

1

INTRODUCTION

A. Objective	1.01	C. Approach	1.32
The investment treaty arbitration phenomenon	1.01	The principles of investment treaty law	1.33
Exposition of common principles of investment protection	1.08	Awards	1.34
B. Structure	1.17	Treaties	1.35
Part I: Overview	1.18	Relevance of general public international law	1.38
Part II: Ambit of protection	1.20	Custom in treaty interpretation	1.38
Parallel proceedings	1.21	Limitations in custom as a source of law	1.44
Nationality and investment	1.22	The emergence of a common law of investment protection	1.48
Part III: Substantive rights	1.24	A balance between the rights of investors and host States	1.57
Chapter 7: Treatment of investors	1.25		
Chapter 8: Expropriation	1.30		
Chapter 9: Compensation	1.31		

Owing to the binding character of express promises and agreements, a wise and prudent Nation will carefully examine and maturely consider a treaty of commerce before concluding it, and will take care not to bind itself to anything contrary to its duties to itself and to others.

Vattel, *Le Droit des Gens* (1758) Book II Chapter VIII para 28¹

A. Objective

The investment treaty arbitration phenomenon

The great accumulation of capital in the money centers of the world, far in excess of the opportunities for home investment, has led to a great increase of international investment extending over the entire surface of the earth . . . All these forms of peaceful interpenetration among the nations of the earth naturally contribute their **1.01**

¹ M de Vattel, *Le Droit des Gens ou Principes de la Loi Naturelle* (1758) trans C Fenwick (1916) Vol III, 122.

instances of citizens justly or unjustly dissatisfied with the treatment they receive in foreign countries . . .²

- 1.02** These comments could be a description of the contemporary investment scene. In fact, they were delivered by Elihu Root, President of the American Society of International Law, in 1910. The issue of the appropriate means of achieving investment protection has not evaporated in the intervening century. But a development in legal technique in the latter part of the twentieth century has fundamentally altered the context in which disputes between foreign investors and host States fall to be resolved.
- 1.03** For Root, the only available solution for the foreigner aggrieved at the treatment which he had received in the host State was to seek diplomatic protection from his home State. Of course, the result of such protection might be an agreement of the host State to submit to the arbitration of the dispute by a claims commission. But the prior intervention of the home State was always required.
- 1.04** This did not of course mean that the protection of foreign investment was solely the province of customary international law, with all the uncertainty and dissension about basic principles with which this area of custom has been bedevilled. As the passage from Vattel cited at the outset of this work illustrates, States had been concluding treaties of commerce between themselves for centuries. Guarantees of investment treatment have long been a subject of specific agreement by treaty.³ However, treaty provision alone would not justify the claim made by a distinguished arbitration expert of the emergence of a field 'dramatically different from anything previously known in the international sphere'.⁴
- 1.05** Nor did the development in 1965 of a dedicated framework for the arbitration of investor-State disputes on its own provoke a revolutionary new form of jurisprudence. The Convention on the Settlement of Investment Disputes between States and Nationals of other States 1965 (the ICSID Convention)⁵ undoubtedly marks a considerable improvement in the procedures available for the settlement of such disputes. Its uniquely self-contained process avoids many of the pitfalls which may otherwise attend the pursuit of such a claim before a national court or commercial arbitration body. But the ICSID Convention found widespread consensus on procedure by deliberately eschewing any provisions on the substance of investment law, and enshrining the consent of the host State as the sole basis for the jurisdiction of the International Centre for Settlement of Investment

² E Root, 'The Basis of Protection to Citizens Residing Abroad' (1910) 4 AJIL 517, 518–519.

³ See eg the references cited in Chap 7 fns 69 & 70 below.

⁴ J Paulsson, 'Arbitration without Privity' (1995) 10 ICSID Rev-FILJ 232, 256.

⁵ 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 ('ICSID Convention').

Disputes (ICSID).⁶ Its early modest case-load was predominantly concerned with contract claims, where the parties had nominated the Centre in their arbitration clause.

Rather, the development in legal technique which has transformed the landscape of modern investment protection has been the emergence of widespread provision, within investment treaties, for the direct invocation of arbitration claims by investors themselves against the host State. Suggestively described as ‘arbitration without privity’,⁷ this new form of dispute resolution does not require the intervention of the home State in the prosecution of a claim. Nor does it require any prior contractual relationship between host State and investor. Previously, the concession contract, complete with arbitration agreement, had been the essential predicate for investor-State arbitrations. But successful recourse to arbitration on the basis of the standing and general consent of the host State to all nationals of the other contracting State requires no such privity of contract. The result is dispute resolution which is arbitration in procedural terms, but which in substance has been said to share more of the characteristics of the direct right of action before human rights courts.⁸ The State will always be the respondent, never a claimant. Its conduct vis-à-vis the investor falls to be judged according to general standards imposed by international law and not by reference to any national system of law. **1.06**

Since the potential of this form of dispute resolution was realized, the results have been dramatic. The first arbitration under a bilateral investment treaty (BIT) was registered in 1987.⁹ The growth in this form of dispute resolution in the two decades since then has been exponential, with the number of registered cases now totalling over 200.¹⁰ If this level of activity seems daunting enough, it is dwarfed by the scale of the underlying network of BITs, with over 2,500 such agreements having been concluded since the first such treaty in 1959.¹¹ **1.07**

Exposition of common principles of investment protection

Yet, this patchwork quilt of interlocking but separate bilateral treaties—each the product of its own negotiation—in fact betrays a surprising pattern of common features. No doubt part of the ready success of the investment treaty phenomenon has been the willingness of negotiators to confine their texts, for the most part, to **1.08**

⁶ *ibid* (Appendix 11 below) Art 25. ⁷ Paulsson (n 4 above).

⁸ G Burdeau, ‘Nouvelles Perspectives pour l’Arbitrage dans le Contentieux Economique intéressant l’Etat’ [1995] *Revue de l’Arbitrage* 3, 16.

⁹ *Asian Agricultural Products Ltd v Republic of Sri Lanka* (Award) 4 ICSID Rep 245 (ICSID, 1990, El-Kosheri P, Goldman & Asante).

¹⁰ UNCTAD, ‘IIA Monitor No 4 (2005) Latest Developments in Investor-State Dispute Settlement’ UNCTAD/WEB/ITE/IIT/2005/2.

