EXPROPRIATION AND INTERNATIONAL LAW: PROPERTY PROTECTION STANDARDS IN HISTORICAL PERSPECTIVE

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Abstract: *This contribution traces the evolution of international legal protection for foreign-owned property from the late nineteenth century to the present. It begins by examining the pre-1900 era, when private property was largely deemed inviolable and disputes were governed by host-state treatment, before turning to the principal justifications states have invoked for takings—chiefly claims of rectifying past injustice (war, colonialism) and the pursuit of legitimate public policy. The main part of the analysis charts four successive protection standards: the Minimum Standard Treatment developed in the aftermath of the Mexican and Russian revolutions; the Hull Doctrine's demand for "prompt, adequate and effective" compensation; the compromise standard of "appropriate compensation" that emerged during decolonization; and the "fair and equitable treatment" standard that has dominated bilateral investment treaties since the 1990s. Each standard is situated within its historical and political context, alongside the principal criticisms it attracted. The contribution concludes that, while debates over the fundamental legitimacy of investment protection and the quantum of compensation have largely subsided, contestation persists over indeterminate treaty language and the balance between investor protection and states' regulatory autonomy—a tension the article identifies as structurally irreducible.*

Keywords: *expropriation, foreign investment, international investment law, minimum standard of treatment, Hull Doctrine, fair and equitable treatment, bilateral investment treaties, decolonization*

INTRODUCTION: JUSTIFICATIONS OF TAKINGS

This contribution surveys the evolution of the relationship between takings of foreign-owned property and international law since the late 19th century. It begins by examining the situation prior to the establishment of international legal protections for foreign property, followed by preliminary remarks on the principal justifications for takings (Section 1). The main section (Section 2) discusses the development of these protections from approximately World War I to the present day. The final section (Section 3) offers observations on the current state of the law and the recurring challenges faced by less developed states.

The topic is characterized by a fundamental dilemma: the more protection international law grants to foreign-owned property, the less room states have to pursue their public policies. Conversely, the greater the leeway states retain for limiting or expropriating foreign property, the more uncertain the position of foreign property owners and investors becomes. Such uncertainty might prompt them to seek alternative destinations for their capital. Foreign investment law has always been – and remains – characterized by this tension between safeguarding foreign investors against unpredictable actions by the host state and preserving that state's sovereignty and freedom to act.[1]

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The contribution is based on the author's speech at the international conference "Protection of Ownership" organized by the Institute of State and Law of the Academy of Sciences of the Czech Republic in Liblice on November 4 and 5, 2025.

[1] GALÁN, Alexis. The Search for Legitimacy in International Law. The Case of the Investment Regime. *Fordham International Law Journal*. 2019, Vol. 93, No. 1, p. 93.

I. BEFORE 1900: RELATIVE INVIOLABILITY OF PRIVATE PROPERTY

Protection of foreign property was not a significant concern in the 19th century. Two factors help explain this absence. First, Western colonizing states exercised imperial dominance. These countries saw little need for international legal protection of property, as they felt powerful enough to secure their interests independently. Second, there was relatively widespread acceptance of a categorical distinction between public foreign property and private foreign property. The latter was regarded as inviolable in principle – untouchable even when the state of the respective national had committed serious wrongdoing, including initiating a war. The Hague Conventions of 1899 and 1907 expressly stipulate the protection of private property from confiscation and the prohibition of pillage.[2] Indeed, until approximately 1914, international law recognized that private property of enemy nationals located within a belligerent's territory was inviolable.[3]

This situation meant that foreign merchants and investors were generally subject to the host state's laws.[4] Domestic law determined how foreign property was treated. This approach is referred to as the "host state treatment" (HST) or "national treatment" standard. Foreigners were entitled to compensation for expropriation only if nationals of the expropriating state also received compensation in comparable circumstances.[5] Latin American states strongly advocated for HST, arguing that it enabled them to defend against the "gunboat diplomacy" of industrialized states – that is, against the coercive extraction of treaties more favorable to foreigners than to nationals. The Argentinian diplomat Carlos Calvo was a particularly prominent proponent of HST. The "Calvo doctrine" held that foreign property should not be treated more favorably than the property of nationals.[6] The doctrine emphasized the sovereignty and self-determination of the host state.[7] At the beginning of the 20th century, however, the situation slowly began to

[2] Art. 46 and 47 Convention (II) with Respect to the Laws and Customs of War on Land and its Annex. Regulations concerning the Law and Customs of War on Land. The Hague, 29 July 1899; Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Law and Customs of War on Land. The Hague, 18 October 1907.

[3] BORCHARD, Edwin M. Enemy Private Property. *The American Journal of International Law*. 1924, Vol. 18, No. 3, p. 523.

[4] WEILER, Todd. An Historical Analysis of the Function of the Minimum Standard of Treatment in International Investment Law. In: Todd Weiler – Freya Baetens (eds.). *New Directions in International Economic Law*. Leiden – Boston: Martinus Nijhoff Publishers, 2011, pp. 337–340.

