TDM

ISSN : 1875-4120
Issue : Vol. 11, issue 1
Published : January 2014

This paper is part of the special issue on the "Reform of Investor-State Dispute Settlement: In Search of A Roadmap" edited for Transnational Dispute Management by:

Jean E. Kalicki
Arnold & Porter LLP and Georgetown University Law Center
View profile

Anna Joubin-Bret
Cabinet Joubin-Bret
View profile

Transnational Dispute Management
www.transnational-dispute-management.com

In Search of Consistency and Fairness in Investor-State Arbitration: An "Institutional" Approach to Interpreting the Doctrine of Legitimate Expectations
by U.E. Özgür

About TDM

TDM (Transnational Dispute Management): Focusing on recent developments in the area of Investment arbitration and Dispute Management, regulation, treaties, judicial and arbitral cases, voluntary guidelines, tax and contracting.

Visit www.transnational-dispute-management.com for full Terms & Conditions and subscription rates.

Open to all to read and to contribute

TDM has become the hub of a global professional and academic network. Therefore we invite all those with an interest in Investment arbitration and Dispute Management to contribute. We are looking mainly for short comments on recent developments of broad interest. We would like where possible for such comments to be backed-up by provision of in-depth notes and articles (which we will be published in our 'knowledge bank') and primary legal and regulatory materials.

If you would like to participate in this global network please contact us at info@transnational-dispute-management.com: we are ready to publish relevant and quality contributions with name, photo, and brief biographical description - but we will also accept anonymous ones where there is a good reason. We do not expect contributors to produce long academic articles (though we publish a select number of academic studies either as an advance version or an TDM-focused republication), but rather concise comments from the author's professional 'workshop'.

TDM is linked to **OGEMID**, the principal internet information & discussion forum in the area of oil, gas, energy, mining, infrastructure and investment disputes founded by Professor Thomas Wälde.

In Search of Consistency and Fairness in Investor-State Arbitration: An "Institutional" Approach to Interpreting the Doctrine of Legitimate Expectations

*Uğur Erman Özgür**

I. Introduction: Issues of Legitimacy in International Investment Law

International investment law consists of rules that regulate international investment. Customary international law and, since their proliferation in the 1990s, international investment agreements (IIAs) govern this much specialised and interdisciplinary subject of international economic law. Though the concept of custom has been characterised as a "generalization of the practice of States"[1], and the general view is that IIAs are instruments of the public international law regime[2], currently, debates on whether international investment law is public or private international law are at odds. On the one hand, international investment law applies to complex investor-state issues resulting from global economic transactions, which, as a result, may involve the use of commercial arbitration procedures.[3] On the other hand, international investment law implements international public law principles, which traditionally govern public interest issues such as human rights and the environment. According to some, the endeavour to characterize international investment law in the public or private sphere, and to balance public and private interests prompts uncertainties[4], and constitutes the very heart of the so-called legitimacy concerns in investor-state arbitration.[5]

---

* PhD Candidate in CEPMLP, the University of Dundee (u.e.ozgur@dundee.ac.uk). I gratefully acknowledge the guidance and comments of Peter Cameron, Melaku Desta, Abba Kolo, Daniel Behn and Katherine Ramo.

[1] J. Crawford, *Brownlie's Principles of Public International Law* (Oxford: Oxford University Press, 2012).

[2] Jose E. Alvarez, *The Public International Law Regime Governing International Investment* (The Hague: The Hague Academy of International Law, 2011a); Prosper Weil, 'The State, the Foreign Investor, and International Law: The No Longer Stormy Relationship of a Ménage Ą Trois', *ICSID Review,* 15/2 (2000), 401-16 at p. 406.

[3] T. W. Wälde, 'Interpreting Investment Treaties: Experiences and Examples', in Christina Binder et al. (eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford: Oxford University Press, 2009) at pp. 724-30.

[4] A. Mills, 'Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration', *Journal of International Economic Law,* 14/2 (2011), 469-503.

[5] G. Van Harten, 'The Public-Private Distinction in the International Arbitration of Individual Claims against the State', *International and Comparative Law Quarterly,* 56 (2007a), 371-94; Stephan W. Schill, 'Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach', *Va. J. Int'l L.,* 52 (2011), 57.

The concerns emphasized by 37 international investment law scholars in the "Public Statement on the International Investment Regime" issued at Osgoode Hall School of Law (Osgoode Hall Public Statement) conclude that States should withdraw from IIAs and furthermore, should not comply with arbitral awards. According to the critics, the international investment regime harms public welfare since (i) it produces inconsistent arbitral decisions contrary to one of its main goals; (ii) it by-passes domestic laws and regulations, and the sovereigns' right to regulate in the public interest, including those actions necessary in emergency situations; therefore it threatens national sovereignty and self-determination; (iii) it incorporates expansive interpretations of treaty standards (expropriation, most-favoured nation – MFN, non-discrimination and fair and equitable treatment – FET), reflecting a strong bias towards transnational corporations; and (iv) it illegitimately privatizes disputes that must be adjudicated in the public sphere, and therefore fails to incorporate rule of law values such as transparency and participation.[6]

According to some others, these problems are not legitimacy problems, but problems resulting from the emerging nature of the system (or as Professor Brigitte Stern recalled, a "*crise de croissance* – a teenager's crisis"), and will be fixed once it completes its development.[7] Some others challenged the word "crisis" and asserted that the so-called problems of legitimacy are an 'illusion'.[8] Likewise, Professor Jose Alvarez argued that contrary to Osgoode Hall Law Scholars' contentions as to the "so-called" deficits in the system, the Argentine decisions[9] do not generate "inconsistent arbitral case law, undue

---

[6] Osgoode Hall Law School, 'Public Statement on the International Investment Regime', <http://www.osgoode.yorku.ca/public_statement>, accessed 15 September 2013; Jose E. Alvarez and G. Topalian, 'The Paradoxical Argentina Cases', *World Arbitration and Mediation Review* (6, 2012), 491-554 at pp. 491-2.

[7] B. Stern, 'The Future of International Investment Law: A Balance between the Protection of Investors and the States' Capacity to Regulate', in Sauvant K. Alvarez J. E. (ed.), *The Evolving International Investment Regime: Expectations, Realities, Options* (New York: Oxford University Press, 2011) at at p. 175.

[8] D. Krishan, 'Thinking About BITs and BIT Arbitration: The Legitimacy Crisis That Never Was', in Baetens F. Weiler T. (ed.), *New Directions in International Economic Law in Memoriam Thomas Wälde* (Brill Online Collection, 2011), 107-50.

[9] In chronological order, reference to "the Argentine decisions" includes CMS Gas Transmission Company v. Republic of Argentina, 'Award', (ICSID Case No. ARB/01/8, 12 May 2005); Corp. LG&E Energy, Corp. LG&E Capital, and Inc. v. Argentine Republic LG&E International, 'Decision on Liability', (ICSID Case No. ARB/02/1 3 October 2006); Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic, 'Award', (ICSID Case No. ARB/01/3, 22 May 2007); CMS Gas Transmission Company v. Republic of Argentina, 'Decision of the Ad Hoc Committee on the Application for Annulment', (ICSID, 25 September 2007); Sempra Energy International v. Argentine Republic, 'Award', (ICSID Case No. ARB/02/16, 28 September 2007); Continental Casualty Company v. The Argentine Republic, 'Award', (ICSID Case No. ARB/03/9, 5 September 2008); National Grid P.L.C. v. Argentine Republic, 'Award', (UNCITRAL, 3 November 2008); Sempra Energy International v. Argentine Republic, 'Decision of the Ad Hoc Committee on the Application for Annulment',

sovereign intrusion, blanket disregard for 'emergency' action, or pro-investor bias". According to him, the Argentine decisions also do not back up the assertions that investment arbitration privatizes public law disputes and therefore falls in the wrong side of the public-private law distinction.[10] Though he admitted that divergences occurred among the arbitral Tribunals and the annulment Committees in operating the doctrine of necessity under customary international law, and Article XI – the non-precluded clause – of the US-Argentina bilateral investment treaty (BIT)[11], Alvarez concluded that legal problems that were considered in the Argentine decisions have changed the international investment regime, and made it more responsive to the needs of states.[12]

To date, in order to resolve these issues, scholars have submitted a variety of proposals. Some radical views included the dismantling of international arbitration as a dispute resolution method in claims grounded on public international law and/or supported the reviving of the *Calvo Doctrine*, which would enable the use of international arbitration solely through "choice of law and forum clauses in contracts with foreign investors over international commitments".[13] At the same time, some focused on improving the investor-state arbitration mechanism with organizational reforms such as limiting access to the mechanism, introducing an appeals facility and creating a standing international investment court.[14] Some others considered codification options including revision of the existing mechanism through drafting of individual IIAs.[15]

Contrary to the dominant approach, this paper does not explain fairness and inconsistency issues with classic dichotomies including private – public, international – national, pro-

(ICSID, 29 June 2010); Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic, 'Decision of the Ad Hoc Committee on the Application for Annulment', (ICSID, 30 July 2010); Suez Sociedad General de Aguas de Barcelona S.A. And Vivendi Universal S.A. v. Argentine Republic, 'Decision on Liability', (ICSID Case No. ARB/03/19, 30 July 2010); Total S.A. v. Argentine Republic, 'Decision on Liability', (ICSID Case No. ARB/04/01 27 December 2010); Impregilo S.p.A. v. Argentine Republic, 'Award', (ICSID Case No. ARB/07/17, 21 June 2011); El Paso Energy International Company v. The Argentine Republic, 'Award', (ICSID Case No. ARB/03/15, 31 October 2011).

[10] Alvarez and Topalian, 'The Paradoxical Argentina Cases'.

[11] Alvarez, *The Public International Law Regime Governing International Investment* at p. 267.

[12] Ibid; Jose E. Alvarez and K. Khamsi, 'The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime', in Sauvant K. P. (ed.), *The Yearbook of International Law and Policy* (New York: Oxford University Press, 2008-2009).

[13] W. Michael Reisman, 'The Evolving International Standard and Sovereignty', *Proceedings of the Annual Meeting (American Society of International Law),* 101 (2007), 462-65 at pp. 464-5.

[14] G. Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford: Oxford University Press, 2007b).

