

2012

Recovering "Protection and Security"

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George K. Foster, Recovering "Protection and Security", 45 *Vanderbilt Law Review* 1095 (2021)
Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol45/iss4/4>

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Recovering “Protection and Security”: The Treaty Standard’s Obscure Origins, Forgotten Meaning, and Key Current Significance

George K. Foster*

ABSTRACT

Among the most persistent controversies in international investment law is the nature of the “protection and security” standard found in most investment treaties. Some tribunals contend that the standard requires nothing more than physical protection of covered investments, while others maintain that it requires legal security as well. Some insist that it is entirely distinct from the fair and equitable treatment standard that is often expressed in the same sentence or paragraph, while others effectively conflate the two standards. These conflicting decisions are undermining the legitimacy of investment treaty arbitration, but this Article seeks to resolve the controversies underlying them by employing the full range of interpretive tools offered by the Vienna Convention on the Law of Treaties. It explores the text, structure, and purpose of the relevant treaties; identifies a norm of protection and security in customary international law; and traces its evolution over time. This inquiry reveals that treaty drafters have long understood protection and security as requiring a specific—and limited—form of legal security. It also reveals that fair and equitable treatment was derived from the same customary norm, but that the two standards have evolved to become conceptually distinct. The Article then employs the interpretation suggested by this analysis to critique modern treaty jurisprudence and the current U.S. approach to drafting investment treaties.

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TABLE OF CONTENTS

I.	INTRODUCTION	1097
II.	INTERPRETING PROTECTION AND SECURITY CLAUSES UNDER THE VIENNA CONVENTION ON THE LAW OF TREATIES FRAMEWORK.....	1105
A.	<i>The Ordinary Meaning of "Protection and Security"</i>	1106
B.	<i>The Object and Purpose of Investment Treaties</i>	1108
C.	<i>The Context of Protection and Security Clauses</i>	1111
D.	<i>Relevant Rules of International Law</i>	1112
E.	<i>Supplementary Means of Interpretation</i>	1114
III.	THE HISTORICAL EVOLUTION OF PROTECTION AND SECURITY IN CUSTOMARY INTERNATIONAL LAW AND U.S. TREATY PRACTICE	1116
A.	<i>The Eighteenth Century</i>	1116
	1. Wolff and Vattel	1117
	2. Early U.S. Commercial Treaties	1118
B.	<i>From 1800 Through World War I</i>	1120
	1. Developments in Customary International Law	1121
	2. Protection and Security Clauses in Treaty Practice	1122
C.	<i>Between the World Wars</i>	1124
	1. Adjustments to U.S. Protection and Security Clauses.....	1124
	2. Jurisprudence and Diplomatic Correspondence	1125
	3. Attempts to Codify the Customary Duty....	1127
D.	<i>The Early Decades of the Cold War</i>	1130
	1. The Havana Charter and the International Chamber of Commerce Code of Fair Treatment.....	1131
	2. The Post-World War II U.S. Friendship, Commerce, and Navigation Treaty Program	1132
	3. The Abs-Shawcross and Organisation for Economic Co-operation and Development Draft Conventions.....	1138
E.	<i>Protection and Security in Modern U.S. Investment Treaties</i>	1141
	1. The Scope of the Standard.....	1142
	2. Relationship to Other Standards.....	1145

IV.	IMPLICATIONS FOR INTERNATIONAL INVESTMENT	
	LAW.....	1149
	A. <i>A Critique of Modern Protection and Security Jurisprudence</i>	1149
	B. <i>A Critique of the Current U.S. Drafting Approach</i>	1154
V.	CONCLUSION.....	1156

I. INTRODUCTION

The rise of the modern investment treaty¹ has created a vibrant new area of international law and practice, and has bestowed upon many foreign investors a package of benefits that was previously unimaginable. Not only do these treaties clarify and strengthen investors' rights under international law vis-à-vis host states, but they also offer, for the first time, an effective avenue for enforcing those rights.² Nevertheless, the law in this area remains unsettled in many respects, and a persistent point of controversy is the meaning of the phrase "protection and security" as used in most investment treaties when detailing obligations of each party toward investments emanating from the other.³

The wording of protection and security provisions varies, but a formulation found in many U.S. bilateral investment treaties (BITs) is as follows: "Investment shall at all times be accorded fair and equitable treatment, shall enjoy *full protection and security* and shall in no case be accorded treatment less than that required by

1. The term *investment treaty* as used herein refers to international agreements that focus on investment (such as bilateral investment treaties (BITs)), as well as trade or sectoral agreements that include an investment chapter (such as free trade agreements or the Energy Charter Treaty). *E.g.*, Energy Charter Treaty, *opened for signature* Dec. 17, 1994, 34 I.L.M. 381 (1995).

2. See Stephan W. Schill, *Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach*, 52 VA. J. INT'L L. 57, 62 (2011) (observing that investment treaties generally grant foreign investors a multitude of substantive rights and allow investors to enforce them in arbitration against the host state); see also RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 220–28 (2008) (noting that providing a private right of action to enforce rights under international law is a key innovation of investment treaties, and discussing the arbitration mechanisms that they typically make available).

3. DOLZER & SCHREUER, *supra* note 2, at 149–51 (noting that most investment treaties contain protection and security clauses, and discussing varying conceptions of what they require).

international law.”⁴ Other treaties refer instead to “constant protection and security,” “constant security and protection,” or—rarely—“protection and legal security.”⁵ Moreover, some non-U.S. provisions make no mention of “fair and equitable treatment” or of international law,⁶ and a few seem to subsume the protection and security standard within the concept of fair and equitable treatment.⁷

Tribunals and commentators are divided over whether the basic notion of protection and security requires merely that host states take steps to shield investors or their investments from *physical* harms, or whether it also requires protection against *nonphysical* threats.⁸ Put another way, does the standard require physical security only, or also legal security? Economic security? Opinions vary widely. In recent years, tribunals have articulated several different and conflicting interpretations of the standard’s scope.⁹

There is also ongoing debate over the relationship between protection and security and fair and equitable treatment. Some tribunals have treated the two obligations as fully distinct,¹⁰ while

4. See, e.g., Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., art. II(2)(a), Nov. 14, 1991, 31 I.L.M. 124, *amended by* S. TREATY DOC. NO. 103-2 (1993) [hereinafter U.S.-Argentina BIT] (emphasis added), available at <http://2001-2009.state.gov/documents/organization/43475.pdf>.

5. For illustrations of the variations among protection and security clauses, see ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 308 (2009) and KENNETH J. VANDELDELDE, BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION 244 (2010).

6. NEWCOMBE & PARADELL, *supra* note 5, at 308.

7. See *id.* at 313 (discussing a treaty between France and Argentina that requires “protection and full security in accordance with the principle of fair and equitable treatment” (emphasis added)).

8. See VANDELDELDE, *supra* note 5, at 244 (“[A]n emerging issue raised by this standard is whether it imposes liability for nonphysical harm to investment.”).

9. For decisions holding that protection and security is limited to physical security, see, for example, *Suez v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, ¶¶ 167–69 (July 30, 2010); *Saluka Invs. BV v. Czech Republic*, ICGJ 368, Partial Award, ¶¶ 483–84 (PCA 2006); *BG Grp. Plc. v. Republic of Arg.*, Final Award, ¶¶ 324–26 (UNCITRAL Arb. Trib. 2007). For decisions holding that the standard extends to legal as well as physical security, see, for example, *AES Summit Generation Ltd. v. Republic of Hung.*, ICSID Case No. ARB/07/22, Award, ¶ 13.3.2 (Sept. 23, 2010); *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Annulment Proceeding, ¶¶ 310–11 (July 14, 2006); *Occidental Exploration & Prod. Co. v. Republic of Ecuador (Oxy I)*, LCIA Case No. UN3467, Award, ¶¶ 183, 187 (London Ct. Int’l Arb. 2004); *CME Czech Republic BV v. Czech Republic*, Partial Award, ¶¶ 159–60 (UNCITRAL Arb. Trib. 2001); *Lauder v. Czech Republic*, Final Award, ¶ 308 (UNCITRAL Arb. Trib. 2001). In addition, at least one tribunal has held that the standard also contemplates “commercial” security. *Biwater Gauff (Tanz.) Ltd. v. United Republic of Tanz.*, ICSID Case No. ARB/05/22, Award, ¶ 729 (July 24, 2008). Unless otherwise indicated, all arbitral awards cited herein may be downloaded via <http://italaw.com>.

10. See, e.g., *Enron Corp. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, ¶¶ 251–68 & 284–86 (May 22, 2007), 19 World Trade & Arb. Materials 109

others have conflated them,¹¹ and still others have discussed the two standards in tandem without explaining their apparent relationship.¹²

Both of these controversies surrounding protection and security have key significance for international investment law. On the one hand, if the standard is construed to require a broad form of legal or commercial security, then host states could face troubling constraints on their sovereign prerogatives. It may be difficult for tribunals to draw a consistent line between permissible modifications of national law or regulatory policy and those giving rise to liability because they are deemed to undermine the country's legal or commercial stability.¹³ States might also be found liable under a broad reading of the standard if they contribute to, or fail to effectively manage, a financial crisis—a risk of particular concern in light of the recent global financial meltdown and multiplying national debt crises.

On the other hand, if protection and security is construed to require nothing more than physical protection, then investors could lack redress when they experience nonphysical wrongs not covered by other standards. To date, many tribunals have avoided this risk by interpreting fair and equitable treatment broadly enough to compensate for any shortfalls in protection and security. Among the concepts that tribunals have held to be implicit in fair and equitable treatment are the obligations to make all laws, regulations, and policies clear to foreign investors in advance; to behave in good faith and respect an investor's legitimate expectations; to maintain a stable and predictable legal framework; to refrain from discrimination; and to provide due process.¹⁴ Some contend, indeed, that fair and

(2007) (analyzing the fair and equitable treatment and protection and security claims separately, and suggesting that it would be problematic to read the two as overlapping).

11. See, e.g., *Oxy I*, LCIA Case No. UN3467, Award, at ¶ 187 (asserting that once a violation of fair and equitable treatment is found, "the question of whether in addition there has been a breach of full protection and security under this Article becomes moot as a treatment that is not fair and equitable automatically entails an absence of full protection and security").

12. See, e.g., *Sergei Paushok v. Mongolia*, Award, ¶ 327 (UNCITRAL Arb. Trib. 2011) (finding that neither the protection and security clause nor the fair and equitable treatment clause were violated).

13. Notably, tribunals in two separate cases arising from the same facts agreed that protection and security extends to legal security, but differed over whether a particular legal amendment violated the standard. Compare *CME*, Partial Award, at ¶¶ 159, 601, 613 (concluding the Czech Republic violated a protection and security provision by amending a Media Law to the disadvantage of an investor), with *Lauder*, Final Award, at ¶¶ 308–314 (concluding the amendment did not violate protection and security).

14. See *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, ¶ 284 (Jan. 14, 2010) (interpreting fair and equitable

equitable treatment has become a sort of “catch all” standard, capable of covering any conduct that strikes the arbitrators as unjust or unwarranted.¹⁵

Meanwhile, some tribunals have used the breadth of fair and equitable treatment (as they interpret it) as part of their rationale for rejecting a wider reading of protection and security, contending that the latter standard *must* be limited to physical protection because, were it construed more broadly, it would encroach on the role they have ascribed to fair and equitable treatment.¹⁶ But even setting aside the tautological nature of this reasoning, this approach to interpreting the two standards has come at a serious cost. The breadth of fair and equitable treatment as interpreted by these tribunals—appearing to some to have been manufactured out of whole cloth and to have no foundation in customary international law—has contributed to a perception that investment treaties impose a troubling and unprecedented constraint on national sovereignty.¹⁷ This, in turn, has prompted some to question the legitimacy of investment treaty arbitration and the wisdom of signing investment

treatment as encompassing all of these concepts); DOLZER & SCHREUER, *supra* note 2, at 130–47 (summarizing the jurisprudence involving fair and equitable treatment).

15. See FIONA MARSHALL, INT’L INST. FOR SUSTAINABLE DEV., FAIR AND EQUITABLE TREATMENT IN INTERNATIONAL INVESTMENT AGREEMENTS 2, 7 (2007), available at http://www.iisd.org/pdf/2007/inv_fair_treatment.pdf (asserting that governments are concerned that expansive readings of fair and equitable treatment give “a tribunal so much discretion that the process resembles a decision *ex aequo et bono*, i.e. a decision based solely on the arbitrators’ subjective view of ‘fairness’ and ‘equity,’” and that fair and equitable treatment risks becoming “a ‘catch all’ provision capable of being invoked in respect of virtually any adverse treatment of an investment”); Matthew T. Parish & Charles B. Rosenberg, *An Introduction to the Energy Charter Treaty*, 20 AM. REV. INT’L ARB. 191, 203 (2009) (summarizing fair and equitable treatment jurisprudence and concluding that “any intrinsically unfair action of government that offends principles of natural justice or proper dealing may infringe the standard”).

16. See, e.g., *Suez v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, ¶¶ 167–68 (July 30, 2010) (asserting that it would be inappropriate to interpret protection and security as extending to legal security because this would “result in an overlap with other standards of investment protection,” including fair and equitable treatment).

17. See, e.g., INT’L INST. FOR SUSTAINABLE DEV., PRIVATE RIGHTS, PUBLIC PROBLEMS: A GUIDE TO NAFTA’S CONTROVERSIAL CHAPTER ON INVESTOR RIGHTS 28–29 (2001), available at http://www.iisd.org/pdf/trade_citizensguide.pdf (arguing that decisions interpreting fair and equitable treatment broadly have imposed on host states “standards never before made applicable in domestic law or international law,” and that—if these are not more precisely defined—they may inhibit host states “when acting to protect the public good”); GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 88–89 (2007) (asserting that expansive readings of the standard have gone “well beyond customary international law” and that “[t]he readiness of tribunals to adopt such an expansive interpretation has major implications for governments,” which now face “an all-encompassing guarantee of highly flexible notions of fairness, equity, and due process”).

treaties.¹⁸ This threat to legitimacy might be alleviated to some extent if arbitrators did not have to rely on a single, amorphous standard to address such a broad range of nonphysical risks, and if it could be shown that fair and equitable treatment and protection and security are both solidly grounded in customary international law.

Moreover, the very fact that tribunals have offered such divergent interpretations of protection and security has caused further damage to the legitimacy of investment treaty arbitration.¹⁹ Conflicting decisions create the impression that the law in this area is in disarray and make it difficult for investors and governments to evaluate their rights and obligations and conduct themselves accordingly.²⁰ This threat to legitimacy, too, could be addressed if the nature of the standard could be ascertained definitively.

Some countries, including the United States, have attempted to resolve the controversies by providing greater specificity in their most recent investment treaties. For example, the four new U.S. investment treaties ratified in 2011 all provide that "protection and security" and "fair and equitable treatment" are intended to express, and are collectively limited to, "the customary international law minimum standard of treatment of aliens"²¹—i.e., the minimum

18. See, e.g., SCHILL, *supra* note 2, at 63 (noting that "the breadth of some interpretations of investors' rights by some arbitral tribunals" has attracted criticism from states and scholars and contributed to "a veritable 'legitimacy crisis,'" as evidenced by the recent withdrawal of some Latin American states from investment instruments); M. Sornarajah, *A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration*, in APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES 39, 40, 66 (Karl P. Sauvant & Michael Chiswick-Patterson eds., 2008) (asserting that "the expansionary attitudes taken by arbitrators" are illegitimate, and have led many countries to question "whether the advantages of entering into investment treaties outweigh their potential advantages").

19. See Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 *FORDHAM L. REV.* 1521, 1558, 1563 (2005) (discussing the damage to legitimacy caused by inconsistent decisions, including those concerning the protection and security standard).

20. See *id.* at 1558 ("Inconsistency creates uncertainty and damages the legitimate expectations of investors and Sovereigns."); Nienke Grossman, *Legitimacy and International Adjudicative Bodies*, 41 *GEO. WASH. INT'L L. REV.* 107, 150 (2009) (arguing that inconsistent applications of a single rule in similar situations make it difficult for those governed by the rule to modify their behavior to accord with it, and leads to a perception that the dispute resolution mechanism is arbitrary and ineffective).

21. Free Trade Agreement, U.S.-Colom., art. 10.5(2), Nov. 22, 2006 [hereinafter U.S.-Colombia FTA], available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text>; Free Trade Agreement, U.S.-Kor., art. 11.5(2), June 30, 2007 [hereinafter U.S.-Korea FTA], available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text>; Trade Promotion Agreement, U.S.-Pan., art. 10.5(2), June 28, 2007 [hereinafter U.S.-Panama FTA], available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/panama-tpa/final-text>; Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-

protection offered by general international law.²² These treaties add that “protection and security,” in particular, requires only “the level of *police protection* required under customary international law”²³—a definition that would seem to limit the standard to physical security. The same approach is employed in the most recent iteration of the U.S. Model BIT, adopted in 2012.²⁴

While drafting measures such as these may resolve the controversies surrounding protection and security with regard to newly concluded treaties, the overwhelming majority of treaties in force contain no such definitions, and the controversies remain very much alive with respect to them. Moreover, it is worth questioning whether the drafting approach taken in these recent U.S. treaties is the optimal one.

Despite the stakes riding on these controversies, surprisingly little has been written about the protection and security standard in an effort to resolve them.²⁵ One scholar has aptly described the literature on the standard as “scarce,”²⁶ and what has been written has not taken advantage of the full range of interpretive tools offered by the Vienna Convention on the Law of Treaties (VCLT), which addresses the interpretation of treaties.²⁷ In particular, little has been written about the significance of the purpose of investment treaties or of the context of protection and security clauses within treaties. Existing literature and case law also reflects only limited research into general rules of international law that shed light on the meaning of the standard, and into the origins and drafting history of the relevant provisions. It has been frequently observed that modern protection and security clauses are derived from similar provisions in

Rwanda, art. 5, Feb. 19, 2008 [hereinafter U.S.–Rwanda BIT], available at http://www.ustr.gov/sites/default/files/uploads/agreements/bit/asset_upload_file743_14523.pdf.

