

Common Good and the Concept of Expropriation in International Law on Foreign
Investment: Determinacy of Substance in Legitimacy of Structure

by

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ABSTRACT

This thesis, exploring the rule of law for international rules, offers a human bond of common good between determinacy of substance and legitimacy of structure of rules in order to evaluate international obligations of States in international law on foreign investment. In an in-depth exposition of the theoretical underpinnings and practices underlying the normative structure of rules in international law, the thesis critically questions the legal reasoning embedded in—and the authority of rules borrowed from—principles and precedents or moral and political evaluations by arbitrators in interpretation of States’ contractual, customary, and treaty obligations in investment arbitrations. With crucial moral, political, social and economic ramifications for the constitutional functions of States and concomitant interests of their human members implicated in the concept of expropriation in international law, the thesis provides a framework of legitimacy in a common good approach with structural criteria of recognition and coherence for the interpretation of States’ obligations in investment arbitration. Coherence brings to the fore conflicting demands of justice requiring fresh evaluation divesting a general rule of its authoritative force, and recognition brings to the fore the validation of the power to engage in moral and political evaluation. Together, these structural criteria offer a common good approach of legitimacy to test the authority of States’ obligations and the power of arbitrators in hard cases. By virtue of these criteria, the thesis characterizes the nature of substantive property rights of corporations and corresponding obligations of States in foreign investment as contingent and consensual in contrast with the absolute and constitutional rights of human beings in human rights. Through coherence and recognition, the thesis also portrays a supreme status for customary international law for the normative structure and substance of States’ contractual or treaty obligations in the interpretation of hard cases in international law on foreign investment. The thesis espouses a new horizon for legal reasoning in foreign investment arbitration that eschews the *lex lata* veneer for *lex ferenda* propositions manufactured from precedents and principles, on the one hand, and the sheen of law for the conception of justice of investor-State arbitrators, on the other, in cases of hard confrontation between the demands of justice.

RÉSUMÉ

Cette thèse, en explorant l'état de droit pour les règles internationales, présente un lien de la déterminabilité de la substance et la légitimité de la structure des règles en vue de bien commun des êtres humains afin d'évaluer les obligations internationales des États en droit international concernant les investissements étrangers. Dans un exposé profond des fondements théoriques et des pratiques qui sous-tendent la structure normative des règles internationales, cette thèse conteste le raisonnement juridique et l'autorité des règles qui sont fondés sur principes et les précédents, ou des évaluations morales et politiques par les arbitres, dans l'interprétation des obligations contractuelles, conventionnelles, et coutumières des États en arbitrages d'investissement. Étant donné les ramifications morales, politiques, sociales et économiques pour les fonctions constitutionnelles des États et leurs peuples impliquées dans la notion d'expropriation en droit international, cette thèse fournit un cadre de légitimité dans une approche de bien commun avec les critères structurels de la reconnaissance et la cohérence pour l'interprétation des obligations des États en arbitrages entre les États et d'investissement les investisseur étrangers. La cohérence concerne des exigences de la justice pour une évaluation nouvelle d'une règle générale, et la reconnaissance concerne la validation de le pouvoir pour exercer une évaluation morale et politique. Ces critères structurels offrent une approche de la légitimité en vue de bien commun pour tester l'autorité des obligations des États et le pouvoir des arbitres dans les cas difficiles. Avec ces critères la thèse caractérise la nature des droits de propriété des entreprises et des obligations correspondantes des États dans le domaine d'investissement étranger comme contingente et consensuelle distingué de droits absolus et constitutionnel des êtres humains dans le domaine de droits de l'homme. Grâce à la cohérence et la reconnaissance, la thèse décrit aussi un statut suprême du droit international coutumier pour la structure et substance normative des obligations des États dans l'interprétation des cas difficiles dans le droit international concernant les investissements étrangers. La thèse adopte un nouvel horizon qui rejette la prétention de *lex lata* pour les propositions de *lex ferenda* fabriqués par des précédents et des principes, d'un côté, et la prétention de loi pour la conception de la justice des arbitres en arbitrages d'investissement, de l'autre côté, dans l'interprétation des cas difficiles de la confrontation entre les exigences de la justice.

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INTRODUCTION

There are structural criteria of legitimacy that frame the determinacy of international rules and obligations in their claim of authority for instances of fundamental moral and political repercussions for nation-States and their human constituents. Recognition and coherence for the common good are a force of legitimacy to reckon with in the construction of authoritative international rules. This is the theme that this thesis develops in addressing hard questions arising from the concept of expropriation in international law on foreign investment.

Interpretation of obligations of States in investor-State arbitral dispute settlement implicates fundamental constitutional powers of States in the interest of the public and wellbeing of human beings. Claims against States such as expropriation in foreign investment disputes are increasing amid concern about undue shrinkage of the powers and funds of States for implementing public programs for economic development, environment, safety, or other measures for the public and human wellbeing. The situation begs structural criteria sound in legal theory to frame the construction and interpretation of international rules in this field of international law.

A thread of legal theory to explain the normative underpinnings of international obligations of States in the field of foreign investment is missing in literature and the investor-State arbitration. Inconsistent arbitral awards have attracted thoughtful criticisms of legitimacy, raising questions about the legitimacy of investor-State arbitration itself. Nonetheless, a more fundamental, theoretical aspect of legitimacy regarding the determinacy of international rules building their authoritative force in areas of indeterminacies is absent. Whereas the approach not to interpret a contractual or treaty undertaking of States in a way that makes it superfluous is common, the broader concern not to construe such an undertaking in a way that renders the normative structure of international law incoherent is scarce in the interpretation of States' obligations in foreign investment disputes. The weight of general international law—not merely its

substance but more importantly the structure of international law—in the process of interpretation of hard indeterminacies in these disputes has been egregiously neglected. The structure and substance of general international law, more emphatically customary international law, is fundamental to illuminate the interpretation of treaty obligations of States in investment disputes where a hard clash of conceptions and demands of justice and constitutional powers of States in international law is implicated. It is not uncommon in foreign investment that the responsibility of States under indeterminate obligations is predicated on views of distinguished academics or arbitral panels, or principles and precedents advocated by them, without any account about the normative structure of international rules or the authoritative force of the purported obligations. An account of what the law is or how compatible it is with the sources and structure of international law has remained out of the picture.

The thesis will measure consistency or inconsistency, change or flexibility, or stability or instability in the normative structure and substance of rules in hard indeterminacies by the legitimacy criteria of the rule of recognition and coherence for the common good. Legitimacy in this thesis consists in two premises. The first premise is that indeterminate obligations of treaty or customary origin entail fresh moral and political evaluations in a creative function requiring coherence of their substance by appropriate consideration of all justice demands to determine their legal content and to obtain authoritative force for the particular indeterminate instance. The second premise is that the power to engage in such an evaluative process is subject to validation by the rule of recognition. In light of these legitimacy criteria, the thesis will lay out a theoretical framework of legitimacy for the construction of the authoritative force of international obligations of States in building their content for particular indeterminate situations. Approaches and practices concerning the property rights of corporations in general and concrete settings of hard cases arising in the concept of expropriation in international law on foreign investment will be critically weighed in the framework of the legitimacy criteria of coherence and recognition. Central questions are, therefore, whether investor-State arbitral tribunals when confronted with hard indeterminate

situations apply the law or engage in moral and political evaluation and whether such a task is recognized.

In legal parlance, hard cases may refer to any indeterminacy of rules that gives rise to controversy and disagreement among lawyers. The terms hard cases, hard penumbra, or hard indeterminacies in this study, however, refer to those situations that involve intense conflict between justice demands with all attending values, social aims and policies competing in an evaluative and selective process in building the content of a rule affecting States' political capacity or economic prosperity. Given the State sovereignty in international law, there is no set definition to preclude the characterization of most issues of international law as a hard case. Indeterminacies of legal obligations in international law implicating the political and economic sovereignty and self-determination of States are rarely of the character of indeterminacy in such rules as 'no vehicle in the park'. In international law on foreign investment, therefore, hard indeterminacies concern situations where the interests of private corporations sharply collide with the substantive and structural rights of States in international law with far-reaching impact on their political powers or economic funds to perform their constitutional functions for development or regulation for the wellbeing of their people and human individuals. In this account, the thrust of hard indeterminacies, penumbra or cases is initially a legitimacy concern of the validation of the power of the body that engages in moral and political evaluations to create the content of indeterminate international obligations of States affecting core matters of States' democratic decision-making and their economic wealth.

The thesis is structured in five chapters. Chapter One will lay out the conceptual framework of legitimacy in general and in its particular relation to indeterminacy from the approach of the common good. This chapter will initially observe the multidimensional concept of legitimacy and concentrate on the notion that rules must adhere to certain structural criteria for their authority and validity. The chapter will raise the question of the determinacy of international rules in relation to legitimacy and authority. The chapter will then identify two hard situations of indeterminacies surrounding the concept of expropriation in

international law on foreign investment for assessment in the final chapters. Indeterminacy of international rules on foreign investment arising from customary or treaty frameworks and the question of general international law in interpretation of treaties will also be raised in this chapter. Finally, the authority and legitimacy of international rules as determinate rules will be discussed. The thesis will present the rule of recognition and coherence as structural criteria of legitimacy for the determinacy of the substance of international rules to test their claim of authority. These structural criteria, offering the bases of legitimacy for the authority of international rules, will measure more specifically principles and customs as authoritative sources of general international law and the question of the adjudicative power in the creation of international rules in the following chapters. To this end, an analysis of the rule of recognition followed by its standing in international law and the link with coherence and common good will be offered. In this regard, the consensual and constitutional schemes of protection of rights rooted in consensual and communitarian bases of international rules and obligations will be raised.

Chapter Two will raise the question of coherence and principles in detail. This chapter will articulate indeterminacy of rules and obligations in a tension of authority and demands of justice arising in their interpretation raising coherence for the common good for authoritative determination of their substance. The background of general principles in international law will provide a starting point. The chapter will depict indeterminacy in a setting depriving general rules of authority or binding force and questions the authority of general principles as a binding source of law for indeterminate instances. The chapter will explore the interface of legal interpretation with morality and demands of justice in the identification and determination of the content of the law. Principles of different levels and natures will be discussed in this regard to assess their status as statements of law. Beneath the upper tier of coherence that connects an existing rule horizontally with other rules of the system, the chapter will develop a layer of coherence subtle in interpretation of indeterminate rules that links a rule deeply to its moral and social roots for the construction of its authoritative force for a

particular situation. Indeterminacy and coherence from this perspective concern extending legal order into a particular situation for the construction of an authoritative prescription in the form of a legal rule following a moral and political evaluative and selective process. Coherence will test the authority of rules by their legal determination for a particular indeterminate instance following appropriate moral and political evaluations for the common good. As such, the terms determination and coherence have their own distinct meanings articulated in this study not to be confused with other usages. The thesis will introduce the notion of contingent principles in contrast with absolute principles to identify situations of indeterminate authority and to distinguish *lex ferenda* from *lex lata*. The chapter will also underscore a major distinction for rights of human beings in human rights and the principles expressing them.

Chapter Three builds upon the previous chapters to test the adjudicative creation of international rules in legal interpretation arising in dispute settlement by the general rule of recognition of international law. The chapter will assess the assertion of an implied legislative power for international adjudicators. This assertion will be measured by reference to practice of States and the practice of International Court along with the general rule of recognition in international law. The chapter will evaluate the practice of States and the International Court surrounding the sources of international law and the particular question of the legislative function of international adjudicators. These practices will also highlight another structural aspect of customary international law in providing a default rule recognizing the absence of limitations on States and rejection of claims of obligations of States in foreign investment disputes where hard indeterminacies arise as to the obligations of States. The chapter will also present customary international law as the authoritative framework for the determination of the substance of international obligations of States in hard penumbra surrounding property rights of corporations in general and protection against expropriation in international law on foreign investment. The chapter will raise the supremacy of customary international law with State practice and opinion as a consensual framework in constructing international rules and obligations in hard

situations of indeterminacy while reconciling States participation with that of non-State actors at a certain level. For this purpose, constitutive statements of customary determination of the content of international obligations will be described in conjunction with constitutive elements of customary international law. Throughout the study, the thesis will underscore in light of the legitimacy criteria of coherence and recognition the essential role of customary international law at different levels for the interpretation of substantive obligations of States in hard cases of foreign investment. The role of customary international law for the interpretation of hard cases in foreign investment notably includes framing and recognizing the structure of international law, providing a presumption for the absence of international obligations of States and rejection of claims of State responsibility by corporations, and functioning as the source for authoritative determinations of the substance of States' obligations. It should be emphasized that the thesis is not espousing a consensualist approach to the obligations of States or the freedom of action of States in international law as such but the rule of recognition grounded in the common good of human beings that may justify a consensual framework or a departure from it. By shifting the focus from the consent of States to the common good of human beings, this thesis underscores practices and justifications building the international rule of recognition. A hallmark of the international rule of recognition is its capacity to assimilate absolute principles or to change to accept limitations and obligations on States in non-consensual patterns of rule determination by virtue of changing practices and common good justifications such as those underlying a constitutional approach to rights of human beings in human rights.

Chapter Four will frame the protection of property in international law on foreign investment in hard situations by reference to the legitimacy criteria of rule of recognition and coherence for the common good. In this light, the contingent and consensual nature of property protection of foreign corporations in international law on foreign investment will be addressed. The international minimum standard of treatment, vested or acquired rights, and property rights and human rights will come into discussion. The chapter will weigh the property

protection of foreign corporations under assertions of standards and rights in view of the conceptual and theoretical underpinnings articulated in earlier chapters as well as pertinent practices and tests of common good. Reference will be made to State practice bearing upon the nature of rights of corporation in the realm of foreign investment in international law. To assess further the practices for the property protection of corporations in this field, contrast will be made with some practices in a constitutional protection of human beings in the domain of human rights. The chapter will also assess the question of the desirability for the scheme protection of corporations in foreign investment in light of the tests of the common good. In this regard, investor-State arbitral dispute settlement and the value of self-determination in international law will be discussed.

Chapter Five will assess the determinacy and authority of the substance of the concept of expropriation in international law on foreign investment by reference to the customary framework of building authoritative obligations in hard indeterminacies. The chapter will employ the criteria of legitimacy of recognition and coherence developed in earlier chapters to customary determinations of States' obligations in hard situations in this field. Two hard situations in this field in the new setting of regulatory measures and the old setting of nationalization in natural resources will be examined in light of these criteria. The first section discusses the hard penumbra in the concept of expropriation regarding the conduct of States arising from investment treaties in relation to regulatory measures of States in public protection. The second section discusses the hard penumbra regarding future profits in compensation for unilateral termination of State contracts under nationalizations for economic reforms in natural resources. The chapter will discuss practices and opinions to assess the position of customary international law or its change with regard to these two hard instances. The chapter will also critically weigh the opinions of arbitral tribunals in terms of the legitimacy criteria of recognition and coherence.

The thesis will expose the process of interpretation of States obligations' in arbitral adjudication of disputes between investors and States to the test of legitimacy criteria of recognition and coherence. It is, however, neither designed

nor meant to undermine the institution of investment arbitration itself. Rather, the thesis is structured to offer a theoretically sound framework for the interpretation of the obligations of States in hard cases in international law on foreign investment. At the heart of the legitimacy challenge to investor-State dispute settlement in hard situations is the pretense of *lex lata* rooted in precedents and principles and the creative power of arbitrators. Throughout the thesis, a thread of theory of legitimacy is maintained to test the authority of indeterminate obligations of States and the justice evaluation power of arbitrators in investor-State arbitration in hard cases. The common good of human beings constitutes the thrust of legitimacy developed in this study with distinct criteria of coherence and recognition, which will both mark the preponderance of justice evaluation in indeterminate areas of States' obligations and demarcate the circumference of arbitrators' power in investor-State arbitral dispute resolution.

CHAPTER I

LEGITIMACY AND DETERMINACY IN A COMMON GOOD APPROACH

The present chapter is devoted to laying out a conceptual framework for the legitimacy discourse of international rules in order to evaluate the question of expropriation of foreign investors' property in that framework. This demands an approach to legitimacy in legal theory to evaluate international rules. When compared with modern municipal legal systems, international law appears short of salient characteristics of law. Conspicuous in international law is the lack of a central and organized apparatus for law-making, law-enforcement and sanctions. It is not hard to realize that for long States have been engaged in restless interactions to address these shortcomings through practices or instruments creating obligations and institutions to articulate international obligations or to ensure their compliance or enforcement. How far international law as a legal system has evolved or how far it must develop is immeasurable here. Rather the focus is on the criteria of legitimacy underpinning general rules of international law.

A. Dimensions of Legitimacy: Process and Substance

In guiding, regulating and controlling the conduct of States in matters falling upon the concern of international community, the boundaries of legitimacy surrounding international law need to be recognized. One set of boundaries relates to the criteria that raising the right process and content of international rules test their authority and validity. A conceptual framework of legitimacy from this perspective would discipline the normative structure and substance of legal obligations of States in international law on foreign investment. To this end, a theoretical background beckons us.

i. Adherence to Legitimacy Criteria of Structure

The existence of central law machinery in modern States in the form of legislative, judicial and executive organs, which is uncharacteristic of international law, has not made national legal systems immune from heated debate about the nature of law and the validity or legitimacy of the legal rules or the system itself. It would be reasonable to imagine that as long as human beings have found themselves in a community of social relations, debate about social behavior and control has existed in one way or another. Legal theorists have interminably been engaged in debates over the validity of national laws. For a long time, legal jurisprudence has involved the confrontation of the rival traditions from positive and natural law schools of thought. The controversy has mainly been over the question of a necessary connection between law and morality. It is no settled matter and plausibly will never be a settled matter. Indeed law poses much controversy as to the formation, content and operation of a legal system and legal rules. These pose multifarious questions beyond the space and the scope of this study. To address a framework of legitimacy of international rules, however, it is necessary to engage in some discussion about unwritten norms of legitimacy that affect the validity of legal rules and indeed their authority.

The tests of legal validity and limitation on power and authority of rulers and the rules have been couched in a number of notions that in one way or another reflect an aspect of legitimacy. Parallel ideas have spread across legal theory in notions such as the rule of law and the principles of legality, secondary rules, integrity, and practical reasonableness carrying connotations of emphasis on lawmaking institutions or processes or emphasis on the content and substance of the law or legal rules in evaluating the validity of legal rules and their authority. We will revisit these notions in more detail insofar as they relate to the indeterminacy of international rules and obligations and the criteria of legitimacy developed here to address the structure of determinacy. The following section will

sketch legitimacy as a concept that provides certain criteria of structure in evaluating legal validity and the authority of rules.

One familiar concept that provides tests for the validity of a legal system and a legal rule is the notion of the rule of law. The rule of law measures the legality of and lays conditions on lawmaking powers, processes and institutions and the authority they claim as legally binding. In contemporary legal theory, Lon Fuller has pointed out certain minimum conditions of the rule of law.

Fuller's account of the rule of law through the principles of legality points to the right process for the existence of a legal system or a legal rule.¹ Under the title "the morality that makes law possible," Fuller begins to speak of the minimum requirements that make the law possible.² According to Fuller, these requirements constitute the "inner morality of law."³ To Fuller creating and maintaining a system of rules depends on *at least* eight conditions; non-observance of any of them is symptomatic of a systematic failure.⁴ Others also endorse the existence of certain conditions of legality in variable terms.⁵ These types of conditions that Fuller or others enumerate are illustrative and are in part germane to national legal systems.

According to Fuller, the principles of legality represent procedural natural law "entirely terrestrial in origin and application."⁶ The word procedural is

¹ Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969) at 33-94. [Fuller, Morality]

² Ibid. at 33.

³ Ibid. at 33-94. According to Lon Fuller, morality resides both inside and outside the law and both a legal system and legal rules are bound to these internal and external natural principles of morality. He calls the first one the internal morality of law and the other the external morality of law. The former sets out the procedural principles of natural law that a legal system or a rule must comply with and the latter concerns the substantive principles of natural law. Ibid.

⁴ Ibid. at 38-39. [emphasis added] These eight conditions include: 1) the generality of law in the sense that there must be rules; 2) promulgation of law in the sense that rules must be available to those expected to observe them; 3) avoidance of retroactive laws; 4) the clarity of laws; 5) avoidance of contradictions in the laws; 6) avoidance of laws requiring the impossible; 7) constancy of the law through time in the sense of avoidance of frequent changes in law; and 8) congruence between the official action and the declared rule. Ibid. at 46-91.

⁵ H.L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Oxford University Press, 1994) at 207 [Hart, Concept]; John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1982) at 270-271; Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979) at 214-216.

⁶ Fuller, Morality, *supra* note 1, at 96. Note should be taken that, Fuller cautions, the word procedural in his account may include certain substantive considerations like a substantive accord between official action and the law. Ibid. at 97.

generally appropriate for the principles of legality because they concern “the ways in which a system of rules for governing human conduct must be constructed and administered” in contrast to substantive ends of rules.⁷ These principles, therefore, concern structure than substance. A total failure in any one of these conditions for creating or maintaining a system of rules and an individual rule itself does not make the system or the rule a bad one but results in their not being able to be called a legal system or a rule at all.⁸ Even a substantial derogation from these principles would create difficulty.⁹ This means that these elements of legality, for a minimum required, are not simply a sign of perfection of the legal system or the rule but establish their existence.

This clarification was necessary because Fuller also speaks of ‘desiderata’ and the aspiration aspect of legality in addition to the duty aspect of legality.¹⁰ Fuller maintains that these principles of the inner morality of law remain in the large part a morality of aspiration testing “excellence in legality”.¹¹ However, this does not negate the necessity of the minimum conditions of legality as a test of the existence of the rules. The elements of legality at a minimum function as the morality of duty to the extent that their total or substantial failure would lead to the non-existence of the legal system or the rule. Fuller discusses “eight routes” to failure in creating law, and then states “[c]orresponding to these are eight kinds of legal excellence toward which a legal system may strive.”¹² In other words, the principles of legality as duty and those as aspiration are not substitutes of one another. The function of the principles of legality as aspiration would not prejudice their function as indispensable conditions for the existence of a legal system or a legal rule, imposing the duty that the legal system or rules should conform to these principles for the minimum required.

The principles of the inner morality of law are aspiration only beyond the minimum they require, which fall within the scope of the morality of duty. It

⁷ Ibid. at 97.

⁸ Ibid. at 39.

⁹ Ibid. at 40.

¹⁰ Ibid. at 41-43. The duty and aspiration aspects of legality flow from Fuller’s distinction between the morality of duty and the morality of aspiration, which will be revisited.

¹¹ Ibid. at 41-43.

¹² Ibid. at 41.

would also be contradictory to state that these principles form the morality that makes law possible without first recognizing that they impose the duty that the legal system or rules should display these conditions. This view is evident in the Fuller's statement that "[w]hat appear *at the lowest level as indispensable conditions for the existence of the law at all*, become, as we ascend the scale of achievement, increasingly demanding challenges to human capacity."¹³ These elements of legality not only test the excellence of legality but also and most importantly are the test of the existence and the validity of a legal system or a legal rule from the point of legitimacy. It is the essence of legitimacy in a broader sense to challenge the validity of the legal systems or rules that contravene certain conditions of structure. These conditions may vary depending on excluding or including in the criteria of legitimacy substantive limitations on rule making in tandem with those on institutions and processes in affecting the legal validity.

According to Fuller, the principles of legality originate in reciprocity between the ruler and the ruled. Fuller posits that there is a bond of reciprocity between the government and citizens with regard to the observance of rules and maintains, "[w]hen [the] bond of reciprocity is finally and completely ruptured by government, nothing is left on which to ground the citizen's duty to observe the rules."¹⁴ This constitutes part of Fuller's interactional theory of law whereby mutual stable expectations between government and the citizens impose certain duties upon the government for the legality of the law.¹⁵ This aspect addresses the function of law and interactions that result in emergence of principles of legality. Fuller stresses the reciprocal interactions between the government and the citizens.¹⁶ This interaction amounts to the acceptance of law by the citizen.¹⁷ Equally remarkable, in a reciprocal manner, the interaction leads to the government's bond to maintain the legal system and the legal rules in conformity

¹³ Ibid. at 41. [emphasis added] See also *ibid.* at 197.

¹⁴ Ibid. at 40.

¹⁵ Law depends on the development of stable interactional expectations between the lawgiver and the subject as well. Ibid. at 28-36. There is another dimension to Fuller's interaction theory whereby interactions conduce to substantive customary rules. That part of the theory for the substantive content of rules is not espoused in this study, See Chapter III, Section B.

¹⁶ Lon L. Fuller, "Human Interaction And The Law" (1969) *Am. J. Juris.* 1, at 23-27 [Fuller, Interaction]

¹⁷ Ibid. at 28-36.

with certain principles.¹⁸ What follows is that, other than morality, these procedural principles of legality derive from stable expectations between the giver and recipient of the law. From this angle, these principles find their roots in custom as well.

What is central to legitimacy of rules is “governance” not “government”.¹⁹ The core issue is governance of rules. This has significance in a community of union of the subjects of law and the makers of law, particularly in the absence of a government, as in customary law or in international law. It follows that in such a community the reciprocity exists between the community of persons or States as a whole from which legal rules proceed as a collective action of its members, on the one hand, and the persons or States as the subjects of law, on the other. Legitimacy, therefore, targets the governance of rules not merely the government making rules. The rule of law or legitimacy imposes a duty upon the lawmaker, the law or its interpreter to meet certain conditions for legal validity and the authority of the rules. This represents an aspect of morality, having central weight in terms of validity of the rule or the system of law: the moral obligation to obey the law depends on the satisfaction of the minimum conditions of legitimacy. This applies to persons and States alike. The fidelity to law withers as law’s validity fades because of the violation of the criteria of legitimacy. The subjects have a moral obligation to obey the law *if* the system of law in a reciprocal manner fulfils its duty to meet the requirements of legitimacy for the system itself and for the rules it generates. The point here is the effect of legitimacy on the moral *fidelity to* law not the moral *purpose of* law. That a subject loses the moral obligation to obey a rule due to infringement of principles that legitimacy prescribes is essentially different from the proposition that through principles of legitimacy or

¹⁸ Ibid. at 28-36.

¹⁹ One may also observe this from the definition of law by Fuller that “law is the enterprise of subjecting human conduct to the *governance of rules*.” Fuller, *Morality*, supra note 1, at 106. Joseph Raz also enumerates some principles of the rule of law that the law itself must meet in contrast to those that law enforcement institutions must meet. Raz, supra note 5, at 214-216.

legality, law as a whole necessarily does good morally. It is the latter issue that has attracted a great deal of objection to the inner morality of law.²⁰

H.L.A. Hart acknowledges that rules of law and rulemaking must conform to certain principles “which might well be called ‘natural’” as an aspect of “minimum form of justice” though without conceding to their moral purpose.²¹ The validation test by the principles of legality is only subsidiary in Hart’s theory not sufficient to show the whole picture of legal validity. In Hart’s account of law, a developed legal system consists in a union of primary and secondary rules.²² Hart distinguishes such a system from a simple form of social structure found in primitive societies that in Hart’s view consists of primary rules of obligation solely.²³ The secondary rules remedy the defects of the simple form of social rules.²⁴ Hart’s concept of law contains much about unwritten rules that

²⁰ Critics of Fuller’s inner morality of law do not deny the principles of legality and their legitimacy weight on the legal system or the legal rules. They reject their classification as the internal morality of law and their moral purpose. They reject a) that a purposive activity would necessarily represent morality because it can be used for either good or evil ends; and b) that the satisfaction of principles of legality necessarily leads to moral substantive ends of law. See Fuller, *Morality*, supra note 1, at 200-224.

²¹ Hart, *Concept*, supra note 5, at 207. (“If social control of this sort [by legal rules] is to function, the rules must satisfy certain conditions: they must be intelligible and within the capacity of most to obey, and in general they must not be retrospective, though exceptionally they may be. Plainly these features of control by rule are *closely related to the requirements of justice* which lawyers term principles of legality. Indeed one critic of positivism has seen in these aspects of control by rules, something amounting to a necessary connexion between law and morality, and suggested that they may be called ‘the internal morality of law.’ Again, if this is what the necessary connexion of law and morality means, we may accept it.” Ibid. Hart added that this is still “compatible with great iniquity” pointing to the formal validity that may arise in a system of the formal rule of law that can still produce unjust laws while formally valid and respecting the rule of law. Ibid.

²² Ibid. at 91-99.

²³ Ibid. According to Hart a simple social structure carries: a) the defect of uncertainty in the sense that there is no reference for the authoritative identification and validation of primary rules and the sources of law and the order of the sources; b) the defect of the static character of rules due to the lack of a reference, the legislator, to authoritatively eliminate old rules and introduce new ones; and c) the defect of diffuse social pressure to enforce the rules due to lack of a reference, the judicial and executive organs, for authoritatively deal with the violations of the rules. Ibid. at 92-93.

²⁴ Ibid. at 94-97. These secondary rules include: a) the secondary rule of recognition that provides authoritative criteria for identifying authoritative sources of law—be it statute, precedent or custom and their hierarchical order—to assess and determine the existence and validity of a legal rule; b) the secondary rule of change that identifies and validates the individual or body, the legislator, for authoritative introduction of new rules and elimination of the old rules; and c) the secondary rule of adjudication that identifies and validates the individuals or bodies, judicial and executive organs, and procedures for authoritative determinations as to the violation of primary rules. Ibid. Hart points out that “there will be a very close connection between the rules of change

encompass the legal validity of rules. In a wider sense, secondary rules reflect the rule of law and legitimacy by providing certain validation criteria placing the law and its author inside the boundaries of the law itself.²⁵ Vital in Hart's feature of law is the notion that substantive primary rules of obligation stand, in their formation and application, within the boundaries that unwritten secondary rules rooted in convention impose.²⁶ A clear affirmation of this is also reflected in an earlier statement by Hart that "nothing which legislators do makes law unless they comply with fundamental accepted rules specifying the essential law making procedures."²⁷

John Finnis, endorsing the rule of law, also views that the fundamental point to the rule of law is "to secure the dignity of self direction and freedom from certain forms of manipulation."²⁸ Finnis ties the reciprocity root of the rule of law to the common good of the community in that respecting the claims of the common good constitutes a condition for respecting the claims of authority.²⁹ The rule of law is a requirement of justice or fairness and the common good of the community.³⁰ Justice and common good are in turn requirements of practical reasonableness. Thus, legitimacy in this account is even wider by importing the

and the rules of recognition: for where the former exists the latter will necessarily incorporate a reference to legislation as an identifying feature of the rules, though it need not refer to all the details of procedure involved in legislation." Ibid. at 96.

²⁵ In a significant way, Hart presents his concept of law as an attempt to mend the positivist theory of law rather than opposing the natural law. Hart's account of law is more a scathing critique of that part of the command theory advocated by his predecessors and generally known as the Austinian version of law, which put the law and its author outside the law itself and outside the legal limitations of procedural character. See Hart, *Concept*, supra note 5, Chaps. 1-4. For the command theory of Austin, see John Austin, *The Province of Jurisprudence Determined in Lectures on Jurisprudence*, (London: 1875) Lec. I, at 11-20.

²⁶ See Hart, *Concept*, supra note 5, at 91-99.

²⁷ H. L. A. Hart "Positivism and the Separation of Law and Morals" (1957) Harv. L. Rev. 593, at 603. [Hart, Separation] Embracing such an attitude, Fuller had expected Hart to recognize a merger of law and morality in these fundamental procedural rules that are not "an authoritative pronouncement" but function to determine "when a pronouncement is authoritative" and accept their mixed nature of law and morality because while they are ordinarily treated as law they are also rules of morality deriving "their efficacy from a general acceptance, which in turn rests ultimately on a perception that they are right and necessary." Lon. L. Fuller, "Positivism and Fidelity to Law—A Reply to Professor Hart" (1957) 71 Harvard L. Rev. 630, at 639. [Fuller, Fidelity]

²⁸ Finnis, supra note 5, at 273.

²⁹ Ibid. at 272-273. ("[T]he claims of authority are respected on condition that authority respects the claims of the common good.") Ibid.

³⁰ Ibid. at 273-277.

requirements of practical reasonableness and common good in measuring the law and its content.³¹

Conditions of the rule of law or legitimacy such as promulgation may find positive enunciation in constitutions or other formulations in a legal system. Some unwritten structural criteria are part of law entailed by the notion of the rule of law or in a broader sense legitimacy grounded in the common good of a community that qualify legal rules and condition their validity and authority. No positive pronouncement is required to bind legal rules and their creators to certain structural norms testing their authority and validity; they are unwritten criteria of structure of subjecting authority to law in a system even if in a legal system they are enunciated in a constitution or otherwise formulated. The common good requires certain structural principles that govern and limit the power of the rule makers, the creation of legal institutions and processes, and the validity of legal rules produced within legal institutions and processes. This applies to the community of States as well as the community of persons. Inherent in the rule of law is restriction on the rule of power. The rule of law restricts the use of power on the part of those who possess, wield, or manipulate it as well as testing the validity and authority of rules in the community of persons and the community of States alike. As a concept, legitimacy promotes the concept of the rule of law by providing conditions for the claims of the authority of rulers and the rules. Inherent in the notion of legitimacy too is restriction on the rule of power. The essence of legitimacy is that lawmaking institutions, processes, and legal rules themselves are bound by criteria governing their authority and validity. The concept of legitimacy captures any unwritten norm that challenges the claims of authority by the rulers or the authority of the rules themselves in testing their validity or binding force. Legitimacy is the justifying force for the authority of law or a rule.³² Without that justifying force, the authority of a rule fades. So does its validity. Essential to the claim of authoritative or binding force of a rule or obligation is its adherence to the criteria of legitimacy. Before dealing with

³¹ See Chapter II, Section C (i) (a).

³² Ronald Dworkin, *Law's Empire* (Cambridge, Massachusetts: The Belknap Press, 1986) at 191.

identification and developing the tests of legitimacy that provide the criteria for their authority or binding force of international rules in their formation and their determinacy in their interpretation, a general discussion about legitimacy in international law is appropriate.

ii. Legitimacy and International Law

In international law, the common good requires measurement of the authority of international rules and their validity by the test of legitimacy within the structure of international law. Legitimacy with criteria of structure is particularly apt for international law whose corpus of general rules is unwritten free from a supreme legislature and receptive of morality in a more open manner in constructing the substance of international rules for flourishing the community of human beings. A legitimate process of lawmaking and rule formation in light of common good promotes and ensures the rule of law on the international plane.

International rules confront the challenges of legitimacy for their validity. Thomas Franck has espoused a number of criteria in the treatment of legitimacy of international rules.³³ In Franck's view, legitimacy in the relations of States "is a *property of a rule or rule-making institution*" that concerns the right process and its compliance power.³⁴ Franck, emphasizing the right process, presents legitimacy as a principle independent of, and sometimes conflicting with, the principle of distributive justice, which interact under the umbrella of fairness in international law.³⁵

According to Franck, the prescriptive aspect of legitimacy indicates that the primitive status of the system of rules in international law is also due to the lack of legitimacy in the processes whereby rules are made, interpreted, and

³³ Thomas M. Franck, *The Power of Legitimacy Among Nations* (New York: Oxford University Press, 1990) [Franck, Legitimacy]. Note that Franck's treatment of legitimacy also addresses institutions in addition to rules.

³⁴ According to Franck, legitimacy emanates from the perception of the subjects believing that a rule or institution has come into being and operates according to the right process. See Ibid. at 24.

³⁵ Thomas J. Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1995) at 7-8 [Franck, Fairness] ; Also legitimacy, supra note 35, at 208-246, 236-237.

applied rather than the sole lack of a hierarchical coercive world sovereign.³⁶ His focus, however, rests on the descriptive aspect of legitimacy (or law) and the right process. Franck highlights the descriptive justification of legitimacy in validating international law by its persuasive role in inducing compliance with rules by States.³⁷ Viewing legitimacy from the descriptive angle as a determinant of the compliance pull, Franck notes because the compliance pull varies among rules and institutions, legitimacy is a matter of degree as well.³⁸ The more legitimate the rule is the more likely the chance of obedience. From this standpoint, legitimacy is a matter of degree as distinct from legality in that obedience or disobedience, while affecting legitimacy, does not affect legality as a rule or text is either law or not.³⁹ It follows that there can be legitimate rules that are not laws or laws that are not legitimate like laws that are not just.⁴⁰ This position appears to have arisen from Franck's focus on compliance/descriptive aspect of rules. Of course, mere degree of disobedience of legal rules does not deprive the rule of its binding quality and of course, there might be rules that are not laws. Central to the descriptive aspect of legitimacy is the proposition that international rules are observed despite the lack of coercive force.

That there might be laws that are not legitimate still admits significant reservation. What follows from the earlier discussion on the concept of legitimacy is that rules not satisfying certain criteria lack the quality of legal rules. Legitimacy not only functions to measure the extent to which a rule can pull compliance, it primarily challenges the validity and the existence of the rule. Compliance with a rule presupposes the existence of a rule with authoritative or

³⁶ Franck, Legitimacy, *supra* note 33, at 21.

³⁷ See *Ibid.* at 21-26. Focusing on this aspect of legitimacy, Franck states, "legitimacy exerts a pull to compliance which is powered by the quality of the rule or the rule-making institution and not by coercive authority. It exerts a claim to compliance in the voluntarist mode." *Ibid.* at 26. He also states that in the international system "many of its rules display authority *in themselves* which is to say that they are obeyed despite the fact that the system has no sovereign and no gendarmes." *Ibid.* at 27.

³⁸ *Ibid.* at 26 et seq.

³⁹ *Ibid.* at 37-38, 43-47. For instance, Franck States street-crossing rules are law but rules for keeping appointments are not. See *Ibid.* This notion of legality employed by Franck should be distinguished from the concept of legality, or the rule of law or legitimacy that legal rules must conform to certain conditions to be called rules.

⁴⁰ *Ibid.* at 37-38. ("Laws can be legitimate or illegitimate, just as they can be just or unjust.") *Ibid.* at 38.

binding force. Hence, legitimacy, in the first place, is a determinant of the validity of a rule showing its existence by providing criteria to measure the authority of the rule and the authority of its makers. Legitimacy would generate power to persuade States to comply with rules when rules initially pass the tests set by the criteria of legitimacy for their authority and validity.

Franck suggests that legitimacy affects the validity of the rule in that the lack of legitimacy and thus frequent disobedience may put an end to the rule.⁴¹ Nonetheless, in many instances it is not a matter of the termination of the rule but its non-formation which is at issue. Franck notes that compliance is one but not the only indicator of legitimacy.⁴² Observing that the existence of a rule depends on the extent to which those addressed by the rule believe that they are obliged by that rule, Franck provides four indicators of legitimacy as objective factors that influence that belief.⁴³ While noticeably Franck sticks to the descriptive weight of legitimacy attracting obedience through voluntary compliance, the elements of legitimacy that he enumerates do in fact indicate that their non-satisfaction is an indicator of the non-existence of the rule. Those elements affecting the legitimacy of a rule or a rule-making process include, in Franck's parlance: determinacy, symbolic validation, coherence, and adherence.⁴⁴ These constitute the criteria that "[i]n both mature domestic communities and in the emergent international community, ... determine and *legitimate* the processes and primary rules by which a community regulates itself."⁴⁵

That legitimacy also validates the international legal order by its persuasive role in inducing compliance of rules by States is a significant aspect but not the core focus of this study. This study presents the angle of legitimacy that relates to the justification of the authority and binding force of international rules by certain criteria of legitimacy. In addition to its weight in attracting

⁴¹ See *ibid.* at 44. The validation weight of legitimacy in international law is also mirrored in Franck's own statement that "[i]n the international—unlike the national—system, once a norm is deprived of legitimacy, it becomes a dead letter." *Ibid.* at 77.

⁴² *Ibid.* at 46. ("Were compliance the only standard, we would have what appears to be a tautology: legitimacy is determined by legitimacy (or compliance determines compliance.") *Ibid.*

⁴³ *Ibid.* at 44-46.

⁴⁴ *Ibid.* at 49.

⁴⁵ Franck, *Fairness*, *supra* note 35, at 30. [footnote omitted] They in turn promote procedural fairness in creation and application of specific laws. *Ibid.*

compliance, legitimacy in international law serves to test the validity of international rules and justification of their authoritative force. Even more vital than the rule of law in the national systems, where principles of legality may find positive formulations in constitutional and statutory texts, legitimacy in international law is essential to provide criteria for the identification and validation of the rules of international law. The pattern of legitimacy advocated here is one that combines process and substance. The right process is a key aspect of legitimacy for international rules but not its whole spectrum.

The rule of law in international law dictates that international rules are also bound by certain unwritten criteria of legitimacy of both process and substance. Legitimacy imposes a duty on the international law itself, in the absence of an international legislator, as well as on international adjudicators to demonstrate conformity with certain structural principles of legitimacy to test the validity of purported international rules. This is a structural requirement that maintains the integrity of the system to govern under the rule of law rather than the rule of power. As the justifying force of authority— not solely of the lawmaker but of the law itself— legitimacy is vital to the identification and validation of international rules, particularly in a horizontal pattern of rule formation exhibited by international rules where rules do not emerge from a central source. The elements of legitimacy in focus of this study are those that concern the determinacy of international rules and obligations in hard cases.

Legitimacy sets the tests for the authority and the validity of rules. This initial function of legitimacy for international rules matters greatly where enforcement, sanction, or some kind of pressure of any sort exists. For instance, where the responsibility of a State for violation of an international rule is at issue before an international court or arbitral tribunal, the tests of legitimacy to measure the validity of the rule are of paramount importance. In such a situation, legitimacy, by providing criteria for measuring the formation and application of the rule, determines whether at all or to what extent the affected State is under a commitment. Owing to the special arrangement of arbitration of disputes between foreign investors and States, some sort of enforcement of international rules has

become available. The challenge of legitimacy for the process and substance of rules is irrespective of technical avenues available for the annulment of arbitral tribunals' decisions in settlement of investment disputes.⁴⁶ Whatever those technical avenues and the flaws in their design, the challenges of legitimacy to the authority of international rules survive. In particular, the validation tests of legitimacy become vital where customary or treaty obligations of States prove indeterminate in disputes before such tribunals. For such disputes, what is far more essential than enforcement is the primary task of identification and validation of obligations or rules. The criteria of legitimacy, which will be identified shortly, are incorporated in the structure of international law framing the arbitration of investor-State dispute taking place within the realm of international law.

Legitimacy offering criteria to test the validity of international rules is of paramount importance in addressing international law on foreign investment including the concept of expropriation in investor-State arbitration in situations where indeterminacy surfaces. No doubt rules of international law in general, including those on foreign investment, embodied in treaties or custom are to put limitations on States' conduct right from the perspective of the rule of law. The other side of the issue is the adherence of those rules creating obligations to the rule of law. Indeterminacy of rules and obligations itself raises fundamental issues of the rule of law and legitimacy affecting the very authority of the rule to claim a binding prescription for the States. International law may not be taken to bring the rule of law for States in protection of foreign investment without subjecting the

⁴⁶ The question of validity and annulment of a decision in international arbitration is a separate issue. The annulment of arbitral decisions are governed by the technical rules of annulment provided under respective conventions. See Convention on Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 U.N.T.S. 38, entered into force 7 June 1959 [New York Convention] Article V; Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 U.N.T.S. 159, 4 I.L.M. 532, entered into force 14 October 1966 [ICSID Convention] Articles 53–55.

The invalidity of a rule by virtue of lack of legitimacy is not to denote that decisions relying on such rules should automatically and technically be regarded invalid. On the other hand, the challenge of legitimacy to the validity of international rules relied on by the arbitral tribunals remains in the face of the technical validity of the decisions under respective conventions. The annulment of arbitral decisions follows its own procedural rules. Yet, upholding a decision of an arbitral tribunal or even absence of such a claim for annulment does not affect the challenge of invalidity of the relied rules in view of legitimacy.

authority and validity of purported international rules and obligations in this field to the tests of legitimacy. If the indeterminacy of rules of expropriation and similar provisions in the field of foreign investment in international law is not disciplined by the framework criteria of legitimacy in the structure of international law, it will be much akin to calling for the rule of law without respecting the rule of law. With these premises in mind, we may now turn to the criteria of legitimacy that surround the formation and validity of international rules and obligations and their indeterminacy in interpretation. To this end, it is first appropriate to assess the determinacy of international rules itself as a requirement of legitimacy and overview indeterminacy of international rules on foreign investment.

B. Determinacy in Legitimacy of Structure

This section sketches the overview of determinacy for authoritative or binding force of rules of international law. It will also frame the question of expropriation rules in international law in view of their determinacy within the legitimacy framework testing their authority or binding force. The issue will be developed in the following sections and chapters of this study.

i. Indeterminacy, Conflict of Rules and Exceptions

Situated in the context of a system of law, a specific rule or obligation operates in relation to other rules of the system. That also raises an aspect of coherence that deals with the operation of legal rules in coherence with one another in the context of the whole legal system. From a contextual treatment of rules follows that rules of a system are interconnected and cannot operate regardless of one another. In international law, for instance, the Vienna Convention on the Law of Treaties in Article 26 stipulates that treaties are binding

on the State parties, thus codifies *pacta sunt servanda*.⁴⁷ Under a series of other articles, however, the application of Article 26 may yield to conflicting rules of the system that may surface. Thus, the Vienna Convention makes *pacta sunt servanda* coherent by adding articles that make the binding force of treaty obligations subject to the absence of nullity provisions under Article 52,⁴⁸ and peremptory norms under Article 53,⁴⁹ the impossibility of performance under Article 61,⁵⁰ and changed circumstances under Article 62 of the same convention.⁵¹ In this way, the application of an obligation under Article 26, with the *pacta sunt servanda* or good faith principle behind it, is subject to contextual coherence in relation to application of other rules of international law in the broader context as well as other provisions in the narrow context of the treaty. This contextual relation extends to general customary international law creating rules that may conflict in practice with other rules of the system. Such conflicts may raise the overriding character of certain peremptory or mandatory rules in a hierarchical manner or the operation of horizontally conflicting rules such as

⁴⁷ Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679. [Vienna Convention]. Article 26: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Ibid.

⁴⁸ Article 52 of the *Vienna Convention*: "A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations."

⁴⁹ Article 53 of the *Vienna Convention*: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Peremptory norms will be discussed in some detail when discussing the right content of rules.

⁵⁰ Article 61.1 of the *Vienna Convention*: "A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty."

⁵¹ Article 62 of the *Vienna Convention*: "1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless: (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty. 2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty: (a) if the treaty establishes a boundary; or (b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty. 3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty."

changed circumstances, force majeure, etc. becoming overriding where applicable.

Conflicting rules may exist in a variety of settings including the conflict between obligations of States within different treaties or under a treaty and customary law. The conflict of rules with specific content in horizontal or hierarchical relationships with one another, posing one aspect of determinacy and coherence reflected in legal interpretation and legal reasoning concerning existing rules, is not the focus of indeterminacy in this study. Such a conflict may increasingly occur in special regimes of treaties creating *lex specialis*.⁵² In particular, *lex specialis* poses the danger of fragmentation arising from individual regimes detached from the system of law.⁵³ On the other hand, conflict of rules may surface in the form of rules that block the application of another specific rule with specific content due to factual issues falling under the rules providing legal excuses. Such rules supplying legal excuses to other rules of specific content are partly expressed in the Vienna Convention mentioned above as part of the coherence in the application of existing rules. Article 62 of the Vienna Convention providing for changed circumstances, where established in factual analysis, would be a justified excuse overriding Article 26 of the Convention. Certain excuses also exist within the framework of general international law regarding State responsibility.⁵⁴ Necessity is one example. Thus, a State that has accorded national treatment in entry and establishment to a particular industry under an investment treaty may later bring a *defense* of necessity or changed circumstances. In fact international instruments often include provisions that raise obligations in relation to other rights and obligations. Treaties may also

⁵² See International Law Commission (ILC) Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission, UN Doc. A/CN.4/L.702. (July 18, 2006). The report points out the conflict of rules or obligations in relations between general and special law (*lex specialis*), past and subsequent law (*lex posterior*) and subordinate and hierarchical law (*lex superior*). Ibid.

⁵³ Ibid.

⁵⁴ See Articles 20 to 26 of Draft Articles on Responsibility of States for Internationally Wrongful Acts, Adopted by the International Law Commission at its Fifty-Third Session (2001), Report of the International Law Commission on the Work of its Fifty-Third Session, official Records of the General Assembly, Fifty-Sixth Session, Supplement No. 10 (A/56/10), Chap. IV.E.1) November 2001. [Draft Articles on State Responsibility]

incorporate a defense of necessity or other general or particular exceptions contemplated in the treaty. These are only defenses for non-performance of an existing international obligation. Defenses of necessity, changed circumstances, etc. are challenging aspects of adjudication including investment arbitration but not the problem of interpretation in view of legitimacy focused in here.

The conflict of rules in legal interpretation may harbor a kind of indeterminacy that the law or the rule itself is indeterminate to a particular situation. The issue of *lex specialis* and conflict of rules or the clash of rule and exception should not obscure what may actually be a question whether at all the scope of a rule *ab initio* covers a particular situation. Where the scope of a rule is indeterminate in its reach to a particular situation or instance, it is no longer a question of rule and exception to require establishment of an exception to defeat the rule. The process rather turns on the conflict of demands of justice in creating the rule and constructing its authoritative force in the first place for a particular situation in the area of indeterminacy.

ii. Determinacy and the Claim of Authority

Determinacy is a principle of legitimacy of international rules.⁵⁵ Determinacy in one sense requires clarity of the rule in communicating what is expected of the rule.⁵⁶ In order to be legitimate, a rule must communicate what acts or omissions it permits and what acts and omissions it forbids.⁵⁷ Determinacy of the law thus constitutes a principle of legality.⁵⁸ Clarity may still result in absurdity, unfairness, or incoherence rendering the rule an “idiot rule” as opposed to a “sophist rule”.⁵⁹ An absolute rule without exception becomes an idiot rule and

⁵⁵ Franck, Legitimacy, *supra* note 33, at 50-66.

⁵⁶ *Ibid.* Determinacy as a principle of legitimacy not only determines what is expected of the rule but also justifies compliance. *Ibid.* at 57.

⁵⁷ *Ibid.* at 57.

⁵⁸ Fuller, Morality, *supra* note 1, at 63-64. (“obscure and incoherent legislation can make legality unattainable by anyone, or at least unattainable without an unauthorized revision which itself impairs legality.”) *Ibid.* at 63. See also Finnis, *supra* note 5, at 270; Raz, *supra* note 5, at 214.

⁵⁹ See Franck, Legitimacy, *supra* note 33, at 77-83.

that with exceptions is a sophist rule.⁶⁰ *Rebus sic stantibus*, for example, represents a rule making another rule, i.e. *pacta sunt servanda* sophist.⁶¹

According to Franck, unclear rules may be clarified by the interpretive, clarifying processes and (mainly judicial) institutions as the process aspect of determinacy.⁶² However, the interpreting body and the process that they employ must exhibit legitimacy and be validated as well.⁶³ Thus, sophist rules create their own problem of legitimacy, namely the legitimacy of the interpretative clarifying process and institution.⁶⁴ In discussing this type of the so-called interpretive clarification and concomitant legitimacy of the so-called clarifying process and institutions, Franck points to the case-by-case factual assessment in a fact-finding process implicated in the application of the rule leading to the choice between conflicting rules.⁶⁵ The ambiguity as to the application of an existing rule in relation to other existing rules that the law has determined (whether in the form of an exception to a general rule or another rule of the system) often involving factual analysis for their choice as well as the associated clarifying interpretive processes and institutions represents one sort of indeterminacy. This should be distinguished from another type of interpretive process entailed by a more fundamental form of indeterminacy and concomitant requirements of legitimacy for the interpretive process and power of the interpretive institution in relation to the creation of rules.

Determinacy of the law or a rule beyond its clarity or precision, or communication of what is expected satisfying certainty and predictability concerns its authoritative or binding force for its covered instances and situations, posing the position of law in areas where the law or the rule is indeterminate for a situation or instance. This is what occurs often under the open texture or indeterminacy of the law or a rule.⁶⁶ Determinacy poses the creation of rules that

⁶⁰ See *ibid.*

⁶¹ *Ibid.* at 85.

⁶² *Ibid.* at 64-66, see also 80-81.

⁶³ *Ibid.* at 77-83.

⁶⁴ *Ibid.* at 64-66, 85.

⁶⁵ See *ibid.* at 82, 88.

⁶⁶ The theoretical underpinnings of indeterminacy will be developed in Chapter II.

may often be obscured or disguised in a fact-finding or rule-application process in legal interpretation and legal reasoning.

There is a far more fundamental challenge of legitimacy than validating a clarifying process and institution for a factual analysis or the choice between conflicting existing rules of law. Determinacy more basically poses the authority of the law as well as the validation of process and power of the interpretive institution within the framework of legitimacy in a given system for creating rules for particular situations that due to their moral and political underpinnings do not fit, and thereby deprive of authority, a general proposition of law. This is closely related to the question of the status of a rule applicable to a settled instance to apply as a general principle to an unsettled situation posing the determinacy of the rule right in terms of its authority for a particular situation raising conflicting justice demands of its own. An indeterminate international rule or obligation of customary or treaty origin confronts the challenges of legitimacy. At the heart of indeterminacy is that legitimacy forbids that the authority of a rule established for a settled scope be transferred as a matter of law to situations for which the rule is indeterminate. If a treaty or customary obligation is indeterminate in its scope to a particular situation, it is no more a question of the operation of a specific obligation but formation of a new one for a particular instance, raising justice demands and policy options, whose legal determination must be disciplined in a framework of legitimacy to obtain authority and validity. For an international rule to claim authority, its determinacy for a particular situation must adhere to the criteria of legitimacy that validates its origin and content. From this angle, determinacy in the framework of legitimacy concerns the authority or binding force of a rule in relation to an unsettled particular situation or instance as well as criteria for validation of the process of creating and the power of the creating body for an authoritative determination of the content of the rule. In this thesis, reference to determinacy/indeterminacy is this notion where interpretation involves moral and political evaluations and the legitimacy foundations of the law for validation of the process and substance.

It must be remembered that indeterminacy does not necessarily undermine legitimacy but is part of the character of a dynamic, evolutionary system of law that reclaims justice as circumstances unfold in a community be it that of human beings or of the States, which require legitimate processes for authoritative solutions. Moreover, legitimacy structures the determinacy of the law or the rule for particular indeterminate cases. This thesis offers a framework of legitimacy for the structure of determinacy. It will present two distinct structural criteria for the legitimacy of international rules to discipline the determinacy of rules of international law in foreign investment in particular the concept of expropriation. These criteria of legitimacy frame the determinacy of international rules implicating sources of general international law and in a broader range the lawmaking powers in areas of indeterminacy. Before identifying these criteria of legitimacy, it is appropriate to overview indeterminacy in the concept of expropriation in international law on foreign investment, which arises in both treaty and customary frameworks.

iii. Indeterminacy and the Concept of Expropriation: A Network of Practices and Provisions under a System of Law

All treaty or customary rules and obligations may at some point become indeterminate. Investment treaty provisions or customary rules of international law on foreign investment in their existing ambit of coverage operate in coherence with other conflicting treaty or customary obligations on human rights, environment and so forth or with other rules or exceptions in treaties or in custom. More foundationally, human rights, labor rights, economic development, environment, climate change, health, safety, and other matters to protect or flourish collective and individual human beings are relevant in a layer of coherence involving moral and political evaluations in instances posing indeterminacies in the obligations of States in foreign investment. In areas of indeterminacies in the obligations of States in foreign investment, public or human values and concerns are no longer implicated as a matter of conflict with an *existing* obligation of States but as a matter of demands of justice to be

considered in the *creation* of a rule for the particular indeterminate instance. Such an evaluative process of creation of the content of indeterminate obligations of States is subject to criteria of legitimacy that frame the determinacy and authority of rules and obligations in foreign investment. The framework of legitimacy is above all necessary in hard cases of foreign investment including hard indeterminacies that have surfaced surrounding the concept of expropriation.

a) International Law on Expropriation in an Interface of Contract, Treaty, Custom and Principle

The annals of State practice record a range of controversies regarding the juridical relationship of the conduct of States and the property of investors in international law whether such a relation is anchored in a treaty, contract, custom, or principle. The controversies have not so much targeted the authority of international law itself but the authority of a purported rule because of its indeterminacy. Indeterminacy of law lies at the root of the normative conflict in the concept of expropriation of the property of foreign corporations.

In customary international law, on the one hand, the international minimum standard of treatment has suffered greatly for its indeterminate status as a legal rule.⁶⁷ On the other hand, the extent of compensation for expropriated property and the conditions of legality for it have been the subject of indeterminacy. The indeterminacy has become in some ways compounded in the wake of investment treaties. Thus, what constitutes expropriation in the first place has also become the subject of heated controversy.

In international instruments including treaties on foreign investment, a variety of language has aimed to express States' obligation for expropriation and compensation. These instruments range from draft codes and articles in instruments of some institutions or in failed multilateral attempts to bilateral and regional treaty arrangements. Currently bilateral investment treaties (BITs) constitute the dominant treaty pattern for foreign investment. BITs succeeded treaties of friendship, commerce and navigation (FCNs) in relation to investment

⁶⁷ See Chapter IV, Section A (i).

and coexist with a rising pattern of treaties that addresses foreign investment alongside trade.

On the multilateral level, provisions of foreign investment—as short as those in the draft Havana Charter or as extensive as in the draft Multilateral Agreement on Investment (MAI) under the auspices of the Organization of Economic Cooperation and Development (OECD)—failed to materialize.⁶⁸ A number of draft articles or guidelines also address expropriation and compensation. These notably include the Harvard Draft,⁶⁹ the United States Restatement Third,⁷⁰ and the World Bank Guidelines.⁷¹ Most of these instruments address expropriation and compensation in general terms with variations in language. BITs commonly refer to expropriation and nationalization without defining or distinguishing them as well as reference to ‘dispossession,’ ‘deprivation,’ ‘tantamount or equivalent to expropriation,’ etc.⁷² As to the provisions on compensation, many BITs mention the terms prompt, adequate, and

⁶⁸ Final Act of the United Nations Conference on Trade and Employment, Havana Charter for an International Trade Organization, Havana, Cuba, Mar. 24, 1948, U.N. Doc. ICITO/1/4 (1948) [Havana Charter]; OECD Draft Convention on the Protection of Foreign Property, 12 October 1967, (1968) 7 ILM 117; The OECD Draft Multilateral Agreement on Investment, (1998), available at <http://www.oecd.org/daf/mai/pdf/ng/ng9817e.pdf>;

⁶⁹ Draft Convention on the International Responsibility of States for Injuries to Aliens (1961) drafted by Louis B. Sohn & Richard R. Baxter, (1961) 55 AJIL 545, reprinted in FV García Amador, Louis B. Sohn, and Richard R. Baxter, *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (Dobbs Ferry, New York: Oceana Publications Inc., 1974). [Harvard Draft]

⁷⁰ Restatement of the Law Third, the Foreign Relations of the United States,” American Law Institute, Volume 1, 1987, Section 712. [Restatement Third]

⁷¹ The World Bank Guidelines on Treatment of Foreign Direct Investment, Article IV, (1992) 31 ILM 1379, at 1382.

⁷² See United Nations Conference on Trade and Development [UNCTAD], *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking*, at 44, U.N. Doc. UNCTAD/ITE/IIT/2006/5 (2007). [UNCTAD, BITs 95-06] Many particularly recent investment treaties refer to ‘direct or indirect measures having effect equivalent or tantamount to expropriation.’ See NAFTA, Article 1110 (1): “No Party shall directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment (‘expropriation’)” Ibid. Certain instruments do not even mention expropriation or nationalization but rather refer to the deprivation of property. See OECD Draft Convention on the Protection of Foreign Property (1967) Article 3, referring to “measures depriving, directly or indirectly, of his property a national of another Party....” Ibid. The definition of investment within investment treaties may also widen or narrow the covered investment.

effective or refer to market value, fair market value, or genuine value of the asset expropriated.⁷³

These semantic provisions, while having significant weight when a specific commitment about a specific situation is addressed, do not necessarily preclude indeterminacy that may arise with regard to a treaty obligation in the course of its application, particularly when a hard indeterminacy arises. Expropriation itself is only one term among others. Nationalization, requisition, confiscation are other familiar terms having their own connotations. There are also categorizations such as direct, indirect, creeping, constructive, regulatory, tantamount or equivalent to expropriation in relation to the State conduct or full, partial, adequate, just, equitable, or appropriate in relation to the amount of compensation. No matter the phraseology or categorization, where the essence of the rule or obligation is indeterminate in its scope to a particular situation, the authority of the rule itself is subject to the tests of legitimacy. In a framework of legitimacy in areas of indeterminacy, beyond and beneath semantics, the validation criteria constructing the structure and content of rules come into focus.

Due to open texture, rules of international law on expropriation may pose a broad range of issues. A tax measure, an act affecting intellectual property, a forced sale, removal of control or management over property, a breach of contract or its terms, a court decision resulting in the deprivation of property, and countless other acts may raise interpretation.⁷⁴ Thus, questions arise whether such acts constitute expropriation or whether the remedy is restitution or specific performance, or damages or compensation, or whether compensation includes future profits, or simple or compound interest and at what rate, from what date, and so forth. This study does not discuss all concrete settings of indeterminacy of foreign investment rules or all indeterminacy settings of the expropriation rules. It will rather introduce a framework of legitimacy for the structure of determinacy of the foreign investment rules and applies this framework to hard instances of

⁷³ See UNCTAD, BITs 95-06, *supra* note 72, at 48.

⁷⁴ Some of these issues may also receive special regimes through separate treaties such as international tax treaties or agreements on intellectual property. A court decision to qualify expropriation often raises the denial of justice rule and exhaustion of local remedies in customary international law.

indeterminacy arisen in the legal discourse of the concept of expropriation in international law on investment.

This thesis will address two situations of hard indeterminacies in the concept of expropriation that has surfaced in the evolution of this juridical institution in international law on foreign investment. The first situation concerns economic development reform in natural resources where hard indeterminacy has emerged as to whether compensation for nationalization resulting in cancellation of economic development agreements includes future profits that the investor could have earned from the revenue of the sales of the resource for the term of the agreement. This indeterminacy surfaced in customary international law when States unilaterally terminated economic development agreements in natural resources, primarily in the oil industry, in implementing a measure of nationalization. Does international law prescribe future profits for cancellation of an economic development agreement with a foreign investor in such a situation? The second situation concerns a more recent case of hard indeterminacy whether bona fide regulation to protect public health, safety, environment, or other social and economic objectives for the public and human wellbeing constitutes expropriation compensable in international law. This indeterminacy has arisen following investment treaty arbitrations. Does international law characterize such conduct of States in their constitutional functions affecting the property of foreign corporations as a compensable act of expropriation?

The authority or binding force of the rule or obligation in such hard indeterminacies depends on adherence to the criteria of legitimacy. These situations of hard indeterminacies do not merely involve legal questions but rather moral and political underpinnings whose engagement must be legitimated according to the criteria of legitimacy in international law. These hard instances of indeterminacy of States' obligations emanating from their contractual, conventional, and customary relations are inextricably bound to general international law in the process of the interpretation and identification of the content of their obligations in these particular hard situations. This figures in not simply what the sources of general international law are but the legitimacy

framework providing the structure of determinacy by identifying and disciplining the sources and the criteria of validity of the system of international law for this field. Before dealing with the legitimacy criteria of structure, it is also appropriate to discuss the question of general international law for the interpretation of treaty obligations.

b) Interpretation in Light of General International Law

The interpretation of treaties including investment treaties is subject to the Vienna Convention on the Law of Treaties. In a wider context, treaties belong and are subject to the whole system of general international law as the governing legal order. Reference to the governing law of the dispute is the stepping-stone of any legal interpretation.

The Vienna Convention embodies the provisions for treaty interpretation under Articles 31 to 33. Article 31 provides for the “general rule of interpretation.”⁷⁵ Article 32 provides for “supplementary means of interpretation” including reference to the preparatory work and circumstances at the time of the treaty conclusion to support the interpretation under Article 31 or determine the meaning.⁷⁶ Article 33 provides for situations of multiple authentic texts.⁷⁷

⁷⁵ Article 31: “1. 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. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended.” Ibid.

⁷⁶ Article 32: “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 (b) leads to a result which is manifestly absurd or unreasonable.”

⁷⁷ Article 33: “1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail. 2. A version of the treaty in a language other than one

Paragraph 1 of Article 31 (1) refers to ordinary meaning, context, and purpose of the terms of treaty. Paragraph 2 mentions that the context of the treaty extends beyond its text and provisions to other agreements and instruments relating to the treaty. Paragraph 3 of Article 31 provides for consideration of subsequent agreement or practice of the parties or consideration of “any relevant rules of international law applicable in the relations between the parties.” Paragraph 4 also takes into account special meaning given to a term by the parties.

Treaty interpretation is one of the most contentious parts of the law of the treaties that generate differences of opinions among international jurists and tribunals.⁷⁸ Within the framework of the Vienna Convention, ordinary meaning and the context of the treaty are deemed primary elements of treaty interpretation.⁷⁹ On the other hand, the ordinary meaning within the context of the treaty only begs the question when the provision is indeterminate to a particular situation, thus incapable of attaining a solution *per se*. The ordinary meaning within the context of the treaty is itself often part of the question of the indeterminacy it seeks to answer.

Object and purpose are in no better position to illuminate the identification of the content of State obligations for expropriation within investment treaties. Pro-investor interpretation often relies heavily on the purpose of investment promotion or protection. Nevertheless, the purpose of a treaty as with other elements of interpretation is not decisive. Even more, the purpose of the treaty itself represents an often controversial element because oftentimes a purpose comes in competition or conflict with other purposes.⁸⁰ Within the rules of interpretation enunciated in the Vienna Convention, object or purpose is considered secondary in view of the primary character of ordinary meaning and

of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree. 3. The terms of the treaty are presumed to have the same meaning in each authentic text. 4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.”

⁷⁸ Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester: Manchester University Press, 1984) at 114, 154.

⁷⁹ *Ibid.* at 130.

⁸⁰ See Chapter II.

context.⁸¹ Object or purpose owes this weaker status to the fact that “most treaties have no single, undiluted object and purpose but a variety of differing and possibly conflicting objects and purposes.”⁸² In this light, resort to the sole purpose of investment protection and promotion in interpreting investment treaties is not only unhelpful but unfounded as well. Moreover, the guidelines of object and purpose under Article 31 suit more appropriately the situations where intentions of the parties to the treaties representing the interests of their nations collide. Interpretation of investment treaties in investor-State arbitration involves the interests of corporations as the beneficiaries of the treaties. The Vienna Convention and customary rules of interpretation in international law afford no rule to indicate where State parties to an investment treaty concur in understanding a vague term of their treaty in a particular way, their common intention can be set aside in the name of purpose or object of the treaty in favor of the beneficiary investors. Disregarding the intention of the parties is a further risk associated with object and purpose of investment treaties.⁸³

Emphasis on investment protection would unduly obscure the whole orientation of investment treaties that are to ultimately benefit nations. Being an instrument between nations, no treaty is devoid of public purposes. This makes the purpose of investment treaties not solely the micro interests of corporations but the macro interests of nations. Investment treaty obligations are not to be construed in view of a purpose that transforms the treaty either into a means to impede States’ legitimate actions for regulation or development or into a reinsurance instrument to convert States’ legitimate rights to regulation or development to a source of revenue for the loss of profits of corporations through compensation.

Just as any other consensual agreement, investment treaties belong and are subject to the broader context of general international law. A sort of connection

⁸¹ Sinclair, *supra* note 78, at 130.

⁸² *Ibid.* at 130.

⁸³ (“There is also the risk that the placing of undue emphasis on the ‘object and purpose’ of a treaty will encourage teleological methods of interpretation [which], in some of its more extreme forms, will even deny the relevance of the intentions of the parties.”) Sinclair, *supra* note 78, at 131.

between treaties and general international law is envisaged within the Vienna Convention itself under paragraph 3 (c) of Article 31 that provides for taking into consideration of “relevant rules of international law”. Paragraph 3 (c) of Article 31 of the Vienna Convention “may be taken to express what may be called the principle of ‘systematic integration’” in the sense that “international obligations are interpreted by reference to their normative environment (‘system’).”⁸⁴ This paragraph means, “[e]very treaty provision must be read not only in its own context, but in the wider context of general international law, whether conventional or customary.”⁸⁵ The provisions of the Vienna Convention under Article 31 to 33 on treaty interpretation only “constitute a general expression of the principles of customary international law relating to treaty interpretation.”⁸⁶ These general guidelines for interpretation, for instance, do not exhaust the adoption of techniques such as *ejusdem generis* rule in legal interpretation.⁸⁷

As far as the connection of specific treaty obligations among each other in particular international law and with general international law is concerned, the ILC report on fragmentation highlights that while each special regime has its own objectives, it is not in isolation.⁸⁸ The ILC study confirms that on the one hand treaties are not self-contained and depend on general international law, and on the other hand, their connection with general international law is not limited to Article 31 (3) (c) but a larger process of interpretation including reference to the applicable law and other sources including customs, principles and legal reasoning.⁸⁹ In this respect, general international law constitutes the normative context in the operation of treaty, including gap-filling function of customary international law and general principles of law.⁹⁰ The function of custom or general principles of law remains to be explored in view of the legitimacy within the structure of international law.

⁸⁴ ILC Report on Fragmentation, *supra* note 52, at 208.

⁸⁵ Sinclair, *supra* note 78, at 139.

⁸⁶ *Ibid.* at 153.

⁸⁷ *Ibid.*

⁸⁸ See ILC Report on Fragmentation, *supra* note 52, at 14, 64, 82, 100-101, 233-234.

⁸⁹ *Ibid.* 64, 82, 100-101, 233-234.

⁹⁰ *Ibid.* at 101.

One important issue regarding reference to general international law is the time frame for the assessment of rules of international law under Article 31 (3) (c) of the Vienna Convention whether reference should be made to the rules of international law existed at the time of treaty making or existing at the time of treaty application. The language and purpose of the treaty may indicate evolutionary status of certain terms of the treaty indicating parties' intention to subject certain obligations to the evolution of the general international law governing their relationship.⁹¹ Such an evolved condition of the rules of international law existing at the time of interpretation may be inferred from the usage of terms that are evolutionary in character such as a generic term like expropriation, or terms that by reference to their purpose point to commitment to a future development, or when obligations are described in very general terms.⁹² Accordingly, the language within context and purpose of the treaty like subsequent practice where displaying evolutionary status import the evolution of the general law into the treaty as well not bound by the general international law as stood or frozen at the time of the conclusion of the treaty.

The terms expropriation and compensation both in investment treaties and customary international law have an evolutionary status whereby their meaning are to be assessed in view of the state of the law governing respective treaty obligations at the time of their interpretation. That the general international law as evolved at the time of interpretation applies to such evolutionary terms, however, does not identify the content of the general law itself. The issue still reverts to the content of the law at the time of interpretation leaving the question open how such an evolution, which has normative consequence for the treaty makers, occurs in law and what the content of the evolved law is with regard to an instance that is indeterminate.

The legal rules and obligations formed to protect foreign investment must be interpreted on sound legal grounds that could legitimize the process of

⁹¹ Ibid. at 240-243. The ILC report raises this issue as part of the question of the "inter-temporality and general developments in international law." in that while treaty makers have in mind the normative environment at the time of entry into force of their obligations, the treaty language may within its context indicate that future developments be taken into account. Ibid.

⁹² Ibid. at 242-243.

interpretation and the content of rules and obligations through the validation criteria provided by legitimacy. Interpretation by reference to the ordinary meaning, context or purpose of the treaty often fails to connect the treaty obligations not merely to the general sources of international law but the structure within which those sources function. The normative context of a rule in its foundational layer consists in the structure that frames the identification and validation of the sources and lawmaking powers in the creation of the content of the law. As far as interpretation or identification of international rules or obligations on expropriation originating in contracts, treaties or customs displays or obscures hard indeterminacies in the content of the rule, the structural requirements of legitimacy as part of general international law are a must to exhaust. In hard indeterminacies, there exist a cluster of relevant purposes, values and demands of justice whose authoritative reconciliation or balancing, and ultimately the construction of authoritative force for the undetermined area of the rule, is subject to the legitimacy criteria validating the process and power in creating rules and their substance. Investment treaties and their interpretation are beyond their own provisions, contexts and purposes subject to the broader context of the legal order to which they belong including the structure within which rules obtain authority from a legitimate origin with a legitimate substance. What identifies and validates sources of obligations in international law as well as the utility of principles, academic and adjudicatory opinions in international law is a question of legitimacy. The position of general international law and the normative relation and function of its sources—customary international law and general principles of law—in the system of international law and interpretation of its rules is a question that also invites an analysis of the criteria of legitimacy. It remains to be seen what components of general international law, custom or principle, may in a legitimate manner generate the substance of rules of expropriation in foreign investment in the interpretation of the content of the rules or obligations governing the parties. We may now turn to identifying the structural criteria of legitimacy framing the determinacy of international rules and obligations.

C. Authority and Legitimacy of International Rules: Structural Criteria of Legitimacy

i. Relevance of Authoritative International Rules

The existence of general obligations in international law with authoritative or binding force on all States presupposes the existence of general rules. If the question of expropriation of foreign investors' property is supposed to be regulated by general international law, then it is necessary to show that there exist general rules in international law that address this issue. General obligations may not be imposed on States without having general rules.

The generality of law is one of the basic conditions of legality in national legal systems. Fuller points out that "the basic characteristic of law lies in its *generality*. Law lays down *general* rules."⁹³ By this Fuller means for a system subjecting human conduct to the governance of rules, there must be rules.⁹⁴ Being a basic characteristic of law, this feature of law applies to international law. It follows that in order to guide and control the behavior of States, international law must provide general rules to meet this basic characteristic of law. Otherwise, international law disintegrates into mere individual arrangements between States regulating their conduct on *ad hoc* and borderline basis. Certainly, such arrangements can always coexist with general rules in international law the way contracts do with legal rules at the domestic level. As seen, however, particular obligations arising from treaty arrangements are not dissociated from general rules.

It is obvious that for addressing foreign investment in international law, the basic premise is regarding international law as law, i.e. it can produce general rules. The question before us is not whether international law is law and can potentially lay down general rules but what conditions international law has to

⁹³ Fuller, Interaction, *supra* note 16, at 23.

⁹⁴ Fuller, Morality, *supra* note 1, at 46-49.

meet in order to produce legitimate rules as legally valid rules.⁹⁵ Hence, the basic premise is that the lack of a central lawmaker and judicial and executive organs with organized sanctions comparable to those of domestic legal systems does not prejudice formation of international rules and their application provided that they meet the requirements of legitimacy. Some observations support this assumption.

More than a decade ago, Thomas Franck announced the transit of international law to its “post-ontological era” where international lawyers no longer debate the existence of international law but engage in assessing its content.⁹⁶ If one were to follow Austin’s version of legal positivism that defined law as orders decreed by a sovereign and habitually obeyed by subjects through the threat of sanctions, international law would be mythical.⁹⁷ Nonetheless, despite continued importance in the positivist account of law, a system of sanction does not constitute the core pillar of law without which the notion of law would collapse. Thus, as Hart opines “there seems no good reason for limiting the normative idea of obligation to rules supported by organized sanction”⁹⁸

What Hart introduced was softening positivism through the removal of the command and sanction from the center of law and its replacement with the union of primary and secondary rules.⁹⁹ Hart’s union of primary rules and secondary rules does not repudiate international law. Hart considers legislative, judicial and executive organs as necessary for the existence of a developed legal system and does not reject the existence of law in their absence.¹⁰⁰ Without these institutions, only a *developed* legal system is at stake in Hart’s concept. Accordingly, their

⁹⁵ It is notable that political scientists of international relations known as ‘realists’ reject the legal character of international law. Realists believe that international law runs on power and self-interest of States rather than on law and obligation. For a discussion of realist views see Oona A. Hathaway and Ariel N. Lavinbuk, Book Rev. “Rationalism and Revisionism in International Law” (2006) 119 Harv. L. Rev. 1404.

This approach to international law also extends to normative weight of customary international law from a rational choice point of view in that customary international law has no or little effect on the behavior of States because States act out of their interest. For such a criticism see generally Jack L. Goldsmith and Eric A. Posner, “Understanding the Resemblance between Modern and Traditional Customary International Law” (2000) 40 Va. J. Int’l L. 639.

⁹⁶ Franck, Fairness, *supra* note 35, at 6.

⁹⁷ See Austin, *supra* note 26.

⁹⁸ Hart, Concept, *supra* note 5, at 218.

⁹⁹ See *ibid.* at 1-123. For Hart’s account of the union of primary and secondary rules, see *supra* notes 22-24 and accompanying text.

¹⁰⁰ *Ibid.* at 213-214.

absence does not foreclose the existence of the law and valid rules in other legal structures. Although Hart regarded international law as a simple form of social structure, he explicitly viewed that international law may produce legal rules binding on States.¹⁰¹ Moreover, Hart's rejection of secondary rules in international law does not preclude the existence of a rule of recognition for identifying and validating international rules where it can be discovered.¹⁰²

International law may lose its ground if narrowed to a vision of law anchored in sanctions solely. Yet, the existence of a rule is one thing and its enforcement is another though important. Once the system is capable of diffusion of general rules in a way that the members of the community largely follow a pattern of conduct accepted in a sense of obligation then instances of violation and incapability of the system to address it should not be regarded as the breakdown of the system, though it is a shortcoming. It is certainly desirable and necessary as well to have an international legal system that can promptly and properly address flagrant incidents, such as genocide, in the international community with meaningful sanctions and enforcement organs not paralyzed by power-based veto of its members. Does this absence mean the rule prohibiting genocide is devoid of binding force? Does this lack detract from the normative value of the rule that demands the prohibition of genocide though it has difficulty in forcefully commanding it? The defects of the system for the enforcement and application of its rules do not derogate from the validity of the rules if legitimately formed.

International law cannot be deemed incapable of imposing primary obligations or be called law.¹⁰³ The appreciation that international law exists despite the lack of a vertical lawmaker confirms that a vertical structure of lawmaking is not a necessary condition for the existence of law. By contrast, law may emerge horizontally. The recognition of a horizontal lawmaking is hardly discreet in Hart's vision of simple form of social structure rooted in customary

¹⁰¹ Ibid. at 218-226. Hart regards international law as a set of rules (very similar to national law in content though not form) rather than a *system* without ruling out the transition of international law to a developed structure like that of a domestic law in the future. See *ibid.* at 234-237.

¹⁰² See below, Section ii (b).

¹⁰³ Ibid. at 220.

law in primitive societies that he extended to international law at the time.¹⁰⁴ Indeed a horizontal structure of lawmaking is a very familiar phenomenon long-lived in the international community and not always or universally seen as a primitive or simple form of structure. Against the primitive background that some scholars once sketched for international law, international customary law has received such a laudable recognition in legal theory in an attempt to justify that national formal laws are also founded on horizontal lawmaking processes in the society of individuals. Lon Fuller recognizes with praise that much of the law among States is customary law.¹⁰⁵

Fuller illustrates international law to justify his interactional theory. According to this theory, law arises from interactional processes among the members of the society.¹⁰⁶ By the interactional theory, Fuller challenges the approach that law serves as an instrument of social control and comes into existence by an exercise of authority.¹⁰⁷ Instead, Fuller posits that law develops from human interaction, normally called customary law and this human interaction in his view consists of reciprocal stable expectations (the practices and conduct mutually expected).¹⁰⁸ This reflects a substantive part of interactional theory as well.¹⁰⁹ Seeking to highlight the role of customary along with enacted

¹⁰⁴ Hart had found international law similar to a primitive society. See *ibid.* at 213-23. Brierly also tended to attach some primitive character to international law, in particular, because he regarded the “spiritual cohesion” of international law as weak, which weakness in his view “will inevitably be reflected in a weak and primitive system of law.” J. L. Brierly, *The Law of Nations: An Introduction to The International Law of Peace*, 6th ed. (Oxford: Oxford University Press) at 73. The temptation to equate international law with a primitive society has not lost its fashion. For example, Bederman states that “[i]nternational law remains a primitive legal system.” David J. Bederman, *The Spirit of International Law* (London: University of Georgia Press, 2002) at 26.

¹⁰⁵ Fuller, Interaction, *supra* note 16 at 2. International scholars have already utilized Fuller’s interactional theory in explaining international law and international relations theory of constructivism. See Jutta Brunnée and Stephen J. Toope, “International Law and Constructivism: Elements of an Interactional Theory of International Law” (2000) 39 *Colum. J. Transnat’l L.* 19.

¹⁰⁶ See generally, Fuller, Interaction, *supra* note 16. Law, in this model, both arises from human interaction and serves to order and facilitate human interaction. *Ibid.* at 1-26.

¹⁰⁷ *Ibid.* at 20. Fuller, however, clarifies that “I trust it is clear that I am not advancing here the thesis that law, in its actual formulation and administration, always serves exclusively the purpose of ordering and facilitating human interaction.” *Ibid.* at 22.

¹⁰⁸ *Ibid.* at 3 *et seq.*

¹⁰⁹ For the structural aspect of interactional theory that gives rise to emergence of principles of legality or legitimacy, see *supra* footnotes 14-18 and accompanying text.

law, in particular, Fuller finds customary law, unlike enacted law, effective for ordering complex relations.¹¹⁰

The social context plays an important role in the realm of international law. In view of cultural variety and power variation in the community of States, not only is international law not suffering from the lack of central and organized machinery for law making but also enacted law could hardly be effective for the complex and dynamic relations of States. Thus, to address the complex and dynamic relations of States in a general pattern of law in contrast to particular treaty arrangements, customary international law is appropriate. In reality, the existence of a world government exercising supreme authority would defy international law because a world government would function as “the antithesis of international law for a world of many separate and independent political entities.”¹¹¹ The fabric of international law is inherently incongruous to such a vertical pattern of law.

It must be noted that while this study regards customary international law as capable of producing authoritative rules, for the formation of the substance and content of customary rules it does not adopt Fuller’s view of formation of the substance of custom through reciprocal expectations. The significance for customary international law and international law in general is that dimension of Fuller’s theory that appreciates the law with authoritative and binding force without being rooted in an authority. It reinforces the position of customary international law that it can horizontally generate general rules in a dynamic and complex structure not merely a simple and primitive one. The generality of international rules also imports the notion of the authority of the law or the rule itself formed in a horizontal way rather than the authority of the lawmaker in a vertical one. The authority of international rules may still be explained in a more theoretically fundamental way.

¹¹⁰ Fuller, *Interaction*, supra note 16, at 36. According to Fuller, customary law can fit all social contexts because contractual law (law created by the parties not enacted law about contracts) and the enacted law cannot regulate certain complex situations arising from intimate or hostile relations. *Ibid.* at 27-33.

¹¹¹ Bederman, supra note 104, at 25.

The authority of rules is distinct from the authority of rulers. Justification for authority is by reference to the common good.¹¹² Bound by the common good, authority mends the limits of unanimity as the other model for solving coordination problems.¹¹³ In a political community, unanimity is not practically possible.¹¹⁴ If unanimity is required, most coordination problems are left without solution.¹¹⁵ This will repudiate any claim for requiring the unanimous consent of all States for the formation of authoritative general rules of international law and justifies the generality of consent in customary international law rather than specific consent. States are so diverse in their cultural, political, economic and social fibers that it is almost impossible to reach unanimity about a solution to a particular coordination problem. Indeed the generality of international law is grounded in the authoritative rules it provides. Therefore, existing rules of general international law have authoritative force binding all States irrespective of their individual consent. An international rule legitimately formed displays authority for its determinate scope. A duly established customary rule has authority.¹¹⁶ Authority is not incompatible with horizontal structure of customary international rules. This authoritative generality of international law explains the binding force of existing international rules for new or emerging States. It also renders the persistent objection theory of general customary international law theoretically fallacious not to mention its vices in practice for generating double standards.¹¹⁷

¹¹² Finnis, *supra* note 5, at 231, et seq.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.* at 233.

¹¹⁵ *Ibid.*

¹¹⁶ See *ibid.* at 238-245. Finnis illustrates customary international law to show that an authoritative rule may arise without being made by anybody with authority. *Ibid.* at 238-245. See also Chapter III, Section B.

¹¹⁷ The general quality of international law would be at stake if for instance a customary law of a general character, in contrast with a particular or regional custom, were to lose force for one State at the will and interest of that State. It would give a wrong message to States that by objecting to a rule every State can rule on its own. One may argue that the rule does not exist for a particular situation. That is another matter. The persistent objection theory perpetuates recourse to the specific consent of States for the formation of a customary rule on power dynamics. Gone in the persistent or subsequent objection formulation is also the hallowed maxim that all subjects are equal before the law. If a custom is asserted to be law, it must at least in theory apply to all States weak or mighty, big or small. If certain States in practice may be exempt from legitimately established rules of the system by their mere objection to the rule out of their self-interest then this system has much anchorage in power. In such a system, as a theoretical problem, rules would lose the generality quality because there can be as many States as the number of States that may object

What is objectionable is the command theory that links the creation of law exclusively to the authority of a sovereign not the authority of the rule itself. To think otherwise, there would be no justification to attempt to stop a government from genocide, to hold a government accountable for its action, or to seek remedies for violation under international law. Asserting that governments have responsibility to reduce gas emissions is no less than asserting that an international rule exists that has the authority to demand the reduction of gas emissions. Whether such rules have formed is another matter but once their existence is established in a determinate way their authority accords binding force to them.

