have often elaborated on FET standards by referring to formulations in previous awards

⁵ Comprehensive and Progressive Agreement for Trans-Pacific Partnership, text available at <<https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/cptpp/>>.

⁶ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980), United Nations, Treaty Series, vol. 1155, No. 18232 [hereinafter VCLT]. The ILC considers these rules to ‘also apply as customary international law’. Draft Conclusions of ILC on Subsequent Agreement and Subsequent Practice, Draft Conclusion 1 para. 1. This position is widely reflected in international law cases: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* ICJ Rep (2007) p 43 para 160; *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* ICJ Rep (2009) p 213 para 47; *Golder v United Kingdom* ECHR Ser. A, [1995] no 18 (European Court of Human Rights); *Restrictions to the Death Penalty Cases* 70 ILR 449 (1986), (Inter American Court of Human Rights); *United States--Standards for Reformulated and Conventional Gasoline AB--1996-1 WT/DS2/AB/R*, 29 Apr 1996, 16 (World Trade Organization Appellate Body).

⁷ As noted by the ILC, ‘It is generally recognized that article 31 of the Vienna Convention must not “be taken as laying down a hierarchical order” of the different means of interpretation contained therein, but that these are to be applied by way of “a single combined operation”’. ILC First report on subsequent agreement and subsequent practice in relation to treaty interpretation, by George Nolte, Special Rapporteur, 19 March 2013, p. 6, para. 9, citing Vienna Convention on the Law of Treaties, article 32, Yearbook of the International Law Commission (1966), vol. II p 219 para 8.

⁸ As noted by the ILC (ibid), ‘...the application of the general rule on treaty interpretation to different treaties, or treaty provisions, in a specific case may result in a different emphasis on the various means of interpretation contained therein, in particular in more or less emphasis on the text of the treaty or on its object and purpose.’

⁹ Draft Conclusions of ILC on Subsequent Agreement and Subsequent Practice, Draft Conclusion 1, para. 5. A/CN.4/L.813, 24 May 2013.

which were not themselves developed via any explicit method of treaty interpretation.¹⁰ While references to a ‘house of cards’ or ‘closed circuit feedback loop’¹¹ may be an overstatement,¹² there is little doubt that over-reliance on previous awards undermines the credibility of the ISDS system. The existing literature offers a significant, but only partial response. The call for interpretation to be informed by a public law comparative approach is an established feature of investment law scholarship.¹³ Under this approach, investment norms should not, without good reason, develop beyond what can be observed in comparable systems of public law adjudication¹⁴ such as administrative and constitutional law at the domestic level, or international judicial review, before the European Court of Justice, European Court of Human Rights or World Trade Organization. I shall argue that this approach can be accommodated under VCLT Article 31(3)(c) and that it may also be relevant under some of the other interpretive strands. However, the more important point is that comparative insights do not exhaust the process of treaty interpretation. They may either be confirmed and reinforced, or called into doubt, upon the application of other interpretive elements. An over-emphasis on comparative insights may also lead to premature acceptance of a ‘treaty-overarching’ uniform FET standard, when it may be more accurate to think in terms of different types of FET standards, or even individualized standards.

Section II sets the scene by tracing the development of legitimate expectations under FET standards within the significant body of relevant cases. The material is condensed by concentrating on the initial threshold issue of the required specificity and clarity of state conduct which can give rise to legitimate expectations.¹⁵ Examples from the cases are located in three broad categories along a spectrum ranging from the most expansive understanding to the strictest approach. Using a doctrinal method, the aim here is to identify the strength of any general direction of travel, thereby enabling a view to be formed on whether some approaches and emphases can now be regarded as anomalous.

¹⁰ Potestà notes that: ‘...through a mechanical and not thoroughly thought-through reference to previous awards, tribunals evade their duty to explain the roots, the exact contours and possible limits of the issue of protection of the investor’s legitimate expectations under the applicable investment treaty’. Michele Potestà ‘Legitimate Expectations in Investment Treaty Law: Understanding the Roots and Limits of a Controversial Concept’ (2013) 28 ICSID Rev-FILJ 88.

¹¹ Anthea Roberts ‘Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States’ (2010) 104 AJIL 179, 179 and 190.

¹² The interpretive relevance of previous decisions is discussed in Section V.

¹³ Stephan W. Schill ‘Enhancing International Investment Law’s Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach’ (2011) 52 Va. J. Int’l L. 57; Santiago Montt *State Liability In Investment Treaty Arbitration* (Hart Pub Oxford 2009); Elizabeth Snodgrass ‘Protecting Investors’ Legitimate Expectations: Recognizing and Delimiting a General Principle’ (2006) 21 ICSID Rev-FILJ 1.

¹⁴ I do not engage in this contribution with the on-going debate on where the investment law regime should be located on a spectrum between public and private law adjudication. Notable contributions include, Anthea Roberts ‘Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System’ (2013) 107 AJIL 45; José E. Alvarez ‘Is Investor-State Arbitration ‘Public’?’ (2016) 7 J. Int’l Dispute Settlement 534.

¹⁵ Space does not permit a more comprehensive survey going beyond this initial threshold matter. An issue of no less importance arises when legitimate expectations are confirmed as having arisen; specifically, the relevance and impact, if any, of explanations put forward by the state for the change in position which frustrates the expectations.

Sections III and IV proceed to evaluate the current picture with reference to the suggested holistic but tailored method of treaty interpretation. The focus in these sections on the three sub-paragraphs of VCLT Article 31(3)¹⁶ might seem narrower and at odds with the stated method. However, I am inclined to accept the view of several tribunals that assessing the ‘ordinary meaning’ of the terms ‘fair’ and ‘equitable’, as required by Article 31(1), does not significantly advance the process of treaty interpretation. This can be little more than a thesaurus based exercise which enables a better understanding of the departure point for interpretation.¹⁷ Another of the Article 31(1) elements, ‘object and purpose’ is undoubtedly important especially as treaties increasingly refer to the ‘right to regulate’.¹⁸ It is notable, however, that several tribunals have declined to give overriding weight to preambles with a more exclusive focus on economic objectives.¹⁹ Thus, while Article 31(1) provides the logical starting point for interpretation, the elements here cannot reveal very much about the scope for legitimate expectations under FET standards. Moreover, I am not aware of any ‘agreement’ or ‘instrument’ which would merit recourse to Article 31(2). In the present context, therefore, Article 31(3) is at the centre of the process of holistic but tailored interpretation.

Section III begins by considering the legal basis for a comparative methodology. Commentators and tribunals are usually content to cite Article 38(1)(c) of the Statute of the International Court of Justice which empowers the Court to apply ‘the general principles of law recognized by civilized nations’. The section addresses the relationship between this provision and VCLT Article 31(3)(c) which requires the taking into account of, ‘[a]ny relevant rules of international law applicable in the relations between the parties’. It is established that these provisions, in principle, combine to provide a strong legal basis for a comparative method. However, this is subject to legitimate expectations having attained the elevated position of a recognized general principle. The section sets out the

¹⁶ VCLT Article 31(3): There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) Any relevant rules of international law applicable in the relations between the parties.

¹⁷ The *Micula* tribunal put the matter as follows: ‘To establish the content of the standard, the Tribunal must first turn to the plain meaning of the terms “fair and equitable.” The plain meaning of these terms, however, does not provide much assistance. As noted by the tribunal in *MTD v. Chile*, “[i]n their ordinary meaning, the terms ‘fair’ and ‘equitable’ [...] mean ‘just’, ‘even-handed’, ‘unbiased’, ‘legitimate’.” Similarly, the tribunal in *S.D. Myers v. Canada* stated that unfair and inequitable treatment meant “treatment in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective.” This Tribunal agrees with the *Saluka* tribunal in that “[t]his is probably as far as one can get by looking at the ‘ordinary meaning’ of the terms of Article 3.1 of the Treaty.” (*Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania* ICSID Case No ARB/05/20 award of 11 Dec 2013 para 504 (notes omitted)).

¹⁸ CETA Article 8.9.1 ‘For the purpose of this Chapter, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.’ This language is identical to the 6th Recital of the CETA Preamble.

¹⁹ This is most clearly reflected in the *Saluka* tribunal’s influential view that over-emphasizing the protection of foreign investments in treaty interpretation will tend to dissuade host states from admitting investments, and undermine the object of intensifying economic cooperation. *Saluka Investments B.V. v. The Czech Republic* UNCITRAL Partial Award of 17 Mar 2006 para 300.

methodological difficulties here, and considers what weight should be given to comparative insights when faced with uncertainty over whether the status of a general principle has been attained. This question is especially sensitive for states which have rejected legitimate expectations in their administrative law.

Section IV turns to subsequent agreement and practice on interpretation as referred to in VCLT Article 31(3) paragraphs (a) and (b). The related enquiries here are the extent to which these elements empower states to influence the process of treaty interpretation, and whether insights gained here reinforce, or differ from, those gained under Article 31(3)(c). These questions are considered first in relation to treaty based mechanisms under which parties can express agreed interpretive positions, and, secondly, in relation to subsequent state practice in the form of state submissions in individual cases. The discussion proceeds via a conceptual analysis of both the ILCs on-going work on subsequent agreements and subsequent practice, and the nature of autonomous FET standards relative to those tethered to the CIL MST. Among the issues considered are whether the ILCs work can be reconciled with the theory that investment tribunals should assess the reasonableness of interpretations advanced by states. Also queried is whether the increasing trend towards tethered FET standards supports or undermines the aim of preserving policy space for states.

Section V addresses the assumption in previous sections that VCLT Articles 31 and 32 are relevant for ascertaining the content of the CIL MST as it applies to foreign investors. As CIL results from the general and consistent practice of states followed from a sense of legal obligation, the question is whether this distinct methodology entails the exclusion of the VCLT interpretive framework. It is suggested that practical considerations must be acknowledged here, in particular the extent to which direct evidence on the content of the CIL MST is available to the tribunal, and the observation that treaty based tethered FET standards are still treaty provisions. Section VI offers concluding observations to the effect that, in principle, the properly delimited protection of legitimate expectations has a role under all FET standards, with the extent of that role in any particular dispute depending on what is revealed through the interpretive process.

II THE DEVELOPMENT OF LEGITIMATE EXPECTATIONS UNDER FET STANDARDS

This section sets the scene ahead of an evaluation with reference to the suggested holistic but tailored method of treaty interpretation. The account of the case law works roughly from the most expansive to the most restrictive approaches towards protecting legitimate expectations. Three broad categories are identified. In the first category, legitimate expectations arising from something other than express and clear undertakings by, or attributable to, the state were both recognized and protected. Cases in the second category preserve this possibility, but also illustrate that claimant's may well encounter formidable barriers in the absence of express and clear undertaking. Cases under the third category arguably do not admit the possibility of legitimate expectations arising from anything other than

express and clear undertakings. While it is possible to discern a general direction of travel towards the second and third approaches, the delimitation of legitimate expectations has not followed a linear and ratcheted progression.²⁰ Modern tribunals are therefore able to choose between different approaches and emphases.

A Legitimate Expectations Protected Without Clear and Express Undertakings

*Tecmed v. Mexico*²¹ provides the foundation for attempts to establish legitimate expectations in the absence of clear and express undertakings. The tribunal envisaged an extremely broad scope for the FET standard²² beginning with the idea of providing, ‘treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment’. This statement empowers claimants to assert that they formed expectations deserving of protection, without necessarily pin-pointing the origin of these expectations.²³ Of greater significance, however, is the further idea that states must act in a manner ‘free from ambiguity’.²⁴ From here, the argument is that ambiguous, or non-committal, state conduct can give rise to legitimate expectations when investors rely upon a plausible understanding of this conduct. The ambiguity will be resolved against the state which will be held, at least in damages, to the investor’s understanding. It is debateable whether or not *Tecmed* itself was decided on this basis. While not free from ambiguity, the relevant assurance was reasonably clear.²⁵ However, the more important point is the continuing influence of the idea that host

²⁰ This is as might be expected in a system of *ad hoc* tribunals operating without a formal doctrine of precedent. On precedent in investment law, see Gabriele Kaufmann-Kohler ‘Arbitral Precedent: Dream, Necessity or Excuse?’ (2007) 23 Arb Int’L 357; Christoph Schreuer & Matthew Weiniger ‘A Doctrine of Precedent?’ in Peter Muchlinski, Federico Ortino, & Christoph Schreuer (eds) *The Oxford Handbook Of International Investment Law* (OUP Oxford 2008) 1188.

²¹ *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No ARB (AF)/00/2 award of 25 May 2003) [*Tecmed*].

²² Mexico – Spain BIT, Article 4(1) Each Contracting Party will guarantee in its territory fair and equitable treatment, according to International Law, for the investments made by investors of the other Contracting Party.

²³ As noted by one tribunal, ‘investors normally have expectations in relation to a wide range of contingencies, great and small, and it is often relatively easy for a claimant to postulate an expectation to condemn the very conduct that it complains of in the case before it’. *Arif* (n 2) para 533.

²⁴ ‘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.’ *Tecmed* para 154. This dictum has been described as, ‘a programme of good governance that no State in the world is capable of guaranteeing at all times’, *El Paso Energy International Company v. The Argentine Republic* ICSID Case No. ARB/03/15 Award 31 Oct 2011 para. 342, and as a ‘description of perfect public regulation in a perfect world, to which all states should aspire but few (if any) will ever attain’. Zackary Douglas, *International Law of Investment Claims* (CUP Cambridge 2009) 28.

²⁵ The case concerned a decision to close a landfill prior to the relocation of the claimant’s business to another location due to community pressure. Reference is made by the tribunal to a declaration from empowered authorities stating that, ‘...the current landfill operated by CYTRAR shall be closed as soon as the new facilities are ready to operate’ (para 160). This statement arguably does not convey the more definite assurance that

states must avoid ambiguity. This has clearly influenced the readiness of some subsequent tribunals to recognize and protect legitimate expectations.

This influence is strongly evident in Thomas Wälde's Separate Opinion in *Thunderbird*²⁶ which cited the *Tecmed* formulation with approval.²⁷ The investor had sought an official clarification on whether the proposed gaming machines were permitted under Mexico's anti-gambling laws, and had misrepresented the operation of the machines as being skill based as opposed to chance based. Having received an official reply to the effect that the machines were permitted if as represented, the claimant proceeded to establish the investment only for permission to be withdrawn when the true operation of the machines was discovered. In contrast to the majority, Wälde considered that there had been a FET violation on the basis that, '...even if government assurances were ambiguous and an extra-careful investor could have found this out, the government still owes a duty of consistency and protection of legitimate expectations to the foreign investor'.²⁸

A broad understanding of the FET standard in the Romania – Sweden BIT²⁹ is again evident in the *Micula*³⁰ award which cited the *Tecmed* formulation with cautious approval.³¹ The dispute arose from Romania's introduction of economic incentives for the development of disfavored regions in Romania, and their subsequent revocation in the context of Romania's accession to the EU. These incentives were established by the Emergency Government Ordinance (EGO) - a general scheme of incentives available to investors who fulfilled certain requirements. They were later provided to individual qualifying investors through a Permanent Investment Contract (PIC). The claimant was a PIC holder who had made substantial investments in a disfavored region. It argued that the legal framework had given rise to a legitimate expectation that the incentives would remain available for a ten year period.

