Arbitrary and Unreasonable Measures

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A. Introduction

Arbitrary and unreasonable measures are among the many causes of action often available to investors under bilateral and multilateral investment treaties. Various formulations have been adopted to establish a legal standard providing protection against such measures. However, the relevant treaty provision usually provides protection to investors against either arbitrary or unreasonable measures, but rarely for both. Does this mean that, regardless of the formulation, such provisions are intended to provide protection against identical or at least similar measures? Or is there a legally definable difference between ‘arbitrary’ and ‘unreasonable’ measures that is of relevance in the context of arbitral decision-making?

To complicate matters, many investment treaties provide for protection against arbitrary and unreasonable measures in the form of a standard that combines protection against arbitrary or unreasonable measures and/or discrimination (‘arbitrary or discriminatory measures’; ‘arbitrary and discriminatory measures’; ‘unreasonable or discriminatory measures’; ‘unreasonable and discriminatory measures’). When confronted with such formulations, arbitral tribunals have generally taken the view that the disjunctive ‘or’ has a normative function and that, accordingly, in order to establish a breach of the standard, it is sufficient for the claimant to demonstrate that one of the two legs of the standard has been breached, i.e. that arbitrary or unreasonable measures, as the case may be, have been taken, or that the claimant has been discriminated against. Thus, in such instances the relevant provision effectively embodies two different standards—one protecting against arbitrary or unreasonable measures, as the case may be, and the other against discriminatory measures. Based on recent case law, the disjunctive formulation of the standard also appears to be the more common one in practice, although other formulations can also be found.

1 For further discussion see below n. 42 and accompanying text.
2 See, eg, Ronald S. Lauder v Czech Republic (UNCITRAL), Award, 3 September 2001, para. 219, concluding that the wording of Article II(2)(b) US/Czech Republic BIT—‘arbitrary
This chapter focuses on arbitrary and unreasonable measures and, accordingly, will not address discrimination, except where relevant. In practical terms, this means that the chapter deals primarily with treaty provisions that provide protection against arbitrary or unreasonable measures, as the case may be, or discrimination.3

As regards protection against arbitrary governmental measures, the locus classicus is the *ELS*4 case, the first case brought before the International Court of Justice (ICJ) dealing with substantive standards of investment protection. There, the relevant provision, Article I of the Supplementary Agreement to the Treaty of Friendship, Commerce and Navigation between the United States and Italy of 1948 (the ‘FCN Treaty’) provided, in relevant part:

The nationals, corporations and associations of either High Contracting Party shall not be subjected to arbitrary or discriminatory measures within the territories of the other Contracting Party resulting particularly in: (a) preventing their effective control and management of enterprises which they have been permitted to establish or acquire therein; or, (b) impairing their other legally acquired rights and interests in such enterprises or in the investments which they have made, whether in the form of funds (loans, shares or otherwise), materials, equipment, services, processes, patents, techniques or otherwise.5

This formulation of the standard, which appears to have been common in FCN treaties, has been adapted and reformulated in modern bilateral and multilateral investment treaties. However, despite the more concise formulation, the substance of the standard has remained largely unaltered. In *Noble Ventures* the tribunal was faced with the new formulation, contained in Article II(2)(b) of the US/Romania BIT, which provided protection against arbitrary (or discriminatory) measures in terms that appear to have become standard in modern investment protection treaties:

Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments.6

—and discriminatory measures3—implied that a breach of the standard required both an arbitrary and a discriminatory measure by the State. A recent case involved a bilateral investment treaty where the relevant provision ensured foreign investments ‘equitable and reasonable treatment’. See *Parkerings-Compagniet AS v Lithuania*, ICSID Case No. ARB/05/8, Final Award, 11 September 2007. The tribunal found that the ‘difference of interpretation between the terms “fair” and “reasonable” is insignificant and concluded that this standard was in effect identical to the fair and equitable treatment standard. Ibid., paras 271–278.

3 The prohibition of discrimination is addressed in two separate chapters of this book, dealing with the national treatment and most-favoured-nation treatment standards, respectively. See A. Bjorklund, at Chapter 3 above and A. Ziegler at Chapter 4 above.


5 Article I US/Italy FCN Treaty (1948) (emphasis added).

6 *Noble Ventures v Romania*, ICSID Case No. ARB/01/11, Final Award, 12 October 2005, para. 47.
A similar formulation can be found in Article 10(1) of the Energy Charter Treaty (ECT), perhaps the most important multilateral treaty in the field of foreign investment protection. But unlike Article II(2)(b) of the US/Romania BIT, the ECT formulation protects investors against ‘unreasonable’ rather than ‘arbitrary’ measures:

Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations.\(^7\)

A similar or identical formulation of the standard is often found in bilateral investment treaties. In *Saluka*, which concerned a formulation identical to the ECT standard, contained in Article 3(1) of the Netherlands/Czech Republic BIT, the tribunal referred to this formulation as the ‘non-impairment standard’.\(^8\) This seems an appropriate shorthand, and accordingly it will also be used in this chapter.

**B. Non-impairment Standard: Three Perspectives**

In arbitral practice, breach of the non-impairment standard is usually asserted alternatively or cumulatively with breaches of other related standards, including expropriation, breach of fair and equitable treatment and failure to provide full security and protection. The relationship between these standards is far from clear, however, in particular if one approaches the issue from the standpoint of a less-known standard such as non-impairment. A number of issues arise, both from the point of view of arbitration strategy as well as of arbitral decision-making. Under what circumstances should the claimant pursue breach of the non-impairment standard as the principal basis of its claim? Should this be done only when an expropriation claim is not available? Or when neither an expropriation claim nor a fair and equitable treatment standard claim is available? What is the scope of application of, and the relationship between, the non-impairment standard and the full security and protection standard? Similarly, from the perspective of

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\(^7\) Article 10(1) ECT (emphasis added).

\(^8\) *Saluka Investments BV (The Netherlands) v The Czech Republic*, Partial Award, 17 March 2006; Article 3(1) of the Netherlands/Czech Republic BIT provides that, with reference to the investments of investors of the other contracting party: ‘[e]ach Contracting Party […] shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors’. 
the arbitral tribunal, in what circumstances should the tribunal rely on a breach of the non-impairment standard as the *ratio decidendi* of its decision? When an expropriation claim has not been proven? Or when neither an expropriation nor a breach of the fair and equitable treatment standard has been proven? If one or both of these have been established, is it still necessary or appropriate to proceed to deal with the non-impairment claim?

