Human Rights Law and BIT Protection: Areas of Convergence

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It has become fashionable, in some quarters, to attack the present worldwide system of investment protection as represented by the many thousands of bilateral investment treaties ("BITs") existing worldwide. Critics of these BITs – who are often similarly hostile to investor-state arbitration – sometimes claim that a host state's recognition of the rights of foreign investors is prejudicial to human rights in the host state.[1]

For the most part, this is a policy debate – as evident, for example, from the recent debate within the U.S. concerning whether the US Model BIT needs to be amended to incorporate environmental or labor concerns.[2] This debate may well continue, as will the separate discussion over "corporate responsibility" for human rights currently being overseen by United Nations Special Representative John Ruggie.[3]

From a legal perspective, some of these criticisms are surprising. At their core, BITs contain a series of obligations owed by the host state towards investors, including the obligation to compensate for expropriation, to treat investors fairly, to afford them physical security and (in many cases) to refrain from discriminating against them on grounds of nationality. To date, no international court or tribunal has held that this bundle of rights should "trump" the human right of its own citizens. On the contrary, a recent ICSID tribunal held that "[the host state's] human rights obligations and its

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[1] *See, e.g.*, "Investment Treaty Arbitration is 'Unfair', Say Academics", Global Arb. Rev., Sept 10, 2010 (reporting that a group of law professors had called for abandonment of BITs based on "moral" concerns). These critics have their own critics. James Fry has observed that these critics of human rights decisions are "[s]urprisingly ... light on tangible examples, instead relying on hypothetical situations and weak counterfactual reasoning." James Fry, "International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity," 18 Duke J. Comp. & Int'l L. 77, 79 (2007-08).

[2] *See* Report of the Subcommittee on Investment of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty, *available at* http://www.state.gov/e/eeb/rls/othr/2009/131118.htm.

[3] Professor Ruggie's mandate includes "identifying and clarifying standards of corporate responsibility and accountability with regard to human rights." *See* http://www.un.org/News/Press/docs/2005/sga934.doc.htm.

investment treaty obligations are not inconsistent, contradictory, or mutually exclusive," and "[it] must respect both of them."[4]

The suggestion of an "inconsistency" between these strands of law is also surprising when one takes into account their common lineage in the customary international law related to treatment of aliens. Indeed, many provisions of human rights treaties expressly provide for the protection of property, in terms similar to the customary international law standard. This convergence, in turn, means that case law from one area of law is potentially useful in the other – indeed, in some cases, it is interchangeable.

I. A COMMON HERITAGE

A. *THE DEVELOPMENT OF MODERN HUMAN RIGHTS PROTECTIONS*

The treatment of foreign nationals (aliens) has long been a concern of international law. As Brownlie observes, "[t]he exercise of diplomatic protection in respect to nationals visiting or resident in foreign countries has subsisted, with some changes of terminology and concept, since the Middle Ages."[5] In the nineteenth and early twentieth centuries, such claims were sometimes submitted to "Mixed Commissions" or "Claims Commissions," a form of arbitral procedure between the two states.[6] As discussed below, the law concerning treatment of aliens has been highly influential in modern BIT practice.

At the same time, international law lacked a well-developed system for the protection of non-aliens (citizens) by their own governments. As Todd Weiler once drily commented, "[historically, states were free to treat their own citizens as poorly as they desired so long as a 'minimum standard of treatment' was provided to aliens (*i.e.*, foreign investors)."[7] Indeed, the U.S.-Mexico Claims Commission recommended in 1926 that:

> [I]t not infrequently happens that under the rules of international law applied to controversies of an international aspect a nation is required to accord to aliens broader and more liberal treatment than it accords to its own citizens under its municipal laws. ... The citizens of a nation may enjoy many rights which are withheld from aliens, and, conversely, under international law aliens may enjoy rights and remedies which the nation does not accord to its own citizens.[8]

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[4] *Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentina*, Case No. ARB/03/17, Decision on Liability ¶ 240 (ICSID July 30, 2010). In that case, the tribunal found Argentina liable for expropriating an investor's rights in a water concession, while also acknowledging that Argentina owed a duty under international human rights law to ensure its citizens had adequate access to water. *See id.* ¶¶ 235-43. The issue of how human rights obligations and treaty obligations, existing simultaneously, must be harmonized and observed simultaneously, was usefully analyzed in depth in Bruno Zimma & Theodore Kill, "Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology" in *International Investment Law for the 21st Century* (Chapter 36) at 379 (Christina Binder ed. 2009).

[5] Ian Brownlie, *Principles of Public International Law* at 522 (7th ed. 2008).

[6] *See* Christopher Dugan, Don Wallace, Noah Rubins & Borzu Sabahi, *Investor-State Arbitration* at 36-37 (2008). On the traditional structure of post-World War I "Mixed Claims Commissions," *see* Elyse Y. Garmise, "The Iraq Claims Process and the Ghosts of Versailles," 67 N.Y.U.L. Rev. 840, 845 (1992).

[7] Todd Weiler, "Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order," 27 B.C. Int'l & Comp. L. Rev. 429, 440 n.24 (2004).

[8] *Hopkins v. Mexico* (1926), 4 R.I.A.A. 41, 47 (U.S.-Mexico Claims Comm'n 1926).

This began to change after World War II, not only with the recognition of certain fundamental customary international law human rights norms binding on all states,[9] but also in multilateral standard-setting treaties such as the 1966 International Covenant on Civil and Political Rights,[10] the 1950 European Convention on Human Rights,[11] 1969 American Convention on Human Rights[12] and 1981 African Charter on Human and Peoples' Rights.[13]

These treaties also helped solve an institutional dilemma. Traditionally, individuals had no direct means of claiming compensation for violations of international law, because "procedurally, only a State could bring an international claim."[14] To be sure, certain "basic" human rights obligations were owed "*erga omnes*," "towards the international community as a whole."[15] But even in those cases, a willing state (other than the perpetrator) would need to espouse the claim. Other, less "basic" rights, could be vindicated only if the national's own state asserted the claims itself, through "diplomatic protection."[16] Post-war treaties such as the European and American Conventions solved this institutional impasse by creating regional institutions – the European Court of Human Rights and the Inter-American Court of Human Rights – with jurisdiction to hear claims by individuals against their own states. These institutions are now leading voices in the field of human rights protection.

B. *Birth of the BIT Era*

Following World War II, investment protection also grew. Concession agreements – direct contracts between the state and the investor – often promised continuity of tenure and provided against nationalization. The United States program of "FCN" (Friendship, Commerce and Navigation) treaties was greatly accelerated during this period. This led to treaties that guaranteed against nationalization of investors' property, as well as providing other guarantees of fair treatment.[17] And the ICJ provided a forum in which states could pursue claims on behalf of their own nationals.

These protections, however, were decidedly imperfect. Not every investor had the bargaining power to enter into a concession agreement. And the enforcement of customary international law and FCN protections still depended on "diplomatic

[9] *Barcelona Traction, Light & Power Co. Case* (Belg. v. Spain) (Second Phase), 1970 I.C.J. Rep. 3 ¶¶ 3, 34 (noting that obligations "*erga omnes*" included "the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination").

[10] International Covenant on Civil & Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (1967).

[11] European Convention for the Protection of Human Rights & Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

[12] American Convention on Human Rights, Nov. 21, 1969, O.A.S.T.S. No. 36 (1969).

[13] African Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 58 (1982).

[14] *Corn Prods. Int'l v. Mexico*, No. ARB(AF)/04/01, Decision on Responsibility ¶ 170 (ICSID Add'l Facility Jan. 15, 2008).

[15] *Barcelona Traction* ¶ 33.

[16] *Id.* ¶¶ 34-35; *see also* Brownlie, *supra* at 58 (7th ed. 2008) (explaining that, traditionally, "[i]t is states and [international] organizations ... which represent the normal types of legal person on the international plane").