The difficulty was to identify the exact origin and content of the asserted expectation. While the legal framework provided a clear assurance that the incentives would be available for ten years, it was, at best, ambiguous on whether the incentives would remain unchanged, or substantially the same, during

closure would *only* occur when new facilities are available, although this could be regarded as a reasonable inference.

²⁶ *International Thunderbird Gaming Corporation v. United Mexican States*, NAFTA Ch. 11 Arb. Trib. Separate Opinion of Thomas Wälde 1 Dec 2005 [*Thunderbird*]. This Opinion is covered both because it is sometimes lauded for the use of the comparative method and because of its relevance to whether investment law protections should extend beyond those in analogous systems; matters which are discussed in Section III:D.

²⁷ *Ibid* para 45.

²⁸ *Ibid* para 57.

²⁹ Article 2(3): Each Contracting Party shall at all times ensure fair and equitable treatment of the investments by investors of the other Contracting Party and shall not impair the management, maintenance, use, enjoyment or disposal thereof, as well as the acquisition of goods and services or the sale of their production, through unreasonable or discriminatory measures.

³⁰ *Micula* (n 17).

³¹ *Ibid* paras 532-534.

this term.³² The tribunal's early statements gave the impression that this would be fatal to the claim. It was noted that, '[i]nvestors must expect that the legislation will change from time to time, absent a stabilization clause or other specific assurances giving rise to a legitimate expectation of stabilization'.³³ However, the need for 'specific assurances' was later interpreted in a broad manner. The tribunal considered that an assurance or representation 'may be explicit or implicit',³⁴ and proceeded as follows:

...the Tribunal finds that, through an interplay of the purpose behind the EGO 24 regime, the legal norms, the PICs, and Romania's conduct, Romania made a representation that created a legitimate expectation that the EGO 24 incentives would be available substantially in the same form as they were initially offered.³⁵

A 'specific assurance' need not, therefore, have definite content, and may be implied from the totality of legal instruments and circumstances before the tribunal.

The decision can be viewed in light of the nature of the instruments from which the majority was able to imply a sufficiently clear representation of stability. There is a difference between changes to the general regulatory environment, and changes to instruments (such as the EGO) which are specifically directed towards attracting investment. It is arguable that investors can reasonably expect a higher level of stability from investment specific instruments. However, it can be noted that investors have the option of negotiating for stabilization clauses which, sometimes, are available at little additional cost.³⁶ It is also notable that some investment specific instruments contain clear assurances while others do not. Indeed, *Micula* was a case in point. There was stabilization language in the predecessor regime³⁷ which was not a feature of the regime at issue in *Micula*.

A similarly broad approach is evident in *Gold Reserve v. Venezuela*.³⁸ A violation of the FET standard in the Canada – Venezuela BIT³⁹ was confirmed on the basis that the respondent's consistent pattern

³² Ibid paras 439, 443, 457 and 676. The Separate Opinion was much clearer on this point noting that, 'all the PIC does it to confer on the investor the right to take advantage of the facilities provided under the Scheme, whatever they may be, at a given moment of time'. *Micula*, Separate Opinion of Professor Georges Abi-Saab 5 Dec 2013 para 7.

³³ Ibid para 529.

³⁴ Ibid para 669.

³⁵ Ibid para 677.

³⁶ See discussion of this point in *Sergei Paushok, CJSC Golden East Company, CJSC Vostokneftegaz Company v. Mongolia* Award on Jurisdiction and Liability in the Matter of an UNCITRAL Arbitration 28 Apr 2011 para 375.

³⁷ *Micula* (n 17) para 618.

³⁸ *Gold Reserve Inc. v. Bolivarian Republic of Venezuela* ICSID Case No. ARB(AF)/09/1 Award 22 Sep 2014 [*Gold Reserve*].

³⁹ Article 2(2) Each Contracting Party shall, in accordance with the principles of international law, accord investments or returns of investors of the other Contracting Party fair and equitable treatment and full protection and security.

of conduct in relation to a mining concession created a legitimate expectation that all authorizations for exploitation would eventually be granted.⁴⁰

In elaborating on the legal standard, the tribunal referred to legitimate expectations being ‘created when a State's conduct is such that an investor may reasonably rely on that conduct as being consistent’.⁴¹ Reference was made to expectations arising from ‘constant behavior and/or promises’.⁴² A need for, ‘precise and specific assurances given by the administration’⁴³ was also identified. Statements of this nature can be misread as communicating a single uniform idea. It is more accurate to identify a progression of ideas in relation to the seed from which legitimate expectations can arise. At one end of the spectrum, representing the strictest approach, there are ‘precise and specific assurances’, although this understanding was interpreted very liberally in *Micula*. Moving along the spectrum, there are ‘promises’ which, if implied, could be less precise and specific. At the opposite end of the spectrum, representing the broadest approach, there is the idea of past conduct of a consistent nature amounting to an implied representation that the state will continue to act in a consistent manner; that there will be no sudden change in policy, or that the rug will not be pulled from under the investor’s feet. The margin of appreciation open to tribunals to confirm or deny a FET violation increases along the spectrum. There is more scope for contestation over whether a pattern of conduct is sufficiently consistent, and over what inference can be drawn from this pattern, than over whether a precise and specific assurance has been given (assuming that the latter test is applied in a manner reflecting the strictness of the terms used).

The *Gold Reserve* tribunal confirmed a FET violation with reference to the broadest understanding. While there had been no express assurance that all authorizations to commence exploitation would be granted, there had also been no warning or formal notice that authorizations would not be granted.⁴⁴ One of the tribunal’s statements is somewhat surprising in that it envisages that long standing tolerance of rule non-compliance, creates an expectation that such tolerance will persist.⁴⁵ States

⁴⁰ The claimant held the 20 year Brisas mining concession originally granted in 1988. This could be extended for two additional 10 year terms if requested six months before expiration. Between 1993 and 2007, various approvals were granted by the relevant Ministries, for example to build access roads and to occupy land adjacent to the Brisas project, and in relation to the claimant’s environmental and socio-cultural impact study. The Construction Permit was granted in 2007, but commencement of works was subject to the signing of an Initiation Act to formally recognize compliance with the Permit conditions. The claimant’s request for signature was met with concerns over the location of an access road. A proposed alternative route was later approved. In 2008, the Environment Ministry declared the Permit an ‘absolute nullity’ for ‘reasons of public order’. Prior to this, the claimant had submitted a timely request to extend the concession. In 2009, the Mining Ministry denied the extension request citing the claimant’s lack of solvency. The Government later seized the claimant’s assets and occupied the Brisas site.

⁴¹ *Gold Reserve* (n 38) para 570.

⁴² *Ibid* para 576.

⁴³ *Ibid*.

⁴⁴ *Ibid* paras 578-9, 587

⁴⁵ ‘...Respondent must have been aware that [the mining Ministry’s] repeated and consistent certifications of Claimant's compliance with its obligations ... generated an expectation that delays or other failures to fully abide by the applicable rules had been and would continue to be accepted by the Administration. Because of

seeking to improve the quality of their administration may therefore incur breaches of FET standards in their investment treaties. As illustrated below, other tribunals have been more forgiving of regulatory changes associated with moves towards good governance.

B Absence of Clear and Express Undertakings Reduce Prospect of Successful Claim

Several other cases recognize the possibility of legitimate expectations arising from something other than a clear and express undertaking. However, these cases also demonstrate that the prospects for establishing a FET violation significantly decline in the absence of such an undertaking. The point is well illustrated by *Parkerings v Lithuania*⁴⁶ in which the tribunal declined to find a violation of the ‘equitable and reasonable treatment’ standard in the Lithuania – Norway BIT.⁴⁷ The claimant was part of a consortium of bidders to whom a car parking concession contract was awarded by the City of Vilnius. Several state laws were later amended which prevented the consortium from receiving an important part of its income. The tribunal considered whether Parkerings had any legitimate expectation in the stability of the legal system. Having cited the *Tecmed* dictum,⁴⁸ it proceeded (much like the *Gold Reserve* tribunal) to outline a broad understanding of the nature of the state conduct from which legitimate expectations can arise:⁴⁹

‘The expectation is legitimate if the investor received an explicit promise or guaranty from the host-State, or if implicitly, the host-State made assurances or representation that the investor took into account in making the investment. Finally, in the situation where the host-State made no assurance or representation, the circumstances surrounding the conclusion of the agreement are decisive to determine if the expectation of the investor was legitimate.’

However, it is difficult to reconcile the breadth of this statement with the recognition of, ‘...each State’s undeniable right and privilege to exercise its sovereign legislative power ... to enact, modify or cancel a law at its own discretion’. Such changes were unobjectionable, ‘[s]ave for the existence of an agreement, in the form of a *stabilisation* clause or otherwise’.⁵⁰ The gold standard for protecting an expectation of stability is thus a stabilisation clause in a contract. Even when set against the general regulatory freedom of the state, explicit and unambiguous assurances of stability not reduced to a stabilisation clause may well also be deserving of protection. However, a further step from the gold standard towards alleged implied assurances of necessarily less definite content will tend to shift the

Respondent’s consistent attitude, Claimant expected to be permitted to continue working on the project by investing substantial amounts to provide the necessary financing.’ Para 605.

⁴⁶ *Parkerings-Compagniet AS v. Republic of Lithuania* ICSID Case No. ARB/05/8 Award 11 Sep 2007 [*Parkerings*].

⁴⁷ Article III.

⁴⁸ *Parkerings* para 330.

⁴⁹ *Ibid* para 331.

⁵⁰ *Ibid* para 332.

balance to regulatory freedom without international liability. This would seem to be a reasonable elaboration of the tribunal's position.

Much the same reasoning is evident in the subsequent *Toto v Lebanon*⁵¹ case decided under the FET standard of the Italy – Lebanon BIT.⁵² In the context of a highway construction contract, Toto complained of increases in customs duties and internal taxes on building materials and diesel which increased costs. The *Tecmed* dictum is once again set out along with the potentially expansive passage from *Parkerings* on the nature of the state conduct from which legitimate expectations can arise. However, also in common with *Parkerings*, significant weight is then attributed to the 'absence of a stabilisation clause or similar commitment'.⁵³ The claimant's attempt to construct an implied representation of stability from the contract, illustrates the difference between express and unequivocal assurances on the one hand, and, on the other hand, alleged undertakings implied from state conduct. Toto argued that an invitation in the contract terms for it to examine all the tax law applicable when it submitted its offer amounted to a commitment not to change that law.⁵⁴ In contrast, the respondent explained this invitation on the basis that Toto needed to understand the full extent of its commitment to pay all prescribed duties and taxes.⁵⁵ Such contestation will almost always be possible and present in the context of alleged implied representations of stability.

A further common message from the two cases is the difficulty of establishing a legitimate expectation of stability when the political and economic conditions are inherently unstable.⁵⁶ Tribunals may therefore be unreceptive towards attempt to construct implied representations of stability when conditions are generally unstable and, even more so, when the changes at issue are explicable on the basis of transition towards better governance.⁵⁷ In such cases, alleged legitimate expectations will only be protected when reflected in a stabilization clause or comparatively unequivocal commitments.

C. Legitimate Expectations Require Clear and Express Assurances

⁵¹ *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon* ICSID Case No. ARB/07/12 Award 7 June 2012 [Toto].

⁵² Article 3(1).

⁵³ *Toto* para 244.

⁵⁴ *Ibid* para 239.

⁵⁵ *Ibid* para 241.

⁵⁶ The *Toto* tribunal put it as follows: 'In *Parkerings*, the arbitrators concluded that the circumstances in a country in transition could not justify the legitimate expectations as regards the stability of the investment's environment. Rather, the investor was considered to have taken the business risk to invest, notwithstanding the possible legal and political instability. Likewise, the post-civil war situation in Lebanon, with substantial economic challenges and colossal reconstruction efforts, did not justify legal expectations that custom duties would remain unchanged.' Para 245.

⁵⁷ This idea was recently put in these terms: '...it would have been irrational in 1998/1999 to insist that Albania maintained the stability of its legal framework, proceedings and general conditions as a *status quo* because this would have condemned the perpetuation of an inadequate system that was still deeply entrenched in communist traditions.' *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania* ICSID Case No. ARB/11/24 Award 30 March 2013 para 629.

The most recent example here is *Philip Morris v Uruguay*,⁵⁸ in which the claimant alleged that various tobacco control measures adversely impacted its cigarette trademarks thereby breaching the FET standard in the Switzerland – Uruguay BIT.⁵⁹ The tribunal considered that, in the circumstances of the case, there could be no legitimate expectation in relation to the stability of tobacco regulation. The tribunal twice referred to the need for ‘*specific* undertakings and representations made by the host State to induce investors to make an investment’.⁶⁰ While it cannot be excluded that ‘a specific undertaking’ could be made implicitly, this expression fits more comfortably with express representations. The tribunal was also influenced by the general nature and subject matter of the instruments which had been modified.⁶¹ Unlike *Micula*, this was not a case about changes to legislation specifically directed towards attracting investments.

*Crystallex v Venezuela*⁶² arose from an eventual refusal to grant a permit for a mining project, and provides a rare example of a successful claim upon application of the strict approach. The tribunal considered that a promise or representation addressed to the investor had to be, ‘precise as to its content and clear as to its form’.⁶³ A letter to the claimant from the Office of Permission of the Ministry of Environment was found to satisfy this standard.⁶⁴ It was further considered that no satisfactory explanation had been provided for frustrating the claimant’s legitimate expectation that the permit would be granted. One example related to the limited content of the letter denying the permit. This referred to recent environmental studies carried out in the area without any references to the authorship and content of these studies or where they might be found.⁶⁵ Overall, the tribunal considered that the permit denial was arbitrary in the sense of being based on a change in policy towards nationalization, rather than the reasons communicated.⁶⁶

The *Total v. Argentina*⁶⁷ tribunal recognized the protection of legitimate expectations in civil law and common law jurisdictions. However, it described this protection as being ‘within well defined

⁵⁸ *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic Of Uruguay* ICSID Case No. ARB/10/7 Award 8 July 2016.

⁵⁹ Article 3(2).

⁶⁰ *Ibid* para 426 (emphasis in original), para 429 (without emphasis).

