UNIVERSIDADE DE SÃO PAULO
INSTITUTO DE RELAÇÕES INTERNACIONAIS

NATALI FRANCINE CINELLI MOREIRA

How the origins of international investment law are reflected in arbitration awards: A study on the 2001 Argentinean crisis

São Paulo
2019

NATALI FRANCINE CINELLI MOREIRA

How the origins of international investment law are reflected in arbitration awards: A study on the 2001 Argentinean crisis

Dissertação apresentada ao Instituto de Relações Internacionais da Universidade de São Paulo para obtenção do título de Mestre em Ciências.

Orientador: Prof. Dr. Yi Shin Tang
Co-orientador: Prof. Dr. Felipe Pereira Loureiro

Versão corrigida
A versão original se encontra disponível no Instituto de Relações Internacionais da Universidade de São Paulo - USP

São Paulo
2019

Autorizo a reprodução e divulgação total ou parcial deste trabalho, por qualquer meio convencional ou eletrônico, para fins de estudo e pesquisa, desde que citada a fonte.

Catalogação na publicação
Serviço de Biblioteca e Documentação
Instituto de Relações Internacionais da Universidade de São Paulo

Moreira, Natali Francine Cinelli
How the origins of international investment law are reflected in arbitration awards: a study on the 2001 Argentinean crisis / Natali Francine Cinelli Moreira ; orientador: Yi Shin Tang ; coorientador: Felipe Pereira Loureiro. – São Paulo, 2019.
159 p.

Dissertação (Mestrado) – Instituto de Relações Internacionais. Universidade de São Paulo, São Paulo, 2019.

1. Direito internacional 2. Direito internacional dos investimentos 3. Imperialismo 4. Arbitragem investidor-estado 5. Crises financeiras 6. Soberania 7. Argentina I. Tang, Yi Shin, orient. II. Loureiro, Felipe Pereira, coorient. III. Título.

CDD – 341

Responsável: Giseli Adornato de Aguiar - CRB-8/6813

Nome: MOREIRA, Natali Francine Cinelli

Título: How the origins of international investment law are reflected in arbitration awards: A study on the 2001 Argentinean crisis

Dissertação apresentada ao Instituto de Relações Internacionais da Universidade de São Paulo para obtenção do título de Mestre em Ciências.

Aprovado em: 17 de fevereiro de 2019

Banca Examinadora

Prof. Dr. Yi Shin Tang
Instituição: Instituto de Relações Internacionais da Universidade de São Paulo
Julgamento: _____

Prof. Dr. Geraldo de Camargo Vidigal Neto
Instituição: University of Amsterdam
Julgamento: _____

Profa. Dra. Nora Matilde Rachman
Instituição: Universidade Presbiteriana Mackenzie
Julgamento: _____

AGRADECIMENTOS

À minha família, por sempre me incentivar a continuar com os meus estudos.

Ao meu companheiro Rafael, serei sempre grata por ter me apoiado incondicionalmente nessa jornada. Obrigada por ter acreditado em mim quando nem eu mesma acreditava.

Às queridas amigas que o IRI-USP me deu de presente, Alessandra, Anna, Kelly e Nathalia. Obrigada por terem feito esse caminho menos solitário. Não teria chegado ao fim dessa etapa se não fosse pelo carinho, cumplicidade e amizade de vocês.

Aos meus queridos orientadores, Professores Drs. Yi Shin Tang e Felipe Pereira Loureiro. Serei sempre grata por toda ajuda e ensinamentos ao longo desses anos. Obrigada por terem acreditado em mim e no meu trabalho, ainda que em meio a tantas dúvidas (e alguns momentos de choro). Vocês são minha inspiração para seguir na carreira acadêmica.

Agradeço, ainda, à Coordenação de Aperfeiçoamento de Pessoal de Nível Superior – CAPES, pelo financiamento da minha pesquisa.

RESUMO

MOREIRA, Natali Francine Cinelli. Como as origens do direito internacional dos investimentos se refletem nas sentenças arbitrais: um estudo sobre a crise argentina de 2001. 2019. 159 f. Dissertação (Mestrado) – Instituto de Relações Internacionais, Universidade de São Paulo, São Paulo, 2019.

O direito dos investimentos é produto de disputas de poder entre estados exportadores e importadores de capital. A origem do direito dos investimentos remonta a tempos de imperialismo. Tratados contemporâneos de investimentos incluem, sob o manto de alegada despolitização, antigos standards de proteção dos investidores sob novas formas. É o que ocorre com o Tratamento Justo e Igualitário, por exemplo; as origens do standard podem ser traçadas até o tratamento mínimo concedido aos estrangeiros, um instrumento bastante utilizado pelos estados exportadores de capital para atender seus anseios imperialistas no século XIX. Tais standards de proteção são amplos e os árbitros possuem ampla margem de discrição quando os interpretam. Entendemos que as origens imperialistas do direito internacional dos investimentos influenciam os árbitros na tomada de decisões, gerando um viés no sistema em favor dos investidores e seus estados de origem. Partimos da crise financeira argentina de 2001 como estudo de caso, e analisamos todas as sentenças proferidas por tribunais arbitrais no contexto desse período emergencial. Focamos a análise no Tratamento Justo e Igualitário, pois investidores repetidamente invocaram esse standard para requerer a condenação da Argentina, e, na maioria dos casos, os árbitros utilizaram-se dele para condenar o país. Encontramos evidências de que as origens imperialistas do direito dos investimentos influenciam a tomada de decisões. Ao replicar padrões de desigualdade e submissão típicos de tempos imperialistas, os árbitros favorecem os investidores de forma inadequada. Encontramos, assim, evidências de que o regime legal para a proteção do investimento estrangeiro não é tão imparcial como dito pelos apoiadores do sistema.

Palavras-chave: direito internacional; direito internacional dos investimentos; imperialismo; arbitragem investidor-estado; crises financeiras; soberania; Argentina

ABSTRACT

MOREIRA, Natali Francine Cinelli. How the origins of international investment law are reflected in arbitration awards: A study on the 2001 Argentinean crisis. 2019. 159 f. Dissertação (Mestrado) – Instituto de Relações Internacionais, Universidade de São Paulo, São Paulo, 2019.

International investment law is the product of power struggles between capital-exporting and capital-importing countries, whose origins may be traced back to imperial times. Investment treaties include old standards of investors' protection under a new form and allegedly under a veil of depoliticization. This is what happened with the Fair and Equitable Treatment standard; the origins of this standard may be traced to the international minimum treatment of aliens, a well-known instrument that capital-exporters used to serve their expansionist intent during the nineteenth century. These standards are very extensive, and arbitrators have wide discretion when interpreting them. We argue that the imperial origins of international investment law influence arbitrators during decision-making, leading to a pervasive bias in the system in favor of investors and their home states. We use the 2001 Argentinean financial crisis as a case study, and we analyze all available awards rendered by investor-state tribunals in the context of this emergency period. We focus the analysis on the Fair and Equitable Treatment, for investors repeatedly invoked the breach of this standard and, in almost all cases, arbitrators used it to find Argentina responsible for the alleged damages. We found evidence that the imperial origins of investment law indeed influences decision-making. By replicating patterns of inequality and subjugation typical of imperial times, arbitrators inadequately favored investors. We thus have found evidence that the legal framework for the protection of international investment is not so impartial as it is claimed to be.

Key-words: international law; international investment law; imperialism; investor-state arbitration; financial crisis; sovereignty; Argentina

LIST OF ABBREVIATIONS

BIT	Bilateral Investment Treaty
ICSID	International Centre for Settlement of Investment Disputes
FET	Fair and Equitable Treatment
IMF	International Monetary Fund
The AWG case	AWG Group v. Argentine Republic, no reference (constituted under UNCITRAL Arbitration Rules)
The BG case	BG Group Plc. v. Argentine Republic, no reference (constituted under UNCITRAL Arbitration Rules)
The CMS case	CMS Gas Transmission Company v. Argentine Republic, ICSID case no. ARB/01/8
The Continental case	Continental Casualty Company v. Argentine Republic, ICSID case no. ARB/03/9
The EDF case	EDF International S.A., SAUR International S.A. and Leon Participaciones Argentinas S.A. v. Argentine Republic, ICSID case no. ARB/03/23
The El Paso case	El Paso Energy International Company v. Argentine Republic, ICSID case no. ARB/03/15
The Enron case	Enron Creditors Ponderosa Assets, L.P. v. Argentine Republic, ICSID case no. ARB/01/3
The Hochtief case	HOCHTIEF Aktiengellschaft v. Argentine Republic, ICSID case no. ARB/07/31
The Impregilo case	Impregilo SPA v. Argentine Republic, ICSID case no. ARB/07/17
The LG&E case	LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc. v. Argentine Republic, ICSID case no. ARB/02/1
The Metalpar case	Metalpar S.A. and Buen Aire S.A. v. Argentine Republic, ICSID case no. ARB/03/5
The Mobil case	Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina Sociedad Anónima v. Argentine Republic, ICSID case no. ARB/04/16

The National Grid case	National Grid P.L.C. v. Argentine Republic, no reference (constituted under UNCITRAL Arbitration Rules)
The SAUR case	SAUR International S.A. v. Argentine Republic, ICSID case no. ARB/04/4
The Sempra case	Sempra Energy International v. Argentine Republic, ICSID case no. ARB/02/16
The Suez case (i)	Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A v. Argentine Republic, ICSID case no. ARB/03/17
The Suez case (ii)	Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID case no. ARB/03/19
The Teinver case	Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic, ICSID case no. ARB/09/1
The Total case	Total S.A. v. Argentine Republic, ICSID case no. ARB/04/1
The Urbaser case	Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic, ICSID case no. ARB/07/26

SUMMARY

INTRODUCTION

Argentina faces a difficult economic situation nowadays. The national currency, the peso, is highly devaluated – one U.S. dollar bought 57 pesos on September 18, 2019.[1] The government imposed capital controls in September 2019, and the country purchases of U.S. dollars have been limited to USD 10,000 a month.[2] A annual inflation rate reached 47% in 2018, the highest rate over the past 27 years.[3] Buenos Aires resorted to the IMF for financial support in 2018; some months later though, Argentina requested additional time to pay for its foreign debt.[4] The country´s socioeconomic outlook is also alarming; in 2018, 32% of the Argentinean population lived in poverty.[5] Among the most vulnerable social groups, such as children and the elderly, this proportion is even higher, reaching roughly half of its members.[6] In August and September 2019, people took the streets in protests against poor local conditions.[7]

This brief portrait could have easily fit Argentina´s situation in 2001 and 2002, when the country experienced its most severe financial crisis to date. Sadly, though, as we know, Buenos Aires is again at the center of a serious economic crisis. Investors wonder whether she will be able to go through this turmoil without breaking previous financial commitments.

In the follow-up of the 2001 financial crisis, Argentina broke some previous commitments, infuriating investors. The country became the world´s largest defendant in arbitrations between investors and host states. Arbitrators sentenced her to pay approximately USD 2 billion to private investors as compensation for alleged damages. Tribunals virtually ignored the emergency that the country was facing, privileging investors and their private property over Argentina´s public interests. The past seems

[1] See González (2019a). In September 2018, 1 U.S. dollar bought approximately 40 pesos.
[2] See Argentina's… (2019).
[3] See González (2019d). The number refers to the total inflation rate of 2018.
[4] See El-Erian (2019). Up to September 2019, IMF has sent USD 44 billion to Argentina under the largest funding arrangement of IMF´s history – executed in 2018. On August 28, 2019 Argentina requested extra time to pay her creditors.
[5] See González (2019c). The data refers to the second semester of 2018.
[6] See Tuñón (2019). The data refers to the period between 2017 and 2018.
[7] See González (2019b). Trade unions have organized major manifestations against the deterioration of labor conditions. On September 10, 2019, Buenos Aires was the stage of an extensive strike.

to be back haunting Argentina, and a scenario where she may end up at the center of a new arbitration saga does not seem so far away.

This Master´s thesis aims to understand how international investment law perpetuates the subjugation of capital-importing countries to the interests of capital-exporting nations. The 2001 Argentinean crisis symbolizes a legitimacy deficit that international investment law has been facing for a long time. Scholars have appointed several issues that came out of the Argentinean awards which represents the crisis that the legal regime for protection of foreign investments is going through. Among these issues, stand out the low maneuverability that host states enjoy, when it comes to the interpretation of the Fair and Equitable Treatment (FET) clause and the protection of investors' expectations. Similarly, the existence of contradictory awards is also commonly referred to when the legitimacy crisis is discussed - especially when the cases refer to similar questions of law and facts relevant for capital-importing countries, including the state of necessity to exempt liability. These issues lead to the perception that the system is biased towards traditionally capital-exporting countries.[8]

Even though the Argentinean arbitrations have been widely studied, there are still important gaps. Few scholars have attempted to analyze the Argentinean cases considering the historical elements that still shape them. Virtually no attention has been paid to the origins of the system, which is key to understand to what extent recent awards have been contributing to the legitimacy deficit that the regime for protection of foreign investments is going through. Authors who claim that we cannot fully understand the present without seriously taking into account the influences of an imperialist past have inspired us to suggest a fresh look into these awards.[9]

Initially, we propose to understand the origins of the international investment law. We suggest these origins are rooted in power relations embedded in the process of Western expansionism. As we will see, these origins still impact, and in significant ways, the current manifestation of the regime. Despite claims of neutrality and depoliticization, bilateral investment treaties (BITs) and investor-state arbitration carry

[8] We explore the legitimacy crisis and the Argentinean arbitration saga in chapter 3.
[9] We mainly dialogue with Miles (2013) and Anghie (2004) to develop our arguments. See especially chapter 1.

much of the interests of capital-exporting countries; they are designed to protect mainly the investors´ needs.[10]

We then take a deeper look at the FET, as investors repeatedly invoked this standard in Argentinean cases. Considering how ample and vague the FET is, arbitrators had wide room for interpretation. Nonetheless, they frequently rejected a more balanced approach considering the interests of investors and host states, and ended up legitimizing the use of the standard as an instrument of informal imperialism.[11] We discuss the standard from its inception, influenced by the so-called "colonial encounter", to the current expansive – and clearly partial – interpretation that arbitral tribunals have given to the clause. In this sense, we demonstrate that the standard carries the burden of historical power relations that are intrinsic to the international investment law.[12]

Taking this historical background as a key analytical parameter, we then investigate the arbitration awards related to the 2001 Argentinean financial crisis. Kate Miles (2018) argues that historical ideas still influence modern practices; we depart from this idea to understand to what extent the colonial and imperial pasts have manifested themselves in the current regime, especially when it comes to arbitrations between host states and foreign investors. Employing Miles' theoretical framework (2018 and 2013), we used the characteristics that the author presented as representative of an imperial past to analyze the arbitral decisions. Specifically, we looked for elements that showed whether arbitrators (i) interpreted standards related to the protection of investors in an excessively high-level fashion; (ii) privileged private over public rights; (iii) analyzed the cases based on notions of control and order from the perspective of investors and their home states; and (iv) employed a discourse that presented itself as non-political. We found clear and abundant evidence confirming all these categories.[13]

---

[10] We discuss the origins of international investment law in chapter 1.
[11] We will discuss the idea of informal imperialism in chapter 2. For now, it suffices to say that we understand informal imperialism as a means to further economic interests without integrating new regions to a colonial subjugation; Western countries made use of a more subtle political and economic elements of expansion, creating an informal net of countries under their economic dependence.
[12] We discuss the FET in-depth in chapter 2.
[13] See chapter 3 for the methodology we adopted, as well as for the results we achieved.

Enjoying a wide room for interpretation, arbitrators opted for interpreting the FET in a one-sided manner; and we suggest that they choose this path because the current manifestation of international investment law carries a past of power struggles. The construction of the FET is embedded in imperialism, influencing how arbitrators read the standard. They constantly place the protection of investors and their property at the center of the system; and if this is how they commonly decide, the system is biased towards investors and their home states. In a biased regime, host states will continuously assume the role of subjugation, and Argentina may be on the verge to experience (again) this situation.

Our work suggests then that responses to the legitimacy crisis that the foreign investment regime faces cannot neglect the imperial origins of the international investment law. The foreign investment regime is indeed biased, reflecting the interests of the powerful who built it in the first place. The imperial past is still much present in the current manifestation of the international investment law, be it through BITs or investor-state arbitrations. Even though our Master´s thesis cannot suggest a response to this legitimacy crisis, we understand that it has systemic proportions, given the imperial origins of the international investment law. As Lorca (2012, p. 1054) has pointed out, international (investment) law has an emancipatory potential. However, to this end, the legal protection of foreign investments must be reconsidered by means of a common effort of capital-importing and capital-exporting countries; for fully emancipation, the international investment regime has to break with this problematic history (MILES, 2018; SCHILL; TAMS; HOFMANN, 2018). No effective answer may forget (again) host states.

We admit that our argument has its own limitations. In very broad lines, we acknowledge that decision-making is multifaceted and we did not have access to the case records of the disputes we analyzed, and, therefore, we could not have a full account of the decision-making process. Moreover, we also know that arbitrators are certainly not the only ones to be blamed for the legitimacy crisis.[14]

[14] We explore these caveats in-depth in chapter 3.

We are also aware that there have been some recent efforts to respond to the legitimacy crisis; however, we understand they are insufficient to write off the imperial origins of the international investment law. Traditional capital-importers such as South-Africa, India, and Brazil have presented new proposals for investment regulation over the past few years, offering a way out of the mainstream protection to foreign investments – including BITs and investors-state arbitrations.[15] Nonetheless, these proposals have not been adopted by many countries so far; certainly not by any of the powerful ones that have conditions to set the agenda.[16] Capital-exporters, on their turn, have also proposed some changes in the existing structures. For instance, they have been revisiting the contours of the FET standard and the policy maneuver that host states enjoy in new BITs. Nonetheless, they do it to serve their interests, for the West has now been repeatedly sitting in the position of host states.[17] Nothing different from how they have been behaving through the past centuries.

This Master´s thesis has five sections, including this introduction. In chapter 1, we will address the origins of the international investment law and the power struggles that have shaped the current manifestation of the legal foreign investment regime. In chapter 2, we will analyze the historical and legal background of the FET standard. In chapter 3, we will conduct an in-depth analysis of the awards regarding the Argentinean 2001 financial crisis, demonstrating how the imperial origins of the international investment have influenced the arbitrators' decision. Argentinean sovereignty has been made flexible to serve the interests of foreign investors; nothing much different from how capital-exporters have acted since the seventeenth century to protect their nationals abroad. In the final section, we briefly present our conclusions.

[15] For new models of international investment regulation, see Morosini and Badin (2017). We discuss this issue in chapter 2.
[16] See Vidigal and Stevens (2018) for a full account of the model that Brazil has proposed since 2015, the Cooperation and Investment Facilitation Agreements (CFIAs). It is yet to be seen whether they will become an alternative for the traditional BITs model.
[17] We will better discuss it in chapter 3.

CHAPTER 1

On power and empire: The origins of international investment law

1.1 Introduction

The modern history of international law is usually told as a progressive narrative.[18] From the scholars of Salamanca in the sixteenth century to the end of the Second World War, it is told linearly as the history of rules which emerged among European states to govern their relationships as sovereigns, and then, later on, to govern their relations with non-European countries, eventually culminating in the widespread of universal, neutral and unbiased norms to reign the relations of the entire globe (FASSBENDER; PETERS, 2012).[19] This history is partial, though.

Several critical approaches have flourished in the last decades, contesting the mainstream history based on an alleged apolitical and procedurally objective international law (BYERS, 1995).[20] The role of power relations in the making and shaping of international law has been reassessed, and several studies have focused specifically on the influence that colonization and imperialism have exerted in international norms that are still in force or in those that originally inspired the creation of current ones.[21] It has been argued that the foundations of modern international law

[18] The modern history of international law is usually told excluding pre- and early history as well as Greco-Roman antiquity. The Middle Ages are commonly included only as a passage to modern times, which is usually traced back to the sixteenth century. For a better assessment of the period of modern international law, see Fassbender and Peters (2012).

