AN INTERNATIONAL COMMON LAW OF INVESTOR RIGHTS?

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1. INTRODUCTION

Customary international law ("CIL") is sometimes referred to as "international common law."[1] In theory, however, CIL is not created like common law through the incremental decision making of tribunals, but rather results from the "general and consistent practice of states followed by them from a sense of legal obligation."[2]

Nonetheless, there is at least one area of CIL that is being

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1 *See, e.g.*, Connie de la Vega, *The Right to Equal Education: Merely a Guiding Principle or Customary International Legal Right?*, 11 HARV. BLACKLETTER L.J. 37, 38 (1994) ("Customary international law essentially is international common law.").

2 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102(2) (1987).

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developed through a process that closely resembles the development of common law by domestic courts: the "minimum standard of treatment" which governments must accord to foreign investors.[3] Although the minimum standard of treatment can claim a long pedigree in international law through its roots in the ancient doctrine of denial of justice,[4] its content has always been highly indeterminate, and the discussions of what types of measures it prohibits have largely focused on how egregiously a government's conduct must offend the sense(s) of justice of the members of a tribunal in order to violate the standard.[5] Recently the vagueness of the minimum standard of treatment—and its "fair and equitable treatment" component in particular—has become a source of significant controversy due to its emergence as the most frequently invoked standard of protection in investor-state arbitral disputes.[6]

In this Article, I argue that because the minimum standard of treatment lacks a clearly defined content, it cannot constitute a legitimate norm of international law. I further argue that this defect cannot be cured, as has been suggested by proponents of the

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[3] The development of what is considered customary international law ("CIL") by tribunals rather than by state practice is a phenomenon which is by no means limited to the minimum standard of treatment. *See* J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 526 (2000) ("Much of what is commonly termed CIL is judge-made or judge-confirmed law."). Arguably, however, the role of tribunals in defining the content of the minimum standard of treatment is particularly significant for at least two reasons. Most areas of customary international law lack an effective enforcement mechanism, particularly with regard to enforcement by private parties. *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 832 (1997) (noting that private parties generally lack standing to enforce CIL standards concerning human rights before the International Court of Justice or other international tribunals). The minimum standard of treatment, in contrast, can be enforced by private parties through the investor-state dispute settlement process provided for in most of the more than 2000 investment treaties. *See infra* note 23 and accompanying text. Moreover, I am unaware of any other purported rule of CIL for which it is so openly acknowledged that the decisions of tribunals rather than state practice define the content of the norm. *See infra* notes 60-69, 84-87 and accompanying text.

[4] *See infra* notes 15-19 and accompanying text.

[5] *See infra* notes 11-14, 60 and accompanying text.

[6] *See* Rudolph Dolzer, *Fair and Equitable Treatment: A Key Standard in Investment Treaties*, 39 INT'L LAW. 87, 87 (2005) ("[I]n current litigation practice, hardly any lawsuit based on an international investment treaty is filed these days without invocation of the relevant treaty clause requiring fair and equitable treatment.").

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minimum standard, by conferring the authority to define the standard's content either on the existing system of *ad hoc* arbitral tribunals or on a new appellate body. This approach would violate nondelegation principles by giving international decision makers the authority to create a continuously evolving international common law of investor rights that would be binding on the United States and extremely difficult for Congress to amend.

In Section 2 of this Article I address both the status of the minimum standard of treatment as customary international law and its widespread incorporation in investment treaties. In Section 3, I discuss the indeterminate and evolving character of the minimum standard. In Section 4, I explain why this indeterminacy renders the minimum standard illegitimate as an international legal norm, and why nondelegation principles preclude resolving the vagueness problem by conferring on international tribunals the authority to define the content of the standard.

2. THE SOURCE OF THE MINIMUM STANDARD OF TREATMENT OBLIGATION – TRADITIONAL CIL, NEW CIL, OR TREATIES?

2.1. *The Minimum Standard of Treatment as Traditional CIL*

Commentators and international arbitral tribunals routinely assert that customary international law includes a minimum standard of treatment for foreign investment and foreign investors.[7] These assertions, however, have never been supported

[7] *See, e.g.*, Award, Waste Mgmt., Inc. v. United Mexican States, Case No. ARB(AF)/00/3, ¶ 91, International Center for the Settlement of Investment Disputes ("ICSID") (W. Bank) (Apr. 30, 2004) (noting that Article 1105 of the North American Free Trade Agreement's ("NAFTA's") reference to the minimum standard of treatment "refers to a standard existing under customary law"); Mondev Int'l, Ltd. v. United States, Case No. ARB(AF)/99/2, ¶ 121, ICSID (W. Bank) (Oct. 11, 2002) ("[T]he phrase 'Minimum standard of treatment' has historically been understood as a reference to a minimum standard under customary international law . . . ."); Catherine Yannaca-Small, *Fair and Equitable Treatment Standard in International Investment Law* 2 (Org. for Econ. Cooperation & Dev., Working Papers on International Investment, Paper No. 2004/3, 2004), *available at* http://www.oecd.org/dataoecd/22/53/33776498.pdf ("Under customary law, foreign investors are entitled to a certain level of treatment, and any treatment which falls short of this level gives rise to responsibility on the part of the State."); J.C. Thomas, Fair and Equitable Treatment under NAFTA's Investment Chapter, Remarks at the Meeting of the American Society of International Law (Mar. 13-16, 2002), *in* 2002 AM. SOC. INT'L L.: PRO. OF THE 96TH ANNUAL MEETING 9, 14 ("Awards of international tribunals and writings of qualified publicists have expressed the view that there is an international minimum standard of treatment that must be accorded to aliens and their

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by any comprehensive empirical study of the actual practice of nations with regard to foreign investment, as presumably would be required to demonstrate that it is the "general and consistent practice of states"[8] to afford foreign investment a certain minimum standard of treatment.[9] Indeed, given the indeterminacy of the content of the minimum standard of treatment, it is difficult to conceive of how such a study could be conducted.[10]

Instead, accounts of the minimum standard of treatment typically start with the 1926 decision of the U.S.-Mexico Claims tribunal in the *Neer* case.[11] *Neer* involved a claim by a United States national that Mexican authorities had failed to adequately investigate the murder of her husband, and that this failure constituted a "denial of justice" in violation of international law.[12] The Commission indicated that in order to constitute a denial of justice a government's conduct must "amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."[13] The Commission concluded that the conduct of

property, below which a state cannot go."); RUDOLF DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES 58 (1995) ("[I]t is generally accepted that international law requires a minimum of fairness in the treatment of foreigners and foreign investment . . . ."). *But see* M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 328 (2d ed. 2004) ("[I]t cannot be said with certainty that there is an international minimum standard of treatment of foreign investment in customary international law . . . .").

8 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102(2) (1987).

9 *See* Kelly, *supra* note 3 at 453 ("Properly understood, customary law is empirical. It consists of those norms that a society, in fact, believes are legally required."). Kelly argues that most CIL norms are not empirically based. *See id.* ("The asserted CIL norms of the literature . . . are declared without either general, consistent practice or clear evidence that the vast majority of states have accepted the norm as a legal obligation.").

10 *See infra* Section 3.

11 L. F. H. Neer (U.S.A.) v. United Mexican States, 4 R. Int'l Arb. Awards 60 (Mex./U.S.A. Gen. Claims Comm'n 1926).

12 *Id.* at 60–61.

13 *Id.* at 61–62. Although the doctrine of denial of justice is primarily associated with judicial malfeasance, the Commission noted that it applies to actions of the legislative and the executive branches as well. *Id.* at 61. *See also id.* at 65 (Fred K. Nielsen, Commissioner, separate opinion) ("There can be no doubt . . . that a State is responsible for the acts of its rulers, whether they belong to the legislative, executive, or judicial department of the Government, so far as the acts are done in their official capacity." (*quoting* JACKSON H. RALSTON, INTERNATIONAL ARBITRAL LAW AND PROCEDURE 51 (1910))).

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the investigation was not so deficient as to give rise to liability under this standard.[14]

The origins of the doctrine of denial of justice to which the *Neer* tribunal referred can be traced back as far as ancient Greece.[15] Grotius and Vattel embraced the doctrine as part of the law of nations,[16] which was viewed during the 17th and 18th centuries as derived primarily from natural law.[17] During the 19th century, the natural law account was supplanted by the modern, positivist view of the law of nations. According to this view, the law of nations is rooted in the implicit consent of nations as demonstrated through customary practice.[18] Yet, despite the rise of the positivist

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[14] *Id.* at 62.

[15] The doctrine was closely linked to the right of reprisal:

> [l]ong before the emergence of the modern State it was settled that an individual who was wronged in a strange land and who had there been unable to obtain reparation for this injury from the local sovereign might, with the permission of his own prince, initiate forceful measures to obtain that justice which had been refused him. The practice had come to be established in ancient Greece as a legitimate international procedure for exacting compensation when justice could not be obtained by peaceful methods.

ALWYN V. FREEMAN, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE 54 (1938). *See also* Hans W. Spiegel, *Origin and Development of Denial of Justice*, 32 AM. J. INT'L L. 63 (1938) (discussing the history of the doctrine of denial of justice from the period following the collapse of the Roman Empire).

[16] *See* Spiegel, *supra* note 15, at 73 (discussing Grotius' ideas on the denial of justice) and 75-76 (explaining Vattel's concept of the denial of justice).

[17] *See* Douglas J. Sylvester, *International Law as Sword or Shield? Early American Foreign Policy and the Law of Nations*, 32 N.Y.U. J. INT'L L. & POL. 1, 65-78 (1999) (discussing the dominant view in the United States during the late-18th century that the law of nations was grounded in natural law).

