Chapter 10: International Investment Law

A. Introduction

The previous chapters brought to fore different aspects of the interrelationship of sources. The eighth chapter on the European Convention on Human Rights demonstrated how functional equivalents to concepts of general international law were developed as a matter of treaty interpretation and how a relation was established between other rules of public international law and the European Convention through proportionality analysis. The ninth chapter on international criminal law illustrated that customary international law was interpreted in light of general principles of international law under consideration of the functional specificities of international criminal law. Both chapters also revealed the importance of doctrinal constructions and perspectives, be it proportionality analysis or a specific understanding of criminal law doctrine.

This chapter on international investment law supports these observations and adds new perspectives on the interrelationship of sources. This chapter will first trace the interrelationship of sources in the modern history of international investment law and highlight in particular the prominent role of customary international law and general principles of law, their contested character and the move towards bilateral investment treaties (B.). The chapter will then demonstrate how this bilateralism in form led to a multilateralism in substance. It will also explore the different doctrinal avenues while evaluating their respective explanatory force for this phenomenon of multilateralism in substance (C.). Last but not least, this chapter will focus on the significance of doctrinal constructions in international investment law, exemplified by the distinction between primary rules and secondary rules (D.). This chapter will critically engage with the reception of this distinction in international investment law and argue against an expansive interpretation of this distinction which would place treaties and custom into strictly separated compartments.

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B. From the interwar period to the modern investment regime

This section will examine different steps in the development from the interwar period to the modern investment regime. It will point to the historical connection between responsibility and the protection of aliens (I.), examine the importance of unwritten law, which expressed itself in the international minimum standards and the doctrine of the internationalization of contracts by general principles of law (II.). Subsequently, it will give an overview of the development of the modern investment regime (III.)

I. The historical connection between responsibility and the protection of aliens

Legal responsibility for breaches of the law is "a general conception of law"[1]. Against this background, it is not surprising that the doctrine of international responsibility and international law relating to the rights of aliens were historically intrinsically connected. Since the way in which states treated "their" citizens was (to a large extent) considered to be a matter for each state to decide on and not subject to strict international legal regulation, the treatment of foreigners belonging to another state was one of the few questions with respect to which questions of international responsibility could become relevant.[2] States were entitled to exercise diplomatic protection and to invoke the international responsibility of another state for injuries to their citizens.[3] Both topics, substantive obligations and the law of international

1 *Case Concerning the Factory at Chorzow* PCIJ Series A No 17, 29.

2 Edwin Montefiore Borchard, *The diplomatic protection of citizens abroad* (The Banks law publishing Company 1915) 177-180 and 349: "Each state in the international community is presumed to extend complete protection to the life, liberty and property of all individuals within its jurisdiction. If it fails in this duty toward its own citizens, it is of no international concern. If it fails in this duty toward an alien, responsibility is incurred to the state of which he is a citizen, and international law authorizes the national state to exact reparation for the injury sustained by its citizen." Alexander P Fachiri, 'International Law and the Property of Aliens' (1929) 10 BYIL 32-33; Nolte, 'From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-state Relations' 1088.

3 Vattel, *The Law of Nations; or Principles of the Law of Nature, applied to the conduct and affairs of nations and sovereigns* book II 161 para 71: "Whoever uses a citizen ill, indirectly offends the state, which is bound to protect this citizen; ant the sovereign

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responsibility, used to be treated together: the League of Nations codification attempted to clarify the rules of responsibility in the context of the rights of aliens, and substantive obligations, such as the prohibition of denial of justice, were studied from the perspective of international responsibility.[4]

However, State responsibility became increasingly understood as a distinct legal category.[5] The *Harvard Draft on the Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners*, whilst being concerned with substantive obligations, such as denial of justice (article 9), began to elaborate on an abstract regime relating to responsibility.[6] Also, several delegates at the 1930 codification conference suggested to separate the rules of responsibility from substantive obligations.[7]

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of the latter should avenge his wrongs, punish the aggressor, and, if possible, oblige him to make full reparation; since otherwise the citizen would not obtain the great end of the civil association, which is safety."; *Mavrommatis Palestine Concessions* PCIJ Series A No 02, 12; Crawford, *Brownlie's principles of public international law* 591; on the description as fiction see Annemarieke Vermeer-Künzli, 'As If: The Legal Fiction in Diplomatic Protection' (2007) 18(1) EJIL 37 ff.

4 Cf. Robert Ago, 'Le délit international' (1939) 68(2) RdC 467, 468: "Pratiquement, et en d'autres termes, au lieu d'étu- dier directement les droits et les devoirs des Etats dans le droit des gens, la doctrine a étudié ces droits et ces devoirs du point de vue indirect de leur violation, et a ramené en quelque sorte tout lo droit international à la notion de la responsabilité."

5 On the law of responsibility as a distinct, objective regime, see already Triepel, *Völkerrecht und Landesrecht* 324-381; Dionisio Anzilotti, 'La responsabilité internationale des états: à raison des dommages soufferts par des étrangers' (1906) 13 RGDIP 5-29. On Anzilotti's influence see Nolte, 'From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-state Relations' 1087-1088. For a historical overview of this development and of earlier writers who did not consider responsibility to be a distinct legal category see Crawford, *State Responsibility: The General Part* 4-26.

6 'Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners' (1929) 23(2) AJIL. Supplement 133-135; see Briggs in *ILC Ybk (1963 vol 2)* 231; Eric David, 'Primary and Secondary Rules' in James Crawford and others (eds), *The Law of International Responsibility* (Oxford University Press 2010) 28 ff.; on the Harvard Draft see Crawford, *State Responsibility: The General Part* 32-35.

7 For the Finnish delegate Erich the general principles on international responsibility "presuppose a wrong, a fault or culpability on the part of the State [...] it would be advisable to reconsider the question whether the idea of international responsibility should be thus limited to acts or omissions which are incompatible with the international obligations of the State", Rosenne, *League of Nations Conference for the Codification of International Law (1930)* 1444. This view was shared by the German delegation which criticized that the bases "dealt with certain special situations:

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Later, in the context of the ILC, the distinction between primary rules of obligations and secondary rules of responsibility asserted itself as codification strategy for the responsibility of states for internationally wrongful acts. After the first ILC Special Rapporteur, Francisco V. García-Amador, had followed the approach adopted earlier during the League of Nations, his successor, Roberto Ago, restarted the project and convinced the other members to focus solely on the secondary rules of international responsibility, without studying the primary obligations.[8]

Until the adoption of this new course, the work of the ILC was characterized by a certain proximity to the Harvard Research Project which culminated into a second draft in 1961.[9] The first Special Rapporteur visited Harvard in order to confer with the directors of the Harvard project.[10] The Secretary to the ILC and Director of the Codification Division, Dr. Yuen-li Liang, spoke of a "collaboration between the United Nations Secretariat and the Harvard Law School in the preliminary work on that topic."[11] Certain members referred to this linkage when they criticized the Special Rapporteur's report. Tunkin argued that some of the problems which characterized both the Harvard

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acts affecting the rights of persons to whom concessions have been granted [...]", Rosenne, *League of Nations Conference for the Codification of International Law (1930)* 1448 (Richter). The method to deal with content of obligations "is open to serious objection". Furthermore, Politis for Greece emphasized that "[w]e are not called upon to deal here with rules of substance or those obligations the infraction of which constitutes responsibility", ibid 1449. See also Cavaglieri from Italy, 1455, 1464, Cruchaga-Tocornal from Chile, 1476-1477, Abdel Hamid Bdaoui Pacha from Egypt ("'remedial law' as contrasted with 'a substantive law'"), 1477; Basdevant from France, 1478.

8 See above, p. 364.

9 On this relationship see James Crawford and Tom Grant, 'Responsibility of States for Injuries to Foreigners' in John P Grant and JCraig Barker (eds), *The Harvard Research in International Law: Contemporary Analysis and Appraisal* (William S Hein & Company 2007) 90-100, 102-106; Nissel, 'The Duality of State Responsibility' 824, 828-830; Philip Allott, 'State Responsibility and the Unmaking of International Law' (1988) 29(1) Harvard International Law Journal 5-7. On the 1961 draft see Crawford, *State Responsibility: The General Part* 34-35.

10 See *ILC Ybk (1961 vol 1)* 208 (the Special Rapporteur summarizing the criticism); Crawford and Grant, 'Responsibility of States for Injuries to Foreigners' 90 with further references.

11 *ILC Ybk (1959 vol 1)* 147; *ILC Ybk (1956 vol 1)* 228; see also *ILC Ybk (1961 vol 1)* 196, where Professor Louis B. Sohn presented a draft of the Convention on the International Responsibility of States for Injuries to Aliens, prepared by the Harvard Law School.

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draft and the Special Rapporteur's report "were closely connected with the existence in the world of two different economic systems."[12] Matine-Daftary criticized that "the Special Rapporteur's draft [...] was based on purely European standards of justice" and suggested that "the Harvard Law School and the Special Rapporteur should endeavour to find a formula which would be more acceptable to all States."[13] With the new exclusive focus on the secondary rules, on the codification of "the whole responsibility and nothing but responsibility"[14], the linkage no longer existed as the Harvard Draft was particularly concerned with substantive obligations.[15]

At that time, Ago's approach was not uncontroversial and it was met with criticism. Robert B. Lillich, for instance, preferred the previous approach and criticized Ago's take as too academic and theoretical which therefore would have left no mark on international practice.[16] In hindsight, however, the reorientation under Ago can be evaluated as a success. Not only did the ILC's efforts result in the ARSIWA. The concentration on secondary rules, on rules on rules rather than on the substance of obligations, became a success formula which was applied in relation to other topics as well, for instance in the context of the ILC's work on subsequent agreements and subsequent practice, customary international law, *jus cogens* and general principles of law.[17] Ago's approach was successful because it allowed the Commission to reapproach the topic of state responsibility without having to engage with the contested subject of obligations of states towards aliens.[18] It was for this reason that García-Amador's approach had been met with resistance.[19] As

12 *ILC Ybk (1959 vol 1)* 149.

13 ibid 149; Crawford and Grant, 'Responsibility of States for Injuries to Foreigners' 95-98 with further references.

14 *ILC Ybk (1969 vol 1)* 106 (Ago).

15 Crawford and Grant, 'Responsibility of States for Injuries to Foreigners' 106.

16 Richard B Lillich, 'The Current Status of the Law of State Responsibility for Injuries to Aliens' in Richard B Lillich (ed), *International Law of State Responsibility for Injuries to Aliens* (University Press of Virginia 1983) 19-21; see also *ILC Ybk (1963 vol 2)* 231, where Briggs argued that "Ago's paper somewhat artificially stressed the distinction between the international law of State responsibility and the law relating to the treatment of aliens[...] it was perhaps a little too abstract to form the framework of a draft treaty to be submitted to States."

17 See also chapter 6 on the International Law Commission.

18 Cf. on the codification strategy to focus on "technical" rules as opposed to more political topics, Lauterpacht, 'Codification and Development of International Law' 23-27, 33; cf. Stone, 'On the Vocation of the International Law Commission' 38 ff.

19 Nissel, 'The Duality of State Responsibility' 821 ff.

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Martti Koskenniemi put it, "[s]tate responsibility for injuries of Aliens was really an American topic"[20], namely an US and Latin American topic.[21] As will be demonstrated below, the different views in particular between the US and Latin American states could not be overcome by unwritten international law and ultimately let states to conclude bilateral agreements.

II. The importance of unwritten law

In the absence of bilateral or multilateral treaties imposing obligations on states with respect to the treatment of foreign nations,[22] obligations could only exist based on unwritten international law. Here, the prohibition of arbitrariness was an important principle, as it was considered to impose limitations on states in areas which were not regulated by more specific

20 Martti Koskenniemi, ‘The Ideology of International Adjudication and the 1907 Hague Conference’ in Yves Daudet (ed), *Topicality of the 1907 Hague Conference, the Second Peace Conference* (Nijhoff 2008) 149.

21 Kathryn Greenman, ‘Aliens in Latin America: Intervention, Arbitration and State Responsibility for Rebels’ (2018) 31 Leiden Journal of International Law 624.

22 On the so-called minority protection treaties see *Rights of Minorities in Upper Silesia (Minority Schools)* PCIJ Series A No 15; Gentian Zyberi, ‘The International Court of Justice and the Rights of Peoples and Minorities’ in Christian J Tams and James Sloan (eds), *The Development of International Law by the International Court of Justice* (Oxford University Press 2013) 329-338.

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obligations.[23] It is reflected in the international minimum standard[24], which, according to Elihu Root's famous description, was said to be

> "a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own citizens is that its system of law and administration shall conform to this general standard. If any country's system of law and administration does not conform to that standard, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens."[25]

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23 For an early example prior to the League of Nations see Paul Heilborn, *Das System des Völkerrechts entwickelt aus den völkerrechtlichen Begriffen* (Verlag von Julius Springer 1896) 357-361, in the context of interventions; Nicolas Politis, 'Le problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux' (1925) 6 RdC; Leibholz, 'Verbot der Willkür und des Ermessensmißbrauches im völkerrechtlichen Verkehr der Staaten' 98; Lauterpacht, *The Function of Law in the International Community* 94 ff. and 303 ff. with further references; see also at 306 where Lauterpacht said that the principle "plays a relatively small part in municipal law, not because the law ignores it, but because it has crystallized its typical manifestations in concrete rules and prohibitions"; Hans-Jürgen Schlochauer, 'Die Theorie des abus de droit im Völkerrecht' (1933) 17 Zeitschrift für Völkerrecht 373, 378-379 on the importance of this principle for common areas; see later Alexandre-Charles Kiss, *L' abus de droit en droit international* (Pichon & Durand-Auzias 1953); but see to the contrary Cavaglieri, 'Règles générales du droit de la paix' 543-545, skeptical of the concept which would have not been confirmed by international practice; see also Jean David Roulet, *Le caractère artificiel de la théorie de l'abus de droit en droit international public* (Ed de la Baconnière 1958) 150; later Schwarzenberger, 'The fundamental principles of international law' 309.

24 Leibholz, 'Verbot der Willkür und des Ermessensmißbrauches im völkerrechtlichen Verkehr der Staaten' 98.

25 Elihu Root, 'The Basis of Protection to Citizens Residing Abroad' (1910) 4(3) AJIL 521-522. Cf. Andrew C Blandford, 'The History of Fair and Equitable Treatment before the Second World War' (2017) 32 ICSID Review 289-291, 294-297, 302-303 for a historical overview of the notion "principles of justice and equity" and for the view that the principles of justice in Root's formula were those recognized in domestic laws and explained by way of reference to the US constitution, rather than by customary international law. Cf. Stephan W Schill, *The multilateralization of international investment law* (Cambridge University Press 2009) 26 ("rule and basis for customary international law").

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This section will zero in on the unwritten law. In particular, it will examine the international minimum standard and its contestation (1.) and the doctrine of the internationalization of contracts by general principles of law (2.).

1. The minimum standard and its contestation

The vagueness and indeterminacy of its description made it difficult to determine the meaning of the international minimum standard in relation to aliens.[26] In particular Latin-American countries adopted the view that international law required nothing more than equal treatment between aliens and nationals according to the laws of the host state.[27] This position can be traced back to Carlos Calvo, the writings of whom were cited by Mexico already in 1873 in a dispute with the United States of America.[28] Calvo himself built on the teachings of Andrés Bello[29] who attempted to reconcile the protection of aliens and the interest of states to regulate. Bello recognized that those countries which treated foreigners with more humanity and liberty have achieved greater wealth than countries which imposed restrictions and

26 Edwin Borchard, 'The 'Minimum Standard' of the Treatment of Aliens' (1940) 38(4) Michigan Law Review 458: "[...] the variability of time, place and circumstance make it even less precise than the term 'due process of law' [...] the standard is mild, flexible and variable according to circumstances [...]".

27 League of Nations Committee of Experts for the Progressive Codification of International Law, 'Annex to Questionnaire No. 4. Report of the Sub-Committee. M. Guerrero, Rapporteur, Mr. Wang Chung-Hui' [1927] printed in (1926) 20 AJIL Supp 99; as stated by Schill, the position of equal treatment can be traced back to the writings of Calvo and was supported by several Latin American states and "gained ground due to the successful communist revolution in Russia in 1917", Schill, *The multilateralization of international investment law* 27; on Bello and Calvo as discussed in this paragraph see Santiago Montt, *State Liability in Investment Treaty Arbitration. Global Constitutional and Administrative Law on the BIT Generation* (Hart Publishing 2009) 31 ff.

28 Jan Paulsson, *Denial of Justice in international law* (Cambridge University Press 2005) 21.

29 See Carlos Calvo, *Le droit international théorique et pratique; précédé d'un exposé historique des progrès de la science du droit des gens* (vol 3, A Rousseau 1896) 109-110; Montt, *State Liability in Investment Treaty Arbitration. Global Constitutional and Administrative Law on the BIT Generation* 41; on Bello see Keller-Kemmerer, *Die Mimikry des Völkerrechts: Andrés Bellos "Principios de Derecho Internacional".*

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disadvantages to foreigners.[30] At the same time, he affirmed the equality of states and the principle of non-interference.[31] His interpretation of international law presented a reconciliation of the interests for free trade and sovereignty: by entering a country, foreigners submit themselves to local law and the host state offers protection to foreigners, also by applying the local law to them in a just manner.[32] If the state refuses to hear the foreigner's complaint or even commits a "manifest injustice", the foreigner can turn to his state[33] for diplomatic protection.[34] Similarly, Calvo's starting point was the equality of states.[35] According to foreigners more than equal treatment would be contrary to equality since the responsibility of a government to foreigners could not be greater than its responsibility to its citizens.[36] As argued by Montt and Garcia-Amador, Calvo did not exclude the possibility of diplomatic protection in cases of denial of justice.[37] Calvo's and Bello's teachings led to the development of what became known as the *Calvo* doctrine, according to which foreigners are not entitled to better treatment than

30 " Las restricciones y desventajas a que por las leyes de muchos paises estan sujetos los estranjeros, se miran jeneralmente como contrarias al incremento de la poblacion y al adalantamiento de la industria y los paises que han hecho mas progressos en las artes y comercio y se han elevado a un grado mas alto de riqueza y poder son cabalmente aquellos que han tratado con mas humanidad y liberalidad a los estranjeros", Andrés Bello, *Principios De Derecho De Jentes* (Imprenta De La Opinion 1832) 53-54.

31 Keller-Kemmerer, *Die Mimikry des Völkerrechts: Andrés Bellos "Principios de Derecho Internacional"* 253 ff.; on the history of European interference in the 19th century on the basis of diplomatic protection and forcible self-help see Montt, *State Liability in Investment Treaty Arbitration. Global Constitutional and Administrative Law on the BIT Generation* 37.

32 Bello, *Principios De Derecho De Jentes* 54-55.

33 ibid 54: "Si éstos (los Estados) contra derecho rehusaren oir sus quejas, o le hiciesen una injusticia manifiesta, puede entónces interponer la autoridad de su propio soberano."

34 See also the summary in Andrés Bello, *Principios de Derecho Internacional* (2nd edn, Almacen de JM de Rojas 1847) 77.

35 Carlos Calvo, *Derecho Internacional teórico y práctico de Europa y América* (vol 1, D'Amyot/Durand et Pedone-Lauriel 1868) 396-397 para 294.

36 ibid 393 para 294; Calvo, *Le droit international théorique et pratique; précédé d'un exposé historique des progrès de la science du droit des gens* 138 para 1276.

37 Montt, *State Liability in Investment Treaty Arbitration. Global Constitutional and Administrative Law on the BIT Generation* 40-41, emphasizing that ; Francisco García-Amador, *The changing law of international claims* (vol 1, Oceana-Publ 1984) 56.