[19] The end of the Second World War and the beginning of the United Nations era are commonly appointed as a caesura in international law and world history; the law currently in force is essentially that of the era of the United Nations from 1945 onwards. See Fassbender and Peters (2012).

[20] When presenting the Third World Approaches to International Law as one of the critical perspectives, Gathii (2011) emphasizes it as a decentralized network with no single authoritative voice; there are multiple fields of contestation of international law including theories such as critical, feminist, post-modern, Lat-Crit, post-colonial, Marxist, critical race and so on. See Franco (2015).

[21] We will follow Anghie (2004) and Miles (2013), using imperialism and colonialism interchangeably. This is not to say that both terms have no different meanings. Colonialism tends to be referred to as the practice of settling territories, and imperialism is generally used to practices of an empire. Imperialism commonly refers to practices of dominance, commercial and political expansionism, involving economic exploitation, all beyond actual annexation of territories. Colonialism has a more formal implication, and imperialism a more informal one. Nonetheless, we will use both to refer to the informal economic, political and cultural influence that powerful Western states, traditionally capital-exporters, exert over non-Western states, traditionally capital-importers. We will also use informal imperialism, as advanced by Gallagher and Robinson (1953); we will return to this issue in chapter 2. For an account of colonialism and imperialism, see Gathii (2007).

are entangled with Western commercial and political expansionism, and, through these lenses, the literature has reassessed the history of international law to better understand how the interests of powerful countries have dominated the creation of international norms and how the international legal system has come to where it is now (MILES, 2018; ANGHIE, 2004).[22]

The history of international investment law is no different from the history of international law; they both are intertwined (MILES, 2018). As part of the bigger picture, the origins of international investment law are also rooted in power relations and Western expansionism, even though they are argued to be neutral and depoliticized, allegedly detached from interests and dominant ideas at the moment of their creation (SORNARAJAH, 2015). These roots have been replicated throughout the centuries, culminating in a legal framework that is excessively protective of capital-exporting countries (MILES, 2013). The current manifestation of investment law, therefore, reflects its origins (ANGHIE, 2004; ORFORD, 2012).

This is the story we will tell in this Master's thesis: A tale of power and empire that resulted in the making of international investment law as we know. We will do it through a case study about how the arbitrators who decided the disputes which emerged out of the 2001 Argentinean financial crisis has ripped off the country's sovereignty. To reanalyze the Argentinean awards, we will walk together with those who understand that international investment law has imperial origins that have found a way into the current manifestation of the regime (MILES, 2018; ANGHIE, 2004).[23]

This is how the chapter will follow. We will first discuss the origins of international law and how it has been constructed according to the interest of powerful countries. Then, we will focus on international investment law, addressing how its history is also entwined with the expansionism of Western countries. Finally, we will demonstrate how the contemporary manifestation of international investment law has never broken with its imperial origins, giving special attention to how its vocabulary became so centered on the protection of investors and private property. To acknowledge that the past is

[22] For Orford (2012), the law is a site for the transmission of inherited obligations from the past. The past is not gone; it is retrieved as a source of rationalization of present obligation.
[23] For a divergent perspective, see Alvarez (2011).

much alive in the contemporary manifestation of international investment law will help us to reanalyze the Argentinean arbitration saga under a different perspective.

1.2 Power and hegemony: The construction of international law through the interests of (traditionally) capital-exporting countries

The mainstream history of modern international law is centered on Europe; initially on the relationship among European countries, and, later on, on their relationship with non-European countries.[24] Colonization, commercial and political expansionism, the scramble for Africa, all is under the auspices of international law.[25] The European experience is widespread throughout the centuries progressively and continuously, to further its supposedly civilizing mission, constantly making the efforts to bring non-Europeans to a "universal" order - which, unsurprisingly, coincides with European ideals.[26] By the end of the Second World War, and, especially, once decolonization took place, international law was expanded equally and universally to the globe.[27] This story acknowledges international law as a neutral and objective process.

[24] Since the sixteenth century, Europe has been made of powerful countries. From the sixteenth century colonization, going through mercantilist expansionism in the seventeenth century, until the industrial revolution in the eighteenth century, they dominated international politics and commerce. During the nineteenth century, they expanded their control over less powerful countries, and only with the twentieth century decolonization is that all states acceded to the international community. For a long time, they were the only sovereign members of the international community. As to the export of capital, in the late eighteenth and nineteenth centuries, industrialization generated capital surpluses that fueled foreign investment on a large scale. Great Britain and a few other Western countries, such as the United States, were involved in the industrialization phenomena (JOHNSON; GIMBLETT, 2012). Long after the industrial revolution, these same European and Western countries are still the main capital exporters. This scenario has recently begun to change, and, nowadays, countries as China and Russia have also become relevant capital exporters (UNCTAD, 2018). In this work, we refer to traditionally capital-exporters as Europe, the United States, Western countries, powerful countries, capital-exporters or home states. For traditionally capital-importers, we refer to virtually all remaining countries that are not Europeans or Western countries. We will refer to them as non-European, non-Western, less powerful, South, Global South, capital-importers or host states.

[25] See Martineau (2018), Lorca (2010), Anghie (2004), and Koskenniemi (2001).

[26] European countries claim the character of universal. For European ideals to be truly universal, it requires non-Europeans to be included in the act of self-constitution. This dynamic, apparently contradictory, is the *raison d´être* of international law: It contains both a promise of freedom and an imperializing peril. Non-European countries are granted legal status and inherit international law as envisioned by Europe while conceding it the so desired universal character. See Pahuja (2005). For the plurality of international law, regardless of what European countries advocated, see Lorca (2010).

[27] For mainstream history, international law expanded after the twentieth century decolonization, when non-Europeans were admitted to the international community. During the nineteenth century, access to international society was ruled by the standard of civilization. Upon decolonization, membership was determined by the doctrine of recognition (sovereign countries so acknowledged are members). See Lorca (2010).

This is the most well-known story about the origins of international law. However, this Eurocentric account is partial; it deems irrelevant the power struggles inherent to the construction of international law, as well as other experiences and legal relations outside European boundaries (FASSBENDER; PETERS, 2012; ANGHIE, 2004).[28] A Eurocentric perspective on international law serves an ideological function, universalizing and legitimizing a European view of the world.[29] A view from Europe neglects different legal experiences shared by non-Europeans (LORCA, 2012).[30]

It is no surprise that this story of progress, peace, and justice has gained objectors, distrustful of the plausibility of inherited narratives of international law. If legal scholars who support mainstream history have generally assumed that international law is apolitical, created through objective procedures, scholars who challenge this European hegemony, on the other hand, place power struggles right at the center of the making and shaping of international law (KOSKENNIEMI, 2013; BYERS, 1995).[31]

---

[28] Several authors acknowledge mainstream international law history as deeply Eurocentric. See Koskenniemi (2013), Miles (2013), and Anghie (2004).

[29] Dupuy (2005) rejects that the instrumentalization of international law is a European specialty. For him, all States use international law for their purposes. This idea would prove two points. Firstly, Europeans may be the first ones to do it, but they are not the only ones. Secondly, universal values could not be merely reduced to the partisan promotion of selfish interests. We disagree. Non-Europeans using international law to further their interests only indicates they are following a pattern traditionally used by Europe, replicating over less powerful states imperial techniques that Europe uses for centuries; imperial, in this context, does not mean formal colonization as in the nineteenth century, but rather a subtler form of imposing political and commercial preferences. And even if non-former imperial powers are attempting to instrumentalize international law, they rarely are successful. During the 1960s and 1970s, non-European countries tried to mold international law according to their interests. Concepts such as sovereignty over natural resources and New International Economic Order were forcefully rejected by European states, preventing them to become customary international law. See Schrijver (1997).

[30] For an account of non-European experiences, see Gathi (2007). The author describes how institutions and norms familiar to the British (including class society and rules of private property) were imposed on the East African Protectorate (now, Kenya) – a British protectorate by the end of the nineteenth century –, leaving behind a communal society and kinship authority to be aligned to British interests.

[31] Power relations are not the only factor influencing international law. To subjugate international law to a single causal determinant – e.g. imperial interests – is no less reductionist than the claim that law is apolitical. According to a constructive approach, other factors influence international law, such as the claims and interests of society and its participants. Nonetheless, power relations have indeed influenced the creation of international law, reflecting the interest of the powerful. See Byers (1995) and Koskenniemi (2013). For a constructive approach to international law, see Brunnée and Toope (2000). For a definition of power, see Byers (1995, p. 113): “Power is the ability of one actor to compel or significantly influence the behavior of another. It may be applied through the use or threat of force, economic incentives or penalties, or a variety of social pressures. It may be derived from several different sources, including military capabilities, wealth or moral authority. It may be augmented or constrained by concepts, values, institutions, and rules. It is above all a relational concept, in that the ability to compel or influence always depends on the relative abilities of the different actors concerned either to apply or resist pressure.”

International law is a process through which political preferences of powerful actors are articulated into legal claims. The origins of international law cannot be detached from political contestation that serves the interest of powerful countries. International law is a process that translates such interests; it is a hegemonic technique. Koskenniemi (2004) argues that international law is constructed through *hegemonic contestation*, a process that powerful actors use to turn their preferences, world view, and practices into the valid universal norm. Moreover, Koskenniemi points out, powerful countries not only shape the law but also set the agenda, marginalizing problems that are not sensitive to them.

Besides Koskenniemi, other authors also acknowledge the crucial role of power over international law. Benton suggests legal institutions have emerged through “repetitive assertions of power and response to power” (BENTON, 2002, p. 10-11), making clear the interplay of power and the emergence of international legal rules. Sornarajah (2015) also understands international law through the lenses of power and hegemonic relations. He claims hegemonic states set universally applicable norms, as their practice is more likely to be followed by others and to be converted into customary law. When their interests change, the rules also change, so they constantly serve the needs of the most powerful. The legitimacy of a norm is thus associated with power, which enables its acceptance.

The influence that power has on the construction of international law may be used as an instrument of domination. International law translates dominant ideas of the most powerful into universal rules, which are claimed to have naturally developed. The construction of an international law that is deemed universal disempowers the party to which it applies; it subordinates less powerful countries, as the international law they receive under the veil of neutrality is, in fact, the creation of powerful countries (CHIMNI, 2006; ANGHIE, 2004; BYERS, 1995).

Power indeed shapes the law. The alleged neutrality of international law only served to ensure no further inquiries were made. Western countries wanted to avoid questions such as how the rules were created and shaped or to whom international law served

(SORNARAJAH, 2015).[32] When scholars proposed to take a fresh look at the mainstream history of international law, they had the opportunity to expose its dark side. The relationship between international law, colonialism, and imperialism became central in this quest. One of the main historical facts to be reassessed was the encounter between Europeans and non-Europeans because international law needed to achieve one of its main characteristics: the universality (LORCA, 2012).

One of the most well-known scholars who challenge the mainstream history of international law is Antony Anghie. He is one of the voices of a growing network of authors that dispute dominant narratives.[33] His main argument is that colonialism is essential for the construction of international law. The so-called "colonial encounter" molded international law – until present days – in a way to further European interests and to subjugate non-Europeans to these rules as if they were indeed universal and neutral:

> (…) colonialism was central to the constitution of international law in that many of the basic doctrines of international law – including, most importantly, sovereignty doctrine – were forged out of the attempt to create a legal system that could account for relations between the European and non-European worlds in the colonial confrontation. In making this argument, I focus on the colonial origins of international law; I attempt, furthermore, to show how these origins create a set of structures that continually repeat themselves at various stages in the history of international law. In so doing I seek to challenge conventional histories of the discipline which present colonialism as peripheral, an unfortunate episode that has long since been overcome by the heroic initiatives of decolonization that resulted in the emergence of colonial societies as independent, sovereign states. (ANGHIE, 2004, p. 3)

Power struggles are essential to Anghie´s view. For him, international law was (and still is) an instrument to extend and universalize the European experience. From the initial encounter, the history of international law develops between a sovereign European and a non-European to whom sovereignty was denied. They were not equal,

[32] This line of arguments disavows the role played by Europeans in molding international to legitimize colonialism, imperialism and the *lato sensu* subjugation of non-Europeans. See Lorca (2012).
[33] Anghie is one prominent voice of the Third World Approaches to International Law. See footnote n. 20.

and international law legitimized it. This situation remained through centuries; from the sixteenth century, Europe has been using the civilizing mission under different forms to further its interests. Colonialism has found the means to somehow persist in international law - in a pervasive and foundational way - legitimizing the subjugation of less powerful countries to the interests of the powerful (ANGHIE, 2004).

To make his point, Anghie (2004) revisits crucial moments of the history of international law. Beginning with Francisco de Vitoria in the sixteenth century and his studies on the property, trade, commerce, and warfare, Anghie reconceptualized existing doctrines and conceived new ones to deal with the problem of the encounter with the Indians. Vitoria acknowledged Indians as human beings who possessed the capacity of reason and subjected them to the *jus gentium*, which reflected Spanish ideals of the world, such as the protection of property rights and the right to travel and sojourn. However, he also argued that Indians are different from the Spanish, as their social and cultural practices mismatch those of *jus gentium*. Consequently, as *jus gentium* was universal and binding, the Spanish did not violate international law going to war against Indians who refused to obey. The contours of international law were shaped by what Europeans deemed necessary to further their colonial interests.

This pattern was replicated in the nineteenth century when European imperialism and the expansion of international society found their apogee. The standard of civilization delimited the scope and validity of international law. Only states that achieved this standard were considered members of international society – or, part of the family of civilized nations. To become a civilized country, they agreed to internalize and comply with European norms and institutions - opening local markets to foreign trade, providing foreigners with the most favored nation treatment, and so on (LORCA, 2010). In this context, Latin American and Asian countries had the opportunity to join international society; the price was to accept European standards. At the same time, African countries were colonized and brought under the subjugation of Europe, based both on a new civilizing mission and a humanitarian excuse, openly discussed and legitimized by the Conference of Berlin (1884-1885). Non-Europeans acquired personhood precisely when they agreed to change their cultural practices and political organizations to accept the European ones or when European Empires absorbed them; their sovereignty did not mirror their own identity (ANGHIE, 2004).

This process was recreated in the twentieth century. Initially, through the Mandate System, when the discourse shifted from one based on the race – non-Europeans were savage and barbaric – to one based on economics.[34] The new civilizing mission was placed on the economic development of non-Europeans, imposing on them economic policies akin to the European experience. Through decolonization, all states supposedly achieved a sovereign status. Newly Independent states indeed acceded to the international community; however, they did not translate their sovereignty into the real power they had hoped for. They inherited the international law powerful countries constructed. They perceived it as disadvantageous, but they did not have enough power to shape international law according to their interests (ANGHIE, 2004).

Therefore, Europeans constructed international law to further their identity and interests, in opposition to the alterity created by Europe itself (PAHUJA, 2005). The image of the 'other' (non-European) was crucial for the development of international law. Norms were created and shaped to exclude the other (the barbaric, the savage, the underdeveloped).[35] International law served Europeans interests to legitimize the colonial encounter with the Indians in the sixteenth century, to create an international society only acceded by those who met the standard of civilization during the nineteenth century, and so on.

The sovereign status of sates was shaped by this dynamic of difference.[36] The sovereign doctrine developed throughout the centuries always found a way to be fully exercised by Europeans, excluding non-Europeans:[37]

---

[34] The Mandate System of the League of Nations was an international regime created to administer the territories previously annexed or colonized by Germany and the Ottoman Empire, the two powers defeated in the First World War. Instead of submitting these territories to colonization, they were placed under the tutelage of the victorious powers. See Anghie (2004).

[35] Koskenniemi discussed this relationship as a discourse of exclusion-inclusion. Non-Europeans were excluded from the construction of international law and, when they were granted some statehood, they had to give up their identity to embrace a European universalism. See Koskenniemi (2004).

[36] Although Europeans have put it in terms of cultural differences – uncivilized, barbaric – Anand highlights that Europeans and non-Europeans only differ in their interests: "In fact the attitudes of the Western countries, as well as those of the Asian and African nations, whether toward the traditional principles of customary law, international organisations, or newly developing areas of international law are determined, as always, by their views of their interests. It is this conflict of interests of the newly independent States and the Western Powers, rather than differences in their cultures and religions, which has affected the course of international law at the present juncture." (ANAND, 1966, p. 72)

[37] In fact, sovereignty has no fixed content and this concept may be adapted according to the interests of the powerful. See Koskenniemi (2004). We will come back to this topic in chapter 3, when discussing

> I have argued that because sovereignty was shaped by the colonial encounter, its exercise often reproduces the inequalities inherent in that encounter. But the further and broader point is that sovereignty is a flexible instrument which readily lends itself to the powerful imperatives of the civilizing mission, in part because it is through engagement with that mission that sovereignty extends and expands its reach and scope. This is why the essential structure of the civilizing mission may be reconstructed in the very contemporary vocabulary of human rights, governance and economic liberalization. (ANGHIE, 2004, p. 113-114)

Telling the story of international law through a European narrative was a defense mechanism to maintain the *status quo* (LORCA, 2012). Powerful countries universalized norms that reflected their interests, repealing any tentative approach to object them. They advanced their worldview over different experiences, so the international agenda did not incorporate the difficulties non-Western countries faced. It was a way to keep those at the margin of international law in a constant state of marginalization, turning the international system into a more predictable and stable environment for their actions. Therefore, imperialism was (and still is) a constant (ANGHIE, 2004).

In a nutshell, Anghie demonstrates it is virtually impossible to retell the history of international law without referring to a vocabulary and to a set of techniques that have come hand in hand with a history of European domination.[38] It is not a mere divergence of opinion; it is an awareness that international law was constructed alongside the emergence of European states to justify their colonial possessions, empires and commercial interests (KOSKENNIEMI, 2013; CRAVEN, 2012).[39]

---

how the Argentinean sovereignty was threatened and, somehow, gained a lot of flexibility, by foreign investors dissatisfied with the actions took by the government to overcome the 2001 financial crisis.

[38] The colonial critical approach has gained space and today is no longer a standpoint of dissent or radical revisionism. Dupuy (2005), who objects the Eurocentrism critique, does not reject the role of third-world critiques in international law history. See Craven (2012) and Kammerer (2016).

[39] Cavallar (2008) and Hunter (2013) reject the idea of the European domination of international law. They understand it is possible to find true cosmopolitanism or universalism in European lectures. Cavallar (2008) presents four main *errors* that would be common to colonial approaches. The fallacy of great narratives, placing empty and misleading labels like *imperial projects*; the construction of false continuities, ignoring complexes and plural discourses; the influence of international legal theory is overestimated, as legal practice and legal theory not always would overlap; and the ambiguity of texts which are fundamental to the colonial critique. We disagree. Colonial approaches do not claim to be definitive, rejecting any other possibility to discuss international law. They are one way to understand

These aspects of international law repeat themselves throughout time.[40] The rhetoric of the civilizing mission, the dynamic of difference, the European imperialism; all still find a way in international law. The continuing effects of centuries of European domination are perceptible within the contemporary legal system; for non-Europeans, sovereignty still represents alienation, non-empowerment, and submission to standards created by a different other, leaving their own identity to oblivion. Even when international law innovates, it replicates the pattern of colonial encounter: "(…) the division between civilized and uncivilized, the developed and the developing, a division that international law seeks to define and maintain using extraordinarily flexible and continuously new techniques" (ANGHIE, 2004, p. 315).

We will demonstrate in the rest of this chapter how the current manifestation of international investment law incorporates the imperial origins of international law. The power struggles, the dynamic of difference, the subjugation of the other non-European, the shaping of sovereign doctrine, all bring to international investment law the burden of a past of domination and imperialism. Even when new instruments, norms, and concepts are created, they replicate old patterns and domination of European over non-Europeans; or, in the language of international investment law, of investors and their home states over host states. There are huge efforts to disconnect the past from the present manifestation of international investment law, but we stand with those who do not leave the past behind.

1.3 International investment law history, or another tale of power and hegemony

As seen above, international law history is a story of power and hegemony. Beyond claims that international law is apolitical or shielded against power struggles, scholars aligned to critical approaches have demonstrated not only that power shapes the law,

---

the past and its heritage today. They lay in broad narratives, but so the mainstream history of international law, based on a progressive set of facts that have uniformly conducted to an allegedly universal law. Mainstream history ignores other experiences, institutions, and world views, subsuming other experiences to a European fashion. Even though legal practice and theory may not always overlap, a theory that is aware of the past may lead to better construction and application of the law.