[18] Vattel played a critical role in the shift from natural law to the positivist model by asserting that customary practice, in addition to natural law, could give rise to obligations among nations. As Vattel stated:

> [c]ertain maxims, and *customs*, consecrated by long use, and observed by nations in their mutual intercourse with each other as a kind of law, form the *Customary Law of Nations*, or the *Custom of Nations*. This law is founded on a *tacit* consent, or, if you please, on a tacit convention of the nations that observe it towards each other. Whence it appears that it is not obligatory except on those nations who have adopted it, and that it is not universal, any more than the *conventional law*.

EMMERICH DE VATTEL, THE LAW OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS (Joseph Chitty ed., 1852) 62 (1758). The reliance on custom and tacit consent gradually replaced reference to natural law as the dominant approach to the law of nations. *See* Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 511 (1998) ("As the

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approach to international law, the doctrine of denial of justice endured into the early 20th century as part of the natural law legacy of the law of nations without any attempt to justify it based on the actual practice of nations.[19]

2.2. The Minimum Standard of Treatment as New CIL

Since World War II a proliferation of bilateral investment treaties ("BITs") and a more liberal approach to defining customary international law have led to a new argument for the status of the doctrine of denial of justice as CIL. More than 2000 BITs were ratified during the second half of the 20th century,[20] most of which included an obligation to provide foreign investors with the "minimum standard of treatment" to which they were entitled under customary international law.[21] The "minimum standard of treatment" was a broad concept intended to encompass the doctrine of denial of justice along with other aspects of the law of state responsibility for injuries to aliens.[22] Significantly, the BITs also provided for "investor-state" dispute settlement, which permits individual investors—rather than their national governments—to bring claims under the agreements before international arbitral tribunals.[23]

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nineteenth century progressed, courts and commentators began to embrace positivism. As a result, the natural law conception of international law faded and was replaced by an emphasis on state practice and consent."); Kelly, *supra* note 3, at 508-09 (describing the development of the positivist theory of customary international law during the 18th and 19th centuries). It has been suggested that the state consent theory, in turn, has yielded to a "common consent" approach under which the content of CIL can be determined by reference to the consensus of an overwhelming majority of nations. *Id.* at 510.

[19] *See* Spiegel, *supra* note 15, at 80 (describing denial of justice as "an offspring of the Law of Nature").

[20] *See* Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67 (2005) ("From 1959 to 2002, nearly 2200 individual BITs were formed, ..."); Stephen M. Schwebel, *The Influence of Bilateral Investment Treaties on Customary International Law*, 98 AM. SOC'Y INT'L. L. PROC. 27, 28 (2004) ("[I]n the last quarter century, more than 2000 bilateral investment treaties (BITs) have been concluded.").

[21] *See infra* notes 26–27 and accompanying text.

[22] *See* SORNARAJAH, *supra* note 7, at 138–42 (describing the relationship between the minimum standard of treatment and the body of international law addressing state responsibility for injury to aliens). For a discussion of the content of the minimum standard of treatment, see *infra* Section 3.

[23] *See* Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L.

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The wave of BITs coincided with the controversial efforts to promote acceptance of a "new customary international law" of human rights, based upon declarations of the United Nations General Assembly and other international instruments rather than on evidence of consistent state practice.[24] The "new CIL" methodology has been widely criticized for not being grounded in actual state practice.[25] Nonetheless, proponents of the view that CIL includes a minimum standard of treatment for foreign investors have enthusiastically embraced the "new CIL" approach, arguing that a minimum standard of treatment for foreign investors has become part of CIL based upon the widespread inclusion of the concept in BITs. According to Stephen Schwebel, a former President of the International Court of Justice:

> The process by which provisions of treaties binding only the parties to those treaties may seep into general international law and thus bind the international community as a whole is subtle and elusive. It is nevertheless a real process known to international law.
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> . . .
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> [W]hen BITs prescribe treating the foreign investor in accordance with customary international law, they should

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REV. 1521, 1539–45 (2005) (discussing the investor-state investment arbitration process).

[24] *See* Bradley & Goldsmith *supra* note 3, at 838–42 (describing growing acceptance since World War II of CIL norms based on treaties and other "international pronouncements" rather than state practice); *see also* Jack L. Goldsmith & Eric A. Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. INT'L. L. 639, 640 (2000) ("[The new CIL approach] derives norms of CIL in a loose way from treaties (ratified or not), U.N. General Assembly resolutions, international commissions, and academic commentary . . . ."); Kelly, *supra* note 3, at 484–85 ("The premise of 'new CIL' methodology is that unanimous and near-unanimous resolutions and declarations of the U.N. General Assembly and other international fora constitute a consensus on legal norms providing clear evidence of the opinio juris of nations.").

[25] *See, e.g.*, Curtis A. Bradley & and Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 328 (1997) ("There is much debate about how this new CIL is made and identified. One thing, however, is clear: This new CIL does *not* reflect the actual practice of states.") *See also* Kelly, *supra* note 3, at 485 ("The traditional criticism of 'new CIL' methodology is that it is not based on general and consistent state practice, but rather on non-binding verbiage. Resolutions are said to declare law or the international community's normative conviction, rather than law evolving as a social phenomenon.").

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> be understood to mean the standard of international law embodied in the terms of some two thousand concordant BITs. The minimum standard of international law is the contemporary standard.[26]

Similarly, the tribunal in *Mondev v. United States* asserted that:

> [T]he vast number of bilateral and regional investment treaties (more than 2000) 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.[27]

Critics have responded to the attempt to use the BITs to establish a minimum standard of treatment for foreign investment by noting that the failure of attempts to negotiate a multilateral investment treaty indicates that there is not sufficient agreement on the existence of a minimum standard of treatment to support a rule of CIL.[28]

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[26] Schwebel, *supra* note 20, at 29-30; *cf.* Kelly, *supra* note 3, at 501-503 (describing reference to BITs as evidence of the proper standard for compensation for expropriation under customary international law). *But see* Bernard Kishoiyian, *The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law*, 14 NW. J. INT'L. L. & BUS. 327, 329 (1994) ("[E]ach BIT is nothing but a *lex specialis* between parties designed to create a mutual regime of investment protection. . . . uncertainty in the law on investment protection [makes this necessary, but it]. . . cannot be removed on a universal basis by these treaties as they do not consistently support definite legal principles.").

[27] Award, Mondev Int'l, Ltd. v. United States, Case No. ARB(AF)/99/2, ¶ 117, ICSID (W. Bank) (Oct. 11, 2002). *Mondev* involved a dispute over a failed development project between a Canadian corporation, the City of Boston, and the Boston Redevelopment Agency. The corporation brought a claim under NAFTA Chapter 11 arguing, *inter alia*, that a ruling by the Massachusetts Supreme Court that the Redevelopment Authority enjoyed statutory immunity from suit over the dispute violated the minimum standard of treatment. The NAFTA tribunal rejected this claim, but indicated that under some circumstances a government's granting immunity from suit to a public agency could constitute a violation of the minimum standard of treatment. *See id.* ¶¶ 151-54.

[28] *See* Sornarajah, *supra* note 7, at 159 ("[BITs] cannot create customary

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2.3. *The Minimum Standard of Treatment as Treaty Obligation*

Arguably, however, the debate over whether CIL includes a minimum standard of treatment for foreign investors is largely irrelevant if the objective is to establish that existence of such a norm. The BITs and various regional agreements such as NAFTA not only establish the minimum standard of treatment as a treaty obligation, but make it enforceable through investor-state dispute settlement; establishing that the minimum standard of treatment would exist as a binding (albeit largely unenforceable)[29] requirement under CIL in the absence of these agreements is unnecessary to establish the existence of the obligation.[30]

Nonetheless, customary international law does play an important role to the extent that it defines—or fails to define—the minimum standard of treatment. Investment treaties generally provide little guidance on the content of the minimum standard of treatment, but instead define it by reference to CIL.[31] As discussed

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international law. The projects to bring about multilateral agreements on investment have been significant failures indicating the variety of viewpoints that are taken on this issue even among developed states.") *See also* Kelly, *supra* note 3, at 503 ("The recent failed attempt to negotiate a comprehensive agreement to protect trade-related investment during the Uruguay Round of trade negotiations confirms that there is not yet a consensus on the core principles of investment protection.").

[29] Even the most enthusiastic proponents of the CIL of investor protection have not argued that the right to investor-state dispute settlement has become part of CIL as a result of its widespread inclusion in BITs. *See, e.g.*, Schwebel, *supra* note 20, at 30 ("In view of the treaty-specific nature of grants of international jurisdiction, and the presumption that states are not amenable to international adjudication unless they consent to it, it would not be tenable to suggest that BIT provisions that afford arbitral recourse have themselves found their way into the body of customary international law.").

[30] *See* SORNARAJAH, *supra* note 7, at 328:

> [I]t cannot be said with certainty that there is an international minimum standard of treatment of foreign investment in customary international law . . . [b]ut, where there is a treaty on investment which makes reference to an international minimum standard, the treaty conclusively establishes the existence of the standard as between the parties.

As Professor Sornarajah notes, tribunals convened pursuant to Chapter 11 of NAFTA have acknowledged the controversy over the existence of a minimum standard of treatment in CIL, but have indicated that NAFTA resolves the issue among the NAFTA Parties. *See id.* at 328–29 and n.32, citing *ADF v. United States*, ¶ 178, and *Mondev v. United States*, ¶ 120.

[31] *See* SORNARAJAH, *supra* note 7, at 330 ("[T]reaties limit [the minimum standard of treatment's] meaning to the circumstances in which it was recognised in customary international law as conceived by the major capital-exporting states").

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below, however, just as CIL is largely irrelevant in establishing the existence of a widely enforceable minimum standard of treatment norm, it has also thus far proven incapable of providing clear guidance on the content of the standard.

