

Some Philosophical Questions to Understand the Role of Arbitrators through the Notion of Fair and Equitable Treatment

Algunas preguntas filosóficas para entender el rol de los árbitros a través de la noción de trato justo y equitativo

Algunas questões filosóficas para entender o papel dos árbitros através da noção de tratamento justo e equitativo

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ABSTRACT

This article presents the explorations of the contributions philosophical debates can make to understanding the role of arbitrators and international adjudicators in investment disciplines. To do so, a series of decisions and discussions in the doctrine and arbitration award concerning the standard of fair and equitable treatment were surveyed.

Keywords: Investment law; ISDS; arbitration; jurisprudence; legal theory.

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RESUMEN

Este artículo presenta las exploraciones de las contribuciones que los debates filosóficos pueden aportar para entender el rol de los árbitros y los entes que adjudican disputas internacionales en disciplinas relativas al derecho internacional de las inversiones. Para este fin, se analizó una serie de textos de doctrina y las decisiones de los árbitros en torno al debate sobre el estándar de trato justo y equitativo.

Palabras clave: derecho de las inversiones; solución de controversias inversionista-Estado; filosofía del derecho; teoría del derecho.

RESUMO

Este artigo explora as possíveis maneiras pelas quais os debates filosóficos podem contribuir para a compreensão do papel dos árbitros e entidades que atribuem disputas internacionais em disciplinas relacionadas ao direito internacional de investimento. Para tanto, o artigo analisa uma série de textos doutrinários e as decisões dos árbitros em torno do debate sobre o padrão de tratamento justo e equitativo.

Palavras-chave: direito do investimento; solução de controvérsias investidor-Estado; filosofia do direito; teoria do direito.

Introduction: Why this Debate Matters

Most bilateral investment treaties (BITs) contain a clause obliging States to “ensure fair and equitable treatment of the investments of investors of the other Contracting Party” (Netherlands, 2019, Art. 9). A provision of this type tells us little (if anything) about the concrete obligations imposed. Is *fair* and *equitable* treatment (FET) a confirmation of the minimum standard of treatment of foreign investors under customary international law? Or, instead, is it a heightened standard established by a treaty? Does FET imply *single* or *multiple* standards depending on whether the contested measure is a legislative act, a judicial decision, or an administrative resolution? To what extent does a State enjoy a margin of appreciation vis-à-vis the treatment to accord to foreign investors?

Investment tribunals do not have simple answers to these questions. Room for diverging interpretations –sometimes described as uncalled for activism (Bernasconi-Osterwalder, 2016, p. 325)– is hardly surprising in the face of vague notions like *fair* or *equitable*. In a 2004 report, the OECD suggested that States had devised the FET treaty provisions in broad terms “to give arbitrators the possibility to articulate the range of principles necessary to achieve the treaty’s purpose in particular disputes” (OECD, 2004, p. 2). Some commentators dismissed this idea as improbable. States had not foreseen the overly broad interpretation of the standard by investment tribunals when they negotiated BITs (Sornarajah, 2010, p. 350). Moreover, it would be preposterous that “in a document that contains a limitation on their sovereignty, the state parties agreed [that] a casually appointed arbitrator should have the capricious discretion as to how their sovereignty should be limited in the future” (Sornarajah, 2007, p. 168).

The fact that FET is “the most frequently invoked standard in investment disputes” and that “the majority of successful claims pursued in international arbitration are based on a violation of the FET standard” (Dolzer & Schreuer, 2012, p. 130) compound the problems and criticisms surrounding its application. Some States have devoted efforts to improve the predictability of FET rulings by attempting to specify the

standard further in the text of the treaties (Sisodia & Khatana, 2019; Lim et al., 2018, pp. 283-287). There is, nonetheless, a general sentiment (expressed mainly by the European Union) that, in its current form, Investor-State Dispute Settlement (ISDS) can only offer “unjustifiably inconsistent interpretations of investment treaty provisions” —European Union, 2019, § 6(i)—, including cases that apply FET.

In this essay, I suggest that jurisprudential debates can enrich this discussion. Underlying this debate is our understanding of the role of arbitrators and the quest for a conception of law that reflects ISDS practices in their best light. These issues are far from being new (even for ISDS). According to the tribunal in *Romak*, its mission was not “to ensure the coherence or development of ‘arbitral jurisprudence’” but something “more mundane, but no less important: to resolve the present dispute between the Parties in a reasoned and persuasive manner” (PCA Case 2007-07/AA280, § 171) irrespective of the forward-looking consequences of its decision. Is this approach warranted? Or, in contrast, do arbitrators have a “duty to adopt solutions established in a series of consistent cases” (*Oostergetel*, Uncitral, 2012, § 145) to “contribute to the harmonious development of investment law” (*Saba Fakes*, ICSID Case ARB/07/20, 2010, § 96)? Should arbitrators apply principles recognised by a “community of States and investors” (*Lighthouse*, ICSID Case ARB/15/2, 2017, § 111) and act as the guardians of the “coherence and well-being” of ISDS, conceived as a “system of justice”? (*BIVAC*, ICSID Case ARB/07/9, 2009, § 58).

Underneath this debate also lie questions about the legitimacy of the tribunals’ decisions and ISDS as a system (Alter et al., 2016). The formal sources of international law fall short of meaningfully answering this question. We may repeat that awards are final, and States must comply with them because they consented to the BITS¹ without adding much to the discussion.

On the other hand, the jurisprudential debate may provide insightful answers to the arbitrators’ role and authority. When applying a FET provision to a *hard* case, are arbitrators creating norms in the interstices

¹ It is almost a truism that an award “shall be final and binding” and that “[t]he respondent shall comply with the award with undue delay” (Netherlands, 2019, Art. 22).

of open-textured concepts? Or should we conceive the arbitrators' task as one "testing fundamental principles, not as borderline cases calling for some more or less arbitrary line to be drawn" (Dworkin, 1998, p. 43)?