[15] See UNCTAD, 'Reform of Investor-State Dispute Settlement: In Search of a Roadmap', *IIA Issues Note* (2: UNCTAD, June 2013a).

investor – pro-state or market – sovereign. It employs the New Institutional Economics (NIE) as its framework: This paper discusses the role of institutions (particularly regulatory institutions in the context of the Argentine decisions) in understanding essence of investor-state relations, and explores the potential contribution of the NIE framework in the interpretation of IIAs. This paper does not conclude that investor-state arbitration should be discarded and/or a return to the *Calvo Doctrine* should be supported. At the same time, it does not consider the so-called legitimacy concerns as an illusion. Below, this paper will discuss that international investment law has not reached the desired level of consistency in the interpretation of the standards of protection. It argues that arbitral tribunals are not consistent in considering institutions, and economic and political organisations surrounding the investment environment in a country when they interpret treaty standards.

In making this argument, it limits its scope to the doctrine of legitimate expectations under the fair and equitable treatment (FET) standard. This paper first outlines the concept of NIE and its relevance to international investment law. Subsequently, it revisits some of the controversial Argentine decisions and shows that issues of fairness and inconsistency also stem from divergences among the arbitral Tribunals' considerations of institutional structures inherent to the governance reforms in the Argentine utilities sector. This paper argues that tribunals could be provided with interpretative tools in order to overcome such inconsistencies. It proposes that the NIE could provide a useful framework to strike a fair balance in investor-state arbitration and to promote establishment of consistent arbitral jurisprudence. Consequently, it discusses codification of institutional principles in individual clauses and/or annexes to IIAs as an option for reform.

II. New Institutional Economics (NIE) and its Relevance to International Investment Law

In his famous book, *Institutions, Institutional Change and Economic Performance*, Douglas North described institutions as "any form of constraint that human beings devise to shape human interaction". These include "formal constraints" such as written rules and agreements that regulate "contractual relations and corporate governance" and "constitutions, laws and rules that govern politics, government, finance, and society" as well as "informal constraints" such as "unwritten codes of conduct, norms of behaviour, and beliefs".[16] New Institutional

[16] Douglass Cecil North, *Institutions, Institutional Change and Economic Performance* (Cambridge: Cambridge University Press, 1990) at p. 4.

Economics (NIE) studies institutions and their interactions with organizations: According to the NIE scholars, contrary to conventional assumptions of neoclassical economics, individuals have incomplete information and do not possess unbounded rationality.[17] Thus, individuals create institutions in order to mitigate risks and reduce transactions costs, and provide a degree of certainty and predictability in their interactions. Forms of economic transactions such as markets and firms, and contractual and behavioural arrangements (that establish organizational structures) fall within the scope of NIE's definition for organizations. While institutions and their underlying principles are directly involved in the establishment of organizations, in return, organizations shape changes in institutions.[18]

According to the NIE scholars, institutions are central to the economic development of societies. North noted that "[institutions] are the underlying determinants of the long-run performance of economies".[19] "Third World countries are poor because the institutional constraints define a set of pay-offs to political/economic activity that do not encourage productive activity".[20] Similarly, in 2008, Dani Rodrik observed that economic objectives of States shifted from "getting the price right" to "getting the institutions right". According to Rodrik:

> "[M]arkets are unlikely to work well in the absence of a predictable and legitimate set of rules that support economic activity and dispense its fruits. 'Governance reforms' have become the buzzword for bilateral donors and multilateral institutions, in much the same way that liberalization, privatization and stabilization were the mantras of the 1980s".[21]

More recently, Daron Acemoglu and James Robinson explained the difference between poor and prosperous countries with the difference in their institutional trajectories (i.e. institutions being either "inclusive" or "extractive").[22] Nowadays, the quality of institutions is considered as a central factor in understanding differences in economic development of states. In this, scholars highlight five key settings: Property rights, regulatory institutions, institutions for macroeconomic stability, social insurance institutions and institutions for conflict

[17] Claude Menard and Mary M. Shirley (eds.), *Handbook of New Institutional Economics* (Berlin: Springer, 2008) at Introduction, pp. 1-2.
[18] Ibid.
[19] North, *Institutions, Institutional Change and Economic Performance* at p. 107.
[20] Ibid., at p. 110.
[21] Dani Rodrik, 'Second-Best Institutions', (National Bureau of Economic Research, 2008) at p. 1.
[22] D. Acemoglu and J. Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty* (Crown Publishing Group, 2012).

management.[23] According to the NIE scholars, these institutional settings are rarely about "passing a piece of legislation" or drafting of rules for "anti-trust, financial supervision, securities regulation". Effective private enforcement, custom and tradition should complement appropriate legislation. Existence of sound institutions rests on if, for instance, the scope of property rights includes control as well as ownership, and also, if regulatory institutions provide equal and non-discriminatory private enforcement for the rights of individuals.[24]

Herein, it is argued that the NIE relates to international investment regime in two ways: First, the NIE underlines that institutions are central to affecting locational decisions of investors, particularly, in long-term and capital intensive infrastructure projects. Thus, it could be argued that institutions available in a host-state constitute the basis for foreign investors' essential expectations. Theoretical and empirical studies support this position: For instance, in the scope of Central and Eastern Europe, Robert Grosse and Len Trevino concluded that institutions possess the ability "to reduce transaction costs associated with foreign direct investment (FDI) that result from uncertain environments".[25] Likewise, Thomas Murtha and Stefanie Lenway considered "organizational capabilities and countries' political institutional structures" as direct determinants of "multinational corporations' international strategies and organization structures".[26] Furthermore, in their empirical cross-country research, Agnès Bénassy-Quéré et al. demonstrated that the quality of domestic institutional structure of a host-state is a major determinant in the level of inward-FDI. They outline three reasons for why the quality of institutions matter in promoting inward-FDI: First, sound institutions increase productivity prospects and thus foreign investments. Second, poor quality of institutions may bring in additional costs to foreign investors (for instance in the case of corruption). And last, particularly in infrastructure investments, poor institutional quality

[23] Rodrik, 'Second-Best Institutions'.
[24] Dani Rodrik, 'Institutions for High-Quality Growth: What They Are and How to Acquire Them', *IMF Conference on Second Generation Reforms Conference Paper* <http://www.imf.org/external/pubs/ft/seminar/1999/reforms/rodrik.htm#II>, accessed 27 October 2013
[25] Robert Grosse and Len J Trevino, 'New Institutional Economics and FDI Location in Central and Eastern Europe', *MIR: Management International Review,* (2005), 123-45. See also Ibrahim Fi Shihata, 'Factors Influencing the Flow of Foreign Investment and the Relevance of a Multilateral Investment Gaurantee Scheme', *Int'l L.* (21: HeinOnline, 1987), 671.: "Governments which [...] have established institutions to ensure continuity and smooth transitions without the pains of abrupt or violent changes, greatly contribute to the evolution of an attractive investment enviroment".
[26] Thomas P Murtha and Stefanie Ann Lenway, 'Country Capabilities and the Strategic State: How National Political Institutions Affect Multinational Corporations' Strategies', *Strategic Management Journal,* 15/S2 (1994), 113-29.

such as "poor government efficiency, policy reversals and graft or weak enforcement of property rights" may cause additional constraints in sustaining stability.[27] In a similar vein, by conducting a comparative research among 83 developing countries covering 1984 to 2003, Matthias Busse et al. showed that institutional issues concerning "government stability, internal and external conflict, corruption and ethnic tensions, law and order, democratic accountability of government, and quality of bureaucracy" are significant determinants for investment decisions of multinational corporations and thus inward-FDI.[28]

In searching for alternative financing options, states may undertake a broad range of institutional changes to promote foreign investment including establishment of a municipal legal framework for FDI, and introduction of tax and contractual incentives and governance reforms. However, as discussed above, institutional development is not only about drafting a piece of legislation or mere existence of liberalisation/privatisation/stabilisation policies. According to the NIE it is crucial to establish an accountable system of enforcement in order to restrain the sovereign from "alter[ing] property rights for his or her own benefit", and thus from lowering "the expected returns from investment and […] investors' incentive to invest".[29]

The enforcement aspect of institutions forms the second link between the NIE and international investment regime: If host-states infringe essential expectations of investors and municipal institutions fail to provide effective remedy, international investment law may complement and, in some instances, even substitute for host-state's enforcement mechanisms.[30] Thus, international investment law helps entrenching institutional rights

---

[27] Agnès Bénassy Quéré, Maylis Coupet, and Thierry Mayer, 'Institutional Determinants of Foreign Direct Investment', *The World Economy,* 30/5 (2007), 764-82.

[28] Matthias Busse and Carsten Hefeker, 'Political Risk, Institutions and Foreign Direct Investment', *European Journal of Political Economy,* 23/2 (2007), 397-415.

[29] Douglass C North and Barry R Weingast, 'Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England', *The Journal of Economic History,* 49/04 (1989), 803-32 at p. 803.

[30] Tom Ginsburg, 'International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance', *International Review of Law and Economics,* 25/1 (2005), 107-23. Michael Reisman argued that Article 42(1) of the ICSID Convention makes international law supplemental and corrective to national law: see W. Michael Reisman, 'The Regime for Lacunae in the ICSID Choice of Law Provision and the Question of Its Threshold', *ICSID Review,* 15/2 (2000), 362-81. Similarly Todd Weiler noted that "[investor-state arbitration, international investment law] and international human rights law all […] [provide] a kind of transnational judicial review for municipal regulatory decision-making": Todd Weiler, *The Interpretation of International Investment Law: Equality, Discrimination, and Minimum Standards of Treatment in Historical Context* (6; Leiden: Martinus Nijhoff Publishers, 2013) at p. 33, ft. 79.

promised to foreign investors.[31] In this, it provides protection against deficiencies in municipal institutions through treaty standards under respective IIAs.[32] In the arbitral practice, tribunals often consider municipal institutions in determining whether there is an institutional deficiency, and if there is, whether this deficiency would constitute a treaty violation.[33] For instance, the Tribunal in *Metalclad* considered Mexico's General Ecology Law of 1988 in assessing if the Municipality's possession in controlling hazardous waste matters was in excess of authority[34], and thus amounted to an institutional shortcoming. In *CMS*, the Tribunal examined municipal institutions including contractual and legal arrangements, and the Argentine Civil Code (the theory of "imprévision") to determine whether there was an institutional deficiency.[35] Likewise, in *Sempra*, considering the Argentine municipal institutions, including "the Constitution, the Civil Code or Argentine administrative law", the Tribunal concluded that the host-state was liable since the government failed to meet "the very conditions set out by the legislation and the decisions of courts".[36]

The thesis in this paper is that, though, "institutions matter" in investment decisions of foreign investors and international investment law helps in entrenching municipal institutional rights, arbitral tribunals are not equally sensitive in considering institutional peculiarities of disputes. The following sections attempts to show how and why tribunals diverge in their understanding of municipal institutions.