[40] The civilized against the terrorist, the refugee, the migrant and so on. Us against the other. This dichotomy is still much ingrained in current discourse.

but also that the current manifestation of international law replicates old patterns of Western domination. The history of international investment law is no different.

There are two main narratives of international investment law (KULICK, 2018). One is aligned to a mainstream history of international law, telling the history of international investment law in a progressive story-line fashion as an unbiased modern phenomenon that began in the late 1950s with the signing of the first known bilateral investment treaty (BIT) between Germany and Pakistan.[41] International investment law is claimed depoliticized, as dispute settlement is withdrawn from the hands of both home[42] and host[43] states to be placed with (allegedly) impartial private arbitrators under no domestic jurisdiction.[44] International investment agreements are referred to as a truly global framework, creating protection standards for investors (VANDEVELDE, 2005).[45] This narrative is also entangled with an economic view that investment promotes the development of host countries.[46] In summary, this story is claimed non-ideological, while constructed over (alleged) principles of objectivity and neutrality. Power struggles find no prominent place in this narrative.

---

[41] Some authors tell the story in such a smooth and linear fashion that it seems only the modern manifestation of investment law is relevant. See Newcombe and Paradell (2009, p. 2): "The uniqueness of the current IIA network is a product of an historical evolution going as far back as the Middle Ages". See also Vandevelde (2005, p. 194): "This is but another era in the continuing evolution of international investment agreements". For a dissonant voice, see Martineau (2018).

[42] Traditionally home states asserted for centuries their right to exercise diplomatic protection over their overseas nationals. The threat to use force against host states was common; the term "gunboat diplomacy" is commonplace to describe the readiness of capital-exporters to resort to military intervention on behalf of their nationals. However, home states were careful when deciding to protect the rights of their nationals in other countries. Opening diplomatic channels or resorting to military force would require the home state's wiliness to follow costly paths. Overseas nationals could end up with no protection of their home states if the latter decided not to embrace his case. In this last case, overseas nationals would have to resort to the courts of the host state. See Johnson and Gimblett (2012).

[43] Investors and home states long argued that domestic courts of host states would be biased. There was a long tendency to internationalize foreign investment to insulate it from the domestic realm. See Sornarajah (2010) and Newcombe and Paradell (2009).

[44] Internationalizing dispute resolution was crucial for investors and home states to ensure their interests remained within structures that could be readily accessed and dominated by them. Both domestic courts and domestic law were perceived as prejudicial to investors and home states' interests. BITs were an alternative, elevating the protection of investors to an international treaty level, away from domestic legislative. See Odumosu (2007).

[45] Before the BITs era, there was a confusing state of conflicting norms regarding investment protection. It is hard to argue there was a customary law on the protection of investors, as capital importers and exporters rarely agreed on crucial issues. There were plenty of doubts and few answers. Precisely because of such a confused state of the law is that states signed BITs, crystalizing standards to protect the investors and their investments. See Sornarajah (2010).

[46] Mainstream scholars advance that international investment norms are cosmopolitans and they serve the global interest of promoting investment flows, which are claimed beneficial in the economic development of less developed countries. See Sornarajah (2015).

The other narrative tells a different history; it tells a story of imperialism and constantly submission of host states. The history of international investment law is traced back far beyond the late 1950s, returning to the seventeenth century when Europeans developed legal tools to protect their property overseas and to promote investments abroad (MILES, 2013; KAUSHAL, 2009; SCHRIJVER, 1997). The history develops from this moment on, always marked by irreconcilable interests of capital importers and exporters. Power struggles between investors, home state, and host states deeply influence international investment law. International investment law is said to be a product of the interplay of economic, political and social processes over time, and, therefore, its current manifestation reflects the clash of the most different interests of actors involved, prevailing, clearly, investors and their home states (MILES, 2013; SORNARAJAH, 2010; ANGHIE, 2004). Host states traditionally did not have enough military, economic, political, or moral power to influence the creation of norms to protect international investment.[47] It is anything but neutral, apolitical or objective; it furthers the interests of the most powerful actors.

We are aligned with the latter narrative. We understand the dominant economic and political ideas of different periods deeply influence international investment law. This is even more notable when hegemonic powers advance the tenets of the prevailing ideology. For instance, BITs and investor-state arbitrations grew exponentially during the 1990s, right when capital-exporters embraced the Washington Consensus as the dominant economic idea. Whenever there are shifts in the dominant power relations, international investment law also changes (SORNARAJAH, 2015). Power struggles are a constant, impossible to be detached from international investment law. To suggest, as Vandevelde (2005) did, that the current norms protecting international investment have reached a depoliticized destiny or that they overcome the ideological division between capital exporters is nothing more than an attempt to ignore the (imperial) past and how it still reverberates in present days.

Kate Miles (2013) is one of the most prominent scholars to acknowledge the role of power struggles in the making of international investment law.[48] She dialogues with

[47] We refer to the concept of power in footnote n. 31.
[48] Kaushal (2009), Anghie (2004) and Schrijver (1997) are examples of authors who also acknowledge the influence of power struggles in the making and shaping of international investment law.

both Anghie (2004) and Benton (2002) to develop her main arguments. For her, international investment law develops out of the colonial encounter, constantly excluding host states who are in a permanent condition of otherness. This evolutionary process involves repetitive assertions by capital-exporters of their viewpoint as universal international law; political and commercial power enabled capital-exporters to claim their perspective as binding international law, disregarding any other views advanced by capital-importers. This context of prevailing Western interests and legitimizing imperialism shaped international investment law, and these origins still find a way to resonate within its current manifestation, including principles, agreements, and dispute resolution system.

To demonstrate how power struggles are pervasive in international investment law, Miles (2013) reassess some crucial historical facts. She traces the origins of international investment law to the seventeenth century when the expansion of European trade and investment emerged. International rules to protect foreign-owned properties are appointed as the first expression of the international protection of foreign investments; they originated from reciprocal arrangements between European nations, or, in other words, from the relationship between sovereigns that possessed relatively equal bargaining power. Extending these norms to non-Europeans changed their nature: From a consensual character to imposition and oppression. Existing non-European legal regimes were disregarded. In their place prevailed a European international law that included the protection of private property and the regulation of trade and investment. This process is linked with colonialism, European expansionism and the subjugation of non-Europeans. These are the first lines of foreign investment protection, an assertion of power over non-Europeans to facilitate trade and investment.

The alignment of state interests and private commercial interests is crucial to understand the protection of property from the seventeenth century, as European trading companies played an important role in the development of international (investment) law. A select group of trading companies received sovereign rights and privileges from home states, including the possibility to execute international treaties,

to administrate settlements and to engage in military conquest.[49] Their commercial interests soon blurred with the political objectives of their home states; by the eighteenth century, these trading companies were responsible for imperial acquisition and management. Lecturers as Grotius developed legal doctrines to legitimize the activities of these companies, influencing the making of international law; for example, the entanglement of private and state interests lead to an embryo of the doctrine of diplomatic protection of aliens.[50] Power struggles between home and host states begin to flourish, as international law was molded to exclude non-Europeans – subjugated to the interests of Western companies – and to legitimize the intrusion of private companies and their home states in the territory of host states (MILES, 2013).[51]

The protection of property abroad was further expanded through mechanisms to advance the commercial and investment expansion by Western countries during the eighteenth and nineteenth centuries. These mechanisms include friendship, commerce and navigation treaties[52], the acquiring of concessions[53], capitulation or unequal treaties[54], and colonial annexation of territories (MILES, 2013; LORCA, 2010; ANGHIE, 2004; SCHRIJVER, 1997).[55] They assured the dissemination of Western

[49] The English East India Company, the French East India Company, and the Dutch West India Company are examples of trading companies.
[50] It includes a doctrine that elevated the protection of commerce to a level of national identity and, thus, a threat to private commercial interests was a legit basis for a state to go to war. See Miles (2013).
[51] See the case of the Dutch East India Company and its imperialistic practices in East Asia. The company established the Government of Batavia (former Jakarta), appointed a Governor-General and assumed the responsibility of enacting norms, policing the territory and administering the civil and criminal justice system, which applied the Dutch Law. All these practices were way beyond those of a commercial company and were legitimized by international law. See Miles (2013).
[52] They were an instrument to recognize newly independent countries and to regulate commercial relationship. Even though they were concluded on equal terms, they are known for including standards of protection much favorable to home states and for systematically imposing the liberalization of trade and investment. See Miles (2013); Lorca (2010); and Vandevelde (2005).
[53] Concession agreements allow foreign investors to engage in activities that were originally under the realm of the host state. Concessionaires usually obtained very expansive rights and powers in economic sectors that were essential for the host state, such as the extraction of natural resources or the construction of public utilities. These agreements effectively involved the transfer of sovereign rights to the concessionaire. Economy and politics are much entwined in the acquiring of concessions, then. Exceptional powers were granted to foreign investors to explore concessions, subjugating host states to their political and commercial influence. See Miles (2013).
[54] Capitulation or unequal treaties were the product of the use of force (actual or threatened) by dominant powers, conferring one-sided rights to European states. These treaties granted to European states extra-territorial jurisdiction over the activities of their overseas citizens. They were a clear derogation of sovereignty from non-Europeans. See Miles (2013); Lorca (2010) and Anghie (2004).
[55] Foreign direct investment had different destinies depending on the political situation of the host state – under colonial rule or an independent country. The important issue here is that international investment, imperialism, and trade were connected in different ways since the seventeenth century, always under the auspices of international law and legitimized by it according to European expansionist interests. See Miles (2013) and Frieden (1994).

notions of property and an intrusive presence within non-European states. Rules to facilitate trade and investment, far-reaching concessions granted to foreigners, and the extraterritorial application of laws from Western states to their overseas nationals were also widespread (MILES, 2013; SORNARAJAH, 2010). Friendship, commerce and navigation treaties, in special, contained standards for the protection of private property that served as inspiration for BITs, such us the most-favored-nation clause (SORNARAJAH, 2010). All these mechanisms were under the auspices of international law and they were imposed on non-Europeans as a promise to grant them some personhood, either by joining the international community (as a standard of civilization) or by colonial annexation. Again, non-Europeans were subjugated and treated as a different other, whose sovereignty was flexible, and Europeans states reasserted their power to facilitate trade and investment (ANGHIE, 2004).

It was throughout the nineteenth century that two fundamental concepts for international law emerged, which were soon incorporated into international investment law and practice: the doctrines of state responsibility and diplomatic protection of aliens. Both concepts were developed in a wider context of international law, addressing the relationship between host states and foreigners *lato sensu*. Nonetheless, Western countries incorporated them both to attend their interests regarding the protection of foreign investment. The West developed the concept of a universal and binding international minimum standard for the treatment of foreigners and their property, regardless of the domestic rules of host states. If this standard was breached, the host state would be internationally responsible for its acts (MILES, 2013). An injury to a foreigner constituted an injury to his home state, which, as a last resource, could authorize military intervention (NEWCOMBE; PARADELL, 2009).[56]

The doctrines for protection of aliens and property overseas emerged right when Europe and the United States had large capital surpluses to invest abroad, a product

[56] Throughout the nineteenth century, Western countries asserted their right to exercise diplomatic protection over their nationals abroad, making it clear they could even resort to military intervention. Great Britain is renowned for expressing its readiness to use military means to protect nationals overseas. British Foreign Secretary and Prime Minister Lord Palmerston strongly defended before the Parliament military intervention to protect British nationals abroad throughout 1840 and 1850. Western powers such as the United States, Germany and France also commonly resorted to military interventions. Nonetheless, by the end of the century, the use of *ad hoc* arbitral tribunals to adjudicate claims between host and home states became the preferred method of dispute resolution. See Johnson and Gimblett (2012).

of early industrialization. This capital flew not only from colonial powers to their overseas possessions – where colonizers had control over the investment –, but also from Western states to countries outside the colonial system (JOHNSON; GIMBLETT, 2012; SORNARAJAH, 2010). It is, in fact, because of Western expansionism that these doctrines were developed, as capital-exporters countries were in need of international law to protect their nationals and property abroad:

> The growth of the law of state responsibility reflected the more intense identification of the individual (or later, the corporation) with his country that accompanied the nationalist trends of the 18th to early 20th centuries. That growth would not have taken place but for Western colonialism and economic imperialism which reached their zenith during this period. (NEWCOMBE; PARADELL, 2009, p. 9)

European states furthered these doctrines to legitimize their expansionism. They reflected an inherent imbalance of power between capital exporters and importers (JOHNSON; GIMBLETT, 2012; SORNARAJAH, 2010). Home states argued they had the right to expect that their nationals abroad would not be treated below an international minimum, regardless of the legislation of host states. Even though the content of the international minimum standard was elusive, it reflected the interest of capital-exporters: From the payment of a prompt, adequate and effective compensation in case of expropriation to the consolidation of *pacta sunt servanda* and the respect of investors' acquired rights (SCHRIJVER, 1997). The minimum treatment was weighted towards the interests of capital-exporters, while host states received virtually no attention (MILES, 2013). Home states insisted on the application of an alleged international standard regardless of the domestic laws of the country where the investment occurred, in complete disregard the sovereignty of host states. It was another successful attempt by Western powers to use international investment law as an instrument to serve their interests.

It is no surprise that only one group of contestants was satisfied with these doctrines – clearly, not host states (SORNARAJAH, 2015). While capital-exporters claimed that the international minimum standard was part of international law, scholars of non-European countries were resistant to the idea that aliens could be entitled to a more favorable treatment than the nationals of host states (JOHNSON; GIMBLETT, 2012).

They resisted the threat to their sovereignty. One of the main voices from resistance is the Argentinean jurist Carlos Calvo. The doctrine named after him objected the international minimum standard, stating that nationals and foreigners should be treated with equality. For the jurist, the foreigner and his property should be subject to the domestic law and jurisdiction of the host state; the foreigner should not plea for the interference of his home state, and the host state would not be obliged to pay compensation for damages suffered by foreigners in case of expropriation, unless its law stated otherwise (LORCA, 2010; SCHRIJVER, 1997). Despite their clear response against capital-exporters' assertion of power, Latin American states were not strong enough to resist the demands of Western powers to subject their nationals to the minimum standard (JOHNSON; GIMBLETT, 2012). Western countries successfully reasserted their world view one more time. We will come back to this discussion in chapter 3.

In the twentieth century, Europeans rejected new attempts to dispute international law. At the beginning of the century, new governments in Mexico and Russia used mass expropriation for social change.[57] Both countries argued foreigners were not entitled to compensation, as expropriations had a social purpose. Home states intervened on behalf of their nationals and opened diplomatic channels to discuss the issue with host states.[58] These cases lead to different legal solutions, but the outcome was similar: The interests of home states prevailed and both countries eventually paid compensations to investors. Capital-exporters interfered in the domestic affairs of capital-importers; the latter could not freely decide on how to conduct their economic, political and social reforms. (MILES, 2013; JOHNSON; GIMBLETT, 2012).

Later in the twentieth century, another demonstration of assertion, response, and reassertion of power. After decolonization, newly independent countries claimed for

[57] The Mexican case is particularly relevant for the construction of international investment law. It was due to the expropriation of properties that belonged to U.S. Nationals that the American Secretary of State Cordell Hull engaged in long discussions with Mexico regarding the payment of compensation. In one of the communications exchanged between the governments, Hull stated that payment of compensation should be 'adequate, effective and prompt'. This formula has been widely replicated in investment agreements until current days. See Miles (2013).

[58] Gunboat diplomacy was no longer accepted by public opinion in the inter-war period. Diplomatic channels and, eventually, arbitral tribunals – such as the Special Claims Commission created to settle claims between U.S. nationals and the Mexican state regarding expropriations from the revolutionary period – were the available means to settle disputes of this nature. See Johnson and Gimblett (2012).

an international investment law more responsive to their interests. The international law they inherited from centuries of Western hegemony did not attend their concerns. They wanted to have a better control over foreign investments to avoid excessive interference over their domestic affairs. For instance, they understood that compensation regarding expropriation of foreign property should be based on national laws (SORNARAJAH, 2010; NEWCOMBE; PARADELL, 2009; VANDEVELDE, 2005).

These countries used the United Nations General Assembly during the 1960s and 1970s to reconstruct the international legal framework, reaffirming principles and rights more suitable to their interests. Among several General Assembly resolutions, we highlight three of them: Resolution 1803, which acknowledges the permanent sovereignty of peoples and nations over their natural wealth and resources; Resolution 3201, which established a New International Economic Order; and Resolution 3281, which adopts the Charter of Economic Rights and Duties of States.[59] While Resolution 1803 is generally interpreted as reflecting elements that are not that different from the international minimum standard, Resolutions 3201 and 3281 indeed attempt to break with a past dominated by Western interests, including provisions that are a clear effort to universalize the Calvo Doctrine.[60] Resolutions 3201 and 3281 acknowledge the right of every country to adopt the economic and social system they deem appropriate for their development, as well as the right to regulate and exercise authority over foreign investment within their national jurisdiction and according to their domestic laws. Both Resolutions 3201 and 3281 also acknowledge no preferential treatment is due to foreign investors and, in case of nationalization or expropriation, compensation should be subject to the laws of the host state (SORNARAJAH, 2015; SCHRIJVER, 1997).[61]

---

[59] Regarding only the principle of permanent sovereignty over natural resources, there are seven resolutions approved by the United Nations General Assembly (NEWCOMBE; PARADELL, 2009).

[60] Resolution 1803 acknowledges the right of peoples and nations to permanent sovereignty over their national wealth and resources, which must be exercised in the interest of their national development and of the well-being of the people (provision n. 1). However, the same Resolution also acknowledges that nationalization and expropriation shall be based on the ground of public utility, security or national interests, and they are subject to the payment of compensation for the investor according to both domestic rules of the host state and international law (provision n. 4). It also states that foreign investment agreements shall be observed in good faith (provision n. 8). Provisions n. 4 and 8 are in line with the international minimum standard long-advocated by Western countries and clearly do not break with the past of Western hegemony. The prevalence of international law and the maintenance of old investment agreements of the time of colonization are not broken with this Resolution.

[61] Provision n. 4, ‘d’ of Resolution 3201 and articles 1, 2, ‘a’ and ‘c’ of Resolution 3281.

The newly independent countries strongly fought to affirm their economic independence. They presented a response to Western hegemony, counteracting longtime practices; they attempted to reject the constant state of 'otherness' they were subjugated, exercising an active role in the construction of international law (SORNARAJAH, 2015; MILES, 2013; NEWCOMBE; PARADELL, 2009). However, capital-exporters also fought hard to reassert their power. Western countries refused the changes proposed by non-Westerns, voting against the approval of the Resolutions and arguing they violated international law. Western countries formulated instead new doctrines and presented them as if they were long-incorporated to international law (such as the 'international law of contracts', an initial attempt to internationalize disputes between foreign investors and home states - ANGHIE, 2004).[62] Post-Second World War investment arbitrations reaffirmed the old Euro-American consensus, rejecting the content of the referred Resolutions.[63] Despite being asserted that after decolonization all countries were equally sovereigns, capital-importers were not able to shape international law according to their interests: "(…) formal acquisition of sovereignty and equality did not translate into the real power that the Third World states had hoped for" (ANGHIE, 2004, p. 199).

For the next decades, capital-exporters continued to reassert their power. They continued creating new institutions, new doctrines and new treaties, everything to maintain investors and their property at the center of international investment law (MILES, 2013). Nothing different from their constant practice since the seventeenth century. Capital-exporters presented BITs and investor-state arbitration as the modern manifestation of international investment law: BITs crystalized the protection to foreign investments that capital-exporters long advanced, while diplomatic channels and gunboat diplomacy were no longer necessary, for investor-state arbitration was detached from the politics of both home and host states (VANDEVELDE, 2005;

[62] For an in-depth account of how capital-exporters created the doctrine of transnational law after newly independent countries attempted to incorporate the doctrine of permanent sovereignty over natural resources and to create a New International Economic Order, see Anghie (2004). Transnational law was an effort by the West to internationalize concession agreements executed with foreign investors, through clauses that submitted disputes arising out of these agreements to international arbitration.