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nationals, and to the *Calvo* clause in contracts where foreigners waive their right to seek diplomatic protection by their state of nationality [38]

The *Calvo* doctrine also informed the famous *Guerrero* report of José Gustavo Guerrero, who later became the last President of the PCIJ and the first president of the ICJ. According to this report, international law had only a minor role to play in the treatment of aliens as long as aliens were accorded equal treatment by the host state.[39] He stressed that the binding force of international law rested on "the consent of all States and not merely the consent of some."[40] He was critical of international tribunals rehearing cases that domestic courts had already decided.[41] He, therefore, proposed a quite narrow scope of the international prohibition of denial of justice: in principle, a "decision of a judicial authority, in accordance with the *lex loci*, that a petition submitted by a foreigner cannot be entertained should not, however, be regarded as a denial of justice."[42] In other words, the state had fulfilled its international obligation as soon as its courts gave *any* decision. In his view, "a judicial decision, whatever it may be, and even if vitiated by error or injustice, does not involve the international responsibility of the State."[43]

Opponents of the *Calvo* doctrine argued that this doctrine was too far-reaching, reduced the scope of international law too significantly and did not sufficiently appreciate the independence of the normative content of international law *vis-à-vis* domestic legal orders.[44] According to the General Claims

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38 But see also Montt, *State Liability in Investment Treaty Arbitration. Global Constitutional and Administrative Law on the BIT Generation* 40, 45, arguing that the Calvo doctrine "at least as Andrés Bello originally envisioned it - did not intend to dismantle state responsibility" and that the Calvo clause was based on the investor's consent, see also 48 on the common purpose of the doctrine and the clause "to curb the excesses of diplomatic protection"; on the Calvo doctrine and clause see also Patrick Juillard, 'Calvo Doctrine/Calvo Clause' [2007] Max Planck EPIL paras 3 ff.

39 League of Nations Committee of Experts for the Progressive Codification of International Law, 'Annex to Questionnaire No. 4. Report of the Sub-Committee. M. Guerrero, Rapporteur, Mr. Wang Chung-Hui' 99.

40 ibid 92.

41 ibid 99.

42 ibid 99.

43 ibid 104.

44 Borchard, 'The 'Minimum Standard' of the Treatment of Aliens' 447, 452, 460; Edwin M Borchard, '"Responsibility of States," at the Hague Codification Conference' (1930) 24 AJIL 537; Fachiri, 'International Law and the Property of Aliens' 33; Robert Yewdall Jennings, 'State Contracts in International Law' (1961) 37 BYIL 181: "The

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Commission (Mexico and United States)[45], "equality is not the ultimate test of the propriety of the acts of authorities in the light of international law. That test is, broadly speaking, whether aliens are treated in accordance with ordinary standards of civilization."[46] Consequently, foreign citizens might in certain circumstances even receive "broader and more liberal treatment" in comparison to nationals.[47]

Claims Commissions attempted to operationalize the vague international minimum standard by explaining its object and purpose. The most influential definition was developed in the *Neer* case[48] which focused on denial of justice. In the *Neer* case, the United States-Mexico Claims Commission had to decide whether Mexico had violated this standard for failing to investigate and prosecute those responsible for the death of US citizen. The commission decided

> "[first] that the propriety of governmental acts should be put to the test of international standards, and [second] that 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 interna-

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international standard thus means little more in practice than the assertion of the primacy of international over municipal law"; see also Paparinskis, *The international minimum standard and fair and equitable treatment* 42.

45 US – Mexico Claims Convention of 8 September 1923 (signed 8 September 1923, entered into force 19 February 1924) 68 UNTS; On the contributions of the Claims Commissions see recently Jean d'Aspremont, 'The General Claims Commission (Mexico/US) and the Invention of International Responsibility' in Ignacio de la Rasilla and Jorge E Viñuales (eds), *Experiments in International Adjudication* (Cambridge University Press 2019) 161 ff.

46 *Harry Roberts* U.S.A. v. United Mexican States, (2 November 1926) IV RIAA 80; cf. Schill, *The multilateralization of international investment law* 27-28, acknowledging that international tribunals in the inter-war period "did not accept that national treatment independent of a specific minimum standard was sufficient to conform to international law".

47 *George W Hopkins* U.S.A. v. United Mexican States (31 March 1926) IV RIAA 47 para 16.

48 Cf. *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc v Government of Canada: Award on Jurisdiction and Liability (17 March 2015)* UNCITRAL PCA Case No. 2009-04 para 434: "The starting point is generally the *Neer* case."; Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press 2015) 87: "The survival of this standard, as stated in the Neer Claim (1926) decided by the Mexican Claims Commission, into modern times is an indication of the influence of the law that was made in this period."

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> tional standards that every reasonable and impartial man would readily recognize its insufficiency."[49]

The vagueness of this test may be considered against the background of the fact that the commission attempted to describe arbitrary excess of state power in specific contexts which had not been subject to more specific and detailed regulation by international law, namely a state's obligation to prosecute non-state actors for crimes committed against aliens and a state's criminal legal system.[50]

Subsequently, the *Chattin* commission confined this test to situations of indirect liability of governmental branches which had failed to sufficiently address injuries of an alien committed by citizen of the host state, and the commission argued that direct responsibility of the legislature and the executive did not presuppose any bad faith or other criteria set forth in *Neer*.[51] It is therefore still debated whether the *Neer* test provided for a general rule which focused on arbitrary excess of state power in situations in which more specific obligations were lacking,[52] or whether it was confined to denial of justice, understood as a concept which is different from the international minimum standard.[53]

Be that as it may, it was in any case difficult to conceptualize the protection of more specific, substantive rights such as the right to property within the *Neer* formula.[54] Certain authors regarded the protection of property as

49 *L F H Neer and Pauline Neer* U.S.A. v. United Mexican States (15 October 1926) IV RIAA 61-62; on the Neer case and the further development of the standard see *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc v Government of Canada* 126-128.

50 Cf. for this observation also Paparinskis, *The international minimum standard and fair and equitable treatment* 51.

51 *B E Chattin* United States v. United Mexican States (23 July 1927) IV RIAA 285-286.

52 Paparinskis, *The international minimum standard and fair and equitable treatment* 52-53.

53 Jan Paulsson and Georgios Petrochilos, 'Neer-ly Misled?' (2007) 22(2) ICSID Review - Foreign Investment Law Journal 242 ff.; see also Montt, *State Liability in Investment Treaty Arbitration. Global Constitutional and Administrative Law on the BIT Generation* 308, writing against a conflation of the minimum standard and the *Neer* dictum, the latter being concerned with denial of justice only.

54 John Fischer Williams, 'International Law and the Property of Aliens' (1928) 9 BYIL 29: "This is not the language in which all sober men in civilized countries would at the present time describe any and every measure of expropriation [...]"; Paparinskis, *The international minimum standard and fair and equitable treatment* 46 ("the focus of the practice of the 1920s and 1930s as well as earlier law was not on protection

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a principle accepted in the international legal order[55] which could also be based on a general principle of law as recognized in Western[56] legal orders.[57] Borchard, for instance, argued that "the international standard is compounded of general principles recognized by the domestic law of practically every

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of property but on denial of justice.") and 54 ("Neer also made it potentially more complicated to develop more detailed rules that did not fit within the procedural framework.").

55 'Report by Dr. J. C. Witenberg to the Protection of Private Property Committee' [1930] International Law Association's Report of the Thirty-Sixth Conference 317-318 (on respect for acquired rights as part of customary international law to which treaties had contributed); Fred K Nielsen, *American-Turkish Claims Settlement: Under the Agreement of December 24, 1923, and Supplemental Agreements between the United States and Turkey* (Government Printing Office 1937) 22: "There is an abundance of evidence in various forms to show a general recognition of the principle that the confiscation of the property of an alien is violative of international law", see also at 289; Alexander P Fachiri, 'Expropriation and international law' (1925) 6 BYIL 169; Fachiri, 'International Law and the Property of Aliens' 33, 54.

56 Paparinskis, *The international minimum standard and fair and equitable treatment* 60, noting that "the broader practice raised (not unjustifiable) concerns about externalization of peculiar Western conceptions." See for instance Edwin Borchard, 'The Minimum Standard of the Treatment of Aliens' (1939) 33 American Society of International Law Proceedings 53: "But international law has not only been woven from the approved practice if states in their diplomatic intercourse and from the decisions of arbitral tribunals. It is also composed of the uniform practices of the civilized states of the western world who gave birth and nourishment to international law." See also *Norwegian shipowners' claims* Norway v. USA (13 October 1922) I RIAA 332, referring to the Fifth Amendment of the Constitution of the United States of America, adding: "It is common ground that in this respect the public law of the Parties is in complete accord with the international public law of all civilised countries." Frederick Sherwood Dunn, 'International Law and Private Property Rights' (1928) 28 Columbia Law Review 175-176.

57 Borchard, 'The 'Minimum Standard' of the Treatment of Aliens' 449 ("In most states, the elementary private rights of life, liberty and property, within their well-recognized and increasing limitations, are not denied to aliens any more than they are to nationals.") and 459; see also the comment by Fred K. Nielsen, printed in 'Discussion' (1939) 33 American Society of International Law Proceedings 65: "Our great constitutional guarantees stand in the way of confiscation of property, and they also safeguard vital personal rights. I like to think [...] that those constitutional guarantees, with the superstructure of interpretation framed by the courts, exemplify the international standards. And I think that, without any improper or dangerous confusion of domestic law with international law, the principles underlying those provisions may so very usefully be given application in the settlement of international controversies relating to property rights."

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civilized country, and it is not to be supposed that any normal state would repudiate it or, if able, fail to observe it."[58] Yet, he also acknowledged that the scope of protection "will have to be determined from case to case. The doctrine of vested rights depends on so many variables that prediction is hazardous."[59] Other scholars were skeptical as to the existence of such protection. Notably, John Fischer Williams argued that "it is a long step to convert a constitutional obligation into a duty of international law"[60] and that "[i]t is an error to exalt domestic arrangements of economic or political expediency, which are relative to particular societies at particular times [...] into fundamental principles of eternal morality which are to be enforceable as part of international law."[61]

The different perspectives on the scope of the international minimum standard and the protection of property were presented in a famous exchange of notes between the USA and the Mexican State in 1938 regarding the question of compensation for the take over of agrarian and oil properties in Mexico by Mexico[62]: US Secretary of State Cordell Hull argued that "the right of prompt and just compensation for expropriated property [...] is a principle to which the Government of the United States and most governments of the world have emphatically subscribed"[63] and that it recognized both the host state's right to regulate for public purposes and respect for "legitimately acquired rights of citizens of other countries".[64] The Mexican Minister of Foreign Affairs argued that "there does not exist in international law any principle universally accepted by countries, nor by writers of treatises on this

58 Borchard, 'The Minimum Standard of the Treatment of Aliens' 61.

59 ibid 62-63.

60 Williams, 'International Law and the Property of Aliens' 17.

61 ibid 18, and 20: "It is surely impossible, whatever may be our views as to the relative merits of socialist and individualist, doctrines, to assert that modern civilization requires all states to accept so unreservedly the theories of one side in the great economic dispute."

62 The exchange is printed in Green Haywood Hackworth, *Digest of International Law* (vol III, Department of State 1942) 655-665; see also Montt, *State Liability in Investment Treaty Arbitration. Global Constitutional and Administrative Law on the BIT Generation* 57, arguing that "the *classic* claim-the nineteenth century Calvo Doctrine, whoe aim had not been to erode the rule of law but to terminate forcible self-help through national treatment-was transmuted into a new and *opportunistic* one: expropriation without compensation."

63 Hackworth, *Digest of International Law* 657, see also 658 where the formula "adequate, effective and prompt payment" appears.

64 ibid 657.

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subject, that would render obligatory the giving of adequate compensation for expropriation of a general and impersonal character."[65] Hull maintained that the view according to which foreigners "are not entitled to better treatment than nationals of the country, presupposes the maintenance of law and order consistent with principles of international law; that is to say, when aliens are admitted into a country the country is obligated to accord them that degree of protection of life and property consistent with the standards of justice recognized by the law of nations."[66] In summary, the unwritten law could not overcome these fundamental differences.

2. The internationalization of contracts by general principles of law

According to a different construction, the international protection was based on general principles of law and the idea of so-called internationalized or delocalized contracts.

a) The emergence of this doctrine in the interwar period

The doctrine began to emerge with arbitration awards in which the arbitrators did not just apply the local law, meaning the host state's law, to a concession agreement between the host state and aliens, but took recourse to general principles of law and of international law.[67] The contracts were said to have

65 ibid 658: "Nevertheless Mexico admits, in obedience to her own laws, that she is indeed under obligation to indemnify in an adequate manner; but the doctrine which she maintains on the subject, which is based on the most authoritative opinions of writers of treatises on international law, is that the time and manner of such payment must be determined by her own laws."

66 ibid 660; see also Alfred Verdross, 'Règles générales du droit international de la paix' (1929) 30 RdC 384, according to whom the general rule of national treatment does not apply if the domestic legal system did not live up to international standards.

67 Joost HB Pauwelyn, 'Rational Design or Accidental Evolution? The Emergence of International Investment Law' in Zachary Douglas, Joost HB Pauwelyn, and Jorge E Viñuales (eds), *The Foundations of International Investment Law* (Oxford University Press 2014) 25, 27; Charles Leben, 'La théorie du contrat d'état et l'évolution du droit international des investissements' (2003) 302 RdC 221-234; Irmgard Marboe and August Reinisch, 'Contracts between States and Foreign Private Law Persons' [2011] Max Planck EPIL para 5 ff.; Alfred Verdross, 'Die Sicherung von ausländischen Privatrechten aus Abkommen zur wirtschaftlichen Entwicklung mit Schiedsklauseln'

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become "internationalized"[68] or "delocalized"[69]. According to the doctrine of delocalized or internationalized contracts, the parties of a contract could decide *qua* party autonomy to subject the contract to a foreign legal order or even to public international law. This doctrine differed from the jurisprudence of the PCIJ which held that acquired rights were protected by international law[70], but added in the *Serbian Loans* case that "any contract which is not a contract between States in their capacity as subjects of international law is based on municipal law of some country."[71]

The case which, in hindsight, significantly contributed to the doctrine of internationalized contracts was the *Lena Goldfields* arbitration.[72] In a dispute concerning the concession agreement between the USSR and the British Lena Goldfields company, the arbitrators accepted the company's argument that not only Soviet law but general principles of law in the sense of article 38(3) of the PCIJ Statute formed the applicable law.[73] The USSR lost the

(1957) 18 ZaöRV 635 ff.; Patrick Dumberry, 'International Investment Contracts' in Tarcisio Gazzini and Eric de Brabandere (eds), *International Investment Law. The Sources of Rights and Obligations* (Martinus Nijhoff Publishers 2012) 224 ff.; Elisabeth Kjos, *Applicable law in investor-state arbitration: the interplay between national and international law* (Oxford University Press 2013) 214.

68 *Texaco Overseas Petroleum Company and California Asiatic Oil Company v The Government of the Libyan Arab Republic* Jean-Marie Dupuy, Sole Arbitrator, Awards on the Merits (19 January 1977) 53 ILR 446; Francis A Mann, 'The theoretical approach towards the law governing contracts between states and private persons' (1975) 11 Revue belge de droit international 564-565.

69 *Texaco Overseas Petroleum Company and California Asiatic Oil Company v The Government of the Libyan Arab Republic* 53 ILR 420, 445.

70 *Certain German Interests in Polish Upper Silesia* PCIJ Series A No 07, 22.

71 *Case Concerning the Payment of Various Serbian Loans Issued in France: France v Kingdom of the Serbs, Croats, and Slovenes* Judgment of 12 July 1929 [1929] PCIJ Series A 20, 41.

72 VV Veeder, 'The Lena Goldfields Arbitration: The historical roots of three ideas' (1998) 47 ICLQ 772: Lena Goledfield's counsel's "internationalisation of a transnational contract was a gigantic first step for international commercial arbitration, almost equivalent to the caveman's discovery of fire."; Sornarajah, *Resistance and Change in the International Law on Foreign Investment* 95-96 on the genesis of the view of the internationalizations of contracts, also arguing: "it would be inexact to elevate the Lena Goldfields Arbitration as being the forerunner of the internationalization theory. It was an aberration that was seized upon later to make exorbitant claims." See also Andrea Leiter, 'Protecting concessionary rights: General principles and the making of international investment law' (2022) 35 Leiden Journal of International Law 55 ff.

73 Arthur Nussbaum, 'Arbitration between the Lena Goldfields Ltd. and the Soviet Government' (1950) 36(1) Cornell Law Review 42-53 (where the award is printed); on

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case and was ruled to compensate the company for the unjust enrichment, a principle which was back then not well known in English law.[74] The concession agreement did not refer to general principles of law or any particular law. As Veeder demonstrated, several reasons may explain the reference to general principles of law: the company likely did not want Soviet law to be the sole applicable law. Furthermore, there was no possible argument to be made for English law as applicable law.[75] Hence, the company appealed to general principles of law and the tribunal accepted this argument.[76] The emerged doctrine of internationalized contracts was based on the concern of Western "lawyers for the protection of foreign investors in developing countries"[77], and certain awards were certainly not free from problematic, if not patronizing[78], formulations with respect to the local law.[79]

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the difficulty to obtain an official citation see Veeder, 'The Lena Goldfields Arbitration: The historical roots of three ideas' 748 footnote 1.

74 ibid 751; cf. Wolfgang Friedmann, *The Changing Structure of international law* (Stevens 1964) 146 on the arbitrators' use of the principle of unjust enrichment.

75 English law was the *lex loci arbitri* as the award "was an English award made in London", Veeder, 'The Lena Goldfields Arbitration: The historical roots of three ideas' 749.

76 ibid 766-767.

77 Arghyrios Athanasiou Fatouros, 'International Law and the Internationalized Contract' (1980) 74 AJIL 140, who also referred to what he described as "the lack of legal sophistication in many of these countries at that time".

78 Vaughan Lowe, 'The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?' in Michael Byers (ed), *The role of law in international politics: essays in international relations and international law* (Oxford University Press 2000) 208; Paparinskis, *The international minimum standard and fair and equitable treatment* 60.

79 In 1939, the Sheikh of Abu Dhabi concluded a concession agreement with the company Petroleum Development (Trucial Coast) Limited in Abu Dhabi. The ensuing arbitration concerned the question whether the concession to drill for and extract mineral oil in Abu Dhabi includes the right to do so from the subsoil of the seabed subjacent to the territorial sea of Abu Dhabi and in any submarine area lying outside territorial waters. The Umpire came in his award to the conclusion that the dispute could not be settled on the basis of municipal law, *Petroleum Development (Trucial Coast) Ltd v Sheikh of Abu Dhabi* Award of Lord Asquith of Bishopstone (September 1951) 1 ICLQ 247 250-251: "[N]o such law can reasonably be said to exist. The Sheikh administers a purely discretionary justice with the assistance of the Koran; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instrument [...] Clause 17 of the agreement [...] repels the notion that the municipal law of any country, as such, could be appropriate. The terms of that clause invite, indeed prescribe, the application

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b) The continuation of this doctrine after the second world war

After the second world war, certain awards were based on this doctrine. In the *Sapphire* arbitration between the National Iranian Oil Company (NIOC), a publicly owned company, and the Sapphire Petroleums Ltd., a Canadian company, the arbitrator, Pierre Calvin, decided the case on the basis of what he considered to constitute general principles of law, instead of Iranian law. Article 38 of the contract provided that the parties undertook to carry out the contract's provisions according to the principles of good faith and good will, and to respect the spirit as well as the letter of the agreement. On the basis of this reference to the principles of good faith and good will and under consideration of the *Lena Goldfields* arbitration and the *Abu Dhabi* arbitration, the arbitrator concluded that "such clause is scarcely compatible with the strict application of the internal law of a particular country. It much more often calls for the application of general principles of law, based upon reason and upon the common practice of civilized countries".[80]

The doctrine was also relevant in the so-called Libyan cases concerning the nationalization of the oil industry.[81] The awards dealt with identical choice of law clauses which were construed in different ways.[82] For instance, in the *Texaco* case, the sole arbitrator Pierre-Marie Dupuy[83] decided that the parties could choose international law as applicable law by virtue of the

of principles rooted in the good sense and common practice of the generality of civilised nations- a sort of 'modern law of nature.' [...] albeit English municipal law is inapplicable as such, some of its rules are in my view so firmly grounded in reason, as to form part of this broad body of jurisprudence-this 'modern law of nature.'"