[5] SCHÖBENER, Burkhard. Internationales Recht. Enteignung und Entschädigung im Systemvergleich. In: Otto Depenheuer – Foroud Shirvani (eds.). *Die Enteignung – Historische, vergleichende, dogmatische und politische Perspektiven auf ein Rechtsinstitut*. Berlin: Springer Verlag, 2018, p. 80.

[6] DUMBERRY, Patrick. *The Formation and Identification of Rules of Customary International Law in International Investment Law*. Cambridge: Cambridge University Press, 2016, p. 63.

[7] The "Calvo clause" – a corollary of the "Calvo doctrine" – in contracts between aliens and states constitutes a waiver to the right to diplomatic protection. An example can be found in Art. 27 of the Mexican Constitution of 1917, para I: "Only Mexicans by birth or naturalization and Mexican companies have the right to own lands […] The State may grant the same right to foreigners, provided that they agree […] to consider themselves as Mexicans regarding such property and not to invoke the protection of their governments in reference to said property".

change. Calls grew louder for at least some level of protection for foreign property.[8] The world's dominant nations began to promote "prompt and adequate" compensation for the taking of alien property.[9] The debate intensified particularly from the 1910s onward, as discussed below in Section 2.

II. JUSTIFICATIONS OF TAKINGS: PAST INJUSTICES AND PUBLIC POLICY

Generally speaking, takings of foreign-owned property can be justified in two ways. First, they may be presented as responses to serious past injustice. A prominent example illustrates the underlying rationale: if the owner's state has initiated and subsequently lost an aggressive war, the victorious state may confiscate the property of that state's nationals. Thus, if a person is a national of an attacking state but resides in the state under attack, the latter may – after prevailing in the conflict – seize that person's property as part of its measures against enemy nationals.

Such justifications began to appear in the aftermath of World War I. Article 297(b) of the Versailles Treaty marked a break with the past tradition of respecting private foreign property. The provision granted the Allies the right to "retain and liquidate all property rights and interests" belonging to German nationals.[10] The measure was heavily criticized, but the pattern repeated.[11] In Yugoslavia, for example, Tito's regime regarded the German minority after World War II as "enemies of the people." The Anti-Fascist Council for the National Liberation of Yugoslavia (AVNOJ) issued decrees targeting the property of ethnic Germans, stripping them of their citizenship, civil rights, and all their property.[12] In Poland, the so-called "Bierut Decrees" of 1945 and 1946 (named after Poland's communist leader Bolesław Bierut) also de facto confiscated estates owned by Germans. They first transferred ownership of all land within the prewar borders to municipal authorities. Following this, a decree on "abandoned and left property" was adopted, which introduced a key distinction between the situation of Poles and Germans: while Poles were seen as having merely "left" their property and were given the possibility of return, Germans were deemed to have "abandoned" theirs.[13] They irretrievably lost their ownership. In Czechoslovakia, the "Beneš Decrees" after World War II targeted the German-speaking population, including Liechtenstein nationals.[14] The decrees led to the expulsion of approximately three million

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[8] WEILER, Todd. *An Historical Analysis of the Function of the Minimum Standard of Treatment in International Investment Law*, p. 351.

[9] GUZMAN, Andrew T. Why LDCs Sign Treaties that Hurt Them. Explaining the Popularity of Bilateral Investment Treaties. *Virginia Journal of International Law*. 1998, Vol. 38, p. 644.

[10] BORCHARD, Edwin M. *Enemy Private Property*, p. 525.

[11] Essentially, the criticism was: for a temporary gain of a few millions within easy reach, the clock has been turned back several hundred years; there has been a revival of a "barbaric practice" which is likely to do incalculable harm before a wiser generation will undo it: BORCHARD, Edwin M. *Enemy Private Property*, p. 526.

[12] ZAKIĆ, Mirna. *Ethnic Germans and National Socialism in Yugoslavia in World War II.* Cambridge: Cambridge University Press, 2017, pp. 239–243.

[13] ZBOROWSKA, Agata. "Abandoned" Things. Looting German Property in post-war Poland. *History and Anthropology*. 2023, Vol. 34, No. 4, pp. 584–585.

[14] RISINI, Isabella – ULFSTEIN, Geir. Liechtenstein v Czech Republic before the European Court of Human Rights. In: *EJIL: Talk! Blog of the European Journal of International Law* [online]. 7. 9. 2020 [2026-07-30]. Available at: https://www.ejiltalk.org/liechtenstein-v-czech-republic-before-the-european-court-of-human-rights/.

people and widespread expropriations.[15] Liechtenstein's neutrality during the war was disregarded, and its nationals were treated in the same manner as Germans.