[63] The decisions rendered in Iran-US Claims Tribunal virtually ignored the UN Resolutions furthered by non-Wester countries and consistently held that nationalization and expropriation required payment of full compensation according to international law. See Johnson and Gimblett (2012).

JOHNSON; GIMBLETT, 2012). A whole new era of international investment law was (allegedly) inaugurated.

Not at all. We will discuss below that the so-called depoliticized regime is a fiction. Power struggles are deeply ingrained in international investment law for centuries, and they are still very much alive in BITs and investor-state dispute resolution. There is no real rupture from the past, but only a usual change (MILES, 2018). From the historical facts reassessed above, we understand international investment law has centuries-old roots and it is a long-shaped regime responsive to the interests of investors and home states.

Attempts to isolate international investment law in a self-contained regime ignores the whole set of norms that informs international law and that could eventually conflict with the rules that protect international investments - including general principles and customary rules, human rights and environmental law (VIÑUALES, 2014). This compartmentalization of international investment law favors the protection of investors and home states, as well as the use of a private vocabulary. If a specialized regime is outside the realm of international law, then its norms apply, and supersede every other, even if it includes interpreting long known concepts – as fair and equitable treatment – in a fashion unknown to international law (SORNARAJAH, 2015).[64] Then, it is necessary to reinforce that international investment law is part of international law and they both are tangled. Power struggles and Western imperial expansion molded them both. Ignoring this past could lead to dangerous paths, such as the claim that international law could be depoliticized.[65] We will explore it below.

We do not ignore scholars that reject the influence the past may have on the current manifestation of international investment law. For Alvarez (2011, p. 144), it is difficult to *caricature* international investment law as a product of neo-imperialist empire. For him, the regime approaches universal participation and both BITs and investor-state arbitration have carried structural changes. An increasing number of non-Westerns

[64] We will discuss in chapter 3 how investor-state tribunals interpret the fair and equitable treatment standard.

[65] To claim international investment law is an infant discipline not only rejects its past and all the pervasive power struggles but also creates a general apology in the sense that eventual problems should be excused as beginner´s mistake. See Martineau (2018).

have signed BITs among themselves and Western countries have become defendants in several arbitrations, including the United States. In a nutshell, he claims the regime is too complex to have a single explanation. Fahner (2015) claims that besides the colonial approach, there is also a 'Neo-Liberal Alternative'. For him, the current investment protection regime is a voluntary commitment to international standards, aiming at the expansion of capital flows, rather than an imperial heritage. It is a regime of mutual benefits for all. Moreover, following Alvarez (2011), he claims it is irrelevant to look at the past, as traditionally capital-importers have become home states, evidencing how flexible and complex international investment law has become.

The arguments advanced by Alvarez and Fahner are insufficient to write off the imperial origins of the international investment law. We said from the start that there is more than one narrative to understand a complex regime such as international investment law. We have chosen a colonial approach, but we acknowledge other alternatives are possible, such as the neoliberal. That being said, the fact non-Westerns have been signing BITs among them only evidence that they are replicating the old imperial past to which they were submitted to, and not that this past has not found a way in the current manifestation of the regime. Even so, it is important to highlight that traditional capital-importers as South-Africa, India, and Brazil presented in the last years new proposals for investment regulation, precisely to offer a way out of traditional BITs.[66]

Traditionally capital-exporting countries have indeed suggested themselves structural changes in BITs. They have included in treaties clauses to preserve the host state's right to regulate regarding issues of public interest, such as the environment, labor affairs, and health, as well as provisions to preserve essential security issues.[67] Yet, they have used these mechanisms (once again) as an instrument to further interests. For instance, traditionally capital-exporters have become defendants in some investment arbitrations and, for this reason, they are concerned to preserve their

[66] For new models of international investment regulation, see Morosini and Badin (2017).
[67] See, for example, the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union brings a detailed FET standard (Article 8.10).

(newer) needs – such as maintaining sufficient policy power space. We will return to this discussion in chapter 2.[68]

Although capital-importers attempted several times to object the boundaries of international law, capital-exporters have reasserted their power to use the law as an instrument to prevail their world view: "(…) there is an effort to attempt to impose standards of investment protection preferred by the more powerful states on other states through the instrumentality of international law" (SORNARAJAH, 2010, p. 19). Power struggles are so pervasive that international investment law disregards host states; capital-importing countries are still placed in a condition of otherness.

1.4 International investment law beyond claims of depoliticization: A private rights vocabulary for the protection of investors

The international investment legal regime is praised for having removed the protection of foreign investors and their property from a political context and placed them in the realm of the law (TITI, 2015; VANDEVELDE, 2005; SHIHATA, 1986). This argument was constructed over the claim that the laws to protect international investment are part of a self-contained regime, with its vocabulary, institutions, rules, and principles (SORNARAJAH, 2015). We understand this claim present limitations. There is no such thing as a depoliticized regime; international investment law is characteristically political (MILES, 2018).

The mainstream literature appoints BITs and investor-state arbitration as the turning point of a modern era in international investment law (JOHNSON; GIMBLETT, 2012). Yet, both BITs and the International Centre for Settlement of Investment Disputes (ICSID) are a political response of capital-exporters to the twentieth century decolonization and the attempt of capital-importers to create an international law more responsive to their interests.

[68] It is more common now to see traditionally capital-exporting countries acting as respondents in arbitrations. Nonetheless, this number is still low. Taking the United States as an example, the country is respondent in only 16 arbitrations and home state in another 166 cases. For a complete list of all investor-state arbitrations the United States are involved, see <https://investmentpolicyhub.unctad.org/ISDS>. Last accessed: March 2, 2019.

The ICSID was created to internationalize the settlement of investment disputes (SORNARAJAH, 2015; SHIHATA, 1986; LILLICH, 1975).[69] Capital-exporters claimed that an international forum was an essential feature of the investment regime, for they perceived local courts as biased, corrupt, and inefficient (NEWCOMBE; PARADELL, 2009). The creation of an international institution where investors may file arbitral proceedings directly against the host state isolates the claim from its socio-economic, cultural, and political context (ODUMOSU, 2007). The internationalization of disputes is then favorable to the interests of investors, freeing investors from the constraints of domestic legislation and public opinion (KOSKENNIEMI, 2017).

Capital-exporting countries even suggested that detaching dispute resolution from local courts would promote investment flows to host states that signed treaties which included investor-state arbitration as the means to the settlements of disputes (MILES, 2013). High executives of the World Bank as Aron Broches and Ibrahim Shihata claimed that such an institutional framework would create an atmosphere of confidence among investors and home states while stimulating larger flows of private investment into host states willing to attract them (NEWCOMBE; PARADELL, 2009; SHIHATA, 1986).[70] ICSID soon found its place in the investment regime, becoming a fundamental part of its structure (ODUMOSU, 2007).

Alongside ICSID, BITs are another decisive moment of an alleged depoliticized era. The first BIT is dated back to 1959; nonetheless, it was only during the 1990s that BITs were widely spread. At this time, the Washington Consensus was the prevailing economic ideology, having as one of its central canons the liberalization of foreign investments.[71] Taking away the legal framework of foreign investment from the domestic legislation of host states, capital-exporting countries furthered BITs as a

[69] The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States – International Centre for Settlement of Investment Disputes was executed in Washington, 1965. It entered into force on October 14, 1966. The ICSID is one of the five organizations of the World Bank Group.

[70] Aron Broches was the General Counsel of the World Bank at the time ICSID was created. Ibrahim Shihata was Vice President and General Counsel of the World Bank from 1983 to 1994.

[71] John Williamson created a list with ten measures to overcome the economic crisis Latin American countries faced throughout the 1980s. The International Monetary Fund, the World Bank, and members of the Organisations for Economic Co-operation and Development – OECD, they all gave support and recommended these measures. Among other liberalizing proposals, the list emphasized that states should be opened for foreign direct investment. Financial flows of this nature were deemed essential for the economic development of the host state. See Perrone (2016) and Rodrik (2006).

means to assure the stability of foreign investments, the protection of foreign investors, and the security of property and contract rights (SORNARAJAH, 2015). These treaties elevated the protection of investors to an international treaty level (ODUMOSU, 2007). Moreover, following the tenets of the Washington Consensus, liberalization of investment flows was also seen as the path for economic development and, therefore, BITs found the perfect setting to proliferate (SORNARAJAH, 2015).

Departing significantly from the principles advanced by non-Western countries throughout the 1960s-1970s, BITs are remarkably uniform in content and form. They typically contain strong investment protection standards and guarantees long asserted by capital-exporters, such as national treatment, fair and equitable treatment, and compensation on expropriation. All these standards are notoriously vague and ambiguous, leaving great room for interpretation by decision-makers. They are also one-sided, ensuring more favorable protection for foreign investors (BOASE; 2018; PERRONE, 2016; NEWCOMBE; PARADELL, 2009; VANDEVELDE, 2005). Little protection is guaranteed to host states and no obligations are imposed on investors.

It is *very old news* that treaty-based protection of foreign investment reflects the old Euro-American consensus (JOHNSON; GIMBLETT, 2012, p. 679). BITs crystalize rules to protect investors that were long furthered by Western countries as part of international law. The treaties essentially articulate the standards of protection that capital-exporters had always wished to see established as law; and they did it by vesting nationals of capital-exporting countries – investors – with such standards:

> And although the instruments were framed as reciprocal arrangements, they had been drafted by capital-exporting states to protect the interests of their investing nationals and were largely concluded in unequal political and economic conditions between capital-exporting states and developing states. Accordingly, the expectation was, on the whole, that the capital flows would be one-way and that the obligations assumed under the treaty would also effectively only be on one side. (MILES, 2013, p. 89)

International law has been transformed into some kind of a worldwide unpolitical facilitator of technical governance. International investment law is no different (KOSKENNIEMI, 2017). ICSID, investor-state arbitration, and BITs were developed to

further neoliberal legality. Neoliberalism places market discipline and the maximization of individual material preferences at the center of political and economic debates; it praises private control of resources and free flows of private investment. In a so-called depoliticized regime, states act through contractual legal techniques, and host states' public regulation is subjected to the supervision of institutions that are autonomous and isolated from state politics (PERRONE, 2016).[72]

However, international investment law is indeed politicized (TITI, 2015; MILES, 2013).[73] All these multiple attempts of depoliticization are promises that international investment law could be detached from the political and economic context it is inserted into; as if it could be *sanitized*. It cannot. The rules to protect international investment reflect the interests of capital-exporters; consequently, they essentially focus on the protection of investors and their investments. As the interests of some actors prevail over others, it is clear that international investment law is very much political:

> International investment law is innately 'political', in the sense of it having evolved out of the political and commercial aspirations of Western capital-exporting nations and with its core purpose designed to further those interests. (…) From an historical perspective, it seemed to me that political attempts to generate an active role for the host state under international investment law were continually met with reassertions of the protected position of the foreign investor. I wanted to explore the idea that it was in this way that a pattern emerged of reproducing the imperialist origins of international investment law. (MILES, 2013, p. 71)

We understand BITs as a modern version of unequal treaties from the eighteenth century, created out of economic and political inequalities between capital exporters

[72] The so claimed depoliticization of international investment law is not the only example of an attempt to detach political motivations from economic decisions. See the case of the so-called Alliance for Progress, a major U.S. economic aid programme launched by President John F. Kennedy for Latin America. The programme was supposed to "*provide substantial long-term assistance to countries based on their performance in economic growth, implementation of social reforms and respect for democracy*" (LOUREIRO, 2014, p. 323). The economic aid was fundamentally based on a technical and apolitical discourse. Nonetheless, the aid then provided for Brazil was withdrawn mostly because of Brazilian President João Goulart's willingness to dialogue and be associated with the domestic radical Left – especially in the labor movement; at the beginning of the 1960s, this situation was clearly against North-American interests. See Loureiro (2014) for a full account of this period.

[73] Titi (2015) also acknowledges that investment disputes are intrinsically political as not rarely arbitrators evaluate host state's public policies, including those developed to overcome the financial and economic crisis, leading to some degree of indirect control of state policies by one-time appointed arbitrators. We will better analyze it in chapter 3, when discussing the 2001 Argentinean crisis.

and importers (ANGHIE, 2004).[74] Bonnitcha, Poulsen and Waibel (2017) argue that host states signed BITs believing that these treaties would attract foreign direct investments.[75] This is so because capital-exporters furthered two complementary ideas: Foreign direct investment was essential for the economic development of host states and, to increase investment flows, host states should lock in liberalizing domestic reforms for foreign capital to signalize that they were integrated into an international economic agenda - BITs included.[76] In this context, the referred authors assert that at least until the end of the 1990s, host states signed BITs influenced by these ideas. And they did it without careful negotiations and with little regard to their consequences; not surprisingly, the preferences of capital-exporting countries prevailed.

Host states felt the need to be part of this *spirit of the time*; they had to if they wanted to attract the so needed foreign direct investment.[77] Thus, even if host states were not *coerced* to sign BITs, they were forced to, due to the massive international pressure. And they did it at the cost of their interests and sovereignty, as they agreed to sign international treaties that essentially protected investors. This inequality resembles old international law of conquest, perpetuating a disparity between host and home states. The former was subjugated to the interests of the latter, through the signing of one-sided BITs (ANGHIE, 2004).

The past is then very much present. Orford (2012) claims legal concepts and practices developed in other eras may continue to shape the current manifestation of international law, as the law is not only a site to create new obligations but also for the transmission of inherited ones. BITs and investor-state arbitration did not emerge out

[74] See footnote n. 54 above.
[75] Home states commonly argued that signing BITs was necessary to attract foreign direct investment for host countries. However, they knew this claim was not entirely true. Bonnitcha, Poulsen and Waibel (2017, p. 209) report that a British official who negotiated BITs acknowledged internally that BITs were not important for British investors when deciding where to invest.
[76] Vandevelde (2005), on the contrary, claims capital-importers signed BITs when they realized that policies of hostility to foreign investment during the 1960s and 1970s were a *mistake*, and so they rushed in the late 1980s to conclude BITs to attract foreign investment, signalizing they had a secure environment for foreign investors.
[77] Home states, legal experts - as the United Nations Conference on Trade and Development - and international financial institutions - as the International Monetary Fund and the World Bank, they all spread the idea that foreign direct investments were a kind of panacea for economic development. The pressure for the signing of BITs was evident. See Bonnitcha, Poulsen and Waibel (2017). For the idea of panaceas for economic development, see Easterly (2002).

of a vacuum, the challenge is to think how the concepts, principles, and norms that mold them have moved across time and space, for international law is living and breathing, constantly being shaped by the ideas of the time (MILES, 2018).[78]

International law replicates centuries-old concepts and principles even when it attempts to innovate (MILES, 2013). BITs and investor-state arbitration are furthered as innovations; nonetheless, they replicate the same well-known ideas.[79] BITs and investor-state arbitration are no more than 'usual' change. These mechanisms do not disconnect international investment law from its history. Rather the contrary, they bring the colonial past even closer: They both privilege private rights vocabulary, placing the protection of investors and their property at the center of the law and decision-making (MILES, 2018). They did not *sanitize* international investment law; they are mechanisms to modernize a century-old culture of privileging the protection of foreign investors and their private property. The past is still much alive.

Historical ideas still influence modern international investment practices (MILES, 2018). Investment dispute settlement is an arena for power struggles, where particular viewpoints are furthered as the prevailing position on international investment law. BITs bring standards so wide and imprecise, as the fair and equitable treatment, that arbitrators have great room for interpretation. When deciding the claim, the tribunal renders highly politicized decisions: "(…) it is one thing to deem a regulatory measure illegal, it is another to interpret it as arbitrary or unreasonable because it was adopted in response to public demand." (ODUMOSU, 2007).[80]

Depoliticization is used to neutralize the attempts of host states to create space for public policies they deem necessary for their development, including environmental and public health protection, as well as economic measures to overcome the financial crisis. To characterize environmental, health and economic regulation as hostile to the interests of foreign investors and in need of being neutralized – to become apolitical, unbiased, uncorrupted – is a modern manifestation of a culture of control and

[78] For the idea that international law is constantly developing, see Lowe (2001).
[79] The same idea applies to the concept of fair and equitable treatment. We will explore this standard in depth in chapter 2.
[80] We will see in chapter 3 that arbitrators involved in the Argentinean saga rendered highly politicized decisions.

indifference in international investment law grounded in an imperialist framework (MILES, 2013).

It is not unusual for host states to be tied up when it comes to regulating in favor of public interest. BITs crystalize elusive standards of investment protection, which could be read as an obstacle for the enactment of public policies in host states. It is not uncommon for a tribunal to read these standards in a very extensive manner, oblivious of the public interest and welfare of host states, sentencing the latter to pay stratospheric compensations for investors. Foreign investment and its regulation are an intrusive process. We will analyze it in chapter 3; however, for now, it suffices to say that this is precisely what happened to Argentina in the early 2000s.

Argentina faced an unprecedented financial crisis at the end of 2001, and it had to enact a new domestic regulation that foreign investors perceived as harmful. Investors argued the emergency legislation breached the fair and equitable treatment standard inserted in relevant BITs, for damaging their legitimate expectations. The majority of arbitrators involved in the disputes agreed with investors, rendering awards centered in a private law vocabulary that determined Argentina to pay high compensations. The decisions replicate the century-old idea furthered by capital-exporters that private property and investors are at the center of the protection. The fact the host state acted to overcome the most severe economic crisis of its history was virtually neglected. Argentinean sovereignty was disfigured, while arbitrators decided whether the sovereign right to regulate her economy breached alleged promises made to private investors. Knowing the history of international law and the claims of depoliticization, we understand how these decisions replicate old imperialistic patterns. We will come back to this later on.

The remarkable disregard of capital-exporting countries for host states' sovereignty has found its way in present days under pretexts of depoliticized BITs and investor-state arbitration. It supports the interests of foreign investors while overtly disregarding the needs of host states, perpetuating a culture that centers the private property and the protection of foreign investors at the center of international law since the seventeenth century. It is just another tool to intervene in the sovereignty of capital-importers, such as the mechanisms and legal doctrines of the eighteenth and

nineteenth centuries. It is no different from the subjugation of capital-importers as the other who has a marginal role in the formation of international law, as it was clear after twentieth century decolonization.

From all the above, we claim international investment law is a product of hegemonic contestation. Koskenniemi (2004, p. 199) defines hegemonic contestation as a process through which “international actors routinely challenge each other by invoking legal rules and principles on which they have projected meanings that support their preference and counteract those of their opponents”. Through this process, more powerful actors make their partial view appears the main – hegemonic – view; their preference has a universal character. This is precisely what has happened in international investment law. The regime has been constructed through a process in which home states and investors invoke rules and principles that support their interests as if the laws and the dispute resolution mechanism they support were the *universal preference*. Meanwhile, the interests of host states are ignored, for they are not a *universal preference*.

The origins of international investment law are ingrained in Western imperialism. International investment law is shaped by power struggles pervasive to the political context in which the regime emerged, and these origins still resonate within its current manifestation, including principles, concepts, structures, treaties, and dispute resolution system. It shall come with no surprise by now that one finds at the center of the mechanisms designed for the protection of foreign investments notions of control and order from the perspective of investors and their home states, the privileging of private rights, high-level standards of substantive protection for investors and the imposition of the rule of law in host states. Not so different from previous centuries (MILES, 2018).

This is how international investment law is structured, over a vocabulary of private law, turning the line between private and public law thinner (FRIEDMANN, 1962). Concepts such as the respect for private property are used to solidify the private realm and to enhance the role of private actors. Private law rules, as suggested by Anghie, play a significant role in creating and furthering colonial inequalities (ANGHIE, 2004).

The contemporary manifestation of international investment law has never broken with its imperial origins. Over claims of depoliticization, international investment law was (and still is) constructed around the protection of the investor and private property. It replicates the centuries-old pattern of privileging Western interests; and so we ended up with a framework much concerned with private property, with little regard to home states and their need to regulate in the name of public interest.