¹¹ UNCTAD, ‘IIA Monitor No 3 (2006) The Entry into Force of Bilateral Investment Treaties (BITs)’ UNCTAD/WEB/ITE/IIA/2006/9.

a limited number of rather general guarantees, each expressed in conventional form. The form of the modern BIT may be traced to a series of initiatives shortly after World War II, which produced draft conventions.¹² In turn, State practice in this area has been characterized by an ongoing sharing and borrowing of concepts, which one of the authors has described elsewhere as ‘akin to a continuous dialogue within an open-plan office’.¹³ Moreover, the inclusion of most favoured nation (MFN) clauses in most BITs drives convergence in treaty drafting, as each State strives to ensure that the benefits which it is extending to the nationals of one State are consistent with obligations already undertaken in prior treaties—the very point made by Vattel, cited at the outset of this chapter. This means that it is possible to speak of a common lexicon of investment treaty law.

- 1.09** In earlier decades, these common features might simply have provided food for thought for the dedicated observer of treaty-making practice. However, the inclusion of provision for direct investor-State arbitration in so many modern investment treaties has ensured that the general treaty guarantees would be tested in the crucible of the arbitration process. The result, even after what may be regarded as simply the first wave of awards, is the emergence of a jurisprudence of investment treaty law, which interprets the key common provisions of the treaties, and applies them to the myriad of contexts in which relations between host State and foreign investor are played out.
- 1.10** To date, however, this jurisprudence has not been the subject of critical analysis within the compass of a monograph. For reasons which will be shortly explained, this is perhaps unsurprising. The *procedural framework* of investment arbitration has been the subject of elaborate attention by scholars and practitioners.¹⁴ But the *substantive meaning* of the central tenets of investment treaties lies, at times uncomfortably, between two different fields of legal scholarship.
- 1.11** To the arbitration specialist, the law applicable to the merits is a matter of secondary importance to the procedure, since it may vary from one case to the next, depending upon the expressed wishes of the parties and the discretion of the arbitrators.¹⁵ Even where the arbitration involves a sovereign State, public international law is only one potentially applicable source of law.¹⁶ However, the conventional

¹² H Abs & H Shawcross, ‘Draft Convention on Investments Abroad’ (1960) 9 J Pub L 115, 116 and OECD, *Draft Convention on the Protection of Foreign Property and Resolution of the Council of the OECD on the Draft Convention* (1967). On the historical evolution see further 7.38–7.59 below.

¹³ C McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ (2005) 54 ICLQ 279, 284.

¹⁴ See, notably, CH Schreuer, *The ICSID Convention: A Commentary* (2001); and also L Reed, J Paulsson & N Blackaby, *Guide to ICSID Arbitration* (2004).

¹⁵ For further discussion see: L Collins et al (eds), *Dicey, Morris and Collins on the Conflict of Laws* (14th edn, 2006) 712 (Chap 16 Rule 57(3)) and commentary at 730–734; and A Redfern & M Hunter, *Law and Practice of International Commercial Arbitration* (4th edn, 2004) Chap 2.

¹⁶ See ICSID Convention (n 5 above) Art 42; and commentary in Schreuer (n 14 above) 549–631.

approach to applicable law in commercial arbitration is displaced in the context of a claim founded upon an investment treaty. In that case, the treaty itself forms the basis for the parties' applicable rights and duties. The treaty is itself 'governed by international law'.¹⁷ As such it must be 'applied and interpreted against the background of the general principles of international law'.¹⁸

To the public international lawyer, however, the BIT sits at the margins of the main-stream. Being *lex specialis*, the traditional assumption is that its provisions cannot be said necessarily either to state, influence, or be derived from, principles of customary international law. As discussed below, recent practice may be calling that assumption into question. But, for the moment at least, the field receives only brief attention in the classic general texts.¹⁹ The considerable repository of scholarship on the treatment of aliens, which accumulated in the first half of the twentieth century,²⁰ casts an uncertain light on the modern treaties. To what extent does this old law, which evolved in an era of Western expansionism, and before the independence of much of the developing world, still hold sway in interpreting subsequent compacts? **1.12**

The post-war era has been marked by continuing and fundamental disagreement between States on the basic rules of international investment law, precluding any possibility of multilateral agreement. No doubt wisely, therefore, the International Law Commission has studiously avoided tackling the *primary* rules on the treatment of aliens in its work on State responsibility and diplomatic protection. In the process, it has made clear that its codification of the customary international law rules of diplomatic protection does not apply to BITs, to the extent of any inconsistency.²¹ Meanwhile, and by contrast, the process of conclusion of BITs has proceeded apace. As FA Mann wryly observed: 'The cold print of these treaties is a more reliable source of law than rhetorics in the United Nations.'²² It is these treaties, rather than the direct application of customary international law, which have dominated the investment field in modern times. **1.13**

Yet detailed studies of the substantive rights protected in investment treaties are not abundant. Writing in 1997, Sacerdoti observed that State practice on the content **1.14**

¹⁷ Vienna Convention on the Law of Treaties (signed 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 ('VCLT') Art 2(1)(a).

¹⁸ A McNair, *The Law of Treaties* (1961) 466.

¹⁹ See eg R Jennings & A Watts (eds), *Oppenheim's International Law* (9th edn, 1996) 925–926; M Shaw, *International Law* (5th edn, 2003) 747–749.

²⁰ Notably E Borchard, *The Diplomatic Protection of Citizens Abroad or The Law of International Claims* (1916); A Freeman, *The International Responsibility of States for Denial of Justice* (1938); Harvard Research Draft, 'Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners' (1929) 23 AJIL 133 (Special Supplement).

²¹ ILC (Dugard, Special Rapporteur), 'Draft Articles on Diplomatic Protection with Commentaries' in *Report of the International Law Commission on the Work of Its Fifty-Eighth Session* (1 May–9 June; 3 July–11 August 2006) UN Doc A/61/10, 89–90, Art 17.

²² FA Mann, 'British Treaties for the Promotion and Protection of Investments' (1981) 52 BYIL 241, 250 reprinted in FA Mann, *Further Studies in International Law* (1990) 234, 246.

of the applicable standards of treatment is rare outside the area of the deprivation of property.²³ Both this important study, and the invaluable 1995 work by Dolzer and Stevens on *Bilateral Investment Treaties*,²⁴ were written before the protections embodied in BITs had been tested to any significant degree in arbitration.²⁵ Sacerdoti's conclusion that 'major conflicts between host States and foreign investors tend to be rare',²⁶ undoubtedly justified by the evidence in 1997, has been dramatically disproved in the decade since then.