22. The international minimum standard is discussed in detail *infra* Parts III.B.1, III.E.2. For more on the standard, see NEWCOMBE & PARADELL, *supra* note 5, at 11–15.

23. U.S.–Colombia FTA, *supra* note 21, art. 10.5(2)(b) (emphasis added); U.S.–Korea FTA, *supra* note 21, art. 11.5(2)(b) (emphasis added); U.S.–Panama FTA, *supra* note 21, art. 10.5(2)(b) (emphasis added); U.S.–Rwanda BIT, *supra* note 21, art. 5(2)(b).

24. U.S. Model Bilateral Investment Treaty Concerning the Encouragement and Reciprocal Protection of Investment, art. 5(2), 2012 [hereinafter 2012 U.S. Model BIT], available at <http://www.state.gov/documents/organization/188371.pdf>.

25. See CHRISTOPHER F. DUGAN ET AL., INVESTOR-STATE ARBITRATION 532 (2008) (asserting that protection and security is “one of the more venerable international obligations contained in treaties relating to the treatment of foreigners and their property,” but that “far more attention in recent years has been given to other standards of treatment”).

26. Giuditta Cordero Moss, *Full Protection and Security*, in STANDARDS OF INVESTMENT PROTECTION 131, 131 (August Reinisch ed., 2008).

27. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force January 27, 1980) [hereinafter Vienna Convention].

older U.S. friendship, commerce, and navigation (FCN) treaties,²⁸ but the origin of those FCN treaty provisions—and how they were understood when adopted—has not been explored in depth.

A clearer picture of protection and security and its relationship to other standards begins to emerge upon a more extensive inquiry into each of the foregoing. Among other things, it becomes clear that U.S. treaty negotiators have long viewed protection and security clauses as expressing a norm of customary international law, which addresses a *range* of potential threats to foreigners, not merely physical ones.²⁹ While physical threats have always posed the gravest risk to merchants or investors in a foreign land, certain other serious risks have existed as well. These include, *inter alia*, the possibility that the foreigner could be defrauded or denied recovery of just debts, that the host state could apply its laws in an arbitrary or discriminatory way, or that the foreigner's property could be expropriated without compensation. As discussed in greater detail below in Part III, numerous FCN treaties and such learned authorities as Christian Wolff, Emmerich de Vattel, Alexander Hamilton, James Kent, Lassa Oppenheim, Elihu Root, and Andreas Roth have referred to a duty of "protection" or "security" under international law to guard against precisely such risks, among others.

A review of the historical record also reveals that the fair and equitable treatment concept, though of more recent vintage, is closely aligned with and derived from the older notion of protection and security.³⁰ In their modern senses, the two standards are best seen as distinct but overlapping. Protection and security obliges the host state to act with due diligence as reasonably necessary to protect foreigners' persons and property, as well as to possess and make available an adequate *legal system*, featuring such protections as appropriate remedial mechanisms, due process, and a right to compensation for expropriation. By contrast, fair and equitable treatment concerns the manner in which the state treats the investment when interacting with it, requiring that the state act reasonably and in good faith. Certain conduct can potentially violate both standards—such as a denial of justice, an arbitrary application of the law, or intentional harassment—but the analysis under each standard would differ. Namely, under a protection and security analysis, these acts would be wrongful because they would reflect the lack of an adequate legal system or a failure to act with due diligence,

28. See, e.g., NEWCOMBE & PARADELL, *supra* note 5, at 307.

29. Evidence in this regard is discussed *infra* Part III.

30. The origin of the fair and equitable treatment standard is discussed in detail *infra* Part III.D.2.

whereas under a fair and equitable treatment analysis, the wrong would be a failure to treat the investment reasonably or in good faith.

As can be seen, these two standards collectively encompass many of the notions that modern tribunals have held to be inherent in fair and equitable treatment. Yet both standards are firmly enshrined in customary international law, and are therefore not unprecedented or anomalous in the slightest. Moreover, it is important to emphasize that there have always been distinct limitations on the scope of both duties. In particular, host states have never been obliged to ensure the complete stability and predictability of their legal systems, which would not only be unrealistic, but would also unduly inhibit the natural evolution of national regulatory regimes.³¹

In sum, this Article aims to recover for international investment law the traditional meaning of protection and security under customary international law and to demonstrate the relationship between that notion and the standards of protection and security and fair and equitable treatment as set forth in all but the very most recent U.S. investment treaties.³² It seeks to do so with a view toward enhancing the legitimacy of international investment law and of investment treaty arbitration.

The discussion proceeds as follows. Part II outlines the VCLT interpretive framework and explains, preliminarily, how it should be applied to protection and security clauses, while underscoring the critical role assigned by that framework to general rules of international law, preparatory work, and other evidence extrinsic to the treaty text. Part III collects and applies such evidence. Specifically, it traces the evolution of the protection and security concept from the 1740s through the rise of the modern investment treaty and identifies related diplomatic correspondence, case law, and commentary, so as to arrive at a more reliable interpretation of the

31. See *Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, ¶ 103, (Dec. 16, 2002), 7 ICSID Rep. 341 (2003) (arguing that “governments must be free to act in the broader public interest” through reasonable modifications of their laws without incurring liability to a foreign investor, and that “it is safe to say that customary international law recognizes this” (emphasis added)). Several modern treaty tribunals have also emphasized that investment treaties are not intended to serve as insurance policies against any adverse development, legal or otherwise. See, e.g., *EDF (Servs.) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award, ¶ 217 (Oct. 8, 2009), available at <https://icsid.worldbank.org/ICSID/FrontServlet> (“Except where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State’s legal and economic framework. Such expectation would be neither legitimate nor reasonable.”).

32. This Article focuses on the nature of the standard in U.S. investment treaties, although it likely has a similar meaning in other treaties, given that all protection and security provisions derive from U.S. precedent. See NEWCOMBE & PARADELL, *supra* note 5, at 307.

standard. Part IV employs that interpretation as the lens through which to critique modern treaty jurisprudence, as well as the United States' current approach to drafting protection and security clauses. Part V concludes.

II. INTERPRETING PROTECTION AND SECURITY CLAUSES UNDER THE VIENNA CONVENTION ON THE LAW OF TREATIES FRAMEWORK

It is widely accepted that the VCLT outlines the appropriate methods for interpreting any agreement between states. It codifies a number of principles of customary international law and is routinely relied upon by courts, tribunals, and scholars as *the* authoritative guide to interpreting treaties.³³

The provisions of the VCLT governing treaty interpretation are found in Articles 31 and 32. Article 31 begins with the general mandate that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."³⁴ It goes on to provide that one shall also take into account any subsequent agreement between the parties regarding treaty interpretation, their practice in applying the treaty, as well as "any relevant rules of international law applicable in the relations between the parties."³⁵

Article 32, in turn, provides:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31

(a) leaves the meaning ambiguous or obscure; or

33. See *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 309 (2d Cir. 2000) (describing the VCLT as "an authoritative guide to the customary international law of treaties"); MICHAEL BYERS, *WAR LAW: UNDERSTANDING INTERNATIONAL LAW AND ARMED CONFLICT* 5 (2005) (observing that the VCLT rules on treaty interpretation are generally acknowledged as codification of customary international law and are therefore binding even on nonsignatory nations); JAN PETER SASSE, *AN ECONOMIC ANALYSIS OF BILATERAL INVESTMENT TREATIES* 60 (2011) (asserting that the starting point for most tribunals interpreting an investment treaty is Article 31 of the VCLT). Although the United States has never ratified the VCLT, the U.S. government has repeatedly acknowledged that most of the treaty's provisions—including those relating to the interpretation of treaties—are binding on all states as an authoritative statement of customary international law. See, e.g., MARIAN NASH LEICH, *OFFICE OF THE LEGAL ADVISER, DEP'T OF STATE, 1980 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW* 400, 419–20 (1980).

34. Vienna Convention, *supra* note 27, art. 31(1).

35. *Id.* art. 31(3).

(b) leads to a result which is manifestly absurd or unreasonable.³⁶

The Parts that follow apply the foregoing interpretive framework to protection and security provisions in U.S. investment treaties.

A. *The Ordinary Meaning of "Protection and Security"*

As previously noted, Article 31 of the VCLT calls for determination of the "ordinary meaning" of the treaty terms at issue.³⁷ To ascertain that meaning, it is common for those seeking to interpret treaty terms to refer to dictionary definitions.³⁸

The definitions of "protection" and "security" provided by dictionaries vary, but those in the *Oxford English Dictionary* are relatively comprehensive. That dictionary defines protection as "the fact or condition of being protected; shelter, defence, or preservation from harm, danger, damage, etc.; guardianship, care."³⁹ It defines "to protect," in turn, as "[t]o defend or guard from danger or injury; to support or assist against hostile or inimical action; to preserve from attack, persecution, harassment, etc.; to keep safe, take care of," and so on.⁴⁰ The same dictionary defines security to include "[t]he state or condition of being protected from or not exposed to danger; safety," and "the state or condition of being . . . secure," as in "[f]reedom from danger," "freedom from care, anxiety, or apprehension," "freedom from uncertainty or doubt," "stability," and "freedom from material or financial want."⁴¹

The above definitions suggest that the terms *protection* and *security* are largely synonymous and that both generally signify the

36. *Id.* art. 32.

37. *Id.* art. 31(1).

38. *See, e.g.*, MTD Equity Sdn. Bhd. v. Republic of Chile, ICSID Case No. ARB/01/7, Award, ¶ 113 (May 25, 2004), available at http://www.oxfordlawreports.com/subscriber_article?script=yes&id=hc/Awards/law-iic-174-2004&recno=12&module=iic&category=Chile (consulting the *Concise Oxford Dictionary of Current English* to determine the ordinary meaning of the words "fair" and "equitable"); *Lauder v. Czech Republic*, Final Award, ¶ 221 (UNCITRAL Arb. Trib. 2001) (consulting *Black's Law Dictionary* to determine the ordinary meaning of the term "arbitrary" as used in an investment treaty).

39. OXFORD ENGLISH DICTIONARY (3d ed., 2007) [hereinafter OXFORD DICTIONARY]; *see also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1822 (2002) [hereinafter WEBSTER'S] (defining "protection" as "the act of protecting; the state or fact of being protected: shelter from danger or harm").

40. OXFORD DICTIONARY, *supra* note 39; *see also* WEBSTER'S, *supra* note 39 (defining "protect" as "to cover or shield from that which would injure, destroy or detrimentally affect: secure or preserve").

41. OXFORD DICTIONARY, *supra* note 39; *see also* WEBSTER'S, *supra* note 39, at 2053 (defining "security" as "the quality or state of being secure," as in "freedom from danger," "freedom from fear, anxiety, or care," "freedom from uncertainty or doubt," and "dependability, stability").

act or status of being shielded from threats or risks, which can be of a physical, legal, financial, or even emotional nature, depending on the context.

Not surprisingly, therefore, several tribunals have noted that the phrase is capable of being used in relation to harms of a nonphysical nature. For example, in *National Grid v. Argentina*, the tribunal found that a clause in the UK–Argentina BIT requiring “protection and constant security” contemplated legal as well as physical security.⁴² As part of its reasoning, the tribunal observed that the terms “protection” and “security” are capable of covering nonphysical harms and that the treaty in no way restricted the standard to physical protection.⁴³

Similarly, in *Azurix v. Argentina*, the tribunal noted that the terms in their ordinary meaning are broad enough to cover more than physical harms and asserted that they should be read as doing so, at least when preceded by a modifier such as “full” (as in “full protection and security”).⁴⁴

The tribunal in *Biwater Gauff v. Tanzania* endorsed the *Azurix* reasoning and went even further, asserting that the language “implies a State’s guarantee of stability in a secure environment, both *physical, commercial and legal*.”⁴⁵

Nevertheless, several other tribunals have viewed the obligation of protection and security as limited to physical protection, even when modified by a term such as “full” or “constant.”⁴⁶ And to be sure, the mere fact that the terms are *capable* of covering nonphysical harms does not mean they are used in that sense in a particular treaty. To be confident about which types of threats or risks the terms contemplate in a treaty, one must look further.

42. See *Nat’l Grid P.L.C. v. Argentina*, Case 1:09-cv-00248-RBW, Award, ¶¶ 187–89 (UNCITRAL Arb. Trib. 2008) (holding changes in a regulatory framework that created uncertainty were contrary to the protection and security obligation).

43. *Id.*

44. *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Annulment Proceeding, ¶ 408 (July 14, 2006).

45. *Biwater Gauff (Tanz.) Ltd. v. United Republic of Tanz.*, ICSID Case No. ARB/05/22, Award, ¶ 729 (July 24, 2008) (emphasis added).

46. See, e.g., *Suez v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, ¶¶ 167–69 (July 30, 2010) (“[T]he full protection and security standard primarily seeks to protect investment from physical harm.”); *Saluka Invs. BV v. Czech Republic*, ICGJ 368, Partial Award, ¶¶ 483–84 (PCA 2006) (arguing that the protection and security clause is only meant to cover the “physical integrity of an investment against interference by use of force”); *BG Grp. Plc. v. Republic of Arg.*, Final Award, ¶ 324 (UNCITRAL Arb. Trib. 2007) (asserting that full protection and security is usually associated with the physical security of the investor and his investment).

B. *The Object and Purpose of Investment Treaties*

Article 31 of the VCLT also calls for a term to be interpreted in light of the “object and purpose” of the treaty in which it appears.⁴⁷ This refers to the “reasons for which the treaty exists”—sometimes termed as the *ratio legis* or the treaty’s *raison d’être*—from the perspective of the treaty parties.⁴⁸ In ascertaining the object and purpose, the treaty’s title and preamble often provide key clues.⁴⁹

In this case, the titles of many investment treaties signal that their purpose is to provide enhanced protection for investment, with a view toward promoting investment by nationals of one party into the territory of the other. Notably, U.S. BITs are consistently entitled “Treaty . . . Concerning the Reciprocal *Encouragement and Protection* of Investment.”⁵⁰

Preambles typically record a similar purpose. For example, the preamble to the U.S. BIT with the Democratic Republic of the Congo notes that the parties concluded the treaty “to promote greater economic cooperation between them, with respect to investment by nationals and companies of each Party in the territory of the other Part,” based on their expectation that “the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties.”⁵¹ Many other preambles include similar language, and it is widely recognized that this accurately reflects the purpose of investment treaties.⁵²

Further insight into the purpose of U.S. investment treaties can be gleaned from the letters that accompany a treaty when submitted by the State Department to the President. For example, the letter of submittal associated with the first U.S. BIT ever signed (with Panama in 1982) observed that the purpose of the then-new U.S. BIT program was “to encourage and *protect* U.S. investment in developing

47. Vienna Convention, *supra* note 27, art. 31(1).

48. ULF LINDERFALK, *ON THE INTERPRETATION OF TREATIES: THE MODERN INTERNATIONAL LAW AS EXPRESSED IN THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES* 204–05 (2007).

49. NEWCOMBE & PARADELL, *supra* note 5, at 113 (“Many tribunals have sought to interpret [International Investment Agreements] on the basis of their object and purpose, typically by looking at their titles and preambles.”).

50. *See, e.g.*, U.S.–Argentina BIT, *supra* note 4 (emphasis added).

51. Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.–Congo, pmbl., Feb. 12, 1990, S. TREATY DOC. NO. 102-1 (1991).

52. *See, e.g.*, DOLZER & SCHREUER, *supra* note 2, at 21–22 (noting that the preambles of investment treaties often address their purpose, and concluding from these that “the purpose of investment treaties is to address the typical risks of a long-term investment project, and thereby to provide for stability and predictability in the sense of an investment-friendly climate”); VANDEVELDE, *supra* note 5, at 57 (asserting that countries have concluded BITs on the premise that “offering a secure legal framework for foreign investment would induce foreign investors to invest”).

countries. By providing certain mutual guarantees and *protection*, a BIT creates a *more stable and predictable legal framework for foreign investors* in each of the treaty Parties."⁵³ The letter added that this BIT, and others then under consideration, were

consistent in *purpose* with the network of treaties of Friendship, Commerce and Navigation . . . which the United States negotiated from the early [y]ears of the Republic until the last successful negotiations with Thailand and Togo in the late 1960s. They continue the U.S. policy of securing by agreement standards of *equitable treatment and protection* of U.S. citizens carrying on business abroad, and institutionalizing processes for the settlement of disputes between investors and host countries, and between governments.⁵⁴

To date, the tribunals and scholars offering interpretations of protection and security clauses have identified few insights to be gleaned from such evidence of the object and purpose of investment treaties. Although it is common for tribunals to consider evidence of this nature when interpreting *fair and equitable treatment*—and to conclude that one of the elements of that standard is to require a stable and predictable legal environment⁵⁵—they rarely draw similar conclusions about protection and security.

One of the few instances in which a tribunal has referred to the object and purpose of the treaty when interpreting a protection and security clause can be seen in the first known investment treaty arbitration, *Asian Agricultural Products, Ltd. v. Republic of Sri Lanka (AAPL)*.⁵⁶ This was a case filed by a Hong Kong investor under the UK–Sri Lanka BIT, at a time when the treaty covered investors from Hong Kong.⁵⁷ The claimant alleged that Sri Lanka violated a provision of the treaty requiring “full protection and security” by failing to prevent the destruction of the claimant’s shrimp farm and the deaths of several of the claimant’s employees during a clash between the Sri Lankan military and Tamil Tiger rebels.⁵⁸ The claimant argued further that the standard imposed a duty of strict liability on Sri Lanka to prevent harms to covered investments.⁵⁹

53. Letter of Submittal for Treaty Concerning the Treatment and Protection of Investments, U.S.–Pan., Oct. 27, 1982, S. TREATY DOC. NO. 99-2 [hereinafter Panama Letter of Submittal] (emphasis added), available at http://www.sice.oas.org/Investment/BITSbyCountry/BITS/PAN_USA_1982_e.asp.

54. *Id.* (emphasis added).