80 *Sapphire International Petroleums Ltd v National Iranian Oil Company* Pierre Cavin, Sole Arbitrator, Award (15 March 1963) 35 ILR 173; Mārtiņš Paparinskis, 'Sapphire Arbitration' [2010] Max Planck EPIL 11; Georges R Delaume, 'The Proper Law of State Contracts and the Lex Mercatoria: A Reappraisal' (1988) 3(1) ICSID Review - Foreign Investment Law Journal 86-87.

81 Kjos, *Applicable law in investor-state arbitration: the interplay between national and international law* 219.

82 The provision read: "This Concession shall be governed by and interpreted in accordance with the principles of law of Libya common to the principles of international law and in the absence of such common principles then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals."

83 On the role of Dupuy see Antonio Cassese, *Five masters of international law: conversations with R-J Dupuy, E Jiménez de Aréchaga, R Jennings, L Henkin and O Schachter* (Hart 2011) 31-36; Julien Cantegreil, 'The Audacity of the Texaco/Calasiatic Award: René-Jean Dupuy and the Internationalization of Foreign Investment Law' (2011)

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principle of party autonomy on which the contract was based.[84] According to Dupuy, it was not the host state's law[85] but international law itself which "empowered the parties to choose the law which was govern their contractual relations."[86] Dupuy argued that the references to general principles of law were "always regarded to be a sufficient criterion for the internationalization of a contract".[87] He also pointed to the existence of an arbitration clause[88] and the nature of concession deeds since those were "not concerned only with an isolated purchase or Performance, but tend to bring to developing countries Investments and technical assistance" and aim at a "close cooperation between the State and the contracting party".[89]

In contrast, the *BP* arbitrator held that the governing law consisted first and foremost of the principles of Libyan law: "[I]n the absence of principles common to the law of Libya and international law, the general principles of law, including such of those principles as may have been applied by international tribunals."[90]

22(2) EJIL 441 ff.; for a critical evaluation see Sornarajah, *Resistance and Change in the International Law on Foreign Investment* 113-115; according to Spiermann, out of the awards on the Libyan nationalization, "it was Texaco v. Libya that was most creative, or incorrect, in applying international law", Ole Spiermann, 'Applicable Law' in Peter T Muchlinski, Federico Ortino, and Christoph Scheuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 99 footnote 38.

84 *Texaco Overseas Petroleum Company and California Asiatic Oil Company v The Government of the Libyan Arab Republic* 53 ILR 420, 442, 447; see recently Kjos, *Applicable law in investor-state arbitration: the interplay between national and international law* 213.

85 *Texaco Overseas Petroleum Company and California Asiatic Oil Company v The Government of the Libyan Arab Republic* 53 ILR 420, 460.

86 ibid 443, 450 (quote).

87 ibid 453.

88 ibid 454-455.

89 ibid 456; cf. on the significance of these contracts for the foreign policy of the host state: Weil, 'Le droit international en quête de son identité: cours général de droit international public' 96.

90 *BP Exploration Company (Libya) Limited v Government of the Libyan Arab Republic* Lagergreen, Sole Arbitrator, Award (10 October 1973, 1 August 1974) 53 ILR 329; *LIAMCO v The Government of the Libyan Arab Republic* Sobhi Mahmassani, Sole Arbitrator, Award (12 April 1977) 20 ILM 34-37; cf. also *The Government of the State of Kuwait v The American Independent Oil Company* Paul Reuter, Hamed Sultan, Sir Gerald Fitzmaurice, arbitrators, Award (14 March 1982) 21 ILM 100, holding that the applicable law is Kuwaiti law and international law which forms part of Kuwaiti

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The doctrine as such remained controversial both as matter of legal doctrine and from the perspective of legal policy.[91] It was based on the idea of both parties standing on equal footing, which is why one party, the state, should not be in a position to unilaterally amend the contractual relationship by changing its municipal legislation.[92] General principles such as *pacta sunt servanda*[93] and good faith motivated the search for a legal system different from municipal law and invited tribunals to engage with comparative law for the purpose of identifying the applicable law and to focus on limits imposed by international law on states' capacity to introduce legislative changes. However, the very idea of internationalization according to which the contract was first and foremost subject to international law was not necessary in order to arrive at a different law than the host state's law. The same result could have been achieved by way of conventional choice of law doctrines which take the host state's legal order as a starting point.[94] According to Oscar Schachter, the term "internationalized contracts" should be understood "in a descriptive sense" for certain types of contracts without implying, however, "that the contracts have been transposed to another 'legal order' or that they have become subject to international law in the same way as a treaty between two

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law, the tribunal stressed that "Kuwait law is a highly evolved system"; Animoil thus stands for a tendency to "relocalize" contracts and to take account of developments in local law, see Georges R Delaume, 'The Proper Law of State Contracts Revisited' (1997) 12(1) ICSID Review - Foreign Investment Law Journal 2 ff.

91 Muthucumaraswamy Sornarajah, 'The Myth of International Contract Law' (1981) 15 Journal of World Trade Law 187 ff.; Jean Ho, *State Responsibility for Breaches of Investment Contracts* (Cambridge University Press 2018) 187.

92 *Saudi Arabia v Arabian American Oil Company* Sausser-Hall Referee, Badawi/Hassan, Habachy Arbitrators, Award (23 August 1958) 27 ILR 168; *Texaco Overseas Petroleum Company and California Asiatic Oil Company v The Government of the Libyan Arab Republic* 53 ILR 420, 456.

93 Spiermann, 'Applicable Law' 95: "[...] the principle pacta sunt servanda conveys the basic premise upon which applicable law in this field has been internationalized".

94 Fatouros, 'International Law and the Internationalized Contract' 136; Delaume, 'The Proper Law of State Contracts and the Lex Mercatoria: A Reappraisal' 93; cf. also Francis A Mann, 'State Contracts and State Responsibility' (1960) 54 AJIL 580-581, referring to the role of private international law in order to identify the proper law; he did not reject the doctrine of internationlization completely: "there is no room for the doctrine of the possible 'internationalization' of contracts except in cases in which the parties, judge or arbitrator consciously and specifically refer to or apply public international law as such", Francis A Mann, 'The Proper Law of Contracts Concluded by International Persons' (1959) 35 BYIL 54.

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states."[95] Also, the existence of an arbitration clause "can hardly be construed as necessarily a sign of internationalization".[96] At the very least, the doctrine inspired to a certain extent the scholarship on the transnationalization of law[97] and article 42 of the ICSID convention.[98] Today, the international protection of contracts does not depend on the doctrine of internationalized contracts but follows from umbrella clauses and the extension of the protections of fair and equitable treatment provisions to contracts.[99]

III. The development of the modern investment regime after WW II

Because of its vagueness and its political background, the content of the unwritten law on the international minimum standard remained contested, and the awards were difficult to enforce. Already in 1931, Beckett argued that the "protection of its nationals (including companies) would be much easier for the State concerned if the rights of such nationals were defined by elaborate treaties and not allowed to rest on general principles of International Law" which had been formulated "when the economic life of nations was much simpler than it is to-day".[100] As will be demonstrated below, states in fact pursued strategies of "treatification"[101], but they did so for different reasons which also concerned the interrelationship of bilateral treaties and customary international law.

95 Schachter, 'International Law in Theory and Practice: general course in public international law' 308-309.

96 Fatouros, 'International Law and the Internationalized Contract' 136.

97 cf. Philip C Jessup, *Transnational Law* (Yale University Press 1956) 81-82, referring to the Abu Dhabi arbitration; Delaume, 'The Proper Law of State Contracts and the Lex Mercatoria: A Reappraisal' 85 footnote 25, referring to the Lena Goldfields arbitration.

98 Weil, 'Le droit international en quête de son identité: cours général de droit international public' 97.

99 On this development see Julian Arato, 'Corporations as Lawmakers' (2015) 56 Harvard International Law Journal 230 Fn. 4, 247 ff.; Campbell McLachlan, Laurence Shore, and Matthew Weiniger, *International Investment Arbitration* (2nd edn, Oxford University Press 2017) 128 ff.; Spiermann, 'Applicable Law' 103 ff.

100 WE Beckett, 'Diplomatic Claims in Respect of Injuries to Companies' (1931) 17 Transactions of the Grotius Society 194.

101 Jeswald W Salacuse, 'The Treatification of International Investment Law' (2007) 13 Law and Busines Review of the Americas 155 ff.

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1. Failed multilateral attempts

Early attempts after the second world war to establish a multilateral regime failed. The Havanna Charter[102] was intended to establish an international trade organization with competences both on trade and investment. Because of different interests between capital-importing countries and capital-exporting countries, the Havanna Charter "contained only embryonic rules on foreign investment protection."[103] The so-called cold war as well as the difficulty of obtaining the US Senate's advice and consent necessary for a ratification by the US explained the failure of the Havanna Charter.[104]

The 1967 OECD Draft Convention on the Protection of Foreign Property[105] was inspired by the so-called Abs-Shawcross Draft[106], named after Hermann Abs, then Chairman of Deutsche Bank, and Lord Hartley Shawcross, former British Attorney-General and then Director of the Shell Petroleum Company.[107] Both provided for the fair and equitable treatment standard which can be found in modern bilateral investment treaties. However, the OECD Draft Convention was never opened to signature due to the lack of support by OECD states.[108] According to the OECD, the suggested standard of fair and equitable treatment "conforms in effect to the 'minimum standard' which forms part of customary international law."[109]

2. Ongoing contestation in the General Assembly

The substantive obligations, in particular in relation to expropriation, remained contested. The political disputes continued in the General Assembly.

102 Havana Charter for an International Trade Organization (signed 24 March 1984) United Nations Conference on Trade and Employment, Final Act and Related Documents, E/CONF2/78.

103 Schill, *The multilateralization of international investment law* 33.

104 ibid 34.

105 OECD Draft Convention on the Protection of Foreign Property (1967, not open to signature) (1968) 7 ILM 117–143; Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012) 8-9.

106 Georg Schwarzenberger, 'The Abs-Shawcross Draft Convention on Investments Abroad; a Critical Commentary' (1960) 9 Journal of Public Law 147 ff.

107 Schill, *The multilateralization of international investment law* 36.

108 ibid 36.

109 OECD Draft Convention on the Protection of Foreign Property (1967, not open to signature) (1968) 7 ILM 117–143 at 120.

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In 1962 the General Assembly adopted resolution 1803.[110] According to the resolution, "nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law."[111] The resolution represented a compromise and was subject to different readings: whereas supporters of the Hull formula could argue that nationalizations required compensation, opponents could point out that only "appropriate compensation" is required which was less than complete compensation and which recognized the public interest in measures of this kind.[112] In 1974, the General Assembly adopted the Declaration on the Establishment of a New International Economic Order (NIEO).[113] The resolution recognized "the right of nationalization or transfer of ownership to its nationals, this right being an expression of the full permanent sovereignty of the State"[114] without recognizing, however, an obligation to pay compensation.[115]

3. Preference for BITs

It is against this background that one has to consider the turn to bilateral investment agreements. States made a "conscious choice for bilateralism"[116], but were motivated by different reasons.

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110 UNGA Res 1803 (XVII) (14 December 1962) UN Doc A/RES/1803(XVII).

111 ibid para 4.

112 Giorgio Sacerdoti, ‘Bilateral treaties and multilateral instruments on investment protection’ (1997) 269 RdC 391; Schill, *The multilateralization of international investment law* 37.

113 UNGA Res 3201 (S-VI) (1 May 1974) UN Doc A/RES/3201(S-VI).

114 ibid para 4 e).

115 Schill, *The multilateralization of international investment law* 37-8; cf. UNGA Res 3281 (XXIX) (12 December 1974) UN Doc A/RES/3281(XXIX), "Charter of Economic Rights and Duties of States", Art. 2(2)(c): "[Each State has the right] to nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures".

116 Paparinskis, *The international minimum standard and fair and equitable treatment* 142; Patrick Juillard, ‘L’évolution des sources du droit des investissements’ (1994) 250 RdC 78 ff.

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In response to doubts and the "political controversies illustrated by the shaky foundations of the standards of customary international law with regard to the protection of aliens"[117], capital-exporting states attempted to translate what they considered to be general principles of international law into bilateral agreements.[118] Bilateral treaties were, therefore, a means to "prevent a backsliding of customary international law"[119] and to strengthen and reaffirm the international minimum standard. From the perspective of capital-importing states, however, bilateral treaties made it possible for those states to actively shape international law. As Montt pointed out, it was the "relative success" of the NIEO which made bilateral arrangements attractive both for capital-importing and for capital-exporting states.[120]

Since the first modern BIT has been concluded between the Federal Republic of Germany and Pakistan in 1959[121], as over 2.000 BITs are currently

117 Schill, *The multilateralization of international investment law* 27-28, acknowledging that international tribunals in the inter-war period "did not accept that national treatment independent of a specific minimum standard was sufficient to conform to international law," adding: "Nevertheless, [...] political controversies illustrated the shaky foundations of the standards of customary international law with regard to the protection of aliens."

118 Kenneth J Vandevelde, 'U.S. Bilateral Investment Treaties: The Second Wave' (1993) 14(4) Michigan Journal of International Law 625: one purpose of BITs "was to counter the claim made during the 1970s by many developing countries that customary international law no longer required that expropriation be accompanied by prompt, adequate, and effective compensation, if indeed it ever had"; Pauwelyn, 'Rational Design or Accidental Evolution? The Emergence of International Investment Law' 25 ff.; Paparinskis, *The international minimum standard and fair and equitable treatment* 165 and in particular pp. 67, 84 ("Compliance with the international minimum standard has often been imposed as a matter of treaty law"); in the *ELSI* case, the Court did not discuss the relationship between treaty and custom in the context of international investment law, *Elettronica Sicula SpA (ELSI)* (*United States of America v. Italy*) (Judgment of 20 July 1989) [1989] ICJ Rep 5 ff.

119 Pauwelyn, 'Rational Design or Accidental Evolution? The Emergence of International Investment Law' 25-26.

120 Montt, *State Liability in Investment Treaty Arbitration. Global Constitutional and Administrative Law on the BIT Generation* 62-63.

121 Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments (signed 25 November 1959, entered into force 28 April 1962) 457 UNTS 23. As part of the first generation of BITs, the treaty between Germany and Pakistan did not provide for investor-state dispute settlement. For a historical overview see Chester Brown, 'Introduction: The Development and Importance of the Model Bilateral Investment Treaty' in *Commentaries on Selected Model Investment Treaties* (Oxford University Press 2013) 3 ff.

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in force.[122] Several BITs have contained so-called umbrella clauses, by which states agree to honour contractual commitments with foreign investors.[123] By virtue of such an umbrella clause, breaches of a contract can be elevated to breaches of the BIT.[124]

The multilateral ICSID Convention establishes the International Centre for the Settlement of Investment Disputes (ICSID)[125] and offers a procedural framework for the settlement of disputes without providing substantive rules that govern a dispute between a state and foreign investors.[126] According to article 42(1) of the ICSID convention, the tribunal shall decide a dispute in accordance with such rules of law as agreed by the parties. In the absence of such agreement the tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.[127] More and more BITs built on the

122 Dolzer and Schreuer, *Principles of International Investment Law* 13: "close to 3,000 BITs"; José E Alvarez, 'The Public International Law Regime Governing International Investment' (2009) 344 RdC 214: "some 2,600 BITs and an additional 30 or so regional FTAs". According to UNCTAD, there are 2850 bilateral investment treaties in force, UNCTAD, 'International Investment Agreements Navigator' ⟨https://investmentpolicy.unctad.org/international-investment-agreements⟩ accessed 1 February 2023.

123 Marboe and Reinisch, 'Contracts between States and Foreign Private Law Persons' para 38.

124 On the debate as to the scope of umbrella clauses see ibid para 39.

125 Convention on the settlement of investment disputes between States and nationals of other States (signed 18 March 1965, entered into force 14 October 1966) 575 UNTS 159.

126 Ursula Kriebaum, 'Article 42' in Stephan W Schill (ed), *Schreuer's Commentary on the ICSID Convention* (3rd edn, Cambridge University Press 2022) 802 para 1; Rudolf Dolzer, Ursula Kriebaum, and Christoph Schreuer, *Principles of International Investment Law* (3rd edn, Oxford University Press 2022) 16.

127 It is debated whether parties' choice of domestic law, or any other legal order, excludes the application of international law. The dominant view holds, however, that even when domestic law is chosen by the parties, international law remains applicable to some extent and can exercise a "corrective function" and operate as a limit to the application of the host state's law cf. Kriebaum, 'Article 42' 845 para 159, 847 para 165, 849 para 170, 885-891. This statement holds true, of course, from the perspective of the ICSID convention; from the perspective of the respective domestic constitutional law there may be limits to the application of international law, see on the relationship between German constitutional law and investment law Peter-Tobias Stoll, Till Patrik Holterhus, and Henner Gött, *Investitionsschutz und Verfassung: völkerrechtliche Investitionsschutzverträge aus der Perspektive des deutschen und europäischen Verfassungsrechts* (Mohr Siebeck 2017) 97 ff; Peter-

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ICSID system and provided for investor-state dispute settlement.[128] In *AAPL v. Sri Lanka*, an ICSID tribunal[129] accepted for the first time that an investor was entitled to bring a claim against a state based on the provisions of a BIT, rather than based on a contract or arbitration agreement with the state.[130] The most recent trend represents a shift to multilateral, or so-called mega-regional trade agreements which combine trade agreements and investment protection.[131]

C. *The interrelationship of sources in a bilateralist structure and the quest for general law*

International investment law can appear paradoxical when it comes to the interrelationship of sources of international law. As one observer has pointed out, the very form of bilateral treaties "suggests divergence rather than convergence"[132] at first sight; at the same time, is has been argued that "it would be difficult to imagine a category of treaties that is less of a self-contained regime or more dependent for its life upon nourishment from general international

Tobias Stoll, 'International Investment Law and the Rule of Law' (2018) 9 Goettingen Journal of International Law 272-273.

128 Sometimes, these BITs are referred to as second generation, see for instance Pauwelyn, 'Rational Design or Accidental Evolution? The Emergence of International Investment Law' 29-30, 33; Marc Jacob, 'Investmens, Bilateral Treaties' in *Max Planck EPIL* (2014) paras 11, 45. For a different genealogy see Anthea Roberts, 'Investment Treaties: The Reform Matrix' (2018) 112 AJIL Unbound 191, distinguishing "[f]irst-generation treaties from the 1990s and earlier" and "second generation of treaties from the mid-2000s onward [...] that aim at striking a better balance between investor protection and state sovereignty, while retaining investor-state arbitration".

129 *Asian Agricultural Products Ltd v Republic of Sri Lanka* Final Award (27 June 1990) ICSID Case No. ARB/87/3 para 18.

130 On this development see also Jan Paulsson, 'Arbitration Without Privity' (1995) 10(3) ICSID Review - Foreign Investment Law Journal 232 ff.; Pauwelyn, 'Rational Design or Accidental Evolution? The Emergence of International Investment Law' 31: "standing for a private investor to invoke a treaty breach".