1.5 Conclusion

International law is the product of power struggles. Even though the mainstream literature claims international law as an apolitical site where universal rules have progressively emerged to be equally bound to sovereign countries, we have seen that this story is one-sided. It is incomplete, as it misses a crucial element in the construction of international law: the pervasive power struggles.

Critical approaches to the mainstream history have flourished, highlighting that the story is being told essentially through Eurocentric lenses. Scholars aligned with critical studies propose a new view over international law; they give special attention to how it was constructed alongside with European trade and commerce expansionism, as well as how non-Europeans were excluded from this narrative, The colonial encounter is one of the historical facts reassessed to understand why international law legitimized a different treatment for Western and non-Western countries.

The history of international investment law is no different. Power struggles pervasive to international law have also molded the rules that protect foreign investments. It could not have been different, as international investment law is indeed part of international law. European and North-American interests - as traditionally capital-exporters - have guided the construction of international investment law from its inception. From the seventeenth century, where international law as essentially responsive to private companies, through the creation of mechanisms and legal doctrines in the eighteenth and nineteenth century to legitimize Western expansionism and to protect foreigners and property abroad, until the twentieth century, when capital-exporters reassured their power and rejected capital-importers' revindications for an international investment regime more responsive to their needs.

Capital-exporters created new institutions, new doctrines and new treaties to further their expansionist interests; they developed and molded these rules to protect their nationals abroad. Capital-importers were resumed to a different other, voiceless, who never found for themselves an active role in the construction of international investment law. Anghie (2004) points out that imperialism is a constant. In this context, we suggest that the imperial origins of international law are also constantly being repeated and reasserted, finding their way in the current manifestation of the regime.

Miles (2013, p. 152) claims that, “(…) colonialism reproduces itself. It is a subtle and pervasive phenomenon that finds infinite manifestations in modern international law and politics”. Even though the current manifestation of international investment law is claimed depoliticized, BITs and investor-state arbitration are political. They reproduce the colonial origins of international law. They are based on a private vocabulary that places the protection of investors and their property at the center of international agreements and decision-making; they do not break with the imperial past, they are a usual change that brings the colonial past even closer (MILES, 2018). As the colonial past is indeed present in international investment law, sovereignty still represents for capital-importers alienation, non-empowerment, and submission to standards created by a different other, leaving their own identity to oblivion. They are subject to an international investment law that obliviates their interests.

CHAPTER 2

From the international minimum standard to fair and equitable treatment: A (dangerous) courtesy of capital-exporting countries

2.1 Introduction

As seen in the first chapter, international investment law is the product of power struggles. Although bilateral investment treaties (BITs) and investor-state arbitration are claimed depoliticized, they are indeed inextricably political. They both reproduce the imperial origins of international law; centered on notions of control and order from the perspective of investors and their home states, they privilege private rights over public regulation and they set up high-level standards of substantive protection for investors (MILES, 2018).

To acknowledge the imperial origins of international investment law reinforces that studying past times is not only of historic interest. It is an effort to understand the present, for historical ideas still influence modern practices (MILES, 2018). The colonial encounter molded sovereignty, one of the fundamental concepts of international law; sovereignty thus carries an inherent discriminatory nature. Powerful countries, traditionally capital-exporters, were granted full sovereignty, while non-Europeans, traditionally capital-importers, had a merely formal sovereign status that not always was translated into real power. This pattern has been repeated over and over.[81] Consequently, sovereignty was (and it still is) a flexible instrument molded according to who uses it and to whom it is applied (ANGHIE, 2004; ANGHIE, 1999).

When international investment law incorporated sovereignty as a fundamental principle, the concept brought both the flexibility and the biased character of an idea that was never constructed by capital-importing countries or for them; as pointed out by Anghie (1999) and Roy (1961), it reflected the racially and geographically limited interest of powerful countries:

[81] When new countries emerged from decolonization after the Second World War, they inherited an international law that was constructed by the West and that did not reflect their main interests, in a clear example of how their sovereignty was limited. See chapter 1 for a full account of this issue.

> (…) the concepts themselves are far from neutral, that they are racialized and contain within them the discrimination that non-European people have attempted to contest. An appreciation of the way in which the very vocabulary of international law was racialized from its inception raises important questions about the ways in which sovereignty operates. (ANGHIE, 1999, p. 70)

Sovereignty operates in international investment law with the discriminatory character inherent to the concept. Host states do not enjoy full-sovereignty; on the contrary, their sovereignty is flexible. Home states and investors generally receive full protection for their investment – sometimes even shielding it against regular business risk (MAYEDA, 2007) –, while the sovereign right of the host state to regulate for the public interest is frequently disregarded.[82] And this pattern has also been repeated over and over.[83]

One way to illustrate how the sovereignty of host states has been constantly diminished when it comes to the protection of foreign investment is to analyze the fair and equitable treatment (FET) standard. From its inception, influenced by the colonial encounter, to the current expansive interpretation given by arbitral tribunals, the standard carries power struggles pervasive to international investment law.

The FET standard has officially emerged in the first half of the twentieth century. Nonetheless, its origins may be traced back to more ancient times - more precisely, to the doctrines of state responsibility and the protection of aliens. In the context of the nineteenth century globalization and the spread of foreign capital from the West (Europe and the United States) to non-Western countries (including colonies and free countries), these doctrines found an optimum scenario for development, and, eventually, they culminated in the creation of the minimum standard.

The international minimum standard provided that those who decided to invest abroad had the right to be treated according to an international parameter, even if it meant a different treatment between aliens and nationals; not surprisingly, this standard of

[82] Not rarely the attempt of host states to regulate to protect the environment or the human rights, or yet to overcome the economic crisis, have been objected by investors before arbitral tribunals. We will explore in-depth the case involving the economic crisis that Argentina faced in 2001 and the regulatory measures that the state had to adopt as an attempt to overcome such a crisis.

[83] The 2001 Argentinean crisis is clear evidence, as we will demonstrate in chapter 3 below.

treatment found objection from its inception. Be it from the uncertainty of the concept or the resistance that non-Western countries expressly manifested for understanding that the standard threatened their sovereignty,[84] the emergence of the FET was nothing less than controversial (DUMBERRY, 2017; ROY, 1961). To overcome the disagreement between Western and non-Western countries, the FET slowly substituted the international minimum standard throughout the twentieth century. As a dangerous courtesy of capital-exporting countries, the FET inherited the imperial nature of the international minimum, and, despite claims it would be depoliticized, pervasive power struggles between home and host states are still much present in the construction and interpretation of the standard (MILES, 2013).

Dialoguing with Miles (2013) and Anghie (2004), we claim that the past is still present in the current manifestation of the standard and the burden of the colonial encounter is alive. Not rarely, the interpretation of the FET standard leads to broad definitions that cast doubts on whether arbitrators were systematically deciding in favor of foreign investors, jeopardizing the right of the host state to regulate and to decide on its future (PICHERACK, 2008). To understand the past is then, once again, crucial to comprehend the present (ORFORD, 2012).

This is how the chapter will be developed. We will first contextualize the economic history of the nineteenth-century globalization, as this background was perfect for the development of the doctrines of state responsibility and the protection of the alien. Then, we will discuss how the international minimum developed, focusing on the power struggles inherent to the creation of the standard. Finally, we will demonstrate how the international minimum evolved to the FET, highlighting how this concept has been constructed by arbitrators in current days still in the light of the colonial encounter.

2.2 From the West to the rest: The nineteenth-century globalization and the spread of foreign investment

An increased transfer of commodities, people, capital, and ideas between and within continents occurred in the period from 1870 to 1914. This time is referred to as the

[84] We will see below that the Calvo doctrine is the main manifestation of this *pièce de résistance* (CIEL, 2003).

nineteenth-century globalization, or the first wave of globalization. It created the appropriate political and economic conditions for the protection of the alien – foreign investors included – to become a worldwide issue (BROADBERRY; O´ROURKE, 2010).

An independent Latin America[85] became one of the main targets of early-industrialized countries[86] – mainly the United States, Great Britain, Germany and France –, due to its pattern of specialization: Industrialized countries were in need of raw materials and food products, precisely what Latin Americans were able to provide them. Once these states were no longer under colonial submission, including the monopolies inherent to this condition, industrialized countries approached Latin America to have access to its (vastly unexploited) natural resources. Besides the need to import these products, the West was also interested in finding a consumer market to export the surplus products of its industries, and Latin American countries, with their weak industrial base and open trading system, was an optimum choice (BROADBERRY; O´ROURKE, 2010; BULMER-THOMAS, 2003).

Even if marginally, as an exporter of commodities, Latin America joined the wave of modern economic development at an early stage (BÉRTOLA; OCAMPO, 2012). By the last decades of the nineteenth century, Latin America was fully integrated into the world economy through exports and capital imports.[87] At that time, all Latin America republics followed an export-led growth mode fundamentally based on commodities, in response to the demand created by the Industrial Revolution. The export of primary-products has been since this post-independence moment until present days the main economic link of Latin American with the rest of the world. A liberal ideology also dominated the continent by that time, stimulating the modest role of states, free-trade,

[85] The majority of Latin American countries become independent in the 1820s. See Bulmer-Thomas (2003) for an in-depth account of the few exceptions (Haiti, Uruguay, the Dominican Republic, Cuba, and Panama).
[86] The West also took the opportunity to attempt a closer approach with other world regions, like Asia. Nonetheless, we will focus on Latin-America during the nineteenth century globalization, as our case study – to be better developed in chapter 3 – is Argentina.
[87] See Bértola; Ocampo (2012) and Bulmer-Thomas (2003) for a further account of the economic history of Latin-America in the first decades after independence. In the context of this work, it suffices to say that the international commodity scenario was favorable throughout this period; however, newly independent Latin-American countries faced political weakness and some considerable obstacles for the supply of these products, and, therefore, they took little advantage of a prosperous external time.

foreign immigration and the attraction of foreign investments (BULMER-THOMAS, 2003).

The extraction of natural resources demanded the development of infrastructure throughout Latin American countries. However, states who had freed from colonial power a few decades earlier found difficulties in mobilizing domestic resources for capital accumulation. Embedded in the widespread liberal ideology, Latin America turned to foreign investors as a source of supplementary finance. Foreign investment was mainly directed at railways and public utilities. Capital came primarily from Great Britain throughout the nineteenth century, and, in the first decades of the twentieth century, North-American capital also became prominent in the region (BULMER-THOMAS, 2003):

Table 1. Foreign Investment in Latin America, values per country and year (in millions of U.S. dollars)

	1880	**1913**	**1926**
United Kingdom	868	4,867	5,825
France	218	1,002	not available
United States	not available	1,276	5,370
Total	1,087	7,145	11,194

Source: Bértola and Ocampo (2012), p. 124

Considering Argentina, *circa* 1913 the country received almost half of the total amount of investment directed at Latin America – 3,217 million U.S. dollars (BULMER-THOMAS, 2003, p. 102). Brazil, Mexico, Chile, Cuba, Peru, Uruguay and Venezuela also received a considerable amount of foreign investment throughout these years.[88] Foreign investment was spread throughout the continent, ensuring basic conditions for raw products to be exported and for industrialized products to be imported.

The relationship between foreign investors and host states was not always smooth. Foreign direct investment usually assumed the form of companies operating in the host country; many of them were natural monopolies – involving, for example, water supply –, others enjoyed a quasi-monopoly – as those involved in the construction and operation of railways – and, in some cases, they operated price-fixing cartels – such

[88] See Bértola; Ocampo, 2012, p. 124 and Bulmer-Thomas, 2003, p. 102 for an in-depth account of the total foreign direct investment sent to Latin America in this period.

as companies in insurance and shipping. The balance of power usually pended towards foreign investors: They created an unequal relationship with local governments, and many contracts regulating the access to host states' natural resources looked extremely generous to foreign companies (BULMER-THOMAS, 2003).

In this context of an unbalanced relationship between investors and host states, the independence of Latin American republics was continually threatened; not by a formal colonial annexation, but rather by an informal political-economic influence. As highlighted by Gallagher and Robinson, mentioning the Prime Minister of Great Britain Mr. George Canning, in 1824: "*Spanish America is free and if we do not mis-manage our affairs sadly she is English*" (GALLAGHER; ROBINSON, 1953, p. 8). It resembled a second conquest of Europeans for the development of a new colonial pact (BROADBERRY; O´ROURKE, 2010).

In very broad terms, imperialism "*involves the diminution of sovereignty through the exercise of power*" (HOPKINS, 1994, p. 476). It shall not be reduced to the formal annexation of countries as colonies; imperial interests may also be furthered through indirect methods. An informal form of imperialism was also much used by the West during the nineteenth century, beyond colonial ties. To further economic interests without integrating new regions to a colonial subjugation, Western countries made use of more subtle political and economic elements of expansion, creating an informal net of countries under their economic dependence. Aiming at politically weaker states, the West imposed its interests in disregard of non-Westerns:

> Imperialism, perhaps, may be defined as a sufficient political function of this process of integrating new regions into the expanding economy; its character is largely decided by the various and changing relationships between the political and economic elements of expansion in any particular region and time. (…) It is only when the polities of these new regions fail to provide satisfactory conditions for commercial or strategic integration and when their relative weakness allows, that power is used imperialistically to adjust those conditions. (…) Consequently, in any particular region, if economic opportunity seems large but political security small, then full absorption into the extending

> economy tends to be frustrated until power is exerted upon the state in question. (GALLAGHER; ROBINSON, 1953, p. 6-7)

Latin America was coopted under this veil of informal imperialism. Latin-American republics were mainly used as satellite economies providing commodities to the West so the latter could further its industrialization potential; Latin America was left behind in terms of economic development. Treaties of Friendship, Commerce, and Navigation were one of the most used political instruments to expedite Western economic interests, while abounded episodes of (in)direct interference on host states to assure the interests of foreign investors were attended (MILES, 2013; BULMER-THOMAS, 2003; GALLAGHER; ROBINSON, 1953).[89]

It was precisely in the context of the nineteenth-century globalization that the doctrines of state responsibility and the protection of the alien grew up to its maturity, as this historic period produced the political and economic conditions for the protection of the alien to become a worldwide issue (BROWNLIE, 2008; ROY, 1961). When investments left the West to reach different regions of the globe, as an instrument of informal imperialism, capital-exporters worried about their legal protection. New instruments to protect imperial interests had to be developed, then.

2.3 The protection of foreign investors and the creation of an international minimum standard

It is true that the redress of a wrong done to an individual – whomever the offender may be – is a timeless axiom of justice (ROY, 1961). It is also true that the exercise of diplomatic protection of the alien visiting or residing abroad has subsisted at least since the Middle Ages (BROWNLIE, 2008). Nonetheless, these doctrines gained much of

[89] See Hopkins (1994). The author analyses the relationship between Argentina and Britain from 1810 to 1914, and he concludes that Argentina was under British informal imperialism. For him, the patterns of the Argentinean development in the nineteenth century are only comprehensible in a political and economic context essentially shaped by Britain as a major power. We acknowledge this topic is controversial. Thompson (1991) argues that Argentina and Britain had a relationship of co-operation, rather than an imperialist one; he claims Britain did not act as an indirect political hegemon, nor there was disproportionate asymmetry or inequality in their relationship, and, therefore, the informal empire was no more than a myth. Nonetheless, we follow in this work the steps of Gallagher and Robinson (1953), Hopkins (1994) and so many others who understand that Latin America was indeed coopted under a veil of informal imperialism.

the contours we know today from the nineteenth century onwards when they also became instruments of capital-exporting countries' imperialism (ROY, 1961).

When commercial relationships occurred in the context of equally-sovereign Western states or in the context of their colonial relations, they were governed by commercial treaties and by customary law that emerged for the protection and security of aliens living or residing abroad – if only among Western countries (WEILER, 2011; ROY, 1961).[90] Be it by treaty or by custom, these laws reflected the interests pursued by Western countries (ROY, 1961). When an ever-growing number of Western nationals embraced the opportunity to take their capital to non-Western countries with different legal, political and economic realities, the concern over how investors and their investment should be protected grew among home states.

Absent a contrary disposition in a treaty or customary law, the alien could only expect to be treated equally to the nationals of the host state, with all the benefits and burdens of such a choice, as he/she voluntarily opted to invest abroad (BROWNLIE, 2008; ROY, 1961). It was indeed common for international treaties to include national treatment standards, establishing that aliens should be subjected to the laws and courts of the host state. For instance, this is what happened in the context of the relationship between the United States and Latin America in the first decades of the nineteenth century.

Several Treaties of Friendship, Commerce, and Navigation executed between the United States and Latin American countries established that nationals from the other party should be submitted to the domestic laws and courts of the host state.[91] These treaties did not refer to an international standard; the national treatment is the rule

[90] Weiler (2011, p. 345-346) refers directly to Frederick S. Dunn, who also claims that customary law would have emerged for the protection of aliens (DUNN, F. The Diplomatic Protection of Americans in Mexico, Columbia University Press, 1933).

[91] We analyzed all of the Friendship, Commerce and Navigation Treaties – or similar denominations, but all referring to commercial relationships between the countries – available in the website of the North-American Library of Congress: <http://www.loc.gov/law/help/us-treaties/bevans.php>, last accessed: May 30, 2019. There are 19 available treaties. The countries that entered into these treaties with the United States are the following: Argentina, Bolivia, Brazil, Chile, Colombia, Peru-Bolivian Confederation, Central American Federation, Costa Rica, Dominican Republic, El Salvador, Ecuador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Paraguay, Peru, and Venezuela. A complete reference of these treaties is available at the end of this work.

among contracting parties. See, for example, how the treaty executed between Argentina and the United States regulates this issue:

> Article VIII. (…) The citizens of the two contracting parties shall reciprocally receive and enjoy full and perfect protection for their persons and property and shall have free and open access to the Courts of justice in the said countries respectively for the prosecution and defence of their just rights, and they shall be at liberty to employ in all cases such advocates, attorneys or agents as they may think proper, and they shall enjoy in this respect the same rights and privileges therein as native citizens. (Treaty of Friendship, Commerce and Navigation, between the United States and the Argentine Confederation, signed at San José July 27, 1853, 10 Stat. 1005, Treaty Series 4)

Nonetheless, in spite of the practice established in almost two dozen treaties executed from 1824 to 1867, the United States, accompanied by European countries, ignored the national treatment standard. They upheld, in the context of disputes between foreign investors *versus* Latin American host states in the final part of the nineteenth century that the latter should be abided by an international minimum (ANGHIE, 1999).[92] Capital-exporting countries embraced this situation to draft the first lines of an instrument to impose – once again – their world view over capital-importing countries: the international minimum standard for the protection of the alien.[93]

Claiming that existing standards for the treatment of aliens were insufficient in non-Western countries, capital-exporters strongly opposed their nationals being subject to the laws of host states. They concerned host countries lacked basic measures of protection for investors and their property (BLANDFORD, 2017; DUMBERRY, 2017; WEILER, 2011). They also argued that without an international parameter there would be no limitations for arbitrary power – or the *unlimited power of spoliation* – of a state to deprive foreign investors of their elementary rights (BORCHARD, 1940).

---

[92] See Miles (2013) for some of the cases that happened in the late nineteenth and early twentieth centuries, including the United States and Paraguay Navigation Company Claim and the Venezuelan Arbitrations of 1903.

[93] The international minimum standard was not the only instrument created by capital-exporting countries to further their interests on trade and investment; we saw in chapter 1 other instruments, such as the acquiring of concessions and capitulation or unequal treaties. Nonetheless, an international standard that reflected their laws and practice was one of the preferred resorts (CIEL, 2003).

Host states should then be abided by the minimum treatment even if it exceeded the contours of their domestic law (PICHERACK, 2008). Those who backed the standard claimed that foreign investors had the right to expect to be treated according to an international minimum, even if it meant a different standard of treatment to aliens and nationals (SCHRIJVER, 1997). In case the host state failed to observe it, the breach would give rise to state responsibility under international law (ANGHIE, 1999).[94]

There were different ways to refer to the standard. Root (1910, p. 21) argued it was "a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world" and, thus, all countries were should measure the justice due to an alien against the standard.[95] Borchard (1940, p. 448), on his turn, claimed it was a "fundamental, natural, or inherent rights of humanity or of man or of the alien". Common to these claims was the lack of consensus as to the actual content of the standard and a highly discriminatory and rationalized vocabulary.