⁶¹ ‘The present case concerns the formulation of general regulations for the protection of public health. There is no question of any specific commitment of the State or of any legitimate expectation of the Claimants vis-à-vis Uruguayan tobacco control regulations. Manufacturers and distributors of harmful products such as cigarettes can have no expectation that new and more onerous regulations will not be imposed, and certainly no commitments of any kind were given by Uruguay to the Claimants or (as far as the record shows) to anyone else.’ para 429.

⁶² *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2 Award 4 April 2016.

⁶³ *Ibid* para 547.

⁶⁴ This letter referred to, ‘the Environmental Impact Evaluation of the project, which had been analysed and approved by this office’ and used the phrase ‘will be handed over’ in reference to the required permit upon the posting of a bond (para 561).

⁶⁵ *Ibid* para 594.

⁶⁶ *Ibid* para 614.

⁶⁷ *Total S.A. v. The Argentine Republic* ICSID Case No. ARB/04/01 Decision on Liability 27 Dec 2010.

limits'.⁶⁸ On the scope for deriving legitimate expectations from ambiguous communications, the tribunal drew, in addition, from public international law. It noted that, unilateral acts by states, 'may be the source of legal obligations which the intended beneficiaries or addressees, or possibly any member of the international community, can invoke'.⁶⁹ However, citing ICJ case law, the tribunal proceeded to note that, 'only unilateral acts that are unconditional, definitive and "very specific" have binding force'.⁷⁰

Several of the cases interpreting the NAFTA Article 1105 FET standard are still more definite on the need for express and clear assurances as the basis for legitimate expectations. This is especially in relation to the cases which post-date the NAFTA Free Trade Commission (FTC) interpretation of Chapter 11⁷¹ which clarified that Article 1105(1) is an expression of, and goes no further than, the customary international law minimum standard of treatment.⁷² At issue in *Mobil Investments v, Canada*⁷³ were increases in the required level of research and development expenditures by petroleum operators. The tribunal was disinclined to construct an implied representation of stability from state conduct at the time of the investment. It was therefore insufficient that the empowered Board had not indicated any disapproval with the actions proposed to be taken by the claimants in respect of the expenditures.⁷⁴ This is a point of contrast with *Gold Reserve*, in which legitimate expectations were founded on the consistent absence of warnings that required authorizations would not be granted. For the *Mobil Investments tribunal*, the emphasis was rather on the need for express assurances of a positive nature, and allocation of responsibility to investors.⁷⁵

⁶⁸ Ibid para 128.

⁶⁹ Ibid para 131.

⁷⁰ Ibid citing *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 457, para. 46 at p. 472 and W. Fiedler 'Unilateral Acts in International Law' *IV Encyclopedia of Public International Law* 1018 (2000).

⁷¹ Notes of Interpretation of Certain Chapter 11 Provisions (NAFTA Free Trade Commission 31 July 2001). Minimum Standard of Treatment in Accordance with International Law

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.

2. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

⁷² NAFTA Article 1131(2) establishes the status and authority of these interpretations as 'binding on a Tribunal established under' Chapter 11.

⁷³ *Mobil Investments Canada Inc., Murphy Oil Corporation v, Canada* ICSID Case No. ARB(AF)/07/4 Decision on Liability and on Principles of Quantum 22 May 2012 [*Mobil Investments*].

⁷⁴ Ibid para 161.

⁷⁵ Ibid para 169: 'In the present instance the Claimants need to show a specific assurance attributable to the Respondent. They need to be able to show that there were clear and explicit representations made by or attributable to the Respondent, in relation to future changes to the regulatory framework or requirements under Benefits Plans... If the Claimants identified ambiguities in relation to the regulatory framework ... then it was for them to seek clarifications and obtain specific assurances.'

Other awards interpreting NAFTA Chapter 11 have taken the further step of finding the *Tecmed* formulation to be irrelevant on the basis that the FET standard there at issue was of an autonomous nature, rather than an expression of customary international law.⁷⁶ It is notable, however, that none of these tribunals (nor any other⁷⁷) has completely excluded the possible relevance of legitimate expectations. The *Cargill v Mexico* award came closest. In responding to the claimant's argument that NAFTA Article 1105 requires Parties, 'to provide a stable and predictable environment in which reasonable expectations are upheld'⁷⁸, the tribunal noted that this argument was premised exclusively on the Preamble to the NAFTA,⁷⁹ and concluded that, '[n]o evidence ... has been placed before the Tribunal that there is such a requirement in the NAFTA or in customary international law, at least where such expectations do not arise from a contract or quasi-contractual basis'.⁸⁰

The recent NAFTA Chapter 11 jurisprudence is not completely consistent with regards to the strict approach to the nature of assurances from which expectations can arise. *Bilcon v. Canada*⁸¹ involved a refusal, on environmental grounds, to grant a permit to the claimant's investment for a quarry development. Bilcon alleged a failure to apply the legally mandated evaluative standard under Canadian law. The majority confirmed an Article 1105 violation primarily on the basis that there had been a failure to follow Canadian law. However, it is also notable that the claimant's case was strengthened by expectations derived from strong encouragement of the investment from government officials.⁸² In contrast, the dissent considered this encouragement to be irrelevant to the prospects of the claim and proceeded to deny the FET violation.⁸³

⁷⁶ *Glamis Gold, Ltd. v. The United States of America* UNCITRAL Award 8 June 2009 para 610 [*Glamis*]; *Cargill, Incorporated v. United Mexican States* ICSID Case No. ARB(AF)/05/2 Award 18 Sep 2009 [*Cargill*] para 286.

⁷⁷ The only clear refutation of legitimate expectations was a dissent: 'My disagreement with the reasoning in this Decision on Liability extends to recent awards that identify fair and equitable treatment with the protection of so-called "legitimate expectations of the investor," which, in my opinion, goes beyond the normal meaning of the terms of the BITs and the intention of the parties.' *Suez, Sociedad General de Aguas de Barcelona S.A., Vivendi Universal S.A., AWG Group v. Argentine Republic*, ICSID Case No ARB/03/19 Separate Opinion of Pedro Nikken 30 July 2010) para 2.

⁷⁸ *Cargill* (n 76) para 288.

⁷⁹ 289. The Preamble refers to ensuring 'a predictable commercial framework for business planning and investment'.

⁸⁰ *Cargill* (n 76) 290.

⁸¹ *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada* UNCITRAL PCA Case No. 2009-04 Award on Jurisdiction and Liability 17 Mar 2015 [*Bilcon*].

⁸² *bid* paras 448, 455, 464, 466, 468.

⁸³ *Bilcon*, Dissenting Opinion of Professor Donald McRae 10 Mar 2015 para 5. Outside of the NAFTA Chapter 11 context, the *Mamidoil* award reflects this position. The investment here was the construction of an oil storage center by a Greek investor at the port of Durres Albania. The ability to discharge oil from vessels at the port was crucial to the business plan. The claimant considered that the circumstances accompanying the decision to invest generated a legitimate expectation that this would be possible. These circumstances included oral assurances from high level government officials, including the Prime Minister, that the investment at Durres was welcome. While the tribunal did not doubt that there had been 'cordial and encouraging' meetings (para 640), it also considered that 'political statements create no legitimate expectations' (para 643). *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania* ICSID Case No. ARB/11/24 Award Mar 30, 2015.

D Concluding Observations

The cases considered above exhibit different emphases in relation to the seed from which legitimate expectations can grow in investment law. Some tribunals insist on express and unambiguous assurances. The *Philip Morris* and *Crystallex* cases indicate that this may be emerging as the prevailing approach. As such, the *Tecmed* idea of host states needing to act in a manner free from ambiguity, and the consequent possibility of deriving legitimate expectations from state conduct less than express and unambiguous assurances, seems to be receding. However, the *Glamis Gold*, *Micula* and *Bilcon* cases are sufficiently recent to indicate that this possibility cannot yet be consigned to legal history. As indicated, the article will proceed to evaluate the different emphases in the investment law cases with reference to a holistic but tailored method of treaty interpretation.

III VCLT ARTICLE 31(3)(C) AND ICJ STATUTE ARTICLE 38(1)(C)

This section discusses the relationship between VCLT Article 31(3)(c) and ICJ Statue Article 38(1)(c). These two provisions combine in the present context to provide a strong legal basis for a comparative method. However, much depends here on whether the protection of legitimate expectations has emerged as a general principle of law, and on the scope for drawing comparative insights if this status has yet to be attained. It is argued non-attainment of this status should not be regarded as a barrier to drawing on remarkably consistent comparative insights which provide support only for the narrow approaches evident in the investment law cases.

A Legal Basis for a Comparative Method

Investment tribunals have referred to Article 38(1)(c) as a basis for the comparative method.⁸⁴ This directs the Court to apply the ‘general principles of law recognized by civilized nations’. There is similar content in the applicable law clauses of arbitration instruments and investment treaties. For example, Article 42 of the ICSID Convention refers to ‘such rules of international law as may be applicable’.⁸⁵ It is accepted that the reference to ‘international law’ here is to be understood as including the ‘general principles of law recognized by civilized nations’.⁸⁶ It is natural for tribunals hearing NAFTA Chapter 11 disputes to refer to Article 38 of the ICJ Statute. This is because NAFTA Article 1131:1 provides: ‘A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.’

⁸⁴ *Thunderbird* (n 26) Award 26 Jan 2006 para 90; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1 Award 22 Sep 2014) para 575; *Total S.A. v. The Argentine Republic* ICSID Case No. ARB/04/01 Decision on Liability 27 Dec 2010 para 111.

⁸⁵ Similarly, Article 54(1)(b) of the ICSID Arbitration (Additional Facility) Rules refers to ‘such rules of international law as the Tribunal considers applicable’. The UNCITRAL Arbitration Rules 2013, Article 35(1) refers to ‘the law which it [the tribunal] determines to be appropriate’.

⁸⁶ Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention of the Settlement of investment Disputes Between States and Nationals of Other States 18 Mar 1965 para 40 available at <<https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/basic-en.htm>>.

These applicable law clauses may in themselves provide a clear permission for a comparative method. However, it is also clear that this permission can, in principle, be reinforced with reference to VCLT Article 31(3)(c) which directs the interpreter to ‘take into account ...any relevant rules of international law applicable in the relations between the parties’. In *Golder v United Kingdom*⁸⁷ the question was whether Article 6 of the European Convention on Human Rights secured a right for all persons to have a civil claim submitted to a judge. In interpreting Article 6, the Court moved from VCLT Article 31(3)(c) to Article 38(1)(c) of the ICJ Statute. The right of access to a civil court to determine rights and obligations was then identified as, ‘one of the universally “recognised” fundamental principles of law’.⁸⁸ This is a clear example of Article 38 operating as a bridge between the VCLT and a recognized general principle of strong relevance to the norm being interpreted. The relationship between the two provisions is further considered below.

The starting point is to note the close link between ICJ Statute Article 38(1), and VCLT Article 31(3)(c). Citing Villiger,⁸⁹ the WTO Appellate Body has confirmed that the ‘rules of international law’ referred to in the VCLT provision correspond to the sources of international law in Article 38(1) including general principles of law.⁹⁰ This correspondence means that there is no need to assess whether Article 38(1) itself meets the tests set out in Article 31(3)(c). Rather, the question is whether the rule of international law invoked, which may be a general principle of law, is ‘relevant’ and ‘applicable in the relations between the parties’.

Setting aside for the moment the status of legitimate expectations, there are different understandings of the ‘relevant’ standard. The WTO Appellate Body has held on a number of occasions that, in order to be relevant, rules of international law ‘must concern the same subject matter as the treaty terms being interpreted’.⁹¹ This reflects the prevailing approach.⁹² However, as noted by Simma and Kill, the ICJ has sometimes preferred a more flexible approach.⁹³ Thus, the Court in the *Mutual Assistance in Criminal Matters* case considered a treaty from which interpretive guidance was sought to be ‘relevant’ even though its rules were, ‘formulated in a broad and general manner, having an aspirational character’, and did, ‘not provide specific operational guidance as to the practical

⁸⁷ Judgment 21 Feb 1975, ECHR Ser A no 18; 57 ILR 200 at 213.

⁸⁸ *Ibid* para 35.

⁸⁹ M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff, 2009), p. 433.

⁹⁰ Appellate Body Report, *United States – Anti-Dumping and Countervailing Duties (China)*, WT/DS379/AB/R adopted March 25, 2011 para 308.

⁹¹ Appellate Body Report, *Peru – Agricultural Products*, WT/DS457/AB/R adopted July 31, 2015 para 5.101.

⁹² Villiger, *above n. 89* at 433; U. Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (2007): ‘a rule of international law is to be considered “relevant”, if (and only if) it governs the state of affairs, in relation to which the interpreted treaty is examined’ (at 178).

⁹³ Bruno Simma and Theodore Kill, ‘Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology’ in Christina Binder, Ursula Kriebaum, August Reinisch, and Stephan Wittich (eds.) *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* 678 at 695-696.

application' of the treaty under interpretation.⁹⁴ I am inclined to agree with the authors that the more flexible approach should be preferred, on the basis that it better accommodates the idea of calibrating the interpretive weight given to the external norm, based on the extent of correspondence in subject matter. In terms of how the VCLT 'relevant' standard should be applied when the external norm invoked is a general principle rather than a treaty, the Court's reference above to the external treaty provision being 'formulated in a broad and general manner' is interesting. In the present context, this phrase is arguably a better fit for the norm under interpretation (a FET obligation) than it is for the external norm (a general principle of protecting legitimate expectations). FET obligations are open textured even when elaborated upon in modern treaties. In relative terms, the protection of legitimate expectations is potentially more specific, if approached as one of the analytical tools used to give content to open textured FET obligations. This is the reverse of the situation in the *Mutual Assistance in Criminal Matters* case, in which the interpretive weight of the external treaty provision was low due to its very general nature relative to the treaty provision under interpretation.⁹⁵

The further question of whether general principles (if recognized as such) are applicable in the relations between the parties, presents no difficulty. Indeed, the analysis is freed from the uncertainties which arise when the external norm is a treaty provision.⁹⁶ Along with customary international law, general principles are by their nature applicable in the relations between all states. Of course, this position shifts the focus to whether the status of a general principle has been attained, and to the question of interpretive weight of comparative insights when this status has not been attained.

B *Legitimate Expectations as a General Principle of Law?*

There is considerable uncertainty over the nature, relevance and weight of general principles of law in international law, and on the methodology for recognizing these principles.⁹⁷ Writing in the context of legitimate expectations, Snodgrass identifies the range of views on questions such the number and

⁹⁴ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, Judgment, 4 June 2008, *ICJ Reports* (2008), para 113.