131 Eyal Benvenisti, 'Democracy Captured: The Mega-Regional Agreements and the Future of Global Public Law' [2016] (2) IILJ Working Paper 1 ff.; see also below, p. 591.

132 Stephan W Schill, 'System-Building in Investment Treaty Arbitration and Lawmaking' in Armin von Bogdandy and Ingo Venzke (eds), *International judicial lawmaking: on public authority and democratic legitimation in global governance* (Springer 2012) 151.

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law."[133] In spite of this "treatification"[134], investment lawyers and tribunals continued to turn to customary international law.[135] This section explores the jurisprudence of investment tribunals and reasons for a multilateralization in substance in a system that is shaped, by and large, by bilateralism in form. It will focus on the relationship between treaty obligations under investment treaties and customary international law and point to a convergence of functionally equivalent rules in the jurisprudence of tribunals and in the treatymaking practice of states (I.). It will then survey and comment on the scholarly debate on the interrelationship of sources in the context of international investment law (II.) before it will offer an evaluation (III.).

I. The relationship between treaty obligations and customary international law

The emerging network of bilateral relations has cast doubts on the (continued) relevance of any customary international law.[136] In 1970, the International Court of Justice held that the treatment of foreign investors by host states did not belong to the body of *erga omnes* obligations, stressing that this field would be characterized by "bilateral relations".[137] Therefore, "general arbitral jurisprudence" could be of no help for the identification of the general law, as the decisions "rested upon the terms of the instruments establishing the jurisdiction of the tribunal [...] and determining what rights might enjoy protection" and "therefore cannot give rise to generalization".[138]

133 Campbell McLachlan, 'Is There an Evolving Customary International Law on Investment?' (2016) 3(2) ICSID Review 262.

134 Salacuse, 'The Treatification of International Investment Law' 155.

135 d'Aspremont, 'International Customary Investment Law: Story of a Paradox' 5.

136 ibid 5 ff., pointing out that recently the interest in custom increased again; cf. Juillard, 'L'évolution des sources du droit des investissements' 130.

137 *Barcelona Traction, Light and Power Company, Limited* 32 paras 33-34, 46-47 para 89: "[T]he law on the subject has been formed in a period characterized by an intense conflict of systems and interests. It is essentially bilateral relations which have been concerned, relations in which the rights of both the State exercising diplomatic protection and the State in respect of which protection is sought have had to be safeguarded. Here as elsewhere, a body of rules could only have developed with the consent of those concerned."

138 ibid 40 para 63; on the lack of references to investment tribunals in the ICJ jurisprudence see Schill and Tvede, 'Mainstreaming Investment Treaty Jurisprudence The Contribution of Investment Treaty Tribunals to the Consolidation and Development

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One decade later, however, in light of the increasing network of bilateral regulations, Francis Mann argued that it was not possible for states to reject the same principle of rule in a multilateral, customary, setting but accept it in a multitude of bilateral settings.[139] Mann's writings epitomize the difficulty of characterizing the relationship between the international minimum standard under customary international law and the obligation to accord fair and equitable treatment to investors under different BITs. He argued that fair and equitable treatment exceeded the international minimum standard and provided for a higher level of protection.[140] At the same time, he acknowledged the functional equivalence of the treaty standard and unwritten law insofar as he regarded the FET obligations as "a confirmation of the obligation to act in good faith, or to refrain from abuse or arbitrariness."[141]

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of General International Law' 112-118. Cf. now *Obligation to Negotiate Access to the Pacific Ocean* (*Bolivia v. Chile*) (Judgment of 1 October 2018) [2018] ICJ Rep 559 para 162, noting that "references to legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment. It does not follow from such references that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation."

139 Francis A Mann, 'British treaties for the promotion and protection of investments' (1981) 52 BYIL 249-250: "Is it possible for a State to reject the rule according to which alien property may be expropriated only on certain terms long believed to be required by customary international law, yet to accept it for the purpose of these treaties? [...] The cold print of these treaties is a more reliable source of law than rhetorics in the United Nations." Cf. on the role of legitimate expectations created by treaties on the formation of custom Byers, *Custom, power and the power of rules: international relations and customary international law* 89, 125-126.

140 Mann, 'British treaties for the promotion and protection of investments' 241; for the view that fair and equitable treatment cannot be equated with the international minimum standard or customary international law, in particular against the historical background of the controversy concerning the international minimum standard see Stephen Vasciannie, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice' (1999) 70 BYIL 104-105, 144; Patrick Dumberry, *Fair and Equitable Treatment. Its Interaction wit the Minimum Standard and Its Customary Status* (Brill 2018) 28, 76; on the debate see Dolzer and Schreuer, *Principles of International Investment Law* 130 ff.

141 Francis A Mann, *The legal aspect of money* (4th edn, Clarendon Press 1982) 510; see on this point Chester Brown and Audley Sheppard, 'United Kingdom' in *Commentaries on Selected Model Investment Treaties* (Oxford University Press 2013) 721-722; Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (Oxford University Press 2008) 66-67.

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When it comes to functional equivalence and to functionally equivalent rules (see below 1.), the jurisprudence of investment tribunals (a)) and the treaty-practice of states (b)) can be read as confirmation of a convergence of functionally equivalent rules. One reason for this convergence might have been the view that the general obligations under a particular BIT should not be applied and concretized in an isolated fashion but under consideration of the broader normative environment (2.).

1. The relationship between functionally equivalent rules

a) The jurisprudence of investment tribunals

In international investment arbitration jurisprudence, the interrelationship of sources was discussed with respect to the relationship of the treaty-based concept of fair and equitable treatment and the international minimum standard under customary international law, in particular in the context of NAFTA.[142] Article 1105 NAFTA[143] sets forth the "minimum standard of treatment", according to which "each party shall accord to investments of another Party and to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection of security." As the obligation to accord fair and equitable treatment can be found in other investment treaties[144], tribunals assumed a convergence of

142 For an overview see Roland Kläger, *'Fair and equitable treatment' in international investment law* (Cambridge University Press 2011) 48 ff.; Marcela Klein Bronfman, 'Fair and Equitable Treatment: An Evolving Standard' (2006) 10 Max Planck Yearbook of United Nations law 608 ff. But see, for instance, *Metalclad Corporation v The United Mexican States* Award (30 August 2008) NAFTA ARB(AF)/97/1 paras 70, 76, 88, where the tribunal did not elaborate on the relationship between the FET provision and customary international law and instead interpreted the provision in light of the obligation to ensure transparency which the tribunal derived from article 102 NAFTA. This award illustrates an interpretative approach to fair and equitable treatment which focuses more on the letter and the spirit of the treaty than on customary international law.

143 North American Free Trade Agreement (signed 17 December 1992, entered into force 1 January 1994) 32 ILM (1993) 289.

144 According to *SD Myers, Inc v Government of Canada* Partial Award (13 November 2000) UNCITRAL/NAFTA (2001) 40 ILM 1408 para 259, the "minimum standard of treatment provision of the NAFTA is similar to clauses contained in BITs" and "is a floor below which treatment of foreign investors must not fall, even if a government

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the treaty-based concept and customary international law also outside the NAFTA context, as will be demonstrated below.

The *Pope & Talbot* case was of crucial importance for this development and the discussion of the relationship between customary international law and treaty law. The tribunal rejected Canada's submission according to which the treaty obligations to accord to investors fair and equitable treatment, full protection and security would have to be read in light of international law which in Canada's view addressed only egregious misconduct. The tribunal went even further and adopted the view that article 1105 NAFTA went beyond customary international law.[145] In response to this award, Canada, Mexico and the USA issued through the NAFTA Free Trade Commission a binding interpretation[146] which went against the tribunal's interpretation of the relationship between article 1105 NAFTA and customary international law and instead synchronized both:

> "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."[147]

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were not acting in a discriminatory manner" (para 259). In para 260 the Tribunal referred to the US-Mexican Claims Commission which applied the international minimum standard). According to the tribunal, "a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective" (para 263).

145 *Pope & Talbot Inc v The Government of Canada* Award on the merits of phase 2 (10 April 2001) UNCITRAL/NAFTA 7 ICSID Reports 102; 122 ILR 352, see paras 109-118.

146 Article 1131(2) NAFTA reads: "An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section."; see Anthea Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (2010) 104 AJIL 179 ff. on the shared interpretative authority of tribunals and states which can shape the interpretation by subsequent agreements and subsequent practice; on the development of states beginning to reasserting control over the development of international investment law by state-state arbitration see also Andreas Kulick, 'State-State Investment Arbitration as a Means of Reassertion of Control: From Antagonism to Dialogue' in Andreas Kulick (ed), *Reassertion of control over the investment treaty regime* (Cambridge University Press 2017) 128 ff.

147 *Notes of Interpretation of Certain Chapter 11 Provisions* NAFTA Free Trade Commission (31 July 2001) 6 ICSID Rep. 567 sect. B; see now article 14.6(2) Agreement

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This interpretation raised the questions of the content of the international minimum standard and of the relevance of the *Neer* formula, which the *Pope & Talbot* tribunal had the opportunity to address at the damages stage. According to the Canadian submission, "the principles of customary international law were frozen in amber at the time of the *Neer* decision".[148] The tribunal rejected "this static conception of customary international law" and referred to "an evolution in customary international law concepts since the 1920's" to which the many investment treaties as form of state practice were said to have contributed.[149]

Other tribunals likewise characterized the relationship between the treaty standard and the standard under customary international law as what could be described as convergence.[150] The *Mondev* tribunal argued that custom has evolved since the *Neer* case[151] and that the widespread proliferation of investment treaties as "a body of concordant practice will necessarily have influenced the content of rules governing the treatment of foreign investment in current international law. It would be surprising if this practice and the vast number of provisions it reflects were to be interpreted as meaning no more than the Neer Tribunal".[152] The *Loewen* tribunal argued that "'fair and equitable treatment' and 'full protection and security' are not free-standing

between the United States of America, the United Mexican States, and Canada (signed 30 November 2018, entered into force 1 July 2020) Office of the United States Trade Representative 14-5.

148 *Pope & Talbot Inc v The Government of Canada* Award in respect of damages (31 May 2002) UNCITRAL/NAFTA 7 ICSID Reports 148, 126 ILR 131, at para 57.

149 ibid paras 58, 59, 65; see also José Alvarez, 'A Bit on Custom' (2009) 42 NYU JILP 62-63: "One does not have to agree with every aspect of these extensive enumerations of what apparently FET and CIL now require to acknowledge that even if some of these requisites are now widely expected of governments, general public international law has shifted a great deal indeed since the Neer case recognized only the barest minimum requirements of states. It would appear, based on the available FET arbitral decisions, that today a state need not have taken concrete action in bad faith to be guilty of a violation of that standard—or of the underlying international minimum standard. Today, a state's failure to act, particularly to provide a remedy of a breach of the state's own representations to an investor, could ground a violation of general international law."

150 See *Chemtura Corporation v Canada* Award (2 August 2010) PCA Case No. 2008-01 paras 121, 236; *Merrill & Ring Forestry LP v Canada* Award (31 March 2010) ICSID Case No. UNCT/07/1 paras 210-213.

151 *Mondev International Ltd v United States of America* Award (11 October 2002) ICSID Case No. ARB(AF)/99/2 para 116.

152 ibid para 117.

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obligations. They constitute obligations only to the extent that they are recognized by customary international law."[153] The *ADF* tribunal indicated a convergence, or even assimilation, by speaking of "the customary international law standard of treatment embodied in Article 1105(1)".[154] As was aptly summarized by *Waste Management* tribunal:

> "[...] 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".[155]

Against the background of this case-law, the *Glamis* tribunal's approach was an outlier. According to the *Glamis* tribunal, "the fundamentals of the *Neer* standard thus still apply today", a violation of the minimum standard continued to require a sufficiently egregious and shocking act; the determination as to the existence of such act could be made, however, according to present standards since "as an international community, we may be shocked by State actions now that did not offend us previously".[156] The *Glamis* tribunal emphasized the separation between treaty based concepts and customary international law. In its view, arbitral awards could serve "as illustrations of customary international law if they involve an examination of customary international law, as opposed to a treaty-based, or autonomous, interpretation."[157] In contrast, "arbitral decisions that apply an autonomous standard provide no guidance inasmuch as the entire method of reasoning does not bear on an inquiry into custom."[158] However, to make the possibility of consideration of awards dependent on whether those awards explicitly apply customary international law instead of examining the possibility of convergence in sub-

153 *Loewen Group, Inc and Raymond L Loewen v United States of America* Award (26 June 2003) ICSID Case No. ARB(AF)/98/3 para 128.

154 *ADF Group Inc v United States of America* Award (9 January 2003) ICSID Case No. ARB (AF)/00/1 para 190.

155 *Waste Management, Inc v United Mexican States ("Number 2")* Award (30 April 2004) ICSID Case No ARB(AF)/00/3 para 98; according to the *Bilcon* tribunal, "formulation of the 'general standard for Article 1105' by the Waste Management Tribunal is particularly influential", *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc v Government of Canada* para 442.

156 *Glamis Gold, Ltd v The United States of America* Award (8 June 2009) UNCITRAL/NAFTA 48 ILM 1038 para 22.

157 ibid para 605.

158 ibid para 608.

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stance may overemphasize the distinctiveness of the sources and represent an isolationist understanding of sources. In any case, even though treaties and custom were separated, the tribunal still recognized some value in custom, as custom would provide a minimum standard, "a floor, an absolute bottom, below which conduct is not accepted by the international community".[159] As the *Bilcon* tribunal rightly observed, "NAFTA tribunals have, however, tended to move away from the position more recently expressed in *Glamis*".[160]

Moreover, it is difficult to find support for the *Glamis* tribunal's static understanding of custom outside NAFTA. The *Occidental* tribunal concluded that "*in the instant case* the Treaty standard is not different from that required under international law concerning both the stability and predictability of the legal and business framework of the investment. *To this extent* the Treaty standard can be equated with that under international law as evidenced by the opinions of the various tribunals cited above."[161] Likewise, the *CMS* tribunal held that in the case under review differences between the treaty standard and the international minimum standard were not "relevant *in this case*" since "the Treaty standard of fair and equitable treatment and its connection with the required stability and predictability of the business environment [...] is not different from the international law minimum standard and its evolution under customary law."[162]

The passages quoted above highlight that the relationship between treaty standards and customary international law also depends on the particularities of the case and of the respective treaty standard, which, as also recognized by the *Sempra* tribunal and the *Enron* tribunal, may sometimes "be equated" with the minimum standard and in other cases "be more precise than its customary international law forefathers".[163] Also, the *Saluka* tribunal argued

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159 ibid para 615.

160 *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc v Government of Canada* para 435; for a critique of *Glamis*, see also Reisman, 'Canute Confronts the Tide: States versus Tribunals and the Evolution of the Minimum Standard in Customary International Law' 630-632.

161 *Occidental Exploration and Production Company v The Republic of Ecuador* Final Award (1 July 2004) UNCITRAL LCIA Case No. UN3467 para 190 (italics added).

162 *CMS Gas Transmission Company v Argentine Republic* Award (12 May 2005) ICSID Case No. ARB/01/8 (italics added) para 284.

163 *Sempra Energy International v Argentine Republic* Award (28 September 2007) ICSID Case No. ARB/02/16 para 302; *Enron Creditors Recovery Corp Ponderosa Assets, LP v Argentine Republic* Award (22 May 2007) ICSID Case No. ARB/01/3 para 258.

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that the difference between both standards "may well be more apparent than real" and that apparent differences could often be explained "by the contextual and factual differences" of the respective cases.[164]

b) The treatymaking practice of states

This trend of alignment and convergence is also mirrored in treaty practice. As pointed out by Jean Ho,[165] the UNCTAD World Investment Reports have depicted a tendency of states to equate fair and equitable treatment to the international minimum standard under customary international law.[166] According to UNCTAD, two policy objectives underlined this trend, namely to "preserve the right to regulate in the public interest" and to "avoid overexposure to litigation".[167] As the 2016 UNCTAD World Report illustrates, only two percent of the 1,372 BITs that were concluded between 1962 and 2011 referred to the minimum standard of treatment under customary international

164 *Saluka Investments BV v The Czech Republic* Award (17 March 2006) UNCITRAL (1976) PCA Case No. 2001-04 para 291; see also *Azurix Corp v The Argentine Republic* Award (14 July 2006) ICSID Case No. ARB/01/12 para 361 (arguing that the text of article II.2(a) of the BIT between Argentina and the USA according to which investors shall be accorded fair and equitable treatment and shall in no case be accorded treatment less than required by international law "permits to interpret fair and equitable treatment and full protection and security as higher standards than required by international law [...] [but] the Tribunal does not consider that it is of material significance for its application of the standard of fair and equitable treatment to the facts of the case [...] [T]he minimum requirement to satisfy this standard has evolved and the Tribunal considers that its content is substantially similar whether the terms are interpreted in their ordinary meaning").

165 Ho, *State Responsibility for Breaches of Investment Contracts* 115.

166 UNCTAD, *World Investment Report 2015* (2015) ⟨https : / / unctad . org / en / PublicationsLibrary/wir2015_en.pdf⟩ accessed 1 February 2023 113; UNCTAD, *World Investment Report 2016* (2016) ⟨https://unctad.org/en/PublicationsLibrary/wir2016_en.pdf⟩ accessed 1 February 2023 111, 113; UNCTAD, *World Investment Report 2017* (2017) ⟨https://unctad.org/en/PublicationsLibrary/wir2017_en.pdf⟩ accessed 1 February 2023 121; UNCTAD, *World Investment Report 2018* (2018) ⟨https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf⟩ accessed 1 February 2023 97; UNCTAD, *World Investment Report 2019* (2019) ⟨https://unctad.org/en/PublicationsLibrary/wir2019_en.pdf⟩ accessed 1 February 2023 107.

167 UNCTAD, *World Investment Report 2015* at 113.

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law in relation to fair and equitable treatment, whereas 35 percent of 40 BITs concluded between 2012 and 2014 referred to customary international law.[168]

The so-called megaregional trade and investment agreements confirm this trend to different degrees. Article 9.6(1) CPTPP[169] stipulates that "[e]ach party shall accord to covered investments treatment in accordance with applicable customary international law principles, including fair and equitable treatment and full protection and security". Article 9.6(2) CPTPP specifies that "paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the standard of treatment to be afforded to covered investments. 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 that standard".

Also, article 14.6(1) of the so-called New NAFTA refers to the "minimum standard of treatment [...] in accordance with customary international law, including fair and equitable treatment and full protection of security." Article 14.6(2) confirms that "the concepts of 'fair and equitable treatment' and 'full protection of security' do not require treatment in addition to or beyond that what is required by this standard". In an annex, the parties confirm "their shared understanding that 'customary international law' [...] results from a general and consistent practice of States that they follow from a sense of legal obligation. The customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the investments of aliens."[170]

In 2011, the European Parliament adopted a resolution in which it "considers that future investment agreements concluded by the EU should be based on [...] fair and equitable treatment, defined on the basis of the level of treatment established by international customary law"[171] It is noteworthy

168 UNCTAD, *World Investment Report 2016* at 114.

169 Comprehensive and Progressive Agreement for Trans-Pacific Partnership (signed 18 May 2018, entered into force 30 December 2018) Australian Government Department of Foreign Affairs and Trade.

170 Agreement between the United States of America, the United Mexican States, and Canada (signed 30 November 2018, entered into force 1 July 2020) Office of the United States Trade Representative 14-5, Annex 14-A.

171 European Parliament resolution of 6 April 2011 on the future European international investment policy (first published 2011, 2012/C 296 E/05, 2011) para 19.