---

[31] Michael Reisman and Robert Sloane noted that "[p]rivatization, the BIT generation recognizes, demands far more than selling off economically inefficient publicly-owned or –managed companies to private investors. It also requires, particularly, in the utility sector, the simultaneous establishment or regulatory environment (unnecessary, of course, for state owned industries) that forms part of the indispensable normative and legal framework without which private industry, no less than the public it serves, cannot survive, let alone thrive. Privatization, that is, calls for the very 'stable and orderly framework for investment' that BITs strive to establish. In this respect BITs pursue the macrolegal side of the macro-economic structural readjustment policies encouraged by multilateral financial institutions": W. Michael Reisman and Robert Sloane, 'Indirect Expropriation and Its Valuation in the BIT Generation', *British Yearbook of International Law,* 75 (2004), 115.

[32] Ginsburg, 'International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance', (In stressing the role of Chapter 11 of NAFTA, Charles Brower also noted "Let us hope that we will have the fortitude to acknowledge the deficiencies of our institutions, instead of vilifying Chapter 11 as an "outrageous" or "bizarre" regime": see Charles H Brower, 'Investor-State Disputes under NAFTA: A Tale of Fear and Equilibrium', *Pepp. L. Rev.* (29, 2001), 43 at p. 85.

[33] For instance "[i]n addressing the minimum standard of treatment, Chapter 11 tribunals have uniformly shown deference to domestic institutions": see Brower, 'Investor-State Disputes under NAFTA: A Tale of Fear and Equilibrium', at p. 84.

[34] Metalclad Corporation v. United Mexican States, (ICSID Case No. ARB(AF)/97/1, Award 30 August 2000) at paras. 82-4 and 86.

[35] CMS Gas Transmission Company v. Republic of Argentina, 'Award', at paras. 212, 22-7 and 41-5.

[36] Sempra Energy International v. Argentine Republic, 'Award', at para. 268.

III. The Context: Interpretation of the Doctrine of Legitimate Expectations

Above instances, drawing on the NIE, illustrate that rights deriving from municipal institutions specify the subject matter of investor-state disputes, and thus, shape the development of arbitral jurisprudence. In this, treaty interpretation has a central importance. The general framework that formulates sources of international law (i.e. Article 38 of the Statute of the International Court of Justice – ICJ)[37], the interpretative rules (i.e. Articles 31 and 31 of the VCLT)[38] and furthermore, applicable[39] or governing law clauses[40] in respective IIAs enable tribunals to consider municipal institutions including property rights, contracts and regulatory structures in economic sectors.[41] However, even in cases that concern same or similar facts and institutions, tribunals follow different methodologies in interpreting treaty standards and reach divergent conclusions. Scholars argue that this arises from the vague and imperfect drafting of treaty standards such as expropriation, MFN and FET.[42]

Herein, it is argued that investors take locational decisions based on institutional rights; expectations of investors stem from municipal institutions available when they made their investment. In return, are arbitral tribunals responsive to the institutional insights of legitimate expectations of investors when rendering awards? In other words, are tribunals consistent in considering formal legal rules, and economic and political organisations surrounding the investment environment in a host-state when they interpret treaty standards?

In addressing these questions, this paper narrows down its focus to the interpretation of the doctrine of legitimate expectations under the FET standard. This has two motives: First, the

[37] Crawford, *Brownlie's Principles of Public International Law* at p. 34. See L. F. L. Oppenheim, Sir Robert Jennings, and Sir Arthur Watts, *Oppenheim's International Law: Vol.1 : [Book 1] : Peace. Introduction and Pt.1* (Harlow: Longman, 1992) at p. 24.
[38] VCLT Article 31 and 32; see Ian M.T. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press, 1984) at Ch. 5.
[39] ICSID Convention Article 42(1); see C. H. Schreuer, *The ICSID Convention* (Cambridge: Cambridge University Press, 2009) at Ch. 4, Article 42.
[40] NAFTA Chapter 11, Article 1131(1).
[41] "[W]henever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules; it has to refer to the relevant rules of municipal law": Barcelona Traction Light and Power Company Limited (Belgium v. Spain) Second Phase, (ICJ, 5 February 1970) at p. 3, 32-4; as cited in Crawford, *Brownlie's Principles of Public International Law* at p. 608 ft. 5.
[42] J. Romesh Weeramantry, *Treaty Interpretation in Investment Arbitration* (Oxford: Oxford University Press, 2012).

institutional shift from the mercantilist to the regulatory state[43] has transformed a major concern of investors, "the protection of tangible property", into the security of the efficient functioning of their investments through regulatory institutions.[44] In particular, the doctrine of legitimate expectations under the FET standard has become a key pillar in disputes arising out of excessive state regulation.[45] Second, as Professor Thomas Wälde outlined in his often-cited dissenting opinion in *Thunderbird*, the development of legitimate expectations as a self-standing principle has been mostly available through FET claims.[46] According to Wälde, the FET standard:

> "[…] provides a more supple way of providing a remedy appropriate to the particular situation as compared to the more drastic determination and remedy inherent in concept of regulatory expropriation. It is probably partly for these reasons that "legitimate expectation" has become for Tribunals a preferred way of providing protection to claimants in situations where the tests for a "regulatory taking" appear too difficult, complex and too easily assailable for reliance on a measure of subjective judgment".[47]

In arbitral jurisprudence, tribunals established some common principles that underlie the doctrine of legitimate expectations: The *TECMED* Tribunal, under the Spain-Mexico BIT, considered that the host-state had the obligation to treat the investor in a way that "does not affect the basic expectations that were taken into account by the foreign investor to make the investment". The Tribunal defined the principle of legitimate expectations as the host-state's obligations:

> "[…] 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 well as the goals of the relevant policies and administrative

[43] G. Majone, 'The Rise of the Regulatory State in Europe', *West European Politics,* /17(3) (1994), 77-101; P. Bobbitt, *The Shield of Achilles: War, Peace, and the Course of History* (Knopf Doubleday Publishing Group, 2007).
[44] T.W. Wälde and P.K. Wouters, 'State Responsibility in a Liberalised World Economy:"State, Privileged and Subnational Authorities" under the 1994 Energy Charter Treaty: An Analysis of Articles 22 and 23', *Netherlands Yearbook of International Law,* 27/1 (1996), 143-91 at p. 148.
[45] Ibid. See T.W. Wälde and S. Dow, 'Treaties and Regulatory Risk in Infrastructure Investment: The Effectiveness of International Law Disciplines Versus Sanctions by Global Markets in Reducing the Political and Regulatory Risk for Private Infrastructure Investment', *Journal of World Trade* (34, 2000), 1-61.
[46] T.W. Wälde, 'Seperate Opinion in International Thunderbird Gaming Corporation v. United Mexican States ', (1 December 2005). See Elizabeth Snodgrass, 'Protecting Investors' Legitimate Expectations-Recognizing and Delimiting a General Principle', *ICSID Review,* 21/1 (2006), 1-58.
[47] Wälde, 'Seperate Opinion in International Thunderbird Gaming Corporation v. United Mexican States ', at para. 35.

> practices or directives, to be able to plan its investment and comply with such regulations" (emphasis added).[48]

In addition, in its interpretation of legitimate expectations within the scope of NAFTA, the *Thunderbird* Tribunal observed that it applied:

> "[…] to a situation where a Contracting Party's conduct creates **reasonable** and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages" (emphasis added).[49]

Despite these common principles, tribunals have taken divergent positions as to the thresholds that limit successful invocation of legitimate expectations under the FET standard.[50] For instance, in disputes concerning contractual obligations; while there is a narrow interpretation of the doctrine that requires the state to act in its sovereign capacity *(puissance publique)* in order to elevate such a dispute to a treaty violation[51]; there also is a broader view, which suggests that *pacta sunt servanda* and contractual obligations shall be observed as parts of the FET standard.[52] As to disputes concerning governmental assurances and representations, tribunals most commonly require formal and official assurances/representations to be specific to the particular investor in the dispute.[53]

In the context of disputes related to regulatory framework in force at the time the investor makes its investment – though stability, clarity and predictability of the institutional framework are considered to be central to investors' locational decisions – the concept of

---

[48] Técnicas Medioambientales Tecmed S.A. v. The United Mexican States, 'Award', (ICSID Case No. ARB (AF)/00/2, 29 May 2003) at para. 154.

[49] International Thunderbird Gaming Corporation v. United Mexican States (Thunderbird), 'Award', (UNCITRAL 26 January 2006) at para. 147.

[50] In this context, for a recent review of arbitral jurisprudence see Michele Potestà, 'Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept', *ICSID Review,* 28/1 (2013), 88-122.

[51] Impregilo S.p.A. v. Islamic Republic of Pakistan, 'Decision on Jurisdiction', (ICSID Case No. ARB/03/03, 22 April 2005) at para. 268. See also Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador, 'Award', (ICSID Case No. ARB/04/19, 18 August 2008) at paras. 342-3; Toto Costruzioni Generali S.p.A. v. Republic of Lebanon, 'Award', (ICSID Case No. ARB/07/12, 7 June 2012) at paras. 161-2.

[52] SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay, 'Award', (ICSID Case No. ARB/07/29, 10 February 2012) at ft. 134. See also Noble Ventures Inc. v. Romania, 'Award', (ICSID Case No. ARB/01/11, 12 October 2005) at para. 182.

[53] "[R]epresentations made by the host State are enforceable and justify the investor's reliance only when they are **specifically** addressed to a particular investor" (emphasis added): Total S.A. v. Argentine Republic, 'Decision on Liability', at para. 119; White Industries Australia Limited v. The Republic of India, 'Final Award', (UNCITRAL, 30 November 2011) at para. 10.3.17; Frontier Petroleum Services Ltd. v. The Czech Republic, 'Final Award', (UNCITRAL/PCA, 12 November 2010) at paras. 465-8.