International law is not reduced to a voluntary system of unanimity to the degree to entirely depend on specific consent of individual States for creating binding rules, which is incongruous to the requirement of generality lending it the character of 'law'. At the same time, authority and consent are not rivals but may interact. The general consent of States in a consensual basis for international rules plays a vital role in legitimizing the authority of rules constructed in general international law.¹¹⁸ That international law can produce general, authoritative rules for the community of States does not obviate but necessitates legitimacy for justifying and validating the authoritative force of international rules. As the justifying force of authority, legitimacy appraises the claim of authoritative or binding force of an international rule. We may now turn to identifying those validating criteria of legitimacy in international law that frame the determinacy of primary rules of obligations.

to a rule once it becomes a matter of their interest. As a matter of practice, power would reign. The view allows powerful States' leeway to evade responsibility that would arise from the practice of other States. It wrongly presupposes that all States have the means to know and protest the formation of a customary international rule. The formulation only benefits the powerful States because only those States have such means. The doctrine wrongly promotes that certain States may, thank to their power and resources, create and impose rules on others and, at the same time, reject and evade rules created by others. This cannot reflect a structure that the rule of law constructs but a scheme that the rule of power designs.

¹¹⁸ See below, Section (ii) (b).

ii. The Right Source and Content of the Law: Consent and Common good in Recognition and Coherence of International Rules

The source of law matters significantly in any system of law. It is important because “the concept of “ a ‘source’ of a rule of law ... enables rules of law to be identified and distinguished from other rules (in particular from rules *de lege ferenda*) and concerns the way in which the legal force of new rules of conduct is established and in which the existing rules are changed.”¹¹⁹ It has perhaps more significance in international law because of the lack of a central law-making machinery and thereby the need for a legitimate source to validate and delineate formal sources such as custom or principles to identify valid primary international rules. Primary rules of international law raise their relation with secondary rules.

Franck observed the existence of secondary rules in international law.¹²⁰ The legitimacy of international primary rules depends on compliance with secondary rules of legitimacy.¹²¹ However, Franck focused on the secondary rules that account for the binding force of treaties and customs and thereby adherence of States to a binding treaty or custom. The utility that Franck attaches to rule adherence is explaining the binding force of the Vienna Convention and customary rules as a secondary rule of international law arising from membership in the community creating the obligation to obey the law.¹²² To explain the binding force of the consent of States itself, Franck employs a status-based secondary rule—ultimate rule of recognition—of international law to justify the binding force of obligations.¹²³ This “rulehierarchy” provides the source that confers binding force on treaties and customs.¹²⁴ In Franck’s opinion, the ultimate rule of recognition conferring binding force on treaties and customs arises from

¹¹⁹ Robert Jennings and Arthur Watts, eds. *Oppenheim’s International Law*, 9th ed. (Harlow: Longman, 1992) at 23.

¹²⁰ See Franck, *Legitimacy*, supra note 33, at 202-205; Franck, *Fairness*, supra note 35, at 30.

¹²¹ *Ibid.*

¹²² See Franck, *Legitimacy*, supra note 33, at 183-195.

¹²³ *Ibid.*

¹²⁴ *Ibid.*

the membership status of States in the international community.¹²⁵ According to Franck, the ultimate rule of recognition of international law provides that the enjoyment of the right to statehood conferred by the community is in consideration of compliance with international obligations.¹²⁶ What concerns this version of adherence of States is a secondary rule recognizing treaties and customs as binding sources of international law, raising the obligation to obey the law.

The issue is different where the formation of authoritative or binding force of treaty or customary obligations is itself in question raising adherence to legitimacy criteria of structure. As discussed, in a reciprocal manner rooted in the common good of the community, adherence to rules is geared to the adherence of rules to the legitimacy criteria of the system as to the process and content of the rules. Adherence of States to international rules requires adherence of primary rules to the higher rules that shape the legitimacy framework of rules. These rules about rules test the validity of primary rules by means of criteria for identification and validation of international rules in the process of their formation and the substance of their content as well as validation of the lawmaker of the system. Whether a treaty or customary obligation, it must adhere to legitimacy criteria to obtain authority or binding force. This is not to indicate that the secondary rules of international law or criteria of legitimacy functioning as such are finite or limited to those presented here. Nevertheless, the rule of recognition and coherence for the common good will be advanced in this thesis as the structural criteria of legitimacy, secondary rules, in international law that govern the process and content of primary rules of international law structuring their authoritative determinacy for particular situations.

¹²⁵ Ibid. at 191-192, 202-203.

¹²⁶ Ibid.

a) The Rule of Recognition

The first step in identification and validation of international rules is evaluating the right source of rules as a principle of legitimacy in terms of the rule of recognition of the system. The question of the right source as a condition of legitimacy and the validity of international rules basically concerns the rule of recognition in international law. The first legitimacy criterion advanced here for the process of formation of primary rules or their change is the rule of recognition as a secondary structural rule identifying and validating the origin and the sources of primary international rules. This structural rule raises the question of recognition and relation of sources of international law, the consent of States, and the lawmaking power in international law. The question of sources and their relation to authority and validity of rules have received a fundamental legal basis by Hart's introduction of the rule of recognition. The rule of recognition is a secondary rule of the system in contrast to a primary rule of obligation.¹²⁷ What Hart has introduced as the rule of recognition of a system addresses one stage earlier in the process of the identification of primary rules of the system. The concept of the rule of recognition offers a necessary though not sufficient key element of legitimacy in the determinacy of rules of international law and thereby merits the review of some relevant aspects of the rule of recognition. Hart's discussion of the rule of recognition alluded to a number of aspects of the rule of recognition that are important to examine in order to develop the rule of recognition in international law.

1. Concept and Function

The rule of recognition provides authoritative criteria of validity including sources of law and their hierarchical relations for the identification and validation of primary rules in a given legal system.¹²⁸ The rule of recognition thus provides

¹²⁷ See supra notes 24-26 and accompanying text.

¹²⁸ Hart, Concept, supra note 5, at 101-117.

“the criteria by which the validity of other rules of the system is assessed.”¹²⁹ It functions to remedy the uncertainty attributed to the simple social structure about the validity or existence of a rule “if doubts arise what the rules are or as to the precise scope of some given rule.”¹³⁰ With the acceptance of a rule of recognition, “both private persons and officials are provided with authoritative criteria for identifying primary rules of obligation.”¹³¹ A source of law such as legislation, custom, precedent in view of the rule of recognition constitutes an authoritative criterion of validity of primary rules.¹³² The criteria of validity also include procedures within each criterion (source) for the creation of rules.¹³³ Accordingly, the rule of recognition supplies the tests to be met for a source to count as a source of law, thereby a valid rule of law can be identified by specifying which source and whether alone or in tandem with other sources is the identifying criterion of validity of the rules.¹³⁴ The concept of the rule of recognition is part of the general theory of law in that “it is not tied to any particular legal system or legal culture.”¹³⁵

The rule of recognition also concerns the power and authority of lawmaking. In addition to validating the authority of rules, the rule of recognition validates the authority of the lawmaker in a given system.¹³⁶ It should not be deemed that in a system in which a hierarchical authority is absent, this basic aspect of the rule of recognition is immaterial. In a horizontal system of law like that of international law the issue is of paramount importance in cases of indeterminacy of international rules whether the rule of the recognition identifies and validates the power of international adjudicators to make law.¹³⁷ The rule of recognition in the first place is a rule that identifies and validates the authority of

¹²⁹ Ibid. at 105. (“[T]hat a particular rule is valid it means it satisfies all the criteria provided by the rule of recognition.”) Ibid. at 103.

¹³⁰ Ibid. at 92.

¹³¹ Ibid. at 100.

¹³² See 94-96, 100 et seq.

¹³³ Ibid. at 92, 107.

¹³⁴ Ibid. at 94-96.

¹³⁵ Ibid. at 239. Hart emphasizes this general aspect of his “theory of what law is” in differentiating it from Dworkin’s theory being “addressed to a particular legal culture”, i.e. Anglo-American law. Ibid. at 240.

¹³⁶ See infra notes 151-153 and accompanying text.

¹³⁷ See infra notes 151-153 and accompanying text. See also Chapter III.

the lawmakers in a given system to legitimize the authority of rules by recognizing and validating its origin.

2. Form and Content

The rule of recognition varies in form.¹³⁸ It may be in a simple form providing a single criterion of validity like “authoritative text or list of rules” in “early law of many societies.”¹³⁹ A simple rule of recognition with a single criterion of validity may, in the evaluation of an imaginary King Rex I, be “whatever Rex I enacts is law” as the “sole criteria for identifying the law” without any legal restrictions on the legislative power of Rex I.¹⁴⁰ That is to regard Rex’s declarations as the exclusive source of authoritative law. In modern developed legal systems, the rule of recognition exists in a complex form providing several criteria of validity, i.e. sources to identify authoritative rules.¹⁴¹ These several sources include “enactment by a legislature,” “customary practice,” “written constitution,” or “judicial precedent.”¹⁴² In this way, the rule of recognition in a legal system may recognize a statute, or custom, or precedent, or constitution as sources, i.e. authoritative criteria, to identify and validate primary rules of obligation in settling doubt as to what the rules are or what the scope of a given rule is. The existence or validity of a primary rule in such a system is established by its formation according to these identifying criteria, sources recognized in that system. In the complex form where there are more than one source or identifying criteria, the rule of recognition in a system may also include criteria for settling the conflict between the sources “by their arrangement in an order of superiority”, i.e. providing for the hierarchy of sources where there are

¹³⁸ Ibid. at 94-95, 100-101.

¹³⁹ Ibid. at 94, 100.

¹⁴⁰ Ibid. at 96, 101-102.

¹⁴¹ Ibid. at 95, 101.

¹⁴² Ibid. at 95, 101.

more than one source or identifying criteria.¹⁴³ In the complex form of rule of recognition that has several criteria, one of its criteria is supreme or superior.¹⁴⁴

The content of the rule of recognition is system-based. The rule of recognition is systematic in that each system of law provides for its own rule of recognition. This lends the rule of recognition, while a universal concept across legal systems, different contents depending on a given legal system. Hart was not claiming same rules of recognition for all legal systems. Throughout his debate, Hart distinguished between the rules of recognition in the United Kingdom and the United States. This is also clear in his statement that “[i]n our own system, custom and precedent are subordinate to legislation since customary and common law rules may be deprived of their status as law by statute.”¹⁴⁵ Hart also indicated that this supreme criterion of validity provided by the rule of recognition in the English legal system is different from that in the United States. Unlike providing for the supremacy of legislation in the English legal system, the rule of recognition in the United States, which specifies a constitution among its criteria of validity, provides for no unlimited legislature but “the clauses of its constitution as the supreme criterion of validity.”¹⁴⁶ Therefore, not only the content of the rule of recognition about which criteria (sources) count as tests for the identification of a valid rule may vary from one system to another but also variation may exist from one system to another in terms of superiority and inferiority in relations among the criteria of validity that the rule of recognition provides.

A central question as to the content of the rule of recognition is whether and how it admits principles. Hart acknowledged that the rule of recognition of a given system might contain principles among the criteria of validity.¹⁴⁷ In describing his doctrine as ‘soft positivism’, Hart stated that “the rule of

¹⁴³ Ibid.

¹⁴⁴ Ibid. at 106.

¹⁴⁵ Ibid. at 101, see also at 95. This subordination may also occur in other domestic legal systems as Hart also indicated “the common subordination of custom or precedent to statute.” Ibid. at 95.

¹⁴⁶ Ibid. 106.

¹⁴⁷ Ibid. at 247-265. Hart provided these clarifications on the issue of principles, among others, in a postscript in response to Dworkin’s criticism. See Hart, Concept, *ibid.* at 239-276.

recognition may incorporate as criteria of legal validity conformity with moral principles or substantive values.”¹⁴⁸ Even more significant than counting as the criteria of validity, moral principles and values may count as the supreme criteria of validity in a given system.¹⁴⁹ According to Hart many principles are “identified by pedigree criteria,” i.e. “the manner of their creation or adoption by a recognized authoritative source,” and not by their content.¹⁵⁰

With regard to principles as part of the criteria of the legal validity, two issues are important. The first one is the question of moral principles and values. On this point a basic aspect of the rule of recognition, which is validating the power of the rule maker for the validation of the rule, is at issue. According to Hart, the incorporation of a controversial moral test lacking “an objective standing” in the criteria provided by the rule of recognition is not inconsistent with the rule of recognition. On this matter, Hart points to the issue of indeterminacy and the rule of recognition for the discretion of judges. For Hart, “if there are no such [objective moral] facts, a judge, told to apply a moral test, can only treat this as a call for the exercise by him of a law-making discretion.”¹⁵¹ Thus, addressing national legal systems, Hart maintains that the criteria of a rule recognition by incorporating a moral test for legal validity, recognizes and validates in the first place the power of judges to make the law where such a test is at issue. This is part of the broader aspect of the rule of recognition in Hart’s theory of law, which relates to the indeterminacy of primary obligations and the issue of the judicial discretion. Hart has addressed the question of indeterminacy and open texture of rules for national legal systems and has posited that in such cases judges perform a creative role.¹⁵² The rule of recognition in a broader aspect recognizes and validates the authority of the rule maker. Part of the function of the rule of recognition in national systems, in Hart’s theory, is the validation of the power of judges to create rules, though within limits, in cases where the law is

¹⁴⁸ Ibid. at 250. See also ibid. at 247-248.

¹⁴⁹ See supra note 146 and accompanying text.

¹⁵⁰ Ibid. at 264-265. This “is not only consistent with, but actually requires acceptance of that doctrine [the rule of recognition].” Ibid. [clarification added]

¹⁵¹ Ibid. at 253-254.

¹⁵² See Hart, at 124-147, 272-273. See also Chapter II.

indeterminate.¹⁵³ Validating the authority of the rule maker in given system is a basic aspect of the rule of recognition. The rule of recognition in this basic function identifies who has the power recognized and validated in the system to create rules, which is of paramount importance in cases of indeterminacies, raising the question whether an adjudicator has such a power according to the rule of recognition of the system. The second question concerns the possibility of inclusion of certain principles by virtue of their content among the criteria of validity provided by the rule of recognition. This issue draws on the origin of the rule of recognition and its criteria.

3. Status and Origin

The rule of recognition constitutes the “foundations of a legal system.”¹⁵⁴ Hart did not assert that a rule of recognition is a necessary feature of law because in certain societies, namely those of simple form of primary rules, a social rule can be binding by acceptance. In the simple social structure of rules, Hart maintains, legal rules may come into existence by acceptance not requiring validation by a rule of recognition.¹⁵⁵ In this simple social structure consisting of primary rules formed in a customary manner, once the existence of a primary rule (by general practice) is established, there is no question of validity.¹⁵⁶ In this structure of primary rules of a customary form, the existence and binding force of rules depends on wide acceptance.¹⁵⁷ Thus, in its concept the rule of recognition is

¹⁵³ In cases of indeterminacy “the judge both makes new law and applies the established law which both *confers and constrains his law making powers*. Ibid. at 272.

¹⁵⁴ Ibid. at 100, 110.

¹⁵⁵ See *ibid.* at 101-117, 246. See also *supra* notes 100-101 and accompanying text.

¹⁵⁶ Ibid. at 109-110. Hart also views that the existence of a primary rule in simple structure of primary rules is asserted in an external statement by an observer not from the internal point of view. Ibid. (“In the simple system of primary rules of obligation ..., the assertion that a given rule existed could only be an external statement of fact such as an observer who did not accept the rules might make and verify by ascertaining whether or not, as a matter of fact, a given mode of behaviour was generally accepted as a standard and was accompanied by those features which ... distinguish a social rule from mere convergent habits.”) Ibid. at 109.

¹⁵⁷ (“In the simpler structure [as opposed to a legal system], since there are no officials, the rules must be widely accepted as setting critical standards of behaviour of the group. If there, the

compatible with the existence of other rules whose binding force comes from acceptance not requiring conformity with certain criteria of validity where such rules are established. Regarding international law as a simple structure, Hart rejected a rule of recognition for international law.¹⁵⁸ In so doing, Hart in view of the absence of legislature, judiciary and enforcement institutions comparable to those in national systems regarded international law as similar to a simple social structure of primary rules in form.¹⁵⁹ Yet, Hart focused on the question of the legal character of international law supporting that international law is law notwithstanding the absence of institutions similar to national systems.¹⁶⁰ On the question at issue, Hart viewed that international law need not have a Kelsenian basic norm or a rule of recognition for its legal character and binding force of its rules because in a simple social structure the authority or the binding force of primary rules forms when they come into existence by acceptance not by validation criteria.¹⁶¹ This observation by Hart about the rule of recognition in international law should not be taken as the absence of the rule of recognition in international law. This matter will be discussed shortly.

In Hart's theory, the rule of recognition, while mostly unstated, is the ultimate rule of the system.¹⁶² Hart also views that the practice of accepting a rule of recognition to refer to certain sources as authoritative criteria for the identification of the law takes place from an internal point of view but that a rule of recognition exists is expressed from an external point of view.¹⁶³ According to Hart, the distinction between internal and external statements assists to remove obscurities as to the notion of legal validity.¹⁶⁴ In Hart's view, legal validity concerns the particular rules of the system that are identified and validated by the

internal point of view is not widely disseminated there could not logically be any rules.") Ibid. at 117. [clarification added].

¹⁵⁸ See *ibid.* at 214-237.

¹⁵⁹ *Ibid.* at 214, 227.

¹⁶⁰ *Ibid.* at 214 et seq.

¹⁶¹ *Ibid.* at 234-235.

¹⁶² *Ibid.* at 101, 105-106.

¹⁶³ *Ibid.* at 102-103, 110. ("[I]t is possible to be concerned with the rules, either merely as an observer who does not himself accept them, or as a member of group which accepts and uses them as guides to conduct. We may call these respectively the 'external' and the 'internal points of view'") *Ibid.* at 89. See also at 98, 102-103.

¹⁶⁴ *Ibid.* at 103.

rule of recognition.¹⁶⁵ Yet, for the existence of the rule of recognition, it is required that the rule of recognition used by a person in identifying the law and asserting the validity of a particular rule, “is not only accepted by him but is the rule of recognition *actually accepted and employed in the general operation of the system*.”¹⁶⁶ The legal status of the rule of recognition as the ultimate rule of the system is not a question of validity provided by another rule in an internal assertion nor by showing that its validity “is ‘assumed’ or ‘postulated’ or is a ‘hypothesis’.”¹⁶⁷ Thus, Hart maintains that “[t]he assertion that it [a rule of recognition] exists can only be an external Statement of the fact. For whereas a subordinate rule of system may be valid and in that sense ‘exist’ even if it is generally disregarded, the rule of recognition exists only as a complex, but normally concordant practice of the courts, officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact.”¹⁶⁸

Although Hart included private persons among those whose concordant practice may bring a rule of recognition into existence, he grounds the rule of recognition in the practice of officials of the system and particularly the practice of the courts.¹⁶⁹ Hart did not assert that the consensus arising from the practice of courts in any system of law would constitute the rule of recognition.¹⁷⁰ Thus, like its content being variable among legal systems, that in a given system whose practice counts for the formation of the rule of recognition also depends on the system of law concerned. What is material is the requirement of general practice

¹⁶⁵ Ibid.

¹⁶⁶ Ibid. at 108. [emphasis added]

¹⁶⁷ Ibid. at 108-110. Its existence is a matter of fact not a question of validity since “it can be neither valid nor invalid but is simply accepted as appropriate for use in this way.” Ibid. at 109.

¹⁶⁸ Ibid. at 110. In this way, the rule of recognition reflects both internal and external points of view. (“[W]e need to remember that the ultimate rule of recognition may be regarded from two points of view: one is expressed in the external statement of fact that the rule exists in the actual practice of the system; the other is expressed in the internal statements of validity made by those who use it in identifying the law.” Ibid. at 112.

¹⁶⁹ (“[T]he rule of recognition is treated in my book as resting on a conventional form of judicial consensus.” Ibid. at 266-267. Hart also stated that in a complex legal system the acceptance of the rule of recognition comes from the practice of officials and ordinary individuals acquiesce the rule by obeying it. Ibid. at 117.

¹⁷⁰ See ibid. at 267 where Hart observes that the rule of recognition rests “on a conventional form of judicial consensus ... seems quite clear at least in English and American law ...” Ibid. at 266-267.

for the formation of a rule of recognition within the structure of the legal system concerned. The formation of the rule of recognition, whether simple or complex, “is manifested in the general practice of identifying the rules by such criteria.”¹⁷¹ Therefore, it requires a general practice in a given system according to its own structure for the rule of recognition or a particular form of criterion, a particular source, under that to come into existence. Its formation through actual practice still does not deprive the rule of recognition of being called ‘law’.¹⁷²

The legal status of the rule of recognition rooted in convention, however, should not be treated to reject altogether any test for the origin of the rule of recognition lying at the base of a system of law or in the criteria it contains. If there is conventional recognition for recognizing principles by way of their content, no doubt it is compatible with Hartian conception of the rule of recognition. Yet, the question of content raised earlier concerns the possibility of inclusion of certain principles by virtue of their content as part of the criteria of validity provided by the rule of recognition not rooted in the convention. Hart does not seem to reject this possibility although he believed that a legal system with such a criterion of validity might not actually be found without a conventional rule of recognition.¹⁷³ In his discussion of the objective standing of principles too, Hart also suggests where certain principles do have objective standing they do not require a conventional, general practice for their inclusion as part of the criteria supplied by the rule of recognition.¹⁷⁴ Similarly, Hart indicated that the superiority of a source like statute is a relative notion without connoting a “legally *unlimited* legislative power.”¹⁷⁵ This also indicates that the rule of recognition imports limitations on the power or authority of those creating the law through other criteria of legitimacy. The rule of law limitations represent a

¹⁷¹ Ibid. at 101.

¹⁷² See *ibid.* at 264-268. Hart distinguishes the legal character of the rule of recognition from other accounts asserting, “at the base of legal systems there is something which is ‘not law’, which is ‘pre-legal’, ‘meta-legal’, or just ‘political fact’.” Ibid.

¹⁷³ See at 265-268. Hart even pointed to the observation of some critics as to the possibility of “identifying principles by their content not by their pedigree” as “a complex ‘soft positivist’ form” of a criterion provided by the rule recognition. Ibid. at 265. Hart explicitly said “the belief that a rule of recognition can only provide pedigree criteria” is an error. Ibid. at 264.

¹⁷⁴ See *supra* note 153 and accompanying text.

¹⁷⁵ Hart, *Concept*, *supra* note 5, at 106.

structural aspect of restrictions on authority. Hart himself has indicated that certain principles may exist to secure the functioning of the social control as an aspect of the “minimum form of justice which may be called ‘natural’” including the principles of legality and the rule of law.¹⁷⁶ The rule of recognition as a secondary rule of the system itself constitutes part of structural limitations on authority to adhere to criteria of validity.¹⁷⁷ In creation, application or interpretation of the law, the rule of recognition demands conformity with its criteria and basic tests for the identification and validation of the source of law and the power of the lawmakers alike. These suggest admissibility of the rule of recognition for the inclusion of certain absolute principles of structural, procedural and substantive nature that may show objective standing by virtue of their content. The concept of the rule of recognition is compatible with having certain principles by virtue of their absolute character not merely their conventional acceptance among its criteria of validity.

Hart also alluded to the possibility of the evaluation of the rule of recognition in his discussion of the open texture of the rule of recognition and the pathology of the rule of recognition.¹⁷⁸ Both these phenomena point to doubts about the content and origin of the rule of recognition. This situation may suggest occasional indeterminacy about the rule of the recognition whose response falls within Hart’s theory that the courts may exercise discretionary power to remove uncertainty.¹⁷⁹ Yet there may be another kind of doubt about the power and authority of the lawmakers that targets the very power and practice of the courts and officials as the participants whose practice creates the rule of recognition. This kind of doubt arises because of the detachment of the official world from the bulk of the society, which may lead to the breakdown of the system and its rule of recognition as a phenomenon of the “pathology of the legal systems.”¹⁸⁰ The breakdown of the rule of recognition thus may be due to limiting its content (for instance not recognizing certain procedural and substantive principles imposing

¹⁷⁶ Ibid. at 207. See also supra note 21.

¹⁷⁷ See supra notes 25-27.

¹⁷⁸ For pathology, see Hart, Concept, supra note 5, at 118. For open texture, see ibid. at 145-154.

¹⁷⁹ See Ibid. 148-154.

¹⁸⁰ Hart, Concept, supra note 5, at 118.

limitations on lawmakers) to the consensus of officials and courts rather than the bulk of the society. From another perspective, this situation raises the point and reform of the rule of recognition in view of the common good for which an assessment of the international rule of recognition must also heed.

b) The Rule of Recognition in International Law

A number of observations may now be drawn from the previous section that guide the assessment of the international rule of recognition. First, the essence of the rule of recognition consists in its concept not its content or origin that may both vary across legal orders and have controversial status in each system. The rule of recognition constitutes a framework rule of legitimacy not only providing the criteria that identify and validate primary rules of obligations but also the criteria identifying and validating the power of those creating the law in a given system. International law has now a rule of recognition of its own providing both of these criteria for the international primary rules of obligation and the power of those creating them.

Hart's rejection of a rule of recognition in international law should not be taken as the absence of the rule of recognition in international law. That in international law most of its primary rules must be widely accepted (by States in a customary framework) does not necessarily earn it the characterization of a 'primitive' society. International law is in some sense 'decentralized', but it is not reduced to what Hart describes a "pre-legal form of social structure which consists only of primary rules."¹⁸¹ The international legal system, while certainly different from those of national systems, cannot be a system of law devoid of a rule of recognition with multiple criteria of validity. There are, for instance, complex criteria of validity developed and accepted in international law for the formation of customary international law.¹⁸² Still what is more important is the international rule of recognition for the indeterminacy of international rules

¹⁸¹ See *ibid* at 117

¹⁸² See Chapter III.

whether of treaty or customary origin. Hart did not address this aspect of the rule of recognition for international law, which he had addressed for national systems for which he viewed judges perform a creative, legislative role in situations of indeterminacy.¹⁸³ Hart rejected the need for a rule of recognition for international law because once a rule (in a simple social structure) comes into existence by acceptance, it needs no basic norm to validate its binding force or authority.¹⁸⁴ Whereas international rules may also become indeterminate where the very existence of a rule for particular a situation becomes the question, thus the need for a rule of recognition to validate the creation of the rule no longer attributed to its acceptance but to its validity. Hart did not address for international law that broader aspect of the rule of recognition concerning the power of the creators of the rule in situations of indeterminacy of rules that needs validation by the rule of recognition of the system. Hart did not raise the situation of indeterminate rules in their interpretation for international law where the question is no longer the existence of the rules by way of acceptance of the rule for the instance in question but the validity of the legislative power of adjudicators and thereby the validity of the rule so created.

Where international rules become indeterminate in the process of interpretation, the rule of recognition is pivotal whether international law recognizes an adjudicative creation of international rules in cases of indeterminacies. It is this aspect of the rule of recognition that challenges the validity of international rules and thereby the legitimacy of the process. This is a key issue in international law on foreign investment and the assessment of the substance of its rules in indeterminate instances. It is this broader aspect of the rule of recognition relating to the power of the creators of law that raises the question of legitimacy in international rule-making in indeterminate cases where the very existence of the rule for a particular instance is in question. For being a legitimate authoritative primary rule of international law, such a rule must satisfy the rule of recognition of the international system by being created through

¹⁸³ See supra notes 153-155 and accompanying text; Hart, at 124-147, 272-273; Chapter II.

¹⁸⁴ See supra notes 155-160 and accompanying text.

validating sources and criteria recognized in the system of international law and by the lawmaker recognized in that system. In other words, it requires a rule of recognition to validate an adjudicative creative power in indeterminate cases. The adjudicative creation of rules and obligations in international law is a matter requiring validation by the international rule of recognition. It remains to be seen whether the international rule of recognition actually has such a validation in its content.

Second, in content, the criteria for the identification and validation (the sources of law) of the primary rules may vary from one system to another. Significantly, the contents of the rule of recognition as a basic rule to identify and validate the power of lawmakers including the lawmaking power of adjudicators in cases of indeterminacy may also differ between legal orders and particularly between national systems and international law. The basic rule of recognition in a given system concerns the validation of the authority of the rule-makers along the criteria of validity it provides for validating the authority of the particular rules. The rule of recognition in its basic aspect identifies and validates the lawmaker of the system. In indeterminate cases, this basic aspect rule of recognition raises the question whether the rule of recognition of a given system identifies and validates the power or authority of adjudicators to create the law. The identification and validation of the creative power of international adjudicators in the international legal order is a question that must be established by reference to the rule of recognition within its own structure.

Third, in origin, generally the rule of recognition consists in a conventional acceptance by those whose general practice in a given system is recognized as competent to bring such a rule into existence, which may also vary among legal systems. Whose practice may create or change a rule of recognition or its criteria may vary from one legal system to another. In international law, therefore, the origin of the rule of recognition and those creating or changing it follows the structure of international law itself.

The rule of recognition loses legitimacy if the practice of the officials and the courts creating that rule separates from the bulk of the society. The same risk exists in international law if the creator of the rule of recognition is exclusively narrowed to States or its criteria of validity for the primary rules and rule makers solely refer to the consent of States. Yet, there must be a basic yardstick of legitimacy to distinguish where States' consent is recognized from where it is deplored in international law, which may lead to welcoming it in a field of international law but eschewing it in another. The yardstick advocated in this thesis is the common good of the community in the interest of human beings, which may challenge the origin of the international rule of recognition and the criteria it supplies. This mixture of consent and common good will situate the rule of recognition of international law in the consensual and communitarian bases of rules.

1. Consensual Basis

The international rule of recognition provides the criteria of validity of primary rules of obligations and the validity of international lawmaking power emerging from an origin and with content germane to its own structure without being impervious to moral influences for reform in its origin and content. This is a structural rule of the system of international law that cannot be transferred from national systems to international law. International law has developed a rule of recognition recognizing and validating that in general authoritative primary rules and obligations come into existence by the specific or general consent of States. Both the origin and the content of the international rule of recognition have roots in the consent of States earning it a consensual basis.

State practice heavily weighs in the formation (origin) of the international rule of recognition. Absent central lawmaking and enforcement machinery and officials in international law, in the words of the editors of Oppenheim's International Law "[i]t is the practice of States which demonstrates which sources

are acknowledged as giving rise to rules having the source of law.”¹⁸⁵ Hence, the international rule of recognition as to which source has the authority of law in international law in the first place emanates from the practice of States. The international rule of recognition in its content also defers to the consensual basis of international law by identifying and validating specific or general consent of States for the creation of most authoritative primary rules and obligations. As the editors of the of Oppenheim’s International Law state, “as the international community at present organize, the will of States normally predominates in the creation of rules of international law.”¹⁸⁶ Accordingly, custom and treaties constitute “the *principal and regular* sources of international law”¹⁸⁷ The international rule of recognition thus more basically identifies and validates that in international law States are the author of laws.

The international rule of recognition recognizing and validating the consent of States as the source of the creation of primary international rules is the stepping-stone of the legitimacy of the right process in the structure of international law. Franck presumed this fundamental principle of legitimacy under the contractarian foundation of international rules without examining it.¹⁸⁸ Franck restates the classical view in international law rooted in the contractarian theory that “States, like persons in the state of nature, are equal in their ‘statehood’, which is restrained only to the extent that they have agreed voluntarily to be associated in a common enterprise and have defined the limits on their rights and autonomy in reciprocal fashion.”¹⁸⁹ Under international law, States enjoy freedom, equality, sovereignty, autonomy, self-determination, and self-preservation that have fundamentally brought their consent in the forefront of the lawmaking mechanism in international law.

¹⁸⁵ Oppenheim, *supra* note 119, at 24. The editors also State that Article 38 of the Statute of the International Court of Justice “cannot be itself creative of the legal validity of the sources set out in it, since it belongs to one of those sources itself. It, is however, legally binding on the International Court of Justice because of its inclusion in the statute of the Court, and is authoritative generally because it reflects State practice.” *Ibid.* at 24.

¹⁸⁶ *Ibid.* at 24.

¹⁸⁷ *Ibid.* at 24. [emphasis added]

¹⁸⁸ Franck, *Fairness*, *supra* note 35, at 26-29. See also Franck, *Legitimacy*, *supra* note 33, at 198-207.

¹⁸⁹ Franck, *Fairness*, *supra* note 35, at 28.

The modern era of international law was marked by the emergence of the nation States in Europe from late 15th century when a series of treaties ushered in the emergence of independent nations.¹⁹⁰ Sovereignty merged into international law in 1648 when the Europeans materialized a multilateral charter under the Peace of Westphalia treaty to extinguish the flames of a thirty-year war.¹⁹¹ The Peace of Westphalia culminated a long process of the erosion of the imperial authority.¹⁹² The Peace of Westphalia stands out in history as the inauguration of the law of nations under a system grounded in independence and equality of nations. Balance of power fell at the core of the agenda for the realization of peace.¹⁹³ From sovereign equality it followed that independent nations admitted no supreme authority and no interstate obligations without their consent. This new system recognized “a law operating between rather than above States and a power operating between rather than above States.”¹⁹⁴ The principles of equal sovereignty and self-determination revived in a universal format in the Charter of the United Nations.¹⁹⁵ What this survey narrates is that, in hindsight, equality,

¹⁹⁰ See Arthur Nussbaum, *A Concise History of the Law of Nations* (New York: The Macmillan Company, 1954) at 61-66. It began with the *Peace of Basel* of 1499 whereby Switzerland voiced its independency from the Western Empire. Switzerland, however, gained complete independency only in 1648. Ibid. at 6162. Before this era, resort to consent for creating obligations was reflected in practice among ancient oriental and occidental communities to address their affairs in relation to one another within treaties though without having the modern concept of nation-State. See ibid. at 1-16. In those times, treaties carried a religious attribute. Ibid. The peace convention of 562 between Byzantium and Persia that provided for the protection of religious minorities is considered to be one of the important conventions in that era. Ibid. at 48. The protection of religious minorities under that treaty later inspired treaties among Europeans with similar protections in the 17th and 18th centuries. Ibid. at 126. Among the features of the treaties in the 18th century was differentiation between political and commercial treaties. Of particular importance was the Jay Treaty of 1794 between the United States and England that embodied arbitration provisions. Ibid. at 128-129.

¹⁹¹ Bederman, *supra* note 104, at 3.

¹⁹² Leo Gross, “The Peace of Westphalia, 1648-1948” in Ku, Charlotte, Diehl, Paul F. & Boulder, Colo., eds., *International Law: Classic and Contemporary Readings* (London: L. Rienner Publishers, 2003) 57, at 63.

¹⁹³ See Nussbaum, *supra* note 190, at 115-118. The family of nations was not expanding over the globe on the basis of equality. One example is the agreements of the capitulation nature that Europeans entered into with Far East obtaining unilateral concessions from China and Japan. Ibid. at 194-196. Outside Europe, colonialism and imperialism replaced sovereign equality of nations, promoting “western international law.” Bederman, *supra* note 104, at 7-8.

¹⁹⁴ Gross, *supra* note 192, at 62.

¹⁹⁵ See Articles 1 and 2 of the Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, *entered into force* Oct. 24, 1945; See also the Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States, (1970). G.A. Res. 2625, 25

sovereignty and self-determination and concomitant consensual basis of international rules have not been mere rhetoric. They have played a major role in constructing a horizontal structure of legal order for international law, in building international institutions, and in creating international obligations whereby the peaceful coexistence of States and their orderly intercourse could materialize. International law has grown in the foreground of independence and the background of interdependence out of respect for these enduring values.

The consent theory constitutes the backbone of modern democracies. The legitimacy of today's legal systems is anchored in their democratic dimension. At least theoretically, though not always practically, this dimension is rooted in the acceptance of the members of the community of its underlying shared principles through a referendum of a written constitution or customary deference to an unwritten one, as well as expressing their voice in ordinary laws through elections and delegation of lawmaking authority. In international law, the absence of an identical centralized apparatus dealing with law has brought this fundamental aspect of legitimacy to the fore. The consent of States in international law functions, at high profile, as a fundamental principle legitimating the legal order and the rules flowing from it. Just as acceptance of the members of the community legitimate rules and their authority at the domestic level, the consent of States confers legitimacy on international rules for their claim of authority laying burdens on States. The voice of the members of the community underpins the validity of its rules. Due to the cultural complexity in the fabric of the international community, international law needs to reflect this element far greater than domestic legal systems. A vertical delivery of authority in the name of international law irrespective of the share that each diverse culture enjoys in shaping international rules through the collective practice and opinion of States is the very sign of the demolition of legitimacy of rules and the destruction of their authority.

U.N.GAOR Supp. (No. 28) U.N. Doc. A/8082, emphasizing the sovereignty and equal rights of States.

The consent of States, therefore, constitutes one essential element for legitimating the primary rules of international law. This is couched in the terms that the consent of States forms “the condition historically deemed necessary, but not necessarily sufficient, for any demonstration of rule legitimacy.”¹⁹⁶ The consent of States constitutes the foundation of the legitimacy of international rules according to the rule of recognition in the system of international law. Not only does international law have a rule of recognition but also it has a complex one though it has its own complexity as to the supremacy of one criterion over another. The international rule of recognition provides the consent of States as the criterion of validity of primary obligations thus rendering custom and treaty as primary sources of validation in international law. The rule of recognition further provides for procedural conditions for the formation of custom or conclusion of treaties. The existence of its primary rules in general international law within the customary framework and particular international law within the treaty framework must satisfy the demonstration of meeting certain procedures developed in international law for the formation of custom and treaty. More basically, the international rule of recognition provides the criteria for the lawmaking power in international law by designating States as the author of primary rules of obligations in a consensual basis. No doubt, determinate treaty and customary obligations conform to the rule of recognition of the system in regard to the authority lent by States to their settled scope. What departs from this general rule of recognition of international law is an adjudicative creation of rules and obligations in the interpretation of indeterminate treaty or customary obligations. What further departs from this rule of recognition is an interpretative tool such as general principles where they lead to an adjudicative creation of rules and obligations. These important issues will be dealt with in detail in the next chapters.

The power to create rules in international law, which validates the rulemaking authority of the rule-maker and thus the validity of the rule, is a requirement of legitimacy that needs to be satisfied by demonstrating the

¹⁹⁶ Franck, Fairness, *supra* note 35, at 29.

existence of a rule of recognition to this effect. This is a framework rule of the system whose existence cannot be taken for granted, presupposed or transformed from national systems to international law. The rule of recognition is a structural rule of legitimacy in international law, which in general requires the consent of States for the creation of international obligations lending their authoritative force including in areas of indeterminacies where the authority of the rule for a particular situation is in question. Any departure from the consensual basis of international rules, therefore, needs to be established by showing the modification of the rule of recognition. Indeed, in a number of ways the international rule of recognition has embraced a communitarian basis both in its origin and content but leaving intact the consent of States for the large part of international primary rules.

2. Communitarian Basis

By virtue of the rule of recognition of international law, the structural criterion of legitimacy for the right source and process of rule formation in international law provides that the primary rules of international law flow from the consent of States. Primary obligations of States rest on the consensual basis in large part. By the consensual basis of international rules, however, is not meant to accord sovereignty a status above international law. There is another dimension to international lawmaking stemming from a communitarian basis that while supporting the rule of recognition in many aspects may challenge its origin or content as well as requiring another criterion of legitimacy.

Human community is a form of unifying relationship and interaction between the members of the society, which involves relationships in four types of order.¹⁹⁷ These orders or sets of unifying relationships form the unity of human beings in the community in different aspects. One part of the unity of members of

¹⁹⁷ Finnis, *supra* note 5, at 136-138.

human community is “the unity of common action.”¹⁹⁸ This order or unity represents interactions and mutual commitments among the members of human community in order to solve their co-ordination problems.¹⁹⁹ The sole interaction is not sufficient. Community exists wherever interaction blends with a shared purpose.²⁰⁰ The existence of social rules and authority go together with the existence of community in finding meaning wherever “some shared conception of the point of continuing co-operation, namely “the common good” is present.²⁰¹ The shared purpose and common good are rooted in basic values.²⁰²

The unity of common action resting on common good can justify the existence of the international community. The common good of the members of the international community, as with the members of individual nation States, in some respects is realized in the international community not the national systems alone. Similar to the function of a federal system that supervises its constituent societies on fundamental issues that matter for the whole national community, the international community exists alongside national States to urge matters fundamental to the international community that have earned the quality of common action and common good. In this sense, the emergence of an international community is barely refutable.²⁰³

As indicated earlier, the existence of international community further bolsters the existence of certain secondary or framework rules.²⁰⁴ The rule of recognition in Hartian conception is rooted in the convention, namely the practice

¹⁹⁸ Ibid. at 138. This is the forth unity along with the other three parts of unity. The unity of human beings in the community is partly “physical or biological” unity, namely “the genetic unity of the race.” Ibid. at 136. It is in part “the unity of intelligence in its capacities, its workings, and its product, knowledge.” Ibid. at 137. It is also partly “the cultural unity of shared language, common technology, common technique (as in an orchestra), a common capital stock, and so on.” Ibid. at 137.

¹⁹⁹ See *ibid.* at 138-150.

²⁰⁰ Ibid. at 151.

²⁰¹ Ibid. It is important to point out that the common good in Finnis’ view consists of a set of conditions whereby the members of the community can achieve the values for which they have reason to positively or negatively cooperate, which “in this sense is a frequent or at least a justified meaning of the phrases ‘the general welfare’ or the ‘public interest’.” Ibid. at 155-156.

²⁰² See Chapter II, Section C (i) (a).

²⁰³ See Finnis, *supra* note 5, at 150.

²⁰⁴ See *supra* notes 120-126 and accompanying text.

of officials and courts though not rejecting other possibilities.²⁰⁵ In Franck's opinion, the ultimate rule of recognition conferring binding force on treaties and customs in international law arises from the membership status of States in the international community.²⁰⁶

The common good is advocated here, which also alleviates the shortcomings of membership or convention accounts for the origin or content of the rule of recognition. The rule of recognition of international law can justifiably be grounded in the common good of the community than convention or the membership status in the community. For instance, treaties and customs owe their binding status to the common good since the recognition of the binding status of treaties or customs would enable States to solve coordination problems.²⁰⁷ The common good of States outweighs the conventional origin or membership status in accounting for the origin and content of the international rule of recognition, its change, or coexistence of the rule of recognition with another criterion of legitimacy, i.e. coherence for consideration of justice demands in the construction of rules.

The membership argument tends to mirror a quasi club picture of international community. Clubs run mostly on power than law. The club extends privileges to its members in proportion to the power and wealth of the members. The rich and powerful members gain more privileges. The legal scheme of international law cannot subscribe to a pattern of power. Beyond doubt, power is a major factor in the national legal systems and the international system alike. The point, however, is to highlight that the rule of law, legitimacy, and the law also function to place legal limitations on those wielding power and to correct imbalances, inequalities, and other vices flowing from power. In theory, the legal

²⁰⁵ See *supra* notes 169-170 and accompanying text

²⁰⁶ Frank, *Legitimacy*, *supra* note 33, at 191-192, also at 202-203. According to Franck, the enjoyment of the right to statehood conferred by the community is in consideration of the compliance with international obligations. *Ibid.*

²⁰⁷ See Finnis, *supra* note 5, at 244. ("[b]oth the framework custom and the particular customs which become authoritative within its framework derive their authoritativeness directly from the fact, if treated as authoritative, they enable States to solve their co-ordination problems—a fact that has normative significance because the common good requires that those co-ordination problems be solved.") *Ibid.* Note that Finnis speaks of a 'meta rule' instead of the rule of recognition.

scheme of international law cannot be anchored in something that it seeks or should seek to contain. The conventional origin of the rule of recognition may also end up in a narrow club of the practice of officials or courts or States segregating the criteria of validity from the human constituents of the society.

The conventional acceptance of the rule is an important part of the rule of recognition. Nevertheless, the rule of recognition drastically diminishes in legitimacy—and sometimes to the point of extinction—if its conventional origin is always narrowed to the practice of officials without considering the perception of the bulk of the society and human values and interests in the criteria provided for the validation of primary rules or the power of the rule makers. The laws of a ruling body representing a majority suppressing the minority may be formally validated by the officials of the system and ultimately by the acceptance/acquiescence of the community as a whole. Even worse, officials of a system including its courts may accept, recognize, and validate the authority of a despot or despotic ruling party or a regime or ruling body representing a minority and a concomitant supreme criterion of validity producing unjust laws and suppressing the people or the majority. Legitimacy challenges the validity of such rulings even if compatible with a conventional rule of recognition because of failure to advance the common good. The absence of officials in international law leaves a more dynamic space for participation in the lawmaking process by States, which are usually burdened by rules and obligations imposed by the system. This space is more apt to avert extreme scenarios of national legal systems in which officials become the sole narrators of the internal point of view in accepting and using the criteria of validity of the system indicative of a “deplorably sheeplike” society or legal system.²⁰⁸ On the other hand, international law itself may turn out to be vulnerable to the same situation if individual human beings are neglected in its lawmaking process. States as subjects of international law should not be treated

²⁰⁸ (“In an extreme case the internal point of view with its characteristic normative use of legal language (‘This is a valid rule’) might be confined to the official world. In this more complex system, only officials might accept and use the system’s criteria of legal validity. The society this was so might be deplorably sheeplike; the sheep might end in the slaughter-house. But there is little reason for thinking that it could not exist or for denying it the title of a legal system.”) Hart, *Concept*, *supra* note 5, at 117.

in a way to end up in a 'sheeplike' scenario, substituting officials in treatment of individual human beings, by becoming the sole participant in authoring primary rules of obligation or shaping the rule of recognition.

A number of restrictions on the will of individual States are already observable in international law. A general consent not a universal one among States is sufficient to have the force of customary law, treaties or customs representing consent may not derogate from *jus cogens* norms, and treaties and customs are not the sole sources of international law, which embrace certain principles as a source of international law.²⁰⁹ These restrictions on the consent of individual States represent partial changes materialized in the content of the international rule of recognition and its criteria of validity. The general rule of recognition in international law recognizes the creation of rules of international law under customary rules by the general consent of States not requiring specific consent of every individual State. Equally important, the international rule of recognition counts certain principles as a source of law. The international rule of recognition embodies among its criteria of validity or legitimacy certain principles that by their absolute content apply as law without the need of conventional sanction or in the face of adverse convention. Through their practice, States have sanctioned a category of norms, peremptory norms, with a supreme status in international law. To ascribe the recognition of the force of law of certain absolute principles of structure or substance to mere State practice, however, is a capital mistake. Principles with an absolute character in international law need no pedigree or conventional reception to count as the criteria of the rule of recognition of a legal system identifying and validating a binding or authoritative primary rule by virtue of its content. The legal position of absolute principles resides in the common good of the community and the requirements of reasonableness.²¹⁰

As discussed as a framework rule of legitimacy of the system, the international rule of recognition requires the general consent of States in creation

²⁰⁹ See Oppenheim, *supra* note 119, 24-25.

²¹⁰ See Chapter II, Section C (ii) (b).

of primary rules and identifying and validating States as the lawmakers in the international system where absolute rights and principles are not at issue. The rule of recognition itself originates in State practice to determine what counts as a criterion of validity or a valid lawmaker. This is compatible with the common good while the common good may require a reform of the criterion of the rule of recognition in a field of international law. Just as authority is justified because it advances the common good, the rule of recognition of international law in the ultimate measure is justified because it advances the common good. More fundamentally, the common good necessitates the rule of recognition to identify and validate the lawmaking agent in the international system with legitimate power to command authoritative prescriptions of the members of the international community and demand compliance. On the other hand, just as the common good may place limitations on authority, it may place limitations on the rule of recognition including widening the circle of participants whose practice counts in the formation or change of the rule of recognition or its criterion.

There is no dogmatic preference for the stability of a criterion of validity and a source of law that the rule of recognition of a system provides or the sort of participants whose practice count to bring it into existence. The international rule of recognition may change. However, the desirability for a change in the content of the rule of recognition and more foundationally in the origin of the rule of recognition of a given system at least must advance the common good of the community.

The rule of recognition of international law may undergo reform in keeping abreast of developments in human societies. International law has already experienced reform in a number of ways including embracing certain principles as its criteria of validity. What is of particular relevance for the purpose of this study is whether the international rule of recognition has changed to recognize and validate a constitutional construction of rights and obligations whereby the consent of states is no longer the determinant element in their authorship. Such reform in departing from the consent of States is mostly apt for the field of human rights in a constitutional than consensual construction of rights of human beings

in international law. Whether such a departure from the consent of States for a constitutional construction of rights and obligations is also justifiable in the construction of the rights of corporations in international law on foreign investment is a question to explore. The test for the desirability or justification of such a change is the common good of the community. Common good is the measure of desirability or justification for a challenge to the consensual basis of international rules and obligations in a particular field in international law.

In the majority of situations of indeterminacy of international law arising in legal interpretation, the rule of recognition concerns not counting absolute principles as criteria of validity but whether the international rule of recognition counts the creation of rules by adjudicators. It is perfectly compatible with the general rule of recognition for the creation of international rules by States that there may be a particular authorization or recognition in a particular field of international law to depart from the consent of States in the creation of their international obligations delegating a creative task to international adjudicators. It still needs the establishment of such a particular authorization or recognition to depart from the general of rule recognition requiring the creation of the international rules and obligations by the States. A particular authorization or recognition in a particular field such as human rights is not a sign or authority for the departure from the rule of the recognition in the other fields of international law such as foreign investment.

The basic international rule of recognition provides that in international law States are the author of international rules. State practice with a view to the common good is required to justify and show a change in this basic lawmaking power validation in international law. For a change of the rule of recognition in any system and so in international law, it requires much beyond implication or assumption. There is no prejudice or sympathy for sovereignty when it is reduced to the benefits of governments or rulers detached from nations and human individuals. Sovereignty is not above international law. Nonetheless, sovereignty and self-determination are part of the values of the international community as long as advancing the common good of the community in the interest of human

beings. The consensual basis of the international rule of recognition and the primary rules of international law is justified because it generally advances and has historically advanced the common good of human beings. This consensual basis lies beneath the structure of international law in order to give every culture and community formed as a nation-State a share of participation in the construction of rules and obligations burdened upon them by international law.

The international community and national communities coexist with their own coordination in terms of competencies of authoritative lawmaking rendering States both independent and interdependent. The international community has a limited ambit that, in Franck's view, only signifies "a high level of sophistication in the *rule* structure within which a group of actors habitually interact."²¹¹ The international general legal agenda is much narrower than national communities that are assumed to provide a solution to every coordination problem. A structural part of international law similar to but far more profound than the federal institutions in national systems concerns the allocation and distribution of lawmaking competencies between national and international systems and the recognition of national communities' sovereignty and self-determination for policy and law making. The existence of common good does not mean that members of a community "must all have the same values or objectives (or a set of values or objectives); it implies only that there must be some set (or set of sets) of conditions which needs to obtain if each of the members is to attain his own objectives."²¹² The implication for the international community is much greater. The diverse cultures, values and purposes give little space for a broad international common action, shared purpose or value. The central point of the common good of the international community, advocated here, is human beings. The centrality of human beings may embrace sovereignty, independence, and the consent of States where functioning to benefit human beings and nations just as equally eschewing sovereignty, independence, and the consent of States where

²¹¹ Frank, Legitimacy, *supra* note, 33, at 201-202. Franck's vision of the international community defers to the consensual basis of primary rules of international law arising from the consent of States. See Franck, legitimacy, *supra* note 33, at 198-207; Franck, Fairness, *supra* note 35, at 26-29.

²¹² Finnis, *supra* note 5, at 156.

diminishing human beings. The centrality of human beings in the common good of the community may also explain why the structure of international law may in the particular field of protection of human rights depart from its basic values of sovereignty and independence for the basic values of human beings while standing by those basic values in the protection of corporations. Equally, the common good of human beings may justify respect for sovereignty and self-determination, respect for the concomitant consensual basis of international rules, and the maintenance of the general rule of recognition requiring the consent of States for the validation of international rules in a field such as foreign investment but not in another such as human rights. These issues will be elaborated in detail in the next chapters. For now, it is observed that in international law the general rule of recognition as a structural rule of legitimacy recognizes the creation of international rules by the States as the normal and regular source of international law and lawmaking power. The appreciation of a communitarian basis for the rules of international law does not undermine their consensual basis. They coexist to confer authority and legitimacy on international rules. The rule of recognition of international law admits the general consent and practice of States in building the international primary rules of obligation.

The common good is not a rhetorical notion. There are sound theoretical foundations with justifiable practical guidance for the assessment of sources of international law and settlement of disputes governed by international law that will be developed in the next chapters for the recognition of lawmaking power and coherence of the content of rules of international law. Besides justifying and disciplining the rule of recognition, the common good underscores coherence as another criterion of legitimacy for the substance of international rules along the rule of recognition. On the one hand, coherence of the content of international rules for the common good as another criterion of legitimacy requires in the first place reference to the rule of recognition of international law for identifying and validating the power for engagement in moral and political evaluations. On the other hand, the rule of recognition is not a sufficient criterion of legitimacy;

coherence for the common good is also required for the substance of international rules.

Thomas Franck adopts Dworkin's account of coherence.²¹³ That account of coherence refers to the integrity of rules by their relation to other rules in a principled way, requiring consistency in the application of rules in order to treat like cases alike rejecting checkerboard solutions or compromises or their application inconsistently by reference to principles and the purpose of the rules justifying exceptions.²¹⁴ This account of coherence relies on principles. However, legitimacy turns on coherence for the common good and the recognition of power of lawmaking body if principles themselves are part of an evaluative process. If justice is deemed a component of the common good of the community, as advocated in this study, its evaluation for every particular situation of hard indeterminacy of rules is an integral part of legitimacy for constructing the content of rules of international law proved indeterminate. This implicates in the first place the power of the body engaging in justice evaluation in international law for creating rules. Coherence as a criterion of legitimacy requires consideration of justice concerns extending legal order into a particular situation of indeterminacy having a, sometimes hard, collision of demands and conceptions of justice all required by the common good to be considered in constructing the substance of an authoritative rule with an engagement in moral and political evaluation. It also entails the rule of recognition to identify and validate the power of the rule maker engaging in such an evaluation or its delegation to adjudicators for particular cases of hard collision of justice demands. The rule of recognition and coherence for the common good constitute structural criteria of legitimacy for validating the process and content of primary rules of international law that guide general sources of international law and participants in its rule formation processes.

As a structural criterion of legitimacy, the rule of recognition constitutes one indispensable element in identifying and validating the origin of authority for

²¹³ See Franck, *Legitimacy*, supra note 33, at 143-148, 150-182; Franck, *Fairness*, supra note 35, at 38. For Dworkin's account of coherence and interpretative theory, see Chapter II, Section B.

²¹⁴ *Ibid.*

the formation or change of primary rules of obligation in international law. On the other hand, coherence including consideration of justice, equity and fairness constitutes another structural criterion of legitimacy for the formation or change of the content of primary international rules prescribing obligations for States. Both are justified and bound by the common good of the community. This leads the study to explore these structural criteria of legitimacy in view of situations of indeterminacies of the international rules and ultimately rules of international law on foreign investment. The examination of sources of general international law—general principles of law and customary international law— in terms of the underlying lawmaking power in international law in constructing the content of international rules will be developed in the course of this exploration.

CHAPTER II

COHERENCE AND PRINCIPLES

The previous chapter articulated the conceptual approach to legitimacy in view of the common good of the community for the structure of the determinacy of the substance of international rules by distinct criteria of the rule of recognition and coherence. Coherence is a criterion of legitimacy. This criterion is linked to the common good requiring consideration of all appropriate justice demands in the creation of the substance of the law. Being a creative task involving moral and political evaluation requiring recognition, the criterion of coherence is also linked to the legitimacy criterion of the rule of recognition. To explore the concept of coherence and these links, this chapter will address the matter in light of the nature and function of principles and rule determination. This can begin with a background of general principles of law in international law.

A. Background of Principles in International Law

A basic category of principles relate to principles of structure in international law, including the criteria of legitimacy discussed in the previous chapter, which measure the claim of authority of an international rule. The function of substantive principles, therefore, must be compatible with these structural criteria of legitimacy.

No state of disarray is probably greater in the lawmaking aspect of international law than what the term ‘principle’ poses in substance. A discussion of general principles of law in international law usually revolves around subparagraph C of Paragraph 1 of Article 38 of the Statute of the International Court of Justice that refers to “the general principles of law recognized by civilized nations” among other sources that the ICJ may refer to in deciding disputes brought before it. This provision is a source of debate and leaves important questions about the generality, nature and function of principles.

There is opposition to the association of general principles with ‘civilized nations’.²¹⁵ The generality is no longer supposed to arise by common approaches adopted in ‘civilized nations’ with European or Western characterization. To argue for a general principle in international law it is necessary to reflect the approaches by nations of different cultural and legal backgrounds.²¹⁶ This makes the generality test far more formidable to fulfill. Including other nations in the generality test is a positive starting point but not adequate. From the practical point of view, the identification of a general principle of law and its elevation and incorporation in the international law meets a fundamental challenge. As one scholar notes “[t]he more abstract the principle, the greater consensus of legal systems but also the less useful the rule....The less abstract (and more concrete) the principle, the greater meaning it has but also the more difficult it is to find a consensus among domestic legal systems.”²¹⁷ The task of establishing the generality of the principle is extremely formidable. This is not to indicate that once the generality test is met, i.e. it is established that a principle is used in most developed systems, the principle may be applied as an authority deciding the case. While a purported general principle of law may collapse simply by not being shown as a principle recognized by most developed legal systems, meeting this test alone does not justify the application of the principle. From the legitimacy

²¹⁵ The practical effect of this phrase is doubtful. Was the United States uncivilized at the time when it systematically and formally practiced racism against the black people? No tangible demarcation existed or exists today to determine a civilized from uncivilized *nation* because while certain acts may be found in gross conflict with moral conviction or conscience, to label the whole society or nation as uncivilized is unwarranted.

²¹⁶ David J. Bederman, *The Spirit of International Law* (London: University of Georgia Press, 2002) at 30. Bederman, finding a gap-filling function of general principles of domestic law for the rules of international law, notes that ‘civilized nations’ referred to in Article 38 (1) (c) “should be eclectically be taken as referring to jurisdictions embracing the common law tradition, the civil law, significant religious legal cultures (including Islamic law), and ideological legal systems (including socialist law as practiced in China and elsewhere).” Ibid.

²¹⁷ Ibid. at 31. (“The irony of general principles is that the truly useful rules rarely pass the test of generality. As a consequence, international lawyers have tended to err on the side of the lowest-common-denominator kind of logic in which abstract principles are derived from national legal systems and then shoehorned into appropriate legal submissions. Interestingly, this has most often been seen in “mixed” international arbitrations (involving commercial disputes between States and private parties) where a ‘new’ *lex mercatoria* has been derived from general rules of domestic practice.”) Ibid. at 97-98.

point of view, the core of the matter is not reaching the generality of principles but their compatibility with the criteria of legitimacy.²¹⁸

The meaning of principles in international law is controversial. Reference has been made to the principles of international law, the principles of domestic law, the principles of domestic private law, or the principles of natural law.²¹⁹ Thus, in the treatment of principles literature refers to principles of different types and levels.²²⁰ Disagreement also exists about the function of general principles of law whether they can go beyond assisting the interpretation of customary or treaty obligations to an independent source.²²¹ One view while acknowledging a supplementary role of general principles of law does not rule out the possibility of principles as an independent source.²²² Some also view that general principles of law are not part of international law but part of law that only the international

²¹⁸ See below Section, C (ii).

²¹⁹ See Bin Cheng, *General Principles of Law: As Applied by International Courts And Tribunals* (London: Stevens and Sons Limited, 1953) at 2-3; Martti Koskenniemi, *General Principles: Reflexions on Constructivist Thinking in International Law*, (1985) 18 *Oikeustiede-Jurisprudentia* 117, reprinted in Martti Koskenniemi ed., *Sources of International Law* (Aldershot: Dartmouth Publishing Company Limited, 2000) at 124-126, who also observes that Western scholars have regarded Article 38(1) (C) as referring to principles generated in national legal systems. Robert Jennings observes that “[s]o if we take it that the general principles of law are, as SIR GERALD FITZMAURICE has suggested, just those necessary general principles such as the rules of natural justice, *res judicata*, and the like, then there is no great difficulty, though their content will then be very limited, and *virtually confined to obvious*, basic principles that hardly require today a distinct source.” Sir Robert Jennings, *What is International Law and How Do We Tell It When We See It*, (1981) 37 *Schweizerisches Jahrbuch für Internationales Recht*, 59 reprinted in Martti Koskenniemi ed., *Sources of International Law* (Aldershot: Dartmouth Publishing Company Limited, 2000) at 40. [emphasis added]

²²⁰ Cheng’s treatment of general principles of law reflects a mixture of rules and principles, fundamental principles and substantive principles as well as procedural and structural principles, which he examines under four categories of the principles of self-determination, good faith, the concept of responsibility and judicial proceedings. See Cheng, *supra* note 219, at 29 et seq. Koskenniemi observes a wide range of references to principles including *res judicata*, equality of States, State immunity, self-determination, sovereignty, or principles such as good faith and estoppel. See Koskenniemi, *supra* note 219, at 121-125.

²²¹ See Cheng, *supra* note, 219, at 4-5.

²²² Oppenheim, *supra* note 119, at 40. General principles in Article 38 was included among the sources of international law because it purportedly “amounts to an acceptance of what has been called the Grotian view, which while giving due—and, on the whole, decisive—weight to the will of States as the authors of international law, did not divorce it from legal experience generally.” *Ibid.* at 25. It is further observed that the sub-paragraph (c) of Article 38 (1) has rarely been used by the ICJ. *Ibid.* at 36-37. See also Koskenniemi, *supra* note 219, at 122-123.

court could apply in the absence of treaty or custom by virtue of sub-paragraph C of Article 38 (1).²²³

Even as a guiding tool for treaty interpretation, there is no consensus as to how principles may play that role. The issue turns on the question of the normative weight of principles and their binding force, which also relates to the question of their status as a source of law. The sources doctrine in international law is confusing.²²⁴ Accordingly, the use of the source of law for principles as appearing in literature and indicated by Article 38 (1) (c) may accommodate theories that both attribute and do not attribute a binding force to principles.²²⁵ These theories from one perspective represent normative and descriptive theories of principles in international law.²²⁶ The normative theory attaches a binding force to principles and the binding force of norms usually means that norms or principles “govern the solution of normative problems”, that is they are applied to provide solutions to the exclusion of other solutions in controlling decisions and provide explanation for decisions.²²⁷ The descriptive theory regards principles as non-binding because “rules of international law are the only legally binding norms of international conduct.”²²⁸ A gap-filling function to general principles in judicial practice is regarded as a branch of the normative theory.²²⁹ The gap-filling function is an aspect that may arise in the interpretive aspect of adjudication. Accordingly, to use principles such as principles of equity, estoppel, etc. as interpretative standards when seen carrying a binding force would be an interpretive exercise representing the normative theory.²³⁰

The gap filling function of general principles has also been raised in the discussion of *non-liquet* in adjudication, particularly for novel cases in the

²²³ See Cheng, *supra* note 219, at 4; See also generally, Lord McNair, “The General Principles of Law Recognized by Civilized Nations” (1957) 33 Brit. Y.B. Int’l L. 1, who regarded general principles of law as a source for application to economic development agreements.

²²⁴ Koskenniemi, *supra* note 219, at 127.

²²⁵ *Ibid.*

²²⁶ *Ibid.*

²²⁷ *Ibid.* at 129. The normative theory itself has varying shades. See *ibid.* at 125-126.

²²⁸ *Ibid.* at 126.

²²⁹ *Ibid.* at 126. Koskenniemi observes that the gap-filling function is what principles are often associated with. *Ibid.* at 133, also no. 54.

²³⁰ *Ibid.* at 128.

absence of specific rules. On analogies with national systems, Hersch Lauterpacht treated the completeness of the legal system and the prohibition of *non-liquet* itself as a general principle and transposed it to international law on the ground that the process of judicial settlement does not permit *non-liquet*.²³¹ This transposition also accompanied the assumption that “[t]he rejection of the admissibility of *non-liquet* implies the necessity for creative activity on the part of international judges.”²³² Lauterpacht assumed the judicial activity for what he termed “real gaps”, i.e. “gaps due to discrepancies of practice” unlike “unreal gaps” attributed to situations where the legal situation is unsatisfactory in view of the purpose of law for which a gap filling function by the tribunal is much limited in international law because is seen as overriding the existing law.²³³ This view runs along the lines of the distinction between the notions of equity.²³⁴

The material completeness approach regarded the prohibition of *non-liquet* in international adjudication as requiring beyond the method whereby claims are rejected because of the absence of a rule, notably the absence of a rule in international law to restrict the freedom of State action.²³⁵ Lauterpacht acknowledged, “[v]ery frequently this method of dealing with claims will be in accordance with the judicial function of international judges as distinguished from that of legislators or mediators.”²³⁶ Yet, Lauterpacht advocated extending to international law a material completeness of law deemed to be “the necessary aim

²³¹ Sir Hersch Lauterpacht, *The Function of the Law in the International Community* (Hamen: Archon Books, 1966) at 60 et seq.

²³² Ibid. at 100. However, ‘the judicial creativity’ is presented among other methods such as analogy or the application of general principles of law in the judicial exercise of filling the gaps. Ibid. at 101-102, 109-111.

²³³ Ibid. at 76-82.

²³⁴ For the notions of equity and how their distinction may obscure the creative function of adjudicators, see Section C (i) (b) (2) below and Chapter III, Section A.

²³⁵ See Lauterpacht, *supra* note 231, at 77, 85. (“There is always open to the Tribunal the possibility of rejecting the claim on the ground of the absence of an agreed rule of law supporting the demand. In so doing, the Tribunal may proceed on a number of rules of varying degree of elasticity. It may act on the view that freedom and independence of States are the basis of international law, and that no claim aiming at a restriction of a State’s freedom of action can be recognized unless it is based on an expressly agreed rule of international law. It may adopt as a guiding principle the rule that whatever is not expressly prohibited is permitted....”) Ibid. at 85.

²³⁶ Ibid. at 85.

of *any* legal system” for its achievement “the judge must consider not only the letter of the law, but also its spirit and purpose.”²³⁷

Opinions on gaps and *non-liquet* diverge diametrically. Views divide on whether *non-liquet* should be rejected in international law with some rejecting the declaration of *non-liquet* by an international tribunal and others believing that in the absence of sufficient State practice *non-liquet* must be declared as an inherent aspect of customary international law as an incomplete system.²³⁸ The view expressing non-permissibility of *non-liquet* in international law has received sharp criticism.²³⁹ Declaration of *non-liquet* could be justified in certain cases, which albeit important no “wise solution” is available for them for the present and *non-liquet* in some cases is even required.²⁴⁰ Furthermore, a customary or general principle basis of the prohibition of *non-liquet* in international law is rejected.²⁴¹ One main concern for the issue of *non-liquet* is the law-creating exercise of international courts as opposed to their function for the application of law.²⁴²

It is acknowledged that *non-liquet* prohibits the refusal by the adjudicator to give a decision on the ground of the absence of an applicable rule.²⁴³ Thus, the notion of *non-liquet* does not necessarily mean the decision has to be positive by creating a rule on a material completeness approach instead of rejecting the claim. Yet, the more fundamental issue is the *non-liquet* associated with the material completeness of the law that begs the question whether the international rule of recognition recognizes and validates any moral and political evaluation task, arising from whatever sort of gap, creating obligations and limitations on the

²³⁷ Ibid. at 85-86. [Italic added] On this assumption, Lauterpacht also criticized the judgment of the Permanent Court of International Justice in the Lotus case, which embodied an early enunciation of the freedom of State action rule by the International Court. See *ibid.* 94-96.

²³⁸ See Bederman, *supra* note 104, at 99; Julius Stone “Non Liquet and the Function of Law in the International Community” (1959) 35 *Brit. Y.B. Int’l L.* 124.

²³⁹ See Stone, *Ibid.*

²⁴⁰ *Ibid.* at 140, 157-158.

²⁴¹ *Ibid.* at 145-147.

²⁴² *Ibid.* at 127.

²⁴³ See Lauterpacht, *supra* note 231, at 85-86; Weil also viewing that the process of judicial settlement would indicate a duty to avoid *non-liquet*, observes that the question of *non-liquet* is avoiding the statement that the law has no answer. Prosper Weil, “The Court Cannot Conclude Definitively...: *Non Liquet* Revisited” (1997) 36 *Columbia Journal of Transnational Law* 109, at 118.

conduct of States. This question as indicated has links to the function of principles and the process of rule determination.

The boundaries of principles in international law are not marked. Principles of different orders interplay. Article 38 leaves unanswered significant questions about general principles of law in international law in terms of their compatibility with the criteria of legitimacy regarding the identification of the origin and content of law. The above account raises important questions of legitimacy regarding the application of principles and the creative function of international adjudicators in the interpretation of indeterminate obligations of states in international law. In relation to principles, the question concerns the compatibility of the binding force of substantive principles in view of the criterion of coherence. In relation to the creative function of international adjudicators, the question concerns the conformity of the adjudicators' power with the criterion of the rule of recognition in international law. To address these questions a distinction between the types and the nature of principles is important to evaluate the function of principles and its implication for the function of adjudicators in view of legitimacy.

The capacity to provide a solution in a legitimate manner is a fundamental issue surrounding the question of principles in areas of indeterminacies in international law. Indiscriminate reference to principles of different levels and functions to either appreciate or repudiate the binding force of principles obscures their true juridical character in international law that the criteria of legitimacy depict. All these questions invite exploration of the pertinent aspects of legal theory, in order to build a justified account of general principles of law in international law and the issue of the creative function of adjudicators in terms of legitimacy. This may begin with a discussion of indeterminacy and the issue of gap arising in interpretation in identification of the content of law.

B. The Identification of the Content of Law

Legitimacy of process heavily affects the legitimacy of content in substance. The concern of the content of law arises both at the legislative and

interpretative levels, which is bound by the criteria of legitimacy. Determining the content of law at the legislative level may very often implicate challenges at the interpretation level for the identification of the content of law in terms of unjust laws or the gap of law.

Conventional approach in legal theory deems natural law's primary or extreme claim to be attaching a moral test for the legal validity of laws.²⁴⁴ In Hart's view, the most hotly contested theory of natural law regards bad (morally wrong or unjust) laws not laws or invalid laws, whereas positivists regard them as valid or to be still laws but "too iniquitous to be applied or obeyed."²⁴⁵ This form of relation of morality and law ascribed to natural law is, according to John Finnis, not the primary concern of natural law.²⁴⁶ Finnis shows that the thrust of natural law theory is the rational foundations for moral judgment and the legal rules embodying the moral judgment.²⁴⁷ Natural law in this account concerns the principles of 'reasonableness' that lay the foundations for the construction of rules. The primary concern of natural law is not to challenge the positive law and the validity of its rules through moral tests but to equip positive law with principles of practical reasonableness in order to solve coordination problems and

²⁴⁴ See Finnis, *supra* note 5, at 25-29.

²⁴⁵ Hart, *Concept*, *supra* note 5, at 208. Hart refers to this type of morality that targets the validity of law through moral judgments as the extreme form of natural law, which assumes there are principles of morality or justice derived and discoverable from human reason, not man-made, with an overriding effect in case of conflict with rules of law. *Ibid.* at 156, 186. Hart links his discussion about the claims of natural law to the relation of law and morality and enumerates six forms of claims for necessary connection between law and morality. These include the relation of morality in obligation to obey the power and authority, in influencing the legislation of laws, in influencing the interpretation of laws, in criticizing the law, regarding the procedural principles of legality and justice, and regarding the legal validity of laws. Dworkin also views that the most extreme theory of natural law finds "law and justice identical, so that no unjust proposition of law can be true" and other versions of natural law "claim only that morality is sometimes relevant to the truth of propositions of laws" for example that in the interpretation of laws the more morally superior interpretation "is the more accurate statement of the law." Dworkin, *supra* note 32, at 35-36. Dworkin puts the school of natural law on the line of semantic theories that he also attributes to positivism. *Ibid.* at 33-36. Dworkin notes that the extreme form obscures the reality of legal practice that, for instance, lawyers in the United States regard progressive income tax as unjust but they all consider the law to impose such a tax. *Ibid.* at 36. He further finds the less extreme view of natural law as a semantic theory unpersuasive because it contradicts what lawyers believe in practice. *Ibid.*

²⁴⁶ Finnis points out that the theories of natural law are the theories of "rational foundations of moral judgment" not the images of natural law reflected by positivists that the legal validity of positive laws derives from natural law. Finnis, *supra* note 5, at 25-29.

²⁴⁷ See generally Finnis, *ibid.*

promote the common good in the community.²⁴⁸ What primarily natural law eschews about positive law is when legal rules are defective in practical reasonableness including legality (in the sense of the rule of law), i.e. legitimacy.²⁴⁹ The question of unjust laws in national legal systems is open to an interminable debate in legal theory, which may not correspondingly reflect in international law. What may create a great deal of confusion regarding international rules—still mingled with moral and justice foundations of rules—is the gap of law, which deserves a closer look.

Although the question of gap surfaces in interpretation of the content of a rule, it actually concerns the content of the law. It turns on what the position of the law of a given system is in attaching an instance to the scope of a rule whose extent to the instance at issue is controversial. If the rule does not cover the instance in its content, there is, therefore, a gap in the law. This is what Hart describes as the open texture of law or indeterminacy resulting from disputable rules. Hart points out that law has open texture, namely indeterminacy about the application of words and rules, and posits that judges in such cases exercise discretion in making a choice between different interests and alternatives.²⁵⁰ The legislator's inability to predict all circumstances, namely "ignorance of fact", will lead to "a relative indeterminacy of aim."²⁵¹

Hart's open texture of law builds upon his earlier account of the gap of law resulting from disputable rules. Hart distinguished between standard and penumbral cases with respect to the application of existing rules to facts. Therefore, a legal rule forbidding taking vehicles into parks, according to Hart, has uncontroversial core meaning in contrast to penumbral issues whose scope is disputable.²⁵² A "penumbra of uncertainty" surrounds all rules where judges make

²⁴⁸ Ibid.

²⁴⁹ See below Section C (i) (a).

²⁵⁰ Hart, Concept, supra note 5, at 127- 136 ("Whichever device, precedent or legislation, is chosen for the communication of behaviour, these, however smoothly they work over the great mass of ordinary cases, will, at some point where their application is in question, prove indeterminate; they will have what has been termed an *open texture*.") Ibid. 127-128. [italics original]

²⁵¹ Ibid. at 128.

²⁵² Hart, Separation, supra note 27, 593, at 603.

a choice between alternatives.²⁵³ The issue of penumbra of uncertainty is fundamental for interpreting an issue like expropriation of foreign investors' property in international law because the interpretation of the 'expropriation' or 'compensation' involves disputable instances whose arbitral assessment must conform to the criteria of legitimacy.

In response to what makes a decision in interpretation of penumbral cases sound or better than alternatives, Hart emphasizes the separation of law and morality in that "the criterion which makes a decision sound in such cases is some concept of what the law ought to be."²⁵⁴ This in fact concerns the existence or non-existence of a rule for a particular situation due to the penumbra of uncertainty surrounding a rule. That a decision in the interpretation of penumbral cases reflects what the law should be does not preclude moral judgments to determine what the law should be.²⁵⁵ Acknowledging this relation between law and morality, Hart recognizes "a point of necessary intersection" instead of "connection" between law and morality.²⁵⁶ Behind this account of interpretation of legal rules is that in penumbral cases judges engage in the lawmaking process because they confront alternatives to choose.²⁵⁷ Thus, the interpretation of the content of law in the adjudication of indeterminate rules turns on competing alternatives.

Lon Fuller finds Hart's account of interpretation defective because it assumes that interpretative problems arise from the meaning of individual words.²⁵⁸ In response to Hart's seemingly semantic account of interpretation, Fuller offers the purposive interpretation of law that takes the aim or purpose of a statute or a precedent into account in the interpretation of its content.²⁵⁹ This

²⁵³ Ibid. at 607-608; Hart Concept, supra note 5, at 12, 272.

²⁵⁴ Hart, Separation, supra note 27, at 608.

²⁵⁵ Ibid.

²⁵⁶ Ibid.

²⁵⁷ See *ibid.* at 608-609; Hart, Concept, supra note 28, at 12, 127-136.

²⁵⁸ Fuller, Fidelity, supra note 27, at 662. Fuller challenges whether mounting a historical truck on a pedestal in a park falls within the core or penumbra of a rule forbidding taking vehicles into parks, or whether a passenger napping at 3 a.m. while waiting for a train or a person lying with a blanket and pillow without actually sleeping violates a rule prohibiting sleeping in a railway station. *Ibid.* at 663-664.

²⁵⁹ *Ibid.* at 663-669.

purposive interpretation assesses the purpose of a rule itself rather than the intention of its framers. Fuller suggests that the purposive interpretation has a place not only in penumbral but ordinary cases as well.²⁶⁰ A mere semantic character is not, however, attributable to Hart's analysis of legal interpretation as Hart has rejected mechanical interpretation and acknowledged interpretation in light of social aims.²⁶¹ There is no reason that the distinction between core and penumbra solely and necessarily applies to the meaning of words rather than the meaning or the content of rules. Certainly, there are rules that have core or standard instances as well as penumbra instances. At the core of this distinction is that in interpreting the content of a rule there are instances whose coverage by the rule is indeterminate.

Hart's account of interpretation still indicates that in penumbral cases where the meaning of rules is disputable judges engage in a gap filling exercise. Fuller's purposive account of interpretation implies that by deciding the meaning of a rule through the purpose of the rule, judges discover its scope rather than creating a new rule for a new instance. Nonetheless, as long as the purposes of rules are themselves to be weighed in light of social aims, purposes, and policies or moral judgments and be chosen among alternatives, then an instance, which is not at the core and undisputable meaning of the rule, is legally undetermined. Fuller's acknowledgement that when purposive interpretation is made within the limits of "structural integrity" of rules, the fidelity to law permits and requires judges' creative role, points to the gap-filling function of judges in a law-making manner even though they are deciding the purpose of rules.²⁶²

Fuller concedes that purposive interpretation of law is significantly susceptible to abuse to an extent that may jeopardize human dignity and liberty.²⁶³ To reduce the vice of purposive interpretation, Fuller emphasizes, that judges are

²⁶⁰ Ibid. at 661-669.

²⁶¹ See Hart, Separation, *supra* note 27, at 611-614. Hart observes that a mechanical interpretation of general terms contained in rules without considering social aims, policies and consequences would amount to an absurd result such as including a toy motion car and excluding a bicycle as a vehicle in the coverage of the rule prohibiting taking vehicles into parks. Ibid. at 611. According to Hart, the aim or purpose of law is not necessarily moral. See *ibid.*

²⁶² See Fuller, Fidelity, *supra* note 27, at 670.

²⁶³ Ibid. at 670-671.

bound by the “structural integrity” of the rules.²⁶⁴ Fuller only hints at the structural integrity by stating, “[a] statute or a rule of common law has, either explicitly, or by virtue of its relation with other rules, something that may be called a structural integrity.”²⁶⁵ The question of the gap of the law and the judicial function to address it also finds expression in Ronald Dworkin’s vision of law. Dworkin argues that in hard cases judges’ disagreement about the truth of propositions of law, namely “all the various statements and claims people make about what the law allows or prohibits or entitles them to have” is theoretical as opposed to philosophical or empirical disagreement that focuses on the issues of the fidelity or gap.²⁶⁶ The theoretical disagreement, in Dworkin’s view, concerns the grounds of law as “more familiar propositions of law,” which “makes a particular proposition true or false.”²⁶⁷ Dworkin asserts that in deciding important cases judges in the Anglo-American system “generally offer ... ‘new’ statements of law as improved reports of what the law, properly understood, already is” and claim that their “new statement is required by a *correct* perception of the true grounds of law even though this has not been recognized previously, or has even been denied. So the public debate about whether judges ‘discover’ or ‘invent’ law is really about whether and when that ambitious claim is true.”²⁶⁸

What, in relation to principles, Dworkin builds on these assumptions is his account of integrity advocating coherence of rules with background principles constituting part of the law as a whole.²⁶⁹ Dworkin divides integrity between “integrity in legislation” and “integrity in adjudication”.²⁷⁰ Whereas legislative

²⁶⁴ Ibid. at 670.

²⁶⁵ Ibid. at 670. Fuller suggests that by virtue of fidelity to law, judges’ creative role may only take place within the limits of the structural integrity. Ibid.

²⁶⁶ Dworkin, *supra* note 32, at 4-5. Judges and lawyers “might agree, in the empirical way, what the statute books and past judicial decisions have to say about compensation for fellow-servant injuries, but disagree about what the law of compensation actually is because they disagree about whether statute books and judicial decisions exhaust the pertinent grounds of law. We might call that a ‘theoretical’ disagreement of the law.” Ibid. at 5. Dworkin describes the philosophers’ disagreement as “plain fact view” which, in Dworkin’s view, treats the issue as disagreeing about what the law should be and about the issue of morality and fidelity or the silence and vagueness of law. See *ibid.* at 7-9.

²⁶⁷ Ibid. at 5.

²⁶⁸ Ibid. at 6. [emphasis added]

²⁶⁹ Ibid. at 167 et seq.

²⁷⁰ Ibid. at 167, 217-218.

integrity requires lawmakers to make law coherent with principles of justice and fairness, the adjudicative integrity demands judges to treat law “as expressing and respecting a coherent set of principles, and to that end, to interpret these standards to find implicit standards between and beneath the explicit ones.”²⁷¹ Thus, according to Dworkin, law as integrity, the adjudicative integrity, means “propositions of law are true if they figure in or follow from the principles of justice, fairness or procedural due process that provide the best constructive interpretation of the community’s legal practice.”²⁷²

Reliance on the principles of justice or fairness in Dworkin’s adjudicative integrity is accompanied with some assumptions. First, Dworkin supports that a “principle model” of community is preferred to a “rule-book model.”²⁷³ Second, by projecting a gapless vision of law in the name of integrity, Dworkin argues that principles provide one right or best solution or answer to controversial legal questions in the legal interpretation of hard cases.²⁷⁴ It follows that the gap is

²⁷¹ Ibid. at 217.

²⁷² Ibid. at 225. (“Law as integrity ... holds that people have as legal rights whatever rights are sponsored by the principles that provide best justification of legal practice as a whole.”) Ibid. at 152.

²⁷³ Ibid. at 209-214. Dworkin argues that “[m]embers of a society of principle accept that their political rights and duties are not exhausted by the particular decisions their political institutions have reached, but depend, more generally, on the scheme of principles those decisions presuppose and endorse. So each member accepts that others have rights and that he has duties flowing from that scheme, even though these have never been formally identified or declared.” Ibid. at 211. Dworkin, however, acknowledges that even a community of principle may not be a just community. See *ibid.* at 213-214.

²⁷⁴ See *ibid.* at viii-ix, 258-263, 266-270. Dworkin has also posited that a principle is a matter of weight in a way that, while it “does not purport to set out conditions that makes its application necessary. Rather, it states a reason that argues in one direction, but does not necessitate a particular decision” and may be defeated by “other principles or policies arguing in other direction,” it is part of the legal system. Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass: Harvard University Press, 1978) at 26. Yet, this view of the principle is in an irreconcilable tension with Dworkin’s theory of ‘one right solution’ giving his theory the tendency of favoring one principle over another not as matter of direction but as a matter of a requirement of law projecting one principle as a governing law of the case in a particular controversial situation. This is also reflected in his definition of principle where he states that while he often uses the term principle in reference to “standards other than rules” including “principles and policies and other sorts of standards,” in differentiation from what he calls a ‘policy’ he states that “I call a ‘principle’ that is to be observed, not because it will advance or secure an economic, political or social situation deemed desirable, but because *it is a requirement of justice or fairness or some other dimension of morality.*” Ibid. at 22. [emphasis added] It is further reflected in the statement that “[w]e might treat legal principles the way we treat legal rules and say that some *principles are binding as law* and must be taken into account by judges and lawyers who make decisions of legal obligation ..., we should say that in the United States, at least, the ‘law’ includes principles as well

attributed to rule books (statutes or precedents) not the law as a whole because principles of justice or fairness as integral part of the law provide one right solution in a hard case where the scope of a statute or precedent is in question.