In practice, the non-impairment standard is rarely relied upon by investors as the principal or exclusive basis of their case. It is therefore hardly surprising that arbitral decisions usually do not turn on whether or not this particular standard has in fact been breached. Indeed, there appears to be only one case where the only breach of treaty found by the tribunal was that of the non-impairment standard. In *Lauder*, where the claimant asserted a number of alternative causes of action in addition to impairment, including expropriation, breach of fair and equitable treatment, failure to provide full security and protection, and failure to ensure minimum standard of treatment under international law, the tribunal found, after having examined and dismissed each of these claims, that only the ‘arbitrary and discriminatory’ measures standard had been breached. However, even if the tribunal found that a breach had occurred, it eventually concluded that no compensation was due because the losses sustained by the claimant were not directly or proximately caused by the measure which the tribunal found to be arbitrary and discriminatory:

The arbitrary and discriminatory breach by the Respondent of its Treaty obligations constituted a violation of the Treaty. The alleged harm was, however, caused in 1999 by the acts of CET 21, controlled by Mr Železný. The 1993 breach of the Treaty was too remote to qualify as a relevant cause for the harm caused. A finding on damages due to the Claimant by the Respondent would therefore not be appropriate.9

More generally, despite the growing body of arbitral jurisprudence dealing with the various substantive standards of investment protection, arbitral tribunals have struggled to develop a consistent approach to the relationships between the various standards and to define, even approximately, their scope of application. As noted above, the opacity of arbitral practice becomes particularly striking when one approaches it from the perspective of a less-known standard such as the non-impairment standard, rather than expropriation or fair and equitable treatment. When analysing the existing jurisprudence, one is constantly confronted with the interrelation between this and the other related standards. While this chapter is limited to pointing out these issues as they arise, the proper scope of application of each of the different standards, or the methodology that arbitral tribunals employ in determining the sequence in which the various causes of action should be considered, clearly deserves further discussion among investment arbitration professionals.

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Given the varying approaches adopted by different tribunals, it seems convenient to analyse the recent arbitral jurisprudence from three different perspectives—the perspective of ‘judicial economy’, a ‘methodological’ perspective, and a ‘substantive’ perspective. Each of these perspectives is addressed below in turn.

**The Perspective of ‘Judicial Economy’**

From the point of view of arbitral decision-making, one of the key issues in analysing the relationship between the non-impairment standard and the other related investment protection standards is whether, in cases where the claimant asserts a number of alternative or cumulative claims, there is a pragmatic way of establishing a priority between the various causes of action such that it would allow the tribunal to dispose of the case by dealing with only one of them rather than addressing each of them one by one.

As noted above, one such possible approach could be based on ‘judicial economy’. In this approach, the tribunal would look at the possibility of prioritization from the perspective of valuation and quantification of the claims. In other words, the tribunal would ask itself whether one (or more) of the various causes of action asserted by the claimant should be given priority because, from the quantification and valuation perspective, compensation for a breach of such a standard, if established, would necessarily subsume any remedies that might be available as a result of a breach of all the other standards.

From this perspective, expropriation clearly appears to be the primary cause of action under multilateral and bilateral investment treaties. Assuming the various causes of action are asserted on the basis of the same set of facts, expropriation seems logically to be the one to be considered first since compensation for expropriation by definition covers a total loss of business and thus compensates the claimant for the loss of business as a whole. Accordingly, if the loss of business is compensated as a whole (or as a going concern), there can be, virtually by definition, no loss or damage left to be compensated separately based on a breach of the other, ‘lesser’ standards. Such losses are effectively subsumed by compensation for expropriation.

Conversely, compensation for breach of standards other than expropriation arguably should be granted only if the governmental measure in question falls short of a full-blown expropriation. From a valuation perspective, such other standards are designed to deal with business interruption rather than a total loss of business. Thus, for example, arbitrary and unreasonable governmental measures may damage a business and cause financial losses, but they do not usually result in a total loss of business, which continues after the interruption—if they did, they would effectively amount to expropriation. The only exception would appear to be the situation where the business is destroyed as a result of acts or omissions attributable to the government, which however
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neither seeks nor obtains any economic benefit as a result of such destruction. In such a case, the measure in question can perhaps more appropriately be characterized as failure to provide full security and protection (in case the property is destroyed by third parties whose acts are not attributable to the government) or as an arbitrary or unreasonable measure, depending on whether the government is able to provide any (police powers-based) justification for its action, rather than as an expropriation.10

Recent case law lends some support to the relevance of judicial economy as an approach to arbitral decision-making. Thus, in Saluka, the claimant asserted a number of causes of action, including failure to ensure fair and equitable treatment, impairment, failure to provide full security and protection, and expropriation, in this particular order. Disregarding the order in which the claims were asserted, the tribunal considered the expropriation claim first, dismissing it.11 Similarly, in Lauder the tribunal addressed the expropriation claim first, even though the claimant put it forward as the last item on its list of causes of action. The tribunal did not provide any explanation or justification for its approach, simply stating that it felt it 'appropriate to address the issues in that order'.12 In Nykomb, an ECT case, the tribunal also followed the same approach, prioritizing the expropriation claim even though it appeared to have been the last claim among the claimant's pleadings.13 In Occidental the tribunal also gave priority to the expropriation claim.14

By contrast, in CME the tribunal adopted a more complex approach. The tribunal first bifurcated the proceedings between liability and quantum, and when dealing with the liability issue, addressed in turn each of the various causes of action asserted by the claimant, finding a series of breaches of the various treatment standards.15 In its final award on quantum, however, the tribunal quantified the claimant's losses applying only one methodology, focusing on compensating the claimant for the fair market value of the investment as a whole.16 Of course, this is a methodology that applies in cases where the investment has not only been damaged but irreversibly lost—in other words, in cases of expropriation.

11 Saluka, above n. 8 paras 252–265.
12 Lauder, above n. 2, paras 193, 195.
14 Occidental Exploration and Production Company v Republic of Ecuador, LCIA No. UN 3467, Award, 1 July 2004. For further discussion see below n. 25 and accompanying text.
15 See CME Czech Republic B.V. v Czech Republic (UNCITRAL), Partial Award, 13 September 2001, paras 611–614, finding that the facts that constituted an unlawful expropriation also breached fair and equitable treatment, the prohibition of unreasonable or discriminatory measures, the obligation of full security and protection and the minimum standard of treatment under the Netherlands/Czech Republic BIT.
16 CME Czech Republic v Czech Republic (UNCITRAL), Final Award, 14 March 2003.
While the CME tribunal can be criticized for having made, in effect, ‘unnecessary’ findings of liability, to the extent that it went beyond the finding of expropriation, on quantum it in a sense respected judicial economy by refraining from quantifying each of the breaches separately. The question arises, however, whether arbitral tribunals should be even more aggressive and whether they should, when dealing with liability issues, limit their findings to expropriation alone, assuming it can be established, without proceeding any further. There seems to be no serious argument against such a more economical approach. Even in the context of possible annulment proceedings (in an ICSID context) or judicial review (in the context of an ad hoc arbitration), it is unlikely that the party seeking annulment or setting aside of the award—which invariably would be the respondent—would argue that the tribunal has failed to exercise its jurisdiction by failing to deal with the other causes of action asserted by the claimant.