"War", however, was not the only grave past injustice serving as justification for takings. The other prominent example is "colonialism". Muammar Gaddafi, for instance, employed it systematically. In 1970, his regime seized the property of Italians and other foreigners who had remained in Libya after independence. He also ordered, inter alia, the withdrawal of US forces from Wheelus Air Base and linked these measures to Libya's "battle with foreign oil companies."[16] At the end of 1971, Gaddafi announced the nationalization of British Petroleum.[17] The essence of the justification was: what we do merely undoes what your group did to ours in the past. Takings were portrayed as reactions to historical wrongs.

Takings can also be justified by reference to the host state's right to pursue its own public policies. The state may argue, for instance, that it seeks to realize certain infrastructure projects or environmental policies. Another justification in this category is rent control. Poland, for example, already had such a system in the years before World War II. The European Court of Human Rights later addressed a more contemporary version of the system. In a 2006 judgment, it found that the scheme violated Article 1 of Protocol No. 1 (protection of property) of the European Convention on Human Rights, arguing that the system excessively restricted the applicant's property rights and income.[18] Transforming a society into a socialist society provides another example. In all these instances, foreign property owners are generally stripped of their property rights. The core of the justification is the sovereignty of the state and its right to self-determination. A policy goal for the future may require certain regulation of takings of property in the present. The precise line between lawful regulation without a right to compensation and violations of international protection standards is difficult to draw. In the context of environmental policy, for example, this question arises regularly.[19]

When does a "taking" require compensation? The answer depends on the applicable regime of international law. There is no single, unified system governing property and expropriation. Questions of takings and expropriation may be addressed in the context of international alien law (customary law), under international investment protection

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[15] Ibidem.

[16] DIETRICH, Christopher R. W. Strategies of Decolonization. Economic Sovereignty and National Security in Libyan-US Relations, 1949–1971. *Journal of Global History*. 2022, Vol. 17, No. 1, p. 84.

[17] DIETRICH, Christopher R. W. *Strategies of Decolonization. Economic Sovereignty and National Security in Libyan-US Relations*, p. 87; COLLINS, Carole. Imperialism and Revolution in Libya. *MERIP Reports*. 1974, No. 27, p. 18.

[18] *Hutten-Czapska v. Poland*, 2006-VIII Eur. Ct. H. R., §§ 224–225.

[19] In 2019, for example, the Netherlands passed a "Prohibition of Coal in Electricity Production Act," aiming to meet its international climate obligations. It requires that coal can no longer be used to generate electricity by 2030 in order to reduce CO_2 emissions from power generation. The energy companies RWE and Uniper, which own three major coal-fired plants in the Netherlands, argued the law infringed on their property rights, since there was no financial compensation scheme. The District Court found, however, that the law infringed property rights lawfully, as it constituted regulation rather than expropriation and thus did not require compensation: District Court of The Hague, RWE and Uniper v. the Netherlands (Ministry of Climate and Energy), ECLI:NL:RBDHA:2022:12635, 30 November 2022.

law (treaty law), or through the property guarantee of the European Convention on Human Rights[20] (treaty law). Each employs slightly different criteria. The key debate, however, primarily concerns the precise conditions under which an expropriation requires compensation. In this context, direct and indirect expropriation must be distinguished. Direct expropriation refers to a formal act by a state authority that explicitly removes the ownership title of property, usually transferring it to a public entity or third party.[21] Indirect expropriation, by contrast, occurs when a state's regulatory or administrative measure significantly restricts the use or value of property without formally transferring ownership, yet with equivalent impact.[22] A classical authority is the Tippetts case (1984) of the Iran-US Claims Tribunal. It held that deprivation of property occurs "whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral."[23] For the European Court of Human Rights, what matters are the "realities" behind appearances. Even without a formal transfer of ownership, a situation may effectively amount to an expropriation.[24]

III. DEVELOPMENT OF PROTECTION STANDARDS: CORE IDEAS AND CRITICISMS

This section surveys the emergence and development of international legal protection for foreign property over time. It examines four standards that have played – or continue to play – major roles in the discourse. The background and key criticisms of each standard are briefly discussed.

III.1 Early 1900s to 1950s: "Minimum Standard Treatment" (MST) – Alien Law

The origins of modern protection for foreign property can be traced to post-World War I disputes over the treatment of foreigners, particularly in the aftermath of the revolutions in the Soviet Union and Mexico.[25] The revolutions occurred – or in the case of Mexico, began – in the 1910s. Both were driven by economic transformation of society. Mexico in particular was of major importance to US investors. Capital-exporting states increasingly became aware of and concerned about the lack of basic protection afforded

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[20] Art. 1 Para 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, March 20, 1952, ETS No. 9 reads: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law". Due to differing positions of the member states, it took lengthy discussions before Art. 1 of Protocol No. 1 could be adopted. A key question was whether the guarantee should provide protection only against arbitrary expropriations or establish a general right to compensation. The wording (reference to "the general principles of international law") reflects a compromise: NUSSBERGER, Angelika. Enteignung und Entschädigung nach der EMRK. In: Otto Depenheuer – Foroud Shirvani (eds.). *Die Enteignung*. Berlin: Springer-Verlag, 2018, p. 90.