The title of this essay signals my starting point. Hart would agree that FET disputes often concern applying open-textured provisions to hard, *penumbral* cases. Thus, arbitrators create law (in the interstices of these provisions), deciding cases "according to [their] own beliefs and values" and following "standards or reasons for decisions which are not dictated by the law" (Hart, 2015, p. 276).

It is, in contrast, possible to conceive arbitrators as attempting to provide the best possible solution for a case considering values and principles underlying ISDS. If that is the case, the arbitrators' role would be explained better by Dworkin's (1998) interpretive ideal of integrity. Arbitrators would try to "find, in some coherent set of principles [...] the best constructive interpretation of the political structure and legal doctrine" (Dworkin, 1998, p. 255) of a community of States (and even investors). Lastly, I will offer a brief conclusion on the implications of this debate for investment arbitration.

Hart at ICSID

Interstitial Legislation

According to Hart, the rules of law are expressed through the human language, which is inherently open-textured, and they carry a degree of ambiguity that is impossible to eliminate. This is especially the case when we try to determine whether general categories (*concepts*) apply to more specific instances (objects, situations, conducts).

The open-textured nature of language has consequences for adjudication. In some cases, applying the law's general categories to a particular case will be doubtful. There will be instances falling within the "core of settled meaning" (Hart, 1957, p. 614) of the rule and others in its *penumbra*. In these penumbral cases, whether the case resembles the core case "'sufficiently' and in 'relevant' respects" (Hart, 2015, p. 127) will depend on the adjudicator. Such a decision is not determined beforehand

by the law. Suppose that the law provides that a license is required to operate an aeroplane. A case then arises where the plaintiff disputes the need for a license to fly an ultralight (is an ultralight an aeroplane for legal purposes?). A judge will exercise *discretion* in deciding whether that rule applies to ultralights or not (in the sense that his/her decision will not be “controlled by a standard furnished by the particular authority we have in mind when we raise the question of discretion” (Dworkin, 2013a, p. 50). In doing so, he/she will “have settled a question as to the meaning, for the purposes of this rule, of a general word”, and either answer provided to this legal issue will be correct.

A crucial implication also follows: “There will always be certain legally unregulated cases in which on some point no decision either way is dictated by the law” (Hart, 2015, p. 129). The law is incomplete by nature, and adjudicators have a law-creating power to fill the law’s interstices in penumbral cases. Thus, a first possible way emerges to conceive the arbitrators’ role in deciding whether a State accorded FET to a foreign investor. According to this conception, arbitrators have a rule-making power in penumbral cases when applying a rule providing for FET.

It would be clear that the investor has been accorded (or denied) FET in some instances. The tribunal in *Tokios Tokelés* took this approach. In that case, the tribunal considered whether certain measures taken against a publisher constituted breaches of the Lithuania-Ukraine BIT (and ultimately rejected the claimant’s claims). However, it noted that, had the factual allegations been confirmed, this case would have been “the clearest infringement one could find of the provisions [on FET] and aims of the Treaty, whatever precise standards those provisions might set” (ICSID Case ARB/02/18, 2007, § 123). The tribunal deemed it unnecessary to engage in the controversy surrounding the FET standard’s concrete interpretation as other tribunals did. Being punished for working for the country’s political opposition would be an example of the *core settled meaning of unfair and inequitable treatment*.

The tribunal in *BCB* understood its task in similar terms and embraced the century-old position according to which it is virtually impossible

to articulate a comprehensive FET definition.² The tribunal noted that the FET standard “has generally resisted the formulation of any comprehensive definition”. However, it was possible to identify typical unfair and inequitable measures that would be relevant to assess Belize’s conduct without “attempting to advance any comprehensive view of the meaning” of the standard (PCA Case 2010-18/BCB-BZ, 2014, §281). For Hart’s theory, FET possesses several features (at the core of the concept). Nevertheless, a *comprehensive* view that would provide a solution beforehand to all possible penumbral cases would be, indeed, impossible to formulate.

Away from this *core of settled meaning*, a FET provision does not furnish, beforehand, any specific solution. In these *penumbral* cases, what FET requires is left to the arbitrators’ discretion. In *Genin*, the tribunal considered that a breach of the FET standard would follow from procedural irregularities in the State conduct, noting that they “would have to amount to bad faith, a wilful disregard of due process of law or an extreme insufficiency of action” (ICSID Case ARB/99/2, 2001, §371). This rule was later abandoned by other tribunals as they considered that the FET standard requirements were “unrelated to whether Respondent has had any deliberate intention or bad faith in adopting the measures in question” (See *CMS*, ICSID Case ARB/01/8, 2005, §280 and *Azurix*, ICSID Case ARB/01/12, 2006, §372). According to Hart’s theory, the requirement of bad faith would not have been settled beforehand by the treaty; instead, tribunals created it in analysing specific conducts as possible instances of unfair and inequitable behaviour.

International Law Is Not Law

In the last chapter of *The Concept of Law*, Hart noted the absence of a “basic rule providing general criteria of validity for the rules of international law”. On this basis, he concluded that international law did not constitute a legal system but a set of rules “in fact observed

² In *Neer*; it was said not to be practicable “to lay down in advance precise and unyielding formulas by which the question of a denial of justice may in every instance be determined” because of the “evasive and complex” character of the concept (UNRIAA, 1926, §4).

by the States” (Hart, 2015, p. 236). If anything, international law was law only in a truncated way, chiefly given the lack of secondary rules.

These conclusions are debatable (I will come back to this point below). They may, however, have some bearing on this essay’s first observations. No rule of recognition as those perceived in domestic systems exists in international law. Adjudicators, therefore, operate applying minimal sets of rules (primary rules in Hart’s attributes to this concept): arguably, little more than the BIT in question and possibly some general rules of customary law, including rules of treaty interpretation. Under this assumption, arbitrators’ discretion is virtually unfettered, limited only by the core of the treaty provisions’ meaning.