[17] *See* Timothy G. Nelson, '"History Ain't Changed': Why Investor-State Arbitration Will Survive the 'New Revolution'" in *The Backlash Against International Arbitration* at 567-69 (Michael Waibel, Asha Kaushal, Kyo-Hwa Chung & Claire Balchin, eds., 2010).

protection," a system that "had its drawbacks, for the espousing state had complete discretion over the claim."[18]

With the end of the Cold War came the wave of modern BITs and Free Trade Agreements ("FTAs") containing comparable substantive investment protections. Most provide for investor-state arbitration before bodies such as the International Centre for Settlement of Investment Disputes ("ICSID") – which, since 1965 has served as a specialist forum for investor-state arbitration – or the arbitration rules of the United Nations Commission on International Trade Law ("UNCITRAL"), in force since 1976. The overall result is a system of "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."[19] This has coincided with a large increase in the amount of foreign direct investment worldwide – FDI is said to have "surged from $200 billion in 1990 to over $1 trillion in 2000."[20]

C. *TWO SEPARATE TREATY SYSTEMS*

Although human rights treaties often include protection of property, there are potentially real differences between these treaties and BITs. As Paulsson has warned:

> While it is tempting to import notions from the international law of human rights dealing with deprivations of property and violations of due process, there can be no assumptions about the perfect correspondence between instruments devised for quite different purposes.[21]

The jurisdictional powers of investor-state tribunals and human rights bodies may also vary sharply – meaning, for example, that an investor-state tribunal might lack the power to determine an investor's claims that its human rights were threatened.[22] There are also potentially "remarkable differences" in the conception of protected "property," including different rules as to shareholder standing, the protections available to intangible property and the role played by national law in defining what is "property."[23]

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[18] William S. Dodge, "Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement," 39 Vand. J. Transnat'l L. 1, 8 (2006). Indeed, "Professor Jessup [once] complained that '[i]nstances in which the Department of State has declined to press diplomatic representations on behalf of importunate claimants are frequent and have often been due, not to the demerits of the claims, but to some overriding policy of fostering friendly relations.'" *Id.* at 9 (citation omitted).

[19] Campbell McLachlan, Laurence Shore & Matthew Weininger, *International Investment Arbitration: Substantive Principles* at 5 § 1.06 (2007).

[20] Susan D. Franck, "Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law, "19 McGeorge Global Bus. & Dev. L.J. 337, 338 (2007).

[21] Jan Paulsson, *Indirect Expropriation: Is the Right to Regulate at Risk?* ¶ 6 (Dec. 12, 2005). The *Chevron* tribunal thus declined to apply the principle of "retroactivity" (a human rights doctrine) to the United States-Ecuador BIT, holding that "the analogy between BITs and human rights treaties [was not] sufficiently strong to warrant deviating from the dominant legal framework for retroactivity." *Chevron Corp. v. Ecuador*, PCA Case No. 34877, Interim Award ¶ 176 (UNCITRAL Dec. 1, 2008). Indeed, some have argued that there is not one monolithic body of "International Human Rights Law" today but rather a collection of regional human rights treaties, each with its own particular standards and procedures. Brownlie, *supra* at 554.

[22] *Biloune v. Ghana Investment Centre*, 95 I.L.R. 183, 203 (UNCITRAL Oct. 27, 1989) (investor's claims of "denial of justice and violation of human rights" fell outside scope of arbitration clause).

[23] *See* Ursula Kriebaum & Christoph Schreuer, "The Concept of Property in Human Rights Law and International Investment Law," in *Investment Arbitration and the Energy Charter Treaty* at 108-59 (C. Ribeiro ed., 2006); *see, e.g., id.* § III.3 (noting the differing approaches of the ECHR, Inter-American Commission and IACHR in

(footnote continued on next page)

Another potential difference lies in the nature of the rights conferred by the relevant treaties. Within investor-state law, it is sometimes suggested that investors themselves do not possess treaty rights. Indeed, the traditional "entrenched view was that individuals have status on the international plane only derivative of their protecting states."[24] On this view, treaty rights belong to the state, with the investor given the *procedural* right to enforce those rights by bringing arbitral claims.[25] The issue remains debated.[26]

By contrast, at least some human rights treaties "grant[] substantive rights to persons and permit[] them to bring direct claims against states" in their own capacity.[27]

D. *The Residual Role of Customary International Law*

Where no treaty remedy is available, customary international law and "diplomatic protection" still can play a role in protecting the property of foreign investors. In the still-pending ICJ case of *Ahmadou Sadio Diallo*, the Republic of Guinea exercised its right of diplomatic protection in respect of one of its nationals, Mr. Diallo, in a claim against the Democratic Republic of Congo (the former Zaire). Guinea has alleged that, during the 1990s, Mr. Diallo was arrested, detained and expelled from Zairian territory, and his equity interest in a Zairian company expropriated without due process. A variety of cases, from pre-World War II Claims Commission jurisprudence as well as more recent investment treaty cases, are cited in support of Guinea's claims that the DRC had breached the minimum level of treatment owed to aliens under customary international law.[28]

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relation to the standing of shareholders to claim for losses caused to a corporation; comparing this to the "far more generous" approach of investor-state tribunals under most BITs.

[24] Andrea K. Bjorklund, "Private Rights and Public International Law: Why Competition Among International Economic Law Tribunals Is Not Working," 59 Hastings L.J. 241, 262 (2007).

[25] The tribunal majority in *Archer Daniels Midland Co. v. Mexico*, No. ARB/AF/04/05, Award (ICSID Add'l Facility Nov. 21, 2007) held that although BITs and FTAs "provide a set of obligations which require the State to treat investment of qualified investors in accordance with the standards of that treaty; ... *these obligations are only owed to the State of the investor's nationality*." Id. ¶ 169 (emphasis added). On this view, if an investor brings arbitration "in order to request compensation,... [it] will be in reality stepping into the shoes and asserting the rights of the home State." *Id.*

[26] The *Corn Products* majority took the view that BIT/FTA rights are held directly by the investor:

> It is now clear that States are not the only entities which can hold rights under international law; individuals and corporations may also possess rights under international law. In the case of rights said to be derived from a treaty, the question will be whether the text of the treaty reveals an intention to confer rights not only upon the Parties thereto but also upon individuals and/or corporations.

Id. ¶ 168; *see also Archer Daniels Midland Co. v. Mexico*, Separate Opinion of Arbitrator Arthur Rovine ¶ 36 (disagreeing with *ADM* majority and concluding that, under modern BITs/FTAs, "nationals are protecting themselves by invoking their right to go to arbitration, pursuant to the treaties, to enforce State Party obligations owed to them"); Anthea Roberts, "Power & Persuasion in Investment Treaty Interpretation: The Dual Role of States," 104 Am J. Int'l L. 179, 183-84 (2010); Zachary Douglas, *The International Law of Investment Claims* at 10-38 (2008) (advancing proposition that "a claim advanced by the investor in accordance with [investor-state adjudication] is its own claim and the national contracting state of the investor has no legal interest in respect thereof and discussing this proposition in depth by reference to past ICJ authority); Bjorklund, *supra*, at 263-73. In all events, even if investors' rights are merely derivative, the availability of investor-state arbitration can be said to "permit[] investors to function in a manner akin to a private attorney general by initiating adjudication to redress inappropriate government conduct." Franck, *supra*, at 343-44.

[27] Roberts, *supra*, at 184 n. 22.

[28] Illustrating the diverse sources of law governing the treatment of foreign investors, Guinea cites: (1) jurisprudence from the Iran-US Claims Tribunal, *e.g.*, *Starrett Housing Corp. v. Iran*, 4 Iran-US C.T.R. 122, 154 (1983) (addressing the meaning of expropriation and de facto expropriation); (2) Claims Commission jurisprudence, such as Martini (*Italy v. Venezuela*), 2 R.I.A.A. 975 (US-Italy Claims Comm'n 1930) (a claims commission case

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In 2007, the ICJ held that it had jurisdiction to adjudicate certain of these claims.[29] In November 2010, the ICJ issued a merits judgment upholding certain of Guinea's claims relating to violation of Mr. Diallo's human rights (*e.g.*, his procedural protections relating to his expulsion from Zaire and his rights to consular representation)[30] but denying most of Guinea's claims regarding impairment of his investment.[31] In doing so, the ICJ did not engage in a detailed discussion of the "minimum treatment standard" under customary international law. The case illustrates, however, that the ICJ can still play a role in adjudicating investment disputes that are not governed by specific BITs or FTAs.