In case the expropriation claim fails, does judicial economy provide any guidance for prioritizing the remaining causes of action? This is a more complicated question. From the perspective of quantification and valuation, none of the remaining standards—fair and equitable treatment, full security and protection and the non-impairment standard—would appear to command any priority. A breach of any of these standards does not generally result in a total loss of the investment—otherwise an expropriation would have been found—and in these circumstances judicial economy appears to provide little guidance. As noted above, the only exception would be the situation where the investment has been destroyed as a result of acts or omissions attributable to the government, with no economic benefit to the government itself. In such situations, the government’s failure may be properly characterized as a failure to ensure full security and protection (in case of omission) or an arbitrary or unreasonable measure (in case of a positive act), rather than as an expropriation.17

‘Methodological’ Perspective

Where judicial economy fails to provide guidance, the question arises whether the various investment protection standards could be prioritized on another, more formal, or ‘methodological’ basis. Can it be argued that there is a formal ‘hierarchy’ among the various standards in the sense that a breach of one of the standards would ipso jure amount to a breach of another, related standard? Or vice versa, is it rather arguable that some of the standards are more specific or concrete than others and that therefore an arbitral tribunal should start its analysis from such more specific standards—lex specialis derogat legi generali? While arbitral tribunals appear to have recognized that these are legitimate questions, there seems to be no settled methodological approach.

17 See above n. 10 and accompanying text.
From the perspective of a legal ‘hierarchy’, and setting aside expropriation, the argument can be made—and indeed has been made and also accepted—that the fair and equitable treatment standard is broader than the two other standards (full security and protection and non-impairment) and that, accordingly, its breach in itself amounts to a breach of the other two standards, or at least one of them. Thus, in *Saluka* the tribunal, having first dismissed the claimant’s expropriation claim, went on to determine whether there had been, nonetheless, a breach of the fair and equitable treatment and non-impairment standards. The tribunal first examined the claimant’s fair and equitable treatment claim and concluded that it was well-founded. Turning to the non-impairment standard, the tribunal found that this and the fair and equitable treatment standard were ‘associated’, and that a violation of the former does not ‘differ substantially’ from a violation of the latter, but merely identifies ‘the more specific effects’ of any such violation:

The standard of ‘reasonableness’ has no different meaning in this context than in the context of the ‘fair and equitable treatment’ standard with which it is associated, and the same is true with regard to the standard of ‘non-discrimination.’ The standard of ‘reasonableness’ therefore requires, in this context as well, a showing that the State’s conduct bears a reasonable relationship to some rational policy, whereas the standard of ‘non-discrimination’ requires a rational justification of any different treatment of a foreign investor.

Insofar as the standard of conduct is concerned, a violation of the non-impairment requirement does not therefore differ substantially from a violation of the ‘fair and equitable treatment’ standard. The non-impairment requirement merely identifies more specific effects of any such violation, namely with regard to the operation, management, maintenance, use, enjoyment or disposal of the investment by the investor.\(^\text{18}\)

The tribunal eventually concluded that the Czech Government had also breached the non-impairment standard, in part on the same grounds which led the tribunal to find a violation of the fair and equitable treatment standard.\(^\text{19}\)

However, in *CMS*\(^\text{20}\) the tribunal adopted a somewhat different approach. The tribunal first considered the claim for breach of the fair and equitable treatment standard, finding that it had been breached. The tribunal then proceeded to deal with the claimant’s claim for breach of the non-impairment standard (prohibition of arbitrary and discriminatory measures). While one would have expected that the tribunal, like the *Saluka* tribunal, would have raised the question of whether a breach of the fair and equitable treatment standard would also, *ipso jure*, amount to a breach of the prohibition of arbitrary or discriminatory measures, the tribunal, somewhat surprisingly, took the reverse approach and asked

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\(^{18}\) *Saluka*, above n. 8, paras 460–461.

\(^{19}\) Ibid., paras 503–504. See also ibid., para. 465, summarizing its findings and concluding that ‘by violating the “fair and equitable treatment” standard, […] [the Czech Republic] at the same time violated its non-impairment standard’.

\(^{20}\) *CMS Gas Transmission Company v The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005.
itself whether a finding of a breach of the prohibition of arbitrary or discriminatory measures in itself would also constitute a breach of the fair and equitable treatment standard:

The standard of protection against arbitrariness and discrimination is related to that of fair and equitable treatment. Any measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment.\(^{21}\)

However, the tribunal did not leave matters there, noting that

\[\text{[\ldots] the standard is next related to impairment: the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of the investment must be impaired by the measures adopted.}\] \(^{22}\)

Based on the requirement of impairment, the tribunal eventually found that, although 'some adverse effects can be noted', there had been no sufficient impairment and dismissed the claim.\(^{23}\)

Some tribunals appear to have adopted an approach that prioritizes the more specific standards. Thus, in Noble Ventures the tribunal decided to disregard, without providing any explanation, the order in which the claimant asserted the various causes of action—which was also the same in which standards were listed in the applicable treaty (the US/Romania BIT)—and chose to deal first with the non-impairment standard rather than the fair and equitable treatment standard or indeed expropriation. Finding neither arbitrariness nor discrimination, the tribunal turned to the fair and equitable treatment standard, making, along the way, some interesting observations about the relationship between the various treaty standards:

Considering the place of the fair and equitable treatment standard at the very beginning of Art. II(2) [of the US/Romania BIT], one can consider this to be a more general standard which finds its specific application in inter alia the duty to provide full protection and security, the prohibition of arbitrary and discriminatory measures and the obligation to observe contractual obligations towards the investor. As demonstrated above, none of those obligations or standards has been breached. While this in itself cannot lead to the conclusion that the more general fair and equitable treatment standard has not been breached, it remains difficult to see how the judicial proceedings can be regarded as a violation of Art. II(2)(a) of the BIT.\(^{24}\)

Thus, characterizing the fair and equitable treatment standard as the 'more general standard' and setting aside on this basis, provisionally, the consideration of this particular standard, the tribunal appears to have applied what could be termed a lex specialis approach to arbitral decision-making. However, as noted above, the tribunal did not provide any explanation or justification as to why it preferred this particular approach.

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\(^{21}\) Ibid., para. 290.

\(^{22}\) Ibid.

\(^{23}\) Ibid., paras 292, 295.

\(^{24}\) Noble Ventures, above n. 6, para. 182.
The non-impairment standard and its relationship to the other investment protection standards has also been raised in a number of other BIT arbitrations, although in none of them has it been asserted by the claimant as the principal or exclusive cause of action. Apart from Saluka and Noble Ventures, perhaps the most elaborate analysis of the standard has been conducted in Occidental\textsuperscript{25} and MTD.\textsuperscript{26}

In Occidental the claimant again raised a number of causes of action, including failure to ensure fair and equitable treatment, breach of the non-impairment standard, and expropriation, in this particular order.\textsuperscript{27} The tribunal first considered the expropriation claim, dismissing it as being manifestly without merit and thus inadmissible. It then decided to examine the claimant’s remaining claims ‘following the reverse order’, which led it to consider first the impairment claim (ie prohibition of arbitrary or discriminatory treatment).\textsuperscript{28} Stressing that ‘the claim that these measures [complained of by the claimant] are also discriminatory has a meaning under this Article only to the extent that impairment has occurred’, the tribunal was eventually persuaded that the respondent had acted arbitrarily, ‘at least to an extent’.\textsuperscript{29} The tribunal then went on to consider the claim that the respondent had failed to honour its obligation to accord fair and equitable treatment. The tribunal found a breach and concluded that

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\ldots \textit{in the context of this finding the question of whether in addition there has been a breach of full protection and security under this Article becomes moot as a treatment that is not fair and equitable automatically entails an absence of full security and protection.}\textsuperscript{30}
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Thus, the tribunal effectively subsumed the full security and protection standard under the fair and equitable treatment standard, while treating the non-impairment standard as a stand-alone cause of action. This approach may well have been adopted by the tribunal because it reflected the structure of the US/Ecuador BIT itself, since the BIT in question was somewhat unusual in that the non-impairment standard was contained in a separate provision of the BIT (Article II (3)(b)), whereas the fair and equitable treatment and the full security and protection standards were included in the same provision (Article II (3)(a)).