55. See, e.g., CMS Gas Transmission Co. v. Argentina, ICSID Case No. ARB/01/8, Award, ¶ 274 (May 12, 2005), 44 I.L.M. 1205 (2005) (concluding a stable legal and business environment is an essential element of fair and equitable treatment based on objectives of the Treaty).

56. Asian Agric. Prods. Ltd. v. Republic of Sri Lanka (AAPL), ICSID Case No. ARB/87/3, Final Award, ¶ 51 (June 27, 1990), 30 I.L.M. 580 (1991).

57. *Id.* at 580–81.

58. *Id.* at 581–82.

59. *Id.* at 583–84, 588.

In evaluating this claim, the tribunal observed that the “proper interpretation [of the protection and security clause] has to take into account the realization of the Treaty’s general spirit and objectives, which is clearly in the present case the encouragement of investments *through securing an adequate environment of legal protection.*”⁶⁰ The tribunal added that it did not necessarily follow from this purpose, however, that the parties intended the standard to impose strict liability and asserted that reading the treaty in such a way would be inappropriate absent supporting drafting history or other preparatory work.⁶¹ The tribunal accordingly concluded that the duty of protection and security in the BIT required only “due diligence” in protecting the investment, not an absolute guarantee that no harm would occur.⁶²

It bears noting that while the tribunal in *AAPL* did not explicitly state that the protection and security standard extends beyond physical protection (an issue it had no need to reach because the case before it involved physical harm), it clearly acknowledged in the above-quoted language that the treaty’s purpose was to “secur[e] an adequate environment of *legal protection*,” and felt this was relevant to interpreting the standard.⁶³

The *AAPL* tribunal was correct in this regard, but more can be said on the subject. To begin with, the references to protection and treatment in the preambles of BITs signal that the protection and security and fair and equitable treatment standards expressed in the body of the treaty are both directly connected to the treaty’s purpose. After all, the typical treaty begins with a statement that the parties are concluding the treaty in order to secure enhanced protection and treatment for investment—including an enhanced legal framework—and this is soon followed by clauses whereby the parties undertake to provide “full” protection (and security) and “fair and equitable” treatment. This suggests that the parties intend these standards to give legal substance to the aspirations expressed in the preamble, i.e., to convert the goals of the treaty into obligations. Furthermore, the assertion in letters of submittal that “[b]y providing certain mutual guarantees and *protection*, a BIT creates a more stable and predictable *legal framework* for foreign investors” seems to confirm that the notion of protection in the protection and security clause contemplates some form of legal protection.⁶⁴

60. *Id.* at 601 (emphasis added).

61. *Id.*

62. *Id.* at 602, 612.

63. *Id.* at 601 (emphasis added).

64. Panama Letter of Submittal, *supra* note 53 (emphasis added).

C. The Context of Protection and Security Clauses

Article 31 of the VCLT indicates that a term must be read in its context within the treaty, including any related annexes or agreements.⁶⁵ Context in this sense includes the grammatical construction of the provision within which the term appears, and the location of the term within the structure of the treaty as a whole.⁶⁶

Most U.S. BITs in force begin with a preamble, followed by a definitions section, followed by a substantive section, followed by language on dispute resolution, treaty termination, and other nonsubstantive matters.⁶⁷

The first article of the substantive section, Article II, sets forth various broad undertakings regarding the treatment and protection to be accorded to investment. Specifically, it refers to an obligation to treat investments of companies or nationals of the other party no less favorably than investments of the party's own nationals or of third country nationals.⁶⁸ (This is commonly referred to as "national treatment" and "most-favored-nation treatment," respectively.⁶⁹) Next come commitments to provide fair and equitable treatment and protection and security.⁷⁰ These commitments are followed by undertakings to refrain from arbitrary or discriminatory impairment of investments⁷¹ and to observe obligations that may have been entered into with regard to investments.⁷²

After that language comes a litany of more specific substantive provisions, dealing with such matters as

- an obligation to provide effective means of asserting claims and enforcing rights;⁷³
- an obligation to make public all laws, regulations, administrative policies, and adjudicatory decisions pertaining to investment;⁷⁴
- compensation for expropriation;⁷⁵ and
- compensation for losses incurred in connection with "war or other armed conflict, revolution, state of

65. Vienna Convention, *supra* note 27, art. 31(1)–(2).

66. RICHARD K. GARDINER, TREATY INTERPRETATION 178, 182 (2008).

67. *See, e.g.*, U.S.–Argentina BIT, *supra* note 4.

68. *See, e.g., id.* art. II(2)(a).

69. DOLZER & SCHREUER, *supra* note 2, at 178–79, 186–87.

70. *See, e.g.*, U.S.–Argentina BIT, *supra* note 4, art. II(2)(a).

71. *See, e.g., id.* art. II(2)(b).

72. *See, e.g., id.* art. II(2)(c).

73. *See, e.g., id.* art. II(6).

74. *See, e.g., id.* art. II(7).

75. *See, e.g., id.* art. IV(1).

national emergency, insurrection, civil disturbance or other similar events.”⁷⁶

The foregoing treaty structure is consistent with the tentative reading of the protection and security and fair and equitable treatment standards suggested above in Part II.B. In particular, the placement of these standards at the beginning of the substantive section (together with other language regarding the treatment of investment) suggests that they may be intended as general, overarching obligations committing each party to provide the sort of protection and treatment necessary to stimulate further investment. These obligations are then seemingly fleshed out by the more specific provisions that follow. Thus, for example, the effective means, transparency, expropriation, and war and civil disturbance clauses may all be designed to elucidate aspects of the protection and security and fair and equitable treatment to be provided.

If, by contrast, the notion of protection and security was intended as a narrow standard requiring nothing more than physical protection, then one would expect it to appear later in the treaty, amongst other subsidiary obligations. One might expect it to appear in particular in the same article as the war and civil disturbances clause, which deals with the consequences of physical harms. That it does not so appear is likely no coincidence.

D. *Relevant Rules of International Law*

In ascertaining the meaning of a term used in a treaty, the VCLT calls for one to consult any relevant rules of international law applicable between the parties.⁷⁷ Thus, for example, if there are customary norms that govern states' obligations toward foreigners, these may offer insight into the nature of obligations toward foreigners expressed in an investment treaty.

There certainly are such general rules of international law, including the “international minimum standard” referenced in recent U.S. investment treaties. Yet one should not be too quick to draw connections between a treaty standard and a general rule of international law when the latter is not explicitly referenced. As Christoph Schreuer has pointed out, the parties may have intended to lay down an autonomous standard, i.e., one that is independent of whatever rules exist under customary international law.⁷⁸ Schreuer

76. See, e.g., *id.* art. IV(3).

77. Vienna Convention, *supra* note 27, art. 31(3).

78. Christoph Schreuer, *Full Protection and Security*, 1 J. INT'L DISP. SETTLEMENT 353, 364 (2010). Other authorities making this point are discussed *infra* Part III.E.2.

has cautioned in particular against equating protection and security with the international minimum standard because "it is hard to see why the drafters of a treaty would use 'full protection and security' where they mean the 'minimum standard under customary international law.'"⁷⁹ In other words, if the parties wished to refer to a customary norm, it would be logical to mention it *by name*. This is a clever argument, but the conclusion would not follow if it could be shown that the term *protection and security* has its *own* established meaning in customary international law as an element of—or alternative label for—the international minimum standard. In that event, in requiring protection and security, the parties *would* have referred to a general rule by name. As it turns out, that is precisely the case.

Indeed, a number of investment treaty tribunals have noted that customary international law includes an obligation of protection toward foreigners and have drawn a connection between that duty and the treaty standard of protection and security. The tribunal in *AAPL* is an example. In evaluating the claimant's protection and security claim, the tribunal identified various historical authorities referring to a customary duty to "protect" aliens according to a "due diligence" standard and drew a connection between that duty and the treaty standard.⁸⁰ The cases to which *AAPL* referred involved *physical harms* inflicted upon foreigners, which was only natural considering that *AAPL* itself involved a physical attack on the claimant's property and personnel. Nevertheless, as will be seen, that *AAPL* focused on that authority helped give rise to an impression that the customary duty of protection is *limited* to the physical context.

This impression was reinforced when the next two cases to equate a treaty standard of protection and security with the customary duty—*American Manufacturing & Trading, Inc. (AMT) v. Republic of Zaire*⁸¹ and *Wena Hotels, Ltd. v. Arab Republic of Egypt*⁸²—likewise involved physical interferences with investments. After those cases, several tribunals and scholars concluded that the customary duty is limited to preventing physical harm. For example, in *Saluka Investments B.V. v. Czech Republic*, the tribunal cited *AMT* and *Wena Hotels* before asserting that "[t]he practice of arbitral tribunals seems to indicate . . . that the 'full security and protection' clause is not meant to cover just any kind of impairment of an

79. Schreuer, *supra* note 78, at 364.

80. *Asian Agric. Prods. Ltd. v. Republic of Sri Lanka (AAPL)*, ICSID Case No. ARB/87/3, Final Award, ¶¶ 69–77 (June 27, 1990), 30 I.L.M. 580 (1991).

81. *Am. Mfg. & Trading Inc. (AMT) v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, ¶ 6.04 (Feb. 10, 1997), 36 I.L.M. 1531, 1548–49 (1997).

82. *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, ¶ 79, 80–95 (Dec. 8, 2002), 41 I.L.M. 896, 911–14 (2002).

investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force."⁸³

Similarly, in *BG Group v. Argentina*, the tribunal summarized the same jurisprudence (by that time augmented by *Saluka* as well), and relied upon it to conclude that "notions of 'protection and constant security' or 'full protection and security' in international law have *traditionally been associated with* situations where the physical security of the investor or its investment is compromised."⁸⁴

Indeed, when other tribunals have taken a different view of protection and security—interpreting the standard as requiring legal as well as physical security—their faithfulness to the "traditional" understanding of the concept has sometimes been called into question. For example, one scholar commented in relation to one such award, in *CME Czech Republic BV v. Czech Republic*,⁸⁵ that the tribunal "did not give any clear reason as to why it was departing from the *historical interpretation traditionally employed by courts and tribunals* and choosing to expand the concept to cover non-physical actions and injuries."⁸⁶

It is unfortunate that this common impression of the customary duty has not yet been subjected to closer scrutiny. As discussed below in Part III—which explores the historical evolution of the notion of protection and security in customary international law and its parallel development in U.S. treaty practice—that impression is mistaken.

E. Supplementary Means of Interpretation

The VCLT also provides that "recourse may be had to supplementary means of interpretation," including "preparatory work" (also known as *travaux préparatoires*) and the circumstances in which the treaty was signed.⁸⁷ There is a debate over precisely when one may resort to supplementary means,⁸⁸ but it is undisputed that

83. *Saluka Invs. BV v. Czech Republic*, ICGJ 368, Partial Award, ¶ 484 (PCA 2006).

84. *BG Grp. Plc. v. Republic of Arg.*, Final Award, ¶ 324 (UNCITRAL Arb. Trib. 2007) (emphasis added); *see also* *Enron Corp. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, ¶ 286 (May 22, 2007), 19 *World Trade & Arb. Materials* 109 (2007) ("There is no doubt that historically this particular standard [of protection and security] has been developed in the context of physical protection and security of the company's officials, employees or facilities.").

85. *CME Czech Republic BV v. Czech Republic*, Partial Award, ¶¶ 159–60 (UNCITRAL Arb. Trib. 2001).

86. JESWALD W. SALACUSE, *THE LAW OF INVESTMENT TREATIES* 214 (2010) (emphasis added).

87. Vienna Convention, *supra* note 27, art. 32.

88. Compare LINDERFALK, *supra* note 48, at 236–37 (arguing that supplementary means may be consulted only if the meaning suggested by the primary

one may consult supplementary means *at least* to confirm a meaning suggested by the primary means, or when the primary means leave some degree of ambiguity or obscurity, which is often the case.⁸⁹

Furthermore, it is widely recognized that whatever the role *formally* assigned by the VCLT to supplementary means, courts and tribunals routinely consult them *in practice* to the extent they are available. As one scholar has put it, "the parties to a dispute will always refer the tribunal to the *travaux* and the tribunal will inevitably consider them along with all the other material put before it."⁹⁰

The notion of preparatory work covers not only drafts of the treaty at issue, but also correspondence between the parties during negotiations⁹¹ and "[c]ommentaries, explanatory reports, and similar documents . . . written at the same time as a treaty is being drawn up."⁹² And the phrase "circumstances of the treaty's conclusion" refers to the factual and legal background against which the treaty was concluded, or, more specifically, factors that influenced the conclusion of the treaty.⁹³ Such circumstances may include other treaties that have a similar subject matter or employ similar terminology.⁹⁴ In the present context, this would include other treaties dealing with investment, such as FCN treaties.

Moreover, Article 32 does not limit the permissible supplementary means to preparatory work and the circumstances of the treaty's conclusion.⁹⁵ Other permissible evidence would include,

means is ambiguous, unreasonable, or obscure), *with* Stephen Schwebel, *May Preparatory Work Be Used to Correct Rather than Confirm the 'Clear' Meaning of a Treaty Provision?*, in *THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY* 541 (1996) (arguing that supplementary means may be referenced from the outset of the interpretive process, and employed to modify an interpretation suggested by the primary means that appears clear).

89. See GARDINER, *supra* note 66, at 328 (discussing how supplementary means of interpretation may be used when ambiguity remains after grammatical construction within the context of the provision and the treaty as a whole).

90. ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 245 (2d ed. 2007); see also GARDINER, *supra* note 66, at 326 ("The term 'confirm' in article 32 is very loosely interpreted in practice, reference to preparatory work and circumstances of conclusion being made to substantiate an interpretation that is emerging as much as confirming one which is already pretty much clear.").

91. LINDERFALK, *supra* note 48, at 240.

92. GARDINER, *supra* note 66, at 346.

93. See LINDERFALK, *supra* note 48, at 246.

94. See GARDINER, *supra* note 66, at 345 (discussing how courts and tribunals will often draw comparisons between the treaty at issue and other treaties—particular when they address similar subject matter).

95. See *id.* at 343 (noting that permissible supplementary means are not limited to the examples provided in the VCLT text).

for example, statements by a party in connection with the *ratification* of the treaty, such as letters of submittal.⁹⁶

It is therefore appropriate to consider any and all of the above categories of evidence to the extent they can be located, with a view toward understanding the notion of protection and security expressed in modern investment treaties. Such evidence will accordingly be collected and discussed in Part III.

III. THE HISTORICAL EVOLUTION OF PROTECTION AND SECURITY IN CUSTOMARY INTERNATIONAL LAW AND U.S. TREATY PRACTICE

Part II revealed that the ordinary meaning of the phrase protection and security, the object and purpose of investment treaties, and the context of protection and security clauses within treaties all suggest a reading that contemplates at least some form of legal security. Nevertheless, one must also consider relevant rules of international law, including the customary norm of protection that has been referenced—but not fully explored—in cases such as *AAPL*. One must also consider what light, if any, supplementary means of interpretation shed on the matter.

Evidence regarding each of the foregoing is therefore developed in the subparts that follow, as part of a broader discussion of the historical evolution of the protection and security standard in customary international law and U.S. treaty practice. This evidence strongly supports an interpretation of the standard that extends beyond physical protection, requiring, among other things, the existence of a legal system that offers such features as access to courts, due process, and compensation for expropriation.

A. *The Eighteenth Century*

A distinct obligation of protection or security owed by a state to foreigners in its territory had coalesced in customary international law at least by the mid-eighteenth century and found detailed expression in the writings of both Christian Wolff and Emmerich de Vattel. This notion was then invoked in U.S. commercial treaties concluded in the final decades of that century: the first protection and security clauses.

96. LINDERFALK, *supra* note 48, at 249.

1. Wolff and Vattel

In 1749, Wolff, a German professor, published *The Law of Nations Treated According to a Scientific Method*,⁹⁷ which discussed at length an obligation of "protection" and "security" owed by a host state to foreigners under international law. In particular, in a section entitled "Of the assurance of *security* to foreigners in one's territory," Wolff observed that "[f]oreigners, as long as they live in alien territory, ought to be safe from *every injury*, and the ruler of the state is bound to defend them against it, that is, *security* is to be assured to foreigners living in alien territory."⁹⁸ He added that "[t]he ruler of a state ought not to allow any one of his subjects to *cause a loss or do a wrong* to the citizen of another nation, and if this has been done, he ought to compel him to repair the loss caused and to punish him."⁹⁹ By using general terms such as "injury," "loss," and "wrong," Wolff made clear that the duty required protection against *nonphysical* as well as physical harms.

Wolff went on to explain that this duty is based on a tacit agreement between the foreigner in question and the ruler of that state:

[B]etween the ruler of the territory and the foreigner living in it there exists a tacit agreement, by which the latter promises temporary obedience, the former *protection*. Therefore, since tacit agreements of that sort are to be observed, the ruler of the territory is bound to *protect* foreigners, consequently not to allow them to be injured contrary to the right common to all men by nature. But if he does not allow foreigners living in his territory to be injured by others, he assures *security* to them. Therefore, the ruler of a state is bound to assure *security* to foreigners living in his territory.¹⁰⁰

Writing shortly after Wolff, in 1758, Vattel likewise acknowledged the existence of this international duty of protection and security in his seminal work *The Law of Nations or the Principles of Natural Law*:

A sovereign may not allow the right of entrance into his territory granted to foreigners to prove detrimental to them; in receiving them he agrees to *protect* them as his own subjects and to see that they enjoy, as far as depends on him, *perfect security*. Thus we see that every sovereign who has granted asylum to a foreigner considers himself no

97. CHRISTIAN WOLFF, *JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM* (1749), reprinted in 2 *THE CLASSICS OF INTERNATIONAL LAW* 9 (James Brown Scott ed., Joseph H. Drake trans., 1934).

98. *Id.* at 536 (emphasis added).

99. *Id.* (emphasis added).