II. AREAS OF CONVERGENCE IN HUMAN RIGHTS AND BIT CASES

A. *EXPROPRIATION*

1. ORIGINS IN THE LAW REGARDING PROPERTY OF ALIENS

For "centuries," states have been concerned for "[t]he protection of property against seizure during time of war," and have pursued compensation for their nationals' property "confiscated during hostilities."[32] Even during peacetime, states' claims concerning seizure of their nationals' assets have featured in many Claims Commission cases.[33]

Expropriation cases assumed a new urgency after World War I, in the wake of wartime expropriations and post-war population adjustments, as well as the Russian Revolution.[34] One of the most important cases decided in this era was the *Chorzów Factory* case, a PCIJ claim by Germany for expropriation of a German-owned nitrogen factory in Upper Silesia (which became part of Poland in 1922). In a 1928 holding that still resonates today, the Permanent Court held that, due to the unlawful nature of that expropriation, the proper standard of compensation was restitutionary, *i.e.*, restoration

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involving Venezuela's denial of justice to an Italian investor); and (3) *Elettronica Sicula S.p.A. (U.S. v. Italy)*, 1989 I.C.J. Rep. 15, a past treaty claim espoused against Italy by the United States in connection with the alleged expropriation of investments in violation of the Italy-United States FCN Treaty.

[29] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections (I.C.J., May 24, 2007), available at http://www.icj-cij.org/docket/files/103/13856.pdf.

[30] The ICJ held that the DRC had violated Articles 9 and 13 of the International Covenant on Civil and Political Rights, Articles 6 and 12 of the African Charter on Human and Peoples' Rights, and Article 36, paragraph 1 *(b)*, of the Vienna Convention on Consular Relations. *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment ¶¶ 73, 74, 85, 97 (ICJ Nov. 30, 2010).

[31] *See id.* ¶¶ 8, 148, 157-59.

[32] Vandevelde, *Bilateral Investment Treaties: History, Policy & Interpretation* at 23 (2d ed. 2010).

[33] *See, e.g.*, *Shufeldt Claim* (U.S. v. Guatemala), 2 R.I.A.A. 1079 (ad hoc arbitration 1930) (adjudicating claims concerning improper termination of agricultural concession); *Orinoco S.S. Co.* (U.S. v. Venez.), 11 R.I.A.A. 226, 228 (Perm. Ct. Arb. 1910) (granting compensation for investor claims concerning revocation of exclusive navigation concession); *Delagoa Bay and East African Railway Company* (Great Britain, U.S. v. Portugal), Sentence finale, March 29, 1900, reprinted in H. La Fontaine, *Pasicrisie Internationale*, 398 (1902) (awarding damages following annulment of rail concession in Portuguese colony/present-day Mozambique).

[34] Vandevelde, *supra* at 35.

of the property or an award of damages paid that "correspond[ed] to the value which a restitution in kind would bear."[35]

In the 1930s, the Mexican government resisted paying compensation for certain U.S. agrarian and oil interests it had seized. In 1938, Secretary of State Cordell Hull stated that Mexico was obligated to make "prompt payment of just compensation to the [agrarian land owners] in accordance with the universally recognized rules of law and equity."[36] Two years later, addressing the oil assets, he wrote that "the right to expropriate property is coupled with and conditioned upon the obligation to make adequate, effective and prompt compensation. The legality of an expropriation is in fact dependent upon the observance of this requirement."[37] These words, which became immortalized as the "Hull Formula," "seemed to define the law of international expropriation for the first half of the twentieth century. No international tribunal sitting during this period held the appropriate remedy was anything less than full compensation."[38]

2. EXPROPRIATION PROVISIONS IN BITS AND HUMAN RIGHTS TREATIES

BITs typically provide for compensation in the event of nationalization, usually using some variation of the Hull Formula. The Netherlands Model BIT states:

> Neither Contracting Party shall take any measures depriving, directly or indirectly, nationals of the other Contracting Party of their investments unless the following conditions are complied with:
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> (a) the measures are taken in the public interest and under due process of law;
>
> (b) the measures are not discriminatory or contrary to any undertaking which the Contracting Party which takes such measures may have given;
>
> (c) the measures are taken against just compensation. Such compensation shall represent the genuine value of the investments affected, shall include interest at a normal commercial rate until the date of payment and shall, in order to be effective for the claimants, be paid and made transferable, without delay, to the country designated by the claimants concerned and in the currency of the country of which the claimants are nationals or in any freely convertible currency accepted by the claimants.[39]

Human rights treaties often recognize that the ownership of property is a human

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[35] *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Judgment No. 13 (Merits), Series A, No. 17, at 47 (P.C.I.J. Sept. 13,1928) ("reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed" and should take the form of " [r]estitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it").

[36] Letter from U.S. Secretary of State Cordell Hull to the Mexican Ambassador (F. Castillo Najera) (Washington D.C., July 21, 1938), *in* 5 Foreign Relations of the United States, Diplomatic Papers 1938, at 674, 678 (1956); *see also* Vandevelde, *supra*, at 283-84 (quoting further exchanges).

[37] 3 Hackworth Digest of International Law 662.

[38] Dugan et al., *supra*, at 433.

[39] Netherlands Model BIT, art. 6 (1993); *see also* 2004 U.S. Model BIT, art. 5 (2004) (requiring "prompt, adequate, and effective" compensation be paid in freely convertible currency based on market value), *available at* http://www.ustraderep.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847.6987.pdf.

right and that "just compensation" is payable if the government seizes it. Article 21 of the American Convention on Human Rights, for example, strongly echoes the Hull Formula:

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.[40]

The African Charter of Human Rights also "guarantee[s]" the right to property,[41] and the First Protocol to the European Connection speaks of the right to "peaceful enjoyment" of "possessions," which cannot be denied except in the "public interest" and "subject to the condition provided for by law and the general principles of international law.[42] As a result of these treaty similarities, "the decisions of the [ECHR] as well as the decisions of other regional human rights courts should be taken into consideration when seeking to understand customary international law on expropriation as well as the investment treaty elaboration of customary international law (as interpreted by arbitral tribunals)."[43]

3. SIMILAR AWARDS OF JUST COMPENSATION FOR WRONGFUL TAKING

Human rights and BIT claims may exist in parallel. The Zimbabwe farmers cases are a prime example. In 2000, the Mugabe government amended its Land Acquisition Act to strip numerous farmers of title to their farms and enable those farms to be seized by "veterans" of the 1980 Zimbabwean independence war.[44] Some of these farmers happened to possess Dutch citizenship. Those farmers exercised their rights, as Dutch nationals, to bring proceedings before an ICSID arbitral tribunal to seek compensation based on Zimbabwe's violation of Article 6 of that BIT (which largely mirrored the Netherlands Model BIT text, quoted above). The tribunal found that Zimbabwe's farm seizures indeed had violated Article 6 of that BIT, and awarded the farmers approximately €8.2 million, representing "the damages suffered in each case at the date of dispossession on the basis of the market value at that date."[45]

Other farmers availed themselves of their right to bring human rights claims under

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[40] American Convention on Human Rights, *supra*, art. 21.

[41] African Charter on Human and Peoples' Rights, art: 14 ("The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws").

[42] First Protocol to the European Convention on Human Rights & Fundamental Freedoms, Mar. 20,1952, art. 1. "Even though the First Protocol ... does not contain the word 'expropriation,' the [ECHR] has provided guidance in its case law on whether measures taken by a state amount to expropriation." McLachlan et al., *supra*, at 288 § 8.63.

[43] Id. § 8.64.

[44] *Funnekotter v. Zimbabwe*, No. ARB/05/6, Award ¶¶ 21, 28-34 (ICSID Apr. 22, 2009).