[21] SCHÖBENER, Burkhard. *Internationales Recht. Enteignung und Entschädigung im Systemvergleich*, p. 63.

[22] Ibidem.

[23] Iran-U. S. Claims Tribunal, Award No.141–7–2, 29 June 1984, 6 Iran–U. S. C. T. R. 219, pp. 225–226; SCHÖBENER, Burkhard. *Internationales Recht. Enteignung und Entschädigung im Systemvergleich*, p. 68.

[24] *Sporrong and Lönnroth v. Sweden*, Judgment of 23 September 1982, Serie A52, p. 18, § 63.

[25] SCHILL, Stephan W. Investitionsschutzrecht als Entwicklungsvölkerrecht. *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*. 2012, No. 72, p. 272.

to foreign investors in host states.[26] This gave rise to the central question of whether there existed a minimum international standard for the treatment of foreign investors – especially regarding compensation for expropriations. The question sharply divided supporters of the Calvo Doctrine, who advocated national treatment, from European powers and the United States. The United States insisted on an independent international minimum standard. The core argument was that international alien law requires a minimum level of protection for any foreigner: a minimum standard of treatment for any alien (MST).[27] At the heart of this concept lies the idea that states have a due diligence obligation to respect the rights of foreigners.[28]

A landmark case – the Neer case – deserves particular mention.[29] It concerned arbitrary violence against US citizens in Mexico, resulting in casualties and a violation of the aforementioned due diligence principle. The Mexican authorities had failed to prosecute the murderer of Paul Neer, a US citizen. The case was decided by an arbitral commission in 1926. The commission found – and this rationale can be applied to takings of foreign property – that international law obliges states to afford foreign nationals a basic level of protection. While the failure to apprehend or punish murderers did not per se violate MST, the commission ruled that "the treatment of an alien, in order to constitute an international delinquency should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that *every reasonable and impartial man* (emphasis added) would readily recognize its insufficiency."[30] According to the commission, it was not decisive whether the insufficiency stemmed from the deficient execution of an otherwise reasonable law or from the fact that the laws did not empower the authorities to meet international standards. At its core, the decision reflects principles of good faith and due diligence.

There was, of course, criticism of MST. A key argument was that the standard, as an umbrella concept, lacks precise definition and content.[31] Specifically in the Neer case, the award has often been challenged as a weak foundation for defining MST in international law.[32] Some argued that it hardly makes sense to attribute such weight to an award consisting of no more than three pages,[33] containing only a general statement unsupported by broader state practice. These criticisms have persisted. In 2012, an ICSID

[26] DUMBERRY, Patrick. The "Minimum Standard of Treatment" in International Investment Law. The Fascinating Story of the Emerge, Decline and Recent Resurrection of a Concept. In: Panos Merkouris – Andreas Kulick – José Manuel Álvarez-Zarate – Maciej Żenkiewicz (eds.). *Custom and Its Interpretation in International Investment Law.* Cambridge: Cambridge University Press, 2024, pp. 6–7.

[27] DUMBERRY, Patrick. *The Formation and Identification of Rules of Customary International Law in International Investment Law*, p. 60.

[28] DUMBERRY, Patrick. *The "Minimum Standard of Treatment" in International Investment Law. The Fascinating Story of the Emerge, Decline and Recent Resurrection of a Concept*, p. 6.

[29] L. F. H. Neer and Pauline Neer (U. S. A. v. United Mexican States), 4 R. I. A. A. 60 (1926).

[30] Ibidem, pp. 61–62.

[31] DUMBERRY, Patrick. *The "Minimum Standard of Treatment" in International Investment Law. The Fascinating Story of the Emerge, Decline and Recent Resurrection of a Concept*, p. 5.

[32] DUMBERRY, Patrick. *The Fair and Equitable Treatment Standard. A Guide to NAFTA Case Law on Article 1105.* Alphen aan den Rijn: Kluwer Law International, 2013, pp. 16–17.

[33] SCHWEBEL, Stephen M. Is Neer far from Fair and Equitable? *Arbitration International.* 2011, Vol. 27, No. 4, pp. 555–561.

award stated that the Neer case cannot be regarded as reliable evidence of customary international law because it did not base its formulation of MST on state practice.[34] While MST is generally regarded to have become international customary law around the mid-20th century,[35] the standard remained conceptually fragile.[36]

III.2 1938: "Hull Doctrine" – Market Value Compensation

The confiscations in Mexico continued as the revolution progressed. Between 1915 and 1940, the Mexican government developed a general pattern of confiscating valuable properties belonging to US citizens. Agrarian and oil properties in particular were expropriated.[37] The United States – more consistently than before – sought compensation. In 1938, the US Secretary of State, Cordell Hull, began advocating the formula "prompt, adequate and effective" compensation for expropriations.[38] Support was provided by a well-known judgment of the Permanent Court of International Justice (PCIJ). In its 1927 judgment on state responsibility for violations of international law, the Court held that when an international norm is breached, "all the consequences" of the wrongful act must be wiped out.[39] Primarily, the situation before the breach must be re-established. If this is not possible, compensation must be paid. The state must pay a sum corresponding to the value that restitution would have borne.[40]