Is Tecmed Acceptable?

Commentators often agree that *Tecmed*—ICSID Case ARB(AF)/00/2, 2003— was notable for its “intrusive approach [...] [to] reviewing the appropriateness and necessity of particular measures” (Paparinskis, 2013, p. 241) and the little deference the award pays to the State’s regulatory prerogatives. The case is relevant for this discussion because of its strong influence on practitioners’ and arbitrators’ understanding of FET.

The case concerned the operation of a hazardous waste landfill. The investor faced problems with the local population for the proximity of the facility to the city of Hermosillo. While negotiations with local authorities for the relocation were underway, Mexico’s environmental authority refused to renew the operating license (effectively causing the end of operations). The investor launched ICSID proceedings against Mexico under the Spanish-Mexico BIT, claiming, *inter alia*, a violation of the State’s obligation to accord “fair and equitable treatment, in accordance with international law”.³ The tribunal reckoned that the FET standard required Mexico to protect the investor’s legitimate expectations and to act “in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as

³ Mexico-Spain BIT (1995), Article IV (1). A new BIT superseded this treaty in 2006.

well as the goals of the relevant policies and administrative practices or directives –ICSID Case ARB(AF)/00/2, 2003, § 154–”.

Tecmed's dictum proved profoundly influential in defining the doctrine of investors' legitimate expectations in modern investment arbitration. Many cases after *Tecmed* followed the doctrine of legitimate expectations as expressed in this award (McLachlan et al., 2017, § 7.180).

However, the *dictum* remained deeply controversial. Some considered that the resulting *Tecmed* standard was “not a standard at all; it is rather a description of perfect public regulation in a perfect world, to which all states should aspire but very few (if any) will ever attain” (Douglas, 2006, p. 27). For others, *Tecmed* was flatly wrong: it would be a mistake to see “a general principle of law [according to which] violations of legitimate expectations give rise to substantive remedies” (Sornarajah, 2010, p. 355). These reactions are unsurprising. The *Tecmed* standard is highly demanding on the State (almost to the point of preventing any reasonable and legitimate change in regulation). In any event, the investor's legitimate expectations are still treated today –*Glencore v. Colombia (I)*, ICSID Case ARB/16/6, 2019, § 1368; *STEAG*, ICSID Case ARB/15/4, 2020, § 308– as a “dominant element of [the FET] standard” (*Saluka*, PCA Case 2001-04, 2006, § 302).

Following the premises described in the sections above, would it be possible to endorse the findings in *Tecmed*? The first thing to note is that *Tecmed* qualifies as *penumbral*, as it is impossible to outrightly qualify Mexico's actions as unfair or inequitable. We do not face a case dealing with the *core* of FET, like the politically motivated measures described in *Tokios Tokelés*. What this means is that the FET provision in question did not furnish all the elements beforehand to the arbitrators' decision. Therefore, they were called to exercise discretion in deciding the case. But, in exercising discretion, did the arbitrators reach a *correct* decision? This question warrants several comments.

A preliminary general objection must be dismissed. Arguably, a tribunal cannot go beyond the four corners of the treaty provision. According to this view, any interpretation issue in penumbral areas shall not warrant the exercise of a norm-creating power but the referral of

the matter to the States parties to the treaty to obtain an authoritative text interpretation.⁴

Such an objection makes little sense. The mere definition of what is penumbral (which would warrant a referral) would be debatable. Most importantly, the inclusion of general standards in the law is a feature devised to provide discretion in those cases where “[t]he anticipatable combinations of relevant factors are few, and this entails a relative indeterminacy” (Hart, 2015, p. 131) in the initial aims of the legislator. It is also possible that the legislator identifies a range of varied circumstances that share “familiar features of common experience” (Hart, 2015, p. 132), for which it is impossible to formulate a simple rule. States may have a preconceived idea of what is *fair* or *equitable* but cannot anticipate how fairness and equitableness (or lack thereof) would crystallise in particular situations. As discussed above, the OECD endorsed this approach in its 2004 report. This situation is not exclusive to international law. Hart provides as an example the standard of *due care*, which is quintessential to understanding the common law tort of negligence.

The discretion attributed to arbitrators, in this sense, is a feature of the system (not a flaw) because the States entrusted them with a rule-making authority to decide concrete cases. In those penumbral cases where they must exercise discretion, Hart would argue “there is no possibility of treating the question raised by the various cases as if there were one uniquely correct answer to be found”. Instead, any decision amounting to a “reasonable compromise between many conflicting interests” would suffice (Hart, 2015, p. 132).

A more complex debate emerges in the law’s interstices. If respecting the investors’ *legitimate* expectations (as described in *Tecmed*) falls within the definition of fair and equitable treatment, there is nothing questionable about tribunals taking *persuasive* and even possibly *incompatible* decisions under the same treaty. In fact, an adjudicator must not exercise her rule-creating power arbitrarily. Instead, he/she “must always have some general reasons justifying [her/his] decision and [she/]he

⁴ This argument may justify the inclusion of provisions that confer interpretive powers to States. As an example, article 5 of the Uncitral Transparency Rules sets forth a provision for submissions by a non-disputing Party to the treaty.

must act as a conscientious legislator would by deciding according to [her/his] own beliefs and values” (Hart, 2015, p. 273). From this perspective, arbitrators may question whether *Tecmed* rightly captures what Mexico and Spain would have decided had they been confronted with this case. However, the solution is furnished by extra-legal reasons that support divergent solutions. Nothing would prevent another tribunal from invoking equally persuasive (and extra-legal) reasons to reach a different conclusion.