⁹⁵ *Ibid.* para 114: The Court thus accepts that the Treaty of Friendship and Co-operation of 1977 does have a certain bearing on the interpretation and application of the Convention on Mutual Assistance in Criminal Matters of 1986. But this is as far as the relationship between the two instruments can be explained in legal terms. An interpretation of the 1986 Convention duly taking into account the spirit of friendship and co-operation stipulated in the 1977 Treaty cannot possibly stand in the way of a party to that Convention relying on a clause contained in it which allows for non-performance of a conventional obligation under certain circumstances.

⁹⁶ For the various understandings of when a treaty provision is 'applicable in the relations between the parties' see Campbell McLachlan 'The principle of systemic integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 *ICLQ* 279 at 314.

⁹⁷ Neha Jain 'Judicial Lawmaking and General Principles of Law in International Criminal Law' (2016) 57 *Harv. Int'l L.J.* 111; Caroline Foster 'A New Stratosphere? Investment Treaty Arbitration as 'Internationalized Public Law'' (2015) 64 *ICLQ* 461 at 468-472.

selection of legal systems in which, and the consistency with which, a principle must be observed.⁹⁸ This author discerns that universal application is not required, and that differences in ‘points of detail’ or ‘routes of legal reasoning’ should not be fatal to recognition to the extent that similar cases have similar outcomes.⁹⁹ Different views have been expressed on whether the substantive protection of legitimate expectations has attained the status of a general principle of law.¹⁰⁰ It is clear that a growing number of jurisdictions recognize legitimate expectations¹⁰¹ and there is evidence that the list is not limited to Western countries, thereby lessening the danger of internationalizing the rules of a limited number of developed countries.¹⁰² In this respect, the doctrine of ‘legitimate confidence’ in Venezuela¹⁰³ is no less significant than the recognition of substantive legitimate expectations by the English Court of Appeal in *R v Secretary of the State for the Home Department and Another, ex parte Coughlan*.¹⁰⁴ In contrast, the Australian High Court in *Minister for Immigration and Border Protection v WZARH*¹⁰⁵ emphatically rejected any value in analysing even procedural cases with reference to legitimate expectations.

⁹⁸ Snodgrass (n 13) at 21-23.

⁹⁹ *Ibid.* at 22.

¹⁰⁰ Chester Brown ‘The Protection of Legitimate Expectations as a “General Principle of Law”’: Some Preliminary Thoughts’ *Transnational Dispute Management* (2009) 6 considering that legitimate expectations achieves a general principle of law status despite differences as between legal systems (at 1); Trevor Zeyl ‘Charting the Wrong Course: The Doctrine of Legitimate Expectations in Investment Treaty Law’ (2011) 49 *Alta L Rev* 203 considering that ‘recognizing legitimate expectations as part of the general principles of law is at this point premature’ (at 203); Michele Potestà ‘Legitimate Expectations in Investment Treaty Law: Understanding the Roots and Limits of a Controversial Concept’ (2013) 28 *ICSID Rev-FILJ* 88 considering that ‘to establish an at least emerging general principle of protection of legitimate expectations would not seem to be an unrealistic endeavour’ (at 98).

¹⁰¹ Surveys on the recognition of legitimate expectations are provided by Søren Schønberg *Legitimate Expectations In Administrative Law* (OUP Oxford 2000); Potestà (n 100) at 7-13; Snodgrass (n 13) at 25-30; Zeyl (n 100) at 211-216.

¹⁰² Martins Paparinskis *The International Minimum Standard and Fair and Equitable Treatment* (OUP Oxford 2013) 255. Roberts similarly refers to the danger of holding developing countries to utopian norms unknown to their own legal systems, in the analogous context of recognizing customary international law norms from state practice and *opinio juris*. Anthea Roberts ‘Traditional and Modern Approaches to Customary International Law: A Reconciliation’ (2001) 95 *AJIL* 757 at 768.

¹⁰³ The *Gold Reserve* tribunal noted the agreement of the legal experts for the claimant and respondent that Venezuelan courts had developed a doctrine of ‘legitimate confidence’. (n 38) para 606. Academic commentary on the case has confirmed this position, and has also referred to legitimate expectations in South African law, Colombian law, Indian law, Kenyan law, Australian law, Canadian law, Scottish law and Japanese law. See, Nitish Monebhurrin ‘*Gold Reserve Inc. v. Bolivarian Republic of Venezuela* Enshrining Legitimate Expectations as a General Principle of International Law?’ (2015) 32 *J Int Arb* 551 at 557.

¹⁰⁴ [2001] QB 213 (CA). ‘Where the court considers that a lawful promise or practice has induced a legitimate expectation of a *benefit which is substantive*, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy.’ (para 57).

¹⁰⁵ (2015) 90 ALJR 25. The case involved a refugee claimant who was told in an interview with an Independent Merits Reviewer that this Reviewer would process the case and make a recommendation to the Minister. However, the case was subsequently processed by a different Reviewer without informing the claimant of the change. This Reviewer determined that the claimant should not be given refugee status. The question was whether this uncommunicated change was procedurally unfair.

The view taken here is that the recognition of legitimate expectations as a general principle is likely to remain contested for some time by reason of the methodological difficulties hinted at above. A less equivocal position could only result from a detailed attempt to both resolve these difficulties and undertake a survey of the selected jurisdictions. While this is not attempted here, a discrete example of a difficult question can be offered. There are different possible views on the impact of the Australian *WZARH* case on recognition. One view is that emphatic rejection in a major common law jurisdiction is detrimental to recognition. However, another view is that the case is a good example of what Snodgrass refers to as alternative routes of legal reasoning leading to the same outcome; an assessment which is at least neutral, if not even tending to support recognition. The High Court did not disagree with the majority of the Full Federal Court that the applicant had been denied procedural fairness, but merely with the approach of analysing the issue with reference to legitimate expectations.¹⁰⁶

The uncertainty here means that it cannot presently be established that legitimate expectations, as a recognized general principle, satisfies the VCLT Article 31(3)(c) test of applicability. It is therefore submitted that a shift in focus is required, and that the better question is whether comparative insights should be excluded from the interpretive process until such time as a more positive conclusion can be reached. Such an absolute approach would be a poor fit with the notion that comparative insights (even when drawn from accepted general principles) merely inform rather than exhaust treaty interpretation. This means that the interpretive weight given to comparative insights can vary depending on the extent of progress (or lack of progress) towards the status of a general principle. Some guidance here may also be drawn from the situation where the external norm is a treaty provision. A principle such as legitimate expectations which is recognized only by some states, is analogous to an external treaty with limited membership. It is accepted that, where the state parties to the treaty under interpretation are also parties to the external treaty, the external treaty satisfies the test of applicability.¹⁰⁷ By analogy, even if legitimate expectations is not recognized as a general principle, particular weight can be given to it in the interpretive process if it is recognized in the legal systems of the state parties to the investment treaty under interpretation. Conversely, a tribunal should be especially cautious if legitimate expectations is not recognized by any of the treaty parties. Between these two extremes, tribunals should be sensitive to the position within the legal system of the respondent state.

¹⁰⁶ In the High Court, Gageler and Gordon JJ. put the matter as follows: “By focussing on the opportunity expected, or legitimately to have been expected, the concept can distract from the true inquiry into the opportunity that a reasonable administrator ought fairly to have given.” at para 61.

¹⁰⁷ Simma and Kill (n 93) at 698. The authors note that difficult problems can arise here when the treaty under interpretation has a large number of state parties. The question is then whether all state parties to this treaty must also be members of the external treaty, or whether it is sufficient that the state parties in dispute are members of the external treaty. At least in cases involving a BIT, this difficulty does not arise. The question can only be whether the home and host states are parties to the external treaty.

More generally as an argument for engagement with legitimate expectations, to insist upon unequivocal attainment of the status of a general principle as a threshold, would cut off investment law from an already rich source of jurisprudence which exhibits remarkable consistency on the required specificity and clarity of state conduct from which legitimate expectations can arise.

C Main Comparative Insight

The strongest signal which emerges is that legitimate expectations can only be derived from representations which are clear and unambiguous. This is a commonly recurring theme of surveys in this area,¹⁰⁸ and is reflected in the continuing surge of cases in English law.¹⁰⁹

The possibility of protecting substantive legitimate expectations was first unequivocally recognized in *R v Secretary of the State for the Home Department and Another, ex parte Coughlan*.¹¹⁰ The Court of Appeal upheld a promise made to a severely disabled person about the location at which she would receive care. The individual had agreed to move from a hospital to a special housing unit on the assurance that this unit would be her 'home for life'. Lord Woolf MR noted that this was, 'an express promise or representation made on a number of occasions in precise [and unqualified] terms'.¹¹¹ The need for 'a sufficient degree of certitude'¹¹² has been reinforced in subsequent cases. For example, in a much cited dictum, Laws LJ noted in *Bhatt Murphy v Independent Assessor*¹¹³ the requirement for, '...a specific undertaking, directed at a particular individual or group, by which the relevant

¹⁰⁸ Snodgrass (n 13) 'National legal systems impose few formal requirements for the type of governmental conduct that can give rise to legitimate expectations, although the person asserting expectations must be able to point to some overt government action, and the conduct in question must be precise and unambiguous' at 31-32; Schönberg (n 101) '[T]he wording of a representation is of major importance for its ability to create reasonable expectations which will generate procedural entitlements. A representation must normally be clear, unambiguous, and devoid of relevant qualifications' at 51. In the context of EU administrative law, Craig notes that the 'great majority of claims for breach of legitimate expectations fail because the applicant cannot establish the requisite precise and specific assurance'. Paul Craig *EU Administrative Law* (2nd edn OUP Oxford 2012) 569. The need for clear and unambiguous representation is referred to by several authors in a recent edited collection in relation to South Africa (Ch 8), New Zealand (Ch 9) and Singapore (Ch 12): Matthew Groves & Greg Weeks (eds) *Legitimate Expectations in the Common Law World* (Hart Publishing 2016).

¹⁰⁹ Contributions include, Christopher F Forsyth 'The Provenance and Protection of Legitimate Expectations' (1988) 47 CLJ 238; Paul P Craig 'Substantive Legitimate Expectations in Domestic and Community Law' (1996) 55 CLJ 289; Paul Craig and Soren Schönberg 'Substantive Legitimate Expectations After Coughlan' Pub L (2000) 684; Farrah Ahmed and Adam Perry 'The Coherence of the Doctrine of Legitimate Expectations' (2014) 63 CLJ 61; Jack Watson 'Clarity and Ambiguity: a New Approach to the Test of Legitimacy in the Law of Legitimate Expectations' 30 Legal Studies (2010) 633; Mark Elliot 'From Heresy to Orthodoxy: Substantive Legitimate Expectations in English Public Law' in Matthew Groves & Greg Weeks (eds) *Legitimate Expectations in the Common Law World* (Hart Publishing 2016).

¹¹⁰ [2001] QB 213 (CA). 'Where the court considers that a lawful promise or practice has induced a legitimate expectation of a *benefit which is substantive*, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy.' (para 57).

¹¹¹ *Ibid* para 86.

¹¹² [2014] EWHC 3677 (Admin) Green J para 71.

¹¹³ [2008] EWCA Civ 755.

policy's continuance is assured'.¹¹⁴ He also noted that previous case law illustrated '*the pressing and focussed nature of the kind of assurance required if a substantive legitimate expectation is to be upheld and enforced*'.¹¹⁵ More recently, the Court of Appeal considered in *R. (on the application of Badger Trust) v Secretary of State for the Environment, Food and Rural Affairs* that: '[t]he requirements for establishing a substantive legitimate expectation are no longer controversial. There must be a representation or promise which is clear, unambiguous and devoid of relevant qualification.'¹¹⁶

These tests are applied strictly. For example, in *Solar Century Holdings Limited & Others v Secretary of State for Energy & Climate Change*, Green J noted: '...a representation that a policy will continue until a specified date is not the same as a promise that it will never be changed even if circumstances change. If it were otherwise then an intention to pursue a policy for a fixed period would become set in stone and permanently unyielding to changes in relevant circumstances however compelling they might be.'¹¹⁷ In *R. (on the application of Grimsby Institute of Further and Higher Education) v Chief Executive of Skills Funding*,¹¹⁸ the issue was whether the Learning and Skills Council had represented to a further education institute that, if an approval in principle were to be obtained for a grant, the availability of funds would thereafter be irrelevant in determining an application for approval in detail. Judge Langan QC considered that a, 'legitimate expectation founded on a past practice required there to have been a specific undertaking to an individual group whereby its continuance was assured'.¹¹⁹ It was further noted that, 'even implied representations, have to be clear and unequivocal'.¹²⁰ The judge found there to be 'light years' between what had actually been said or done, and what the institute sought to infer.¹²¹

Most recently, *Infinis Energy Holdings Ltd v HM Treasury*¹²² concerned the withdrawal without notice of the exemption for renewable source electricity from the Climate Change Levy. Among other grounds, this was challenged as contrary to the EU law principles of foreseeability, legal certainty and protection of legitimate expectations. The Court of Appeal considered that there was a, 'clear and consistent line of EU authority that what is required ... is the promotion by the public authority in question by means of the giving of a precise, unconditional and unambiguous assurance, whether by words or conduct, of an expectation as to how it will behave in future'.¹²³ The Court of Appeal indicated willingness, in principle, to consider whether past conduct of a consistent nature amounted

¹¹⁴ Ibid para 43.

¹¹⁵ Ibid para 46.

¹¹⁶ [2014] EWCA Civ 1405 para 24.

¹¹⁷ [2014] EWHC 3677 (Admin) para 72.

¹¹⁸ [2010] EWHC 2134 (Admin).

¹¹⁹ Ibid para 87.

¹²⁰ Ibid para 113.

¹²¹ Ibid para 124.

¹²² [2016] EWCA Civ 1030 (*Infinis*).

¹²³ Ibid para 45.

to an assurance that the state would continue to follow an established practice. However, based on evidence in relation to analogous schemes, the contention of a ‘settled practice’ for notice periods was rejected.¹²⁴

Claims based on legitimate expectations have also come before the Privy Council. The case of *United Policyholders Group v Attorney-General of Trinidad and Tobago*¹²⁵ arose from statements made by officials from the government of Trinidad and Tobago during the global financial crisis of 2009 to the effect that a major insurance company would be placed in a position to fulfil all its obligations. A newly elected government did not honour the statements of the previous administration. The need for statements relied upon to be ‘clear, unambiguous and devoid of relevant qualification’ was confirmed.¹²⁶ Lord Carnwath highlighted that a number of the leading authorities had drawn a parallel between statements which might give rise to legitimate expectations in public law, and statements which would become contract terms in private law.¹²⁷ This echoes the possibility recognized by the *Cargill* tribunal noted above that legitimate expectations might arise on a ‘quasi-contractual basis’.¹²⁸ Also of note was the Board’s approach of assuming, without deciding, that the claimants had derived legitimate expectations from the assurances, thereby shifting the focus to whether the new administration was entitled to resile from the assurances, if given.¹²⁹ While not the focus of this article, it is increasingly understood that the scope of legitimate expectations depends on how easy it is for the state to invoke grounds to dislodge the expectation.¹³⁰ Like the Court of Appeal, the Board was inclined to defer to the government’s view that fully compensating all policy holders could have grave economic consequences for the country via the responses of the IMF and credit rating agencies.