"stability" stands out as being the most common referred justification in establishing an FET violation. In this, tribunals, once again, take divergent positions: The first view accepts the concept of stability as "[…] an essential element of [the FET standard]", and thus legitimate expectations.[54] According to a second view the concept of stability "[...] is not a legal obligation in itself for the Contracting Parties, nor can it be properly defined as an object of [a] Treaty".[55] Also, as examined in detail below, the *Total* Tribunal considered that stability "limitations upon a government should not lightly be read into a treaty which does not spell them out clearly nor should they be presumed" even if they are explicitly mentioned in the preamble of a treaty.[56]

Thus, tribunals do not put forward a clear definition of the doctrine of legitimate expectations. Particularly the concept of stability lacks a consistent and balanced approach. Though, as Vandevelde argued, tribunals commonly refer to rule of law principles including "due process", "reasonableness", "non-discrimination", "consistency" and "transparency"[57], such principles may remain insufficient in delivering consistency since interpretation of the FET standard also requires a common methodology in considering institutional peculiarities at the municipal level. It is argued that imbalances and inconsistencies also stem from the fact that arbitral tribunals are not equally sensitive to concrete institutional and legal realities in host-states in their interpretation of the doctrine and the FET standard. In making this argument, this paper revisits some of the controversial Argentine decisions. It is contended that treaty interpretation lacks a common methodology in addressing institutions, and economic and political organisations surrounding the investment environment in a country.

The central thesis in this paper is that the NIE relates to investor-state arbitration and as such could contribute in the interpretation of treaty standards. The following section focuses on how the emergence of the *New Institutionalism in treaty interpretation* could aid overcoming issues of fairness and inconsistency in the practice of the doctrine of legitimate expectations. This analysis has to two implications: First, it shows that there is ample evidence as to inconsistencies in the Tribunals' approach to municipal institutions. Second, the *Total* award

[54] Occidental Exploration and Production Company (OEPC) v. Ecuador, 'Final Award', (LCIA Case No UN 3467, 1 July 2004) at para. 183. See also CMS Gas Transmission Company v. Republic of Argentina, 'Award', at paras. 274 and 66-84. Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic, 'Award', at para. 260. LG&E Energy, LG&E Capital, and LG&E International, 'Decision on Liability', at para. 125.
[55] Continental Casualty Company v. The Argentine Republic, 'Award', at para. 258.(emphasis added)
[56] Total S.A. v. Argentine Republic, 'Decision on Liability', at para. 105.
[57] K.J. Vandevelde, 'A Unified Theory of Fair and Equitable Treatment', *NYUJ Int'l L. & Pol.*, 43 (2010), 43.

proves that the NIE could provide a useful framework in establishing a balanced understanding as to the purpose and objectives of regulatory institutions.

IV. An "Institutional" Approach to the Argentine Legacy

Historical development of institutions could take different forms. These include establishment of regulatory institutions. Regulatory institutions could be used to control industrial as well as non-industrial activities. In this, scholars group institutions into two: First, *social regulation institutions*, which deals with health and safety, environmental and consumer protection issues, and aims to prevent market failures arising from inadequate information regarding the quality of goods by suppliers and/or adverse effects of market transactions to consumers.[58] A second group of regulatory institutions called *economic regulation institutions* is used to control a range of activities in industries that exhibit natural monopoly characteristics.[59]

The research in the following section falls within the ambit of the economic regulation dimension of regulatory institutions since it is this dimension of the Argentine institutions that underlie the basis of disputes in the selected cases: *CMS, LG&E, Enron, Sempra* and *Total*. In all five cases the subject matter of the disputes arises out of the governance reforms, latter changes in the institutional structure in the network bound energy sector[60] and emergency measures resulting from the 2001 crisis. While institutional structure for each case is similar, in the first set of cases, i.e. *CMS, LG&E, Enron* and *Sempra*, Tribunals followed a methodology and approach that is different to that of the Tribunal in *Total* in interpreting the doctrine of legitimate expectations under the FET standard. In the following section, this paper explores how and why Tribunals in the first set of cases and the Tribunal in *Total* diverged.

Background

CMS, LG&E, Enron, Sempra and Total concern investments by US and French investors in the Argentine network bound energy sector in the context of governance reforms implemented by the Argentine Government since 1989. Between 1989 and 1992, the

[58] A. I. Ogus, *Regulation: Legal Form and Economic Theory* (Hart, 2004) at pp. 3-5.
[59] Robert Baldwin and Martin Cave, *Understanding Regulation: Theory, Strategy, and Practice* (Oxford University Press, 1999) at p. 10.
[60] In the context of this paper the term 'network bound energy sector' means electricity, natural gas and district heating transmission and/or distribution systems.

Argentine Government enacted Law No. 23.696 on the reform of the state, Law No. 23.928 on currency convertibility and Decree No. 2128/91 that fixed the Argentine Peso at par with the US Dollar. This general framework was crucial to implement institutional changes in the gas and electricity networks.

Subsequently, with Law No. 24.076 (the Gas Law) of 1992, the Argentine officials restructured the state owned enterprise (SOE), Gas del Estado, dividing it into two transportation and eight distribution companies in order to enable privatisation of infrastructure assets. In the area of electricity networks, the Argentine Government carried out a deregulation and privatisation programme by enacting the Law No. 24.065 in 1992 (the Electricity Law), which introduced private sector participation in the sector. The governance reforms were driven by the same motives that drove the UK and Chile to liberalise their electricity sectors: To promote investment in network infrastructure, to introduce competition, and to put the entire sector in the hands of and impartial and independent regulator. Thus, it could be argued that the institutional structure of the Argentine network energy sector was an important determinant for locational decisions of foreign investors.

When the Argentine Government introduced the Emergency Law in 2001, investors invoked arbitral procedures; first CMS, a gas transmission company having acquired shares in Transportadora de Gas del Norte (TGN), challenged the Argentine Government's unilateral action in abolishing consumer tariffs based on the United States Producer Price Index (US PPI) and the Law No. 23.928 on currency convertibility and Decree No. 2128/98.[61] Thereafter LG&E[62], Sempra[63], Enron[64] and Total[65] followed up the wave of arbitral proceedings in the network bound energy sector against the Argentine Republic. Though the legal bases of these disputes differed in terms of the BITs applied (*see Total*), the subject matter of claims directed to the Argentine Republic was shared in common. Claimants challenged measures by the host government including:

[61] CMS Gas Transmission Company v. Republic of Argentina, 'Award', at paras. 53-67.
[62] Holding a shareholding interest in three local gas-distributing companies, Distribuidora de Gas del Centro, Distribuidora de Gas Cuyana S.A. and Gas Natural BAN S.A: LG&E Energy, LG&E Capital, and LG&E International, 'Decision on Liability', at para. 2.
[63] As the shareholder in Sodigas Pampeana S.A. and Sodigas Sur S.A., which in turn were the owners of two gas distribution companies: Sempra Energy International v. Argentine Republic, 'Award', at para. 83.
[64] Having obtained shares in Transportadora Gas del Sur (TGS)Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic, 'Award', at paras. 47-60.
[65] Holding shares in TGN as well as two electricity generation companies, Central Puerto S.A. and Hidroelectrica Piedra de Aguila S.A.Total S.A. v. Argentine Republic, 'Decision on Liability', at paras. 41-9 and 232-6.

- "the forced conversion of dollar-denominated public service tariffs into pesos (or pesification) at a rate of one to one;
- the abolition of the adjustment of public service tariffs based on the US PPI and other international indices;
- the pesification of dollar-denominated private contracts at a rate of one to one;
- the freezing of gas consumer tariff (which is the sum of the (a) well-head price of gas; (b) gas transportation tariff; and (c) gas distribution tariff);
- the abandonment of the uniform marginal price mechanism in the power generation market by price caps and other regulatory measures".[66]

These measures, according to the claimants, violated, among other standards (such as full protection and security, and expropriation), the concept of legitimate expectations in the context of the FET standard, since the allegedly arbitrary re-regulation of gas and electricity prices deprived them of their right to obtain a reasonable rate of return from their long-term investments in the Argentine network bound energy sector. Below, the diverging conclusions of the Tribunals with regard to the applicable law, and interpretations of the FET standard will be analysed.

Applicable Law

In *CMS*, the Tribunal held that there was a close interaction between the Argentine Gas Regulatory Framework and international law.[67] It considered the regulatory institution in a *complementary role* to the BIT and customary international law. In *Enron* and *Sempra*, the Tribunals followed the justification of the *CMS* Tribunal with regard to applicable law; both Tribunals held that they would consider "[…] the Argentine law and international law to the extent that each is relevant to the determination of the liability".[68]

On the other hand, the *LG&E* Tribunal chose to establish a *hierarchy* among the laws that it considered were applicable. The Tribunal held that:

> "[T]he present Tribunal shall apply **first** the Bilateral Treaty; **second and in the absence of explicit provisions therein**, general international law, and, **third**, the Argentine domestic law, particularly the Gas Law that governs the natural gas sector. The latter is applicable in view of its

[66] Ibid., at para. 25.
[67] CMS Gas Transmission Company v. Republic of Argentina, 'Award', at paras. 115-22.
[68] Sempra Energy International v. Argentine Republic, 'Award', at para. 209; Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic, 'Award'.

> relevance for determining the Argentine Republic's liability and the defenses to which it may resort vis-à-vis the allegations made by Claimants" (emphasis added).[69]

A third approach as to the interaction between the Argentine Electricity and Gas Regulatory Framework and international law was put forward by the Tribunal in *Total*. The *Total* Tribunal held that:

> "[T]he extensive reliance by the Claimant on Argentina's acts of a legislative and administrative nature governing the gas, electricity and hydrocarbons sectors, as well as the extensive discussion between the parties regarding the content and extent of Total's rights in respect of the operation of its investments, is a recognition that **Argentina's domestic law plays a dominant role**" (emphasis added).[70]

Accordingly the *Total* Tribunal concluded that it "shall determine the precise content and extent of Total's economic rights under Argentina's legal system in respect of Total's claims under the BIT, wherever necessary in order to ascertain whether a breach of the BIT has occurred".[71]

These three divergent methods used by the Tribunals to determine applicable laws to the dispute have led the Tribunals to take different methodological positions when considering institutional rights of investors in the context of legitimate expectations under the FET standard in the US-Argentina and France-Argentina BITs. In some cases, these differences affected their views as to the scope of the protection provided under the FET standard.