3. THE CONTENT OF THE MINIMUM STANDARD OF TREATMENT

From its origins in the doctrine of "denial of justice," the content of the minimum standard of treatment for foreign investors has always been highly indeterminate.[32] The tribunal in *Neer* acknowledged the vagueness of the standard, quoting John Bassett Moore's observation that it is "[not] practicable to lay down in advance precise and unyielding formulas by which the question of a denial of justice may in every instance be determined."[33] The *Neer* tribunal offered its own characterization of denial of justice not as a "precise formula," but rather only as an incremental improvement on the standard as articulated by Moore and others.[34] One commentator, writing a decade after *Neer*, referred to the term denial of justice as "a compromise in words . . . [that] amounts to a postponement of the decision" as to whether government conduct

[32] *See* JAMES L. BRIERLY, THE LAW OF NATIONS 207 (4th ed. 1949) ("[T]he international standard cannot be made a matter of precise rules. It is the standard of the reasonable state; reasonable, that is to say, according to the notions that are accepted in our modern civilization."); Charles H. Brower, II, *Structure, Legitimacy, and NAFTA's Investment Chapter,* 36 VAND. J. TRANSNAT'L L. 37, 66 (2003) ("[I]ncongruity has become the hallmark of decisions involving the minimum standard of treatment . . . ."); Renée Lettow Lerner, *International Pressure to Harmonize: The U.S. Civil Justice System in an Era of Global Trade,* 2001 BYU L. REV. 229, 248 (2001) ("The minimum standard of treatment for aliens is related to what is known in international law as 'denial of justice.' 'Denial of justice' is, however, much easier to state than to define. One prominent jurist has called this doctrine 'one of the oldest and one of the worst elucidated in international law.'") (quoting Charles de Visscher, *Le déni de justice en droit international,* 52 RECUEIL DES COURS 369, 369 (1935 II)); Stefan Matiation, *Arbitration with Two Twists:* Loewen v. United States *and Free Trade Commission Intervention in NAFTA Chapter 11 Disputes,* 24 U. PA. J. INT'L ECON. L. 451, 495 (2003) ("[The Doctrine of Denial of Justice] has been both respected and maligned, and its meaning has always been extremely difficult to pin down—making it a challenging doctrine to apply to particular facts."); Spiegel, *supra* note 15 at 80 (asserting that denial of justice can "hardly be defined in a purely rationalistic way, and it is, therefore, particularly cherished by those who hope to derive benefit from its obscurity. . . . All attempts at definition are arbitrary and in no way precise.").

[33] L. F. H. Neer (U.S.A.) v. United Mexican States, 4 R. Int'l Arb. Awards 60, 61 (Mex./U.S.A. Gen. Claims Comm'n 1926) (quoting John Bassett Moore in Paul S. Reinsoh, *The Fourth International Conference of American Republics,* 4 AM. J. INT'L L. 777, 787 (1910)).

[34] *Id.* at 61.

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in any given case will be judged to violate the international standard.[35]

The inclusion of minimum standard of treatment provisions in over 2000 investment treaties since *Neer* was decided has done little to clarify the content of the standard.[36] The indeterminacy of the standard began to generate significant controversy as a result of its inclusion in Article 1105 of NAFTA, which led for the first time to the assertion of the standard in investment claims brought against the United States.

Article 1105 states that "[e]ach 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."[37] Two issues in particular regarding Article 1105 proved contentious: (1) whether the term "fair and equitable treatment" imposed obligations in addition to those contained within the CIL minimum standard of treatment; and (2) whether the reference to "treatment in accordance with international law" referred to treaty law as well as customary international law.[38]

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[35] Spiegel, *supra* note 15, at 81.

[36] *See* SORNARAJAH, *supra* note 7, at 331:

> [T]he increasing spread of investment treaties . . . cannot contribute to the identification of the content of an international minimum standard as none of the treaties seeks to describe the content of this standard. They merely make reference to this standard. The . . . assertion that this numerical explosion of treaties must have some meaning hardly gives content to the standard. The number of repetitions of the same notion is immaterial if the content of it is not identified. Emptiness multiplied several times over can still produce only emptiness.

See also Dolzer & Stevens, *supra* note 7, at 58 ("Nearly all recent BITs require that investments and investors covered under the treaty receive 'fair and equitable treatment,' in spite of the fact that there is no general agreement on the precise meaning of this phrase.").

[37] North American Free Trade Agreement, U.S.-Can.-Mex., art. 1105(1), Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA]. "Full protection and security" refers to the obligation to provide foreign investment with "reasonable" police protection under the circumstances, but does not require governments to guarantee the safety of an investment. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 711, cmt. e (1987) ("A state does not guarantee the safety of an alien or of alien property, but it is responsible for injury when police protection falls below a minimum standard of reasonableness.").

[38] *See generally* Charles H. Brower, II, *Fair and Equitable Treatment Under NAFTA's Investment Chapter*, 96 AM. SOC'Y INT'L L. PROC. 9 (2002) (discussing the "different conclusions about the body of 'international law' to which Article 1105 refers and the extent to which 'fair and equitable treatment' subjects public regulation to international scrutiny."); Jack J. Coe, Jr., *Taking Stock of NAFTA*

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Addressing the first issue, the tribunal in *Pope & Talbot v. Canada* concluded that Article 1105's reference to "fair and equitable treatment" was "additive" to the requirements of the customary international law minimum standard, and therefore required it to determine whether the treatment of the investor had been fair "free of any threshold that might be applicable to the evaluation of measures under the minimum standard of international law."[39] The tribunal based this reading of Article 1105 on its conclusion that the NAFTA minimum standard of treatment provision was based on similar provisions in the BITs, which the tribunal interpreted as requiring that foreign investors be provided with fair and equitable treatment in addition to the standard of treatment provided for under international law.[40] Applying this "additive" interpretation of fair and equitable treatment, the tribunal concluded that Canada's conduct of an audit of the claimant related to Canada's quota system for exports of softwood lumber to the United States violated the minimum standard of treatment.[41]

Other early decisions interpreting NAFTA's minimum standard of treatment provision addressed the second issue by indicating that violations of other sections of NAFTA—or even other international trade agreements—constituted violations of the minimum standard of treatment as well. In *Metalclad v. The United Mexican States*, for example, the tribunal indicated that a Mexican municipality's denial of a permit for the construction of a hazardous waste landfill by a United States investor violated the minimum standard of treatment because it violated NAFTA's

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Chapter 11 in Its Tenth Year: An Interim Sketch of Selected Themes, Issues and Methods, 36 VAND. J. TRANSNAT'L L. 1381, 1427-29 (2003) (exploring whether, for purposes of Article 1105, "international law" merely meant custom or also included treaties and general principles of international law).

[39] Award, Pope & Talbot Inc. v. Canada, (Award on the Merits of Phase 2) ¶¶ 105-118, (Apr. 10, 2001), *reprinted in* NORTH AMERICAN FREE TRADE AGREEMENTS: COMMENTARY 29-30 (James R. Holbein & Donald J. Musch eds., 2003).

[40] *Id.* ¶¶ 111-16. The tribunal also noted that investors could use the most favored nation provision of NAFTA to claim entitlement to the "additive" standard for fair and equitable under the BITS. *Id.* ¶ 117.

[41] *Id.* ¶¶ 156-81. The tribunal indicated that the audit violated the standard for fair and equitable treatment because the investor was "subjected to threats, denied its reasonable requests for pertinent information, required to incur unnecessary expense and disruption in meeting . . . requests for information, forced to expend legal fees and probably suffer [sic] a loss of reputation in government circles." *Id.* ¶ 81.

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transparency provisions.[42] Similarly, in *S.D. Myers v. Canada*, the tribunal indicated that its conclusion that Canada's ban on the export of polychlorinated biphenyls ("PCBs") violated Chapter 11's national treatment provision "essentially establishes a breach of Article 1105 as well." [43]

The claimant in *Methanex Corp. v. United States* attempted to extend this approach to the minimum standard of treatment even further, arguing that "[a]ny violation of an international principle intended for the protection of trade or investment is also a violation of the NAFTA Article 1105 requirement that state measures be fair, equitable, and in accordance with international law."[44] Methanex, the claimant, argued specifically that California's ban on the fuel additive MBTE—of which Methanex made a component—violated provisions of two World Trade Organization ("WTO") agreements and therefore violated NAFTA's minimum standard of treatment provision.[45]

Before the tribunal could rule on Methanex's minimum standard of treatment claim, NAFTA's Free Trade Commission ("FTC") issued an interpretive statement in an attempt to rein in the expansive interpretations of Article 1105.[46] The interpretive statement indicated that Article 1105 did not require treatment "in addition to or beyond that which is required by the customary international law minimum standard of treatment" and that "[a] determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105."[47]

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[42] Award, Metalclad Corp. v. United Mexican States, Case No. ARB(AF)/97/1, ¶¶ 74-101, ICSID (W. Bank) (Arbitral Trib. 2000), *reprinted in* 40 I.L.M. 36 (2001).

[43] S.D. Myers v. Canada, ¶ 266, Arbitral Tribunal, Doc. 742416:01 (Nov. 13, 2000), *available at* http://www.dfait-maeci.gc.ca/tna-nac/documents/myersv canadapartialaward_final_13-11-00.pdf.

[44] Claimant Methanex Corporation's Draft Amended Complaint, Methanex Corp. v. United States 61 (Feb. 12, 2001), *available at* http://naftaclaims.com/Disputes/USA/Methanex/MethanexAmmendedStatem entOfClaim.pdf.

[45] *Id.* at 58-64 (arguing that California's ban on MBTE violated provisions of the WTO's Agreement on Technical Barriers to Trade and Agreement on Sanitary and Phytosanitary Measures and therefore violated Article 1105 of NAFTA).

[46] *See* NAFTA, *supra* note 37, art. 2001(1) (explaining that the FTC is comprised of one representative from each of the NAFTA Parties). *See id.* art. 1131(2) (providing that interpretations by the FTC are binding on tribunals established under Chapter 11).