This conception of integrity situates principles at the core of law and legal interpretation of a rule and the law as a whole. On this ground, Dworkin presents a constructive interpretation consisting of elements of fit and justification whereby judges test different interpretations and principles expressing them in hard cases in view of principles of justice or fairness.²⁷⁵ Through this constructive interpretation, judges interpret the law in a way to make it the best it can be construed as the work of a single legislator.²⁷⁶ They first decide which interpretations fit past decisions (precedents, statutes) as a whole and then, confronting several contradictory or conflicting interpretations and the principles expressing them that fit the law as a whole, judges make the law and the legal practice the best it can through the interpretation that best justifies it in light of principles of fairness or justice.²⁷⁷ For instance, among different interpretations and principles expressing them about the compensation for emotional injury suffered in automobile accidents in England, six interpretations may be short-listed by the judge.²⁷⁸ An interpretation that allows only compensation for physical injury or allowing compensation for unforeseeable damages is rejected

as rules.” Ibid. at 29. Hart has observed that with the introduction of the interpretative theory Dworkin has not been so emphatic on “earlier denial of judicial discretion in the strong sense and his insistence that there is always a right solution” which “were associated with the idea that the judge’s role in deciding cases was to *discern* and *enforce existing law*.” Hart, *Concept*, supra note 5, endnote, at 307.

²⁷⁵ Dworkin, supra note 32, at 65-67, 229-. (Judges “decide hard cases by trying to find, in some coherent set of principles about people’s rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community. They try to make that complex structure and record the best these can be.” Ibid. at 255. This interpretive enterprise includes the pre interpretative, interpretative and post interpretive stages. Judges decisions belong to the post interpretive stage, which “must be drawn from an interpretation that both fits and justifies what has gone before [past decisions], so far as that is possible.” Ibid. at 239. Dworkin introduces “Judge Hercules” as an imaginary judge of “superhuman intellectual power and patience who accepts law as integrity” who can employ the constructive interpretation offered by Dworkin. Ibid. at 239.

²⁷⁶ Ibid. at 229. Ibid.

²⁷⁷ Ibid. at 65-67-229-254.

²⁷⁸ See *ibid.* at 239-241.

because it does not fit past decisions (precedents) in that system.²⁷⁹ An interpretation that allows compensation for emotional injury at the scene but not away from the scene fits past decisions but fails the justification dimension as “it does not state a principle of justice at all.”²⁸⁰ An interpretation and the principle expressing it that allows compensation if seemingly on a utilitarian basis that practice would reduce the cost of accidents or make the community wealthier also fits past decisions but does not meet well the justification test because it states policies rather than principles of justice or fairness.²⁸¹ The battle comes to the conflicting interpretations and principles expressing them that both fit past decisions but one (conforming to popular opinion) requiring unlimited compensation and the other limited compensation due to grave financial impact on the party at fault.²⁸²

A key point in this constructive interpretation is conceiving integrity in the sense of “treat like cases alike.”²⁸³ Hence, in deciding the similarity of cases and therefore the principles behind them, Dworkin suggests that a judge modeling after his imaginary ‘Judge Hercules’ “expands the range” to “see whether it [the interpretation or principle] is compatible with the bulk of legal practice more generally.”²⁸⁴ By expanding the range, he means testing each interpretation and the underlying principle (legal principle) against past decisions (and their principles) beyond those of immediate cases of likeness in that legal field to other cases in the field or even beyond its field.²⁸⁵ For instance, in the case of accidental emotional injury in tort law, justice requires to treat it like a case not same as physical or emotional injury that may result in unlimited liability but similar to cases in which damages are potentially great such as injury caused by accountants

²⁷⁹ See *ibid.* at 242, 245.

²⁸⁰ *Ibid.* at 242.

²⁸¹ See *ibid.* at 243. (“[I]ntegrity does not recommend what would be perverse, that we should all be governed by the same goals and strategies of policy on every occasion.”) *Ibid.* Dworkin does not reject justification of rules and creation of rights and duties by sound policies for the good of the community but views that there is a limit to that. See *ibid.* at 244.

²⁸² See *ibid.* 245-250.

²⁸³ See *infra* notes 350-353 and the accompanying text.

²⁸⁴ Dworkin’s, *supra* note 32, at 245.

²⁸⁵ See *ibid.* at 245-250.

or surveyors where liability is limited.²⁸⁶ In this account, the judge considers which interpretation or principle expressing it better “fits the extended legal record.”²⁸⁷ Ultimately, the judge would confront a question of political morality where in order to show the legal record the best it can be, principles of fairness and justice diverge, the former demanding unlimited liability and the latter requiring limited liability.²⁸⁸ The answer will depend on the judge’s conviction about justice and fairness constituting political morality.²⁸⁹ Whether principles can offer solutions so as to characterize judges’ decisions in a constructive interpretation or any other interpretation based on principles as legal rather than moral or political remains a question. Before addressing the question of principles in detail, some points may be highlighted. Firstly, Dworkin’s reliance on principles for the adjudicative integrity is primarily on principles of justice and fairness not general principles of law. In fact, his assessment in the question of emotional injury shows how these general principles emanating from rules as settled law are tested against what the principles of justice or fairness require for a particular hard case. Secondly, Dworkin’s theory of adjudicative integrity and a community of principles tend to protect rights of individual human beings by preventing an affront to what principles of fairness and justice demand in such protection. No safeguard, however, is provided in that theory to secure that such

²⁸⁶ Ibid. at 247. Dworkin further argues that as long as the justification test demands, this expansion of range may also involve crossing the boundaries of legal fields, thus from tort law to contract law to discover the similarity and the better principle elsewhere in law that makes legal practice coherent in view of principles of justice or fairness. See *ibid.* at 250-253.

²⁸⁷ Ibid. at 247.

²⁸⁸ Ibid. at 248-249. Dworkin tends to call this situation a competition rather than a contradiction between principles and views that neither of these principles should be wholly denied if integrity is to be served as these competing principles live together. See *ibid.* at 270. Despite this, Dworkin finds the principle of limited liability a more just solution than the other one for automobile accidents, thus willing to declare conflicting decisions as mistakes. See 270-271.

²⁸⁹ Ibid. at 249. Dworkin admits that judges disagree about the conceptions of justice and fairness and that in his interpretative theory judges’ moral convictions about political morality are directly and indirectly engaged. See *ibid.* at 255-256. Dworkin, however, unconvincingly attempts to respond to the criticism that in Dworkin’s conception of integrity the judge makes a political decision out of choice not law based on political grounds reflecting his own political morality and conception of fairness or justice expressing what the law should be without representing a principled best interpretation or one right solution. See *ibid.* 258-263, 266-270.

affront does not follow at the adjudication level from judges' opinions about fairness or justice in the name of those principles.²⁹⁰

Thirdly, Dworkin acknowledges that judges and lawyers disagree about the grounds of law and have different opinions as to what fairness or justice requires or how conflict between them should be resolved. Yet, he insists on a right or real solution as a matter of law. There is an understatement of rules and overstatement of principles in the adjudicative integrity and similar calls for principles in their role to solve coordination problems.

Fourthly, as with other accounts relying on principles Dworkin also relies on principles indiscriminately in their function as a requirement of law, whereas some principles have this effect and many do not. Dworkin's theory is compatible with certain principles of absolute character. It will also promote a constitutional approach to the construction of rights of human beings. Neither of these can be taken for granted for corporations. Part of the confusion surrounding binding force of principles is the attempts to create a universal theory for principles regardless of their character and function.

Fifthly, Dworkin's interpretive theory is "addressed to a particular legal culture", which is the Anglo-American system.²⁹¹ Thus, it cannot be applied to international law irrespective of the structure of international law. There is no reason to suppose that the question of gap in international law is commensurable to domestic systems or uniformly applicable for all relations of States in all fields of international law. Dworkin's argument cannot be generalized as a necessarily correct picture of all fields of international law.

Sixthly, coherence as a key element of legitimacy is not tied to the notion of interpretive integrity in adjudication. Dworkin's own reference to integrity in legislation affirms this point. Therefore, objections to Dworkin's conception of integrity in adjudication or to one right solution in all hard cases should not be regarded as objections to coherence in law. Moreover, Dworkin's conception of

²⁹⁰ The controversy over the appointment of supreme court justices in the United States because of their conservative or liberal views on controversial issues signifies the lack of such a safeguard not to mention the lack of a democratic mandate.

²⁹¹ See Dworkin, *supra* note 32, at 102. This is one major distinction that Hart finds between his theory of law and Dworkin's. See Hart, *Concept*, *supra* note 5, at 240.

integrity and coherence is about consistency in law through the principles of fairness or justice, making one part of the law consistent with another part. Coherence, however, at the same time, supports inconsistency in law in the sense that, for example, in Dworkin's analysis of emotional injury justice demands a solution not consistent with the general principle of unlimited liability. Coherence, therefore, involves inconsistency with a general principle.²⁹²

Theorists such as above, in one way or another, raise the content of the law in legal interpretation in controversial cases with varying reliance on rules, purposes and principles. In all these variations, the identification of the content of the law in indeterminate cases implicates evaluation of different values and making choices by a legitimate body to determine the content of the law to give specificity to the scope of a new or existing rule for a particular situation. A substantial issue for the application of principles in interpretation is compatibility with the criteria of legitimacy. The question of the utility of principles in interpretation and identification of the content of the law is subject to legitimacy criteria. The interpretation of rules— be it semantic, purposive, or constructive— is disciplined by the criteria of legitimacy. This raises the question whether the application of principles in a binding manner conforms to the legitimacy criteria of coherence and the rule of recognition of the system. This question receives deeper treatment in a discussion of the determination of the content of the law.

C. The Determination of the Content of Law

The previous section showed that the identification of the content of law in legal interpretation of indeterminate law or rules raises the question of the utility of principles. The application of principles in a binding manner needs to be assessed in terms of their conformity with the criteria of legitimacy. To this end, this section will focus on certain different levels and types of principles and the manner they implicate the requirements of coherence and the rule of recognition. By the types of principles discussed in this section, it is not meant to indicate that

²⁹² See below, Section C (ii).

they exhaust the range of principles that may come into focus in relation to law. The principles discussed in this section will rather assist to identify their character and their capacity to apply in a binding manner. This assessment will then assist to revisit the question of the application of principles in international law.

i. Variety and Variability of Principles

In addition to structural principles of legitimacy that provide the framework criteria for the formation and identification of primary rules, a variety of principles may interact in the determination of the content of rules or law. These include principles expressing basic values to general principles of law and in between principles of justice, fairness, and equity. The following will address these principles to assess their character and function and their weight in the process of determination of specific rules.

a) Practical Principles: Diversity of Participation in Values

An intimate bond firmly ties natural law and positive law in the process of rational determination of rules. The primary dependency of natural law on positive law is to secure basic human values.²⁹³ The community of human beings has basic values that both orient and justify the necessity for law and specific rules, justice, authority and the rule of law (legitimacy) in an orderly manner where these virtues of human association merge to produce rational determination of rules in order to solve coordination problems of a society for the common good.²⁹⁴

Legal theorists have treated human goods differently. For instance, Hart, as “an attenuated version of Natural Law”, reduces natural human end or good, which in his view emanates from teleological view of nature, to human

²⁹³ See Finnis, *supra* note 5, at 1.

²⁹⁴ See *ibid.* generally.

survival.²⁹⁵ Hart finds this modest human aim or value of survival as the core indisputable element of natural law.²⁹⁶ Thus, in Hart's approach, survival is an irreducible human good, value or aim.²⁹⁷ To Fuller, human end is not limited to survival but imports communication as well.²⁹⁸ Fuller does not contest that a necessary condition for human achievement is survival, but objects to survival as being "the core and central element of all human striving."²⁹⁹ What Fuller adds is the objective of maintaining communication for supporting and infusing all human aspirations since it is because of communication with other fellows that man has been able to survive.³⁰⁰

In Finnis's account of natural law, neither survival nor the combination of survival and communication, nor Finnis's own enumeration exhausts human values. Finnis counts, in a non-exhaustive manner, seven forms of good or basic values, which comprise life, knowledge, play, aesthetic experience, sociability, practical reasonableness, and religion.³⁰¹ The basic values are not only 'self-evident', 'underived', and 'incommensurable' but also "equally fundamental" without hierarchy among them.³⁰² Only may one's focus shift from one value to another based on the circumstances and the value focused in those circumstances. In this way, no value is more fundamental than the others because each value "can reasonably be focused upon, and each, when focused upon, claims a priority of value."³⁰³ That basic values are equally fundamental, of course, does not prevent

²⁹⁵Hart, *supra* note 5, at 189-191. ("[I]t is the tacit assumption that the proper end of human activity is survival, and this rests on the simple contingent fact that most men most of the time wish to continue in existence.") *Ibid.* at 191.

²⁹⁶ *Ibid.*

²⁹⁷ *Ibid.* at 191-192. ("We could not subtract the general wish to live and leave intact concepts like danger and safety, harm and benefit, need and function, disease and cure; for these are ways of simultaneously describing and appraising things by reference to the contribution they make to survival which is accepted as an aim.") *Ibid.* at 192.

²⁹⁸ Fuller, *Morality*, *supra* note 1, at 185.

²⁹⁹ *Ibid.*

³⁰⁰ *Ibid.*

³⁰¹ See Finnis, *supra* note 5, at 86-90.

³⁰² *Ibid.* at 92. For non-commensurability of basic goods, see *ibid.* at 115. There Finnis criticizes consequentialists or utilitarians for treating basic goods as commensurable. The problem of the utilitarian claims, which makes it senseless, flows from an erroneous assumption that basic goods or values are commensurable. *Ibid.* Finnis points out that the basic aspects of human good, while sharing a common feature by their very being a good, are "objectively incommensurable." *Ibid.*

³⁰³ *Ibid.* at 93.

a person from the choice of treating one or some values as more important in his life so that they can elect to participate in one or some values and not in others.³⁰⁴

The values of life, sociability, and practical reasonableness are significant in this discussion. Life is a basic value corresponding to the drive for self-preservation, and “signifies every aspect of the vitality (*vita*, life) which puts a human being in good shape for self-determination.”³⁰⁵ There is also the value of sociability, which ranges from peace and harmony among persons to forms of human communities.³⁰⁶ There is further the basic value of practical reasonableness that provides criteria for effectively solving problems of choosing actions and decisions by individuals as well as lawmakers and adjudicators.³⁰⁷ The basic principle of practical reasonableness is pivotal among the basic values in that not only is it itself a basic value but also it disciplines participation in all other aspects of human values or goods.³⁰⁸ Participation in values creates coordination problems in relation to other members in the community that need to be solved. To this end, the basic value of practical reasonableness provides certain requirements for the lawmaking process.³⁰⁹

These three basic values find immediate focus in dealing with the rule formation and interpretation in international law in shaping and determination of the origin and content of rules in boundaries of legitimacy. A number of values may be put forward as basic values in the international community corresponding to life and community. Self-determination, self-preservation, equality of States, peace and peaceful co-existence are familiar terms.³¹⁰ Parallel to the basic value of life in the human community, which concerns the self-preservation and self-

³⁰⁴ Ibid.

³⁰⁵ Ibid. at 86.

³⁰⁶ Ibid. at 87.

³⁰⁷ Ibid. at 88-89.

³⁰⁸ Ibid. at 103.

³⁰⁹ See *infra* notes 329-333 and the accompanying text.

³¹⁰ These express some of the principles of friendly relations of States that have been enunciated in the Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, *supra* note 195. These include: 1) refraining from use of force, settling international disputes peacefully, not-interfering in the domestic matters of any State, cooperating with one another, equal rights and self-determination of peoples, sovereign equality of States, fulfillment in good faith the obligations assumed according to the UN Charter. Ibid.

determination of human beings, there is a basic value of life of States for their self-preservation and self-determination. The parallel to the value of community at the domestic level, in international law is the sociability of States and the community of States.³¹¹ The association of States in peace and peaceful coexistence is a basic value of international law.

These values in the international community have a dual aspect by being bound to basic values of human beings. The collective life of communities of human beings is manifested in the notion of nations underlying the values of self-preservation and self-determination of States. On one side then, the corresponding value at the international level is the life of nations in the form of States, which includes every aspect of viability of nation-States that put their communities in a good shape for self-preservation and self-determination. The other aspect is the co-existence of the value of life and the dignity of human beings as individuals in the international community. The international community is ultimately a community by and for the communities of human beings. Not only are basic values of human beings part of the basic values of the international community, but also it may turn out that “the good of individuals can only be fully secured and realized in the context of international community.”³¹²

As a basic value that disciplines participation in other values to solve coordination problems, the basic value of practical reasonableness also applies to international lawmaking. With so many complex coordination problems in the international community, this basic value and its requirements function as principles of legitimacy to be met in international rulemaking to justify the authority of rules.³¹³ The rule formation in international law must display respect for this basic value and its requirements as part of the criterion of coherence.

What express basic values are basic value judgments or basic practical principles. An important issue is then what a practical principle is and how to participate in a value. A principle of practical reasonableness is any expression of

³¹¹ See the discussion of international community in Chapter I, Section C (ii) (b) (2).

³¹² Finnis, *supra* note 5, at 150.

³¹³ For the requirements of practical reasonableness, see *infra* notes 129-133 and accompanying text.

our understanding of a value (such as ‘knowledge is something good to have,’ or ‘ignorance is to be avoided’) that provides “a starting point for reasoning about what to do.”³¹⁴ By the proposition that knowledge is good is not meant that it is a moral value and follows a moral recommendation, prescription, requirement or obligation.³¹⁵ Practical principles express values in basic and particular forms.³¹⁶ A basic practical principle such as ‘knowledge is good’ orients the reasoning.³¹⁷ A particular practical premise such as ‘it is desirable to find out about ...’ formulates a desire but makes the desire more specific by “refereeing its object to the intelligible and general form of good which that object is one possible way of participating in or instantiating.”³¹⁸ Another particular practical principle such as ‘reading this particular book serves the end to find out about ...’ adds a “straightforward factual judgment about relevance, coherence, etc., of a particular book” to the particular practical principle, which together “expresses a reason for acting in the manner signified in the conclusion that ‘therefore, I will read this particular book’.”³¹⁹ An important issue is that in many cases beyond the basic form of good just as with knowledge and the principle expressing it, rule formation, creation, and interpretation is a matter of evaluation, assessment, all-considered, and selection of choices and specification of particulars. Basic practical principles “can be instantiated (rather than ‘applied’) in indefinitely many, more specific, practical principles and premises.”³²⁰

To translate the basic practical principles and the function of the basic requirements of reasoning in relation to a rule making process, reference may be made to the example of determination of a rule for the ownership of natural resources in the High Seas. The first practical principle is that it is desirable or

³¹⁴ Finnis, *supra* note 5, at 63.

³¹⁵ *Ibid.* at 62.

³¹⁶ *Ibid.* at 63.

³¹⁷ See *ibid.* at 63-64. “A basic practical principle serves to orient one’s practical reasoning....” *Ibid.* at 63. The basic practical principle: E.g., knowledge is good “need hardly ever be formulated as the premiss for anyone’s actual practical reasoning.” *Ibid.* at 63-64. In addition, usually propositions of basic and particular practical principles in practical reasoning in example such as knowledge is good and it would be good to know about this particular book are omitted and presupposed in declaring the conclusion. See at 64.

³¹⁸ *Ibid.* at 63.

³¹⁹ *Ibid.*

³²⁰ *Ibid.*

good to have a rule in this particular field of law as it would solve the coordination problems that arise from the relations between States in extracting these resources. But, that ‘this particular rule of common ownership rooted in the notion of common heritage of mankind is good for this field’ is a particular practical principle. Such a particular practical principle may be formulated subsequent to the evaluation of conceptions of justice and concerns of the international community whether through customary or conventional international law specification of the legal order of the ownership of natural resources in the High Seas. The necessity for the determination of the content of law through specific rules in part relates to the range of possibilities open to evaluation and selection in formulating this second particular practical principle.

That knowledge is good as a self evident and universal practical principle cannot be extended to the premise that knowledge about a particular object is universally good. As Finnis observes “[t]he *universality* of a desire is not a sufficient basis for inferring that the object of that desire is really desirable, objectively good.”³²¹ The universality, irreducibility, self-evidentness of principles is attributable to basic goods, basic practical principles and the requirements of practical reasonableness or structural principles. Such attribution does not fit substantive moral principles or particular practical judgments or general principles of law that are subject to evaluation and choice in infinite instances.

The necessity for specificity in rule making at the deepest root stems from the indefinite and inexhaustible diversity existing for the realization of or participation in basic values. The basic values and the basic value judgments (basic practical principles) built on them such as ‘the human life is a value’ are universal. There is a concern for the value of human life, for the value of cooperation, for the value of common good, for the value of justice, etc. in all societies, and all have conceptions of property, title, and reciprocity.³²² The basic value judgments form the rational infrastructure of moral judgments as well as

³²¹ Ibid. at 66.

³²² Ibid. at 83.

human law. Thus, they are manifested not only in moral requirements but in human cultures and institutions as well.³²³ Yet, the basic values and basic value judgments do not entail universal methods and forms in particular realization of or participation in basic values (principles) or universal moral attitude. They provide horizons and opportunities for which human beings and communities are free to select in shaping life.³²⁴ There is infinite diversity in particular realization of or participation in basic values and instantiation of basic practical principles, in free and selective pursuit of opportunities open to human beings and communities.³²⁵ There is also diversity in the level of priority given in the pursuit of a given value. Human beings, cultures, and communities differ in their realization of values and in their response to any value.³²⁶ Law and law-making enterprise respect diversities in participation in and response to basic values by human beings, cultures, and communities. International law in particular is built upon respect for these diversities through its basic values and structural principles and criteria of legitimacy.

Law, justice, and authority are also values of the community because without them the basic values could not be secured or at least advanced.³²⁷ They are needed because basic values may be participated in a variety of ways and the communal life pose coordination problems that need to be solved and the solution could only be provided through institutions of human law.³²⁸ The variation in realization of and response to basic values and practical principles is, therefore, conducive to coordination problems that require specific rules determined through rational evaluations and selection of choices in a given community.

In addition to justifying the need for law, justice and authority to determine solutions to coordination problems through specific rules, the basic good of practical reasonableness provides criteria for such determination and

³²³ Ibid. at 84.

³²⁴ Ibid.

³²⁵ See *ibid.* at 63, 84-85.

³²⁶ Ibid. at 85.

³²⁷ See *ibid.* Chaps. VII, IX, and X.

³²⁸ See *ibid.* at 1.

indeed for actions and decisions by individuals, judges, and lawmakers.³²⁹ These are the methodological principles that are among others required in lawmaking and law applying decisions. Amongst the basic requirements of practical reasonableness that discipline the decision and making the determination of the content of rules are “no arbitrary preferences” among values or persons, “respect for every basic value in every act”, and the advancement of the common good.³³⁰ Morality is the product of the basic requirements of practical reasonableness.³³¹ Finnis observes “[v]ery many, perhaps, even most of our concrete moral responsibilities, obligations, and duties have their basis in ... the requirement of favouring and fostering the common good of one’s communities.”³³² The content of the common good of the political community or the international community is the subject matter of justice, law including the rule of law, and authority.³³³ These methodological requirements of practical reasonableness, notably the advancement of common good, are tied to the legitimacy criterion of coherence in determining the content of law.

Basic values and their concomitant basic principles together with the requirements of practical reasonableness furnish foundations for moral evaluations and legal formulations in the construction of order in relations between the members of the community and the determination of solutions to their coordination problems. The basic values, the basic practical principle expressing the values of the community, and the basic requirements of practical

³²⁹ See *ibid.* Chap V.

³³⁰ *Ibid.* at 103-127. Other practical reasoning requirements are “a rational plan of life”, “efficiency within reason,” “commitment and attachment,” and “[f]ollowing one’s conscience”. *Ibid.* Just as basic values, “each of these requirements of practical reasonableness is fundamental, underived, irreducible, and hence is capable when focused upon of seeming the most important.” *Ibid.* at 102.

³³¹ *Ibid.* at 126. Finnis states that “[n]ow we can see why philosophers have located the essence of ‘morality’ in the reduction of harm, others in increase of well-being, some in social harmony, some in universalizability of practical judgments, some in the all-round flourishing of the individuals, others in the preservation of freedom and personal authenticity. Each of these has a place in rational choice of commitments, projects, and particular actions. Each, moreover, contributes to the sense, significance, and the force of terms such as ‘moral’, ‘[morally] ought’, ‘right’; not every one of the nine requirements has a direct role in every moral judgment, but some moral judgments do sum up the bearing of each and all of the nine on the questions in hand, and every moral judgment sums up the bearing of one or more of the requirements.” *Ibid.* 126.

³³² *Ibid.* at 125.

³³³ *Ibid.* at 156.

reasonableness underlying the necessity for specific rules have also significant implications for moral principles and general principles of law. These implications are reflected in the following sections.

b) Moral Principles: Variability of Moral Attitude

The capacity of morals to be binding as a matter of law may also be evaluated in view of variability of moral judgments. Two aspects of morality in this regard are general and specific morality. On the issue of general morality, the distinction between duty and aspiration comes to point. On the question of specific morality, the shifting aspect of principles of justice, fairness, or equity comes into focus. These issues will be assessed from the legitimacy point of view in relation to the determination of the content of rules.

1. Duty and Aspiration on the Scale of Morality

The portrait of morality as a scale of human achievement between duty and aspiration has been depicted by Lon Fuller. This scale of human achievement starts with the morality of duty at the bottom and switches to the morality of aspiration towards the top with an imaginary pointer to mark the line where the duty stops and excellence begins.³³⁴ The morality of duty is akin to law, whereas the morality of aspiration finds its relation to aesthetics.³³⁵ The morality of duty concerns the minimum requirements or conditions of social living “without which an ordered society is impossible, or without which an ordered society directed toward specific goals must fail of its mark” similar to rules of grammar in language in preserving language as a means of communication.³³⁶ Morality of aspiration reaches towards the excellence of good life and realization of human capacity and powers, similar to rules of good writing.³³⁷ Below the imaginary pointer, failure is condemned as a violation of duty and success is not praised as a

³³⁴ Fuller, *Morality*, supra note 1, at 3-35.

³³⁵ *Ibid.* at 15.

³³⁶ *Ibid.* at 5-6.

³³⁷ *Ibid.*

fulfillment of duty, whereas above the pointer, failure results in expression of pity and success is admired.³³⁸ This distinction explains lawmakers' treatment of a question such as gambling.³³⁹ If the lawmaker regards gambling as a morality of aspiration and not duty, then it has no (direct) bearing on law because law cannot, as Fuller submits, or should not seek to, "compel a man to live up to the excellences of which he is capable."³⁴⁰

A similar analysis is traceable to Hart's distinction between moral ideals and moral obligations.³⁴¹ Hart pointing to the evaluation of competing moral values, states that

[D]ifferences of weight or emphasis placed on different moral values may prove irreconcilable. They may amount to radically different ideal conceptions of society and form the moral basis of opposed political parties. One of the great justifications of democracy is that it permits experimentation and a revisable choice between such alternatives.³⁴²

This account of duty and aspiration or obligation and ideal carry significant implications for rule determination.

First, it indicates that not all moral propositions impose duty. There could be morals that are not located in law. Second, the fact that many moral propositions may not impose duties necessitates a legitimate process to determine rules that specify rights and obligations in order to provide a conclusive line between duties and aspiration in the communal life to rescue the members of the community from arbitrary or idiosyncratic solutions as to what morals impose legal obligations. This is part of the coherence required as a criterion of legitimacy. The distinction between duty and aspiration is another aspect of diversity in participation in basic values, which further affirms that the law-making processes involve decisions as to the choice between moral conceptions. Therefore, moral principles are not universal or absolute but contingent upon

³³⁸ Ibid. at 10, 30-31.

³³⁹ Ibid. at 7-9.

³⁴⁰ Ibid. at 6-9.

³⁴¹ Hart, Concept, supra note 5, at 182.

³⁴² Ibid. at 184.

determination of specific rules to show the choice of the community where duties are imposed and where morals remain aspirations.

In international law, the distinction between duty and aspiration is even more significant in separating the duties of States from what are aspirations. International law, by virtue of its basic values and fundamental principles expressing them such as self-determination and self-preservation, leaves a great deal of autonomy to States particularly in their economic affairs. This makes the tension between international duties and aspirations even higher because many activities with cross-boundary effect may in the international agenda remain aspirations beyond the sphere of morality of duty in international law. International law determines its own sphere of morality of duty and aspiration.

Just as international law may require a minimum treatment for the treatment of aliens regardless of whether the national law of a State may have determined that minimum as aspiration, international law may treat many issues as aspirations even though in a national system they may have been determined as a duty. By way of illustration, international law may treat equal treatment between a foreign investor and a national investor for establishing investment not as an obligation of States but an aspiration that if desired States may within their consensual scheme through treaties formulate as a duty in their particular relations. The fundamental point is that locating the line between the morality of duty and morality of aspiration in international law requires determination under a legitimate process according to criteria of legitimacy in international law. It requires making rules coherent with what are determined as morality of duty according to the criteria of practical reasonableness under the rule of recognition not undue extension of aspiration into morality or ideal into obligation through transposition of national duties into international duties.

As a requirement of legitimacy, determination is essential to ascertain the duty of States. Fuller reminds that “[i]f the morality of duty reaches upward beyond its proper sphere the iron hand of imposed obligation may stifle experiment, inspiration, and spontaneity. If the morality of aspiration invades the province of duty, men may begin to weigh and qualify their obligations by

standards of their own ...”³⁴³ The stake for international law is much greater. If the morality of aspiration intrudes upon the morality of duty in international law through ambitious agenda to extend aspirations into States’ obligations without determination and specification of those obligations in the context of international law, this would create a legitimacy shortfall causing States to employ their own yardsticks to assess international duties. The more resort to abstract standards or principles to attach duties to States, the more likelihood of erosion of international law and retard of genuine international rules. Determination of duties in specific rules, in contrast, restores the yardstick of legitimacy and efficiency of genuine rules. Determination of the content of rules is an essential element in international law to test and demonstrate through the criteria of legitimacy what has reached the level of duty and what has not. The distinction between morality of aspiration and duty is also linked to the status of moral principles of justice, fairness or equity in relation to rules.

2. Concept and Conception of Justice

Closely related to the distinction between aspiration and duty is that justice, fairness, equity and similar hallowed concepts do not automatically impose a duty. A process of determination in most cases is required to legitimate the obligation demanded by these fundamental principles of all communities. Otherwise, aspiration would intrude upon duty and more importantly violate legitimacy. Justice as a significant segment and more specific form of morality does not necessarily guarantee the existence of excellences in laws or administration of laws.³⁴⁴

Justice, fairness, equity or similar cherished principles truly constitute the moral foundations of all legitimate lawmaking processes in human communities. These concepts may indeed differ in meaning or character, or their interaction. For instance, Dworkin’s reference to fairness includes both procedural and

³⁴³ Fuller, *supra* note 1, at 27-28.

³⁴⁴ Hart, *Concept*, *supra* note 5, at 157.

substantive aspects that may even compete with the principle of justice.³⁴⁵ Franck also treats fairness as an umbrella notion with equity or justice as its substantive portion.³⁴⁶ Equity in turn has been conceived in three notions of equity under the law (*infra legem*), equity additional to the law (*praeter legem*), and equity contrary to the law (*contra legem*).³⁴⁷ However, the discussion here concerns not the differences in meaning but mainly the function of these principles. Reference to justice in this perspective also includes equity or fairness in the way they function in rule construction. What is material here is the relation of the principle of justice to the criteria of legitimacy and determination of rules.

On the one hand, legitimacy is linked to procedural justice or fairness. In this respect, the legitimacy of structure and adherence to the criteria of legitimacy for rule construction is a reflection of procedural justice.³⁴⁸ Franck has treated this procedural aspect of justice in the notion of fairness. Franck articulates legitimacy as a requirement of fairness in that for a legal system to be seen as fair, the subjects

[E]xpect that decisions about distributive and other entitlements will be made by those duly authorized in accordance with procedures which protect against corrupt, arbitrary, or idiosyncratic decision-making or decision-executing. The fairness of international law, as of any other legal system, will be judged, first by the degree to which the rules satisfy the participants' expectations of justifiable distribution of costs and benefits, and secondly by the extent to which the rules are made and applied in accordance with what the participants perceive as right process.³⁴⁹

³⁴⁵ See Dworkin, *supra* note 32, at 164-166, 249-250. Dworkin refers to fairness as “in politics a matter of finding political procedures—methods of electing officials and making their decisions responsive to the electorate—that distribute political power in the right way” and justice as concerning “decisions that the standing political institutions, whether or not they have been chosen fairly, ought to make”. *Ibid.* at 164-165.

³⁴⁶ Franck, *Fairness*, *supra* note 35, at 7. The two aspects of fairness in Franck's view are distributive justice as the substantive aspect and the right process as its procedural aspect, which do not always go in the same direction. See *ibid.* at 22-23.

³⁴⁷ See Michael Akehurst, “Equity and General Principles of Law” (1976) 25 *International Law and Comparative Law Quarterly* 801, at 801. For further discussion of equity in relation to the question of the creative power of international adjudicators, see Chapter III, Section A.

³⁴⁸ See Chapter I.

³⁴⁹ Franck, *Fairness*, *supra* note 35, at 7.

The other side of the equation is that in relation to law substantive principles of justice depend on the criteria of legitimacy including principles of practical reasonableness for the determination of the content. Accordingly, legitimacy that may find its origin in procedural justice requiring it for a legitimate structure itself disciplines the content of substantive justice. Similar to the relation of law and criteria of legitimacy where law acts and functions by reference to criteria of legitimacy, substantive justice acts and functions by reference to criteria of legitimacy. The phrase ‘justice under law’ is self-explanatory in this regard. Criteria of legitimacy measure the conceptions of justice and selection of a reasonable solution in formulation of a rule for a particular problem in the community in the context of that community and with consideration of values and concerns appropriate to that community. For international law to pay respect to justice, it must above all show that the conception of justice reflected in the content of its rules is disciplined by the criteria of legitimacy of its own community.

The significance of criteria of legitimacy to determine the demand of justice in the content of a specific rule in each situation is in turn due to the fact that, just as with other abstract ideas, justice reflects a concept and conception. The concept of justice is abstract and global. Its conceptions are particular and local. The concept of justice endures across times and places in guiding human or communal relations or interactions. The conceptions of justice may vary from time to time, place to place, situation to situation, and context to context. The maxim ‘treat like cases alike’ is pivotal in this respect.

Hart finds the maxim ‘treat like cases alike’ in the core of the concept of justice to maintain a balance or proportion in the distribution of burdens and benefits in relationships in the social life or restore that balance or proportion when disturbed.³⁵⁰ Dworkin renames this maxim as “the virtue of political integrity”, which “requires government ... to extend to every one the substantive

³⁵⁰ Hart, *Concept*, supra note 5, at 158-159. In many instances general good, public good, common good, general welfare of the society overrides the precept of justice that treat like cases alike. Ibid. at 166-167. This involves making a choice between alternatives and that choice can be defended on the ground that it is for public good. Ibid. at 167.

standards of justice or fairness it uses for some.”³⁵¹ On the basis of this maxim, Dworkin eschews ‘checkerboard laws’ in a system that, for instance, impose strict liability for manufactures of automobiles and not washing machines.³⁵² Dworkin acknowledges that different solutions may not necessarily be checkerboard solutions.³⁵³ The maxim ‘treat like cases alike’ even demands that where in a case of liability for injury by accountants law has accepted limited liability because of great financial burden, the same principle of justice applies to cases of emotional injury.³⁵⁴

From the maxim ‘treat like cases alike’ may follow that enslaving one black person would justify enslaving another black person, etc. Finnis objects to the restriction of the concept of justice to that maxim that deems equality rather than the common good as the object of justice. Equality is among the elements of the concept of justice but not its object.³⁵⁵ Finnis offers criteria of practical reasonableness among them the requirement of the common good of the community for the assessment of justice.³⁵⁶ Finnis defines justice in the general and particular senses. In its general sense, justice is “always a practical willingness to favour and foster the common good of one’s communities.”³⁵⁷ This general disposition or concept of justice, however, is not sufficient to meet the requirements of practical reasonableness and thus to satisfy the common good of the community.³⁵⁸ To meet the requirements of practical reasonableness, the

³⁵¹ Dworkin, supra note 32, at 165. Dworkin regards “integrity” as a “political ideal” besides justice or fairness that may even “conflict with what justice and fairness recommend.” Ibid. at 188. For Dworkin’s account of integrity. See supra notes 269-272 and accompanying text.

³⁵² See at 178-179.

³⁵³ Ibid. at 180-183.

³⁵⁴ See supra note 284-286 and accompanying text.

³⁵⁵ Finnis, supra note 5, at 162-163. The other elements include “other-directness” in that “justice has to do with one’s relations and dealings with other persons; it is ‘inter-subjective’ or interpersonal” and “duty”, which means “what is owed (*debitum*) or due to another, and correspondingly of what that other person has a right to (viz. roughly, to what is his ‘own’ or at least his ‘due’ by right).” Ibid. at 161-162.

³⁵⁶ See ibid. at 163-164. (“My theory includes principles for assessing how one person ought to treat another (or how one person has a right to be treated), regardless of whether or not others are being so treated; in my usage, a principle forbidding torture in *all* cases is a principle of justice.”) Ibid.

³⁵⁷ Ibid. at 164.

³⁵⁸ Ibid. at 165.

concrete meaning of justice, justice in particular sense, must be considered.³⁵⁹ The concrete meaning of justice in turn draws on the concrete meaning of the common good, namely “effective collaboration of persons, and co-ordination of resources and of enterprises” for the well-being of the members of the community.³⁶⁰ Therefore, there are also two classes of particular justice—distributive and commutative justice—which pose coordination problems in the society requiring effective collaboration and coordination and appropriate solutions.³⁶¹ Distributive justice concerns the reasonable allocation of an essentially common subject matter that needs to be appropriated to individuals for the sake of the common good.³⁶² The problem that the distributive justice poses is “to whom and on what conditions to make the necessary appropriation.”³⁶³ The coordination problems arising from particular justice necessitates determination of the content of the common good, justice and rules that must reflect them disciplined by the criteria of legitimacy including coherence and the concomitant requirements of practical reasonableness. The process implicates evaluation of values and assessment of different but appropriate solutions and selection among alternatives.³⁶⁴ Application of the principle of justice in the abstract without consideration of the background competing values and demands of justice in the context of a particular case would violate the very requirement of practical reasonableness including the common good as part of the legitimacy criterion of coherence.

There are some criteria for distributive justice. Equality is a fundamental one. According to this criterion, “*all* members of a community *equally* have the

³⁵⁹ Ibid. at 165-166.

³⁶⁰ Ibid. at 165.

³⁶¹ See Ibid. at 166. The first set of coordination problems are the “problems of *distributing* resources, opportunities, profits and advantages, roles and offices, responsibilities, taxes and burdens—in general the *common stock* and the *incidents of communal enterprise*, which do not serve the common good unless and until they are appropriated to particular individuals.” Ibid. Distributive justice is a response to this type of problems. Ibid.

³⁶² Ibid. at 166-167. As opposed to problems of justice in distribution that concerns whatever that relates to the community as common and allotted among its members, the commutative justice concerns justice and fairness in relationships between persons including between individuals and officials. Ibid. at 177-178. Nevertheless, the line between commutative and distributive justice is not always clearly demarcated. Some rules pose difficulty whether they aim at securing distributive justice or commutative justice. Ibid. at 180.

³⁶³ Ibid. 167.

³⁶⁴ Ibid. at 166-167.

right to respectful consideration when the problem of distribution arises.”³⁶⁵ Equality is an element that more than others accords an analogical sense to the concept of justice, and introduces a notion of proportionality, in that ‘equity’ depends on “the terms of the comparison in any assessment of proportions.”³⁶⁶ Because of this analogical nature of justice and its elements, “either sort of comparison suffices to supply the equality/inequality or proportion/disproportion that must enter, at least implicitly, into any assessment in terms of justice/injustice.”³⁶⁷

Whether deemed solely as equality associated with the maxim treat like cases alike or as a concept to foster the common good of the community with equality as one criterion among others, therefore, what the principle of justice requires depends in each particular situation on concrete solutions determined to respond to collaboration and coordination problems that particular justice poses. The core matter is the need for law and specific rules to determine a conception of justice appropriate to the context of a particular situation for the common good of the community. From another angle, the process involves appreciation of different solutions for seemingly similar cases. Hart recognizes that justice cannot be conceived solely as treat like cases alike. That element of justice while important and constant, “cannot afford any determinate guide to conduct” unless supplemented by another significant element, namely “a shifting or varying criterion used in determining when, for any given purpose, cases are alike or

³⁶⁵ Ibid. at 173. However, Finnis argues, to solve problems of distributive justice equality is “a residual principle” in that it can be “outweighed by other criteria and applicable only when those criteria are inapplicable or fail to yield any conclusion.” Ibid. 173-174. The reason for this residual character is that equality is not the objective of justice. Ibid. at 174. The common good serves as the objective of justice, namely “the flourishing of all members of the community”, which may not be enhanced by the identical treatment of everyone when distributing resources, opportunities and roles.” Ibid. In enumerating other criteria for solving distribution problems, Finnis acknowledges that no universally applicable criterion exists. The criterion of “need” is a primary one regarding “the realization of basic human goods, up to a certain threshold level in each member of the community” because it concerns a “fundamental component of the common good.” Ibid.

³⁶⁶ Ibid. at 162. Finnis illustrates that to give a large man the same rations as a child “is and is not to treat the two equally” because the large man’s rations maybe compared with the child’s rations on the basis of available supply or they may be compared on the basis of what the large needs or “what is *fitting* for him if he is to remain alive and well.” Ibid.

³⁶⁷ Ibid. at 163.

different.”³⁶⁸ This is a fundamental issue in justifying the necessity for specific rules to capture the conception of justice for a particular instance. The criterion of legitimacy of coherence and concomitant requirements of practical reasonableness become necessary precisely because of this varying element of justice to see where and in which context the cases are different and where similar and for evaluation of justice demands subject to the legitimacy criterion of recognition that validates the power to engage in such a task. The assessment of analogy, therefore, precedes an assessment of the application of principles. Determination of the content of rules is necessary to assess the similarities and differences between the cases and to determine the appropriate principle for a particular situation according to its own context in order to provide solutions to coordination problems in a legitimate structure. Human communities confront vast diversity in participation in values, coordination problems, justice perceptions, and conflict of principles. Coordination problems arising from particular justice necessitates the determination of the content of the common good through concrete content of specific rules disciplined by the criteria of legitimacy. Equally important, the requirements of the practical reasonableness including the criterion of common good as part of legitimacy appreciate the existence of certain absolute principles of justice or constitutional approach to rights of human beings, which avoids the vice that may attend the maxim treat like cases.³⁶⁹

Moral principles in most cases are devoid of legal determinacy and coherence. Moral principles including justice, equity and fairness depend on determination through specific rules to respond to coordination problems and conceptions of justice and its elements for the common good. Another category of principles, though in less abstraction, joins practical and moral principles in their lack of determinacy and coherence and dependency on determination.

³⁶⁸ Hart, *Concept*, supra note 5, at 160.

³⁶⁹ See below, Section C (ii).

c) General Principles of Law: An Inconclusive Character

General principles of law also pose dependency on determination as they may often collide and yield to one another or principles of higher-order. Reference to general principles of law may be made for different aspects of law. They may be used for substantive or procedural aspects of law.³⁷⁰ The focus here is on substantive general principles of law. Unlike principles of morality and justice, general principles of law have a positive pedigree. General principles of law stem from positive laws in the form of statutes, precedents or customs. In fact, the status of a general principle of law is supposed to derive from past and wide repeated usage in positive law. As Hart notes “many legal principles owe their status not to their content serving as interpretation of settled law, but to ... their ‘pedigree’; that is the manner of their creation by a recognized authoritative source.”³⁷¹ Inherent in the pedigree status of general principles of law is the analogical assumptions for transferring the authority of a settled law to a new penumbral instance by using a general principle. What can fundamentally render this utilization specious is precisely the analogy involved.³⁷²

In international law, the pedigree of general principles of law is often tied to national systems, but it may originate in the international system as well. Certain general principles are further conceived to assist the evaluation of the principle of justice or equity.³⁷³ This approach displays more an affirmation of the lack of substance of principles of justice, fairness and equity and their

³⁷⁰ Finis provides a list of general principles of both substantive and procedural character. The list includes: “(i) compulsory acquisition of property rights to be compensated, in respect of *damnum emergens* (actual losses) if not of *lucrum cessans* (loss of expected profits), (ii) no liability for unintentional injury, without fault; (iii) no criminal liability without *mens rea*; (iv) estoppel (*nemo contra factum proprium venire* potest); (v) no judicial aid to one who pleads his own wrong (he who seeks equity must do equity); (vi) no aid to abuse of rights; (vii) fraud unravels everything; (viii) profits received without justification at the expense of another must be restored; (ix) *pacta sunt servanda* (contracts are to be performed); (x) relative freedom to change existing pattern of legal relationships by agreement; (xi) in assessment of the legal effects of purported acts-in-the-law, the weak to be protected against their weakness; (xii) disputes not to be resolved without giving both sides an opportunity to be heard; (xiii) no one to be allowed to judge his own cause.” Finnis, *supra* note 5, at 288.

³⁷¹ Hart, *Concept*, *supra* note 5, at 264.

³⁷² See below Section (ii) (a) (3).

³⁷³ In assessing the principle of equity, Franck views that equity includes principles such as estoppel or good faith, acquiescence, and unjust enrichment. Franck, *Fairness*, *supra* note 35, at 47-48. See also Akehurst, *supra* note 347, at 813-815.

contingency on determination in majority of cases than a demonstration of the substance of general principles of law. Having pedigree does not entail having universally applicable content or coherence.

Contrary to the impression that general principles of law can afford what justice, fairness or equity demands, the conflict among principles shows that a general principle may yield to another less frequent or novel principle. Justice or fairness may demand determining the legal order for a particular situation other than what has frequently been used. Justice may, after evaluation of competing values and justice conceptions, result in a different solution both in a national system and even more in international law. The example of unlimited compensation for emotional injury as a frequent principle and its conflict with the principle of limited liability for the particular situation of emotional injury illustrates the point.³⁷⁴ The coherence of a rule for a particular situation with its context and conception of justice for that context not of course necessarily as a one single answer or solution but through appropriate consideration of all justice demands, therefore, may quite legitimately lead to the collapse of a supposedly general principle.

The pedigree of general principles of law cannot release them from dependency on determination. Just as with moral principles, general principles of law are in most cases contingent on determination and instantiation in specific rules. Principles have a “dimension of weight” or are non-conclusive in that they may be overridden or defeated.³⁷⁵ As opposed to rules that are “near conclusive”, principles are “generally non-conclusive” in that they “merely point towards a decision but may very frequently fail to determine it.”³⁷⁶ General principles of law “justify, rather than require, particular rules and determinations, and are qualified in their application to particular circumstances by other like principles.”³⁷⁷ General principles may “be outweighed and overridden (which is not the same as

³⁷⁴ See supra note 286 and accompanying text.

³⁷⁵ See Hart, *Concept*, supra note 5, at 261-263.

³⁷⁶ *Ibid.* at 263.

³⁷⁷ Finnis, supra note 5, at 288.

violated, demanded, or repealed) by other important components of the common good, other principles of justice.”³⁷⁸

Indeed general principles may not only often yield to competing principles or rules but also to different and competing moral and justice demands and the demand of the common good that may surround a particular case. In determining the content of rules, the consideration of competing but appropriate demands of justice and moral values is a requirement of practical reasonableness and legitimacy. This makes the coherence of rules with their context through a legitimate determination a prerequisite to meet the requirement of the common good of the community. The inconclusiveness of general principles of law is in fact rooted in their lack of coherence with what the background common good of a community as a requirement of legitimacy may require in the context of a particular situation. A general principle of law in the sense of a binding requirement of law is incongruous with what this criterion of legitimacy requires because its automatic application would give supremacy to one conception of justice without considering other demands of justice that the common good of the community may demand for the context of the case. Respect for the common good requires a genuine consideration of conflicting demands of justice, which is not met by mere acknowledging their being a matter of weight but genuinely treating substantive general principles only as an expression of one demand of justice and not the statement of the law as their appellation misleadingly suggests.

General principles of law, despite their legal attribution and pedigree status, share the very shifting character of moral and justice principles tied to the diversity of participation in basic values and infinite instantiation possibility of particular practical principles. Similar to particular practical principles and moral principles, general principles of law depend on the determination of the content of rules. The next section will depict the requirement of coherence and determination in more detail.

³⁷⁸ Ibid.

ii. Coherence and Determination Requirement

a) Contingent Principles

1. Principles and Rule Specification

A cardinal feature of law is that “law brings definition, specificity, clarity and thus predictability into human interactions, by way of a system of rules ...”³⁷⁹ Thus specificity, determinacy and coherence are also a dimension of the formal feature of predictability associated with law. Law’s demand for determination is indeed rooted in the need for specification of rights and obligations. Most rights find their protection not by way of emanation from nature but formulation in law. The specification of rights and obligations and concomitant consideration of competing conceptions of justice involve evaluation and choices. Finnis states, “most assertions of right made in political discourse need to be subjected to a rational process of specification, assessment and qualification.”³⁸⁰

Specification of rights is geared to determination of rules and the determination of rules involves selecting among competing and appropriate perceptions of justice or moral values with all associated social aims and policy considerations for the common good in a given community. Rule determination based on the demands of justice and the common good is a requirement of practical reasoning whose absence makes not only the content of the rule but the process of its formation devoid of legitimacy. That the law may not sometimes secure predictability and specificity for a particular situation does not undermine but underscores the necessity for determination. Legitimacy or the rule of law links these formal features of law to the requirements of practical reasonableness including the common good.³⁸¹

Determination is a requirement of legitimacy not because of structural coherence but its concomitant infrastructural requirements furnished by practical reasonableness to take into appropriate account the common good of the community and its components. This is not solely a process requirement of

³⁷⁹ Finnis, *supra* note 5, at 268.

³⁸⁰ *Ibid.* at 218.

³⁸¹ See *Ibid.* at 270.

legitimacy but a merger of process and substance. Common good together with other requirements of practical reasonableness provide process criteria to ensure a substantively justified content that has been rationally weighed and chosen with due consideration to and evaluation of the ingredients of common good including competing, appropriate moral values and justice demands behind policies and decisions in the lawmaking process.

Determination of the content of rules is necessitated in order to meet coherence and the concomitant methodological requirements of practical reasonableness. Along with the advancement of the common good of the community, the content of rules must show respect for other requirements of practical reasonableness. Among others, these requirements include “no arbitrary preferences” among values or persons and “respect for every basic value in every act.”³⁸²

Preferences reflected in the content of rules must first show that they are not arbitrary. Bias and arbitrariness in action or decision for choosing principles and values violates this requirement of legitimacy in the determination of the content of rules. Pre-supposition of a conception of justice for a particular case, which the application of a general principle as a statement of the law instead of treating it only as a demand of justice entails, without an appropriate evaluation of competing demands of justice for the common good equals to a biased and arbitrary preference violating the legitimacy criterion of coherence. A genuine respect for the common good begins with acknowledgment by the tribunal of a determination, i.e. moral and political evaluation, task without obscuring the process behind the veil of principles or precedents as well as demonstrating authorization for this task.

Preferences mirrored in the content of rules must also show ‘respect for every basic value in every act.’³⁸³ In negative terms, the formulation of this requirements reads as “one should not choose to do any act which *of itself does nothing but* damage or impede a realization or participation of any one or more of

³⁸² For other requirements, see supra note 330 and accompanying text.

³⁸³ Ibid. at 118-124.

the basic forms of human good.”³⁸⁴ This requirement provides a foundation for a category of absolute principles related to human life and dignity having paramount importance for international law.³⁸⁵ These requirements of practical reasonableness have significant implications in rule formation and interpretation in international law.

These criteria do not necessarily guarantee a legal solution that suits everybody’s conception of morality or justice. They accompany the legitimacy criterion of coherence that along with the rule of recognition lays out a legitimate structure for a legitimate process to ensure that the selection of that solution has been made by due consideration of all competing justice and moral demands and by the authorized body of the system. These requirements of reasoning provide criteria as to how in process the conceptions of justice and morality are to be assessed and how the selection of choices is to be made to reach a rule that can be legitimate in content. They provide yardsticks for a justifiable determination in specifying rights and obligations under coherent specific rules determining the conduct and consequences required by law. The lawmaking process is bound to the criteria of legitimacy including coherence with its component of requirements of practical reasonableness.³⁸⁶

The principles of practical reasonableness including the requirement of the common good not only discipline but also require determination. In most cases, they may not be met without the determination of specific rights and obligations through specific rules. Participation in basic values is diverse, justice has a particular aspect leading to coordination problems as well as shifting character varying from one particular situation to another, and general principles of law are inconclusive. This state of principles makes determination necessary in order to

³⁸⁴ Ibid. at 118. “For the only ‘reason’ for doing such an act, other than the no-reason of some impelling desire, could be that the good *consequences* of the act *outweigh* the damage done in and through the act itself.” Ibid.

³⁸⁵ See below, Section (b).

³⁸⁶ See Finnis, *supra* note 5, at 286-290. The “task of definition (and redefinition in the changing conditions of society) has its own principles, which are not the citizen’s. The reasonable legislator’s principles include the desiderata of the Rule of Law. But they also include a multitude of other substantive principles related, some very closely, others more remotely, some invariably and others contingently, to the basic principles and methodological requirements of practical reasonableness.” Ibid. at 286.

make the substance of a rule coherent with what the common good of a community requires in a particular context upon consideration of all justice demands. Such coherence and determination extends legal order into a field. Extending legal order into a field such as contract law, property law etc. “is justified not only by the desirability of minimizing tangible forms of harm and economic loss but also by the value of securing, for its own sake, a quality of clarity, certainty, predictability, trustworthiness, in the human interactions.”³⁸⁷ Determination required by the legitimacy of process and principles of practical reasonableness functions to extend coherence and legal order into a particular field. Principles whether substantive moral principles of justice, fairness, and equity or general principles of law, *per se*, fail to extend legal order into a particular field.

The inadequacy of principles and the necessity for determination can further be demonstrated through assessment of the relationship between positive rules and natural principles. The tradition of natural law has exposed positive rules to two modes of derivation from basic principles of practical reasonableness (which are themselves connected to the basic human values), which include the ratification and determination of these basic principles of natural law by positive law.³⁸⁸ The mode of ratification of basic principles of natural law concerns the focal principle of law of a subject-matter such as murder, theft, contract, property, etc.³⁸⁹ Reflecting this aspect of relationship, positive law is connected to the basic principles of practical reasonableness expressing human values and the basic requirements of practical reasonableness through a process of ratification. Thus, the positive rule in a legal system that holds that “one is not to deliberately kill the innocent ... unless in self defence ... is derived from the basic principle that human life is good” and the basic requirement of practical reasonableness that every basic value must be respected in every act.³⁹⁰ This sort of rule is derived from natural law like “deduction of demonstrative conclusions from general

³⁸⁷ Ibid. at 272.

³⁸⁸ Ibid. at 281-291.

³⁸⁹ See *ibid.* at 281-284, also 289.

³⁹⁰ Ibid. at 281.

principles.”³⁹¹ Thus, positive laws whose relation to natural law is in this sense of derivation have part of their force in these basic principles of practical reasonableness.³⁹² Nevertheless, it does not follow that the substantive basic principles like the one expressing the prohibition of killing is exempted from determination. As will be seen shortly, such derivation from natural law also involves determination of rights and obligations of conduct and consequences for each legal subject matter like murder, property, contract, and so forth to satisfy the requirement of coherence and to extend legal order into a particular instance.

Another closely related mode of derivation of positive law from natural law is determination. This mode of link between positive law and the natural principles of reasoning is derivation “like implementations (*determinations*) of general directives.”³⁹³ Determination involves choices.³⁹⁴ As opposed to rules related to natural principles by ratification that are regarded as partly natural, rules that are mere determinations are pure human law having their whole force from human law.³⁹⁵ The creation of a private property regime illustrates this sort of relationship. It starts with a general requirement that a regime of private property is as a requirement of distributive justice necessary if “material goods are to be used efficiently for human well-being” as a requirement of practical reasonableness.³⁹⁶ However, this requirement of justice does not determine “precisely what rules should be laid down in order to constitute such a regime.”³⁹⁷ Therefore, the rules that are adopted for this regime will “for the most part be *determinations* of the general requirement—derived from it but not entailed by it even in conjunction with a description of those particular circumstances.”³⁹⁸

The first mode of derivation involves determination process as well. The relationship set by the first mode of derivation does not obviate the necessity for the determination of the content and scope of those principles through specific

³⁹¹ Ibid.

³⁹² Ibid.

³⁹³ Ibid. at 284.

³⁹⁴ See *ibid.* at 284-285.

³⁹⁵ Ibid. at 285.

³⁹⁶ Ibid. at 285.

³⁹⁷ Ibid. at 286.

³⁹⁸ Ibid.

rules. That there are certain basic principles of reasonableness as the focal principles of the law of a particular subject matter like murder does not mean that they can apply without determination of their scope through determinate and coherent rules that make the content of the legal requirement coherent in such and such instances and such and such consequences. Whereas the general core point of the law of the subject matter is not a matter of choice, its specific scope requires determination that may also involve choices. What human law does to the preexisting basic natural principles of reasoning is not mere application of substantive basic principles. If it were so, there was no need of positive law because such principles could be applied directly. Yet, not only basic principles and values but also constitutional principles cannot dispense with rules.

The proposition that rules that ratify basic principles of reasonableness derive from natural law like deduction of conclusions from general principles receives a significant clarification. Coherence of rules and satisfaction of requirements of practical reasonableness emerge from a determination of such and such conduct and consequences in each particular case according to its context for the common good. This clarification is best inferred from the process of reception of basic principles of reasonableness into the law that ratifies them. The issue raises the interface between the reception of moral principles into the law of subject matters such as marriage, murder, contract, property and so forth and extending legal order into these fields.³⁹⁹ Thus, Finnis points out that “the effort to integrate these subject-matters into the Rule of Law will require of judge and legislator countless elaborations which in most instances partake of the second mode of derivation [determination].”⁴⁰⁰ It is the role of law to specify in which “relationships an act of killing-under-such-and-such circumstances fit.”⁴⁰¹ This requirement of specification of such and such conducts and consequences as

³⁹⁹ See *ibid.* at 282-283.

⁴⁰⁰ *Ibid.* at 289. [clarification added]

⁴⁰¹ *Ibid.* at 283. This is because “in the legally constructed version of social order there are not merely ‘reasonable’ and ‘unreasonable acts’. Therefore, “an unreasonable act, for example of killing, may be a crime (and one of several procedurally significant classes of offence), and/or tort, and/or an act which effects automatic vacation or suspension of office or of forfeiture of property, and/or an act which insurers and/or public officials may properly take into account in avoiding a contract or suspending a licence” *Ibid.*

requirements of law explains why “‘*No one may kill ...*’ is legally so defective a formulation.”⁴⁰² This analysis shows that a general principle as hallowed and undisputable as that expressing the prohibition of killing may not operate without determination in specific rules for particular situations if it is to serve social order, to meet the common good, and to solve co-ordination problems. Principles such as those expressing the sanctity of contract or property that fall far below the inviolability of person are no exception and are *a fortiori* contingent on determination through specific rules for instantiation.

The necessity for determination also shows that in many cases ‘the best answer’ may not be identifiable.⁴⁰³ The significance of determination in relation to natural law is, that natural law “‘already somehow in existence’ does *not* itself provide all or even most of the solutions to the co-ordination problems of communal life.”⁴⁰⁴ The requirement of the determination of the content of law in specific rules is, therefore, not solely a requirement of positive law but also a requirement of natural law. The requirement of determination is essential to secure basic values of the community and solve coordination problems arising from participation in them including problems of distributive justice. Determination is a moral and political evaluation task entailed by the common good that requires consideration of all justice demands in making legal determination.

Coherence is a criterion of legitimacy to extend legal order into a field through a legal determination task with genuine moral and political evaluation taking into appropriate consideration all justice demands posed in the context of a particular indeterminate situation to meet the common good of human beings in a community. This account of the legitimacy requirement of coherence, which includes the requirements of practical reasonableness, for the determination of conduct and its consequences in such and such cases and rights and obligations in

⁴⁰² Ibid.

⁴⁰³ John Finnis, “On Reason and Authority in ‘Law’s Empire’” (1987) 6:3 *Law and Philosophy* 357, at 376. One important argument leveled by Finnis against Dworkin’s one right solution theory is that in that theory “responsibilities to engage in practical reasoning with an eye to the common good and the Rule of Law ... never come into focus.” Ibid. at 359.

⁴⁰⁴ Finnis, *supra* note 5, at 28.

specific rules would test the legitimacy of a rule claiming authority to demand and command actions and consequences. General principles of law or moral principles including justice or fairness fail to meet this test of legitimacy *per se* to justify the claim of legal authority (binding force) over the members of the community. They lack the capacity to extend legal order into a particular field due to their lack of coherence with what the common good of a community may demand in the context of a particular indeterminate situation. Most substantive principles, therefore, do not qualify *qua* law *per se*. They are contingent upon legal determination to meet the legitimacy criterion of coherence. The vice in the application of principles in a biding manner to penumbral cases in legal interpretation is not merely their impotence to account for such-and-such conduct or such and such consequences. Such application is rather an affront to justice and common good. This account of determination will further explain the fallacy of any attempt to derive a legal requirement from a general principle as major premise of a deductive analysis in interpretation of rules where those principles are not absolute principles.

2. Principles and Deduction

That determination in such and such circumstances through specific rules is necessary to provide solutions to coordination problems of the community also transpires in a deductive analysis of general principles. If a rule does not unambiguously fit a particular instance in a penumbral case, what is latent in the process is determination not application of a rule to its covered instance in which deduction is not operable. In the penumbral area, i.e. where the coverage of an instance is in dispute or doubtful, the application of legal rules “cannot be a matter of logical deduction.”⁴⁰⁵ In fact, what makes deduction inoperable in such

⁴⁰⁵ Hart, Separation, *supra* note 27, at 607-608. (“Logic only tells you hypothetically that *if* you give a certain term a certain interpretation then a certain conclusion follows. Logic is silent on how to classify particulars and this is the heart of a judicial decision.”) *Ibid.* at 610.

situations is the very existence of competing values, demands of justice, social purposes, and policies open to evaluation.

General principles cannot apply in a deductive manner to a specific instance for which a rule is absent or silent. Where a general principle is treated as the major premise of a deduction, it will result in a doubtful and inconclusive conclusion. Most principles as discussed are subject to determination in the mould of rules according to the criteria of legitimacy and the concomitant requirements of practical reasonableness. Deduction from inconclusive principles violates these criteria.

Supposedly universal propositions such as ‘killing is forbidden’ or ‘promises must be kept’ find expressions in other premises. The instantiation of instances for these universal propositions is not a matter of application of the principle but determination of a rule. The determination alters an abstract principle into a coherent set of rules for such-and-such specific circumstances and such-and-such specific consequences. If there is a defect in the substance of either of the major or minor premise of a deductive analysis, the conclusion is fallacious. The defect that the application of principles carries in a deductive analysis is the disregard to determination required by the criteria of legitimacy and an affront to the justice and the common good.

To illustrate the issue in the example of killing, which as discussed requires such and such determination, if one follows the major premise of a deductive reasoning that reads ‘no one may kill’ from the minor premise that “A” has killed “B” in self defense’ proceeds the conclusion that “A” is legally responsible. Then in the analysis of the premises expressing the consequences of the conduct from a principle that “all killers must be killed” follows that “A” must be killed.⁴⁰⁶ Likewise, based on the major premise that ‘promises must be kept’

⁴⁰⁶ Similarly, the premise that ‘no one may profit from his own wrong’ may not necessarily prevent a person performing euthanasia from inheriting from the person whom he has killed not out of atrocity but out of altruism. The law of a system, may after legitimate evaluation and choice, consider this act not as obviating the responsibility arising from the penal statute forbidding euthanasia but still allow inheritance. The consequence of deprivation of the bequest cannot be derived from the principle in a deductive manner because it is not clear for the purposes of law whether euthanasia in such a case should also carry such a consequence unless a given legal system determines so after evaluation.

from the factual minor premise that “A” has entered into a treaty with State “B” that allows or condones human trafficking between their borders’ follows the conclusion that they must keep their promise.

Principles cannot work in deduction because as shown earlier they are open to evaluation and may often yield not only to another rule in the system but also to a different solution that the common good may require. The absurd result in these deductive analyses lies in the defect of the substance of the major premises projecting principles or precedents as conclusive propositions. An undetermined proposition whose truth for the specific instance of the case has not been determined in a coherent way would result in a defect of substance in deduction not capable of justifying the conclusion. The link of legitimacy and the common good is missing in drawing a conclusion from a principle that is inconclusive and open to evaluation. A general principle as the major premise of a deductive analysis taints the analysis with untruth. It distorts the minor premise by misleadingly projecting a case to be an instance of what the law requires whereas the law is either yet undetermined as to that specific situation or determined in another specific rule that requires a solution consistent with the particular context of the case.

Principles applying in a deductive manner are incoherent with established rules of the system or the context of particular situations requiring consideration of different demands of justice and determination according to the requirements of the common good of the community. Such an application of principles violates the criteria of legitimacy. Principles are subject to refinery through specific rules. In each particular situation of a penumbral case, it requires fresh evaluation and consideration of competing demands of justice to meet the requirements of legitimacy.

Just as the inconclusiveness of general principles of law makes them inappropriate for deductive analysis in law, their inconclusive character precludes their application through analogy. The implication of analogy was pointed out in relation to principles of justice or fairness.⁴⁰⁷ General principles of law are prone

⁴⁰⁷ See supra note 368 and accompanying text.

to the same flaw. Inherent in applying general principles of law is the assumption of similarity between a case or an instance that has found pedigree in law and a case or instance that is in dispute.

3. Principles and Analogy

Two aspects of analogy have significant implications for the construction of the substantive content of international rules and the criteria of legitimacy. The first aspect concerns the analogy with substantive law of national systems. General principles are determinations of justice and common good in a system and as such they are also tied to the context of their system including parallel principles and rules and their background competing values and conceptions of justice in that system.⁴⁰⁸ The transfer of a purportedly general principle extracted from national systems to apply as a binding rule in international law in a hard case firstly violates the legitimacy requirement of coherence by disregarding what the common good in the context of international law may require for the determination of the content of the rule for a particular situation. Such transfer would accord a floating character to principles extracted from seemingly similar rules in national systems detaching them from their own context that makes them coherent with other competing or counter rules and principles behind them in each system. This aspect of coherence in fact challenges the analogy of national systems in extracting general principles solely based on their similarities in national systems but ignoring the differences that each system develops in competing or counter rules. On the point of differences among national systems, a scholarly view affirms that

⁴⁰⁸ Transposition of domestic rules onto international law carries the danger that “qualifications or mitigations of the rule, provided for on the internal plane, may fail to be adequately reflected on the international, leading to a resulting situation of paradox, anomaly and injustice.” The Case Concerning Barcelona Traction, Light and Power Company Limited, (Belg v. Sp.) Judgment, Second Phase, ICJ Rep. 1970, Separate Opinion by Judge Fitzmaurice, p. 66, para. 5. Jennings and Watts also view that regarding reference to general principles of national systems under Article 38 of the ICJ Statute “[t]he intention is to authorize the Court [ICJ] to apply the general principles of municipal jurisprudence, *insofar as they are applicable to relations of States.*” Oppenheim, *supra* note 119, at 36-37. [emphasis added]

[C]onsidering the fact that law gives effect to key cultural values of different civilizations and that there are striking variations in legal arrangements in, let us say, contract law between countries as close as France and Germany or either of those countries and the United States, the proposition that there are specific common norms in international business remains to be established. Systematic comparative inquiry usually establishes remarkable differences between apparently similar legal approaches, even in systems that have common origins.⁴⁰⁹

In international law, the binding force of a general principle of law with a pedigree in national systems becomes further objectionable by obscuring the very context and differences in values, cultures, and conceptions of justice in the background of each principle in its own system that give rise to formation of competing or counter rules or principles in each system. This aspect of disregarding coherence by analogy of national systems between themselves with their similarities not their differences in extracting general principles is an additional objection to the application of general principles of law in a binding manner in international law.

More objectionable in view of the criteria of legitimacy is the analogy of international coordination problems/solutions with those of national systems disregarding what the common good in the international community and criteria of legitimacy including requirements of practical reasonableness in the context of international law requires for a particular situation. The inconclusive character of general principles entails the necessity for determination of the content of rules and the determination of the content of international rules follows evaluation of the common good and justice in its own context according to its criteria of legitimacy. The analogy syndrome of general principles of law in a binding manner in international law becomes more acute by presupposing the likeness of paradigms and parameters of national systems with those in international law or presupposing paradigms and parameters of private relations in national legal systems with those of relations involving nations in international law. Rooted in

⁴⁰⁹ W. Michael Reisman, *Systems of Control in International Adjudication and Arbitration: Breakdown and Repair* (Durham: Duke University Press, 1992) at 135.

the application of general principles of law in international law is the analogy of international coordination problems/solutions with coordination problems/solutions at the national level. Because of contextual differences between international law and national systems, parameters and paradigms of justice and common good in the international law may oftentimes be incommensurate to national systems. Justice and common good concerns in the context of the international community may justify different approaches to issues such as repayment of loans, concept of ownership of natural resources, etc. in determination of the content of respective rules. Rules of international law require determination according to conceptions of justice and common good germane to the community of nations according to the criteria of legitimacy that are not achieved by mechanical comparison of its problems and solutions to those that resemble in the national systems. The application of principles as an authority extracted from national systems and transposed in international law in such an analogical way would distort what the common good and justice in the context of international law may require in each particular case.

The second, more fundamental aspect of analogy concerns not analogy with domestic systems but analogy itself. That the general principles and precedents are not workable in deduction has close relation to the question of analogy as well. Resort to analogy is made to use what has found pedigree in the settled law to justify a new law.⁴¹⁰ What is sought by analogical reasoning is in effect to rely on an established rule and to borrow its recognized authority for the case that is in dispute. Using a general principle or precedent in essence is predicated on an analogical assumption. This is rooted in the justice maxim 'treat like cases alike'. Thus, an automatic application of a general principle or precedent to a penumbral case, say liability for emotional injuries, would assume similarity with cases to which the principle of unlimited liability has generally been applied. Yet, the other side of the justice precept is 'treat different cases differently'.⁴¹¹ The whole process turns on the elements of similarity and

⁴¹⁰ See Hart, *Concept*, supra note 5, at 274.

⁴¹¹ *Ibid.* at 159.

difference by the legitimate body in a given legal system to ascertain and evaluate those elements in the context of a particular situation to make the content of the rule coherent with what the common good considering all demands of justice requires in that context. Application of a general principle in a binding manner to penumbral instances ignores and violates this coherence requirement. Cases may be similar in one element and different in another. Thus the emotional injury case may be similar to physical injury cases in being foreseeable but not in having the same the financial burden, and, therefore, similar to cases that consider great financial burden in treating liability. A determination is necessary to weigh the justice demands in each particular case that general principles of law fail to provide just because the common good and justice may require a solution different from that adopted in apparently similar cases.

In the ordinary assessment of such cases, the conventional wisdom tends to perceive this as exceptions but neglects the requirement of determination as a condition precedent to make such exceptions. That is, the criterion of legitimacy of coherence requires initially the appraisal of common good for a particular situation in order to determine the case as an exception or not. Exceptions are themselves rules for their sphere of application for a specific case. The construction of exceptions, i.e. rules for specific situations, is itself part of evaluation and selection among principles, about locating the pointer on the scale of moral aspiration or duty, and about selecting the conception of justice for the common good for a particular case.

Coherence for the common good of a community as a yardstick of legitimacy requires consideration of competing elements such as social purposes, public policies, moral values, and justice demands and selection of choices according to the criteria of legitimacy and the accompanying requirements of practical reasonableness in determining the content of rules. Meeting this requirement of legitimacy is what the application of a general principle proceeding from a superficial analogy misses.

In the analogical process what the common good as the requirement of legitimacy in the determination of the content of rules requires is not a mere

similarity of facts but similarity in the background moral values, justice foundations, social aims, and policy drives. Legitimacy dictates the coherence of the content of a rule with its own context that may not be same as a seemingly similar case. General principles of law *per se* lack the capacity to exhibit this requirement of legitimacy in the interpretation of the content of rules. In penumbral cases each instance pose circumstances of justice and common good of the community peculiar to its own context that may also be in part linked to the cultural and social background of each community. What makes general principles of law inconclusive and contingent upon determination in penumbra areas is precisely the fact that in penumbra cases moral weights, justice demands, policy needs, and social purposes together with competing rules and principles constituting the context of a particular issue at the background of the case are not similar.

The criterion of coherence for the common good requires evaluation of justice appropriate to the context of international law and the particular instance at issue. Thus, in the penumbral area of international law that requires determination for the common good in its own context, using analogy to import, as a matter of principle, the authority of a settled rule whether of national or international pedigree departs from the legitimacy criterion of coherence. The transplant of the authority of a settled rule into penumbral cases, particularly hard penumbra, without coherence for the common good— such as analogies in the legal discourse of foreign investment that enrich corporations and impoverish human beings— beyond a defect of substance is a sign of decay of structure. Such a transfer of authority fails to consider the common good of the international community that include the flourishing of human beings and nations.

That the participation in basic values is diverse, the possibility of instantiation of particular practical principles is infinite, moral principles fluctuate on a scale of morality between duty and aspiration, justice conceptions shift across places and times, and general principles of law are inconclusive involving evaluation of justice for the common good can justifiably characterize most principles as contingent. They are contingent in the sense that they depend on

legal determination and coherence for the common good as a requirement of legitimacy that turns on the evaluation of justice and selection of choices among different conceptions of justice. In order to meet the requirements of legitimacy, it requires determination to extend legal order into a particular field and making its scope coherent for the common good and thus constructing its authority. Reasons are not enough for the statement of law; it requires legal determination according to the criteria of legitimacy. It is not enough that tribunals should provide reasons. Where competing but appropriate demands of justice and options of policy are involved, the competing reasons expressing or advocating them are all appropriate as well, requiring evaluation and selection for the common good in a legal determination according to criteria of legitimacy. This account of principles justifiably warrants the proposition that principles mostly guide the formation of the content of rules but are not binding in relation to law in the sense of requiring conduct or consequences of conduct creating obligations. The relevance of contingent principles expressing values, morals and laws is by way of orientation not application.

In light of these observations, in penumbral areas *lex lata* is illusive.⁴¹² The statements represented by contingent principles to show *lex lata*, what the law is, are only part of *lex ferenda*, what the law should be. In penumbral areas, the application of a general principle in a binding manner would be in fact a disguise determination without meeting the criteria of legitimacy. A contingent general principle having its pedigree in national systems or the international law itself expresses no more than one demand of justice itself subject to fresh determination of the content of rules in penumbral areas for coherence. The most subtle form of violation of coherence takes place when in a penumbral case, particularly a hard case, the justice demand represented by a contingent principle is taken for granted as the statement of the law and other justice demands are deemed calls for revising the law in a determination disguised by resort to a general principle of law. In penumbral areas, the rule receives authority, a binding character, through coherence for the common good according to the criteria of legitimacy. Where

⁴¹² On *lex lata* and *ferenda*, see also Chapter III, A (iv).

the tension between moral values, demands of justice, social purposes, and policy options is tense with significant implications for those affected by the rule, a hard penumbra is at issue for which the power to engage in the task of coherence and determination cannot be substantiated without the legitimacy criterion of recognition.

The above account of principles and requirements of legitimacy of process for the specification of rights in specific rules should not be regarded as undermining human rights.⁴¹³ First, it should not be taken as detracting from the constitutional rights of human beings and their construction and interpretation in a constitutional manner in favor of human beings.⁴¹⁴ Second, releasing rights from a legitimate specification requirement would not necessarily bolster human rights. As Finnis observes “[h]uman rights (not to mention public order and morality which constitute a necessary framework for their enjoyment) can certainly be threatened by use of rights-talk which, in bad faith or good, prematurely ascribe a conclusory or absolute status to this or that human right.”⁴¹⁵ Specification of rights and obligations in specific rules by employing the requirements of practical reasonableness for legitimate assessment of demands of justice may further bolster human and people rights by requiring their consideration in the formation and interpretation of rules in areas such as foreign investment. Various aspects of human rights from labor rights to aboriginal rights may be at stake in investment matters in international law. Without specification of states’ obligations and determination of the content of rules in foreign investment according to the criteria of legitimacy, many concerns of human beings such as human life and dignity, environment, climate, work conditions and so forth would be left out of the legal discourse that the common good of the international community requires for rule formation. In fact, the requirements of legitimacy, by demanding coherence with what the common good in the context

⁴¹³ The term inviolability or inalienability or the like does not signify the absoluteness of rights. See Finnis, *supra* note 5, endnote at 230.

⁴¹⁴ See Chapter IV.

⁴¹⁵ *Ibid.* at 220-221. This does not mean that the rights-talk has no place in the process of determination of rules and specification of rights. Indeed, the rights-talk “as the principal counter in political discourse” by emphasizing human flourishing, which “keeps justice in the foreground of our considerations,” has a significant place in practical reasoning. See *ibid.* at 221.

of international law requires, would insulate rule formation in foreign investment in international law from fragmentation. Without this insulation, many individual or group human rights that national and international law protect are vulnerable to an illegitimate subordination. More profoundly than linkage with other fields of international law for the application of existing rules, coherence for the common good figures in genuine consideration of human rights, labor rights, environment, and other public protection demands of justice right in the determination of the content of treaty or customary rules on investment that surface in the penumbral areas. The criteria of legitimacy are, therefore, essential to maintain coherence for appropriate consideration and evaluation of all demands of justice in the formation of international rules. The criteria of legitimacy are further essential to maintain coherence with absolute principles.

b) Absolute Principles

Not all principles can be characterized as contingent. There exists a category of principles of absolute character, whose significance for international law is paramount. There is a category of human rights that is absolute giving rise to absolute substantive principles.⁴¹⁶ Corresponding to absolute rights of human beings, there are principles of justice that can never be outweighed or overridden.⁴¹⁷ This class of absolute rights flows from the requirement of practical reasonableness that “it is always unreasonable to choose directly against any basic value, whether in oneself or in one’s fellow human beings.”⁴¹⁸ This basic requirement underscores “the strict inviolability of basic human rights.”⁴¹⁹ At the core of this requirement is then the distinction between where a choice in

⁴¹⁶ Other types of principles to which an absolute character can be attributed include structural principles including legitimacy of process shaping the structure of law in a given system and many principles of due process that protect procedural fairness and justice.

⁴¹⁷ Finnis, *supra* note 5, at 288.

⁴¹⁸ *Ibid.* at 225.

⁴¹⁹ *Ibid.* at 121.

participating in a basic value is right, that is moral and rational and where it is not right, which provides a yardstick for treating basic human rights.⁴²⁰

By absolute principles, it is meant principles that are exceptionless expressing exceptionless duties and their correlative exceptionless human rights, which are entailed by that requirement of practical reasoning.⁴²¹ The most obvious of absolute rights that arise directly from the natural law requirement of practical reasonableness are, for instance, “the right not to have one’s life taken directly as a means to any further end; ... and the right to be taken into respectful consideration in any assessment of what the common good requires.”⁴²²

The application of substantive absolute principles is not incompatible with the rule of recognition.⁴²³ International law provides for a category of principles under the notions of *jus cogens* or peremptory norms although their basis and content are controversial.⁴²⁴ The Vienna Convention has recognized this category of principles in international law focusing on their overriding character.⁴²⁵

⁴²⁰ (“The choice would be immoral and irrational where “directly and immediately damaging a basic good in some aspect or participation by choosing an act which in and of itself simply (or, we should now add, primarily) damages that good in some aspect or participation but which indirectly, *via* the mediation of expected consequences, is to promote either that good in some aspect or participation, or some other basic good(s).”) Ibid. at 120. The yardstick that Finnis offers is to avoid the arbitrary, delusive, and senseless consequentialist reasoning that an act that does nothing itself but damage a basic good is justified for the sake of the net benefits that it may have. See Ibid. at 118-121. Finnis illustrates the moral and rational choice by the example that “if the consequentialist reasoning were reasonable, one might sometimes reasonably kill some innocent person to save the lives of some hostages.” Ibid. at 119. Finnis rejects the consequentialist reasoning as it is arbitrary, delusive, and senseless. In that example, Finnis argues, “such a killing is an act which of itself does nothing but damage the basic value of life. The goods that are expected to be secured in and through the consequential release of the hostages (if it takes place) would be secured not in or as an aspect of the killing of the innocent man but in or as an aspect of a distinct, subsequent, act an act which would be one ‘consequence’ amongst the innumerable multitude of incommensurable consequences of the act of killing.” Ibid. at 119

⁴²¹ Ibid. at 225.

⁴²² Ibid.

⁴²³ See Chapter I, Section C (ii) (a).

⁴²⁴ See Ian. Brownlie, *Principles of International Law*, 6th ed. (Oxford: Clarendon Press, 2003) at 488-490 [Brownlie, *Principles*]; Bederman, *supra* note 104, at 39.

⁴²⁵ See the Vienna Convention, Article 53, *supra* note 49. The Vienna Convention in this Article focuses on the overriding character of peremptory norms. Ibid. For a list of *jus cogens* or peremptory norms see: Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, Adopted by the International Law Commission at its Fifty-Third Session (2001), Report of the International Law Commission on the Work of its Fifty-Third Session, official Records of the General Assembly, Fifty-Sixth Session, Supplement No. 10 (A/56/10), Chap. IV.E.2), Commentary on Article 40, paras. 4-6, at 283-284. [Commentaries to the Draft Articles on State Responsibility] See also Brownlie, *Principles*, *supra* note 424, at 515

Another aspect of peremptory norms is whether they also constitute obligations *erga omnes* in that they are owed to the international community and thereby any State can invoke their breach, i.e. the right to action.⁴²⁶ What is in focus here is not the supremacy of peremptory norms in that they cannot be derogated by treaty or their capacity as obligations to the international community. Rather the absolute character of certain principles by virtue of the requirements of practical reasonableness is at issue.⁴²⁷ The international community as part of domestic human communities cannot be indifferent to human catastrophes and miseries. Slavery, torture, genocide, human trafficking and many atrocities inflicted in wars or conflicts are all examples of using human life as a means to an end. Principles prohibiting them in the law of human rights or humanitarian law in international law, therefore, carry absolute characterization no matter their customary recognition. They are absolute because such acts violate absolute basic human rights by treating human life as a means to an end. When concerning human beings in many respects absolute principles of treatment come into play for the value of human life and dignity and their personal security

The challenge in international law with respect to absolute rights and obligations is not much about the prohibition of conduct violating them but as to how to deal with their violation. The challenge, for instance, is not that ‘genocide

for a controversial list: prohibition of the use of force, the law of genocide, the principle of racial non-discrimination, crimes against humanity, and the rules prohibiting trade in slaves and piracy. See also the examples given by the ICJ in the *Barcelona Traction* case, namely prohibition of aggression, genocide, breaches of rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.” The Case Concerning the *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* (Second Phase) I.C.J. Reports 1970 p. 32, para. 35.

⁴²⁶ See *Barcelona Traction*, *ibid.*; See also: The ILC Report on the Fragmentation, *supra* note 52, at 193; ILC Commentary to the Draft Articles on Responsibility of States: “While peremptory norms of general international law focus on the scope and priority to be given to a certain number of fundamental obligations, the focus of obligations to the international community as a whole is essentially on the legal interest of all States in compliance - i.e., in terms of the present Articles, in being entitled to invoke the responsibility of any State in breach. Consistently with the difference in their focus, it is appropriate to reflect the consequences of the two concepts in two distinct ways. First, serious breaches of obligations arising under peremptory norms of general international law can attract additional consequences, not only for the responsible State but for all other States. Secondly, all States are entitled to invoke responsibility for breaches of obligations to the international community as a whole.” Commentary to the Draft Articles on Responsibility of States, *supra* note 425, at 281-282.

⁴²⁷ The ICJ in the *Barcelona Traction* pointed to the absolute character of certain norms. *Barcelona Traction*, *supra* note 425, p. 32, para. 35.

is forbidden' is exceptionless but how to stop it and what consequences should follow for the perpetrators of genocide. When confronting an absolute principle like this, States usually attempt to cover or justify their actions rather than denying the obligation. Although the category of absolute principles is recognized by the rule of recognition in international law, the binding force of an absolute principle like prohibition of genocide is not anchored in customary practice of States. Genocide is prohibited however widespread and frequent the practice may be. For the absolute substantive principles of international law geared to human dignity, in contrast to contingent principles, adverse practice of States is not a sign of the non-formation of the rule but the violation of the rule. There is, therefore, no contradiction between an absolute principle requiring the prohibition of genocide and a customary practice to the contrary because there is no customary law requiring the contrary. That the life of human beings cannot be taken as a means to an end is an absolute human right generating concomitant absolute principles from which no derogation is possible, which provides a yardstick of legitimacy for the identification of some substantive absolute rights and principles within the category of peremptory norms of international law.