As indicated, these insights from English law correspond with other surveys in this area.¹³¹ Collectively, this material clearly casts a shadow over the first category of investment law cases in which legitimate expectations were protected without clear and express undertakings. Indeed, the phrase ‘light years’ may be borrowed to describe the gap between these cases and what can be observed in other systems of public law adjudication. The English law cases indicate that even modest lack of clarity on the origin and content of any alleged assurance is fatal to claims based on defeated expectations. In contrast, several investment tribunals have preserved, and acted upon, a significant margin of discretion for confirming FET violations when the alleged expectations are of uncertain provenance and content. It follows that treaty interpretation drawing on the VCLT 31(3)(c) element

¹²⁴ Ibid paras 72-73.

¹²⁵ [2016] UKPC 17.

¹²⁶ Ibid para 37.

¹²⁷ Ibid paras 91, 92, 94, 95, 98.

¹²⁸ *Cargill* (n 76) 290.

¹²⁹ *United Policy Holders Group* (n 125) 68.

¹³⁰ Chintan Chandrachud ‘The (Fictitious) Doctrine of Substantive Legitimate Expectations in India’ in *Legitimate Expectations in the Common Law World* (n 109) 245 at 222-255.

¹³¹ See studies cited at n 109.

provides strong support only for the third category of investment law cases considered, even if it cannot be confirmed that legitimate expectations already constitutes a general principle of law.

D A More Expansive Doctrine in Investment Law?

In Section II, Thomas Wälde's Separate Opinion in *Thunderbird* was provided as an example of the broadest approach. This dissent considered that an expectation derived from an ambiguous communication should be protected. The Opinion is sometimes lauded for its use of the comparative method as Wälde drew comparisons with contract law, and jurisprudence emanating from the ECJ, ECHR and WTO panels.¹³² However, the conclusion on ambiguous communications was reached, not by applying known principles from other systems, but rather via the premise of foreign investors being in a uniquely vulnerable position relative to other actors, such as domestic competitors, private parties in commercial contracts and states under conventional international law.¹³³ For the comparison between foreign investors and domestic competitors, this idea finds some expression in the case law of the European Court of Human Rights under Article 1 Protocol 1 of the Convention. Both the *James*¹³⁴ and *Lithgow*¹³⁵ cases concerned property takings from nationals in the context of large scale social or economic reforms. The Court considered that the takings had taken place in circumstances justifying an exception to the general position that compensation should be reasonably related to the value of property taken. However, the Court also indicated that the nationality of the claimant matters when deciding on whether to depart from the general position. In particular, it was noted that, 'non-nationals are more vulnerable to domestic legislation: unlike nationals, they will generally have played no part in the election or designation of its authors nor have been consulted on its adoption'.¹³⁶

It is submitted that caution is required in relation to generalizations about asymmetries between national and foreign investors. As pointed out by Kriebaum,¹³⁷ not all states have meaningful elections. Asymmetries related to knowledge of local conditions, rather than political voice, can also be reduced through independent legal advice. While it cannot be excluded that some foreign investors are in a weak position relative to domestic competitors and host states, the orientation of a power imbalance might be the reverse in the case multi-national corporations in developing countries. Indeed, the award in *Azinian v. Mexico*¹³⁸ even gives the impression of the naivety of Mexican officials in dealing with a small foreign investor, as opposed to a power imbalance in favour of the

¹³² *Thunderbird* (n 26) paras 24-29.

¹³³ *Ibid* 33.

¹³⁴ *James and Others v. United Kingdom*, Judgement of 21 February 1986, *ECHR* (Ser. A) No. 98.

¹³⁵ *Lithgow v. United Kingdom*, Judgement of 8 July 1986, *ECHR* (Ser. A) No. 102.

¹³⁶ *James* para 63; *Lithgow* para 116.

¹³⁷ Ullrich Kriebaum 'Nationality and the Protection of Property under the European Convention on Human Rights' in Isabelle Buffard, James Crawford, Alain Pellet and Stephan Wittich (eds.) *International Law between Universalism and Fragmentation* (Brill, 2008) 649 at 665.

¹³⁸ *Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States* ICSID Case No. ARB (AF)/97/2 award of 1 Nov 1999.

state.¹³⁹ Coming back to the facts of *Thunderbird*, small foreign investors cannot be permitted to overcome any weakness by committing misrepresentations while continuing to expect protection under FET standards.¹⁴⁰ In sum, it is difficult to discern that there are generally applicable reasons for extending investment law protections beyond what can be found in other systems.

IV VCLT ARTICLE 31(3)(A)&(B) – SUBSEQUENT AGREEMENT AND PRACTICE

The comparative dimension discussed above indicates that a carefully delimited doctrine of legitimate expectations could have a role under investment law FET standards. This section considers another dimension of at least equal importance.

Tribunals are required under Article 31(3) paragraphs (a) and (b) to take into account subsequent agreements between the parties in relation to the interpretation of a treaty.¹⁴¹ The two paragraphs differ with regard to the directness and immediacy with which subsequent agreements are considered. While paragraph (a) presupposes a ‘single common act’,¹⁴² however informal,¹⁴³ which can be identified as recording an agreed interpretive position, paragraph (b) envisages the possibility of establishing an agreement ‘through individual acts which in their combination demonstrate a common position’.¹⁴⁴ To the extent that treaty parties have the capacity and inclination to make their views known,¹⁴⁵ and to the extent that consistent positions emerge,¹⁴⁶ these provisions afford treaty parties considerable scope to influence the manner in which investment treaties are interpreted. This potential

¹³⁹ Ibid ‘The Claimants obviously cannot legitimately defend themselves by saying that the Ayuntamiento should not have believed statements that were so unreasonably optimistic as to be fraudulent.’ (para 108).

¹⁴⁰ A recurring finding of Schönberg’s study is that claimants will not be protected if the ‘representation was procured by fraud or the person failed to disclose clearly relevant facts’ (n 101 at 52, see also 79).

¹⁴¹ Article 31 (3): There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

¹⁴² ILC Report on the work of the sixty-fifth session (2013) A/68/10 chap IV.C.2 Commentary to draft conclusion 4 para 10.

¹⁴³ ILC Report on the work of the sixty-sixth session (2014) A69/10, chap. VII.C.2 Commentary to draft conclusion 9 para 7 ‘There is no requirement that an agreement under article 31, paragraph 3 (a), be published or registered under Article 102 of the Charter of the United Nations’ [notes omitted].

¹⁴⁴ Ibid.

¹⁴⁵ These points are made in the OECD Roundtable on Freedom of Investment 19, 15-16 Oct 2013: Among the subheadings here are, ‘Silence is the dominant approach’ and ‘Very few countries avail themselves of their options for voice’ p. 20. The following point is made in relation to capacity: ‘Another representative advanced the view that it is a pity that States are not more active in influencing how their treaties are interpreted, since they are the major actors in the investment law ‘system’ – both as treaty drafters and respondents to treaty based investor claims. This participant wondered with [*sic*] government silence on this matter was not due to either a lack of ability and capacity of states to participate in dialogue on investment treaty law.’ p 21. Available at <<http://www.oecd.org/daf/inv/investment-policy/19thFOIroundtableSummary.pdf>>.

¹⁴⁶ OECD Roundtable on Freedom of Investment 20, 19 Mar 2014 p 5 ‘Joint clarifications require shared views by treaty partners and this might not be easy to obtain. One country noted that it has concluded two interpretive agreements with a treaty partner, but also remarked that these agreements were facilitated by the fact that both countries had similar views on the issues under discussion. Such commonality of view cannot be expected to always be present.’ Available at <<http://www.oecd.org/daf/inv/investment-policy/20thFOIroundtableSummary.pdf>>.

may be especially high in the investment law context given the low number of parties to virtually all treaties. On the other hand, the difficulty of reaching agreement even between two parties ought not to be underestimated. In particular, capital-importing and capital-exporting states may hold different views.

The scope for treaty parties to influence treaty interpretation is explored below with reference to two types of state conduct having different levels of persuasiveness. At one end of the spectrum, there are potentially binding interpretations via the use of treaty mechanisms for advancing agreed interpretations. Moving along the spectrum, there are treaty party submissions in individual cases whether as non-disputing or respondent state.

A Use of Treaty Based Mechanisms

NAFTA Article 1131(2)¹⁴⁷ was the first investment law provision providing for binding interpretations by the treaty parties. As noted by an OECD Working Paper,¹⁴⁸ such provisions also now feature in the model BITs of the NAFTA Parties and have been included in a range of recent treaties including the ASEAN Comprehensive Investment Agreement, the Dominican Republic Central America FTA and the TPP (now CPTPP).¹⁴⁹ Notably, the China – Australia FTA provides that interpretations of the parties are binding not only in subsequent disputes, but also ongoing disputes.¹⁵⁰ Treaty based mechanisms are, however, by no means universally incorporated into recent treaties, and are ‘rare in the many older treaties’ such that the, ‘vast bulk of investment treaties do not address joint government interpretive action’.¹⁵¹

The existence of these provisions raises a difficult conceptual point. At first glance, an interpretation emerging from the use of a treaty based mechanism provides the quintessential example of state conduct falling under the VCLT Article 31(3)(a) definition of subsequent agreement. When used, it may at least be argued that the parties have expressed an agreed position in an individual agreement.¹⁵² Indeed, some tribunals have considered this matter to be beyond dispute.¹⁵³ While this is

¹⁴⁷ NAFTA Article 1131(2): An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.

¹⁴⁸ David Gaukrodger ‘The legal framework applicable to joint interpretive agreements of investment treaties’ *OECD Working Papers on International Investment* (2016) OECD Publishing Paris available at <<http://dx.doi.org/10.1787/5jm3xgt6f29w-en>>.

¹⁴⁹ ACIA Art 40(3) ‘A joint decision of the Member States, declaring their interpretation of a provision of this Agreement shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with the joint decision’; CAFTA-DR, Art 10.22(3); CPTPP Art 9.25.3.

¹⁵⁰ CHAFTA Article 9.18.2.

¹⁵¹ Gaukrodger (n 148) at 5.

¹⁵² Kawharu has recently reiterated that transparency based concerns make it difficult to dismiss the possibility that FTC decisions reflect the power of one treaty party rather than a true consensus of all parties. Amokura Kawharu ‘Punctuated Equilibrium: The Potential Role of FTA Trade Commissions in the Evolution of International Investment Law (2017) 20 JIEL 87, 108.

¹⁵³ As the *ADF* tribunal stated in relation to the NAFTA FTC interpretation: ‘we have the Parties themselves — all the Parties — speaking to the Tribunal. No more authentic and authoritative source of instruction on what the

the essence of a subsequent agreement, it may also be that the agreement is outside of the VCLT interpretive framework when sufficiently authentic and authoritative to be binding. Arguably, the process of interpreting a treaty term covered by the agreement would then need to begin with, and go no further than, the agreement itself. This is at odds with the holistic nature of the VCLT interpretive process which entails ‘a single combined operation’ rather than a ‘hierarchical order’ yet alone the exclusive use of only one element.

The proper characterization of treaty based mechanisms has been touched upon by the ILC in its Commentary to Article 2.¹⁵⁴ It is noted that, ‘...subsequent agreements and subsequent practice establishing the agreement of the parties regarding the interpretation of a treaty *must* be conclusive regarding such interpretation when “the parties consider the interpretation to be binding upon them”’ [emphasis added].¹⁵⁵ This is reinforced by the further statement that the, ‘possibility of arriving at a binding subsequent interpretive agreement by the parties is particularly clear in cases in which the treaty itself so provides’ with the NAFTA mechanism cited as the example.¹⁵⁶ However, it is then noted that:

The existence of such a special procedure or an agreement regarding the authoritative interpretation of a treaty which the parties consider binding may or may not preclude additional recourse to subsequent agreements or subsequent practice under article 31 (3) (a) and (b).¹⁵⁷

The ILC therefore prefers at present not to express a definite view on how treaty based mechanisms fit within the overall interpretive framework. In the on-going work, it may be helpful to draw a distinction between the mere existence of a special procedure as yet unused, and the actual use of a special procedure. There is authority to the effect that, when special procedures have not been used, they are not usually intended to exclude recourse to the means of interpretation under article 31(3)(a) and (b). In other words, the mere existence of the clause should not be taken to imply that treaty parties may only express their views via the formal mechanism, and that the treaty provision cannot be interpreted with reference to subsequent agreement and practice arising independently of the use of the clause.¹⁵⁸ This understanding can be seen as a means to preserve the possibility of developing

Parties intended to convey in a particular provision of NAFTA, is possible.’ *ADF Group Inc. v. United States* ICSID No. ARB(AF)/00/1, award of 9 Jan 2003, para. 177.

¹⁵⁴ A/68/10 (n 142) chap IV.C.1: ‘Conclusion 2 Subsequent agreements and subsequent practice as authentic means of interpretation. Subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), being objective evidence of the understanding of the parties as to the meaning of the treaty, are authentic means of interpretation, in the application of the general rule of treaty interpretation reflected in article 31.’

¹⁵⁵ A/68/10 chap IV.C.2 Commentary to draft conclusion 2 para 5.

¹⁵⁶ *Ibid* para. 6.

¹⁵⁷ *Ibid*.

¹⁵⁸ This is the correct understanding of the following WTO Appellate Body dictum: ‘[w]e fail to see how the express authorization in the WTO Agreement for Members to adopt interpretations of WTO provisions which requires a three quarter majority vote and not a unanimous decision would impinge upon recourse to subsequent practice as a tool of treaty interpretation under Article 31(3)(b) of the Vienna

investment law via an iterative dialogue between tribunals and treaty parties with the possible use of a formal mechanism as a backstop.

The more difficult situation is where the treaty based mechanism has actually been used in relation to the very same point of interpretation before the tribunal. In this situation, *Oppenheim's* seems to envisage that the matter is then outside of the normal VCLT interpretive framework. An 'interpretive declaration' is among the examples of 'authentic interpretations given by the treaty parties' which 'override general rules of interpretation'.¹⁵⁹ However, the *Methanex* tribunal did not see any contradiction between relying on this position while at the same time noting that, 'any interpretation of Article 1105 should look to the ordinary meaning of the provision in accordance with Article 31(1) of the Vienna Convention, and also take into account the interpretation of 31st July 2001 pursuant to Article 31(3)(a) of the Vienna Convention'.¹⁶⁰ This is closer to holistic interpretation rather than the overriding importance of a single element.