- 1.15** In the result, therefore, this book aims to address what has become a substantial gap in the literature. Its simple (but nevertheless demanding) aim is to provide an analysis of those common features of investment treaties which may form the basis of an arbitration claim, in the light of the reported jurisprudence. In so doing, it seeks to marry the twin influences in this field of both arbitration and public international law. It brings together guidance derived from the applicable general international law with the specific consideration of the concepts in arbitral awards in order, by close analysis, to elucidate the meaning and application of those key common terms.
- 1.16** Others have sought to describe the emergence of the modern investment treaties within the broad lines of development of international economic law in the twentieth century.²⁷ This book's objective is modest in comparison. Yet the very novelty and variety of the problems being constantly thrown up in investment arbitrations has made its ambit challenging enough.

B. Structure

- 1.17** In addressing this task, the authors have adopted a structure which seeks to address the main *substantive* principles of investment treaty law in an order in which they are likely to be addressed in arbitration. Accordingly, the work is divided into three parts: Overview; Ambit of Protection; and Substantive Rights. Each Part contains three chapters.

Part I: Overview

- 1.18** Following this Introduction, Chapter 2 sets out the basic features of investment treaties. It is designed to provide a route map to the book as a whole.

²³ G Sacerdoti, 'Bilateral Treaties and Multilateral Instruments on Investment Protection' (1997) 269 *Recueil des Cours* 269, 339.

²⁴ R Dolzer and M Stevens, *Bilateral Investment Treaties* (1995).

²⁵ Sacerdoti (n 23 above) 453. ²⁶ *ibid* 454.

²⁷ eg AF Lowenfeld, *International Economic Law* (2002); M Sornarajah, *The International Law on Foreign Investment* (2nd edn, 2004); P Muchlinski, *Multinational Enterprises and the Law* (1995).

Chapter 3: Dispute Settlement then looks in more detail at four fundamental issues in the settlement of investment disputes through arbitration—issues which may be said to frame the rest of the debate: **1.19**

- (1) *Dispute Settlement Provisions*. In the first place, Chapter 3 analyses the clauses in investment treaties which provide for investor-State arbitration. Although dispute resolution provisions are commonly found towards the conclusion of an investment treaty, it is these provisions, and the array of options which they provide to the investor, which provide the key to the rest of the process. They are therefore dealt with at the outset.
- (2) *Transparency*. A feature of investment arbitration, which distinguishes it from commercial arbitration, and which reflects its mixed public/private character, is the extent to which the process, and the resulting award, is exposed to public scrutiny. An important element of this is the extent to which non-parties may be heard in the process, whether as *amici curiae* or otherwise.
- (3) *Legal Nature of the Rights at Issue*. The rights contained in investment treaties have been rightly described as having a mixed or hybrid character,²⁸ entered into on the plane of public international law between States, but vindicated directly through claims brought by private investors. This section explores the relative emphasis to be put on the respective roles of the contracting State and the claimant investor in determining the basis of the rights asserted.
- (4) *Interpretation of BITs*. The final section examines the overall approach to be taken to the interpretation of investment treaties, and discusses in particular whether a doctrine of precedent is emerging in investment arbitration.

Part II: Ambit of protection

Part II is concerned with three major sets of issues related to the ambit of the protections afforded by investment treaties. In turn, these provisions contribute to the determination of whether the arbitral tribunal may, or should, assume jurisdiction to hear the claim. It is divided into three chapters: Parallel Proceedings; Nationality; and Investment. **1.20**

Parallel proceedings

Chapter 4 is concerned with a complex set of problems which have arisen in determining the relationship between parallel claims in investment arbitration, and other forms of dispute resolution, notably proceedings in host State courts. These issues typically arise at the preliminary jurisdictional phase of investment arbitration. The response of tribunals has been shaped by a combination of the specific treaty provisions dealing with conflicts of jurisdiction, and consideration of more **1.21**

²⁸ Z Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (2003) 74 BYIL 151.

general principles of *lis pendens* and *res judicata*. The chapter addresses four issues in particular:

- (1) *Breach of contract and breach of treaty*. What is the essential basis of the distinction between those claims which may properly be characterized as treaty claims, which are therefore amenable to arbitration under the provisions of an investment treaty, and claims which instead are founded upon contractual or other rights? This distinction provides the starting-point for the analysis of the problems in this area, since it provides a tool to delimit the respective provinces of investment treaty arbitration and host State litigation or commercial arbitration.
- (2) *Election, waiver, and 'fork in the road'*. May the parties resolve some of the conflict between jurisdictions by requiring the claimant to make a choice between available fora? The techniques which insist that the claimant *electa una via*, comprise both election (the suggestively entitled 'fork in the road'), as well as waiver upon the commencement of an arbitration proceeding.
- (3) *Internationalized contract claims and 'umbrella clauses'*. Conversely, to what extent can specific provisions in an investment treaty extend the scope of disputes amenable to investment arbitration to contract claims by way of an 'umbrella clause'?
- (4) *Parallel treaty arbitration*. Finally, what restrictions, if any, does international law impose upon parallel treaty arbitrations brought under different investment treaties, but concerning the same underlying dispute?

These issues are not only of fundamental practical importance to the successful invocation of an investment arbitration claim. They also shed light on the underlying role of treaty arbitration vis-à-vis other methods of resolving investment disputes.

Nationality and investment

- 1.22 Chapter 5: Nationality and Chapter 6: Investment address the two principal respects in which investment treaties define the ambit of their protection. Since these provisions are the critical, if not exclusive, determinant of the jurisdiction of an arbitral tribunal in an investment claim, they have not unnaturally attracted a considerable number of preliminary objections by States.
- 1.23 The authors have deliberately resisted the temptation, now fashionable in some awards,²⁹ to impose an *a priori* distinction between jurisdiction *ratione personae* and jurisdiction *ratione materiae*. For many purposes, the treaty provisions on nationality may be said to deal with arbitral jurisdiction over persons (*ratione*

²⁹ eg *Impregilo SpA v Islamic Republic of Pakistan* (Jurisdiction) ICSID Case No ARB/03/3 (ICSID, 2005, Guillaume P, Cremades & Landau).

personae); while the treaty provisions on investment prescribe the extent of arbitral jurisdiction over subject-matter (*ratione materiae*). But the treaties themselves proceed simply on the basis of nationality and investment, and the dividing line between persons and things is not exact. Indeed, the definition of ‘investment’ may well extend the reach of a treaty’s protection to many classes of persons (such as minority shareholders) who would have no basis for a claim under customary international law. The temporal application of investment treaties (*ratione temporis*) is dealt with as part of the consideration of covered investments.