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that article 8.10 CETA[172] defines breaches of fair and equitable treatment without any explicit recourse to customary international law.[173] CETA also provides that "[a] Tribunal established under this Chapter shall render its decision consistent with this Agreement as interpreted in accordance with the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties".[174]

2. Reasons for the preference for convergence

Tribunals preferred to assume convergence between customary international law and the treaty-based standard when they determined the content of "fair and equitable treatment" rather than applying their "own idiosyncratic standard *in lieu* of the standard laid down in Article 1105(1) [NAFTA]".[175] By referring to international law, tribunals strengthened their interpretations of what they regarded to be fair and equitable. That references to international law can have such a strengthening effect stands to reason since the legitimacy of the adjudicative process rested on the application of preexisting norms that were enacted by others.[176] As stated by the *ADF* tribunal, "any general requirement to accord 'fair and equitable treatment' and 'full protection and

172 Comprehensive Economic and Trade Agreement between Canada, of the One Part, and the European Union and Its Member States, of the Other Part (signed 29 February 2016) 60 Official Journal of the European Union (2017) 23.

173 See also Dumberry, *Fair and Equitable Treatment. Its Interaction wit the Minimum Standard and Its Customary Status* 44-45, characterizing the list of article 8.10 as "closed list", since previous drafts' opening formulas ("notably", "non exclusively" or "includes") cannot be found in article 8.10's final text, and arguing (at 44) that "the final list of elements [...] is to a very large extent based on how NAFTA tribunals have interpreted Article 1105 over the last 20 years."

174 Art. X.27(1).

175 *Mondev International Ltd v United States of America* Award (11 October 2002) para 120; on the convergence of both standards see also Campbell McLachlan, 'Investment Treaties and General International Law' (2008) 57(2) ICLQ 394.

176 Montt, *State Liability in Investment Treaty Arbitration. Global Constitutional and Administrative Law on the BIT Generation* 309; see also Jürgen Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (William Rehg tr, 2nd edn, MIT Press 1996) 261-262; Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* 317-319; Maus, 'Die Trennung von Recht und Moral als Begrenzung des Rechts' 199, 208; Benvenisti, 'Customary International Law as a Judicial Tool for Promoting Efficiency' 103.

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security' must be disciplined by being based upon State practice and judicial or arbitral caselaw or other sources of customary or general international law."[177]

For this reason, tribunals also invoked general principles of law. According to the *Sempra* tribunal, "[t]he principle of good faith is thus relied on as the common guiding beacon that will orient the understanding and interpretation of obligations, just as happens under civil codes".[178] The *Merril Ring* tribunal argued that the principle of good faith and the prohibition of arbitrariness "are not stand-alone obligations under Article 1105(1) or international law, and might not be a part of customary law either, these concepts are to a large extent the expression of general principles of law and hence also a part of international law [...] no tribunal today could be asked to ignore these basic obligations of international law."[179]

Turning from single cases to the jurisprudence of international investment tribunals at large, it can be said that tribunals applied and invoked both customary international law and general principles of law.[180] Furthermore, by and large, the cross-reliance between tribunals was not dependent on whether they applied the same source, treaty or customary international law.[181] These standards, the international minimum standard and fair and equitable treatment, have in common that they are broadly framed, characterized by a high

177 *ADF Group Inc v United States of America* Award (9 January 2003) para 184; see also *Loewen Group, Inc and Raymond L Loewen v United States of America* Award (26 June 2003) para 128: the obligation to accord fair and equitable treatment was no free-standing obligation but indicated a renvoi to customary international law.

178 *Sempra Energy International v Argentine Republic* Award (28 September 2007) para 297.

179 *Merrill & Ring Forestry LP v Canada* Award (31 March 2010) para 187.

180 Kriebaum, 'Article 42' 870-877. As examples for customary international law, the commentary lists principles of state responsibility, denial of justice, compensation, the standard of protection in case of an insurrection; as general principles, the commentary refers to good faith, nobody can benefit from his or her own fraud, unjust enrichment, compensation, prohibition of abuse of rights, duty to mitigate damage; Ole Kristian Fauchald, 'The Legal Reasoning of ICSID Tribunals - An Empirical Analysis' (2008) 19(2) EJIL 309-313, 324-326.

181 Stephan W Schill, 'Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law' in Stephan W Schill (ed), *International investment law and comparative public law* (Oxford University Press 2010) 153-154; critical of this development Theodor Kill, 'Don't Cross the Streams: Past and Present Overstatement of Customary International Law in Connection with Conventional Fair and Equitable Treatment Obligations' (2008) 106(5) Michigan Law Review 864 ff.

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degree of generality[182] and they are functionally equivalent in that they provide for an *international*, as opposed to a domestic, standard.[183] Tribunals, therefore, were particularly interested in the concretization of one of these standards to particular cases.[184]

To the extent that the *Vivendi* tribunal criticized the "equation" of treaty standards and customary international law, it highlighted that article 3 of the BIT between Argentina and France[185] and its "reference to principles of international law supports a broader reading that invites consideration of a wider range of international law principles than the minimum standard alone"; according to the tribunal, the language of the treaty indicated to consider also "contemporary principles of international law".[186] What is described in this study as a convergence of functionally equivalent standard does not necessarily imply "equation" in the sense of a static relationship. Customary international law and the international minimum standard themselves require interpretation in light of the principles of international law. The linkage between both standards which tribunals' jurisprudence suggested cannot freeze or "restrain the evolution of the FET standard".[187] One may ask whether there is a risk of arbitrariness when tribunals are at liberty to decide when a treaty standard such as fair and equitable treatment is similar to, or goes beyond, customary international law. The possibility of such risk, however,

182 Cf. *El Paso Energy International Company v Argentina* Award (31 October 2011) ICSID Case No ARB/03/15 para 335: "[...] the scope and content of the minimum standard of international law is as little defined as the BITs' FET standard [...] The issue is not one of comparing two undefined or weakly defined standards; it is to ascertain the content and define the BIT standard of fair and equitable treatment."

183 ibid para 336, and see also para 337.

184 Cf. *Mondev International Ltd v United States of America* Award (11 October 2002) para 118: "A judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case."

185 Agreement between the Government of the French Republic and the Government of the Republic of Argentina on the Encouragement and Reciprocal Protection of Investments (signed 3 July 1991, entered into force 3 March 1993) 1728 UNTS 281.

186 *Compana de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic* Award (20 August 2007) ICSID Case No. ARB/97/3 202-203 para 7.4.7.

187 Dolzer, Kriebaum, and Schreuer, *Principles of International Investment Law* 203: "The emphasis on linkages between FET and customary international law is unlikely to restrain the evolution of the FET standard. On the contrary, this may have the effect of accelerating the development of customary law through the rapidly expanding practice on FET clauses in treaties."; Schill, 'Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law' 153-155.

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cannot be evaluated in the abstract but only in the specific case. In the end, it automatically follows from the bilateral structure of international investment law and the *lex specialis* principle, according to which states may decide to agree on a standard different from customary international law.

II. The interrelationship of sources in the scholarly debate

The conceptual roads taken by scholars towards the interpretation of the BITs and the explanation of the emergence of general law differ. International investment law represents an interesting contextual setting for approaches to the interrelationship of sources.[188] In the following, this section will survey selected approaches which can also inform the discussion of the interrelationship of sources outside international investment law. In particular, this section will focus on arguments concerning customary international law (1.), the *jurisprudence constante* (2.), the multilateralization *qua* interpretation (3.) and general principles with examples of the practice of tribunals for the purposes of illustration (4.)

1. Customary International Law

Certain scholars link the emergence of general law in international investment law in spite of the latter's bilateralist structure to the concept of customary international law.[189] In response to criticism according to which a BIT is *lex specialis* to customary international law and replaces the latter *inter partes*[190], José Alvarez has noted that "conclusions that BITs or FTAs are *lex specialis*, are not 'legislative', or lack common content, present artificially constrained black/white choices that bear little resemblance to the complexities of the interactions between treaty and non-treaty sources of law or the international

188 Alvarez, 'The Public International Law Regime Governing International Investment' 357: "[T]he investment regime is an excellent place to re-examine the ways international law now gets made."

189 Andreas F Lowenfeld, 'Investment Agreements and International Law' (2003) 42 Columbia Journal of Transnational Law 129.

190 See Alexander Orakhelashvili, 'The Normative Basis of 'Fair and Equitable Treatment': General International Law on Foreign Investment?' (2008) 46(1) Archiv des Völkerrechts 80.

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legal process."[191] Commenting on what he considered to be the traditional view, namely that the practice contributing to customary international law must be taken from a sense of legal obligation, Andreas Lowenfeld suggested "that perhaps the traditional definition of customary law is wrong, or at least in this area, incomplete."[192] Mārtiņš Paparinskis has argued that the phenomenon of cross-reliance can only be justified by the general rule of interpretation as set forth in article 31 VCLT if one assumes the existence of a rule of customary international law to which the FET provisions in BITs gives expression.[193] In a similar sense, Campbell McLachlan has argued that customary international law can "constrain the unfettered discretion of the adventurist arbitrator by reference to the constraints of a wider body of law."[194]

In the end, however, the relationship between an obligation of a given BIT and customary international law has to be determined by an analysis of the respective BIT.[195] This may explain why the preference for customary international law as explanatory model for the emergence of general law is not unanimously shared. Patrick Dumberry, for instance, concluded in his studies that the practice of FET provisions in BIT was not sufficiently uniform in order to qualify for the characterization of customary international law.[196] In

191 Alvarez, 'The Public International Law Regime Governing International Investment' 333; Alvarez, 'A Bit on Custom' 30-31.

192 Lowenfeld, 'Investment Agreements and International Law' 129, 130. See also on this topic Steffen Hindelang, 'Bilateral Investment Treaties, Custom and a Healthy Investment Climate: the Question of Whether Bits Influence Customary International Law Revisited' (2004) 5(5) The journal of world investment & trade; Alvarez, 'A Bit on Custom'; Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* 54-83 (FET emerged as a rule of customary international law "in a different manner compared to the classical theory of custom formation"); Stephen M Schwebel, 'The Influence of Bilateral Investment Treaties on Customary International Law' (2004) 98 Proceedings of the American Society of International Law at Its Annual Meeting 27-30; Christoph Schreuer, 'Investment Arbitration - A Voyage of Discovery' (2005) 5(2) Transnational Dispute Management 73 ff.

193 Paparinskis, *The international minimum standard and fair and equitable treatment* 95, 154; see also Alvarez, 'A Bit on Custom' 76.

194 McLachlan, 'Is There an Evolving Customary International Law on Investment?' 258.

195 Dolzer and Schreuer, *Principles of International Investment Law* 135.

196 Patrick Dumberry, 'Has the Fair and Equitable Treatment Standard Become a Rule of Customary International Law?' (2017) 8 JIDS 155 ff.; Patrick Dumberry, 'Are BITs Representing the "New" Customary International Law in International Investment Law?' (2009) 28(4) Penn State International Law Review 675 ff.; Patrick Dumb-

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his view, customary international law would remain important as applicable law in the absence of a treaty or when the treaty incorporates and refers to custom, as gap filler and as answer to the questions left open by treaties and as legal basis for the general rules of responsibility and interpretation.[197] Dumberry's analysis is primarily concerned with references to the notion of "fair and equitable treatment" and emphasizes the particularities of each BIT[198], whereas the above-mentioned tribunals and scholars focused more on the functional equivalence of the different standards. Other scholars are reluctant with respect to customary international law as well and suggest alternative approaches to explain the harmonization and convergence of standards in international investment law, which range from a focus on the jurisprudence of tribunals to the use of the concept of principles.

2. *Jurisprudence Constante*

One conceptual alternative to customary international law may be seen in the so-called *jurisprudence constante*, or standing jurisprudence.[199] According to Andrea Bjorklund, "[t]he informal and dispersed regime of investment treaty arbitrations is not well suited to developing a system of formal precedent. Eventually, however, an accretion of decisions will likely develop a *jurisprudence constante* - a 'persisting jurisprudence' that secures 'unification and stability of judicial activity'."[200] While admitting that the lack of a hierarchical court system in international investment arbitration makes the *jurisprudence constante* analogy an imperfect one, she values that this anal-

erry, *The Formation and Identification of Rules of Customary International Law in International Investment Law* (Cambridge University Press 2016) 151, 189.

197 ibid 352.

198 For a summary of Dumberry's analysis see Dumberry, *Fair and Equitable Treatment. Its Interaction wit the Minimum Standard and Its Customary Status* 71-77.

199 Andrea K Bjorklund, 'Investment Treaty Arbitral Decisions as "Jurisprudence Constante"' in Colin B Picker (ed), *International economic law: the state and future of the discipline* (Hart 2008)265 ff.; Ho, *State Responsibility for Breaches of Investment Contracts* 72 ff.; James Crawford, 'Similarity of Issues in Disputes Arising under the Same or Similarly Drafted Investment Treaties' in Emmanuel Gaillard and Yas Banifatemi (eds), *Precedent in International Arbitration* (Juris Publishing 2007) 102-103; Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse' (2007) 23(3) Arbitration International 357 ff.

200 Bjorklund, 'Investment Treaty Arbitral Decisions as "Jurisprudence Constante"' 265.

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ogy "preserves the primacy of the code provision as a source of law (while recognising) the evolution of code-based law through interpretation."[201]

Awards surely play an important role in the systematization of international law:[202] In spite of not being formally binding except for the parties, a precedent is said to "shif[t] the burden of argumentation by demanding a reasoned justification for departing from precedent"[203], tribunals consider the awards of other tribunals when faced with similar problems to the extent they are persuaded of the quality of the reasoning in the other awards.[204] Arbitral awards are particularly important in international investment law because of the vague substantive standards, by virtue of which states as masters of the treaties leave arbitral tribunals "with ample interpretative choices about how to concretize the content of investment treaty obligations and what concrete obligations to derive from – or to read into – them."[205] Jean d'Aspremont has even argued that because of concepts like *jurisprudence constante* and the general rules of interpretation there would no longer be any need for recourse to customary international law.[206] In his view, *jurisprudence constante* is "a

201 Bjorklund, 'Investment Treaty Arbitral Decisions as "Jurisprudence Constante"' 273; but see Ho, *State Responsibility for Breaches of Investment Contracts* 79, who rejects this analogy because of the lack of centralisation while agreeing that arbitral awards "converge on the content of international law".

202 See also Schill, 'System-Building in Investment Treaty Arbitration and Lawmaking' 165 ff.

203 ibid 162 with further references; *Saipem SpA v The People's Republic of Bangladesh* Decision on Jurisdiction and Recommendation on Provisional Measures (21 March 2007) ICSID Case No. ARB/05/07 para 167.

204 Ho, *State Responsibility for Breaches of Investment Contracts* 80; cf. Jan Paulsson, 'International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law' (2006) 3(5) Transnational Dispute Management 1, 4: "In practice, it will also doubtless turn out to be subject to the same Darwinian reality: the unfit (awards) will perish."

205 Schill, 'System-Building in Investment Treaty Arbitration and Lawmaking' 151: "The vagueness of the substantive standards that are applied as a yardstick for the international responsibility of host States are the root cause for the significant law-making activities arbitral tribunals engage in. This law-making activity is a consequence of the position that was envisaged for them by States."

206 d'Aspremont, 'International Customary Investment Law: Story of a Paradox' 42: "[...] the principle of systemic integration enshrined in article 31.3(c) of the Vienna Convention on the Law of Treaties already provides judges with a sweeping power to harmonize without unnecessary and costly inroads into the murky theory of customary investment law."

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self-explanatory and selfsufficient phenomenon" which "does not need to be 'authorized' or 'validated' by any secondary rule".[207]

The constant jurisprudence can be seen as a phenomenon of factual convergence of different standards; it is not, however, concerned with the emergence of general law on a normative level.

3. Multilateralization *qua* interpretation and the rise of general principles

Stephan Schill's multilateralization thesis offers a different model for understanding the formation of general law outside the concept of customary international law.[208] Schill has demonstrated that investment tribunals did not apply a particular BIT as a treaty isolated from other BITs and that the tribunals' interpretations were informed by each other and in particular by BITs and Arbitral Awards concerning third states.[209] He has traced the normative convergence in international investment law in part to the states parties and their use of MFN provisions in BITs and to the tribunals[210]. Tribunals both presupposed, and contributed to, the existence of an international investment law system.[211] In particular, a common multilateralist mindset between arbitrators and teleological approaches to interpretation resulted in normative convergence in international investment law.[212] The result was said to be

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207 ibid 45-46, also arguing that the multilateral character in the sense of a multilateralization of the investment law system provides for a sufficient basis.

208 Stephan W Schill, 'General Principles of Law and International Investment Law' in Tarcisio Gazzini and Eric de Brabandere (eds), *International investment law: the sources of rights and obligations* (Martinus Nijhoff Publishers 2012) 151 ("multilateral in nature, even though it has taken the form of bilateral treaties").

209 On cross treaty interpretation see Schill, *The multilateralization of international investment law* 295 ff., 359; cf. also Mārtiņš Paparinskis, 'Sources of Law and Arbitral Interpretations of "Pari Materia" Investment Protection Rules' in Ole Kristian Fauchald and André Nollkaemper (eds), *The practice of international and national courts and the (de-)fragmentation of international law* (Hart 2012) 87 ff.

210 Schill, *The multilateralization of international investment law* 312, 314.

211 ibid 294.

212 ibid 312, 314; see also the commitment of the Saipem tribunal to contribute to consolidation: "[The tribunal] believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law", *Saipem SpA v The People's Republic of Bangladesh* para 67.

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"a system that behaves and functions according to multilateral rationales and does not, despite the existence of innumerable bilateral investment relationships, dissolve into infinite fragmentation."[213] The shift of authority from states to tribunals connected with this development resulted from states' choices for vague substantive standards.[214]

Schill has argued that the process of multilateralization by investment tribunals can raise legitimacy concerns with respect to the restrictions on states' capacity to regulate in the public interest; in his view, a multilateral system cannot, in terms of legitimacy, rest on the discourse between tribunals alone and instead needs to be linked to the sources of international law.[215] Therefore, "general principles of law may be the best explanation to link the multilateralization of international investment law".[216] General principles would also allow tribunals to "bypass debates about the content of customary international law and about the relationship between treaty and custom and to implement what were formerly firm grounds under customary international law as part of general principles."[217]

4. Examples of tribunals' recourses to principles

The *Continental* tribunal illustrates that interpreters may prefer to take recourse to principles that reveal themselves in other areas of international law instead of relying solely on customary international law. The Continental

213 Schill, *The multilateralization of international investment law* 361.

214 Schill, 'System-Building in Investment Treaty Arbitration and Lawmaking' 151; see also Schill, *The multilateralization of international investment law* 355: "Far from constituting merely a subsidiary source of international law, precedent in these cases assumes the function of a primary source of international law."

215 Stephan W Schill, 'From Sources to Discourse: Investment Treaty Jurisprudence as the New Custom?' [2016] BIICL 16th Investment Treaty Forum Public Conference ⟨https://www.biicl.org/files/5630_stephan_schill.pdf.⟩ accessed 1 February 2023 15-16.

216 Schill, 'General Principles of Law and International Investment Law' 135; see also Schill, 'From Sources to Discourse: Investment Treaty Jurisprudence as the New Custom?' 16: "Methodologically, general principles may the be only doctrinally viable and convincing way to justify the multilateralization of international investment law through the discourse of investment treaty tribunals."

217 Schill, 'General Principles of Law and International Investment Law' 134-135. See also Juillard, 'L'évolution des sources du droit des investissements' 130-132.