In MTD the claimant alleged a series of breaches of the Chile/Malaysia BIT and certain other BITs, based on a most-favoured-nation clause, including failure to ensure fair and equitable treatment, breach of foreign investment contracts, breach of the non-impairment standard (prohibition of unreasonable or

\textsuperscript{25} Occidental, above n. 14.
\textsuperscript{26} MTD Equity Sdn. Bhd. and MTD Chile S.A. v Republic of Chile, ICSID Case No. ARB/01/7, Award, 25 May 2004.
\textsuperscript{27} Ibid., para. 36.
\textsuperscript{28} Ibid., para. 158.
\textsuperscript{29} Ibid., paras 162, 165.
\textsuperscript{30} Ibid., para. 187. See also Azurix v Argentine Republic, ICSID Case No. ARB/01/12, Award, 14 July 2006, paras 406–408.
discriminatory measures) and expropriation. In this case, however, the tribunal decided to follow religiously the order in which the claimant had asserted its claims. When reaching the non-impairment claim, the tribunal recognized the potential overlap between the various treatment standards, including that between fair and equitable treatment and the non-impairment standard. Observing that '[t]o a certain extent, this claim [ie the non-impairment claim] has been considered by the tribunal as part of the fair and equitable treatment', the tribunal noted that the approval of an investment against the Government urban policy—the measure that formed the basis of the claimant's claims—'can be equally considered unreasonable'. However, the tribunal found no discrimination, and although the reasoning is not entirely clear, eventually appears to have concluded that there had been no breach of the BIT on this account.

Instead of seeking to establish an order of priority among the many causes of action, one possible methodological approach that indeed could be adopted is that the arbitral tribunal simply respects the manner in which the claimant has chosen to argue its case and examines the causes of action in the same order in which they have been asserted by the claimant. This approach would have the advantage of avoiding any surprises to the parties, even though it might often be considered rather inefficient from the perspective of judicial economy, nor particularly creative from the point of view of legal methodology. Indeed, in practice, instead of following the pleadings of the claimant, certain arbitral tribunals have preferred the opposite approach where they not only disregard the order in which the claimant has chosen to assert the causes of action it relies upon, but simply select one of them as a basis of their decision and disregard, without discussion, all others. This approach, which could be characterized as a jura novit curia approach, in effect equates arbitral tribunals with courts—according to this approach, arbitral tribunals, like courts, are not bound by the parties' pleadings and remain free to choose the basis of their decision.

31 MTD, above n. 26, para. 196.
32 See the dispositif of the award, MTD, above n. 26, para. 253, referring only to a breach of Article 3(1) of the Malaysia/Chile BIT, which contains the fair and equitable treatment standard, but not mentioning Article 3(3) of the Croatia/Chile BIT, which contains the impairment standard. For a discrimination claim see also Champion Trading Co v Egypt, ICSID Case No. ARB/02/09, Final Award, 27 October 2006, paras 125–156, finding no discrimination since the relevant parties were not in 'like situations'.
33 The jura novit curia has been explicitly endorsed by the ICJ and its predecessor, the Permanent Court of International Justice (PCIJ), in a number of decisions. Perhaps the most opportune in this context is the formulation adopted by the ICJ in The Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v Sweden), Judgment, 28 November 1958: 'The Court] retains its freedom to select the ground upon which it will base its judgment, and is under no obligation to examine all the considerations advanced by the Parties if other considerations appear to it to be sufficient for its purpose.'
This approach has recently been adopted by two ECT tribunals—Nykomb and Petrobart. In both cases the claimants relied, in part, on the non-impairment standard as a legal basis of their claims.

Nykomb arose out of a contract entered into between Windau, a company controlled by Nykomb, a Swedish company, and Latvenergo, the Latvian electricity utility, which obligated Latvenergo to pay Windau a preferential double tariff for the first eight years of production at the Bauska co-generation plant built by Windau pursuant to the contract. As Latvenergo failed to pay the agreed tariff, Nykomb brought a claim before the Arbitration Institute of the Stockholm Chamber of Commerce under Article 26 of the ECT, arguing that Latvenergo’s failure constituted a breach of Article 10(1) of the ECT and was attributable to the State. Nykomb asserted a number of alternative causes of action, including breach of fair and equitable treatment, breach of the minimum standard of treatment under international law, impairment by unreasonable or discriminatory measures, and expropriation.

As noted above, the tribunal considered first Nykomb’s expropriation claim, dismissing it on the basis that, in the circumstances, ‘(...) there [was] no possession taking of Windau or its assets, no interference with the shareholders’ rights or with the management’s control over and running of the enterprise.’

As to the other causes of action, the tribunal noted that the State’s failure to ensure that Latvenergo pay Windau the contractually agreed double tariff was capable of constituting a breach of ‘various Treaty provisions’. However, since the damage or loss caused by the non-payment to the claimant was in all instances the same, the tribunal concluded that, ‘[...] in order to establish liability for the Republic it is strictly speaking sufficient to find that one of the relevant provisions has been violated’. The tribunal then proceeded to consider Nykomb’s claim that the Republic had failed to comply with its obligation to ensure that Nykomb’s investment was not impaired by unreasonable or discriminatory measures. The tribunal concluded that the Republic had indeed acted in a discriminatory manner since it was established, and the Republic did not deny, that Latvenergo was paying double tariff for electricity produced by two other companies which the tribunal considered were comparable to Windau and operated under the same laws and regulations. The Republic failed to prove that the different treatment was justified. This was the crux of the tribunal’s reasoning:

The Arbitral Tribunal accepts that in evaluating whether there is discrimination in the sense of the Treaty one should only ‘compare like with like’. However, little if anything

34 Nykomb, above n. 13.
36 Nykomb, above n. 13. Nykomb did not assert a breach of contract claim under the umbrella clause since it was not party to the contract out of which the dispute arose.
37 Ibid., 33.
38 Ibid.
39 Ibid., 34.
has been documented by the Respondent to show the criteria or methodology used in fixing the multiplier, or to what extent Latvenergo is authorized to apply multipliers other than those documented in this arbitration. On the other hand, all of the information available to the Tribunal suggests that the three companies are comparable, and subject to the same laws and regulations. In particular, this appears to be the situation with respect to Latelektro-Gulbene and Windau. In such a situation, and in accordance with established international law, the burden of proof lies with the Respondent to prove that no discrimination has taken or is taking place. The Arbitral Tribunal finds that such burden of proof has not been satisfied, and therefore concludes that Windau has been subject to a discriminatory measure in violation of Article 10(1).40