Part III: Substantive rights

The third Part of the book deals with the core substantive rights accorded to investors under an investment treaty. It is divided into three chapters: Treatment of Investors, Expropriation, and Compensation. **1.24**

Chapter 7: Treatment of investors

In general, investment treaties seek to protect investors by assuring them of two types of treatment. The standards of fair and equitable treatment and full protection and security have been described as ‘non-contingent’ in the sense that the protections which they extend are absolute.³⁰ They are not dependent upon the extent of protection afforded to others. By contrast, the provisions for national treatment and MFN treatment and the guarantee of non-discrimination are contingent standards. The extent of the protection which they afford is dependent upon that which the host State metes out to others, who stand in the requisite legal relationship to the protected investor. **1.25**

The concepts of national treatment and MFN treatment have long been widely used in international economic law. Such protections are only obtained by way of express provision by treaty. The non-contingent standards, on the other hand, while employing language which is distinctive to the treaty context, perform in substance a task which has long been an important part of the minimum standard of treatment of aliens expected by customary international law. **1.26**

Non-contingent standards The assurance of ‘fair and equitable treatment’ provides the most basic protection for foreign investment. Yet the expression has proved stubbornly resistant to precise definition. This section therefore puts the evolution of the standard in historical context, in order to provide a framework for analysis of its present application by arbitral tribunals in relation to: **1.27**

- (1) *Denial of justice*, or the breach of the standard in the course of the host State’s judicial process; and,

³⁰ H Walker Jr, ‘Modern Treaties of Friendship, Commerce and Navigation’ (1957–1958) 42 Minn LR 805, 810–811.

(2) *Review of administrative action*, or the breach of the standard in the investor's treatment by the executive.

1.28 As will be seen, in both contexts, the standard is concerned with the process of decision-making in the host State, rather than with the prescription of substantive outcomes. Analysis of arbitral awards enables a distillation of the factors which are likely to indicate that the standard has been breached, and a comparison with those factors which have been successfully relied upon by host States to show that the standard has been met.

1.29 **Contingent standards** The discussion of the contingent standards draws together the common threads of national treatment and MFN treatment with the more general right of non-discrimination. It does so by examining the techniques for the identification of a difference in treatment, and then considering whether any such difference in fact breaches the standard.

Chapter 8: Expropriation

1.30 By contrast with the rights discussed in Chapter 7, the protection of property rights in investments from expropriation has long been the subject of close consideration by arbitral tribunals. However, the factual matrix in which the modern expropriation claim arises may well be very different to the context of outright nationalization of foreign property, which characterized many of the earlier causes célèbres. Giving her lectures at The Hague Academy of International Law in 1982 on 'The Taking of Property by the State',³¹ Rosalyn Higgins commented on the relative paucity of literature dealing with the concept of 'indirect expropriation', which addressed many of the more difficult questions in which the law of State takings had to be applied in modern times.³² The observation proved prescient. Many of the modern arbitral awards have been concerned with the determination of the appropriate boundary between two potentially conflicting values: a legitimate sphere for State regulation in the pursuit of public goods on the one hand (even if it may result in a loss of economic benefits to those subject to the regulation); and the protection of private property from State interference on the other.

Chapter 9: Compensation

1.31 The final chapter is concerned with the approach to be taken to the determination of the appropriate level of compensation for breach of treaty rights. The law on this topic is an amalgam of the provisions of general international law with the specific provisions of the treaties themselves. Compensation is a potential form of reparation for any internationally wrongful act of a State.³³ This part of the work

³¹ (1982) 176 *Recueil des Cours* 259.

³² *ibid* 322.

³³ ILC (J Crawford, Special Rapporteur), 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' in *Report of the International Law Commission*

is therefore closely linked to the international law of State responsibility. But the specific provisions of investment treaties, as *lex specialis*, have resolved a number of contentious issues as to the appropriate approach to be taken to the calculation of the amount of compensation. Nevertheless, the detailed principles to be applied when determining the amount of compensation, both for expropriation claims, as for other claims for breach of treaty, have continued to raise difficulties for arbitral tribunals. This chapter discusses the range of options adopted in actual practice by tribunals, dealing in addition with interest and costs.

C. Approach

With this syllabus in mind, it is now possible to make three points about the overall approach which the authors have sought to adopt throughout the work. **1.32**

The principles of investment treaty law

The overall purpose of the book is to distil the principles which apply in the application of the general standards found in investment treaties. This is not a matter of mere description. On the contrary, it is the authors' view that what has been most needed in this area is to subject the awards to critical analysis. Where possible, the authors have also sought to assist the reader by providing a principled approach to problem-solving, setting out guidance by way of specific conclusions. **1.33**

Awards

The authors consider that this critical analysis is best fostered through a selective approach to reference to both awards and to treaties. In contrast to commercial arbitration, where the reporting of awards is often restricted or fragmentary, the practice in investment arbitration, described in more detail in Chapter 3, has come to be that the majority of awards are made public. They are widely available in full text, both in published law reports, such as *ICSID Reports*, *ICSID Review—Foreign Investment Law Journal* and *International Legal Materials*, as well as in electronic form, in particular on the ICSID website.³⁴ As the volume of awards has continued to grow, it has become more and more important to be discriminating. This work does not purport to be an exhaustive digest. Rather, it aims to select and discuss in depth the significant investment arbitration awards in terms of doctrinal development or the exposition of original perspectives. **1.34**

of the Work of Its Fifty-Third Session (23 April–1 June; 2 July–10 August 2001) UN Doc A/56/10, 243–263.

³⁴ <<http://www.worldbank.org/icsid>>. Also useful are <<http://ita.law.uvic.ca>> and <<http://www.naftaclaims.com>>.