Although the line between contingent and absolute principles is not always clear, there is a general yardstick to assist the avoidance of adulteration of some domains. That yardstick is the sanctity of human person and dignity. It may sometimes be difficult to distinguish absolute from contingent when addressing the rights of persons. Yet, the human characteristic of substantive absolute rights and principles provides a clear line for non-human subjects that do not have the sanctity of human being. Substantive absolute rights and principles belong to human beings. This is in part because the value of human person is immeasurable.⁴²⁸

An important corollary of human centrality of absolute rights is that the scope of these rights and their concomitant principles is limited to natural persons, human beings. In international law on foreign investment, substantive rights and privileges of corporations are subject to contingent principles and always need to

⁴²⁸ See Finnis, *supra* note 5, at 225-226.

be specified under specific rules in order to meet the requirements of legitimacy and practical reasoning including the common good.⁴²⁹ The integrity of natural persons consists in human life and dignity. The entity of corporations consists in the notion of property. Human life or dignity in which absolute rights and principles are grounded is a basic good. Property is an “instrumental good”.⁴³⁰ Any attempt to extend absolute principles or other status exclusive to human beings to corporations under international law would stem from a false analogy in a flagrant equation of property of corporations with human life and dignity. Any attempt to elevate non-absolute rights and their concomitant principles to the status of absolute ones may not elevate contingent principles but degrade the absolute ones. Putting the principle forbidding termination of a contract on par with a principle forbidding genocide may sometimes not solely mask the contingency of the former but distort the absoluteness of the latter. The treatment of corporations in international law on foreign investment is subject to principles contingent on legal determination. Treatment of corporations in the field of foreign investment in international law is a domain where rules must be determined and specified in accordance with the criteria of legitimacy of recognition and coherence for the common good.

Legitimacy dictates the treatment of principles in international law in a manner neither to underrate absolute principles nor to overrate contingent principles. The excesses of a blanket treatment of principles with binding force or blanket treatment of principles without binding force is unjustified in view of legitimacy. There are absolute principles of structure and procedure as well as certain substantive principles germane to human life and dignity that are binding.

Principles by the inconclusive character of general principles of law tied to the shifting character of moral principles and conceptions of justice joined with infinite instantiation possibility of particular practical principles and all of these originating in diversity of participation in basic values posing coordination problems to communities are contingent on legal determination. To meet the

⁴²⁹ See Chapter IV.

⁴³⁰ Finnis, *supra* note 5, at 111.

requirements of legitimacy, most substantive principles of varying degree of abstraction and specificity still are contingent on determination through specific rules to make the content of rules and obligations on conduct or consequence in a specific situation coherent with the demands of the common good and its competing elements of morality, justice, social aims, and public policy. Legal determination is essentially a moral or political task, a legislative or creative function, requiring validation of the power to engage in determination under the rule of recognition of the system.

By determination, it is not meant to advocate once a determination is made through a specific rule in a community, it must remain intact through generations. It is not meant that law freezes or the conceptions of justice or choices among alternatives in one community or at a period of time are immutable across times and places. There may be aspirations in one community that are duties in another or vice versa. There may also be conceptions of justice within a society that may no longer be popular within the same society. That is part of the evolution in law in any system including international law. The notion of a legitimate coherence of a rule with its background context itself promotes changes and flexibility in law by demanding detachment of an instance from a rule or general principle that is not coherent with what the common good may require for it according to the criteria of legitimacy.

That law should be and is open to development is still a matter essentially different from who may bring about change or development to law according to the rules of the system. To utilize contingent general principles— or by that matter opinions or dicta expressing or advocating them however persuasive— as starting points or guidance to reasoning in making legal determination involving justice evaluation and political assessment is subject to validation by the rule of recognition. That principles, or opinions or dicta, can contribute to the process of determination does not *per se* confer the power to make legal determination. That power is subject to the rule of recognition. It is a matter of the rule of recognition to validate and recognize the power to engage in legal determination of the content of the rule in a particular penumbral situation—i.e. to review social aims,

weigh moral values, evaluate justice demands, and assess policy orientations at the background of a rule— in a community in balancing burdens and benefits. For hard collision of these aims, values, demands, and orientations creating hard penumbra of indeterminacy in rules, the question is whether the general rule of recognition of international law admits adjudicative determination of the content of international rules and obligations of States by international tribunals.

CHAPTER III

RECOGNITION AND CUSTOM

The previous chapter articulated the legitimacy criterion of coherence for the determination of the content of international rules and the status of principles in view of this criterion. This chapter will address the power to make legal determinations in international law. The question to explore concerns whether legal determination in hard indeterminacies is vested in customary international law as a consensual framework of rules and obligations in international law or the general rule of recognition admits a creative function by international adjudicators to engage in legal determination, a task of moral and political nature, in hard penumbra.

A. Recognition of Determination Power in International Law

The rule of recognition of a system may empower its adjudicators a degree of discretion in making legal determinations for particular situations brought before them. To reiterate in cases facing the gap of law, national judges do not merely make new law but they initially apply the secondary rules that confer and restrict their discretionary power for the law-making exercise.⁴³¹ It requires a rule of recognition to recognize adjudicative discretion for determination. A rule of recognition is also traceable in Dworkin's model of adjudication in which his three-stage interpretive formula presupposes rules of recognition in the name of assumptions or convictions.⁴³² Still an acknowledgement of the rule of recognition goes beyond this by suggesting that even in a federal system like that of the United States in which States are under a single constitution, each State acts according to its own rules of recognition over matters of principle:

The American Constitution provides a federal system: it recognizes States as distinct political communities and *assigns them sovereignty over many issues of principle*. So there is no violation

⁴³¹ See Hart, Concept, supra note 5, at 272-273.

⁴³² See Dworkin, supra note 32, at 47, 65-67, 72-73, 91-92. See also Hart, Concept, supra note 5, at 266-267. For Dworkin's interpretive theory, see Chapter II, Section B.

of political integrity in the fact that the tort laws of some States differ from those of others even over matters of principle. Each sovereign speaks with a single voice, though not in harmony with other sovereigns. But in a federal system integrity makes demands on the higher-order decisions, taken at the constitutional level, about the division of power between the national and the more local levels.⁴³³

The hallmark of sovereignty in international law is much deeper and broader than that in a federal system. The allocation of lawmaking powers to States is a bedrock structural principle in international law. The rule of recognition of a system is a necessary condition of legitimacy and a fundamental requirement for the identification and validation of the lawmaking framework that cannot be transferred from one system to another. What lies at the heart of the legitimacy is that a lawmaking power for international adjudicators requires an *international* rule of recognition. The general rule of recognition of international law validates and requires the determination of the content of international rules and obligations in a consensual framework by the consent of States.⁴³⁴ Except for absolute principles or particular recognition of a constitutional approach to rights as in human rights, by virtue of the general rule of recognition of international, substantive primary rules and obligations of States are determined by specific or general consent of States.⁴³⁵ Accordingly, the general rule of recognition does not admit adjudicative creation by international adjudicators to engage in legal determination in a justice or policy evaluation for States in the interpretation of the content of indeterminate obligations of States in hard penumbra. This status of the general rule of recognition may further be assessed in light of the approaches to the question of the legislative function of international adjudicators displayed in the practice of States as well as the practice of the Permanent Court of International Justice and the International Court of Justice. Whether the notions of equity or *non-liquet* import an implied discretionary power for a general

⁴³³ Ibid. at 186. [emphasis added]

⁴³⁴ See Chapter I, Section C (ii) (b) (1).

⁴³⁵ Ibid.

adjudicative legislative function for international adjudicators to exercise the evaluation of justice or policy for States in international law is a matter to explore.

i. Implied Discretionary Power: Equity, Non-Liquet, and Ex Aequo et Bono

Non-liquet and equity constitute two different concepts. *Non-liquet* and equity as an aspect of justice were addressed earlier.⁴³⁶ *Non-liquet* even in the narrow sense of prohibiting a refusal to give a decision by the tribunal is controversial in international law.⁴³⁷ Far more disputable is the assumption of a general principle of the material completeness of the international legal system attached to *non-liquet*.⁴³⁸ It is this broader reading of *non-liquet* that suggests the power for an adjudicative creation of obligations in international law instead of rejecting of claims on the basis of the absence of positive rules imposing obligations. Equity is in no better position to provide such a power.

To address these concepts in terms of implication for adjudicative discretion, it is appropriate to also explore Article 38 of the Statute of the International Court of Justice surrounding this implication. The question poses the boundary between Paragraph 1 (c), to which the prohibition of *non-liquet* and the application of equity are attributed, and Paragraph 2 of Article 38 of the ICJ Statute, which bans an *ex aequo et bono* decision unless authorized by the parties.⁴³⁹ The question is whether, in the absence of particular recognitions or authorizations, notions of *non-liquet* or equity by implication provide a general power to international adjudicators to engage in a legislative function when interpreting the hard penumbra of international obligations of States.

⁴³⁶ See Chapter II, Section A and Section C (i) (b) (2).

⁴³⁷ See Chapter II, Section A.

⁴³⁸ See Ibid. As an exponent of the avoidance of *non-liquet* and material completeness of law, Hersch Lauterpacht, acknowledges that what he refers to as the positivist doctrine of international law admits *non-liquet* and that “[i]n the writings of publicists, at international conferences, in the pronouncements of statesmen, and in the provisions of arbitration treaties runs a persistent current of opinion to the effect that the international judicial function is necessarily limited as the result of material insufficiency of international law.” Lauterpacht, *supra* note 231, at 51-52, 85-86.

⁴³⁹ Article 38 (2): “This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.” Ibid.

A distinction is usually made between a decision *ex aequo et bono* and a decision based on equity.⁴⁴⁰ Equity is deemed part of the law and decisions on that basis remain bound to the existing law while *ex aequo et bono* offers more discretionary power.⁴⁴¹ Franck, while acknowledging that there is “‘no bright line’ between *ex aequo et bono* and equity” follows this distinction albeit on the assumption that general principles of law constitute the content of equity.⁴⁴² Akehurst, observing three notions of equity *infra legem*, *praeter legem*, and *contra legem*, maintains that while equity may be applied in some situations, it is not a source of international law.⁴⁴³ The application of equity *infra legem* is vaguely accepted, *praeter legem* is hotly disputed, and *contra legem* is unquestionably rejected.⁴⁴⁴ Nevertheless, this categorization of the notions of equity provides little as to an international tribunal’s discretionary power.

These notions can barely add clarity to the legal concept of equity or “justice as law.” As Ian Brownlie has observed “the particular and interstitial significance of equity in the law of the nations, as a general reservoir of ideas and solutions for sophisticated problems it offers little but disappointment.”⁴⁴⁵ The desirability and utility of equity in international law is questionable.⁴⁴⁶ A general principle of law does not provide a mandate to international adjudicators to apply equity. On this point, Akehurst stresses that “[e]ven if such a general principle exists, it cannot be transplanted into international law, because the homogeneity

⁴⁴⁰ Lauterpacht, *supra* note 231, at 314; C. Wilfred Jenks, *The Prospects of International Adjudication* (London: Stevens & Sons Limited, 1964) at 319-320.

⁴⁴¹ See *ibid.*

⁴⁴² Franck, *Fairness*, *supra* note 35, at 54.

⁴⁴³ Akehurst, *supra* note 347, at 801, 806. Equity is deemed *infra legem* where “it can be used to adapt the law to the facts of individual cases,” *praeter legem* where “it can be used to fill gaps in the law,” and *contra legem* where “it can be used as a reason for refusing unjust laws.” *Ibid.*

⁴⁴⁴ See *Ibid.* at 802-807.

⁴⁴⁵ Ian Brownlie, “Legal Status of Natural Resources in International Law” (1979) *Recueil des Cours*, volume 162, issue I, p. 245-318, at 288. Brownlie describing the principles of equity as “principles which, in spite of the designation of equity, have or intended to have, the same form and purpose as other principles applicable in a legal context,” states that “with little or no clear content a direction to apply equitable principles is a conferment of a general discretionary power upon the decision-making body.” *Ibid.* at 287.

⁴⁴⁶ See Akehurst, *supra* note 347, at 809. Regarding desirability, Akehurst maintains that the subjectivity and various perceptions of equity, which differ according to the interests and cultures of States, would weaken international law by making its rules more uncertain. He points out that clarity, predictability and certainty of rules are no less desirable in international law. *Ibid.* at 809.

of values, which is the condition precedent for such a principle in municipal law, simply does not exist in international law.”⁴⁴⁷

It is notable that general principles are regarded as leading candidates for the content of equity. Some writers raising the distinction between equity and *ex aequo et bono* identify the content of equity with general principles of law.⁴⁴⁸ This is even observable in the view that espouses the prohibition of *non-liquet*, which resorts to general principles of law in filling gaps to reconcile the decision with what purportedly the law requires.⁴⁴⁹ Yet as discussed general principles of law only beg the question as to providing content for equity because they themselves lead to fresh assessment of justice.⁴⁵⁰ The assumption that the application of general principles as the content of equity would be the application of law than a conception of justice is illusive. This assumption fails to justify a distinction between the application of equity and *ex aequo et bono* because general principles of law too, as elaborately shown, lead to a justice evaluation exercise depending on legal determination in a particular penumbral situation.

Anchored in analogies with national legal systems and the notion of the judicial process of dispute settlement, advocates of the prohibition of *non-liquet* assume a general power for the international adjudicators to avoid *non-liquet*.⁴⁵¹ An advocate of equity as a source of international law follows in the footsteps of such a view for the application of equity in international law.⁴⁵² Accordingly, in this approach from a “judicially created notion of implied powers” a general authorization for international adjudicators to apply principles of equity is

⁴⁴⁷ Ibid. at 810. [footnotes omitted].

⁴⁴⁸ See the views by Franck and Akehurst, *supra* note 373 and accompanying text. These writers stand out in that, although tending to support the distinction between *ex aequo et bono* and equity, they did not specify judicial discretion or the creative role of international adjudicators through the application of equity. They assumed general principles of law to provide the content of equity.

⁴⁴⁹ See Lauterpacht, *supra* note 231, at 101-102.

⁴⁵⁰ See Chapter II, Section C.

⁴⁵¹ See Chapter II, A.

⁴⁵² According to one view arguing from a “legal realism” approach, equity has two aspects: one being, a concept of natural law, an administrative aspect rooted in equity in the Anglo-Saxon system is the principles of equity guiding the procedure of judicial proceedings and the other aspect is the rules of equity such as estoppel concerning factual circumstances. See Christopher R. Rossi, *Equity and International Law: A Legal Realist Approach to the International Decision Making* (Irvington, N.Y.: Transnational Publishers, 1993)76-129. Rossi, for instance, gives a list of principles of equity similar to maxims of equity in common law such as that ‘equality is equity’ or civil law notions such as unjust enrichment or abuse of rights. See *ibid.* at 81-82.

inferred.⁴⁵³ The practice of tribunals, with the tacit acknowledgment by States attributed to it, is then advanced to rationalize such a power for international adjudicators.⁴⁵⁴

A distinction between a decision *ex aequo et bono* and the application of equity has been made in a number of decisions by the International Court, which requires an assessment of the pertinent dicta whether they endorse a general discretionary power for international adjudicators. In international disputes before PCIJ, this distinction is traced to the opinion provided in the Meuse case.⁴⁵⁵ According to this view, principles of equity could be applied as general principles of law applicable under the then point 3 of Article 38 of the Statute of PCIJ.⁴⁵⁶ The continental shelf boundary cases brought before ICJ also suggested that the application of equitable principles as general principles of law was to be distinguished from a decision *ex aequo et bono*.⁴⁵⁷ In these continental shelf cases, the general dictum on the distinction between equity and a decision *ex aequo et*

⁴⁵³ See *ibid.* at 129 et seq. Rossi attempts to rationalize a general theory of implied powers for the International Court by asserting that “the Court has its primary purpose the settlement of disputes, it must be afforded the wherewithal to accomplish its end. Consequently, when rules fail to provide a standard for the resolution of disputes, judges rely on inherent interpretative powers to apply principles they deem essential to the performance of their duties. This conclusion, in the abstract, explains the judicial recourse to equitable principles.” *Ibid.* at 143.

⁴⁵⁴ See Lauterpacht, *supra* note 231, at 110-133. See also Rossi, *supra* note 452, referring to a mixture of arbitral and judicial cases in which reference had been made to equity. See *ibid.* at 77-79, 131, 143, 155.

⁴⁵⁵ In the Diversion of Water from the River Meuse, in an individual opinion, Judge Manley O. Hudson made some observations regarding equity and its distinction from a decision *ex aequo et bono*. The Diversion of Water from the River Meuse, (Netherlands v. Belgium) 1937 P.C.I.J. (ser. A/B) No. 70, Individual Opinion by Manley O Hudson, at p. 76.

⁴⁵⁶ *Ibid.* at p. 76. Judge Hudson stated that “[t]he Court’s recognition of equity as a part of international law is in no way restricted by the special power conferred upon it ‘to decide a case *ex aequo et bono*, if the parties agree thereto’.” *Ibid.* To justify recourse to equity as a general source, advocates of equity place much reliance on this opinion. See Rossi, *supra* note 452, at 144, 155 et seq.; Jenks, *supra* note 440, at 322. For advocates of equity as source of international law, Judge Hudson’s opinion in the Meuse case is “the benchmark for equity’s inclusion as a source of law in international adjudication.” Rossi, *ibid.* at 155. It remains to be seen how far this assertion can go. For observations on Judge Hudson’s view and its theoretical weight for the application of equity, see *infra* notes 525-527 and accompanying text.

⁴⁵⁷ See North Sea Continental Shelf cases I. C.J. Reports, (Germany/Denmark; Germany/Netherlands) 20 February 1969, para. 88 [North Sea Continental Shelf cases]; The case concerning the Continental Shelf (Tunisia/Libya), I. C. J. Reports, 24 February 1982, para. 71 [Tunisia/Libya]; The case concerning the Continental Shelf (Libya/Malta) ICJ reports, 3 June 1985, para. 45 [Libya/Malta]; See also The Frontier Dispute Case (Burkina Faso/ Republic of Mali) Judgment, ICJ Reports 1986, p. 567 at paras. 27-28, p. 633 at para. 149. [Burkina Faso/Mali Frontier Dispute].

bono was predicated on the application of equity and equitable principles inside the law.⁴⁵⁸ In a separate opinion in the Barcelona Traction case, Judge Gerald Fitzmaurice also pointed to the distinction between equity and decisions *ex aequo et bono*.⁴⁵⁹ These dicta will later be assessed in terms of the position on the legislative function of international adjudicators.

The question is whether under a system of dispute settlement governed by international law, the appreciation of equity or prohibition of *non-liquet*, even if expressly indicated, as in the dicta of the International Court or in the ICSID Convention respectively, establishes a general legislative function for international adjudicators in international law. The core matter that guides this analysis is whether the rule of recognition of international law permits notions of *non-liquet* or equity to import a general discretionary power for international adjudicators to perform a legislative task accompanied with the legal determination latent in the interpretation of the content of law. The following sections address this issue through exploring the approaches to the question of the legislative function of the international adjudicators in the practice of States and the International Court.

⁴⁵⁸ See North Sea Continental Shelf cases (“when mention is made of a court dispensing justice or declaring the law, what is meant is that the decision finds its objective justification in considerations lying not outside but within the rules.” North Sea Continental Shelf, *supra* note 457, para. 88. On this basis, the ICJ found that “[t]here is consequently no question in this case of any decision *ex aequo et bono*.” Ibid; The ICJ in the Tunisia/Libya case declaring “[e]quity as a legal concept is a direct emanation of the idea of justice” and that “the legal concept of equity is a general principle directly applicable as law,” stated that “[a]pplication of equitable principles is to be distinguished from a decision *ex aequo et bono*.” Tunisia/Libya, *supra* note 457, para. 71; Libya/Malta, *supra* note 457, para. 45; Bukina Faso/Mali Frontier Dispute, where the Court rejecting the power to apply equity *contra legem* and equity *praeter legem* indicated that it might apply equity *infra legem*. Bukina Faso/Mali, *supra* note 457, p. 567 at paras. 27-28, The Court further linked equity *infra legem* to the applicable law and held that “[i]t is not a matter of finding simply an equitable solution, but an equitable solution derived from the applicable law.” Ibid.

⁴⁵⁹ Barcelona Traction, *supra* note 424, p. 85, para. 36.

ii. Treatment of Adjudicative Determination Power in International Law

a) The Practice of States

1. *Early Arbitration Treaties*

The application of equity or avoidance of *non-liquet* in the arbitral and claims commission practices of mainly the nineteenth century and some in the twentieth century, if the respective treaties were deemed to permit a legislative function for adjudicators, was based on built-in authorizations. The treaties constituting the arbitral tribunals or claims commissions had expressly authorized the tribunal to make decisions in accordance with equity or justice, thereby delegating a limited determination power to the tribunals. In a variety of formulations, references to make decisions according to ‘equity’ or ‘justice’ for arbitrators fashionably abounded in the treaties of that era providing for arbitral dispute settlement mechanism between States.

The mixed claims commission established under Article VI of the Jay Treaty of 1794 between Great Britain and the United States concerning compensation for losses and damages resulting from lawful impediments to the recovery of pre-war debts was empowered to decide the claims “... as equity and justice shall appear to them to require.”⁴⁶⁰ Many other treaties providing for arbitral settlement of disputes between State parties embodied such authorizing references, empowering the tribunal to decide according to equity and justice.⁴⁶¹ These included treaties establishing various claims commissions for settling

⁴⁶⁰ Mixed Commission Under Article VI of the Treaty of Amity, Commerce, and Navigation of 1794 between the Great Britain and the United States (8 Stat. 116 (19 November 1794), (effective 28 October 1795) reprinted in John Bassett Moore ed., *International Adjudications*, Modern Series, v. 3, at 7. [Moore Adjudication]

⁴⁶¹ These references appeared in a variety of terms such as ‘justice and equity,’ ‘principles of equity,’ ‘absolute equity,’ ‘justice, equity and good faith,’ ‘principles of international law and the maxims of justice,’ ‘law and equity,’ ‘principles of international law, equity, and the Laws of Nations,’ ‘treaty rights, principles of international law and equity,’ ‘international law and equity,’ etc. See Jenks, *supra* note 440, at 343-390. Each formulation raises its own interpretative questions, but what they commonly share is the parties’ authorization to the tribunal to decide a dispute according to equity and justice.

disputes between the United States, the Great Britain, France, Germany, and the Latin American countries.⁴⁶²

That States have in the past provided for resort to equity by the adjudicators in numerous treaties as a means to fill the gaps and prohibit *non-liquet* or even to modify the existing law does not establish recognition of such function by resort to equity in treaties that do not specify such adjudication. It is one thing to state that an authorization to make decisions in accordance with equity and justice implies according a discretionary power to the respective international adjudicator for a creative, legislative function. It is quite another, and egregiously unwarranted, thing to generalize such authorization itself to argue that in the absence of an express authorization such a discretionary power may be imported into the treaty due to the instances of such authorization in other treaties. The cases where international tribunals had been authorized by treaty to make decisions in accordance with equity or justice are not authority for the discretionary power in cases where the tribunals have not been given such treaty authorization.⁴⁶³

Even if the particular nature of authorizations under past arbitration treaties is ignored, to suggest that international adjudication practice whether of past or present may *per se* create a rule of recognition in international law is unwarranted. Apart from the fact that the decisions of international tribunals are both inconsistent and controversial, this approach is not justified because international tribunals' decisions, even as important as ICJ's, do not enjoy a precedent status.⁴⁶⁴ This situation a fortiori applies to arbitral tribunals that are far below the stature of ICJ for international law. It is unwarranted to assert that a subsidiary source without even a precedent status for substantive issues could

⁴⁶² See Jenks, *supra* note 440, at 343-390 in particular at 343, 353-355, 357, 365, 374.

⁴⁶³ Akehurst, *supra* note 347, at 801. In *Barcelona Traction*, the International Court rejected the generalization of jurisprudence of arbitral practice of the past century because "the decisions cited rested upon the terms of the instruments establishing the jurisdiction of the tribunal or claims commission ..." *Barcelona Traction*, *supra* note 425, p. 40, para. 63.

⁴⁶⁴ See ICJ Statute Article 59. ("The decision of the Court has no binding force except between the parties and in respect of that particular case.") *Id.* Article 38 (1) (d) also refer to judicial decisions as a subsidiary source subject to Article 59. This is not to indicate that ICJ's decisions do not have persuasive value. That is another matter that in each case the persuasiveness of the ICJ decisions on the substantive issues should be weighed in terms of criteria of legitimacy.

without concordant State practice function as a basis for a framework rule of the system that is structural and foundational. The origin of the international rule of recognition rests heavily on State practice.⁴⁶⁵ Reliance on practices and verdicts in international dispute resolution, particularly the arbitral practice of late 18th and nineteenth centuries, to support a general discretionary power of international adjudicators for the application of equity or avoiding *non-liquet* loses weight firstly on account of the existence of particular authorizations embodied in the treaties or mandates or otherwise by parties conferring power. Accordingly, no actual arbitral practice existed to argue for the application of equity without authorization by State parties. Secondly, adjudicative practice in international law is in no juridical position to create such a power on its own.

2. Architecture of Sources of International Law under Article 38

The Statute of the Permanent Court of International Justice marked a turning point in abandoning the practice of authorizing decisions based on justice and equity for international disputes. Despite prior practices, reference to equity or justice did not find its way in the Statute of the Permanent Court of International Justice.⁴⁶⁶ This practice runs counter to the assertion of inclusion of discretionary power in the task of international adjudicators. The drafting history of Article 38 of the Statute of Permanent Court of International Justice unequivocally shows that the international adjudication has developed in the direction of avoiding a determination power for international adjudicators for a legislative function entering into moral or political evaluation.

⁴⁶⁵ See Chapter I.

⁴⁶⁶ The Covenant of the League of Nations was created by the Treaty of Versailles, which called for the establishment of the Permanent Court of International Justice, Article 14. The Permanent Court of Arbitration was established at the First Peace Conference under the Hague Convention for the Pacific Settlement of International Disputes of 1899, July 29, 1899, entered into force September 4, 1900, reprinted in (1907) 1 A. J. Int'l L. 103. This Convention of 1899, while still in force, was replaced by the 1907 Hague Convention for the Pacific Settlement of International Disputes, October 18, 1907, entered into force January 26, 2010, reprinted in (1908) 2 AJIL Supp. 43.

Article 38 was crafted in a setting where numerous treaties embodied provisions allowing the tribunal to decide in accordance with justice and equity. In 1907 prior to the establishment of PCIJ, the Draft Hague Convention of the Second Peace Conference intending to establish an International Prize Court, provided that in the absence of the treaty provisions or the rules of international law “the court shall give judgment in accordance with general principles of justice and equity.”⁴⁶⁷ If reference to general principles of law contained in Article 38 had meant the same as general principles of justice and equity, it would have replicated a similar formulation, but it did not because it would have met the same response by States as this provision received.

In 1920, an advisory committee of jurists convened to draft the Statute of PCIJ.⁴⁶⁸ The records of the advisory committee debate on the text of Article 38 show that even though certain members were of the view that a situation of *non-liquet* should be avoided, the article was drafted not to accord discretionary power to international judges for a legislative function. This also indicates that avoiding *non-liquet* does not necessarily mean a creative, legislative function for the tribunal.

An earlier draft on the law that the Court must apply in settling disputes contained a broad wording.⁴⁶⁹ Baron Descamps from Belgium, who had proposed the draft, while advocating the prevention of *non-liquet*, stressed that “far from giving too much liberty to the judge’s decision his proposal would limit it.”⁴⁷⁰ In supporting general principles of law to avoid *non-liquet* or fill the gaps in other

⁴⁶⁷ Article 7 of Draft Hague Convention Relative to the Establishment of an International Prize Court, Second Peace Conference, 18 October 1907, reprinted in (1908) 2 Am. J. Int’l L. (Supp.) 174, at 179.

⁴⁶⁸ Permanent Court of International Justice, Advisory Committee of Jurists, Process-Verbaux of the Proceedings of the Committee, June 16th–July 24th, 1920, with Annexes (The Hague, 1920).

⁴⁶⁹ Ibid. at 306, Annex No. 3, Proposal by Baron Descamp. This proposal read:

“The following rules must be applied by the judge in the solution of international disputes; they will be considered by him in the undermentioned order:

1. conventional international law, whether general or special, being rules expressly adopted by the States; 2. international custom, being practice between nations accepted by them as law; 3. the rules of international law as recognized by the legal conscience of civilized nations; 4. international jurisprudence as a means for the application and development of law.” Ibid. This paragraph was among the draft articles proposed by the Committee President, Baron Descamps of Belgium.

⁴⁷⁰ Ibid. at 311. For his support of prohibition of *non-liquet*, see *ibid.* at 310 where he exemplifies his case by an arbitration case. See also *ibid.* at 318.

sources of international law, Descamps assumed their function as *objective* justice not abstract justice or legislative function.⁴⁷¹ Yet, the proposed draft was rejected. The discretionary power was attempted to be preserved through a wording including recourse to justice and equity. However, such a wording was not adopted and there was no reference to principles of equity. Modeling after arbitral treaties of the 19th century, Albert De Lapradelle from France preferred the phrase “the Court shall judge in accordance with law, justice, and equity.”⁴⁷² In a similar vein, the Norwegian member, Francis Hagerup, preferred a wording empowering the Court to judge according to justice and equity in order to avoid declaration of *non-liquet* by the court in the absence of conventional or general rules.⁴⁷³ Hagerup supported that the Court must have the power to apply [equitable] principles to fill gaps in law.⁴⁷⁴

In objecting to the proposed draft, the American member of the committee, Elihu Root, stated “[i]f these clauses were accepted, it would amount to saying to the States: ‘You surrender your rights to say what justice should be’.”⁴⁷⁵ Root was also of the view that “[t]he Court must not have the power to legislate” and thus incompetent to fill the gaps and at best giving a recommendation instead of giving a binding decision.⁴⁷⁶ The Italian member, Arthur Ricci-Busatti, joined the view that “legislation dealing with International Law comes within the power of the States. That fact does not prevent

⁴⁷¹ Ibid. at 324. In his speech about his proposal, which was later rejected, Descamps stated that he inserted “amongst the principles to be followed by the judge in the solution of the dispute submitted to him, the law of objective justice.” Ibid.

⁴⁷² See the view by Albert De Lapradelle, *ibid* at 295. In advocating this wording, Lapradelle still rejected the legislative function by the Court though supporting modification of law according to the “exigencies of justice and equity” through such a wording. See *Ibid.* at 296.

⁴⁷³ *Ibid.* at 296. Hagerup was also of the view that the court must have the task to develop the law. See *ibid.* at 307-308.

⁴⁷⁴ *Ibid.* at 296. Accordingly, Hagerup insisted that the court must not refuse to give a decision on the ground of the absence of positive rules, and where a rule of international law existed, the Court might refer to equity only by parties’ authorization. *Ibid.* Yet, he admitted that equity was “a very vague conception.” *Ibid.* Supporters of the prohibition of *non-liquet* in the committee were of the opinion that a declaration of *non-liquet* by reason of the absence of rules would be a denial of justice, likening international adjudication with that of national systems. See *ibid.* at 312. These supporters such as La Pradelle did not wish the Court’s competence to be limited but suggested “[t]he competence of arbitrators’ might be limited.” *Ibid.* at 314.

⁴⁷⁵ *Ibid.* at 294.

⁴⁷⁶ *Ibid* at 309-310.

administration of justice.”⁴⁷⁷ Opposing the proposed draft, the English member Lord Phillimore also stated, “legislation in matters of international law could only be carried out by the universal agreement of all States.”⁴⁷⁸ He further emphasized that he “did not wish, in any case, to give international judges legislative powers.”⁴⁷⁹ He posited that the International Court is not competent to fill the gap in cases where moral rights arise.⁴⁸⁰

The final draft as now appearing in the ICJ Article 38 (1) (a, b, c) was drafted by Root together with Lord Phillimore who both rejected any legislative role for international judges.⁴⁸¹ Apparently based on his assumption of objective justice, Descamps, for instance, saw point 3 referring to general principles of law in Article 38 to function to avoid *non-liquet*.⁴⁸² A general prohibition of *non-liquet*, however, is not consistent with the rejection of discretionary power of the Court by the committee and rejection of references to equity or justice. Lord Phillimore who co-drafted the current paragraph of Article 38 (1) referring to general principles of law, explained that it reflected principles “*accepted by all*

⁴⁷⁷ Ibid. at 314. (“By declaring the absence of a positive rule of international law, in other words an international limitation on the freedom of the parties, nevertheless a legal situation is established. That which is not forbidden is allowed.”) Ibid.

⁴⁷⁸ Ibid. at 295.

⁴⁷⁹ Ibid. at 316.

⁴⁸⁰ Ibid. at 316. (“[I]n every day life many cases appear in which there exists a right, or quasi right, of a moral order; a complaint could be justified, though it might not fall within the bounds of actual law, and consequently could not be recognized according to law. The result sometimes was the creation of a new statute; sometimes also the judge considered that he could judge without the law. If cases of this nature arises in international affairs, two solutions are possible: either the Assembly may be asked to fill the gap by means of legislation, or the question may be submitted to the Council for decision.”) Ibid. at 320.

⁴⁸¹ See *ibid.* at 331 et seq. See the amended draft *ibid.* at 344, Annex No. 1, Amended Draft Proposed by Mr. Root. The amended draft read:

“The following rules are to be applied by the Court within the limits of its competence, as described above, *for the settlement of international disputes*, they will be considered in the undermentioned order:

1. conventional international law, whether general or special, being rules expressly adopted by the States which are parties to a dispute; 2. international custom, being practice between nations accepted by them as law; 3. the general principles of law recognised by civilised nations; 4. the authority of judicial decisions and the opinions of writers as a means for the application and development of law.” Ibid. The second reading of this amended text read: the preamble: “the following rules *of law*” and paragraph 4: “the authority of judicial decisions, *and the doctrines of the best qualified writers of the various nations ...*” Ibid.

⁴⁸² See *ibid.* at 336.

nations in foro domestico,” which he meant to be “maxims of law.”⁴⁸³ He also viewed that that as a matter of general principle if the claimant does not demonstrate the claim, no *non-liquet* would arise because “[t]here is no question of a refusal of justice,” where “the court could only say no injustice had been done.”⁴⁸⁴ This is a situation that will “possibly arise more often in international law.”⁴⁸⁵

In this setting of the rejection of reference to equity and justice and rejection of discretionary power and legislative power of international adjudicators, reference to decisions *ex aequo et bono* in case of authorization by the parties was added. The clause was added to the PCIJ draft statute in response to the concern raised by the Greek representative that the Court should apply the principles of justice only if the parties agree so.⁴⁸⁶

What further tie the realm of evaluation of justice and filling the gaps to decisions *ex aequo et bono* under Paragraph 2 of Article 38 are the developments taking place subsequent to the PCIJ Statute. In 1928, Article 28 of the General Act for the Pacific Settlement of International Disputes provided that “[i]f nothing is laid down in the special agreement or no special agreement has been made, the Tribunal shall apply the rules ... enumerated in Article 38 of the Statute of the International Court of Justice. *In so far as there exists no such rule applicable to the dispute, the Tribunal shall decide ex aequo et bono.*”⁴⁸⁷ Article 28 affirms that the scope of Article 38 of the PCIJ Statute is limited to existing laws and a function for the filling of gaps in the absence of rules, i.e. equity *praeter legem*

⁴⁸³ Ibid. at 335. [italics added] He gave the examples of what he meant as “certain principles of procedure, the principle of good faith, and the principle of *res judicata*, etc.” Ibid. For a list of maxims of law see also Jenks, *supra* note 440, at 412-414. Jenks regards notions such as estoppel and unjust enrichment not as maxims of law but “concepts of equity” as “equitable concepts” distinct from the maxims of equity. Ibid.

⁴⁸⁴ Ibid. at 316. The principle he mentioned was that “the plaintiff must prove his contention under penalty of having his case refused.”

⁴⁸⁵ Ibid. at 316.

⁴⁸⁶ Modification to the Draft Article by the Third Committee of the First Assembly. See Rossi, *supra* note 452, at 91 n. 15 citing 10th Meeting held on December 7, 1920, Minutes of the Meeting of the Subcommittee of the Third Committee, 1 League of Nations, the Records of the First Assembly, Meetings of the Committees 403, 403 (1920)

⁴⁸⁷ Article 28 of the General Act for the Pacific Settlement of International Disputes drafted by the Ninth Assembly of the League of Nations, 71 UNTS 101 (1928, 1950), revised by the United Nations in 1949, UNGA Res. 268A (III) of April 1949.

not solely equity *contra legem*, falls within the ambit of decisions *ex aequo et bono* not other paragraphs of Article 38.

What sharply contrasts the General Act from PCIJ Statute is that PCIJ Statute and its successor, ICJ Statute recognizes a decision *ex aequo et bono* solely subject to parties agreement, whereas the failed General Act attempted to provide a general authorization for giving decisions *ex aequo et bono* in the absence of law. What matters significantly is that it would be illogical to conceive that the drafters of this General Act would have offered the formula of Article 28 to provide for such authorization had they thought such authorization would have proceeded as a result of equity or *non-liquet* from point 3, currently sub-paragraph C of paragraph 1, of Article 38.

In 1945, the text of Article 38 evolved within the Statute of International Court of Justice. The text received further elucidation with regard to the function of the International Court. To emphasize the function of the Court, the phrase “whose function is to decide in accordance with international law” was added to the top of Article 38 (1), while retaining the requirement for parties’ agreement for decisions *ex aequo et bono*.⁴⁸⁸ This development further shows the rejection of a legislative function for the Court in the name of equity or *non-liquet*.

The reference to general principles of law in Article 38 was, therefore, not to accord discretionary power or legislative function to international adjudicators or the application of equity or justice that leads to such a function. They did not mean to create a sweeping prohibition of *non-liquet* in the sense that material completeness of international law suggests. As a member of the committee of jurists preparing Article 38, Ricci-Busatti stated that the amended draft, which embodied reference to general principles of law as sources of law to be applied, “did not prevent the possibility of *non-liquet*.”⁴⁸⁹ A legislative function was rejected by that committee. An advocate for the application of equity in international law admits that textual, logical, and historical readings of Article 38

⁴⁸⁸ See Documents of the United Nations Conference on International Organizations (San Francisco 1945) v. 13 at 493.

⁴⁸⁹ Process-Verbaux of the Proceedings of the Committee of Jurists, *supra* note 468, at 338.

do not support incorporation of equity.⁴⁹⁰ This advocate of equity as a source of international law further acknowledges that “*the most obvious point* of agreement among participants was the limitation placed on the court that it must not legislate.”⁴⁹¹ With this background, Robert Jennings finds it “ironic that para. (c) [of Article 38 (1) of the ICJ Statute] was later seen by writers like HERSCH LAUTERPACHT and JENKS as a tool for the expansion and change of the content of international law.”⁴⁹²

The architecture of sources of international law does not warrant that a determination power was a component of Article 38 or a companion to the notion of *non-liquet* or equity or general principles of law. Article 38 (1), enunciating the sources of international law for disputes involving States, was not drafted or subscribed to by States to include a legislative power for international adjudicators to engage in moral and political evaluation creating States’ obligations. Principles were deemed to function as law without engaging the legislative function of international adjudicators. If most principles in fact result in a legislative function as contingent principles do, Article 38 is no authority for such a function.

As an instrument expressing sources of international law for any disputes governed by international law, Article 38 (1) of the ICJ Statute accords no power to international tribunals settling disputes under international law to engage in legal determination for justice evaluation or policy assessment. Such a power requires specific parties’ authorization under a treaty for a decision *ex aequo et bono* or decision in accordance with justice or equity. Such a power is not even extant in current arbitral treaties, instruments, or clauses. Reference to decisions *ex aequo et bono* and the requirement for parties’ authorization has grown in this atmosphere of elimination of particular authorizations for decisions in accordance with equity and justice and instead requiring parties’ authorization for such decisions. This is a practice now in operation in many institutional arbitral rules,

⁴⁹⁰ See Rossi, *supra* note 452, at 87-88.

⁴⁹¹ *Ibid.* at 115.

⁴⁹² Jennings, *supra* note 419, at 39-40.

instruments, treaties, and clauses thereby not even establishing a particular authorization for the respective tribunal.

3. Modern Arbitration Instruments

References to justice and equity are also absent in arbitration instruments that deal with the applicable law questions in arbitral settlement. Current resolution of investor-State disputes are mostly brought before ICSID tribunals or forums constituted under UNCITRAL arbitration rules by virtue of agreements for arbitration under treaties or contracts. Arbitration rules governing these forums in part provide for the applicable law.⁴⁹³ None of these arbitration rules accords

⁴⁹³ See: the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 U.N.T.S. 159, 4 I.L.M. 532, entered into force 14 October 1966 [ICSID Convention]. The ICSID Convention in Article 42 provides: (1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable. (2) The Tribunal may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law. (3) The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute *ex aequo et bono* if the parties so agree; ICSID Arbitration (Additional Facility) Rules (2006) [ICSID Additional Facility], available at <http://icsid.worldbank.org/ICSID/ICSID/AdditionalFacilityRules.jsp>. The ICSID Arbitration (Additional Facility) Rules in Article 54 provides that (1) The Tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the Tribunal shall apply (a) the law determined by the conflict of laws rules which it considers applicable and (b) such rules of international law as the Tribunal considers applicable. (2) The Tribunal may decide *ex aequo et bono* if the parties have expressly authorized it to do so and if the law applicable to the arbitration so permits; The UNCITRAL Model Law on International Commercial Arbitration (1985), as Amended in 2006, 24 ILM 1302 (1985) [UNCITRAL Arbitration Rules]. The UNCITRAL Arbitration Rules in Article 28 provides that: (1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules. (2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable. (3) The arbitral tribunal shall decide *ex aequo et bono* or as amiable compositeur only if the parties have expressly authorized it to do so. (4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction; The Rules of Arbitration of the International Chamber of Commerce (1998) [ICC Arbitration Rules], available at http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf. The ICC Arbitration Rules in Article 17 on applicable Rules of Law provides: 1. The parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute. In the absence of any such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate. 2. In all cases the Arbitral Tribunal shall take account of the

the arbitral tribunal the power to decide in accordance with justice or equity. Additionally, they ban decisions *ex aequo et bono* without parties' authorizations. While ICSID arbitration prohibits a finding of *Non-liquet*, it expressly conditions the power of an ICSID Tribunal to decide *ex aequo et bono* on parties' authorization.⁴⁹⁴ Moreover, in disputes governed by international law, a prohibition of *non-liquet* such as that in ICSID Convention is bound by the broader context of non-recognition of a legislative function of the tribunal in engaging in justice evaluation or policy assessment in international law. In a claim of a breach of an obligation or a rule whose basis is the consent of States under a treaty or custom, the arbitral tribunal's duty to make a decision does not mean its power to create an obligation for States. Rejection of a claim for the absence of such an obligation is not *non-liquet*. This concept of prohibition of *non-liquet* reflected in the design of sources of international law as discussed, limiting it to a refusal to give a decision than a material completeness of law for consent-based obligations, is also reflected in the discussion of the ILC group for a model draft on arbitration procedure. In his comments on the draft Article 12 of the ILC Model Draft for Arbitral Procedure prohibiting *non-liquet*, Fitzmaurice viewed that "... There seemed to be some confusion as to the exact connotation of the term *non liquet*. Article 12 did not mean that when the law was silent or obscure the tribunal was entitled to indulge in invention; it simply meant that the tribunal must render a decision." ⁴⁹⁵

Absence of authorization for adjudicative legislative function is now also reflected in instruments that provide for investment arbitration.⁴⁹⁶ What is conspicuous in investment treaties providing for the arbitration of investment

provisions of the contract and the relevant trade usages. 3. The Arbitral Tribunal shall assume the powers of an amiable compositeur or decide *ex aequo et bono* only if the parties have agreed to give it such powers.

⁴⁹⁴ See ICSID Convention, Article 42 (3); ICSID Additional Facility, Art. 54 (2); UNCITRAL Arbitration Rules, Art. 28 (3); ICC Arbitration Rules, Art. 17 (3).

⁴⁹⁵ ILC Report on Model Draft on Arbitral Procedure, adopted by ILC for General Assembly at its 10th session, General Assembly Resolution 989 (x) (A.CN4/113), Yearbook of International Law, 1958, V.I, at 51. Roberto Ago also viewed that "[w]hen international law contained no rule on a given matter, the consequence was not that the tribunal could not decide on the basis of law but that it had to base its decision on a recognition of the fact that States were under no legal obligation in that matter." Ibid. at 54.

⁴⁹⁶ See Chapter IV, Section B (1) (c).

disputes against States is the absence of provisions, as opposed to particular authorizations in the arbitral treaties of the nineteenth century, to empower the tribunal to decide in accordance with justice or equity.

The above international practices unambiguously exhibit the absence of a rule of recognition in international law for a general adjudicative determination power. These developments strongly dismiss the assertion that asking a tribunal to settle a dispute would entail an authorization for the determination of the content of rules and obligations in a legislative function bearing on the evaluation of justice in hard penumbra. Prior to the twentieth century arbitration of State disputes featured the application of equity through powers conferred to the arbitral body under respective treaties. This practice most conspicuously emerged in late eighteenth century, peaked during the nineteenth century, dwindled through the twentieth century, and extinguished by the twenty first century. The architecture of the sources of international law as well as international instruments designing contemporary international arbitration for disputes involving States is consistent with the general rule of recognition of international law that does not admit a determination power for adjudicators to create the content of obligations in interpretation of hard penumbra. It remains to assess references to equity and its distinction from *ex aequo et bono* in reputed dicta of the International Court whether the practice of the International Court itself would support a legislative function.

b) The Practice of the International Court

The question of the adjudicative determination power in international law and the tie between general principles of law and decisions *ex aequo et bono* and *non-liquet* may further be explored through the angle of the dicta of the International Court bearing on the question of the adjudicative legislative function.

1. The Free Zones Case

The PCIJ in the Free Zones Case held that the court did not have a legislative function creating rights and obligations.⁴⁹⁷ That the application of justice and equity is a function falling within the ambit of decisions *ex aequo et bono* was affirmed in Judge Kellogg's opinion expressed in his observations in the Free Zones case while agreeing with the Court's action in the Order of 6th December 1930.⁴⁹⁸ Interestingly, Judge Kellogg even viewed that an authorization by the parties to adjudicate *ex aequo et bono* does not extend to political questions.⁴⁹⁹ In his view, even an authorization pursuant to then second Paragraph and now Paragraph 2 of Article 38 shall not empower the court to deal with political issues. Even if this part of the Court's decision is disputable, it leaves no question that an adjudicative legislative function at least requires authorization by the parties according to Article 38. Where general principles or methods of legal reasoning such as analogy do involve a legislative function through justice or policy evaluation and choice such authorization is necessary. The dicta of the International Court in other cases further reject an adjudicative legislative function.

⁴⁹⁷ The Free Zones case (Switzerland v. France) (PCIJ, 1932, Series A/B No. 46). In this case the Court (by majority) raised doubts that even with parties' authorization to decide *ex aequo et bono* the Court may by its statute engage in judicial legislation by regulation of interests and the compatibility of such function with its judicial function. Ibid. A chamber of ICJ deciding the Gulf of Maine case has also suggested that political and economic considerations fall outside the power of the Court but they could be decided by an authorization to make a decision *ex aequo et bono*. ("However, the crux of the matter lies elsewhere. It should be emphasized that these fishing aspects, and others relating to activities in the fields of oil exploration, scientific research, or common defence arrangements, may require an examination of valid considerations of a political and economic character. The Chamber is however bound by its Statute, and required by the Parties, not to take a decision *ex aequo et bono*, but to achieve a result on the basis of law.") Case Concerning the Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America) ICJ Reports, October 12, 1984, at para. 59.

⁴⁹⁸ ("The authority given to the Court to decide a case *ex aequo et bono* merely empowers it to apply the principles of equity and justice in the broader signification of this latter word.") Free Zones of Upper Savoy and the District of Gex (France and Switzerland) 1930 PCIJ (Ser. A) No. 24 (Dec. 6), Separate Opinion of Judge Kellogg, para. 40.

⁴⁹⁹ Judge Kellogg viewed that parties' authorization for decisions *ex aequo et bono* shall not include "questions involving the making of agreements between nations and the decision of disputes of a purely political nature, in accordance with considerations of political and economic expediency." Ibid. Judge Kellogg indicated that political questions could be decided by arbitration where States authorize the tribunal to decide *ex aequo et bono* thereby including political questions in the scope of decisions *ex aequo et bono* in arbitration but still requiring parties' authorization. Ibid. at 42.

2. *Maritime Delimitation Cases*

The decisions where the International Court distinguished between equity and decisions *ex aequo et bono* embodied dicta and circumstances that dismiss a legislative function for the international adjudicators. For the particular field of boundary delimitation of continental shelf, the ICJ suggested the application of equitable principles.⁵⁰⁰ In this regard, the ICJ took the view that according to international law the delimitation of continental shelf is to be effected by the application of equitable principles, as applicable rules and principles to be applied by the parties with the goal to achieve an equitable result.⁵⁰¹ Reference to equitable principles in the particular case of maritime boundary delimitation cases was also due to recognition by the parties to the dispute. States parties to the disputes had expressed their position that delimitation was to be effected by applying equitable principles although they disagreed what principle, especially if equidistance, was the applicable equitable criterion.⁵⁰² Even at some points, the application of equity in the particular situation of maritime boundary delimitation of continental shelves was associated with customary international law recognition in view of State practice in the development of the law of the sea.⁵⁰³

⁵⁰⁰ (“[I]n this field it is precisely a rule of law that calls for the application of equitable principles.” The North Sea Continental Shelf, *supra* note 457, at para. 88. See also Libya/Malta, *supra* note 457, at para. 45.

⁵⁰¹ In the North Sea Continental Shelf, the ICJ held that international law of continental shelf delimitation has no single, imperative rule and allows various principles and methods to be applied by the parties taking into account equitable principles. See North Sea Continental Shelf, *supra* note 457, at paras. 90, 92-93, 101 see also para. 85. The ICJ took a similar approach in its 1982 and 1985 judgments on continental shelf cases. See Tunisia/Libya, *supra* note 457, at paras. 70, 71, 72, 133; Libya/Malta, *supra* note 457, at paras. 45, 76, 79. See also the Gulf of Maine for a similar approach that also cited Article 83 (1) of UNLOS (1982) for emphasizing the need to arrive at an equitable solution. Gulf of Maine, *supra* note 497, at para. 300.

⁵⁰² See primarily: Tunisia/Libya, *supra* note 457, at paras. 2, 4, 23 and 25; Libya/Malta, *supra* note 457, at paras. 29, 45.

⁵⁰³ See North Sea Continental Shelf cases, *supra* note 457, at para. 85. (“It emerges from the history of the development of the legal régime of the continental shelf, which has been reviewed earlier, that the essential reason why the equidistance method is not to be regarded as a rule of law is that, if it were to be compulsorily applied in all situations, this would not be consonant with certain basic legal notions which, as has been observed in paragraphs 48 and 55, have from the beginning reflected the *opinio juris* in the matter of delimitation; those principles being that delimitation must be the object of agreement between the States concerned, and that such agreement must be arrived at in accordance with equitable principles.”) *Ibid.* See also The Gulf of

The application of equity in delimitation cases, therefore, has received a particular recognition for this field. This recognition, however, was not a sufficient means to accord a discretionary power to determine a solution through judicial creation in an evaluative exercise because the equitable principles were not to be applied by the Court itself but by the parties. The equity principle overarching the delimitation of maritime boundary of continental shelves embodied another segment in addition to equitable principles and reaching an equitable solution. Equity also embodied the principle that such delimitation had to be effected by agreement.⁵⁰⁴ This additionally accorded a consensual basis to the reconciliation of conflicting interests and their underlying justice demands in the field of maritime boundary delimitation of continental shelves.

In boundary delimitation of continental shelf, the ICJ, as per its mandate under the treaty between the respective parties conferring jurisdiction, mainly dealt with identifying the rules and principles applicable to the delimitation of continental shelf areas, and thereby the application of the equitable principles by the parties following indications given by the Court. This concern was common to a number of continental shelf cases.⁵⁰⁵ In these continental shelf cases, the ICJ

Maine acknowledging a “ fundamental norm of customary international law governing maritime delimitation” providing that “delimitation , whether effected by direct agreement or by the decision of a third Party, must be based on the application of equitable criteria and the use of practical methods capable of ensuring an equitable result.” *The Gulf of Maine*, supra note, 497, at para. 113, also para. 98.

⁵⁰⁴ (“[D]elimitation must be the object of agreement between the States concerned, and that such agreement must be arrived at in accordance with equitable principles”) *The North Sea Continental Shelf cases*, supra note 457, p. 46, para. 85. See also Article 83 (1) of the UN Convention on the Law of the Sea (1982). (“The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.”) United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N... Doc. A/CONF.62/ 122, 21 I.L.M. 1261 (1982).

⁵⁰⁵ See *North Sea Continental Shelf cases*, supra note 457, at paras. 2, 84; the *Tunisia/Libya Continental Shelf*, supra note 457, at para. 23, also paras. 2, 4; and the *Libya/Malta Continental Shelf*, supra note 457, at para. 1. As a case that differed on this point of jurisdiction, reference may be made to the *Gulf of Maine* brought before a Chamber of ICJ. The Chamber had been asked “to decide in accordance with the principles and rules of international law applicable in the matter as between the Parties” what was “the course of the single maritime boundary that divides the continental shelf and fisheries zones” of the two countries in the Gulf of Main area. *Gulf of Maine*, supra note 497, at para. 5. This case differed from the above continental shelf cases decided by ICJ in the significant aspect that the delimitation task was to be effected by the Chamber rather than by the parties. *Ibid.* para. 25. In the *Bukina Faso/Mali Frontier Dispute*, the ICJ had also been given

provided certain indications, factors or procedures for the parties to follow in effecting the delimitation.⁵⁰⁶ The ICJ, however, left open the question as to what equitable principle amounts to an equitable solution in the particular case of boundary delimitation of continental shelf. The Court identified, in the words of one critic, “the principle of non-principle.”⁵⁰⁷ The Court in effect assumed the situation to be in essence one that for which no single substantive rule existed, a *non-liquet* without filling the gap by the Court itself. The ICJ did not determine the content of the law applicable to the boundary delimitation for adjacent countries.

It follows that the Court did not employ a discretionary power to create a substantive rule for the boundary delimitation. The ICJ was not engaged in formulating a rule or determination of the content of substantive rule for the maritime boundary delimitation of continental shelves but left it to the parties in following the Court’s judgment to apply equitable principles in delimiting the boundary for which the parties had much leeway.⁵⁰⁸ Moreover, the International Court did not utilize or project equity as a device to assume a discretionary power to engage in a legislative function and determine the content of rules through assessment of justice. In the maritime delimitation cases, the equity pointed out by ICJ was not abstract justice. Although ICJ did not articulate the legal concept of equity or the content of equity, it did point out that equity was not deemed to be

the task of “indicating the line of the frontier between Burkina Faso and the Republic of Mali.” Burkina Faso/ Republic of Mali, *supra* note 457, p. 562. at para. 16, p. 633 at para. 148.

⁵⁰⁶ For instance in the North Sea Continental Shelf cases, the court indicated some factors to be taken into account by the parties in their negotiation including: “the land is the legal source of the power which a State may exercise over territorial extensions to seaward, it must first be clearly established what features do in fact constitute such extensions,” the unity of deposits, and a reasonable degree of proportionality. The North Sea Continental Shelf, *supra* note 457, at paras. 96-98. The Court further indicated certain criteria for the negotiation process between the parties, which included the obligation to enter into meaningful negotiation, to act in a way that equitable principles are applied, and that the natural prolongation of land of one State does not violate that of the other. *Ibid.* para. 85. See also Libya/Malta Continental Shelf, *supra* note 457, at para. 46; Tunisia/Libya Continental Shelf, *supra* note 457, at para. 133 (c).

⁵⁰⁷ Tunisia/Libya Continental Shelf, *supra* note 457, dissenting opinion by Judge Oda, at para. 1.

⁵⁰⁸ Although the goal is to reach equitable solution, “there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures.” The North Sea, *supra* note 457, at para. 93.

abstract justice.⁵⁰⁹ This clarification indicates that ICJ, even if it had advanced equity as a legal concept applicable to all disputes, did not advocate the inclusion of what amounts to abstract justice, and concomitant adjudicative discretion to evaluate justice, under the rubric of equity or otherwise. By distinguishing the application of equity from a decision *ex aequo et bono*, the ICJ in the maritime delimitation cases did not express a discretionary power to engage in justice evaluation and selection among competing demands of justice for the determination of the content of substantive obligations of States in a creative function of international adjudicators.

Even if the dicta of ICJ provide a discretionary power for the Court for the particular case of delimitation of boundary disputes, which is questionable in light of the above observations, the extension of such a power to other disputes that are to be decided under international law would be unfounded. The above observations set these dicta on the distinction between equity and *ex aequo et bono* in the layout of an accompanying particular recognition for the application of equity coupled with the ultimate determination of delimitation by the parties. Thus, the distinction in no way indicates advocating by the International Court for an adjudicative power to engage in abstract justice or legislative function in settling disputes under international law.

With regard to what lies inside and outside the realm of law, the concept of equity and the three notions of equity under, additional, and contrary to law barely provide clarification to the issue of the adjudicative power to engage in a legislative function and evaluation of justice. The area of widest vagary is equity *infra legem*.⁵¹⁰ The observations on maritime delimitation cases show that what is meant to be inside the law in the notion of a binding requirement of the law applicable to the case is not a legislative function or principles conducive to a discretionary power for the adjudicative determination of the content of

⁵⁰⁹ See *Libya/Malta*, supra note 457, at para. 45, citing *North Sea Continental Shelf*, para. p. 47, para. 85. (“[I]t is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles, in accordance with the ideas which have always underlain the development of the legal régime of the continental shelf in this field.” Ibid. See also *Tunisia/Libya Continental Shelf*, supra note 457, at para.71.

⁵¹⁰ There is no clear scope for equity *infra legem*, the type of equity which is supposed to function within the law. Views differ on what equity *infra legem* means. Akehurst, supra note 347, at 102.

international law. In these cases, a notion of equity under law, as such *infra legem*, was in operation in that both a rule of recognition and the will of parties requires, and thereby recognizes, the application of equitable principles. Still ICJ has not endorsed a legislative function for international law to create rights and obligations for States upon moral or political evaluation. This approach is observable in other practices of the International Court as well.

3. *Other Dicta*

In a separate opinion in the Barcelona Traction case, Judge Fitzmaurice called for the need of “a body of rules or principles which can play the same sort of part internationally as the English system of Equity does.”⁵¹¹ This view expresses desirability for the development of equitable rules in international law but suggesting it through the channels of international law. On this note, he viewed that “[d]eciding a case on the basis of *rules of equity, that are part of the general system of law applicable* is something quite different from giving a decision *ex aequo et bono*.”⁵¹² His view indicates that for the application of equity in international law an international system of equity is necessary. From this appreciation of equity or its distinction from *ex aequo et bono*, a creative role of international adjudicators through application of equitable principles or otherwise does not proceed.

Early rejection of a legislative function of the International Court was reflected in the PCIJ’s pronouncement in the Lotus case affirming the consensual basis of rules binding on States enunciating the freedom of action of States in

⁵¹¹ The Case Concerning Barcelona Traction, Light and Power Company Limited, (Belg v. Sp.) Judgment, Second Phase, ICJ Rep. 1970, Separate Opinion by Judge Fitzmaurice, at p. 85, para. 36. Judge Fitzmaurice viewed that according to the existing law, the Canadian nationality of Barcelona Traction prevented the admissibility of the claim of the Belgium in protection of the Belgian shareholders, but the existing law was “in this respect unsatisfactory”. Ibid. at p. 76, para. 21, see also p. 84, para. 35. He regarded international law “as deficient and underdeveloped in this field” Ibid. at p. 78, para. 25.

⁵¹² Ibid. p. 85, para. 36. [italics original]

international law.⁵¹³ There are other illustrations of the line of practice by the International Court against an adjudicative legislative function for the creation of international obligations as well. In the South West Africa case, the ICJ held that “[a]s is implied by the opening phrase of Article 38, paragraph 1, of its Statute, the Court is not a legislative body. Its duty is to apply the law as it finds it, not to make it.”⁵¹⁴ On another occasion in its advisory opinion on the legality of nuclear weapons, the ICJ held that “[i]t is clear that the Court cannot legislate.”⁵¹⁵ This holding on the non-legislative function of the court is consistent with the practice of the International Court. This holding survives the declaration of ICJ in its advisory opinion that it cannot reach a definitive answer on a specific issue before it, thus suggesting *non-liquet*.⁵¹⁶

⁵¹³ S.S. Lotus Case, France v Turkey (1927) P.C.I.J. Ser. A. No. 10. at 18. The Permanent Court of International Justice in *Lotus Case* acknowledged the weight of the consent of States in the formation of international obligations and rules declaring that “the rules of law binding upon States emanate from their own free will as expressed in conventions or by usage generally accepted as expressing principles of law and established in order to regulate their relations between these co-existing independent communities or with a view to the achievement of common aims.” Ibid.

⁵¹⁴ South West Africa Cases, Second Phase, 1966 ICJ Reports, 18 July 1966, at p. 48, para. 89. The court indicated that the legislative function falls within Article 38 (2). See *ibid.* at paras. 89-90. (“It is always open to parties to a dispute, if they wish the Court to give a decision on a basis of *ex aequo et bono*, and are so agreed, to invoke the power which, in those circumstances, paragraph 2 of this same Article 38 confers on the Court to give a decision on that basis, notwithstanding the provisions of paragraph 1. Failing that, the duty of the Court is plain.”) Ibid. p. 48. para. 90. Rejecting a legislative function for international adjudicators is further reflected in the ICJ’s distinction between substantive rights and recourse to a tribunal. See *infra* note 659 and accompanying text.

⁵¹⁵ See Legality of the Threat or Use of Nuclear Weapons, ICJ Advisory Opinion of 8 July 1996, at para. 18.

⁵¹⁶ In that advisory opinion, the Court declared that “the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.” Ibid. at para. 97, see also *ibid.* para. 105 (2E). This has been considered to be an admission of *non-liquet*. See Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) ICJ, 8 July 1996, Dissenting Opinion by Judge Higgins, at para. 2. On this point, “the Court effectively pronounces a *non-liquet* on the key issue on the grounds of uncertainty in the present state of the law, and of facts.” Ibid. There is a view that the admission of *non-liquet* in this advisory opinion is because in such advisory opinions the court is not under the duty to settle a dispute otherwise it would avoid *non-liquet* by the duty to settle the dispute. See Prosper Weil, *supra* note 243, at 118. Weil acknowledges that the question of *non-liquet* is avoiding the statement that the law has no answer. Ibid. 118. Weil also observes the application of the principle of freedom of State action as another approach whereby there would be no occasion for raising the issue of gap or *non-liquet* and even views that ICJ could have resorted to this principle in the Advisory opinion to avoid *non-liquet*. Ibid. at 110, 112-114, 117.

On lines with the freedom of action principle in international law, the ICJ in the Kosovo Advisory Opinion affirmed the principle that in the absence of a prohibitive rule the conduct of States is permissive.⁵¹⁷ In a declaration, Judge Simma found the approach of the Court in this opinion reflective of an old vision of international law expressing “the Lotus principle.”⁵¹⁸ Judge Simma argued that the Court could have considered whether international law tolerated or permitted the declaration of independence or it was neutral or silent on the matter.⁵¹⁹ Judge Simma viewed that “that the international legal order might be consciously silent or neutral on a specific fact or act has nothing to do with *non liquet*, which concerns a judicial institution being unable to pronounce itself on a point of law because it concludes that the law is not clear. The neutrality of international law on a certain point simply suggests that there are areas where international law has not yet come to regulate, or indeed, will never come to regulate. There would be no wider conceptual problem relating to the coherence of the international legal order.”⁵²⁰ In this way, Judge Simma apparently is not suggesting a creative function for the Court because of *non-liquet* in such situations. Still, the question remains how the Court can avoid engaging in a creative exercise in deciding such areas of neutrality, silence or non-regulation in international law in a contentious case where there is a claim of violation of an international obligation of a State if not by rejecting the claim because of the absence of an obligation. A broader point implied in Judge Simma’s opinion is that there might be areas where obligations of States in international law do not fit a consensual framework. It is always

⁵¹⁷ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, ICJ Advisory Opinion, 22 July 2010, paras. 79-84, 122-123. In response to the question by the UN General Assembly whether the unilateral declaration of independence by Kosovo was in accordance with international law, ICJ in its advisory opinion declared that there was no international rule to prohibit a unilateral declaration of independence, thus the Kosovo declaration of independence did not violate general international law. Ibid.

⁵¹⁸ Accordance with International Law of the Unilateral Declaration of Independence In Respect of Kosovo, ICJ Advisory Opinion, 22 July 2010, Declaration of Judge Bruno Simma, paras 2-3, 8-9. (“by upholding the *Lotus* principle, the Court fails to seize a chance to move beyond this anachronistic, extremely consensualist vision of international law.”) Ibid. at para. 3.

⁵¹⁹ “[T]he court Could have explored whether international law can be deliberately neutral or silent on a certain issue, and whether it allows for the concept of *toleration*, something which breaks from the binary understanding of permission/prohibition and which allows for a range of non-prohibited options. That an act might be “tolerated” would not necessarily mean that it is ‘legal’, but rather that it is ‘not illegal’.” Ibid. at para. 9.

⁵²⁰ Ibid.

possible to espouse, as this thesis does, that the obligations of States in international law are not limited to consensual frameworks. Yet, that does not necessarily mean the collapse of the consensual framework of obligations of States in international law in every field. The thrust should be not to lose sight of the rule of recognition of international law in view of the common good of human beings.

The Lotus and Kosovo and in between decisions rejecting a legislative function for the International Court are only components of the bulk of practice of the International Court itself together with the practice of States affirming the general rule of recognition of international law recognizing a consensual framework of determination of the content of primary obligations of States. This does not foreclose non-consensual frameworks for the obligations of States in international law. The international rule of recognition recognizes certain substantive limitations and obligations on States originating in absolute principles.⁵²¹ The content of the international rule of recognition may also change by supporting practices and common good justifications in a particular field of international law as in human rights recognizing a constitutional approach to the construction of abstract rights of human beings and corresponding obligations of States.⁵²²

In this setting, to cull from the dicta of the International Court on the distinction between equity and decisions *ex aequo et bono* or the avoidance of *non-liquet*, a general power for international adjudicators to create the content of rules in international law and engage in a legislative function would be untenable. A decision rejecting a claim based on the absence of an obligation in international law detracts from neither the notions of equity or *non-liquet* in international law nor the function of the tribunal in disposing of the case in a consensual structure of formation of rules and obligations. If asking a tribunal to settle a dispute were in and of itself a ground for conferring discretionary legislative power, the International Court should have relied on such a power in its decisions as a result

⁵²¹ See Chapter I, Section C (ii) and Chapter II, Section C (ii) (b).

⁵²² See Chapter I, Section C (ii).

of mere submission of the case for settlement. Even if on occasions the Court may virtually have engaged in a creative role, the important factor about the practice is that the Court has not supported or justified such a function. The core of this function is engagement in political and moral evaluation of justice, policies, or social aims disguised in the employment of equity and general principles of contingent character, which in view of the absence of a general rule of recognition requires particular authorization for decisions *ex aequo et bono*. An implied discretionary power relegates the sources of international law to an empty shell undermining the whole system and the rule of recognition of international law.

The foregoing practice shows that despite the dicta distinguishing between equity and *ex aequo et bono*, the International Court has indicated, though not articulated, the requirement of parties' authorization where the application of equity converts the function of the court into a legislative function be it a new rule or modifying an existing one. This practice is consistent with the State practice earlier identified, and the framework rule of legitimacy, affirming that the general rule of recognition in international law does not admit adjudicative creation of the content of international rules and obligations. Such a function requires either a particular authorization by the parties or a particular recognition for a field of international law such as human rights. The question of the constitutional construction of rights of human beings and corresponding obligations of States and limitations on their actions towards human beings in the field of human rights will be addressed in the next chapter in contrast with the field of foreign investment. The situations where substantive, procedural, or structural principles of absolute dimensions may function in legal reasoning and settlement of disputes as equity inside the law need to be distinguished. A number of illustrations may be observed.

iii. Equity Inside the Law

Along the possibility of emergence of a particular recognition for a field of international law for reference to justice to determine the substance of rules and obligations as in the case of maritime delimitations or constitutional construction

of human rights, equity may also be deemed inside the law, *infra legem*, where it mirrors justice in absolute dimensions. This quality cannot be generalized to contingent principles. On the one hand, substantive, procedural or structural principles may themselves be of absolute dimensions representing a statement of the law. On the other hand, as a matter of fairness of process in an absolute dimension, justice under the law may be reflected in a particular recognition for the adjudicative discretionary power for the determination of the amount of compensation in the absence of a rule, in the penumbra of consequence regarding the quantum of compensation. These two cases will be discussed below.

Justice inside the law is from one angle reflected in the application of absolute principles which whether of procedural or substantive character be they called principles of equity, justice, or fairness represent statements of law and are thus part of the law to be applied.⁵²³ Where an equitable principle by virtue of its absolute character expresses the statement of the law, its application is by character different from an implied power. The ICJ in *Tunisia/Libya* suggested that in the application of international law, the international court might choose among various interpretations the one “closest to the requirements of justice.”⁵²⁴ This view fits a situation like the one espoused by Judge Hudson in the *Meuse* case, which is governed by a principle of absolute dimension where obvious fairness or justice can be conceived. It was particularly the absolute aspect of a principle that underlay the distinction between equity and *ex aequo et bono* in its inception pronounced in the *Meuse* case. Judge Hudson’s opinion in the *Meuse* case essentially concerned a procedural principle of adjudicative process with an absolute aspect, which would be unwarranted to stretch it to rationalize a discretionary power to exercise justice evaluation by way of substantive equitable principles.⁵²⁵ What influenced this opinion was the “obvious fairness” aspect of

⁵²³ For absolute principles, see Chapter II, Section C (ii) (b).

⁵²⁴ *Tunisia/Libya*, *supra* note 457, at para. 71.

⁵²⁵ What Judge Hudson relied on as a principle of equity was that a party that has continually breached a reciprocal treaty obligation cannot seek a relief to “take advantage of a similar non-performance of that obligation by the other party.” The *Meuse* case, *supra* note 455, at 77. This principle does not define the substantive content of the obligations of the parties but represents a principle of absolute dimension regarding the enforcement of the obligations. Judge Hudson referred to maxims “equality is equity” and “who seeks equity must do equity” in municipal laws

the equitable principle concerned.⁵²⁶ Contingent principles do not share this character. The theoretical link behind the virtue and propriety of this view is the absolute character of the principle, which is not an analogous authority for the application of equity for contingent principles. Never does this opinion entail a legislative function for international adjudicators or utilization of principles in engaging in such a function. Judge Hudson even cautioned that “[t]he general principle is one which an international tribunal should make a very sparing application.”⁵²⁷ That is why the principle ‘equality is equity’ has received mixed reactions in the decisions of the International Court.

In the Meuse case, the maxim ‘equality is equity’ relied on by Judge Hudson reflected a procedural principle of absolute dimension, thus applicable by virtue of this nature and its obvious fairness demand. Whereas in the North Sea Continental Shelf cases, the ICJ held “equity does not necessarily imply equality.”⁵²⁸ The contrast lies in the fact that in the North Sea Continental Shelf cases the ICJ faced contingent substantive aspects of the principle in a penumbra hard case of delimitation of continental shelf between adjacent States. Absolute principles neatly qualify a character of obvious fairness or justice. Contingent principles, for which conflicting demands of justice are implicated, do not reflect obvious justice but justice subject to evaluation.

The other manifestation of justice inside the law is where justice precludes denial of compensation on the ground of absence of rules applicable to the question of measure of damages while the law has determined that a conduct

of Anglo-American systems. Ibid. at 77. One should recall that Lord Phillimore as the drafter of what now appears as paragraph C of Article 38 clarified the intention behind the principles as maxims of law. See *supra* note 483 and accompanying text.

⁵²⁶ The Meuse case, *supra* note 455, at 77.

⁵²⁷ Ibid.

⁵²⁸ North Sea Continental Shelf, *supra* note 457, p. 85, para. 46 [citation omitted]. The ICJ in the Bukina Faso/Mali Frontier Dispute acknowledged this dicta in the North Sea Continental Shelf case stating ‘Equity does not necessarily imply equality’ but applied equality as an equitable principle applicable to a disputed region (the region of the pool of Soum) in the case before it because in cases “*where there are no special circumstances* the latter [equality] is generally the best expression of the former [equity]. The Bukina Faso/Mali Frontier Dispute, *supra* note 457, p. 633, para. 150. [emphasis and clarification added] Remarkably, though subtly, the Court in the Bukina Faso/Mali Frontier Dispute also affirmed the approach by the ICJ in the North Sea Continental Shelf that where special cases arise, namely penumbral cases, as in the delimitation of the continental shelf between adjacent countries, the principle may not work and thus not a statement of the law.

entitles a party to compensation. An area also ascribed to equity *infra legem* is the equitable calculation of damages for compensation.⁵²⁹ For instance, where the law entitles the claimant to compensation for pain and suffering, the difficulty of valuation of damages should not deprive the party of compensation.⁵³⁰

In cases where a conduct has been determined under the law to entitle the party concerned to compensation, failure to award compensation on the ground of the absence of a rule on the quantum of compensation is a *non-liquet* against an absolute principle of justice. The ICJ in Barcelona Traction suggested this limited scope of *non-liquet* in international law when it attributed a legal vacuum to the “situation where a violation of law remains without remedy.”⁵³¹

In the UNESCO case, decided by the Administrative Tribunal of the International Labor Organization, the tribunal, awarding compensation for the failure to rehire UNESCO’s employees despite their contracts having fixed terms, found the amount of compensation not subject to a specific rule and thus held that “[t]he redress will be ensured *ex aequo et bono*”⁵³² The ICJ’s advisory opinion was sought by the organ’s executive board on the invalidity of the decision of the tribunal in part for being excessive to apply equity without an express agreement by the parties for a decision *ex aequo et bono*. The ICJ held that the Tribunal did not have the intention to “depart from principles of law.”⁵³³ This case has two important implications. One is that neither the Tribunal nor the Court in its advisory opinion distinguished between the application of equity and a decision *ex aequo et bono*. The other is that both the tribunal and the Court suggested that for the particular question of valuation of compensation, there is an authorization for the court not restricted by the general requirement for parties’ authorization to apply equity, i.e. to decide *ex aequo et bono*. Whether the entitlement to compensation arises from conventional or general international law is immaterial in this respect. This particular recognition for the application of equity, deciding

⁵²⁹ Akehurst, *supra* note 347, at 802. Another example is the discretion of the tribunal for resorting to equity for fixing “a fair rate of interest” or “a fair order concerning costs”. *Ibid.* at 803.

⁵³⁰ See *Ibid.* at 802-803.

⁵³¹ Barcelona Traction, *supra* note 425, p. 44-45, para. 80.

⁵³² Advisory Opinion on Judgments of the Administrative Tribunal of the I.L.O. upon complaints Against the U.N.E.S.C.O., ICJ Rep, 1956, at 100.

⁵³³ *Ibid.* at 100.

ex aequo et bono, in the absence of a specific rule on compensation, which accords a discretionary power to the adjudicator to determine the amount of compensation, originates in an absolute principle of fairness whereby the absence of a rule on compensation should not negate the entitlement to compensation.

The equity *infra legem* and prohibition of *non-liquet* may accord the adjudicator a degree of discretion for the calculation of compensation that the law has entitled it as a consequence that the law has determined. Here equity, together with the concomitant prohibition of *non-liquet*, is not supposed to address the legal status of a conduct but some degree of the consequence for a conduct that has already received legal determination. The vacuum of international law itself as to the conduct to which a violation is attributed admits no adjudicative creation of the content of the law to reconstruct the status of the law on the conduct itself unless upon particular authorization or recognition. In hard cases equity *infra legem* may become very illusive and may distort the limited authorization for adjudicative determination of the amount of compensation. The discretion to measure compensation still must not distort the statement of the law. Absolute procedural fairness provides a particular recognition for a degree of adjudicative discretion to international adjudicators, not for the gap relating to the conduct, but to the gap relating to the consequence of the conduct to ensure that compensation is not denied for a conduct for which the law requires compensation.

The exercise of this adjudicative discretion in making legal determinations whether by particular authorization or by absolute fairness for determining compensation is still bound by the criteria of legitimacy as well. On the one hand, coherence requires the determination to be made with appropriate consideration of appropriate demands of justice for the common good. The requirement of coherence also bars the adjudicative body to display contingent substantive principles as statements of the law and application of an existing law in justifying their decisions while they represent an adjudicative determination. This will lead to disregarding or underplaying other demands of justice in violation of the legitimacy requirement of coherence for the common good. Such an act would distort the statement of the law by projecting one demand of justice as the law

disregarding the other by being considered as a revision of the law against the requirement of coherence for such hard penumbral cases. Moreover, although the adjudicator may exercise discretion towards the parties of the case by virtue of this particular rule of recognition emanated from procedural justice, the general rule of recognition of international law still governs in that the decision rendered will not represent a juridical statement of a general rule. In legal determinations by adjudicators whether by way of authorizations by the parties for the conduct or particular recognition to meet the requirement of fairness not to leave a legally entitled claimant without compensation, the legal status of the matter remains subject to subsequent State practice and opinion.⁵³⁴ That international adjudicators may by virtue of a particular authorization or recognition engage in a certain legal determination does not relieve adjudicators from adherence to the criteria of legitimacy. Recognition of power for determination in the penumbra of consequence for compensation amount is no recognition for determination power for the conduct and creating of the obligations for which the consequence is attributed. Nor does an authorization or recognition for making legal determination relieve the adjudicators from the criterion of coherence to consider all justice demands for the common good. Nor must it in and of itself be regarded as the statement of law on the question of the amount of compensation. Departure from these criteria of legitimacy may often occur along the lines of *lex lata* and *lex ferenda*.

iv. Lex Lata and Lex Ferenda

Where in hard penumbra the application of equitable principles or general principles of law is conducive to political and moral evaluation, characteristic of contingent principles, it would be untenable to circumvent the rule of recognition of international law required for such evaluation. Parallel observations apply to the equity discourse. The accuracy of equity *infra legem* as a class of equity truly distinguishable from other types of equity on substantive issues is still a point to

⁵³⁴ See below, Section B.

ponder more deeply. The distinction between the notions of equity *infra*, *praeter*, and *contra legem* fails to delineate the scope of equity as the application of law as opposed to an adjudicative legislative function creating legal rights and obligations. Akehurst, acknowledging the merger of these notions of equity, states that:

[E]quity *infra legem* can be used in a wide number of situations, ranging from cases which differ only slightly from a strict application of the letter of the law, through cases where the spirit of the law is made to prevail over its letter. Consequently a judge who wishes not to apply a rule of law can say that application of the letter of law is contrary to its spirit or that the legislator must have intended that there must be exceptions to the letter of law (equity *infra legem*) or that the law does not apply to the case and that the judge can fill the resulting gap by recourse to equity (equity *praeter legem*); or that the law is unjust and should not be applied (equity *contra legem*).⁵³⁵

Oftentimes the line between equity *infra*, *praeter* or *contra legem* is illusory because in hard penumbral cases each, involving a general principle, entails fresh assessment of justice for the particular situation of hard penumbra for which the situation may fit the character of an unjust law or the absence/silence of law for the particular situation at issue. The equidistance in the maritime boundary delimitation of continental shelf is itself a vivid example.

In the conventional wisdom, the justice demand for the non-application of the equidistance rule to the particular situation of continental shelf delimitation may be attributed to a demand for the modification of the rule, thus conceived as equity *contra legem*. Some criticisms of the ICJ decision in the North Sea Continental Shelf are also in line with such an approach.⁵³⁶ Nonetheless, from the perspective of coherence and the requirement for the determination of the content of the rule for a penumbral hard situation, a rule for the particular situation of the lateral delimitation of continental shelf between adjacent States did not exist. In

⁵³⁵ Akehurst, *supra* note 347, at 801-802.

⁵³⁶ See for instance, the dissenting opinion by vice-President Kortesky in the North Sea Continental Shelf, *supra* note 457, at page 165-166; Tunisia/Libya Continental Shelf, *supra* note 457, dissenting opinion by Judge Oda, at para. 1; Wolfgang Friedman, The North Sea Continental Shelf Cases— A Critique (1970) 64 Am. J. Int'l L. 229, at 236.

effect, the ICJ in the North Sea Continental Shelf and following cases as well as State practice treated the question of the delimitation of continental shelf in such situations as a penumbral hard case for which a rule did not exist.

The ICJ in the North Sea Continental Shelf for the application of the equidistance method in boundary delimitation cases rejected the analogy of median-line delimitations between opposite States with lateral delimitations between continental shelves of adjacent States or analogy of waters (mostly internal waters such as lakes, rivers) with seabeds and continental shelf, implying that as a penumbral instance.⁵³⁷ In other words, even if the equidistance rule had been found a customary rule of international law, it had formed in the special instance of median-line delimitation between opposite States or internal waters, whereas delimitation of continental shelf areas for lateral delimitation of adjacent States requires rules of its own context not analogous to other situations. The ICJ, in interpreting a seemingly determinant treaty provision of Article 6 of the Geneva Convention of 1958 on Continental Shelf embodying equidistance rule espoused non-existence of the equidistance rule for the lateral delimitation of continental shelf for adjacent countries. Therefore, equidistance was not deemed *lex lata* for the penumbral situation of lateral delimitations between adjacent States. It only formed part of *lex ferenda*.

⁵³⁷ ("Finally, it appears that in almost all of the cases cited, the delimitations concerned were median-line delimitations between opposite States, not lateral delimitations between adjacent States. For reasons which have already been given (paragraph 57) the Court regards the case of median-line delimitations between opposite States as different in various respects, and as being sufficiently distinct not to constitute a precedent for the delimitation of lateral boundaries. In only one situation discussed by the Parties does there appear to have been a geographical configuration which to some extent resembles the present one, in the sense that a number of States on the same coastline are grouped around a sharp curve or bend of it. No complete delimitation in this area has however yet been carried out. But the Court is not concerned to deny to this case, or any other of those cited, all evidential value in favour of the thesis of Denmark and the Netherlands. It simply considers that they are inconclusive, and insufficient to bear the weight sought to be put upon them as evidence of such a settled practice, manifested in such circumstances, as would justify the inference that delimitation according to the principle of equidistance amounts to a mandatory rule of customary international law, -more particularly where lateral delimitations are concerned.") North Sea Continental Shelf cases, *supra* note 457, at para. 79. See also *ibid.* at para. 80 for the rejection by the ICJ of the analogy between delimitation of waters with that of seabed. ("There are of course plenty of cases (and a considerable number were cited) of delimitations of waters, as opposed to seabed, being carried out on the basis of equidistance-mostly of internal waters (lakes, rivers, etc.), and mostly median-line cases. The nearest analogy is that of adjacent territorial waters, but as already explained (paragraph 59) the Court does not consider this case to be analogous to that of the continental shelf.") *Ibid.* at para. 80.

To illustrate the issue further, recalling the example of emotional damages, assuming that the law in a given system like that of the United Kingdom entitles the claimant to compensation for emotional injuries suffered away from the accident scene, the question of measure of damages in this particular situation is a penumbral case.⁵³⁸ If limited liability is considered for this particular situation, it could be interpreted, being an exception to the rule or not, as equity *contra legem* or *praeter legem*. In the conventional wisdom, it would be equity *contra legem* in view of the legal materials providing for unlimited liability and projecting the demand for modification or exception as a demand in justice criticism of an existing law. Whereas as a matter of legitimacy, the unlimited liability rule, like the equidistance for the delimitation of continental shelf for the adjacent States, for this hard penumbral situation does not exist because it lacks coherence for the common good. Just as with the case of equidistance rule, it would be a distortion of the law to regard the unlimited liability rule as representing *lex lata* to justify the authority of this rule for penumbral hard cases. Such an approach would distort the scheme of liability behind the calculation of damages even if the law has determined that a specific conduct would give rise to entitlement to compensation. It would also distort the picture of gap and rule creation in penumbral hard cases discussed above which arise not only as to the legal determination of the conduct but also the consequence of the conduct.

In these examples both general principles expressing equidistance and unlimited liability rooted in the pedigree of legal materials would be short of authority, for the penumbra of delimitation of continental shelf for adjacent States and compensation for emotional damages respectively in view of the legitimacy criterion of coherence for the common good. To argue that a type of equity has its allegiance to law and the other to the notion of justice is misleading in penumbral cases because they involve creation of new rules or obligations for particular situations not fitting ordinary instances. The distinction between outside and inside the boundaries of law for distinguishing decisions *ex aequo et bono* from decisions based on equity only begs the question, distorting the whole

⁵³⁸ See Chapter II, Section B.

interpretation ambiguity for the application of rules in penumbral instances. To situate equity inside the law and *ex aequo et bono* outside the law to justify the legal character of equity disregards the fact that being inside or outside the law is the foundation of the very controversy surrounding equity, justice, or fairness in legal discourse.