[47] *Free Trade Commission Clarifications Related to Chapter 11* (July 31, 2001),

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The interpretive statement generated significant controversy concerning whether the FTC had effectively amended Article 1105 and therefore exceeded its authority. The *Pope & Talbot* tribunal indicated that "were the Tribunal required to make a determination whether the Commission's action is an interpretation or an amendment, it would choose the latter."[48] The tribunal avoided the issue, however, by concluding that Canada's conduct violated the minimum standard of treatment even as explicated in the interpretive statement.[49] Several commentators have similarly questioned the validity of the interpretive statement.[50]

Given the indeterminacy of the body of customary international law to which the interpretive statement refers, however, it has done little to clarify the minimum standard of treatment or the meaning of "fair and equitable treatment." In *Mondev v. United States*, for example, after extensive discussion of the interpretive statement the tribunal offered the following characterization of the minimum standard of treatment as

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reprinted in NORTH AMERICAN FREE TRADE AGREEMENTS: COMMENTARY 2 (James R. Holbein & Donald J. Musch eds., 2003):

> B. Minimum Standard of Treatment in Accordance with International Law
>
> 1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
>
> 2. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
>
> 3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).

[48] Award, Pope & Talbot v. Canada ¶ 47 (May 31, 2002). The claimant in Methanex similarly suggested that the Interpretive Note constituted an *ultra vires* attempt to amend NAFTA. *See* Investor's First Submission re: NAFTA FTC Statement on Article 1005, at 17-20, Methanex Corp. v. United States, (Sept. 18, 2001).

[49] Award, Pope & Talbot v. Canada ¶¶ 65, 67-69 (May 31, 2002).

[50] *See, e.g.*, Brower, *supra* note 38, at 10 ("[T]ribunals might conclude that the [interpretive statement] represent[ed] an ultra vires amendment of the NAFTA."); Murray J. Belman, Remarks to the American Society of International Law, *in* AM. SOC. INT'L PROC., *supra* note 7, at 12, 13 (questioning whether the American interpretive statement constituted an "amendment that is beyond the power of the Free Trade Commission").

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applicable to judicial actions:

> [T]he question is whether . . . a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment. *This is admittedly a somewhat open-ended standard, but it may be that in practice no more precise formula can be offered to cover the range of possibilities.*[51]

Despite the interpretive statement's failure to provide clear guidance on the minimum standard of treatment, it has become part of the standard model for United States investment agreements, and similar language has been included in recent United States free trade agreements ("FTAs") and BITs.[52] Arguably, this new U.S. model has actually exacerbated the controversy over the content of the minimum standard of treatment by contributing to the development of variant formulations of the minimum standard in different BITs and FTAs. The U.S. model represents one class of agreements that confine fair and equitable treatment to CIL, whereas another (larger) class of agreements permit "additive" interpretations of fair and equitable

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[51] Award, Waste Management, Inc. v. United Mexican States, Case No. ARB(AF)/00/3, ¶ 95, ICSID (W. Bank) (Apr. 30, 2004), *available at* http://ww.state.gov/documents/organization/34643.pdf (emphasis added). *See also* Brower, *supra* note 38, at 9 ("[T]he recent Notes of Interpretation . . . leave ample room for debate".); Courtney C. Kirkman, *Fair and Equitable Treatment: Methanex v. United States and the Narrowing Scope of NAFTA Article 1105*, 34 LAW & POL'Y INT'L BUS. 343, 390 (2002) ("The FTC Interpretation has not completely clarified the scope of Article 1105, however. In tying fair and equitable treatment to the international minimum standard, new debate has begun as to the meaning of the international minimum standard."); Yannaca-Small, *supra* note 7 at 40:

> It would be inappropriate at this stage to establish a definitive interpretation of the "fair and equitable treatment" standard. The jurisprudence which has applied it and identified elements of its normative content is relatively recent and is not uniform, and therefore does not allow for a firm and conclusive list.

[52] *See, e.g.*, U.S.-Morocco Free Trade Agreement, art. 10.5(3), Aug. 17, 2004, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Morocco_FTA/Final_Text/Section_Index.html ("A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article."); 2004 U.S. Model Bilateral Investment Treaty, art. 5(3), *available at* http://www.state.gov/documents/organization/38710.pdf ("A determination that there has been a breach of another provision of this Treaty, or of a separate international agreement, does not establish that there has been a breach of this Article.").

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treatment that are not rooted in CIL.[53]

There are, however, certain consistent themes in the recent attempts of tribunals and commentators to summarize content of the minimum standard of treatment. There appears to be broad agreement that it encompasses international versions of both substantive and procedural due process.[54] The U.S. model BIT and recent U.S. FTAs emphasize this aspect of the minimum standard of treatment, stating that "fair and equitable treatment" includes the obligation not to deny justice in "criminal, civil, or administrative adjudicatory proceedings *in accordance with the principle of due process embodied in the principal legal systems of the*

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[53] *See* Yannaca-Small, *supra* note 7, at 40:

> Because of the differences in its formulation, the proper interpretation of the "fair and equitable treatment" standard depends on the specific wording of the particular treaty, its context, the object and purpose of the treaty, as well as on negotiating history or other indications of the parties' intent. For example, some treaties include explicit language linking or, in some cases limiting, fair and equitable treatment to the minimum standard of international customary law. Other treaties which either link the standard to international law without specifying custom, or lack any reference to international law, could, depending on the context of the parties' intent, for example, be read as giving the standard a scope of application that is broader than the minimum standard as defined by international customary law.

See also Jack J. Coe, Fair and Equitable Treatment under NAFTA's Investment Chapter, Remarks at the Meeting of the American Society of International Law (Mar. 13-16, 2002), *in* 2002 AM. SOC. INT'L L.: PRO. OF THE 96TH ANNUAL MEETING 9, 18 ("Broadly speaking, then, there are two textual families, the most prolific by far being those in which the fair and equitable treatment provision—though often combined with other guarantees—is not explicitly linked to international law.").

[54] *See, e.g.*, Award, Waste Management, Inc. v. United Mexican States, Case No. ARB(AF)/00/3, ¶ 98, ICSID (W. Bank) (Apr. 30, 2004):

> the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves *a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings* or a complete lack of transparency and candour in an administrative process.

(emphasis added); Loewen Group v. United States, Case No. ARB(AF)/98/3, ¶ 132, Arbitral Tribunal (2003) (defining the minimum standard of treatment in the context of judicial proceedings as requiring "[m]anifest injustice in the sense of lack of due process leading to an outcome which offends a sense of judicial propriety."); Yannaca-Small, *supra* note 7, at 40 ("Most of the arbitral opinions [interpreting fair and equitable treatment] . . . mention two elements, due diligence and due process.").

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world . . . ."[55]

The United States is presumably one of the principal legal systems of the world. The arbitral decisions that have interpreted the minimum standard of treatment, however, suggest that it could potentially provide significantly greater rights than the due process clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution, particularly with regard to substantive due process. The standard for substantive due process review of economic regulations under the Constitution is extremely deferential and requires only that legislation bear some rational relationship to the objectives of the legislature.[56] A court will not use substantive due process review to "sit as a superlegislature" and strike down laws that it considers to be unwise, inefficient, or unfair.[57]

The content of the minimum standard of treatment is less clear, but appears to permit a more aggressive review of economic legislation. One line of tribunal decisions, for example, has indicated that the minimum standard of treatment imposes a duty on governments not to change legal standards that were in effect

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[55] 2004 U.S. Model Bilateral Investment Treaty, art. 5(2)(a), *available at* http://www.state.gov/documents/organization/38710.pdf [hereinafter Model U.S. BIT] (emphasis added). *See also* Central American Free Trade Agreement art. 10.5(2)(a), Aug. 5, 2004, 43 I.L.M. 514 [hereinafter CAFTA] (containing similar provisions); U.S.-Chile Free Trade Agreement, art. 10.4(2)(a), May 6, 2003, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html [hereinafter U.S.-Chile FTA] (containing similar provisions); U.S.-Singapore Free Trade Agreement art. 15.5(2)(a), June 6, 2003, *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_upload_file708_4036.pdf (containing similar provisions).

[56] *See* Concrete Pipe and Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 639 (1993) ("[U]nder the deferential standard of review applied in substantive due process challenges to economic legislation there is no need for mathematical precision in the fit between justification and means."); United States v. Carolene Products, 304 U.S. 144, 152 (1938) ("[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.").

[57] Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 124 (1978) ("[T]he Due Process Clause does not empower the judiciary to sit as a superlegislature to weigh the wisdom of legislation.") (citation and quotation marks omitted). *See also* Eastern Enterprises v. Apfel, 524 U.S. 498, 537-538 (1998) (quoting Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 488 (1955)) ("The day is gone when this Court uses the Due Process Clause . . . to strike down . . . laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.").

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when a foreign investment was made.[58] Under substantive due process analysis, in contrast, governments are generally free to change regulatory standards in response to changed circumstances or priorities.[59]

In addition to its inclusion of an international version of substantive due process, another area of apparent consensus concerning the minimum standard of treatment is that it is a continuously evolving concept, and that this evolution is driven to

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[58] *See* Award, Occidental Exploration & Production Co. v. Ecuador, ¶ 191 (UNCITRAL Arb.) (2004) (stating that under fair and equitable treatment "there is certainly an obligation not to alter the legal and business environment in which the investment has been made"); *see also id.* ¶ 183 ("[T]he stability of the legal and business framework is . . . an essential element of fair and equitable treatment."); Award of May 12, 2005, CMS Gas Transmission Co. v. The Argentine Republic, Case No. ARB/01/8, ¶ 274, ICSID (W. Bank) (2005) ("There can be no doubt, therefore, that a stable legal and business environment is an essential element of fair and equitable treatment."); Award of May 29, 2003, Tecnicas Medioambientales Tecmed S.A. v. Mexico, Case No. ARB (AF)/00/2, ¶ 154, ICSID (W. Bank) (2003) (indicating that an investor must "know beforehand any and all rules and regulations that will govern its investments"). This purported right against legal changes that adversely affect an investment "is an objective requirement that does not depend on whether the [government] has proceeded in good faith or not." *Occidental,* ¶ 186. *See also CMS,* ¶ 280 ("[T]his in an objective requirement unrelated to whether [a government] has had any deliberate intention or bad faith objective in adopting the measures in question.").