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tribunal had to interpret a NPM provision (Art. XI[218]) according to which the treaty "shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests". This article raised the question of how to interpret the term "necessary". Unlike other tribunals, the Continental tribunal did not take recourse to necessity under customary international law as reflected in article 25 ARSIWA. Instead, the tribunal argued that similar provisions in so-called treaties of friendship, commerce, and navigation [219] and in particular Art. XX GATT[220] would be more helpful for illuminating the meaning of Article XI BIT than custom: "[...] the Tribunal finds it more appropriate to refer to the GATT and WTO case law which has extensively dealt with the concept and requirements of necessity in the context of economic measures derogating to the obligations contained in GATT, rather than to refer to the requirement of necessity under customary international law."[221] In its interpretation of whether the alleged conduct was necessary, the tribunal employed a proportionality test.[222]

This example illustrates how general principles can operate: inspirations are sought in other fields of law in order to solve a specific problem, in this case, the interpretation of the term "necessary". Arguably, the interpreter does not look, firstly, at various legal systems in order to ascertain a general principle of law and then, secondly, applies this principle by adapting it to the particular normative context. Presumably, both operations run almost simultaneously, the examination may shift between the provision to be interpreted and the legal materials from which a general principle may be identified. The classification as a general principle of law does not necessarily indicate that it can be "applied" without further regard to the normative environment. Whether, for instance, proportionality analysis fits international investment

218 Treaty between the United States of America and the Argentine Republic concerning the reciprocal encouragement and protection of investment (signed 14 November 1991, entered into force 20 October 1994) (1992) 31 ILM 124.

219 *Continental Casuality Company v Argentine Republic* Award (5 September 2008) ICSID Case No. ARB/03/9 para 176 ff.

220 General Agreement on Tariffs and Trade (signed 30 October 1947, entered into force 1 January 1948) 55 UNTS 187.

221 *Continental Casuality Company v Argentine Republic, Award* Award (5 September 2008) para 192.

222 ibid para 227, 232.

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law depends on the respective provisions of the BIT, "on the normative setting"[223] as well as on the institutional setting.[224]

The jurisprudence of investment tribunals offers several examples of borrowing principles from other fields of international law[225]: the tribunal in *S.D. Myers* searched for inspirations from WTO jurisprudence on "like products" in order to interpret the investment treaty obligation to treat foreigners no less favourably than nationals in "like circumstances".[226] Tribunals searched for inspirations in the jurisprudence of the European Court of Human Rights in order to interpret the obligation to accord fair and equal treatment[227], took re-

223 Bücheler, *Proportionality in investor-state arbitration* 62: "First, proportionality is sufficiently prevalent on the domestic level to pass the first step of identifying a general principle of law-a comparative analysis of domestic legal systems. Second, this alone tells us very little about when adjudicators should apply proportionality at the international level. All depends on the relevant normative setting." Also, the legal-political vision of the future development of one's regime may be an aspect to consider, see below, p. 606; on proportionality analysis as means to accommodate public interests and to balance conflicting interests see Andreas Kulick, *Global public interest in international investment law* (Cambridge University Press 2012) 168 ff.

224 Cf. Georg Nolte, 'Thin or Thick? The Principle of Proportionality and International Humanitarian Law' (2010) 4(2) Law & Ethics of Human Rights 246, 251, according to whom a choice between a thin and a thick proportionality analysis should be made depending on the respective normative as well as institutional setting: "The more the enforcement of a legal rule can typically rely on institutions and a shared vision of the common interest, the more it makes sense that the institution concerned directly evaluates the interests at stake".

225 Anthea Roberts, 'Clash and Paradigms: Actors and Analogies Shaping The Investment Treaty System' (2013) 107 AJIL 51-52.

226 *SD Myers, Inc v Government of Canada* Partial Award (13 November 2000) paras 243-251; contra *Methanex Corporation v United States of America* Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005) UNCITRAL/NAFTA, 44 ILM 1345 Part IV paras 29-35; on this topic see Robert Howse and Efraim Chalamish, 'The Use and Abuse of WTO Law in Investor-State Arbitration: A Reply to Jürgen Kurtz' (2009) 20(4) EJIL 1087 ff.; Jürgen Kurtz, 'The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents' (2009) 20(3) EJIL 749 ff.

227 *Mondev International Ltd v United States of America* Award (11 October 2002) para 144; cf. José E Alvarez, 'The Use (and Misuse) of European Human Rights Law in Investor-State Dispute Settlement' in Franco Ferrari (ed), *The impact of EU law on international commercial arbitration* (JurisNet 2017) 519 ff.; on the relationship of human rights law and international investment law see Pierre-Marie Dupuy, 'Unification Rather than Fragmentation of International Law? The Case of International

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course to domestic public law, European human rights law, European Union law and public international law in order to interpret the meaning of the protection of "legitimate expectations".[228] In *Tecmed*, the tribunal referred to the Iran-US-Claims tribunal, the European Court of Human Rights and the Inter-American Court of Human Rights in order to define an indirect *de facto* expropriation.[229]

The acceptance of analogies cannot be determined in the abstract but must be assessed in the individual case. In *Occidental* the annulment committee argued that the tribunal "has convincingly explained that the principle of proportionality between intensity and scope of the illicit activity, and severity of the sanction is a general principle of punitive and tort law, both under Ecuadorian and under international law", for which the tribunal had referred to case-law of the WTO Dispute Settlement Body, the European Court of Justice and European Court of Human Rights.[230] Analogies are not always

Investment Law and Human Rights Law' in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009) 61 (arguing that both belong to the same legal order); Bruno Simma, 'Foreign Investment Arbitration: A Place For Human Rights?' (2011) 60(3) ICLQ 573; Simma and Kill, 'Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology' 691-706 on article 31(3)(c) VCLT and its harmonizing potential.

228 *Total SA v The Argentine Republic* Decision on Liability (27 December 2010) ICSID Case No ARB/04/01 paras 128-134.

229 *Técnicas Medioambientales Tecmed, SA v The United Mexican States* Award (29 May 2003) ICSID Case No. ARB(AF)/00/2 116, 122: "[The tribunal] will consider, in order to determine if they are to be characterized as expropriatory, whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality." It also referred to *James v United Kingdom [Plenum]* App no 8793/79 (ECtHR, 21 February 1986), in order to illustrate the vulnerability of foreigners in the domestic democratic process; *Azurix Corp v The Argentine Republic* Award (14 July 2006) paras 311-312: The ECHR case law to which *Tecmed* referred "provide useful guidance for purposes of determining whether regulatory actions would be expropriatory and give rise to compensation"; but see *Fireman's Fund Insurance Company v The United Mexican States* Award (17 July 2006) ICSID Case No. ARB(AF)/02/1 para 176 Fn. 161: "[...] it may be questioned whether (the ECHR) is a viable source of interpreting Article 1110 of the NAFTA".

230 See *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador* Decision on Annulment of the Award (2 November 2015) ICSID Case No. ARB/06/11 para 324, 350.

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accepted. The *Siemens* tribunal rejected to adopt the margin of appreciation doctrine of the European Court of Human Rights[231] and the *Pezold* tribunal emphasized that "due caution should be exercised in importing concepts from other legal regimes (in this case European human rights law) without a solid basis for doing so."[232]

III. Evaluation

1. General principles and the development of the law

It has been questioned whether the system-building efforts of investment tribunals described above, meaning the reference to other awards rendered on the basis of different BITs between third states or the search for analogies in other fields of international law, can be justified by "the general rule" of interpretation which is set forth in article 31 VCLT and which does not authorize the interpreter to take into account third-party agreements.[233] Moreover, according to Daniel Peat, tribunals took recourse to domestic public law without claiming to apply a general principle of law.[234] Anthea Roberts has argued with respect to analogies borrowed from other fields of international law that such "principles and cases are not necessarily 'relevant rules of international law applicable in the relations between the parties' (in the sense

231 *Siemens AG v The Argentine Republic, Award (17 January 2007)* ICSID Case No. ARB/02/8 para 354, the tribunal "observes that Article I of the First Protocol to the European Convention on Human Rights permits a margin of appreciation not found in customary international law or the Treaty."; *Quasar de Valors SICAV SA v Russian Federation* Award (20 July 2012) SCC No. 24/2007 para 158.

232 *Bernhard von Pezold and Others v Republic of Zimbabwe* Award (28 July 2015) ICSID Case No. ARB/10/15 para 465; on the reception of the doctrine of the margin of appreciation see also Julian Arato, 'The Margin of Appreciation in International Investment Law' (2013) 54(2) Virginia Journal of International Law 1 ff.; cf. on ECHR references as "extraneous" to the investment arbitration without any link to the investment *ST-AD GmbH v Republic of Bulgaria* Award on Jurisdiction (18 July 2013) PCA Case No. 2011-06 para 260.

233 Andrew D Mitchell and James Munro, 'Someone Else's Deal: Interpreting International Investment Agreements in the Light of Third-Party Agreements' (2017) 28(3) EJIL 695 (taking into account third-party agreements erroneous application of the customary rules of treaty interpretation).

234 Daniel Peat, 'International Investment Law and the Public Law Analogy: The Fallacies of the General Principles Method' (2018) 9 JIDS 662, 677.

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of article 31(3)(c) VCLT), even when they originate in public international law."[235] José Alvarez has questioned arbitrators' creative recourse to principles embodied in regional treaties such as the European Convention on Human Rights. Boundary crossings would entail the risk to get the unfamiliar borrowed law wrong, to transform the treaty in a way unintended by its makers, and to opt for a regional treaty without justifying the choice or without searching for general law. Tribunals' practice to cite the ECHR and the jurisprudence of the ECtHR might not even be the expression of a commitment to further the cause of human rights but of an attempt to increase the arbitrators' likeliness for reappointment in subsequent proceedings. Interpretation, however, should not be determined by regional law but be based on general law.[236]

These critical observations caution against an unreflected and overhasty use of analogies or "general principles"; at the same time, it certainly is possible and plausible to seek guidance from the practice in specific legal regimes in which interpreters face similar challenges. This process can contribute to the gradual crystallization of a general principle.[237] Principles can appear attractive in the context of international investment law because of their auxiliary character; since in most cases a tribunal will have a treaty to apply, concepts are needed which help in interpreting the treaty. General principles which are based on the experiences in other legal fields can both offer guidance as to how to interpret the substantive obligations and provide for very technical solutions concerning questions of damages or procedure. Therefore, principles in this sense continue to play an important role even

235 Roberts, 'Clash and Paradigms: Actors and Analogies Shaping The Investment Treaty System' 52: "When invoking such analogies, participants are often not claiming that these principles and cases are applicable in the relations between the parties or cross-apply to the investment treaty system as a matter of law. Rather, they are often arguing or simply assuming that textual or functional similarities between these fields make it instructive to draw comparisons when resolving difficult issues. Some of these analogies might fit within the ambit of Article 31(3)(c), but the use of analogical reasoning extends well beyond this."

236 José Alvarez, ''Beware: Boundary Crossings'- A Critical Appraisal of Public Law Approaches to International Investment Law' (2016) 17 The Journal of World Investment & Trade 191 ff., 199-203, 220 ff.; Alvarez, 'The Use (and Misuse) of European Human Rights Law in Investor-State Dispute Settlement' 519 ff.: José E Alvarez, 'The Use (and Misuse) of European Human Rights Law in Investor-State Dispute Settlement' [2016] SSRN ⟨https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2875089⟩ accessed 1 February 2023 49-50, 96.

237 See also above, p. 138, on different perspectives on general principles of law.

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when more specific obligations under treaties or customary international law exist.[238]

General principles, however, not only embody legal experience but also represent the law in action. They can emerge through judicial practice. Therefore, the question of whether a certain principle is already a general principle of law which could be considered under article 31(3)(c) VCLT is misleading insofar as it implies that only preexisting principles of law may legitimately inform a judicial reasoning. Within the confines of legal reasoning based on the general rules of interpretation, tribunals can seek inspiration from nonbinding materials, provided that the use of this inspiration is disciplined by legal methodology which is applied to the interpretation of the binding rule.[239] It is not uncommon that a general legal idea in the sense of a non-binding principle can support the result of an interpretation of the written law according to legal methodology, and over the course of several judgments such principle can harden into a legal principle.

While principles can be employed only within the confines of legal reasoning, principles can have a transformative effect. The interpreter can relate the rule to be interpreted and applied to a broader normative environment and seek guidance from the practice in specific legal regimes in which interpreters face similar challenges. As described by Alec Stone Sweet and Giacinto Della Cananea, "[g]eneral principles are unwritten, doctrinal constructions, institutionalized as case law"[240], and by developing general principles of law judges "become architects of their own legal systems, in relation to other systems."[241]

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238 See also Tams, 'The Sources of International Investment Law: Concluding Thoughts' 324-325: "If we look at the general sources debate, general principles are 'wallflowers' existing on the margins of international legal argument – occasionally useful to fill gaps, but typically side-lined by legally relevant conduct of a genuinely international character. A quick glance at the current academic debate is sufficient to show that international investment law – again – is different."; but cf. Moshe Hirsch, 'Sources of International Investment Law' in Andrea K Bjorklund and August Reinisch (eds), *International investment law and soft law* (Edward Elgar Publishing 2012) 9 ff., 13 (speaking of a reservoir of legal rules that may fill gaps).

239 On a similar discussion in the context of the ECHR see above, p. 416; on the Kelsenian perspective according to which the application of law is not completely determined by the norm that is applied see above, p. 196 and below p. 668.

240 Alec Stone Sweet and Giacinto Della Cananea, 'Proportionality, General Principles of Law, and Investor-State Arbitration: a Response to José Alvarez' (2014) 46(3) NYU JILP 912-913.

241 ibid 913.

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The subjectivity involved here which, it should not be forgotten, is always to some extent inherent in applying abstract law to particular cases, can be tamed to a certain extent by a commitment to "a more rigorous methodology" with respect to the comparative legal exercise.[242] Whereas representativeness can be important for the persuasiveness of a given principle, it should not be overestimated, as the normative setting to which the principle is to be applied as well as the underlying vision with respect to this normative setting are important as well. Neither can subjectivity and selectivity be entirely excluded, nor can a methodology release the legal operator from her or his responsibility to reflect on her or his necessary value judgment and to "make a searching enquiry into the values that we want the investment regime to uphold".[243]

2. The promotion of paradigms by recourse to principles

It is submitted that the discussion in international investment law about the significance of paradigms can be seen as an important contribution to international legal doctrine more generally. As Anthea Roberts has explained, behind the choice of analogies and principles on the microlevel for the interpretation of a specific treaty term, one can find a "clash of paradigms" on the macrolevel, meaning "competing conceptualizations of the investment treaty system as a subfield within public international law, as a species of international arbitration, or as a form of internationalized judicial review".[244] Such paradigms are "not inevitably outcome-determinative" but "promote different visions of the investment treaty system, which, in turn, tend to privilege different actors and goals."[245] Gus van Harten, for instance, distinguished a

242 Schill, ‘General Principles of Law and International Investment Law’ 139, 145 ff.; Stephan W Schill, ‘International Investment Law and Comparative Public Law - an Introduction’ in Stephan W Schill (ed), *International investment law and comparative public law* (Oxford University Press 2010) 27 ff., 37.

243 Peat, ‘International Investment Law and the Public Law Analogy: The Fallacies of the General Principles Method’ 678.

244 Roberts, ‘Clash and Paradigms: Actors and Analogies Shaping The Investment Treaty System’ 47.

245 ibid 74.

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commercial arbitration analogy[246], a public international law analogy[247], an investor rights approach[248], which focuses on individual rights, and a public law framework[249] which appreciates the regulatory character of disputes and reconciles investors' rights and states' interest to regulate in the public interest.[250] Another example is a "public law paradigm".[251] It focuses on the vertical relationship between a state and an individual and borrows from experiences in other fields of international law which are concerned with the relationship between a state and an individual.[252] Stephan Schill has argued that general principles can provide a public law paradigm which reconciles the rights of individuals and the interests of the public to regulate.[253] Once this paradigm would be established, general principles from several branches could help in defining the general standard and applying it in concrete cases, benefiting from the experiences of others.[254] By linking FET to the rule of law, itself a general principle of (public) law[255], fair and equitable treatment could be concretized to a number of normative requirements, such as the requirements of stability, predictability and consistency of the legal framework, the protection of legitimate expectations, procedural and administrative due process and the prohibition of the denial of justice, the requirements of transparency as well as reasonableness and proportionality.[256]

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246 Gus van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press 2008) 123 ff.

247 ibid 131 ff.

248 ibid 136 ff.

249 ibid 143 ff.

250 Cf. Roberts, 'Clash and Paradigms: Actors and Analogies Shaping The Investment Treaty System' 66; Montt, *State Liability in Investment Treaty Arbitration. Global Constitutional and Administrative Law on the BIT Generation* 7-8; on the accommodation of public interests see Kulick, *Global public interest in international investment law*.

251 See on this topic also Roberts, 'Clash and Paradigms: Actors and Analogies Shaping The Investment Treaty System' 64-65; Alvarez, ''Beware: Boundary Crossings'- A Critical Appraisal of Public Law Approaches to International Investment Law' 181-191.

252 Roberts, 'Clash and Paradigms: Actors and Analogies Shaping The Investment Treaty System' 69.

253 Schill, 'General Principles of Law and International Investment Law' 162.

254 ibid 180.

255 ibid 164.

256 ibid 165 with further references.

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General principles of law as well as paradigms and underlying visions must be reflected on. They cannot be imposed on a legal reasoning, however, they must emerge from and through the interpretation of the binding law. A legal reasoning can therefore derive persuasiveness from recourse to a principle no more than the specific recourse to the principle derives its persuasiveness from the legal reasoning.

3. A remaining role for customary international law as community mindset?

It is interesting that customary international law seems to be regarded by some to be more important as a mindset of the legal operators that entails a commitment to, and the conscience to be part of, a wider legal community, rather than as applicable law.[257] It is said to provide for a common bound which is said to be the normative justification for cross-reliance, cross-fertilization and a de-facto *jurisprudence constante* in spite of institutional decentralization.[258] Customary international law can offer normative support in a decentralized system for understanding functionally equivalent rules as an expression of a general rule or principle. It is not excluded that the jurisprudence based on investment treaties informed by general principles of international law will furnish the growth of customary international law. In this sense, Campbell McLachlan has convincingly regarded the relationship between treaty and custom as symbiotic and noted a "convergence [...] between treaty practice and custom (with respect to FET and IMS), in which the modern understanding of the content of the customary right is being elaborated primarily through the treaty jurisprudence."[259] Where regulation by way of customary international law falls short, for instance in matters of fair procedure or decision-making processes, general principles of international

257 Cf. Jorge E Viñuales, ‘Sources of International Investment Law: Conceptual Foundations of Unruly Practices’ in Samantha Besson and Jean d’Aspremont (eds), *The Oxford Handbook of the Sources of International Law* (Oxford University Press 2017) 1029, arguing that one should not underestimate the value of "deeply rooted shared understandings". He refers to a commitment to sources in the context of international investment law which would include customary international law as well.

258 Cf. Paparinskis, *The international minimum standard and fair and equitable treatment* 95, 154; Alvarez, ‘A Bit on Custom’ 76.

259 McLachlan, ‘Investment Treaties and General International Law’ 394.

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law such as human rights law can gain importance.[260] Yet, as demonstrated above, conceptual alternatives to customary international law and to general principles of law are available which would view the convergence as a mere factual phenomenon.[261] Also, the "principles" tribunals apply could be regarded not to be law but only considerations which influence the tribunals in the concretization of the law.[262] From such a perspective, customary international law might not be necessary to consider other tribunals' decisions rendered under different BITs. This demonstrates that one's understanding of the interrelationship is interlinked with one's view of the scope of law that exists in the field of international investment law. Which view will prevail will be indicative not only of the relative significance of each source but also of doctrinal preferences and of the scope given to (general) law within, and in the long run potentially also beyond, the field of international investment law.