Treaties

- 1.35** How should a work on the principles of investment treaties cope with the sheer multiplicity of texts? With over 2,500 agreements in force, an attempt to be encyclopedic would quickly bury the reader under the weight of detail, and obscure the lines of principle. In addition to the official treaty series (which the authors have cited wherever possible), investment treaties have also been usefully collected by the United Nations Commission on Trade and Development (UNCTAD), both in a multi-volume compendium and in electronic form.³⁵ Of course, any process of interpretation of the rights arising from an investment treaty must start from the specific provisions of the treaty in force between the relevant States. However, the striking degree of commonality of language between treaties does facilitate a general work of this kind. This is particularly so as many States, capital-importing as well as capital-exporting, have adopted model form BITs. These are of more general significance, since they are a statement of the provisions which that State considers acceptable in its international relations.
- 1.36** Nevertheless, a choice has had to be made for the purpose of this volume. In the result, the authors have selected the model bilateral investment treaties of Sri Lanka (as a representative example of a capital-importing State), the United Kingdom, France, Germany, the Netherlands, and the United States. Each of these is reproduced in full in the Appendices, and the clauses relevant to the particular topic are analysed chapter by chapter. These prototypes have also had considerable influence on the treaty-making practice of other States. The United States 2004 model BIT³⁶ is of particular current significance, and reflects the formulation of investment protection provisions in new-model free trade agreements.³⁷ Other bilateral treaties are referred to in the text where they offer particular solutions which are germane to the topic or award under discussion.
- 1.37** In addition to the bilateral treaties, there are two important multilateral instruments in this field: Chapter XI of the North American Free Trade Agreement (NAFTA)³⁸ and the Energy Charter Treaty (ECT),³⁹ whose provisions are reproduced in the Appendix and are analysed in detail in the text. Both of these treaties have a restricted scope: NAFTA is restricted *ratione personae* to its three contracting States (Canada, Mexico, and the United States). The ECT is restricted *ratione materiae* to the energy sector. Further, in important respects they adopt legal solutions which differ from the bilateral treaties. But both treaties represent significant

³⁵ <http://www.unctadxi.org/templates/Startpage____718.aspx>.

³⁶ 2004 US model BIT (Appendix 6 below).

³⁷ See eg United States-Singapore Free Trade Agreement (signed 6 May 2003) Chap 15.

³⁸ North American Free Trade Agreement (adopted 17 December 1992, entered into force 1 January 1994) CTS 1994 No 2, (1993) 32 ILM 612 ('NAFTA') (Chapter 11, Appendix 1 below).

³⁹ Energy Charter Treaty (signed 17 December 1994, entered into force 16 April 1998) 2080 UNTS 100 ('ECT') (Part III, Appendix 2 below).

State practice in the investment field, and both have given rise to a number of significant arbitration awards. Reference has also been made to the ASEAN Agreement for the Promotion and Protection of Investments of 15 December 1987, as another important regional investment treaty providing for investor-State arbitration.⁴⁰

Relevance of general public international law

Custom in treaty interpretation

The book starts from the proposition that investment treaties are not self-contained regimes.⁴¹ The meaning of their operative terms must therefore be informed by reference to the ‘relevant rules of international law applicable in the relations between the parties’.⁴² On one level, this requirement states little more than a truism—no treaty can exist in isolation from general international law.⁴³ But it is nevertheless indispensable in reminding the treaty interpreter of the potential guidance in interpretation which may be obtained beyond the four corners of the treaty. This may be expressed in terms of a presumption with both positive and negative aspects:

- (1) *negatively* that, in entering into treaty obligations, the parties intend not to act inconsistently with generally recognized principles of international law or with previous treaty obligations towards third States;⁴⁴ and
- (2) *positively* that the parties are taken ‘to refer to general principles of international law for all questions which [the treaty] does not itself resolve in express terms and in a different way’.⁴⁵

This approach was specifically approved as part of a general approach to interpretation of investment treaties by the Tribunal in the first ICSID treaty arbitration: *Asian Agricultural Products Ltd v Republic of Sri Lanka*.⁴⁶ Indeed, in this context, there may be particularly compelling reasons to refer to general international law in interpretation. In the first place, there is evidence that the treaty framers often consciously sought not to go beyond obligations which were thought to reflect the

⁴⁰ (1988) 27 ILM 612 (Appendix 3 below).

⁴¹ See generally ILC, ‘Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission’ (Koskenniemi C) UN Doc A/CN.4/L.682, 4 April 2006; UN Doc A/CN.4/L.702, 18 July 2006; C McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ (2005) 54 ICLQ 279.

⁴² VCLT (n 17 above) Art 31(3)(c).
⁴³ See the comments of R Higgins, ‘A Babel of Judicial Voices? Ruminations from the Bench’ (2006) 55 ICLQ 791.

⁴⁴ *Case Concerning Right of Passage over Indian Territory (Portugal v India)* (Preliminary Objections) [1957] ICJ Rep 125, 142; R Jennings & A Watts (eds), *Oppenheim’s International Law* (9th edn, 1996) 1275.

⁴⁵ *Georges Pinson Case* (1927–1928) AD Case no 292, 426 per Verzijl P.

⁴⁶ *Asian Agricultural Products Ltd v Republic of Sri Lanka* (Award) (ICSID, 1990, El-Kosheri P, Goldman & Asante) 4 ICSID Rep 245, 265–266, Rule (D).

current state of international law.⁴⁷ Their purpose was to enhance the mechanisms for the protection of the rights, rather than to extend the rights themselves.

- 1.40** In some treaties, this is made express. Thus, for example, the French prototype guarantees: ‘traitement juste et équitable, conformément aux principes du Droit international’.⁴⁸ The 2004 US model BIT goes even further, enshrining ‘the customary international law minimum standard of treatment of aliens’,⁴⁹ and recites a shared understanding of the parties that the expropriation and compensation clause ‘is intended to reflect customary international law’.⁵⁰ For good measure, the US model even offers a definition of customary international law as resulting from ‘a general and consistent practice of States that they follow from a sense of legal obligation’.⁵¹ Even the most determined classicist could not object.
- 1.41** Article 1105 of NAFTA requires that: ‘Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.’ Controversy among arbitral tribunals as to whether that form of words left room for a more expansive reading of ‘fair and equitable treatment’⁵² was settled by the NAFTA Free Trade Commission, which issued an Interpretation of the Article providing that it ‘prescribes the customary international law minimum standard of treatment of aliens’ and not more.⁵³
- 1.42** But, even where the matter is not dealt with expressly, there is much room for reference to custom. In the case of expropriation, for example, the definition commonly found in investment treaties has been so patently adopted from a formulation widely employed in customary international law that it invites reference to the general authorities on its meaning. Similarly, the standard of full protection and security is on all fours with that expected in customary international law.⁵⁴ In the case of compensation, the concept fits within a larger framework of reparation in the law of State responsibility.
- 1.43** Moreover, practical considerations may impel the interpreter to seek guidance from general international law. Investment treaties typically enshrine guarantees of investor treatment in general, open-textured language. As discussed further below,⁵⁵ the standard extrinsic aids to treaty interpretation may yield only limited guidance—there is rarely much in the way of *travaux préparatoires*. The

⁴⁷ See eg E Denza & S Brooks ‘Investment Protection Treaties: United Kingdom Experience’ (1987) 36 ICLQ 908, 912.