Even if it accepted that interpretations expressed to be binding ought generally to be accepted as such, this far from resolves the interpretive space open to tribunals. A possible intervention is to question whether the alleged interpretation is more properly characterized as an amendment of the treaty which ought to have been implemented under the relevant treaty provisions dealing with this distinct matter. The *Pope & Talbot* tribunal was assertive in its reaction to the NAFTA FTC interpretation tethering Article 1105 to the customary international law minimum standard of treatment.¹⁶¹ However, the tension in this particular case was resolved by finding that the challenged conduct, already found to have violated the Article 1105 standard as understood before the FTC Note, in any event also violated the strictest possible understanding of the CIL MST.¹⁶² It was not therefore necessary for the tribunal to determine whether the Notes set out an interpretation or an amendment. In reacting to the Notes, subsequent tribunals were less inclined to dwell on this distinction¹⁶³ and exhibited approaches now reflected in the ILC's work.¹⁶⁴

Convention.' WTO, Appellate Body Report *EC — Chicken Cuts* WT/DS269/AB/R, WT/DS286/AB/R 12 Sept 2005, para. 273

¹⁵⁹ *Oppenheim's International Law* 9th edn Volume 1 (OUP Oxford 2008) p. 1268.

¹⁶⁰ *Methanex Corporation v. United States of America* UNCITRAL Final Award on Jurisdiction and Merits of 3 Aug 2005 Part II - Chapter H - page 11 para. 23.

¹⁶¹ The tribunal noted that the NAFTA contained 'separate and different' provisions with respect to interpretation (Arts 2001(2) and 1131(2)) and amendment (Art 2202) and proceeded to indicate that it would be an abdication of its duty 'simply to accept that whatever the Commission has stated to be an interpretation is one for the purposes of Article 1131(2)'. *Pope & Talbot Inc. v. The Government of Canada* UNCITRAL Award in respect of damages of 31 May 2002 para 23.

¹⁶² *Ibid* paras 67-69.

¹⁶³ The *Methanex* tribunal saw no need to distinguish between interpretations and amendments on the basis that VCLT Article 39 envisages the possibility of amendment, 'by agreement between the parties'; the very same method envisaged for an agreed interpretation under Article 31(3)(a). Final Award on Jurisdiction and Merits, 3 Aug 2005, Part IV Chapter C paras. 20-21. This may be an oversimplification bearing in mind that the specific NAFTA amendment procedure (Article 2202(2)) envisages that amendments do not enter into force until ratification in accordance with the constitutional procedures of each NAFTA Member, a requirement which

The question of whether an interpretation is binding may also distract attention from a no less important issue. In tethering Article 1105 to the CIL MST, the FTC Notes arguably did no more than reframe uncertainty. This aspect of the Notes served only to open the debate on the methodology for determining the content of the CIL MST as it applies to foreign investors. This point is reflected in the *ADF* award. It would be difficult to imagine a stronger endorsement of the binding quality of the Notes.¹⁶⁵ Yet, the tribunal also did not consider itself to be on firm ground when it came to the content of the standard it was required to apply:

...[I]t is not necessary to assume that the customary international law on the treatment of aliens and their property, including investments, is bereft of more general principles or requirements, with normative consequences, in respect of investments, derived from—in the language of *Mondev*—“established sources of [international] law.”¹⁶⁶

This passage raises the question of whether the content of FET standards which are tethered to the CIL MST can be informed by general principles of law recognized by civilized nations - including legitimate expectations if recognized as such. In turn, the further question is how tribunals would respond if the NAFTA Parties issued a further interpretation to clarify that Article 1105 does not extend to the protection of legitimate expectations. This is not inconceivable bearing in mind that the CPTPP text comes somewhat close to this position, and that, as respondent states, both Canada¹⁶⁷ and the United States¹⁶⁸ have been unreceptive towards the recognition of legitimate expectations under NAFTA Article 1105.

It is overly simplistic, in this eventuality, to envisage complete obedience by way of affirming the binding quality of the interpretation. Article 1105 is now tethered to the CIL MST which has an existence independent of any particular treaty provision. The idea of a ‘minimum’ standard also implies a uniform standard which does not vary as between treaties and countries. It is therefore

does not apply to interpretations. The *ADF* tribunal considered that engagement with whether the notes set out a ‘true interpretation’ or an amendment would, ‘degrade and set at naught the binding and overriding character of FTC interpretations’ (n 153 para 177).

¹⁶⁴ ‘Conclusion 7, Possible effects of subsequent agreements and subsequent practice in interpretation. 3. It is presumed that the parties to a treaty, by an agreement subsequently arrived at or a practice in the application of the treaty, intend to interpret the treaty, not to amend or to modify it.’ The Commentary to this paragraph notes (at para. 24) that: ‘States and international courts are generally prepared to accord States parties a rather wide scope for the interpretation of a treaty by way of a subsequent agreement. This scope may even go beyond the ordinary meaning of the terms of the treaty. The recognition of this scope for the interpretation of a treaty goes hand in hand with the reluctance by States and courts to recognize that an agreement actually has the effect of amending or modifying a treaty.’ Report of the International Law Commission on the work of its [sixty-eighth session](#), 2 May–10 June and 4 July–12 August 2016, A/71/10, Ch VI Subsequent agreement and subsequent practice in relation to the interpretation of treaties at p. 165.

¹⁶⁵ See extracts at n 124 and 134

¹⁶⁶ *ADF* para 185.

¹⁶⁷ *V.G. Gallo v Canada* UNCITRAL, respondent’s counter memorial, 29 June 2010, p. 95, heading D.1; *Mobil Investments* n 70, respondent’s reply post-hearing brief (21 January 2011) para. 98.

¹⁶⁸ *Glamis* respondent’s counter-memorial, 19 September 2006, pp. 180-184.

difficult to envisage any method, whether amendment or subsequent agreement, by which parties to a particular treaty can definitively decide that certain elements are included or excluded, albeit that these steps would provide evidence of general and consistent practice of States that they follow from a sense of legal obligation. In this respect, the CIL MST is different from autonomous FET standards over which treaty parties retain a higher degree of control. There is no conceptual objection to subsequent agreements in relation to different autonomous FET standards, one of which clarifies that legitimate expectations is the very essence of the standard; the other of which clarifies that it is excluded. Paradoxically, therefore, the only NAFTA FTC interpretation to date may have curtailed the ability of the Parties to further influence the interpretive process in future interpretations.

To conclude on the use of treaty based mechanisms, the interpretive space left for tribunals is at its narrowest when a binding interpretation has been issued.¹⁶⁹ For autonomous FET standards, it is possible to envisage equally high tribunal deference to multiple successive interpretations of the same treaty, and conflicting interpretations of different treaties. However, this is conceptually difficult for FET standard which are, either from the outset or via use of a treaty based mechanism, tethered to the CIL MST. This is simply because this standard exists independently of the views (however authoritatively expressed) of parties to a particular treaty. For treaty parties seeking to optimize their ability to influence treaty interpretation, the advice is therefore to use an autonomous FET standard.

B Non-disputing Party and Respondent State Submissions

1 Interpretive Weight of State Submissions

Interpretations advanced by states in individual disputes are, in principle, relevant under VCLT Article 31(3)(b) as they fall within the meaning of ‘subsequent practice in the application of the treaty’. This is confirmed by the ILC’s work. Draft Conclusion 6 states that subsequent practice, ‘can take a variety of forms’,¹⁷⁰ while the Commentary to Draft Conclusion 4 refers to ‘statements in the course of a legal dispute’.¹⁷¹ Under VCLT Article 31(3)(b), this subsequent practice must be taken

¹⁶⁹ As Roberts notes (n 11 at 208): ‘When an investment treaty specifically incorporates rules on subsequent agreements and practice, these form part of the treaty’s general regulatory framework. Investors take their investment rights, and tribunals take their adjudicatory powers, subject to the interpretive rights reserved by the treaty parties. This is not a case of giving unqualified rights and later infringing them; rather, the rights granted were qualified in the first place.’

¹⁷⁰ Conclusion 6 Identification of subsequent agreements and subsequent practice, para. 2, A69/10 Ch VII.C.2 (2014) p. 170.

¹⁷¹ Conclusion 4 Definition of subsequent agreement and subsequent practice... para 2. A “subsequent practice” as an authentic means of interpretation under article 31 (3) (b) consists of conduct in the application of a treaty, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty. Commentary para. (17) Subsequent practice under article 31 (3) (b) must be conduct “in the application of the treaty”. This includes not only official acts at the international or at the internal level which serve to apply the treaty, including to respect or to ensure the fulfilment of treaty obligations, but also, inter alia, official statements regarding its interpretation, such as statements at a diplomatic conference, statements in the course of a legal dispute, or judgments of domestic courts; official communications to which the treaty gives rise; or the enactment of domestic legislation or the conclusion of international agreements for the purpose of implementing

into account in the interpretive process if it establishes the, ‘agreement of the parties regarding ... [the treaty’s] interpretation’. When this threshold is not met, the subsequent practice may nevertheless be relevant as a supplementary means of interpretation under Article 32.¹⁷²

Conclusion 8 deals with the ‘weight of subsequent agreements and subsequent practice as a means of interpretation’:

1. The weight of a subsequent agreement or subsequent practice as a means of interpretation under article 31, paragraph 3, depends, inter alia, on its clarity and specificity.
2. The weight of subsequent practice under article 31, paragraph 3 (b), depends, in addition, on whether and how it is repeated.

Neither Conclusion 8 nor its Commentary clearly separate the two sequential questions which arise under VCLT Article 31(3)(b). As indicated, there is first the threshold question of whether the subsequent practice establishes agreement on the treaty’s interpretation. The formulation ‘whether and how’ the subsequent practice is repeated is surely relevant to this threshold question. If the threshold is met, the weight of the established agreement in the interpretive process must then be considered. The ‘whether and how’ formulation is no less relevant here. Additionally, the answer to the threshold question may well strongly inform the answer to the second question. The threshold for establishing agreement under paragraph 3(b) ought logically to be high because the immediate context under paragraph 3(a) is a ‘single common act’ which unequivocally sets out an agreed interpretive position. A high threshold for establishing agreement in turn suggests reasonably high interpretive weight.

It is equally important to consider the distinction from the different angle of whether the evidence under second question (interpretive weight of an established agreement) can go beyond that considered under the first question (the threshold of agreement). It is appropriate here to revert to the open textured requirement that relevant subsequent practice under paragraph 3(b) must be ‘taken into account’. The generality of this requirement indicates that the evidence considered under the second question can indeed be supplementary to that considered under the first question. Thus, while the clarity and extent of repetition of subsequent practice are relevant both to the existence of agreement, and the interpretive weight of this agreement, these considerations do not exhaust those relevant to interpretive weight. Roberts’ perspective that the reasonableness of the agreed interpretation ought to be considered, therefore remains valid.¹⁷³

a treaty even before any specific act of application takes place at the internal or at the international level. A68/10 Chap. IV.C.2 (2013) pp. 34-35.

¹⁷² Conclusion 4, para 3. Other “subsequent practice” as a supplementary means of interpretation under article 32 consists of conduct by one or more parties in the application of the treaty, after its conclusion. See also para. 22 of Commentary p. 37.

¹⁷³ Roberts n 12 at 209-10.

On the distinction between the two questions, the Commentary to Conclusion 8 understandably suffers from a circularity of reasoning.¹⁷⁴ However, useful guide-posts are provided. In particular, it is noted that the formula:

“whether and how it is repeated” brings in the elements of time and the character of a repetition. It indicates, for example, that, depending on the treaty concerned, something more than just a technical or unmindful repetition of a practice may contribute to its interpretive value in the context of article 31, paragraph 3 (b).¹⁷⁵

This guidance indicates that the capacity in which states advance interpretations in individual disputes may matter. Some commentators differentiate between interpretations advanced by non-disputing parties, and those advanced by respondent host states. The latter are more likely to be perceived as ‘self-serving’¹⁷⁶ positions calibrated with little more in mind than defeating the claim. Other commentators extend this observation equally to non-disputing parties, at least when these parties are themselves respondent states in other immediately pending or parallel cases.¹⁷⁷ In terms of interpretive weight, the distinction between non-disputing and respondent state submissions is therefore a dubious one. However, this is not to exclude the possibility of impartial state submissions which may have been formulated with care.¹⁷⁸

It follows from these considerations that common interpretations repeatedly advanced by non-disputing, and respondent states in successive disputes under the same treaty, would amount to subsequent practice providing strong evidence of agreement regarding interpretation. Other subsequent practice may also be taken into account to verify the existence of an agreement. However, it must be borne in mind that VCLT Article 31(3)(b) refers to subsequent practice, ‘...in the application of the treaty...’. Thus while public statements on the interpretation of a particular treaty recorded on a State’s web-site or in its yearbook of international law would likely satisfy this nexus, this might not be the position with regard to the model-BITs of the treaty parties,¹⁷⁹ or other treaties

¹⁷⁴ Paragraph 11 of the Commentary to Conclusion 8 (A69/10 Ch VII.C.2) ends with the statement that, ‘...a one-off practice of the parties which establishes their agreement regarding the interpretation needs to be taken into account under article 31, paragraph 3 (b). Note 676 then proceeds: ‘In practice, a one-off practice will often not be sufficient to establish an agreement of the parties regarding a treaty’s interpretation, as a general rule, however, subsequent practice under article 31, paragraph 3 (b), does not require any repetition but only an agreement regarding the interpretation.

¹⁷⁵ Paragraph 6 of the Commentary to Conclusion 8.

¹⁷⁶ Dolzer & Schreuer consider that respondent state submissions have ‘limited value’ because they are ‘likely to be perceived as self-serving and as determined by the desire to influence the tribunal’s decision in favour of the state offering the interpretation’. Rudolf Dolzer & Christoph Schreuer *Principles of International Investment Law* (OUP Oxford 2008) at 34.

¹⁷⁷ Stephan W. Schill ‘MFN Clauses as Bilateral Commitments to Multilateralism – A Reply to Simon Batifort and J. Benton Heath’ (2017) 111 AJIL 914, p. 16 of the SSRN pdf.

¹⁷⁸ Roberts (n 11 at 218) notes that, ‘...some states clearly recognize the importance of adopting interpretations that they are content to stand by in other contexts, which leads them to take actions such as requiring pleadings to be approved by numerous government departments before filing [notes omitted].’

¹⁷⁹ This point is offered as a refinement to the examples of subsequent practice given by Roberts at 220-221.

subsequently entered into. As argued, however, evidence which may not be relevant to whether subsequent practice has reached the threshold of an agreement, may nevertheless be relevant to assessing the weight of this agreement in terms of the extent to which it should be ‘take into account’. The content of the model-BITs of the treaty parties, and subsequent treaties, may therefore reinforce or undermine the interpretive weight of Article 31(3) agreements.