Interestingly, the tribunals in both Occidental and CMS cited *United Mexican States v. Metalclad Corp.* in support of their interpretation of fair and equitable treatment. *See* Occidental, ¶ 185; CMS, ¶ 278. The Supreme Court of British Columbia, however, rejected the *Metalclad* tribunal's conclusions regarding fair and equitable treatment as inappropriately construing NAFTA's minimum standard of treatment provision to incorporate transparency provisions contained in other sections of NAFTA. *See* United Mexican States v. Metalclad Corp., 2001 B.C.T.C. 664, ¶¶ 66-76. The court had jurisdiction under Canada's International Commercial Arbitration Act to review the award on certain grounds because the parties had designated Vancouver, B.C. as the place of the arbitration. *Id.* ¶ 1.

[59] In addition to the highly deferential standard for challenges to economic regulations (*see supra* notes 56-57 and accompanying text), the limited scope of economic interests that are subject to substantive due process protection also presents a significant obstacle to claims against changed regulatory standards. Under the "entitlement rule," a party usually may not bring a substantive due process challenge to an economic measure unless the measure adversely affects a legal entitlement (e.g., a vested property right) of the party. *See* Daniel R. Mandelker, *Entitlement to Substantive Due Process: Old Versus New Property in Land Use Regulation,* 3 WASH. U.J.L. & POL'Y 61, 78-80 (2000) (describing how the courts apply the entitlement rule to land use proposals). The scope of "investment" that is subject to the minimum standard of treatment, in contrast, is extremely broad, and appears to include such generalized interests as the interest in conducting business or making a profit. *See* Matthew C. Porterfield, *International Expropriation Rules and Federalism,* 23 STAN. ENVTL. L.J. 3, 44-54 (2004) (discussing the broad scope of economic interests protected under Chapter 11 of NAFTA).

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a large extent by the decisions of arbitral tribunals. In *Mondev v. United States,* the tribunal indicated that because of developments in international law the minimum standard of treatment could no longer be confined to the "egregious" conduct proscribed under *Neer*:

> *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. In particular, both the substantive and procedural rights of the individual in international law have undergone considerable development. In the light of these developments it is unconvincing to confine the meaning of "fair and equitable treatment" and "full protection and security" of foreign investments to what those terms—had they been current at the time—might have meant in the 1920s when applied to the physical security of an alien. To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.[60]

The *Mondev* tribunal cautioned that the "evolutionary potential"[61] of the minimum standard of treatment did not provide a tribunal with an "unfettered discretion to decide for itself, on a subjective basis, what was 'fair' or 'equitable' . . . without reference to established sources of law."[62] The tribunal, however, identified "the jurisprudence of arbitral tribunals"[63] as such a source.

The tribunal in *ADF Group, Inc. v. United States* similarly observed that all three NAFTA Parties agreed that "customary international law . . . is not 'frozen in time' and that the minimum standard of treatment does evolve."[64] The ADF tribunal further noted that:

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[60] Award, Mondev Int'l, Ltd. v. United States, Case No. ARB(AF)/99/2, ¶ 116, ICSID (W. Bank) (Oct. 11, 2002).

[61] *Id.* at ¶ 119.

[62] *Id.*

[63] *Id.*

[64] Award, ADF Group Inc. v. United States, 6 ICSID (W. Bank) 450, 527 (Jan. 9, 2003).

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what customary international law projects is not a static photograph of the minimum standard of treatment of aliens as it stood in 1927 when the Award in the *Neer* case was rendered. For *both customary international law and the minimum standard of treatment of aliens it incorporates, are constantly in a process of development.*[65]

As in *Mondev,* the *ADF* tribunal specifically referred to arbitral case law as a source of law guiding the evolution of the minimum standard.[66] Numerous commentators have similarly noted both the evolutionary character of the minimum standard of treatment and the role of arbitral tribunals in determining the course of that evolution.[67] Significantly, it is implicit in this concept of an

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[65] *Id.* at 528 (emphasis added).

[66] *Id.* at 530. The tribunal also identified state practice, judicial case law, and "other sources of customary or general international law" as factors in the evolution of the minimum standard of treatment (*Id.*), but failed to elaborate on how these sources had influenced the development of the minimum standard other than quoting *Mondev*'s reference to the role of bilateral investment treaties. *ADF,* 6 ICSID (W. Bank) at 529-30. However, as discussed *supra* notes 29-31 and accompanying text, although BITs may establish the minimum standard of treatment as an international legal obligation, they do little to define the minimum standard's content.

[67] *See, e.g.,* Sornarajah, *supra* note 7, at 318 ("[A]rbitral tribunals have independently created 'law' through their awards asserting the existence of an international minimum standard of treatment of aliens, including foreign investors."). *See also id.* at 329 ("Tribunals have asserted that they . . . have a creative function to perform. . . . The difficulty in this approach is whether the tribunal will perform a near-legislative function . . . in identifying areas of international minimum standard."); Thomas W. Wälde, *Investment Arbitration under the Energy Charter Treaty: An Overview of Selected Key Issues based on Recent Litigation Experience, in* 19 STUDIES IN TRANSNATIONAL ECONOMIC LAW: ARBITRATING FOREIGN INVESTMENT DISPUTES 193, 207 (Norbert Horn ed., 2004) ("[N]o self-respecting tribunal would interpret the standard as it was done in 1926, but rather sees it as an 'evolutionary' standard reflecting the expected minimum expectation in the 21st century or the contemporary notion of what is 'fair' and what is 'equitable.'"); Yannaca-Small, *supra* note 7, at 40 ("[T]he minimum standard refers to an evolving international customary law which is not 'frozen' in time, but may evolve over time depending on the general and consistent practice of states and *opinio juris,* as may be reflected in jurisprudence related to the interpretation and application of these treaties."); Patrick G. Foy and Robert J.C. Deane, *Foreign Investment Protection under Investment Treaties: Recent Developments under Chapter 11 of the North American Free Trade Agreement,* 16 ICSID REV.: FOREIGN INVESTMENT L.J. 299, 317 (2001) ("The customary international law norms regarding fair and equitable treatment of foreign nationals and their property are evolving."); Franck, *supra* note 23, at 1617 ("Arbitrators inevitably create 'new international law' founded on the norms present in investment treaties when they apply the substantive rights in investment treaties to the facts of actual disputes.").

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"evolutionary" minimum standard of treatment that the scope of foreign investor rights will continue to expand.[68]

Charles H. Brower, II has argued that the term "fair and equitable treatment" constitutes "an intentionally vague term, designed to give adjudicators a quasi-legislative authority to articulate a variety of rules necessary to achieve the treaty's object and purpose in particular disputes."[69] As discussed below, whether its vagueness is intentional or not, the minimum standard of treatment remains highly indeterminate, calling into question its legitimacy as a norm of international law.

4. THE VAGUENESS AND DELEGATION PROBLEMS

4.1. *The Vagueness Problem*

Although an international "void for vagueness" doctrine has never been fully articulated, it is implicit in the concept of binding international legal norms (or norms at all, for that matter) that they have identifiable content. Thomas Franck has argued that in order for an international legal standard to be legitimate, it must provide reasonably clear guidance concerning the nature of the obligation that it imposes.[70] Franck equates determinacy with transparency:

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[68] *See* Barnali Choudhury, *Evolution or Devolution? Defining Fair and Equitable Treatment in International Investment Law*, 6 J. WORLD INVESTMENT & TRADE 297, 320 (2005):

> [A]ccepting the evolving nature of the definition of fair and equitable treatment will also require governments to accept that, over time, the concept will gradually take on a more liberal and expansive scope. Thus, the breadth of grounds under which foreign investors are covered will continue to grow as the definition of the standard evolves. Expanding the scope of protection for foreign investors will also lead to a corresponding decrease in a State's ability to act at will.

[69] Brower, *supra* note 32, at 66 n. 163. *See also* Kenneth J. Vandevelde, UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE 76 (1992) ("The phrase [fair and equitable treatment] is vague and its precise content will have to be defined over time through treaty practice, including perhaps arbitration under the dispute provisions."); Franck, *supra* note 23, at 1589 (arguing that defining more precisely the meaning of "fair and equitable treatment" in investment treaties would "sacrifice the flexibility and equity that exists in the present system and may also prematurely stunt the development of new areas of law"); *cf.* SORNARAJAH, *supra* note 7, at 329 ("The issue will always be whether such a mandate to [define the minimum standard of treatment for foreign investment] was intentionally given to arbitral tribunals.").

[70] *See* THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 57 (1990) ("To be legitimate, a rule must communicate what conduct is permitted and what conduct is out of bounds.").

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> The pre-eminent literary property affecting legitimacy is the rule text's *determinacy*: that which makes its message clear. The same quality may also be termed its "transparency." Logical deduction suggests . . . that rules which are perceived to have a high degree of determinacy—that is, readily ascertainable normative content—would seem to have a better chance of actually regulating conduct in the real world than those which are less determinate.[71]

The United States has also recognized the need for international legal standards to have clearly defined content. In submissions to the WTO rejecting the assertion that the precautionary principle constitutes a rule of CIL, the United States has asserted that in order to constitute a norm of international law, a legal standard must have a "single, agreed formulation."[72] In the absence of consensus on its meaning, a legal standard cannot be considered a "rule" because "it has no clear content and therefore cannot be said to provide any authoritative guide for a State's conduct."[73] Moreover, if a legal standard is not sufficiently determinate to constitute a binding norm,

> it is *a fortiori* not a *rule* of customary international law. . . . [because] it cannot be said to reflect the practice of States, as it cannot even be uniformly defined by those who espouse it . . . [and because it] cannot even be defined and, therefore, could not possibly be a legal norm, one could not argue that States follow it from a sense of legal obligation.[74]

The federal courts have similarly recognized the need for international rules to have a well-defined content by declining to give domestic legal effect to vague international legal standards. In *Sosa v. Alvarez-Machain*,[75] the Supreme Court rejected a claim brought against the United States based on an alleged violation of CIL, on the grounds that the purported customary standard lacked sufficient "specificity" to be enforceable in U.S. courts. The claim

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[71] *Id.* at 52.