These examples further exhibit the illusiveness of *lex lata* when penumbral hard cases are at issue. Penumbral hard cases are short of *lex lata*. It is the legitimacy requirement of coherence for the common good with appropriate consideration of all justice demands required by the practical reasonableness that makes a rule for ordinary instances non-existent for penumbral hard cases. By entering into the domain of penumbra, rules such as those discussed become general principles forming only part of the *lex ferenda* discourse for the determination of the content of law subject to evaluation of all justice demands and policy considerations for the common good of the community. Statements representing general principles are part of *lex ferenda* not determinative of *lex lata*. To project general principles as statements of law for a penumbral hard case is an affront to the legitimacy requirement of coherence.

Consistent with the general rule of recognition of international law requiring specific or general consent of States, neither the architecture of Article 38 of the ICJ Statute reflecting the sources of international law, nor State practice or the practice of the International Court warrants a general legislative power for international adjudicators entertaining disputes involving States governed by international law. In other words, the freedom of action and presumption associated with it ‘what is not prohibited is permitted’ has gained concordant practices by States and the International Court as a presumption that requires demonstration of existence of rules or obligations established in international law to rebut. It should be reiterated that the consent or freedom of action of States is not the focus. What is material is the rule of recognition in view of the common good of human beings, which also accepts absolute principles as well as openness to practices and justifications for a non-consensual framework for the obligations

of States laying limitations on States in a constitutional approach to the rights of human beings in international law.

The foregoing sections exhibit that the integrity of international law does not admit narrowing the scope of *ex aequo et bono* to exclude authorization for an adjudicative determination power or broadening the scope of paragraph C of Article 38 (1) of the ICJ Statue to include a sweeping application of equity or prohibition of *non-liquet* implicating an adjudicative determination power. The rule of recognition of the system of international law may not be assumed relinquished by implication. As the Chamber of ICJ in the ELSI case has held, it “finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so.”⁵³⁹ To inject an adjudicative determination power in settling disputes under international law is not reconcilable with the criterion of legitimacy of the rule of recognition, which consistent with the practice of States and that of the International Court rejects a legislative function by international adjudicators.

In the current structure of international law, an adjudicative legislative function to engage in justice evaluation or policy assessment requires a particular authorization by the parties or a particular recognition in a particular field of international law. National systems provide their own rules of recognition for the determination power by adjudicative bodies. Regional or even international institutions and organizations may also be established with their own systems and structures. In their design, such institutions and organizations may develop particular authorizations for the competencies granted to the deciding bodies functioning within the system. What follows from the requirements of legitimacy of coherence and rule of recognition is that the competencies and processes in such systems may not be taken for granted for or transferred to general international law and a system of adjudication governed by international law.

⁵³⁹ Elettronica Sicula S.P.A. (ELSI) (US v. Italy), Judgment, I.C.J. Reports 1989, p. 42, para. 50, available at <http://www.icj-cij.org/docket/files/76/6707.pdf>.

International law has its own determination structure unless particular authorization or recognition is established.

In penumbral hard cases arising from ambiguous treaty obligations or customary rules, the authority of the law figures in fresh coherence for the common good according to the rule of recognition of the system. As a matter of general rule of recognition in international law, in areas subject to contingent principles, State practice and opinion are required to determine the content of primary obligations with the caveat of particular recognition for a particular field such as human rights. The general international rule of recognition does not validate the determination of the content of the law in a justice or political evaluation—often masked by reliance on general principles, standards, or tests in tandem with reliance on past decisions—in hard indeterminacies by an international tribunal deciding a dispute governed by international law without a particular authorization or recognition. Nor does the general rule of recognition of international law validate a common law development of international obligations of States by adjudicative decisions if not rooted in or subscribed by State practice and opinion within the customary framework. The general rule of recognition of international law requires customary determination and development of the content of rules in hard penumbra.

B. Customary Framework of Determination

The normative vehicle that can meet the legitimacy criteria of the rule of recognition and coherence for the common good in general international law is customary international law.⁵⁴⁰ Coherence and the rule of recognition require the customary framework of international law to locate and construct legal determinations for the content of the primary obligations of States that are in a consensual frame of rules and obligations in hard penumbra arising from treaty or custom unless a particular authorization or recognition is established. Customary

⁵⁴⁰ It should be noted that the customary international law discussed in this study is a global custom not a regional or special custom between two or more States.

international law still has a framework of its own for generating authoritative rules in international law. This framework raises the constituent elements of custom. It also raises a theoretical analysis as to the question of the participation of contingent principles, decisions of international adjudicators, and academic opinion in the formation of an international customary rule than independent sources in a way reconcilable with the legitimacy criteria of coherence and the rule of recognition.

i. Constitutive Elements of Customary Rules

State practice and *opinio juris* are constitutive elements of customary international law. Customary rules of international law arise from State practice and *opinio juris*.⁵⁴¹ State practice and *opinio juris* constitute the objective and subjective elements necessary for the formation of a customary rule of international law.⁵⁴² In line with these elements, in a series of treaties on investment, States have further affirmed that customary international law “... results from a general and consistent practice of States that they follow from a sense of legal obligation.”⁵⁴³ Accordingly, international law has also developed criteria of validity within its rule of recognition about how a customary

⁵⁴¹ The Statute of the International Court of Justice, Article 38 (1) (b); North Sea Continental Shelf cases, *supra* note 457, at para. 77; Nicaragua v US (1986) I.C.J. 14, at para. 207; Oppenheim, *supra* note 119, at 26-28. Brownlie, Principles, *supra* note 424, at 6-10.

⁵⁴² *Ibid.*

⁵⁴³ See Free Trade Agreement between the United States with Central America (Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua) Central America (CAFTA), Annex 10 B, available on line at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/asset_upload_file328_4718.pdf; Treaty Between the Government of the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, Annex A, available on line at <http://www.State.gov/documents/organization/56650.pdf>; US-Australia Free Trade Agreement, May 18, 2004, Annex 11 A, available on line at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/asset_upload_file248_5155.pdf; US-Singapore Free Trade Agreement, Jan. 15, 2003, available on line at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_upload_file708_4036.pdf. The footnote to the Article 15.5 refers to the letter exchange of May 6, 2003, between the parties as their share understanding of customary international law. The Letter exchange is available on line at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_upload_file665_4057.pdf; and US-Chile Free Trade Agreement, 2003, Annex 10.A, available online at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/asset_upload_file1_4004.pdf.

international rule forms. It requires the conditions of State practice and *opinio juris*. Thus, for the existence of a customary rule of international law for a particular situation, State practice and *opinio juris* for that particular situation must be established. State practice and *opinio juris* formed for ordinary instances of the rule are short of authority for hard penumbra by virtue of legitimacy criteria of rule of recognition and coherence for the common good. Each hard penumbra requires fresh customary determination for validation of the origin of the rule and coherence of its content.

Where State practice and opinion may be located is one important question. What may indicate the practice and opinion of States may take various forms in States' actions (positive or negative), omissions, statements or votes. Usual candidates constitute the conduct of States, treaties, UN General Assembly Resolutions, domestic laws, diplomatic correspondence and public official statements by States.⁵⁴⁴ Treaties and General Assembly Resolutions stand out in these material sources.

Treaties may be raised as an indicator of an international customary rule. No doubt, treaties constitute a major source of international obligations among States. However, their scope is normally limited to the parties concerned and the obligations created do not have a general applicability for all States. Treaties made by two or a few States and even multilateral law-making agreements among many States are not *per se* the source of general rules.⁵⁴⁵ The question then arises about the evidentiary quality of treaties in indicating customary international law. Treaties may often indicate the absence of a particular legal obligation not

⁵⁴⁴ Brownlie observes a number of material sources of custom that have been referred to by tribunals and writers, which include "diplomatic correspondence, policy Statements, press releases, the opinions of official legal advisers, official manuals on legal questions, e.g. manuals of military law, executive decisions and practices, orders to naval forces etc., comments by governments on drafts produced by the International Law Commission, State legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly." Brownlie, *Principles*, supra note 424, at 6. Brownlie adds that "[o]bviously, the value of these sources varies and much depends on the circumstances." *Ibid.*

⁵⁴⁵ Brownlie, *supra* note 424, at 4. See also *North Sea Continental Shelf Cases*, supra note 457, at para. 77.

existing in customary international law.⁵⁴⁶ Ordinary treaties between two or more States “can very rarely be used even as evidence to establish the existence of a rule of a general law.”⁵⁴⁷ Multilateral lawmaking treaties may evidence general rules.⁵⁴⁸ Being a sign of the conduct of States, then multilateral treaties have to be examined on the basis of State practice and *opinio juris*. Thus, they must satisfy the requirements of State practice and *opinio juris* in evidencing customary law. *A fortiori*, a bilateral treaty cannot *per se* reflect a customary rule on a particular issue without other indicators of the custom outside the treaty framework to establish State practice and *opinio juris*. As such, there cannot be a categorical rejection or appreciation of the utility of bilateral treaties including investment treaties for reflecting or developing customary international law. It is the practice and opinion outside the bilateral treaty framework that matter much for the existence of a customary rule.

The Resolutions of UN General Assembly may play a significant role for indicating the attitudes of States towards general law and reflecting or building customary international law although they are non-binding instruments. General Assembly resolutions can provide strong indication of a customary rule because they are backed by the votes of States. In the Nicaragua case, the ICJ suggested that the attitudes of States towards certain General Assembly resolutions may be used as evidence of *opinio juris*.⁵⁴⁹ As Brownlie puts “if it is inferred that such resolutions can have no effect on the shaping of international law this is a capital error.... Thus the proceedings and the resolutions themselves constitute *evidence* of the formation of rules of customary or general international law.”⁵⁵⁰

The UN General Assembly is a unique forum where States cast their voice in a collective manner. They also do this in a quasi-legislative manner with deliberations among the States on a particular subject as if they are engaging in a

⁵⁴⁶ Jennings, *supra* note 219, at 35.

⁵⁴⁷ Brierly, *supra* note 104, at 57. Apparently, Brierly does not deny such a role for lawmaking treaties.

⁵⁴⁸ Brownlie, *supra* note 421, at 4, 12-14. These treaties may codify a customary rule. For instance, Article 2 (4) of the United Nations Charter codifies the customary rule of prohibition of use of force. Similarly, Article 2 (1) of the Charter codifies the customary rule of equal status of States. UN Charter, *supra* note 195.

⁵⁴⁹ See Nicaragua, *supra* note 541, at para. 188.

⁵⁵⁰ Brownlie, Legal Status, *supra* note 445, at 260.

lawmaking endeavor for the global community. There is no compelling reason to disregard the UN General Assembly Resolutions on a particular issue in view of the debates concerned as a strong indication of existence or non-existence of a customary international rule on that issue. Positive collective action of States in voicing unanimously or in large number in support of a rule in this forum can indicate the opinion of States' as to what the law is. Negative collective action in opposition to a rule in this forum or other similar forums is also an indication of what States believe the law is not. The engagement of States is much different from their practice in treaties or other bilateral or unilateral contexts. The general assembly is a unique global forum where the collective voice of States on a given matter can be obtained. The collective voice of States on an issue at the global level, positive or negative, indicates the *opinio juris* on that matter evidenced by the votes of States in a global forum where the practice of State is much like a parliament at the national level. That is to say, what is deliberated there intuitively though not technically is regarded as deliberation on what might be taken as rules of general application. That is why States in the UN general assembly usually engage in heated debates and deliberations on a particular resolution. These resolutions can reflect a general consent and *opinio juris* of a customary law though not themselves binding on States. The elements of State practice and *opinio juris* carry other important aspects as well.

1. State Practice

Generality and consistency are important aspects of State practice as an element of customary international law.⁵⁵¹ For the formation of a customary rule, the general consent of States would be sufficient.⁵⁵² For the analysis of general consent, the practices of States of different cultural backgrounds must count.⁵⁵³

⁵⁵¹ See Brownlie, Principles, supra note 424, at 7-8; See also sources mentioned in supra notes 535. Duration is also a question for the formation of custom.

⁵⁵² Ibid.

⁵⁵³ According to one commentator, "the analysis of State practice in the literature of the West, particularly among Anglo-American writers, is based almost exclusively on Western practice. The

Particularly those whose special interests are affected by the rule must be represented in its construction.⁵⁵⁴ The UN Charter has enunciated the equal rights of States.⁵⁵⁵ From the practical point of view, such equality may not have much value because States are not equal in power or position. Nonetheless, from the theoretical perspective, the equality of the rights of States does imply that the practice and opinion of States of different backgrounds must be considered in the formation of a customary rule. The proposition that States are equal in theory attempts to narrow the practical inequality by allowing weak States to participate in the determination of issues that matters to them. The common good requires consideration of all appropriate justice demands in the construction of rules and thereby requirement for participation of States of different powers and positions to represent their demands of justice in the formation of customary rules to meet the consent.

How such a consistent, general practice is demonstrated in practice is also a question that affects the legitimacy of the purported customary rule. Inherent in the element of State practice as a constitutive element of customary international law is what is attributed to customary law must empirically reflect State practice and opinion than the views of commentators or international tribunals.⁵⁵⁶ Observing that what are attributed to customary international law instead of being demonstrated empirically, are what writers and tribunals conclude based on assumptions predicated among others on the past views of tribunals and writers,

practices and attitudes of Japan, China, and the many nations of Africa, Asia, and Latin America are virtually ignored in the Western literature. Even the use of Continental sources is generally limited to the decisions of international tribunals and other sources available in English. In part, this is the result of our lack of facility in foreign languages, but it also reveals a peculiar chauvinism that is incompatible with the concept of customary law. There is an unspoken assumption that the practices, theories, and perspectives of the United States and the United Kingdom, each of which have been paramount powers in distinctive periods of international law, have preeminent weight. The practices of non-Western cultures are just not taken seriously.” Kelly, 1. Patrick “The Twilight of Customary International Law” (2000) 40 Va. 1. Int’l L. 449, at 452, at 472-473. See also Michael D. Ramsey, “The Empirical Dilemma of International Law” (2004) 41 San Diego L. Rev. 1243, at 1247-1248.

⁵⁵⁴ See North Sea Continental Shelf cases, *supra* note 457, at para. 73.

⁵⁵⁵ UN Charter, *supra* note 195, Article 2 (1).

⁵⁵⁶ See Bederman, *supra* note 104, at 34. For a recent academic writing emphasizing empirical assessment of customary international law see, Ramsey, *supra* note 553, at 1247; Kelly, *supra* note 553, at 453.

thus generating “paper norms”, one commentator seems to find this situation a fatal defect of customary international law calling for its elimination.⁵⁵⁷

Purported customary rules may often be taken for granted by tribunals and writers and often inferred from past views of other tribunals and writers than based on State practice and opinion. This situation, however, by no means warrants a radical call for the elimination of customary international law as a source of international law. Nor does the situation justify categorically ruling out treaties or UN resolutions and other State practice or opinions as part of material sources where they can contribute to the formation of customary law among other indications of practice and opinions of States or provide negative attitudes by States to a proposed or desired state for the law. The fact that some rules may often be raised that do not satisfy the elements of customary international law does not necessarily entail that no customary rule exists or none can come into existence. The focus must be on the general international rule of recognition that requires customary determination of the content of primary rules of obligations on a consensual basis, except for absolute principles and particular recognitions or authorizations, as well as its component criteria that customary international law forms by the necessary elements of State practice and *opinio juris*. This does not mean that non-State actors including the views of academic writers and particularly decisions of international tribunals as subsidiary sources and more broadly NGOs cannot contribute to the formation of custom, if not as its creator. The question of participation of non-State actors in building customary international law in a manner compatible with the legitimacy criterion of the general rule of recognition of international law is linked to the element of *opinio juris*.

2. *Opinio Juris*

The second requirement of customary international law is *opinio juris*. This constitutive element for the formation of customary law is under Article 38

⁵⁵⁷ Kelly, *supra* note 553, at 454-498.

of the ICJ Statute described as “a general practice accepted as law”.⁵⁵⁸ In further elaboration, the ICJ in the North Sea Continental Shelf cases held that

Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.⁵⁵⁹

To build the authority of customary international law *opinio juris* is indispensable. The element of *opinio juris* poses a question of circularity that how an international customary rule may “come into existence (i.e. become authoritative) only by virtue of the ... belief that it is already in existence (i.e. authoritative).”⁵⁶⁰ This question will be dealt shortly in view of determination and coherence for the common good that would explain the evaluative level of *opinio juris* without its circularity.

While agreeing that practice alone cannot give rise to customary law, in discovering the second element necessary for the formation of the substance of customary law, Lon Fuller proposes that custom be interpreted in the light of interaction.⁵⁶¹ Fuller confirms that the doctrine of *opinio juris* is respected in international law. Fuller finds this doctrine covering established customary law and not the situations where customary law is in the process of formation, apparently because of its circularity.⁵⁶²

⁵⁵⁸ ICJ Statute, Article 38 (1) (b).

⁵⁵⁹ North Sea Continental Shelf cases, *supra* note 457, p. 44, at para. 77.

⁵⁶⁰ Finnis, *supra* note 5, at 239.

⁵⁶¹ Fuller, Interaction, *supra* note 16, at 16. Fuller’s posits that stable interactional expectations on which basis the parties anticipate actions and reactions and prudently adjust their affairs would amount to obligation. *Ibid.*

⁵⁶² See *ibid.*

The interaction theory and others cannot dispense with *opinio juris* for the emergence of an individual customary rule in international law. *Opinio juris* is a key criterion of validity for the formation of customary international law and its legitimacy in view of the rule of recognition. Moreover, it should not be thought that the consent basis is missing in a customary law that recognizes stable interactions. Fuller himself notes “[i]f we speak of a ‘system of stabilized interactional expectancies’ as a more adequate way of describing what the treatises call ‘customary law’ we encounter the embarrassment that many of these expectancies relate to matters that seem remote from anything like a legal context. For example rules of etiquette fully meet the suggested definition, yet one would scarcely be inclined to call rules of this sort rules of law.”⁵⁶³ Mere reliance on stable expectations as a sign of customary rule still poses graver difficulties from the common good standpoint. It was stable interaction among one group and other group (the black people) that the latter act as the slaves of the former. The first group created the expectation and the second group reacted to that expectation by satisfying the demands of the first group. Both groups relied on those reactions and expectations and both planned their affairs on that basis. Was there a customary law obligating the black people to act as slaves? Employers may create stable, widespread expectations for their employees that the latter work overtime without remuneration or work in poor health and safety conditions or that the employees including women and children perform harsh, onerous tasks in return for meager subsistence of life. Employees in such conditions may well react to those expectations by complying the wishes of the employers, expecting that they would keep their jobs or their means of living for survival. Both employers and employees rely on these expectations and plans and adjust their lives and affairs accordingly. Does it mean that there is a customary rule obliging employees to work in such circumstances? European empires had created stable expectations throughout the world that through colonization they should rule where they occupied. The colonized States reacted by meeting this expectation. Was there a customary law between the colonizing and colonized countries that sanctioned the

⁵⁶³ Ibid. at 10.

ruling of the former over the latter? It was stable widespread expectation that the gunboat policy would follow in the name of diplomatic protection. Was that a customary law between the host States and home States that if the former interfered with the interests of the latter, military intervention or other gross consequences should follow? Do such instances and similar ones represent customary law or merely actions and interactions grounded in fear, force, poverty, and power? Customary interaction anchored in power and fear, however stable or widespread and expressive of expectation, is nothing short of the gunman situation that has long lost its theoretical and practical grip. Mere reliance on stable, widespread expectations among the members of the community of persons and the States alike cannot *per se* justify an obligation under the rubric of a customary rule.

For the formation of customary international law, *opinio juris* is a necessary criterion of validity. The circularity argument can be avoided by a theoretical account of *opinio juris* that both adheres to the general rule of recognition of international law requiring the general consent of States for the formation of primary rules on a consensual basis and embraces moral evaluations by States and non-State actors alike in the formation of customary international law. This account will be presented in the next section.

ii. Constitutive Statements of Customary Determination

The general consent of the participants reflected in *opinio juris* is required to shape a customary rule. The authority of a rule and participants in its construction and determination of its content may be described by reference to statements of authority. Statements about recognition of an authoritative rule may manifest themselves in three forms.⁵⁶⁴ These three statements are issued by the participant, the observer, and the jurist. The party affected by the rule issues the statement that X has authority because X's pronouncements give exclusionary reasons to anyone including the participant to act in accordance with those

⁵⁶⁴ Finnis, *supra* note 5, at 234-236.

pronouncements and as such to treat X as having authority and his pronouncements as authoritative.⁵⁶⁵ The observer issues the statement that X has authority without regarding X as having authority over himself but because some people treat X as having authority and because the group regard it as a good reason.⁵⁶⁶ Finally the jurist issues the statement that X has authority not because of regarding X's authority over himself nor as a result of reporting "other people's attitudes to X, but rather by way of stating what is the case" from the participant's point of view. This view can be the participant's view from a professional perspective without affirming or rejecting that there is good reason.⁵⁶⁷

With these distinctions in mind and distinction of practical principles earlier discussed, authoritative customary international rules may arise from general practice of States and *opinio juris* without the circularity of *opinio juris*. The analysis of customary international rules in view of the statements of authority and practical principles not only explains the element of *opinio juris* in the determination of customary rules in a non-circular manner but also makes their determination compatible with the legitimacy criteria of the rule of recognition and coherence for the common good. The analysis of customary international rules in light of statements of authority and practical principles also elucidates the participation of contingent general principles and the opinions of non-State actors including the opinions of international tribunals, academics, NGOs, etc. in the formation of customary rules at an evaluative level consistent with the criteria of legitimacy. This analysis consists in a formula for the formation of customary international law in which customary rule determination does not begin with State practice and *opinio juris*. The determination of the substance of customary rule in this formula originates in evaluative judgments through practical principles laying moral and political foundations for building State practice and opinions. The determination of the substances of a customary rule of international law in this analysis consists of practical, empirical, and

⁵⁶⁵ Ibid. at 234.

⁵⁶⁶ Ibid.

⁵⁶⁷ Ibid. at 235.

juridical judgments about the existence and the extent of State practice and opinion.⁵⁶⁸ These judgments are discussed in terms of the non-legal and legal stages of formation of customary international law.

Following Finnis' approach, in the formation and recognition of an authoritative customary rule of international law, there are, in order, two practical judgments and two empirical judgments at the non-legal stage, two practical judgments, one empirical judgment, and one jurist judgment at the legal stage. *Opinio juris* addresses practical judgments about a desirable but not yet legal pattern of conduct that occur at the non-legal stage, thus *opinio juris* is not about an already existing law.⁵⁶⁹ Two practical judgments of the non-legal stage rescue *opinio juris* from circularity. The first judgment is that in a specific domain of States' affairs it is desirable to have "some determinate, common, and stable pattern of conduct, and, correspondingly, an authoritative rule requiring that pattern of conduct"⁵⁷⁰ The second judgment is that it is or would be appropriate to have "this particular pattern of conduct" if adopted as an authoritative, common rule.⁵⁷¹ These two practical judgments expressed are not yet legal judgments.⁵⁷² These practical judgments represent practical principles expressing general and particular desirability.⁵⁷³

This layer of the formation of a customary rule does not yet represent legal rules. It represents the expression of desirability of the international community as a whole for some pattern of conduct in general, on the one hand, and the expression of desirability for a particular pattern of conduct, on the other.⁵⁷⁴ The assessment of the desirability in the first place would be the common good of the

⁵⁶⁸ See Finnis, *supra* note 5, at 238-245. .

⁵⁶⁹ Ibid. at 239-241. Practical judgments refer to "judgments made by any person, whether privately or in some official capacity, which explicitly or implicitly state that some action (including always omissions or forbearances) by some (potential) agent should (not) be done, or could (not) appropriately or justifiably be done (in any of the various senses of 'should', 'appropriately', or 'justifiably'." Ibid. at 239.

⁵⁷⁰ Ibid. at 239.

⁵⁷¹ Ibid. at 240. Finnis notes that the pattern of conduct X "may be procedural or 'framework' in nature, e.g. *negotiation of agreements*, as the appropriate and required method of settling disputed questions about (substantive) conduct in such-and-such domain." Finnis *ibid.* at 240, n. 9.

⁵⁷² Ibid. Note should be taken that in this study the terms 'practical statements' or 'practical views' refer to 'practical judgments' discussed in this section.

⁵⁷³ See Chapter II, Section C (i) (a).

⁵⁷⁴ Finnis, *supra* note 5, at 240.

international community as a whole and its members and in the second place the interests of States making judgments.⁵⁷⁵ At this stage, the formation of custom is linked at the upper level to a communitarian-based element rooted in the common good of the members of the international community as a whole. Customary rule formation is still incomplete, only with the consensual-based elements is the process complete. A customary international rule comes into existence only when States subscribe to the desirable general and particular pattern of conduct through their widespread practice and opinion. As such, empirical judgments reflecting the widespread and general practice and opinion of States are required to complete custom formation.⁵⁷⁶ Two empirical judgments at the non-legal stage are involved. The formation or non-formation of an international customary rule depends on the empirical judgments that “(i) the practice of many (or few) States, in the relevant domain, is convergent in pattern and is of the pattern” of the particular conduct of the second practical judgment, and (ii) other States do (or do not) acquiesce in that pattern of conduct.”⁵⁷⁷

If there is general widespread State practice coupled with *opinio juris* widely accepting the desired pattern of conduct reflected in the practical judgments, then there would now emerge two new practical judgments at the legal stage. The first one is that the general widespread State practice and widespread subscription by way of *opinio juris* to the pattern of conduct desired in the practical judgments of the non-legal stage are sufficient to warrant the judgment that there exists an authoritative international customary rule requiring X.⁵⁷⁸ The second practical judgment is that X “is required (or permitted), by virtue of an authoritative customary rule of international law,” which in turn would allow the empirical judgment at the legal stage that “States generally accept the rule that X is to be done (or may be done)” as well as the juridical judgment that “according to international law, X is required (or permitted).”⁵⁷⁹

⁵⁷⁵ Ibid.

⁵⁷⁶ See *ibid.* at 240-241.

⁵⁷⁷ Ibid. at 240.

⁵⁷⁸ See *ibid.* at 241-242.

⁵⁷⁹ Ibid. at 242.

Diplomatic immunity may serve a good illustration. First, practical judgments are made that in the domain of diplomatic relations that it is desirable to have some rule to protect diplomats serving in foreign countries. The particular conduct of allowing immunity for diplomats is advanced as appropriate for adoption by States through practical views or statements by some States reflected in their practice or practical views or statements by non-state actors. A large number of States accept this conduct through widespread practice and *opinio juris*. The general, widespread practice and subscription of *opinio juris* to the proposed pattern of conduct are sufficient to affirm that there is a binding customary rule requiring diplomatic immunity of diplomats in foreign States, allowing the statement that States accept that this rule must be observed. What follows is the jurist statement that under customary international law the diplomatic immunity of diplomats is required.

As we ascend the layers of structure of custom formation from substance to framework rules, it is easier to identify agreement by States. As we descend from framework to substantive rules, the empirical demands are higher and more difficult to find the agreement of States in practice and opinion. As to the substance itself, it is far easier to discover general agreements of States that it is desirable or appropriate to have ‘*some* rule’ than ‘*this* particular rule’ in a specific domain.⁵⁸⁰ It is very plausible that States subscribe in practice and opinion that it is desirable or appropriate to have *some* rule in a specific domain, i.e. to basic practical principles, but not subscribe in practice and opinion to *this particular* rule, i.e. particular practical principles, proffered before them through practical views or statements of States or non-State actors. This should not be used as a weakness of customary international law or to discard the required elements for the formation and recognition of customary law on the pretext of circularity or the empirical difficulty. The determination of customary rules of international law with the involvement of practical, empirical, and juridical judgments elucidates a number of important factors for the formation and interpretation of customary rules of international law including those on foreign investment.

⁵⁸⁰ See *ibid.* at 243.

First, *opinio juris* is not paradoxical or circular when evaluative practical judgments are considered. Second, the practical judgments expressing general or particular desirability for a pattern of conduct are evaluative statements or views that do not determine the content of the rule or represent the legal status of the rule unless subscribed to by empirical judgments representing widespread State practice and opinion to both the general and the particular practical judgments. General State practice and *opinio juris* are required to meet the legitimacy criteria of the rule of recognition and coherence for the common good. The subscription of States in practice and opinion to a practical judgment expressing a general desirability of 'some rule' is not enough to determine a customary rule. Customary determinations require subscription of States in practice and opinion to a particular practical judgment expressing the desirability of a particular proposed rule in a specific domain as well.

Third, the determination of customary rules of international law embraces moral evaluations as well at some foundational level without bypassing the rule of recognition. The practical judgments or views by States and non-State actors at the non-legal stage offer proposals as to a desired rule for a specific field of activity or relation at an evaluative level of the formation of customary international rules. Moral and political evaluative views or reasons advocating a conception of justice overwhelm this stage, which may or may not lead to adoption by States in their practice and opinions to reach a legal determination for the proposed rule.

Fourth, the participation of non-consensual sources, i.e. contingent principles or views by non-State actors, in the formation of customary international law takes place through practical judgments at the non-legal stage. Contingent principles and views advocating them lack the status of law. These principles and views represent practical judgments that may or may not lead to the formation of a customary rule depending on the empirical judgments by States through their practice and opinions subject to the rule of recognition for the determination power. The non-legal stage may involve States or may very well involve non-State actors including international tribunals, jurists, NGOs, etc.

through practical judgments or views expressing desirability for a particular rule, advocating a demand of justice or a general principle of law. In fact, a good deal of participation for urging customary rule formation is owed to non-State actors that engage in practical judgments at the non-legal stage, calling for a new pattern of conduct or the change of an existing one on the part of States. These non-State actors alone or together with some States may act in pushing States to act by raising moral dimensions or considerations surrounding a desired pattern of conduct to follow or an undesirable pattern of conduct to cease. Oftentimes the share of non-State and sub-State actors is much greater than States themselves at the non-legal stage. They play a significant role in urging States to act in a particular way. Thus, the normative value of the non-legal stage is significant. At this stage, proposed rules are offered to States through practical judgments of State and non-State actors that a sphere of affairs requires some rule in general and in particular. The emergence of the rule as an authoritative rule still needs the adoption by States of the particular desired rule proposed by the practical views of States or of non-State and sub-State actors. The subsidiary sources of international law are not limited to views of international tribunals or academics but embody any other sources expressing moral and political evaluative views advocating a demand of justice including NGOs voicing for human beings or matters of concern for human beings such as environment and climate, natural resource, economic development, safety, health, and so forth. In many instances, public opinion and non-State actors like NGOs have much greater weight in reshaping the conduct of States than jurists do.

Fifth, the juridical judgment as to the existence of a customary rule of international law can only occur subsequent to the due establishment of the rule through State practice and *opinio juris* in order to meet the legitimacy criteria of recognition and coherence for the common good. A juridical statement expressing the authority of a customary rule of international law figures in the determination of the rule for a particular situation with an appropriate consideration of all demands of justice in a moral and political evaluation by way of State practice and opinion, subscribing to a practical judgment. In order to declare the existence

of a customary rule, the decisions of international tribunals must demonstrate the establishment of State practice and *opinio juris*. The statements of academics and international tribunals about the existence of a rule, which are not grounded in a customary determination by general State practice and opinion, merely represent their own practical views at the non-legal stage for a desirability proposed for adopting or changing a particular rule. Still, the emergence of a customary rule depends on the establishment of State practice and *opinio juris* to validate the juridical statement that there exists an authoritative (binding) customary rule.

The difficulty in establishing an international customary rule leads to rejection of many purported rules attributed to customary international law because:

Today ... the world's nations do not share a common heritage, and international law seeks to govern matters on which even nations with a European heritage have no common outlook. In addition, it is notoriously easier to disprove a consensus than to prove one. As empirical difficulties mount, that point becomes more pronounced. Looking at a few accessible jurisdictions may be sufficient to show a lack of consensus, but looking at a large number of jurisdictions that share common practices may not even be enough to show consensus.⁵⁸¹

If customary international law is, oftentimes in hard indeterminacies, stretched unduly to cover areas where general and widespread State practice and *opinio juris* are missing, it is not the defect of customary international law but the defect in its interpretation. What is unjustified is the attempt to rationalize rules that do not conform to the criteria of legitimacy for the determination of the content of obligations of States whether under treaties or custom. A criticism of customary international law that many alleged customary rules fail to show the required elements of State practice and *opinio juris* in essence cannot be attributed to customary international law because the purported rules are not customary rules of international law at all. They are practical views. The difficulty in establishing an international customary rule does not affect the foundation of customary international law. It rather exhibits the fact that not all practical views expressing

⁵⁸¹ Ramsey, *supra* note 553, at 1250.

desirability for a proposed particular legal situation in hard penumbra may find their way in customary determinations.

Customary international law endures as a vital source of international law in the construction and interpretation of the obligations of States in a consensual framework with evaluative moral layers, providing practices and principles for the lawmaking structure in international law and supplying authoritative determinations for the substance of obligations of States in hard penumbra. A consensual framework of the construction of obligations of States is still bound to the common good of human beings. There are significant caveats of common good restricting the consent of States. The practices building the international rule of recognition are open to common good justifications. The freedom of States' action is also subject to limitations in frameworks other than consent, notably limitations by virtue of absolute principles and particular recognition of a constitutional approach to rights in a particular field such as human rights.

The difficulty in establishing customary international law should not be a pretext for an adjudicative determination of the content of international rules and obligations in hard penumbra. Such determination requires particular recognition or authorization. When hard indeterminacy arises, by virtue of the international rule of recognition requiring formation of primary rules of obligations in a consensual framework, a customary determination is required to make the content of the rule coherent for the common good.

Determinacy of the substance of obligations of States in the field of foreign investment including the concept of expropriation is structured by the criteria of legitimacy of recognition and coherence for the common good. Arbitration of States obligations in hard penumbra under international law in foreign investment is bound to adherence to these criteria. This and previous chapters have presented the contingent character of principles for the formation of primary obligations of States and the consensual character for their determination in view of the criteria of coherence and recognition. These bases discipline rule formation in international law on foreign investment for the protection of foreign investors' property and ultimately the concept of expropriation to analyze the

legal determination for the conduct and consequence in instantiation of that concept in terms of legitimacy. The next chapter will assess the contingent and consensual character of rights of corporations and corresponding obligations of States in protection of foreign investors' property in international law and whether in this field a particular rule of recognition or authorization exists for departing from the general international rule of recognition requiring customary determinations in hard penumbra.

CHAPTER IV

PROTECTION OF PROPERTY OF FOREIGN INVESTORS IN INTERNATIONAL LAW

The obligations of States for interference with foreign investors' property in international law whether arising from customary rules or treaty obligations in hard indeterminacies are required to be interpreted by adherence to the legitimacy criteria of recognition and coherence for the common good. The previous chapters displayed that indeterminate international rules and obligations arising in legal interpretation are devoid of authoritative force as to the particular penumbral instance. In areas of indeterminacy, because of the contingency of rights and principles involved, the determination of the content of States' obligations in an evaluative and selective exercise with appropriate consideration of all demands of justice is required to meet coherence for the common good. It was also shown that the power to engage in such determination must be validated by the rule of recognition of the system and that according to the general rule of recognition of international law, the determination function with moral and political evaluation is reserved to States in the consensual customary framework. Accordingly, the general rule of recognition of international law invalidates the adjudicatory determination of the content of States' obligations in hard penumbra. An adjudicatory determination power must be established by a particular authorization, e.g. decision *ex aequo et bono*, delegated by States to an international adjudicator. Otherwise, it requires the establishment of a particular rule of recognition in a field of international law to demonstrate consistent practices with the justification of the advancement of common good for a constitutional scheme of construction of rights in interpretation of indeterminate obligations in international law.

Constitutional construction of rights entails the treatment of abstract rights and principles appearing in international instruments on human rights and the concomitant obligations of States as a matter of principle laying limitations on States in favor of human beings by an adjudicative body or any other decision maker. A rule of recognition validating a constitutional construction of rights of

individual human beings, including their property rights as well as civil rights, appearing in international instruments on human rights may now be observable in the field of human rights in view of both practices and the common good. This chapter will examine the nature of rights of corporations and their construction according to the rule of international law. This examination will be in view of practices and the test of the common good for the desirability of a particular rule of recognition in the field of foreign investment for a constitutional construction of the rights of corporations and concomitant obligations of States in international law. A thorough assessment of practices showing a particular rule of recognition in the field of human rights is beyond the purpose of this study. However, references will be made to the field of human rights in juxtaposing the nature of rights and their construction for individual human beings in contrast with those of property rights of corporations on the international plane in the field of foreign investment.

A. Coherence and Contingent Nature of Rights of Corporations

Substantive rights and principles expressing them may be absolute in character thereby even constituting a supreme source of international law that other sources may not override. As discussed such substantive absolute rights and principles are not numerous. Most of rights and principles are contingent in character. It is now to examine more closely the nature of the property rights of corporations in foreign investment. This raises the questions of the international minimum standard of treatment, acquired or vested rights, and property rights as human rights.

i. The International Minimum Standard of Treatment

The nineteenth century marks the era where the call for an international standard for the treatment of aliens in customary international law heightened. The desire for this standard emerged in response to developments in transportation and communication together with the phenomenon of

industrialization and the increase in cross-border movement of persons and capital.⁵⁸² From the inception, foreign property was an important dimension of the standard. The standard involved a conflict between the interests of States exporting and importing capital.⁵⁸³ The question of expropriation of foreign property attracted much controversy over the minimum treatment of property acquired by aliens in foreign countries.⁵⁸⁴ The international minimum standard of treatment of foreign property assumes the recognition of certain property rights upon the admission of foreign property.⁵⁸⁵ The principal question is what those rights and corresponding obligations of States are in international law.

A general international minimum standard of treatment emerged in competition to a demand of justice emphasizing on the national standard—also referred to as equality doctrine.⁵⁸⁶ According to the equality doctrine in substantive terms, a State's international obligation towards the treatment of aliens and their property is fulfilled once aliens receive treatment equal to that accorded to the nationals of the host State.⁵⁸⁷ A version of the national standard most closely adhering to the equality doctrine and popularly followed in Latin American countries emerged under the Calvo Doctrine.⁵⁸⁸ This doctrine was

⁵⁸² Andreas Hans Roth *The Minimum Standard of International Law Applied to Aliens* (Leiden: A. W. Sijthoff's Uitgeversmaatschappij N.V., 1949) at 30.

⁵⁸³ Brownlie, *Principles*, supra note 424, at 500.

⁵⁸⁴ Richard B. Lillich, "The Current Status of the Law of the State Responsibility for Injuries to Aliens" in Richard B. Lillich, ed., *International Law of State Responsibility for Injuries to Aliens* (Charlottesville: University Press of Virginia, 1983) at 3; See also Alwyn V. Freeman, *The International Responsibility of States for Denial of Justice* (London: Longmans, Green and Co, 1938) at 515; Borchard noted that "[i]n recent years the question whether the protection of private property against confiscation is included within minimum standard has given rise to much debate." Edwin M. Borchard "The Minimum Standard of Treatment of Aliens" (1940) 38:4 Mich. L. Rev. 445, at 458-459. [Borchard, Minimum Standard]

⁵⁸⁵ Roth, supra note 582, at 47, 165-166; Freeman, supra note 584, at 516.

⁵⁸⁶ The national standard discussed here is a notion in customary international law meaning that aliens and their property are entitled to no more favorable treatment than the treatment that the nationals of the host-States receive. This notion of the national standard is different from the treaty-based national treatment standard that refers to the treatment of investors no less than the treatment accorded to the nationals of the host-State.

⁵⁸⁷ Roth, supra note 582, at 62. This also meant that the home State of the foreigner had no right to intervene by way of diplomatic protection in the claim of its subject against the host State unless there was a denial of justice. Ibid. at 64; Lillich, supra note 584, at 4. To Latin American countries denial of justice meant failure to provide access to courts. Freeman, supra note 584, at 97; Borchard, Minimum Standard, supra note 584, at 456-457.

⁵⁸⁸ The Calvo doctrine rejected the duty of a State to accord treatment to aliens beyond that offered to nationals, subjecting them to national laws and tribunals as well as rejecting the diplomatic

deemed defective on the ground that it prompted non-responsibility in international law.⁵⁸⁹

Prior to the advent of the international minimum standard of treatment, the national standard dominated the treatment of aliens.⁵⁹⁰ The national standard constituted the dominant standard in the mutual relations among European States while these States in their overseas relations demanded an international minimum standard of treatment.⁵⁹¹ The international minimum standard of treatment has confronted adverse reactions in State practice. These reactions are reflected in conferences and debates for the codification of State responsibility for injuries to aliens and their property in the League of Nations in 1930 and later by the International Law Commission as well as practices surrounding the UN General Assembly Resolutions dealing with economic sovereignty of States.⁵⁹² Developed States have also reacted to a general minimum standard of treatment of foreign investment more conspicuously in post-NAFTA practice.⁵⁹³

protection. See Roth, *supra* note 582 at 76; Lillich, *supra* note 584, at 4; Samuel K.B Asante “International Law and Foreign Investment: A Reappraisal” (1988) 37 *Int’l & Comp. L.Q.* 588, at 591-592.

⁵⁸⁹ Lillich, *supra* note 584, at 5; Freeman, *supra* note 584, at 505-506.

⁵⁹⁰ See Freeman, *ibid.* at 501. See also Roth, *supra* note 582, at 63-68.

⁵⁹¹ Roth, *supra* note 582 at 64. For support for the national standard by those countries opposing to capitulations in their relations with western countries, see *ibid.* at 63-64. For cases that supported the national standard, see *ibid.* at 66-68.

⁵⁹² Preliminary Documents of the Conference for the Codification of International Law, The Hague, March-April 1930, (1930-Suppl.) 24 *A.J. Int’l L.* 1; Fourth Report of the International Law Commission on State Responsibility for Injuries Caused in its Territory to the Person or Property of Aliens, by F. V. Garcia Amador, Special Rapporteur, 16 February, 1959, Document A/CN.4/119, Yearbook of the International Law Commission, 1959, vol. II, Part Two [1959 ILC Report on State Responsibility]; Permanent Sovereignty over Natural Resources GA Res. 1803 (XXVII), U.N. GAOR, U.N. Doc. A/5217 (1962), 2 *I.L.M.* 223 (1963); Permanent Sovereignty over Natural Resources, GA Res. 3171 (XXVIII), UN GAOR, UN Doc. A/9030, Supp. No. 30 (1973), 13 *I.L.M.* 238; Declaration on the Establishment of a New International Economic Order, GA Res. 3201 (S-VI), UN GAOR, UN Doc. A/9559, Supp. No. 1 (1974), 13 *I.L.M.* 715; and the Charter of Economic Rights and Duties of States, GA Res. 3281 (XXIX), UN GAOR, UN Doc. A/9631, Supp. No. 31 (1974), 14 *I.L.M.* 251.

⁵⁹³ In the post-NAFTA practice the national standard is reflected in the US Bipartisan Trade Promotion Authority Act of 2002: “the principal negotiating objectives of the United States regarding foreign investment are to reduce or eliminate artificial or trade-distorting barriers to foreign investment, while ensuring that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States, and to secure for investors important rights comparable to those that would be available under United States legal principles and practice, ...” The Bipartisan Trade Promotion Authority Act in 2002 (the “2002 TPA”) enacted by the U.S. Congress (19 U.S.C.S. § 3801), section 2102(b) (3). See also changes in the investment treaty practice in the post-NAFTA era, *infra* notes 676-682 and accompanying text.

If the national standard is assumed as pure equality of nationals and aliens in disregard of what international law has determined as an obligation for States, this will repudiate the competence of international law to lay down minimum requirements for States in treatment of aliens and their property. The most troublesome aspect of the international minimum standard of treatment, however, has been its infusion with a general standard of justice. The standard was advanced on the assumption of a common standard for the treatment of aliens recognized by civilized nations.⁵⁹⁴ This attachment to civilized nations also projected the standard as a “standard of civilized justice or civilization.”⁵⁹⁵ Conceptualization of the minimum standard of the treatment of aliens in terms of the standard of justice appears in the passage that

There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own citizens is that its system of law and administration shall conform to this general standard.⁵⁹⁶

This association of justice with a general minimum standard of treatment carries infinite substantive consequences capable of finding any conduct by a State as an international wrong. A corollary of this transpires in attempts to underlie a test for the application of the standard rather than underscoring the specific rules articulating those tests and the standard itself in contingent situations although the cases pronouncing these tests may have actually relied on specific rules and obligations for responsibility of States or actually concerned human beings. An early pronouncement of a test for the minimum standard appeared in the decision by the US-Mexican Claims Commission in the *Neer* case:

⁵⁹⁴ Roth, *supra* note 582, at 87; Borchard, Minimum Standard, *supra* note 582, at 448-449.

⁵⁹⁵ Roth, *supra* note 582, at 81.

⁵⁹⁶ Elihu Root “The Basis of Protection to Citizens Residing Abroad” (1910) 4:3 Am. J. Int’l L. 517, at 521-522. Another example of infusing the minimum standard of treatment with the standard of justice appears in the statement by the US Secretary Hull in 1938 that “when aliens are admitted into a country the country is obligated to accord the degree of protection of life and property consistent with the standards of justice recognized by the law of nations.” Note by the Secretary of State of the United States to the Mexican Ambassador at Washington (August, 22, 1938) reprinted in (1938) 32 Am. J. Int’l L. Supp. 191, at 198.

[T]he treatment of an alien, in order to constitute an international delinquency should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.⁵⁹⁷

This standard has been raised in the context of investment treaties in the interpretation of the treaty obligation of fair and equitable treatment in tying the content of this obligation to the minimum standard of treatment under customary international law.⁵⁹⁸ Ironically, developed States resorted to this standard in opposition to an autonomous, expansive reading of their obligation of according fair and equitable treatment under investment treaties.⁵⁹⁹ The expansive approach has equally relied on general principles or notions such as good faith, legitimate expectation, or transparency in interpreting the fair and equitable treatment of

⁵⁹⁷ *Neer v. Mexico*, US-Mexico Claims Commission (Oct. 15, 1926) reprinted in (1927) 21 Am. J. Int'l L. 555, at 556. Cf. the *ELSI* case where in deciding the arbitrary character of the act by Italy under the FCN treaty between Italy and the United States, the Chamber of ICJ held that "[a]rbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety." *ELSI*, supra note, 539, p. 76, para. 128.

⁵⁹⁸ The *Neer* standard was raised by Canada in the *Pope and Talbot* case. See *Pope & Talbot, Inc. v. Canada*, Award on the Merits of Phase 2 (Apr. 10, 2001) 41 ILM 1347. NAFTA Free Trade Commission (FTC) issued an interpretative note under NAFTA Article 1131 on fair and equitable treatment under Article 1105. The FTC Notes declared the intention of the parties for Article 1105 of NAFTA that "[t]he 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." NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions (July 31, 2001), § B, available online at <http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp>. NAFTA Parties have acknowledged the evolutionary character of the standard of treatment but maintained that the threshold for the infringement of the standard remains high. The evolutionary character of the customary standard of the minimum standard of treatment was discussed in certain arbitral tribunals. See for instance: *Mondev International Ltd. (Canada) v. United States of America*, ICSID Case No. ARB (AF)/99/2 (Oct. 11, 2002) 42 ILM 85 (2003) 125; *ADF Group v. United States of America*, ICSID Case No. ARB (AF)/00/1 (Jan. 9, 2003), 18 ICSID Rev. 195, (2003), at para. 179, available online at <http://www.worldbank.org/icsid/cases/ADF-Group-award.pdf>; *Waste Management Inc. v. United Mexican States*, ICSID Case No. Arb. (AF)/00/03 (April 30, 2004) 43 ILM 967 (2004) at para. 98.

⁵⁹⁹ For the autonomous reading of the treaty obligation of fair and equitable treatment in isolation from or parallel with general principles such as good faith or notions like transparency and legitimate expectation, see, for instance: *CME v. Czech Republic*, Case T 8735-01, (Sept. 13, 2001) at paras. 156, 611 available at <http://ita.law.uvic.ca/documents/CME-2001PartialAward.pdf>; *Técnicas Medioambientales Techmed S.A. v. the United Mexican States*, ICSID case No. ARB(AF)/00/2 (May 29, 2003), 43 ILM 133 (2004), at paras. 153-155, 166; *Pope & Talbot*, Merits of Phase 2, supra note 598, at paras. 111-118.

foreign investment in international law evocative of a general standard of justice under minimum standard of treatment.⁶⁰⁰

The standard of justice still was not utilized to avail the injured aliens of redress for the justice denied to them by the host-States but to remedy the injured *nation*. A core aspect of the standard of treatment for injuries to aliens was the national character of the claim. The national character was rooted in the view espoused by Vattel, the founder of the international minimum standard of treatment of aliens, that “[w]hoever ill-treats a citizen indirectly injures the State”⁶⁰¹ The injured national did not control the claim as the home State could settle, compromise, release, or abandon the claim.⁶⁰² Furthermore, the indemnity received by the home State belonged to the national fund.⁶⁰³ There was no legal

⁶⁰⁰ See for example: CME, *supra* note 599, at paras. 156, 611; Temed, *supra* note 599, at paras. 153-155; Eureko B.V. v. Republic of Poland (Partial award, Aug. 19, 2005) at paras. 231-235, available online at <http://ita.law.uvic.ca/documents/Eureko-PartialAwardandDissentingOpinion.pdf>; Metalclad Corporation v. United Mexican States (Aug. 30, 2000), 40 ILM 36 (2001), at paras. 70-71, 76, 99. The Metalclad award was subsequently set aside by the British Columbia Supreme Court. The BC Supreme Court reasoned that the jurisdiction conferred upon the tribunal in dealing with investors claims against State parties was limited to investment provisions under chapter 11 and two articles in chapter 15 and by relying on transparency requirement in other provisions of NAFTA the tribunal had exceeded its jurisdiction. *United Mexican States v. Metalclad Corp.* (May 2, 2001) (Can.), [2001] B.C.S.C. 664, at paras. 58, 72-76, available online at http://www.worldbank.org/icsid/cases/metalclad_reasons_for_judgment.pdf. See also the argument by the investor in ADF claiming that a treaty obligation of fair and equitable forms “a positive legal requirement” that functions independent of customary international law or any other requirement of international law, governing the treatment of an investor protected by a treaty clause like the article 1105 of NAFTA. ADF, *supra* note 598, at paras. 70-71. The ADF Tribunal rejected the claim because it was not satisfied that the claimant had proved it. *Ibid.* at paras. 183-184.

⁶⁰¹ Emer de Vattel, *The Law of Nations or the Principles of Natural Law*, BK. II, Ch. VI, in James Brown Scott ed. *The Classics of International Law*, vol. III, Translated by Charles G. Fenwick (Washington: Carnegie Institution of Washington, 1916) at 136. The Permanent Court of International Justice in *Mavrommatis Palestine Concessions*, held that “[b]y taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right— its right to ensure in the person of its subjects, respect for the rules of international law.” *The Mavrommatis Palestine Concessions*, Greece v. UK (Jurisdiction) (Aug. 30, 1924), No. 2 ser. A PCIJ (1924) at 12. Borchard described the national character of the claim that “by espousing a claim of its national for injuries inflicted by a foreign State, the claimant government, acting in its sovereign capacity makes the claim its own and therefore acts neither as agent nor trustee for the claimant.” Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad* (New York: The Banks Law Publishing Co., 1916) at 357, [Borchard, Diplomatic Protection].

⁶⁰² Borchard, Diplomatic Protection, *supra* note 601, at 366.

⁶⁰³ *Ibid.* at 359-360, 384-385.

right for the injured national to receive the indemnity.⁶⁰⁴ This aspect of the standard divested aliens of the remedial aspects of the standard on a legal basis for the injury they had suffered.

From one angle, adverse reactions to the minimum standard were a sustained opposition to the power system of the colonization era combined with bitter experiences of claims and interventions, demanding participation of States of non-Western traditions in the rule formation processes in international law.⁶⁰⁵ From another angle, adverse reactions to the international minimum standard for the protection of property in foreign investment have been a corollary of the indeterminacy of purported rules and obligations that, while at times leading to the extreme of the equality doctrine, often carried a demand by the States for the establishment of specific determinate rules imposing obligations on them. Both of these demands are justified in terms of legitimacy. The latter demand poses disagreement over what the obligations of the States are to challenge the conduct of States and consequences for it in the field of foreign investment. The question of existence of obligations in international law is essentially distinct from the ability of States to disobey existing international obligations and evade international responsibility by invoking their national laws and their treatment of nationals.

The syndrome of vagary of the international minimum standard in foreign investment is anchored in an assumption that the minimum standard than international rules can afford the bases of obligations of States. One approach

⁶⁰⁴ Ibid. at 384-385. The national character of the claim, therefore, departed from a postulate of private justice attributed to the international minimum standard of treatment. This, on the other hand, suggests the public dimension of the international minimum standard of treatment for a broader objective of peaceful and orderly relations among States. With the rise of investment treaties and arbitrations, diplomatic protection of foreign investment by way of espousal of claims has fallen into desuetude. This, however, does not warrant the disintegration the ties of investment treaties to the benefits of nations in the interpretation of the minimum standard.

⁶⁰⁵ This power system recognized that “colonialism, conquest and intervention were legitimate.” F. V. Garcia-Amador, “Current Attempts to Revise International Law— A Comparative Analysis” (1983) 77 Am. J. Int’l L. 286, at 287. The opposition to the power system other than Latin American States, in a broader spectrum included States from Eastern Europe as well as Asian and African States in their relations with Western countries. See Asante, *supra* note 588, at 592-594. As the Third World, now developing countries, emerged after World War II, these States demanded participation in the international rule formation process. See generally Park, No-Hyoung “The Third World As an International Legal System” (1987) 7 B.C. Third World L.J. 37.

could be to suppose the standard “is concerned with ... the establishment of a somewhat indefinite standard of treatment” whose violation by a State engages its responsibility in international law.⁶⁰⁶ However, the content of the standard is acknowledged to be “vague, deceiving and confused properly calculated to produce error, for it pretends to express a conception which is reality seldom if ever exits.”⁶⁰⁷ Other scholars have also viewed that the international standard of justice “has always suffered from a fundamental defect: its obvious vagueness and imprecision.”⁶⁰⁸

This vagary of content is associated with a general standard of justice with infinite substantive consequences to challenge any conduct by a State as an international wrong. The appreciation of the international minimum standard of treatment standard in foreign investment still is not, nor is justified to deem it, independent of specific rules providing the minimum requirements established in international law for the treatment of the foreign investors’ property. As an advocate of the international minimum standard of treatment once put “... the international standard is nothing else than a set of rules, correlated to each other and deriving from one particular norm of general international law, namely that the treatment of alien is regulated by the law of nations.”⁶⁰⁹ The minimum standard of treatment obtains its content from specific rules of international law. This aspect of the standard has now been explicitly supported by the United States, a long time proponent of protection of property of foreign investors, in reaction to general principles and standards in interpretation of treaty obligations, thereby rejecting the idea of international responsibility based on general principles and standards.⁶¹⁰ The core tenet of international minimum standard is

⁶⁰⁶See Borchard, *Diplomatic Protection*, supra note 601, at 39.

⁶⁰⁷ Borchard quoted in Roth, supra note 582, at 120. Borchard elsewhere stated that the content of international minimum standard of treatment is neither “defined nor definable.” Borchard, *Minimum Standard*, supra note 584, at 453.

⁶⁰⁸ F.V. Garcia Amador, Louis B. Sohn, and R.R. Baxter *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (New York: Oceana Publications Inc., 1974) at 4.

⁶⁰⁹ Roth, supra note 582, at 127.

⁶¹⁰See ADF, supra note 598, at paras. 103, 110, 182. The ADF Tribunal summarized the United States’ position in the following terms: “international minimum standard” embraced by Article 1105(1) is, according to the Respondent, “an umbrella concept incorporating a set of rules” which “have crystallized into customary international law in specific concepts.” The term “fair and equitable treatment” refers to “the customary international law minimum standard of treatment”

that States may not avoid international responsibility for injuries to aliens in all circumstances by treating aliens and nationals equally, which is distinct from its content and mode of application.⁶¹¹

The value and status of the international minimum standard of treatment in international law has been obscured by the generality ascribed to it. The national standard is not and cannot be assumed to import a notion of equality doctrine repudiating the competency of international law in providing minimums for the State conduct, which is the core of the international minimum standard of treatment. Such an assumption is not even attributable to all supporters of the national standard.⁶¹² The international minimum standard of treatment itself is a standard of competency of international law demanding compliance by States with minimums determined in international law for the treatment of alien property. The international minimum standard of treatment expresses the competency of international law to provide minimums without determining their substance *per se*. The standard leaves each minimum for each specific situation of particularly hard indeterminacy in foreign investment to determination within specific rules. Rules concerning denial of justice, expropriation, full protection

which encompasses rules such as “those for denial of justice, expropriation and other acts subject to an absolute, minimum standard of treatment under customary international law. ... The pertinent rules of the customary international law minimum standard of treatment of aliens, according to the Respondent, are “specific ones that address particular contexts. There is no single standard applicable to all contexts.” Ibid. at para. 110. [Footnotes Omitted]. Elsewhere, in reaction to claims of a general obligation for legitimate expectations of investors or a predictable and transparent legal framework for investment or refraining from arbitrary conduct, the United States declared that none of these constitutes a general, stand-alone customary rule of international law. See the response by the United States in the *Glamis Gold Ltd. v. the United States of America*, May 16, 2009, paras. 575-582, 589-597, available online at http://www.naftaclaims.com/disputes_us_glamis.htm. The United States declared that the existence of no customary rule has been demonstrated to require “States to regulate in such a manner—or refrain from regulating—so as to avoid upsetting foreign investors’ settled expectations with respect to their investments.” Ibid. at para. 575. The United States also stated that “[i]mperfect legislation or regulation, however, does not give rise to State responsibility under customary international law” and that “[u]nder international law, every State is free to ‘change its regulatory policy,’ and every State ‘has a wide discretion with respect to how it carries out such policies by regulation and administrative conduct.’” Ibid. at 591. The United States and Canada have also changed their model investment treaties in response to claims of violations of their treaty obligations that are sources of hard indeterminacies. See *infra* notes 676-677 and accompanying text.

⁶¹¹ Brownlie, *Principles*, *supra* note 424, at 503.

⁶¹² (“[T]hose supporting the national treatment principle are not necessarily committed, as is sometimes suggested, to the view that the municipal law has supremacy over international law....”) Brownlie, *Principles*, *supra* note 424, at 503.

and security and the like in international law on foreign investment represent one level of the specification process of minimums for specific situations. Further levels of the rule specification include the determination of the content of each rule for such-and-such conduct and such-and-such consequences in hard indeterminacies. The requirement of determination is not merely consistent with the status of the international minimum standard of treatment as a standard of competency of international law. Determination of the content of the rule is more importantly the requirement of the legitimacy criterion of coherence for the common good, which as a moral and political evaluation task is subject the rule of recognition of international law.

The international minimum standard of treatment originally concerned the personal security of aliens to safeguard aliens' enjoyment of life, and liberty against States' arbitrary acts.⁶¹³ In fact, the Neer case that gave rise to the landmark pronouncement on the application of the minimum standard of treatment concerned the personal security of aliens as opposed to the protection of foreign property.⁶¹⁴ This original association of person and property is a source for a great deal of confusion for an unfounded combination of the dignity of human beings with the property of corporations in the discourse of the standard of justice whose weight for human beings and corporations cannot run on equal footing in common good.⁶¹⁵ A general substantive standard or principle for the treatment of corporations in international law begs fundamental questions of legitimacy right from the standpoint of justice itself for rule coherence and recognition required by the common good. A general minimum standard, as other contingent principles, under lofty appellations of justice, fairness and equity will not meet the legitimacy requirements of recognition and coherence for the common good in international law for the protection of the property of corporations. Resort to a general principle with an undetermined content to

⁶¹³Borchard, *Diplomatic Protection*, supra note 601, at 39; Borchard, *Minimum Standard*, supra note 584 at 451-452. See also Roth, supra note 582, at 127-185; Freeman, supra note 584, at 497 et seq. These rights were classified as public or private rights. Freeman, *ibid.* at 507-522.

⁶¹⁴ See the Neer, supra note 597. In that case, the United States had brought a claim of responsibility of Mexico before the US-Mexico Claims Commission for the loss of life of its national, Paul Neer. *Ibid.*

⁶¹⁵ See Chapter II, Section C (ii) (b) and below Section A (iii) and Section (B).

measure international responsibility for States' conduct and its consequences in the protection of foreign corporations has always bred acute confrontation of justice. Clashes of justice demands in the field of foreign investment have concerned the political and territorial integrity of nations on a gunboat policy, or their economic development prosperity on an inequitable compensation scheme, or their constitutional viability for legitimate regulation on an approach oscillating between relinquishing regulation and shrinking public wealth through payment of compensation for regulation. This leads the study to examine another attempt for a general principle in the notion of acquired or vested rights for the protection of property rights of corporations in international law and its weight in light of the legitimacy requirements of coherence and recognition.

ii. Vested or Acquired Property Rights

For the protection of property in international law, 'vested rights' or acquired rights' are familiar terms. What has been sought of principles expressing these notions is that a State may not extinguish the property rights legally acquired by foreigners under its existing laws.⁶¹⁶ In 1959, the ILC Report on State Responsibility, which at the time attempted to address primary rules of obligations of States towards aliens in its codification agenda, viewed that States have an obligation under international law to respect acquired rights of aliens.⁶¹⁷

The notion/principle of vested or acquired rights itself depending on the standard of justice, fairness and equity is the ancestor of a series of other principles advanced for the property protection of corporations in foreign investment. From this principle, estoppel, good faith, *pacta sunt servanda*, legitimate expectation, proportionality, and full compensation among other notions have proceeded in the interpretation of expropriation in investment arbitration under State contracts or treaties to measure the responsibility of States for arbitrary, unjust, or unfair conduct in interfering with the property of foreign

⁶¹⁶ See S. Friedman, *Expropriation in International Law* (London: Stevens & Sons Limited, 1953) at 122. For writers supporting acquired rights in a notion that "[w]hilst a State is free to modify the position of foreigners with respect to future, a State is forbidden to destroy rights already acquired under pre-existing legislation," see *Ibid.* at 122, n. 44.

⁶¹⁷ 1959 ILC Report on State Responsibility, *supra* note 592, at p. 5, para. 15.

corporations and the consequences for such conduct.⁶¹⁸ Likewise, general principles or notions such as good faith, legitimate expectation, or transparency in interpreting the fair and equitable treatment of foreign investment in international law have surfaced in investment treaty arbitration.⁶¹⁹ Similarly, an autonomous version of fair and equitable treatment has been advanced to measure the conduct of States in treatment of foreign investment. The autonomous approach employs semantically less stringent tests such as what is unfair or inequitable than what is ‘surprising’ or ‘shocking’ or ‘outrageous’ or ‘egregious’ or ‘patently or grossly or manifestly unfair or unjust’ or ‘in gross denial of justice’ or ‘manifestly arbitrary’ or other equally question-begging tests in the field of substantive rights of corporations in foreign investment.⁶²⁰ This has also involved the attribution of a customary origin to such principles, standards and tests.⁶²¹

⁶¹⁸ The arbitral cases involving hard indeterminacies of expropriation will be addressed in Chapter V.

⁶¹⁹ See for supra note 600. The notion of contingency of standards and principles articulated in this study should not be confused with the non-contingent character of the fair and equitable treatment in another notion. The non-contingency attribute of fair and equitable standard has been raised in contrast to national treatment or most-favored nation standards whose contents are ascertained by reference to the national law of the host State or its treaties with other countries. See Stephen Vasciannie “The Fair and Equitable Treatment Standard in International Investment Law and Practice” (1999) 70 *Brit. Y.B. Int’l L.* 103, at 106.

⁶²⁰ For the autonomous reading of the obligation of fair and equitable treatment see, supra note 599. The ‘shocking’, ‘outrageous’, ‘bad faith,’ ‘outrageous’ or ‘egregious’ or ‘patently or grossly or manifestly unfair or unjust’ or ‘in gross denial of justice’ or ‘manifestly arbitrary’ and similar terms of the so-called ‘high threshold’ are anchored in the Neer case thought to be somewhat relaxed by the ELSI case. Arbitrariness, shocking, grossly unfair and the like in international law have their affinity with procedures in the administrative and judicial proceedings under the denial of justice rule, which includes the element of exhaustion of local remedies, for the due process and operation of the rule of law. Such tests in both Neer and ELSI cases were raised in relation to the rule of denial of justice in the judicial and administrative proceedings. For Neer and ELSI cases, see supra note 597 and accompanying text. For the content of the fair and equitable treatment under the minimum standard of treatment, since 2004 the United States has clarified in its investment treaties that “[f]or greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide: (a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world....” The United States Model Treaty of 2004 Concerning the Encouragement and Reciprocal Protection of Investment, Article 5, [U.S. 2004 Model BIT], available online at <http://www.state.gov/documents/organization/38710.pdf>.

⁶²¹ In accommodating the autonomous approach of fair and equitable treatment to post-award NAFTA FTC interpretation requiring reference to customary international law, the Pope & Talbot Tribunal posited that bilateral investment treaties existing in thousands evidence fairness elements

Despite all their variations, general principles and standards advanced for the protection of corporations in foreign investment aim to perpetuate the legal framework standing at the time of the acquisition of property or the establishment of investment in the territory of the host State to challenge States' power to introduce or change laws and policies altering that framework. The grand principle of acquired or vested rights has never received a credit to this effect. Neither do its offspring. The principle of acquired rights has been used "in an improvident way in the past as a rather vague doctrinal obstacle to any act affecting the interests of aliens, in spite of the fact that the domestic legal systems of the capital-exporting States did not apply such a general principle."⁶²² The Preparatory Committee of the League of Nations for the Codification of International Law on State Responsibility for Damages Caused in Their Territory to the Person or Property of Foreigners observed controversies among States in their response to the question whether a State is responsible for legislation that infringes vested rights.⁶²³ There is little doubt that the background of such controversies also impeded the realization of the project of International Law Commission in codifying State responsibility for injuries to aliens and their property, pushing the ILC to shift its work from defining the obligations of States to "secondary rules" of responsibility.⁶²⁴ The final product by the ILC culminating

in addition to customary international law evolving the Neer test and that this notion is now itself a customary international law, rejecting Canada's assertion that the standard is the test set by the Neer case. *Pope & Talbot, Inc. v. Canada, Award on Damages* (May 31, 2002) at paras. 61-62, available online at http://www.naftaclaims.com/disputes_canada_pope.htm.

⁶²² Ian Brownlie, *Legal Status*, supra note 445, at 270. See also Freidman, supra note 616, at 123 referring to the practice of the United States with regard to the "effects of the prohibition laws in the United States, which destroyed investments valued at millions of dollars" as well as other practices including "the upheavals brought about in England and elsewhere by death duties, town planning, and the redistribution of land." *Ibid*.

⁶²³ Preliminary Documents of the Conference for the Codification of International Law, supra note 592, at 50. Among the responses were doubts as to the meaning of vested rights as well as responses by some States that it was impossible to provide a general answer to that question. *Ibid*.

⁶²⁴ For such a shift in the program of ILC on State responsibility see Daniel Bodansky and John R. Crook, Symposium, "The ILC's State Responsibility Articles: Introduction and Overview" (2002) 96 *Am. J. Int'l L.* 773, at 777-779. The distinction between "primary rules" and "secondary rules" was first made by Roberto Ago, the second Rapporteur of ILC, obviously to dissociate the ILC work from injury to aliens that under that distinction were considered to be the "primary rules" not able to be determined by the ILC work. See *Ibid*.

in a draft Articles on State Responsibility in 2001 leaves it open what constitutes primary rules and obligations of States.⁶²⁵

The 1959 ILC report itself gave an important caveat with regard to acquired rights that

[T]he principle of respect for acquired rights does not imply an absolute or unconditional obligation. The idea of ‘respect’ in no way corresponds to that of ‘inviolability’. ... And the protection extended to patrimonial rights is—if such a term may properly be used—particularly ‘relative’. In fact, from the point of view of international law, respect for acquired rights is conditional upon the subordinate to the paramount needs and general interests of the State. This is not solely due to the fact that ‘in principle, the property rights and the contractual rights of individuals depend in every State on municipal law . . .’ It is also, and indeed primarily, due to the fact that, according to a fundamental legal precept, private interests and rights, regardless of their nature and origin or of the nationality of the persons concerned, must yield before the interests and rights of the community. International law cannot ignore this universal precept.⁶²⁶

Criticisms have continued to be leveled against the principle of acquired rights or similar principles. For instance, Ian Brownlie observes that “[t]he principle of acquired rights is thought by many to be unfortunately vague, and the difficulty is to relate this principle to other principles of law: in short this and other general principles [unjust enrichment, abuse of rights] beg too many questions.”⁶²⁷ Acquired rights are protected in international law but that alone cannot determine the scope of protection. A general principle of acquired rights for the protection of the property of corporations in foreign investment suffers from the same syndrome as its peers do in the deficit of adherence to the

⁶²⁵ Draft Articles on Responsibility of States for Internationally Wrongful Acts, Adopted by the International Law Commission at its Fifty-Third Session (2001) official Records of the General Assembly, Fifty-Sixth Session, Supplement No. 10 (A/56/10), Chap. IV.E.1).

⁶²⁶ 1959 ILC Report, *supra* note 592, at p. 5, para. 15.

⁶²⁷ Brownlie, *Principles*, *supra* note 424, at 510, [clarification added]. Brownlie identifies the concept of permanent sovereignty over natural resources as “a counterpart to the concept of acquired rights.” Brownlie, *Legal Status*, *supra* note 445, at 270. See also Friedman, *supra* note 616, at 120-126. (“The Concept of acquired rights is obscure, ambiguous and indefinable. It finds no support in international judicial decisions and was practically repudiated by States during the preparatory work for the Codification Conference and cannot, therefore, be raised to the dignity of a principle of international law.”) *Ibid.* at 126.

requirements of legitimacy for recognition and coherence for the common good. This deficit of legitimacy also invalidates a purposive approach to the protection of property rights of corporations in international law narrowing the purpose of investment treaties on semantic terms to encouragement and protection of investment without considering other purposes and demands of justice in hard indeterminacies to predicate the general principles in favor of their property protection. The problem of purpose and object is far deeper than these issues. The lack of justification to base the interpretation and identification of the content of States' obligations in foreign investment on the purpose of investment protection and promotion lies in a more fundamental problem. To resort to such a purpose in the interpretation of States' obligations in foreign investment is unjustified because it would bypass the legitimacy criteria required to engage in the evaluation of competing purposes, aims, or objects and the underlying demands of justice that precede the formation of the authority of the rule or obligation for the particular hard indeterminate instance.

The theoretical explanation in legitimacy terms is what earlier discussed in detail about the contingency of most rights and principles and the justice demands surrounding legal determination in areas of indeterminacies of the law requiring coherence for the common good by a body validated by the rule of recognition of the system. Our classification of contingency to which most rights and principles, no matter of national or international pedigree, belong without expressing the statement of the law now assists in characterizing the substantive rights of corporations arising from customary law or treaties as contingent.

The legitimacy requirements of the recognition and coherence for the common good dismiss the scheme of assuming principles of having a binding force for all situations, which in effect masks the creative function of adjudicators relying on such principles. Not only would States have little space for legislative power and regulation of the economic activities of foreign investors conferred to States by international law under self-determination if every conduct of States could be challenged as a matter of principle in indeterminate treaty and customary obligations than an internationally determined rule. But also it would frustrate the

legitimacy requirement of coherence for the common good if in interpretation of indeterminate obligations of States contingent principles expressing the interests of corporations were deemed *lex lata* and those expressing the interests of States deemed *lex ferenda*. This way of rationalizing a decision in favor of the former against the latter interests would foreclose a chance for the competing demands of justice to be appropriately considered.

Being contingent in the legal discourse of foreign investment, the property rights of corporations and principles expressing them do not state the law but are subject to evaluation of justice and policies to determine the scope of the rights of corporations and obligations of States where their justice demands collide in hard instances. In foreign investment, the substantive principles that ‘the destruction of property rights is forbidden’, i.e. principle of acquired rights, ‘breach of a promise is forbidden’, i.e. the principle of good faith or *pacta sunt servanda*, ‘acting contrary to what has created reliance for others is forbidden’, i.e. legitimate expectation or estoppel, and the like are all contingent. They are contingent on rule specification and determination as to what constitutes a conduct against good faith or reasonable expectation and the appropriate consequence for it in each hard penumbral situation all depending on evaluation of demands of justice and other elements of the common good by the recognized agent to make legal determination in an evaluative exercise.

Because of the contingency of the rights of corporations in international law and principles expressing them, being subject to the legitimacy criteria of recognition and coherence for the common good, there is no monolithic legal principle to describe expropriation or its consequences in a single rule applicable across factual situations in hard indeterminacies. Legitimacy requires determination to make the content of the rule coherent for such and such conduct and consequences in hard penumbral cases by reference to common good and reference to customary determination in adherence to the rule of recognition of international law validating States as the rule-makers with power to make justice evaluation in this field on a consensual basis.

Ordinary instances of expropriation may follow a similar legal solution. Nonetheless, when penumbral hard cases arise— as in economic development reforms or regulation in the public interest— the question whether the conduct constitutes expropriation or what consequence is appropriate depends on a fresh assessment of appropriate justice demands according to the legitimacy criteria of recognition and coherence. The rule of expropriation in international law on foreign investment serves as a minimum rule in specifying the scope of protection of acquired rights and other principles limiting the freedom of States. The content of the rule may not in circle consist in the principles which it seeks to determine their scope and relations with other principles in balancing conflicting interests and demands of justice. We may now discuss whether a human rights discourse for property rights can affect these requirements of legitimacy for legal determination by States of rights of corporations in international law and the corresponding obligations of States in adhering to coherence and the rule of recognition.

iii. Property Rights and Human Rights

A number of declarations and conventions on human rights include the protection of property. On the international scale, the Universal Declaration of Human Rights enunciates the protection of property for all human beings, nationals or foreigners. In Article 17 (2) the Declaration provides that “[n]o one shall be arbitrarily deprived of his property.”⁶²⁸ On the regional scale, the European Convention for the Protection Human Rights and Fundamental Freedoms provides for the right of all persons whether natural or legal to “peaceful enjoyment of his possessions.”⁶²⁹ Likewise, the American Convention

⁶²⁸ Universal Declaration of Human Rights, 10 December 1948, General Assembly Resolution 217 A (III). of 10 December 1948. Article 17: “(1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property.” Ibid.

⁶²⁹ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. TS No. 5, 213 UNTS 221 . [European Convention on Human Rights] The convention itself does not have a provision for respect for property but it came under protocol 1 later. Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 1, March 20,

on Human Rights [ACHR] provides for the protection of property by providing that “[e]very person has the right to the use and enjoyment of his property.”⁶³⁰

As a declaration, the Universal Declaration of Human Rights does not express qualifications to the right of property. In contrast, both European and American conventions on human rights specify qualifications to the property of private persons and their defeasibility to public interests. The European Convention does not even express compensation as a condition for the deprivation of property in the interest of public. Moreover, the European Convention adds “[t]he preceding provisions shall not, however, in any way impair the right of a State to enforce such laws *as it deems necessary* to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”⁶³¹ Whereas the American Convention provides for ‘just compensation’ and due process as well.⁶³²

What is significant for the present study is the distinction between human beings and corporations. For instance, the right to own property is a fundamental human right according to the Universal Declaration of Human Rights.⁶³³ However, it would be absurd to stretch this human right to the right of foreign

1952, Europ. TS No. 9, 213 UNTS 262. The Protocol does not address compensation. (“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.” Ibid. Article 1; See also the Charter of Fundamental Rights of the European Union. (“Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.”) Charter of Fundamental Rights of the European Union, Art. 17(1), Dec. 7, 2000, 2000 O.J. (C 364) 1, 12, reprinted in 40 ILM 266, 269 (2001).

⁶³⁰ American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, 22 November 1969 entered into force July 18, 1978. Available <http://www.oas.org/juridico/English/treaties/b-32.html>. Article 21. Right to Property, (“1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. 3. Usury and any other form of exploitation of man by man shall be prohibited by law.”) Ibid.

⁶³¹ See Article 1 of Protocol 1 to European Convention on Human Rights, *supra* note 629.

⁶³² See Article 21 (2) of the American Convention of Human Rights, *supra* note 630.

⁶³³ See Article 17 (1) of the Universal Declaration of Human Rights, *supra* note 628.

corporations for the acquisition of property or the entry and establishment of foreign investment. That right has no universal or customary basis in international law and is only available to foreign investors by way of a treaty. Even more, the protection of property that has customary pedigree in international law is not on the same footing with the protection for corporations in foreign investment. Although the Protocol 1 of the European Convention on Human Rights also refers to legal persons, the Universal Declaration of Human Rights and the regional conventions on human rights have been oriented towards the protection of human beings and reference to right of property of people is made along with the political and civil rights and freedoms of human beings. The centrality of human beings in these instruments is self-evident. None of them attempts to impart a human right protection of property to the protection of the property of corporations in foreign investment. Even the European Convention on Human Rights envisaging legal persons, has the most restrictive language for the protection of property.⁶³⁴ The property rights of foreign corporations cannot be elevated to a universal or multilateral regime of protection of human beings. The evolution of the field of human rights has even outshined the protection of personal security component of the international minimum standard for treatment of non-nationals.⁶³⁵

Human rights and foreign investment are two distinct fields of international law with discrete structures for the construction of rights of human beings and corporations and corresponding obligations of States. Two major distinctions can be made between the rights of human beings under human rights and the rights of corporations in foreign investment and the corresponding obligations of States in light of the criteria of legitimacy for the rule of recognition and coherence for the common good.

Turning to the first distinction, unlike certain rights of human beings, the property rights of corporations belong to the majority category of contingent

⁶³⁴ See supra note 629.

⁶³⁵ It is confirmed that “[a]s regards natural persons, most injuries that in the past would have been characterized as ‘denial of justice’ are now subsumed as human rights violations ...”, Lori F Damrosch, et al. *International Law, Cases and Materials* 4th ed. (St. Paul: West Group, 2001) at 768. In respect of human rights, international law has acquired a new content. Brownlie, *Principles*, supra note 424, at 505.

rights and principles expressing them. The 1959 ILC Report on State Responsibility acknowledged for the protection of acquired property rights by international law “the resulting obligation of the State to respect them cannot be of the same nature and scope as when the rights involved are rights inherent in the human person.”⁶³⁶ In international law, respect for the property of foreign investors is not absolute.⁶³⁷ The ICJ in the *Barcelona Traction* held that obligations for the protection and treatment of “foreign investments or foreign nationals, whether natural or juristic persons” that a State is bound to upon their admission “are neither absolute nor unqualified.”⁶³⁸ The emphasis on non-absolute character of substantive rights of corporations in international law in this study refers to what was elaborately discussed earlier in contrast with contingent principles that legitimacy requires their determination in specific rules imposing obligations on States according to the rule of recognition to obtain binding force as an authoritative statement of law.⁶³⁹

Human beings enjoy certain absolute rights and principles expressing them due to the basic value of human life and dignity.⁶⁴⁰ Many procedural rights and principles relating to due process and the rule of law in administrative and judicial processes in the national systems may also have an absolute dimension.⁶⁴¹ Persons including investors in their human capacity enjoy the protection of human rights for the value of the life and dignity of human beings, which in absolute substantive rights for human beings and many procedural rights related to due process of law can readily enable judgments of grossly unfair, arbitrary, unjust and the like.

⁶³⁶ 1959 ILC Report on State Responsibility, *supra* note 592, at p. 3, para. 7.

⁶³⁷ See Oppenheim, *supra* note 119, at 912.

⁶³⁸ *Barcelona Traction*, *supra* note 425, at p. 32, para. 35 (“when a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified.” *Ibid.*)

⁶³⁹ See Chapter II, Section C (ii) (b).

⁶⁴⁰ See *ibid.*

⁶⁴¹ In international law, this field of rights and principles has found its own specific rule through the rule of denial of justice that concerns the administrative and judicial decision-making processes.

There is a difference between the international minimum treatment obligations of States grounded in absolute rights and principles associated with the life and dignity of human beings and those depending on determination. A minimum treatment originating in absolute rights expressed by absolute principles is incommensurable with a minimum treatment exposed to contingent principles where the concomitant content of States' obligation is subject to legal determination by the practice and opinion of States in hard penumbra surfacing in investment disputes governed by international law. The former does not implicate a discrepancy of practice in the formation of a rule but a practice in the violation of legal statements manifested in absolute principles for which international tribunals have the power by the rule of recognition of international law to disregard the consent of States as absolute principles operate out of a consensual scheme of law. The latter, to which the legal discourse of corporations in international law is subject, relates to State practice and opinion, whose existence for each instance in hard penumbra must be established and for which the rule of recognition of international law bans international tribunals to create the content of the rules and obligations. The legitimacy criteria of the rule of recognition and coherence for the common good require further distinction between human beings and corporations.

Fairness, justice, and equity are foundations of rules that provide their authoritatively and legitimately determined content for a particular situation of conflicting demands of justice not their substitutes unless reflecting an absolute right and its concomitant principle. Substantive rights of corporations consisting in the instrumental value of property are contingent requiring their determination and that of concomitant obligations of States in international law according to the rule of recognition of international law. Absolute rights and principles may also entail a test of obvious fairness or justice and similar notions in adjudication that are not relevant to substantive contingent rights and principles involving conflicting demands of justice requiring the rule of recognition to validate the power to make determination of the content of law engaging in moral and political

evaluations.⁶⁴² Accordingly, in legal interpretation of the protection of corporations in foreign investment being subject to contingent substantive rights and principles, the yardsticks of obvious fairness or justice, or general principles and standards do not represent the statement of law. They only veil the creative, justice and policy evaluation exercise of the arbitral tribunal in the face of the rule recognition. The question is not whether a general test, standard, or principle has evolved to become more or less strict in customary international law. It rather concerns its irrelevancy at all for the substantive rights of foreign corporations and concomitant obligations of States in international law in hard indeterminacies without determination according to the rule of recognition for rule specification. In the contingent areas, general principles, standards, and tests such as equality or proportionality measuring justice, fairness, or equity may be applied to interpretation only if the rule of recognition of the system validates the power of the adjudicator to engage in moral and political assessment. The general international rule of recognition does not admit of such a power for international arbitrators in settling foreign investment disputes. This dimension of the legitimacy for the validation of the determination power by the rule of recognition leads to consideration of the second major distinction of rights of human beings and those of corporations in international law with regard to the structure of the determination of these rights and corresponding obligations of States.

B. Recognition and Consensual Structure of Rights of Corporations

The adjudicative discretion in international law generally rests on *non-liquet* and equity that were discussed earlier.⁶⁴³ The bottom line of this section is whether the obligations of States towards foreign corporations in hard cases *is* structured to be or *should* be determined by States in a consensual manner or by arbitral tribunals in a constitutional manner. According to the general rule of recognition of international law only the consensual manner of determination for moral and political evaluation in hard indeterminacies is recognized and validated

⁶⁴² See Chapter II and III.

⁶⁴³ See Chapter III.

in international law. A great source of confusion is the field of human rights where practices and common good may potentially justify a reform in the international rule of recognition for a constitutional approach to the rights of human beings and obligations of States towards human beings. This structure of constitutionality cannot be transferred to rights of corporations in international law without underlying supporting practices and common good justification. For a constitutional determination of rights of corporations and obligations of States by arbitral tribunals in foreign investment there must be supporting practices as well as common good justification to exhibit a change or a desirability of change in the consensual pattern of recognition in the international system in foreign investment.

i. Consensual Design and Practice in Foreign Investment

a) Approaches to Discretion and Constitutionalism Implications

Not all suggestions for arbitral discretion are predicated on explicit advocacy for a constitutional approach to rights of corporations or moral and political evaluations by arbitral tribunals. Three related approaches may be discussed in this section. These approaches do not necessarily converge in the appreciation or deprecation of investment treaties or investment arbitration. Still they assume that at a policy level States have delegated discretion to tribunals rather than approaching the issue from the viewpoint of an interpretive problem at the adjudicative level. They make a straying short-cut by attributing to States the grant of authorization for adjudicative creation instead of taking the disciplined road of structure of determinacy and legitimacy in international law.

One approach to constitutionalism in investment treaties addresses the implications of investment treaties for domestic constitutional orders than focusing on, though perhaps assuming, the question of the discretion of arbitral tribunals and the constitutional construction of the rights of investors. This approach depicts the global processes of constraining States' powers under investment treaties restricting the democratic decision making processes at

domestic level as a “new constitutionalism”.⁶⁴⁴ The new constitutionalism is of course of a wider scope concerning mechanisms for making and enforcing rules to limit market intervention by States deemed represented by GATT/WTO regimes at the trade level and extended to investment treaties processes by analogy of the practices while also considering the instrumentality of favorable conditions for investment for trade regimes.⁶⁴⁵ An aspect of the new constitutionalism is that constraints on State domestic policies through investment treaties may have implications on the internal constitutions of States and their interpretation (when in conflict with treaty provisions).⁶⁴⁶ Investment treaties certainly create constraints on States. That is not the question here.