⁴⁸ France model BIT (Appendix 10 below) Art 4.

⁴⁹ US model BIT (Appendix 6 below) Art 5.

⁵⁰ *ibid* Annex B.

⁵¹ *ibid* Annex A.

⁵² *Pope & Talbot Inc v Government of Canada* (Award on the Merits of Phase 2) 7 ICSID Rep 43 (NAFTA/UNICTRAL, 2001, Dervaird P, Greenberg & Belman).

⁵³ NAFTA Free Trade Commission (FTC), Interpretation of NAFTA Chapter 11 (31 July 2001) 6 ICSID Rep 567, 568. The full text is set out at 7.26 below.

⁵⁴ *Asian Agricultural Products Ltd v Republic of Sri Lanka* (Award) 4 ICSID Rep 245 (ICSID, 1990, El-Koshery P, Goldman & Asante).

⁵⁵ See 3.66–3.77 and 7.64–7.72 below.

bilateral treaties normally lack any formal mechanism for the contracting States to agree subsequently on troublesome matters of interpretation.⁵⁶ In contrast, then, to a complex multilateral treaty in other spheres of international law, the bilateral investment treaties appear more than usually dependant upon their wider context.

Limitations in custom as a source of law

Yet the relationship between investment treaties and general international law remains deeply problematic for at least three reasons. **1.44**

In the first place, it is evident that on many issues, States have entered into investment treaties precisely in order to remedy perceived gaps or limitations in the protections afforded by customary international law in the field of the treatment of aliens. The law of diplomatic protection imposes a number of strict pre-conditions upon the exercise of an international claim. Conditions such as the requirement to exhaust local remedies, or the strict rule on nationality of claims, make good sense in the context of a remedy of last resort between sovereign States. But, as will be seen, it was part of the very object and purpose of investment treaties, with their provision for direct investor-State arbitration, to remedy the perceived shortcomings in diplomatic protection. This objective would be fundamentally undermined if restrictions of this kind were to be re-imported into investment treaties by the back-door of interpretation—a point developed in Chapters 5 and 7, for example, in relation to the *Loewen* award.⁵⁷ In any event, many of the rights found in investment treaties require the express agreement of States. National treatment and MFN treatment, for example, must always be creatures of convention, not custom. The same is true for dispute settlement provisions, and for many of the more detailed clauses summarized in Chapter 2. In short, where the treaty itself resolves the matter in a different way, it must prevail as *lex specialis*. **1.45**

Secondly, the invocation of customary international law is apt to neglect the essentially contested nature of so many of the rights in customary international law. Even in the inter-war years, when the development of this branch of the law reached its zenith in terms of both regular application and codification, the very existence of many of the rights was denied by many key capital-importing States.⁵⁸ The fate, since World War II, of any attempt to frame a multilateral treaty on investment; the development in the General Assembly of the doctrine **1.46**

⁵⁶ cf the procedure of the Free Trade Commission under NAFTA Art 2001(2), referred to at 7.26 below.

⁵⁷ *Loewen Group Inc & anor v United States of America* (Award) 7 ICSID Rep 421 (NAFTA/ICSID (AF), 2003, Mason P, Mikva & Mustill) discussed at 5.64–5.71 and 7.87–7.98 below.

⁵⁸ eg Montevideo Convention on the Rights and Duties of States (signed 26 December 1933) 165 LNTS 19 Art 9; E Borchard, ‘The “Minimum Standard” of the Treatment of Aliens’ (1940) 38 Mich LR 445.

of permanent sovereignty over natural resources; the early exclusion by the International Law Commission of primary rules on the treatment of aliens from its codification of the law of State responsibility and diplomatic protection; the paucity of post-war jurisprudence applying these customary rights—all of these speak volumes as to the difficulties of stating the rules of custom in this field with any confidence. Of course, one purpose of the proliferation of treaties has been to remedy this uncertainty. The investor, who has the benefit of an applicable investment treaty, at least need not ask whether the right exists. But the wide extent of treaty protections may also be said to limit the possibility of the further development of custom outside the treaty context. In the result, one is still left with a treaty provision of an open-textured character which requires interpretation.

- 1.47** Thirdly, the overwhelming majority of State practice in this field in the last few decades has been through the medium of the very treaties which are the subject of this book. Is all of this to be ignored in treaty interpretation on the grounds that ‘the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, *inter alia*, differences in the respective contexts, objects and purposes, subsequent practice of parties and *travaux préparatoires*’?⁵⁹ Undoubtedly, the bilateral character of most investment treaties precludes the adoption of binding rules of general application across the whole field. But the practice of international arbitrators, documented in this book, demonstrates an extensive exchange of ideas on the interpretation of similar provisions.

The emergence of a common law of investment protection

- 1.48** What explanation is to be given to this phenomenon? In paras 3.83 to 3.103 below, it is submitted that, while no *de jure* doctrine of precedent exists in investment arbitration, a *de facto* doctrine has in fact been building for some time. This was well put by the Tribunal in *AES v Argentina*:

Each tribunal remains sovereign and may retain, as it is confirmed by ICSID practice, a different solution for resolving the same problem; but decisions on jurisdiction dealing with the same or very similar issues may at least indicate some lines of reasoning of real interest; this Tribunal may consider them in order to compare its own position with those already adopted by its predecessors and, if it shares the views already expressed by one or more of these tribunals on a specific point of law, it is free to adopt the same solution . . . precedents may also be rightly considered, at least as a matter of comparison and, if so considered by the Tribunal, of inspiration.⁶⁰

⁵⁹ *The MOX Plant Case (Ireland v United Kingdom)* (ITLOS, Provisional Measures, Order of 3 December 2001) (2002) 41 ILM 405, 413.