When referring to the international minimum, it is commonly mentioned a list of specific elements related to the mistreatment of foreign investors and their property, including denial of justice, denial of due process, lack of due diligence, non-discrimination, full protection and security, corrupt administration of justice, arbitrary conduct of judges, bad faith, fraud and outrage resulting in injury to the foreign investor (DUMBERRY, 2017; SORNARAJAH, 2015; CAMPBELL, 2013; NEWCOMBE; PARADELL, 2009; BORCHARD, 1940). The original scope of the standard refers *lato sensu* to bad faith and outrageous or egregious conduct of the host state (MILES, 2013); nevertheless, no consensus as to a comprehensive and widely accepted concept was ever reached.

[94] The standard would also have created the expectation that if local remedies available in host states did not exist or if they were below international standards, the foreign investor would have the right to appeal directly to international adjudication. See Boase (2018) and Schrijver (1997).
[95] Root (1910) is widely referred to when it comes to the origins of the international minimum standard. Curiously, the author did not use the term international minimum standard; he referred to an international standard of justice. Borchard (1940) seems to be the first to refer expressly to an international minimum standard. In any case, these are paradigmatic texts extensively used by Western countries to argue for the existence of an international minimum standard. See Blandford (2017).

The Neer case[96] brought some light to the issue, though insufficient to overcome a disputed debate. The case refers to the death of Mr. Neer, an American citizen killed in Guanacevi, and the alleged lack of diligence of the Mexican state to investigate and prosecute those involved in the crime. The award brings a paradigmatic definition of the mistreatment of aliens: An international delinquency amounts "*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 would readily recognize its insufficiency*" (PAPARINSKIS, 2013, p. 6).

The award rendered in the Neer case does not include the expression *international minimum standard*. Nonetheless, the case exerts considerable influence on the emergence of the concept. Several contemporary arbitration awards refer to the Neer case when attempting to define the international minimum standard, including the tribunals in Mondev International Ltd. v. the United States of America (ICSID case n. ARB AF/99/2) and Railroad Development Corporation v. Republic of Guatemala (ICSID case n. ARB/07/23). Nonetheless, some scholars cast doubt on the real relevance of the Neer case for contemporary international investment law; they claim the facts of the case do not involve an investment dispute or the mistreatment of an alien by the State, and, in any case, the standard would have evolved since the 1920s (DUMBERRY, 2017; PAPARINSKIS, 2013).[97]

For those who backed an international minimum, the lack of consensus as to its content was not a downside. Rather the contrary, the standard would be dependent on so many variables that a fixed content was claimed to be hazardous (BORCHARD, 1940). They argued the concept was flexible and variable according to the circumstances of the case, as an umbrella clause that incorporates different elements (DUMBERRY, 2017). It would consist of "a series of interconnecting and overlapping elements or standards that apply to both the treatment of foreigners and their property" in a continuous process of development (NEWCOMBE; PARADELL, 2009, p. 236-237). As a catch-all

[96] L. F. H. Neer and Pauline Neer (USA) v United Mexican States, 1926, before the Mexico/USA General Claims Commission.

[97] "Consequently, the vagueness and deference of Neer may have come from a theoretically, systemically, and factually misguided approach to the legal issue at hand, and its legally almost meaningless criteria should not be taken as an exhaustive, self-sufficient, and irreplaceable elaboration of the content of classical law." (PAPARINSKIS, 2013, p. 51)

concept, there were no clear directions within international law as to how it should be applied; nonetheless, there were few doubts that the threshold for the breach was limited to outrageous situations committed by the host state (PAPARINSKIS, 2013; HAERI, 2011; MAYEDA, 2007).

The debate over the international minimum also resorted to a highly discriminatory and rationalized vocabulary. Root (1910, p. 20-21) expressly referred to non-Western countries as “those incapable of maintaining order”, and Borchard openly declared that non-Western states were less mature and weaker than Western countries:

> Sovereignty is more emotionally invoked by the less mature than by older states. These weaker countries often disregard the rule, axiomatic in fact, that a state claiming the privileges of international law must comply with its duties, or deny that there is any duty to establish any degree or standard of organization or perform any normal obligations with respect to aliens. (BORCHARD, 1940, p. 451)

It should come as no surprise that an open-ended concept molded by a discriminatory and rationalized vocabulary could be used by capital-exporting countries as an instrument in the context of the nineteenth century (informal) imperialism.[98] The whole package for the protection of the alien was used as an instrument of Western imperialism;[99] to facilitate the economic exploitation of non-Westerns.[100]

Western countries molded the parameters of the standard according to the facts of the case and their interests, so it could be used as a means to justify the abuse of

---

[98] Shea (1955, p. 9) highlights the presence of foreign investments in non-Western countries as an instrument of exploitation: “The Calvo Clause has existed as a legal and diplomatic problem for about eighty years. It is closely related to, and a result of, the development and exploitation of the natural resources in the underdeveloped regions of the world that occurred in the latter part of the nineteenth century and the early part of the twentieth. In some areas of the world, this exploitation took the form of outright colonization in various forms and degrees. However, where independent governments existed in the underdeveloped regions, the exploitation generally came in the form of large foreign investments and a consequent migration of foreigners to these countries to supervise and direct the development of their natural resources”.

[99] “Imperialism, however, found in it a ready-made device to push itself forward under a sort of legal banner and at the same time helped the law to develop along certain lines” (ROY, 1961, p. 880-881).

[100] Anghie (1999, p. 65) refers to Anand when acknowledging that the rules of state responsibility were an instrument of economic domination: “Anand refers to many rules of international law, such as the rules of state responsibility, which were explicitly devised to facilitate the economic exploitation of non-European territories”.

diplomatic protection and other forms of intervention by European powers and the United States, involving, not rarely, *the barrel of a gun* (WEILER, 2011, p. 371).[101] The abusive treatment occurred in three main spheres: national treatment (the protection of foreign investors was elevated beyond levels that could be reached by nationals), diplomatic protection (foreign investors were vested with the right to resort to international *fora* and diplomatic channels to adjudicate investment disputes), and the exhaustion of local remedies (acceding to international *fora* and diplomatic channels did not prescind the exhaustion of local remedies - BOASE, 2018; CIEL, 2003).

The international minimum standard inherited the relationship of power and subordination inherent in the colonial relationship (ANGHIE, 2004). García-Mora (1950, p. 209) referred to the international minimum as the product of a Western presumption that capital-exporting states had “a superior standard of civilized justice”. Shea (1955), on his turn, highlighted the argument furthered by the West that foreign investment would be attracted to less-risky states aligned to international standards for the protection of aliens.

Taking for granted that domestic laws and courts of traditionally capital-importing countries would not suffice to protect foreign investors, capital-exporting countries insisted on an international minimum. However, the standard represented interference in the domestic affairs of host states: Neither the law nor the courts of host states were adequate to protect foreign investors. A gap, then, emerges between capital-exporting, whose laws and concept of the world inspired the creation of an international standard, and capital-importing countries, whose laws should be disregarded if they did not reach the minimum standard. It posits a difference between Western and non-Western

[101] Referring to the construction of the international responsibility of States, what necessarily goes through the construction of the international minimum standard, see Weiler (2011, p. 376): “The root of the problem was political. It began with European powers, and the United States, using military force to secure capitulation treaties with Asian countries. Military force was then used as a means of diplomatic protection in Latin America, essentially resurrecting the retrograde regime of reprisal long since banished by commercial treaty practice in Europe. Next came the imposition, by threat and/or use of force, of mixed claims commissions in Latin America. Finally, as African and other Asian countries emerged from centuries of colonial rule, the threat of military intervention hung over disputes involving the equitable exploitation of natural resources, the control of which remained in colonial hands, albeit in the private sector”. Shea (1955, p. 12) also acknowledges that the use of armed force was not uncommon in the relationship between home and host states: “Utilization of armed force to compel the weaker nations to honor these dubious claims was not infrequent, and it sometimes happened that the severity of the measures adopted in seeking compensation for the alleged injuries was far out of proportion to the extent of the initial damages suffered.”

countries, a dynamic of civilized against the uncivilized, or, as Roy (1910) termed it, those capable of maintaining the order *versus* those who allegedly were incapable of doing so.

There was no reciprocity between capital-exporting and capital-importing countries as to the protection of the foreign investment; the past of exploiter and exploited from colonial times was back (ROY, 1961). As Western and non-Western countries were placed in different positions, power struggles are easily identified. The sovereignty of capital-importing countries was a formality, representing alienation, non-empowerment, and submission to standards created by the different other. They were indeed requested to assimilate the authoritative standard imposed by the other – amicably or by force:

> The jurisprudence of the nineteenth century has had profound and enduring consequences for the non-European world. Basically, it presented non-European societies with the fundamental contradiction of having to comply with authoritative European standards in order to win recognition and assert themselves. (…) Consequently, for the non-European world, the achievement of sovereignty was a profoundly ambiguous development, as it involved alienation rather than empowerment, and presupposed the submission to alien standards rather than the affirmation of authentic identity. (ANGHIE, 1999, p. 65)

Hence, as Weiler (2011, p. 345) pointed out, the international minimum standard represented formal equality among “radically unequal States”. The colonial encounter shaped the international minimum; the interaction between sovereign Western states and non-Western states whose sovereignty was disregarded produced the standard. The rationalized image of non-Western capital-importing countries was, in fact, the inspiration for the international minimum: An allegedly universal standard inspired in the laws of civilized Western countries that rejected any other different legal manifestation. The standard was created to subjugate the different ones.

This unequal relationship was the perfect framework for immense discord among capital-importing and capital-exporting countries. It is in this context that the Calvo doctrine emerged in the last decades of the nineteenth century as a Latin American response to the abuses of Western countries to legitimize their exercises of military

brutality and economic force (WEILER, 2011; GARCIA-MORA, 1950).[102] Through the Calvo doctrine, Latin American countries questioned a few decades after their formal decolonization whether they were actually free. Although they were deemed sovereign, they lacked the economic and political power to object international rules they perceived as biased (ANGHIE, 2004).

Equality was the cornerstone of Calvo doctrine, be it equality among states or between foreign investors and nationals. The doctrine was rooted in the absolute sovereign autonomy and equality of countries – especially Latin American states – against the military, economic, and diplomatic intervention by capital-exporting states. According to Calvo´s lessons, equality, sovereignty, and independence are fundamental rights of all states, and, therefore, they shall not expect to suffer unduly interference – diplomatic, judicial or military – from other (equally sovereign) states.[103] In this sense, there should be absolute equality between states and they should be free to object interferences of any sort by whoever was the source of said interference (LORCA, 2012; MANNING-CABROL, 1995; SHEA, 1955).

Calvo asserted that foreigners should be subjected to the laws and Courts of host states, claiming for equal treatment between nationals and foreigners. The doctrine also determined that foreigners living or residing abroad should waive the protection of home states, demanding their full abstention from interferences in disputes involving the property of foreign investor; it still stipulated that there was no obligation for the host state to pay compensation to foreign investors in case of an eventual interference with his/her property, unless the laws of the latter foresaw it (SCHRIJVER, 1997).

Non-Western countries acknowledged their responsibility to respect and protect foreign investors (GARCIA-MORA, 1950). They understood foreign investors should be subject to and protected by their domestic legislation, observing the same

[102] Carlos Calvo was an Argentine publicist, diplomat, and historian who created the doctrine named after him, based on the equality of both host states and investors.
[103] Considering the Calvo doctrine was created by an Argentinean national, it is interesting to bring the declaration made by an Argentine representative at the 6th International Conference of American States, held in Havana in 1928: “Intervention — diplomatic or armed, permanent or temporary — is an attempt against the independence of nations and cannot be justified on the plea of protecting the interests of citizens.“ (SHEA, 1955, p. 71). We will see below that Interamerican Conferences were crucial in the development of the Calvo doctrine itself.

guarantees due to their nationals (ROY, 1961). They did not reject or obliviate their responsibility. However, they objected unduly intrusions by Western countries who wanted to dictate both the contours and the use of the protection of aliens (GARCIA-MORA, 1950). Thus, no justice was denied to the alien, as he would have full access to the laws and courts of the host state (SHEA, 1955). Unless local remedies are exhausted and no justice is obtained for the alien, then the foreign investor shall be subject to the domestic law of host states, as he assumed the risks of investing abroad. Foreign investors are presumed to know the law of the place where they conduct businesses (MANNING-CABROL, 1995; GARCIA-MORA, 1950).[104]

Western countries attempted to disregard the Calvo doctrine mainly by suggesting that it repudiated international law.[105] They claimed the doctrine was part of a non-Western campaign to get rid of diplomatic protection – or, at least, to restrict significantly the responsibility of host states for the damage suffered by foreigners – and to escape from international responsibility (BORCHARD, 1940; SUMMERS, 1933). Mainstream scholars suggested that the mere attempt to rethink the responsibility of states for injuries to aliens was an unreasonable attack.[106]

Much of the struggle as to the international minimum took place within Inter-American conferences. Latin-American countries made a great effort to back the Calvo doctrine in these international *fora*; as they were the strong majority, they had a favorable position to exert considerable pressure to further their agenda. However, the United States repeatedly positioned itself against the Calvo doctrine. Even if in numeric disadvantage, the economic and political power of the United States was enough to reject any compromise that could harm its interests.

Latin American countries reiterated for years in inter-American conferences their position to consolidate both a non-intervention principle for the continent and the idea that *"equality is enough"*, meaning aliens and foreigners should be treated equally

[104] Not obtaining a favorable judgment is insufficient for the alien to claim that justice was denied. Some degree of arbitrariness is necessary for denial of justice to be established (GARCIA-MORA, 1950).
[105] See also Feller (1933) for a critic of Calvo doctrine, especially on the awards rendered by international courts that addressed the issue.
[106] Lillich (1975) begins his paper by alerting that traditional international was under attack for several decades, as new attempts to think such doctrine had emerged in the last years.

(SHEA, 1955, p. 64).[107] The United States had a more dubious position: If initially the country openly defended an interventionist policy[108], a few years later they publicly acknowledged no Latin American government needed to fear a north-American intervention.[109] A similar movement could be seen in how the United States behaved towards Latin America as a whole. At the beginning of the twentieth century, the United States openly proclaimed to be responsible, under the Monroe Doctrine, to intervene in Latin America. The United States claimed to be responsible for the exercise of international police power over the continent. From the 1930s, the scenario changed; the United States rejected the use of force, and, instead, relied on "more tactful and sophisticated alternatives to influence Latin America" (BAILY, 1976, p. 33).[110]

In the context of the inter-American conferences, influenced by this paradigmatic change in the 1930s, the United States endorsed the Convention on Rights and Duties of States[111] - whose articles 8 and 9 asserted that no state had the right to interfere in the internal or external affair of another,[112] stating that the jurisdiction of states within the limits of national territories would apply to all inhabitants.[113] It does not mean, however, that the United States eventually accepted the Calvo doctrine. The country ensued intervening diplomatically on behalf of its citizens abroad and promoting the

[107] For a full account of how Latin American countries have positioned throughout the inter-American conferences, see Shea (1955).
[108] Shea (1955, p. 66) refers to the 6th International Conference of American States, held in Havana in 1928, when the United States secretary of state openly backed an interventionist approach of his country over Latin American countries: "The debate was highlighted by an address to the conference by Charles Evans Hughes, the United States secretary of state, in which he defended the intervention policy of the United States and quite frankly attempted to place the responsibility for the interventions on the internal condition of the Latin American countries."
[109] Shea refers to a speech presented by Mr. Cordell Hull, the United States secretary of state, at one of the committees that took place in the context of the 7th International Conference of American States, in 1933: "Hull said he felt (…) 'safe in undertaking to say that under our support of the general principle of non-intervention as has been suggested, no government need fear any intervention on the part of the United States under the Roosevelt Administration. I think it unfortunate that during the brief period of this Conference there is apparently not time within which to prepare interpretations and definitions of these fundamental terms that are embraced in the report'." (SHEA, 1955, p. 67-68)
[110] See Baily (1976) for a more in-depth discussion of the relationship between the United States and Latin America throughout the twentieth century.
[111] The Convention was adopted amid the 7th International Conference of American States, held in Montevideo in 1933.
[112] The United States indeed presented a lengthy reservation to this article to assert that the country would be guided by the law of nations as generally-recognized and accepted, hinting that it would still be resorting to the international minimum standard respectful of the Convention on Rights and Duties of States (SHEA, 1955).
[113] The United States also submitted a reservation to this Article, adding that it reserved its rights to be abided by the law of nations as generally recognized and accepted. Once again, it opened the opportunity to continue invoking the international minimum standard (SHEA, 1955).

existence of an international standard. Nonetheless, Latin America continued strongly asserting in inter-American conferences against any intervention by Western states into their domestic affairs:

> Thus, the United States, in an effort to overcome the resentment, suspicion, and bitterness that were the heritage of the Monroe Doctrine and the Roosevelt Corollary, and in order to guarantee hemispheric solidarity in the face of world-wide economic and political stress, has found it expedient to abandon its opposition to some points of the Calvo principles. While this has by no means resulted in total surrender, the story of the inter-American conferences has been one of gradual progress for several of the basic Latin American contentions regarding the practice of governmental intervention in behalf of nationals in foreign countries. (SHEA, 1955, p. 63)

Latin American countries found some success in the inter-American conferences and the influence of the Calvo doctrine has not been completely disregarded. Capital-importing states' opposition against Western intervention, including the international minimum standard, remained on the agenda for the years to come.[114] Even so, Western states ultimately succeeded in their attempt to reject Calvo doctrine, avoiding it from reaching the status of international law (MILES, 2003; MANNING-CABROL, 1995).[115] Calvo´s lessons empowered non-Western states; therefore, it is not a surprise that the West rejected their acceptance within the international legal framework. Once again, the balance of power favored Western countries.

The international minimum standard is a clear example of *hegemonic contestation* (KOSKENNIEMI, 2004).[116] Western states challenged non-Westerns by developing a standard that supported their preferences, their world view and practices, to turn them

---

[114] Anghie (2004) highlights that the Latin American experience throughout the nineteenth century against Western intervention and the creation of the Calvo doctrine was inspirational for the New International Economic Order movement proposed by newly independent countries after the twentieth century decolonization.

[115] Weather the international minimum standard is currently part of the body of customary law remains a controversial issue. Newcombe; Paradell (2009) and Dumberry (2017) argue that the international minimum standard is a customary law, while Sornarajah (2004) rejects it. Some voices argue that Calvo doctrine has reached regionally the status of customary law: "These elements of State practice, followed by a sense of legal obligation, may be evidence of regional customary law on the treatment of foreign investments in Latin America, as well as evidence of opposition to the formation of international custom regarding State responsibility for injuries to aliens and of persistent objection to the application of such custom to these States." (CIEL, 2003, p. 2)

[116] The concept of hegemonic contestation was presented in chapter 1.

into valid universal norm while neutralizing (different) non-European world views and practices. The attempt to counteract the international minimum through the Calvo doctrine was treated by Western countries as a temporary interruption that should be overcome, no more than a hysterical reaction or a failure (BOASE, 2018). The fact is that when hegemony is embedded within a legal regime, "(…) external critique appears ignorant while becoming insider involves embracing a complexity that often stuns the ability to contest." (KOSKENNIEMI, 2017, p. 203-204).

The international minimum survived; yet, not without major casualties. The Calvo doctrine made clear that several countries vehemently opposed an international minimum standard. Thus, the latter turned out to be anything but unanimous. In this context, doubts as to the effectiveness of the standard emerged and the protection of foreign investors remained controversial (DUMBERRY, 2017). It did not take long for capital-exporting countries to come up with a solution, albeit a mischievous one.

2.4 From the international minimum to the FET standard: Foreign investors and private property continuously at the center of protection

2.4.1 A brief account on the origins of the FET standard

The Calvo doctrine made clear that the international minimum was not a unanimous concept. Western countries attempt to defend it as a *universally accepted principle of justice* (ROOT, 1910, p. 27). However, non-Westerns opposed any endeavor to reject their domestic laws under the aegis of an allegedly universal standard (ANGHIE, 2004). A standard presumed biased – at least through the eyes of capital-importing countries – was not the best instrument to protect foreign investors; the uncertainty surrounding the international minimum turned it into an ineffective tool in providing basic legal protection to investors and their property (DUMBERRY, 2017; PAPARINSKIS, 2013).