[45] Id. ¶¶ 107, 124; *see also id.* ¶ 148 (awarding the farmers €8.2 million damages plus interest).

the Southern African Development Community Treaty ("SADC"),[46] a regional treaty to which Zimbabwe is a party. In November 2008, a tribunal of the SADC held that:

> The [farmers] have established that they have been deprived of their agricultural lands without having had the right of access to the courts and the right to a fair hearing, which are essential elements of the rule of law, and we consequently hold that [Zimbabwe] has acted in breach of Article 4(c) of the [SADC] Treaty.[47]

The SADC Tribunal further held that the seizure had violated Article 6(2) of the SADC Treaty because it involved "discrimination" solely based on "race." Thus, "fair compensation is due and payable to the [farmers] by [Zimbabwe] in respect of their expropriated lands."[48]

The *Campbell* tribunal's remarks about denial of "due process" under the SADC Treaty resonate strongly from a BIT perspective. The seminal 1968 OECD Draft Convention on the Protection of Foreign Property,[49] in requiring that nationalizations be accompanied by "due process," states that "the notion of due process of law make it akin to the requirements of the 'Rule of Law,' an Anglo-Saxon notion, or of the 'Rechtsstaat,' as understood in continental law."[50] Under this standard, expropriation should be free from arbitrariness, and the "amount of compensation fixed should be subject to judicial review," as should the "legality of the measures taken by the expropriating State."[51]

The Yukos cases represent another example of parallel claims. Following the demise of the Yukos group in Russia (a private company that collapsed in 2004 after receiving certain revised tax assessments), some Yukos shareholders brought investment treaty claims against Russia before a Hague-based UNCITRAL tribunal.[52] Other Yukos investors' claims are also pending before the ECHR.[53] Neither case has reached a merits determination.

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[46] South African Development Community Treaty, Aug. 17, 1992, *available at* http://www.sadc.int/inde/browse/page/119. The SADC Treaty, by a Protocol, establishes .... SADC Tribunal; a standing tribunal with power to hear claims under the human rights provisions of the SADC Treaty.

[47] *Mike Campbell (Pvt) Ltd. v. Zimbabwe*, No. 2/2007, at 41 (SADCT Nov. 28, 2008).

[48] *Id.* at 53, 57. The *Funnekotter* tribunal did not analyze issues of discrimination because, under Article 6 of the BIT, it did not need to; a treaty violation was established simply by reason of the Zimbabwe government's failure to compensate investors at the time of seizure. *Id.* ¶¶ 96-107.

[49] 7 I.L.M. 117 (1968) ("Draft OECD Convention").

[50] *Id.*, art. 3 cmt. 5 (citing R.R. Wilson, United States Commercial Treaties and International Law 1960, p. 115); adding that expropriation must be free from arbitrariness, the "amount of compensation fixed should be subject to judicial review," as should the "legality of the measures taken by the expropriating state"); J.H. Reichman, *Intellectual Property in Int'l Trade: Opportunities & Risks of a GATT Connection*, 22 Vand. J. Transnat'l L. 747, 797-98 (1989) ("[w]hile [a] state has no obligations to admit aliens to its territory ... [o]nce admitted ... customary international law allows the alien's national state to insist that the host state observe international minimum standards of due process if the latter decides to expropriate any property the alien acquires.... A failure to observe the minimum standard[s] ... will engage the offending state's international responsibility.").

[51] *See* Draft OECD Convention, Art. 3, cmts. 6(b)-(c); *see also* Kenneth J. Vandevelde, United States Investment Treaties: Policy and Practice § 7.02, at 121 (1992) ("The international standard includes a requirement of non-arbitrariness and of the availability of judicial review.").

[52] *Hulley Enters. Ltd. v. Russia*, Interim Award on Jurisdiction & Admissibility (UNCITRAL Nov. 30, 2009); *Yukos Universal Ltd. v. Russia*, Interim Award on Jurisdiction & Admissibility (UNCITRAL Nov. 30, 2009); *Veteran Petroleum Trust v. Russia*, Interim Award on Jurisdiction & Admissibility (UNCITRAL Nov. 30, 2009).

[53] *See* Press Release, ECHR Registrar, Chamber Hearing, *OAO Neftyanaya kompaniya YUKOS v. Russia*

(footnote continued on next page)

4. SIMILAR CONCEPTIONS OF "*DE FACTO*" EXPROPRIATION

Expropriation is not always overt. In *Ivcher-Bronstein v. Peru*, a naturalized Peruvian citizen, Mr. Ivcher-Bronstein, owned a TV station. The government, perhaps displeased by its news reporting, revoked Mr. Ivcher-Bronstein's citizenship, and then invoked a law banning foreign media ownership of TV stations.[54] The Inter-American Court, sustaining Mr. Ivcher-Bronstein's claim of unlawful expropriation, held that although there was never a formal dispossession, formalities are not dispositive:

> To determine whether Mr. Ivcher was deprived of his property, the Court should not restrict itself to evaluating whether a formal dispossession or expropriation took place, *but should look beyond mere appearances and establish the real situation....*[55]

Having found *de facto* expropriation, the Inter-American Court held that (1) consistent with the restitutionary rule stated in *Chorzów Factory*, Mr. Ivcher-Bronstein was entitled to have his investments restored to him; and (2) in addition, Peru should pay $20,000 as moral damages.[56]

In close parallel is *CME*, a case arising under the Netherlands-Czech BIT. That case originated when the Czech Media Council (a government body) issued a commercial TV license in 1992. Although the Media Council knew that the exclusive use of that license would be assigned to a Dutch-owned company, CNTS, it later took steps to squeeze out CNTS. In 1996, apparently at the instigation of CNTS's local "partner," the Media Council accused CNTS of operating a TV broadcast without proper authority, and by 1999, it had forced CNTS to surrender its rights. A Stockholm-based UNCITRAL tribunal later determined that the Media Council had engaged in indirect expropriation, in violation of the Netherlands-Czech BIT.[57] In 2003, it awarded over $270 million in damages.[58] Both CME and Bronstein have since been cited by international tribunals as examples of "*de facto*" or indirect expropriation.[59]

5. THE MEASURE OF COMPENSATION FOR UNLAWFUL EXPROPRIATION

The Hull Formula requires "adequate, effective and prompt compensation," which is translated in many BITs as payment of market value at the time of the taking. But *Chorzów Factory* calls for compensation that will "wipe out" the consequences of an

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(Application no. 14902/04) (Mar. 24, 2010). Among the treaty violations claimed by the applicant are: breach of ECHR Article 6 (right to a fair hearing) based on alleged irregularities in the proceedings concerning its tax liability; breach of Article 1 of Protocol No. 1 (protection of property), ECHR art. 1 (obligation to respect human rights), ECHR art. 13 (right to an effective remedy), ECHR, art. 14 (prohibition of discrimination), and ECHR art. 18 (limitation on use of restrictions on rights); and ECHR art. 7 (no punishment without law). Further details of the case are available at the ECHR website, http://www.echr.coe.int.

[54] *Ivcher-Bronstein Case*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 74 ¶ 125 (Feb. 6, 2001).

[55] *Id.* ¶¶ 120-24.

[56] *Id.* ¶¶ 178-85.

[57] *CME Czech Republic B.V. v. Czech Republic*, Partial Award ¶¶ 591, 609 (UNCITRAL Sept. 13, 2001).

[58] *CME Czech Republic B.V. v. Czech Republic*, Final Award ¶ 649 (UNCITRAL Mar. 14, 2003).

[59] *Técnicas Medioambientales TECMED, S.A. v. Mexico*, No. ARB (AF)/00/2, Award ¶ 116 & n. 139 (ICSID Add'l Facility May 29, 2003) (citing Bronstein).

illegal act. This prompts the question: Does *Chorzów Factory* permit a higher amount than market value at the time of taking if the expropriated property rises in value after the taking?

The case of *Papamichalopoulos v. Greece*[60] involved land seized by the Greek navy in 1967, without compensation. In 1993, the ECHR sustained claims by the landowner, finding the Navy's measures to be "*incompatible with [the landowners'] right to the peaceful enjoyment of their possession*" under the First Protocol to the European Convention on Human Rights.[61] By that time, however, property had increased significantly in value. Citing *Chorzów Factory*, the ECHR concluded that the landowners should be restored to ownership of the land or recover damages based on the "current value" of the land, as opposed to the 1967 value.[62]

The same valuation issue arose in *ADC*[63] a case involving the Cyprus-Hungary BIT. The investor possessed a series of development rights at Budapest airport. Those rights were seized in 2002, just as passenger traffic was on the verge of a huge increase. Citing *Papamichalopoulos*,[64] *Chorzów Factory*, and other cases, the tribunal held that Hungary needed to wipe out all the consequences of its illegal seizure and therefore was required to pay damages for breach of the BIT based on the 2006 value of the investment.[65]

Papamichalopoulos and *ADC* have prompted further jurisprudential debate. In his dissenting opinion in *Siag v. Egypt*, a case involving the Italy-Egypt BIT, Professor Orrego Vicuña disagreed with *ADC*, opining that, in all but exceptional cases, damages for unlawful expropriation should be "fair market value at the time of expropriation."[66] For its part, the ECHR in *Guiso-Gallisay* recently departed from *Papamichalopoulos* and adopted a "new approach," limiting damages for "constructive expropriation" to the value of the investment at the time of taking.[67] Future tribunals will need to decide whether this aspect of ECHR case law is applicable in the BIT context.