Having found a breach of the prohibition of unreasonable and discriminatory measures, and apparently recognizing that a finding of any additional breaches would not have affected the quantification of the claim, the tribunal concluded that there was no need to proceed any further in order to examine whether such additional breaches of the ECT had in fact occurred.41

The tribunal did not explain why it chose to examine the alleged breach of one particular treaty standard—failure to refrain from unreasonable or discriminatory measures—rather than the other breaches alleged by the claimant. The methodology adopted by the tribunal cannot be explained by reference to the manner in which the claimant pleaded its case, since it appears that the order in which the tribunal chose to examine the claimant’s causes of action was not the one in which the claimant asserted them. The most likely explanation for the chosen order appears to be that, based on the evidence, a finding of breach of the reasonable and non-discriminatory measures standard was relatively easy to establish and thus was the obvious standard to be considered first. In any event, as a result of the chosen approach, the award sheds little light on the relationship between the various standards enumerated in Article 10(1) or, more generally, in Part III of the ECT—apart from the position, in effect endorsed by the tribunal, that expropriation is the principal cause of action in terms of judicial economy in that compensation for expropriation subsumes remedies available under all of the other causes of action listed in Article 10(1). Indeed, the tribunal’s finding was limited to only one of the two legs of the standard it chose to apply—it found the respondent’s action ‘discriminatory’ but did not say anything about its ‘reasonableness’. This suggests, as noted above—and as is indeed indicated by the very formulation of the standard (‘unreasonable or discriminatory measures’)—that the two components of the standard are independent of each other and that, accordingly, it is sufficient, for the purposes of establishing a breach of the standard, that one of the two elements of the standard has been breached.42

40 Ibid. (emphasis omitted).
41 Ibid., concluding that it did ‘not find it necessary to adjudge the other Treaty violations asserted in this arbitration’.
42 A similar approach was adopted by an ICSID tribunal operating under the US/Romania BIT. See Noble Ventures, above n. 6, paras 175–183, examining separately a possible breach of the
A claim relating to the breach of the non-impairment standard was also raised, among a number of other causes of action, in *Petrobart*, another ECT arbitration.\(^{43}\) This case involved a contract between Petrobart, a company based in Gibraltar, and Kyrgyzgazmunaizat (‘KGM’), a petroleum supply and distribution company owned by the Kyrgyz Republic, for the sale of gas condensate. Since KGM failed to comply with its payment obligations, Petrobart brought court proceedings against KGM. Petrobart alleged that the State interfered in these proceedings and stripped KGM of its assets by transferring them to two newly established companies, thus preventing Petrobart from satisfying its legal claims, and causing damage. The tribunal held that the respondent had failed to respect Petrobart’s rights under the investment agreement, in breach of Article 10(1) of the ECT. However, the tribunal declined to enter into a detailed analysis of all of the claimant’s causes of action and instead opted for a more comprehensive approach:

The Arbitral Tribunal does not find it necessary to analyze the Kyrgyz Republic’s action in relation to the various specific elements in Article 10(1) of the Treaty but notes that this paragraph in its entirety is intended to ensure a fair and equitable treatment of investments. In the Arbitral Tribunal’s opinion, it is sufficient to conclude that the measures for which the Kyrgyz Republic is responsible failed to accord Petrobart a fair and equitable treatment of its investments to which it was entitled under Article 10(1) of the Treaty.\(^ {44}\)

Like the *Nykomb* tribunal, the *Petrobart* tribunal took the view that it was not required to follow the order in which the claimant asserted its causes of action, or indeed even to examine them one by one, but instead was entitled to freely select the legal basis of its decision. Moreover, like the *Nykomb* tribunal, the *Petrobart* tribunal did not provide any explanations or reasons as to why it chose to base its decision on one particular standard—in this case breach of the fair and equitable treatment standard—rather than one of the various other standards asserted by the claimant.

\(^2\)two elements of the arbitrary and discriminatory measures standard. See also *Azurix*, above n. 30, para. 391, finding that a measure needs ‘only to be arbitrary to constitute a breach’ of the standard. Cf. *Lauder*, above n. 2, para. 219, concluding that the wording of Article II(2)(b) of the US/Czech Republic BIT—‘arbitrary and discriminatory measures’—implied that a breach of the standard required both an arbitrary and a discriminatory measure by the State.

\(^{43}\) *Petrobart*, above n. 35.

\(^{44}\) Ibid., 76. The claimant had claimed that the State had breached the following standards of treatment: (1) failure to create stable, equitable, favourable and transparent conditions for investment; (2) failure to accord fair and equitable treatment; (3) breach of prohibition of unreasonable and discriminatory measures; (4) breach of observance of obligations clause; (5) breach of the minimum treatment standard; (6) failure to ensure that domestic law provides effective means for assertion of claims and enforcement of rights with respect to investments; (7) expropriation; and (8) failure to ensure that a State enterprise conducts its activities in accordance with the State’s obligations under Part III of the ECT.
‘Substantive’ Perspective

From a ‘substantive’ point of view, the key issue is the meaning to be given to terms such as ‘arbitrary’ and ‘unreasonable’. What kind of measures can be characterized as ‘arbitrary’ or ‘unreasonable’? What is required, in terms of law and fact, to establish that these standards have been breached? Is there a difference between the levels of protection provided by the two standards? In the affirmative, which one provides a ‘higher’ level of protection? And finally, is the level of protection provided by these standards higher than that available under customary international law?

These questions are all the more relevant since the terms ‘arbitrary’ and ‘unreasonable’ are rarely, if ever, defined in bilateral or multilateral investment treaties, as noted by arbitral tribunals as a matter of routine. Thus, it is perhaps not surprising that arbitral tribunals have struggled with the interpretation of the two terms, often searching for their meaning in legal dictionaries—as well as in decisions of other tribunals. However, this has not led to a uniform approach. Based on recent jurisprudence, one can distinguish between two competing approaches to determining the substance of the two standards. These may be called, for lack of a better term, the ‘I know it when I see it’ approach and the ‘due process’ approach.

‘I know it when I see it’

This is an approach where the meaning of standards such as ‘arbitrary’ or ‘unreasonable’ is effectively defined as a function of the effect that the evidence and legal argument presented by the parties has on the arbitral tribunal. In other words, in order to be able to convince the arbitrators that the governmental measure in question is indeed ‘arbitrary’ or ‘unreasonable’, the claimant must demonstrate it to be ‘shocking’, or at least ‘surprising’, without the respondent being able to rebut this effect.

The most prominent example of this approach is the ELSI case, where the ICJ defined its understanding of what counts as ‘arbitrary’ in the following terms:

Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law [. . .]. It is wilful disregard of due process of law, an act which shocks, or at least surprises a sense of judicial propriety.45

The ‘ELSI standard’ is often cited in international investment arbitration as an appropriate way of describing what counts as arbitrary. Thus, in Noble Ventures the tribunal referred to the ELSI standard (having first noted that the relevant treaty did not define the notions of ‘arbitrary’ or ‘discriminatory’) and found that, based on the facts before it, the measures in question could not be considered as

45 ELSI case, above n. 4, para. 128 (emphasis added).
being ‘opposed to the rule of law’. In \textit{Lauder} the tribunal, again noting that the relevant treaty did not define an arbitrary measure, sought comfort from \textit{Black’s Law Dictionary} and concluded that the measure in question was arbitrary ‘because it was not founded on reason or fact, nor on the law, […] but on a mere fear reflecting national preference’. The \textit{Azurix} tribunal also resorted to dictionaries, both legal and others, and concluded that ‘the definition in \textit{ELSI} is close to the ordinary meaning of arbitrary since it emphasizes the element of willful disregard of the law’.