Common submissions not reaching the level of agreement for Article 31(3)(b) are also relevant as supplementary means of interpretation under Article 32 by reason of the absence of any formal hierarchy either within 31, or between Articles 31 and 32.¹⁸⁰ Indeed, state practice falling under Article 32 can arguably be attributed a higher weight than general principles under Article 31. By definition, subsequent practice in the application of a treaty has a strong relational link to the treaty whether or not this practice establishes the agreement of the parties. In contrast, the general principles of law have no particular link to investment treaties. The recognition of legitimate expectations in domestic legal orders is only more obliquely relevant to treaty interpretation because, under VCLT Article 31(3)(c), Article 38(1)(c) of the ICJ Statute can operate as a stepping stone between the VCLT interpretive framework and domestic law materials of strong relevance to the treaty norm being interpreted. It is therefore important to consider what insights can be gained from state submissions, whether reaching the Article 31(3)(b) ‘agreement’ threshold, or under Article 32.

2 Application

The content of state submissions in individual cases differs between autonomous FET standards and those which are tethered to the CIL MST. For some autonomous standards, there is acknowledgement that legitimate expectations are relevant¹⁸¹ while, for tethered standards, the position is less receptive.¹⁸² For NAFTA Article 1105, it is reasonably clear that all parties have expressed a common

¹⁸⁰ Reviewing the ILC’s preparatory work on the law of treaties in the 1960’s, Fitzmaurice and Merkouris comment: ‘Text, context, object and purpose, preparatory work are not in a hierarchical relationship with each other, based on the order in which they are mentioned in the relevant articles of the VCLT. As the drafters of the VCLT themselves, made clear, this was a logical/temporal sequence not a hierarchical one.’

Malgosia Fitzmaurice and Panos Merkouris ‘Canons of Treaty Interpretation: Selected Cases from the World Trade Organization and the North American Free Trade Agreement’ in Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds.) *Treaty Interpretation and the Vienna Convention on the Law of Treaties 30 Years on* (Martinus Nijhoff Publishers Leiden 2010) 153 at 219 (notes omitted).

¹⁸¹ The *Micula* tribunal noted the agreement of the parties over the autonomous nature of the FET standard in Article 2(3) of the Romania – Sweden BIT (para. 503). It later noted (para. 527): ‘Respondent concedes that its regulatory sovereignty is limited by the legitimate expectations the state has validly created in investors, provided that these expectations arise from specific assurances entered into by the state, are reasonable, and were the predicate of the Claimants’ investments.’ *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania* ICSID Case No. ARB/05/20, Final Award 11 Dec 2013.

¹⁸² Representative here is Canada’s submission that Claimant’s had, ‘submitted no evidence of practice of the three NAFTA Parties regarding the protection of legitimate expectations, let alone evidence of practice by any of the other 189 members of the United Nations, as would be necessary to prove that a rule of custom crystallized through widespread and consistent practice undertaken out of a sense of legal obligation.’ *Mobil Investments* (n 73) respondent’s reply post hearing brief 31 Jan 2001 para. 98. See also, *EDF International v Argentina* ICSID Case No. ARB/03/23 Award 11 June 2012 para. 359.

position in at least one recent case.¹⁸³ This is significant, even if the commonly expressed position does not yet reach the VCLT Article 31(3)(b) threshold for ‘agreement’ on interpretation. This is because of the universal and minimum nature of the CIL MST. In principle, its content is the same as between countries and treaties. Therefore, when states express views on any particular treaty provision tethered to the CIL MST, they are expressing a view on all such treaty provisions. The submissions are an expression of what the state in question considers to be the general and consistent practice of states followed from a sense of legal obligation.

As indicated, state submissions in individual cases have been unreceptive towards the recognition of legitimate expectations under FET standards tethered to the CIL MST. However, careful evaluation of these submissions, including an assessment of their reasonableness, indicates not that tribunals should avoid all engagement with legitimate expectations, but rather that they should proceed with caution by ensuring that the development of legitimate expectations in investment law does not exceed what can be observed in comparable systems of public law adjudication. In other words, there may not be very much space between a properly delimited doctrine of legitimate expectations under some autonomous FET standards, and equivalent recognition under the CIL MST.

At first impression, El Salvador’s submission as non-disputing party in *RDC v Guatemala*,¹⁸⁴ is a straightforward refutation of any role for legitimate expectations under the CIL MST. El Salvador considered that, ‘the requirement to provide "Fair and Equitable Treatment" under CAFTA Article 10.5 does not include obligations of transparency, reasonableness, refraining from mere arbitrariness, or not frustrating investors' legitimate expectations.’¹⁸⁵ The force of this submission is however qualified when the cogency of the accompanying reasoning is assessed. El Salvador had referred with approval to most aspects of the interpretation of NAFTA Article 1105 by the tribunal in *Glamis Gold v United States*. This tribunal had recognized the possibility of the state creating, ‘objective expectations *in order to induce* the investment, and the subsequent repudiation of those expectations’.¹⁸⁶ El Salvador’s attempt to distance itself from this particular aspect fails to convince. The argument here is that, ‘reference to the investor’s legitimate expectations is unnecessary’ because, ‘it is the act or measure of the State, not the investor's expectations, that must be examined’.¹⁸⁷ The

¹⁸³ *Windstream Energy LLC v. Government of Canada* PCA Case No. 2013-22, Award 27 Sep 2016. The tribunal outlines that respondent’s submissions at paras. 320-326; United States paras. 329-332; Mexico paras. 333-336. Also notable are the submissions in respect of FET standard in Article 10.5 of the CAFTA–DR FTA which is explicitly tethered to the CIL MST. Of the seven parties to this treaty, Guatemala (as respondent) and El Salvador, Honduras and the United States (as non-disputing parties) have argued against the recognition at least of an expansive role for legitimate expectations. See Lise Johnson ‘Ripe for Refinement: The State’s Role in Interpretation of FET, MFN and Shareholder Rights’ Global Economic Governance Working Paper 20015/101, April 2015, pp. 15-17.

¹⁸⁴ *Railroad Development Corporation v. Guatemala* ICSID Case No. ARB/07/23 [*RDC*].

¹⁸⁵ Submission of the Republic of El Salvador as a Non-Disputing Party under CAFTA Article 10.20.2, 1 Jan 2012 para. 7 (emphasis in original).

¹⁸⁶ *Glamis* (n 76) para. 627 (emphasis in original), see also 620-621.

¹⁸⁷ Submission of the Republic of El Salvador (n 182) para. 7 n 3.

problem here is that the need to identify whether the state conduct breaches a FET standard, provides no guidance one way or the other on whether the standard extends to the protection of legitimate expectations. Conversely, the statement gains normativity if understood as indicating that the investor's subjectively held expectations can be ignored, and that what matters is whether there is state conduct from which a reasonable investor would derive a certain understanding of the limits of future state conduct.

Other states have argued against legitimate expectations under the CIL MST on the basis of an apparent tension in this area. According to this argument, most clearly articulated by the United States in *Glamis*,¹⁸⁸ as FET standards are not generally infringed when contractual expectations are defeated, they cannot possibly be infringed when expectations brought about by lesser forms of assurances not embodied in contracts are defeated. The persuasiveness of this argument depends on the rationale for not equating contract breaches with FET breaches. If the rationale is that contractual expectations are unworthy of protection under FET standards, the protection of non-contractual expectations might indeed be nonsensical. However, in the long line of cases which have insisted on something more than contract breaches as a basis for international responsibility,¹⁸⁹ there is little indication that this reluctance is based on any lack of importance of protecting contractual expectations. The true rationale is the separation of domestic and international legal orders. It is a matter of ensuring that municipal contract disputes are not elevated to the international plane, while also ensuring that international tribunals retain jurisdiction over possible breaches of international law.¹⁹⁰

¹⁸⁸ 'If breach of contract – which also necessarily frustrates expectations – is not protected by the minimum standard of treatment, certainly frustrated expectations in the absence of such an express commitment cannot give rise to a violation of that standard. *Glamis* offers no evidence that – or rationale why – international law would not recognize mere breach of a contract as wrongful, but would find cognizable disappointment of an investor's expectations based on a lesser form of assurance. Thus, the fact that breach of contract does not violate the customary international law minimum standard of treatment demonstrates that frustration of an investor's expectations cannot form the basis for a finding that the State has violated customary international law...' *Glamis* (n 76) pages 180-181.

¹⁸⁹ *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States* ICSID Case No. ARB (AF)/97/2 Award 1 Nov 1999 para. 87; *Glamis* (n 76) para. 620; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* ICSID Case No. ARB/97/3 Decisions on Annulment 3 Jul 2002 para. 101; *Waste Management, Inc. v. United Mexican States* ("Number 2") ICSID Case No. ARB(AF)/00/3 Award 30 Apr 2004 para. 115 [*Waste Management II*]; *Joy Machinery Limited v. Arab Republic of Egypt* ICSID Case No. ARB/03/11 Decision on Jurisdiction 6 Aug 2004 para 82; *Impregilo S.p.A. v. Islamic Republic of Pakistan* ICSID Case No. ARB/03/3 Decision on Jurisdiction 22 Apr 2005 para 260; *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador* ICSID Case No. ARB/04/19 Award 18 Aug 2008 para. 345; *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon* ICSID Case No. ARB/07/12 Award 7 Jun 2012 para 162; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay* ICSID Case No. ARB/07/9 Further Decision on Objections to Jurisdiction 9 Oct 2012 para 211; *Hochtief AG v. The Argentine Republic* ICSID Case No. ARB/07/31 Decision on Liability 29 Dec 2014 para. 218.

¹⁹⁰ Article 3 of the ILC Articles on State Responsibility provides: 'The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.' On Article 3, the *Vivendi* annulment tribunal noted: 'In accordance with this general principle (which is undoubtedly declaratory of general international law), whether there has been a breach of the BIT and whether there has been a breach of contract are different

The notion that protecting contractual expectations is unimportant is also dispelled by the manner in which some tribunals and commentators have elaborated on what more than a mere contract breach can incur international responsibility. When there are sovereign acts which disturb a contract, as opposed to conduct capable of manifestation in the private commercial context, part of the rationale for international review may be to protect contractual expectations.¹⁹¹ The fact that mere contract breaches do not incur international responsibility does not, therefore, prevent the protection of legitimate expectations outside of contract.

As indicated, in assessing the reasonableness of submissions in individual cases as state practice, recourse can be had to new investment treaties. Indeed, this may be especially illuminating as states are likely to formulate their positions for treaty drafting more carefully than for other purposes. Recent treaty content tends to confirm that the correctly discerned signal to tribunals is to proceed with caution, and that the CIL MST and autonomous standards are converging with regard to legitimate expectations. This is evident via a comparison of the CPTPP¹⁹² and CETA¹⁹³ texts. The CPTPP text specifies that it prescribes the CIL MST.¹⁹⁴ The main development from NAFTA Article 1105 and the FTC Note is as follows:

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.¹⁹⁵

In contrast, the CETA text contains no reference to the CIL MST and can therefore be taken to establish autonomous FET standards. These texts provide an exhaustive list of grounds for a FET violation which does not refer to legitimate expectations.¹⁹⁶ However, the text then proceeds as follows:

questions. Each of these claims will be determined by reference to its own proper or applicable law—in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract, in other words, the law of Tucumán.’ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* ICSID Case No. ARB/97/3 Decisions on Annulment 3 Jul 2002 para. 96.

¹⁹¹ Consider Stephen Schwebel’s review of the cases:

‘...the breach of such a contract by a State in ordinary commercial intercourse is not, in the predominant view, a violation of international law, but the use of the sovereign authority of a State, contrary to the expectations of the parties, to abrogate or violate a contract with an alien, is a violation of international law... when the State employs its legislative or administrative or executive authority as only a State can employ governmental authority to undo the fundamental expectation on the basis of which parties characteristically contract – performance, not non-performance – then it engages its international responsibility.’ Stephen M. Schwebel *Justice in International Law* (CUP Cambridge 2011), Chapter 26, cited in *Impregilo* (n 186) para 260.

¹⁹² CPTPP (n 5).

¹⁹³ CETA (n 4).

¹⁹⁴ CPTPP Article 9.6 paras. 1 & 2.

¹⁹⁵ CPTPP Article 9.6 para. 4.

¹⁹⁶ CETA Article 8.10 para. 2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes:

1. denial of justice in criminal, civil or administrative proceedings;

When applying the above fair and equitable treatment obligation, a tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.¹⁹⁷

The excerpts above can credibly be read as expressing acknowledgement of the properly delimited protection of legitimate expectations as an element of FET standards. Neither passage would elicit any puzzlement if added to the other. On the contrary, the CETA passage arguably answers the question in the CPTPP text – what more than ‘mere’ frustration of the investor’s [subjective?] expectations might incur liability.¹⁹⁸ In terms of convergence, the likely origin of the idea in the CETA text that legitimate expectations is not a stand alone element of the FET standard is interesting. The formulation is reminiscent of the widely accepted explanation of NAFTA Article 1105 in *Waste Management II*.¹⁹⁹ The CETA text is therefore an example of an autonomous provision which reflects a moderate interpretation of a FET standard tethered to the CIL MST.

In conclusion, it can now be argued that submissions in relation to NAFTA Article 1105 have coalesced into ‘an agreement of the parties’ on interpretation under VCLT Article 31(3)(b). Even if this threshold has not been met, the considerable volume of submissions under this treaty and others fall under Article 32 as supplementary means of interpretation. The non-hierarchical nature of the VCLT interpretive framework suggests that Article 32 status does not involve any significant downgrade in interpretive relevance. The content of state submissions indicates that treaty parties are less receptive towards legitimate expectations under FET standards tethered to the CIL MST than autonomous standards. As a broad sketch of what state submissions (properly evaluated) contribute to the interpretive process, some autonomous FET standards have been accepted as protecting legitimate expectations as an independent element. Other autonomous standards, refute legitimate expectations

-
2. fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;
 3. manifest arbitrariness;
 4. targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
 5. abusive treatment of investors, such as coercion, duress and harassment; or
 6. a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.

¹⁹⁷ CETA Article 8.10 para. 4.

¹⁹⁸ In *Windstream Energy* (n 183 paras 330 and 335) the tribunal noted that both the United States and Mexico submitted that, “something more” than mere interference with the investor’s expectations is required under the minimum standard of treatment’.

¹⁹⁹ ‘Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct 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.’ *Waste Management II* (n 189) para 98.

as an independent element but also explicitly recognize its relevance to more established heads of liability. For FET standards tethered to the CIL MST, there is acknowledgement that legitimate expectations are of possible relevance.²⁰⁰ Thus the least receptive signal from state practice is that legitimate expectations should be acknowledged and developed with caution. In this respect, the manner in which legitimate expectations have been delimited in jurisdictions which recognize the principle can be instructive. The general principles of law accessible via Article 31(3)(c) therefore complement and reinforce interpretive insights via state practice under paragraph (b).