100. *Id.* at 537 (emphasis added).

less offended by injuries which may be done to the foreigner than if they were done to his own subjects.¹⁰¹

Vattel made clear, moreover, that the "injuries" against which states must protect foreigners are not limited to physical harms, by noting that the state must guard against *any unjust act*.¹⁰² He added that host states must protect not only foreigners' persons, but their property as well,¹⁰³ and must provide compensation for any expropriation.¹⁰⁴

Vattel's treatise on the law of nations achieved wide circulation during the second half of the eighteenth century and was viewed by contemporaries and subsequent generations—particularly in the English-speaking world—as the single most useful and authoritative expression of international law.¹⁰⁵

2. Early U.S. Commercial Treaties

In light of the weight accorded to Vattel's writings in the late eighteenth century, it is only natural that when the fledgling United States began concluding commercial treaties for the benefit of its citizens engaged in foreign commerce, those treaties explicitly incorporated the duty of protection and security that he had described.

The first treaty concluded by the new nation, with Prussia in 1785, included only brief and cryptic references to the protection due to foreign merchants.¹⁰⁶ Yet a treaty concluded with Great Britain a

101. EMMERICH DE VATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW* (1758), reprinted in 3 *THE CLASSICS OF INTERNATIONAL LAW* 145 (James Brown Scott ed., Charles G. Fenwick trans., 1916).

102. *Id.* at 136 ("If a sovereign who has the power to see that his subjects act in a just and peaceable manner permits them to injure a foreign Nation, either the State itself or its citizens, he does no less a wrong to that Nation than if he injured it himself.")

103. *Id.* at 146.

104. *Id.* at 96.

105. Albert de Lapradelle, *Introduction* to 3 *THE CLASSICS OF INTERNATIONAL LAW* xxxiv–xxxv (James Brown Scott ed., Charles G. Fenwick trans., 1916) (asserting that, in Britain, "[o]f all the authors, even the English who have written upon the Law of Nations, not one is more often nor more copiously quoted than Vattel," and that, in the United States, Vattel has always been seen as "the most competent, the wisest, and the safest guide, in all the discussions of Congress, in all the trials in court, and in diplomatic correspondence, especially that concerned with questions of legality").

106. See, e.g., Treaty of Amity and Commerce, U.S.-Prussia, art. XVIII, Sept. 10, 1785, 8 Stat. 84 ("If the citizens or subjects of either party, in danger from tempests, pirates, enemies or other accident, shall take refuge with their vessels or effects, within the harbours or jurisdiction of the other, they shall be received, *protected* and treated with humanity and kindness . . ." (emphasis added)).

few years later, in 1794, contained more detailed references to protection and security.¹⁰⁷

Article II provided that Britain was to withdraw its military posts from U.S. territory but that

[a]ll settlers and traders, within the precincts or jurisdiction of the said posts, shall continue to enjoy, unmolested, all their property of every kind, and shall be *protected* therein. They shall be at full liberty to remain there, or to remove with all or any part of their effects; and it shall also be free to them to sell their lands, houses or effects, or to retain the property thereof, at their discretion.¹⁰⁸

This use of the term *protected* connotes not only physical protection, but also the status of having secure property rights under the law.

Article XIV set forth a general guarantee of "reciprocal and perfect liberty of commerce and navigation," then specified that "[t]he people and inhabitants of the two countries respectively, shall have liberty freely and *securely* . . . to hire and possess houses and warehouses for the purposes of their commerce, and generally the merchants and traders on each side, shall enjoy *the most complete protection and security for their commerce*."¹⁰⁹ This use of *protection and security* seems to connote at least in part an absence of undue or discriminatory legal restrictions on foreign merchants' activities.

Article XIX required security for the citizens and vessels of each party against men-of-war and privateers—a usage that connotes *physical security*.

Finally, although Article X of the treaty did not use the words *protection* or *security*, a defender of the treaty, Alexander Hamilton, contemporaneously described it as reflecting a customary duty of *protection and security*. The provision in question provides that "[n]either the debts due from individuals of the one nation to individuals of the other, nor shares, nor monies, which they may have in the public funds, or in the public or private banks, shall ever in any event of war or national differences be sequestered or confiscated."¹¹⁰ After the text of this treaty became public, some people criticized Article X—and other provisions—as being too generous to the British.¹¹¹ Hamilton came to the defense of the treaty in a series of letters published under the pseudonym "Camillus."¹¹² Hamilton explained that Article X was of a nature commonly found in treaties

107. See Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit., Nov. 19, 1794, 8 Stat. 116, 117.

108. *Id.* art. II, at 117 (emphasis added).

109. *Id.* art. XIV, at 124 (emphasis added).

110. *Id.* art. X, at 122.

111. See Harold C. Syrett, *Introductory Note* to 18 THE PAPERS OF ALEXANDER HAMILTON 475, 475 (Harold C. Syrett ed., 1973).

112. *Id.*

and asserted that those provisions clearly amounted to the following, "that upon the breaking out of a War between the contracting parties in each case, there shall be for a term of six or nine months *full protection and security* to the persons and property of the subjects of one which are then in the territories of the other."¹¹³ He added that the granting of such protection to alien merchants and their property formed "*a part of the law of Nations.*"¹¹⁴ Hence, he argued, by including Article X the parties had done nothing extraordinary; they had simply incorporated a preexisting obligation under the law of nations. Significantly, Hamilton cited Vattel in support of the existence of such a customary norm of protection and security.¹¹⁵

In another letter, Hamilton elaborated upon this norm as follows:

The right of holding or having property in a country always implies a duty on the part of its Government to *protect* that property and to *secure* to the owner the full enjoyment of it. Whenever therefore a Government grants permission to foreigners to acquire property within its territories or to bring & deposit it there, it tacitly promises *protection and security.*¹¹⁶

Hamilton added that this duty required that "the foreign proprietor . . . shall enjoy the rights privileges and immunities of a native proprietor—without any other exceptions than those which the established laws may have previously declared."¹¹⁷ In other words, the customary duty of protection and security required equal protection before the law, among other things.

The foregoing evidence makes it clear that the notion of protection and security in the earliest U.S. commercial treaties contemplated shelter from a *range* of threats, from attacks by men-of-war to governmental confiscations to infringements of legal rights. It also suggests that these treaties used the phrase in essentially the same manner as had Wolff and Vattel.

B. From 1800 Through World War I

During the nineteenth century and the first part of the twentieth, the customary notion of protection and security underwent

113. ALEXANDER HAMILTON, THE DEFENCE NO. XXII (Oct. 14, 1795), *reprinted in* 19 THE PAPERS OF ALEXANDER HAMILTON 380, 382 (Harold C. Syrett ed., 1973) (emphasis added).

114. *Id.* at 387.

115. ALEXANDER HAMILTON, THE DEFENCE NO. XXI (Oct. 30, 1795), *reprinted in* 19 THE PAPERS OF ALEXANDER HAMILTON 365, 365 (Harold C. Syrett ed., 1973).

116. ALEXANDER HAMILTON, THE DEFENCE NO. XIX (Oct. 14, 1795), *reprinted in* 19 THE PAPERS OF ALEXANDER HAMILTON 318, 319 (Harold C. Syrett ed., 1973) (emphasis added).

117. *Id.*

further refinement, and U.S. FCN treaties evolved in commensurate fashion. The evidence is unequivocal, however, that the standard was understood throughout this period as requiring more than mere police protection. Indeed, to the extent the standard evolved, it was in the direction of requiring more extensive protections under the law for aliens' property rights.

1. Developments in Customary International Law

Several commentators asserted during this period that the customary duty of protection requires not only physical protection but also ready access to courts, equal protection before the law, and just treatment by governmental authorities.

For example, in his 1878 *Commentary on International Law*, James Kent observed: "When foreigners are admitted into a state upon free and liberal terms, the public faith becomes pledged for their *protection*. The courts of justice ought to be freely open to them to resort to for the redress of their grievances."¹¹⁸ Similarly, Lassa Oppenheim commented in 1905 as follows:

[A] foreigner . . . must be afforded such *protection* of his person and property as is enjoyed by a citizen. . . . In consequence thereof every State is by the Law of Nations compelled to grant to foreigners *equality before the law* with its citizens as far as safety of person and property is concerned. A foreigner must in especial not be wronged in person or property by the officials and Courts of a State. Thus, the police must not arrest him without just cause, *custom-house officials must treat him civilly, Courts of Justice must treat him justly and in accordance with the law.*¹¹⁹

Scholars and diplomats from capital-exporting countries also began emphasizing during this era that the protection offered to foreigners must be consistent with *international* standards, not only national ones. They did so in response to a position first articulated by the Argentine diplomat Carlos Calvo—and later taken up by many Latin American countries—that a home state has no basis to complain under international law unless the treatment accorded to its nationals is worse than that experienced by host-state nationals.¹²⁰ An example of the developed country view that host

118. JAMES KENT, *KENT'S COMMENTARY ON INTERNATIONAL LAW* 113 (J.T. Abody ed., 2d ed. 1878) (emphasis added).

119. L. OPPENHEIM, *INTERNATIONAL LAW* 376 (1st ed. 1905) (emphasis added).

120. [P]ostcolonial Latin American jurists drew upon the teachings of Carlos Calvo, an Argentine diplomat of the late nineteenth century, to reject the developed nations' arguments for an 'international minimum standard' of treatment for aliens. Instead, their position was that aliens were entitled only to the same level of treatment that domestic nationals receive under the domestic laws and legal system.

states must meet an international minimum in the protection accorded to foreigners can be seen in the following comments by former U.S. Secretary of State Elihu Root in 1910:

Each country is bound to give to the nationals of another country in its territory the benefit of the same laws, the same administration, the same *protection*, and the same redress for injury which it gives to its own citizens, and neither more nor less: provided the *protection* which the country gives to its own citizens *conforms to the established standard of civilization*.¹²¹

In time, this notion that the host state must meet “the established standard of civilization” in relation to foreigners would come to be known as the “international minimum standard of treatment.”¹²²

2. Protection and Security Clauses in Treaty Practice

Protection and security provisions in U.S. FCN treaties from this era likewise reflect a requirement that the host state’s legal system include certain basic features. For example, an 1824 FCN Treaty with Colombia provided that each party was “to give their special *protection* to the persons and property of the citizens of each other . . . *leaving open and free to them the tribunals of justice for their judicial recourse*.”¹²³ In other words, the legal system must provide covered foreigners with open access to the courts. Moreover, a U.S. diplomatic instruction from 1866 asserted that this provision in the treaty would preclude “any *arbitrary* act of either Government whereby a citizen of the other may be deprived of his rights or injured in his property *without due process of law*.”¹²⁴ This suggests that the notion of protection and security required not only access to courts

Nicholas DiMascio & Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?*, 102 AM. J. INT’L L. 48, 52 (2008)

121. Elihu Root, *The Basis of Protection to Citizens Residing Abroad*, 4 AM. J. INT’L L. 517, 521 (1910) (emphasis added).

122. See SALACUSE, *supra* note 86, at 48 (describing Root’s comments as “[a]n authoritative statement of the international minimum standard”); see also ANDREAS H. ROTH, *THE INTERNATIONAL MINIMUM STANDARD* 112–13 (1949) (describing the international minimum standard and its rationale).

123. General Convention of Peace, Amity, Navigation and Commerce, U.S.-Colom., Oct. 3, 1824, art. 10, 8 Stat. 306.

124. Robert R. Wilson, *Property-Protection Provisions in United States Commercial Treaties*, 45 AM. J. INT’L L. 83, 97 (1951) (emphasis added) (quoting a U.S. diplomatic instruction of April 9, 1886). By the time of this instruction, Colombia had changed its name to New Granada, and the 1824 treaty had been superseded by a new treaty concluded in 1846. Treaty of Peace, Amity, Navigation and Commerce, U.S.-New Granada, Dec. 12, 1846, 6 Bevans 868. Nevertheless, the “protection” clause to which the instruction referred was worded almost identically to the 1824 original. See *id.* art. XIII.

but also that those courts refrain from arbitrary applications of the law and provide due process.

The relevant provisions of the U.S. FCN treaties concluded during the nineteenth century with Costa Rica, Argentina, and Japan had nearly identical language, except that they referred to "the most complete protection and security" or to "full and perfect protection," rather than to "special protection."¹²⁵ One distinctive feature of the treaty with Japan, however, was that it added that one party's nationals "shall enjoy in the territories of the other the same *protection* as native citizens or subjects *in regard to patents, trademarks and designs*, upon fulfilment of the formalities prescribed by law."¹²⁶ This is yet another usage of the term protection that contemplates nonphysical protection, as it relates to intangible property.

All of this contrasts with the position taken by some modern tribunals—and embraced in the most recent U.S. investment treaties—that the notion of protection and security under customary international law is limited to police protection.

Other countries began including protection and security clauses in their commercial treaties during this period as well. For example, an 1861 treaty between Italy and Venezuela provided that "[t]he citizens and subjects of one state shall enjoy in the territory of the other the *fullest measure of protection and security* of person and property."¹²⁷ After that treaty was concluded, an Italian national, Salvatore Sambiaggio, experienced "requisitions and forced loans exacted of him by revolutionary troops" during a time of civil war in Venezuela.¹²⁸ Italy brought a claim on behalf of Sambiaggio before a claims commission, asserting that Venezuela had violated the treaty's protection and security provision by failing to protect Sambiaggio from those losses.¹²⁹ The umpire in the case, Jackson H. Ralston, determined that the protection and security clause contemplated a duty of due diligence on the part of one party to protect nationals of

125. Treaty of Commerce and Navigation, U.S.-Japan, art. I, Nov. 22, 1894, 1 U.S.T. 352 [hereinafter U.S.-Japan FCN Treaty]; Treaty of Friendship, Commerce and Navigation, U.S.-Arg., arts. II, VIII, July 27, 1853, 5 Bevens 61; Treaty of Friendship, Commerce and Navigation, U.S.-Costa Rica, arts. II, VII, July 10, 1851, 6 Bevens 1013.

126. U.S.-Japan FCN Treaty, *supra* note 125, art. XVI (emphasis added).

127. See Salvatore Sambiaggio (It. v. Venez.), 10 R.I.A.A. 499, 518 (It.-Venez. Mixed Claims Comm'n 1903) (emphasis added) (quoting Article 4 of the treaty).

128. *Id.* at 500.

129. See *id.* at 500-02 (recording Italy's assertion that Venezuela had a duty to guard against such losses when "said authorities exercise a de facto power or when the troops have a recognized military organization for the purpose of overthrowing the legal government").

the other party.¹³⁰ He nevertheless rejected the claim on various grounds, including his conclusion that Venezuela did not control the revolutionaries and could not reasonably have prevented the losses.¹³¹

As will be seen, this case—and Ralston's use of a "due diligence" test in particular—would prove influential to subsequent tribunals and scholars seeking to identify the degree of protection required by the standard.

C. *Between the World Wars*

World War I and its aftermath brought an increase in hostility toward foreigners in many countries,¹³² as well as regime changes and associated expropriations of foreign-owned private property in Russia and elsewhere in Eastern Europe.¹³³ Faced with these developments, the United States adjusted the wording of its protection and security clauses so as to spell out in more detail the characteristics of the host state's legal system that were contemplated by the standard. Meanwhile, international tribunals reaffirmed traditional notions of protection and security, and the League of Nations attempted (unsuccessfully) to codify the concept.

1. Adjustments to U.S. Protection and Security Clauses

Following World War I, the protection and security provisions in newly concluded U.S. FCN treaties underwent a marked change. They began to articulate various civil liberties to be enjoyed by covered nationals, and made explicit both the fact that the standard was enshrined in general international law and the fact that covered foreigners were entitled to compensation for any expropriations. In no instance did any treaty indicate that the standard was somehow limited to police protection.

The FCN treaty that the United States concluded with Germany in 1923 is illustrative. Article I began by reciting various civil

130. See *id.* at 524 (stating that if it is "alleged and proved that Venezuelan authorities failed to exercise due diligence to prevent damages from being inflicted by revolutionists, that country should be held responsible").

131. See *id.* (holding that "[i]n the present instance no such want of diligence is alleged and proved").

132. See Pitman B. Potter, *International Legislation on the Treatment of Foreigners*, AM. J. INT'L L. 748, 749 (1930) (noting that during the War, "the equal and equitable treatment of the alien began to be abandoned, or deliberately reversed, in favor of discriminatory treatment of one sort or another, in a great many European States").

133. VANDEVELDE, *supra* note 5, at 34–35.

liberties to be accorded to covered nationals, including access to courts of justice, then provided:

The nationals of each High Contracting Party shall receive within the territories of the other, upon submitting to conditions imposed upon its nationals, *the most constant protection and security for their persons and property, and shall enjoy in this respect that degree of protection that is required by international law. Their property shall not be taken without due process of law and without payment of just compensation.*¹³⁴

That U.S. officials viewed the standard as extending beyond police protection is further demonstrated by a December 31, 1924, Memorandum by the office of the State Department's Solicitor regarding this treaty with Germany.¹³⁵ That Memorandum observed the following:

In the last paragraph of Article I it is provided that the treatment accorded the resident alien is that accorded by international law. *This stipulation will operate to secure protection against arbitrary and unjust treatment* in any particular in which the Government of a country does not accord its own nationals as liberal treatment as that which is recognized in international law.¹³⁶

In other words, Article I's mandate to accord protection and security as "required by international law" contemplated not merely physical protection, but protection against arbitrary and unjust treatment as well.

2. Jurisprudence and Diplomatic Correspondence

While U.S. protection and security provisions were being modified and interpreted in this manner, other sources of international law were regularly alluding to a duty to give protection and security to foreigners, and making clear that it required certain legal as well as physical safeguards.

Several decisions involving this duty were rendered by the U.S.-Mexico General Claims Commission, a body established pursuant to an agreement between the United States and Mexico dated September 8, 1923.¹³⁷ In such cases, the Commission repeatedly

134. Treaty of Friendship, Commerce, and Consular Rights, U.S.-Ger., art. I, Dec. 8, 1923, 8 Bevans 153 (emphasis added).

135. Memorandum, Office of the Solicitor, Dep't of State, Treaty of Friendship, Commerce and Consular Rights Between the United States and Germany Concluded December 8, 1923: Legal Reasons Why Such a Treaty is Desirable, file 711.622/60 (Dec. 31, 1924) (on file with author) [hereinafter Solicitor Memorandum].