The newly introduced standard consisted of three elements. "Prompt" responded to a classical problem associated with confiscations and expropriations. It essentially means there must be no delay.[41] The second element, "adequate", referred to the relationship between the compensation and the property's market value. In principle, full market value is owed. Finally, "effective" meant that compensation had to be paid in a convertible or freely usable currency. The standard thereby clearly went beyond the original MST. It aimed to ensure that the compensation paid corresponded to the "amount that a willing buyer would normally pay to a willing seller." [42]

Criticism of this higher standard was rather limited. This was mainly due to the fact that decolonization had not yet (fully) begun. Many of the states that would later strongly

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[34] Ibidem; *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, § 216 (June 29, 2012).

[35] DUMBERRY, Patrick. *The "Minimum Standard of Treatment" in International Investment Law. The Fascinating Story of the Emerge, Decline and Recent Resurrection of a Concept*, p. 3.

[36] PAPARINSKIS, Martins. *The International Minimum Standard and Fair and Equitable Treatment*. Oxford: Oxford University Press, 2013, pp. 64–67.

[37] GUZMAN, Andrew T. *Why LDCs Sign Treaties that Hurt Them. Explaining the Popularity of Bilateral Investment Treaties*, p. 645.

[38] Department of State. The Secretary of State to the Mexican Ambassador (Castillo Nájera). Foreign Relations of the United States, Diplomatic Papers, Washington, 1938, The American Republics, Vol. V, Doc. 662 (July 21, 1938). In: *Office of the Historian* [online]. [2026-07-30]. Available at: https://history.state.gov/historicaldocuments/frus1938v05/d662.

[39] Case Concerning the Factory at Chorzów (*Germany v. Poland*), Judgment, 1928 P. C. I. J. (ser. A) No. 17, p. 47 (Sept. 13, 1928): "[...] reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."

[40] Ibidem.

[41] UNCTAD, Expropriation, Series on Issues in International Investment Agreements II, New York and Geneva, 2012, p. 40.

[42] Cf. Art. IV(5) World Bank Guidelines on the Treatment of Foreign Direct Investment (1992).

oppose high standards were still colonies in the late 1930s and 1940s.[43] The standard was mainly pushed by the United States and the Europeans. Resistance came, once more, from Mexico.[44] Over time, however, more developing countries joined the camp of critics. Their core argument was that the Hull standard impeded economic development in less-developed countries by one-sidedly favoring the interests of the already wealthy and powerful. The international legal status of the standard remained – overall – rather unclear. It is argued that – in contrast to MST – it did not crystallize into customary law in the mid-20th century.[45]

III.3 1960: "Appropriate Protection" – Compromise during Decolonization Process

A third step in the development of international protection standards was the claim for "appropriate compensation" for foreign property. Decolonization began after World War II and reached its peak in 1960.[46] In that year, no fewer than 15 former colonies became independent states. Decolonization radically changed the world. Newly Independent States (NIS) soon outnumbered the traditional powers and began to demand changes in the substance of international law. Namely, they challenged the legitimacy of customary international law rules on foreign investment as remnants of colonial subjugation.[47] MST came under increasing pressure, and many NIS held particularly strong views about the Hull doctrine. They claimed that domestic law should apply to foreign-owned property and opposed full compensation standards for expropriation such as the Hull formula. They used their majority in the UN General Assembly to advance their views.[48] Between 1960 and the mid-1970s, the UN General Assembly passed a series of resolutions emphasizing the sovereignty of nations with respect to foreign investments.[49]

In 1962, the UN General Assembly adopted a resolution on "Permanent Sovereignty (of states) over Natural Resources" (Resolution 1803),[50] attempting to reach a compromise between NIS and industrialized Western states. The resolution consisted of two key elements. First, it recognized the host state's right to nationalize foreign-owned property.[51] This clearly was a concession to NIS. Second, it also required "appropriate compensation, in accordance with the rules in force in the State taking such measures (…) and in accordance with international law."[52] This formulation recognized that some compensation was owed – a concession to Western capital-exporting states – but allowed