V DETERMINING THE CONTENT OF THE CIL MST AS IT APPLIES TO FOREIGN INVESTORS

This section responds to the question raised in the introduction, of whether the methodology for ascertaining the content of the CIL MST as it applies to foreign investors is an aspect of, or separate from, VCLT Articles 31 and 32. As such, it also responds to what might be regarded as the assumption in the previous section that state practice under the VCLT framework is relevant for elucidating the content of the CIL MST.

My perspective here can be outlined in two propositions. First, the methodology for determining the content of CIL is distinct from the methodology for interpreting treaties. As set out in some investment treaties, CIL results from a ‘general and consistent practice of states’ coupled with *opinio juris*, which requires that the general practice is followed ‘from a sense of legal obligation’.²⁰¹ Secondly, for treaty based FET standards tethered to the CIL MST, the VCLT interpretive framework supplements the distinct methodology for determining the content of CIL. The tension between these statements can be reduced by imagining a case before an international tribunal in which the claimant investor (or its home state) is unable to rely on an investment treaty. The protection available to this investor would depend on the content of the CIL MST as it applies to foreign investors. As there is no applicable treaty, it would not be appropriate to have recourse to the VCLT interpretive framework. By comparison, it would seem anomalous to exclude this framework if, as is more typical, the claimant can invoke a treaty. Treaty based FET standards which are tethered to the CIL MST, are still treaty provisions.

²⁰⁰ Canada as respondent state in *Windstream Energy* (n 183) noted: ‘In sum, the *Thunderbird*, *Glamis* and *Mobil* Tribunals merely determined that a breach of “clear and explicit representations made... in order to induce the investment” could be a “relevant factor” in assessing whether a measure amounts to the type of egregious behaviour prohibited by the customary international law minimum standard of treatment. None of these tribunals held that a breach of legitimate expectations in and of itself could amount to a breach of 1105(1). Respondent Rejoinder Memorial 6 Nov 2015 para 209 (emphasis in original, notes omitted).

²⁰¹ CAFTA – DR Annex 10-B Customary International Law. As the International Court of Justice has stated, ‘[n]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it’. *North Sea Continental Shelf Cases*, Judgment of 20 Feb 1969 para 77.

That such exclusion would be anomalous is also suggested by the content of the VCLT principles. CIL is relevant for treaty interpretation by reason of VCLT Article 31(3)(c). As noted, this refers to, '[a]ny relevant rules of international law applicable in the relations between the parties'. It is not even necessary to refer to Article 38(1)(b)²⁰² of the ICJ Statute to confirm that this includes customary international law.²⁰³ It is therefore clearly the position that CIL can be considered, along with other VCLT interpretive elements, in the context of autonomous FET standards. From here, it may be seen as a significant leap to claim that treaty based FET standards which are tethered to the CIL MST can only be interpreted with reference to one element of treaty interpretation. Rather, a holistic but tailored method of treaty interpretation, suggests that the methodology for determining the content of CIL will play a strong role to the extent that the parties present relevant evidence, and a lesser role compared to other interpretive elements, when little evidence is available to the tribunal.

Thus, in *Apotex v United States*, the tribunal was able to consider a significant amount of evidence in relation to the content of CIL with regard to procedural rights invoked by the claimant (prior notice and a hearing) in relation to administrative measures blocking the import of its drugs. In particular, the tribunal considered state practice in the form of the procedural steps generally taken by regulatory agencies ahead of prohibiting or limiting the importation of drugs considered to be adulterated.²⁰⁴ In contrast, the *Windstream* tribunal envisaged shared responsibility to adduce evidence of state practice and *opinio juris*, before noting that neither party had produced any such evidence.²⁰⁵ The tribunal then turned its attention to 'other indirect evidence' including the decisions of other NAFTA tribunals and relevant legal scholarship.²⁰⁶ A clear basis for this recourse is provided by Article 38(1)(d) of the ICJ Statute which refers to 'judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'. Moreover, the ILC's current work in this area indicates that these sources are 'especially' relevant for customary

²⁰² Article 38(1): The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: b. international custom, as evidence of a general practice accepted as law.

²⁰³ Pappas notes as follows: 'The 'relevance' of the customary minimum standard for the interpretation of fair and equitable treatment seems unquestionable. The whole spectrum of positions in treaty law and arbitral practice, from identifying treaty with custom to finding custom to be archaic or modern, similar to treaty in general or in the particular instance necessarily rests on the same premise: treaty and customary rules address the same subject matter, whether with the same or different content.' Martins Pappas *The International Minimum Standard and Fair and Equitable Treatment* (OUP Oxford 2013) 166.

²⁰⁴ *Apotex Holdings Inc. and Apotex Inc. v. United States of America* ICSID Case No. ARB(AF)/12/1, Award, 25 Aug 2014 paras. 9.15-9.40 in general and paras. 9.27-9.36 in particular.

²⁰⁵ *Windstream* (n 180) paras 350-351.

²⁰⁶ *Ibid* para. 351.

international law,²⁰⁷ while also indicating that decisions of international courts and tribunals are generally accorded more weight than those of national courts.²⁰⁸

It cannot therefore be disputed that the manner in which previous tribunals have interpreted the CIL MST amounts to indirect evidence of the content of this standard and it is difficult to criticize tribunals for resorting to such evidence as is available. Little weight can ingenuously be attributed to the possible retort that previous awards did not themselves evaluate state practice and *opinio juris*, for this observation applies equally to the formulation of the CIL MST in *Neer v Mexico* which tends to be preferred by respondent states.²⁰⁹ To the extent that use of the available evidence (previous decisions) raises the spectre of investor-friendly interpretations, the antidote is to accept the VCLT interpretive framework. As indicated, there is considerable scope for states to influence treaty interpretation via subsequent agreement and practice, albeit (as also argued) this scope may well be greater for autonomous standards.

In sum, a strong argument can be made that the VCLT applies to all treaty based FET standards. When the standard in question is tethered to the CIL MST, VCLT Article 31(3)(c) assumes a particular importance and invites tribunals to engage with the distinct methodology for determining the content of CIL. However, the other interpretive elements are not excluded and will tend to assume lesser or greater relevance depending on the evidence available to the tribunal. This approach does not come at the cost of restricting the ability of states to influence treaty interpretation.

VI CONCLUSION

This article has appraised the scope for legitimate expectations under investment law FET treaty provisions. A review of the relevant cases revealed a general direction of travel towards a strict approach under which legitimate expectations can only arise from express and clear undertakings. However, recent cases exhibiting broader understandings were also noted. Modern tribunals are therefore able to choose between different approaches and emphases so that state concerns here cannot yet be said to be of merely historical note.

²⁰⁷ ILC Third report on identification of customary international law by Michael Wood, Special Rapporteur, A/CN.4/682, 27 Mar 2015 para. 55.

²⁰⁸ ILC, Identification of customary international law, The role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law, Memorandum by the Secretariat, A/CN.4/691, 9 Feb 2016 para. 55.

²⁰⁹ *L. F. H. Neer and Pauline Neer (United States) v. United Mexican States* (Mexico-United States Claims Commission), Decision of 15 Oct 1926. On the formulation in this case, the *RDC* tribunal (n 184 para 216) noted: It is ironic that the decision considered reflecting the expression of the minimum standard of treatment in customary international law is based on the opinions of commentators and, on its own admission, went further than their views without an analysis of State practice followed because of a sense of obligation. By the strict standards of proof of customary international law applied in *Glamis Gold, Neer* would fail to prove its famous statement - “the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency” - to be an expression of customary international law.

The article proceeded to evaluate the different approaches using a holistic but tailored method of treaty interpretation as envisaged by VCLT Articles 31 and 32, with the Article 31(3) elements emerging as the most important for investment law FET standards. This method was presented as a response to the more limited approaches evident in the case law and the existing literature; the former tending towards interpreting FET standards with reference to formulations in previous awards, and the latter concentrating on comparative insights as a significant but only partial response.

An initial concern was to locate reliance on comparative insights within the VCLT interpretive framework. VCLT Article 31(3)(c) requires the treaty interpreter to take into account, '[a]ny relevant rules of international law applicable in the relations between the parties'. By reason of Article 38(1)(c) of the ICJ Statute, the reference to 'rules of international law' must be taken to include, 'the general principles of law recognized by civilized nations'. Thus a comparative method is placed on the most confident footing when it can be confirmed, not only that protecting legitimate expectations has emerged as a general principle of law, but also that this principle is 'relevant' to the interpretation of the treaty norm in question, and 'applicable in the relations between the parties'. Particular attention was given to identifying and illustrating the methodological difficulties in relation to the general principle question. While no definitive view can credibly be offered here, it was argued that this should not result in the exclusion of comparative insights from the interpretive process. Among other reasons, this would amount to cutting off investment law from an already rich source of jurisprudence which exhibits remarkable consistency on the required specificity and clarity of state conduct from which legitimate expectations can arise. Legitimate expectations can only be derived from representations which are clear and unambiguous. Thus, comparative insights provide little support for the broader understandings still evident in some investment law cases.

The task was then to assess whether comparative insights are confirmed, or called into question, upon application of other interpretive elements, in particular, subsequent state agreements and practice under VCLT Article 31(3)(a) and (b). Via engagement with the ILC's on-going work in this area, attention was given to the scope for states to influence interpretation through use of treaty based mechanisms for expressing agreed positions, and submissions in individual cases. This scope is at its greatest when treaty based mechanisms are used. However, beyond this general position, it was argued that there is more scope for treaty parties to influence the interpretation of autonomous FET standards, than those tethered to the CIL MST. The latter have an existence independent of any particular treaty provision since the idea of a 'minimum' standard implies uniformity which does not vary as between treaties and countries. It is therefore difficult to envisage any method, whether amendment or subsequent agreement, by which parties to a particular treaty can definitively decide that certain elements are included or excluded from the CIL MST. In contrast, this is conceptually unproblematic for autonomous FET standards. For treaty parties seeking to optimize their ability to

influence treaty interpretation, the advice is therefore to use autonomous FET standards; the very opposite of the current trend.

The analysis proceeded to confirm that state submissions in individual cases may either establish agreement on interpretation under VCLT Article 31(3)(b), or be relevant as supplementary means of interpretation under Article 32. In assessing the interpretive weight of this state practice, it was argued that tribunals should bear in mind the open textured nature of the opening phrase of Article 31(3). The need for subsequently agreed interpretations to be ‘taken into account’ suggests that a broad range of evidence can be considered in deciding on interpretive weight. This might include evidence which does not itself amount to ‘subsequent practice in the application of the treaty’ under paragraph (b), such as the Model BITs and newer treaties of the treaty parties. The ‘taken into account’ language also provides textual support for the theory that investment tribunals should assess the reasonableness of interpretations advanced in subsequent agreements. This theory was applied to some of the state arguments which have been advanced against the recognition of legitimate expectations. It was concluded that these arguments do not withstand close scrutiny.

In terms of the actual content of state submissions in cases, states have been more receptive towards legitimate expectations under autonomous FET standards than those tethered to the CIL MST. However, it was argued that careful evaluation of these submissions, does not lead to the conclusion that tribunals should avoid all engagement with legitimate expectations, but rather that they should proceed with caution. In other words, there may not be very much space between a properly delimited doctrine of legitimate expectations under some autonomous FET standards, and equivalent recognition under the CIL MST. Interpretive insights gained by way of subsequent practice under Article 31(3)(b) at least do not contradict those gained through the comparative approach under paragraph (c).

The article proceeded to address the assumption in previous sections that VCLT Articles 31 and 32 are relevant for ascertaining the content of the CIL MST as it applies to foreign investors. While CIL results from the general and consistent practice of states followed from a sense of legal obligation, it was argued that this distinct methodology does not entail the exclusion of the VCLT interpretive framework. Treaty based FET standards which are tethered to the CIL MST are still treaty provisions. Moreover, consideration of CIL is an aspect of treaty interpretation since the ‘relevant rules of international law’ under Article 31(3)(c) includes CIL. Holistic but tailored treaty interpretation, therefore suggests that the methodology for determining the content of CIL will play a strong role to the extent that the parties present relevant evidence, and a lesser role compared to other interpretive elements, when little evidence is available to the tribunal.

The core conclusion is therefore that, in principle, the properly delimited protection of legitimate expectations has a role under all FET standards. The precise extent of this role in any given dispute

could be at any level between highly relevant to very limited depending on the outcome of the interpretive process. Thus a tribunal might be expected to avoid engagement with legitimate expectations when it is clear that the domestic courts of the state parties to the treaty have expressly rejected this doctrine, and when the respondent state advances further reasons for the rejection of the doctrine under the FET standard at issue more cogent than those evaluated in this article. Conversely, legitimate expectations will have a stronger role when recognized in the domestic legal orders of the treaty parties and (hypothetically) if there a subsequent agreement to the effect the FET standard at issue covers legitimate expectations. Whether we will see broader recognition and further development, or curtailment, depends on the interactions between treaty parties and tribunals. If tribunals heed the message from comparative insights (the need for clear assurances) and from state submissions (proceed with caution), the broader acceptance of legitimate expectations in this area can be anticipated. Conversely, state opposition would likely intensify in the event of expansive interpretations unrecognized in any comparable system of adjudication.

The former eventuality is preferable as the doctrine has significant potential for objectively balancing host state and investor interests. This is already evident in some cases. While this article has focused on the threshold issue of the clarity and specificity of state conduct which can give rise to legitimate expectations, tribunals have proceeded beyond this enquiry. For example, they have developed and applied the idea that the strength of expectations, and the extent to which they deserve protection, grow as the flexibility available to investors to withdraw from projects decreases.²¹⁰ This form of balancing represents a sophisticated refinement to protecting legitimate expectations based on clear assurances. It is therefore hoped that remaining echoes of overly expansive understandings in the cases will soon fade. This ought to be accompanied by a gradual softening of reservations about adding legitimate expectations to the more established criteria for evaluating possible FET breaches.

²¹⁰ ‘As the investment increased and matured, the consequences of any failure to fulfil the legitimate expectations became increasingly severe. The implications for the state's obligations under the fair and equitable treatment standard are not the same when a legitimate expectation is breached at the commencement of an investment, as when the investment is well advanced.’ *Arif* (n 2) para 543.

‘The investor's flexibility is reduced the more it commits funds to implementation, and the gradual loss of flexibility increases the legitimate expectation of stability and protection, while the State, although retaining its right and duty to pursue public policy objectives, is obliged to respect the legitimate expectations by pursuing the objectives consistently, coherently and predictably.’ *Mamidoil* (n 57) para 707.