FET Interpretation

In *CMS*, the Tribunal started its evaluations with the Argentine law including the Gas Law No 24.076 of May 1992, the Gas Decree No 2.255/92 and the License to transport gas in Argentina, which together formed the legal basis of the governance reform for the Argentine gas sector. In addition the Tribunal considered the Information Memorandum issued in 1992 in conjunction with the initial public tender offer.[72] Consequently, the Tribunal came to the conclusion that:

> "[I]n the context of privatization it was abundantly clear that one of the key elements in attracting foreign investment and in overcoming the economic and financial crisis of the late 1980's was to

[69] LG&E Energy, LG&E Capital, and LG&E International, 'Decision on Liability', at para. 99.
[70] Total S.A. v. Argentine Republic, 'Decision on Liability', at para. 39.
[71] Ibid.
[72] CMS Gas Transmission Company v. Republic of Argentina, 'Award', at para. 133.

> provide **the necessary stability**. **Declarations** by public officials repeatedly confirmed this understanding and the **Memorandum**, while **not legally binding**, accurately reflects the views and intentions of the Government. This very same understanding, as the Claimant has emphasized, was **expressly confirmed by the Privatization Committee**, a step that must be considered as having some **legal implications**" (emphasis added).[73]

Thus, with reference to the investor's claims on the grounds of its rights to a tariff calculated in US Dollars[74] and to adjustment of tariffs in accordance with the US PPI[75], the Tribunal considered that the Argentine regulatory institutions provided the grounds for stability and predictability expectations. The Tribunal viewed that "the meaning of the legal framework and the License, particularly in the context of privatization, was to guarantee the stability of the tariff structure and the role the calculation in dollars and the US PPI adjustment played therein".[76] It further noted that the discussion held in the Privatization Committee were also helpful to "clarify the real meaning of the guarantee provided".[77]

Having established that the Argentine government owed an obligation of stability and predictability to the investor as a result of its institutional structure in the Argentine network bound energy sector, the Tribunal then evaluated if these would qualify for FET standard protection in the context of the principle of legitimate expectations under the US-Argentina BIT. The Tribunal held that both the preamble of the BIT[78], and discussions in the legal scholarship and arbitral jurisprudence suggest that FET standard is inseparable from the principles of stability and predictability.[79] Accordingly, it concluded that having failed to provide stability of the legal framework and to comply with the assurances/representations that were undertaken (which were essential to the investor in giving the investment decision), the Argentine government breached the FET standard laid down in Article II(2)(a) of the BIT.[80]

The *CMS* award (2005) was the first award to be issued among the relevant Argentine cases; thereafter, *LG&E* (2006), *Enron* (2007) and *Sempra* (2007) followed. Although there were variations between *CMS*, *Enron* and *Sempra* as a result of slight differences in the claims of

[73] Ibid., at para. 134.
[74] Ibid., at paras. 127-38.
[75] Ibid., at 139-44.
[76] Ibid., at para. 161.
[77] Ibid., at para. 163.
[78] Ibid., at para. 274.
[79] Ibid., at para. 276.
[80] Ibid., at para. 281.

the investors, the methodology of *Enron* and *Sempra* Tribunals followed the blueprints of the *CMS* award. In *Enron*, the Tribunal assessed the Argentine institutions including the regulatory framework and assurances/representations as provided by the government. Like the *CMS* Tribunal, the *Enron* Tribunal first established that the investor had rights "to the US PPI adjustment under both the regulatory framework and the License"[81], and to "the US Dollar calculation of tariffs".[82] Thereafter it concluded that the violation of these rights by the host-state amounted to a breach of the FET standard under Article II(2) of the BIT.[83] In *Sempra*, the Tribunal followed the methodology and the reasoning of the *Enron* Tribunal; it held that the host-state breached the FET standard as provided in the BIT.[84] The *LG&E* Tribunal, on the other hand, followed a *hierarchical* consideration of the laws applicable (*see above* the discussion on applicable laws), and first discussed the scope of the FET standard in the US-Argentina BIT.[85] Thereafter, the Tribunal assessed the Argentine government's guarantees to the investor.[86] Consequently, similar to the *CMS, Enron* and *Sempra* Tribunals, the *LG&E* Tribunal established that the host-state breached the FET standard since it failed to comply with stability and predictability commitments it had made.[87]

Contrary to the conclusions of the *CMS, Enron, Sempra* and *LG&E* Tribunals, the *Total* (2010) Tribunal found no breach of the FET standard on the grounds of the US PPI adjustment and the US Dollar calculation of tariffs claims. Rather, the *Total* Tribunal established breaches of the FET standard by upholding the investors' claims on the Argentine government's freezing of tariffs since 2002 (which was rejected in the first set of cases). The *Total* case could be distinguished from *CMS/Enron/Sempra*, and *LG&E*. First, *Total* included investor claims operating in the electricity sector, and production and exploration of hydrocarbons in addition to the gas sector. Second, the treaty that was applicable to the dispute was the France-Argentina BIT. However, it could also be argued that, it included similarities since investor claims arose out of the issues in the application of the regulatory framework that formed the basis of the governance reforms in the Argentine network bound

[81] Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic, 'Award', at para. 103.
[82] Ibid., at paras. 127-50.
[83] Ibid., at paras. 251-68.
[84] For the findings of the Tribunal with regard to the regulatory framework and assurances/representations see Sempra Energy International v. Argentine Republic, 'Award', at paras. 113 and 41-74. For the findings of the Tribunal with regard to the breach of the FET standard see also ibid., at paras. 290-304.
[85] LG&E Energy, LG&E Capital, and LG&E International, 'Decision on Liability', at Section IV(A).
[86] Ibid., at paras. 119-20.
[87] Ibid., at paras. 132-9.

energy sector. Also, as will be discussed below, the *obiter* in the interpretation of the FET standard was similar though the France-Argentina BIT did not have a reference to the principles of "stability and predictability" in its preamble.

The Tribunal in *Total* followed a methodology similar to that of the *LG&E* Tribunal; it first determined the content and scope of the FET standard and in that context the principle of legitimate expectations under Article 3 of the France-Argentina BIT and public international law. The Tribunal then tested how the FET standard applied to specific claims in the dispute. This, however, should not mean that *Total* also took a hierarchical approach; as noted above, according to the Tribunal, Argentina's "domestic law play[ed] a dominant role".[88]

In interpreting the principle of legitimate expectations the *Total* Tribunal took a restrictive approach; the Tribunal noted that the France-Argentina BIT does not refer to the principle of "stability" in its preamble in contrast to the US-Argentina BIT. According to the Tribunal, the approach followed by *CMS, Enron, Sempra* and *LG&E* Tribunals was justified as the preamble "is a tool for the interpretation of the treaty since it sheds light on its purpose."[89] The Tribunal noted that:

> "This absence [of a reference to stability in the preamble] indicates, at a minimum, that stability of the legal domestic framework was not envisaged as a specific element of the domestic legal regime that the Contracting Parties undertook to grant to their respective investors. The operative provisions of the France-Argentina BIT must in any case be read taking into account, within the object and purpose of the treaty, the reference in the Preamble to the desire of the Parties to create favourable conditions for the investments covered".[90]

Thus the Tribunal in *Total* argued that the principle of legitimate expectations does not *per se* provide stability, predictability and consistency of the investment environment, unless "the host-state has explicitly assumed a specific legal obligation for the future, such as by contracts, concessions or stabilisation clauses on which the investor is therefore entitled to rely as a matter of law".[91] Conclusions of the *Total* Tribunal considerably differ from those findings of the Tribunals in *CMS, Enron, Sempra* and *LG&E*. Though the Tribunals in *CMS, Enron, Sempra* and *LG&E* considered the wording of the preamble when interpreting the scope of the principle of legitimate expectations, they did not rely on the concept of

[88] Total S.A. v. Argentine Republic, 'Decision on Liability', at para. 39.
[89] Ibid., at para. 116..
[90] Ibid.
[91] Ibid., at para. 117.

"stability" simply because of the explicit reference in the preamble, but also because they considered "stability" as an emerging principle in international law.[92] The *Total* Tribunal did not share this point of view; it held that "[i]n the absence of some "promise" by the host-state or a specific provision in the bilateral investment treaty itself, the legal regime in force in the host country at the time of making the investment is not automatically subject to a "guarantee" of stability merely because the host country entered into a bilateral investment treaty with the country of the foreign investor".[93]

Consequently, the Tribunal did not apply the principle of "stability" in *Total*. This divergence affected subsequent findings of the Tribunal when evaluating the claims of the investor. These findings of the Tribunal in *Total* should be assessed separately since the Tribunal seems to have followed an innovative approach; it could be argued that the Tribunal introduced a new concept in interpreting the doctrine of legitimate expectations under the FET standard.

A New Concept: Regulatory Fairness/Certainty

While the Tribunal in *Total* did not deem the conventional meaning of "stability" as applicable in the case, it held that:

> "[…] a claim to stability can be based on the **inherently prospective nature of the regulation at issue aimed at providing a defined framework for future operations**. This is the case for regimes, which are applicable to **long-term investments and operations**, and/or providing for "fall backs" or contingent rights in case the relevant framework would be changed in unforeseen circumstances or in case certain listed events materialize. In such cases, reference to commonly recognized and applied financial and economic principles to be followed for the regular operation of investments of that type (be they domestic or foreign) may provide a yardstick. **This is the case for capital intensive and long term investments and operation of utilities** under a license, natural resources exploration and exploitation, project financing or Build Operate and Transfer schemes. The **concept of "regulatory fairness" or "regulatory certainty"** has been used in this respect. In the light of these criteria **when a State is empowered to fix the tariffs of a public utility it must do so in such a way that the concessionaire is able to recover its operations costs, amortize its investments and make a reasonable return over time**, as indeed Argentina's gas regime provided" (emphasis added).[94]

[92] LG&E Energy, LG&E Capital, and LG&E International, 'Decision on Liability', at para. 125.
[93] Total S.A. v. Argentine Republic, 'Decision on Liability', at para. 117.
[94] Ibid., at para. 122.