[72] Rebuttal Submission of the United States, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, ¶ 22 WT/DS291, 292-93, (July 19, 2004).

[73] *Id.* at ¶ 23.

[74] *Id.*

[75] Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

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was brought by a Mexican national under the Alien Tort Statute ("ATS"), which provides federal courts with jurisdiction to hear claims by aliens for torts "committed in violation of the law of nations or a treaty of the United States."[76] The plaintiff argued that his abduction and transportation to the United States to be prosecuted for the murder of a Drug Enforcement Administration agent violated a CIL prohibition on detentions of foreign nationals that are not authorized by a nation's domestic law.[77] The Court held that in order to be cognizable under the ATS, a norm of international law must be "defined with a specificity" comparable to the narrow class of international offenses (e.g., violation of safe conducts, abuse of ambassadors, and piracy) that were contemplated by Congress when the ATS was first enacted in 1789.[78] The prohibition on unauthorized detentions asserted by the plaintiff, the Court concluded, did not constitute a "norm of customary international law *so well defined as to support the creation of a federal remedy*."[79]

The federal courts have also declined to give vague international treaty provisions domestic legal effect—i.e., to interpret them as being "self-executing."[80] In *American Baptist Churches in the U.S.A. v. Meese*, for example, the United States District Court for the Northern District of California held that the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War did not provide Salvadoran and Guatemalan nationals with a right of refuge in the United States.[81] The court noted that the relevant treaty provision lacked "intelligible guidelines for judicial enforcement" and "[was] 'phrased in broad generalities' and contain[ed] no 'rules by which private rights may be determined.'"[82]

Although the question of the domestic enforceability of international rules is distinct from the legitimacy of those rules at the international level, the same need for legal standards to

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[76] 28 U.S.C. § 1350 (2000).

[77] *Sosa*, 542 U.S. at 735-36.

[78] *Id.* at 725.

[79] *Id.* at 738 (emphasis added).

[80] *See* Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 713 (1995) ("[Treaties may be held unenforceable if they do not] set forth sufficiently determinate standards for evaluating the conduct of the parties and their attendant rights and liabilities.").

[81] 712 F. Supp. 756 (N.D. Cal. 1989).

[82] *Id.* at 770 (internal citations omitted).

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provide "intelligible guidelines" that has led the federal courts to reject the domestic enforcement of vague international rules argues against the legitimacy of these standards at the international level. Accordingly, because it lacks a clearly defined content, the minimum standard of treatment cannot constitute a legitimate norm of international law.

4.2. *The Process Determinacy Solution*

Thomas Franck has suggested that international standards that lack sufficient "textual determinacy" may achieve "process determinacy" and therefore legitimacy through interpretation by a process that is perceived as legitimate.[83] Commentators have embraced Franck's process determinacy approach as a solution to the vagueness of the minimum standard of treatment, either arguing that the existing system of ad hoc tribunals can gradually provide more guidance concerning the content of the standard,[84] or calling for the creation of a new appellate body that would be charged with "supervising the development of a coherent body of law among the various tribunals."[85] Congress has endorsed the latter approach, instructing the Office of the United States Trade Representative ("USTR") to ensure that future trade agreements to which the United States is a party "provid[e] for an appellate body

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[83] *See* FRANCK, *supra* note 70, at 61-66; *see also infra* notes 109-110 and accompanying text.

[84] *See, e.g.*, Ari Afilalo, *Towards a Common Law of International Investment: How NAFTA Chapter 11 Panels Should Solve Their Legitimacy Crisis*, 17 GEO. INT'L ENVTL. L. REV. 51, 88 (2004) ("NAFTA panels may, through a common law interpretation of Chapter 11, draw upon principles born out of experience with international trade in order to confine Chapter 11 to its proper domain.").

[85] Brower, *supra* note 32, at 91; *see also* Frederick M. Abbott, *The Political Economy of NAFTA Chapter Eleven: Equality Before the Law and the Boundaries of North American Integration*, 23 HASTINGS INT'L & COMP. L. REV. 303, 308 (2000) ("One solution to a potential Chapter 11 legitimacy problem would be to constitute an Appellate Body composed, for example, of the Chief Justices of the three nations' Supreme Courts."); Coe, *supra* note 38, at 1453 ("[T]here is reason to hold that an appellate mechanism of some kind [for NAFTA Chapter 11 arbitrations] would be beneficial."); Franck, *supra* note 23, at 1617 ("A single, unified, permanent body charged with developing international law and creating consistent jurisprudence will promote legitimacy more than disaggregated arbitrations that come to different conclusions on the same issue."). Alwyn V. Freeman made a similar proposal almost 70 years ago, suggesting that the international standard for "denial of justice" could be clarified by having disputes decided by the Permanent Court of International Justice, which could gradually develop "a consistent body of legal principles readily applicable to specific cases." Freeman, *supra* note 15, at 570.

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or similar mechanism to provide coherence to the interpretations of investment provisions."[86]

This new appellate body presumably would provide more consistent guidance on the evolving content of the minimum standard of treatment than the current system of *ad hoc* tribunals but would nonetheless still be engaged in the essentially "creative" process of defining the standard's content.[87] As discussed below, even if this delegation of authority to an appellate body could, over time, solve the problem of the vagueness of the minimum standard of treatment, it would result in a new and illegitimate form of international law: an international common law of investor rights.[88]

4.3. *The Delegation Problem*

An international minimum standard of treatment created by arbitral tribunals (or an appellate body) through a common law process is difficult to justify as consistent with basic principles of either international or United States law. There are two generally recognized sources of binding international law—treaties and CIL.[89] Under the dominant Westphalian view of international law,

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[86] Trade Act of 2002, Pub. L. No. 107-210, § 2102(b)(3)(G)(iv), 116 Stat. 933, 955 (2002). Although no appellate body for investment disputes has yet been created, recent U.S. free trade agreements have included language indicating that the parties will engage in negotiations concerning the establishment of such a body. *See, e.g.*, U.S.-Chile FTA, *supra* note 55, Annex 10-H, at 10-36 ("Within three years after the date of entry into force of this Agreement, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered under Article 10.25 in arbitrations commenced after they establish the appellate body or similar mechanism.").

[87] *See* Brower, *supra* note 32, at 66 (discussing the "creative, rather than purely analytical" role of tribunals in interpreting the standard for fair and equitable treatment).

[88] Several commentators have noted the similarities between the development of common law and the process used by arbitral tribunals to identify and define the content of investors' rights under international law. *See, e.g.*, Coe, *supra* note 38, at 1407 ("Many of the awards [under chapter 11 of NAFTA] seem to share, methodologically, a common law influence. Despite the absence of stare decisis, prior awards have often been carefully dissected, sometimes cited with approval, and sometimes distinguished on their facts.") (internal citation omitted); David A. Gantz, *The Evolution of FTA Investment Provisions: From NAFTA to the United States—Chile Free Trade Agreement*, 19 AM. U. INT'L L. REV. 679, 708 (2004) ("[M]embers of the tribunals . . . routinely cite, distinguish, agree with, or discount decisions of prior tribunals.") (internal citation omitted).

[89] Article 38 of the Charter of the United Nations is frequently cited for the proposition that there are actually four categories of international law, including "general principles of law recognized by civilized nations" and "judicial decisions

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both derive their legitimacy from the consent of States.[90]

An international common law of investor rights, in contrast, lacks the legitimacy provided by State consent. The consent of States to participation in treaties that contain minimum standard of treatment provisions cannot reasonably be said to constitute consent to the specific content of the minimum standard of treatment, given that that content is largely indeterminate and is continuously evolving through the decisions of tribunals. Instead, States can only be considered to have consented to the minimum standard of treatment to the extent that they have agreed to the arbitral process for determining the content of the standard and applying that evolving standard in particular disputes.

As a matter of United States law, consenting to bind the nation to certain international rules is an essentially legislative act and therefore can only be done by Congress—the politically accountable representatives of the people (or by the Senate, in the case of Article II treaties).[91] Congress inappropriately delegates

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and the teachings of the most highly qualified publicists" in addition to treaties and CIL. *See* U.N. Charter art. 38, ¶ 1(c)-(d). Neither "general principles of law" nor judicial decisions and the writings of highly qualified publicists, however, constitute primary sources of binding international norms. "General principles of law" refers to principles that are common to the "major legal systems . . . which may be invoked as supplementary rules of international law when appropriate." *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102(4) (1987). General principles of law are not binding international legal obligations, but rather constitute "a secondary source of law, resorted to for developing international law interstitially in special circumstances." *Id.* at § 102.4 cmt. l. Similarly, "judicial decisions and the teachings of the most highly qualified publicists" are not sources of international legal obligation, but rather "opinion-evidence as to whether some rule has in fact become or been accepted as international law." *Id.* at § 102 rep. note 1.

[90] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. 1, ch. 1, intro (1987) ("Modern international law is rooted in acceptance by states which constitute the system. Specific rules of law also depend on state acceptance."); LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 27 (1995) ("State consent is the foundation of international law. The principle that law is binding on a state only by its consent remains an axiom of the political system, an implication of state autonomy."); Andrew T. Guzman, *A Compliance Based Theory of International Law*, 90 CAL. L. REV. 1823, 1833 (2002) ("[P]robably the most commonly held rationale for the relevance of international law to national conduct . . . is based on the notion of consent."). The view that CIL is based on state consent is not universally shared; an alternative account holds that CIL derives its authority from the consensus of nations. *See* Kelly, *supra* note 3, at 510.