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[60] *Papamichalopoulos v. Greece* (1993) 16 E.H.R.R. 440 (emphasis added).

[61] *Id.* ¶¶ 35-46; *see also id.* ¶ 36 ('*[t]he act of the Greek Government... contrary to the Convention was not an expropriation that would have been legitimate but for the failure to pay fair compensation...* the pecuniary consequences of a lawful expropriation cannot be assimilated to those of an unlawful dispossession.").

[62] *Papamichalopoulos*, [1995] ECHR 14556/89, ¶ 39.

[63] *ADC Affiliate Ltd. v. Hungary*, No. ARB/03/16, Award (ICSID Oct. 2, 2006).

[64] *Id.* ¶ 497.

[65] *Id.* ¶ 499.

[66] *Siag v. Egypt*, No. ARB/05/15, Dissenting Opinion of Professor Orrego Vicuña, at 3 (ICSID June 1, 2009); *see also* Audley Sheppard, "The Distinction between Lawful and Unlawful Expropriation," *Investment Arbitration and the Energy Charter Treaty* at 172 (C. Ribeiro ed., JurisNet LLC, 2006) (arguing that "where a claim is brought under an investment treaty in respect of an expropriation, and that treaty prescribes a standard of compensation, the question of compliance or non-compliance with the conduct requirements should be immaterial to the standard of compensation and the treaty standard should apply").

[67] *Guiso-Gallisay v. Italy*, [2009] ECHR 58858/00, Judgment (Just Satisfaction) ¶¶ 103-04 (Dec. 22, 2009), *available at* http://www.echr.coe.int/ECHR/EN/Header/Case-Law/Hudoc/Hudoc+database.

B. *FAIR AND EQUITABLE TREATMENT*

1. ORIGINS: THE MINIMUM STANDARDS FOR TREATMENT OF ALIENS

The works of Claims Commissions involved numerous allegations of mistreatment of foreign nationals in a variety of circumstances. Within the U.S.-Mexican Claims Commission, for example, several cases held the host state liable for such things as "cruel and inhumane" treatment of a foreign national while in custody,[68] extrajudicial killing by police officers[69] and failure to apprehend or prosecute someone who was known to have murdered a foreign national.[70] On their face, each of these cases involved human rights.

The limits of state responsibility were reached in *Neer*.[71] In that case, a U.S. citizen, Mr. Neer, had lived in the village of Guanacevi in the Mexican State of Durango and worked as supervisor in a nearby mine. While riding on horseback with his wife, he was accosted and shot dead. His killers were never apprehended or prosecuted. His widow claimed against Mexico, complaining that the authorities had improperly failed to capture the killers and that the state should be held responsible for the murder.[72] In adjudicating the claim, the Claims Commission articulated the following test for determining whether a state had violated the minimum treatment standard at international law:

> "[T]o constitute an international delinquency, [state action] 'should amount' to an outrage, bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."[73]

On the facts, the Commission held that "the Mexican authorities ha[d] [not] shown such lack of diligence or such lack of intelligent investigation in apprehending and punishing the culprits as would render Mexico liable.[74] As discussed below, this holding remains highly significant in BIT/FTA jurisprudence, particularly within NAFTA.

2. THE MODERN BIT STANDARD OF "FAIR AND EQUITABLE TREATMENT"

The kinds of personal injuries abuses encountered in the early Claims Commission cases (improper arrest and detention, extrajudicial killing) are readily recognizable as the

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[68] *Roberts Claim* 4 R.I.A.A. 77 (U.S-Mexico Claims Commission 1926) (holding that Mexico had violated the "ordinary standards of civilization" by subjecting a U.S. citizen to "cruel and inhumane treatment" while in custody was entitled to compensation").

[69] *Quintalnilla Claim*, 4 R.I.A.A. 101 (U.S.-Mexico Claims Commission 1926) (holding that United States was liable to pay damages after a Texas sheriff had organized the extra-judicial killing of a Mexican national suspected of certain crimes).

[70] *Janes (United States v. Mexico)*, 4 R.I.A.A. 82 (U.S.-Mexico Claims Commission 1926) (awarding $12,000 damages for failure to pursue murderer of U.S. citizen even though the identity of the murderer was notorious).

[71] *Neer v. Mexico*, 4 R.I.A.A. 60-62 (U.S.-Mexico Mixed Claims Comm'n 1926).

[72] *Id.* at 60-61

[73] *Id.*

[74] *Id.* at 62.

kind of conduct that would violate modern human rights treaties. Indeed, these instruments usually define the rights of the individual in more detail than *Neer*.

BITs and FTAs, meanwhile, have continued to contain a more general statement concerning the level of treatment to be afforded investors. Following on from FCN practice,[75] they typically contain a provision concerning "fair and equitable treatment." Article 2 of the UK-Argentina BIT, for example, states that:

> Investments of investors of each Contracting Party *shall at all times be accorded fair and equitable treatment* and shall enjoy protection and constant security in the territory of the other Contracting Party.

This standard usually has been applied in cases of injury to economic interests, to challenge measures that, while not "expropriation," completely altered the basis of an investment. Several tribunals have thus held that Argentina's so-called "pesification" laws of early 2002, making it illegal to set energy and water tariffs in dollars and re-pegging them to the Argentine peso, were "unfair and inequitable" because they radically degraded those investments.[76]

Occasionally, "fair and equitable treatment" cases actions that directly impact human as well as economic rights. The case of *Loewen v. United States* originated with a local commercial dispute between a Mississippi-based funeral insurance business, owned by a Mr. O'Keefe, and another funeral/funeral insurance business, Riemann Holdings, Inc., whose ultimate shareholder was Raymond Loewen, a Canadian citizen. In the early 1990s, O'Keefe brought a US $5 million lawsuit against Loewen's companies in Mississippi state court, accusing them of selling funeral insurance in the Mississippi in violation of a contract allegedly giving O'Keefe exclusive territorial rights over the same area.[77] This lawsuit, however, eventually developed into an extremely bitter and acrimonious lawsuit and trial, culminating injury verdicts against Loewen's companies of $100 million in compensatory and $500 million in punitive damages. A NAFTA arbitral tribunal, reviewing the entire trial record, held that "the conduct of the trial by the trial judge was so flawed that it constituted a miscarriage of justice amounting to a

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[75] *See* Catherine Yannaca-Small, Fair & Equitable Treatment Standard in International Investment Law at 3-4 (OECD Working Paper 2004) (noting that the concepts of "fair and equitable treatment" and "equitable treatment" for investors was embodied in certain pre-war regional instruments within Latin America, as well as several post-war FCN treaties of the U.S.); Dugan *et al.*, *supra*, at 503.

[76] *See, e.g.*, *BG Group Plc v. Argentina*, Final Award ¶ 467 (UNCITRAL Dec. 24, 2007) ($186 million in damages awarded based on breach of fair and equitable treatment obligation as a result of pesification measures); *National Grid plc v. Argentina*, Award ¶ 297 (UNCITRAL Nov. 3, 2008) ($296 million awarded for breach of fair and equitable treatment obligation; same laws; *CMS Gas Transmission Co. v. Argentina*, No. ARB/01/8, Decision on Annulment (ICSID Sept. 25, 2007) (upholding award of $131 million damages in favour of utilities provider, following pesification measures). Two further awards involving the US-Argentina BIT have been annulled: in both cases, the annulment committee, while leaving undisturbed the original tribunals' findings that the pesification laws had violated the "fair and equitable treatment" obligation, held that the ICSID tribunals should have given fuller consideration to whether the pesification laws could be defended on the basis of the "essential security" clause in Article XI of the BIT. *Enron Corp. v. Argentina*, No. ARB/01/03, Decision on Annulment (ICSID Jan. 14, 2004); *Sempra Energy Int'l v. Argentina*, No. ARB/02/16, Decision on Annulment (ICSID July 29, 2010). Meanwhile, a United States court has thus far rejected Argentina's challenges to the decisions rendered under the UK-Argentina BIT. *See Argentina v. BG Group Plc.*, No. 08-485 (RBW), 2010 WL 2264957 (D.D.C. June 7, 2010).