To the extent that arbitrators enjoy discretion to decide penumbral cases, there would be no issue in applying different solutions, even if these could be understood as contradictory. This is not to say that any solution applied to a dispute concerning the FET is correct or acceptable for extra-legal reasons (like policy reasons or morality reasons). For Hart, discretion requires an argumentative activity from arbitrators and adopting sound policy solutions (although the applicable legal rules do not strictly determine them).

Dworkin’s Perspective

Is this enough?

At this stage, we may ask ourselves whether Hart’s approach gives the best account possible of the arbitrators’ practice. Several arguments militate against that view. One problematic aspect is that Hart’s theory is essentially descriptive and, thus, it is insufficient to explain the legitimacy of a tribunal’s decision. To say that arbitrators can decide penumbral cases based on extra-legal reasons because of some ambiguity in treaty language is hard to accept. This answer is particularly unsatisfactory for ISDS, where arbitrators review measures adopted by governments that, in most cases, are democratically elected and widely recognised by the international community. The lack of legitimacy is particularly salient here: arbitrators are not governmental bodies and are entrusted with limited powers to decide a single dispute between a State and a private individual. It is hard to accept that, when entering a BIT, the States are

accepting that a tribunal takes down legitimate measures of their organs based on extra-legal (or non-exclusively legal) reasons.

In line with this criticism, Hart's theory is of little help to understand what the practice of arbitrators is doing. Legal scholars have noted that "[i]nternational courts shape the law prospectively and affect actors beyond the litigants immediately before the court. They are engaged in perpetuating values and maintaining normative communities" (Grossman, 2013, p. 76). In international economic law, adjudicators "are expected not merely to resolve disputes, but to promote the regime's underlying goals and interests, overcome international cooperation problems, and keep states within a particular normative community" (Shlomo Agon & Benvenisti, 2017, p. 5). The idea that tribunals would act as "a conscientious legislator" (*i. e.*, only in line with the will of the parties to a treaty in particular) when exercising discretion fails to capture the idea that such a normative community exists.

Investment tribunals understand their practice along the lines of what has been noted by commentators. The AWG tribunal made a proper illustration of this point when it considered that the FET provision in the UK-Argentina BIT was "vague, flexible, basic, and widely used". However, arbitrators had to their benefit "decisions by prior tribunals that have struggled strenuously, knowledgeably, and sometimes painfully, to interpret the words 'fair and equitable' in a wide variety of factual situations and investment relationships". It thus acknowledged the need to apply "the basic judicial principle that 'like cases should be decided alike', unless a strong reason exists to distinguish the current case from previous ones" (*AWG Group Ltd. v. The Argentine Republic*, 2010, § 189).

Hence, for Hart's conception of law, compliance with an award by a State is justified by little more than the past political decision reflected in the treaty's text. Arbitrators, conventionalism would say, cannot claim "any law beyond convention" (Dworkin, 1998, p. 119). However, convention in these cases tells us very little—if anything at all—about what the law requires. It is hard to see the connection between a typical FET provision in a treaty and the *Tecmed* dictum. Nothing, in principle, favours the standard based on the investor's legitimate (yet exclusively *subjective*) expectations. Nothing, besides extra-legal considerations, in Hart's theory, explains why we

should abandon this interpretation of the standard and favour instead a standard based on “treatment that objectively will be considered just by an impartial observer bearing in mind the circumstances” (*Gosling*, ICSID Case ARB/16/32, 2020, § 246).

According to conventionalism, adjudicators have “no reason for acknowledging consistency in principle as a judicial virtue or for dissecting ambiguous statutes or inexact precedents to try to achieve it” (Dworkin, 1998, p. 135). Yet this is what arbitrators do. Even the *Romak* tribunal, which purportedly ignored any forward-looking consequence of its decision, saw value in past awards as a “means to [...] explain succinctly [its] own reasoning” (PCA Case 2007-07/AA280, 2009, § 171).

Tecmed was influential not *because* of a convention. It was influential because it appeared in the context of adjudication as an argument that would justify the invalidity, under international law, of the measures adopted by a sovereign State. In Dworkin’s words, this successful argument was “drawn from more general movements in the political and social culture”, rather than an unreported agreement between Mexico and Spain or some equally unreported extra-legal reasoning in the arbitrators’ mind.

Therefore, Hart’s theory understood as a form of conventionalism is insufficient. It does not account for the arbitrators’ practice unless we accept that their statements about past practice and the value of FET are mostly (if not only) extra-legal considerations. Neither does Hart’s theory hint at any meaningful explanation on the legitimacy of the decisions that arbitrators make. We cannot accept it as the best conception of the practice, especially since ISDS concerns the revision and potential nullification of acts issued by legitimate governments.

On the other hand, Dworkin maintains that integrity supposes that rights, even when they follow from explicit past political decisions, “go beyond the explicit extension of political practices conceived as conventions” (Dworkin, 1998, p. 134). What does this mean for ISDS?

Interpretive Attitude and Law as Integrity

In interpreting the requirements of FET, the tribunal in *El Paso* observed that its contours “have gradually come into focus in the past

few years”, also noting that its “basic touchstone [...] is to be found in the legitimate and reasonable expectations of the parties, which derive from the obligation of good faith” (ICSID Case ARB/03/15, 2011, §339).

The *coming into focus* was essentially⁵ the result of the interpretative task that many tribunals undertook after *Tecmed*. In this regard, scholars often cite the *dictum* in *Waste Management II*—ICSID Case ARB(AF)/00/3, 2000, §98—⁶ as having “achieved wide acceptance by subsequent tribunals as a useful statement of the standard in its contemporary application” (McLachlan et al., 2017, §7.175).