Thus according to the Tribunal, the fact that the claims concerned long-term and capital intensive investments and utility operations in electricity and gas sectors necessitated the concept of *regulatory fairness* or *regulatory certainty* to be applied. The Tribunal held that this concept provided investors the right to a rate of return on the basis of *reasonableness* and *proportionality*, and in addition, *a guarantee for the host-state's legitimate regulatory interests*. In this context, the Tribunal viewed that the doctrine of legitimate expectations cannot be evaluated in isolation, considering only bilateral relations of states. In this, the Tribunal drew an analogy from the General Agreement on Trade of Services (GATS) of 1994; according to Article VI of the GATS "[i]n sectors where specific commitments are undertaken, each member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner".[95] The Tribunal identified *objectivity and impartiality* as being the remaining conditions of regulatory fairness/certainty concept. This analogy, according to the Tribunal, was adequate since governance reforms in the Argentine utility sector did not contain stability commitments specific to Total. It could be argued that these commitments were general and inherent to the nature of institutions in electricity and gas sectors. According to the Tribunal, the GATS is a useful instrument since it puts forward those "requirements that a domestic regulation must contain in order to be considered fair and equitable".[96]

On the basis of the regulatory fairness/certainty concept, the Tribunal rejected Total's claims with regard to the abolition of the denomination of the tariffs in US Dollars and the adjustment of the tariffs to the US PPI in the gas sector since, according to the Tribunal, they were:

> "[N]ot the object of a promise or a commitment to Total but rather was an integral element of the Gas Regulatory Framework in place in Argentina when Total made its investment. The automatic adjustment of the tariffs to the US PPI was part of this framework and was closely linked to and reflected the denomination and calculation in US dollars of those tariffs, which in turn was correlated to the convertibility monetary system in force in Argentina since 1991".[97]

The Tribunal considered that Total's assertions (in so far as it did not take into account the negative developments in the Argentine economy) were inconsistent and, concluded that

[95] Ibid., at para. 123.Total Decision on Liability, para. 123.
[96] Ibid.
[97] Ibid., at para. 150.

Total failed to establish its case on the abolition of tariffs and US PPI. This conclusion, as also acknowledged by the *Total* Tribunal, is different from *CMS, Enron, Sempra* and *LG&E*, which held that denomination of tariffs in US Dollars and their adjustment to the US PPI should have remained immune to the Emergency Law pursuant to the FET Standard.[98]

Another important difference is that the Tribunal in *Total* ruled in favour of the investor in its claims with regard to freezing of gas and electricity tariffs since 2002, which was caused by the failure to renegotiate tariffs under the mechanisms offered by the Argentine government after the enactment of Emergency Law.[99] The Tribunal once again applied the concept of regulatory fairness/certainty under the circumstances and held in *obiter* that:

> "[T]he principle that tariffs of privatized gas utilities should be sufficient to cover their reasonable costs and a reasonable rate of return was enshrined in the Gas Regulatory Framework. As a means to ensure this "economic equilibrium", a variety of adjustments over time were provided for by the Gas Regulatory Framework. These included the 6-month US PPI adjustment, the 5-year Tariff Review and the Extraordinary Review. This framework is consistent with sound management of utilities in a market economy, where private entrepreneurs must be able to cover their costs and make a reasonable return in order to operate and to raise capital to provide an efficient service, especially considering that investments in such utilities are based on long term planning. The gas transportation tariffs were accordingly to be determined and adjusted in a way reflecting those criteria" (emphasis added).[100]

According to the *Total* Tribunal, when the Argentine Republic failed to adjust tariffs in accordance with "market economy" principles contrary to its privatisation and liberalisation programme, she violated the FET protection under the France-Argentina BIT.[101]

As for its investments in the electricity sector, Total invoked the FET standard based on similar grounds. According to Total, under free market rules of supply and demand, its investment should have been treated with minimal regulation as suggested by the Electricity Regulatory Framework comprising of the Electricity Law and Decree No. 1.398/92.[102] Though the Tribunal rejected Total's claims finding that the Electricity Regulatory Framework did not provide a "guarantee of stability", it ruled that price cap regulation introduced by the Argentine Republic prevented the electricity network to "reflect the

[98] Ibid., at para. 179.
[99] Ibid., at para. 166.
[100] Ibid., at para. 167.
[101] Ibid., at para. 168-75.
[102] Ibid., at para. 248.

economic costs of the system" and deprived Total from getting a reasonable rate of return.[103] The Tribunal concluded that:

> "[T]he fair and equitable standard has been breached through the setting of prices that do not remunerate the investment made nor allow reasonable profit to be gained contrary to the principles governing the activities of privately owned generators under Argentina's own legal system. This is especially so in the utility or general interest sectors, which are subject to government regulation […] where operators cannot suspend the service, investments are made long term and exit/divestment is difficult" (emphasis added).[104]

Remarks

The conceptual framework operated in *CMS, LG&E, Enron* and *Sempra* was "stability": Tribunals concluded that privatization policies implemented to attract foreign investment committed the Argentine government to a degree of stability. Based on this justification, the Tribunals upheld investors' claims with regard to abolition of the tariffs and the US PPI. On the other hand, the Tribunal in *Total* established the treaty violation on the basis of the concept of "regulatory stability/certainty". According to the Tribunal, host-state policy on the privatization of the utilities sector was insufficient to establish responsibility on the basis of the concept of "stability": The underlying regulatory framework was of a general nature and it did not provide explicit promises specifically directed to the claimant investor. Radically, though, the *Total* Tribunal argued that this general regulatory framework required the host-state to treat the investor *reasonably, proportionally, objectively* and *impartially*. This new approach formed the basis of the Tribunal's findings with regard to "freezing of tariffs" claim of the investor. Some may argue that this divergence was due to the fact that, by contrast to the US-Argentina BIT, the France-Argentina BIT does not refer to "stability of business framework" in its preamble. However, as emphasized above, the *CMS/LG&E/Enron/Sempra* Tribunals considered the concept of "stability" as an emerging principle embodied in the FET standard: Even if there was no explicit reference in the preamble of the US-Argentina BIT, the Tribunals would deem the concept of stability as applicable in the subject investor-state disputes. According to the Tribunal in *Total*, however, applicability of the concept of stability is possible only if there is an explicit reference. It could be argued that this divergence

[103] Ibid., at para. 327.
[104] Ibid., at para. 333.

derives from the vagueness in setting the limits to the specificity requirement of the concept of stability in arbitral jurisprudence.

However, in its roots, this vagueness also results from the Tribunals' divergent understanding of the governance reforms in Argentina: The Tribunals in *CMS, LG&E, Enron* and *Sempra* interpreted institutional developments as creating an expectation of stability of the regulatory framework for investors. Whereas the *Total* Tribunal considered the regulatory institution not only as a piece of legislation but as a framework, which aims to guarantee a degree of certainty for a reasonable rate of return for investors, and efficiency and low prices for consumers. This, rather radical, approach by the *Total* Tribunal seems to have provided parties a balanced interpretation since it shed light on *the host-state's legitimate regulatory interests* in addition to protection of investors' rights. It could be argued that, in practice, if the doctrine is interpreted similarly, a regulatory measure that might infringe legitimate expectations of investors could be exempted from compensation when the infringement is justified on the grounds of public welfare objectives such as security of supply or climate change. Such interpretative approaches could also enable counter claims by host-states (as experienced in *Occidental*[105]) if a foreign investor violates its regulatory responsibility to contribute in host-state's institutional objectives.

The Tribunal in *Total* emphasized that it is institutional certainty but not the conventional concept of stability that formed the basis for the host-state commitment. In this, it considered the objectives of economic institutions in the Argentine utilities sector including fair access and fair rate of return. It is believed that the *Total* Tribunal's approach proves that the NIE perspective could be a useful framework in treaty interpretation. By taking into account institutional objectives of host-states, the doctrine of legitimate expectations could be interpreted in order to strike a fair balance between investors' institutional rights and host-states' legitimate regulatory interests.

[105] Occidental Petroleum Corporation, Occidental Exploration, and Production Company v. The Republic Of Ecuador, 'Award', (ICSID Case No. ARB/06/11, 2012) at Ch. IV, p. 104.

V. Conclusion: Establishing Balance and Consistency through the NIE and the IIAs

In 2000, Professor Thomas Wälde and Stephen Dow asserted that a "better understanding of regulatory risk, comparative regulatory practice and evolution of accepted standards for control of regulators would help the debate surrounding the evolution of new case law".[106] The case law established by the *Total* Tribunal seems to have followed this assertion. The approach of the Tribunal has paved the way to consider *New Institutionalism in the interpretation of treaty standards*. At the same time, one might explain this new concept with "evolutionary interpretation"[107]; it may be argued that arbitral jurisprudence is evolving in parallel with institutional developments, and a call for reform in investor-state arbitration is therefore unnecessary. However, as the Argentine cases illustrate evolutionary interpretation might not be sufficient in establishing consistency since the broad drafting of treaty standards allows subjectivity in considering institutional developments in a host-state. Hence, in the pursuit to maintain objectivity in treaty interpretation, it is believed that codification of institutional principles that underlie certain sectors in IIAs might be necessary.

In response to the rising discontent as to the broadness of the treaty standards, a recent trend has been to limit their scope to international minimum standard; the US model BIT of 2012 provides that "[t]he concepts of '[FET]' and 'full protection and security' do not require treatment in addition to or beyond that which is required by that standard [i.e. the international minimum standard], and do not create additional substantive rights".[108] However, it could be argued that limiting the scope of vague standards such as the FET to international minimum standard might neither restrict the discretion of Tribunals nor unify their interpretation. As experienced with the NAFTA free trade commission's (FTC) decision of 31 July 2001, tribunals might approach to such a limitation differently. Furthermore, despite these restrictive approaches in the drafting of the FET standard, arbitral jurisprudence illustrates that tribunals are inclined to interpret the international minimum standard as an

[106] Wälde and Dow, 'Treaties and Regulatory Risk in Infrastructure Investment: The Effectiveness of International Law Disciplines Versus Sanctions by Global Markets in Reducing the Political and Regulatory Risk for Private Infrastructure Investment'.

[107] Pierre-Marie Dupuy, 'Evolutionary Interpretation of Treaties: Between Memory and Prophecy', in Enzo Canizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (Oxford: Oxford University Press, 2011).