[77] *Loewen v. United States*, No. ARB(AF)/98/3, Award ¶ 30-38 (ICSID Add'l Facility June 26, 2003) (same).

manifest injustice as that expression is understood in international law,"[78] adding that the conduct of the trial was a "disgrace" and that Mr. O'Keefe's counsel had engaged in "tactics" that were "impermissible" "by any standard of review."[79] Among these were: (1) overt appeals to anti-foreign bias, including portraying Mr. Loewen's company as a "ruthless foreign (Canadian) corporate predator" and efforts to "implant inflammatory and prejudicial materials" against foreign nationals in the jury's mind and to (2) the use of "racially based evidence"; (3) appeals to "class" bias.[80] The tribunal held that the case was "clearly improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment."[81]

The *Loewen* tribunal went on to hold, controversially, that the trial court's improprieties could ultimately have been redressed on appeal to the United States Supreme Court, and that, under the standards applicable to a "denial of justice" (*see below*) a treaty violation had not arisen.[82] Nevertheless, it remains reasonably clear that, but for this factor, "fair and equitable treatment" violation would have been made out, and equally clear that, had this case been reviewed by a human rights tribunal, the criticisms of the Mississippi courts would have been as (if not more) trenchant.

C. "*Denial of Justice*"

The notion that a state's "denial of justice" to foreign nationals may result in a breach of international law has been recognized in past Claims Commission cases[83] – indeed, this principle goes back many centuries.[84] It has been said that "denial of justice" can arise in a variety of circumstances, *e.g.*, where the courts refuse to allow access to foreigners, where "undue delay" exists, where there are "manifestly xenophobic judges," when the "final decision" was "incompatible with state obligations," or where there is a refusal to provide execution of rulings that are favourable to the foreign party.[85]

Not surprisingly, the notion that "justice delayed is justice denied" is a staple of human rights treaties and, among other instruments, finds expression in Article 6(1) of the ECHR, which requires claims to be heard "[w]ithin a reasonable time."

For BIT/FTA purposes, some tribunals have held that "denial of justice" can constitute a form of "unfair and inequitable treatment." In *Azinian v. Mexico*, for example, it was said that a "denial of justice" might constitute such a violation "if the

[78] *Id.* ¶ 54.
[79] *Id.* ¶ 119.
[80] *Id.* ¶¶ 56-70.
[81] *Id.* ¶ 137.
[82] *Id.* ¶¶ 141-57, 217. For a critique of this decision, *see, e.g.*, Noah Rubins, "The Burial of the Loewen Claim: A First Analysis of the Final Award," Transnat'l Dis. Mgm't, Vol. 1, No. 4 (October 2004), *available at* www.transnational-dispute-management.com.
[83] *See, e.g., El Oro Mining & Railway Co. (Ltd.)* (Great Britain v. Mexico), 5 R.I.A.A. 191 (G.B.-Mexico Claims Commission, June 18, 1931).
[84] *See generally*, Jan Paulsson, *Denial of Justice in International Law* 13-18 (2005).
[85] P. Daillier & A. Pellet, *Droit International Public* 751 (Nguyen Quoc Dinh ed., L.G.D.J. 1999).

relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way."[86] The 2004 US Model BIT states that the "fair and equitable treatment" obligation "includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world."[87]

In *Pey Casado v. Chile*, the Chilean government established a compensation process for persons whose assets had been expropriated by a prior regime. But for one such claimant, Mr. Pey Casado, the Chilean judicial system failed to render any decision for a period of seven years. Based on this failure, and other shortcomings in the compensation process, the Tribunal concluded that Chile had committed a "denial of justice" and had thus breached its obligation to treat Mr. Pey Casado fairly and equitably under the Spain-Chile BIT.[88] In doing so, the *Pey Casado* tribunal not only took account of past Claims Tribunal jurisprudence[89] but also specifically noted that the ECHR had held that a seven year delay constitutes a violation of Article 6(1) of the European Convention.[90]

More recently, the *Chevron* tribunal was asked to decide whether a multi-year delay by the Ecuadorian courts in adjudicating various contractual claims by Chevron resulted in a breach of the US-Ecuador BIT. Chevron submitted copious ECHR and Inter-American case law in support of its contention that this delay was a "denial of justice."[91] Ultimately, the tribunal held that Chevron's claims could be determined solely by reference to Article 11(7) of the U.S.-Ecuador BIT, providing that "each Party must provide effective means of asserting rights and claims with respect to investment, investment agreements, and investment authorizations."[92] This provision, it held, was "a *lex specialis* with greater specificity than the customary law standard of denial of justice."[93] Nevertheless, it regarded some aspects of the customary "denial of justice" as instructive in applying that treaty provision.[94]

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[86] *Azinian v. Mexico*, No. ARB(AF)/97/2, Award ¶ 102 (ICSID Add'l Facility Nov. 1, 1999); *see also Mondev Int'l Ltd v. United States* No. ARB (AF)/99/2, Award ¶ 133 (ICSID Add'l Facility Oct. 11,2002) ("[T]he question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to 'unfair and inequitable treatment.'"); *Loewen* ¶ 133 (same).

[87] *Id.* art. 5(2)(b).

[88] *Pey Casado v. Chile*, No. ARB/98/2, Award ¶¶ 659, 674 (ICSID May 8, 2008).

[89] *Id.* ¶ 665 (quoting *El Oro*, 5 R.I.A.A. at 199 ("'[I]t is ... obvious that a period of nine years by far exceeds the limit of the most liberal allowance that may be made' in determining whether there has been a denial of justice.")).

[90] *Id.* ¶ 664 (citing *Ruiz-Mateos v. Spain*, (1993) 16 Eur. Ct. H.R. 505 (ECHR case involving allegations of denial of justice due to unreasonable court delays)).

[91] *Chevron Corp. v. Ecuador*, Partial Award on the Merits ¶¶ 166-204 (UNCITRAL March 30, 2010).

[92] U.S.-Ecuador BIT, art. 11(7).

[93] *Chevron*, Partial Award ¶ 275.

[94] For example, the tribunal accepted the view of Chevron's expert, Jan Paulsson, that once a denial of justice had occurred (or, in this case, a treaty violation of the right of access to justice), it could not be remedied by the state issuing a belated ruling on the (delayed) claims. *Id.* ¶ 272.

D. *Full Protection and Security*

Some early international jurisprudence included cases where a host state failed to adequately protect a foreign national from physical harm. In the *Dexter Baldwin* case, for example, Panama was held to be responsible for the deaths and injuries of U.S. nationals caused by "insufficient police protection and improper police action," including "fail[ure] to restore order" in a situation of "civil unrest."[95] "By the mid-twentieth century, FCN treaties almost invariably contained a protection and security clause,"[96] and these are now a common feature of BITs and FTAs. The US-Zaire BIT states, for example, that an investment:

> shall enjoy protection and security in the territory of the other party. The treatment, protection and security of investment shall be in accordance with applicable national laws, and may not be less than that required by international law....