⁶⁰ *AES Corp v Argentine Republic* (Jurisdiction) ICSID Case No ARB/02/17 (ICSID, 2005, Dupuy P, Böckstiegel & Janeiro) paras 30–31.

The extensive exchange of ideas between tribunals has been facilitated by the wide publication of awards, as well as by scholarly journals⁶¹ and committees.⁶² Further, it is no accident that this new jurisprudence has developed in the era of the internet, which has rapidly built a global community of scholars, practitioners, and arbitrators exchanging ideas about current developments in the field as they arise.⁶³ **1.49**

Does this ongoing conversation between arbitrators, in which findings arrived at in prior awards on particular provisions are cited and relied upon as authorities in the interpretation of different investment treaties, have any broader significance for the development of international law in the field? It is the thesis of this book that what is emerging is a common law of investment protection, with a substantially shared understanding of its general tenets. This still depends for the most part on the existence of a treaty forming the basis for the enforceable rights. It will always yield to particular provisions of a treaty which diverge from the general rule, or to other contrary indications resulting from the application of the rules of treaty interpretation. But the differences between treaties, and indeed between treaty and the substantive rights in custom, may be less than the common elements. As one recent award put it, ‘the difference between the Treaty standard . . . and the customary minimum standard, when applied to the specific facts of a case, may well be more apparent than real’.⁶⁴ **1.50**

This process may share more with the way in which ‘general principles of law common to civilized nations’ are used as a source of law in international law.⁶⁵ Chapter 4 explores the way in which the general principles of *res judicata* and *lis pendens*, common to civilized nations, may be applied in investment arbitration, where the parallel claims meet the conditions for the application of the doctrines. In Chapter 7 it is submitted that the content of the principle of ‘fair and equitable treatment’ is to be derived by reference to such general principles, and reference is also made to general principles as a basis for the approach to causation in determining damages in Chapter 9.⁶⁶ **1.51**

⁶¹ Notably ICSID Review—Foreign Investment Law Journal (ICSID Rev-FILJ), and Journal of World Investment and Trade.

⁶² Notably, the International Law Association Committee on International Law on Foreign Investment (est 2003), and the British Institute of International & Comparative Law Investment Treaty Forum (est 2004), as to which see: F Ortino, A Sheppard & H Warner, *Investment Treaty Law: Current Issues Volume 1* (2006).

⁶³ Notably the OGEMID Discussion List established by the Centre for Energy Petroleum and Mineral Law and Policy at the University of Dundee, together with its online subscription service <<http://www.transnational-dispute-management.com>>.

⁶⁴ *Saluka Investments BV (The Netherlands) v Czech Republic* (Partial Award) (UNCITRAL, 2006, Watts C, Fortier & Behrens) para 291.

⁶⁵ Statute of the International Court of Justice (26 June 1945 annexed to the Charter of the United Nations) Art 38(1)(c).

⁶⁶ See especially 7.176–7.188 and 9.86–9.94 below.

1.52 The point here is a related, but broader one. It is that the very iterative process of the formulation and conclusion of investment treaties, and the vindication of the rights contained in those treaties in arbitration, is producing a set of general international principles about the meaning of the common substantive clauses, and indeed the larger operation of the system of investment arbitration.

1.53 To what extent can it be said that this common treaty practice itself contributes to the development of customary international law? FA Mann gave an initial answer to this question in 1981. While accepting the general point made by the International Court of Justice in the *North Sea Continental Shelf Cases*,⁶⁷ that it is difficult to deduce a rule of international law from a treaty, he continued that the significance of that decision should not be overrated, at least in the context of investment treaties:

There is, in the first place, the very large number of treaties the scope of which is increased by the operation of the most-favoured-nation clause. There is, secondly, the fact that many States which have purported to reject the traditional conceptions and standards included in these treaties have accepted them, when (if the colloquial phrase may be permitted) it came to the crunch. There is, thirdly, the most important fact that these treaties establish and accept and thus enlarge the force of traditional conceptions. Is it possible for a State to reject the rule according to which alien property may be expropriated only on certain terms long believed to be required by customary international law, yet to accept it for the purpose of these treaties? The paramount duty of States imposed by international law is to observe and act in accordance with the requirements of good faith. From this point of view it follows that, where these treaties express a duty which customary international law imposes or is widely believed to impose, they give very strong support to the existence of such a duty and preclude the Contracting States from denying its existence.⁶⁸

1.54 This last point merits careful consideration, especially in the light of the practice adopted in many States of promulgating model investment treaties, which indicate the standards which those States find acceptable; and the adoption, express or implied, in many such treaties of standards which are based upon customary international law, especially in relation to the non-contingent treatment standards and expropriation. The result is a convergence, on these issues, between treaty practice and custom, in which the modern understanding of the content of the customary right is being elaborated primarily through the treaty jurisprudence. As the Tribunal put it in *CMS v Argentina*, ‘the fact is that *lex specialis* in this respect is so prevalent that it can now be considered the general rule’.⁶⁹

1.55 This process of cross-fertilization in the development of the customary standards through the treaty jurisprudence saves general international law from being cast

⁶⁷ *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands)* [1969] ICJ Rep 3.

⁶⁸ FA Mann, *Further Studies in International Law* (n 22 above) 245.

⁶⁹ *CMS Gas Transmission Co v Republic of Argentina (Jurisdiction)* 7 ICSID Rep 492, 504 (ICSID, 2003, Orrego Vicuña P, Lalonde & Rezek).

in aspic at some earlier point in time; and saves treaty tribunals from isolation and inconsistency. It reflects the fact that the general standards are of their nature evolutionary.⁷⁰ The Tribunal in *Mondev*⁷¹ described this process in the following way. It was responding to a submission advanced by Canada that the customary international law standard incorporated into Article 1105 of NAFTA was to be determined by reference to Claims Commission awards of the inter-war years, in particular the *Neer* case.⁷² It held:

Secondly, *Neer* and like arbitral awards were decided in the 1920s, when the status of the individual in international law, and the international protection of foreign investments, were far less developed than they have since come to be . . .