136. *Id.* (emphasis added).

137. See Convention Between the United States and Mexico for the Reciprocal Settlement of Claims, U.S.-Mex., Sept. 8, 1923, 43 Stat. 1730 (describing the composition and establishment of the Commission).

asserted that a state has a duty under international law to protect foreigners within its territory according to a standard of reasonable care or due diligence, and sometimes found the respondent liable for failure to satisfy the standard.¹³⁸

Although the cases before that Commission generally involved physical harms, other authorities at the time were recognizing that the duty of protection and security contemplates more than police protection.

For example, in the *Brown* case of 1923,¹³⁹ another claims commission held that a Boer-dominated political entity known as the Transvaal Republic violated international law by rendering “manifestly *insecure*” a U.S. citizen’s interest in certain mining claims.¹⁴⁰ The commission labeled the international delict in question a “denial of justice” and explained that it resulted from the combined actions of the executive, legislature, and judiciary, which reflected a *legal system* incapable of securing the U.S. citizen’s property rights.¹⁴¹ This is similar to Jan Paulsson’s observation that denial of justice in customary international law is a *systemic* failure, namely “a failure of a national legal system to provide due process.”¹⁴²

Also during this period, U.S. State Department officials asserted to Spanish authorities that the customary duty of protection required compensation in the event of expropriation. Specifically, in correspondence sent during the Spanish Civil War of the 1930s, U.S. officials referred to recent confiscations of property owned by U.S. nationals and asserted that the “protection to which it is entitled under international law” required “prompt and full compensation to the owners.”¹⁴³

Such references to a duty under international law to protect or secure foreigners’ property rights provide further evidence that the customary norm of protection and security was seen at the time as extending beyond police protection.

138. See, e.g., *Youmans* (U.S. v. Mex.), 4 R.I.A.A. 110, 114–15 (U.S.-Mex. Gen. Claims Comm’n 1926) (upholding a claim that was predicated on “the failure of the Mexican Government to exercise due diligence to protect the father of the claimant from the fury of the mob at whose hands he was killed, and the failure to take proper steps looking to the apprehension and punishment of the persons implicated in the crime”); *Home Ins. Co.* (U.S. v. Mex.), 6 R.I.A.A. 48, 52 (U.S.-Mex. Gen. Claims Comm’n 1926) (holding that Mexico was not liable because it discharged its “duty to protect the persons and property within its jurisdiction by such means as were reasonably necessary to accomplish that end”).

139. *Brown* (U.S. v. Gr. Brit.), 6 R.I.A.A. 120, 120 (Perm. Ct. Arb. 1923).

140. *Id.* at 129 (emphasis added).

141. See *id.* at 128–29 (“All three branches of the Government conspired to ruin his enterprise . . . [A] system was created under which all property rights became . . . manifestly insecure.”).

142. JAN PAULSSON, *DENIAL OF JUSTICE IN INTERNATIONAL LAW* 36 (2005).

143. Dep’t of State, file 352.115/45 (on file with author) (emphasis added).

3. Attempts to Codify the Customary Duty

The Covenant by which the League of Nations was established in 1919 included a provision, Article 23(e), which committed each member state to "make provision to secure and maintain freedom of communications and of transit and *equitable treatment* for the commerce of all Members of the League."¹⁴⁴ This appears to be the first time that an international instrument used the term *equitable treatment* in relation to foreign investment—a practice that has since become common with the profusion of fair and equitable treatment clauses in investment treaties.

The Covenant seems to have used the term equitable treatment as shorthand for the treatment to which foreigners are entitled under customary international law. It cannot have been a coincidence that the drafters of Article 23(e) chose the term *treatment*, which by then was being used routinely (together with protection and security) to refer to a host state's international obligations toward foreigners. Such usage can be seen, for example, in Root's comments that the customary duty of protection contemplates an international minimum standard of treatment.¹⁴⁵ It can also be seen in the assertion by the U.S.–Mexico General Claims Commission that, under international law, aliens must be "*treated* in accordance with ordinary standards of civilization."¹⁴⁶

Indeed, that the drafters of Article 23(e) understood a requirement of equitable treatment as existing under customary international law is evident from the fact that, shortly after the Covenant's adoption, the League of Nations' Economic Committee initiated efforts to codify states' customary obligations toward foreigners "in pursuance of" this provision.¹⁴⁷ This is not to say that

144. League of Nations Covenant art. 23(e), *reprinted in* 1 INTERNATIONAL LEGISLATION 16 (Manley O. Hudson ed., 1931) (emphasis added).

145. See Root, *supra* note 121, at 521–22 (discussing the customary duty of protection and asserting that "[i]f any country's system of law and administration does not conform to that standard, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of *treatment* to its citizens" (emphasis added)).

146. Roberts (U.S. v. Mex.), 4 R.I.A.A. 77, 80 (U.S.–Mex. Gen. Claims Comm'n 1926).

147. The League of Nations Covenant pledges the members to "make provision to secure and maintain . . . equitable treatment for the commerce of all members." It was *in pursuance of* this intention that the Economic Committee of the League drew up the Draft Convention on the Treatment of Foreigners, which deals in particular with commercial matters and allied fields.

John Ward Cutler, *The Treatment of Foreigners in Relation to the Trade Convention and Conference of 1929*, 27 AM. J. INT'L L. 225, 233 (1933) (emphasis added). Another

the drafters of the Covenant believed that international law in this area was perfectly settled and faithfully followed by all countries. Had that been the case, there would have been no need to require such treatment in the Covenant and no benefit to codifying international law on the subject. Nevertheless, in light of the foregoing, it cannot be credibly doubted that they understood international law as addressing the treatment due to an alien, and as requiring, in a general sense, that it be equitable.¹⁴⁸

The drafters of Article 23(e) could just as well have referred to an obligation to accord protection or security to foreigners. The notions of equitable treatment, on the one hand, and protection or security, on the other, were viewed by many at the time as equivalent, or at least overlapping. This is evident from the Solicitor's assertion in 1924 that the treaty obligation of protection and security precluded "arbitrary and unjust *treatment*" of U.S. citizens.¹⁴⁹ It is also clear from the fact that the draft convention prepared pursuant to Article 23(e) began as a "series of principles for the guidance of states in respect to the *protection* of foreign nationals and enterprises against arbitrary fiscal treatment and unfair discrimination."¹⁵⁰ In fact, although the draft convention itself was entitled a "Draft Convention on the *Treatment* of Foreigners," a commentator described it at the time as "in part a codification of international law relating to the *protection* of aliens."¹⁵¹ And, indeed, the Draft Convention referred repeatedly to an obligation of "protection."¹⁵²

scholar described this draft convention at the time as an attempt at "*codification of international law* relating to the protection of aliens." Arthur K. Kuhn, *International Conference on the Treatment of Foreigners*, 24 AM. J. INT'L L. 570, 573 (1930) (emphasis added).

148. A student note has argued that the term "equitable treatment" in Article 23(e) could not have been referring to a notion within customary international law because the law in that area was not fully settled at the time. See Theodore Kill, Note, *Don't Cross the Streams: Past and Present Overstatement of Customary International Law in Connection with Conventional Fair and Equitable Treatment Obligations*, 106 MICH. L. REV. 853, 870 (2008). This argument assumes that the parties to an international agreement could not (or would not) refer to a principle of law unless its meaning was settled. The reality is that parties do precisely that all the time. A good example is the multitude of modern investment treaties in which the parties agree to accord "fair and equitable treatment," "protection and security," and treatment no less than that required by "international law," notwithstanding ongoing controversies over the precise meanings of those terms and the contours of international law generally. See VANDEVELDE, *supra* note 5, at 226–32 (discussing these notions and controversies surrounding their meanings).

149. Solicitor Memorandum, *supra* note 135 (emphasis added).

150. Kuhn, *supra* note 147, at 571 (emphasis added).

151. *Id.* at 573 (emphasis added).

152. *Draft Convention on the Treatment of Foreigners*, League of Nations Doc. C.36.M.21.II, *passim* (1929).

For example, Article 9 provided that "[n]ationals of each of the High Contracting Parties shall enjoy in the territory of the other High Contracting Parties the same treatment as nationals in respect of the *legal and judicial protection of their persons, property, rights and interests.*"¹⁵³ This article went on to list specific legal protections to be accorded, including the right to file lawsuits and to have the law applied without discrimination.¹⁵⁴

Similarly, Article 12 provided that covered nationals shall enjoy, with regard to fiscal charges, "the same treatment and the same *protection* by the fiscal authorities and tribunals as nationals of the country."¹⁵⁵ Once again, the term *protection* is used in tandem with *treatment* and connotes shelter from *nonphysical* threats.

Around the same time, researchers from Harvard Law School prepared their own draft codification of states' obligations toward foreigners. Completed in 1929 and entitled *Draft Convention on Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners*, this instrument, too, set forth a number of principles associated with the customary norm of *protection and security*.¹⁵⁶ For example, Article 5 provided that "[a] state has a duty to afford to an alien means of redress for injuries which are not less adequate than the means of redress afforded to its nationals."¹⁵⁷ In addition, Article 9 dealt with "denials of justice," providing that states are responsible for injury resulting from "denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guaranties which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment."¹⁵⁸ These provisions call to mind assertions by such authorities as Wolff, Vattel, and Kent that the customary duty of *protection and security* requires remedial mechanisms for injuries incurred by a foreigner. They also evoke the guarantees of due process in legal proceedings set forth in the *protection and security* provisions of U.S. FCN treaties concluded during the nineteenth and early twentieth centuries.

Article 10 of this *Draft Convention* provided further that "[a] state is responsible if an injury to an alien results from its failure to exercise due diligence to prevent the injury, if local remedies have

153. *Id.* art. 9 (emphasis added).

154. *Id.*

155. *Id.* art. 12 (emphasis added).

156. Edwin M. Borchard, *Part II: Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners*, 23 AM. J. INT'L L. 133, 133 (Spec. Supp. 1929).

157. *Id.*

158. *Id.* art. 9, at 134.

been exhausted without adequate redress for such failure.”¹⁵⁹ This captures yet another aspect of the customary norm of protection and security, as expressed in cases like *Sambiaggio*: the duty to use due diligence to prevent injuries to aliens.

Both of these attempts at codification ultimately foundered as a result of disagreements within the increasingly diverse international community regarding the nature of the duties owed to foreigners.¹⁶⁰ Nevertheless, both give insight into how their drafters understood international law at the time.

D. *The Early Decades of the Cold War*

World War II and its aftermath only increased ideological divisions within the international community. The spread of communism resulted in a new wave of expropriations, and hostility toward foreign investments in developing countries became increasingly common.¹⁶¹

Faced with these developments, the U.S. government and business interests in capital-exporting countries came to view investor protections at the international level as more important than ever. Accordingly, the United States strengthened its FCN treaty program and participated in a series of talks aimed at concluding a multilateral convention on investment, while business interests worked independently to promote a similar accord. The resulting treaties and draft instruments all contained protection and security clauses and were the immediate precursors to those in modern treaties. As will be seen, their language, drafting history, and associated commentary all signal that the protection and security standard as used therein contemplated a legal system featuring particular substantive and procedural protections, and that the standard was seen as expressing customary international law.

159. *Id.* art. 10, at 134.

160. See NEWCOMBE & PARADELL, *supra* note 5, at 15–17; see also Manley O. Hudson, *The First Conference for the Codification of International Law*, 24 AM. J. INT'L L. 447, 459 (1930) (noting that there was extensive jurisprudence and scholarship on the subject of state responsibility, but that it was “not understood in the same way in all countries,” and its authority was “not universally acknowledged in the same degree”).

161. VANDEVELDE, *supra* note 5, at 41–43; see also Louis Henkin, *International Law: Politics, Values and Functions*, in 216 RECUEIL DES COURS 9, 195–96 (1989).

1. The Havana Charter and the International Chamber of Commerce Code of Fair Treatment

On March 24, 1948, in Havana, Cuba, fifty-three countries finalized and executed a document that came to be known as the Havana Charter.¹⁶² This instrument called for the formation of an International Trade Organization (ITO) to help negotiate and implement international agreements on trade and investment, and contained notable references to the need for the "equitable treatment" and "security" of investments.¹⁶³

In particular, Article 11(2) called for the ITO to make recommendations for international agreements designed "to assure *just and equitable treatment* for the enterprise, skills, capital, arts and technology brought from one Member country to another."¹⁶⁴ Article 12 added that member states were to "provide reasonable opportunities for investments acceptable to them and adequate *security* for existing and future investments."¹⁶⁵

The drafting history of the Havana Charter gives some insight into how its drafters understood the term *security* as used in Article 12. Notably, in one session, the delegate from Czechoslovakia (which had recently experienced a Communist revolution) proposed inserting the word "legal" before "security."¹⁶⁶ He asserted that this edit would be appropriate because, without it, an investor might argue that the term "security" contemplated *political* security, and specifically security against a revolution.¹⁶⁷ The U.S. delegate responded that he had "no strong objection" to this proposal, but that it was unnecessary because "no Member would be so unreasonable as to demand security whilst a country was in a state of revolution."¹⁶⁸ The UK delegate, in turn, commented that he opposed the proposal because "[i]t suggests a very narrowly legalistic interpretation of security and I am sure the intention was that it should be *wider*."¹⁶⁹ These comments reveal that the delegates had no objection to requiring legal security, and, to the

162. United Nations Conference on Trade and Employment, Havana, Cuba, Nov. 21, 1947–Mar. 24, 1948, *Havana Charter for an International Trade Organization, Final Act and Related Documents*, U.N. Doc. E/CONF.2/78 (Mar. 24, 1948) [hereinafter *Havana Charter*].

163. Hugh M. Hollman & William E. Kovacic, *The International Competition Network: Its Past, Current and Future Role*, 20 MINN. J. INT'L L. 274, 316–17 (2011); accord VANDEVELDE, *supra* note 5, at 41.

164. *Havana Charter*, *supra* note 162, art. 11(2) (emphasis added).

165. *Id.* art. 12(2)(a)(i) (emphasis added).

166. See U.N. ESCOR, 2d Sess., 39th mtg. at 21, U.N. Doc. E/PC/T/A/PV/39 (Aug. 14, 1947) (comments of Mr. Augenthaler).

167. *Id.* (emphasis added).

168. *Id.* at 24.

169. *Id.* (emphasis added).

contrary, believed that the existing reference to security already covered legal security. The only question was whether the language should be qualified to make clear that it did not cover political in addition to legal and physical security.

In any event, the Havana Charter never entered into force, in part because business interests in capital-exporting states felt that the language concerning investment had been watered down excessively at the insistence of developing countries.¹⁷⁰ Accordingly, in 1949, the International Chamber of Commerce promulgated a draft that employed the same basic notions of treatment and security, but articulated them more robustly. Although it was never adopted, this instrument—formally entitled the International Code of Fair Treatment for Foreign Investments (the ICC Code)¹⁷¹—bears striking similarities to modern investment treaties.

Notably, Article 2 set forth a commitment by the parties “to apply *fair treatment* . . . to investments of any kind made in their territories by the nationals of the other High Contracting Parties.”¹⁷² This is quite similar to the modern fair and equitable treatment clause.

Article 5 of the ICC Code was a form of protection and security clause, providing that:

[T]he treatment extended to the nationals of the other High Contracting Parties shall be not less favourable than that applied to their own nationals, in respect of the *legal and judicial protection of their person, property, rights and interests*, and in respect of the acquisition, purchase, sale and assignment of moveable and immoveable property of any kind.¹⁷³

Once again, the term *protection* was being used here to signify more than police protection.

2. The Post-World War II U.S. Friendship, Commerce, and Navigation Treaty Program

While these efforts to achieve a multilateral investment accord were playing out, the United States was busy concluding bilateral FCN treaties.¹⁷⁴ These consistently included protection and security

170. See VANDEVELDE, *supra* note 5, at 41; Gudrun Monika Zagel, *Protection of Foreign Investment Under International Law*, in INTERNATIONAL PROTECTION OF FOREIGN INVESTMENT 6 (Dennis Campbell ed., 2d ed. 2010).

171. Int'l Chamber of Commerce [ICC], *International Code of Fair Treatment for Foreign Investments*, Brochure 129 (June 1949) [hereinafter *ICC Code*].

172. *Id.* art. 2 (emphasis added).

173. *Id.* art. 5 (emphasis added).

174. See VANDEVELDE, *supra* note 5, at 56 (noting that the United States concluded twenty-one FCN treaties between 1946 and 1966).

provisions, and their language—as well as contemporaneous commentary by State Department officials—make it clear that they, too, contemplated a legal system offering certain substantive and procedural protections for covered foreigners.

Perhaps the most compelling piece of evidence in this regard is an official State Department publication from the late 1950s describing the FCN treaty program.¹⁷⁵ Among the observations in that document were the following:

- U.S. FCN treaties include “assurances of *protection and security* for the individual in his capacity as property holder. These include freedom from unlawful visit and search of his home or place of business, *the right to just compensation if his property is taken by the state, and certain rights in connection with acquiring, holding, and disposing of both real and personal property.*”¹⁷⁶
- “Guaranties of *security of rights in property*, of course, are of special importance to the American who goes abroad as a businessman. Without such guaranties the economic privileges given to him by a treaty would lose much of their meaning.”¹⁷⁷
- “Special attention has been given to affording American investors a proper measure of *security* against undue risks likely to plague their foreign operations. It has not been intended to shield the investor against the economic risks to which venture capital is subject but to reduce the special hazards to which overseas investment may be exposed by reason of *unfavorable laws or juridical conditions.*”¹⁷⁸

These comments provide strong evidence that the obligation of protection and security as used in U.S. FCN treaties of this era was designed to shield investors not only from physical threats but also from unreasonable searches, uncompensated expropriations, and adverse juridical conditions. They stand in sharp contrast to the language in recent U.S. investment treaties asserting that the duty of protection and security is limited to police protection.

That the protection and security provisions of the early Cold War era contemplated more than police protection can also be seen from contemporaneous commentary by the scholar Michael Brandon. He asserted that protection and security provisions were designed to ensure that “individual and corporate aliens are entitled to *the same*

175. See U.S. DEPT OF STATE, PUB. NO. 6565, COMMERCIAL TREATY PROGRAM OF THE UNITED STATES (1958).

176. *Id.* at 1 (emphasis added).