In *AMT v. Zaire*[97] a United States investor's car battery factory in Kinshasa was twice looted by the Zairian army, leading the investor to bring claims for violation of the full protection and security clause. Upholding this claim, an ICSID tribunal held that because "*Zaire ha[d] not fulfilled its obligation of vigilance*" and had also "*breached its obligation to prevent the occurrence of a given event,... there have been acts of violence on the Zairian territory, giving rise to losses, damages and injuries sustained by AMT.*"[98] It awarded $9 million in damages.[99]

Human rights cases have occasionally dealt with situations where the state failed to prevent injury to their own citizens. In *Velasquez Rodriguez*, a Honduran citizen became one of the "disappeared." Armed men dragged him into a car in broad daylight and he was never seen again. The Inter-American Court concluded that this was "carried out by agents who acted under cover of public authority." It added that "the failure of the State apparatus to act" was in itself wrongful. States had the duty to "take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation."[100]

In times of civil and mob unrest, determining the level of state responsibility under the "full protection and security" standard may require more nuanced analysis. In

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[95] *Dexter Baldwin v. Panama*, 6 R.I.A.A. 328, 331 (U.S.-Panama Claims Comm'n 1933).
[96] Dugan et al., *supra*, at 533.
[97] *Am. Mfg. & Trading, Inc. v. Zaire* (ICSID Feb. 10, 1997), reprinted in 36 I.L.M. 1534.
[98] *Id.* ¶ 7.01.
[99] *Id.* at 42.
[100] *Velasquez Rodriguez v. Honduras*, Inter-Am. Ct. H.R. (Ser. C) No. 4, Judgment ¶¶ 174-75, 182 (1988). It added:

> If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.

Id. ¶ 176.

Pantechniki, the state of Albania was held *not* responsible for failure to stop rioting.[101] In *Asian Agricultural Products*, by contrast, Sri Lanka was responsible for damages inflicted on a foreigner's property during its counterinsurgency operations against the Tamil Tigers.[102] In *Tecmed*, the owner of a landfill facility complained that the state failed to protect it against demonstrators. The tribunal held, however, that Mexico "reacted reasonably, in accordance with the parameters inherent in a democratic state, to the direct action movements conducted by those who were against the Landfill."[103] As Luke Peterson remarked, this "seemingly recogni[zes] the obligation for a democratic state to ensure the right of protest."[104] On the other hand, there may be situations comparable to the *Tehran Hostages* case, where "mob" demonstrations led to violence being directed against foreigners. In the event that the "mob" action is later "endorsed" by the state, the state may become liable.[105]

III. NAFTA AND THE MINIMUM STANDARD OF TREATMENT OF ALIENS

A. *THE* NEER *DEBATE*

In 2001, the NAFTA member states issued an "interpretation" declaring that NAFTA's "fair and equitable treatment" clause[106] merely "prescribes the *customary international law minimum standard of treatment of aliens* as the minimum standard of treatment to be afforded to [foreign] investors."[107] The 2004 US Model BIT now contains an identical qualification, adding that (1) the "fair and equitable treatment" standard "do[es] not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights," and (2) the "full protection and security" standard is only intended to preserve the customary international minimum standard of "police protection."[108]

The 2001 interpretation has thus brought the old Claims Commission jurisprudence back to center stage. NAFTA's member states now insist that the customary "minimum" standard of treatment of investors is no higher than that adopted in *Neer* in 1926. If so, NAFTA and the U.S. Model BIT may well be on the lower rung of a two-tier system: one governed by the 1926 "minimum treatment" standard; the other arising

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[101] *Pantechniki S.A. Contractors & Eng'rs v. Albania*, No. ARB/07/21, Award ¶¶ 71-84 (ICSID July 28, 2009).

[102] *Asian Agric. Prods. Ltd. v. Sri Lanka*, No. ARB/87/3 (ICSID June 27, 1990). The tribunal appeared to accept as fact that the government's inaction derived from its suspicion that the investor's management were "guerrilla supporters." Even so, the tribunal held, the "legitimate expected course of action against those suspected persons would have been either to institute judicial investigations against them to prove their culpability or innocence, or to undertake the necessary measures to get them off the Company's farm." *Id.* ¶ 85(d).

[103] *Técnicas Medioambientales Tecmed, S.A. v. Mexico*, No. ARB (AF)/00/2, Award ¶ 177 (ICSID May 29, 2003).

[104] Luke E. Peterson, "Investment Protection Treaties & Human Rights," in Amnesty International, *Connections Between Trade, Investment and Human Rights* (May 2006).

[105] *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, Judgment, I.C.J. Rep. 1980, p. 3 ¶ 74 (holding that Iran was responsible for the actions of the "students" who took over the US Embassy).

[106] NAFTA, art. 1105. ("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.")

[107] Free Trade Comm'n Clarifications Related to NAFTA Chapter 11 ¶¶ B.1-B.2 (July 31, 2001).

[108] United States Model BIT, art. 5(2) (2004).

under other BITs (*e.g.*, the Netherlands or UK texts), which simply guarantee "fair and equitable treatment" and "full protection and security" without linking this to the customary international law standard.[109]

In 2002, the *Mondev* tribunal reacted against this possibility, remarking that the widespread adoption of BITs and FTAs protection must "necessarily" have developed customary international law, such that the customary minimum standard had evolved to the same level as the "fair and equitable" treaty standard.[110] *Mondev* thus is in line with Professors Dolzer and Schreuer's prediction that the "insistence that FET is identical with customary international law may well have the effect of accelerating the development of customary law through the rapidly expanding practice on FET clauses in treaties."[111]

In 2009, however, the *Glamis Gold* tribunal sided with the NAFTA member states and held that the customary international law standard remains frozen at the 1926 *Neer* standard. In that case, a California state regulation affected an investor's ability to operate a gold mine.[112] The case involved the site known as the "Imperial Project" in South East California – which is located on federal lands. The Canadian claimant challenged Californian legislation that inhibited its ability to use open-pit mining techniques.[113] The investor claimed this breached NAFTA's "fair and equitable treatment" standard,[114] thus requiring the tribunal to ascertain the customary minimum standard of treatment of aliens according to the FTC 2001 interpretation.[115] It found that "the standard for finding a breach of the customary international law minimum standard of treatment therefore remains as stringent as it was under *Neer*,"[116] with the qualifications that: (1) the *Neer* test might "find shocking and egregious events not considered to reach this level in the past";[117] and (2) "one aspect of evolution from *Neer* that is generally agreed upon is that bad faith is not required to find a violation of the fair and equitable

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[109] *See* Timothy G. Nelson, "Setting the Bar: The Glamis Gold Tribunal Sticks to the 1926 Standard for 'Minimum Treatment' of Foreign Investors," IBA Arbitration News (March 2010). In the early 1980s, the great F.A. Mann felt that the then UK Model BIT's "fair and equitable treatment" obligation far exceeded the customary international law minimum standards of treatment of aliens:

> The terms "fair and equitable treatment" envisage *conduct that goes far beyond the minimum standard* and afford protection to a greater extent and according to a much more objective standard than any previously employed form of words. A Tribunal would not be concerned with a minimum, maximum or average standard. It will have to decide whether in all the circumstances the conduct in issue is fair and equitable or unfair and inequitable. No standard defined by any other words is likely to be material. The terms are to be understood and applied independently and autonomously.

F.A. Mann, British Treaties for the Promotion and Protection of Investments, 52 Brit. Y.B. Int'l. L. 241, 244 (1981) (emphasis added). This view has since been embraced in *Saluka Investments B. V. v. Czech Republic*, Partial Award ¶ 293 (UNCITRAL Mar. 17, 2006), and finds support in various academic writings. *See, e.g.*, Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* at 124 (2008).

[110] *Mondev Int'l Ltd. v. United States*, No. ARB(AF)/99/2, Award ¶¶ 116, 117,125 (ICSID Add'l Facility Oct. 11, 2002).

[111] Dolzer & Schreuer, *supra*, 128.

[112] *Glamis Gold, Ltd. v. United States* (UNCITRAL, June 8, 2009).

[113] *Id.* ¶ 11.

[114] *Id.* ¶ 185.

[115] In the view of the *Glamis Gold* tribunal, *minimum meant minimum*: it characterized Article 1105 of NAFTA as "a floor, an absolute bottom, below which conduct is not accepted by the international community." *Id.* ¶ 615.

[116] *Id.* ¶ 22 (emphasis added); *see also id.* ¶¶ 614, 616.

[117] *Id.* ¶ 613. As *Mondev* noted, "[t]o the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious." *See Mondev* ¶ 117; *see also Glamis Gold* ¶ 613.

treatment standard, but its presence is conclusive evidence of such."[118] The investor's claims, which did not satisfy this standard, were rejected.