It is a methodology common to the foregoing decisions to rely on other tribunals’ decisions. In this sense, arbitrators seem less concerned to find what the States parties to an investment treaty specifically meant by FET. Instead, they seem to devote themselves to justify the best interpretation possible of what FET requires *in general* (often without even referring to any customary dimension of the standard). Hart’s theory would explain this situation in *semantic* terms: arbitrators are concerned with defining a standard that happens to appear in many treaties. Indeed, most treaties use the words *fair* and *equitable* treatment as a standard that States shall accord to foreign investors.

However, this semantic approach is insufficient to explain two further characteristics of the analysed decisions: arbitrators (i) engage in a *dialogue* with past decisions, and (ii) they tend to qualify these in terms of whether they *rightly* capture what FET requires. In *El Paso*, the tribunal dismissed “the line of cases in which fair and equitable treatment was viewed as implying the stability of the legal and business framework [as] [e]conomic and legal life is by nature evolutionary” (ICSID Case ARB/03/15, 2011, §352). Hart’s theory would have to accommodate these cases as well were it be reasonable to consider that guaranteeing a stable legal framework could be subsumed into the definition of FET. Since there are no reasons, *a priori*, to deny this latter claim, Hart’s theory is ill-fitted to explain this attitude.

⁵ Some States have been actively trying to fill the standard’s content in interpretative statements and new formulations of FET provisions in more recent treaties (McLachlan et al., 2017, §7.82).

⁶ According to the database Investor-State Law Guide, at least 85 subsequent decisions have referred to this standard.

Dworkin's theory may offer a more compelling explanation. Arbitrators are not concerned with elucidating the semantic intricacies of what is *fair* or *equitable* under a specific treaty (they are not engaging in finding *descriptive meaning*). Instead, they see that FET—and the legal provisions that underly its application—rests on an “interpretive concept of value: [its] descriptive sense is contested, and the contest turns on which assignment of a descriptive sense best captures or realizes that value” (Dworkin, 2008, p. 150).

The engagement of tribunals in defining what FET requires also reflects an interpretive attitude as well as theoretical disagreement. Arbitrators generally disagree about FET's requirements—this is not to say that they do not agree with the official sources (the treaty in question or international law). Their disagreement is genuine as, in each award, they engage meaningfully in a debate and strive to provide the best possible interpretation of the law. The interpretive attitude towards, among others, FET is evidence of an ongoing legal practice—international investment law—shared by a community of States.

This ongoing practice does not exist in isolation, relegated to a single treaty or within the four corners of a single case. There is an interpretive activity, “prominent and powerful”, that is “dependent in many ways on the interpretive activity of other, professional and lay, participants in legal practice” (Postema, 1987, p. 310). The activity thrives in what commentators have described as a “patchwork quilt of interlocking but separate bilateral treaties—each the product of its own negotiation” that nonetheless possesses a “surprising pattern of common features” (McLachlan et al., 2017, § 1.07).

There is some further evidence that the interpretive attitude of the tribunals is not merely a semantic digression. What arbitrators are doing is what any interpreter engaged in any social practice (as law) would: they “propose value for the practice by describing some scheme of interests or goal or principles the practice can be taken to serve or express or exemplify” (Dworkin, 1998, p. 52). *Tecmed* did so implicitly by seeing in FET a set of safeguards surrounding the investors' legitimate expectations. Other tribunals have attempted to be more explicit. In *Bahgat*, arbitrators reasoned that FET had the purpose of “guaranteeing the rule of law” through “the protection of legitimate expectations, the

absence of bad faith, and the requirements that the conduct of the State be transparent, consistent and non-discriminatory and not based on unjustifiable distinctions or arbitrary” (PCA Case 2012-07, 2019, §246).

The foregoing considerations show that Dworkin’s theory explains in a better light the concerns that many tribunals have in making sense of this constellation of treaties. However, this interpretive attitude is only a starting point. Does it also reflect arbitrators do and are able to embrace law as integrity?

According to the conception of law as integrity, “propositions of law are true if they figure in or follow from the principles of justice, fairness and procedural due process that provide the best constructive interpretation of the community’s legal practice” (Dworkin, 1998, p. 225). This conception is not just concerned with interpreting and applying the sources of law but with providing the best possible justification of the State’s coercion. Law as integrity is, in this sense, not only concerned with the *grounds* of law but also with the *force* of law (the political morality of a decision at law). This approach requires the interpreter to take a moral stance without relegating her analysis to the formal sources. Contrary to what Hart would argue, it is impossible and artificial to detach these moral, political considerations –underpinning the best interpretation of the legal practice– from the *grounds* of law.⁷

In an article published in 2013, Dworkin discussed the implications of his theory for international law. He deemed it necessary to abandon the old, inadequate theories that predicate the *force* of international law on the States’ consent and Hart’s suggestion that international law is law only in a limited, sociological dimension. In Dworkin’s view, international law can be conceived as an interpretive concept that we share because we believe that there is value in its application. Like domestic law, international law is subject to the same normative theory that explains both its *grounds* and its *force*: “A theory of political morality about the circumstances in which something ought or ought not to happen”

⁷ This point relates to Dworkin’s (2013a) early work, where he discusses the nature of discretion and the incidence of principles devoid of legal pedigree in decision-making. The test of pedigree is not applicable to principles as their origin “lies not in a particular decision of some legislature or court, but in a sense of appropriateness developed in the profession and the public over time” (Dworkin, 2013a, p. 58).

(Dworkin, 2013b, p. 11). This conception of international law rests on the values on which a State would accept “feasible and shared constraints on its own power. That requirement sets out [...] the true moral basis of international law [and] states the basic interpretive principle” (Dworkin, 2013b, p. 17) that ought to be applied by international adjudicators.