[108] 2012 US Model Bilateral Investment Treaty, Article 5: Minimum Standard of Treatment, <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> accessed 26 August 2013. See Jose E. Alvarez, 'The Return of the State', *Minnesota Journal of International Law*, 20/2 (2011b), 223.

evolving doctrine[109]; however, regulatory actions by a host-state might still violate the standard without presence of outrage, bad faith and wilful neglect of duty.[110]

A second approach in addressing issues of fairness and consistency focuses on defining obligations and rights of both investors and host-states in respective IIAs. In this context, scholars have submitted a variety of proposals. In a recent study, United Nations Conference on Trade and Development (UNCTAD) drew attention to the significance of treaty interpretation and its role in establishing consistency in arbitral jurisprudence. The study included proposals such as increasing clarity and preciseness in the wording of IIAs, formal or informal side agreements in the ratification process of IIAs and authoritative interpretation of treaty standards during the investor-state dispute settlement process. The reform options put forward in this paper are based on this second approach: It is believed that codification of the NIE framework could help in the balancing of rights and obligations of the State and the investor. This proposal, however, does not include multilateralization of the NIE framework: The failure of the OECD's multilateral agreement on investment (MAI) proves that multilateral consensus is politically hard to achieve.[111] Rather, it is believed that regional endeavours such as Association of Southeast Asian Nations' (ASEAN's) Regional Comprehensive Economic Partnership (RCEP), the European Union's IIA programme and the existing network of BITs will continue shaping investor-state arbitration system.[112]

In the context of treaty interpretation, UNCTAD suggested that IIAs could be drafted to include obligations for investors such as compliance with municipal laws related to investment (which might refer to e.g. environmental clean-up) and recognition of internationally accepted standards or guidelines (e.g. the United Nations Guidelines on

[109] For example the Tribunal in *Waste Management* concluded that a general standard for NAFTA Article 1105 was emerging. Considering similar interpretations established in *S.D. Myers, Mondev, ADF* and *Loewen*, the Tribunal concluded that "the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process": Waste Management Inc. v. United Mexican States (Waste Management), 'Award', (ICSID Case No. ARB(AF)/00/3, 30 April 2004).

[110] Gabrielle Kaufmann-Kohler, 'Interpretive Powers of the Free Trade Commission and the Rule of Law', *Fifteen years of NAFTA,* (2011), 175-94.

[111] Despite the endeavours by the OECD to revitalise the process: see the OECD Investor-State Dispute Settlement Public Consultation Study: 16 May – 9 July 2012, at http://www.oecd.org/daf/internationalinvestment/internationalinvestmentagreements/publicconsultationisds.htm.

[112] In this context, see UNCTAD, 'The Rise of Regionalism in International Investment Policymaking: Consolidation or Complexity?', (3: UNCTAD, June 2013b).

Business and Human Rights).[113] Such an approach, though limited, is available in the Common Market for Eastern and Southern Africa (COMESA) Investment Agreement: Article 13 of the Agreement requires a COMESA investor and its investment to "comply with all applicable domestic measures of the Member State in which their investment is made".[114] Furthermore, the Southern African Development Community (SADC) Model BIT Template (in addition to compliance with domestic law in Article 11) refers to an extended set of investor obligations including "Common Obligations against Corruption" and obligations arising out of human rights, labour rights and environmental protection.[115]

Likewise, the Model International Agreement of the International Institute of Sustainable Development (IISD) refers to a – rather – essential understanding of investor obligations: "Investors and investments shall strive, through their management policies and practices, to contribute to the development objectives of the host-states and the local levels of government where the investment is located".[116] In setting the framework for the "development objectives of host-states", the IISD Model Agreement provides that "[i]nvestments are subject to the laws and regulations of the host-state".[117] However, in the context of the NIE framework, the Agreement entails two shortcomings: First, in defining the development objectives of host-states, it provides the laws and regulations of the host-state as the only guideline. As discussed earlier, institutional objectives of host-states do not necessarily have to be included in a piece of legislation. Municipal laws and regulations are only one type of instrument that reflects institutional settings in a host-state. Institutional settings might as well be reflected in governmental policies and administrative actions. Second, though the Model Agreement commits host-states "to improve the transparency, efficiency, independence and accountability of their legislative, regulatory, administrative and judicial processes"[118], this is limited – once again – to domestic laws and regulations, which might be

[113] UNCTAD, 'World Investment Report 2012: Toward a New Generation of Investment Policies', <http://www.unctad-docs.org/files/UNCTAD-WIR2012-Full-en.pdf>, accessed 15 September 2013.
[114] Investment Agreement for the COMESA Common Investment Area, Article 13, available at http://vi.unctad.org/files/wksp/iiawksp08/docs/wednesday/Exercise%20Materials/invagreecomesa.pdf, accessed 15 October 2013.
[115] See the Southern African Development Community (SADC) Model BIT Template, Part 3 on Rights and Obligations of Investors and State Parties, available at http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf, accessed 15 October 2013.
[116] International Institute of Sustainable Development (IISD) Model International Agreement on Investment for Sustainable Development, Article 11(C), available at http://ces.iisc.ernet.in/envis/sdev/investment_model_int_handbook.pdf, accessed 15 October 2013.
[117] Ibid., at Article 11(A).
[118] Ibid., at Article 19(A).

amended in political rent-seeking and contrary to institutional objectives of the subject host-state.

The Proposed Reform

In search of fairness and consistency in investor-state arbitration, one might consider crafting IIAs that give reference to principles that underlie different institutional trajectories of host-states; each host-state and furthermore, each industry might reveal different institutional characteristics. In the case of governance reforms in utilities sector, these principles derive from the mode of regulatory institution applicable: Economic regulation of utilities entails control of independent regulatory agencies rather than direct state control of the utility industries. As highlighted above in the Argentine decisions, in the network bound energy sector economic regulation requires separation of potentially competitive segments of the gas and electricity networks, i.e. generation and supply, from transmission and distribution activities. This process is known as "restructuring" or "unbundling". Once a vertically integrated network has been unbundled, statutory rules should be implemented with the objective to introduce competition in the generation and supply activities by taking regulatory actions to protect free entry, and free investment of investors; to eliminate centralised or administrative pricing, and thus freedom of contract and competitive pricing; to enable and facilitate access to transmission/distribution infrastructure; to form an independent regulatory office and equip it with supervisory authority, and tools to adapt technical and technological information required to run the network.[119] In a nut shell, governance reforms in utilities sector aims to introduce competition, to increase efficiency and to lower prices as well as to provide the impartial and non-discriminatory environment for investors to obtain a reasonable rate of return. Thus, these settings restrain investors from distorting institutional objectives (such as consumer protection) for higher profitability. At the same time, they commit host states to an impartial investment policy making.

This paper proposes two options in the context of codification of such institutional rights and obligations: First is the drafting of clauses that respond to institutional peculiarities in IIAs during negotiation and/or drafting procedures. Second is the codification of binding interpretative annexes during or after negotiation of IIAs that would address to relevant

[119] Peter D. Cameron, *Competition in Energy Markets: Law and Regulation in the European Union* (Oxford: Oxford University Press, 2007) at para. 1.18.

institutional settings. Depending on the policy preferences of negotiating state-parties, annexes that detail institutional peculiarities of certain sectors (e.g. the utilities sector, see above) could be drafted as an integral part of IIAs, which would complement clauses discussed under the first proposal above. Second such annexes could also be drafted as interpretative instruments that guideline arbitral tribunals in interpreting already negotiated treaty standards. State-parties that are willing to limit tribunals' discretion in interpreting treaty standards (particularly the doctrine of legitimate expectations under the FET) to a textual analysis could negotiate and agree on the principles that underlie their institutions before an investor-state dispute arises.

In this context, UNCTAD's Investment Policy Framework for Sustainable Development (IPFSD)[120] could provide an effective tool: The IPFSD consists of guidelines for the design of IIAs and national investment policies. It sets out core principles for investment policy making in national and international levels, which promote development of institutions including property rights, conflict management institutions, fiscal institutions, competition law and labour market regulation. It is believed that the IPFSD could be utilized to increase synergies between municipal institutions and IIAs under the auspices of the NIE framework: It provides a useful forum to explore *institutional settings in which an investment takes place* and to negotiate IIAs that could *align municipal institutions and international investment law*.

The two proposals outlined above aim to minimize inconsistencies in treaty interpretation, and also to aid establishing a balanced and fair interpretation of treaty standards (particularly the FET standard in the context of this paper). It is believed that a thorough description of institutional settings in certain sectors (e.g. the utilities sector) could provide both consistency and fairness in treaty interpretation. As discussed throughout the paper, the NIE reveals a more balanced understanding of investor-state relations: While institutions require a degree of certainty for institutional rights and obligations of investors, they also foresee security of institutional settings and objectives of host-states.

[120] UNCTAD, *Investment Policy Framework for Sustainable Development* (2012), available at http://unctad.org/en/PublicationsLibrary/diaepcb2012d5_en.pdf

Bibliography

Acemoglu, D. and Robinson, J. (2012), *Why Nations Fail: The Origins of Power, Prosperity, and Poverty* (Crown Publishing Group).

Alvarez, Jose E. (2011a), *The Public International Law Regime Governing International Investment* (The Hague: The Hague Academy of International Law).

--- (2011b), 'The Return of the State', *Minnesota Journal of International Law,* 20 (2), 223.

Alvarez, Jose E. and Khamsi, K. (2008-2009), 'The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime', in Sauvant K. P. (ed.), *The Yearbook of International Law and Policy* (New York: Oxford University Press).

Alvarez, Jose E. and Topalian, G. (2012), 'The Paradoxical Argentina Cases', *World Arbitration and Mediation Review* 6(3), 491-554.

Baldwin, Robert and Cave, Martin (1999), *Understanding regulation: Theory, Strategy, and Practice* (Oxford University Press).

Barcelona Traction Light and Power Company Limited (Belgium v. Spain) Second Phase (5 February 1970), (ICJ).

Bénassy Quéré, Agnès, Coupet, Maylis, and Mayer, Thierry (2007), 'Institutional Determinants of Foreign Direct Investment', *The World Economy,* 30 (5), 764-82.

Bobbitt, P. (2007), *The Shield of Achilles: War, Peace, and the Course of History* (Knopf Doubleday Publishing Group).