Yet, non-Western countries were not powerful enough to shape international law according to their understanding of the international responsibility of states. They understood that foreigners should be subject to the laws and courts of the host country, except where there was a clear denial of justice, and not to an international standard

that conferred a different treatment between foreigners and nationals (GARCIA-MORA, 1950). However, they did not have the means to set the agenda, and, once again, the West coopted it. To overcome the uncertainty over the international minimum standard, capital-exporting countries started to draft the first lines of a new standard for the protection of foreign investors; a standard that was claimed to break with the imperial past while conceptually different from the international minimum: the FET standard.

The first reference to equitable treatment in a multilateral instrument is found in Article 23 (e) of the League of Nations Covenant, referring to the equitable treatment for commercial relations of its members (DUMBERRY, 2017).[117] Three decades later, in 1948, the Havana Charter for an International Trade Organization ("ITO") was adopted under the auspices of the United Nations. Article 11 (2) established that ITO could make recommendations and promote agreements to assure the just and equitable treatment for "*the enterprise, skills, capital, arts and technology brought from one Member country to another*";[118] it was an authorization for ITO to include the standard in future agreements, less than a *pactum de contrahendo* thus (VASCIANNIE, 1999). Even though the limited reach of both instruments – the League of Nations ceased to exist in 1946 and the ITO never came into effect –, they were part of the initial steps in the formulation of the FET standard, serving as a means to favor international standards over the Calvo doctrine and national treatment (PICHERACK, 2008).[119]

Alongside these multilateral agreements, the United States had a crucial role in the creation and further consolidation of the standard. Back in 1938, the United States

---

[117] "Article 23, (e): Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the Members of the League: (…) (e) will make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all Members of the League. In this connection, the special necessities of the regions devastated during the war of 1914-1918 shall be borne in mind (…)." The Covenant was executed in 1919.

[118] "Article 11, (2): The Organization may, in such collaboration with other inter-governmental organizations as may be appropriate: (a) make recommendations for and promote bilateral or multilateral agreements on measures designed. (i) to assure just and equitable treatment for the enterprise, skills, capital, arts and technology brought from one Member country to another; (…)."

[119] Weiler (2011) highlights the lack of interest from the United State for anything more than just an agreement on tariffs and trade as one of the causes that lead to the failure of the Havana Charter: neither US businesses nor the governments of other capital-exporting countries were satisfied with the north-American approach. They wanted more; they were aiming at meaningful standards for the protection of foreign investment. The FET standard developed significantly after the Havana Charter and some decades after it was widely incorporated into investment agreements. We will see how it happened below.

secretary of state Mr. Cordell Hull, in the context of the Mexican nationalization of north-American investments in the oil sector, stated that the country "sought 'a fair and equitable solution for the expropriation problem,' which would require 'just and equitable compensation'" (BLANDFORD, 2017, p. 301). In 1946, it was the United States that proposed the inclusion of just and equitable treatment in the Havana Charter and, from 1946 to 1966, the United States entered into several treaties of friendship, commerce, and navigation which regularly contained a FET clause (BLANDFORD, 2017; JOHNSON; GIMBLETT, 2012; VASCIANNIE, 1999).[120] This was a remarkable difference from the treaties of friendship, commerce, and navigation executed by the United States throughout the nineteenth century, where national treatment was the rule among contracting parties, as we saw above.

In the post-War period, the United States abandoned the highly criticized international minimum terminology – which it had helped to create –, developing and systematically disseminating instead the fair (or just) and equitable treatment (BLANDFORD, 2017; WEILER, 2013).[121] Facing uncertainties regarding the international minimum, the United States did not hesitate in offering the FET standard, rather than insisting on a never-ending discussion over the scope of the former (WEILER, 2013). This practice anticipated what would become common ground in BITs in the following years.[122]

While developing the FET standard, North-American negotiators were looking for treaty terms that were not only acceptable to capital-importing countries but, at the same time, provided decision-makers with broad discretion to interpret standards of

[120] Treaties of friendship, commerce and navigation were commonly executed by the United States from the end of its War of Independence until 1966. Even though the focus of these treaties was trade, as the name implies, from 1920 they also frequently included provisions on the protection of foreign investors, including the prohibition of expropriation without payment of compensation (JOHNSON; GIMBLETT, 2012).

[121] To exemplify it, the Treaty of Friendship, Commerce, and Navigation between the United States and Germany, executed in 1954 brings the fair and equitable standard: "Article I.1. Each Party shall at all times accord fair and equitable treatment to the nationals and companies of the other Party, and to their property, enterprises and other interests". In the Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua, executed in 1956, a shorter formula is used: "Article I. Each Party shall at all times accord equitable treatment to the persons, property, enterprises and other interests of nationals and companies of the other Party".

[122] "The significance of FCN treaties, at least for purposes of this article, is that there is a long standing and extensive treaty practice predating BITs that rather consistently reflected the Euro-American consensus concerning a sovereign's obligations with respect to alien-owned property. Indeed, postwar FCN treaties anticipated the majority of the investment-protection provisions found in BITs today." (JOHNSON; GIMBLETT, 2012, p. 678)

protection more strictly. Another concern was to distance the FET from the widely disputed international minimum. It was not by chance that they opted for vague terms such as fair and equitable, which could lead to different interpretations by different people. They could mean virtually *everything*. Equitable could be interpreted as a manifestation of the principle of sovereign equality of states, meaning that all states are equal and should be treated equally; at the same time, it could also be applied in a more high-level fashion to favor the protection of foreign investors (DUMBERRY, 2017).[123] Referring to broad terms was a trick to amplifying the protection of foreign investors and empowering decision-makers:

> The same sentiments which drove segregation of the issue of compensation for expropriation from the issue of protection and security also led treaty drafters to introduce a few other drafting 'tricks'. One of those techniques was to refer to "international law," "justice," or "equity" as part of the applicable law of any dispute under the treaty. The purpose of including such references in a treaty was to construct a halfway-house between a mandating a decision based on specific rules of law and a decision made *ex aequo et bono*. (…) Reference was being made to international law, or principles of international law or the law of nations, as being either part of, or in addition to, the minimum standard of protection and security. (…) As we shall see, the next step would be to add a "fair and equitable treatment" provision to these treaties, starting in the 1950's. (WEILER, 2011, p. 367-368)

Following the steps of the international minimum standard, the West carefully molded the FET. Once again, capital-exporting countries furthered an international standard of protection; and an international standard so indeterminate made it easier for non-Westerns to accept it while empowering decision-makers to apply stringent interpretations of the standard (WEILER, 2013). The FET seemed to be something different from the international minimum earlier rejected by capital-importing countries; it was not, though.[124]

---

[123] The practice of arbitral law-making that advances the interests of capital-exporting countries and foreign investors is still much alive nowadays, as we will see in chapter 3 below.

[124] Weiler (2013, p. 188-189) makes it very clear that the West used its power to reduce to write a standard that non-Westerns rejected for decades: "The relative indeterminacy of such terms no doubt allowed many parties to arrive at bargains that might otherwise have remained elusive – reflecting the diplomatic axiom that a good treaty is 'a disagreement peaceably reduced to writing'".

The FET standard was no more than a usual change, as coined by Miles (2018). It does not break with the imperial nature of the international minimum standard; rather the contrary, the colonial encounter shaped it, bringing informal imperialism even closer. As Van Harten (2007, p. 82) suggested, the FET standard was not “pulled from a hat by the negotiators of the treaties”. It originates from the contentious international minimum, ensuring foreign investors and their property remain at the center of the international protection, regardless of domestic laws and courts of host states (BLANDFORD, 2017; PERRONE, 2017; PAPARINSKIS, 2013; VAN HARTEN, 2007).

As to how this development happened, some scholars claim that the FET does no more than crystallize the international minimum standard into international agreements; others claim that using the FET was simply a choice for a different and more politically neutral term, as an attempt to separate it from the international minimum; and, finally, a third view argues the FET was adopted by capital-exporting countries to counter non-Westerns’ assertion that there was no such thing as an international minimum standard for the protection of foreign investors (DUMBERRY, 2017). Whatever the reason, the fact is that the FET standard is part of a historical continuum. It is a repacked international minimum standard, not an isolated accident (MILES, 2013).

The North-American government presented the FET standard as a courtesy, as a way out of the international minimum (WEILER, 2013). We claim it was rather a dangerous courtesy of the United States and capital-exporting states in general. When they acknowledged how far the standard could go to protect foreign investors under vague terms, capital-exporting countries – such as Germany, France, and Switzerland – embraced the term and actively contributed to disseminate it (DUMBERRY, 2017; WEILER, 2013).

One of the main steps to consolidate the FET standard as furthered by the United States was to include it in multilateral initiatives led by capital-exporting countries. The Draft Convention on Investments Abroad, proposed in 1959 by European businessmen and lawyers under the leadership of Hermann Abs and Lord Shawcross included a

FET clause not fundamentally dissimilar from the North-American formula.[125] Both origins and excessive emphasis on the protection of foreign investors lead to a perception that the instrument was biased in favor of capital-exporting countries (VASCIANNIE, 1999). This initiative was soon overcome in 1963 by "the most influential of the early post-war drafts on investment" (VASCIANNIE, 1999, p. 112), the Draft Convention on the Protection of Foreign Property adopted by the Organization for Economic Co-Operation and Development ("OECD"), albeit never opened for signature. The OECD initiative was not much different from the Abs-Shawcross one, as it clearly had Western roots and privileged foreign investors. Still, it gained broader repercussion and deeply influenced standard bilateral investment treaties of the coming years:

> Although the Draft Convention was never opened for signature, its importance should not be underestimated since it 'represented the collective view and dominant trend of OECD countries on investment issues'. The Draft Convention also provided OECD member States with guidelines that were subsequently used by them as a model to draft their own BITs. In fact, it has been rightly observed that the many textual similarities between the different treaty models used by developed OECD member States as a basis for treaty negotiation with developing countries, has led to a greater uniformity in BIT language. (DUMBERRY, 2017, p. 21)

The practice fostered by the OECD initiative was essential for the proliferation of FET standards in BITs (HAERI, 2011). Reflecting Western interests, by the 1970s the FET standard had assumed a position of prominence in international investment agreements, being included in most treaties between capital-importing and capital-exporting countries (DUMBERRY, 2017; VASCIANNIE, 1999). By that time, BITs had become the preferred means to further investment protection between capital-exporting and capital-importing countries; as all multilateral initiatives for the regulation of foreign investment failed at some point, capital-exporting countries changed the strategy to pursue consensus with capital-importing states on a bilateral basis.[126]

---

[125] Draft Convention on Investments Abroad: "Article 1. Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties. Such property shall be accorded the most constant protection and security within the territories shall not in any way be impaired by unreasonable or discriminatory measure."

[126] See chapter 1 for a brief account of the proliferation of BITs in the last decades of the twentieth century.

The last decades of the twentieth century culminated in the spread of thousands of BITs and virtually all of them contained a FET clause (DUMBERRY, 2017).[127] Moreover, the FET is not only the most popular legal ground invoked by foreign investors in their claims before arbitral tribunals, but it is the standard that arbitrators have interpreted most broadly (ISLAM, 2018; BERNASCONI-OSTERWALDER, 2016; PICHERACK, 2008)[128]. It has been claimed as "(…) the most important substantive protection in the investment treaty regime" (BONNITCHA; POULSEN; WAIBEL, 2017, p. 108). Both vagueness and depoliticization are commonly mentioned for the success of the standard; unlike the international minimum standard, the FET standard would not be "accompanied by unwanted political baggage" (NEWCOMBE; PARADELL, 2009, p. 263).

We reject this argument. The FET has reached prominence in investment law precisely for its pervasive political nature. The origins of the standard evidence it was molded by the same power struggles that shaped the international minimum. It does not break with the colonial encounter; on the contrary, the FET reinforces it. The vagueness of the terms *fair* and *equitable* goes hand in hand with the political nature of the standard; they rely on this characteristic to place the protection of foreign investors at the heart of the system. It goes even beyond the international minimum; the FET seems to turn the international minimum – a standard highly disputed for such a long time – into a less harmful option for non-Westerns. And, for serving Western interests so fully, the standard has gained the main stage.

2.4.2 The concept of the FET: Arbitral-lawmaking at its fullest

Fair and equitable treatment is not a term of art in public international law and BITs generally do not provide the tools to understand the concept (SORNARAJAH, 2015;

[127] To illustrate the point, from all the 1,964 BITs available on the UNCTAD website in February 2014, only 50 of them did not include a FET clause (DUMBERRY, 2017, p. 22). Yet, new treaty models have opted not to include the FET standard at all. This is the case of India's 2015 draft model BIT and Brazil's Cooperation and Facilitation Investment Agreement. Still, the immense majority of BITs in effect include the FET standard.

[128] All of the awards regarding the 2001 Argentinean crisis that we will analyze in chapter 3 include claims based on the breach of the FET standard. We highlight the impressive frequency that arbitrators have found that the host country violated the standard. See Haeri (2011) and Van Harten (2007).

POTESTÀ, 2013; NEWCOMBE; PARADELL, 2009).[129] The parties to the treaties usually do not define, clarify or delimit broad terms like unfair and inequitable (VAN HARTEN, 2007). The vagueness of the standard has become its most remarkable attribute, and arbitrators have taken advantage of this characteristic to advance the protection of foreign investors and their property with little regard for the interests of host states.

Fairness and equity are subjective terms, and they do not automatically translate a clear set of prescriptions. Ordinary dictionary definitions of one term usually refer to the other, turning it into a never-ending circle with no actual progress: Fairness may be referred to as treating people equally and equity may be defined as the quality of being fair.[130] Fair and equitable lack in precision and they do not refer to an established body of law or a consolidated technical understanding (VASCIANNIE, 1999).

When the parties agree to include a standard in a treaty, it is presumed they accept a common understanding of what is under protection. This is not so simple with the FET standard; the challenge is to identify the elements that are part of the standard – if they can ever be identified (VASCIANNIE, 1999). There is no definition of the FET standard widely agreed by states as a group, tribunals or academics. The FET is usually referred to as a compilation of specific elements of protection, of substantive and procedural nature, including not exhaustively the protection of legitimate expectations, denial of justice, non-discrimination, full protection and security, transparency and protections against arbitrariness, bad faith, coercion, threats and harassment. There is no consensus as to the precise threshold of states' liability or to which state's actions

[129] The EU-Canada Comprehensive Economic and Trade Agreement (CETA) is an exception. The agreement provides a list of instances that amount to a breach of the FET clause: "Article 8.10. 1. Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 through 7. 2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes: (a) denial of justice in criminal, civil or administrative proceedings; (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; (c) manifest arbitrariness; (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; (e) abusive treatment of investors, such as coercion, duress and harassment; or (f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article."

[130] The Cambridge Dictionary defines fairness as "*the quality of treating people equally or in a way that is right or reasonable*" and equity as "*the situation in which everyone is treated fairly and equally*". The Oxford Dictionary, on its turn, defines fairness as "*impartial and just treatment or behaviour without favouritism or discrimination*" and equity as "*the quality of being fair and impartial*".

would suffice to breach the standard (ORTINO, 2018; BONNITCHA; POULSEN; WAIBEL, 2017; SORNARAJAH, 2015; POTESTÀ, 2013; CAMPBELL, 2013; NEWCOMBE; PARADELL, 2009; VAN HARTEN, 2007).[131]

The FET came out of the international minimum. Both standards overlap in some of their main elements. Apart from the protection of legitimate expectations, all other elements could be included under the catch-all concept of international minimum, as if the protection of the expectation of investors would be the only distinct (and characteristically) content of FET (SORNARAJAH, 2015). Therefore, the FET goes even further than the international minimum. It involves harsher protection of the needs of foreign investors beyond bad faith, outrageous or egregious conduct characteristic of the latter (WEILER, 2013; VAN HARTEN, 2007).

There are different forms to include the FET standard in a BIT, and different forms to approach the standard do lead to different interpretations (DUMBERRY, 2017). The FET may be included in the preamble, it may be an unqualified standard with no further references to international law or any other criteria, it may be tied to the customary law, to the international minimum standard, or other standards - such as non-discrimination, denial of justice, full protection and security and national treatment -, or, still, it may be related to a list (exhaustive or not) of instances that amount to its breach. An unqualified FET standard is the most often used approach in BITs (BERNASCONI-OSTERWALDER, 2016; SORNARAJAH, 2015).

Absent specific wording to the FET, authors claim that the standard is autonomous and independent from the international minimum.[132] A nonqualified FET clause is likely to be interpreted in a very broad fashion, leading to harsher protection of the interests of foreign investors (BERNASCONI-OSTERWALDER, 2016). This seems to be the understanding of the great majority of arbitral tribunals, outside of the North-American Free Trade Agreement – NAFTA context, almost as *jurisprudence constante*.[133]

---

[131] As noted by Bonnitcha; Poulsen; Waibel (2017, p. 109), the disagreement over the FET is such that *"no two academic commentators propose the same taxonomy of 'elements*".

[132] See Dumberry (2017); Newcombe; Paradell (2009); Vasciannie (1999).

[133] The NAFTA context is different, *inter alia*, due to the fact that the three parties to the agreement – Canada, Mexico, and the United States – issued a binding interpretation through the NAFTA Free Trade Commission acknowledging that the FET does not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. For a better

Those who understand the FET is an autonomous standard rely on two main complementary arguments. They claim international minimum standard was a widely known standard, and, therefore, if the parties to a treaty wanted to restrict the FET to the international minimum, they would have expressly opted for it (NEWCOMBE; PARADELL, 2009). Moreover, in the absence of an express reference to international law, to the international minimum or to any other criteria in the relevant BIT, the FET clause should be read according to the ordinary meaning of the words fair and equitable, in their context and in the light of the treaty's object and purpose, as stated in article 31 (1) of the Vienna Convention on the Law of Treaties (HAERI, 2011).[134] As fair and equitable are vague terms, arbitrators do not have many strings attached and they go far to include features beyond the international minimum:

> In their ordinary meaning, the terms 'fair' and 'equitable' mean, inter alia, 'just', 'legitimate and 'reasonable'. Although such definitions are perhaps rather circular, they have given tribunals considerable discretion to develop the fair and equitable treatment standard in a way that affords investors treatment which the tribunals consider is 'fair' and 'equitable. (…) It is not, therefore, surprising that the fair and equitable treatment standard has been interpreted autonomously as a broader standard than the international minimum standard, nor that it has been subjected to more varied applications. (HAERI, 2011, p. 42)

Others understand that the FET should not be read beyond the international minimum standard.[135] They argue that an unqualified FET standard find support neither in international law nor in the definition of the terms fair and equitable, or, still, in BITs and international agreements to extend the protection owed to foreign investors beyond bad faith and outrage conduct characteristic of the international minimum; certainly not to extend the standard to the protection of legitimate expectations, then

account of NAFTA's peculiarities, see Dumberry (2017), Bernasconi-Osterwalder (2016), and Campbell (2013).

[134] Article 31 (1). "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and on the light of its object and purpose."