Dworkin argued that the *force* of domestic legal systems rests on the political value of *legality* (Dworkin, 2008, p. 169). This value, in turn, is an interpretive concept in itself: some authors may argue that its importance lies in enabling one’s free planning of life; others, like Dworkin, in that it realises political integrity, meaning coherent government for all members of society under the same set of principles. In international law, Dworkin (2013b) replaced the *legality* principle for *salience* in the following terms:

[I]f a significant number of states, encompassing a significant population, has developed an agreed code of practice, either by treaty or by other form of coordination, then other states have at least a prima facie duty to subscribe to that practice as well, with the important proviso that this duty holds only if a more general practice to that effect, expanded in that way, would improve the legitimacy of the subscribing state and the international order as a whole (p. 19).

Salience thus conceived recognises whatever most of the States regard as an obligatory practice. There is a crucial qualification: salience only accepts the requirements that enhance the *legitimacy* of the State’s domestic legislation and international order as a whole. Otherwise, there would be no difference between such a system and an abusive international majority rule. The annotated difference in the *force* of law (the difference between salience and legality) is a symptom of Dworkin’s Westphalian view of international law. In this view, only States are considered *proper* subjects of international law. Hence, the value of *legality* concerns relationships between the State and *individuals*. *Salience* concerns those of States among *themselves*. *Legality* seeks to justify coercion in *vertical* relationships; *salience* seeks to justify an international practice’s obligatory nature in the context of *horizontal* relationships—where States regard themselves (at least formally) as equal.

As an expression of international law's political morality, salience explains the underpinnings of ISDS more compellingly. As discussed above, tribunals are concerned with the *legitimacy* of their decisions and the *authority* projected on the parties and the members of the international community. Salience justifies the ongoing debate among tribunals on the FET requirements in these terms. Tribunals do not discuss the semantic meaning of a discrete treaty but the meaning of the widely recognised State practice consisting of FET to foreign investors. This understanding further warrants some tribunals' belief that there is a duty "to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law" (*Lighthouse*, ICSID Case ARB/15/2, 2017, § 111).

However, contrary to what Dworkin contends, salience concerns international economic law (and ISDS) too. It is hard to conceive the WTO or ISDS as mere "club[s] of signatory nations" (Dworkin, 2013b, p. 20) in a world of economic interdependence and globalised trade. International peace and security (one of the UN Charter's fundamental goals) depend on the realisation of human rights, which cannot be achieved without fostering all nations' economic development (United Nations, 1986). The community of States acknowledges that trade and foreign investment play a key role in securing these goals, making it impossible to set aside the international economic agenda as a discrete concern. Also, it is no exaggeration to say that our future as a civilisation depends on the States' coordinated effort to implement environmentally sound policies and transition to new paradigms of sustainable development and protection of the environment.⁸ International economic law and ISDS will play a fundamental role in that transition. To deny salience to it runs against the overwhelming international practice, as reflected, *inter alia*, in the 2030 Sustainable Development Goals or the Paris Agreement's provisions concerning the transition to a green economy.

In sum, it seems possible to apply the conception of law as integrity to ISDS. Salience —reflected in the customary minimum standard of

⁸ The economic pillar of sustainable development is also fundamental for international security (Brundtland Report, Ch. 11, § 37).

treatment and the myriad FET provisions in the BITs— also appears to underpin the States’ obligation to accord FET to foreign investors. How to understand ISDS if Dworkin’s theory applies?

Hercules and Tecmed

If investment law is to be interpreted in its best light, in light of the principles and values that underpin the states’ obligations of protection and promotion of investments, the discretion afforded by Hart’s theory ceases to exist. Arbitrators are, by this account, required to provide the best eligible interpretation possible considering such values. As members of the practice —by participating in the ISDS system set up by States— arbitrators must be morally engaged to find this answer (Dworkin, 1998, pp. 255-256). To what extent this task is visible in the tribunals’ decisions will depend on the features of each particular case. The role political morality and jurisprudence would play —how they would be more or less a “silent prologue to [a] decision at law” (Dworkin, 1998, p. 90)— would depend on the intricacies particular to each case. Some cases will prove to be *pivotal* and will test the foundations of the system. In those cases, tribunals will have to carry out a more intense and overt interpretive activity to justify their decisions.

Hercules represents Dworkin’s theory’s ideal of adjudication. He is a judge with all the time and patience required to find the best possible answer in light of the applicable principles of political morality that sustain the legal system. What would have crossed his mind sitting as an arbitrator in a case like *Tecmed*?

Hercules would first confirm that salience underpins FET. Many —if not all— states are committed to some form of FET to foreign investors either by treaty or on a customary basis. The content of FET is further determined, as discussed above, by the value of legality —the *rule of law* (Dworkin, 2008, p. 169). What lies at the core of FET is the prevention of arbitrariness. As famously put by the International Court of Justice, arbitrariness “is not so much something opposed to a rule of law, as something opposed to the rule of law” (ICJ Reports 1989, p. 284). This political dimension of value, and not a mere discussion on the semantic meaning of treaty provisions, is the actual core of FET.

Hercules would likely not approve of the broad formulation of the FET standard in *Tecmed*. Legality, in its best possible light, is not equivalent to perfect government. Its requirements do not arise from the *subjective* standard set by the investors' legitimate expectations. They are better captured, for example, in Fuller's eight principles of legality. Hercules would probably pay particular attention to the requirement that there must be congruence between the official action and the declared rule (a sounder *objective* test). Such congruence may indeed protect in many instances investors' expectations based on declared rules and enhance the bond of reciprocity which, in Fuller's theory, provides moral value (and, in a Dworkinian sense, *force*) to a legal system (Fuller, 1963, p. 162).

Nevertheless, congruence between official action and the declared rule is only one of the many *desiderata* that inform the value of legality: "The stringency with which the eight desiderata as a whole should be applied, as well as their priority of ranking among themselves, will be affected by the branch of law in question, as well as by the kinds of legal rules that are under consideration" (Fuller, 1963, p. 93).