Thirdly, the vast number of bilateral and regional investment treaties . . . almost uniformly provide for fair and equitable treatment of foreign investments, and largely provide for full security and protection of investments. Investment treaties run between North and South, and East and West, and between States in these spheres *inter se*. On a remarkably widespread basis, States have repeatedly obliged themselves to accord foreign investment such treatment. In the Tribunal's view, such a body of concordant practice will necessarily have influenced the content of rules governing the treatment of foreign investment in current international law.⁷³

It is this 'body of concordant practice' which serves as the central, and defining, feature of modern investment law, and which may in the end provide the most satisfactory explanation for the extensive application of precedent in the recent treaty jurisprudence. **1.56**

A balance between the rights of investors and host States

The final element of the overall approach has been a conscious effort to discern an appropriate balance between protection of the rights of foreign investors on the one hand, and recognition of the legitimate sphere of operation of the host State on the other. After all, host States have a responsibility to govern in the interests of all of those within their jurisdiction, and to promote many other public objectives as well as investment. As the editors of *Oppenheim* put it: 'The requirements of international law in this field . . . represent an attempt at accommodation between the conflicting interests involved.'⁷⁴ The need to chart such a balance was recognized by the Tribunal in *CMS v Argentina*, which held: 'The right of the host State to adopt its economic policies together with the rights of investors under a system **1.57**

⁷⁰ McLachlan (n 41 above) 317; ILC (n 41 above) 16–17; *Case concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7, 67–68.

⁷¹ *Mondev International Ltd v United States of America* (Award) 6 ICSID Rep 181 (NAFTA/ICSID(AF), 2002, Stephen P, Crawford & Schwebel).

⁷² *LFH Neer & Pauline Neer (USA) v United Mexican States* (1926) IV RIAA 60.

⁷³ *Mondev* (n 71 above) 222.

⁷⁴ R Jennings & A Watts (eds), *Oppenheim's International Law* (9th edn, 1996) 933.

of guarantees and protection are at the very heart of this difficult balance, a balance which the [ICSID] Convention was careful to preserve'.⁷⁵

- 1.58** Investment arbitration wears a very public face. A number of recent arbitrations have aroused considerable controversy amid claims that the process gives insufficient weight to other social goods, or to social and economic rights, or that it infringes national sovereignty. These objections have not been limited to traditional capital-importing States. On the contrary, arbitration under NAFTA has provoked considerable public dissent within North America.⁷⁶ Some have concluded that the existing law is 'shockingly unsuited to the task of balancing private rights against public goods'.⁷⁷ The International Institute for Sustainable Development (IISD) has developed a wholly new Model International Agreement on Investment for Sustainable Development.⁷⁸ This seeks to balance the rights of investors and duties of host States, with concomitant duties of investors and of their home States. The approach is innovative and constructive. It acknowledges the value of promoting foreign investment, but seeks to place it within the broader legal framework of host and home State regulation, as well as other international law obligations which undoubtedly apply. To date, however, there is little evidence of the direct application of this model in the investment treaty-making practice of States. Nevertheless, it has been rightly observed that: 'If investment arbitration is to fulfill its promise, however, some mechanism must be found to promote greater sensitivity to vital host state interests.'⁷⁹
- 1.59** There is some recent evidence that these concerns are impacting on drafting practice. Notably, the 2004 US model BIT⁸⁰ incorporates numerous innovations designed to reflect the public interests of States, and to achieve its investment objectives 'in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights'.⁸¹ There are specific articles which are designed to ensure that investment measures will not conflict with environmental and labour standards.⁸² The model treaty's extended definition of expropriation expressly provides: 'Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations'.⁸³

⁷⁵ CMS (n 69 above) 499.

⁷⁶ GA Alvarez & WW Park, 'The New Face of Investment Arbitration: NAFTA Chapter 11' (2003) 28 Yale JIL 365.

⁷⁷ H Mann, *International Institute for Sustainable Development and World Wildlife Fund, 'Private Rights, Public Problems: A Guide to NAFTA's Controversial Chapter on Investor Rights'* (2001) 46.

⁷⁸ H Mann, K von Moltke, L Peterson & A Cosby, 'IISD Model International Agreement on Investment for Sustainable Development' (2005) <<http://www.iisd.org>> accessed 20 September 2006.

⁷⁹ Alvarez & Park (n 76 above) 399. ⁸⁰ 2004 US model BIT (Appendix 6 below).

⁸¹ *ibid* Preamble. ⁸² *ibid* Arts 12–13.

⁸³ *ibid* Annex B, discussed at 8.36 below.

Both NAFTA and the ECT similarly make provision for environmental and other measures. Article 1114 of NAFTA provides that nothing in its investment chapter is to prevent a State party from adopting environmental measures and that investment should not be encouraged by relaxing domestic health, safety, or environmental measures. Article 19 of the ECT commits State parties to taking account of environmental considerations in the formulation of energy policy.⁸⁴ **1.60**

Where, however, disputes arise under treaties already in force, these issues will have to be worked out by arbitrators in the course of applying the general, unqualified treaty language. In so doing, arbitrators must still adopt a balanced approach between the rights of investors, and those of host States. As was rightly observed in one recent important award: **1.61**

The protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties' economic relations. That in turn calls for a balanced approach to the interpretation of the Treaty's substantive provisions for the protection of investments, since an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties' mutual economic relations.⁸⁵

On the present state of the law, it cannot be said that this dictum has always been observed. Where the authors have found instances of the balance having swung too far against States, or where tribunals appear to have accorded more weight to the interests of powerful States than to developing States, they have said so. However, a close analysis of the jurisprudence developed through the recent awards demonstrates that the general concepts do in fact contain within them considerable flexibility. This enables arbitrators to balance the public and the private interest, and to ensure that the treaty protections retain their role as a safety-net, leaving a considerable margin of appreciation for the exercise of State sovereignty. Indeed, the open-textured nature of tests such as fairness and equity invites such an exercise. This work seeks to facilitate such a balancing exercise, by isolating the factors which tribunals have regarded as significant in deciding which side of the line particular conduct may fall. **1.62**

⁸⁴ See further T Wälde & A Kolo, 'Environmental Regulation, Investment Protection and "Regulatory Taking" in International Law' (2001) 50 ICLQ 811.

⁸⁵ *Saluka Investments BV (The Netherlands) v Czech Republic* (Partial Award) (UNCITRAL, 2006, Watts C, Fortier & Behrens) para 300.