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[43] GUZMAN, Andrew T. *Why LDCs Sign Treaties that Hurt Them. Explaining the Popularity of Bilateral Investment Treaties*, p. 646.
[44] Ibidem.
[45] For the role of the standard since the 1990s see below 2.4.
[46] Three waves of decolonization can be distinguished: (1) decolonization of large parts of Latin America in the first third of the 19th century; (2) decolonization in the interwar period following the creation of the League of Nations; (3) decolonization from 1945 to 1975.
[47] DUMBERRY, Patrick. *The "Minimum Standard of Treatment" in International Investment Law. The Fascinating Story of the Emerge, Decline and Recent Resurrection of a Concept*, p. 8.
[48] Ibidem, pp. 8–9.
[49] GUZMAN, Andrew T. *Why LDCs Sign Treaties that Hurt Them. Explaining the Popularity of Bilateral Investment Treaties*, p. 648.
[50] G. A. Res. 1803 (XVII), U. N. Doc. A/RES/5217(XVII) (Dec. 14, 1962).
[51] G. A. Res. 1803 (XVII), para 4, U. N. Doc. A/RES/5217(XVII) (Dec. 14, 1962).
[52] G. A. Res. 1803 (XVII), para 4, U. N. Doc. A/RES/5217(XVII) (Dec. 14, 1962).

NIS to decide on the amount on a case-by-case basis. The United States, however, reinterpreted the compromise in its own way, arguing that "appropriate" compensation meant "prompt, adequate and effective" – the Hull Doctrine formula.[53] NIS did not give in during the rather tough debate that followed. The UN General Assembly ultimately sided with NIS, where they formed a clear majority. In the 1970s, the Assembly adopted Resolution 3171 (1973), which rejected the Hull formula and stated that the host state should determine the amount of compensation owed, depending on the specific circumstances.[54] A year later, it went a step further. In Resolution 3201 (1974), the "Charter of Economic Rights and Duties of States" was adopted, which did not recognize any obligation of repayment.[55] This approach essentially put investors at the mercy of the host country. It had consequences. In the late 1970s and 1980s, investments declined.

Against this backdrop, the status of the "appropriate compensation" standard became the subject of renewed debate. A famous arbitral award of 1977 – in the Texaco case – declared it to be customary international law.[56] Many regarded this ruling as a breakthrough for developing states. There was, however, no general consensus on the issue. The ICJ, in particular, had taken a very different stance in 1970. In the Barcelona Traction case, it had stated there was no rule of customary international law in the field of international investment law.[57] Opinions remained sharply divided. Only in 1990 did the ICJ change its view. In the Elettronica Sicula S.p.A. case, it recognized a "minimum international standard" of protection with respect to foreign property.[58]

III.4 1990s to Present: "Fair and Equitable Treatment" (FET in BITs) – Investment Protection

In the 1990s, the situation changed once again – this time fundamentally. Less-developed states had experienced difficulties as foreign investment declined. They came to realize that creating unstable and unpredictable investment environments had discouraged much-needed foreign investments into their economies. Returning to MST, however, was not an attractive option. Both developed and developing states viewed the standard as ineffective and too vague.[59] Instead, they shifted toward bilateral investment treaties (BITs), [60] which offered more precise rules in an era of accelerating globalization since

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[53] SCHWEBEL, Stephen M. The Story of the U. N.'s Declaration on Permanent Sovereignty over Natural Resources. *American Bar Association Journal.* 1963, Vol. 49, No. 5, p. 465.

[54] G. A. Res. 3171 (XXVIII), para 3, U. N. Doc. A/RES/3171(XXVIII) (Dec. 17, 1973) stated that "each state is entitled to determine the amount of possible compensation and the mode of payment".

[55] G. A. Res. 3201 (S-VI), U.N. Doc. A/RES/3201(S–VI) (May 1, 1974) declared a "New International Economic Order"; cf. GUZMAN, Andrew T. *Why LDCs Sign Treaties that Hurt Them. Explaining the Popularity of Bilateral Investment Treaties*, pp. 649–650.

[56] Texaco Overseas Petroleum Co. & California Asiatic Oil Co. v. Government of the Libyan Arab Republic, 53 I. L. R. 389 (1977), para 87; DUMBERRY, Patrick. *The Formation and Identification of Rules of Customary International Law in International Investment Law*, p. 77.

[57] Barcelona Traction, Light and Power Company, Limited, Judgment, I. C. J. Reports 1970, pp. 47–48, § 89.

[58] Elettronica Sicula S. p. A. (ELSI), Judgment, I. C. J. Reports 1989, s. 66–67, § 111. DUMBERRY, Patrick. *The "Minimum Standard of Treatment" in International Investment Law. The Fascinating Story of the Emerge, Decline and Recent Resurrection of a Concept*, pp. 9–10.

[59] Ibidem, p. 10.