[91] In areas that are within the scope of executive authority, the President may also enter into international agreements—know as "sole executive agreements"—without obtaining the consent of Congress (or of the Senate). *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 648 (3d ed. 2003) ("At the very least, the

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this legislative authority when it consents to U.S. participation in FTAs and BITs that effectively confer on tribunals the power to define the content of the minimum standard of treatment.[92]

In practice, the nondelegation doctrine has not imposed a significant restraint on legislative action since the 1930s.[93] The Supreme Court has approved delegations of rulemaking authority subject only to the requirements that there be evidence of Congressional intent to make the delegation[94] and that Congress provide some "intelligible principle" to guide the exercise of the delegated power.[95]

Arguably, however, the discretion conferred on international tribunals to define the content of the minimum standard of treatment violates even these minimal criteria for permissible delegations. In the Trade Act of 2002, Congress did delegate to the

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President is empowered to employ executive agreements within the penumbras of enumerated presidential powers, as, for example, when invoking the Commander in Chief power to justify an armistice agreement.").

92 Congress also, of course, delegates an adjudicative function to investment tribunals, which may implicate the authority of the federal judiciary under Article III of the Constitution. *Compare* Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1564-66 (2003) (discussing potential Article III limitations on delegations of judicial authority to international tribunals), *with* Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1532 (2004) (suggesting that critics of delegations of judicial authority to international bodies "must confront the longstanding practice of employing international arbitral tribunals, which appear to have been controversial more because of their sometimes legislative character than due to any distinct Article III issue.") (citation omitted).

93 *See* Whitman v. American Trucking Associations, 531 U.S. 457, 474 (2001) ("In the history of the Court we have found the requisite 'intelligible principle' lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'") (citing Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) and A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)).

94 United States v. Mead Corp., 533 U.S. 218, 226-27 (2001). *See also* Michael P. Van Alstine, *The Judicial Power and Treaty Delegation*, 90 CAL. L. REV. 1263, 1285-86 (2002) ("[A] purported statutory delegation must . . . reflect a congressional intent to confer developmental authority. . . .").

95 *See* J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle . . . such legislative action is not a forbidden delegation of legislative power."). Congress has been extremely deferential in its application of the "intelligible principle" standard. *See, e.g.*, National Broadcasting Co. v. United States, 319 U.S. 190, 225-26 (1943) (rejecting claim that Congress's grant of authority to the Federal Communications Commission to regulate radio broadcasting "in the public interest" constituted an unconstitutional delegation of legislative authority).

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USTR the authority to negotiate trade agreements containing "standards for fair and equitable treatment consistent with United States legal principles and practice, including the principle of due process . . . ."[96] Congress's attempt to link the standard for fair and equitable treatment to due process was part of a broader instruction to the USTR to "ensur[e] that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States . . . ."[97] This delegation of negotiating authority *to the USTR* cannot reasonably be interpreted as evidence of a Congressional intent to delegate *to international tribunals* the authority to develop (as opposed to apply) a body of international rules governing the treatment of foreign investors. Nor can such intent be inferred from Congressional approval of FTAs and BITs containing minimum standard of treatment provisions.

Moreover, it is difficult to argue that Congress has provided an "intelligible principle" that guides the development of this international common law. The USTR has responded to Congress's mandate in the Trade Act by including language in recent FTAs that states that the "fair and equitable treatment" component of the minimum standard of treatment includes the right to due process.[98] Nonetheless, these FTAs still define the minimum standard of treatment primarily by reference to customary international law,[99] which continues to "evolve" independent of any congressional guidance.[100] The principal reference points for identifying the relevant standards under CIL are the decisions of previous tribunals, which have interpreted the minimum standard of treatment—Congress's "no greater rights" directive notwithstanding—to provide significantly greater rights than the due process clauses of the U.S. Constitution.[101]

Arguably, the nondelegation doctrine should apply with particular force when authority is delegated to international bodies. A central principle underlying the nondelegation doctrine

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[96] Trade Act of 2002, Pub. L. No. 107-210, § 2102(b)(3)(E), 116 Stat. 933 (codified in scattered sections of 19 U.S.C.).

[97] *Id.* § 2102(b)(3).

[98] *See supra* note 55 and accompanying text.

[99] *See, e.g.*, CAFTA, *supra* note 55, art. 10.5(1) ("Each Party shall accord to covered investments treatment in accordance with customary international law . . . ."); U.S.-Chile FTA, *supra* note 55, art. 10.4(1) (same).

[100] *See supra* notes 60-68 and accompanying text.

[101] *See supra* notes 56-59 and accompanying text.

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is that Congress should not be permitted to avoid political responsibility for controversial decisions by conferring the authority to make those decisions on either another branch of government or some entity outside the government.[102] The typical delegation occurs when Congress directs an administrative agency to develop regulations to implement some broad congressional directive. In this situation, the delegation is to an agent of a coordinate branch of government, which is also ultimately accountable to the electorate.[103] Delegations to international bodies, in contrast, confer authority on decision makers who "are at least less democratically accountable than are U.S. political institutions to U.S. citizens."[104]

The delegation of the authority to define the content of the minimum standard of treatment to a system of ad hoc arbitral tribunals is particularly problematic. A standing institution, such as an appellate body, would at least provide a target at which the

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[102] *See* Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring) ("[The nondelegation doctrine] ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will."). *See also* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 133 (1980) ("That legislators often find it convenient to escape accountability is precisely the reason *for* a nondelegation doctrine.").

[103] *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 323 (2000) ("Agencies are themselves democratically accountable via the President . . . .").

[104] Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1566 (2004) (emphasis omitted). *See also* T. Alexander Aleinikoff, *Thinking Outside the Sovereignty Box: Transnational Law and the U.S. Constitution*, 82 TEX. L. REV. 1989, 2002 (2004):

> In the case of domestic delegations—even those that license a fair degree of autonomy for administrative agencies—there are significant checks on agency behavior in the form of appropriations, oversight, amending legislation, and publicity. These checks are obviously weaker at the international level—particularly the ability of the United States to overturn decisions of transnational bodies, which would require the amendment of a treaty.

See also Bradley, *supra* note 92, at 1574 ("[I]t is arguable that international delegations . . . should be subject to greater scrutiny because the institutions exercising rulemaking authority do not possess independent constitutional power and are less accountable than domestic officials to the U.S. electorate."); *see also* Kelly, *supra* note 3, at 530 ("[T]he allocation of lawmaking authority to [an international] tribunal seriously undermines the democratic legitimation of law. There is no legislature or other effective means of overturning judge-made law and of making . . . tribunal decisions accountable to the popular will of states or their people.").

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public and its political representatives could direct their criticism regarding the evolution of the minimum standard of treatment. The incremental development of a common law of investor protection by ad hoc tribunals diffuses accountability even further by making it difficult to identify the relevant decision maker.[105]

Moreover, the broad scope of government measures to which the minimum standard of treatment applies raises significant nondelegation concerns. The Supreme Court has indicated that "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred"[106]—i.e. the broader the scope of the delegated authority, the more specific the "intelligible principle" guiding the exercise of that authority must be.

Under the FTAs and the BITS, the minimum standard of treatment has enormous scope—it does not apply only to a particular regulatory area, but rather to any government "measure,"[107] which is defined broadly to include "any law, regulation, procedure, requirement or practice."[108] Accordingly, given the broad range of government activities that are subject to the minimum standard of treatment, the lack of control by politically accountable actors over the content of the standard is particularly inappropriate.

Thomas Franck has suggested a different approach to evaluating the legitimacy of international legal standards that depends on neither the consent of states nor the political accountability of those charged with creating the standards. Franck argues that the legitimacy of international rules can be

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[105] *See* Brower, *supra* note 32, at 93 ("[B]y their very nature, ad hoc tribunals tend to be relatively less accountable, transparent, and accessible to democratic processes than permanent tribunals"); *see also id.* at 91 (referring to advantages of a standing appellate body as potentially including a "developed sense of accountability").

[106] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 475 (2001).

[107] *See, e.g.*, NAFTA, *supra* note 37, art. 1101 (defining NAFTA's investment provisions scope and coverage as applying "to measures adopted or maintained by a Party relating to . . . investors of another Party . . . [or] investments of investors of another party in the territory of the Party . . . ."); U.S.-Chile FTA, *supra* note 55, art. 10.1(1) ("This Chapter applies to measures adopted or maintained by a Party relating to: (a) investors of the other Party; [and] (b) covered investments . . . ."); *see also* Model U.S. BIT, *supra* note 55, art. 2(1) ("This Treaty applies to measures adopted or maintained by a Party relating to: (a) investors of the other Party; [and] (b) covered investments . . . .").

[108] NAFTA, *supra* note 37, art. 201; *see also* Model U.S. BIT, art. 1 (same); U.S.-Chile FTA, *supra* note 55, art. 2:1 (same).

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determined by examining whether the rule "exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule . . . has come into being and operates in accordance with generally accepted principles of right process."[109] Franck identifies four criteria for evaluating the legitimacy of an international rule:

> *pedigree, determinacy, coherence* and *adherence* . . . . [P]edigree refers to the depth of the rule's roots in a historical process; determinacy refers to the rule's ability to communicate content; coherence refers to the rule's internal consistency and lateral connectedness to the principles underlying other rules; and adherence refers to the rule's vertical connectedness to a normative hierarchy, culminating in an ultimate rule of recognition, which embodies the principled purposes and values that define the community of states.[110]

Whatever the merits of Franck's theory of "right process," it does not address the need for those creating international legal standards to be politically accountable, and is therefore inadequate to support the participation in international legal regimes by the United States.

Nonetheless, there are several plausible grounds for rejecting the nondelegation critique of an international common law of investor rights. It could be argued that there is nothing extraordinary about the role played by arbitral tribunals in providing guidance on the content of the minimum standard of treatment, given that tribunals are routinely required to interpret similarly vague provisions such as the prohibition on "indirect expropriation."[111] No other standard of investor protection, however, confers on arbitrators such a widely acknowledged "quasi-legislative authority"[112] to define its content.