Brower, Charles H (2001), 'Investor-State Disputes Under NAFTA: A Tale of Fear and Equilibrium', *Pepp. L. Rev.,* 29, 43.

Busse, Matthias and Hefeker, Carsten (2007), 'Political Risk, Institutions and Foreign Direct Investment', *European Journal of Political Economy,* 23 (2), 397-415.

Cameron, Peter D. (2007), *Competition in Energy Markets: Law and Regulation in the European Union* (Oxford: Oxford University Press).

CMS Gas Transmission Company v. Republic of Argentina (12 May 2005), 'Award', (ICSID Case No. ARB/01/8).

--- (25 September 2007), 'Decision of the Ad Hoc Committee on the Application for Annulment', (ICSID).

Continental Casualty Company v. The Argentine Republic (5 September 2008), 'Award', (ICSID Case No. ARB/03/9).

Corporation, Occidental Petroleum, Exploration, Occidental, and Ecuador, Production Company v. The Republic of (2012), 'Award', (ICSID Case No. ARB/06/11).

Crawford, J. (2012), *Brownlie's Principles of Public International Law* (Oxford: Oxford University Press).

Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador (18 August 2008), 'Award', (ICSID Case No. ARB/04/19).

Dupuy, Pierre-Marie (2011), 'Evolutionary Interpretation of Treaties: Between Memory and Prophecy', in Enzo Canizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (Oxford: Oxford University Press).

El Paso Energy International Company v. The Argentine Republic (31 October 2011), 'Award', (ICSID Case No. ARB/03/15).

Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic (22 May 2007), 'Award', (ICSID Case No. ARB/01/3).

--- (30 July 2010), 'Decision of the Ad Hoc Committee on the Application for Annulment', (ICSID).

Frontier Petroleum Services Ltd. v. The Czech Republic (12 November 2010), 'Final Award', (UNCITRAL/PCA).

Ginsburg, Tom (2005), 'International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance', *International Review of Law and Economics,* 25 (1), 107-23.
Grosse, Robert and Trevino, Len J (2005), 'New Institutional Economics and FDI Location in Central and Eastern Europe', *MIR: Management International Review*, 123-45.
Impregilo S.p.A. v. Argentine Republic (21 June 2011), 'Award', (ICSID Case No. ARB/07/17).
Impregilo S.p.A. v. Islamic Republic of Pakistan (22 April 2005), 'Decision on Jurisdiction', (ICSID Case No. ARB/03/03).
International Thunderbird Gaming Corporation v. United Mexican States (Thunderbird) (26 January 2006), 'Award', (UNCITRAL).
Kaufmann-Kohler, Gabrielle (2011), 'Interpretive powers of the free trade commission and the rule of law', *Fifteen years of NAFTA*, 175-94.
Krishan, D. (2011), 'Thinking About BITs and BIT Arbitration: The Legitimacy Crisis that Never Was', in Baetens F. Weiler T. (ed.), *New Directions in International Economic Law In Memoriam Thomas Wälde* (Brill Online Collection), 107-50.
LG&E Energy, Corp. , LG&E Capital, Corp. , and LG&E International, Inc. v. Argentine Republic (3 October 2006), 'Decision on Liability', (ICSID Case No. ARB/02/1).
Majone, G. (1994), 'The Rise of the Regulatory State in Europe', *West European Politics,* (17(3)), 77-101.
Menard, Claude and Shirley, Mary M. (eds.) (2008), *Handbook of New Institutional Economics* (Berlin: Springer).
Metalclad Corporation v. United Mexican States (30 August 2000), (ICSID Case No. ARB(AF)/97/1, Award).
Mills, A. (2011), 'Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration', *Journal of International Economic Law,* 14 (2), 469-503.
Murtha, Thomas P and Lenway, Stefanie Ann (1994), 'Country Capabilities and the Strategic State: How National Political Institutions Affect Multinational Corporations' Strategies', *Strategic Management Journal,* 15 (S2), 113-29.
National Grid P.L.C. v. Argentine Republic (3 November 2008), 'Award', (UNCITRAL).
Noble Ventures Inc. v. Romania (12 October 2005), 'Award', (ICSID Case No. ARB/01/11).
North, Douglass C and Weingast, Barry R (1989), 'Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England', *The Journal of Economic History,* 49 (04), 803-32.
North, Douglass Cecil (1990), *Institutions, Institutional Change and Economic Performance* (Cambridge: Cambridge University Press).
Occidental Exploration and Production Company (OEPC) v. Ecuador (1 July 2004), 'Final Award', (LCIA Case No UN 3467).
Ogus, A. I. (2004), *Regulation: Legal Form and Economic Theory* (Hart).
Oppenheim, L. F. L., Jennings, Sir Robert, and Watts, Sir Arthur (1992), *Oppenheim's International Law: Vol.1 : [Book 1] : Peace. Introduction and Pt.1* (Harlow: Longman).
Osgoode Hall Law School (2013), 'Public Statement on the International Investment Regime', <http://www.osgoode.yorku.ca/public_statement>, accessed 15 September.
Potestà, Michele (2013), 'Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept', *ICSID Review,* 28 (1), 88-122.
Reisman, W. Michael (2000), 'The Regime for Lacunae in the ICSID Choice of Law Provision and the Question of its Threshold', *ICSID Review,* 15 (2), 362-81.
--- (2007), 'The Evolving International Standard and Sovereignty', *Proceedings of the Annual Meeting (American Society of International Law),* 101, 462-65.
Reisman, W. Michael and Sloane, Robert (2004), 'Indirect Expropriation and its Valuation in the BIT Generation', *British Yearbook of International Law,* 75, 115.

Rodrik, Dani 'Institutions For High-Quality Growth: What They Are and How to Acquire Them', *IMF Conference on Second Generation Reforms Conference Paper* <http://www.imf.org/external/pubs/ft/seminar/1999/reforms/rodrik.htm#II>, accessed 27 October 2013.

--- (2008), 'Second-Best Institutions', (National Bureau of Economic Research).

Schill, Stephan W. (2011), 'Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach', *Va. J. Int'l L.,* 52, 57.

Schreuer, C. H. (2009), *The ICSID Convention* (Cambridge: Cambridge University Press).

Sempra Energy International v. Argentine Republic (28 September 2007), 'Award', (ICSID Case No. ARB/02/16).

--- (29 June 2010), 'Decision of the Ad Hoc Committee on the Application for Annulment', (ICSID).

SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay (10 February 2012), 'Award', (ICSID Case No. ARB/07/29).

Shihata, Ibrahim FI (1987), 'Factors Influencing the Flow of Foreign Investment and the Relevance of a Multilateral Investment Gaurantee Scheme', *Int'l L.* (21: HeinOnline), 671.

Sinclair, Ian M.T. (1984), *The Vienna Convention on the Law of Treaties* (Manchester University Press).

Snodgrass, Elizabeth (2006), 'Protecting Investors' Legitimate Expectations-Recognizing and Delimiting a General Principle', *ICSID Review,* 21 (1), 1-58.

Stern, B. (2011), 'The Future of International Investment Law: A Balance Between the Protection of Investors and the States' Capacity to Regulate', in Sauvant K. Alvarez J. E. (ed.), *The Evolving International Investment Regime: Expectations, Realities, Options* (New York: Oxford University Press).

Suez Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic (30 July 2010), 'Decision on Liability', (ICSID Case No. ARB/03/19).

Técnicas Medioambientales Tecmed S.A. v. The United Mexican States (29 May 2003), 'Award', (ICSID Case No. ARB (AF)/00/2).

Total S.A. v. Argentine Republic (27 December 2010), 'Decision on Liability', (ICSID Case No. ARB/04/01).

Toto Costruzioni Generali S.p.A. v. Republic of Lebanon (7 June 2012), 'Award', (ICSID Case No. ARB/07/12).

UNCTAD (2013), 'World Investment Report 2012: Toward a New Generation of Investment Policies', <http://www.unctad-docs.org/files/UNCTAD-WIR2012-Full-en.pdf>, accessed 15 September.

--- (June 2013a), 'Reform of Investor-State Dispute Settlement: In Search of a Roadmap', *IIA Issues Note* (2: UNCTAD).

--- (June 2013b), 'The Rise of Regionalism in International Investment Policymaking: Consolidation or Complexity?', (3: UNCTAD).

Van Harten, G. (2007a), 'The Public-Private Distinction in the International Arbitration of Individual Claims against the State', *International and Comparative Law Quarterly,* 56, 371-94.

--- (2007b), *Investment Treaty Arbitration and Public Law* (Oxford: Oxford University Press).

Vandevelde, K.J. (2010), 'A Unified Theory of Fair and Equitable Treatment', *NYUJ Int'l L. & Pol.,* 43, 43.

Wälde, T. W. (2009), 'Interpreting Investment Treaties: Experiences and Examples', in Christina Binder, et al. (eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford: Oxford University Press).

Wälde, T.W. (1 December 2005), 'Seperate Opinion in International Thunderbird Gaming Corporation v. United Mexican States '.

Wälde, T.W. and Wouters, P.K. (1996), 'State Responsibility in a Liberalised World Economy:"State, Privileged and Subnational Authorities" under the 1994 Energy Charter Treaty: An analysis of Articles 22 and 23', *Netherlands Yearbook of International Law,* 27 (1), 143-91.

Wälde, T.W. and Dow, S. (2000), 'Treaties and Regulatory Risk in Infrastructure Investment: The Effectiveness of International Law Disciplines versus Sanctions by Global Markets in Reducing the Political and Regulatory Risk for Private Infrastructure Investment', *Journal of World Trade,* 34 (2), 1-61.

Waste Management Inc. v. United Mexican States (Waste Management) (30 April 2004), 'Award', (ICSID Case No. ARB(AF)/00/3).

Weeramantry, J. Romesh (2012), *Treaty Interpretation in Investment Arbitration* (Oxford: Oxford University Press).

Weil, Prosper (2000), 'The State, the Foreign Investor, and International Law: The No Longer Stormy Relationship of a Ménage Ą Trois', *ICSID Review,* 15 (2), 401-16.

Weiler, Todd (2013), *The Interpretation of International Investment Law: Equality, Discrimination, and Minimum Standards of Treatment in Historical Context* (6; Leiden: Martinus Nijhoff Publishers).

White Industries Australia Limited v. The Republic of India (30 November 2011), 'Final Award', (UNCITRAL).