Two subsequent tribunals, however, have agreed with *Mondev* that the minimum treatment standard has evolved beyond *Neer*. In *Merrill*, a NAFTA tribunal held that the minimum treatment standard had evolved such that "fair and equitable treatment has become a part of customary law," implying that the treaty standard and customary international law standard may have converged.[119] The tribunal in *Chemtura* made similar observations.[120]

As NAFTA tribunals do not operate on a *stare decisis* basis, the divergence of views between *Glamis Gold* (on the one hand) and *Chemtura*, *Merrill* and *Mondev* currently remains unresolved. At one stage, it was considered possible that the *Diallo* case might lead to an authoritative restatement by the ICJ of the customary minimum standard applicable to foreigners (which, had it been done, might have fed directly into the NAFTA "fair and equitable treatment" standard and its counterpart in the new US Model BIT minimum standards). In the event, though, the ICJ's merits judgment of November 30, 2010 refrained from engaging in such an analysis and instead confined itself to addressing whether certain specific corporate ownership rights had been impaired.[121] It remains nevertheless possible that the ICJ will address the customary minimum standard in future case law. Indeed, by pegging its treaty obligations to the customary minimum treatment standard, the United States may have given the ICJ carte blanche in future cases to define its NAFTA treaty obligations owed to other NAFTA members. Some might savour this irony.

B. *NAFTA AND INDIGENOUS RIGHTS*

Grand Rivers Enterprises Six Nations, a recent NAFTA case, reveals another way in which customary international law might inform the NAFTA standard. The investors in that case were members of the Iroquois tribe and makers of "Seneca" and "Opal" cigarettes. In the late 1990s, they became subject to legislation implementing a large-scale litigation settlement between the big tobacco firms and the U.S. state governments. The claimants, who were not party to that litigation, insist that they were innocent of any alleged wrongdoing, that the settlement was foisted on them without consultation, and that, as implemented, the settlement regime discriminates against small businesses in Indian communities. They argued that the NAFTA "minimum treatment" standard includes the special rights of indigenous peoples under customary international

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[118] *Glamis Gold* ¶ 616; *see also Mondev* ¶ 117 ("a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith").

[119] *Merrill & Ring Forestry L.P. v. Canada*, Award ¶ 211 (UNCITRAL Mar. 31, 2010). Nevertheless, based on the facts, the tribunal held that the measures in question (regarding export restrictions on certain lumber products) did not rise to the level of "unfair" or "inequitable" treatment, even under modern standards.

[120] *Chemtura Corp. v. Canada*, Award ¶¶ 121 (UNCITRAL Aug. 2, 2010). The *Chemtura* tribunal ultimately held, on the facts, that Canada's actions (in banning a particular chemical) did not violate the FET standard.

[121] *See supra* nn. 31-32.

law, including as stated by the Inter-American Court.[122] This case was rejected in January 2011, but the award has not yet been released at the time of publication and so it is not known whether the Tribunal addressed the relationship between indigenous rights and NAFTA investment protection.

IV. COMMON PROBLEMS OF ENFORCEMENT

Human rights courts do not generally have direct power to enforce their awards on the member states. For the European Court of Human Rights, the Committee of Ministers has the power to "supervise" enforcement (and, at least in theory, recommend expulsion or suspension from the Council of Europe of members who fail to comply with court orders).[123] In a similar vein, the Committee of Ministers of the African Charter is responsible for "monitor[ing]" the "execution" of judgments of the African Court of Human and Peoples' Rights.[124] The IACHR appears to rely on diplomatic pressure and the moral force of its judgments in order to ensure enforcement, aided by the mandatory publication by the Court of an annual report "specify [ing], in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations."[125]

Within the investment treaty system, ICSID awards are supposed to have a special status. Article 54 of the ICSID Convention requires that ICSID awards be enforceable as judgments in each ICSID member state, without any possibility that they be vacated by national courts. Article 53 of the ICSID Convention requires states to pay ICSID awards. For investor-state awards rendered outside the system, enforcement generally is carried out by national courts pursuant to the New York or Panama Conventions, which provide generally for recognition and enforcement of international arbitral awards, with very limited exceptions.[126]

Instances persist of states refusing to comply with ICSID awards. The Zimbabwe government, for example, has apparently refused to pay the *Funnekotter* award, forcing the claimants to bring proceedings in New York federal court in an apparent effort to enforce it against Zimbabwe's U.S. assets.[127] In the parallel human rights case, *Campbell*

[122] *Grand River Enters. Six Nations, Ltd. v. United States*, Claimants' Merits Memorial ¶ 180 n.223 (NAFTA/UNICTRAL July 10, 2008) *Advisory Opinion on Juridical Condition and Rights of the Undocumented Migrants*, OC-18/03, at 23 (Sept. 17, 2003), *available at* http://www.unhcr.org/refworld/docid/425cd8eb4.html (last visited September 14, 2010); *The Mayagna (Sumo) Indigenous Community of Awas Tingni*, Judgment of August 31, 2001 ¶¶ 2, 148, Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001) (on indigenous rights).)

[123] *See* European Convention on Human Rights, art. 46(2) ("The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.").

[124] Protocol to the African Charter on Human & Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, art. 29(2); *see also* art. 30 ("The States Parties to the present Protocol undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution.").

[125] American Convention on Human Rights, art. 65.

[126] *See* 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 U.N.T.S. 3 (June 10, 1958), art. v (limiting grounds for non-enforcement of foreign arbitral awards); 1975 Inter-American Convention on International Commercial Arbitration, 1975 O.A.S.T.S. No. 42, 141. L.M. 336 (Jan. 30, 1975), art. v (same).

[127] *See Funnekotter v. Zimbabwe*, 1:09-cv-08168-CM, Judgment (S.D.N.Y. Feb. 1, 2010) (U.S. court entering judgment against Zimbabwe based on the ICSID award).

v. Zimbabwe, Zimbabwe has likewise failed to comply with the award of compensation to the farmers,[128] despite the fact that the SADC Treaty is supposed to assure enforcement of the awards in each member state.[129] The SADC tribunal has formally requested that the Summit of the SADC take formal action to sanction Zimbabwe's non-compliance.[130] Meanwhile, there have been *ex post facto* diplomatic moves (presumably backed by Zimbabwe) for the SADC Summit to "review the role, responsibilities and terms of reference of the SADC Tribunal,"[131] a possible threat to retroactively strip the tribunal of its adjudicatory power.

The problem of enforcement is not new. Years ago, the Soviet Union's attempts to block enforcement of the *Lena Goldfields* award were described by V.V. Veeder as "a baleful monument to the absolute power of a State able by force to thwart the consensual process of international arbitration, a threat to transnational trade still present in many parts of the world."[132] It is to be hoped that the Zimbabwe cases will not be another example.

CONCLUSION

Decisions in investment-related cases, whether by human rights or BIT tribunals, have successfully exposed some (by no means all) of the excesses of the Fujimori regime of Peru, the Greek colonels, the Mobutu regime of Zaire and the Mugabe regime in Zimbabwe. This suggests that the two strands of case law are more in harmony than some critics might imagine.

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[128] *See* "Statement by the Southern African Development Community Lawyers Association to the 2010 SADC Summit on the Continued Disregard of SADC Tribunal Rulings by the Government of Zimbabwe," http://www.legalbrief.co.za/article.php?story=20100809131425266.

[129] The farmers have been successful in enforcing the SADC tribunal's award as a judgment in South Africa. "South African Court Orders Enforcement of SADC Decision on Zimbabwe Land," Voice of America News (Feb. 25, 2010).

[130] *Fick v. Zimbabwe*, Ruling on Noncompliance (SADC Tribunal July 16, 2010) (exercising its power under Article 32(5) of the Protocol to the SADC Treaty to report Zimbabwe's non-compliance with the prior compensation ruling in *Campbell*).

[131] South African National Assembly, Response by the Minister for Justice and Constitutional Development to a question by Dr. W.G. James (date of question: Mar. 30, 2010; Parliamentary Question No. 981).

[132] V.V. Veeder, "The *Lena Goldfields* Arbitration: The Historical Roots of Three Ideas," 47 Int'l & Comp. L.Q. 747, 747 (1998).