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[109] FRANCK, *supra* note 70, at 24 (emphasis omitted).

[110] Thomas M. Franck, *The Emerging Right to Democratic Government*, 86 AM. J. INT'L L. 46, 51 (1992).

[111] *See* Técnicas Medioambientales TECMED S.A. v. United Mexican States, Case No. ARB(AF)/00/2, ¶ 114 ICSID (W. Bank) (May 29, 2003), *available at* http://ita.law.uvic.ca/documents/Tecnicas_001.pdf (noting that indirect expropriation "do[es] not have a clear or unequivocal definition . . . ."); *see also* Dolzer *supra* note 6, at 100 ("[T]here is no clear definition of the concept of indirect expropriation. . . . [Instead,] it is generally accepted that a wide variety of measures are susceptible to lead to indirect expropriation and each case is therefore likely to be decided on the basis of its attending circumstances.").

[112] Brower, *supra* note 32, at 66 n. 163.

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Another possible response to the nondelegation critique is that domestic courts frequently play a similar lawmaking role when engaged in developing common law principles or in interpreting vague statutory provisions. State and federal court interpretations of vague statutes and common law principles, however, are subject to legislative revision. In contrast, an international minimum standard of treatment developed through a common law methodology (either by tribunals or a standing appellate body) is much less susceptible to modification by Congress, principally because modification would require the cooperation and consent of other nations.[113] Moreover, the analogy to domestic common law is particularly inapt given that the international arbitral system is formally non-precedential,[114] leaving each tribunal to determine to what extent it finds the pronouncements of previous tribunals on the nature of the minimum standard of treatment persuasive.[115]

A third potential response to the nondelegation critique is that minimum standard of treatment provisions are not "self-

[113] *See* Kelly, *supra* note 3, at 529 ("The only effective way to overturn [international] judicial lawmaking is for nations to negotiate a multilateral treaty. As a practical matter, there are large transaction costs to this strategy . . . ."). Interpretive statements, such as that adopted by NAFTA's Free Trade Commission concerning the minimum standard of treatment, are another option in addition for formal amendments of treaties. *See* Waste Mgmt., Inc. v. United Mexican States, Case No. ARB(AF)/00/3, ¶ 91, ICSID (W. Bank) (Apr. 30, 2004) (noting that the Free Trade Commission's interpretation "resolves any dispute" concerning the minimum standard of treatment in international law).

[114] *See, e.g.*, NAFTA, *supra* note 37, at 296 art. 1136(1) ("An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case."); U.S.-Chile F.T.A., *supra* note 55, at 10-22 ("An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case."). The lack of precedential effect of the decisions of tribunals in investment disputes is consistent with the general approach to precedent in international law. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 103 cmt. b (1987) ("[T]he traditional view [is] that there is no *stare decisis* in international law. . . . [However,] to the extent that decisions of international tribunals adjudicate questions of international law, they are persuasive evidence of what the law is.").

[115] *See* Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30, 55 n. 117 (2003) (arguing that the arbitral process under NAFTA chapter 11 is distinguishable from domestic common law because "insofar as the tribunals are not bound by stare decisis and are not subject to centralized appellate review" and there is "no guarantee that delegation . . . to adjudicative development will result in anything approaching uniform standards"). The creation of a standing appellate body, however, could presumably help to harmonize the interpretation of the minimum standard of treatment.

executing" – i.e. they do not have domestic legal effect, but rather only define the obligations of the United States to foreign investors as a matter of international law.[116] This argument, however, depends on questionable legal and functional premises. BITs, including the minimum standard of treatment provisions they contain, are apparently intended to be self-executing.[117] Similarly, Congress has specified in the implementing legislation for NAFTA and other FTAs that contain a minimum standard of treatment article, that the federal government may sue to have a state or local law declared invalid based its inconsistency with a trade or investment rule.[118] In addition to their potential use to preempt

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[116] *See* Bradley, *supra* note 92, at 1587 ("At least some . . . [international] delegation concerns . . . can be addressed by presuming that the decisions and rulings of international institutions are 'non-self-executing' – that is, they do not create enforceable federal law unless and until they are implemented by Congress.").

[117] *See, e.g.*, United States-Egypt Bilateral Investment Treaty, U.S.-Egypt, art. II(7), Mar. 11, 1986, S. TREATY DOC. NO. 99-24 (1986) ("Each Party shall grant to nationals or companies of the other Party . . . the right of access to its courts of justice, administrative tribunals and agencies, and all other bodies exercising adjudicatory authority . . . for the purpose of asserting claims, and enforcing rights, with respect to their investments."); Model U.S. BIT, *supra* note 55, art. 11(5)(a) ("Each Party shall establish or maintain judicial, quasi-judicial, or administrative tribunals or procedures for the purpose of the prompt review and, where warranted, correction of final administrative actions regarding matters covered by this Treaty."); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 111 n. 5 (1987) ("Provisions in treaties . . . conferring rights on foreign nationals, especially in matters ordinarily governed by State law, have been given effect without any implementing legislation, their self-executing character assumed without discussion."); VANDEVELDE, *supra* note 69, at 113–16 (discussing the right to access to domestic courts under the U.S. BITs).

[118] *See* North American Free Trade Agreement Implementation Act § 102(b)(2), 19 U.S.C. § 3312(b)(2) (2000) (providing that a state and local law or its application may be declared invalid based on its inconsistency with a provision of NAFTA "in an action brought by the United States for the purpose of declaring such law or application invalid"); *see also, e.g.*, The U.S.-Chile Free Trade Agreement Implementation Act § 102(b)(1), 19 U.S.C. § 3805 (2000) ("No State law, or the application thereof, may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with the Agreement, except in an action brought by the United States for the purpose of declaring such law or application invalid.").

There is, however, at least one potential constitutional obstacle to the preemption of state and locals laws under the minimum standard of treatment. As noted *supra*, the minimum standard of treatment can function like a heightened version of substantive due process (*see supra* notes 56-59 and accompanying text), and it applies to essentially any government measure (*see supra* notes 107–08 and accompanying text). Accordingly, the courts could decline to give it preemptive effect on the grounds that to do so would permit Congress to effectively expand the limitations on state authority imposed by the Due Process

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state laws, minimum standard of treatment provisions also can have a domestic legal effect in the form of imposing a financial liability on the federal government for the payment of arbitral awards.[119]

Moreover, even as a purely international obligation, the minimum standard of treatment raises significant nondelegation concerns.[120] International liability for violations of the minimum standard of treatment—as developed and defined by arbitral tribunals—can reasonably be expected to affect how domestic policy makers exercise their authority. Given the indeterminacy of the standard's content, it is impossible to determine whether the practice of nations with regard to the minimum standard of treatment conforms with Louis Henkin's dictum that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."[121] Presumably, however, Congress and the President would feel some compulsion—whether dispositive or not—to alter a federal law that had been found by a tribunal to violate the minimum standard of treatment.[122]

Clause without following the procedures prescribed for amending the Constitution in Article V. *See* Porterfield, *supra* note 59, at 70-86 (2004) (discussing potential limits under Article V on preemptive effect of international expropriation rules that effectively amend the Takings Clause of the Constitution).

[119] *See, e.g.*, NAFTA, *supra* note 37, at art. 1351 ("Where a Tribunal makes a final award against a Party, the Tribunal may award . . . monetary damages and any applicable interest . . . .").

[120] It should be noted that the nondelegation doctrine is unlikely to impose any judicially enforceable limits on the ability of the United States government to delegate the authority to make rules that do not have domestic legal effect. *See* Goldwater v. Carter, 444 U.S. 996, 1002-06 (1979) (Rehnquist, J., concurring) (finding that President Carter's decision to terminate a mutual defense treaty with Taiwan constituted a nonjusticiable political question); Made in the USA Found. v. United States, 242 F.3d 1300 (11th Cir. 2001) (holding that the constitutionality of Congress's approval of NAFTA by a simple majority vote in each House rather than by a supermajority in the Senate under art. II, sec. 2 of the Constitution presented a political question).

[121] Louis Henkin, HOW NATIONS BEHAVE 47 (2d ed. 1979) (emphasis omitted).

[122] *See* David Golove, *The New Confederalism: Treaty Delegations of Legislative, Executive and Judicial Authority*, 55 STAN. L. REV. 1697, 1735 (2003):

> [O]nce an international obligation is created, Congress's freedom of action is significantly limited. It can only refuse to implement the resolution of such an international body if it is willing baldly to disregard an acknowledged international legal obligation. Unless the non-self-execution view is coupled with a skeptical view about the status or even the existence of international law, then, non-self-execution, at

5. CONCLUSION

The explanation for the minimum standard of treatment's purported status as a binding norm of international law has changed repeatedly over the years. The minimum standard has its origins in the ancient doctrine of denial of justice, and was accepted during the 17th and 18th century as part of the (natural law-based) law of nations. Beginning in the 19th century, it was viewed as part of customary international law derived from state practice. Over the last half-century, it has become a prevalent treaty obligation through the inclusion of minimum standard of treatment provisions in BITs and FTAs.

One aspect of the standard, however, has been consistent: its lack of a clearly defined content. Given the indeterminacy of the standard, it can not constitute a legitimate norm because it does not provide governments with specific guidance concerning what type of treatment of foreign investors is prohibited. Proponents of the minimum standard of treatment suggest that this defect can be cured either by permitting the existing system of ad hoc tribunals to define the content of the standard using a common law methodology, or by conferring that authority on a new appellate body. This approach could conceivably resolve, or at least mitigate, the vagueness problem. It would result, however, in the inappropriate delegation of Congress's lawmaking authority to international tribunals, which would be vested with the power to create an international common law of investor rights.

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most, can only diminish but not eliminate the popular sovereignty objection.

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