[60] Ibidem, pp. 3, 10.

the 1980s. Large numbers of BITs were concluded. The 1990s are sometimes described as "the roaring 1990s" or the beginning of an era of "treatification" of investment law.[61] The aim was to create reliable investment environments and to overcome the ineffectiveness of MST. More than 3,000 BITs have been concluded to the present day.[62]

The key standard of the new era was "fair and equitable treatment" (FET standard). FET began to replace MST in most BITs. By the late 1990s, MST clauses had largely disappeared from treaty language.[63] Less than 5% of BITs did not include FET obligations.[64] It is not entirely clear, however, what the new standard meant and means in substance. To make a long story short: FET clauses over time increasingly included lists specifying when the standard is violated and when it is not.[65] A process of clarification occurred. The standard became more concrete, covering elements such as the prohibition of denial of justice, due process requirements, and – at least in principle – full compensation. There was also a gradual tendency to interpret FET as a (new) minimum standard treatment clause, allowing some limited leeway for developing states but in principle guaranteeing full compensation for investors. From the 2000s onward, arbitral tribunals began granting broad protection under FET rules. Interpreting BITs has since become a microcosm of international law requiring highly specialized expertise. A general trend emerged to interpret FET in line with MST.

Most scholars nowadays believe that some customary rules still exist in the field.[66] They assume a certain coexistence of partly independent treaty law and some customary law. Customary law sets limits to lawful expropriations. It seems generally accepted that lawful expropriations must meet four conditions: the taking must be for a public purpose (1) and provided by law (2), it must be non-discriminatory (3), and must be followed by compensation (4).[67] Critics, however, question whether these rules reflect a genuine opinio juris on the part of developed countries.[68] They argue that these states often have no practical alternative to accepting BITs, which weakens the basis for assuming real consent to a customary standard. In practice, the crucial question typically is whether a particular act by an authority constitutes an expropriation at all.[69]

[61] SALACUSE, Jeswald W. The Treatification of International Investment Law. *Law and Business Review of the Americas*. 2007, Vol. 13, No. 1, p. 157.

[62] According to the International Investment Agreements Navigator: 2853 BITs in total.

[63] DUMBERRY, Patrick. *The "Minimum Standard of Treatment" in International Investment Law. The Fascinating Story of the Emerge, Decline and Recent Resurrection of a Concept*, p. 3.

[64] DUMBERRY, Patrick. *The Formation and Identification of Rules of Customary International Law in International Investment Law*, p. 145.

[65] DUMBERRY, Patrick. *The "Minimum Standard of Treatment" in International Investment Law. The Fascinating Story of the Emerge, Decline and Recent Resurrection of a Concept*, pp. 17–18.

[66] See, e.g., GRISEL, Florian. The Sources of Foreign Investment Law. In: Zachary Douglas – Joost Pauwelyn – Jorge E. Viñuales (eds.). *The Foundations of International Investment Law. Bringing Theory into Practice*. Oxford: Oxford University Press, 2013, pp. 221–222.

[67] UNCTAD, Expropriation, Series on Issues in International Investment Agreements II, New York – Geneva, 2012, p. 27; OECD, "Indirect Expropriation" and the "Right to Regulate" in International Investment Law, Working Papers on International Investment 2004/4, p. 3.

[68] GUZMAN, Andrew T. *Why LDCs Sign Treaties that Hurt Them. Explaining the Popularity of Bilateral Investment Treaties*, pp. 684–687.

[69] SCHÖBENER, Burkhard. *Internationales Recht. Enteignung und Entschädigung im Systemvergleich*, p. 62.

CONCLUDING REMARKS: PRECISE RULES AND EXTENSIVE PROTECTION

The final section offers some remarks on resolved and ongoing debates and the current situation in the field. It highlights which controversies have been settled, which remain contested, and how changing economic realities shape states' approaches to investment protection.

Current Situation: Overcome and Ongoing Debates

A number of debates on the protection of foreign-owned property have been overcome. The discussion has shifted to more technical details. Fundamental differences regarding the necessity and suitability of international legal norms for property protection, for example, have largely faded away.[70] Today, investment protection law is embodied in more than 2,800 bilateral, regional, and sectoral investment agreements, as well as in approximately 300 investment chapters of free trade agreements.[71] These agreements are, by and large, based on uniform substantive principles. The amount of compensation to be paid is also no longer the central point of contention. While it was the key issue in the 1960s and 1970s – when newly independent states tried to minimize their financial obligations –[72] there is no longer a fundamental divide between industrialized and developing states. Even countries that initially strongly opposed the Hull formula have since accepted such compensation mechanisms in investment protection clauses.[73] Most BITs now literally incorporate the Hull formula: prompt, adequate, and effective protection.[74]

Nevertheless, some issues remain unresolved. A frequent criticism concerns the use of vague legal terms in investment agreements.[75] Critics argue that indeterminate concepts, such as "due process" or "prompt, adequate, and effective", enable arbitration tribunals to limit the autonomy of states to regulate in the public interest, for example when they seek to protect the environment or human rights. Critics also contend that investment treaties still disproportionately prioritize property and investor interests.[76] Whether the criticism is justified is subject to debate. Opponents of this view argue that tribunals today do consider competing public interests. They grant states significant discretion to regulate, as long as such measures are reasonable and proportionate.[77] Indeed, the principle of proportionality is increasingly applied under FET in cases of indirect expropriation.[78]

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[70] SCHILL, Stephan W. *Investitionsschutzrecht als Entwicklungsvölkerrecht*, p. 294; SCHÖBENER, Burkhard. *Internationales Recht. Enteignung und Entschädigung im Systemvergleich*, p. 82.