The core point here is who determines the substance of those constraints and obligations of States. This issue requires examining the practices and justification of the common good to gauge the assertion of actual or desirable delegation by States of their right to determine the content of their obligations in hard indeterminacies to arbitral tribunals in a constitutional approach to the rights of corporations in investment arbitration. The new constitutionalism in the notion of constraints on States beyond their own constitutions is a phenomenon that

⁶⁴⁴ David Schneiderman, *Investment Rules and the New Constitutionalism* (2000) 25 *Law & Soc. Inquiry* 757, at 758, 767-768. (“The new constitutionalism refers to the quasi-legal restructuring of the State and the institutionalization of international political forms that emphasize market credibility and efficiency and also limit the processes of democratic decision making within nation States. The project mandates the insulation of key aspects of the economy from the influence of politicians or the mass of citizens ‘by imposing, internally and externally, ‘binding constraints’ on the conduct of fiscal, monetary, trade and investment policies’. By limiting State action with regard to key aspects of economic life, the new constitutionalism confers privileged rights of citizenship and representation on corporate capital, while at the same time constraining democratic processes. Central to the new constitutionalism, then, is the imposition of ‘discipline’ on State institutions, both ‘to prevent national interference with property rights and [to provide] entry and exit options of holders of mobile capital with regard to particular political jurisdictions.’ Ibid. at 758. [citations omitted].

⁶⁴⁵ See *ibid.* at 758-759. “The proliferation of investment rule-making structures signals that trade promotion is viewed no longer as sufficient to ensure the background conditions for freedom of movement in the global marketplace; rather, the necessities of foreign direct investment (FDI) are considered as linked closely to trade.” *ibid.* at 759.

⁶⁴⁶ *Ibid.* at 777-781. A constitutionalization approach to international trade has proponents and opponents. For advocating a constitutionalization approach to trade with the aim of promoting human rights, see for instance Ernst-Ulrich Petersmann, *Time for a United Nations ‘Global Compact’ for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from the European Integration* 13 *Eur J Int’l L* 821. EU Petersmann, ‘Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston’ (2002) 13 *Eur J Int’l L* 845, 850. For a trenchant opposition to this approach see, Philip Alston, ‘Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann’ (2002) 13 *Eur J Int’l L* 815.

concerns policy options of States in entering into an investment treaty with such constraints on their actions lawful under their own constitution. Such constraints may simply reflect restrictions on States already existing under customary international law that an investment treaty merely provides a means for their enforcement under arbitration not available without the treaty. For various reasons grounded in convenience or self-interest at a policy level, States may also to undertake constraints in clear *lex specialis* beyond their obligations under customary international law. Nonetheless, it is quite another matter to read States' consent to obligations under investment treaties to include a constitutional determination of rights of corporations in hard indeterminacies, which begs the criteria of legitimacy. This is not a problem at the policy level of States. It is primarily a problem of interpretation at the adjudicative level whose solution is to be sought, as this study urges, in the legitimacy criteria of the rule of recognition and coherence for the common good. These criteria reveal deficiencies of analogies with national systems and other fields of international law unfounded in practice or justification in common good.

A second approach is to draw arbitral discretion from broad language in investment treaties. This approach, therefore, heavily capitalizes on the obligation of fair and equitable treatment to suggest that by inserting a general standard or principle in their treaties States are implied to have empowered tribunals to exercise discretion.⁶⁴⁷ Apart from deviating from the legitimacy criteria of recognition and coherence for the common good, this inference of arbitral discretion runs afoul of the integrity of investment treaties. To argue for discretion under this treaty clause with vast possibilities of finding any conduct that may seem to the tribunal unfair and unjust as a violation of the treaty would turn the clause into a catch-all, ubiquitous principle, rupturing the integrity of the treaty itself or general international law in relation to other rules of the system. A general standard of justice, fairness, or equity tends to attract compensation for any conduct where other applicable treaty clauses or rules of international on

⁶⁴⁷ For a study suggesting this approach in relation to the treaty obligation of fair and equitable treatment, see generally Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (Oxford: Oxford University Press, 2008).

foreign investment and property are doomed to failure.⁶⁴⁸ Likewise, this approach would result in a disservice to useful rules of the system. The approach recalls a sweeping view of denial of justice in international law repudiated in the scholarly words that “[t]o say that denial of justice is simply any State act resulting in ‘great’, ‘substantial’, or ‘clear’ injustice is to submit a convenient formula under which a multitude of claims not warranted by the law of nations might be presented.”⁶⁴⁹

A third approach, besides the broad language argument, infers the discretion of arbitral tribunals under investment treaties from States’ consent to arbitration and analogies of investor-State disputes and their adjudication under investment treaties with disputes between individuals and governments in national systems. This approach emphasizes a prospective, compulsory manner of arbitration under investment treaties for the general class of investors than a specific investor as under a contract to interpret broad terms in investment treaties.⁶⁵⁰ According to this view, by allowing investors to bring claims of responsibility against States in arbitration under investment treaties, States delegate “public authority to private arbitration” for arbitration of any dispute regarding their “exercise of public authority in relation to foreign investors” in a “public law adjudication”, whereby arbitral tribunals possess “comprehensive jurisdiction” for settlement of “regulatory disputes” to “review and control States” and to make States liable through application of broad terms or “treaty’s standards

⁶⁴⁸ This is evident in investment treaty arbitrations whereby almost all claims of violation of the expropriation clause are also coupled with the claims of violation of the fair and equitable treatment. Even if such a power were explicitly conferred to an arbitral tribunal to treat the fair and equitable clause as discretion for justice and policy evaluation, it would only concern the fair and equitable clause not other clauses such as expropriation. Naturally, the legal consequence for expropriation in terms of the extent of compensation or damages may be different from the legal consequence for a violation of fair and equitable treatment (e.g. for denial of justice rule) and the extent of compensation or damages for such a violation. Yet, assuming fair and equitable treatment as a standard of fairness or equity importing arbitral discretion would deflate the expropriation rule under the treaty and general international law on the conduct of the State in the first place by its openness to find any conduct of States interfering with the property of foreign investors unfair or inequitable and thus compensable, which under the expropriation rule would not be admissible at all.

⁶⁴⁹ Freeman, *supra* note 584, at 104. (“Continued loose usage of the term ... must inevitably inject a new source of disagreement among States and retard the formulation of serviceable rules.”) *Ibid*

⁶⁵⁰ See Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford; New York: Oxford University Press, 2008).

of review” similar to national systems.⁶⁵¹ This argument attempts to keep distant from likening rights of foreign investment with constitutionality of human rights.⁶⁵² Nevertheless, it retains the very lines of the constitutionality of the rights of individuals in certain respects.⁶⁵³ Read from this viewpoint, conformity with international law shrinks to “analogy with international law.”⁶⁵⁴

That investment treaties do not create a reciprocal relationship between investors and States, retaining the reciprocity between States, is acknowledged but largely downplayed in these approaches.⁶⁵⁵ The practice in investment treaties relating to the reciprocal relation between States and the consensual character of the substance of obligations is a core matter for their interpretation. The practice relating to the structure of the substance of States’ obligations in a consensual manner within investment treaties and the overarching international law framework is a key component of the identification of the rule of recognition for the determination of the content of their obligations not to be succumbed to the conjecture of observers. The legitimacy criterion of the rule of recognition for a justice evaluation determination would be at stake where the consensual character of the substance of obligations of States under investment treaties is detached from the reciprocal relations designed by States under the treaty or broader relations of States under international law. The least persuasive attempt would be to detach investment treaties from their backbone of international law, where investment treaties have most bonds and bounds, and attach them to the substantive or adjudicative analogies of national systems, with which investment treaties have least affinity, thereby according a constitutional tinge to foreign investors’ rights without justifications of practice and common good.

⁶⁵¹ Ibid. at 4-25; 45-71; 96-108, 122-123.

⁶⁵² Ibid. at 39-43. The author criticizes likening of investment protection with human rights in a way that the rights of investors subordinate other interests and rights and investment promotion and protection should be prioritized over other purposes. Ibid. 136-143. The writer also observes that rights of investors under investment treaties limited to investors having foreign assets are not only not universal in comparison to human rights but also beneficial only to an elite group of multinational corporations that can afford hefty costs of arbitration. Ibid. at 141-142. Moreover, by subordinating other rights and interests, a human rights system of investment treaties would hinder human rights than promoting it. Ibid. at 142.

⁶⁵³ See *ibid.* at 96-108, 136-137.

⁶⁵⁴ Ibid. at 131-135.

⁶⁵⁵ See *ibid.* at 131.

Balancing private interests of investors and those of States is part of coherence and determination task to be made for the common good as a criterion of legitimacy in the construction of rights and obligations. The determination task for coherence for the common good requires in the first place recognition of the power to engage in weighing justice demands and policy options for States. The above approaches unjustifiably infer from States' agreement to a direct claim by investors against States in a prospective fashion, their agreement to the determination of the substance of the rights of investors and obligations of States in a constitutional approach or creative function by arbitral tribunals in hard indeterminacies. This is a false assumption. The authorization by States under investment treaties for foreign investors to bring a direct claim against States, even if this right of standing is assumed as their own right than the right of their home States, is no justification for the determination power of arbitral tribunals.

b) Jurisdiction and Substance

That the language is broad capturing regulatory activities of States does not warrant the imposition of the authority of the law beyond what international law imposes.⁶⁵⁶ There is also overemphasis on the general, prospective, and regulatory than consensual arbitration under investment treaties being all jurisdictional aspects confused with substantive matters. Such an approach reflects only one side of the practice that by no means proves the other side for a jurisdiction or power to arbitral tribunals to create international obligations for States to measure States' exercise of authority over foreign investment.

By distinguishing jurisdiction from substance, it is not meant to argue that substance and jurisdiction may not interact in dispute settlement as vividly doing so in investment treaty arbitration.⁶⁵⁷ It is rather to highlight that the consent to

⁶⁵⁶ Moreover, not all treaty provisions are of the same level of abstraction. For instance, fair and equitable treatment is far more abstract than expropriation. Overemphasis on abstraction and labeling them as a standard of review would also result in impairing the integrity of the treaty. See *supra* note 648 and accompanying text.

⁶⁵⁷ One example is deciding on the content (substance) of the umbrella clauses in investment treaties for deciding on the jurisdiction of the tribunals. See for example *SGS Société Générale de*

arbitration does not necessarily entail the consent to arbitral tribunals' creation of the content of the States obligations. Mere general, compulsory, prospective jurisdiction does not warrant the justice evaluation of the tribunal. From the jurisdictional viewpoint, investment treaty arbitration may constitute a major development in international law. This, however, does not change the structure of international law and investment treaties for the substance of the obligations of States and the claims of their violation under investment treaties. What is material is the consensual character of the substance of the obligations of States not bound to the advance consent for arbitration under investment treaties. The general and prospective character of consent to arbitration does not affect the consensual nature of substance of obligations of States in foreign investment. The former is a jurisdictional matter and the latter a substantive issue.⁶⁵⁸ Whatever implications of the novelty for jurisdictional matters in investment treaties, they cannot be stretched to substantive law governing the substance of the dispute. As the ICJ has pointed out "[j]urisdictional clauses do not determine whether parties have substantive rights, but only whether, if they have them, they can vindicate them by recourse to a tribunal."⁶⁵⁹ The Methanex Tribunal stated that "from the time of the *Alabama* award, it has been accepted that States may agree to arbitrate by specifying the principles and rules of law they wish the tribunal to apply. This is frequently referred to as arbitration on an agreed basis. When the parties wish to arbitrate on an agreed basis, a tribunal is then bound by law and honour to respect and give effect to the parties's selection of the rules of law to be applied."⁶⁶⁰ This makes the mandate of the arbitral tribunals limited to what States have determined

Surveillance S.A. v. Islamic Republic of Pakistan (Jurisdiction), ICSID Case No. ARB/01/13 (Aug. 6, 2003), 42 ILM 1290, paras. 163-174; SGS Société Générale de Surveillance S.A. v. Republic of the Philippines (Jurisdiction), ICSID Case No. ARB/02/6 (Jan. 29, 2004), paras. 113-129, available at <http://www.worldbank.org/icsid/cases/SGSvPhil-final.pdf>.

⁶⁵⁸ Even the consent to arbitration is also consensual in reciprocity to the other State party's consent to arbitration. It is not, however, to argue that investor-State arbitration and commercial arbitration run on the same model. Moreover, by giving advance consent to arbitration a State is not giving a right to action to all foreign investors to bring a claim but investors of the other State party in the reciprocal relations of the State parties.

⁶⁵⁹ South West Africa, *supra* note 514, at para. 65.

⁶⁶⁰ Methanex Corporation v. United States of America (Aug. 3, 2005), Part IV, Chapter C, at para. 23. [footnote omitted], available online at http://www.naftaclaims.com/disputes_us_methanex.htm.

in their treaties or what general international law has determined in a customary framework.

Acceptance of investor-State dispute settlement does not entail acceptance of creation of obligations that do not exist. A mandate by States establishing the competence of an arbitral tribunal to decide a dispute does not import a mandate to create rules and obligations. Such a separation of substance and jurisdiction is no hindrance to the function of an investment arbitral tribunal to reach a decision as a decision rejecting a claim based on the absence of an obligation derogates nothing from the function of the tribunal in disposing of the case.⁶⁶¹ Jurisdiction is not equal to discretion. Investor-State arbitration is not a forum to review and control State actions but to decide on the breach of the obligations of the States under the treaty and international law. The consent to jurisdiction of an arbitral tribunal is no sanction for moral and political exercise by the tribunal for the creation and determination of the scope of rights of investors and obligations of the States in hard indeterminacies by the same tribunal deciding a violation of a treaty obligation or a rule of international law. That a State by advance consent to investment arbitration by investors of the other party is authorizing a sort of arbitration of whatever label involving a moral and political evaluation by arbitral tribunals in hard indeterminacies is a baseless assumption not attributable to the intention of the States in investment treaties. Even a vague dispute settlement provision in a treaty should not be construed in such a manner. No State would accept such a broad interpretation of their consent to arbitration even if it does not act or react to it for self-interest gains. States under investment treaties consent to arbitration for the violation of their existing obligations under investment treaties or international law generally.

The approaches linking jurisdiction to substance or relying on abstract provisions and advance consent within investment treaties reflect only one portion of the practice and a narrow part of the broader practices and legal order underlying investment treaties. Only an approach that isolates investment treaties from surrounding practices, from the context of international law and from the

⁶⁶¹ See Chapter III, Section A.

common good may elicit a creative function to investor-State arbitral tribunals from the consent of States to allow investors' claims and incorporation of general terms. Neither investment treaties stipulations, nor overarching purposes, nor surrounding practices of States, nor underlying structure in international law admit the function of arbitral tribunals to create obligations of States. A State consents to investment arbitration in a package of the whole text and context of the treaty including other provisions of the treaty such as the governing law on the dispute and the applicable institutional rules on the power of arbitral tribunals in deciding according to the law. Furthermore, the legal background of the treaty extends to the sources of international law to which all treaties are subject. Investment treaties must be read in the whole spectrum and broader order of international law to which investment treaties belong including the structural criteria of legitimacy for recognition and coherence for the common good. The general rule of recognition of international law forbids an arbitral tribunal's determination of the content of States' obligations towards investors in hard indeterminacies often masked behind employing a principle, rooted in rules applied in national or international law for ordinary instances of the rule, or relying on other tribunals' own determinations outside the customary framework of rule determination. It requires supporting practices and justification of the common good to warrant and validate a reform in the international rule of recognition in the field of foreign investment for a constitutional reading of rights of corporations and adjudicative justice and political evaluation by arbitral tribunals in hard indeterminacies.

c) Design and Practice

1. Arbitral Tribunal Practice

Rarely if ever investment arbitral tribunals themselves actually express advocacy for a justice evaluation power to create the content of treaty obligations or international rules for States. On the contrary, there exist arbitrations even those with dicta on general concepts such as manifest injustice, arbitrariness,

unfairness and the like that showed their adherence to a consensual character of the substance of the obligations of States in interpreting treaty obligations of hard indeterminacies. Broadly speaking, two approaches reveal arbitral tribunals' adherence to the consensual character of the substance of investment treaties obligations and rights of investors by the arbitral tribunals in the interpretation of State obligations under investment treaty clauses of hard indeterminacies. These approaches include reference to the specific consent of States parties to the treaty and general consent of States under customary international law.

The first approach consists of ante and post consent of State parties for their intention on the substance of their obligations. Displaying the first approach, one way of seeking the consent of the State parties to the treaty is to seek their intention on the substance of their obligations under the treaty by reference to their intention manifested prior to the conclusion of treaty. This may include reference to rules of interpretation under the Vienna Convention to one way or another obtain the intention of the parties while quite often arguably.⁶⁶² This approach may often fail to provide solutions and may result in attributing to States what they have not intended particularly in hard indeterminacies. Accordingly, reference to the criteria of legitimacy within the broader spectrum of international law is required to identify the substance of the obligations of States, which may go beyond the specific consent of the State parties but may not go beyond the general consent of States within the customary framework. Another way of this approach is to locate the specific consent of State parties over an ambiguous treaty obligation in other treaty provisions for the violation of the treaty. The SD Myers Tribunal applied this approach.⁶⁶³ This approach may also depart from the specific consent of States parties to the treaty but the attitude remains to search

⁶⁶² See Chapter I, Section B (iii) (b).

⁶⁶³ The S.D. Myers Tribunal while holding that the breach of fair and equitable treatment occurs if "it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective," did not apply a general standard of justice or arbitrariness but found a breach of fair and equitable treatment by Canada because of the breach of a specific international obligation of Canada under NAFTA, namely national treatment. *S.D. Myers, Inc. v. Canada* (Nov. 13, 2000) (First Partial Award), 40 ILM 1408, at paras. 263, 266. See also *The Metalclad Tribunal* which heavily relied on transparency requirement in other provisions of NAFTA. *Metalclad*, *supra* note 600, at paras. 71, 75-76.

the intention of the parties than entrenching the tribunal's own conception of justice.⁶⁶⁴

The arbitral tribunals' reference to or recognition of the State parties' unanimous expression of their intention on the substance of their obligation after the conclusion of the treaty or during its interpretation in the course of a dispute is another example of adherence to the consensual character of investment treaty obligations. Thus, the ADF Tribunal in adhering to the unanimous submissions of NAFTA State parties stated that "we have the Parties themselves—all the Parties—speaking to the Tribunal. *No more authentic and authoritative source of instruction* on what the Parties intended to convey in a particular provision of NAFTA, is possible."⁶⁶⁵ A similar holding appears in the Methanex Tribunal's

⁶⁶⁴ For instance, after the SD Myers decision, both Canada and the United States declared and incorporated in their investment treaties that a violation of a provision in the NAFTA or other agreements does not constitute a violation of the fair and equitable treatment. NAFTA FTC declared that "[a] determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)." NAFTA FTC, supra note 598. See also Canada's Model Agreement for the Promotion and Protection Investments Agreement, Article 5 (3). [Canada Model BIT], available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/2004-FIPA-model-en.pdf>; ASEAN Comprehensive Investment Agreement, Signed 26 February 2009, Article 11 (3), available online at <http://www.aseansec.org>.

⁶⁶⁵ ADF, supra note 598, para 177 [emphasis added]. Even the claimant had not disputed the authority of the NAFTA FTC interpretation but argued that the FTC interpretation had the character of an amendment to be subject to internal procedures of the NAFTA parties for ratification to become effective. See *ibid.* See also Glamis, supra note 610, para. 599. In Pope and Talbot, the Tribunal had first rejected the declaration of the United States as the home State of the investor on fair and equitable treatment. See Pope and Talbot, supra note 598, at para. 114. Later the Pope and Talbot Tribunal objected to NAFTA FTC interpretation of Article 1105 raising concerns about a post-award interpretation and retrospective effect of the interpretation on the NAFTA tribunal decision on merits already made, which in the view of the Tribunal offended the rule of law by rendering the disputing State party as "judge in his own cause." See Pope & Talbot, Inc. v. Canada, Award on Damages (May 31, 2002), para. 13 (1), available online at http://www.naftaclaims.com/disputes_canada_pope.htm. Like all contingent principles the obligation that the Pope and Talbot Tribunal was creating was retrospective and in itself contrary to the rule of law not to mention the violation of legitimacy criteria of coherence and the rule of recognition. Some other tribunals also gave indications that may be read as a rejection of the submission of the home State of the investor. See *GAMI Investments, Inc. v. United Mexican Status* (Nov. 15, 2004), at paras. 29-30, available online at <http://naftaclaims.com/Disputes/Mexico/GAMI/GAMIfinalAward.pdf>. This is still different from the position by the Pope and Talbot Tribunal in rejecting the declaration of the United States as the home State of the investor on the substance of the fair and equitable treatment. See Pope and Talbot, Merits Phase 2, supra note 598, at para. 114. In GAMI the home State, the United States, posited that NAFTA Article 1116 was not meant to "derogate from the rule that shareholders may assert claims only for injuries to their interests and not for injuries to the corporation." GAMI, *ibid.* at para. 29. The Tribunal rejected that this is the general rule. *Ibid.* para. 30. This position about what the general rule contains, which requires reference to general consent of States under customary international

statement that “even if Methanex’s assertions of the existence of a customary rule were correct, the FTC interpretation would be entirely legal and binding on a tribunal seised with a Chapter 11 case. The purport of Article 1131(2) is clear beyond peradventure (and any investor contemplating an investment in reliance on NAFTA must be deemed to be aware of it).”⁶⁶⁶ Here, the Tribunal rightly acknowledges the rights of States parties in investment treaties to override a customary rule of non-peremptory character derogation from which is permissible under international law.

The second approach adhering to the consensual character of the obligations of States under investment treaties is displayed by recourse to the general consent of States under specific customary rules of international law. Most explicitly, the Loewen Tribunal took this approach.⁶⁶⁷ A similar position for reference to the general consent of States was taken by the Supreme Court of British Columbia in its review of Metalclad arbitral award holding that “... treatment may be perceived to be unfair or inequitable but it will not constitute a breach of Article 1105 unless it is treatment which is not in accordance with international law. In using the words ‘international law’, Article 1105 is referring to customary international law which is developed by common practices of

law and not solely the consent or intention of one or more of the State parties, is different from the rejection of a joint interpretation by the State parties on the substance of their obligations and what they have intended under those obligations.

⁶⁶⁶ Methanex, *supra* note 660, Part IV, Chapter C, at para. 20. The Tribunal supported this view by reference to the Vienna Convention Article 39 whereby for amendment of treaties the agreement of the parties is sufficient with no particular form or requirement of re-ratification. *Ibid.* at para. 21. For propriety of the right of States parties to change the treaty, the Tribunal also pointed to structural general principles of law within national systems or “international constitutional principles” holding that “[i]f a legislature, having enacted a statute, feels that the courts implementing it have misconstrued the legislature’s intention, it is perfectly proper for the legislature to clarify its intention. In a democratic and representative system in which legislation expresses the will of the people, legislative clarification in this sort of case would appear to be obligatory. The Tribunal sees no reason why the same analysis should not apply to international law.” *Ibid.* at para. 22.

⁶⁶⁷ The Tribunal in the Loewen case, had found that “[b]y any standard of measurement, the trial involving O’Keefe and *Loewen* was a disgrace By any standard of evaluation, the trial judge failed to afford *Loewen* the process that was due..” *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, (June 23, 2003) ICSID case no. ARB(AF)/98/3, 42 ILM 811 (2003), at para. 119. Nonetheless, applying the rule of denial of justice, the Tribunal rejected the claim because the claimant had not completed the process for available local remedies. *Ibid.* at para. 217.

countries.”⁶⁶⁸ Likewise, the position of customary international law was sought by the ICSID Tribunal in *SGS v. Pakistan* holding that, as a breach of contract is not by itself a violation of international law, an ambiguous umbrella clause of the investment treaty cannot elevate the breach of contract to the violation of the treaty to qualify arbitration under the treaty.⁶⁶⁹ It is not simply to stress that the Tribunal rightly applied the principle *in dubio mitius* in relations between States and foreign corporations, which conforms to the structure of international law. The emphasis is more on the Tribunal’s reference to what States have generally accepted in international law in the absence of clear intention of the parties on the issue.⁶⁷⁰ In the same vein, the Methanex Tribunal referred to customary law on expropriation for interpreting the content of the NAFTA Article 1110 on compensable regulation.⁶⁷¹

All these approaches distinguish the rights of investors under an investment treaty from rights approaches in a domestic adjudication system. There is affirmation that a treaty need not express that the arbitral tribunal shall decide ‘on the basis of law’.⁶⁷² Rather a justice evaluation, a determination exercise,

⁶⁶⁸ Mexico v. Metalclad, supra note 600, at para. 62.

⁶⁶⁹ *SGS v. Pakistan*, supra note 657, at para 167.

⁶⁷⁰ What matter here is the reference to general international law for the content of a vague umbrella clause. The *SGS v. Philippines* Tribunal sharply disagreed that an umbrella clause should be read to exclude the possibility of treaty violation as a result of a breach of contract but also suggested that a general clause may leave the door open to such an approach. *SGS v. Philippines*, supra note 657, at para. 122.

⁶⁷¹ *Methanex*, supra note 660, Part IV, Chapter D, para. 7.

⁶⁷² The CME Tribunal in its Final Award on Quantum of damages stated that the stipulation that the arbitral tribunal shall decide ‘on the basis of the law’ would be “a self-explanatory confirmation of the basic principle of law to be applied in international arbitration according to which the arbitral tribunal is not allowed to decide *ex aequo et bono* without authorization by the parties.” *CME Czech Republic B.V (Netherlands) v. Czech Republic*, Final Award, 2003, para. 403. The CME Tribunal also stated that “an arbitral’s decision is rendered on ‘the basis of the law’ if the award is based on well-recognized international precedents as developed e.g. by the international Court of Justice, ICC or UNCITRAL tribunals ...” *Ibid.* at, para. 406. However, the Tribunal did not articulate the weight and manner of participation of adjudicative decisions for subsequent tribunals and more generally for the statement of the law within the structure and sources of international law. The weight and manner of participation of arbitral tribunals in the development of the law shape in adherence to the rule of recognition of international law requiring a customary framework of rule determination. Otherwise, it would be much of the character of a decision *ex aequo et bono* for which the Tribunal acknowledged it did not have a power. See Chapters II and III. Indeed, as a member of the CME Tribunal in the Final award, Ian Brownlie in a separate opinion in effect rejected adjudicative precedents in international law or principles derived solely from tribunals without being backed by State practice. This is reflected in Brownlie’s view that ‘full compensation’ under the Hall Formula, which many international

oftentimes occur behind reliance on general principles or the purpose of investment treaties or decisions of other tribunals relying on such principles or purposes. An advocate of the public adjudication approach to investment treaty arbitration, while advocating taking into account public interests of the States and not giving priority to investment protection in the adjudication of investment disputes, relies on general principles primarily of domestic law origin and less of international law origin to resolve the so-called regulatory disputes.⁶⁷³ This only begs the capacity of general principles in view of the criteria of legitimacy. In the first place, an arbitral tribunal is unable to unravel concepts of hard indeterminacies in a single domestic system like the United States, not to mention the EU and constitutions of other countries, entangled in the constitutional and jurisprudential maze peculiar to that system let alone most domestic laws and constitutions. Domestic legal concepts and principles of contingent character form in a package of their own cultural, political, constitutional, and legal contexts barely transferable to international law in hard penumbra. More importantly, resort to general principles fatally begs the question about the function of principles and their dependency on determination and for rule coherence according to the rule of recognition. General principles of any origin stop short of authority once in hard indeterminacy zone whose utilization would only engages the tribunal's justice evaluation and policy assessment for which a rule of recognition is required not to mention the requirement of advancing the common good where such a recognition exists. The theoretical analysis for the contingency of substantive principles was offered in previous chapters calling for the

tribunals have supported, is not a general rule of international law because it has been rejected in State practice, thus referring to State practice for identification of the general rule of international law on compensation. See *CME Czech Republic B.V (Netherlands) v. Czech Republic*, Final Award, Separate Opinion by Ian Brownlie, 14 March, 2003, at paras. 26-32.

⁶⁷³ Van Harten, *supra* note 650, at 143-145. The public law adjudication approach to settlement of disputes under investment treaties relies on a banal ploy as it "calls for the application of principles developed domestically and, to a lesser extent, in the international sphere in cases where courts and tribunals directly resolve regulatory disputes between individuals and the State....The primary reference point in this regard must be domestic law, both as a source of analogous rules and principles and as evidence of the practice of the States parties to the treaty, given that in the case international law it is often not possible to disentangle distinctively 'public law' principles from awards and decisions that have been made in the context of reciprocally consensual adjudication between States." *Ibid.* at 143-144.

coherence of the content of the law for particular hard situations in a consensual determination under the general rule of recognition in international law. At this juncture, additional elements will be examined to discover whether practices display the emergence of a trend towards a positive practice for a constitutional adjudicative determination of the rights of corporations and accompanying obligations of States in the field of foreign investment or exhibit further negative practice towards this sort of determination in bolstering the general rule of recognition.

2. State Counter-Practice

In the recent past, States reacted to claims of internationalization of their contracts with foreign corporations particularly in the field of natural resources for huge compensation attributed to the requirements of international law. The States whose special interests were directly affected stopped earlier practice of vague choice of law clauses referring to equity, general principles, or even international law and subjected their contracts to the law of the State party in a negative response to arbitral awards anchored in general principles and the decisions of tribunals.⁶⁷⁴ This attitude dominated the practice of developing countries possessing key natural resources such as oil.⁶⁷⁵

There is remarkable practice in foreign investment whereby States by questioning the existence of the alleged obligations in reaction to claims of State responsibility have displayed a negative attitude to a justice evaluation exercise by arbitral tribunals in the interpretation of treaty obligations that are sources of hard indeterminacies in investor-State dispute settlement. With the proliferation of investment treaties, developed States exposed to claims of violation of treaty obligations of hard sources of indeterminacies such as fair and equitable treatment

⁶⁷⁴ See Georges R. Delaume, "The Proper Law of State Contracts Revisited" (1997) 12:2 ICSID Rev. 1, at 11. ("Recent years have witnessed a determination on the part of a number of States to relocalize State contracts under the aegis of their own legal system.") Ibid. See also: Stephen I. Pogany, "Economic Development Agreements" (1992) 7:1 ICSID Rev. 1, at 13-14; Stephen J. Toope, *Mixed International Arbitration* (Cambridge: Grotius Publications Limited, 1990) at 20-21.

⁶⁷⁵ See *ibid.*

or expropriation and the duty to pay compensation have reacted on the very same lines that developing countries reacted in the past. These reactions have demonstrated a consensual structure of the scope of States' treaty obligations in a negative attitude towards justice evaluation and creative role of the arbitral tribunal determining the obligation of States in international law in hard cases. In reaction to claims of violation of their commitments under investment treaties, Canada and the United States changed their model investment treaties. This practice has figured among others in modification of the key obligations of fair and equitable treatment and expropriation to express the intention of the State parties as to the content of the obligations of fair and equitable treatment and expropriation. The United States changed its model investment treaty with significant changes to these clauses.⁶⁷⁶ Canada also changed its model investment treaty including changes to these clauses.⁶⁷⁷ This practice is appearing in all subsequent investment treaties concluded by the United States and Canada and the network of State parties to these treaties. The United States has entered into investment agreements that represent this practice.⁶⁷⁸ Investment agreements

⁶⁷⁶See U.S. 2004 Model BIT, *supra* note 620, Article 5 and Annex A on the obligation of fair and equitable treatment and Article 6 and Annexes A and B on expropriation.

⁶⁷⁷See Canada Model BIT, *supra* note 664, Article 5 (2) on fair and equitable treatment and Article 13 and Annex b. 13 (1) on expropriation.

⁶⁷⁸Free Trade Agreements between the United States and other countries, available online at <http://www.ustr.gov/sites/default/files/uploads/agreements>. These include: Free Trade Agreement between Singapore and the United States, May 6, 2003, available online at http://www.ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset_upload_file708_4036.pdf; US-Chile Free Trade Agreement, 2003, available online at http://www.ustr.gov/sites/default/files/uploads/agreements/fta/chile/asset_upload_file1_4004.pdf; Free Trade Agreement between Australia and the United States, May 18, 2004, available online at http://www.ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset_upload_file248_5155.pdf; Free Trade Agreement between the United States and Central American Countries (Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua) and the Dominican Republic (CAFTA-DR), August 5, 2004, available online at http://www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file328_4718.pdf; Free Trade Agreement between Morocco and the United States, entered into force on January 1, 2006; Trade Promotion Agreement between The United States and Peru, April 12, 2006, entered into force on February 1, 2009; Trade Promotion Agreement between the United States and Colombia, November 22, 2006; Trade Promotion Agreement between the United States and Panama, June 28, 2007; Free Trade Agreement between Korea and the United States, June 30, 2007; Free Trade Agreement between Oman and the United States, entered into force on January 1, 2009. See also U.S. recent BITs, available online at <http://www.ustr.gov/trade-agreements/bilateral-investment-treaties>. These include: Treaty between the Government of the United States of America and Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, November 4, 2005; Treaty between the Government of the United States of America and Rwanda Concerning the

entered into between Canada and other countries in recent years similarly exhibit this practice.⁶⁷⁹ The practice is not limited to the United States or Canada. Besides the network of States that have entered into investment agreements with the United States and Canada. A number of other States have followed these models as well. For instance, ASEAN members consisting of ten countries signed a Comprehensive Investment Agreement in 2009 that reflects changes in the US model.⁶⁸⁰ Australia, New Zealand, and ASEAN members have also entered into an investment agreement adopting this model.⁶⁸¹ Likewise, the COMESA members comprising nineteen States adopted an agreement on a common investment area with similar provisions.⁶⁸²

Certainly, these textual reformulations will not obviate hard indeterminacies arising from these obligations, requiring their interpretation within the framework of legitimacy. What matters here is the significance of the practice itself for the structure of determination of rights and obligations in the field of foreign investment. The linkage between the content of these obligations to the State intention manifested in State practice is another strong demonstration

Encouragement and Reciprocal Protection of Investment, Signed February 19, 2008. The agreements with Panama, Korea and Colombia await ratification.

⁶⁷⁹ These include Free Trade Agreement between Canada and Colombia, November 21, 2008; Free Trade Agreement between Canada and Peru, August 1, 2009; and Free Trade Agreement between Canada and Panama, May 14, 2010. Available online at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=en#free>; Agreement between Canada and the Government of Jordan for the Promotion and Protection of Investment, June 28, 2009; Agreement between Canada and the Government of Latvia for the Promotion and Protection of Investment, May 5, 2009; Agreement between Canada and the Government of Romania for the Promotion and Protection of Investment, May 8, 2009; Agreement between Canada and the Government of Czech Republic for the Promotion and Protection of Investment, May 6, 2009. Available online at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx>.

⁶⁸⁰ See ASEAN Comprehensive Investment Agreement, *supra* note 664. This agreement upon entry into force would replace earlier ASEAN agreements on investment. ASEAN member States of the Association of Southeast Asian Nations include: Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People's Democratic Republic, Malaysia, the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Viet Nam.

⁶⁸¹ Free Trade Agreement between ASEAN, Australia and New Zealand, Signed 27 February 2009, available online at www.asean.fta.govt.nz.

⁶⁸² Common Market for Eastern and Southern Africa (COMESA), Common Investment Area, adopted by the Twelfth Summit of the COMESA Authority of Heads of Governments, Nairobi, Kenya, 22nd and 23rd May 2007. COMESA member States comprise Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.

of the consensual determination of obligations of States and the rights of corporations in foreign investment, which cannot exceed the general consent of States within the customary determination of international law where their specific treaty consent is indeterminate. This practice further demonstrates a negative attitude by States to leave the determination of their obligations in foreign investment in hard cases having important justice and policy implications for States to arbitral tribunals for a constitutional determination of rights of corporations in an adjudicative moral and political evaluation.

The reactions to the provisions of the OECD draft on a Multilateral Agreement on Investment (MAI), including NGOs' outcry among others, prompted a clarification of the proposed draft by the Chairperson of the MAI Negotiating Group, which is instructive for this discussion. In his report on the MAI, the Chairman of the Negotiating Group included an interpretative note to the then draft MAI Article 1 on 'general treatment' including fair and equitable treatment and Article 5 on expropriation. This interpretative note clarified that

This Article on General Treatment, and the Article on Expropriation and Compensation, are intended to incorporate into the MAI existing international legal norms. The reference in Article -- to expropriation or nationalisation and 'measures tantamount to expropriation or nationalisation' reflects the fact that international law requires compensation for an expropriatory taking without regard to the label applied to it, even if title to the property is not taken. It does not establish a new requirement that Parties pay compensation for losses which an investor or investment may incur through regulation, revenue raising and other normal activity in the public interest undertaken by governments. Nor would such normal and non-discriminatory government activity contravene the standards in this Article.⁶⁸³

This clarification by the MAI Negotiating Group consisting of developed countries is plainly another affirmation of the consensual character of the rights of corporations under investment treaties and corresponding obligations of States. Accordingly, the clarification repudiates any assertion of constitutional or quasi-

⁶⁸³ The Multilateral Agreement on Investment (Report by the Chairman of the Negotiating Group) DAF/MAI(98)17, 4 May 1998, at 13,15, available online at <http://www.oecd.org/daf/mai/pdf/ng/ng9817e.pdf>.

constitutional rights of corporations and limitations on State conduct in treatment of foreign corporations by adjudicative determination of the scope of obligations of States. Likewise, it disproves the assertion that the grant of the right to bring a claim by the corporations under investment treaties includes, imports, or implies the determination of their substantive rights by the arbitral tribunal in a constitutional or creative fashion in hard indeterminacies.

These practices surrounding investment treaties by developed States accentuate that, notwithstanding the grant of the right to bring a claim to investors, States determine the content of their obligations, without leaving a significant issue such as regulation to the arbitral tribunal's evaluation of justice and policy. These practices reveal the consensual character of the scope of obligations of States in hard indeterminacies in foreign investment rather than an adjudicative creation of obligations laying limitations on their actions similar to constitutional or creative patterns that may be available in adjudication within other systems. States have recorded their negative attitude to such a function by arbitral tribunals in foreign investment in areas of hard indeterminacies of moral and political evaluations with democratic and economic repercussions. From another angle, such practices only represent a part of the broader consensual structure of rights of corporations under investment treaties and more broadly in international law. On the one hand, retaining control over the scope of obligations within treaties is simply a tool along all other options of States for termination, modification, clarification of their treaty obligations by their mutual consent or other valid resources that reciprocal and consensual treaties characterize. On the other hand, another aspect of a consensual structure of rights of corporations in foreign investment manifests itself in the governing law order provided in investment treaties themselves or falling within the arbitration instruments or sources of international law.

3. The Governing Law Order

As discussed before major arbitration rules typically utilized in investor-State dispute settlement require parties' authorization for decisions *ex aequo et bono*.⁶⁸⁴ The governing law provisions of investment treaties or in arbitration rules more generally as well as the sources of law delineate the power of arbitral tribunals to decide the disputes according to the applicable law. In tandem with the obligations undertaken, investment treaties, the arbitration rules, and the sources of international law on the treaty lay down the governing law whereby an arbitral tribunal must decide disputes over those obligations. States may designate in their investment treaties the substantive applicable law for the settlement of disputes. In the absence of such provisions on applicable law, the arbitration rules on the applicable law as well as the general sources of international law to which all treaties belong are applicable. The governing law is an integral part of the control mechanism tied to the grant of jurisdiction to an investment arbitral tribunal to ensure that the outcome is what the law has determined.

Those investment treaties that include an applicable law clause typically, though not uniformly or universally, refer to the provisions of the investment treaty and international law as the applicable substantive law sometimes with an express reference to national laws or obligations of States under other international agreements. Many investment treaties provide that the arbitral tribunal must decide according to the provisions of the treaty and the applicable rules of international law.⁶⁸⁵ Indeed, reference to the investment treaty and international law as the applicable law constitutes the trend commonly practiced among BITs.⁶⁸⁶ As to the applicable law to the substance of investment claims of breach of the treaty obligation, NAFTA provides that "a Tribunal established under this Subchapter shall decide the issues in dispute in accordance with this

⁶⁸⁴ See Chapter III, Section A (ii) (3).

⁶⁸⁵ This does not necessarily preclude the application of the national laws of the host States that may in many respects be relevant such as whether the investment has been made in accordance with the law of the host State.

⁶⁸⁶ See UNCTAD, BITs 95-06, *supra* note 72, at 115-116.

Agreement and applicable rules of international law.”⁶⁸⁷ Another example includes the Energy Charter Treaty, although this treaty lacks the genuine reciprocity involved in NAFTA due to investment claims dynamics between two developed States.⁶⁸⁸ To illustrate further, reference may be made to the BIT between Mexico and the United Kingdom, which designates the treaty and international law as the governing law of the investment treaty claim.⁶⁸⁹

There are also treaties that contemplate national laws at some levels alongside treaty provisions and applicable rules of international law as the applicable law. Reference to the provisions of the treaty and the applicable rules of international law, similar to NAFTA, represents the treaty practice of Canada and the United States in their recent investment treaties regarding the law applicable to a claim of a breach of investment treaty provisions.⁶⁹⁰ The US and Canadian investment treaties maintain this governing law clause for a breach of an obligation under the investment treaty.⁶⁹¹

The United States has also distinguished the governing law for the claims of the breach of investment treaty obligations from those for the breach of an investment treaty authorization or agreement. The provisions of the treaty and applicable rules of international law govern the former claims, whereas the latter claims are subject to the applicable law specified in the investment authorization or agreement or agreed by the disputing parties in whose absence the host State’s law and applicable rules of international law shall govern, resembling Article 42

⁶⁸⁷ North American Free Trade Agreement, Dec. 17, 1992, 32 ILM 605 (1993), entered into force January 1, 1994, Article 1130.

⁶⁸⁸ (“A Tribunal established under this paragraph shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.”) Energy Charter Treaty (1994) 34 ILM 360 (1995), Article 26 (6). [ECT]

⁶⁸⁹ The BIT between the Mexico and the United Kingdom of 2006, Article 17 on the Applicable Law: “1. A tribunal established in accordance with this Section shall decide the submitted issues in dispute in accordance with this Agreement and the applicable rules and principles of international law.” Ibid. See also the FTA between Panama and El Salvador, Article 10.32 (1). Panama-El Salvador Free Trade Agreement, March 6, 2002, available online at <http://www.worldtradelaw.net/fta/agreements/panelsfta.pdf>.

⁶⁹⁰ See U.S. 2004 Model BIT, *supra* note 620, Article 30 (1): “Subject to paragraph 3, when a claim is submitted under Article 24(1)(a)(i)(A) or Article 24(1)(b)(i)(A), the tribunal shall decide the issues in dispute in accordance with this Treaty and applicable rules of international law.” Ibid.; Canada Model BIT, *supra* note 664, Article 40 (1): “A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.” Ibid.

⁶⁹¹ See the treaties referred in *supra* notes 678-679.

of the ICSID Convention.⁶⁹² The Canadian Model BIT does not address investment authorization and investment agreements as the US Model does. However, some recent Canadian investment agreements provide for a claim of a breach of a “legal stability agreement” by a tax measure with a governing law similar to the provisions in the US Model for the claims of a breach of an investment authorization or investment agreement.⁶⁹³ Some other treaties refer to national laws with no such distinctions. The ASEAN Comprehensive Investment Agreement illustrates a treaty with reference to applicable laws of State party.⁶⁹⁴ The agreement between Thailand and New Zealand exemplifies another investment treaty for recourse to national laws along with the rules of international law and the provisions of the treaty.⁶⁹⁵ Similarly, the Argentine and New Zealand BIT contains an applicable law clause that among others takes into account the laws of the State party in addition to the treaty and international law.⁶⁹⁶

⁶⁹² See U.S. 2004 Model BIT, Article 30 (2): “Subject to paragraph 3 and the other terms of this Section, when a claim is submitted under Article 24(1)(a)(i)(B) or (C), or Article 24(1)(b)(i)(B) or (C), the tribunal shall apply: (a) the rules of law specified in the pertinent investment authorization or investment agreement, or as the disputing parties may otherwise agree; or (b) if the rules of law have not been specified or otherwise agreed: (i) the law of the respondent, including its rules on the conflict of laws; and (ii) such rules of international law as may be applicable.” Ibid.

⁶⁹³ For distinguishing investment authorization or agreement see, Canada-Peru FTA, *supra* note 679, Article 837 (2): “Subject to the other terms of this Section, when a claim is submitted to arbitration for a breach of a legal stability agreement referred to in paragraph 2 of Articles 819 or paragraph 2 of Article 820, a Tribunal established under this Section shall apply: (a) the rules of law specified in the legal stability agreement, or as the disputing parties may otherwise agree; or (b) if the rules of law have not been specified or otherwise agreed: (i) the law of the disputing Party, including its rules on the conflict of laws, 5 and (ii) such rules of international law as may be applicable.” Ibid. See also Article 819 and 820 for provision for a claim that a tax measure is in breach of a legal stability agreement. Article 820 addressed the issue for claims on behalf of an enterprise.

⁶⁹⁴ ASEAN Comprehensive Investment Agreement, *supra* note 664, Article 40 (1): “Subject to paragraphs 2 and 3, when a claim is submitted under Article 33 (Submission of a Claim), the tribunal shall decide the issues in dispute in accordance with this Agreement, any other applicable agreements between the Member States, and the applicable rules of international law and where applicable, any relevant domestic law of the disputing Member State.” Ibid.

⁶⁹⁵ See the agreement between Thailand and New Zealand whereby the arbitral tribunal shall decide in accordance with the national laws and regulations of the State party as well as provisions of the treaty and international law. Closer Economic Partnership Agreement between Thailand and New Zealand (2005), Article 9.16.5, available at <http://www.mfat.govt.nz/downloads/trade-agreement/thailand/thainzcep-december2004.pdf>.

⁶⁹⁶ The Agreement between the Government of the Argentine Republic and the Government of New Zealand for the Promotion and Reciprocal protection of Investments, 27 August 1999), available online at http://www.unctad.org/sections/dite/ia/docs/bits/argentina_newzealand.pdf.

The governing law on the substance of claims under investment treaties is part of the mandate whereby the arbitral tribunal obtains the consent of the State to the dispute settlement and direct claims by investors. There is an inherent interaction of national laws and international law in foreign investment. Whatever oscillation between national laws and international law in the governing law of investment treaties, it may not go beyond the confines of international law to moral and political assessment by the arbitral tribunals. What is conspicuous in investment treaties providing for the arbitration of investment disputes against States is the absence of provisions, as opposed to particular authorizations in the arbitral treaties of the past centuries, to empower the tribunal to decide in accordance with justice or equity. Even in cases of the silence or ambiguity of an investment treaty on the applicable law, such silence or ambiguity is no justification to imply the adjudicative creative power of arbitral tribunals in investment treaties. The general rule of recognition of international law requires parties' authorization for such a power. More specifically, major arbitration rules typically utilized in investor-State dispute settlement reject a justice or political evaluation engagement by the arbitral tribunals, requiring parties' authorization for such engagement by empowering decisions *ex aequo et bono*, which are a justice evaluation exercise.⁶⁹⁷ The practices surrounding investment treaties themselves reject such an exercise by arbitral tribunals.⁶⁹⁸ Accordingly, where investment treaties are silent or ambiguous on the applicable law, the arbitral tribunals are still bound by the general rule of recognition of international law including, *inter alia*, the governing arbitration rules not to engage in a justice evaluative exercise. The significant point is that in contrast with arbitral treaties of the past centuries, investment treaties do not empower arbitral forums to decide in accordance with equity or justice, nor such a power is sanctioned by the arbitration rules or admitted by the general rule of recognition of international

("... the arbitral tribunal shall decide in accordance with the provisions [o]f this Agreement, the laws of the Contracting Party involved in the dispute, including its laws on conflict of laws, the terms of any specific agreement concluded in relation to the investment from which the dispute arose and the relevant principles of international law.") Ibid. Article 12 (5).

⁶⁹⁷ See Chapter III, Section A (ii) (a) (3).

⁶⁹⁸ See above, Section B (i) (c) (1) & (2).

law. The obligations of the States under investment treaties do not exceed those in customary international law because the tribunal is not empowered to enter into a justice and political evaluation unless authorized by the parties.

Consistent with the general rule of recognition of international law, these practices reinforce the point that by allowing direct claims against States in foreign investment, States are not admitting a constitutional reading of investment treaty provisions for the rights of corporations or empowering arbitral tribunals to determine their obligations in a justice or political assessment in hard indeterminacies. It would be unimaginable, and unfounded to imply, that a State in consenting to an arbitral tribunal to decide its violations under an investment treaty has accepted the creation of the very obligations by the same tribunal in hard indeterminacies. In the absence of an express authorization by the parties, no general rule of recognition of international law accords an investment arbitral tribunal a justice-evaluation or policy-assessment power to create obligations.

4. State Parties Joint Interpretation

One of the other most candid negative practices to a constitutional interpretation of the rights of the corporations and concomitant creative function of the arbitral tribunal in foreign investment has also surfaced in the control of the investment treaty interpretation by way of joint interpretation. Practice has surfaced in the control of the tribunal in the post-dispute phase through joint interpretation of State parties in clarification of their intention binding on the investor-State arbitral tribunal. NAFTA pioneered emphasis on this clarification in investment treaties. Initially, this power under NAFTA was contemplated under NAFTA Article 1131 on interpretation of Annexes.⁶⁹⁹ The interpretation by the

⁶⁹⁹ This commission provides authoritative interpretation of NAFTA provisions under Article 1131 (2). Article 1131: "Interpretation of Annexes 1. Where a disputing Party asserts as a defense that the measure alleged to be a breach of this Chapter is within the scope of an exception set forth in Annex I, Annex II, Annex III or Annex IV, on request of the disputing Party, the Tribunal shall request the interpretation of the Commission on this question. The Commission shall have 60 days to submit its interpretation in writing to the Tribunal. 2. If the Commission submits to the Tribunal an agreed interpretation, the interpretation shall be binding on the Tribunal. If the Commission

State parties of their obligations under investment treaties is a normal corollary of the reciprocal, consensual character rather than a constitutional nature of investment treaty rights.

State parties to investment treaties modeled after the U.S. 2004 Model BIT have clarified their interpretive power of their obligations under investment treaties by incorporating a provision in the applicable law clause of the investment treaties to the effect that a joint interpretation of a provision of the treaty is binding on the arbitral tribunal.⁷⁰⁰ Canada has also inserted this power of State parties in the governing clause in its new model BIT.⁷⁰¹ This is now the treaty practice of Canada as well.⁷⁰² A number of countries are also incorporating such clarifications in investment treaties. ASEAN, by way of example, has incorporated identical provisions in the governing law clause of its Comprehensive Investment Agreement signed in 2009.⁷⁰³ A number of other agreements between countries other than the United States and Canada also embody the same provisions.⁷⁰⁴

This control device additionally displays that States are not leaving the determination of the content of their obligations in hard indeterminacies to arbitral

fails to submit an agreed interpretation or fails to submit an agreed interpretation within such 60 day period, the Tribunal shall decide the issue of interpretation of the exception.” Ibid.

⁷⁰⁰ U.S. 2004 Model BIT, *supra* note 620, Article 30 (3): “A joint decision of the Parties, each acting through its representative designated for purposes of this Article, declaring their interpretation of a provision of this Treaty shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision.” Ibid. The US Model and treaties following that model have made the governing law of the treaty subject to these provisions. See *ibid.* Article 30 (1).

⁷⁰¹ Canada Model BIT, *supra* note 664, Article 40 (2): “An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section, and any award under this Section shall be consistent with such interpretation.” Ibid.

⁷⁰² See for example Canada-Peru Free Trade Agreement, *supra* note 679, Article 837 (3) “An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section, and any award under this Section shall be consistent with the interpretation.” Ibid.

⁷⁰³ ASEAN Comprehensive Investment Agreement, *supra* note 664, Article 40 (3): “A joint decision of the Member States, declaring their interpretation of a provision of this Agreement shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision.” Ibid.

⁷⁰⁴ See the BIT between the United Kingdom and Mexico (2006) Article 17 (2), available online at <http://www.fco.gov.uk/Files/kfile/Mexico%20IPPA.pdf>. (“An interpretation jointly formulated and agreed upon by the Contracting Parties with regard to any provision of this Agreement shall be binding on any tribunal established under this section.”) Ibid. See also the Free Trade Agreement between Panama and El Salvador, Article 10.32 (2), available online at <http://www.worldtradelaw.net/fta/agreements/panelsfta.pdf>.

tribunals. Plainly, by giving an overriding effect to the interpretation by the States parties of the investment treaty, this practice being in conformity with the general rule of recognition joins the negative attitude towards the idea of constitutionality of the rights of corporations and justice evaluation exercise by the arbitral tribunal in hard indeterminacies.

Post NAFTA investment treaty arbitration induced remarkable State practice in line with long extant practices on the international plane for the consensual character of the substance of the obligations of States in foreign investment. Strikingly enough, post-NAFTA practices under investment treaties have been driven by the United States that with a long history of advocacy for the protection of corporations abroad is a major player in foreign investment as a home and host State of foreign investment. If a developed State cannot afford a regime of protection that is pernicious to the viability of an ordinary system of governance, it would be hard to ascribe such a regime to other States. That self-explains the popular growth of these practices in the post-NAFTA era, which dismiss adjudicative determination of the content of States' obligations and constitutional interpretation of rights of foreign corporations in investment treaties arising from penumbral hard cases.

A constitutional approach does not fit the legal structure of foreign investment in international law. Unless specifically provided otherwise by States, a foreign investment tribunal's task is to settle the dispute ultimately governed by international law in accordance with existing law not its own self-created law and obligations. A constitutional approach to the determination of the rights of investors and the obligations of States with concomitant creative function of the arbitral tribunals engaging in the evaluation of justice in hard indeterminacies offends the rule of recognition in international law. Such an approach would be irreconcilable with the structure of international law, inconsistent with the sources of international law enunciated in the letter and enshrined in the spirit of Article 38 of the ICJ Statute, incompatible with contemporary State practice designing dispute settlement, incongruous with the practice of international tribunals, and discordant with the design and practices of investment treaties. A contrast with the

rights of human beings in human rights will further illuminate this consensual structure of the substance of the law on foreign investment in hard indeterminacies.

5. Contrast with Constitutional Rights of Human Beings in Human Rights

The idea of equating the dignity of human beings with the entity of corporations is in itself deplorable. A human right carries its own qualification, belonging to human not non-human beings. In the field of human rights, even as to the contingent property rights of human beings and concomitant obligations of States in their expropriation, a constitutional rather than consensual determination of rights and obligations may be observable. Supporting practices and common good may justify reforming the content or origin of the rule of recognition in international law for the treatment of human beings and determination of their rights irrespective of the consent of States endorsing a decision/determination favorable to human beings. A change in the international rule of recognition for the protection of human rights does not establish a change in the international rule of recognition for the protection of corporations. Although the right to property is recognized in both fields of human rights and foreign investment in international law, its determination and the power involved is not the same for corporations in foreign investment. There is a constitutional dimension to the interpretation of human rights within their own context not transferable to the field of foreign investment.

The consensual character of the rights of corporations may further be illustrated by a contrast with practices under the European Convention on Human Rights. Provisions in human rights instruments include absolute rights or rights whose interpretation may for the dignity of human beings require interpretation favorable to individual human beings including where property rights of individual human beings are at issue as a human right. This belongs in human nature and dignity. It is not sound analogy to assimilate the treatment of human

beings in human rights and property of corporations into one legal discourse. Scholars have objected to such an analogy.⁷⁰⁵

Unlike foreign investment, reform in the field of human rights in international law is accompanied by supporting practices and common good justifications. One area of contrast is the multilateral character of human rights instruments.⁷⁰⁶ This factor coupled with other factors points to a constitutional approach to human rights. Investment treaties are bilateral relations without garnering even a support so far for a multilateral regime of foreign investment even among developed countries.⁷⁰⁷ This status of human rights instruments in contrast to investment treaties indicates that States at least from the normative if not actual practice standpoint recognize broad rights for human beings operative among States at a universal level free from the types of self-interests and negotiated bargains between individual States for gains and costs typical of investment treaties. The status of individual human beings as the ultimate and genuine constituents of national and international communities also justifies a constitutional interpretation of the rights of human beings in many respects favorable to human beings creating new restraints on States beyond existing rules and obligations. There are also textual and contextual grounds in the pertinent instruments and practices that further separate the character of rights of corporations in foreign investment from the rights of human beings.

On the textual basis, that some investment treaty provisions are broad or abstract does not earn them a status parallel with human rights provisions. As a second level of contrast, investment treaties as part of a rule-based system are basically obligation-oriented quite distinct from a human right convention or instrument that are rights-oriented and principle-based. Even advocates of public adjudication in investment treaty acknowledge that investment treaties in neither preamble nor operative provisions resemble human rights provisions.⁷⁰⁸ For

⁷⁰⁵ See Toope, *supra* note 674, at 85; M. Sornarajah, *The Settlement of Foreign Investment Disputes* (The Hague: Kluwer Law International, 2000) at 255, n. 120.

⁷⁰⁶ Toope, *supra* note 674, at 85.

⁷⁰⁷ For the multilateral attempts, see Chapter I, Section B (iii).

⁷⁰⁸ Thus it has been acknowledged that “the preambular language of investment treaties does not provide a basis for adopting a presumption in favour of safeguarding the claimant against the

instance, NAFTA Article 1110 on expropriation begins with “No Party shall ...” In contrast stand human rights conventions and instruments in their provisions on protection of property not to mention those on civil and political rights of human beings. Thus, the Universal Declaration of Human Rights in Article 17 (2) provides that “*No one shall be arbitrarily deprived of his property*” or the European Convention on Human Rights provides that “*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions ...*” or the American Convention on Human Rights provides that “*Every person has the right to the use and enjoyment of his property.... No one shall be deprived of his property*” or the Charter of Fundamental Rights of the European Union provides that “*Everyone has the right to... No one may be deprived of his or her possessions ...*”⁷⁰⁹ There is rights-oriented language in human rights instruments indicative of a constitutional determination of rights of human beings and obligations of States as opposed to the obligation-oriented language indicative of a consensual determination of the rights of corporations in foreign investment.

A third contrast may be illustrated by the power of adjudicators under European Convention on Human Rights. Investment arbitration is bound by numerous provisions and rules that ban a creative role for arbitrators.⁷¹⁰ On the contrary, there is much flexibility in the European Convention on Human Rights for creativity. This creativity has further figured in the Convention itself. Instead of the applicable law or governing law, the European Convention on Human Rights in Article 45 only requires the judges of the European Court of Human Rights (ECHR) to give reasons.⁷¹¹ This is far less restrictive than instruments that require the adjudicator to decide in accordance with the terms of the treaty and rules of international law or in accordance with the applicable law. A wider

State” and that “investment treaties in the great majority of cases do not use bold rights-affirming language to describe the standards that constrain States in order to protect foreign investors.” Van Harten, *supra* note 650, at 140.

⁷⁰⁹ See *supra* notes 628-630.

⁷¹⁰ See above Section B (i) (c) (1, 2, 3, 4).

⁷¹¹ European Convention on Human Rights, *supra* note 629, Article 45 on reasons for judgments and decisions: “1 Reasons shall be given for judgments as well as for decisions declaring applications admissible or inadmissible. 2 If a judgment does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.” *Ibid.*

discretion has been accorded to the ECHR to ignore partial remedy envisaged under the local law and instead award “just satisfaction.”⁷¹² These are only explicit provisions that provide for a discretionary power for ECHR judges in their decisions although they may not use it overly, building the practice for a constitutional construction of rights. In this background, the ECHR in its decisions on property protection of individuals (including corporations) has scarcely resorted to international law. Instead, the ECHR has employed a creative role by adopting a (distributive) justice measure like the proportionality test in the distribution of benefits and burdens in determining the balance between the conduct of State and its burden on the individual, while considering the margin of appreciation for States’ freedom in regulating public affairs.⁷¹³ This part of the jurisprudence of the ECHR is inextricably tied to the function of the Court subject to its own rule of recognition. Absent specific authorization, arbitrators of investor-State disputes cannot assume a power on analogies with ECHR or similar forums of human rights, or the constitutional schemes of national systems such as the US Fifth Amendment, or authorizations elsewhere to engage in moral and political evaluations denied to them by the rule of recognition of international law governing the dispute. In employing the proportionality or similar tests the ECHR or national courts act under their own rule of recognition validating the power to make the determination of rights and obligations in a constitutional manner engaging in moral and political evaluations. The proportionality test where reflecting contingent principles which characterize the protection of property for

⁷¹² Ibid. Article 41 on just satisfaction: “If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.” Ibid.

⁷¹³ See for instance, the case of *James and Others v. United Kingdom*, 1986, 98 Eur. Ct. H.R. (Ser. A) (1986), at p. 34 para. 50. (“Not only must a measure depriving a person of his property pursue, on the facts as well as in principle, a legitimate aim ‘in the public interest’, but there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realized The requisite balance will not be found if the person concerned has had to bear ‘an individual and excessive burden’”) Ibid. [citation omitted]. Even in this peculiar legal environment, the approach by the ECHR is that States have a wide margin of appreciation in their conduct that interferes with property. (“Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is ‘in the public interest’.”) Ibid. at p. 32, para. 46. The Court found it “natural that the margin of appreciation available to legislature in implementing social and economic policies should be a wide one.” Ibid.

corporations is a measure for determination in the law making process requiring a rule of recognition for such a function. It would be an affront to the rule of recognition to resort to the proportionality test for appraising States' conduct towards foreign corporations in investment arbitration, in replication of ECHR or other tribunals, in the absence of an authorization for a decision *ex aequo et bono* or an otherwise specified justice evaluation function.

A fourth level of contrast is the attitude and practice of the ECHR unlike investment treaty tribunals. Investment treaties tribunals rarely expressly advocate departure from the intention of the States parties or a constitutional approach to rights of investors.⁷¹⁴ The European Commission of Human Rights in its report in the Golder Case made the distinction between the constitutional aspect of the Convention on Human Rights and treaties creating mutual obligations. It was thus held that “[t]he overriding function of the [European] Convention [on Human Rights and Fundamental Freedoms] is to protect the rights of individuals and not to lay down as between States mutual obligations which are to be restrictively interpreted having regard to the sovereignty of those States.”⁷¹⁵ The ECHR has explicitly assumed a duty to interpret the convention in a constitutional manner because of the nature of the human rights convention, which is not available in investment treaties representing a reciprocal framework of obligations. The ECHR referred to “the special character of the Convention as an instrument of European public order (*ordre public*) for the protection of individual human beings”⁷¹⁶ Likewise, Paragraph 2 of Article 6 of the Treaty on European Union enunciates the status of fundamental rights in a constitutional setting within the EU. Under that Paragraph “[t]he Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights . . . and as they result from the constitutional traditions common to the Member States, as general principles of Community law.”⁷¹⁷

⁷¹⁴ See above, Section, B (i) (c) (1).

⁷¹⁵ Golder v. United Kingdom, Report of the Commission adopted June 1, 1973, Eur. Cmm’n H. R. Series B. No. 16 p. 40, para. 57.

⁷¹⁶ Cyprus v. Turkey, Judgment of 10 May 2001, Eur. Ct. H. R., 2001-IV, p. 25, para. 78.

⁷¹⁷ See the Consolidated Version of the Treaty on European Union, Article 6 (2), Oct. 2, 1997, 37 ILM 56, 69 (1998).

On a number of distinctions mirrored in the surrounding design and practices, the constitutional approach within ECHR stands on its own rule of recognition. The ECHR is exercising a determination function whose rule of recognition lies in State practice reflected in the Convention itself as well as the practice of the European Court itself coupled with common good justification including the human centrality of the convention and the public character of the Court. This ensemble of political and moral underpinnings builds the components of the rule of recognition to validate the discretionary power of judges in ECHR to engage in a justice evaluation and policy review of the member States in a constitutional attitude towards the rights of human beings and restrictions on the actions of States. The moral and political underpinnings of the European Convention on Human Rights allow its expansive interpretation favorable to human beings not in a framework of consensual, reciprocal obligations but a rights-based constitutional framework in protection of individual human beings. The political and cultural integrations that underscore the delegation of sovereign rights in matters of the determination of member States' obligations in a constitutional framework within the EU are absent in investment arbitration as well.

Property protection in foreign investment within investment agreements and international law stands distinct in the nature of determination from domestic, regional and international constitutional or special frameworks even though there may exist some treaty provisions with pedigree in a particular legal system like the US treaties influenced by the US system. Academic writers have rightly pointed out that the political or economic context of regulatory takings in the domestic law of the United States is different from those in international law.⁷¹⁸

⁷¹⁸ See Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International 'Regulatory Takings' Doctrine*, (2003) 78 N.Y.U. L. REV. 30. Distinctive circumstances may also be observed with bilateral claims settlement institutions such as the Iran-US tribunal established under the Algerian Treaty. Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government Islamic Republic of Iran, 20 ILM 230 (1981). [Algerian Treaty] For the distinctive circumstances of the dispute settlement under the *Algerian Treaty*, see Toope, *supra* note 674, at 264; Sornarajah, M. *The international Law on Foreign Investment* (Cambridge: Cambridge University Press, 1994) at 282-283. Toope points out that "the circumstances that prompted the creation of the [The Iran-

An approach attempting to liken the property protection in investment treaties or international law with that within domestic or special international regimes misconceives the underlying rule of recognition backed by practices and common good justification. Constitutionality of rights of corporations in international law requires at least the formation of a new rule of recognition supported by the practice and common good. As observed, the practice is already in the negative trend. The desirability for an adjudicative determination in investment arbitration in a constitutional approach to rights of corporations and limitations on the actions of States may now be examined.

ii. Desirability in Light of the Common Good

The practices enumerated in the previous section dismiss a constitutional design of the rights of corporations and their adjudicative determination by arbitral tribunals, which is consistent with the general rule of recognition in international law. A final test for this is the common good whether the rule of recognition of international law validating and requiring the consensual determination of rights of corporations and corresponding obligations of States, whereby indeterminate obligations are to be interpreted in light of customary determinations, would advance the common good or hinder it. Before dealing with this question, a distinction must be made between the question of adjudicative discretion and the question of the institution of arbitration generally and its role. The following assessment in view of the common good should not be regarded as undermining the desirability of the institution of arbitration; it solely concerns the question of the desirability of adjudicative determination in investor-State arbitration. The desirability of investor-State arbitration *per se* establishes no support for the desirability of adjudicative determination in policy assessment and justice evaluation for public affairs of States by arbitrators in investment

US Claims] Tribunal and that continue to condition its operation are so singular as to undercut the general application of lessons or insights derived from its practice.” Toope, *ibid.* [clarification added]. Sornarajah, also points out similar caveats about the decisions of the tribunal. Sornarajah, *ibid.*

arbitration. Arbitral tribunals may perform their function in an orderly fashion to hold States responsible for the violation of obligations undertaken under the treaty or within international law but nothing of this task justifies the creation of obligations by the arbitral tribunals. Does common good support the desirability of a reform in the content of the international rule of recognition in the field of foreign investment to call for an adjudicative determination of the obligations of States by the arbitral tribunals? This question may be examined in view of the public character of forum and self-determination of States as conditions to justify the advancement of common good in this field.

a) Investor-State Arbitration and the Public Character of the Forum

Adjudicative determination power in national legal systems derives from and is bound by the criteria of legitimacy of the system consisting in the rule of recognition and coherence for the common good.⁷¹⁹ This restricted recognition is accompanied by the common good justification that courts in national legal systems as well as those such as the European Court of Human Rights are public in character by both possessing a public office and having features of the public service. The public character of the forum constitutes one prerequisite of the common good that a constitutional approach to rights of corporations in international law and their determination by arbitral tribunals in a justice evaluation cannot dispense with.

Judicial power by public courts to make legal determinations in national systems is premised on the desirability that national legal systems should be complete in the sense that they must provide answer to every coordination problem and where there is a gap, it is necessary for judges to fill it. This assumption itself draws on the assumption of the public character of the office of judges in national legal systems. Distributive justice may sometimes justify permitting those in public office to exercise discretion to adequately discharge

⁷¹⁹ See Chapter I, Section C (ii) and Chapter III, Section A.

their responsibilities.⁷²⁰ Investor-State arbitrators as opposed to judges in domestic systems do not hold common or public office and do not serve public to enjoy the discretionary authority in hard indeterminacies that judges in domestic systems may sometimes have according to the rule of recognition of the system. National judicial systems are part of the “institutional aspect of the Rule of Law.”⁷²¹ The judicial institution still has certain characteristics earning them the character of a public institution. These characteristics include independence, openness, accessibility, and reviewability.⁷²² All of these features of the public character of the forum constitute prerequisites for justification of common good in varying degrees.

Accessibility in investor-State arbitration is rooted in the market grounds than common good stems. Even on the market basis, the current design of investor-State arbitration only serves the elites of the market actually leaving myriad of small businesses or entrepreneurs without accessible arbitration recourse. This is due to the tremendous cost of investor-State arbitration that only large multinational companies can afford.⁷²³

Openness is also a major issue in investor-State arbitration. The problem of access to information in investor-State arbitration may potentially be repaired by the publication of awards and the documents of the proceedings. According to an academic, unlike the transparency aspect of openness, participation by *amicus curie* is less important because national legal systems, except for the US courts, do not treat this matter as fundamental.⁷²⁴ Nevertheless, the absence of non-party participation in national courts may not be as important because the courts themselves are public office with a public function often without necessitating non-parties’ participation to represent the public than third parties representing private interests. Whereas in investor-State arbitration non-parties like NGOs

⁷²⁰ Finnis, *supra* note 5, at 168.

⁷²¹ See *ibid.* at 271.

⁷²² *Ibid.*

⁷²³ Investment treaty arbitration is actually open to those multinational corporations that can afford hefty costs of arbitration. Van Harten, *supra* note 650, at 141-142. This advocate of public adjudication of investor-State disputes criticizes investor-State arbitration of investment treaties for lacking the features of national courts functioning in public adjudication. *Ibid.* at 152.

⁷²⁴ *Ibid.* at 159-160.

often represent the public not third-party private interests. Although the State is the primary entity to defend its people before investor-State arbitration, non-parties like NGOs representing the interests of the public as a whole or human beings in particular in issues such as human rights and environment can bring an important dimension to their protection affected in a forum which is not itself a public forum. A technical obstacle such as cost implications for the participation of amicus curie in the arbitral proceedings compounds the problem, thus rendering the system less likely to meet this aspect of the common good. Openness is a critical aspect for international arbitration. The tribunals that are making decisions with far-reaching repercussions for a State cannot advance common good without, among others, an open system in which non-parties representing human and public interests and the public itself affected are adequately informed and represented to further check the limits of the tribunal's adjudicative power.

A critical impediment to common good desirability of adjudicative determination in investment treaty arbitration is also the issue of the dependency of arbitrators on the business. Arbitrators lacking tenure security, which domestic judges enjoy, are perceived to depend on those appointing them and the claimant investors instigating claims thereby influencing decisions in favor of investors to keep the business running.⁷²⁵ This is a perceived bias rather than an actual one.⁷²⁶ Nevertheless, it exposes arbitration of investor-State disputes to a systematic partiality in favor of investors. Bias is a perennial problem long lingering in investor-State arbitration. Before the advent of investment treaties, arbitration of State contracts was marred by the perception of bias in favor of multinational corporations through de-localizing or internationalization of the law governing the contract detaching it from the law of the State party. This prompted observers to characterize arbitration of State contracts a private power mechanism.⁷²⁷

⁷²⁵ See Van Harten, *supra* note 650, at 151, 168-173. This scholar, who argues for a public law adjudication in investment treaties, notes that dependency is "the most important reason not to allocate to arbitrators the ultimate authority to resolve core matters of public law." *Ibid.* at 151.

⁷²⁶ See *ibid.* at 173.

⁷²⁷ See: M. Sornarajah, "Power and Justice in Foreign Investment Arbitration" (1997) 14:3 *Journal of Int'l Arb.* 103; Sornarajah, *Settlement of Investment Disputes*, *supra* note ..., at 276.

Investment arbitration deviates from its very fundamental cause, the impartiality of the forum. Investor-State arbitration has risen from a basic assumption that the national courts of the State party may not be impartial in dealing with foreign investors. The impartiality of national courts is also certainly a perceived one. Judges of a public court of a country dealing with investors' claims against their home State are not necessarily deemed partial. Likewise, arbitrators are not necessarily deemed partial. It is not the integrity of arbitrators, some being eminent academics in international law or distinguished judges of the ICJ or supreme Courts of States, in investment disputes that is in trouble. Tribunals such as S.D. Myers, SGS v. Pakistan, ADF, and Methanex to whom others may join indeed illustrate independency from market or corporate interests preoccupation. That does not mean that any arbitral award against a State is necessarily a partial decision either. It is rather the defect of the system of investor-state arbitration to design a framework immune from a perception of dependency for business on corporate and market interests by arbitrators. This is not a systematic deficit for which this study calls for the elimination of the institution of arbitration. This defect rather drastically detracts from the desirability of the power of arbitrators to engage in moral and political evaluation in hard indeterminacies of international obligations of State.

A short answer to the problem of arbitrators' errors in law is an appeal system of judicial review.⁷²⁸ The review of adjudicative decisions may from one angle concern the mechanism for correction of errors within the judiciary itself. Judicial discretion in national legal systems is limited and subject to some safety valve of the judicial and legislative system available to national legal systems. The judicial discretion of judges operates in a structure where judicial decisions are under layers of control in appeal systems from lower courts to higher courts up to the supreme courts. These safety valves are absent in investor-State arbitration and even a single appeal system would be insufficient to mend the

Dezalay and Garth also observed the power-driven de-localization of the substantive law by way of transnational law in arbitral dispute settlement. Yves Dezalay & Bryant G. Garth, *Dealing In Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago: The University of Chicago Press, 1996) at 98.

⁷²⁸ Van Harten, *supra* note 650, at 154.

layers of control disciplining judicial discretion. An appeal body in investor-State arbitration would not be a substitute for the unifier of the content of international law as supreme courts or legislatures unify the opposing legal opinions in national systems. Even if there were a stable, substantial and substantive appeal system in investment arbitration, there still would be the absence of a legislator representing the people affected advancing their common good to reverse judicial determinations. Important for the common good is the public representation in making important decisions that significantly affect a community. The issue here is not simply a correction mechanism for the decisions of the adjudicators by higher courts but the reversibility of decisions by an elected public office like the legislator. Judicial determination even by the supreme courts is systematically open to legislative reversal. Legislators may repeal a supreme court decision by introducing a law. In Hart's words, "elected legislature will normally have a residual control and may repeal or amend any subordinate laws which it finds unacceptable."⁷²⁹ Public representation in the construction of legal rules affecting vital social and economic affairs of a community with assessment of justice demands and policy matters arising in hard indeterminacies lies at the core of the evaluation of the common good for measuring the desirability of an adjudicative determination of the content of the law for a State in investor-State arbitration. Moreover, the authority of courts ultimately consists in the will and ends of human beings that justify the intervention by the courts as a pillar in the check and balance of power equilibrium to constrain the actions of governments that are or should be constituted by the human constituents for the cause of their flourishing. Thus, the intervention of the national courts to construct or make determination of constitutional rights of individuals even in the face of a majoritarian legislator is grounded in this conferment of sovereignty by human beings and this cause for human beings neither of which is relevant to the rights of corporations in international law. The question closely draws on self-determination and self-preservation of States in international law as the other prerequisite for measuring such desirability, which will be discussed shortly.

⁷²⁹ Hart, Concept, *supra* note 5, at 275.

Judicial discretion in national legal systems is accompanied by institutional safeguards not merely within the judicial institution itself but the entire machinery of the State grounded in its constitution. Institutional safeguards systematically though not perfectly ensure both the integrity of the judiciary as an accessible, open, and independent public institution and its integration within the entity of the State leaving avenues to restore the democratic process of legal determinations. These systematic safeguards are missing in investor-State arbitration.

The constitutive elements of a public court and its discretionary power in national legal systems for engaging in legal determinations of rules and obligations are foreign to investor-State arbitration to justify the desirability of adjudicative determination of the rights of corporations and obligations of States. As far as lawmaking power by adjudicators is concerned, a public office bound to advancing the common good with assurances of public service through maintaining an independent forum, accessible to all, with an open process, and decisions that can be reviewed and reversed is required to justify recognition of a constitutional, adjudicative determination of the content of the law. These systematic deficiencies in investor-State arbitration are obstacles to desirability for a reform in the rule of recognition.

Adherence to criteria of legitimacy lends credibility and integrity to investor-State arbitration. Adjudicative determination would be pernicious to the institution of arbitration as well. By adhering to the rule of recognition, arbitral tribunals would also promote the broader objectives of the institution of arbitration as a neutral forum to entertain investor-State disputes. The overall NAFTA Tribunals' credibility lies in their virtual adherence to the rule of recognition not substituting their conceptions of justice for determinations reflected in the practice and opinion of States in hard indeterminacies. The other way round, by relying on devices that turn on the discretion of arbitrators in an evaluative exercise for morality and policy, the very integrity of the institution of arbitration would be at stake. Adjudicative determination in international law may self-defeat the institution of dispute settlement. This self-defeating

ramification for adjudicative creation of the content of rules may in part result from States' disenchantment with the institution of dispute settlement. This is a phenomenon acknowledged by advocates of judicial discretion. Thus, Hersch Lauterpacht views that "[t]he very existence of an international judiciary might be imperiled if, in the present state of international organization, the conviction gained ground among Governments that circumspection and restraint are absent in the conflict between what has been called judicial idealism and the claims of State sovereignty."⁷³⁰ An adjudicative creation of international obligations may accelerate adverse reaction to the very interests it seeks to protect. This has particularly surfaced in States' reactions to the interpretation of their treaty or contractual obligations in investor-State relations.⁷³¹ Therefore, the interests of investors may just as well justify the containment of arbitral discretionary power.⁷³² A State reaction may also manifest in a more direct opposition to investor-State arbitration. For instance, the United States and Australia Free Trade Agreement does not have a binding arbitration mechanism for direct claims of investors against the State parties.⁷³³ Further negative reaction by States is illustrated by the withdrawal of Bolivia and Ecuador from the ICSID Convention.⁷³⁴ These reactions represent counter-production of adjudicative discretion in creating obligations of the States in their treatment of foreign investors, undermining the institution of arbitration itself.

The issue in focus is still far from defeating or diminishing the institution of dispute settlement. It is rather the question of the justification of the common good for a reform in the international rule of recognition for a constitutional approach to rights of corporations and obligations of States. Such a justification collapses in light of the deficits of the public characteristics of courts in investor-

⁷³⁰ Hersch Lauterpacht, *The Function of the Law in the International Community* (Hamen: Archon Books, 1966) at 104.

⁷³¹ See above, Section, B (i) (c) (2).

⁷³² See also: Loewen, *supra* note 667, at para. 242; Van Harten, *supra* note 650, at 146.

⁷³³ US-Australia FTA, *supra* note 678, Article 11.16.

⁷³⁴ See ICSID Convention, List of Contracting States, available online at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English>.

State arbitration. The question may now be explored in terms of another aspect of common good reflected in the value of self-determination of States.

b) Self-Determination and Human Rights to Development and Regulation

There is a general argument that investment helps the economy, creates jobs, and in the end is supposed to contribute to the wealth of people and persons. There is no doubt that investment backed by sound policies could contribute to economic growth and eventually benefit human communities. Yet, this does not warrant the determination of the protection of foreign investment and the concomitant justice and policy assessment in hard penumbra by arbitral tribunals. It rather necessitates States' freedom to devise and revise their economic policies for the well being of their people and leaving the protection of foreign investment to the specific or general consent of States. The question of presumption of the freedom of action of States in foreign investment and rights of corporations being subject to contingent principles and the consensual limitations on the conduct of States in this field is a basic one that previous chapters dealt with in great length. Now the question is whether it is desirable to treat rights of corporations and the contingent principles in a constitutional approach to justify the adjudicative creation of obligations limiting the conduct of States. This may now be discussed in view of self-determination of States and the rights of peoples and human beings to development and regulation.

Self-determination constitutes a basic value of international law.⁷³⁵ It is part of the basic value of self-determination recognized by international law for the nations to determine their social and economic policies. The Charter of the United Nations has expressed this principle in Articles 1 (2) and 55.⁷³⁶ This structural principle has also been enunciated as one of the basic principles of international law in the Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with

⁷³⁵ For basic values, see Chapter II, Section C (i) (a).

⁷³⁶ Charter of the United Nations, *supra* note 195.

the Charter of the United Nations.⁷³⁷ Covenants on human rights embody this basic value providing that “[a]ll peoples have the right of self-determination.”⁷³⁸ As a basic value of the international community, by virtue of the requirement of practical reasonableness, self-determination must be respected in every act without being directly attacked.⁷³⁹

Self-determination underscores other rights of peoples and human beings in international law. Self-determination is the underlying tenet for the economic sovereignty and rights of States including the concept of sovereignty over natural resources.⁷⁴⁰ It equally underlines the “right to development”.⁷⁴¹ A fortiori, States’ right to regulate public affairs according to the rules of international law is a basic right of States in protection of human beings and promotion of human rights. The common good also requires States representing peoples to build social and economic infrastructures and regulate the economic activities for the good of the human constituents.

The right to expropriation, particularly in issues of economic development such as natural resources is also grounded in this basic value of international law. Thus, recognition of the right to expropriate the property of foreign investors is rooted in the protection of human rights in the collective sense and the self-determination of States. Grounded in sovereignty and self-preservation of States, the right of States to expropriate property of foreign investors is the uncontested element of all practices and instruments on the protection of aliens in international

⁷³⁷ Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States, *supra* note 195.

⁷³⁸ Article 1 (1) of The Covenant on Economic, Social and Cultural Rights G.A. Res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976. (“1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”) *Ibid*.

⁷³⁹ See *supra* notes 330, 383-384 and accompanying text.

⁷⁴⁰ See Brownlie, *Legal Status*, *supra* note 445, at 255.

⁷⁴¹ See Declaration on the Right to Development, GA Res. 128, U.N. GAOR, U.N. Doc. A/RES/41/128 (1986). Article 1 (2) of the Declaration provides that “[t]he human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, *the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.*” [Emphasis added]

law.⁷⁴² All key General Assembly Resolutions on the subject affirm this right despite their variations on the exercise of the right.⁷⁴³ These resolutions varied in the substance they provided and the support they received.⁷⁴⁴

The ILC Report suggested a general status to the principle of acquired rights.⁷⁴⁵ However, the right to expropriate rooted in the structural principle of self-determination and self-preservation of States, presuming States' freedom in economic actions towards foreign corporations, may shrink to a lip service if the principle of acquired rights or other substantive principles in the field of foreign investment are to be of presumptive character. Under customary international law on State responsibility, in the words of the ILC Report itself, "an act of expropriation, pure and simple, constitutes a lawful act of the State and, consequently, does not *per se* give rise to any international responsibility whatever" except "*in the exceptional circumstances.*"⁷⁴⁶ If those exceptional circumstances giving rise to State responsibility are supposed to be culled from contingent general principles with their reach to infinite instantiation possibilities, no conduct of State would be immune from a selective conception of justice as a ground of State responsibility instead of established rules of international law. On this note, the police power, eminent domain, necessity and other exceptions are not exceptions to general principles of protection of property. These exceptions have been raised with regard to State responsibility.⁷⁴⁷ Other general or specific exceptions within investment treaties or international law have the same function of exempting State responsibility. State responsibility may only arise from a

⁷⁴² See ILC 1959 Report affirming that the right of States to expropriate or nationalize property "has been regarded ... in the so-called right of 'self-preservation', which allows it, *inter alia*, to further the welfare and economic progress of its population." ILC 1959, *supra* note 592, at p. 11, para. 41.

⁷⁴³ UN General Assembly Resolutions on Permanent Sovereignty over Natural Resources, Declaration on the Establishment of a New International Economic Order, and the Charter of Economic Rights and Duties of States, *supra* note 592.

⁷⁴⁴ See Garcia-Amador, *The Emerging International Law of Development: A New Dimension of International Economic Law* (New York: Oceana Publications, 1990) at 135-171. [Garcia-Amador, *International Law of Development*]

⁷⁴⁵ See *supra* note 617 and accompanying text.

⁷⁴⁶ ILC 1959 Report, *supra* note 592, at p. 11, para. 42.