For example, congruence will sometimes yield to the need for *consistency* (Fuller, 1963, p. 65) with other principles that justify the State's measures. In this sense, the investor's legitimate expectations do not give rise to promises that laws and regulations will never change or that other interests protected by the State will never take precedence over the investor's expectations.

Hence, *Tecmed* may have required a more balanced and nuanced analysis of what the value of legality meant for that specific case. Legality indeed requires, *inter alia*, a baseline for self-directed action foreign investors can follow (Fuller, 1963, p. 210). This requirement is not an *all-or-nothing* rule. Instead, it is a principle weighted in conjunction with other political values that may have justified Mexico's actions. *Tecmed's* decision would thus be correct only in a limited, narrow sense (and incorrect as to the standard of conduct it requires from the State). Neither principle of perfect government nor one-sided expectations determine the baseline for action foreign investors may enjoy. That baseline can only derive from the State's *valid* commitments (what are those is an issue that Hercules would have to ascertain under the applicable law). Only by failing to honour such commitments, the State

would fail to accord FET—for instance, in *Blusun* (ICSID Case ARB/14/3, 2016, § 319(5)— and *BayWa* (ICSID Case ARB/15/16, 2019, § 460), the arbitrators indeed linked the existence of legitimate expectations to previous specific commitments.

In sum, the doctrine of legitimate expectations is a convenient—yet imprecise—shorthand way to express the standard. Furthermore, even if there is some value in that formulation, the State’s conduct would be understood better as arbitrary action rather than the frustration of the investor’s expectations. *Cairn* (PCA Case 2016-07, 2020, § 1723) takes this position, refusing to consider the investor’s legitimate expectations as a *core* or *dominant* element of the standard.

Conclusions

The Hart/Dworkin debate unfolds a problem well-known to practising lawyers in domestic jurisdictions: the extent to which the legal profession should be concerned with the moral and political justification of State action. Dworkin’s late work shows that the issue takes a different shape in international law and ISDS (*i. e.*, what justifies a sovereign State’s yielding to an international obligation). Dworkin’s theory helps ascertain the values underpinning investment law in general and FET in particular. The obligation to accord FET is salient in the international system and grounded in the value of *legality*. Hart’s agenda to formulate a descriptive theory is purportedly modest in this regard. For that reason, it also appears insufficient.

This conception of the role of arbitrators blurs the line—often unconsciously self-imposed—between the study of the *grounds* and the *force* of law. This methodology may serve better our understanding of the criticisms against ISDS. It may also guide the arbitrators in their approach to interpreting open-textured provisions like FET considering the principles of the community of States that such provisions serve.

Embracing law as integrity requires an effort to strive in the quest of the FET’s best interpretation possible: to accept and to pursue this ideal explicitly may enhance the system as a whole. Accepting *salience* may also assist arbitrators in tackling the challenges that ISDS will face in the

upcoming decades, including the increasing concern for environmental aspects of the disputes and the difficulties posed by the fragmentation phenomenon. Salience, and the express acknowledgement of investment law as an interpretive practice, may hold the key to many of these issues.

References

- Agreement on the Promotion and Reciprocal Protection of Investments between The Kingdom of Spain and the United Mexican States of June 1995. <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5618/download>
- Alter, K. J., Helfer, L. R., & Madsen, M. (2016). How context shapes the authority of international courts. *Law and Contemporary Problems*, 79(1), 1-36. <https://scholarship.law.duke.edu/lcp/vol79/iss1/1>
- AWG Group Ltd. v. The Argentine Republic (Suez, Sociedad General de Aguas de Barcelona S. A., and Vivendi Universal S. A. v. The Argentine Republic)*. ICSID Case ARB/03/19, Decision on Liability, 30 July 2010. <https://www.italaw.com/sites/default/files/case-documents/ita0055.pdf>
- Azurix Corp. v. Argentine Republic*. ICSID Case ARB/01/12, Award, 14 July 2006. http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C5/DC507_En.pdf
- BayWa R. E. Renewable Energy GmbH and BayWa R. E. Asset Holding GmbH v. Spain*. ICSID Case ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019. http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C4445/DS15835_En.pdf
- Bernasconi-Osterwalder, N. (2016). Giving arbitrators carte blanche. Fair and equitable treatment in investment treaties. In C. Lim (Ed.), *Alternative visions of the international law on foreign investment: essays in honour of Muthucumaraswamy Sornarajah* (pp. 324-346). Cambridge University Press. <https://doi.org/10.1017/CBO9781316488317.013>
- Blusun S. A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*. ICSID Case ARB/14/3, Award, 27 December 2016. <https://www.italaw.com/sites/default/files/case-documents/italaw8967.pdf>
- British Caribbean Bank Ltd. v. Government of Belize*. PCA Case 2010-18, Award, 19 December 2014. <https://www.italaw.com/sites/default/files/case-documents/italaw4190.pdf>

- Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*. ICSID Case ARB/07/9, Decision on Jurisdiction, 29 May 2009. <https://www.italaw.com/sites/default/files/case-documents/ita0103.pdf>
- Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Republic of India*. PCA Case 2016-07, Award, 21 December 2020.
- CMS Gas Transmission Company v. Republic of Argentina*. ICSID Case ARB/01/8, Award, 12 May 2005. http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C4/DC504_En.pdf
- Dolzer, R., & Schreuer, C. (2012). *Principles of international investment law*. Oxford University Press.
- Douglas, Z. (2006). Nothing if not critical for investment treaty arbitration: Occidental, Eureko and Methanex. *Arbitration International*, 22(1), 27-51. <https://doi.org/10.1093/arbitration/22.1.27>
- Dworkin, R. (1998). *Law's empire*. Hart.
- Dworkin, R. (2008). *Justice in robes*. Belknap Harvard.
- Dworkin, R. (2013a). *Taking rights seriously*. Harvard University Press.
- Dworkin, R. (2013b). A new philosophy for international law. *Philosophy & Public Affairs*, 41(1), 2-30.
- El Paso Energy International Company v. Argentine Republic*. ICSID Case ARB/03/15, Award, 31 October 2011. <https://www.italaw.com/sites/default/files/case-documents/ita0270.pdf>
- Eltronica Sicula S. P. A. (ELSI), United States of America v. Italy*. Judgment, ICJ Reports 1989. <https://www.icj-cij.org/public/files/case-related/76/076-19890720-JUD-01-00-EN.pdf>
- European Union and its member States. (2019). *Establishing a standing mechanism for the settlement of international investment disputes*. https://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157631.pdf
- Fuller, L. (1963). *The morality of law*. Yale University Press.
- Genin v. Estonia (Alex Genin, Eastern Credit Limited, INC and A. S. Baltoil v. Republic of Estonia)*. ICSID Case ARB/99/2, Award, 25 June 2001. http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C178/DC592_En.pdf
- Glencore International A. G. and C. I. Prodeco S. A. v. Republic of Colombia*. ICSID Case ARB/16/6, Award, 27 August 2019. https://www.italaw.com/sites/default/files/case-documents/italaw10767_0.pdf
- Grossman, N. (2013). The normative legitimacy of international courts. *Temple Law Review*, 86(1), 61. https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=1269&context=all_fac

- Hart, H. H. (1957). Positivism and the separation of law and morals. *Harvard Law Review*, 71(4), 593-629. <https://doi.org/10.2307/1338225>
- Hart, H. L. A. (2015). *The concept of law*. Oxford University Press.
- Jan Oostergetel and Theodora Laurentius v. Slovak Republic, Uncitral*. Final Award, 23 April 2012. <https://www.italaw.com/sites/default/files/case-documents/ita0933.pdf>
- L. F. H. Neer and Pauline Neer (USA) v. United Mexican States, UNRIAA* (15 October 1926). https://legal.un.org/riaa/cases/vol_IV/60-66.pdf
- Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v. Democratic Republic of Timor-Leste*. ICSID Case ARB/15/2, Award, 22 December 2017. http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C4125/DS10851_En.pdf
- Lim, C. L., Ho, J., & Paparinskis, M. (2018). *International investment law and arbitration: commentary, awards and other materials*. Cambridge University Press.
- McLachlan, C., Shore, L., & Weiniger, M. (2017). *International investment arbitration: substantive principles*. Oxford University Press.
- Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt*. PCA Case 2012-07, Final Award, 23 December 2019. <https://www.italaw.com/sites/default/files/case-documents/italaw11724.pdf>
- OECD. (2004). Fair and equitable treatment standard in international investment law. *OECD Working Papers on International Investment* 2004/03. <http://dx.doi.org/10.1787/675702255435>
- Paparinskis, M. (2013). *International minimum standard and fair and equitable treatment*. Oxford University Press. <https://doi.org/10.1093/acprof:oso/9780199694501.001.0001>
- Paris Agreement under the United Nations Framework Convention on Climate Change of 12 December 2015.
- Postema, G. J. (1987). "Protestant" interpretation and social practices. *Law and Philosophy*, 6(3), 283-319. <https://doi.org/10.2307/3504600>
- Romak S. A. (Switzerland) v. Republic of Uzbekistan*. PCA Case 2007-07/AA280, Award, 26 November 2009. <https://www.italaw.com/sites/default/files/case-documents/ita0716.pdf>
- Saba Fakes v. Republic of Turkey*. ICSID Case ARB/07/20, Award, 14 July 2010.
- Saluka Investments BV (The Netherlands) v. Czech Republic*. PCA Case 2001-04, Partial Award, 17 March 2006. <https://pcacases.com/web/sendAttach/880>
- Shlomo Agon, S., & Benvenisti, E. (2017). The law of strangers: the form and substance of other-regarding international adjudication. *University of Toronto Law Journal*, 68(4), 598-660. <https://doi.org/10.3138/utlj.2017-0088>

- Sisodia, R. S., & Khatana, R. (2019). Standard of review in investment arbitrations and India's approach towards addressing the legitimacy crisis. *Global Trade and Customs Journal*, 14(7/8), 366-371.
- Sornarajah, M. (2007). The fair and equitable standard of treatment: whose fairness? Whose equity? In F. Ortino et al. (Eds.), *Investment treaty law: current issues. II. Nationality and investment treaty claims; fair and equitable treatment in investment treaty law* (pp. 167-182). British Institute of International and Comparative Law.
- Sornarajah, M. (2010). *The international law on foreign investment*. Cambridge University Press.
- STEAG GmbH v. Kingdom of Spain*. ICSID Case ARB/15/4, Decision on Jurisdiction, Liability and Principles of Quantum, 8 October 2020.
- Técnicas Medioambientales Tecmed, S. A. v. United Mexican States*. ICSID Case ARB(AF)/00/2, Award, 29 May 2003. http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3785/DC4872_Sp.pdf
- The Netherlands Model Investment Agreement. (2019). <https://investment-policy.unctad.org/international-investment-agreements/treaty-files/5832/download>
- Thomas Gosling and others v. Republic of Mauritius*. ICSID Case ARB/16/32, Award, 18 February 2020. <https://www.italaw.com/sites/default/files/case-documents/italaw11377.pdf>
- Tokios Tokelés v. Ukraine*. ICSID Case ARB/02/18, Award, 26 July 2007. http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C220/DC2233_En.pdf
- United Nations General Assembly. (25 September 2015). *Transforming our world: the 2030 Agenda for Sustainable Development*. A/RES/70/1. https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf
- United Nations. (December 4, 1986). Declaration on the Right to Development. <https://legal.un.org/avl/ha/drd/drd.html>
- Waste Management Inc. v. United Mexican States II*. ICSID Case ARB(AF)/00/3, Award, 30 April 2004.