In \textit{Alex Genin} the tribunal was somewhat more elaborate:

The Tribunal has further considered whether the Bank of Estonia’s actions constituted an ‘arbitrary’ treatment of investment as that term is used in Article II(3)(b) of the BIT. In this regard, it is relevant that the Tribunal has found no evidence of discriminatory action. […] It is also relevant that the Tribunal, having regard to the totality of the evidence, regards the decision of the Bank of Estonia to withdraw the license as justified. In light of this conclusion, in order to amount to a violation of the BIT, any procedural irregularity that may have been present would have to amount to bad faith, a willful disregard of due process of law or an extreme insuffciency of action. None of these are present in the case at hand. In sum, the Tribunal does not regard the license withdrawal as an arbitrary act that violates the Tribunal’s ‘sense of judicial propriety’.

The \textit{Siemens} tribunal also agreed that ‘the definition in \textit{ELSI} is the most authoritative interpretation of international law and it is close to the ordinary meaning of the term emphasizing the willful disregard of the law’. However, it distanced itself from \textit{Alex Genin}, noting that ‘[t]he element of bad faith added by \textit{Genin} does not seem to find support either in the ordinary concept of arbitrariness or in the definition of the ICJ in \textit{ELSI}’.

Other, perhaps less than helpful formulations, have also been proposed. Thus, in \textit{MCI Power} the tribunal defined arbitrary treatment ‘as an act contrary to law’ and concluded that, while the governmental measures in question might ‘betray an unfriendly attitude’, they did not constitute ‘[…] unfair or inequitable, discriminatory or arbitrary treatment in violation of the parameters established by international law as reflected in the BIT’. This seems, frankly, somewhat circular: if arbitrariness is defined by reference to unlawfulness, then all ‘acts

\textsuperscript{46} \textit{Noble Ventures}, above n. 6, paras 177–178.
\textsuperscript{47} \textit{Lauder}, above n. 2, para. 232; according to the dictionary, below n. 54, arbitrary means ‘depending on individual discretion; […] founded on prejudice or preference rather than on reason or fact’.
\textsuperscript{48} \textit{Azurix}, above n. 30, para. 392.
\textsuperscript{50} \textit{Siemens A.G. v Argentina}, ICSID Case No. ARB/02/08, Award, 6 February 2007, para. 318.
\textsuperscript{51} Ibid.; see also \textit{Enron Corporation and Ponderosa Assets, L.P. v Argentine Republic}, ICSID Case No. ARB/01/3, Award, 22 May 2007, para. 281.
\textsuperscript{52} \textit{MCI Power Group L.C. and New Turbine, Inc v Ecuador}, ICSID Case No. ARB/03/6, Award, 31 July 2007, paras 369–371.
contrary to law' must also be considered arbitrary, which is hardly a tenable position.

The strengths and weaknesses of the 'I know it when I see it' approach are obvious. Its strength is that it provides the arbitral tribunal with ample flexibility in determining the substance of opaque standards such as 'arbitrary' and 'unreasonable'. The only thing that the tribunal is expected and indeed required to do is simply to sit and wait and let the evidence and argument speak for itself (albeit through the counsel). While tribunals following this approach may, and often do, refer to a legal dictionary to get a better sense of the substance of the standard in question, such referrals are not necessarily determinative. What is arbitrary or unreasonable can perhaps be described in a dictionary, but in order to understand what it really means, in a concrete context, one must look at the legal argument and evidence produced in the course of the arbitration. In other words, what counts as arbitrary or unreasonable is often a matter of rhetorical effect rather than a matter of semantic definition.

The weakness of the 'I know it when I see it' approach is that it tends to lead to an extreme case-by-case approach where the decision taken by one tribunal provides little guidance for another one facing a similar situation; it is for each tribunal to consider and determine, based on the evidence and argument before it, whether the measure in question is indeed 'shocking' or at least 'surprising'. As a result, the approach leaves the outcome of the case largely dependent on legal argument and evidence presented in the particular case at hand—in other words, on the professional skills of the lawyers handling the case and their ability to create the rhetorical effect of shock or surprise. Such effect is not something that can be found in a dictionary or in a textbook; it must be re-created in the concrete context.

The 'I know it when I see it' approach also effectively leaves open the relationship between the two standards—arbitrariness and unreasonableness. What these terms mean, concretely, can, again, only be assessed in the context of each case. Or, paraphrasing Justice Porter Stewart:

I shall not today attempt further to define the kinds of [governmental measures] I understand to be embraced within that shorthand description [arbitrary or unreasonable]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it [. . .].53

Due process approach

Unlike the 'I know it when I see it' approach, the due process approach seeks to proceduralize the determination of whether a particular governmental measure should be classified as arbitrary or unreasonable. In so doing, it not only enables a more technical approach to the determination of the content of these standards;

53 *Jacobellis v Ohio*, 378 US 184, Mr Justice Stewart, concurring (discussing the definition of unprotected, or 'obscene' speech under the First Amendment).
it also allows the arbitrator to get a better handle on the relationship, or indeed the ‘definition’ of the two standards.

Under the due process approach, the decision-maker assesses the international legality of the governmental measure in question by focusing on the relationship between the measure and its underlying policy justification. Has any rationale or justification been put forward in support of the measure in the first place? In the affirmative, is such a rationale or justification related to a legitimate governmental policy?

If the answer to the first question is in the negative, and if there is no conceivable rationale that could justify it, the measure can be classified as ‘arbitrary’. This ‘definition’ of arbitrary is also largely in line with the standard definition of arbitrary in legal dictionaries—an arbitrary measure can indeed be defined as a measure taken without any justification, actual or conceivable.\(^4\) If the answer to the first question is yes—if a rationale or justification has in fact been put forward for the measure—then the relevant question is whether there is a reasonable relationship between such a purported justification and a legitimate governmental policy. If there is no such relationship (eg if the measure discriminates between investors based on their eye colour), then the measure in question can be considered ‘unreasonable’.\(^5\)

Thus, under the due process approach the distinction between arbitrary and unreasonable governmental conduct boils down to this: a governmental measure can be considered ‘arbitrary’ if no justification or rationale at all has been provided for the measure (ie if there is no relationship at all, let alone a rational relationship, between the measure and a legitimate governmental policy); and it can be considered ‘unreasonable’ if a justification or a rationale has in fact been provided for the measure, but there is no reasonable (or rational) relationship between the purported justification and a legitimate governmental policy.