177. *Id.* (emphasis added).

178. *Id.* at 4 (emphasis added).

protection before the law as is enjoyed by nationals, assuming this meets the minimum international standard."¹⁷⁹

This conclusion is supported by the wording of protection and security provisions from the period, and from their context within the relevant treaties. Although these provisions were more elaborate in some respects than their predecessors (in that they included, for example, a specific formula for calculating the compensation due upon expropriation), their wording makes clear that these new details were mere *elements* of the overarching concept of protection and security.

This point is illustrated by the U.S. FCN treaties concluded with China in 1946¹⁸⁰ (shortly before the Communist takeover of that country) and Italy in 1948.¹⁸¹ The protection and security provisions of those treaties began with a broad requirement that each party provide nationals of the other with "the full protection and security required by international law."¹⁸² They then specified (in the rest of the first two paragraphs) various guarantees and benefits to be accorded to covered nationals in that regard, including certain elements of due process and compensation for expropriation.¹⁸³ The third paragraph continued:

The nationals, corporations and associations of either High Contracting Party shall throughout the territories of the other High Contracting Party receive protection and security with respect to the matters enumerated in paragraphs 1 and 2 of this Article, upon compliance with the laws and regulations, if any, which are or may hereafter be enforced by the duly constituted authorities¹⁸⁴

In other words, covered nationals and companies were to enjoy protection and security *with respect to* due process in legal proceedings and compensation for expropriation. This makes sense only if protection and security extended beyond physical protection, because the mentioned elements are *legal* protections, not physical.

Another notable U.S. FCN treaty is the one concluded with Belgium in 1961.¹⁸⁵ Article 1 of that treaty provided: "Each

179. Michael Brandon, *Legal Aspects of Private Foreign Investments*, 18 FED. B.J. 298, 323 (1958) (emphasis added).

180. See Treaty of Friendship, Commerce, and Navigation, U.S.-China, Nov. 11, 1946, 6 Bevans 761 [hereinafter U.S.-China FCN Treaty].

181. See Treaty of Friendship, Commerce, and Navigation, U.S.-It., Feb. 2, 1948, 12 U.S.T. 131 [hereinafter U.S.-Italy FCN Treaty].

182. U.S.-China FCN Treaty, *supra* note 180, art. VI; U.S.-Italy FCN Treaty, *supra* note 181, art. V.

183. U.S.-China FCN Treaty, *supra* note 180, art. VI; U.S.-Italy FCN Treaty, *supra* note 181, art. V.

184. U.S.-China FCN Treaty, *supra* note 180, art. VI (emphasis added); *accord* U.S.-Italy FCN Treaty, *supra* note 181, art. V.

185. Treaty of Friendship, Establishment, and Navigation, U.S.-Belg., Feb. 21, 1961, 14.2 U.S.T. 1284 [hereinafter U.S.-Belgium FCN Treaty] (emphasis added).

Contracting Party shall at all times accord equitable treatment and effective *protection* to the persons, property, enterprises, *rights and interests* of nationals and companies of the other Party."¹⁸⁶ Article 3.1 added: "Nationals of either Contracting Party within the territories of the other Party shall be accorded *full legal and judicial protection for their persons, rights and interests*. Such nationals shall be free from molestation and shall receive constant protection in no case less than that required by international law."¹⁸⁷ Finally, Article 4.1 added: "Property that nationals and companies of either Contracting Party own within the territories of the other Party shall enjoy *constant security therein through full legal and judicial protection*."¹⁸⁸ This represents the most extreme recognition within the corpus of U.S. FCN treaties that the duty of protection and security contemplated more than police protection.

It might be possible to dismiss this treaty as one whose conception of protection and security was materially different from the norm, except that when it was presented for Senate approval, the State Department offered its assurances that the treaty did not materially differ from other U.S. FCN treaties. Specifically, a State Department official testified that although "[c]onsiderable recasting of the normal wording used in U.S. treaties was found necessary" to overcome concerns raised by negotiating counterparties, these modifications were "of relatively minor significance."¹⁸⁹ Far from being anomalous, in fact, this treaty tracked closely the wording of earlier draft multilateral instruments, including the 1929 Draft Convention on the Treatment of Foreigners and the 1949 ICC Code (discussed in Parts III.C.3 and III.D.1, above, respectively). All of this suggests that the insertion of the words *legal and judicial* before *protection and security* simply made explicit a detail that otherwise would have been implicit.

The FCN treaties concluded by the United States during this period also witnessed the arrival of certain provisions that would later be fixtures of modern U.S. investment treaties, albeit in modified form. These included, *inter alia*, clauses prohibiting unreasonable and discriminatory impairment of acquired rights¹⁹⁰ and clauses requiring fair and equitable treatment.¹⁹¹ Contemporaneous commentary on these provisions indicates that

186. *Id.* art. 1 (emphasis added).

187. *Id.* art. 3.1 (emphasis added).

188. *Id.* art. 4.1 (emphasis added).

189. S. EXEC. DOC. NO. 87-89 (1961) (statement of Peyton Kerr, Deputy Assistant Secretary of State for Economic Affairs, Dep't of State).

190. *See, e.g.*, Treaty of Friendship, Commerce and Navigation, U.S.-Greece, art. VIII, Aug. 3, 1951, 5.2 U.S.T. 1829.

191. *See, e.g., id.* art. XIV(4).

both were viewed as related to protection and security, and as expressing aspects of customary international law.¹⁹²

As for the new “unreasonable and discriminatory impairment” provisions, Herman Walker Jr., a U.S. State Department treaty negotiator,¹⁹³ explained that they were designed to “reaffirm[] and reinforce[] traditional international law regarding the *protection* which a government owes to the property of the alien,” and to target in particular improper governmental conduct falling short of outright expropriation.¹⁹⁴ In other words, these new provisions were merely articulating a facet of the preexisting customary duty of protection. Walker added that U.S. negotiators decided it was prudent to begin spelling out this (and other) aspects of the customary duty of protection, in light of the unsettled state of international law and the increasing frequency with which governments were interfering with private property in ways short of expropriation.¹⁹⁵

With regard to the new fair and equitable treatment clauses, these bear obvious similarity to the references to “just and equitable treatment” in the Havana Charter (adopted in 1948) and “fair treatment” in the ICC Code (promulgated in 1949).¹⁹⁶ Moreover, as already seen, those two instruments were themselves inspired by earlier references to equitable treatment in the League of Nations Covenant of 1923 and the Draft Convention on the Treatment of Foreigners of 1929, and those draft instruments sought to express customary international law.

Under the circumstances, it is not surprising that when fair and equitable treatment clauses began appearing in U.S. FCN treaties, several scholars noted that the standard was derived from customary international law. Brandon, for one, asserted that these clauses were intended to express an obligation of “good faith” under customary

192. See, e.g., Herman Walker, Jr., *The Post-War Commercial Treaty Program of the United States*, 73 POL. SCI. Q. 57, 69 (1958).

193. See *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 182 n.6 (1982) (explaining that Walker “served as Adviser on Commercial Treaties at the State Department” during the 1950s, and “was responsible for formulation of the postwar form of the Friendship, Commerce and Navigation Treaty and negotiated several of the treaties for the United States”).

194. Walker, *supra* note 192, at 69 (emphasis added).

195. Herman Walker, Jr., *Treaties for the Encouragement and Protection of Foreign Investment: United States Practice*, 5 AM. J. COMP. L. 229, 235–36 (1956); see also Walker, *supra* note 192 (discussing how the treaties provide for property protection).

196. See VANDEVELDE, *supra* note 5, at 195–97 (asserting that the fair and equitable treatment provisions that first appeared in U.S. FCN treaties were inspired by the Havana Charter and a draft agreement negotiated by the Organization of American States the same year, which contained a similar reference to “just and equitable treatment”).

international law.¹⁹⁷ Similarly, Georg Schwarzenberger wrote that the standard obliges host states to treat foreigners "in accordance with the requirements of *jus aequum*,"¹⁹⁸ which he defined as a "legal system in which rights are relative and must be exercised reasonably and in good faith."¹⁹⁹ F.A. Mann expressed a similar understanding in his treatise on *The Legal Aspect of Money*, asserting that customary international law prohibits "unjustifiable discrimination, deliberate injury, arbitrariness, [and] denial of justice *lato sensu* or abuse of rights" under the notion of "fair and equitable treatment or, as it is sometimes put, good faith that every State is internationally required to display in its conduct towards aliens."²⁰⁰ Comments such as these by Brandon, Schwarzenberger, and Mann call to mind earlier descriptions of an aspect of the customary norm of protection—namely, the obligation to refrain from unjust or arbitrary applications of the law.²⁰¹

This overlap between protection and security and fair and equitable treatment can be explained by their common derivation from the same customary norm. It would appear, however, that the two standards were employed in distinct ways in post-World War II U.S. FCN treaties. Based on the foregoing evidence, protection and security seems to have required the host state to act with due diligence, as reasonably necessary to protect foreigners' persons and property, as well as to possess and make available an adequate *legal system*, featuring such protections as appropriate remedial mechanisms, due process, and a right to compensation for expropriation. By contrast, fair and equitable treatment seems to have concerned the manner in which states were to treat covered nationals when interacting with them, obliging them to behave reasonably and in good faith.

197. Brandon, *supra* note 179, at 336.

198. GEORG SCHWARZENBERGER, *FOREIGN INVESTMENTS AND INTERNATIONAL LAW* 114 (George W. Keeton & Georg Schwarzenberger eds., 1969).

199. GEORG SCHWARZENBERGER, *THE DYNAMICS OF INTERNATIONAL LAW* 3 (1976). See also Schwarzenberger's detailed discussion of the customary norm of "equity"—of which, he argued, "good faith" was the central component. *Id.* at 56–76.

200. F.A. MANN, *THE LEGAL ASPECT OF MONEY* 472 (5th ed. 1992). These comments by Mann about fair and equitable treatment may seem surprising given that he also argued in a separate article in 1983 that a fair and equitable treatment clause in a particular UK BIT should be seen as expressing an autonomous standard, rather than a principle of customary international law. See F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, 1981 *BRIT. Y.B. INT'L L.* 241, reprinted in F.A. MANN, *FURTHER STUDIES IN INTERNATIONAL LAW* 234, 237–38 (1990). For a discussion of the tension between Mann's various comments on the standard, see J.C. Thomas, *Reflections on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators*, 17 *ICSID REV.—FOR. INVEST. L.J.* 21, 51–58 (2002).

201. See, e.g., Wilson, *supra* note 124, at 97 (quoting an 1866 U.S. diplomatic instruction); Solicitor Memorandum, *supra* note 135.

3. The Abs-Shawcross and Organisation for Economic Co-operation and Development Draft Conventions

Further attempts to achieve a multilateral investment accord occurred near the end of the FCN treaty era, and the draft instruments in which they resulted reflect the same basic understanding of the notions of protection and security and fair and equitable treatment.

One such effort was initiated by Hermann J. Abs, a prominent German banker, and Lord Hartley Shawcross, a British lawyer and politician, who in 1959 published a Draft Convention on Investments Abroad (the Abs-Shawcross Draft Convention).²⁰² Article I of their draft provided:

Each Party shall at all times ensure *fair and equitable treatment* to the property of the nationals of the other Parties. Such property shall be accorded *the most constant protection and security* within the territories of the other Parties and the management, use, and enjoyment thereof shall not in any way be impaired by unreasonable or discriminatory measures.²⁰³

The authors' commentary gives some insight into how they understood this provision. It explains that the Draft Convention was intended to express "*fundamental principles of international law* regarding the treatment of the property, rights, and interests of aliens," which had "a broad basis in the practice of civilized states and the findings of international tribunals," even if "during the last few decades in some countries there has been a tendency to disregard them."²⁰⁴ The authors added that the instrument was intended to assure investors a "measure of *security and protection of their property, rights, and interests.*"²⁰⁵ This seems to indicate that the protection and security standard in Article I extended beyond physical security, because rights and interests are intangible and therefore, any protection accorded to them is necessarily nonphysical in nature. In addition, the authors acknowledged that Article I was based on similar language in U.S. FCN treaties.²⁰⁶

The international community never adopted the Abs-Shawcross Draft Convention, but it inspired yet another attempt to achieve a multilateral accord. Specifically, from 1962 to 1967, the Organisation

202. See VANDELDE, *supra* note 5, at 54.

203. The text of the Abs-Shawcross Draft Convention, together with an introduction by the authors and their formal commentary on the draft, were published in a special issue of the *Journal of Public Law* in 1960. See Ignaz Seidl-Hohenveldern, *The Proposed Convention to Protect Private Foreign Investment: A Round Table*, 9 J. PUB. L. 115, 116 (1960) (emphasis added).

204. *Id.* at 119 (emphasis added).

205. *Id.* (emphasis added).

206. *Id.*

for Economic Co-operation and Development (OECD) (and its European predecessor) prepared drafts of a Convention on the Protection of Foreign Property (the OECD Draft Convention), based on the Abs-Shawcross Draft.²⁰⁷

Article 1(a) of the OECD Draft Convention was taken almost verbatim from Article I of the Abs-Shawcross Draft.²⁰⁸ Comment 1 to the OECD Draft explained that each of the three standards mentioned in Article 1(a) (i.e., fair and equitable treatment, protection and security, and the prohibition on unreasonable or discriminatory impairment) collectively expressed a "well-established general principle of international law that a State is bound to *respect and protect* the property of nationals of other States."²⁰⁹ In other words, the drafters viewed these notions as expressing a customary duty to "protect" property, also known as the international minimum standard.²¹⁰

Comment 4 elaborated upon this point as follows:

The phrase "fair and equitable treatment", customary in relevant bilateral agreements, indicates the standard set by international law for the treatment due by each State with regard to the property of foreign nationals. The standard requires that . . . *protection* afforded under the Convention shall be that generally accorded by the Party concerned to its own nationals, but, being set by international law, the standard may be more exacting where rules of national law or national administrative practices fall short of the requirements of international law. *The standard required conforms in effect to the "minimum standard" which forms part of customary international law.*²¹¹

Comment 5 added that the phrase "[m]ost constant protection and security" in Article 1(a) was "[c]ouched in language traditionally used in the United States Bilateral Treaties," and "indicates the obligation of each Party to *exercise due diligence as regards actions by public authorities as well as others* in relation to such property."²¹²

Comments 4 and 5 are revealing in several respects. Not only does Comment 4 reiterate the connection between fair and equitable treatment and the international minimum standard, but it also

207. OECD Draft Convention on the Protection of Foreign Property, 7 I.L.M. 117 (1968) [hereinafter OECD Draft Convention]; see also Thomas, *supra* note 200, at 46 (discussing how the Abs-Shawcross Draft was considered by the OECD during drafting). See generally Council of the Org. for Econ. Co-operation and Dev., *Draft Convention on the Protection of Foreign Property*, 7 I.L.M. 117 (1968) [hereinafter OECD Draft Convention].

208. Compare OECD Draft Convention, *supra* note 207, art. 1(a), with Seidl-Hohenveldern, *supra* note 203, at 116.

209. OECD Draft Convention, *supra* note 207, cmt. 1 (emphasis added).

210. See VANDEVELDE, *supra* note 5, at 199 (equating the obligation to which Comment 1 was referring with the international minimum standard).

211. OECD Draft Convention, *supra* note 207, cmt. 4(a) (emphasis added).

212. *Id.* cmt. 5 (emphasis added).

suggests an overlap with protection and security in asserting that fair and equitable treatment requires that the host state meet international standards with regard to the protection accorded to foreigners. In addition, Comment 5's contention that "protection and security" refers to an obligation "to exercise due diligence as regards actions by public authorities as well as others in relation to such property" calls to mind references to a due diligence standard in cases such as *Sambiaggio*.²¹³ Yet it is notable that this aspect of the Commentary is worded broadly, describing an obligation to exercise due diligence vis-à-vis foreign property *generally*, not merely in relation to physical threats.

Similarly broad conceptions of a due diligence obligation can be found in other sources from the post-World War II era. For example, Andreas Roth asserted that a host state has an obligation under customary international law to use due diligence *in applying its laws* to foreigners:

The alien has no protest to make if [the host state's] laws are applied bona fide *and with due diligence*. But, since no governmental organization of any sort is perfect, there is a great possibility that he may be violated in his rights by officials in the exercise of their duties.²¹⁴

Roth added that this obligation would be fulfilled if the state's action vis-à-vis the foreigner "was taken in conformity with the due course of law as ordinarily administered in the *legal system* under which it was instituted."²¹⁵ This reinforces the conclusion that the obligation of due diligence, as conceived by Roth, required a degree of legal protection, rather than only physical. Indeed, Roth explicitly asserted that if states allow foreigners to acquire property in their territory, they "fall into an international obligation to provide the same or as effective *legal protection* for it as is required for those rights which are guaranteed by the law of nations."²¹⁶ The OECD Draft Convention and its Commentary seem to have employed the notions of protection and security and due diligence in a manner similar to Roth.

In any event, the OECD members ultimately failed to adopt this draft instrument, as with those that came before it. Once again it proved too difficult to achieve consensus in a multilateral context

213. *Id.*; see, e.g., *Sambiaggio*, *supra* note 127, at 524.

214. ROTH, *supra* note 122, at 139 (emphasis added).

215. *Id.* at 141-42 (emphasis added).