D. The significance of constructions: The distinction between primary rules and secondary rules revisited

At the end of this chapter, this section focuses on the distinction between primary and secondary rules and the use of this doctrinal construction in the jurisprudence of investment tribunals with respect to the relationship between customary international law on necessity and a treaty's NPM provision (I.). This section will revisit the distinction between primary and secondary rules (II.). It will caution against an understanding of the distinction between primary and secondary rules which would imply that both sources, treaties and custom, are sealed in separated compartments of international law (III.).

I. Competing constructions

The discussion about the relationship between necessity under customary international law as reflected in article 25 ARSIWA and a treaty-based NPM

260 McLachlan, 'Investment Treaties and General International Law' 394-400.

261 Cf. Jörg Kammerhofer, *International investment law and legal theory: expropriation and the fragmentation of sources* (Cambridge University Press 2021) 141 f.

262 Cf. for such an argument in the late Hans Kelsen's General Theory of Norms above, p. 146.

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provision in the context of the litigation between Argentina and foreign investors illustrates the significance of doctrinal constructions with respect to the interrelationship of sources.

Article XI of the applicable BIT between the USA and Argentina[263] stipulates:

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

Article 25 ARSIWA[264] imposed more burdensome requirements:

> "1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
> (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
> (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
> 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
> (a) the international obligation in question excludes the possibility of invoking necessity; or
> (b) the State has contributed to the situation of necessity."

This section focuses on the different doctrinal construction employed by tribunals and on its repercussions on the interrelationship of sources.[265]

263 Treaty between the United States of America and the Argentine Republic concerning the reciprocal encouragement and protection of investment (signed 14 November 1991, entered into force 20 October 1994) (1992) 31 ILM 124.

264 ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)*.

265 As the EDFI tribunal would later summarize the development, "eight other tribunals have rejected Argentina's necessity defense under ILC Article 25", whereas "two tribunals that upheld a necessity defense by Argentina invoked Article XI of the Argentina-U.S. BIT", *EDFI International SA, SAUR International SA and LEON Participaciones Argentinas SA v Argentine Republic* Award (11 June 2012) ICSID Case No. ARB/03/23 para 1181. The applicable Argentina-France BIT did not contain a NPM provision, the tribunal ruled that the conditions of article 25 ARSIWA were not met; the Annullment Committee accepted this decision, *EDFI International SA, SAUR International SA and LEON Participaciones Argentinas SA v Argentine Republic* Decision (5 February 2016) ICSID Case No. ARB/03/23 para 319. For an overview of the different constructions see also Jürgen Kurtz, 'Delineating Primary and Secondary Rules on Necessity at International Law' in *Multi-sourced equivalent*

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1. Alignment between the BIT and necessity under customary international law

According to one view, the relationship can be described as convergence or confluence: as the BIT does not stipulate how to interpret "necessary", the interpreter shall have recourse to customary international law on necessity.[266]

In this sense, the *Enron* tribunal firstly concluded that Argentina had not met the requirements of customary international law on necessity and then it argued that customary international law informed and determined the interpretation of what is necessary under article XI BIT. "The Treaty thus becomes inseparable from the customary law standard insofar as the conditions for the operation of state of necessity are concerned."[267] The same approach to the relationship between article XI BIT and custom was taken by the *Sempra* tribunal.[268]

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norms in international law (Hart 2011) 246; Bücheler, *Proportionality in investor-state arbitration* 217-218.

266 José Enrique Alvarez and Kathryn Khamsi, 'The Argentine Crisis and Foreign Investors: a Glimpse into the Heart of the Investment Regime' (2009) 2008-2009 Yearbook on international investment law & policy 379 ff.; José Alvarez and Tegan Brink, 'Revisiting the Necessity Defense' [2010] Yearbook International Investment Law & Policy 319 ff.; Francisco Orrego Vicuña, 'Softening Necessity' in Mahnoush H Arsanjani and others (eds), *Looking to the Future Essays on International Law in Honor of W. Michael Reisman* (Martinus Nijhoff Publishers 2010) 741 ff.; Rudolf Dolzer, 'Emergency Clauses in Investment Treaties: Four Versions' in Mahnoush H Arsanjani and others (eds), *Looking to the future: essays on international law in honor of W. Michael Reisman* (Martinus Nijhoff Publishers 2011) 705.

267 *Enron Creditors Recovery Corp Ponderosa Assets, LP v Argentine Republic* Award (22 May 2007) paras 313, 333, 334 (quote).

268 *Sempra Energy International v Argentine Republic* Award (28 September 2007) paras 376 ff.; for a defense of this approach which he had taken as member of the tribunal see Orrego Vicuña, 'Softening Necessity' 741 ff.; on the basis of this article, Peter Tomka upheld the challenge against Orrego Vicuña as an arbitrator in an UNCITRAL proceeding as by this article the latter would have prejudged the interpretation of the essential security provision, *CC/Devas and the Republic of India* Decision on the Respondent's challenge to the Hon. Marc Lalonde as Presiding Arbitrator and Prof. Francisco Orrego Vicuña as Co-Arbitrator (30 September 2013) PCA Case No 2013-09; for a convincing defense of academic freedom also of arbitrators: Stephan W Schill, 'Editorial' (2014) 15(1-2) Journal of World Investment & Trade 1 ff.

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Similarly, the *CMS* tribunal first decided that Argentina did not satisfy the requirements of customary international law on necessity.[269] Subsequently, the tribunal turned to the question of whether the BIT excluded necessity[270], a question, which the tribunal did not clearly answer, it confined itself only to stating that it "must examine whether the state of necessity or emergency meets the conditions laid down by customary international law and the treaty provisions".[271] The *LG&E* tribunal arrived at the opposite result. It concluded that Argentina could invoke article XI BIT and was therefore "excused under Article XI from liability for any breaches of the treaty between 1 December 2001 and 26 April 2003."[272] It then argued that its interpretation of the treaty finds additional support in customary international law, where Argentina could rely on necessity as well.[273]

2. Differences between the BIT and necessity under customary international law

The annulment committees focused on the differences between article XI of the treaty and customary international law on necessity and on the difference between primary rules and secondary rules and between *lex specialis* and *lex generalis*.[274]

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269 *CMS Gas Transmission Company v Argentine Republic, Award* Award (12 May 2005) paras 315-331.

270 ibid para 353.

271 ibid para 374.

272 *LG&E Energy Corp, et al v Argentine Republic* Decision on Liability (3 October 2006) ICSID Case No. ARB/02/1 paras 206, 229.

273 ibid paras 245-246, 257-262.

274 Cf. also Stone Sweet and Della Cananea, ‘Proportionality, General Principles of Law, and Investor-State Arbitration: a Response to José Alvarez’ 926-932; Jürgen Kurtz, ‘Adjudicating the Exceptional at International Investment Law: Security, Public Order and Financial Crisis’ (2010) 59(2) ICLQ 344; Kurtz, ‘Delineating Primary and Secondary Rules on Necessity at International Law’ 246, identifying three possible models of relationship between both norms, namely "primary-secondary applications", which he favours, a hard *lex specialis* relationship as contract out of customary necessity, which he finds plausible, and a weak *lex specialis* relationship "with the customary plea continuing to have residual effect"; Bücheler, *Proportionality in investor-state arbitration* 217-218, 231 (rejecting to equate both norms); Christina Binder, *Die Grenzen der Vertragstreue im Völkerrecht* (Springer 2013) 643-646, 651-653.

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The *CMS* Annulment Committee argued that article XI BIT was a "threshold requirement: if it applies, the substantive obligations under the Treaty will not apply. By contrast, article 25 was an excuse which was only relevant once it has been decided that there has otherwise been a breach of those substantive obligations."[275] According to the Committee, the tribunal committed one manifest error of law by failing to appreciate the substantive differences between article XI BIT and article 25 and another error of law by failing to clarify the relationship between both rules.[276] If necessity under customary international law even precluded a *prima facie* breach of the BIT, it would have to be characterized as a primary rule and article XI BIT would then have to be applied as *lex specialis*.[277] If necessity concerned the issue of responsibility and thus presupposed a breach, an interpreter must first examine whether article XI BIT rendered the BIT inapplicable.[278] The Annulment Committee noted that the tribunal committed a manifest error of law by having considered the question of whether compensation was due only with a view to article 27 ARSIWA, without assessing whether the BIT constituted a *lex specialis*. In view of the Committee, article XI BIT "if and for so long as it applied, excluded the operation of the substantive provisions of the BIT."[279]

The *Sempra* Annulment Committee annulled the award for the failure of the tribunal to apply the applicable law in the form of article XI BIT.[280] According to the Annulment Committee, "Article 25 does not offer a guide to interpretation of the terms used in Article XI. The most that can be said is that certain words or expressions are the same or similar."[281] Additionally, and "[m]ore importantly"[282], the Committee stressed the differences between article XI BIT as primary law regarding the applicability of the BIT

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275 *CMS Gas Transmission Company v Argentine Republic* Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic (25 September 2007) ICSID Case No. ARB/01/8 para 129.

276 ibid paras 130, 132.

277 ibid para 133.

278 ibid para 134; the award was not annulled on the basis of these errors since there had not been a manifest access of powers, para 136.

279 ibid para 146.

280 *Sempra Energy International v Argentine Republic* Decision on the Argentine Republic's Application for Annulment of the Award (29 June 2010) ICSID Case No. ARB/02/16 para 159.

281 ibid para 199.

282 ibid para 200.

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and necessity under customary international law; both provisions "therefore deal with quite different situations."[283] For the Committee, it did not follow from the characterization of necessity as set forth in article 25 ARSIWA as customary international law "that it must be interpreted and applied in exactly the same way in all circumstances [...]"[284]. In short, the tribunal was criticized for having "adopted Article 25 of the ILC Articles as the primary law to be applied, rather than Article XI of the BIT, and in so doing made a fundamental error in identifying and applying the applicable law."[285]

The *Enron* Annulment Committee annulled the award for the failure of the tribunal to interpret and apply all preconditions of article 25 ARSIWA[286] and criticized the tribunal for the lack of a determination as to whether article XI BIT excluded any recourse to article 25 ARSIWA.[287] The defect of the tribunal's treatment of customary international law affected the tribunals conclusion on article XI BIT which relied on the interpretation of custom as well.[288] In view of the Enron Annulment Committee, it would not be for the committee to "reach its own conclusions" on the interrelationship between Article XI BIT and customary international law.[289]

The *Continental* tribunal adopted a nuanced position that can be read as a reconciliation. In line with the approach adopted by the Annulment Committee in *CMS*, the *Continental* tribunal argued that article XI BIT and customary international law on necessity operate on different levels: Measures covered by article XI BIT would lie outside the scope of the substantive provisions of the BIT,[290] whereas necessity as a circumstance precluding wrongfulness presupposed a breach of the treaty.[291] Nevertheless, the tribunal also recognized "a link between the two types of regulation" as both "intend to provide flexibility in the application of international obligations" and would lead to the same result: "condoning conduct that would otherwise be unlawful

283 ibid para 200.
284 ibid para 202.
285 ibid para 208.
286 *Enron Creditors Recovery Corp Ponderosa Assets, LP v Argentine Republic* Decision on the Application for Annulment of the Argentine Republic (30 July 2010) ICSID Case No. ARB/01/3 para 393.
287 ibid para 394.
288 ibid para 405.
289 ibid para 405.
290 *Continental Casuality Company v Argentine Republic, Award* Award (5 September 2008) para 164.
291 ibid para 166.

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and thus removing the responsibility of the State."[292] It acknowledged that "[t]hese connections may be relevant as to the interpretation of the bilateral provision in Art XI"[293]. Thus, an interpretative relationship is not *a priori* precluded. In the specific case, however, the tribunal decided to take recourse to proportionality analysis in order to interpret the term "necessary", rather than to customary international law on necessity.[294]

II. Revisiting the distinction between primary and secondary rules

In particular the *CMS* Annulment Committee and the *Sempra* Committee referred to the distinction between primary and secondary rules.[295] Based on one reading of these decisions, article XI of the BIT between Argentina and the USA excludes certain matters from the scope of application of the treaty or determines the applicability of the BIT, whereas article 25 ARSIWA presupposes both the applicability and a breach of the treaty. Against the background of this jurisprudence, it has been argued that "[a]n adjudicator that characterizes the treaty exception as a ‘primary’, norm cannot simply draw on the ILC Articles as guidance in an interpretative task."[296] Also, it has been suggested that the classification as primary or secondary rule should determine the appropriateness of analogies based on municipal law or the UNIDROIT principles: "When the [UNIDROIT] Principles can be relied on, tribunals must ensure that they are drawing appropriate comparisons, using the Principles’ secondary rules only to interpret the secondary rules of

292 *Continental Casuality Company v Argentine Republic, Award* Award (5 September 2008) para 168. The tribunal noted that this link existed also when article XI BIT was viewed as "specific bilateral regulation of necessity for purposes of the BIT (thus a kind of *lex specialis*)" which then presupposes a breach.

293 ibid para 168; see also *Continental Casuality Company v Argentine Republic* Decision on the Application for Annulment of the Argentine Republic (16 September 2011) ICSID Case No. ARB/03/9 paras 128-131.

294 *Continental Casuality Company v Argentine Republic, Award* Award (5 September 2008) paras 227, 232.

295 Cf. *CMS Gas Transmission Company v Argentine Republic* Decision on Annulment (25 September 2007) para 134. *Sempra Energy International v Argentine Republic* Decision on Annulment (29 June 2010) para 115.

296 Kurtz, ‘Delineating Primary and Secondary Rules on Necessity at International Law’ 253.

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international law, rather than differently-structured primary rules."[297] Based on these interpretations, a meaningful interaction between NPM provisions and customary international law on necessity may become difficult, if not impossible, for reasons relating not necessarily to the particular treaty in question but to a specific understanding of the distinction between primary rules and secondary rules. Both sources, treaties and customary international law, might then be placed in different compartments. In contrast, it will be argued here that one should not read too much into the distinction between primary and secondary rules as far as the interrelationship of sources is concerned.

1. The distinction in the law of state responsibility

Distinguishing between primary and secondary rules was a convenient way for the ILC to divorce the codification of state responsibility from questions of the content of international legal obligations.[298] However, the *Dogmatik* of the ARSIWA and the often-stressed distinction between primary and secondary rules is a more roughly than gracefully built construction and should, therefore, not be exaggerated. For instance, it can indeed be said that the rules of attribution "relate to the application of primary rules", as "an action or omission can [n]ever constitute a violation of a primary rule of international law if it is not attributable to said state according to Articles 4-11".[299] The use of the term secondary remains justified here in that the rules of attribution

297 Jarrod Hepburn, 'The Unidroit Principles of International Commercial Contracts and Investment Treaty Arbitration: A Limited Relationship' (2015) 64(4) ICLQ 908, see also 925-926, 928.

298 See the working paper prepared by Ago, *ILC Ybk (1963 vol 2)* 253 ("[...] the consideration of the contents of the various rules of substance should not be an object in itself in the study of responsibility, and that the contents of these rules should be taken into account only to illustrate the consequences which may arise from an infringement of the rules.");Federica Paddeu, *Justification and Excuse in International Law* (Cambridge University Press 2018) 40; on the institutional background of the sub-committee see Nissel, 'The Duality of State Responsibility' 835 ff.; David, 'Primary and Secondary Rules' 29.

299 Ulf Linderfalk, 'State Responsibility and the Primary-Secondary Rules Terminology - the Role of Language for an Understanding of the International Legal System' (2009) 78(1) Nordic Journal of International Law 62. In a similar sense Jure Vidmar, 'Some Observations on Wrongfulness, Responsibility and Defences in International Law' (2016) 63 Netherlands International Law Review 351.

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govern attribution solely for the purpose of establishing responsibility; for other purposes, for instance for determining the international character of an armed conflict, other rules of attribution exist.[300] Also, it has been argued that article 16 on aid or assistance in the commission of an internationally wrongful act "does not neatly fit the 'primary'/'secondary' dichotomy"[301], and can be regarded as a primary rule on which the responsibility of the accomplice is based.

Certain circumstances precluding wrongfulness, such as consent (article 20 ARSIWA), relate to the *breach of an international obligation* (Art. 2(b) ARSIWA), the primary rule directly, and constitute "a ground doing completely away with any connotation of breach"[302], whereas other circumstances, such as necessity (article 25 ARSIWA), relate to the *internationally wrongful act* (Art. 1 ARSIWA) and operate as justification or exculpation.[303] It is not argued here that the circumstances precluding wrongfulness should

300 Cf. Tomuschat, 'International law: ensuring the survival of mankind on the eve of a new century: general course on public international law' 276, analyzing positive obligations in specific treaty regimes and concluding: "The examples show that with regard to imputability primary and secondary rules are intimately connected."

301 Aust, *Complicity and the law of state responsibility* 6; Georg Nolte and Helmut Philipp Aust, 'Equivocal Helpers - Complicit States, Mixed Messages and International Law' (2009) 58 International and Comparative Law Quarterly 8 ("[...] questionable whether a strict distinction between primary and secondary rules can always be drawn").

302 Tomuschat, 'International law: ensuring the survival of mankind on the eve of a new century: general course on public international law' 286, 288.

303 It is debated whether the characterization as justification or as exculpation or excuse is more appropriate. On the distinction between justification and excuse see Bjorklund, 'Emergency Exceptions: State of Necessity and Force Majeure' 511 ff.; Vaughan Lowe, 'Precluding Wrongfulness or Responsibility: A Plea for Excuses' (1999) 10 EJIL 406 ("The distinction between the two is the very stuff of classical tragedy. No dramatist, no novelist would confuse them. No philosopher or theologian would conflate them. Yet the distinction practically disappears in the Draft Articles"); *Second report on State responsibility, by Mr James Crawford, Special Rapporteur* 60 paras 230-231, 76 para 307 also available in *ILC Ybk (1999 vol 2 part 1)* 60, 76; the ILC commentary takes a pragmatic approach: "They do not annul or terminate the obligation; rather they provide a justification or excuse for non-performance while the circumstance in question subsists" (*ILC Ybk (2001 vol 2 part 2)* 71 para 2); see now the recent study Paddeu, *Justification and Excuse in International Law* 23-97 (endorsing such distinction); skeptical of the usefulness of this distinction in international law Robert Kolb, *The International Law of State Responsibility* (Edward Elgar Publishing 2017) 110.

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not be considered as secondary rules. Their characterization as secondary rules remains appropriate: These rules "do not annul or terminate the obligation; rather they provide a justification or excuse for nonperformance while the circumstance in question subsists".[304] As they leave the primary rule itself untouched, they can be regarded as secondary rules.[305] As the just stated examples demonstrate, however, the distance between single circumstances precluding wrongfulness and the primary obligation and the way of interaction differ, which speaks against a rigid understanding of the distinction between primary and secondary rules.

2. The distinction in the case-law of the ICJ

Moreover, the case-law of the ICJ does not justify a rigid distinction, it is in this regard inconclusive. In the *Oil Platform* case[306], the Court addressed the question of whether US conduct, which Iran had argued would constitute a breach of the bilateral treaty, could be regarded as lawful exercise of the right of self-defense. The right of self-defense can be seen as operating on both levels.[307] It justifies, or precludes, a breach of article 2(4) UNC as a primary rule under article 51 UNC and customary international law. In addition, self-defense is recognized as a circumstance precluding wrongfulness in article 21 ARSIWA.[308] According to the bilateral treaty's NPM provision, in particular article XX(1)(d), the treaty shall not preclude the application of measures which are "necessary to fulfil the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests."[309] The Court interpreted

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304 *ILC Ybk (2001 vol 2 part 2)* 71 para 2; see also *Gabčíkovo-Nagymaros Project* 63 para 101.