⁷⁴⁷ The police power is an exemption from responsibility alongside other excuses such as state of necessity or force majeure for the destruction of alien property. See ILC 1959 Report, *supra* note 592, at p. 11, para. 43. On exceptions to internationally wrongful acts, see also Articles 20-26 of Draft Articles on State Responsibility, *supra* note 54.

violation of a primary rule of international law.⁷⁴⁸ Thus, responsibility requires existence of a primary obligation and the exceptions may justify a relief from responsibility for a wrongful act. Still, what constitutes a wrongful act depends on the content of the obligation in the first place, a task that ILC ultimately abandoned with respect to the protection of alien including their property in view of controversy surrounding general principles advanced in this field and particularly foreign investment. Breach of a primary obligation requires the determinacy of the obligation for its scope before being capable to give rise to a breach. The contingency and consensual character of the rights of corporations shed light on the question of police power and other exceptions whether of treaty or customary origin in the legal discourse of property protection in foreign investment. A police power exception discourse within a constitutional regime such as the United States is not a valid analogy for international law on foreign investment since no such constitutionality exists in international law. These exceptions concern State responsibility arising from the violation of existing primary rules. They do not concern the content of the primary rules themselves in hard indeterminacies. Wherever an obligation is established, a State must demonstrate existence of such exceptions to relieve from responsibility. Yet, the demonstration of the obligation itself for the alleged instances in the first place is a fundamentally different matter resting on the foreign investor. Where a primary obligation is itself indeterminate in as to a particular hard instance, it initially requires a customary or conventional specification of such an instance. This is a key issue to distinguish the police power, eminent domain, necessity and other exceptions to State responsibility under conventional or customary international law from hard indeterminacies where the content of obligation is indeterminate as to an ambiguous instance. In such a case, an alleged violation of an indeterminate rule poses not a question of fact but the very existence of the rule in the first place

⁷⁴⁸ See Draft Articles on State Responsibility, *supra* note 54, Article 2: “There is an internationally wrongful act of a State when conduct consisting of an action or omission: ... b) Constitutes a breach of an international obligation of a State.” *Ibid.* Article 2 of the Draft Articles “specifies the conditions required to establish the existence of an internationally wrongful act of the State.” Commentary to Article 2, para. (1), Commentaries to the Draft Articles on State Responsibility, *supra* note 425.

for the claimant investor to demonstrate. None of these exceptions excusing State responsibility becomes even relevant where the primary obligation is in the hard indeterminacy zone. Only if the rights of foreign corporations in international law and corresponding obligations of States are treated in a constitutional approach in a matter of principle do such exceptions surface as relevant to the determination of the content of obligations. Yet, in foreign investment both practices and the common good stand against a constitutional construction of rights of corporations and corresponding obligations of States in a matter of principle.

State responsibility may not arise from contingent principles for a hard case whose legal status has not received determination within the framework of international law. Otherwise, in the grand area of contingent principles surrounding coordination problems in international law, State responsibility can follow from any conduct that the adjudicator conceives contrary to international law. It is affirmed that “[s]ince States have rights to far-reaching social reforms, the respect due to the property of aliens cannot be absolute so as to prevent any action by the States which might diminish or even extinguish their property rights.”⁷⁴⁹ States’ right to self-determination and self-preservation in international law underscoring their rights to development, expropriation, and regulation maintains their prerogative status in international law for the presumption of the lawfulness of their actions in international law on foreign investment requiring a rule of international law to the contrary. Brownlie describes, “State measures, *prima facie* a lawful exercise of powers of government.”⁷⁵⁰ Another dimension to this structural presumption in favor of the conduct of States grounded in their self-determination requiring demonstration of restrictive rules in foreign investment is the jurisdictional right of States under international law to regulate property or contract within their territory. Hence, the ILC observed the right of expropriation “as a discretionary power inherent in the sovereignty and jurisdiction which the State exercises over all persons and things in its territory”⁷⁵¹ More precisely, Brownlie states “[i]t is always admitted that *presumptively* the ordering of persons

⁷⁴⁹ Oppenheim, *supra* note 119, at 912.

⁷⁵⁰ Brownlie, *Principles*, *supra* note 424, at 509.

⁷⁵¹ ILC 1959 Report, *supra* note 592, at p. 11, para. 41

and assets is an aspect of domestic jurisdiction of a State and an incident of its sovereign equality and independence in the territorial sphere. Customary law contains long-established *exceptions to the territorial competence of States*.⁷⁵² The international law exceptions to sovereign powers of States recognized by international law to secure their self-determination and self-preservation in economic development and regulation of economic affairs in the interests of their people cannot be assumed on a contingent principle or creation by the tribunal.

Common good does not support a determination power for arbitral tribunals in foreign investment disputes to engage in moral and political evaluations creating the content of international obligations of States in hard indeterminacies. It would be far from desirable if arbitral tribunals were to create international obligations for States restricting their constitutional capacity for adopting or implementing social and economic policies for the wellbeing of their people or diminishing their funds by way of compensation to foreign corporations because of such policies. In view of the vast variety of States' actions for the public wellbeing, such a power for arbitral tribunals would directly attack the basic value of self-determination of a community by transferring justice or policy assessments for every public program in the field from the democratic decision-making processes of States to arbitral tribunals. Self-determination is a basic value of the international community that can be not focused but cannot be directly attacked. The supposition of a determination a power for investment arbitral tribunals as a general state of the law is not only unsupported in practice but unjustified from the point of common good as well. Such a power would directly attack self-determination of States thereby violating the requirement of reasonableness for respect for every basic value in every act. Arbitral tribunals cannot presuppose an implied power, which would lead to a direct attack of a basic value of self-determination of a State in deciding its conduct for the wellbeing of its people not restricted by established rules of international law.

If in relation to human beings limitations upon the freedom of action of States is to be measured solely in a consensual regime of obligation requiring the

⁷⁵² Brownlie, *Principles*, supra note 424, at 500. [emphasis added]

consent of States, it leaves much to deplore. Consent does not explain the whole normative gamut of primary rules for restrictions on the conduct of States in international law. In relation to human beings, there exist both absolute rights that do not originate in the consent of States and constitutional rights whose construction departs from the consent of States in a constitutional interpretation and determination in favor of human beings. The key to this scheme of rights for human beings is the justification of the common good. The field of human rights stands out in a distinctive structure because human beings are the ultimate and genuine element of the common good and basic values of life, community, etc. that gauge the basic values of the international system such as sovereignty in adherence to human basic values for which the international community complements national communities.⁷⁵³ Sovereignty belongs to the structure of international law viewed from this complementary perspective for securing basic human values thereby collapsing whenever departing from advancing the common good of human beings including through restrictions on States in a constitutional scheme of determination of rights of human beings by way of principles.

It is part of the duty of States to human beings to regulate domestic affairs for a prosperous economy, for development, for clean water, air and environment, for healthy and safe living conditions, and for equal chances in life for every human being. Common good justifies a consensual scheme of rights of corporations and obligations of States that allows States to steer their regulatory wheel to devise and revise social and economic programs to enhance living conditions of human beings. Moreover, what lends legitimacy to sovereignty of States in the end is the good of human beings constituting States and voting for the political powers that are from the common good standpoint subject to restrictions wherever such powers fail to advance the flourishing of human beings. States have obligations towards human beings who actually vote and establish them or in principle should. Governments are accountable to the people as they are or should be constituted 'by the people and for the people'. There is a

⁷⁵³ See supra notes 310-312 and accompanying text.

bond of common good between human beings and States to which the authority of States is bound. The accountability of States towards human beings justifies subordination of the political powers to what the good of human beings demands. Sovereignty and other values of the international system safeguarding States, therefore, may be subordinated to basic values of human beings where the life and dignity of human beings are at issue. These values of international law, however, may not be subordinated to the instrumental value of the property of corporations in a scheme of constitutional determination of rights of corporations in a direct attack of self-determination of States. The consensual scheme in foreign investment is indeed a common good requirement to safeguard rights of human beings against multinational corporations that are no less-powerful than many States demanding the protection of human beings against their actions just as against the abuse of power by States. The rule of recognition of international law supported by practices and common good does not permit a constitutional approach in foreign investment in the sense that the determination of the content of rules implicating the capacity of States to regulate their affairs for the benefit of human beings transfers from the competence of States to that of arbitral tribunals.

If investment arbitral tribunals were to assume such a determination power in hard cases, States and their human constituents would lose their voice in matters that vitally affect them. There is no justification for malleable moral and political conceptions to permeate the decisions of investor-State arbitral tribunals in hard indeterminacies. Giving effect to a treaty provision or customary rule in foreign investment does not entail the creation of obligations not accorded by the treaty or the customary rules as in penumbral situations occur. The rejection of a claim due to the absence of an obligation and its violation in a consensual frame of obligations in foreign investment is also a legal effect although it might not be a desirable one to some observers. Desirability is the realm of political and moral evaluation not representative of the statement of the existing law. If any gap in the hard penumbra in foreign investment were deemed a gap to be filled rather than absence of an obligation, there would be no room for a meaningful participation by States to engage in determination of the content of their obligations. If against

the practices and common good justifications the power of an investment tribunal is stretched to determine the content of States' obligations in hard indeterminacies, this not only shrinks the efficiency of international law by making its rules uncertain but also shreds its legitimacy making the system uncertain and incoherent by disposing of its rule of recognition. If moral and political evaluations in hard indeterminacies were supposed to vest in arbitral tribunals, then treaties and customary international law as the prime sources for State participation in international rulemaking would merely be either a subordinate or a neutral source. In such a scenario, no State would any longer be an effective actor in the formation of rules for novel situations that vitally matter for them. For the protection of corporations, the structure of international law remains a consensual determination of the rights of corporations and corresponding obligations of States to be broken down in specific rules to impose obligations on States. Both practices shaping the rule of recognition and the common good justifying that rule in international law maintain this scheme of solving coordination problems in the field of foreign investment.

There will be little point for nations in engaging in investment agreements if the purpose of these agreements is not to be construed for the ultimate benefits of nations to promote their higher living standards, wealthier societies, and healthier environments. This ultimate goal is achieved, far beyond through investment attraction, by means of the structural capacity of States to regulate investment flows and activities to ensure that the desirable effects of investment are both actually delivered and constantly delivered without destroying or eroding other infrastructures of the human community such as health, environment, culture, labor protection, and the economy itself. Compounded by the lack of the public character of investor-State arbitral forums, the common good will be destroyed or severely diminished if the very means, i.e. the regulatory power, required to protect basic values of human beings is to be curtailed by obligations created by arbitral tribunals rather than international law. The scheme of self-determination of States in regulating and controlling foreign corporations cannot be predicated on a constitutional adjudicative creation of obligations and their

retrospective application to States claimed to be violating them, thereby unduly deterring States from fulfilling their own constitutional tasks and duties towards human beings or subjecting them to compensation, often in huge amounts. Practices in international law reject a scheme of a constitutional determination of rights of foreign corporations and implied adjudicative determination power by arbitral. Nor does the common good justify the desirability for such a scheme.

Factual analysis of the question of expropriation in hard indeterminacies is restricted to ascertaining whether an alleged instance is covered by the scope of primary rules on that issue duly established in international law without employing contingent principles or engaging justice assessments. Moral or policy evaluation underlying the determination of rules on expropriation, being a creative task, should not permeate the factual assessment of the conduct of States in violation of existing obligations. In foreign investment general principles of law are not substitute for customary international law so that anytime a customary international rule is hard to establish, a general principle of law be advanced to rationalize a desired outcome. Determination of the scope of obligations for expropriation of foreign investors' property in measuring the conduct of States and its consequence in hard indeterminacies is according to the criteria of legitimacy reserved for States. Customary international law is the appropriate source to cull legal determinations of primary obligations of States in hard indeterminacies towards corporations in foreign investment.

CHAPTER V

CUSTOMARY DETERMINATIONS AND HARD PENUMBRA IN THE CONCEPT OF EXPROPRIATION

Absent a particular authorization for arbitral tribunals to make decisions according to justice, it requires determination in the customary framework of international law to impose an obligation on States for their conduct and its consequence for the expropriation of the property of foreign corporations in hard indeterminacies. Accordingly, to identify the content of rules of international law on expropriation, recourse must be made to the constituent elements of customary law. To this end, *opinio juris* and practice in the analysis offered in this study for judgments building customary determination will be employed to identify the statement of the law.⁷⁵⁴ Hard indeterminacies in the concept of expropriation as to the conduct of States for exercising regulatory measures and compensation for exercising economic reforms in natural resources will be examined.

A. State Regulation for Public Wellbeing

The question that is addressed here with regard to the conduct is whether bona fide regulation of States interfering with foreign investment constitutes indirect expropriation in international law making States liable for compensation. What is meant by bona fide regulations, in the language of recent investment treaty practice, are “regulatory actions ... designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment.”⁷⁵⁵ Thus, the subject of regulation examined below is limited to the question of bona fide regulation including that for environment, health, safety, or other forms for human protection including human rights and subjects falling within the sustainable development discourse.⁷⁵⁶

⁷⁵⁴ See Chapter III, B. It should be reminded that while a few negative indications may suffice to show non-existence of a rule, many indications might not suffice to demonstrate the existence of a customary rule.

⁷⁵⁵ For this provision, see *infra* notes 830-836 and accompanying text.

⁷⁵⁶ There are other forms of actions that may also be identified as regulatory. For instance, actions to maintain public order such as confiscation under penal statutes or the question of regulatory

i. Lex Lata in the Background

In 1962, the General Assembly of the United Nations passed the Resolution 1803 on Permanent Sovereignty over Natural Resources. The Resolution 1803 constitutes a significant instrument for exploring opinions and practices both before and after the Resolution in order to appraise the status of customary law on each particular question about expropriation and compensation for it in international law.⁷⁵⁷ However, to represent customary law, it requires examination of other practices and opinions to meet the requirements of *opinio juris* and State practice for each particular instance. The Report on State Responsibility prepared by the ILC in 1959 provides important data as to these practices and opinions. With regard to expropriation, Article 4 of the Resolution 1803 provides that

Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law....⁷⁵⁸

The Resolution 1803, just as with many investment treaties, does not define expropriation, nationalization, or requisition. State acts on a wide-scale program for transferring ownership from private owners to public ownership usually in key economic sectors or industries is commonly known as nationalization. Therefore, nationalization has found a distinct term of art in international law as the prototype of an “impersonal” or “general” act of expropriation as opposed to

taxation which usually follow specific provisions under tax treaties for which international law does not consider liability for compensation. To the contrary is the example of actions that are regulatory or implemented by legislation or regulation such as nationalizations that expropriate the property of foreign investors but international law does require compensation.

⁷⁵⁷ Permanent Sovereignty over Natural Resources, GA Res. 1803, *supra* note, 592.

⁷⁵⁸ *Ibid.* Article 4.

“individual or personal” acts of expropriation targeting individual property.⁷⁵⁹ This also carries a distinct legal situation, which would be revisited. Expropriation in general denotes “the deprivation of a former property owner of his property.”⁷⁶⁰ Substance still overrides the terminology.⁷⁶¹ What matters is the substance and status of international law on the particular hard penumbral question of bona fide regulations for public wellbeing affecting foreign investment.

Before the question of bona fide regulation arose as a hard penumbra in investment treaty arbitration, the instances, views and practices surrounding the customary rule concerned direct expropriation primarily and more recently expropriation in indirect forms. It should be reminded that many arbitral cases of the past featured a special mandate in one way or another for the tribunal to decide also on the basis of equity or justice, which do not represent the law for later cases.⁷⁶² Prior to 1960s, instances of direct expropriation underlay the practice and opinion of States as to the customary concept of expropriation for a duty of compensation. In these instances, the State’s intent to expropriate was either express or obvious, the conduct resulted in the deprivation of property through physical seizure or removal of title, and the State was directly enriched as a result of the act.

The elements of intent, deprivation, and enrichment were involved in both individual expropriations and expropriations of general application not targeted against a specific property.⁷⁶³ The latter expropriations occurred under reforms in agrarian, mining or other sectors, which were sometimes motivated by revolutionary changes in the political structure of States as in France, the former Soviet Union, Mexico, Poland, former Czechoslovakia, former Yugoslavia, Bulgaria, Hungary, Romania, Albania, and Germany (Eastern zone) and

⁷⁵⁹ 1959 ILC Report on State Responsibility, *supra* note 592, p.13, para. 48. (“There are also other differences, including some fairly marked ones, between nationalization and expropriation pure and simple, but any attempt to point them out would show that many of the characteristic features of the former can also be found, and in fact, often are found, in the latter. In brief, therefore, except in the matter of compensation, where important distinctions can be noted, the two juridical institutions are, at least from the point of view of international law, substantially the same.”) *Ibid*.

⁷⁶⁰ Oppenheim, *supra* note 119, at 916, n. 9.

⁷⁶¹ Brownlie, *Principles*, *supra* note 424, at 508.

⁷⁶² See Chapter III, Section A (ii) (a) (1).

⁷⁶³ See Friedman, *supra* note 616, at 7-66.

sometimes for development programs as later in France, Great Britain, and Japan.⁷⁶⁴ These elements also prevailed in the actions by Cuba in 1960 with regard to the property of foreigners in the sugar and oil industries and the expropriation of the Dutch property by Indonesia.⁷⁶⁵ These features were also extant in outright nationalizations since 1950s mostly in the context of oil concession agreements, which peaked in 1970s and 1980s.⁷⁶⁶

The arbitral views also implicated cases featuring the elements of intent, deprivation and direct enrichment. These characteristics existed in the deprivation of movable or immovable property usually the land owned by an individual.⁷⁶⁷ The cases concerning requisition of property carried the same features.⁷⁶⁸ Moreover, these elements characterized the cases of holders of concessionary property rights as intangible rights.⁷⁶⁹

Concurrent to these instances and cases, there were acts interfering with economic activities or businesses that generally did not rise to the level of international law at all for (or an expression of desirability for) a duty for compensation in international law because they represented the eminent domain of States. Examples include, measures taken by the United States, France, and

⁷⁶⁴ Ibid. at 14-66.

⁷⁶⁵ See Christie, G.C. "What Constitutes a Taking of Property Under International Law?" (1962) 38 Brit. Y.B. Int'l L. 307, at 307- 308

⁷⁶⁶ See: Petroleum Development (Trucial Coast) Ltd. v. The Sheikh of Abu Dhabi (1951), 18 I.L.R. 144; Ruler of Qatar v. International Marine Oil Company (1953), 20 I.L.R. 534; Saudi Arabia v. Arabian American Oil Company (1958), 27 I.L.R. 117; Sapphire International Petroleum Limited v. The National Iranian Oil Company (1967), 35 I.L.R. 136; BP Exploration Company (Libya) Limited v. Government of the Libyan Arab Republic (1973), 53 I.L.R. 297; Libyan American Oil Company (LIAMCO)/ The Government of the Libyan Arab Republic (April 12, 1977), 20 ILM 1 (1981); Texaco Overseas Petroleum Company and California Asiatic Oil Company v. The Government of the Libyan Arab Republic (19 January 1977), Award on Merits, 17 ILM 1 (1978); The Government of the State Kuwait/The American Independent Oil Co. (1982), 21 I.L.M. 976 [Aminoil]

⁷⁶⁷ For instance, See the Jonas King Case (1853), 6 Moore Digest, pp. 262-264. The case was also a question of denial of justice. Ibid.

⁷⁶⁸ See for instance, the Norwegian Ship-owners Claims, P.C. A., Award No. 18, (Norway v US) 1 R.I.A.A. 307 (1922).

⁷⁶⁹ Early concessions disputes included the Delagoa Bay Railway Case (1891) held by American individual Edward McMurdo. 6 Moore, Digest, 647. For recent nationalizations of concessions see, *supra* note 766.

others in prohibiting the manufacturing of certain products.⁷⁷⁰ Likewise, cases of partial interference of the sort of good will of a company were deemed not to give rise to a duty for compensation.⁷⁷¹ The tradition of outright expropriations has become dormant though susceptible to eruption in any major political or economic turmoil. This has shifted both practical and empirical judgments to indirect expropriation.⁷⁷²

The Polish Upper Silesia and Norwegian Ship-Owners cases emerged where the Tribunals found intangible property rights under contracts related to the expropriated tangible property to be expropriations just as well despite the fact that the respective States did not purport to expropriate the contracts.⁷⁷³ These are the prime cases assumed to indicate that the intent of the State is not necessary for expropriation to arise, representing cases of indirect expropriation.⁷⁷⁴ Still, the elimination of the intent of the State altogether from elements of expropriation does not follow necessarily from Upper Silesia and Norwegian Ship-Owners

⁷⁷⁰ For these prohibiting measures in the US and France, see Friedman, *supra* note, 616, at 50-51. France and Italy also adopted measures creating State monopoly to perform certain activities or manufacturing certain products. *Ibid.* at 52-55.

⁷⁷¹ Oscar Chinn case, (1934) Permanent Court of International Justice, series A/B, No. 63, p. 88. Thus interference with good will, following PCIJ holding in Oscar Chinn case, was considered not to give rise to expropriation in itself although may be considered a factor of valuation for an expropriated property. Recently, the Methanex Tribunal endorsed this view that goodwill and market share can be counted in valuation. Methanex, *supra* note 660, at para. 17. See also Gillian White, *Nationalisation of Foreign Property* (London: Stevens & Sons Limited, 1961) at 49.

⁷⁷² Indirect expropriation has been raised in terms such as 'indirect,' 'disguised,' 'de facto,' 'creeping,' or 'constructive.' See Burns H. Weston, "Constructive Takings' Under International Law: A Modest Foray into the Problem of 'Creeping Expropriation'" (1975)16 VA. J. INT'L L. 103, at 106. On indirect expropriation see also Christie, *supra* note 765; Rosalyn, Higgins "The Taking of Property by the State: Recent Developments in International Law", (1982-III) 176 Recueil des Cours 259; Rudolf Dolzer, Indirect Expropriations: New Developments? 11 N.Y.U. ENVTL L.J. 64, 68 (2002); W. Michael Reisman & Robert D. Sloane, "Indirect Expropriation and Its Valuation in the BIT Generation"(2003) 74 Brit. Y.B. Int'l L 115; Jan Paulsson, Indirect Expropriation: Is the Right to Regulate at Risk? TRANSNAT'L DISP. MGMT., Apr. 2006, at 1.

⁷⁷³ Norwegian Ship-owners, *supra* note 768, at 332-334; The Case Concerning German Interests in Polish Upper Silesia, P.C.I.J. ser. A, No. 7, at 32 (1926).

⁷⁷⁴ Christie, *supra* note 765, at 310-311. ("even though a State may not purport to interfere with rights to property, it may by its actions, render those rights so useless that it will be deemed to have expropriated them." *Ibid.* at 311; Higgins, *supra* note 772, at 323. These two cases "indicate that an expropriation of a given property may in fact—regardless of the Stated intention—*involve a taking of closely connected ancillary rights.*" *Ibid.* at 323. For an earlier case on the deprivation of a piece of land indicating no requirement of express intent to expropriate, see De Sabla Case, US-Panama Claims Commission, 7 I.L.R. 241. The case, however, concerned the denial of justice (lack of due process) in the procedures imposed on the individual claimant to protect her property. *Ibid.* at 243.

cases. Firstly, as practical views these decisions do not *per se* change the element of intent existing in the overwhelming instances upon which the State practice and opinion built the customary rule for expropriation. Secondly, these cases, and apparently the academic views on them, concerned the question of ‘express’ or ‘stated’ intent not the ‘existence’ of intent to expropriate on the part of the State. Thirdly, in both cases the contractual claims were ancillary and part of the physical taking of assets (ships and factory). It is very plausible that those tribunals inferred the intent to expropriate the ancillary intangible rights from the intent of the State to expropriate the tangible property. In other words, these cases were not addressing bona fide regulatory measures of States. Thus, to count the decisions in Upper Silesia and Norwegian Ship-owner cases even as practical views in favor of the rejection of the intent of the State as a necessary element to characterize regulatory measures as (indirect) expropriation liable to compensation is of much doubt.

The events and views underlying the practice and opinion of States embodied the elements of intent, deprivation and direct enrichment in the concept of expropriation. Regulation was not the focus of instances of the expropriation rule. Neither did practical views exist to provide proposals for the *opinio juris* and subscription by State practice to conceive bona fide regulation as part of the concept of expropriation under the customary law reflected in the opinion and practice of States. Regulation was not the subject of opinions and practices building the customary rule.

There is a tendency to tie the question of regulation in international law to indirect expropriation. Originally, indirect expropriation concerned the form of expropriation for situations with all the characteristics of intent, deprivation, and enrichment but without outright seizure of property, or formal transfer of title or ownership or formal expression of intent, formal decree or other formal forms. Indirect expropriation was not meant to capture legitimate State regulation by the sole effect or removal of intent. Indirect expropriation was exclusive of bona fide

regulation. The Harvard Draft was less clear on this point.⁷⁷⁵ This conception of indirect expropriation found more expression in the OECD Draft Convention on the Protection of Foreign Property in 1967 explaining the notion of indirect deprivation under Article 3:

By using the phrase ‘to deprive...directly or indirectly ...’ in the text of the Article [3] it is, however, intended to bring within its compass any measures taken *with the intent of wrongfully depriving* the national concerned of the substance of his rights and resulting in such loss (e.g. prohibiting the national to sell his property or forcing him to do so at a fraction of the fair market price).⁷⁷⁶

Likewise, the Commentary on the American Law Institute’s Restatement Third of Foreign Relations Law of the United States separated bona fide regulation from measures in forms that may harbor elements of indirect expropriation. The Commentary noted that

A State is responsible as for an expropriation of property when it subjects alien property to taxation, regulation, or other action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien’s property or its removal from the State’s territory... A State is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of States, if it is not discriminatory...⁷⁷⁷

More importantly, this conception of indirect expropriation was the natural corollary of the status of customary international law on bona fide regulation,

⁷⁷⁵ According to the Harvard Draft a ‘taking of property’ was described “not only an outright taking of property but also any unreasonable interference with the use, enjoyment or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy or dispose of the property within a reasonable period of time after the inception of such interference.” See Article 10 (3) (a) of the Harvard Draft on Responsibility of States for Injuries to the Economic Interests of Aliens, *supra* note 69.

⁷⁷⁶ OECD Draft Convention on Foreign Property, *supra* note 68, Article 3. 4(a). [emphasis added] Further, it was provided that “...Thus in particular, Article 3 is meant to cover “creeping nationalisation” recently practiced by certain States. Under it, measures otherwise lawful are applied in such a way: “...as to deprive ultimately the alien of the enjoyment of value of his property, without any specific act being identifiable as outright deprivation. As instances may be quoted excessive or arbitrary taxation; prohibition of dividend distribution coupled with compulsory loans; imposition of administrators; prohibition of dismissal of staff; refusal of access to raw materials or of essential export or import licences.” Ibid. 4 (b).

⁷⁷⁷ Restatement Third, *supra* note 70, Section 712, Comment g.

which did not look to the effect but the unlawful character of the conduct as well to characterize a regulation as expropriation. In their study of postwar lump sum agreements, Lillitch and Weston observed that “postwar international claims tended to define ‘indirect’ foreign-wealth deprivations as *effective* and *permanent* denials of the ‘use and enjoyment’ of alien-owned property, and . . . compensated for such deprivations . . . *only to the extent that the claimed losses have not resulted from good-faith (i.e., nondiscriminatory) exercises of regulatory power.*”⁷⁷⁸ They further stated that “customary international law generally has reached the same results.”⁷⁷⁹

Notwithstanding the involvement of factual issues in questions of indirect expropriation, under customary international law there has been a legal criterion with respect to characterization of regulation as expropriation, which is of essential necessity. Customary international law has required an additional element of unlawfulness to characterize a regulation as (indirect) expropriation. Not only the intention of the State but also intention in bad faith through the unlawful character of the regulation under international law was required to qualify compensation. What is meant by the unlawful character here for the characterization of regulation as expropriation includes a breach of a condition of legality of non-discrimination, public purpose and due process determined in customary international law to describe what is ‘arbitrary’ and wrongful not solely a breach of a treaty.⁷⁸⁰ Customary international law recognizes the power of States to regulate as a matter of self-determination and sovereignty unless the regulation by character is unlawful. The line between indirect expropriation and non-compensable regulation might often be in factual terms so nebulous but that does not dispense with the juridical line in terms of the demonstration of the unlawful character of the regulation as per customary determinations.

⁷⁷⁸ Richard B. Lillitch and Burns H. Weston, *International Claims: Their Settlement by Lump Sum Agreements* (Charlottesville: University Press of Virginia, 1975.) vol. 1, at 173. [Lump Sum Agreements 1975] [emphasis added]

⁷⁷⁹ Ibid.

⁷⁸⁰ For a distinction between unlawful *per se* due to breach a treaty commitment not to expropriate and unlawful by way breach of conditions against arbitrariness, see 1959 ILC Report on State Responsibility, *supra* note 592, p. 13-14, paras. 50-51. See also *infra* notes 841-844 and accompanying text.

International law imposed no limitation on regulation except under rules such as non-discrimination or due process whereby compensation may be required for interference with property as a result of discrimination or lack of due process amounting to denial of justice in international law. Adverse regulatory measures have been compensable in international law by virtue of their unlawful character—not their effect or otherwise—for specific wrongful actions such as discrimination or lack of due process resulting in denial of justice. These situations carry the element of not only the intention of the State but also intention in bad faith under such specific rules of international law.

Before the rise of investment treaty arbitration in the post-NAFTA era, no sustained practical view existed to even set a proposing stage for States' subscription through their practice and opinion to conceive, include, and recognize bona fide regulation as a compensable conduct under the concept of expropriation in customary international law. Past instances of expropriation and practical views requiring compensation for them do not support that States in their practices and opinions on accepting the duty to pay for compensation were accepting a limitation on their bona fide regulations as compensatory in international law. No such limitation existed in international customary law. This is, furthermore, the conception of indirect expropriation expressed by States today as to their obligation for expropriation and 'effect tantamount or equivalent to expropriation'. The clarification offered in certain recent investment treaties that has gained momentum since 2004 by the introduction of the new US Model BIT explains this conception of indirect expropriation as "an action or series of actions" which "has an effect equivalent to direct expropriation without formal transfer of title or outright seizure."⁷⁸¹

In international law, bona fide regulation has been a lawful act without liability for compensation not as a matter of police power doctrine in domestic

⁷⁸¹ See U.S. 2004 Model BIT, *supra* note 620, Annex B, para. (4); Canada Model BIT, *supra* note 664, Annex B.13(1). For the treaties having this clarification, see *supra* notes 678-682. ("Tantamount" means equivalent and thus the concept should not encompass *more* than direct expropriation; it merely differs from direct expropriation which effects a physical taking of property in that no actual transfer of ownership rights occurs.") Glamis, *supra* note 610, at para. 355, citing S.D. Myers.

systems rather by virtue of international law's own basic value of self-determination and structural sovereignty. A conception of indirect expropriation to include bona fide regulation to fall within the scope of the concept of expropriation, as a hard penumbra requires determination in customary international law to meet the legitimacy requirements of coherence and recognition. The categorization between direct and indirect expropriation should not be the focus of the legal analysis. Rather whether there is a customary determination to impose a limitation on States to make them liable to compensate for bona fide regulation in the absence of an unlawful element determined in customary international law itself such as a violation of the non-discrimination rule.

The problem is in the first place rooted in the tendency to draw from the (indirect) expropriation rule in international law a principle of general application applicable to all State measures that ignore the legitimacy criteria requiring coherence of the content of the law for each hard penumbra according to the rule of recognition. Even if there exists or emerges a criterion— like the sole effect of the State's conduct irrespective of the State's intent— for measuring direct or indirect expropriation, such a criterion may not automatically transfer in a principle fashion to the hard penumbra of bona fide regulations to express their legal status in international law. The particular situation of bona fide regulation is a hard penumbra in the legal concept of expropriation in international law that follows its own criteria of legitimacy for coherence and recognition in a customary determination not to be borrowed in analogy from either domestic approaches or approaches in international law on other instances of direct or indirect expropriation. For a positive customary determination to form, it requires widespread State practice and opinion in subscribing to a given practical view proposing compensation for bona fide regulation. A few negative reactions would signify the opposite in State practice and opinion and non-emergence of such a new limitation. It is appropriate to examine the practical views emerging as *lex ferenda* to include bona fide regulation in the concept of expropriation liable to compensation and the State reaction to such *lex ferenda*.

ii. Lex Ferenda and Bona Fide Regulation

a) Liability beyond Customary International Law

1. The Sole Effect of the Conduct

Some tribunals have viewed that for indirect expropriation to occur the sole effect suffices not the intention of the State.⁷⁸² Academic opinion has also implied the sole effect criterion by suggesting that where the effect is similar to direct expropriation, the investor would probably be covered under the BITs.⁷⁸³ The US jurisprudence on indirect taking leans toward the distinction between a taking for the public use and a taking out of police power for regulatory purposes requiring compensation for the former but not for the latter.⁷⁸⁴ In criticizing this approach, Higgins suggests a sole effect test by asking “is this distinction intellectually viable? Is it not the State in both cases (that is, either by a taking for a public purpose, or by regulating) purporting to act in the common good? And in each case has the owner of the property not suffered loss?” and views that “[u]nder international law standards, a regulation that amounted (by virtue of its scope or effect) to a taking, would need to be ‘for a public purpose’ (in the sense of in the general, rather than for a private, interest). And just compensation would be due.”⁷⁸⁵ This approach is traceable in views of a number of tribunals.

According to the Santa Elena Tribunal, “expropriatory environmental measures—no matter how laudable and beneficial to society as a whole—are in this respect similar to any other expropriatory measures that a State may take in

⁷⁸² See *Metalclad*, supra note 600, at 50; *Temed*, supra note 599, at para. 116, citing *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, 6 Iran-U.S. Cl. Trib. Rep. 219, 225-26 (1984). See also *Phillips Petroleum v. Iran*, 21 Iran-U.S. Cl. Trib. Rep. 79, 115 (1989); *Starrett Housing Corp. v. Iran*, 4 Iran-U.S. Cl. Trib. Rep. 122, 154 (1983); Rudolf Dolzer, & Margrete Stevens, *Bilateral Investment Treaties* (The Hague: Martinus Nijhoff Publishers, 1995) at 100; Dolzer and Christopher Schreuer, *Principles of international investment law* (Oxford; New York: Oxford University Press, 2008) at 101-104.

⁷⁸³ See *Reisman and Sloane*, supra note at 772. (“where the effect is similar to what might have occurred under an outright expropriation, the investor would in all likelihood be covered under most BIT provisions.” *Ibid.* quoting Dolzer & Stevens, supra note 782, at 100.

⁷⁸⁴ See Higgins, supra note 772, at 330-331.

⁷⁸⁵ *Ibid.* at 330.

order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the State's obligation to pay compensation remains."⁷⁸⁶ This statement treats liability for environmental regulatory measures affecting foreign investment as other instances of expropriation. Nonetheless, the tribunal was addressing a case which was already determined in international law as an instance of expropriation. The case concerned an outright (regulatory) decree with the intent to expropriate the subject land for a public purpose for which Costa Rica had proposed payment of compensation.⁷⁸⁷ That such an outright act of expropriation had to be compensated was not in dispute at all, rather the amount of compensation was disputed.⁷⁸⁸ This case represents a classical instance of expropriation for which international law has already determined the duty of compensation. Nationalizations are regulatory measures in a wider scope, which are still compensable in international law. Therefore, the Santa Elena case and the above passage by the tribunal is of no weight for regulations lacking the feature of an outright, direct expropriation because it was addressing situations that international law already determines as expropriation and compensable as such not addressing the areas of hard indeterminacy regarding the conduct of the State.

Relying on the above passage by Santa Elena Tribunal, the Tecmed Tribunal held that "we find no principle stating that regulatory administrative actions are *per se* excluded from the scope of the Agreement."⁷⁸⁹ Likewise, the Azurix Tribunal appreciated the passage by the Santa Elena Tribunal about environmental measures.⁷⁹⁰ In a far distant context than that underlying the Santa

⁷⁸⁶ *Compañía del Desarrollo de Santa Elena, S.A. v. Costa Rica*, ICSID Award, ARB/96/1, 17 February 2000, 39 ILM 317 (2000), at para. 72, also para. 71.

⁷⁸⁷ *Ibid.* at paras. 17-19. With regard to determining the date of expropriation for valuation purposes, the Tribunal pointed to the issue of creeping expropriation and that the intent of the State was less important than its effect citing the Tippetts Tribunal. *Ibid.* at para. 77. Still, the Tribunal found the date of the outright decree of expropriation as the date of expropriation. *Ibid.* at para. 80.

⁷⁸⁸ *Ibid.*

⁷⁸⁹ *Tecmed*, *supra* at 599, at 121. The Tecmed Tribunal supposed this status as to regulatory administrative actions "even if they are beneficial to society as a whole —such as environmental protection—, particularly if the negative economic impact of such actions on the financial position of the investor is sufficient to neutralize in full the value, or economic or commercial use of its investment without receiving any compensation whatsoever." *Ibid.*

⁷⁹⁰ *Azurix Corp. v. Argentina Republic*, Award, 14 July 2006, at para. 309.

Elena case, the Azurix Tribunal held that “[f]or the Tribunal, the issue is not so much whether the measure concerned is legitimate and serves a public purpose, but whether it is a measure that, being legitimate and serving a public purpose, should give rise to a compensation claim.”⁷⁹¹ The Azurix Tribunal then suggested that if regulation tantamount to expropriation were not compensable for being taken for public purpose, it would be contradictory to the requirement that expropriation for public purpose should be compensated.⁷⁹² The Azurix Tribunal exposes the issue of bona fide regulations to a contradiction with general law (restated in BITs) that requires compensation for expropriations taken for public purpose. This approach rests on the question-begging assumption that such measures are tantamount or equivalent to expropriation in the first place on the sole effect doctrine or other doctrines of similar effect applicable to the direct or indirect expropriation. No contradiction arises from the statement that international law does not measure bona fide regulation by reference to its sole effect or similar criteria. On the other hand, these practical views suggesting the sole effect doctrine for measuring States’ regulation as compensable expropriation tend to focus on the common public purpose in both regulation and indirect expropriation. However, the public purpose of the measure, which both an indirect expropriation and a regulatory action may share, is not at issue. Rather, the question is whether international law in its customary determination has included bona fide regulation without an intention manifested in an act such as discrimination in the concept of expropriation. What is not necessary is the expressed or acknowledged intention in indirect expropriations in form. An unlawful element such as discrimination is still necessary.

The sole effect test is further implied in a “consequential” approach to expropriation that relies on the causal link of regulatory measures and a purposive frame of a BIT for investment promotion and protection based on the ‘tantamount’ phrase in a BIT expropriation clause.⁷⁹³ The academics holding this

⁷⁹¹ Ibid. at para. 310.

⁷⁹² Ibid. at para. 311.

⁷⁹³ Under this approach, such a BIT expropriation clause is deemed to dismiss the requirement for the State’s intent to expropriate and to appreciate liability for even a partial interference with

view maintain, “lawful regulation ...is not expropriation.”⁷⁹⁴ However, these scholars are suggesting a novel BIT obligation, whose breach renders the regulatory conduct of the State unlawful. They posit that “consequential expropriations involve deprivations of the economic value of a foreign investment, which, within the legal regime established by a BIT, must be deemed expropriatory because of their causal links to failures of the host State to fulfill its paramount obligations to establish and maintain an appropriate legal, administrative, and regulatory normative framework for foreign investment.”⁷⁹⁵

What begs the question is where those paramount obligations come from whereby the scope of a BIT expropriation clause is construed in this manner to include regulations as consequential expropriations? The issue concerns a hard penumbra under investment treaties posing the scope of the primary obligation of the State on expropriation in the first place. Such an obligation may not be taken for granted on a purposive interpretation of the expropriation clause or the treaty as a whole by reference to the investment protection purpose of the treaty or other purposes attributed to a BIT. The investment promotion or protection purpose in a BIT framework furnishes no conclusive legal statement for the scope of the expropriation clause to include regulations as consequential expropriations but a purpose among competing purposes and demands of justice requiring determination according to the rule of the recognition. To attribute such an obligation to States in the hard zone of regulation requires a customary determination.

foreign investment. See Reisman and Sloane, *supra* note 772, at 129-130, see also at 119. Reisman and Sloane provide four factual scenarios rejecting expropriation in two scenarios and its difficulty in other two scenarios. They consider the possibility of expropriation when the acts or omissions of the State “(i) were themselves *causa causans* of the loss of economic value or (ii) contributed to that loss” as opposed to scenarios where “(iii) whether the loss should rather be ascribed chiefly to misjudgments or (iv) to exogenous economic factors independent of actions (or inactions) of the host State.” *Ibid.* at 130. They refer to actions or inactions of State that “caused, or substantially caused, a legally significant depreciation in the economic value of investment” *ibid.* They also raise the difficulties regarding the moment of expropriation when liability arises or valuation should be assessed. *Ibid.* at 132-133.

⁷⁹⁴ *Ibid.* at 129. They emphasize that they “do not suggest that every governmental adjustment to the normative framework for foreign investment that adversely affect the conditions for foreign investment, *ipso facto*, constitute an expropriatory act.” *Ibid.* at 119, n. 16, see also at 129.

⁷⁹⁵ *Ibid.* at 130, see also at 119. Such an obligation resulting in a breach of treaty and an unlawful act was not referred to by the Methanex Tribunal in which Reisman was an arbitrator. See *infra* note 824 and accompanying text.

The sole effect doctrine misrepresents customary international law in that almost all instances, views, and practices in the background of the opinions and practice of States featured elements of intent and enrichment in addition to effect. The core problem of a sole effect doctrine for the regulatory measures of States is still disregarding coherence for the common good. The doctrine essentially perpetuates a notion of treating all instances emerging in the standard and penumbra areas of the concept of expropriation alike by the sole measure of their effect. The sole effect doctrine fails to appreciate that coherence may require another solution, i.e. liability by the unlawful character, for the particular situation of regulatory measures formed in the customary determination to give rise to an authoritative statement of international law in this hard penumbra. The application of the sole effect doctrine would further disregard coherence for the common good by the very projection of the sole effect test as the statement of the law for a situation where international law has no such a determination for this particular hard issue. Even if the concept of expropriation in international law consisted in the sole effect for the ordinary instances, this criterion would cease to express the authority of the law for the hard penumbral instance of interference of regulation with foreign investment. Moreover, treating the sole effect as the representation of the law would deny coherence for the common good by disregarding the equal weight of the competing demands of justice in constructing the content of the law for the particular situation of regulations and treating them as demands for the revision of the law projected in the sole effect doctrine. This departure from coherence drastically detracts from the sole effect doctrine even as a practical view in the legal discourse of the concept of expropriation in the international law on foreign investment. Furthermore, to rise to a juridical statement of international law for measuring bona fide regulations of States affecting foreign investment, the sole effect proposal requires subscription by State practice and opinion.

2. The Proportionality Test

The proportionality test is a test that merges in a determination task. In distinguishing regulation from a ‘taking’, Weston advocated “the test of a policy which favors a peaceful, productive, and equitable global economy perceived in terms of the common *inclusive* interests of world community perceived in terms of aggregate well-being.”⁷⁹⁶ There is no objection to this test but the question is that whether an arbitral tribunal is empowered to engage in such a task not to mention the requirement for a genuine coherence following such an empowerment. The proportionality test poses the same concern.

The proportionality between the aim and the burden of a regulation has been suggested to test whether legitimate regulation can be considered expropriation and thus to be compensated. The test has been developed in the ECHR jurisprudence and context.⁷⁹⁷ In investment treaty arbitration, this test has gained support in some tribunals.

Having viewed that “regulatory actions and measures will not be initially excluded from the definition of expropriatory acts,” the Tecmed Tribunal appreciated the proportionality test from the ECHR system as a yardstick in addition to its effect in order to gauge the characterization of such acts as expropriation.⁷⁹⁸ The Tribunal acknowledged, as a starting point, “the due deference owing to the State when defining the issues that affect its public policy or the interests of society as a whole, as well as the actions that will be implemented to protect such values.”⁷⁹⁹ The Tribunal, however, assumed a power for itself to second-guess those policies and values by questioning whether the State actions “are reasonable with respect to their goals, the deprivation of economic rights and the legitimate expectations of who suffered such

⁷⁹⁶ Weston, *supra* note 772, at 124.

⁷⁹⁷ See Chapter IV, Section B (1) (c) (5).

⁷⁹⁸ Tecmed, *supra* note 599, at para. 122. To this end, the Tecmed Tribunal held that it “will consider ... whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality.” *Ibid.*

⁷⁹⁹ *Ibid.*

deprivation.”⁸⁰⁰ The Tribunal suggested a reversion to the sort of effect doctrine of substantial deprivation and the absence of compensation for such deprivation as the yardstick to measure the proportionality.⁸⁰¹

The Tecmed Tribunal also overstated the holding of the ECHR that considered a political right of voting for electing authorities making decisions as an element of distinction between foreign investors and nationals.⁸⁰² The ECHR has expressed that view in the context of a human rights convention and protection of individual human beings. Little difference exists between domestic corporations and foreign corporations as neither enjoy the political right of voting to elect decision makers. Foreign corporations cannot exercise a political right of voting in their home country either although they may heavily lobby in the political processes which multinational corporations do everywhere. Even if the distinction holds good as such, it does not necessarily mean that in the assessment of proportionality the foreign investors should receive less burden than nationals. Although foreign investors do not enjoy some political rights, many multinational companies benefit enormously from economic advantages far greater than nationals do by profiting hugely from local societies and resources. The profits obtained from a country could no less equally be raised as a demand of justice to be taken into account in assessing the burden of regulation and, by that measure, huge profits accrue to foreign investors in comparison to national individuals.

Referring to Tecmed, the Azurix Tribunal also welcomed the proportionality test employed by the ECHR as a yardstick in addition to the effect

⁸⁰⁰ Ibid.

⁸⁰¹ (“To value such charge or weight, it is very important to measure the size of the ownership deprivation caused by the actions of the State and whether such deprivation was compensated or not.”) Ibid.

⁸⁰² (“On the basis of a number of legal and practical factors, it should be also considered that the foreign investor has a reduced or nil participation in the taking of the decisions that affect it, partly because the investors are not entitled to exercise political rights reserved to the nationals of the State, such as voting for the authorities that will issue the decisions that affect such investors.”) Ibid. In the case of *James and Others v. United Kingdom*, the ECHR held that “[e]specially as regards a taking of property effected in the context of a social reform, there may well be good grounds for drawing a distinction between nationals and non-nationals as far as compensation is concerned. To begin with, non-nationals are more vulnerable to domestic legislation: unlike nationals, they will generally have played no part in the election or designation of its authors nor have been consulted on its adoption. Secondly, . . . there may well be legitimate reason for requiring nationals to bear a greater burden in the public interest than non-nationals” *James*, supra note 713, at 39, para. 63.

of the measure and its aim.⁸⁰³ Likewise, the Tribunal in the LG&E case, while recognizing the right of States to adopt policies for public purpose, advocated the proportionality test espoused by the Tecmed Tribunal.⁸⁰⁴

The proportionality test has gained no express support in the NAFTA arbitration. NAFTA Tribunals have generally avoided the proportionality test. The tribunal in the Fireman's Fund cases, noting the Tecmed Tribunal's reliance on the proportionality factor, held that "[t]he factor is used by the European Court of Human Rights, and it may be questioned whether it is a viable source of interpreting Article 1110 of the NAFTA."⁸⁰⁵ The NAFTA clause on expropriation still has no special character in narrowing the concept of expropriation within NAFTA to make it distinct from other investment treaties. The particular status of regulation emanates from customary international law governing all investment treaties posing a hard penumbra in the concept of expropriation. The transposition of a proportionality doctrine from the ECHR context to investment treaty arbitration is unfounded. One commentator who tends to support a degree of discretion for arbitral tribunals in deciding the question of indirect expropriation, has also described the employment of the proportionality test in invest arbitrations as a task "to redo the regulator's work" that "may be deemed unwise or indeed unpalatable".⁸⁰⁶

The essential objection to the proportionality test is the legitimacy deficit for its employment in investment arbitration. The proportionality test would lead to second-guessing the policies and values of States—a matter that is not vested in arbitral tribunals. The proportionality carries a political and moral assessment function to be applied in determination of the content of the law by those recognized by the rule of recognition in international law or according to clear, specific authorization. The proportionality test is not a test to identify the

⁸⁰³ Azurix, *supra* note 790, at paras. 311-312. The Azurix Tribunal rejected the expropriation claim on the ground of lack of sufficient impact on the investment. *Ibid.* at 322.

⁸⁰⁴ LG&G v. Argentina, Decision on Liability, 2006, 46 ILM 36(2007), at para. 195. The Tribunal tended to rely on the effect factor in rejecting the claim of expropriation because the measures by Argentine did not have a severe, permanent impact on LG&E's investment as it did not deprive it of the enjoyment of investment or cause loss of the control of investment. *Ibid.* at paras. 198-200.

⁸⁰⁵ Fireman's Fund v. Mexico, ICSID Award, ARB (AF)/02/01, July 14 2006, at para. 176(j), n.161.

⁸⁰⁶ Paulson, *supra* note 772, at 11.

statement of the law for a claim of regulatory expropriation against a State to be applied by the arbitral tribunals in investment arbitration. For the employment of the proportionality test or similar tests in investment arbitration, it requires specific authorization by the parties. In the absence of parties' authorization, to employ the proportionality test to measure the conduct of States towards foreign corporations in investment arbitration would offend the rule of recognition.⁸⁰⁷

The proportionality test as a determination task engaging in moral and political assessments is a criterion within the institution of the ECHR subject to its own rule of recognition establishing the power of the ECHR. International arbitrators in investment arbitration cannot transplant a determination power from ECHR or similar forums of national or international character or the constitutional schemes of national systems operating under their own rule of recognition or delegation of power. They cannot engage or mask their moral and political assessment to create an obligation for States for the benefit of corporations under a power denied to them by the rule of recognition of the international law governing the dispute. The introduction of the proportionality test in the analysis of international law on expropriation would, as reliance on contingent principles does, shift the identification of the statement of international law to the creation of the law. This is not a matter of citing another case whose statement of the law might itself be doubtful instead of establishing the statement of the law through recognized sources; this is even more offensive to the rule of recognition by introducing a fairness tool and foisting it as the statement of the law. Of course, international law looks at the proportionality of the burden on investors and benefit to the public; that is part of the requirement of coherence and advancement of the common good. Nonetheless, coherence merges with the rule of recognition to validate the power to engage in determination and coherence. In the absence of

⁸⁰⁷ For a provision that may arguably suggest a reference to some degree of proportionality test, though not solely, in an investment treaty, see ASEAN-Australia-New Zealand FTA, *supra* note 681, Annex on expropriation and compensation, paragraph 3 (c); ASEAN Comprehensive Investment Agreement, *supra* note 664, Annex 2, para. 3. In these provisions, the proportionality of the government action to the public purpose is listed among factors to be considered in assessing indirect expropriation. However, both agreements exclude the legitimate, non-discriminatory regulatory measures for public purposes such as environment, health from the scope of indirect expropriation. See *infra* notes 834-835 and accompanying text.

a particular rule of recognition for the adjudicative determination power, the employment of the proportionality test along with other general tests for the determination of the content of international law in the evaluation of justice demands to make it coherent, is a process of rule formation vested in customary determinations by States not investment arbitral tribunals. The effect or burden doctrines with respect to bona fide regulation are only part of the *lex ferenda* confronted by competing *lex ferenda* that advocate or suggest the maintenance of the current regime of customary international law that requires an additional unlawful element to characterize regulation as expropriation.

b) Liability by the Character of the Conduct under Customary International Law

Many instruments and opinions acknowledge the *lex lata* in international law on the particular situation of the relation of regulation to expropriation to require an unlawful element to characterize regulation as expropriation. The OECD Draft Convention on Protection of Foreign Property and the US Restatement Third, together with other studies, earlier discussed were among instruments that expressed the status of international law.⁸⁰⁸ This status was also acknowledged in certain arbitral tribunals before the rise of investment treaty arbitration.⁸⁰⁹

Recently opinions have further mounted both within and outside arbitral tribunals that acknowledge and support the position of international law on bona fide regulation as stated in earlier documents. These opinions are not limited to tribunals. NGOs have also expressed their view. Among the NGOs, supporting the position of customary international law reference may be made to the International Institute for Sustainable Development. The IISD Model International Agreement on Investment for Sustainable Development provides that

⁸⁰⁸ See supra notes 776-779 and accompanying text.

⁸⁰⁹ See *Too v. Greater Modesto Insurance Associates*, 23 Iran-U.S. Cl. Trib. Rep. 378, at 387, para. 26 (1989).

Consistent with the right of States to regulate and the customary international law principles on police powers, bona fide regulatory measures taken by a Member State that are designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, shall not constitute an indirect expropriation under this Article.⁸¹⁰

Customary international law at least has a twofold legal criterion to characterize as expropriation a regulation that does not fall within the direct expropriation category. The arbitral views are not uniform and some are even ambivalent or innovative in relation to the position reflected in customary international law. According to the *Fireman's Fund* case, the issue concerns a distinction between "compensable expropriation and non-compensable regulation."⁸¹¹ As such, discrimination was conceived, in its ordinary context of direct expropriation than the particular situation of regulation, as a factor to distinguish between a compensable and non-compensable expropriation and not as a factor characterizing expropriation itself.⁸¹² Although the result concerns the question of compensation for expropriation, the legal criterion for the distinction between regulation and expropriation is an issue relating to the conduct of the State whether it is characterized in international law as expropriation. The consequence of compensation results from this legal characterization. Both in the past practices and recent practices of States, as will be seen, States are not asserting that their bona fide regulation is expropriation but not compensable rather that it is not expropriation. It is one thing to State that an unlawful element is also required as a necessary condition in addition to a substantial impact on investment to characterize a regulation of general application as expropriation and

⁸¹⁰ Institute for Sustainable Development in its Model International Agreement on for Investment for Sustainable Development, April 2005, in Article 8 (I). http://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf. See also Sornarajah, *supra* note 718 at 299-300. ("Regulatory functions are a matter of sovereign right of the host State and there could be no right in international law to compensation or diplomatic protection in respect of such interferences.") *Ibid.*

⁸¹¹ *Fireman's Fund*, *supra* note 805, at paras. 176(j), 205-206.

⁸¹² See *ibid.* at paras. 205-206. The Tribunal found the Mexican regulation discriminatory that could have given rise to a claim under NAFTA Article 1102 or 1105 or 1405 had the Tribunal had jurisdiction for claims under those articles but found that it had not given rise to expropriation under NAFTA Article 1110 because the investment had become worthless. *Ibid.* at paras. 203, 207, 217.

by that matter compensable. It is another matter to argue that discrimination or another element of unlawfulness is a factor to measure whether what is already expropriation by other tests (the effect) is compensable or non-compensable. The latter is the corollary of treating all instances of expropriation alike without considering the particular situation of regulation as a hard penumbra with its distinct legal position in the discourse of expropriation. The vice of this argument is that it would result in the sole effect doctrine, quite contrary to international law, to hold a regulation compensable where the substantial impact exists but an unlawful element is absent.

The Feldman Tribunal stated

The Tribunal notes that the ways in which governmental authorities may force a company out of business, or significantly reduce the economic benefits of its business, are many. In the past, confiscatory taxation, denial of access to infrastructure or necessary raw materials, imposition of unreasonable regulatory regimes, among others, have been considered to be expropriatory actions. At the same time, governments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this ...⁸¹³

The Feldman Tribunal while advocating freedom of States in legitimate regulation did not express the legal criteria for characterization of regulation as expropriation or whether such criteria are issues regarding compensation than the characterization of the conduct of expropriation. The Tribunal still referred to the US Restatement Third that together with other instruments and practices do provide answers to this question.⁸¹⁴

That regulation is not expropriation in international law is also reflected in the SD Myers Tribunal's dicta that "[t]he general body of precedent usually does not treat regulatory action as amounting to expropriation. Regulatory conduct by

⁸¹³ Feldman v. Mexico, ICSID No. ARB(AF)/99/1 (NAFTA Ch. 11 Arb. Trib. Dec. 16, 2000), 42 ILM 625 (2003), para. 103.

⁸¹⁴ Ibid. at paras. 103, 105.

public authorities is unlikely to be the subject of legitimate complaint under Article 1110 of the NAFTA, although the Tribunal does not rule out that possibility.”⁸¹⁵ Despite this strong position, the S.D. Myers Tribunal suggested that a permanent impact resulting in deprivation of property and benefit to the State could lead to expropriation.⁸¹⁶ The Tribunal did not articulate the position of customary international law for an additional element of unlawfulness such as discrimination to characterize regulation as expropriation.

The Glamis Tribunal seems to acknowledge the two-tier test for bona fide regulations, contained in customary international law, by its reference to effect as a threshold but not a sufficient criterion for characterizing a regulation as expropriation not expropriation as non-compensable. Observing that the term expropriation in NAFTA “incorporates by reference customary international law on that subject,” the Glamis Tribunal referred to the US Restatement Third to discover the content of customary international law that “[a] State is not responsible, however, ‘for loss of property or for other economic disadvantage resulting from bona fide ... regulation ... if it is not discriminatory’.”⁸¹⁷

Acknowledging reference to customary international law to interpret the expropriation clause, the Saluka Tribunal held “[i]t is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare.”⁸¹⁸ This statement appears to be supportive of the application of the

⁸¹⁵ SD Myers, *supra* note 663, at 281.

⁸¹⁶ Ibid. (“Expropriations tend to involve the deprivation of ownership rights; regulations a lesser interference.”) Ibid. at 281. (“In this case, the Interim Order and the Final Order were designed to, and did, curb SDMI’s initiative, but only for a time. CANADA realized no benefit from the measure.”) Ibid. at 287.

⁸¹⁷ Glamis, *supra* note 610, at para. 354. The Tribunal, however, in what it referred to “the foundational threshold inquiry of whether the property or property right was in fact taken” continued whether there has been a substantial deprivation at all as the threshold question. Ibid. at 357. The Tribunal held that “the first factor in any expropriation analysis is not met.” Ibid. at para. 536.

⁸¹⁸ Saluka Investments BV (the Netherlands v. Czech republic, partial Award, 17 March 2006. para. 255.

The Tribunal also held that “[i]n the opinion of the Tribunal, the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are “commonly accepted as within the police

criteria of customary of international law. However, apparently the Tribunal did not consider the unlawful test provided by the customary international law such as discrimination for this particular situation decisive of what is and what is not unlawful regulation in international law.⁸¹⁹ The Tribunal held that “[i]t thus inevitably falls to the *adjudicator* to determine whether particular conduct by a State ‘crosses the line’ that separates valid regulatory activity from expropriation. Faced with the question of *when, how and at what point an otherwise valid regulation becomes, in fact and effect, an unlawful expropriation*, international tribunals must consider the circumstances in which the question arises.”⁸²⁰

Instead of appreciating that in foreign investment regulatory measures of States are *prima facie* lawful and search for specific restrictions by way of a customary rule such as discrimination to rebut that presumption, the Saluka Tribunal suggested engaging in a factual analysis, which invites legal determination under what is reasonable or not in the opinion of the Tribunal. The Tribunal did not analyze the facts in view of whether the measure was for instance discriminatory as a legal criterion determined in customary international law for what is arbitrary or unreasonable to measure the unlawfulness of the regulatory conduct of States. Rather, the Tribunal engaged in determining whether the conduct was reasonable or unreasonable in the opinion of the tribunal.⁸²¹ The Tribunal indicated that an error or improper act on the part of the Czech Republic might have changed the opinion of the Tribunal in finding expropriation as if such

power of States” forms part of customary international law today. There is ample case law in support of this proposition. As the Tribunal in *Methanex Corp. v. USA* said recently in its final award, “[i]t is a principle of customary international law that, where economic injury results from a *bona fide* regulation within the police powers of a State, compensation is not required”. Ibid. at para. 262 [footnotes omitted]

⁸¹⁹ (“[I]nternational law has yet to identify in a comprehensive and definitive fashion precisely what regulations are considered “permissible” and “commonly accepted” as falling within the police or regulatory power of States and, thus, noncompensable. In other words, it has yet to draw a bright and easily distinguishable line between non-compensable regulations on the one hand and, on the other, measures that have the effect of depriving foreign investors of their investment and are thus unlawful and compensable in international law.” Ibid. at para. 263.

⁸²⁰ Ibid. at para. 264. [italics original]

⁸²¹ (“The Czech State, in the person of its banking regulator, the CNB, had the responsibility to take a decision on 16 June 2000. It enjoyed a margin of discretion in the exercise of that responsibility. In reaching its decision, it took into consideration facts which, in the opinion of the Tribunal, it was very reasonable for it to consider. It then applied the pertinent Czech legislation to those facts – again, in a manner that the Tribunal considers reasonable.” Ibid. at para. 272.

an error or improper act criterion had substituted the unlawful test required by the customary international law or had constituted an additional element of unlawfulness.⁸²²

There is no doubt that the facts and context of a case constitute an important aspect of dispute settlement analysis. Nevertheless, the factual analysis should assist whether the facts substantiate the criteria determined by the customary law such as discrimination. A factual analysis, in areas of hard penumbra for which an investment arbitral tribunal has not been specifically authorized to engage in justice evaluation, should not amount to a substitution of the conception of justice of the tribunal for the legal criteria determined in customary international law. A factual analysis in the sense of engaging the tribunal's creative role in the hard penumbra of State regulatory power is short of legitimacy of rule of recognition. This is not a question of predictability solely but how the legal criteria form in such hard penumbra obtaining authoritative statement and in their absence how to treat a claim of a violation of non-existing rule and dismissal of a creative role. A tribunal may validly argue that the content of law should change, but may not assume the power to make itself such a change in a hard penumbra of international law on foreign investment. What customary international law has determined as the criterion or criteria for unlawfulness of regulations of general application, discrimination for instance, is precisely the line authoritatively determined by the legitimate body of the system to characterize what regulation is considered expropriation where regulation is not subject of direct expropriation with the elements of intent and enrichment existing in direct expropriation. Manifesting elements of intent to expropriate and direct enrichment in addition to the effect of deprivation, regulation constitutes a direct expropriation and compensable.⁸²³ Absent those other elements of direct expropriation, intent and direct enrichment, regulatory actions of States *prima facie bona fide* and legitimate in international law must be tested by a customary

⁸²² ("In the absence of clear and compelling evidence that the CNB erred or acted otherwise improperly in reaching its decision, which evidence has not been presented to the Tribunal, the Tribunal must in the circumstances accept the justification given by the Czech banking regulator for its decision.") *Ibid.* at para. 273.

⁸²³ For an example, see the cases of nationalizations, *supra* note 766.

requirement of an unlawful element determined in customary international law to qualify as expropriation. Otherwise, what is the point in acknowledging that in international law bona fide regulations are not expropriation and thus non-compensable if at any rate that proposition of the law is to yield to adjudicative determinations. If international law has determined discrimination or another element of unlawfulness as the legal criterion to rebut the presumption of bona fide, legitimate, or normal attributes of a regulation, thus qualifying it as expropriation, then that must be the criterion to be applied by the tribunal without masking moral and political evaluations behind factual analysis.

The controversial or changing character of what the elements of unlawfulness for characterization of regulation as expropriation are or could form in customary international law does not affect, the dual test necessity for this characterization namely the test of unlawfulness in addition to its effect to feature regulation as (indirect) expropriation. The Methanex Tribunal comes closest to the dual test required in customary international law. The Methanex Tribunal held that

In the Tribunal's view, Methanex is correct that an intentionally discriminatory regulation against a foreign investor fulfils a key requirement for establishing expropriation. But as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, *inter alios*, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.⁸²⁴

Obviously compensation cannot count as an element for the characterization of the conduct as expropriation because it will negate the point of the unlawfulness test altogether by requiring compensation on its own measure of non-compensation. The duty to pay compensation for expropriation is an element

⁸²⁴ Methanex, *supra* note 660, Part IV, Chapter D, para. 7. See also para. 15 that because the regulation measure was not unlawful in international law (not discriminatory, for public purpose and according to due process of law) it did not constitute expropriation. *Ibid.* The Methanex Tribunal also held that the California regulation did not have the "features associated with expropriation", namely the loss of control. *Ibid.* at para. 16.

of unlawfulness for what is determined to be expropriation on other grounds of unlawfulness to characterize the conduct as expropriation. The other elements of unlawfulness as the Methanex Tribunal indicated include discrimination, public purpose or due process. The Methanex Tribunal's holding on these elements is not a practical view proposing modification to the existing law but a pronouncement of customary international law.

The view by the Methanex Tribunal regarding the specific assurances, albeit widely shared among tribunals or academics, still seems more part of the practical opinion than a clear customary rule. If a specific assurance not to regulate is provided under a treaty, a conduct contrary to the treaty commitment is no doubt an unlawful act in customary international law though not an absolute one. However, the same cannot be said with certainty about specific assurances not to regulate provided under a contract, legislation, or other acts governed by domestic legal systems. The Methanex Tribunal is suggesting that regulation against a specific commitment not to regulate makes the regulation unlawful and could qualify as expropriation if the test of effect is also met.⁸²⁵ This position, sounding very persuasive from the practical view perspective, does not seem to have ripened into customary determination yet. To accord an international character to specific assurances provided to foreign investment under frameworks other than treaties is often, though not always successfully, sought through an umbrella clause that the majority of investment treaties including NAFTA do not feature.⁸²⁶ The argument of legitimate expectation arising from specific assurances as a factor to characterize the expropriation itself as unlawful without violating a treaty commitment or elements of legality in customary international

⁸²⁵ Ibid. Part IV, Chapter D, at para. 7-8. See also Feldman case, for another recent case where the Tribunal seems to approve that specific and "definitive" assurances to the investor may be an element to characterize the regulation as expropriation and compensable under NAFTA. Feldman, *supra* note 813, at para. 148. On the other hand, a number of Tribunals have also attempted to go beyond what is a specific assurance to regulate to a more general approach of legitimate expectation advocating that general representations and assurances on which the investor has relied on also constitute a legitimate expectation and a conduct contrary to that requires compensation. See for instance: Metalclad, *supra* note 600, at para. 103; Azurix, *supra* note 790, at para. 318.

⁸²⁶ Approximately 40% of BITs contain an umbrella or respect clause. UNCTAD, BITs 95-06, *supra* note 72, at 73. It has been deleted from the US Model BIT. See *ibid.* at 74. NAFTA does not have an umbrella clause either.

law is separate from the argument of utilizing specific commitments for the purpose of increasing compensation.⁸²⁷

The international law characterization of expropriation for regulations that do not feature direct expropriation consists in the unlawful character of the conduct besides the gravity of its effect. It would be easier to receive customary determination for a practical view that proposes an addition or modification of an element of lawfulness such as that a conduct contrary to a specific commitment not to regulate constitutes an unlawful act characterizing regulation as expropriation.⁸²⁸ It would be far harder to obtain a customary determination to a practical view advocating a sole effect or similar doctrine to eliminate the requirement of an unlawful element for such characterization. The particular situation of regulation of States without an unlawful character falls within the freedom of action of States in international law for bona fide regulation. A change in the current customary determination for treating bona fide regulation as

⁸²⁷ See below, Section B.

⁸²⁸ In a number of recent model and concluded investment treaties a variety of language has emerged in the discourse of indirect expropriation that recognize assurances by the States as a factor to be considered in a case by case analysis among the factors of the impact and the character of the conduct of the State. This in more general terms is reflected in the US and Canadian Model investment treaties. See U.S 2004 Model BIT, *supra* note 620, Annex B, Expropriation, Para. 4 (a) (ii). (“.... 4. The second situation addressed by Article 6 [Expropriation and Compensation](1) is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure. (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by case, fact-based inquiry that considers, among other factors: (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred; (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action”) Ibid. ; Canada Model BIT, *supra* note 664, Article 13(1), Paragraph (b) (ii). “The determination of whether a measure or series of measures of a Party constitute an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors: i) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred; ii) the extent to which the measure or series of measures interfere with distinct, reasonable investment-backed expectations; and iii) the character of the measure or series of measures” Ibid. A more specific provision is reflected in the recent ASEAN practice. (“[W]hether the government action breaches the government’s prior binding written commitment to the investor whether by contract, licence or other legal document.”) ASEAN Comprehensive Investment Agreement, *supra* note 664, Annex 2 on expropriation. See also ASEAN-Australia-New Zealand FTA, *supra* note 681. In all these approaches, legitimate expectation is only one factor among others for the assessment of indirect expropriation and more importantly in all these approaches legitimate, non-discriminatory regulatory action is excluded from the scope of indirect expropriation.

expropriation as proposed by practical views require subscription by States and fresh customary determination to meet the rule of recognition.

iii. Recent State Practice

If there exists a customary determination to add a customary rule imposing a limitation on States by characterizing bona fide regulations interfering with foreign investors' property due to its sole impact or proportionality as expropriation and thereby liable to compensation, domestic approaches to the contrary are immaterial. The emergence of a customary rule is still required to positively establish such a determination not by proposals found in arbitral or academic opinions but by the subscription of States to such evaluative opinions in abundant State practice and opinion to satisfy the requirements of customary rule formation for this particular situation of hard penumbra. A few instances of negative State practice, on the other hand, would signify non-emergence of the rule and thereby absence of liability for the States to compensate for bona fide regulation.

States by treating the particular situation of bona fide regulation within the contours of current customary international law separate from indirect expropriation are giving negative attitude to views that suggest the elimination of the unlawfulness test for the characterization of regulation as expropriation. The interpretative note by the Chairman of the Negotiating Group of MAI seems a good starting point. This interpretative note does not represent State practice and opinion in the strict sense. Nevertheless, the interpretative note reflects the negative attitude of the States emerging among the countries surrounding the question of expropriation and similar issues in the negotiation of MAI which the Chairman of the MAI Negotiation Group attempted to clarify. In his report on the MAI, the Chairman of the Negotiating Group included an interpretative note to the then draft MAI Article 1 on 'general treatment' including fair and equitable treatment and Article 5 on expropriation. This interpretative note clarified that

This Article on General Treatment, and the Article on Expropriation and Compensation, are intended to incorporate into

the MAI existing international legal norms. The reference in Article -- to expropriation or nationalisation and ‘measures tantamount to expropriation or nationalisation’ reflects the fact that international law requires compensation for an expropriatory taking without regard to the label applied to it, even if title to the property is not taken. It does not establish a new requirement that Parties pay compensation for losses which an investor or investment may incur through regulation, revenue raising and other normal activity in the public interest undertaken by governments. Nor would such normal and non-discriminatory government activity contravene the standards in this Article.⁸²⁹

This interpretative note maintains the position of customary international law that the question of regulation is a particular situation not considered expropriation, which MAI did not aim to change. Recent investment treaty practices, despite their variations, also show this position and a negative approach to the elimination of the criterion of unlawfulness for finding regulation as expropriation.

The U.S. 2004 Model BIT provides that “[e]xcept in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.”⁸³⁰ This provision is now in the treaties that the U.S. has concluded with Singapore, Chile, Australia, Morocco, Colombia, Panama, Korea, Oman, Uruguay, Rwanda and the CAFTA State Parties including the Central American Countries (including Costa Rica El Salvador, Guatemala, Honduras, and Nicaragua) and the Dominican Republic.⁸³¹ A similar approach but not in identical language appears in the Canadian investment treaties. The Canadian Model BIT provides that “[e]xcept in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as

⁸²⁹ The Multilateral Agreement on Investment (Report by the Chairman of the Negotiating Group) DAF/MAI(98)17, 4 May 1998, at 13, available at <http://www.oecd.org/daf/mai/pdf/ng/ng9817e.pdf>.

⁸³⁰ U.S. Model BIT, *supra* note 620, Annex B, Expropriation, Paragraph 4 (b).

⁸³¹ For these treaties see, *supra* note 678.

health, safety and the environment, do not constitute indirect expropriation.”⁸³² This provision appears in the FTAs that Canada has entered into with Colombia, Peru, and Panama as well as recent BITs.⁸³³

The approach by the ASEAN countries is even more restrictive by not considering “except in rare circumstances” as provided in the US and Canadian models. The ASEAN Comprehensive Investment Agreement and the FTA between ASEAN Countries, Australia and New Zealand provide that “[n]on-discriminatory measures of a Member State that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute an expropriation of the type referred to in subparagraph 2(b).”⁸³⁴ Paragraph 2 (b) in both agreements addresses the question of indirect expropriation. Excluding bona fide regulation from indirect expropriation is also reflected in the Common Investment Area adopted by the Member States of the Common Market for Eastern and Southern Africa (COMESA). In this regard, the COMESA Common Investment Area provides that “[c]onsistent with the right of States to regulate and the customary international law principles on police powers, bona fide regulatory measures taken by a Member State that are designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, shall not constitute an indirect expropriation under this Article.”⁸³⁵

What all these recent treaty practices share in common is excluding bona fide regulation from the scope of indirect expropriation. They all exclude legitimate, non-discriminatory regulatory measures for public purposes such as environment or health from the scope of indirect expropriation and thereby from the factors to be employed for finding an indirect expropriation in a factual analysis. Instead, these agreements follow the legal criterion determined under customary international law, namely the unlawful character of the conduct

⁸³² Canada Model BIT, Annex B.13(1), Paragraph (c).

⁸³³ For these treaties, see *supra* note 679.

⁸³⁴ ASEAN Comprehensive Investment Agreement, *supra* note 664, Annex 2, Paragraph 4; ASEAN-Australia-New Zealand Free Trade Agreement, *supra* note 681, Annex 2, Paragraph 4.

⁸³⁵ Investment Agreement for the COMESA Common Investment Area, *supra* note 682, Article 20 (8). The language of Article 20 (8) of the COMESA Common Investment Area replicates the language in the IISD Model Investment Agreement. See *supra* note 810.

manifested in a customary element of unlawfulness such as discrimination, to qualify regulation as (indirect) expropriation. While, ASEAN Comprehensive Investment Agreement, ASEAN-Australia-New Zealand FTA, and COMESA Common Investment Area exclude bona regulation without exception, the US and the Canadian Model provide “except in rare circumstances”.⁸³⁶ The Canadian Model goes further to illustrate a situation of rare circumstance “when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith.”⁸³⁷ No doubt, such language can be subject to various interpretations. The question is what determines the legal criteria to count a ‘rare circumstance’ of non-discriminatory regulation as indirect expropriation.

One interpretation might be that a non-discriminatory regulation of substantial impact on foreign investment could qualify as indirect expropriation without an additional element of unlawfulness, thus verging on the effect doctrine. It would be incoherent to read these agreements to include regulation as a part of indirect expropriation subject to the factors provided for the assessment of indirect expropriation absent the required unlawful elements provided for the particular situations of bona fide regulation. Customary international law has provided for the unlawfulness character of the conduct, in addition to the effect of the conduct, as the criterion to distinguish legitimate, normal, etc. regulation from what is considered to be indirect expropriation. A rare circumstance can also include other elements of unlawfulness such as the absence of due process or any other element of unlawfulness that ripens into customary international law. It may also include the violation of absolute principles of due process. In this sense, an obvious bad faith may be ascribed to a situation where due process is absent but may not be attributed to contingent situations of hard penumbra.

The exclusionary approach to bona fide regulation by way of requiring an unlawful element does not seem to have been abandoned by contemplating ‘rare circumstances’ so as to invite the effect doctrine from the back door. Moreover,

⁸³⁶ See supra notes 830, 832 and accompanying text. The US approach to include this exception is seemingly anchored in the US domestic taking jurisprudence of the US Supreme Court.

⁸³⁷ See supra note 832 and accompanying text.

absent specific *lex specialis* to the contrary, the operation of customary international law as the law governing the penumbral situation of legitimate regulation under expropriation clauses of investment treaties would narrow the scope of rare circumstances to measures that, while being for public purpose and non-discriminatory, feature another element of unlawfulness such as the absence of due process. Therefore, the elimination of the customary criterion requiring the unlawfulness of the regulatory conduct is not a corollary of such a provision for rare circumstances.

No sufficient positive State practice and opinion exist to demonstrate a customary determination, in modification of the existing customary international law, to characterize as expropriation a bona fide regulation affecting foreign investment in the absence of an unlawful element. The practical views suggesting the elimination of an unlawful character have received a negative response by States as well as by competing practical views among others by the NGOs as important players advocating the protection of human beings. Customary international law, and recent concordant State practice, has treated bona fide regulation as a particular situation of its own legal context and determination in the legal specification and instantiation of the international expropriation rule. Where the features of direct expropriation, i.e. intent to expropriate and direct enrichment in addition to the effect are present, customary international law characterizes regulation as expropriation and compensable. Where those features of direct expropriation are absent, customary international law requires an unlawful element in a customary determination itself to characterize regulation as indirect expropriation and compensable. This is a process of determination and specification of general principles of good faith, legitimate expectation etc. in specific rules which is not only compatible with but required by the legitimacy criteria of the recognition and coherence for the common good.

By virtue of self-determination of States, bona fide regulation in protection of human rights, labor rights, environment, and any other sustainable development objectives for human wellbeing shall always operate without giving rise to State responsibility in international law on foreign investment. To reverse this order

authoritatively in the interest of foreign corporations, the investment protection claim in such a hard penumbra requires a customary determination within the criteria of legitimacy. The particular instance of bona fide regulation in international law has its own context and conflict of justice demands for consideration and determination of its own legal criteria subject to the requirement of coherence for the common good according to the rule of recognition. A great source of confusion and departure from legitimacy is rooted in tendencies to explain, by way of analogy with shifting conceptions of justice, the hard penumbra of bona fide regulation through what international law has developed or is developing for indirect expropriation. A tendency to measure the legal situation of regulatory measures by reference to standards or principles employed in indirect expropriation is implied in the Pope & Talbot statement that “[r]egulations can indeed be characterized in a way that would constitute creeping expropriation... Indeed, much creeping expropriation could be conducted by regulation, and a blanket exception for regulatory measures would create a gaping loophole in international protection against expropriation.”⁸³⁸ On the one hand, such an approach is open to the treatment of the moral and political underpinnings of all instances posed by the concept of expropriation in the same gravity of justice and the same level of legal solution for measuring the regulatory measures of States in international law, thus departing from coherence for the common good. On the other hand, latent in such a view is a material completeness approach that by turning on the creative function of the tribunals and already determining the instance of regulation subject to the general principles and standards of expropriation bypasses the rule of recognition as well. Adhering to the legitimacy criteria of recognition and coherence for the common good is not equivalent to appreciating a “gaping loophole” in rule determination or interpretation. These criteria may require not a blanket *exception* for regulations but a blanket recognition of bona fide regulations in international law on foreign

⁸³⁸ Pope & Talbot v. Canada, Interim Award on Merits, Phase One, 26 June 2000, at para. 99. <http://www.naftaclaims.com/Disputes/Canada/Pope/PopeInterimMeritsAward.pdf>. In a similar perspective, some scholars posit that regulatory measures should be assessed by reference to “standards of protection that have been developed for all other instances.” Dolzer and Schreuer, *supra* note 782, at 110.

investment *except* for exceptional cases of unlawful conduct determined in customary international law. Such an unlawful conduct may manifest itself in discrimination, lack of due process, or lack of public purpose already in the corpus of customary international law or other determinations as may emerge in customary international law, limiting the way that regulations of general application may be conceived as indirect expropriation. Similar generalization and departure from recognition and coherence have also overshadowed the question of compensation for expropriation in the context of economic development reforms in natural resources.

B. Economic Development Reforms in Natural Resources: Future Profits in Penumbra of Legality and Compensation

Hard penumbra in economic reforms has emerged as to the nationalization of natural resources and the relation between States and foreign investors under economic development agreements chiefly in the petroleum sector where the State nationalizes the industry and terminates agreements with foreign investors to effectuate economic reforms sought under nationalization. This area has primarily posed hard indeterminacy as to the consequence of the conduct in international law, particularly for future profits in compensation for nationalization. Nonetheless, the compensation has significantly hinged on the penumbra of the conduct as to its legality in international law. The question relates to the legality of unilateral termination of economic development agreements in international law on the one hand raising the general principle of *pacta sunt servanda*, and compensation for it on the other hand raising the issue of future profits for full compensation. Therefore, the hard penumbra relates to the question what the customary international rule on expropriation contains as to both the conduct and consequence of such a unilateral termination.

A distinction must be made right from the beginning as to two arguments regarding the application of international law to economic development agreements. The first one is that rules of customary international law on

expropriation applies to this set of contracts, though not all contracts under international law, with or without stabilization clauses, not as a matter of contract law or investors as contract parties but as a matter of rules of expropriation and foreign investors as owners of property. The second argument, quite different, is not solely the application of rules on customary international law on expropriation to economic development agreements but the modification of the rule right in its core by arguing that the unilateral termination of the agreement with or without stabilization clauses constitutes an unlawful, wrongful conduct. It follows that such unilateral termination entails either restitution (specific performance) or if impossible full compensation including future profits. This situation constitutes a hard indeterminacy that requires a customary determination for its legitimacy. It is this matter that invites further exploration.

i. Lex Lata in the Background

The duty to pay compensation for expropriation is well settled in customary international law although some States have denied this duty in the history of expropriations.⁸³⁹ This duty was not at the core of controversy surrounding the United Nations General Assembly Resolutions in 1960s and 1970s. Rather the amount of compensation was at the core of disagreement. To assess the argument that a unilateral termination of economic development agreements resulting from nationalizations is unlawful in international law justifying future profits, the starting point is that in customary international law “an expropriation is not necessarily ‘unlawful’ even when the action imputable to the State is contrary to international law.”⁸⁴⁰ In a broader sense, four elements are

⁸³⁹ 1959 ILC Report on State Responsibility, *supra* note 592, at p.18-19. The duty to pay compensation for expropriated property is a “generally accepted requirement ... although there is much disagreement as to the appropriate standard of compensation.” Oppenheim, *supra* note 119, at 920-921. Investment treaties have consolidated this aspect of compensation by providing for the duty to pay compensation for expropriation. See also Schachter noting that investment treaties provide “further evidence of the generally accepted rule that compensation should be paid when property is expropriated.” Oscar Schachter, *International Law in Theory and Practice*, (1982-V) 178 *Rec. des Cours*, at 324.

⁸⁴⁰ 1959 ILC Report on State Responsibility, *supra* note 592, p. 13, para. 50.

often considered to constitute the conditions of legality of an expropriatory conduct in customary international law for expropriation: whether the conduct is discriminatory, not for a public purpose, not according to due process, or not accompanied with compensation.

The G.A. Resolution 1803 Article 4 only pointed to the absence of public purpose and compensation for the unlawfulness of expropriation.⁸⁴¹ Other conditions for non-discrimination or due process were absent in the text of the Resolution. However, this textual deficiency would not change the status of the customary rule existed before or emerged after it. Non-discrimination, due process, and non-violation of a treaty were embodied in the customary rule and its empirical and practical judgments components existed prior to 1962. Thus, the 1959 ILC Report observed where a State was forbidden to expropriate under a treaty, expropriation would be unlawful.⁸⁴² The ILC report also noted public purpose, due process, and payment of compensation as conditions against arbitrariness, thus unlawful by that matter.⁸⁴³ In the current investment treaty practice, NAFTA Article 1110 illustrates a typical reference to these conditions as well as non-discrimination.⁸⁴⁴

⁸⁴¹ See supra note 758 and accompanying text.

⁸⁴² 1959 ILC Report on State Responsibility, supra note 592, p. 13, para. 50. (“Unlike other acts and omissions of this nature which are qualified with the same adjective or the adjective ‘wrongful’, an expropriation can only be termed ‘unlawful’ in cases where the State is expressly forbidden to take such action under a treaty or convention.”) Ibid.

⁸⁴³ Ibid. at p. 14, para. 51. These are the limitations measuring arbitrariness that international law imposes on the exercise of the right of expropriation. Ibid. The ILC report did not raise non-discrimination among these conditions of arbitrariness or conditions of lawfulness in relation to expropriation. It referred to the requirement of non-discrimination in relation to the procedure whereby expropriation is effected or in relation to fixing the amount of compensation in that discrimination to the prejudice of aliens in comparison to nationals in these relations gives rise to State responsibility. See *ibid.* paras. 62 and 90 respectively.

⁸⁴⁴ NAFTA Article 1110 (1): “No Party shall directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment (‘expropriation’), except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and the general principles of treatment provided in Article 1105; and (d) upon payment of compensation in accordance with paragraphs 2 to 6.” Ibid. See also UNCTAD, BITs 95-06, supra note 72, at 47-48, U.N. UNCTAD observes a convergence in BITs regarding these conditions but acknowledges that significant differences exist among BITs on this matter in particular regarding due process and compensation. Ibid. at 47.

All of these conditions have their own penumbra.⁸⁴⁵ Nonetheless, in relation to the consequence of expropriation, no major contest has emerged in the practice of States as to the conditions of public purpose, non-discrimination, or due process. In contrast, the question of compensation for the consequence of expropriation for future profits of economic development agreements has given rise to hard indeterminacy in economic reforms in natural resources.

The general principle drawn from the distinction between lawful and unlawful expropriation with regard to the consequence of expropriation is one to typically require restitution and in its impossibility full reparation or compensation for the latter. Upon this basis, the PCIJ, pronouncing that the violation of a treaty commitment not to expropriate was an unlawful conduct, predicated its judgment for reparation including future profits in the celebrated case of *Chorzów Factory*.⁸⁴⁶ In that case, the PCIJ declared “[t]he action of Poland which the Court has judged to be contrary to the Geneva Convention is no expropriation- to render which lawful only the payment of fair compensation would have been wanting”⁸⁴⁷ Thus, the PCIJ stated

The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all consequences of the illegal act and re-establish the situation which would, in all probability, would have existed if that act had not been committed. Restitution in kind, or if that is not possible, payment of a sum corresponding to the value which a restitution in kind would bear ...—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.⁸⁴⁸

⁸⁴⁵ On public purpose, the ILC report stated that “it is for municipal law, and not for international law, to define in each case the ‘public interest’ or other motive or purpose of the like character which justifies expropriation.” 1959 ILC Report on State Responsibility, at 16, para. 59. On controversy surrounding non-discrimination, see Maniruzzaman A. F. M. “Expropriation of Alien Property and the principle of Non-discrimination in International Law of Foreign Investment: An overview” (1998) 8:1 J. Trans’l L. Policy 57.