216. *Id.* at 165-66 (emphasis added).

regarding the treatment and protection to be promised to foreign investors.²¹⁷

E. Protection and Security in Modern U.S. Investment Treaties

The United States signed its last FCN treaties in 1966, with Thailand and Togo.²¹⁸ After that, the U.S. commercial treaty program went dormant for several years until it was finally revived in 1977, when the Carter Administration decided to pursue a different type of treaty: the BIT.²¹⁹

BITs are distinct from their FCN predecessors in several respects. First, whereas FCN treaties typically concern a range of issues—including trade and navigation, as well as investment—BITs address only investment.²²⁰ Second, to the extent FCN treaties address investment, they are concerned with the protection of the persons, rights, and interests of the covered nationals and companies engaged in investment. By contrast, BITs protect investments *per se*,²²¹ as well as the nationals and companies making those investments.²²² Third, BITs usually establish a mechanism pursuant to which covered investors may bring arbitration claims directly against host states for breaches of the treaties' substantive provisions—an opportunity not provided by FCN treaties.²²³ Despite these differences, however, many of the substantive provisions of

217. The OECD Draft ultimately failed to gain the support of member states such as Greece, Portugal and Turkey, because certain provisions . . . were perceived unduly to favour capital-exporting states. Not for the last time, the US government withheld its whole-hearted support, doubting that the Draft would be accepted by many developing states, and apparently preferring to conduct its own bilateral treaty negotiations.

Anthony C. Sinclair, *The Origins of the Umbrella Clause in the International Law of Investment Protection*, 20 *ARB. INT'L* 411, 432 (2004)

218. VANDELDE, *supra* note 5, at 56.

219. *Id.* at 57.

220. *Id.*

221. Pamela B. Gann, *The U.S. Bilateral Investment Treaty Program*, 21 *STAN. J. INT'L L.* 373, 373–74 (1985).

222. At a minimum, most investment treaties give covered investors the *procedural* protection of access to arbitration to enforce the substantive protections accorded to their investments under the treaty. VANDELDE, *supra* note 5, at 58. Yet some treaties also confer certain *substantive* protections on investors. *See, e.g.*, North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, art. 1102(1), 32 *I.L.M.* 605, 639 (1993) [hereinafter NAFTA] ("Each Party shall accord to *investors* of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments." (emphasis added)).

223. VANDELDE, *supra* note 5, at 58.

BITs are derived from U.S. FCN treaties—including protection and security clauses.²²⁴

In making the shift to BITs, the United States was following in the footsteps of several European countries, some of which had been negotiating BITs with developing countries for some time.²²⁵ It took several years for the new BIT program to bear fruit, but by the mid-1980s the United States had succeeded in negotiating BITs with a number of developing countries.²²⁶

A variety of U.S. sources provide insight into the meaning of the protection and security clauses in those treaties. While the United States is, of course, only one of the two parties to any given BIT, the U.S. perspective is of key importance in light of how these treaties are negotiated. In particular, most BITs are concluded with a developing country and the U.S. negotiating model is presented as a completed whole, with little or no bargaining taking place. As former BIT negotiator José Alvarez has explained,

The U.S. “cookie-cutter” approach to BIT negotiation results in a one-way conversation of imposed terms. A BIT negotiation is not a discussion between sovereign equals. It is more like an intensive training seminar conducted by the United States, on U.S. terms, on what it would take to comply with the U.S. draft.²²⁷

Accordingly, if one seeks to understand the relevant provisions from the perspective of their drafters, that inquiry must focus on U.S. sources. The subparts that follow collect evidence of that nature.

1. The Scope of the Standard

On the question of whether the notion of protection and security extends beyond police protection, one piece of evidence is an article written by Pamela Gann in 1985, shortly after she completed work in the U.S. BIT program at the Investment Division of the Office of the U.S. Trade Representative.²²⁸ Gann explained in that article that the protection and security standard “commits the host party to provide [covered] investments the full protection and security of its legal, judicial, and protective agencies,” which must be “not be less than that required by international law.”²²⁹ By referring to “legal and judicial agencies,” Gann was acknowledging that the duty goes beyond police protection, just as the notion had been understood in

224. *Id.*

225. *See id.* at 55.

226. *See* KENNETH J. VANDEVELDE, U.S. INTERNATIONAL INVESTMENT AGREEMENTS 91–94 (2009).

227. José E. Alvarez, *Remarks*, 86 AM. SOC'Y INT'L L. PROC. 532, 553 (1992).

228. Gann, *supra* note 221, at 390.

229. *Id.* (emphasis added).

the FCN treaty era. She was acknowledging, in particular, that the standard requires that each party have a *legal system* in place (consisting of its legislative, judicial, and executive organs) that is capable of protecting and securing covered investments.

Moreover, the United States itself explicitly acknowledged, shortly after Gann wrote this article, that the protection and security standard contemplates a degree of legal security. This can be seen in the International Court of Justice (ICJ) *ELSI* case, which the United States filed in 1987 on behalf of a U.S. company, Raytheon.²³⁰ Raytheon's Italian subsidiary, ELSI, had ceased operations after a group of workers occupied its factory in response to a round of layoffs, and the local mayor issued a "requisition order" that placed the company into involuntary bankruptcy.²³¹ The United States contended that Italian authorities breached the protection and security clause of the U.S.–Italy FCN Treaty²³² in two respects. First, they allegedly failed to prevent or remedy the occupation of ELSI's plant by the workers.²³³ Second, a local administrative official allegedly took too long (sixteen months) in ruling on ELSI's appeal against the requisition order.²³⁴ Although the first contention was based on an alleged lack of *physical* security, the second was predicated on an alleged absence of *legal* security, i.e., a failure to decide a legal petition with sufficient dispatch. Indeed, counsel for the United States characterized Italy's alleged failure in this regard as a denial of "procedural justice,"²³⁵ resulting from the lack of an *adequate remedial mechanism*.²³⁶

The ICJ ultimately ruled in favor of Italy in this case. With regard to the United States' first contention, the ICJ concluded that the Italian authorities had provided an adequate degree of protection under the circumstances.²³⁷ With regard to the second, the court concluded that the United States had not established that, but for the delay in the ruling on the appeal, ELSI would not have gone

230. See *Elettronica Sicula S.P.A. (ELSI) (U.S. v. It.)*, ¶ 1, 1989 I.C.J. 15, (July 20) (describing the nature of the protection and security standard).

231. *Id.* ¶¶ 1, 16.

232. U.S.–Italy FCN Treaty, *supra* note 181, art. V, ¶ 1 ("The nationals of each High Contracting Party shall receive, within the territories of the other High Contracting Party, the most constant protection and security for their persons and property, and shall enjoy in this respect the full protection and security required by international law.")

233. See *Elettronica Sicula S.P.A.*, *supra* note 230, ¶ 105 (noting the assertion that Italian authorities breached the protection and security clause of the U.S.–Italy FCN Treaty by allowing ELSI workers to occupy the plant).

234. *Id.* ¶ 109.

235. *Id.* ¶ 110.

236. *Id.*

237. *Id.* ¶ 108.

bankrupt.²³⁸ The ICJ added that a delay of sixteen months was not, in any event, so extraordinary as to be contrary to the international minimum standard of treatment.²³⁹ This provides yet another example of the treaty standard of protection and security being equated with the international minimum standard. Furthermore, the ICJ did not question the premise behind the United States' second contention that the protection and security clause would have been violated *if Italy's legal system was sufficiently defective* in its handling of a foreigner's claim. Indeed, some have argued that the ICJ implicitly accepted this premise.²⁴⁰ At a minimum, though, this case demonstrates that *the United States* was of the view at the time—well into the BIT era—that the treaty standard of protection and security contemplates a form of legal security.

It was not until 2004 that the United States suddenly reversed course by amending its model BIT to define the standard as limited to a duty of police protection.²⁴¹ While this reversal may seem curious, it is readily explainable as a reaction to certain arbitral decisions rendered in the early 2000s, in which tribunals interpreted protection and security (and fair and equitable treatment) as contemplating a very broad form of legal security. As discussed in greater detail in Part IV.A below, certain tribunals read these standards as requiring that host states refrain from passing new laws, or modifying their interpretations of existing laws, in a way adverse to covered foreign investments. U.S. treaty negotiators searched for a way to foreclose such broad interpretations going forward, and the solution they came up with was to limit the standard to police protection.²⁴²

Whether or not this new approach to drafting is appropriate is discussed below in Part IV.B. In any event, however, this approach has no impact on the protection and security provisions in the multitude of U.S. investment treaties concluded before it was adopted. Such treaties should therefore still be seen as contemplating a degree of legal security—even if not the extreme version of legal security suggested by the above-referenced tribunals.

238. *Id.* ¶ 110.

239. *Id.* ¶¶ 111–12.

240. *See, e.g.*, NEWCOMBE & PARADELL, *supra* note 5, at 311–12.

241. Treaty Concerning the Encouragement and Reciprocal Protection of Investment, art. 5, ¶ 2, 2004 [hereinafter 2004 U.S. Model BIT], available at <http://www.state.gov/documents/organization/117601.pdf>.

242. *See* Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHI. J. INT'L L. 471, 495 (2009) (describing the amended definitions in the 2004 U.S. Model BIT as a reaction to decisions concerning the relevant standards); *see also* Trevor Zeyl, *Charting the Wrong Course: The Doctrine of Legitimate Expectations in Investment Treaty Law*, 49 ALTA. L. REV. 203, 229 (2011) (arguing that these definitions were added “in an effort to reign [sic] in some of the more expansive interpretations tribunals have come up with”).

2. Relationship to Other Standards

Apart from contemplating a degree of legal security, another notable feature of the protection and security clauses in U.S. BITs concluded prior to 2004 is that they are always preceded by a fair and equitable treatment clause and followed by an admonition that the treatment and protection to be accorded must be no less than that required by international law.²⁴³

A debate has arisen over whether these notions of fair and equitable treatment and protection and security are intended to express principles of customary international law, or are intended as autonomous standards that go above and beyond international law.²⁴⁴ One can refer to the former view as the "equating" approach, because it equates fair and equitable treatment and protection and security with the international minimum standard, and to the latter as the "additive" approach, because it sees the treaty standards as additive to customary international law.

The equating approach has in its favor the fact that the U.S. drafters of these provisions clearly viewed the standards as expressing the international minimum standard. For example, in her 1985 article, former BIT negotiator Gann asserted that the fair and equitable treatment standard "provides, in effect, a 'minimum standard' which forms part of customary international law."²⁴⁵ Similarly, former BIT negotiator Kenneth Vandeveldel has described the full protection and security standard as "an established standard of customary international law," and has asserted that when BITs incorporate this standard, they "make explicit that the standard

243. For example, the U.S.–Bangladesh BIT states:

Investment of nationals and companies of either Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Party. The treatment, protection and security of investment shall be in accordance with applicable national laws, and shall in no case be less than that required by international law.

Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.–Bangl., art. II, ¶ 3, Mar. 12, 1986, S. TREATY DOC. NO. 99-23 (1986).

244. Authorities interpreting fair and equitable treatment, protection and security, or both as principles of customary international law include, for example, *Genin v. Republic of Est.*, ICSID Case No. ARB/99/2, Award, ¶ 367 (June 25, 2001) 17 ICSID REV.—FOR. INVEST. L.J. 395 (2002); Thomas, *supra* note 200, at 51–100. *See also* GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 87 (2007) (describing the standards as expressions of the minimum standard of treatment). Authorities treating fair and equitable treatment, protection and security, or both as autonomous standards include, for example, *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Annulment Proceeding, ¶ 361 (July 14, 2006); *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, ¶¶ 244–54, 284 (Jan. 14, 2010); Schreuer, *supra* note 78, at 364.

245. Gann, *supra* note 221, at 389.

applies to covered investment, although it would apply through customary law even if it were not included in the treaty.”²⁴⁶ In addition, the letters of submittal associated with pre-2004 U.S. BITs consistently describe both fair and equitable treatment and protection and security as expressing principles of customary international law, and the international minimum standard in particular.²⁴⁷

It is also notable that the investment chapter of the North American Free Trade Agreement (NAFTA)²⁴⁸ explicitly ties both standards to international law. Article 1105 of NAFTA is entitled “Minimum Standard of Treatment” and provides: “Each Party shall accord to investments of investors of another Party treatment in accordance with international law, *including* fair and equitable treatment and full protection and security.”²⁴⁹ It has been pointed out that this formulation—and the use of the term *including* in particular—seems to treat fair and equitable treatment and protection and security as elements of international law.²⁵⁰ Moreover, in 2001 the NAFTA parties (acting via the NAFTA Free Trade Commission) issued a joint interpretive statement confirming their mutual intention that “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.”²⁵¹

Unlike NAFTA, however, U.S. BITs concluded prior to 2004 do not refer to these standards as being included within international law, and they do not explicitly equate them with the international minimum standard. Rather, they express the standards and then assert that the treatment and protection to be accorded must be *no less than* that required by international law. Some proponents of the

246. VANDEVELDE, *supra* note 5, at 243. Similar views have been expressed officially by other countries. See Thomas, *supra* note 200, at 48 (noting that the OECD canvassed its members in the early 1980s regarding their understanding of the term “fair and equitable treatment,” and reported a consensus that “fair and equitable treatment introduced a substantive legal standard referring to general principles of international law even if this is not explicitly stated”).

247. See Thomas, *supra* note 200, at 49–50 & n.78 (identifying a multitude of letters of submittal from the late 1980s and 1990s that describe the provisions referring to fair and equitable treatment and protection and security as incorporating principles of customary international law, and in particular the international minimum standard of treatment).

248. NAFTA, *supra* note 222.

249. *Id.* ¶ 1 (emphasis added).

250. See, e.g., Thomas, *supra* note 200, at 55–56 (explaining that this language shows that the NAFTA parties tied fair and equitable treatment and full protection and security to international law).

251. NAFTA Free Trade Comm’n, *Notes of Interpretation of Certain Chapter 11 Provisions*, pt. 2 (July 31, 2001), available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/NAFTA-Interpr.aspx>.

additive approach focus on this and assert that while U.S. BITs treat international law as a floor on the level of protection to be provided, it does not operate as a ceiling in the sense of limiting the fair and equitable treatment and protection and security standards.²⁵²

The truth may lie somewhere between these two positions. In light of the origins of the standards and their characterization by U.S. officials, it appears likely that they were intended to impose obligations equivalent to the international minimum standard, as that standard is understood by capital-exporting countries. Nevertheless, U.S. treaty drafters have long been mindful that capital-importing states do not always share their view of international law.²⁵³ For that reason, U.S. treaty drafters have sometimes hesitated to explicitly equate fair and equitable treatment and protection and security with the international minimum standard, out of concern that the other party might dispute the latter's content.²⁵⁴

The formulation adopted in pre-2004 U.S. BITs was likely an attempt to deal with this dilemma. Specifically, the drafters took two standards (fair and equitable treatment and protection and security, respectively) that are derived from customary international law and have established meanings in international jurisprudence, treaty practice, diplomatic discourse, and scholarly literature, and they expressed those standards in a free-standing way—not in order to impose on the parties duties *beyond* their meanings in those sources, but to ensure that those duties would apply even if the other party (or an arbitral tribunal) did not agree that they are separately and independently imposed by customary international law. Under this

252. For an example of such reasoning, see *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, ¶¶ 253, 284 (Jan. 14, 2010).

253. See, e.g., Stanley D. Metzger, *Multilateral Conventions for the Protection of Private Foreign Investment*, 9 J. PUB. L. 133, 143 (1960).

Multilateral negotiations have been found to produce unsatisfactory results, and the reasons are not difficult to perceive. There are great variances among nations as to the degree to which they are prepared to bind themselves legally to accord fair treatment, even among those which in fact accord fair treatment in practice. . . . Efforts at general uniform arrangements tend to break down over the differences among individual countries and their varying legal systems and economies.

Id. (quoting a Congressional transcript from 1957 featuring the testimony of a U.S. State Department official).

254. See VANDEVELDE, *supra* note 226, at 234 (explaining that U.S. treaty negotiators refrained from equating the protection and security standard with international law in FCN treaty provisions relating to protection of foreign property out of concern "that the principle that international law protected foreign property was sufficiently controversial that including a reference to it might actually weaken the treaty").

reading, it is correct to view the fair and equitable treatment and protection and security standards as autonomous in the limited sense that they are not *dependent upon* the existence of an international minimum standard having any particular content. Yet it would be a mistake to view those standards as having meanings materially different from those suggested by their usage in jurisprudence, treaty practice, diplomatic discourse, and scholarly literature *on the assumption that they form part of customary international law*.

Some have contended that the debate over the nature of these standards is effectively moot, because even if they are equivalent to the international minimum standard, the latter has evolved in recent years to the point that it is now comparable to the expansive interpretations of protection and security and fair and equitable treatment offered by arbitrators who view them as autonomous.²⁵⁵ To be sure, customary norms can evolve over time, and a particular obligation may be more expansive today than it was in the past. One should nevertheless be cautious about finding any dramatic transformation in the content of customary norms, because custom tends to evolve quite gradually.²⁵⁶ While custom can evolve rapidly in some contexts, this requires something extraordinary. According to Michael Scharf, acceleration of the custom-formation process requires “widespread and unequivocal response [by states] to a paradigm-changing event.”²⁵⁷ An example of a paradigm-shifting event is the commission of unprecedented atrocities during World War II, which led to the establishment of the Nuremberg Tribunal and the recognition of individual international criminal liability.²⁵⁸ Others argue that customary international law can evolve *without* a shift in state practice, provided the states concerned offer an explicit acknowledgement of the existence of the new obligations, such as via

255. See, e.g., Roland Kläger, ‘Fair and Equitable Treatment’ and Sustainable Development, in *SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW* 241, 245–46 (Marie-Claire Cordonier Segger et al. eds., 2011) (asserting that the international minimum standard has broadened as a result of recent expansive interpretations of fair and equitable treatment provisions in investment treaties).

256. See Michael P. Scharf, *Seizing the “Grotian Moment”: Accelerated Formation of Customary International Law in Times of Fundamental Change*, 43 *CORNELL INT’L L.J.* 439, 445–46 (2010) (“Normally, customary international law . . . arises out of the slow accretion of widespread state practice evincing a sense of legal obligation (*opinio juris*). . . . [T]he U.S. Supreme Court has recognized that the process of establishing customary international law can take decades or even centuries.”).

257. *Id.* at 446.

258. *Id.* at 454 (explaining that before World War II it was generally accepted that a state’s treatment of its own citizens within its own borders was its own business, but that afterward it came to be recognized that international law protects individual citizens against abuses by their governments and imposes individual criminal liability on officials under some circumstances).