305 See also Kolb, *The International Law of State Responsibility* 113, 117.

306 *Oil Platforms* [2003] ICJ Rep 161 ff.; see also Federica I Paddeu, 'Self-Defence as a Circumstance Precluding Wrongfulness: Understanding Article 21 of the Articles on State Responsibility' [2015] BYIL 37 ff.

307 ibid 16, 37.

308 Cf. *Legal Consequences of the Construction of a Wall* [2004] ICJ Rep 136, 194-195 paras 138-140, where the Court addressed self-defense subsequent to an examination of necessity, which suggests that self-defense was considered as secondary rule.

309 Treaty of Amity, Economic Relations, and Consular Rights between Iran and the United States of America (signed 15 August 1955, entered into force 16 June 1957) 248 UNTS 93.

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the treaty's NPM provision in light of the law of self-defense and decided that the USA could not rely on the justification of self-defense and that therefore the applicability of the treaty was not precluded.[310] The Court then arrived at the conclusion that the conduct of the USA did not amount to a breach of the treaty.[311]

This judgment allows for different interpretations and is not conclusive as to the abstract relationship between primary and secondary rules. According to one interpretation of this judgment, the Court's choice to treat the NPM provision as a starting point indicates that the NPM provision governed the applicability of the treaty, which would be in line with the interpretation by the *Sempra* Annullment Committee of the BIT's NPM provision. According to the *Sempra* Annullment Committee, however, the BIT's NPM provision governed the applicability of the treaty, whereas necessity was a secondary rule, both provisions "therefore deal with quite different situations."[312] In contrast, the ICJ interpreted the NPM provision of the treaty between Iran and the USA in light of self-defence. This suggests then either that self-defense was used as primary rule under article 51 UNC or that the distinction between primary and secondary rules did not constitute a bar to interpreting one in light of the other.

According to a different interpretation, the Court's order of reasoning was chosen in order to do justice to both parties and exhaustively address the parties' submissions. This interpretation finds support in the judgment. The Court acknowledged that it had addressed the interpretation of the NPM provision after the determination of a breach of the respective treaty in the *Nicaragua* case[313], but the Court considered itself free "to select the ground upon which it will base its judgment".[314] Since the original dispute of the parties was focused on the law of self-defense, the Court decided to examine this question at the beginning.[315]

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310 *Oil Platforms* [2003] ICJ Rep 161, 199 para 78.

311 ibid 208 para 100.

312 *Sempra Energy International v Argentine Republic* Decision on Annulment (29 June 2010) para 200.

313 cf. *Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep 14, 140-141 para 280.

314 *Oil Platforms* [2003] ICJ Rep 161, 180 para 37, citing *Application of the Convention of 1902 Governing the Guardianship of Infants* (*Netherlands v. Sweden*) (Judgment) [1958] ICJ Rep 62.

315 *Oil Platforms* [2003] ICJ Rep 161, 180-181 paras 37-38.

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In a subsequent case, the Court followed the characterization in the *Nicaragua* judgment and stated that the NPM provision "do[es] not restrict its jurisdiction but merely afford[s] the Parties a defence on the merits."[316] The characterization as a "defence" could be understood as implying that the NPM provision is a *lex specialis* defence to the circumstances precluding wrongfulness as set forth in the ARSIWA. Based on this interpretation, when the Court interpreted the NPM provision in light of self-defence, two conclusions could be drawn, depending on whether one characterizes self-defence as primary rule or a secondary rule. In the latter case, the Court did not regard itself prevented by the distinction between primary and secondary rules from interpreting the NPM provision as *lex specialis* in light of self-defence in general international law. In the former case, no conclusion as to the distinction between primary rules and secondary rules could be drawn. In any case, the ICJ aforementioned decisions do not suggest to attach too much significance to the abstract distinction between primary and secondary norms.

3. The distinction and the relationship between the general law of treaties and the law of state responsibility

It has also been argued that the distinction between primary and secondary rules corresponds "*grosso modo*" with the distinction between the general law of treaties and the general law of responsibility.[317]

Judge Bruno Simma argued in his separate opinion in the *Accord* case that

> "[i]n the language of the ILC, by now generally accepted and adopted in the literature, the Vienna Convention is designed to provide an exhaustive restatement of the 'primary rules' on treaty breach but does not touch upon matters of State responsibility, regulated by 'secondary rules' as codified and progressively developed in the ILC's 2001 Articles. In other words, Article 60 has nothing to do with State responsibility, and State responsibility has nothing to do with the maxim *inadimplenti non est adimplendum* or the *exceptio non adimpleti contractus*."[318]

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316 *Certain Iranian Assets* [2019] ICJ Rep 7, 20 para 47; see already *Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep 14, 116 para 222; *Oil Platforms* [1986] ICJ Rep 803, 811 para 20.

317 Binder, *Die Grenzen der Vertragstreue im Völkerrecht* 487.

318 *Application of the Interim Accord of 13 September 1995* [2011] ICJ Rep 644 Sep Op Judge Simma para 20.

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To begin with, it is necessary to consider the context of the case. The *Accord* case concerned the question of whether Greece could "justify" the non-compliance with Article 11(1) of the Interim 1995 Accord signed by the former Yugoslav Republic of Macedonia and Greece. Greece relied on countermeasures, the material breach provision of Article 60 VCLT, according to which a material breach of a treaty by one party entitles the other party to suspend the operation of a treaty in whole or in part, and on the *exceptio non adimpleti contractus*. According to this doctrine, one party to a treaty may "withhold the execution of its own obligations which are reciprocal those not performed by the other [party]".[319]

For any of these arguments to succeed, it would have been necessary to demonstrate that the Former Yugoslavic Republic of Macedonia had violated the Interim 1995 Accord, which, however, could not be established. The Court, therefore, did not see any need to engage with the questions of validity and of the preconditions of the *exceptio non adimpleti contractus*: since Greece "failed to establish that the conditions which it has itself asserted would be necessary for the application of the exceptio have been satisfied in this case", the Court considered it unnecessary "to determine whether that doctrine forms part of contemporary international law".[320]

The question of whether the *exceptio* remains applicable next to article 60 VCLT has been controversial. Anzilotti, for instance, called the *exceptio non adimpleti contractus* a general principle of law.[321] It is said to be rooted in the reciprocal nature of treaties[322] and was not codified by the VCLT as a general principle which states could resort to without further conditions. Instead, article 60 VCLT requires a manifest breach for a termination or suspension of a treaty.[323] Article 73 VCLT stipulates that the VCLT is without prejudice to

319 *Application of the Interim Accord of 13 September 1995* 680 para 115.

320 ibid [2011] ICJ Rep 644, 691 para 161.

321 For an invocation of this doctrine as general principle of law see *Diversion of Water from the Meuse: Netherlands v. Belgium* Merits [1937] PCIJ Series A/B 70 Diss Op Anzilotti 50: "As regards the first point, I am convinced that the principle underlying this submission (inadempleti non est adimpletum) is so just, so equitable, so universally recognized, that it must be applied in international relations also. In any case, it is one of these "general principles of law recognized by civilized nations" which the Court applies in virtue of Article 38 of its Statute."

322 See on this topic Simma, 'Reflections on article 60 of the Vienna convention on the law of treaties and its background in general international law' 5-83.

323 Art. 60 VCLT is strengthened by Art. 42(2) VCLT according to which the termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the VCLT.

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the law of international responsibility which is relevant for treaty breaches. It is generally acknowledged that both fields of law, the general law of treaties and the general law of state responsibility, are relevant to treaty breaches.[324] Whereas article 60 VCLT and the *exceptio* are based on the logic of reciprocity in order to "address a contractual imbalance"[325], countermeasures in the law of responsibility serve the purpose of reinforcing the breached obligation.[326] Special Rapporteur James Crawford attempted to reintroduce the *exceptio* in the context of the ARSIWA, but his suggested draft article 30*bis* on reciprocal countermeasures did not find the support of the ILC.[327]

In the *Accord* case, Simma refuted his earlier held view[328] and argued that it was no longer be advisable to argue that there was a place for the *exceptio* next to article 60 of the Vienna Convention as far as the law relating to treaties is concerned. Otherwise, the procedural obligations and the material breach requirement of article 60 would be undermined.[329] Against this background,

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324 For an overview see Shabtai Rosenne, *Breach of Treaty* (Cambridge University Press 1985); Xiouri, 'Problems in the Relationship between the Termination or Suspension of a Treaty on the Ground of Its Material Breach and Countermeasures' 70.

325 Christian J Tams, 'Regulating Treaty Breaches' in Michael J Bowman and Dino Kritsiotis (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge University Press 2018) 23.

326 ibid. *ILC Ybk (2001 vol 2 part 2)* 129 para 6.

327 See Crawford and Olleson, 'The Exception of Non-performance: Links between the Law of Treaties and the Law of State Responsibility' on the treatment of the exceptio by the Commission in different working projects; see also Forlati, 'Reactions to Non-Performance of Treaties in International Law' 766; see also *ILC Ybk (2001 vol 2 part 2)* 72 para 9: "[...] the exception of non-performance (exceptio inadimpleti contractus) is best seen as a specific feature of certain mutual or synallagmatic obligations and not a circumstance precluding wrongfulness".

328 Simma, 'Reflections on article 60 of the Vienna convention on the law of treaties and its background in general international law' 5 ff.

329 *Application of the Interim Accord of 13 September 1995* [2011] ICJ Rep 644 Sep Op Simma 704 para 21, 705 para 22; for a different view see Diss Op Roucounas 745 para 66 with reference to the separate *dictum* in Nicaragua; see also Thirlway, *The Sources of International Law* 101: "[...] in fact Article 60 of the Convention preserves and enacts the essence of the principle[...]"; cf. on this debate Fontanelli, 'The Invocation of the Exception of Non-Performance: A Case-Study on the Role and Application of General Principles of International Law of Contractual Origin' 119 ff.; Xiouri, 'Problems in the Relationship between the Termination or Suspension of a Treaty on the Ground of Its Material Breach and Countermeasures' 75; Forlati, 'Reactions to Non-Performance of Treaties in International Law' 770: the exceptio would play only a limited role.

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Simma's statement cited above highlighted the difference between the treaty regime and the responsibility regime with respect to treaty breaches, with locating the *exceptio non adimpleti contractus* within the treaty regime.[330] It was arguably less about an examination of the abstract distinction between primary and secondary rules.

III. Concluding remarks as to the distinction between primary rules and secondary rules

It is submitted here that the distinction between primary and secondary rules may be a useful heuristic device as it points to differences between rules on the one hand, and rules on rules on the other hand. Yet, the distinction between primary and secondary rules should not be overemphasized[331] and should not be understood as indicating "that in international law legal rules fall into separate and detached compartments".[332]

It is therefore not excluded that the practice on NPM provisions can, in the long run, shape the interpretation of article 25 ARSIWA. Whereas this possibility exists in principle, this effect should not be lightly assumed: NPM provisions are tailormade for the respective treaty regime whereas necessity under customary international law applies, in principle,[333] to all international

330 *Application of the Interim Accord of 13 September 1995* [2011] ICJ Rep 644 Sep Op Simma para 20: "Article 60 has nothing to do with State responsibility, and State responsibility has nothing to do with the maxim inadimplenti non est adimplendum or the exceptio non adimpleti contractus."

331 As depicted by Nolte and Aust, 'Equivocal Helpers - Complicit States, Mixed Messages and International Law' 8 footnote 30, Roberto Ago himself responded to the question of whether the draft article on complicity would not leap the barrier between primary and rules with the remark that "in his opinion the Commission should not hesitate to leap that barrier whenever necessary", *ILC Ybk (1978 vol 1)* 240 para 27.

332 Linderfalk, 'State Responsibility and the Primary-Secondary Rules Terminology - the Role of Language for an Understanding of the International Legal System' 72, who criticized for this reason the distinction and proposed to "stop using it." See also Orakhelashvili, *Peremptory norms in international law* 80: "The UN International Law Commission singled out 'primary' and 'secondary' norms in terms of the law of State responsibility, but it did so for descriptive purposes only, without attributing to this distinction any inherent impact on the character of relevant norms and the rights and obligations arising therefrom"; Milanovic, 'Special Rules of Attribution of Conduct in International Law' 299-301.

333 The Court did not exclude the possibility that the necessity defense applied even to violations of human rights law and humanitarian law, *Legal Consequences of the*

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obligations which are situated in very different normative and institutional settings.[334]

While it is true that the general law of treaties and the general rules of state responsibility have different legal histories, they have in common their characteristic as "rules on rules".[335]

E. Concluding Observations

This chapter explored the interrelationship of sources in the context of international investment law. It began by focusing on the transition from the interwar period to the modern international investment regime.[336] Subsequently, it analyzed the interrelationship of sources and international lawyers' quest for general law in the bilateralist structure of international investment law.[337] The chapter then turned to the significance of doctrinal constructions by considering certain interpretations of the distinction between primary rules

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Construction of a Wall [2004] ICJ Rep 136, 194-195 paras 140-142. Art. 26 ARSIWA excludes obligations arising under a peremptory norm of general international law from the chapter on circumstances precluding wrongfulness.

334 Bücheler therefore convincingly argues against reading proportionality analysis into article 25 ARSIWA, Bücheler, *Proportionality in investor-state arbitration* 281-288.

335 According to the ILC fragmentation study as finalized by Martti Koskenniemi, "even single (primary) rules that lay down individual rights and obligations presuppose the existence of (secondary) rules that provide for the powers of legislative agencies to enact, modify and terminate such rules and for the competence of law-applying bodies to interpret and apply them.", *Fragmentation of international law: difficulties arising from diversification and expansion of international law, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi* 20 para 27; see also André Nollkaemper, 'The Power of Secondary Rules to connect the International and National Legal Orders' in Tomer Broude and Yuval Shany (eds), *Multi-sourced equivalent norms in international law* (Oxford University Press 2011) 47-48: "Secondary rules include rules of interpretation, rules of change and rules of responsibility". Cf. *ILC Ybk (2001 vol 2 part 2)* 31 para 4 (a), where it says in the commentary to the ARSIWA that "it is not the function of the articles to specify the content of the obligations laid down by particular primary rules, or their interpretation." One does not have to read this passage as endorsement of a categorical distinction between rules of responsibility and rules of interpretation.

336 See above, p. 558.

337 See above, p. 582.

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and secondary rules which were developed in relation to the jurisprudence of international investment tribunals.[338]

In particular, this chapter picked up a debate between Latin American states and Western states, in particular between Mexico and the United States of America, which was already addressed in the context of the codification conference of 1930[339] and which was further explored in this chapter. The substance matter of this debate did not solely concern customary international law as such but the rules which were based on customary international law.[340] Whilst the modern history of international investment law bears witness to the creative potential of custom and general principles of law[341], it also illustrates the limited capacity of unwritten law to alleviate and to overcome political contestation, which ultimately explained the move to treaties which, however, was underlined by different motives of capital-importing and capital-exporting states.[342]

The chapter demonstrated that even in a system shaped by bilateralism in form a multilateralism in substance can emerge. States assumed a convergence between their treatymaking and customary international law which may also served the purpose of restricting the extent to which investment tribunals would limit states' capacity to regulate.[343] Moreover, tribunals assumed a convergence between the different treaty standards on fair and equitable treatment and the international minimum standard. This allowed them to buttress their reasoning as to which conduct would violate the obligation to accord fair and equitable treatment, based on the assumption that references to customary international law and general principles of law could enhance the persuasiveness and legitimacy of the respective awards.[344]

This chapter identified different doctrinal proposals in scholarship to explain this multilateralism in substance which can be discussed in other fields of international law as well: from customary international law[345] to a strong focus on the judicial concretization and the technique of treaty interpretation,[346] to the recommendation of general principles of law as guide for this

338 See above, p. 610.
339 See above, p. 182.
340 See above, p. 564.
341 See above, p. 571.
342 See above, p. 579.
343 See above, p. 590.
344 See above, p. 592.
345 See above, p. 595.
346 See above, p. 597.

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process[347]. Which proposal will assert itself and become dominant will also depend on the future legal-political development of international investment law, for instance on the degree of specificity in which states phrase substantive standards in investment law, on the shift of authority between investment tribunals and states and perhaps even on whether disputes will occur in an investor-state or in a state-state adjudicatory setting.[348]

The variety of perspectives illustrates what this study depicted in the context of the jurisprudence of the European Court of Human Rights[349], namely that reference to other sources of international law are but one possibility to interpret a rule and relate it to its normative environment, whilst the doctrine of interpretation which allows for the consideration of a consensus below the threshold of a legal norm or the developments of functional equivalents can perform a similar function. Furthermore, the debate in international investment law on the appropriateness of a given rule or principle from a

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347 See above, p. 599.

348 On using state-state arbitration as means of control see Anthea Roberts, 'State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority' (2014) 55(1) Harvard Journal of International Law 28 ff., arguing that states will plead the law in a different way than investors who are not likewise committed to public interests, which can influence the interpretation of the law by tribunals; see also Kulick, 'State-State Investment Arbitration as a Means of Reassertion of Control: From Antagonism to Dialogue' 128 ff.; on the debate on whether a state can bring a claim based on diplomatic protection if the individual concerned pursues enforcement, see *Preliminary Report on Diplomatic Protection by Mr Mohamed Bennouna, Special Rapporteur* 4 February 1998 UN Doc A/CN.4/484 in *ILC Ybk (1998 vol 2 part 1)* 315 para 40: "[W]here the right of the individual is recognized directly under international law (the bilateral agreements referred to above), and the individual himself can enforce this right at the international level, the "fiction" no longer has any reason for being."; but see *contra First report on diplomatic protection, by Mr John R Dugard, Special Rapporteur* 7 March and 20 April 2000 UN Doc A/CN.4/506 and Add. 1 in *ILC Ybk (2000 vol 2 part 1)* at 213; see also Mārtiņš Paparinskis, 'Investment Arbitration and the Law of Countermeasures' (2008) 79 BYIL 280 ff.; Chittharanjan Felix Amerasinghe, *Diplomatic Protection* (Oxford University Press 2008) 341; on article 27 of the ICSID convention which limits a state's recourse to diplomatic protection "in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention" see Loretta Malintoppi, 'Article 27' in Stephan W Schill (ed), *Schreuer's Commentary on the ICSID Convention* (3rd edn, Cambridge University Press 2022) 633 ff., 638 f. on the position of non-contracting states.

349 See above, p. 408.

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different branch or source shifts the attention to the legal operator's vision for the further development of the legal field.[350] It indicates that discussions of the appropriateness of legal principles should not be confined to the principle's representativeness, or lack thereof, and must consider and reflect on the principle's fit to the normative environment in which it is to be applied. Legal operators can in this sense become architects[351], not only in the relationship to other fields of law but also in relation to their own field. The concept of principles can appear particularly attractive to investment lawyers because of the auxiliary nature of principles in relation to treaty law. At the same time, customary international law may remain relevant as well.[352] It may then, however, assume a different function than it did in the jurisprudence of the ICTY or in parts of the jurisprudence of the ICJ. It will not perform the function of applicable law, but of an interpretative means that indicates how the written law is applied in the community.[353]

Yet, whether customary international law has a future at the level of primary rules or only of secondary rules[354] remains to be seen. This chapter critically engaged with the interpretation according to which primary rules and secondary rules need to be kept strictly separated. It was submitted that this doctrinal construction should not be overemphasized as a model for the interrelationship of sources.[355] What this debate in any case shows, however, is that the place of customary international law is subject to an ongoing discussion.

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350 See above, p. 607.
351 Cf. Stone Sweet and Della Cananea, 'Proportionality, General Principles of Law, and Investor-State Arbitration: a Response to José Alvarez' 913. But see also above on the importance to remain within the structure of legal reasoning, p. 154, p. 416, p. 606.
352 See above, p. 609.
353 Cf. p 119.
354 Cf. above, p. 610.
355 See below, p. 616.

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