The due process approach seems less popular among arbitral tribunals than the ‘I know it when I see it’ approach. However, certain arbitral tribunals appear to have applied a sort of due process approach, as outlined above. In *Saluka* the tribunal first appeared to veer towards the ‘I know it when I see it’ approach, noting that, regardless of their generality, ‘[t]he standards formulated in Article 3 of the Treaty [including fair and equitable treatment and the prohibition of unreasonable or discriminatory measures], vague as they may be, are susceptible of specification through judicial practice and do in fact have sufficient legal content

\(^4\) See, eg, *Black’s Law Dictionary* (6th edn, 1990): ‘Arbitrary. In an unreasonable manner, as fixed or done capriciously, or at pleasure. Without adequate determining principle; not founded in the nature of things; nonrational; not done or acting according to reason or judgment; depending on the will alone; absolutely in power; capriciously; tyrannical; despotic; […]’.

\(^5\) This implies that there is a close relationship between unreasonable measures, on the one hand, and discrimination, on the other, which probably justifies why they are often coupled in the same standard. This also suggests that the ‘discrimination’ against which investors are protected by way if a non-impairment standard is broader than that included in the national treatment and most-favoured-nation treatment standards.
to allow the case to be decided on the basis of law'.\textsuperscript{56} However, when dealing with the non-impairment standard, it seemed to switch to a different approach. While observing that "impairment" means, according to its ordinary meaning, [...] any negative impact or effect caused by measures taken by the respondent, the tribunal went on to consider the meaning of the term 'reasonableness' in the following terms:

The standard of 'reasonableness' has no different meaning in this context than in the context of the 'fair and equitable treatment' standard with which it is associated; and the same is true with regard to the standard of 'non-discrimination'. The standard of 'reasonableness' therefore requires, in this context as well, a showing that the State's conduct bears a reasonable relationship to some rational policy, whereas the standard of 'non-discrimination' requires a rational justification of any differential treatment of a foreign investor.\textsuperscript{57}

By requiring that 'the State's conduct [must] bear [...] a reasonable relationship to some rational policy', the tribunal appears to have applied a procedural standard to assess the legality of the measure, thus adopting, effectively, the 'due process' approach. As noted above, the tribunal eventually found that the conduct of the respondent had indeed been 'unjustifiable and unreasonable' and thus in breach of the non-impairment standard.\textsuperscript{58}

In LG&E Energy the tribunal followed a similar approach. While citing first both the ELSI standard and Lauder, the tribunal went on to consider what 'arbitrariness' would mean in the context of the case before it:

It is apparent from the Bilateral Treaty that Argentina and the United States wanted to prohibit themselves from implementing measures that affect the investments of nationals of the other Party without engaging in a rational decision-making process. Such process would include a consideration of the effect of a measure on foreign investments and a balance of the interests of the State with any burden imposed on such investments.\textsuperscript{59}

The tribunal concluded that the acts of Argentina, 'though unfair and inequitable, were the result of reasoned judgment rather than simple disregard of the rule of law', and thus not arbitrary.\textsuperscript{60}

Unlike the 'I know it when I see it approach, the due process approach provides the decision-maker with a technique that allows it to review the international legality of governmental measures in a more objective and generalizable manner. This is its clear strength. However, the approach is not unproblematic. It is a powerful tool in the hands of arbitral tribunals, and in applying the standard,

\textsuperscript{56} Saluka, above n. 8, para. 284.
\textsuperscript{57} Ibid., paras 460–461 (emphasis added).
\textsuperscript{58} Ibid., para. 481.
\textsuperscript{59} LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc. v Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, paras 156–158 (emphasis added).
\textsuperscript{60} Ibid., paras 161–163.
Arbitrary and Unreasonable Measures

arbitral tribunals must tread a fine line between a mere procedural control (Has any justification been provided for the governmental measure? In the affirmative, does the justification rationally relate to any legitimate governmental policy?) and what may be termed a 'strict scrutiny' of governmental measures. In the latter approach, the decision-maker does not stop at determining whether there is any prima facie reasonable relationship between the purported justification and a legitimate governmental policy, but takes a step further, effectively shifting the burden of proving that there is indeed such a relationship to the government and requiring it to demonstrate that the measure in question not only serves a legitimate governmental purpose but is also necessary in the sense that there are no other, less restrictive alternative measures available.  

Were such a 'strict' standard of review adopted, this would effectively result in classifying all governmental regulations adversely affecting foreign investors as inherently suspect and create the assumption that the underlying policy purpose, or the governing legal principle, of multilateral and bilateral investment treaties is, in effect, the protection of foreign investment as a 'fundamental' right. This is a step that would likely have far-reaching consequences from a systemic point of view, converting as it would international investment arbitration from what is in substance a bilateral exercise into a quasi-multilateral regime. While there presently seems to be no evidence that arbitral tribunals have in fact taken such a step, this may be simply a matter of time. Since how else, except by assuming such a broad legal right or principle, can one conceptualize the distinction between permissible and impermissible discrimination between foreign and domestic investors, or as between foreign investors?  

The non-impairment standard and customary international law

The question of the relationship between the non-impairment standard and customary international law is equally complicated. Indeed, the question can be raised as to whether customary international law provides any protection against arbitrary or unreasonable measures, or whether these must be considered 'purely' treaty standards, ie standards that would not exist but for treaty law.

Most bilateral investment treaties remain silent on the issue. However, as noted above, Article 10(1) of the ECT does touch upon the relationship between treaty standards and customary international law:

Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favorable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting

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61 This is roughly the standard of review applied by WTO panels and the Appellate Body to discriminatory trade measures pursuant to Article XX ("General Exceptions") General Agreement on Tariffs and Trade (GATT). For further discussion see, eg, V. Heiskanen, 'Regulatory Philosophy of International Trade Law', 38 Journal of World Trade (2004) 1.
B. Non-impairment Standard: Three Perspectives

Parties a fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favorable than that required by international law, including treaty obligations.62

Thus, the ECT appears to say that, whatever the level of investment protection provided by the various standards incorporated in Article 10(1), ‘in no case’ shall it be less than the floor required by international law. This is a rather non-committal formulation and leaves open the question of the level of protection actually provided by customary international law. However, it is arguable that in particular the fair and equitable treatment standard is closely related to the customary international law standard and may be considered an emanation of the latter, which is traditionally considered to embody, inter alia, protection against denial of justice.63 In other words, the minimum treatment standard may be considered as providing, in itself, protection against failure to provide fair and equitable treatment, at least to the extent that the alleged breaches relate to the function of administration of justice.64 Thus, the sole effect of specifically incorporating the fair and equitable treatment standard in the ECT is, arguably, that Article 10(1) extends the applicability of this standard to governmental functions other than administration of justice (ie the exercise of legislative and executive powers).

However, this position is not uncontroversial, and arbitral tribunals have been hesitant to jump to conclusions. In ADF, where the claimant’s claims were

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62 Article 10(1) ECT (emphasis added).
63 Cf. Article 1105(1) NAFTA ('Minimum Standard of Treatment'), which provides that ‘[e]ach party shall accord to investments of investors of another party treatment in accordance with international law, including fair and equitable treatment and full security and protection’, and the interpretation of this provision adopted by the NAFTA Free Trade Commission, ‘Notes of Interpretation of Certain Chapter 11 Provisions’ (31 July 2001) (available at http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp). The Commission took the view that ‘Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment in government functions other than administration of justice’. For discussion see The Loewen Group, Inc and Raymond L. Loewen v United States, Final Award, 26 June 2003, paras 35–39.