[71] SCHILL, Stephan W. *Investitionsschutzrecht als Entwicklungsvölkerrecht*, p. 271.

[72] SCHÖBENER, Burkhard. *Internationales Recht. Enteignung und Entschädigung im Systemvergleich*, p. 80.

[73] Ibidem, p. 82.

[74] OECD, "Indirect Expropriation" and the "Right to Regulate" in International Investment Law, Working Papers on International Investment 2004/4, p. 1, Fn. 1.

[75] SCHILL, Stephan W. *Investitionsschutzrecht als Entwicklungsvölkerrecht*, pp. 299–300.

[76] Ibidem.

[77] SCHILL, Stephan W. *Investitionsschutzrecht als Entwicklungsvölkerrecht*, pp. 299–300.

[78] In *Tecmed v. Mexico*, for example, the tribunal adopted a proportionality test from European human rights law, finding that only disproportionate state measures require compensation: SCHILL, Stephan W. *Investitionsschutzrecht als Entwicklungsvölkerrecht*, pp. 299–300.

Key Facts: Vulnerability of Weak Economies and Dependence on Transfer of Technology

A key fact is that less-developed states nowadays are fully aware of their vulnerability. The experience of the 1970s and 1980s had shown them that their claims – aimed at preserving their bargaining power vis-à-vis foreign investors or capital-exporting states – had ultimately become counterproductive. Severe economic stagnation across Africa and in large parts of Latin America prompted a change of heart, or rather, a strategic reorientation: to enter into BITs.[79]

The decline and collapse of the Soviet Union, a major former backer of developing states, reinforced this shift. Governments increasingly realized that their private sector capacity was often simply too weak. Private enterprises were too small and undercapitalized to sustain themselves. BITs thus became tools to achieve a more liberal economy.[80] Policies of economic self-reliance had often led many less-developed states into isolation from the global economy and left them financially strained. A government official of Laos pointedly formulated the problem in 1993: "We have painfully learned that the state cannot do everything. (...) We need to let other institutions in society do these things".[81]

Another key insight was how heavily less-developed states depended on foreign technology. Foreign investment proved vital not only for capital inflows but also because modern technology brings expertise and entrepreneurship into the country. Both are needed for economic restructuring and development.[82] Transnational corporations typically provide the entire package of knowledge and research and development activities (R&D).[83] Already in the 1990s, private capital flows into less-developed states increased dramatically.[84] By 1996, nearly 40% of all external financial flows took the form of direct foreign investment – compared to merely 8% in 1982.[85] This development had a profound impact on many developing economies. Mainly the middle classes profited.

At the same time, developing states increasingly realized that they were not passive recipients. They could influence the impact of foreign investments. Human capital, absorptive capacity, and the quality of institutions are key factors in determining how foreign investments contribute to the host state economy.[86] Over time, a relatively broad consensus has formed on the appropriate level of investment protection – and

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[79] Cf. LOWENFELD, Andreas F. Investment Agreements and International Law. *Columbia Journal of Transnational Law*. 2003, Vol 42, No. 1, pp. 126–127.
[80] SALACUSE, Jeswald W. *The Treatification of International Investment Law*, p. 160.
[81] SALACUSE, Jeswald W. From Developing Countries to Emerging Markets. A Changing Role for Law in the Third World. *The International Lawyer*. 1999, Vol. 33, No. 4, p. 882.
[82] World Bank. *World Development Report 1996. From Plan to Market*. New York: Oxford University Press, 1996, p. 63.
[83] UNCTAD, Foreign Direct Investment, the Transfer and Diffusion of technology, and Sustainable Development, TD/B/C. II/EM. 2/2 (Dec. 8, 2010).
[84] World Bank. *World Development Report 1996. From Plan to Market*, p. 136.
[85] SALACUSE, Jeswald W. *From Developing Countries to Emerging Markets. A Changing Role for Law in the Third World*, p. 886.
[86] BARBOZA, Gustavo – BRAGA, Gustavo – DUCHIER, Aubin et al. Technology Transfer, Knowledge Spillover and Foreign Direct Investment. *The Journal of Technology Transfer*. 2025, Vol. 51, No. 4, p. 6.

on how states can ensure that foreign investment becomes a driver of sustainable economic success.

The tensions underlying the current debate, however, are likely to persist. At its core, the dilemma described in the introduction to this contribution is inextricable: there will always be a trade-off between the exercise of self-determination and the creation of stable investment environments. Strengthening domestic regulatory autonomy inevitably comes at the cost of the predictability sought by foreign investors, while robust investment protection – such as the classical Hull formula – necessarily constrains the host state's policy space. Key criticisms will therefore continue to re-emerge, even as renewed efforts to recalibrate this balance are undertaken.