⁸⁴⁶ *The Factory at Chorzów* (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17.

⁸⁴⁷ *Ibid.* at 46. The action by Poland had been found to be contrary to the explicit commitment under the Geneva Convention for not to expropriate unless in cases provided under the convention. *Ibid.*

⁸⁴⁸ *Ibid.* at 47.

In relation to restitution, the PCIJ did not rule it out as a remedy for unlawful expropriation.⁸⁴⁹ However, the specific question of future profits is in focus here. Moreover, the question is not concerned with the factual barriers to future profits such as their speculative nature or the inability of the business at the time of expropriation to generate revenue so that the absence of such barriers can rationalize the loss of profits.⁸⁵⁰ The question rather concerns the very status of the rule whether international law requires future profits for the remaining term of an economic development agreement unilaterally terminated by a State under nationalization and economic reform in natural resources.

From the standpoint of customary international law, the lawful or unlawful character of the conduct was a key issue in the concept of compensation for expropriation in relation to State responsibility under international law. The distinction was fundamental in two respects. The first one was that whereas responsibility for unlawful conduct “arises directly and immediately from the act or omission causing the injury,” the responsibility for lawful conduct depends on the arbitrary nature of the conduct and unlawful by that matter.⁸⁵¹ Thus, the responsibility that arises from an unlawful act may not have the same consequences for responsibility that arises from an arbitrary act, i.e. the absence of compensation for instance.⁸⁵² This leads to the second aspect of the distinction

⁸⁴⁹ For the discussion of the impossibility of restitution, see, Higgins, *supra* note 772, at 316. Higgins views that the PCIJ pointed to factual impossibility as when the expropriated property is in the hands of third party while observing others indicating also a legal impossibility as in the nationalization of natural resources where the State is unwilling to restore the situation and cannot be forced to. *Ibid.* 316-317. For the view that considers restitution a higher remedy than damages, see *ibid.* at 320. Higgins states “the case law properly read shows that restitution is in general terms a recognized remedy, but that it has not been an established remedy in the field of concessions. State practice seems to support this view.” *Ibid.* For treating the holding of the PCIJ in the Chorzów Factory Case as *obiter dicta*, see the BP case in stark contrast with the Texaco assuming it a general principle. See BP, *supra* note 766, at 337-338; Texaco, *supra* note 766, at 498.

⁸⁵⁰ For these issues, see Dolzer and Schreuer, *supra* note 782, at 274-275.

⁸⁵¹ 1959 ILC Report on State Responsibility, *supra* note 592, at para. 64.

⁸⁵² *Ibid.* at para. 65. (“[E]ven if compensation is inseparable from expropriation, ‘confiscation’ should not be confused, as it sometimes is, with ‘unlawful’ expropriation. As it is the ‘unlawful’ character of an act of expropriation which makes it intrinsically contrary to international law and hence capable of immediately and directly involving the responsibility of the State, measures not of this character cannot have the same juridical consequences. The position is, however, different in regard to what were called above ‘arbitrary’ acts of expropriation; even if compensation is an inescapable requirement, ‘confiscation’ is, or derives from, a measure which is lawful in itself, so that international responsibility could arise only from the nonobservance of a requirement

dealing with the extent of compensation, particularly whether future profits are included in the amount of compensation due for lawful expropriation. This distinction has been essential in international law for separating compensation for lawful expropriation from reparation for a wrongful act. The Draft Articles on State Responsibility provides for full reparation in cases of wrongful conduct.⁸⁵³ The distinction is key to the question of future profits (*lucrum cessans*) in the amount of compensation.⁸⁵⁴ This is particularly so because no customary rule imposes on States to pay for loss of profits in lawful nationalizations.

a) Lawful Conduct

It may be argued that as a condition of legality compensation in full or adequate sense includes future profits even for lawful conduct. According to one school of thought, lawful compensation may in terms of the quantum of compensation be similar to reparation.⁸⁵⁵ The question begs more exploration in light of the future profits for the economic development agreements and the status of customary international law on full compensation to which future profits was associated. The holding of the PCIJ whereby if the right of the State is not limited

concerning compensation.”) Ibid. On the other hand, the distinction indicates that a situation where other conditions of legality (arbitrariness) are met may still be unlawful because of being against an express treaty commitment not to expropriate. See *ibid.* at para. 50.

⁸⁵³ Draft Articles on State Responsibility, *supra* note 54, Article 31.

⁸⁵⁴ See: Chorzów, *supra* note 846, at 46-47; 1959 ILC Report on State Responsibility, *supra* note 592, at para. 64, 77. (Reparation for unlawful acts includes “not only the direct loss but also any other damages caused by the illegal act or omission for which reparations to be made. Compensation for lawful expropriation, on the other hand, is limited to the value of the property expropriated.”) Ibid. at 64; Derek William Bowett, “State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach” (1988) 59 *Brit. Y.B. Int’l L.* 49. (“For the correct principle is believed to be that loss of future, whilst a legitimate head of general damages for unlawful act, is not an appropriate head of compensation for a lawful taking.” Ibid. at 63. Brownlie makes distinction between different kinds of unlawful expropriations as well. Brownlie, *Principles*, *supra* note 424, at 515. (“The practical distinctions between expropriation unlawful *sub modo*, i.e. only if no provision is made for compensation, and expropriation unlawful *per se* would seem to be these: the former involves a duty to pay compensation only for direct losses i.e. the value of the property, the latter involves liability for consequential loss (*lucrum cessans*)” Ibid. See also Eduardo Jiménez de Aréchaga, “International Law in the Past Third of a Century” (1978-I) 159 *Rec. des Cours* 1, at 298.

⁸⁵⁵ See R.Y. Jennings, “State Contracts in International Law” (1961) 37 *Brit. Y.B. Int’l L.* 156, at 172. Jennings also indicated that the terms of the concession affect the assessment of compensation. Ibid. For recent writers who suggest no difference between lawful and unlawful expropriation for the question of compensation arguing that the value of the property does not depend on the legal characterization, see Reisman and Sloan, *supra* note 772 at 134-137.

by a treaty commitment not to expropriate property, 'fair compensation' would apply, does not support future profits for lawful expropriations unlike reparation for wrongful expropriation for which the PCIJ allowed future profits under that characterization.⁸⁵⁶

The argument that future profits is included in the calculation of compensation finds its closest link to the full compensation inferred from the so-called Hull rule that compensation must be 'adequate', as well as 'prompt' and 'effective.'⁸⁵⁷ There are a number of valuation methods that each in its own situation may be appropriate to reach a fair market value. Fair market value may be compatible with net book value, discounted cash flow (on a going concern basis), liquidation value, etc. depending on the case.⁸⁵⁸ What is at the core of matter and fiercely controversial in economic development reforms in natural resource is future profits for the term of the contract associated with concepts of full (adequate) compensation rationalized to reach market value on a going concern basis in a discounted cash flow method.

Future profits have been deemed relevant in situations where the property has been a 'going concern' in particular in nationalization and termination of concessions. The argument is that as compensation should correspond to the full or fair market value of the property where the property or undertaking is a going concern, the compensation must restore what would have been earned had the expropriation not occurred.⁸⁵⁹ The valuation method introduced to this end is the discounted cash flow.⁸⁶⁰ The rationale for future profits and the going concern

⁸⁵⁶ Chorzów, *supra* note 846, at 46-47.

⁸⁵⁷ Note by the Secretary of State of the United States to the Mexican Ambassador at Washington (August, 22, 1938) reprinted in (1938) 32 Am. J. Int'l L. Supp. 191.

⁸⁵⁸ According to the World Bank Guidelines on Treatment of Foreign Direct Investment, "Compensation will be deemed adequate if it is based on the fair market value of the taken asset as such value is determined immediately before the time at which the taking occurred or the decision to take the asset became publicly known." The World Bank Guidelines, *supra* note 71, at 1382.

⁸⁵⁹ B.A. Wortley, *Expropriation in Public International Law* (Cambridge: Cambridge University Press, 1959), at 111-114.

⁸⁶⁰ The World Bank has defined the valuation methods:

"Without implying the exclusive validity of a single of single standard for the fairness by which compensation is to be determined and as an illustration of the reasonable determination by a State of the market value of the investment under Section 5 above, such determination will be deemed reasonable if conducted as follows: i. for a going concern with a proven record of profitability, on the basis of the discounted cash flow value; ii. For an enterprise which, not being a proven going

basis employed by the PCIJ was still the unlawful character of expropriation.⁸⁶¹ Indeed, the going concern basis and discounted cash flow method for the assessment of compensation for the company and undertaking expropriated under a nationalization measure begs the preliminary question whether future profits are determined to be included in the amount of compensation as a matter of law.

Full compensation for expropriation has been contested in view of lump sum agreements. Scholars have argued that lump sum agreements, which provide for partial compensation, comprise important State practice.⁸⁶² On the particular question of the adequacy of compensation, most lump sum agreements have provided “substantially less than ‘adequate’ much less ‘full,’ compensation.”⁸⁶³

concern, demonstrates lack of profitability, on the basis of liquidation value; (iii) for other assets on the basis of (a) replacement value or (b) the book value in case such value has been recently assessed or has been determined as of the date of the taking and therefore can be deemed to represent a reasonable replacement value. For this purpose of this provision, - a ‘*going concern*’ means an enterprise consisting in income-producing assets which has been in operation for a sufficient period of time to generate the data required for the calculation of future income and which could have been expected with reasonable certainty if the taking had not occurred, to continue producing legitimate income over the course of its economic life in the general circumstances following the taking by the State; - ‘*discounted cash flow value*’ means the cash receipts realistically expected from the enterprise in each future year of its economic life as reasonably projected minus that year’s expected cash expenditure, after discounting this net cash flow for each year by a factor which reflect the time value of money, expected inflation and the risk associated with such cash flow under realistic circumstances. Such discount rate may be measured by examining the rate of return available in the same market of alternative investments of comparable risk on the basis of their present value; - ‘*liquidation value*’ means the at which individual assets comprising the enterprise or the entire assets of the enterprise could be sold under conditions of liquidation to a willing buyer less any liabilities that the enterprise has to meet; - ‘*replacement value*’ means the cash amount required to replace the individual assets of the enterprise in their actual State as of the date of the taking; and - ‘*book value*’ means the difference between the enterprise’s assets and liabilities as recorded on its financial Statements or the amount at which the taken tangible assets appear on the balance sheet of the enterprise, representing their cost after deducing the accumulated depreciation in accordance with generally accepted accounting principles.” The World Bank Guidelines, *supra* note 71, at 1383.

⁸⁶¹ See *supra* notes 847-848 and accompanying text. That is why most writers and tribunals advocating future profits in natural resources cases, introduced the internationalization of economic development agreements terminated as a result of nationalization to assert the unlawfulness of the conduct than relying on full compensation. See below, Section (ii).

⁸⁶² Lillich and Weston, *Lump Sum Agreements* 1975, *supra* note 778; Burns H. Weston, Richard B. Lillich and David J. Bederman, *International claims : their settlement by lump sum agreements, 1975-1995* (Ardsley: Transnational Publishers Inc., 1999.) at 97-98 [*Lump Sum Agreements* 1999]. The compensation formulas adopted in lump sum agreements are (sometimes radically) short of the Hull formula of prompt, adequate and effective particularly with regard to promptness and full compensation construed from adequacy. See *Lump Sum Agreements* 1975, at 208 et seq. In their observation, these writers do not accept or reject the Hull formula. See *ibid.* at 208. Same finding has been mentioned in the study of the lump sum agreements from 1975 to 1995. *Ibid.* *Lump Sum Agreements* 1999, at 77 et seq.

⁸⁶³ *Ibid.* at 217.

Nevertheless, reliance on lump sum agreements is not always well founded as they represent negotiated deals that should not be seen *per se* representing *opinio juris*.⁸⁶⁴ The practice of lump sum agreements is itself not sufficient to demonstrate customary international law. Yet, the practice preceding lump sum agreements not necessarily that proceeding from them matters. For instance, in European nationalizations, the legislative acts of the expropriating countries provided for compensation in some cases less than the total value of the property and sometimes less than half or sometimes even one third of the value far below adequate or full compensation.⁸⁶⁵ The practice of the offer of compensation by States preceding the settlement of disputes is still a practice independent of lump sum agreements. Therefore, the bargain character of lump sum agreements does not detract from the fact that the European States in their practice of nationalization had provided for compensation less than the total value of the expropriated property or even less than half.

It is the status of customary international law on other grounds that matter, mainly the absence of a customary rule requiring full compensation for the hard penumbra of nationalizations. Customary international law never contained a rule to require future profits for lawful nationalizations. It is “an erroneous and distorted image” that traditional international law required the Hull formula for nationalizations of general and impersonal character.⁸⁶⁶ Not only State practice but also academic views and tribunal decisions did not corroborate the assertion that the Hull formula reflected customary international law.⁸⁶⁷

Unlike the practice allowing loss of profit from the property between the time of expropriation and the payment of compensation, the award of damages by a tribunal was controversial for “the heading *lucrum cessans* namely the loss of

⁸⁶⁴ They provided “‘negotiated’ compensation” and involved “‘compromise’ formulas” similar to past lump sum agreements for reparation for injuries to aliens due to wrongful acts. 1959 ILC Report on State Responsibility, supra note 592, p. 22, para. 84.

⁸⁶⁵ Ibid. p. 21, at para. 83.

⁸⁶⁶ Garcia-Amador, supra note 744, at 208.

⁸⁶⁷ See Schachter, supra note 839, at 323-324. Schachter wrote that “[a]dvocates of the Hull formula often characterize it as a traditional rule of international law. The record does not support this.” Ibid. For a case assuming the traditional view but observing a change in international law in a way undermining full compensation for large-scale nationalizations, see *INA Corporation v. Iran*, 8 Iran-U.S. Cl. Trib. Rep. 373, at 378, (1985).

future profits from property such as invested capital or a concessionary right granted for a specific number of years.”⁸⁶⁸ Some writers argued that State practice of many States did not support the assertion that general expropriation should be compensated and States’ agreement to pay compensation was out of grace or convenience after their affirmation that they were not bound to pay compensation and the payments were generally in lump sum not in relation to the damages.⁸⁶⁹ Others suggested that in large-scale nationalizations appropriate compensation in a sense of equitable compensation would be appropriate.⁸⁷⁰

There has emerged strong negative reaction to the suggestion of full compensation in a way to rationalize future profits in nationalizations or promptness in payment of compensation in such large-scale economic reforms. Both G.A. Resolutions 1803 and 3281 carried opposition to a notion of compensation that included future profits in nationalizations and long-term concessions in natural resources. This was reflected in reference to appropriate compensation as well as opposition to the approach that advocated the unlawfulness of the unilateral termination of States’ contractual relations under nationalization. The duty to pay compensation as a result of nationalization is not compromised by General Assembly Resolutions on the matter.⁸⁷¹ On the other hand, these resolutions continue to show that full compensation particularly in large-scale nationalizations is not a requirement of international law. Even before the advent of G.A. Resolutions, the ILC observed that the Hull formula as the requirement by “certain States” *expressing* “the orthodox view”.⁸⁷² Adequate was meant to denote ‘fair’ or ‘just’ as the Chorzów case found appropriate for lawful

⁸⁶⁸ White, *supra* note 771, at 15.

⁸⁶⁹ S. Friedman, *supra* note 616, at 206-209.

⁸⁷⁰ Schachter, *supra* note 839, at 325. Lauterpacht has argued more generally that “in regard to interference with rights of property, neither full compensation nor total denial of redress might in sound law meet the requirements of justice. Partial compensation adjusted to the particular circumstances of each case, while giving the impression of a compromise, might nevertheless represent a juridically sound and equitable solution.” Lauterpacht *supra* note 231, at 122. On support for partial compensation, see also L. Oppenheim International Law: A Treaties, Hersch Lauterpacht ed. (London: Longmans Green and Co. Ltd., 1955) at 352.

⁸⁷¹ Schachter, *supra* note 839, at 326; Aréchaga, *supra* note 854, at 301-302.

⁸⁷² 1959 ILC Report on State Responsibility, *supra* note 592, p. 19, paras. 72-73.

compensation.⁸⁷³ Additionally, adequate compensation was favored in ordinary cases of individual expropriations to cover the value of the expropriated property.⁸⁷⁴ For nationalization, the ILC observed the differences of views among those that treated compensation of nationalization the same as other cases of expropriation arguing for full compensation, those that argued that compensation for nationalization falls entirely within the States' discretion, and those that call for a flexible middle ground of partial compensation consistent with the practice in lump-sum agreements.⁸⁷⁵

International law did not have a customary determination to require future profits in the notion of full compensation for lawful nationalizations. The question now to raise is whether investment treaties have changed customary international law that did not require future profits in compensation for lawful nationalizations in economic development reforms. One study of BITs notes widespread usage of Hull formula either by reference to the exact term 'adequate' or assumed in references to terms such as 'the market value,' 'fair market value,' or 'genuine value' of the asset expropriated.⁸⁷⁶ This widespread usage within investment treaties is not *per se* sufficient to change the status of customary international law. A number of points may be made.

From the language point of view, mere reference to 'full,' 'adequate,' 'going concern' is insufficient to demonstrate the acceptance of States to pay future profits in all situations that may arise. Firstly, BITs differ on the question of calculation and payment of compensation.⁸⁷⁷ That is BITs do not even provide a uniform approach to the quantum of compensation that is the essence of adequacy of compensation and the subject of controversy. Secondly, the term 'adequate'

⁸⁷³ Ibid. at paras. 73-74, 90. Even with respect to this type of expropriations, the ILC commented that foreign investors should not expect the international standard of adequacy or compensation at all where investments are made in a country whose constitution provides for less or non-compensation, in which cases the principle of acquired rights cannot be invoked. Ibid. at para. 89.

⁸⁷⁴ Ibid. at para. 74.

⁸⁷⁵ Ibid. p. 23, para. 91. For the position that full compensation of the value of the property may sometimes collapse see, Restatement Third, *supra* note 70, § 712.

⁸⁷⁶ UNCTAD 95-06, *supra* note 72, at 48.

⁸⁷⁷ Ibid. at 52.

denoted 'fair' or 'just' appropriate for lawful compensation.⁸⁷⁸ In addition, mere reference to 'adequate' or 'just' is not enough.⁸⁷⁹

From the customary law standpoint, bilateral treaties are of far less weight than multilateral treaties and conventions in declaring or making customary law, requiring widespread practice and opinion outside the treaty framework.⁸⁸⁰ An important distinction must be made between an issue that has found other support for a customary status as opposed to an issue that has been contested in the past. The latter would require overwhelming practice outside the treaty to show a change of customary international law on the particular matter. There exists little evidence to demonstrate that by agreeing to adequate compensation under investment treaties States are subscribing as law to the view that in case of economic reforms under nationalizations in natural resources they must pay future profits for the term of economic development agreements. The assumption would particularly be flawed in light of the requirement of *opinio juris*.

A widespread utilization of language in investment treaties is not *per se* sufficient to meet the requirement of *opinio juris* and requires other indications of practice and opinions. From this perspective, it has been viewed that

Much has been made of the fact that many bilateral investment treaties concluded in recent years include compensation clauses that are similar to the Hull standard. It is contended that these should be considered as evidence of customary international law. The difficulty with the argument is that the agreements are bargained-for arrangements in which the States that grant protection to foreign investors receive benefits in exchange by way of trade or financial aid. The very negotiations of such reciprocal contractual arrangements shows they are not merely declaratory of existing obligations. One cannot assume the rules adopted are considered obligatory in the absence of the treaty.⁸⁸¹

⁸⁷⁸ See supra note 873 and accompanying text.

⁸⁷⁹ 1959 ILC Report on State Responsibility, supra note 592, p. 20, at para. 77. ("[I]t is clear that the mere requirement that compensation should be 'adequate' or 'just' does not in itself provide a sufficient basis to determine the quantum of compensation to be paid. Even where there is no doubt as to their interpretation, the use of any of these terms immediately raises the question of determining the amount of compensation that should in fact properly be paid to the owners of expropriated property in the various cases and circumstances that may arise. In other words, it is necessary to ascertain the rule or rules that must be followed in assessing the value of expropriated property.") Ibid.

⁸⁸⁰ See Chapter III, Section B (i).

⁸⁸¹ Schachter, supra note 839, at 324.

At the time this view was advanced, bilateral investment treaties were in hundreds. They are now in thousands. Nonetheless, the increase in number does not change the point. The voluminous number of investment treaties is not sufficient to change or develop a customary international rule.⁸⁸² The reasons that a State may enter into an investment treaty may differ from country to another on the level of development and considerations whether it exports or imports investment and for economic or non-economic benefits. Moreover, such an increase in a broader perspective may signify States' willingness to participate in international affairs that build or maintain relations with other States or their desire to have a world player standing. More narrowly, developing countries may enter into investment treaties to attract investment. Although this latter ground is not substantiated, entering into an investment treaty for investment attraction to boost the economy detracts from the assertion that developing States are accepting this part of the treaty, i.e. full compensation, out of law rather than convenience and self-interest. For developed States too, the reason may be that they are contracting out of custom than developing it.⁸⁸³

Even in contexts other than natural resources but of significant financial burden for States, investment treaties are still not deemed to have changed customary international law. By referring to the practice of States under General Assembly Resolutions, Brownlie considered that the 'appropriate' not 'full' compensation constitutes contemporary international standard on

⁸⁸² On this point see, Case concerning Ahmadou Sadio Diallo (Guinea v Congo) (Preliminary Objections), ICJ General List No 103, 24 May 2007, at para. 90. The ICJ held that "The fact invoked by Guinea that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal regimes governing investment protection . . . is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary." Ibid.

⁸⁸³ Jennings, *supra* note 219, at 35. ("if you have a more or less large number of bilateral treaties saying the same thing, should one regard this as evidence of developing custom; or as evidence that governments felt it necessary to make the treaties in order precisely to contract out of the customary rule? There can be no general answer to that question.... A topical example is the tension between the NEIO and the many scores of bilateral investment treaties providing for full compensation in the event of nationalization." Ibid. See also UNCTAD observing that capital-exporting countries turned to BITs because developing countries denied conditions for the lawfulness of expropriation including Hull formula as part of customary international law. UNCTAD 95-06, *supra* note 72, at 47.

compensation.⁸⁸⁴ This view further affirms that customary international law in this respect has not changed as a result of the widespread usage of the Hull formula in investment treaties. The fact that investment treaties surged in the wake of financial crisis of 1990s by no means signifies that States have abandoned their position as a matter of law on so controversial a point.

In light of fierce opposition to full compensation and future profits in State practice, it would require cogent State practice and *opinio juris* outside the investment treaty to meet the requirements of customary international law for subscription to the view advocating future profits in compensation for nationalizations. Moreover, a general usage even if it ripens into customary international law for an ordinary circumstance of compensation is inadequate to build a customary rule for a specific situation of hard indeterminacy. Assuming that investment treaties have developed customary international law for emerging a rule of full compensation for expropriation, such a rule would lack authority for a hard case like economic reforms in natural resources. On major issues of controversies in the legal discourse of expropriation including full compensation for future profits in natural resources, legality of unilateral termination of economic development agreements, or indirect expropriations, investment treaties *per se* are not reflective of customary international law. State practice and opinion outside the investment treaty framework are required to establish a customary determination. A general treaty term for full compensation is devoid of the authority of legal statement once entering a hard penumbra.

Compensation for nationalization in economic development in natural resources has required its own rule for which the statement of the law for ordinary expropriations do not operate. The ICJ in the Barcelona Traction case declared, “arrangements made in respect of compensation for nationalization of foreign property. Their rationale too, derived as it is from structural changes in a State’s economy, differs from that of any normally applicable provisions.”⁸⁸⁵ Such a

⁸⁸⁴ See CME, Separate Opinion by Ian Brownlie, *supra* note 672, at paras. 26-32.

⁸⁸⁵ Barcelona Traction, *supra* note 405, p. 40, para. 61. See also Brownlie, Principles, *supra* note 424, at 513. (“The principle of nationalization unsubordinated to full compensation rule may be

difference requires compensation for nationalization as a lawful conduct “on a basis compatible with the economic objectives of the nationalization, and viability of the economy as a whole” which in relation to the amount of compensation means only “a duty to pay compensation for direct losses, i.e. value of the property” not *lucrum cessans*.⁸⁸⁶

A further point reflected in these observations is the lack of a consensus among practical views, not to mention the absence of sufficient State practice and *opinio juris* of States, to demonstrate that full compensation particularly future profits was a requirement of customary international law for economic reforms arising from nationalizations as a result of the duty to pay compensation. No such customary determination has been formed. It is a requirement of legitimacy that precludes the application of full compensation to penumbral hard cases even if it is assumed that through the history of international law there is consistent and general practice for full compensation. Full compensation, adequate compensation and whatever other terms taken to import future profits for the whole term of a nationalized economic development agreement such as a going concern basis or discounted cash flow method fail to determine, as a matter of principle if any, the statement of the law for a hard situation as natural resources. The product of a consistent and general practice for full compensation, if any, would be a guiding, contingent ‘general principle’ not a binding, authoritative rule for a hard penumbra. The justice background of compensation for expropriation of a small business or entrepreneurship on a going concern valuation cannot be compared with justice and fairness implications of going concern of a company in relation to natural resources, requiring its own coherence for the common good. The common good is the decisive element for compensation in hard indeterminacies not terminology or a general principle. It requires authoritative determination to include loss of profits in the quantum of compensation in nationalization of natural resources and termination of concessions whose legitimacy must be measured by the genuine respect it pays to the common good by considering all

supported by reference to principles of self-determination, independence, sovereignty and equality.”) Ibid.

⁸⁸⁶ Brownlie, *Principles*, supra note 424, at 514-515.

justice demands according to the rule of recognition. The principal objection to the full compensation in natural resources reform is in light of the criteria of legitimacy.

It was earlier indicated that the rule of recognition admits a degree of discretion for the arbitrators to determine the amount of compensation where the law has determined that the conduct is liable to compensation but without engaging in determination as to the conduct. That discretion does not warrant departure from the requirement of the legitimacy of the coherence for the common good to give genuine, appropriate consideration to all demands of justice without giving a substantive principle an overriding character projected as law in the absence of the rule. In such a situation, the legitimacy requirement of coherence for the common good permits no *a priori* status of *lex lata* for a general principle of full compensation including future profits in favor of the private party. That principle is only one principle, a practical judgment, among others as *lex ferenda* for determination in conformity with common good requiring appropriate consideration of demands of justice of States owning resources.

To give full compensation a status of a general principle of law would accord a *lex lata* status in a hard penumbra to a contingent principle of *lex ferenda* weight, thereby giving an advantage to private corporations over the interests of States, suppressing the demands of justice of the States whose appropriate consideration is required by the common good. To meet coherence, it requires far beyond recognizing that a general principle is a matter of weight. It requires genuinely treating the principle and the practical view expressing it only as a conception of justice part of the *lex ferenda* itself rather than the conception of justice that international law has adopted expressive of *lex lata* with superficial treatment of equally appropriate competing views and principles subordinated as *lex ferenda*. This is also the core challenge in view of the legitimacy criteria of the rule of recognition and coherence for the application of general principles of law to characterize unlawful the nationalizations of natural resources affecting economic development agreements. Equally important, the discretion as to the amount of compensation does not warrant the legal determination of the conduct

itself such as its lawfulness or unlawfulness by the tribunal in the task of measuring compensation.

b) Unlawful Conduct

The question in this section is that whether observance of an economic development agreement also constituted a condition of legality for expropriation in customary international law. Put differently, did a unilateral termination of an economic development agreement between a State and a foreign corporation in natural sources subjected to a measure of nationalization constitute an unlawful conduct in customary international law to justify full compensation?

In customary international law a breach of contract did not constitute an unlawful conduct. The proper law of a contract between a State and a private party was the law of the State party.⁸⁸⁷ Destruction of contractual rights by a State fell within the realm of expropriation.⁸⁸⁸ As a result, the conduct would lead to State responsibility under the conditions of expropriation.⁸⁸⁹ The freedom to terminate a concession or an economic development agreement to effectuate nationalization in natural resources in the relation of States and foreign investors emerged as a hard penumbra for which customary international law did not impose a limitation on States except under the rules of lawful expropriation.

The unilateral termination of a contract was not among the conditions of legality of expropriation contained in Paragraph 4 of the United Nations General

⁸⁸⁷ The Permanent Court of International Justice in the Serbian Loans case held that “any contract which is not between States in their capacity as subjects of international law is based on the municipal law of some country.” Serbian Loans case, (1921 Ser .A) 20/21 P.C.I.J. at 41. The court also held that “a sovereign State... cannot be presumed to have made ... the validity of its obligations ... subject to any law other than its own”, *ibid.* at 42. This remains the position of international law. (“The rules of public international law accept the normal operation of private international law and when a claim for breach of a contract between an alien and a government arises, the issue will be decided in accordance with the applicable system of municipal law designated by the rules of private international law.”) Brownlie, *Principles*, *supra* note 424, at 525.

⁸⁸⁸ See Brownlie and sources referred, *ibid.* at 523.

⁸⁸⁹ *Ibid.*

Assembly Resolution 1803 on Permanent Sovereignty over Natural Resources.⁸⁹⁰

Paragraph 8 of the Resolution 1803 provided that

Foreign investment agreements freely entered into by, or between, sovereign States shall be observed in good faith; States and international organizations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the Charter and principles set forth in the present resolution.⁸⁹¹

The phrase ‘by, or between, sovereign States’ has been taken as an indication that the paragraph elevated foreign investment agreements to the international plane in the sense that the unilateral termination of an economic development agreement would be unlawful in international law like a breach of treaty.⁸⁹² The question arises what part of customary international law this paragraph reflects. The paragraph can also mean that such agreements are also subject to the governance of international law and its existing rules on expropriation than the exclusive local law, being the proper law of the contract, without adding to the rules of expropriation. Starting with the Paragraph 8 itself, this paragraph was produced as an amendment to the Resolution drafted by the United States and the United Kingdom, approved by the General Assembly and incorporated in the Resolution 1803.⁸⁹³ The amendment, however, did not receive so substantial a majority as Paragraph 4 did.⁸⁹⁴ From the standpoint of State practice and opinion, there was no acceptance of such provision as an element of unlawfulness in international law for the conduct of States for unilateral termination of contract in the practice of non-western countries. Nor did such an element even exist in the genuine practice of western countries. The United Kingdom, for instance, has unilaterally changed its engagements with foreign investors in the regulation of petroleum

⁸⁹⁰ Permanent Sovereignty over Natural Resources GA Res. 1803, *supra* note 592.

⁸⁹¹ *Ibid.* Paragraph 8.

⁸⁹² See below, Section. (ii).

⁸⁹³ See Garcia-Amador, *supra* note 744, at 171-172.

⁸⁹⁴ See *ibid.* at 171-172. (“The result of the vote, however, reflected certain reluctance on the part of the developing countries to accept the legal implications of the clause that was incorporated into the General Assembly resolution.” *Ibid.* at 172.

industry without paying compensation.⁸⁹⁵ The position of the United Kingdom has been that agreements with foreign investors may not fetter its powers to legislate and regulate its natural resources.⁸⁹⁶ This situation has been differentiated from concessions in view of the absence of international arbitration for recourse in the UK licenses and thereby its treatment as a domestic matter.⁸⁹⁷ Yet, the absence of arbitration and stabilization provisions or reference to international law in the petroleum licenses of developed countries does not change the fact as to the United Kingdom's practice contrary to a general principle of *pacta sunt servanda*. The United Kingdom that has asserted the unlawfulness of cancellation of contracts against other States has not even considered relevant the duty to pay compensation under international law for unilateral changes to its licenses. The United Kingdom has still treated engagements with foreign investors in the oil exploration arrangements, where foreign investors deployed capital and assumed risks, incapable of fettering its sovereign rights unsubordinated to a general principle of *pacta sunt servanda*. That means the United Kingdom did not accept this principle as the authority of the law upon itself. Bowett observes that "[t]he idea that the assertion of a governmental power to vary contracts with foreigners is essentially a policy favoured by developing countries is quite untenable."⁸⁹⁸ He continues that "[i]t will have become clear to oil companies that the UK and Norwegian Governments are no more willing than their OPEC counterparts to stick rigidly to contracts they deem unreasonably disadvantageous and there is no absolute constitutional protection in either country for the principle *pacta sunt servanda*."⁸⁹⁹ The genuine position of States on a particular issue such as natural resources and unilateral termination of commitments towards them is a significant

⁸⁹⁵ This emerged following the UK Petroleum and Submarine Pipelines Act in 1975 where a number of fundamental changes to the licensing regime of oil exploitation was introduced with retrospective application to existing licensees interfering with their interests including control of production rate, determination of royalties in kind than in cash, reduction of foreign participation share through (disguisedly forced through securing purchase of 51 percent of oil produced in the North Sea by the newly established British National Oil Corporation) renegotiations.

⁸⁹⁶ See Higgins, *supra* note 772, at 309, 349-352. The UK government indicated that this did not require a duty to pay compensation because it was of general application without being directed against a specific contracting party for which there was a contract. See *Ibid.* at 350.

⁸⁹⁷ *Ibid.* at 311-312.

⁸⁹⁸ Bowett, *supra* note 854, at 58.

⁸⁹⁹ *Ibid.* at 58, n. 40. [footnote omitted]

part of empirical practice and opinion of States as to the matter to assess the customary status. Whether the action of that particular State is itself actionable under international law is another matter. Thus, ironically on grounds of eminent domain, parliamentary sovereignty or otherwise, developed States as “exporters of capital reserve to themselves legal powers they are not always prepared to recognize in others.”⁹⁰⁰

Furthermore, there is no compelling evidence or reason that by agreeing to Paragraph 8 of the Resolution 1803, developing countries accepted the equation of their investment contracts with a treaty and their cancellation as an unlawful conduct in international law to justify future profits on that ground. More plausibly, by agreeing to Paragraph 8, these countries only accepted subjecting their contracts with foreign corporations to international law on rules of expropriation and duty to pay compensation for expropriating the contract as a lawful conduct in international law. This conclusion is also supported by the debate surrounding the absence of a similar provision in the Charter of Economic Rights and Duties, militating against the internationalization of economic development agreements in the sense of their equation with treaties to justify the unlawfulness of their unilateral termination by developing countries. The then Group 77 expressed their view that

The countries of Group 77 did not deny the general duty of all States to fulfill their obligations, but considered that such agreements [between foreign corporations] were not international agreements, since they were not concluded between States and were therefore governed by the domestic law of the States concerned. They did not have international status, because private companies were not subjects of international law. The developing countries refused to accept the formula in alternative 4 [embodying the developed countries views] because they felt that it would be tantamount to conferring international status on such companies and making the legal bond between the company and the State a

⁹⁰⁰ Brownlie, *Legal Status*, supra note 445, at 280. Brownlie suggests that “the principles of international law stated by publicists which prevent legislative annulment or modification of concession contracts should be examined in the light of municipal law position on ‘Contracts of Public Authorities.’” Ibid.

bond of international law. Disagreement on that issue was radical.⁹⁰¹

Now, as earlier noted, there are two aspects in this respect. One assumption is to read the above statement together with Article 2 (c) of the G.A. Resolution 3281 as an attempt to detach economic development agreements entirely from international law including rules of expropriation and the duty to compensation in case of nationalization of natural resources.⁹⁰² Such an attempt on the part of developing countries, if any, would be only one indication of practice without supporting practice and opinion outside the Resolution to eliminate the governance of international law on the issue of expropriation and nationalization. A different reading of the statement above would be that a unilateral termination of economic development agreements resulting from nationalization of natural resources even against the contract or a specific contractual commitment not to change or terminate the contract constituted a lawful conduct in international law though as a direct expropriation to be compensated under international law. It is this second aspect that matters for compensation, since in international law no customary rule has emerged to determine this particular hard instance of unilateral termination of economic development agreements as an unlawful expropriation solely by its breach of a contractual term rather than by a violation of an independent condition of legality such as discrimination.

This status of customary international law was explicit in the ILC study of the matter in 1959. The 1959 ILC Report on State Responsibility described the

⁹⁰¹ Statement by the President of Group 77. G.A. Second Committee (1638 Mtg.) 382, U.N. Doc. A/C.2/SR 1638, at 383. quoted in Garcia Amador, *supra* note 744, at 172-173. This statement was not mentioned in the Texaco case that gave a broad interpretation to the acceptance of States of their obligation to observe their agreements. See below, Section (ii).

⁹⁰² The Charter of Economic Rights and Duties of States, GA Res. 3281, *supra* note 592. Article 2 (c) of this Resolution subjected the duty to pay compensation for nationalization to the sole governance of domestic law. ("Each State has the right to ... (c) to nationalize, expropriate, or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adapting such measures taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of sovereign equality of States and in accordance with the principle of free choice of means.") Ibid.

internationalization theory that attempted “to extend the notion of ‘unlawful’ expropriation to cases in which the State and the alien individual are bound by a contractual relationship” as “*a tendency, of relatively recent origin* but shared by some authoritative writers.”⁹⁰³ This tendency was “based on the idea that, by analogy with treaties, the non-observance by the State of the obligations which it has assumed in those contracts or concession agreements constitutes a ‘wrongful’ act, which gives rise to direct and immediate international responsibility. In brief, the premise is that the principle *pacta sunt servanda* applies equally to treaties and to contractual relationships between States and alien private persons.”⁹⁰⁴ The theory in a broader sense attempted to rationalize that mere annulment of contract as a result of nationalization was unlawful and in a narrower sense that if nationalization and the concomitant termination was against a specific stipulation within the contract, a stabilization clause not to expropriate, then it was unlawful in international law.⁹⁰⁵ The ILC, therefore, indicated the absence of a customary rule to create an international obligation for States that their unilateral termination of an economic development agreement in foreign investment either with or without a specific stipulation for not to nationalize constituted a wrongful, unlawful conduct on the international plane adding to the conditions of legality of expropriation.

What was advanced as the internationalization theory was a ‘tendency,’ a ‘suggestion,’ a ‘proposal,’ rooted in analogy of an economic development agreement with a treaty and in what is identified as a practical view not the statement of the law. The theory was not even the prevailing practical view. The ILC acknowledged that the “[t]he majority opinion, however, does not seem to support this tendency.”⁹⁰⁶ Additionally, it was pointed out that according to the

⁹⁰³ 1959 ILC Report on State Responsibility, *supra* note 592, p. 14, para. 52, p. 26, para. 102 et seq.

⁹⁰⁴ *Ibid.* at p. 14, para. 52.

⁹⁰⁵ See *ibid.*

⁹⁰⁶ *Ibid.* at para. 54. The ILC observed that “[a]t its Siena session, the *Institut de droit international* rejected a proposal to the effect that the State should be bound to respect (express or tacit) undertakings not to nationalize entered into either with another State or with alien private individuals.” *Ibid.* at para. 70. See also *ibid.* for other sources in support of this status of international law. Earlier in 1930, the Preparatory Committee of the League of Nations for the Codification of International Law on State Responsibility for Damages Caused in Their Territory

“the traditional position” or the “prevailing doctrine and practice” substantive law of the contract was governed by the municipal law.⁹⁰⁷ The governance of international law was not really at issue. Instead, the question concerned whether international law contained a rule to make a unilateral termination or non-performance of the contract *per se* as unlawful in international law. It was acknowledged that “in traditional practice and doctrine a non-performance of contract gives rise to State responsibility only if it involves an act or omission contrary to international law” contrary to the new doctrine that considered “mere non-performance of the contract would, at least in principle, constitute an ‘unlawful’ act.”⁹⁰⁸

It is, therefore, a distortion of law and violation of legitimacy to project the internationalization theory, which was a practical view among others, as the position of international law. Customary international law did not embody a rule to designate unilateral termination of economic development agreements as unlawful in international law. There is no prejudice against the collapse of this status of customary international law. Yet, such a collapse or change requires a customary determination.

ii. Lex Ferenda and Internationalization of Economic Development Agreements

The practical views advocating the theory of internationalization of economic development agreements peaked in 1950s to 1980s. The Special Rapporteur of the ILC that had observed the theory of internationalization of

to the Person or Property of Foreigners noted responses to the question whether a State is internationally responsible for enacting a legislation incompatible with the terms of a contract or concession. Only 23 countries replied, which did not include the United States. The Committee observed that in general most replies were positive but there was hesitation. The hesitation raised was that some States considered the violation of a contract or concession a matter of municipal law and some calling for distinction among different situations, while some advocating a general approach. Particular difficulty was observed as to responsibility for a legislation of a general character. See, Preliminary Documents of the Conference for the Codification of International Law, The Hague, March-April 1930, (1930-Suppl.) 24 A J. Int'l L 1, at 49-50.

⁹⁰⁷ 1959 ILC Report on State Responsibility, *supra* note 592, at pp. 26-27, paras. 104-106, pp. 30-31 paras. 121-124.

⁹⁰⁸ *Ibid.* at p. 30, para. 121.

contracts as a ‘tendency of recent origin’ joined that practical view that considered economic development agreements would create international obligation and their mere non-performance unlawful giving rise to international responsibility.⁹⁰⁹ Some academics have advocated the internationalization theory.⁹¹⁰ The essence of the argument is that as concessions or economic development agreements are different from ordinary contracts, by their character or by explicit contractual provisions such as recourse to arbitration, reference to international law or general principles of law or stabilization clauses, they create an international obligation.⁹¹¹ Thus in an analogy with treaty and on the basis of *pacta sunt servanda* or other general principles of law such as acquired rights, though sometimes acknowledged not to be absolute, non-performance of the agreement was considered to be unlawful giving rise to State responsibility requiring reparation for wrongful conduct than compensation for lawful expropriation.⁹¹²

The internationalization theory received reactions in notable arbitrations dealing with disputes arising from economic development agreements in natural resources raising both the legality of termination of long-term petroleum concessions in the exercise of the right of nationalization and the question of future profits particularly in view of stabilization clauses embodied in the agreements. In *BP v. Libya*, the sole Arbitrator found Libya’s repudiation of the concession against international law because no compensation had been offered to BP after almost two years from nationalization thus a confiscatory nationalization and additionally that “it was made for purely extraneous political reasons and was arbitrary and discriminatory in character.”⁹¹³ Thus, no occasion arose in that case to examine the internationalization theory and the question of stabilization. The sole arbitrator, however, rejected reversal of nationalization by an award of *restitutio in integrum* or specific performance or even that such a remedy

⁹⁰⁹ 1959 ILC Report on State Responsibility, *supra* note 592, at pp. 31-33, paras. 128-132.

⁹¹⁰ See Wortley, *supra* note 859, at 111-114; F.A. Mann “The Proper Law of Contracts Concluded by International Persons” (1959) 35 Brit. Y.B. Int’l L. 34 at 43-56; Jennings, *supra* note 855.

⁹¹¹ 1959 ILC Report on State Responsibility, *supra* note 592, pp. 27-28, paras. 107-111; Jennings, *supra* note 855, at 177. Jennings and Watts, *supra* note 119, at 918, citing *Texaco Award*.

⁹¹² 1959 ILC Report on State Responsibility, *supra* note 592, at pp. 29-30, 36 paras. 115-119, 146; Jennings, *supra* note 855, at 173-177; Wortley, *supra* note 859, at 111-114.

⁹¹³ *BP*, *supra* note 766, at 329.

constituted a general principle of law.⁹¹⁴ More importantly, the sole arbitrator in the BP case gave an important dictum on the question of damages signifying that even in an unlawful nationalization on grounds of discrimination resulting in an unlawful termination of a concession, the fact that the agreement has a stabilization clause could not justify ownership to the oil after nationalization.⁹¹⁵

The sole arbitrator in Liamco Arbitration considered economic development agreements (concessions) of essentially private nature and governed by principles of private law of contracts supporting the sanctity of contracts and validity of stabilization clauses.⁹¹⁶ Nonetheless, the sole arbitrator found the nationalization and the concomitant termination of the concession lawful consistent with customary international law, holding that “it may be safely laid down that it is lawful to nationalize concession before the expiry of the concession term, provided that the measure be not discriminatory nor in breach of treaty, and provided that compensation be paid.”⁹¹⁷ Like the arbitrator in BP, the arbitrator in Liamco held that *restitutio in integrum* was not possible against a nationalizing State and would amount to cancellation of nationalization.⁹¹⁸ The arbitrator also held that “the question whether or not the concessionaire may claim compensation for all the loss of profits for the unexpired term is still a controversial point which has not been definitely settled.”⁹¹⁹

Most explicitly, the internationalization theory was adopted by the sole arbitrator in the Texaco Arbitration. The sole arbitrator viewed that the concession on the ground of its embodiment of clauses referring to arbitration, general principles of law, stability of the concession and its character as economic development character was internationalized in the sense that its unilateral revocation was unlawful in international law.⁹²⁰ The sole arbitrator heavily relied on the stabilization clause and respect for it by virtue of *pacta sunt servanda* to hold that the unilateral termination of the concession implementing the

⁹¹⁴ Ibid. at 349-354.

⁹¹⁵ See infra note 956 and accompanying text.

⁹¹⁶ Liamco, supra note, 766, at 59-60, 105-113.

⁹¹⁷ Ibid. at 143-144, 168.

⁹¹⁸ Ibid. at 125-126.

⁹¹⁹ Ibid. at 143-144.

⁹²⁰ Texaco, supra note 766, at paras. 23-35, 42-45, 62, 66-68.

overarching nationalization was unlawful in international law and awarded *restitutio in integrum* as a remedy equally found to be a general principle of law.⁹²¹ Thus, the principle of *pacta sunt servanda* was considered to create an international obligation not to expropriate the concession against a stabilization clause. The arbitrator in the Texaco Arbitration tended to reject that the internationalization of the contract would mean either that international law governs the contractual relation or that the contract is assimilated with a treaty.⁹²² Yet, the distinction was more to mean that the private parties did not have full but limited capacity under international law.⁹²³ The distinction made little difference for the question of the unlawfulness of nationalization in equation of the concession with a treaty, since in the analysis of the sole arbitrator the concession was given an effect to render nationalization unlawful in international law no less than the effect of a treaty provision, i.e. overriding the right of a State to nationalization. The sole arbitrator attempted to rationalize the operation of *pacta sunt servanda* to this field on the ground of favorable practice by States. In this way, the sole arbitrator read the phrase “by, or between” in Paragraph 8 of G.A. Resolution 1803 as an equation of contracts with treaties.⁹²⁴ That provision, however, by no means establishes such an equation for holding a nationalization unlawful for its mere being contrary to a contractual provision.⁹²⁵

⁹²¹ Ibid. at paras. 45, 70-71, and 92-112.

⁹²² Ibid. at 46.

⁹²³ Ibid. at 47-48.

⁹²⁴ Ibid. at para. 68.

⁹²⁵ See supra note 901 and accompanying text. The sole arbitrator referred to the statement of the Chairman of the Group 77 that “[t]he Charter accepts that international law may operate as a factor limiting the freedom of the State should foreign interests be affected even if Article 2 does not State this explicitly. This stem from the provisions included in other articles of the Charter which should be interpreted and applied jointly with those of Article 2” to conclude that the principle of good faith was also important in the Charter of Economic Rights and Duties of States extending this principle to contracts between States and private parties. Ibid. at 90-91. But, Article 2 (c) raised the question of duty of State to pay compensation as a limitation that international law imposed on States for expropriation and the absence of reference to international law in that Article created the impression that developing States were eliminating this duty under the Resolution. This statement by the Chairman of Group 77 points to the acceptance of the duty to pay compensation for expropriation by the Group 77 and does not seem to concern the question of unlawfulness of nationalization by the mere cancellation of concessions. See also Aréchaga, supra note 854, at 301-302; Schachter, supra note 839, at 326. As to the rejection of equation of contract with treaty and the unlawfulness of cancellation of contract, the Group 77 expressed their position explicitly under another statement specifying that the Group did not accept the view that their contractual obligations are international obligations. See supra note 901 and accompanying text.

A similar question was raised in the Aminoil Arbitration as to the effect of a stabilization clause as part of the internationalization theory to render nationalization and its resulting termination of concession unlawful. The Aminoil Tribunal, by majority, held that the stabilization clause before it could not preclude the State from nationalization because on the one hand the concession agreement itself had changed in character acquiesced by the parties overtime, and on the other hand, the stabilization clause was not specific enough to include nationalization covering only confiscation.⁹²⁶ The Tribunal found the nationalization not confiscatory thus lawful in international law as well as consistent with the concession agreement.⁹²⁷ Therefore, the position of the majority of the Tribunal on the theory of internationalization and a stabilization clause specifically forbidding nationalization is unclear. In a separate opinion, Fitzmaurice disagreed with the Tribunal that the stabilization clause did not cover nationalization, or that nationalization upon offer of compensation was not confiscatory, or that by the change in the nature of the concession over time the stabilization clause even if construed to originally prohibit nationalization had lost that original position.⁹²⁸ Yet, he did not disagree on the question of the quantum

The sole arbitrator in the Texaco Arbitration, however, did not mention this important statement by the Chairman of Group 77.

⁹²⁶ Aminoil, *supra* note 766, at 1023-1024, paras. 97-102. For the stabilization clause, see at 1020. The Tribunal rejected that a stabilization clause would be of no effect. *Ibid.* at 1020-1021, para. 89. The Tribunal attributed “full value to the fundamental principle of *pacta sunt servanda*.” *Ibid.* at 1023, para. 97.

⁹²⁷ *Ibid.*

⁹²⁸ *Ibid.* 1050-153, paras. 21-30. Fitzmaurice went beyond this to argue that even a generous monetary compensation would not remove the confiscatory character of nationalization likening losing of business with a human being “who has lost his leg” or has lost his business or job. (“Nationalization, or any other form of take-over, is necessarily confiscatory in the sense that, irrespective of the wishes of the legal owner, it disposes him of its property and transfers it elsewhere. Nationalizations may be lawful or unlawful, but the test cannot be whether they are confiscatory or not...” *Ibid.* at para. 26. Nevertheless, ownership in natural resources is not the same as ownership of a factory whose loss of business to be the same. Corporations are not the legal owner of natural resources. See *infra* note 956. On the other hand, the position of giant oil corporations and multinational companies is far different from powerless human beings or small businesses whose lives depend on their jobs or businesses. Brownlie has pointed out that “[i]t is, of course, a truism that multinationals may be more powerful than small States. Without exploring this question fully, there is one question that stands out. The resources of a corporation entails considerable flexibility in changing the location of assets and in changing the organisation of the assets. The resources of a country, its human and natural resources, are a given: they are necessarily fixed.” CME, *Separate Opinion by Ian Brownlie*, *supra* note 672, at para. 76.

of compensation.⁹²⁹ This is an important aspect of this separate opinion because the compensation in the award followed the scheme of compensation for lawful nationalization and equity based on a reasonable rate of return. By agreeing to the scheme of compensation applied by the Tribunal, Fitzmaurice, while considering nationalization in that case inconsistent with the stabilization clause and unlawful, implied the rejection of the assertion that the compensation for nationalization and the long term concession should include future profits for the term of the concession based on claimant's calculations.

There are various grounds to object to the internationalization theory. One objection concerns the lack of an *international* obligation for the private party.⁹³⁰ Moreover, the engagement of a State under a treaty is much higher in terms of the consequences of a breach and by that matter the evaluation of the effect of general principles of *pacta sunt servanda* or good faith in the formation of the rule by the recognized body of the system. The practical view equating an economic development agreement with a treaty is not always elevating the concession but degrading the treaty or international law in general as well. One equally unacceptable corollary of the internationalization theory of economic development agreements is the validity of Calvo clauses on the international plane as well.⁹³¹

The fundamental objection in terms of legitimacy here to the internationalization theory is still its projection as *lex lata* than its real status as *lex*

⁹²⁹ Fitzmaurice, stated his difference of view did not affect his concurrence on the award. Ibid. at 1043, para. 1, 1049, para. 19. Moreover, Fitzmaurice qualified his view on stabilization clause that it is not meant to stand in the way of a State in an emergency or to disrespect the right to nationalize. Ibid. 1050, at para. 22. Ibid. 1051, para. 24.

⁹³⁰ Toope, *supra* note 674, at 88. The restriction upon the sovereignty of a State by way of analogy of a breach of an economic development agreement with a breach of a treaty is unfounded. The restriction on sovereignty under a treaty is in return for a reciprocal, corresponding restriction of sovereignty by the other State party rooted in sovereign equality. No such reciprocal obligation exists on the part of the private corporation under an economic development agreement. The invocation of State responsibility by the private party under a State contract is patently unfair. Toope, *ibid.* Another objection is the lack of capacity of corporations as a contracting party in international law. Not even all supporters of the internationalization theory assume a standing for the private party in public international law. Lord McNair, for example, rejected the application of public international law to economic development agreements because they are not interstate contracts and do not deal with interstate relations. See McNair, *supra* note 223, at 10.

⁹³¹ See Brownlie, *Legal Status*, *supra* note 445, at 309. Brownlie also notes little support is found in previous jurisprudence to the approach adopted by the sole arbitrator in *Texaco*. Ibid.

ferenda. Customary international law regards unilateral termination of an economic development agreement a lawful conduct giving rise to payment of compensation under existing expropriation rules. According to White, in international law, “the right of concessionaire was assimilated to other kinds of property owned by an alien in that the expropriation of this right by means of premature cancellation of the concession was not *per se* an international wrong, unless it was in a breach of a treaty provision. The responsibility of the expropriating State arose only if the cancellation were arbitrary, discriminatory or if adequate compensation were not paid.”⁹³² Still, White viewed that a contractual commitment not to nationalize is unlawful.⁹³³ The argument advanced is that international law does not prevent a State to restrict legislative freedom for a limited period of time.⁹³⁴ Yet this only shifts the argument as the question is what customary rule prohibits a State to revoke a stabilization clause. What rule of international rule exists to make a difference between a contract and a stabilization clause to justify that *pacta sunt servanda* cannot restrict a State in international law but a stabilization clause as part of the contract can? What customary international rule characterizes the international legal order of a stabilization clause equating it with a treaty? The view is not expressing the status of custom but a practical view part of the internationalization theory.

International law applies to investment contracts by virtue of customary rules on expropriation of foreign property. That is a limitation upon States. Investment contracts still have not acquired the status and effect of a treaty to

⁹³² White, *supra* note 771, at 86. For the distinction between concession whose breach is equated with a treaty and a concession as property rights whose destruction is subject to payment of compensation according to the rule of expropriation in international law, see also Aréchaga, *supra* note 854, at 306. (“to assert, for instance, that there is a duty of restitution of a nationalized undertaking would be tantamount to a denial of the right to nationalize: this in turn deprives of relevance the principle proclaimed by the Permanent Court that the amount of compensation should correspond as closely as possible to the economic benefit which the foreign owner should gain from restitution.”) Aréchaga, *ibid.* at 299. Foighl also noted that “[t]here is no rule in international law that gives a greater degree of protection to rights secured by contracts than to other rights of property.” Isi Foighel, *Nationalization: A Study in the Protection of Alien Property in International Law* (London: Stevens & Sons Limited, 1957) at 74.

⁹³³ White, *supra* note, 771, at 178.

⁹³⁴ *Ibid.*

render their unilateral change unlawful under international law.⁹³⁵ Nor does a choice by the parties of public international law as the governing law place the contract on the international plane because “a State contract is not a treaty and cannot involve State responsibility as an international obligation.”⁹³⁶ Brownlie, noting a school of thought that argues a breach of a State contract *per se* gives rise to international responsibility, maintains that “apart from the merits of these arguments, it has to be recognized that there is little solid evidence that the position they tend to support corresponds to the existing law.”⁹³⁷ Brownlie adds that “[t]here is no evidence that the principles of acquired rights and *pacta sunt servanda* have the particular consequences contended for.”⁹³⁸

There is no State practice and opinion to corroborate that the status of customary international law has changed with regard to stabilization clauses. While stating conditions of legality for the conduct of State in expropriation such as discrimination as part of international law with certainty, Brownlie only observes that “*it has been suggested* that this category includes ... takings contrary to promises amounting to estoppels.”⁹³⁹ With reference to the Aminoil approach, a stabilization clause may be taken by a tribunal to weigh different circumstances as to the annulment of the contract.⁹⁴⁰ Still Brownlie, in response to the view asserting that terminating a concession in violation of an explicit undertaking in the concession not to annul was unlawful independent of the law

⁹³⁵ Bowett, *supra* note 854, at 54-55. Bowett points out that “[t]he investment contract between a State and a private entity not only is not a treaty but cannot even be regarded as analogous to a treaty.” *Ibid.*

⁹³⁶ Brownlie, *Principles*, *supra* note 424, at 525; Schachter, *supra* note 839, at 306. (“Even if international law or general principles of law is the law of the contract, it does not follow that a breach the contract gives rise to remedies on the international law level.”) *Ibid.* at 307.

⁹³⁷ Brownlie, *Principles*, *supra* note 424, at 524.

⁹³⁸ *Ibid.*

⁹³⁹ Brownlie, *ibid.* at 514. Higgins also observes that the question whether a State may terminate a contract against what has been agreed is a question that both academics and arbitrators are “deeply divided.” Higgins, *supra* note 772, at 338.

⁹⁴⁰ Brownlie, *Principles*, *supra* note 424, at 526. Schachter, *supra* note 839, at 313. Schachter pointing to the treatment of stabilization clauses in arbitration as binding and noting the approach by the Aminoil that a stabilization clause may increase compensation, views that “a stabilization clause does not internationalize the contract in the sense that a State departing from the clause commits an international delict. If it pays the required compensation and its action is not otherwise unlawful (as by denial of justice or discrimination) it incurs no international responsibility.” *Ibid.* at 314.

on expropriation for payment of compensation, states that “[t]his view almost certainly does not represent the positive law” though “not without merit.”⁹⁴¹

From the municipal law standpoint, equality of the contracting parties to justify the prevention of a unilateral termination by the public authority in public contracts is also a fiction. A stabilization clause in public contracts is short of validity in the law of the US, UK and other developed countries.⁹⁴² Likewise, public law, which takes into account economic development as a pertinent factor lowering compensation, is advanced as a more relevant basis for the assessment of the valuation of the expropriated assets than a private law basis.⁹⁴³

There is no customary determination to accord an economic development agreement or a stabilization clause therein a status of an international law obligation to render its unilateral termination or the nationalization act unlawful on the international plane. It requires other conditions of legality established in customary international law to characterize the conduct unlawful. This status of

⁹⁴¹ Brownlie, *Principles*, supra note 424, at 525. (“When a concession contract is made with a foreign interest, it is quite unrealistic to treat this contract as a fundamental law, overriding the power of legislation within the State concerned producing rigidity in the economy. ... What foreign investors cannot expect to obtain is an acquired right, so to speak, to influence or even control the economy of the host State as a result of legal doctrines that purport to create indefeasible rights for foreign investors.”) Brownlie, *Legal Status*, supra note 445, at 309.

⁹⁴² The practice of States in their domestic laws shows public contracts by virtue of their special position may be unilaterally terminated by the government. Brownlie, *Principles*, supra note 424, at 524. See also Bowett, supra note 854, at 55-56. Bowett observes that the in the United States public contracts provide for a ‘termination for convenience’ clause, which in its absence is implied by the US Courts, whereby anticipatory profits shall not be recoverable but only certain profit for the work done. *Ibid.* at 56. In the US and the UK systems, upon cancellation of public contracts as a result of expropriation effected by a legislative act, the statutory right becomes an implied term of the contract and the cancellation is a lawful act without incurring damages (future profits) but only just compensation. Bowett *ibid.* at 57-58. Bowett cites US Supreme Court holding that “The taking of private party for public use upon just compensation is so often necessary for the proper performance of governmental functions that the power is deemed essential to the life of the State. It cannot be surrendered, and, if attempted to be contracted away, it may be resumed at will.” *Ibid.* at 57, citing *Georgia v. City of Chatanooga*, 264 US 472, 480 (1924).) The study of municipal systems of developed countries supports this view: “[t]he most radical of special prerogatives enjoyed by the administration is the right to terminate the contract unilaterally, when the public interest so requires. This drastic power is a wide spread feature of national systems of procurement, and is evidently considered necessary in order to maintain the freedom of action of public authorities.” *International Encyclopedia of Comparative Law*, vol. 2, *Contracts in General*, ch. 4, *Public Contracts* at 40.

⁹⁴³ Brownlie, *Legal Status*, supra note 445, at 281. (“The valuation of expropriated assets should not be on a private law basis but on a public law basis. The modern public law basis would involve assessment in terms of an allowance in favour of territorial sovereign to the extent that the objects of the company concerned had digressed from an objective standard of reasonable economic development.”) *Ibid.*

customary international law has remained unchanged. Investment treaties do not even in general terms provide for a unilateral termination or breach of a contract as a condition of legality for expropriation.⁹⁴⁴

Rarely does an investment treaty contain respect for commitments as a condition of expropriation, thereby turning it into an unlawful conduct.⁹⁴⁵ Within other provisions of the treaty, an umbrella clause is a familiar term that deals with States' commitments outside the treaty such as contractual commitments. The majority of investment treaties do not embody even a broad umbrella clause.⁹⁴⁶ Moreover, when a general umbrella clause enters a hard penumbra, its effect would go no further than reverting to a contingent general principle of *pacta sunt servanda* depending on customary determination for the specific situation of the hard penumbra. This can explain the approach by the *SGS v. Pakistan* to rightly find a general umbrella clause incapable of impeding the conduct of the State when having far-reaching implications for the State for which the acceptance of the treaty obligation by the State is unclear.⁹⁴⁷ Even if there were specific treaty provisions prohibiting a unilateral termination of economic development agreements in the field of petroleum or other natural resources, such provisions, while relevant to the parties to the treaty, would fail to be *per se* declaratory of customary international law. It would require indications outside the treaty context demonstrating State opinion and practice to accept the unlawfulness of such a termination under international law.

States' acceptance that international law applies to their contract does not mean creating rules for international law by the tribunal to characterize lawful conduct unlawful in international law. It requires a customary determination through State opinion and practice for the particular situation of economic development of natural resources to demonstrate formation of a new customary

⁹⁴⁴ The four conditions of legality commonly embodied are non-discrimination, due process, public purpose, and payment of compensation. See *supra* note 844.

⁹⁴⁵ The FTA between New Zealand and China contains a general provision on the prohibition of expropriation contrary to other commitments of the State. See the Free Trade Agreement Between The Government of New Zealand And The Government of the People's Republic of China, 2009, Article 145 (1) (d), available online at <http://www.chinafta.govt.nz/1-The-agreement/2-Text-of-the-agreement/0-downloads/NZ-ChinaFTA-Agreement-text.pdf>.

⁹⁴⁶ See *supra* note 826.

⁹⁴⁷ See *supra* note 669 and accompanying text.

rule to hold their unilateral termination unlawful. Under customary international law, with permanent sovereignty over natural resources grounded in the structural principle of self-determination and self-preservation, nationalization of natural resources even in the face of a contractual commitment for the stability of contract is lawful. No customary rule has emerged to prescribe otherwise.

The most fundamental objection to the internationalization theory is in view of the legitimacy criteria of recognition and coherence. The sole arbitrator in Texaco was ready to accept that without a stabilization clause the concession provided freedom to amend or terminate the contract similar to an administrative contract but not with a stabilization clause.⁹⁴⁸ The sole arbitrator in Texaco asked if the right to nationalize, as a right within the framework of international law, does not have limits in international law and that if it authorizes States to disregard *international* commitments.⁹⁴⁹ Yet, the sole arbitrator bypassed the fundamental question as to how those limits are written into international law. This is right in view of the legitimacy criterion of recognition. The limits on the rights of States in international law on foreign investment derive from customary determinations not the practical views of a tribunal. Those who express practical views are not the authors of international law.

The sole arbitrator in Texaco branded the conflicting views and practices, which were consistent with customary international law that did not determine the unilateral termination of a concession unlawful in international law, as *lex ferenda* and *contra legem*.⁹⁵⁰ Instead, the arbitrator in that case projected his own practical view, rooted in analogy of economic development agreements with private contracts for the equality of contracting parties and at the same time analogy with treaties to deem the contractual obligations of States of an international character, as *lex lata* and positive international law.⁹⁵¹ The sole arbitrator substituted his own *lex ferenda* for the *lex lata* of international law that did not in a customary determination impose a restriction upon the conduct of States for unilaterally

⁹⁴⁸ Texaco, *supra* note 766, at 56,72.

⁹⁴⁹ Ibid. at 61,74.

⁹⁵⁰ See *ibid.* at 55-57, 72, 79-80, 87-88.

⁹⁵¹ Ibid.

terminating a contract except for the payment of compensation under rules of international law on lawful expropriation. Projecting practical views, which may be compatible with certain principles or practical views expressed by other tribunals or academics, as *lex lata* is a major flaw in view of the legitimacy criterion of coherence as well. Even assuming the power of the sole arbitrator in Texaco to apply general principles of law in a creative function to engage in justice evaluation, which the sole arbitrator did not assert and clearly presented its award as *lex lata*, by branding competing views as *contra legem*, the arbitrator still did not take into appropriate consideration other demands of justice. The sole arbitrator was bound by virtue of the contingent character of principles relied and the legitimacy criterion of coherence for the common good to take into account those principles and practical views expressing them as only one demand of justice. Accordingly, coherence required taking into appropriate consideration the competing or conflicting demands of justice expressed by other principles such as self-determination, which was of structural character in international law and by no means subordinated to a substantive principle of *pacta sunt servanda* in a contractual relationship of States. Instead, the sole arbitrator assumed and projected the contingent principles of *pacta sunt servanda* and good faith in this hard penumbra and the practical views including his own advocating them, as the authoritative statement of the law. By presupposing the principles advocated by his practical view as the status of law rationalizing restitution rather than payment of compensation for nationalization, the sole arbitrator in Texaco departed from the legitimacy criterion of coherence for the common good. Nationalizations for economic reforms in natural resources are not exempt from the duty of compensation under customary international law. Yet, to include restitution or future profits in this hard penumbra requires a genuine consideration of the demands of justice for the common good. In the Texaco Arbitration, the award of restitution, instead of compensation under customary international rules on lawful expropriation, was a latent determination task without a genuine consideration of the competing demands of justice represented by the principle of self-determination in international law. Under the analysis in the Texaco Arbitration,

the principle of self-determination was already subordinated as *lex ferenda* to the overriding character of *pacta sunt servanda* and the practical views expressing it assumed as *lex lata*. This way the common good never came into focus to meet legitimacy.

A practical view for the internationalization of economic development agreements emerged which still has supporters but never in a unanimous or prevalent fashion even in the capacity of a practical view. A customary rule did not exist to prescribe that nationalization amounting to a unilateral termination of an investment agreement was *per se* unlawful irrespective of respect for other conditions of legality for expropriation. Moreover, for the internationalization theory and its desired outcome to obtain a binding statement of the law, it required a customary determination by way of subscription by States in their practice and opinion. A positive subscription and customary determination has never materialized to endorse the internationalization theory. Future profits in calculation of compensation is therefore unwarranted on the ground of the unlawfulness of the unilateral termination of economic development agreements under nationalization in natural resources as this conduct is lawful in customary international law.

The question of future profits may still be examined in terms of equity. That consideration is possible in view of the legitimacy requirement of the rule of recognition that permits a degree of discretion in measuring compensation in the absence of a rule. The arbitrator in *Liamco* referred to equity for the assessment of compensation.⁹⁵² It was unclear whether the figure it reached represented compensatory future profits avoiding unjust enrichment of the State or anticipatory profits in excess of a fair rate of return carrying unjust enrichment of investors. The *Aminoil* Tribunal also referred to equitable considerations in the assessment of the amount of compensation for nationalization based on a

⁹⁵² *Liamco*, supra note 766, at paras. 43-45, 149-151, 156-162, 167-171. The Tribunal awarded \$ 66 million (instead of about \$ 186 million claimed) as equitable compensation for the nationalization of the concession rights of LIAMCO in Raguba Field but without explaining the details how it reached this sum and how much was for the unjust enrichment of Libya or how it was different from the loss of profit (apparently all for the unjust enrichment as the compensation for physical assets and equipment was awarded under a separate heading) Ibid.

reasonable rate of return.⁹⁵³ The reasonable rate of return was adopted by the Tribunal to represent the legitimate expectation and the equilibrium of the contract in calculation of risks and benefits.⁹⁵⁴ On the other hand, the reasonable rate of return adopted by the Tribunal did not incorporate future profits for the term of the concession based on the claimant's methods and calculations.⁹⁵⁵ The sole arbitrator in BP pointed out a more fundamental legal factor. One basis for future profits is the assumption of ownership rights in natural resources extracted after nationalization for the private company. The BP arbitrator rejected that assumption.⁹⁵⁶ Hence, even an unlawful nationalization as was found in the BP case on the basis of discrimination was not deemed to automatically recover future revenue from the resources as one basic corollary of nationalization is the cessation of ownership to the resource extracted after nationalization for the private company.

Future profits may be raised as a demand of justice against a mere net book valuation of the nationalized property in natural resources that fails to compensate investors for their capital invested and remuneration for services

⁹⁵³ Aminoil, *supra* note 766, at 1016,-1017, 1036-1038.

⁹⁵⁴ *Ibid.* at 1037-1038. The Tribunal held that "... when a concession comes to an end. Compensation then must be calculated on a basis such as to warrant the upkeep of a flow of investment in the future." *Ibid.* at 1033, para. 147. It also held that "...with reference to a long term contract, especially such as involve an important investment, there must necessarily be economic calculations, and the weighing up of rights and obligations, of chances and risks, constituting the contractual equilibrium. This equilibrium cannot be neglected- neither when it is a question of proceeding to necessary adaptations during the course of the contract, nor when it is a question of awarding compensation." *Ibid.* at 1034, para. 148. The Tribunal found stabilization clause, though not effective to forbid nationalization, as a factor that "created for the concessionaire a legitimate expectation" to be considered in the assessment of compensation, *Ibid.* at 1037, para. 159, which the Tribunal linked to the respect for the concession equilibrium and reasonable rate of return. *Ibid.* 1037, paras, 159-160.

⁹⁵⁵ *Ibid.* at 1035, paras. 153-154. The claimant's amount represented "an estimate on lines of the principle of a *restitutio in integrum* founded on the assumption that the Concession should have continued for its full term under the contractual conditions fixed in 1961, without modification. This calculation is based on a projection of quantities of oil recovered, the prices, the costs of production, and the operations to be undertaken until the end of the concession." *Ibid.* at para. 153. The Tribunal arrived at slightly over \$ 200 million, which less Aminoil's liabilities came to \$ 83 million reaching to almost \$ 180 million with the inclusion of interest, against the claimant's amount of which the sole item of lost profits claimed was close to \$ 2.6 billion. See *ibid.* at 984, 1041-42, paras. 178-179.

⁹⁵⁶ ("The contention as to the ownership of oil extracted from the concession area *after* the date of the BP Nationalisation Law is based on the assumption that the BP Concession survived the nationalisation; that assumption is not accepted by the Tribunal. ... It may be added that the fact that ownership of the oil its natural strata is vested in the State of Libya under the Petroleum Law of 1955 does not argue in favour of the claimant.") BP, *supra* note 766, at 355.

rendered which are only recoverable in a fair rate of return through the revenue (future profits) from the resource produced in the future. Oil companies are well entitled to a fair rate of return for their share in making a barren field a commercial field. However, fairness also demands not to allow anticipatory profits that go beyond a fair rate of return in proportion to capital invested and services rendered to avoid unjust enrichment on the part of the investors.

Whether outright nationalization or participation arrangements these have usually followed circumstances that push the oil price not attributable to extra work or services of the foreign oil company but other circumstances including policy decisions of oil producing countries at the global level. The increase in the oil price, which is the primary cause for the redistribution of future profits, is rarely attributable to the oil company to have a genuine claim for it beyond a fair rate of return from the revenue of the oil to recover capital investments and remuneration for services rendered. It is often a surge in the oil price that disrupts the original equilibrium of the agreement resulting in profits of the companies far in excess of the stated, agreed, assumed, or anticipated rate of return earning them their anticipated return for their investment, risks and services far earlier than the projected years of amortization. A fair rate of return not for the revenue lost during the term of the concession but in proportion to the capital invested and services rendered to compensate the portions of the capital and remuneration that are not yet recovered seems an equitable basis for compensation of nationalization in revenue generating natural resources. In fairness, neither a net book valuation denying remuneration of investors for the services rendered nor a discounted cash flow valuation for future profits for the term of the contract meets the demands of justice. Both methods are prone to unjust enrichment. An equitable compensation is thus bound by the legitimacy requirement of coherence for the common good to consider the competing demands of justice. This in the first place requires refraining from according a *lex lata* status to the principle of full compensation or practical views advocating unlawfulness of unilateral termination of economic development agreements to rationalize future profits for the term of the concession from the legal standpoint. In hard penumbra of economic development

agreements subjected to economic reforms in natural resources, the remedy of such future profits is substantiated neither in law nor in fairness.

CONCLUSION

This thesis has maintained that the authority of international rules hinges on adherence to structural criteria of legitimacy. Recognition and coherence were advanced as tests of authoritative force of international obligations. These criteria were developed in a common good approach to frame the determinacy of the substance of international obligations of States and their authoritative force in international law on foreign investment beyond principles, precedents and analogies. An underlying theme articulated through these criteria was that the substance of law in hard indeterminacies in international law requires moral and political evaluation germane to its own particular context and subject to its own rule of recognition to meet the legitimacy of structure. Consistency or stability in the application of general rules in this account of determinacy and legitimacy became illusive for their deficiency in an authoritative force for a particular indeterminate instance in need of fresh construction by the criteria of coherence and recognition.

Building upon the rule of law and legitimacy in the notion of limitation on authority and power of rules and rule-makers, this study displayed the tie between the authoritative determinacy of the substance and the legitimacy of structure of rules. The thesis has espoused a common good approach to justify both the test of coherence to assimilate moral evaluation and consideration of all demands of justice in rule formation in each particular situation of indeterminacy and the test of recognition to discipline validation of powers of rule-makers. The common good was also discussed to assess desirability in light of compatibility with human values and dignity in the validation criteria of the rule of recognition for the consensual or constitutional scheme of, and concomitant participants in, the construction of rights and obligations in international law.

Raising determinacy and indeterminacy from the open texture of law standpoint in legal theory lying at the root of legal interpretation—discrete from conflict between existing rules at its surface—the thesis showed that moral and political conceptions than legal prescriptions in established authority figure in

areas of indeterminacies. Different sorts of principles including practical, moral and general principles of law were distinguished to further display the deficit of authoritative force of most substantive principles introduced as contingent principles as opposed to absolute principles. All these underlined the distortion of *lex lata* rooted in contingent principles and precedents and dependency on fresh evaluation and legal determination to make the scope of the law coherent for the particular situation of indeterminacy. General principles and precedents of national or international pedigree lack authority once in the indeterminacy zone where coherence requires fresh justice evaluation rendering Statements expressing them all some demands in *lex ferenda*. The substance of law in hard indeterminacies cannot replicate conceptions of justice germane to contexts of different moral and political dimensions without meeting the common good. Coherence was stressed as a legitimacy criterion to make legal determination and extend legal order into a particular field of indeterminacy taking into account all justice demands and associated social aims or policy considerations for the common good in an evaluative exercise. The rule of recognition was emphasized as a legitimacy criterion to measure validation of the power of international adjudicators to engage in such an evaluative function.

Practices surrounding international adjudication and architecture of sources of international law were discussed at the State and International Court levels to further assess the status of the adjudicative determination power in international law. Consistent with the general rule of recognition of international law recognizing and validating a consensual framework of construction of primary rules and obligations of States, these practices showed that adjudicative legislative function engaging in moral and political evaluations for States is not in line with the general rule of recognition of international law. These practices further did not corroborate the resort to notions of equity, *non-liquet*, material completeness of law, or the gaps of law to rationalize an implied discretionary power for international adjudicators to create rules and obligations for States. Particular authorization or recognition was noted in that States may by way of particular authorizations delegate a determination power to international

adjudicators or a reform may occur in the content of the international rule of recognition for recognition of a constitutional construction of rights in a particular field as in human rights. Aside from such particular authorization or recognition or areas subject to absolute principles, with the incapacity of contingent substantive principles to define the content of justice, equity, or fairness for a particular issue in hard cases, customary international law was described as the genuine framework of legal determination in a consensual pattern for hard indeterminacies in international law. On this account, the customary framework of determination, unlike general principles, was identified as the scheme of construction of general primary rules of obligations compatible with the structural criteria of legitimacy of coherence and recognition for the determination of the substance of States obligations in hard indeterminacies in foreign investment. An evaluative account of customary international law was also offered with a key distinction between the constitutive elements of customary international law and the constitutive statements building customary determinations. This account explained an utterly obscure aspect of customary international law, namely participation of non-State actors at an evaluative level of customary rule construction, thereby reconciling primary and subsidiary sources of international law in a disciplined manner compatible with its rule of recognition. Practical views by State and non-State actors—along with principles and precedents expressing them— were presented as the evaluative layer of customary international law determination occurring in *lex ferenda* distinguished from the *lex lata* status of a customary determination built by States' subscription through widespread, general State practice and opinion to a proposed *lex ferenda*.

The rule of recognition and coherence for the common good in the next step framed the analysis of property protection of corporations in international law on foreign investment to justify contingent nature and consensual structure of the property rights of corporations in this field. The criterion of coherence and theoretical underpinnings of contingent principles explained the defects of a general standard of treatment, vested or acquired rights or conflation with human rights in the legal discourse of protection of property of corporations in foreign

investment. Rights of human beings in human rights stand in stark contrast to rights of corporations in foreign investment. This contrast was described in two major distinctions. The absolute character of human rights or constitutional structure for their construction and corresponding obligations of States were distinguished from the contingent character and consensual structure of rights of corporations in foreign investment. The consensual characteristic of rights of corporations was substantiated in the first place by practices in this field that consistent with general rule of recognition accentuate reference to the intention or consent of States in specific or general terms for the scope of their obligations in hard penumbra. The consensual structure for the determination of rights of corporations in foreign investment was also justified in terms of common good. The public character of a forum essential to justify in view of the common good the desirability of an adjudicative determination of the content of obligations of States was found to be absent in investor-State arbitration. The thesis also underscored the basic value of self-determination of States in international law as another essential element of common good to make such a determination justifiable. It underlined that self-determination of States in the interests of flourishing their human members would be directly attacked if moral and political evaluations and subsequent legal determination of hard questions in foreign investment are systematically subject to adjudicative determination. Being substantiated by practices and justified by the common good and consistent with the general international rule of recognition, a consensual construction of property rights of corporations and corresponding obligations of States in international law on foreign investment in the customary framework of determination was found the requirement of legitimacy.

Finally, the criteria of recognition and coherences for the common good developed in the thesis were employed to assess the legitimacy in the concept of expropriation and its evaluation in view of customary determinations in two major instances of hard indeterminacy in this domain. Bona fide regulation of States for public and human protection as an instance of hard penumbra in the conduct of States arising in the concept of expropriation was assessed in the framework of

legitimacy. Discussing *lex lata* in the background of customary international law, it was found that customary international law did not determine the bona fide regulation of States affecting foreign investment as expropriation and thereby did not require compensation for bona fide regulation interfering with foreign investment unless the conduct had an unlawful character determined in customary international law such as discrimination. In line with the framework of legitimacy of recognition and coherence, therefore, the statements expressing precedents, principles and opinions of arbitral tribunals to qualify bona fide regulation as expropriation were characterized as practical statements expressing desirability and evaluation, i.e. *lex ferenda*. The sole effect doctrine and proportionality tests were discussed as practical views that require subscription by States in cogent practice and opinion to represent the statement of the law, i.e. *lex lata*. It was observed that no positive State practice or opinion exists to show the formation of a customary determination to deem bona fide regulation as expropriation without the unlawfulness of the conduct under customary international law. Moreover, it was observed that such practical views have received a negative response by States in their recent practice and opinion. In view of this negative response, a customary determination to change the position of customary international law to characterize bona fide regulation of States on the weight of the sole impact of the conduct of States or the proportionality of its burden on foreign investment in international law is not only presently absent but also unlikely to form in future.

In the same line of reasoning, the thesis approached the question of future profits as another hard penumbra surrounding the question of compensation and legality in the concept of expropriation for unilateral termination of State contracts in implementation of nationalizations for economic development reform in natural resources. Exploring the position of *lex lata*, it was observed that no customary international law determination existed to consider a unilateral termination of an economic development agreement unlawful *per se* in international law to justify future profits for the term of the contract on the ground of unlawfulness of the conduct. In addition, it was observed that no customary determination existed to require such future profits as part of the standard of

compensation. Consistent with the criteria of recognition and coherence, the opinions advocating unlawfulness of the unilateral termination of economic development agreements in natural resources or future profits as a requirement of compensation standard were found expressions of *lex ferenda* discordant with customary international law.

In both of these hard indeterminacies of bona fide regulation and future profits for economic development reform in natural resource, reliance on precedents and principles to transfer their authority to these hard instances and project opinions expressing *lex ferenda* as *lex lata* fell afoul to the criteria of coherence and recognition. In hard penumbra according the private interests of corporations the advantage of *lex lata* on the weight of authority elicited from principles and precedents rooted in analogy for what is actually no more than expression of *lex ferenda* subject to fresh determination is an affront to legitimacy. Assumption of principles and precedents as the statements of law in favor of private corporations branding appropriate opposing demands of justice of States as *lex ferenda* frustrates coherence for the common good. Such an approach disguises latent engagement by arbitrators in a creative function without adhering to the criterion of coherence that requires a genuine consideration of all demands of justice for the common good. Engagement in an adjudicative creative function additionally frustrates the rule of recognition that requires a consensual determination of the obligations of States for the conduct and consequence in the concept of expropriation of property in international law on foreign investment.

In the absence of a theoretically sound framework of legitimacy to sift practical views from juridical statements in order to legitimate the authority of purported rules, interpretation of international obligations of States in investment arbitration would be a process to foist the conception of justice of an arbitral panel at the best or to instill arbitrators' bias at the worst. To rise to the status of juridical statements of law, practical views need to obtain subscription by State practice and opinion. In the current structure of international law on foreign investment, State practice and opinion represent the legitimate unifying actor of

the mass of competing and conflicting practical views in the field of foreign investment.

This thesis has espoused a new horizon for legal reasoning in foreign investment disputes in international law by offering a framework of legitimacy in light of the common good of human beings with structural criteria of coherence and recognition for the determinacy of international obligations of States. In this horizon, the banal method to extract authority from principles and precedents in interpretation of hard penumbra surrounding international obligations of States in international law on foreign investment is the most obscure and offensive manner of departure from the legitimacy criteria of recognition and coherence for the common good. The authority of principles and precedents having a pedigree in past legal materials of national or international origin is of no weight for hard penumbra as it ceases to exist once in hard indeterminacies posing acute moral and political evaluations. In this horizon, limitations upon States may rather figure in absolute principles or constitutional construction of rights and concomitant adjudicative determination power. The legitimacy framework of coherence and recognition offered in this thesis stands steadfast in assimilating such limitations. No change in the framework that requires adherence to coherence and recognition is necessary in order to limit the conduct of States in international law by virtue of absolute principles or constitutional character of rights. A constitutional approach of limitations upon the conduct of States rather hinges on the practices and the common good justifying reform in the content or even the origin of the international rule recognition. There is no rigid stance to project the content and origin of the international rule of recognition impervious to change. Yet, this requires supporting practices and justification of the common good in the interests of human beings.

The content of the international rule of recognition has already succumbed to reform in the field of human rights, validating a constitutional approach to rights of human beings and corresponding limitations on States. If the practice of States is somewhat immature to show this reform fully, the common of the good of the community heavily justifies it. The practices and common good

justification in the field of foreign investment are in an opposite direction. The protection of corporations in foreign investment consists in a consensual pattern requiring State practice and opinions in a customary framework of determination to determine the substance of obligations of States in hard indeterminacies. To assume investment treaties rights as constitutional and investment treaty tribunals as supreme courts determining their content departs from practices and the common good. A constitutional characterization of substantive rights of corporations in national systems or special or regional frameworks of dispute settlement within the powers of public courts in national systems is neither unprecedented nor unfounded. A constitutional construction of the property rights of corporations in international law to lay limitations upon States in hard indeterminacies through arbitral creative power faces major tests of practice and common good. The practices set in establishing a consensual construction of property rights of corporations in hard cases in international law on foreign investment are extremely unlikely to reverse. The common good justifications supporting this consensual scheme of rights are even more plausible to last.

On core matters of policies and principles in interpretation of hard indeterminacies in substantive obligations of States under international law, the process of dispute settlement in investment arbitration is bound by the legitimacy criteria of coherence and recognition within the structure of international law. In the long run, this would elevate the standing of investment arbitration building confidence for States and their democratic constituents. Customary international law should be restored in its fundamental position for the normative structure and substance of obligations of States in hard cases of foreign investment. The regulatory role of States in the interests of their collective and individual human members is ever increasing. To advance a constitutional approach to property rights of corporations in international law on foreign investment, shifting justice evaluation and policy decisions with far-reaching implications for the powers or funds of States from democratic processes to arbitral tribunals, is an ambitious agenda for international law. This agenda is remote in prospect and distant from

the common good when the flourishing of human beings is the primary value and the ultimate end.

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