See also J. Paulsson, Denial of Justice in International Law (2005) 6: ‘Although the expression [denial of justice] does not appear in [human rights conventions] and similar texts, it will continue to influence the way in which international treaties are applied. In turn, the application of treaty provisions will contribute to a modern understanding of the old doctrine. The reason for this inevitable cross-pollination is that the elements of the delict of denial of justice tend to reappear as treaty provisions, for example, when they proscribe “discrimination” or when they require “fair and equitable treatment.”’

64 At least one arbitral tribunal has also drawn the reverse conclusion, ie, that the fair and equitable treatment standard in the relevant BIT incorporated the international minimum standard. See Alex Genin v Estonia, above n. 49, para. 367: ‘While the exact content of the [fair and equitable treatment] standard is not clear, the Tribunal understands it to require an “international minimum standard” that is separate from domestic law, but that is, indeed, a minimum standard’ (emphasis in original; footnote omitted).
based, inter alia, on Article 1105 of the North Atlantic Free Trade Agreement (NAFTA), the tribunal first appeared to take the view (taking into account the Free Trade Commission's Interpretation of 31 July 2001) that the fair and equitable treatment and full security and protection standards were not part of customary international law 'as a general and autonomous requirement', although it did find that there was, in customary international law, 'a general customary international law standard' requiring such treatment:

We are not convinced that the Investor has shown the existence, in current customary international law, of a general and autonomous requirement (autonomous, that is, from specific rules addressing particular, limited, contexts) to accord fair and equitable treatment and full protection and security to foreign investments. The Investor, for instance, has not shown that such a requirement has been brought into the corpus of present day customary international law by the many hundreds of bilateral investment treaties now extant. [...] Any general requirement to accord ‘fair and equitable treatment’ and ‘full protection and security’ must be disciplined by being based upon State practice and judicial or arbitral caselaw or other sources of customary or general international law. [...] Without expressing a view on the Investor’s thesis, we ask: are the US measures here involved inconsistent with a general customary international law standard of treatment requiring a host State to accord ‘fair and equitable treatment’ and ‘full protection and security’ to foreign investments in its territory.65

Similarly, the Azurix tribunal, which operated under the US/Argentina BIT, reached the conclusion that the fair and equitable treatment and full security and protection standards, which according to the relevant provision of the BIT were not to fall below that ‘required by international law’, were no higher than required by international law. This was because:

[...] the minimum requirement to satisfy this standard has evolved and the Tribunal considers that its content is substantially similar whether the terms are interpreted in their ordinary meaning, as required by the Vienna Convention, or in accordance with customary international law.66

If the relationship between the fair and equitable and full protection security standards, on the one hand, and customary international law, on the other, is not entirely clear, this applies a fortiori to the non-impairment standard.67 It is arguable that the non-impairment standard does impose a standard of conduct higher than that required by customary international law, in particular to the extent that it requires governments to conduct their business in a ‘reasonable’ (and not only in a non-arbitrary) manner, or in a wholly non-discriminatory manner. This

65 *ADF Group Inc. v United States* (NAFTA Arbitration), ICSID Case No. ARB (AF)/00/1, Final Award, 9 January 2003, paras 183–186 (emphasis in original).
66 *Azurix*, above n. 30, para. 361.
67 Although it is arguable that the full protection and security standard, at least to the extent it coincides with the customary international law standard of due diligence, is indeed part of customary international law. See above nn. 10, 17 and accompanying text.
was the position adopted by the Alex Genin tribunal, at least with respect to the requirement of non-discrimination:

Article II(3)(b) of the BIT further requires that the signatory governments not impair investment by acting in an arbitrary or discriminatory way. In this regard, the Tribunal notes that international law generally requires that a state should refrain from ‘discriminatory’ treatment of aliens and alien property. Customary international law does not, however, require that a state treat all aliens (and alien property) equally, or that it treat aliens as favourably as nationals. Indeed, ‘even unjustifiable differentiation may not be actionable’.68

Indeed, for many governments the requirement that they always conduct their business in a ‘reasonable’ manner may be a tall order. Politics is not necessarily, and perhaps never, purely a matter of reason and, accordingly, of reasonableness. To the extent that governments have agreed in bilateral and multilateral treaties to have the ‘reasonableness’ of their regulations and other governmental measures reviewed by international arbitral tribunals, they have agreed to a system of control that is based on a standard that appears to be substantially higher than that required by customary international law. The implications of such heightened level of control have perhaps not been fully appreciated by governmental officials responsible for negotiation and implementation of investment protection treaties.

C. Conclusion

The case law reviewed in this chapter shows that the non-impairment standard rarely plays a dispositive role in international arbitral awards. While a breach of the non-impairment standard is often raised in international investment arbitration, it is not usually, if ever, relied upon by claimants as their primary or exclusive cause of action. Equally infrequently is it relied upon by arbitral tribunals as the ratio decidendi of their decisions.

However, even though the non-impairment standard may not be the leading cause of action, it does provide an interesting perspective to the relationship between the various substantive standards of investment protection and the methodology that arbitral tribunals have applied in determining the order in which the causes of action asserted by claimants should be examined and disposed of. Various approaches have been adopted, however, none of them appears to have become preponderant. Some tribunals have preferred to examine the causes of action in the order in which they have been asserted by the claimant, or in the order in which they are listed in the relevant treaty, sometimes tweaking the order for reasons of judicial economy (frequently giving priority to an

68 Genin, above n. 49, para. 368 (footnote omitted).
expropriation claim, if asserted) or legal methodology (applying, apparently, concepts of legal 'hierarchy' or doctrines such as *lex specialis*).

By contrast, some tribunals, in particular those operating under the ECT, appear to have concluded that they have full freedom to select the legal basis of their decision and to disregard the order in which the claimant has chosen to argue its case, without having to provide any explanation or justification for the choice made. Such an approach, which may be consistent with and justified under the *jura novit curia* doctrine, is not necessarily inappropriate. However, those who prefer the arbitration paradigm (as opposed to the adjudication paradigm) might justifiably argue that the *jura novit curia* doctrine must be applied with particular care in an arbitration context, if at all. As the jurisdiction of BIT tribunals is based on the parties' consent (even if not on one expressed in a contract), it is not necessarily appropriate to 'arbitrate by ambush', that is, make findings that take the parties by surprise. This, however, is undoubtedly an area where reasonable persons may reasonably disagree, which of course is unlikely to make the issue go away.

From a substantive perspective, the non-impairment standard imposes a standard of conduct on governments that is arguably substantially higher than that required by customary international law. As the body of international arbitral jurisprudence grows, and as governments become more aware of the standard of conduct that is expected from them under the various multilateral and bilateral investment protection treaties—and, consequently, as they become more sophisticated in their treatment of foreign investors—the non-impairment standard is likely to gain in importance. Whether this will lead to systemic changes in the field of foreign investment protection, remains to be seen.