UN General Assembly declarations.²⁵⁹ Under either view, however, the conditions for accelerated custom formation have not been met in relation to the international minimum standard. There have been no explicit recognitions by states of heightened obligations associated with the minimum standard of treatment, let alone any paradigm-changing event and associated widespread and unequivocal shift in state practice with regard to the protection and treatment of foreigners.²⁶⁰

In light of the foregoing, there is no reason to believe that the international minimum standard (including the customary norm of protection and security) has undergone any radical transformation of late. Accordingly, the way the customary notion of protection and security has been interpreted and applied in the past remains quite relevant to understanding its meaning today.

IV. IMPLICATIONS FOR INTERNATIONAL INVESTMENT LAW

Now that an interpretation of protection and security consistent with the VCLT framework has been identified, it is worth considering its implications for international investment law. To that end, the subparts that follow employ that interpretation as the lens through which to view and critique modern jurisprudence relating to the standard, as well as the recent approach to drafting protection and security clauses in U.S. investment treaties.

A. A Critique of Modern Protection and Security Jurisprudence

As noted in the Introduction and in Part II.A, several tribunals in recent years have asserted that the duty of protection and security is limited to physical protection. Parts II and III demonstrated that this conclusion is untenable, at least with regard to U.S. BITs concluded prior to 2004. As explained below, however, even tribunals

259. This notion is commonly referred to as "instant custom," and was first articulated by Bin Cheng. Bin Cheng, *United Nations Resolutions on Outer Space: "Instant" International Customary Law?*, 5 INDIAN INT'L L.J. 23 (1965), reprinted in INTERNATIONAL LAW: TEACHING AND PRACTICE 237, 249 (Bin Cheng ed., 1982). This notion of instant custom has been widely criticized, however. For examples of works criticizing this concept, see G.J.H. VAN HOOF, RETHINKING THE SOURCES OF INTERNATIONAL LAW, 86 (1983) ("[C]ustomary law and instantaneousness are irreconcilable concepts."); Hugh Thirlway, *The Sources of International Law*, in INTERNATIONAL LAW 115, 124 (Malcolm Evans ed., 2006).

260. See *Glamis Gold, Ltd. v. United States*, Award, ¶¶ 600–03, (NAFTA Ch. 11 Arb. Trib. 2009) (holding that the claimant had failed to demonstrate any significant recent evolution of the minimum standard of treatment as reflected in state practice and *opinio juris*).

that have correctly interpreted protection and security as extending beyond physical security have sometimes delineated the standard's contours too expansively.

One case in which the tribunal arguably read protection and security too broadly is *Occidental Exploration, Ltd. v. Republic of Ecuador (Oxy I)*.²⁶¹ That tribunal held that Ecuador violated the protection and security provision in the U.S.–Ecuador BIT when the Ecuadorian tax authority changed its interpretation of a tax law and began denying value added tax (VAT) reimbursements to the claimant, a U.S. oil company.²⁶² The tribunal reached this result by effectively equating protection and security with fair and equitable treatment—pronouncing that a violation of fair and equitable treatment *automatically* results in a violation of protection and security—and asserting that fair and equitable treatment requires that the host state maintain the “stability of the legal and business framework” of the country.²⁶³ The tribunal asserted further that when the Ecuadorian tax authority modified its approach to VAT reimbursements, “the framework under which the investment was made and operates [was] changed in an important manner,” and the tax authority’s new interpretation was “manifestly wrong.”²⁶⁴ Significantly, however, the tribunal in no way conditioned its holding with regard to fair and equitable treatment and protection and security on any finding that the new interpretation was in bad faith, arbitrary, or discriminatory,²⁶⁵ and the tribunal does not seem to have considered it material that the investor was free to challenge the new interpretation in local courts.²⁶⁶ The tribunal seems to have felt it is enough to violate the protection and security standard if the host state adopts a new legal interpretation that alters the legal

261. *Occidental Exploration & Prod. Co. v. Republic of Ecuador (Oxy I)*, LCIA Case No. UN3467, Award, ¶¶ 183, 187 (London Ct. Int'l Arb. 2004).

262. *Id.* ¶ 1–7, 183–87.

263. *Id.* ¶ 183–87.

264. *Id.* ¶ 184.

265. In another portion of the opinion, the tribunal asserted that the Ecuadorian tax authority discriminated against the claimant in the sense that it gave certain Ecuadorian exporters VAT reimbursements, but denied them to the claimant. *Id.* ¶¶ 167–77. Yet in the discussion of the protection and security claim, the tribunal made no reference to this alleged discrimination and did not suggest that the existence of discrimination was necessary to its finding that Ecuador violated the protection and security clause. *Id.* ¶¶ 183–87.

266. The tribunal in another case arising from the same change in approach to VAT reimbursements observed that the claimant's Ecuadorian subsidiary could have challenged the new interpretation in Ecuadorian courts, and that there was no evidence that the Ecuadorian tax authority had reached its new interpretation in bad faith. On that basis, the tribunal declined to find a treaty violation. *See EnCana Corp. v. Republic of Ecuador*, LCIA Case No. UN3481, Award, ¶¶ 194–97 (London Ct. of Int'l Arb. 2006).

framework in a way that is adverse to the investment and incorrect according to the independent judgment of the tribunal.

If that is what the tribunal had in mind, its approach was problematic because it fails to distinguish in any meaningful way between protection and security and fair and equitable treatment and does not sufficiently delimit either standard. If the tribunal in *Oxy I* had read protection and security in a way consistent with its customary parameters, it could not have found Ecuador in violation of that standard based on the decision of a tax authority without first finding that the Ecuadorian legal system was incapable of securing the investor's property rights. A mere finding that the tax authority applied the law incorrectly would not have been sufficient to establish a denial of protection and security, so long as the investor could readily have challenged (and potentially reversed) the interpretation in local courts.²⁶⁷

Another case in which the tribunal arguably read protection and security too broadly is *CME*. In that case, the tribunal found that the Czech Republic violated the protection and security clause in the Netherlands–Czech Republic BIT by, inter alia, amending its law governing broadcast licenses (the Media Law) in a way that disadvantaged a local company (CNTS) in which the claimant had invested, and endorsing (through the actions of an administrative agency, the Media Council) an attempt by CNTS's business partner, Dr. Železný, to use that amendment as a basis to terminate the company's contractual relationship.²⁶⁸ The tribunal failed to articulate in any detail the content of the protection and security standard, other than to assert that it obliges the host state to "ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor's investment withdrawn or

267. This is because the protection and security standard focuses on the conduct of the state as a whole (i.e., the entire governmental system). In other words, if one state organ could readily correct a mistaken decision by another (upon application by the investor), then the state as a whole cannot be said to have failed in its obligation to protect and secure the investment. For a detailed discussion of the relevance of local remedies to investment treaty claims, see George K. Foster, *Striking a Balance Between Investor Protections & National Sovereignty: The Relevance of Local Remedies in Investment Treaty Arbitration*, 49 COLUM. J. TRANSNAT'L L. 201, 204–09 (2011) (collecting cases holding that certain investment treaty claims can be defective on the merits if the relevant injury could be readily corrected via local remedies, and explaining their rationale).

268. See Franck, *supra* note 19, at 1559–63 (describing the factual and procedural background of the case); see also *CME Czech Republic BV v. Czech Republic*, Partial Award, ¶ 613 (UNCITRAL Arb. Trib. 2001) ("The Media Council's actions in 1996 and its actions and inactions in 1999 were targeted to remove the security and legal protection of the Claimant's investment in the Czech Republic.").

devalued.”²⁶⁹ Such a vague formulation of the standard is troubling because it gives no guidance as to when an adverse legal amendment or administrative action is inconsistent with the security due to an investment, and therefore could have a chilling effect on good faith legislative or regulatory action.²⁷⁰

The tribunal in another case arising from the same facts, *Lauder v. Czech Republic*,²⁷¹ employed a preferable approach. This case was brought by a different investor in CNTS (Ronald Lauder), under a different treaty (the U.S.–Czech Republic BIT). The tribunal in *Lauder* likewise viewed the duty of protection and security as extending to legal security, but articulated its parameters more precisely. It held that the duty “obliges the Parties to exercise such due diligence in the protection of foreign investment as reasonable under the circumstances,” and requires that the host state have an adequate legal system and make the same available to covered investors.²⁷²

Applying this standard to the facts, the tribunal rejected the protection and security claim. It found no evidence that the Media Council applied the law in an arbitrary or discriminatory way, or that the amendment was calculated to destroy the investment.²⁷³ Rather, it was the conduct of Dr. Železný—a private business partner—that harmed CNTS, and CNTS was free to pursue a contractual claim against him in Czech courts.²⁷⁴ According to the tribunal, the Czech Republic’s only obligation in relation to that dispute was to “keep its judicial system available for the Claimant and any entities he controls to bring their claims, and for such claims to be properly examined and decided in accordance with domestic and international law.”²⁷⁵

269. *CME*, Partial Award, at ¶ 613.

270. See SALACUSE, *supra* note 86, at 233 (arguing that investors should always expect “reasonable evolutions in host state law,” such as “the adjustment of environmental regulations to internationally accepted standards or the improvement of labour laws to benefit the host state’s workforce,” and that such developments should not give rise to liability under an investment treaty so long as they are made in good faith and without discrimination).

271. *Lauder v. Czech Republic*, Final Award, ¶ 308 (UNCITRAL Arb. Trib. 2001).

272. *Id.* ¶¶ 308, 314.

273. *Id.* ¶¶ 310–11.

274. *Id.* ¶¶ 311–12.

275. *Id.* ¶ 314. The tribunal applied a similar interpretation of protection and security in another decision:

The Respondent’s duty under the Treaty was, first, to keep its judicial system available for the Claimant to bring its contractual claims and, second, that the claims would be properly examined in accordance with domestic and international law by an impartial and fair court. There is no evidence—not even an allegation—that the Respondent has violated this obligation.

The *Lauder* tribunal's view of the protection and security standard appears consistent with traditional conceptions of that standard, as outlined in Part III, above, and gives the host state adequate leeway to legislate and apply its laws.

A more recent case in which the tribunal articulated a similar understanding of protection and security is *AES Summit Generation Ltd. v. Republic of Hungary*.²⁷⁶ The claimant in that case—a UK company that had invested in an electricity generation company in Hungary—alleged that Hungary violated the protection and security clause of the Energy Charter Treaty when it amended its laws governing the rates due to electricity generators, resulting in financial losses for the claimant.²⁷⁷ In evaluating this claim, the tribunal described the content of the protection and security standard as follows:

[T]he duty to provide most constant protection and security to investments is a state's obligation to take reasonable steps to protect its investors (or to enable its investors to protect themselves) against harassment by third parties and/or state actors. . . . And while it can, in appropriate circumstances, extend beyond a protection of physical security, it certainly does not protect against a state's right (as was the case here) to legislate or regulate in a manner which may negatively affect a claimant's investment, provided that the state acts reasonably in the circumstances and with a view to achieving objectively rational public policy goals.²⁷⁸

Applying that standard to the facts before it, the tribunal rejected the protection and security claim. The tribunal emphasized that Hungary was free to amend its laws in good faith, having never signed any stabilization agreement or otherwise committed that it would not modify its laws.²⁷⁹ As with the *Lauder* tribunal's approach, this gives the host state leeway to modify its legal framework, while still allowing the state to be held accountable under the protection and security standard if it does so in a way that is arbitrary or amounts to harassment.

Parkerings-Compagniet AS v. Republic of Lith., ICSID Case No. ARB/05/8, Award, ¶ 360 (Sept. 11, 2007).

276. *AES Summit Generation Ltd. v. Republic of Hung.*, ICSID Case No. ARB/07/22, Award, ¶¶ 13.3.1–13.1.5 (Sept. 23, 2010).

277. *Id.* ¶¶ 4.1, 13.1.1–13.1.5.

278. *Id.* ¶ 13.3.2.

279. *Id.* ¶¶ 13.3.4–13.3.6.

B. A Critique of the Current U.S. Drafting Approach

In light of awards such as those in *Oxy I* and *CME*, it is easy to understand the decision by the United States (and certain other countries that have followed its lead²⁸⁰) to limit the scope of the protection and security and fair and equitable treatment standards in newly concluded treaties.

Indeed, a key reason why so many countries were willing to sign BITs during the 1980s and 1990s was their impression that the treaties, for the most part, simply incorporated and restated obligations already existing under customary international law. As Alvarez has explained in discussions with prospective BIT partners during that period, "U.S. negotiators argued that the BIT offered only minimal stabilization and imposed only a few, non-onerous, and uncontroversial constraints on government action."²⁸¹ Moreover, the United States itself held the view that "much of what the U.S. BIT contained was already reflected in the traditional principles of international law regarding the treatment of aliens, drawn from the doctrine of state responsibility."²⁸² Similarly, British negotiators have acknowledged that UK BITs were specifically crafted to closely track customary international law (with a few exceptions, such as the inclusion of most-favored-nation provisions) because the treaties would have been unsalable to potential treaty partners had they done otherwise.²⁸³ Consequently, by reading fair and equitable treatment and protection and security as divorced from international law, arbitrators risk imposing on the treaty parties obligations they never contemplated—and which do not accord with their interests and

280. See Lindsey Marchessault, *Recent Trends in International Investment Agreements in Asia*, 1 TRANSNAT'L DISP. MGMT. 23–24 (2011), www.transnational-dispute-management.com/article.asp?key=1673 (noting that a number of countries apart from the United States have recently concluded investment treaties that equate fair and equitable treatment with the international minimum standard).

281. José E. Alvarez, *The Evolving BIT*, in INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW 1, 5 (Ian A. Laird & Todd Weiler eds., 2010).

282. *Id.* at 6; see also Thomas, *supra* note 200, at 54 (arguing that states never would have signed investment treaties containing fair and equitable treatment clauses if they believed their actions would be evaluated by arbitrators according to subjective notions of "fairness" and "equity," divorced from established legal principles).

283. See Eileen Denza & Shelagh Brooks, *Investment Protection Treaties: United Kingdom Experience*, 36 INT'L & COMP. L.Q. 908, 911–12 (1987) (explaining that politically sensitive provisions were drafted so as to not to go beyond what was thought to reflect international law); see also DOLZER & SCHREUER, *supra* note 2, at 186 (noting that "[m]ost-favoured-nation treatment is not required under customary international law").

values—thereby undermining the legitimacy of investment treaty arbitration.²⁸⁴

From the perspective of legitimacy, therefore, revising investment treaties to equate the fair and equitable treatment and protection and security standards with the international minimum standard is a step in the right direction. Nevertheless, the way the U.S. Model BIT has defined protection and security since 2004²⁸⁵ is problematic because it simultaneously suggests that the notion is a principle of customary international law and articulates a meaning of that notion that is inconsistent with its customary meaning. Namely, it asserts that the standard is limited to police protection when protection and security has never been so limited. This risks increasing the confusion over the meaning of the standard in customary international law, thereby further undermining the legitimacy of this area of law.²⁸⁶

Going forward, it would be better to delete the language defining protection and security as limited to police protection and simply record that protection and security and fair and equitable treatment collectively express the international minimum standard. If a more detailed definition of protection and security is deemed necessary, it should be consistent with the standard's customary meaning, as described in Part III.E, above. Alternatively, the definition could assert that the treaty parties intend that any aspects of the customary norm of protection and security beyond police protection shall be covered by other provisions of the treaty, including, for example, the fair and equitable treatment and expropriation clauses. In any event, however, the treaty should avoid perpetuating the misunderstanding that the customary norm of protection and security is somehow limited to police protection, which it is not and never has been.

284. See Sornarajah, *supra* note 18, at 40–41 (arguing that “the expansionary attitudes taken by arbitrators who have accepted the expansionary litigation theories of lawyers who are seemingly taking the law in investment treaties beyond what the parties had originally intended” is resulting in a “crisis of legitimacy”); see also Grossman, *supra* note 20, at 144 (arguing that international adjudication will not be perceived as legitimate by international actors if it is not “consistent with commonly accepted principles or discourse of legal decision making” and in accordance “with international actors’ interests and values”).

285. See 2012 U.S. Model BIT, *supra* note 24, art. 5, ¶ 2; 2004 U.S. Model BIT, *supra* note 241, art. 5, ¶ 2.

286. See Grossman, *supra* note 20, at 149–50 (explaining that inconsistency and lack of clarity can undermine a law’s legitimacy); see also THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 24, 152 (1990) (discussing the importance of coherence to the legitimacy of a rule of international law or an application of such a rule).

V. CONCLUSION

This Article has explained how a thorough application of the VCLT interpretive framework can resolve the controversies surrounding the ubiquitous but enigmatic protection and security standard found in most investment treaties.

With regard to the debate over whether the standard is limited to physical security, the evidence demonstrates that it is *not* so limited, at least as used in most U.S. treaties. Rather, it should be seen as a general, overarching standard that obliges the host state to have a system capable of protecting and securing the investment (both legally and physically), which is often further elaborated via other, more specific treaty provisions likewise aimed at enhancing the protection of investment. These may include, *inter alia*, provisions requiring effective means of asserting claims and enforcing rights and compensation for expropriation. The standard should not, however, be seen as precluding good faith, nondiscriminatory changes in the law.

With regard to the controversy over the relationship between protection and security and fair and equitable treatment, the evidence shows that the two standards are both derived from the same customary norm and are so closely connected that certain conduct may violate both standards. The evidence also shows, however, that these standards are conceptually distinct in that protection and security focuses on the need for an adequate system of protection, whereas fair and equitable treatment focuses on the treatment to be accorded to investors or investments.

If the above interpretations of these standards were to be consistently embraced by tribunals going forward, and were to find expression in the definition sections of newly concluded treaties, this could significantly enhance the legitimacy of international investment law and investment treaty arbitration. Not only would this provide much-needed coherence to the jurisprudence, it would also ensure that host states would not be subjected to unforeseen and onerous obligations (at least in this context), thereby providing greater predictability to host states and investors alike. After all, investors are not the only ones who deserve treatment in accordance with their legitimate expectations and a reasonably stable and predictable legal framework; host states do as well.