[135] See Sornarajah (2010); Mayeda (2007); CIEL (2003).

unknown to international investment law in the form that arbitrators relied on the turn to the twentieth century (SORNARAJAH, 2015; MAYEDA, 2007).[136]

This is not to say that the FET standard should be forever locked into a standard that was born in the nineteenth century. The international minimum would have evolved to incorporate the peculiarities of contemporary times; principles of international law do evolve with time. Nonetheless, it should not be detached from the original scope of the minimum standard: Only bad faith and outrageous or egregious conduct of the host state may breach the standard (HAERI, 2011; PICHERACK, 2008). Fair and equitable are inherently subjective, and, therefore, leaving them to be applied according to decision-makers' understanding of the terms with no limiting parameter could lead to extensively ample interpretations, beyond what could have been foreseeable by the parties to the treaty (CIEL, 2003):

> The fair and equitable treatment standard, when construed as part of the minimum standard of treatment under international law, has thus generally been interpreted and applied by these tribunals so as to afford protection to investors against actions by the State which are arbitrary, demonstrate a manifest lack of due diligence and natural justice, are grossly unfair, and would offend a sense of judicial propriety. (PICHERACK, 2008, p. 270)

Anyway, this controversy has not led to much difference in practice; attached or not to the idea of an international minimum, arbitrators read the FET according to their discretion as to what fair and equitable means (BERNASCONI-OSTERWALDER, 2016). Despite different approaches as to the content of FET or whether the standard shall be read or not as an autonomous concept, arbitrators usually reach the same

[136] Authors who claim the FET standard should not be read beyond the international minimum argue there is no incompatibility between this argument and the long battle fought by non-Westerns against the latter. For them, international investment agreements already impose on host states a treatment beyond domestic law. It is not time to fight against the international minimum, but rather to insist on an interpretation of the FET standard not beyond the latter – certainly not as to include the protection of legitimate expectations –, respecting its characteristically high threshold: "It might seem strange to argue for the equivalence of the principle of fair and equitable treatment with the minimum standard, given that developing countries have frequently objected to the recognition of a minimum standard in international law. This objection was founded on the fear that the standard will be applied unfavorably against them by developed countries seeking to uphold the rights of foreign investors. However, as Denise Manning-Cabrol suggests, the face of international law is changing. International trade and investment agreements already impose obligations on a host State in regard to investors that are separate from the treatment required by domestic law. It is thus too late to roll the clock back and oppose minimal fairness requirements in international law." (MAYEDA, 2007, p. 275)

result: Empowering foreign investors and their (traditionally Western) home states against host states. And they generally arrive at this conclusion through the protection of investors' legitimate expectations.

The protection of investors' legitimate expectations is by far the most controversial aspect of the standard. Reading the FET as to include the protection of foreign investors' expectations is an innovation (UNCTAD, 2012). Although extensively included in BITs throughout the second half of the twentieth century, the FET standard remained dormant; it only became the center of general attention when the Argentinean arbitration saga began in the first decade of the twenty-first century. The first arbitrators to decide these cases acknowledged legitimate expectations as a basis of claims and this understanding was followed by later awards (SORNARAJAH, 2015).[137] We will look into the awards involving the Argentinean crisis in chapter 3 below.

What exactly foreign investors could reasonably expect was never agreed; nonetheless, investment tribunals usually acknowledged that legitimate expectations were based on contractual commitments with the individual investors or reasonable and specific unilateral declarations made by the host state. The idea of legitimate expectations was also somewhat connected with the controversial notion that foreign investors had the right to a stable regulatory environment, and, therefore, changes to the host state legal framework after the foreign investment was established could constitute a violation of the standard. Some tribunals went so far as to understand that any adverse interference in the original framework could amount to a breach of the FET standard (BONNITCHA; POULSEN; WAIBEL, 2017; POTESTÀ, 2013; NEWCOMBE; PARADELL, 2009).[138]

---

[137] Sornarajah (2015) claims that arbitrators were so willing to accept the alleged violation of the FET standard because expropriation claims were not maintainable. We will analyze in-depth the reasons stated by arbitrators to repeatedly accept the breach of FET standard in the Argentinean saga awards in chapter 3 below.

[138] For an in-depth analysis of how arbitrators have analyzed the obligation of regulatory stability under the FET, see Ortino (2018). Even though tribunals have retained, as part of the FET standard, both the protection of investors' expectations and the obligation to provide a stable legal framework for foreign investments, there is little consensus as to the extent to which the FET standard should discipline regulatory changes. Tribunals provide the most diverse interpretations to the standard; from a strict stability obligation that focuses on the existence of any adverse regulatory change to a soft stability obligation that rather focuses on the regulatory change's fairness, reasonableness or proportionality.

A lot of creativity was needed to read the FET standard as to encompasses the protection of legitimate expectations; arbitrators generally relied on principles of good-faith,[139] in domestic laws[140] or a purposive interpretation of the BIT's preamble. The last one was recurrent in the Argentinean cases. It is not uncommon for the preamble of BITs to mention stability and economic development as purposes of the agreement and arbitrators referred to them as a means to acknowledge the parties' intent regarding the FET standard.[141] However, they found an alleged bound that did not find support either in the treaty itself nor in international law:[142]

> No canon of treaty interpretation can support the view that the term 'fair and equitable treatment' can include any reference to the protection of the legitimate expectations of the foreign investor. It is not the natural meaning of

[139] Even though general principles of international law, such as good-faith, are invoked, arbitrators fail to demonstrate how the protection of investors' expectations could be drawn from them. The protection of legitimate interests is not a general principle of international law and it is not part of the body of customary law (SORNARAJAH, 2015). The Tecmed case (Técnicas Medioambientales Tecmed, SA v United Mexican States, ICSID Case No ARB(AF)/00/2, award rendered on May 29, 2003) attempted to tie the FET standard to the good-faith principle; however, arbitrators not only failed to deeply discuss the issue but they also failed to cite any authority to support their argument (POTESTÀ, 2013).

[140] Legitimate expectations are protected under English law; however, there are very few cases in which damages have flowed from the violation of legitimate expectations, and, when it did happen, the target was specific and not general measures: "It is unlikely that courts in any system would accept legitimate expectations as fettering a state which acts in the public interest. An investment tribunal finding domestic law analogies in administrative law on the review of lower functionaries and bodies using discretionary powers embarks on a false path, as it does not provide a parallel with a state legislating a public interest measure that affects the foreign investor." (SORNARAJAH, 2015, p. 269-270). English Courts have acknowledged that the protection of legal expectations should be confined to exceptional situations. Other domestic law systems also protect legitimate expectations, such as German and Dutch law; in any case, domestic systems have precise contours that are generally not fully acknowledged or debated by arbitrators. The peculiarities of each national system have not to be forgotten by the tribunal in the Total case (Total S.A. v Argentine Republic, ICSID Case No ARB/04/1, award rendered on December 27, 2010), for example; recurring to a comparative analysis of the protection of legitimate expectations in domestic jurisdictions, it acknowledged that national laws have well-defined limits to protect expectations. More, even though some jurisdictions have embraced the protection of expectations, others have not. Therefore, any attempt to establish the protection of legitimate expectations as a general principle of law (under the FET standard or not) has to be analyzed with due care (POTESTÀ, 2013): "(…) *even where the doctrine is accepted on the domestic level, it is accompanied by clear limitations which must be kept in mind when attempting to invoke the principle within the investment treaty arbitration context*." (POTESTÀ, 2013, p. 98).

[141] See the preamble of the BIT executed between Argentina and the United States in 1991: "*Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective use of economic resources*."

[142] "No canon of treaty interpretation can support the view that the term 'fair and equitable treatment' can include any reference to the protection of the legitimate expectations of the foreign investor. It is not the natural meaning of the term. It has to be conjured through a mystical process of divining the intention of the parties from the preamble and infusing the intention into the fair and equitable standard. When the attempt is made to give the term a teleological interpretation to make it consistent with investment stability that is referred to in the preamble, the interpretation is contrived. Any rule on legitimate expectations would have been furthest from the intention of the states that made the treaties, and its introduction into the law had an obvious history, which is traced below." (SORNARAJAH, 2015, p. 263)

> the term. It has to be conjured through a mystical process of divining the intention of the parties from the preamble and infusing the intention into the fair and equitable standard. When the attempt is made to give the term a teleological interpretation to make it consistent with investment stability that is referred to in the preamble, the interpretation is contrived. Any rule on legitimate expectations would have been furthest from the intention of the states that made the treaties (…). (SORNARAJAH, 2015, p. 263)

Thus, when arguing that the legitimate expectations of foreign investors are part of the FET standard, arbitrators do not draw this conclusion from an existing doctrine, principles of law or the expressed intent of the parties. They take advantage of the lack of clarity of the standard to develop an interpretation based on their understanding of what fair and equitable is (BERNASCONI-OSTERWALDER, 2016; CAMPBELL, 2013; PICHERACK, 2008). If parties intended the FET to be read broadly and expansively, including a concept that was not natural to its meaning, they would have expressly said so. They would not leave it for arbitrators to assume it several years later (SORNARAJAH, 2015).

Yet, arbitrators have been reading the FET standard exactly to include the protection of legitimate expectations. BITs do not invest arbitrators with the authority to create the law they apply to the investment dispute. Nonetheless, when they read the FET in such a way as to extend its scope to include a concept that is not natural to the terms fair and equitable, arbitrators perform *quasi-legislative functions* beyond the powers they were invested with (SORNARAJAH, 2015, p. 253). They have played a major role in elaborating on the contours of the FET standard when applying it to individual disputes. It is not plausible that capital-importing countries would voluntarily leave broad powers for one-time appointed arbitrators to delimitate the contours of a standard that could limit their own sovereign acts (BONNITCHA; POULSEN; WAIBEL, 2017; BERNASCONI-OSTERWALDER, 2016; VAN HARTEN, 2007; ANGHIE, 2004).[143]

Resting on open-ended terms and counting with little or no guidance, the FET standard is an invitation for arbitrators to interpret host states' obligations according to their own

[143] Note that soon after the first awards supporting a broad reading of the FET standard, NAFTA's members expressly agreed that the FET standard should be read in a more limited fashion. See note n. 134 above.

understanding of fair and equitable (BERNASCONI-OSTERWALDER, 2016). There is much room for interpretation, and they use it to read the standard from the perspective of foreign investors; “[t]ribunals’ interpretation of the FET standard has been for the most part rendered it an investor-oriented protection standard in investment disputes” (ISLAM, 2018, p. 188). Power struggles have clearly molded the FET:

> First and foremost, the notion of fair and equitable has emerged as a one-sided concept. (…) Only a handful of cases seek to contextualize the analysis within a framework of the interests of all the stakeholders of an investment, and the often multiple relationships an investment creates to the local governments, communities, and environment. In most cases, they simply do not figure into the equation. These results explain my view that the standard is only sometimes applied in a manner that merits the description it possesses: fair and equitable. Simply put, for fair and equitable to be fair and equitable, it must be developed and applied in a manner that is fair and equitable for all stakeholders, not just one. Fair and equitable, by its very nature and language, is a contextual standard, not a single absolute standard to be applied without reference to all the circumstances involved. To ignore the full context is thus to truncate its meaning and distort its application. (MANN, 2006, p. 76-77)

Having a large interpretation room, arbitrators opt for interpreting the FET in a one-sided manner. We understand they do so because the current manifestation of international investment law carries a past of power struggles. The FET standard evolves from the international minimum standard embedded in power struggles; as Miles (2018) argues that historical ideas influence modern practices, we suggest that power struggles pervasive to international law since its imperial inception influence how arbitrators read the FET, constantly placing the protection of investors and their property at the center of the system.

Arbitrators read the FET standard especially from the view of the protection of legitimate expectations, paying excessive attention to wealth maximization and overlooking the normative and distributional consequences of this preference for the host state. There are multiple ways of interpreting the standard; still, arbitrators repeat the neoliberal mantra that foreign investment is a catalyst for economic growth and, therefore, protecting investors should be in the best interest of host states. They place host states and foreign investors on the same level as in a contractual relationship,

consistently disregarding the public interest, local preferences and the expectations of host states themselves. Arbitrators end up second-guessing sovereign acts that are sensitive for the survival of the host state, including decisions to overcome financial crisis[144] – as the one Argentina faced by the end of 2001 (PERRONE, 2017; BERNASCONI-OSTERWALDER, 2016; VAN HARTEN, 2007).

This expansive read – not accompanied by methodological rigor (PICHERACK, 2008) – has turned the right to property into the centerpiece of investment arbitration; in fact, the protection of legitimate expectations is elevated to some sort of property rights, so when they are affected, even if in the context of the exercise of sovereign rights by host states, compensation follows (PERRONE, 2017; SORNARAJAH, 2015). The FET has contributed for the construction of an inherently biased international investment law, what comes with little surprise considering the whole construction of international law and, more specifically, the standard under analysis:

> Such approaches in the nineteenth century were discussed in the previous chapter; more modern examples include recent interpretations of the fair and equitable treatment standard, focusing on the legitimate expectations of the investor, and requirements to maintain a stable business and legal framework. Although ostensibly reasonable obligations, they have been interpreted expansively, extending protection well beyond the international minimum standard's original scope of bad faith and outrageous or egregious conduct. For Sornarajah, this expression of the fair and equitable treatment standard is a reflection of the innate bias of investment treaty arbitration towards the interests of foreign investors. For my argument, what I am seeking to explore is the dominant historical narrative of this field, its myth-making and self-justification, and, within that, the patterns of manipulation of legal doctrine that have furthered, and continue to further, the interests of capital-exporting states and their nationals. (MILES, 2013, p. 82)

Host states' public interests are generally subordinated to the claims of foreign investors. When interpreting the FET standard, arbitrators rarely take into account the needs of capital-importing states – and when they do so, it is almost always empty talk, since they end up acknowledging the breach of the FET. Developing countries have

[144] Among other issues which are clearly of public interest, such as environmental regulation, tobacco regulation, the privatization of basic sectors as water and electricity.

limited capacity in terms of resources, infrastructure, technology, and administrative efficiency; yet, arbitrators not rarely disregard their particular developmental stage and the political and economic instabilities they face (ISLAM, 2018; KRIEBAUM, 2011). A balance between foreign investors and host states' interests must be found; a balance the FET standard has failed to find.

International investment law is so perversely biased in favor of investors that even when there is an attempt to innovate, the familiar pattern of the colonial encounter is replicated (ANGHIE, 2004). The FET does not break with the imperial past of the international minimum; it comes in a continuum of power struggles, impersonating Western interests and furthering them. The standard is centered on notions of control and order from the perspective of investors and their home states, encompassing virtually anything desirable by investors, including the protection of their expectations. It also privileges private rights over public regulation, giving support to second-guess sovereign acts by host states. A liberal rule of law is imposed over capital-importing countries, who have to adapt to protect foreign investments even if it conflicts with their public interest as if stability and economic development were the sole objects to be pursued no matter the consequences. No more than a usual change (MILES, 2018).

The FET is an instrument to serve Western needs; so much so that, in an emerging context where a higher amount of capital flows from non-Western countries to Europe and the United States, we note an effort from Western countries to rethink the standard. If the FET has been used in an excessively broad fashion to protect Europeans and North-Americans investing abroad, now traditionally capital-exporting countries have been considering a more restrictive use of the standard, for the West has been sitting more often in the position of host states.

An initial movement was seen in NAFTA. As we saw, in the context of awards that provided a wide interpretation of the FET and, consequently, placed limitations on host states' right to regulate, the three parties to the agreement – including the United States and Canada – issued a binding interpretation acknowledging the FET did not require treatment in addition to or beyond customary law.[145] When traditionally capital-

[145] The Metalclad Corp. v. United Mexican States case (ICSID case n. ARB(AF)/97/1) was one of these cases that raised a concern about the host state's right to regulate.

exporting countries felt threatened by arbitrations that disputed their regulatory acts, they attempted to place limits over the standard's contours.

More recently, the rising of China as a leading economic power has been raising concern in the West.[146] The increase of the Chinese economy in the last years is unprecedented, and it has become one of the main sources of foreign direct investment outflows.[147] Considering only the relationship between China and the United States, Chinese companies and individuals invested approximately USD140 billion into the latter from 2000 and 2018 (KARABELL, 2019). The United States and China have been negotiating an investment agreement for years now, and, if they come into terms, the former will probably become a respondent in future investor-state arbitrations initiated by Chinese investors. Not surprisingly, the United States attempt to find the means to ensure a desirable level of regulatory flexibility in a future agreement (GIBSON, 2015) – paradoxically, precisely what has been taken away from Argentina by foreign investors in the context of the 2001 crisis.

The quest to preserve the right of the host state to regulate goes beyond negotiations between China and the United States; new formulations of the FET and the inclusion of exception clauses to preserve essential security issues are widely seen in recent investment agreements executed by Western countries. The Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union brings a detailed FET standard (Article 8.10), enumerating the measures that are incompatible with fair and equitable treatment. The protection of expectations is not among them. The frustration of investors´ expectations was included in a separate paragraph as an element that arbitrators *may take into account* when applying the FET standard. An exception security concerns clause was included in the 2012 US model BIT (Article 18), in the 2014 Canadian Model BIT (Article 18) and in the BIT executed between China and Canada in 2012 (Article 33), ensuring none of the treaties' standards – the FET included – would preclude the host state to adopt measures

[146] For an in-depth account of China as a leading world power and how it has influenced the international scenario, see Allison (2017).
[147] Chinese economy has reached a prominent status where it can be measured up against the United States economy; the Chinese GDP in 2017 reached USD 12,238 trillion, against the USD 19,390 trillion GDP reached by the United States. See: <https://data.worldbank.org/indicator/ny.gdp.mktp.cd>. Last accessed: April 1, 2019. In 2018, China was number two in a ranking of top 20 home economies in terms of foreign direct investment outflow. See UNCTAD (2019).

necessary for the protection of its own security interests. These clauses provide host states with wider regulatory powers; a more restricted FET standard combined with essential security clauses could have changed the faith of Argentina in the arbitration saga she was involved in.[148] However, these issues were not of the interest of the West back then.

The West is concerned about becoming a recurrent defendant in investor-state arbitrations, and the flexibility of the FET standard, combined with other exceptional treaty standards, may be once again an instrument to further Western interests. As host states, the West does not want to repeat the Argentinean experience. A new usual change is in process, for as long as it suits Western interests.

The FET has become insurance to protect the value of foreign investors' profits (MAYEDA, 2007). The standard was originally meant to provide a floor to shield investors from unacceptable and egregious treatment. It was transformed into an instrument to further the interests of investors and their home states, with little regard for the sovereignty of the host state. The standard has carried on power struggles since its inception, which were not forgotten by decision-makers when called upon to decide investment arbitrations invariably initiated by foreign investors.[149] There is no better way to demonstrate this point than analyzing the arbitral awards regarding the 2001 Argentinean financial crisis.

2.5 Conclusion

International investment law has been constructed and molded according to the interests of capital-exporting countries. It is claimed to be a depoliticized, neutral, universal set of rules created precisely to take political interests out of the equation when it comes to regulating foreign investors and their property abroad; it is not, though. It is rather a construction to further Western interests and to protect private

[148] In modern investment arbitration, "*essential state security concerns are more likely to be invoked in the context of economic crises than other traditional national security interests*" (TITI, 2015, p. 267).
[149] The mere fact that foreign investors almost always are claimants against host states as a respondent is in itself a demonstration of bias in international investment law. It creates a unidirectional arbitral case law. For further reference, see Boase (2018).

property, regardless of host states' need to attend the public interest (SORNARAJAH, 2015).

We have explored throughout this chapter a standard of protection that evidences how international investment law was used in favor of foreign investors, the FET. From its inception, influenced by the colonial encounter, to the current expansive interpretation given by arbitral tribunals, the standard carries power struggles pervasive to international investment law.

The origins of the FET standard may be traced back to the doctrines of state responsibility and the protection of aliens, which gained much of their current contours during the nineteenth-century globalization. The spread of foreign capital from the West to non-Western countries raised concern in capital-exporting countries as to the protection of foreign investors and their property, and, in this context, they developed the international minimum standard.

The minimum standard of treatment has faced objection since its inception, as home states felt unease to embrace a vague international standard that threatened their sovereignty. It was not unusual for capital-exporting states to rely on an alleged international minimum to justify the abuse of diplomatic protection and other forms of (in)formal intervention over host states; the standard, then, was "*historically viewed with suspicion because of the legacy of gun-boat diplomacy and imperialism*" (NEWCOMBE; PARADELL, 2009, p. 263).

To overcome such disagreement, the international minimum standard was (mischievously) substituted by the FET clause. Despite the new terminology, the FET inherited the imperial nature of the international minimum standard. The precise meaning of the FET standard is *a matter of conjecture* (VASCIANNIE, 1999, p. 130). Therefore, not so different from the international minimum, the FET is also another vague, broad and catch-all concept. The choice for ambiguous words such as fair and equitable was not by chance. The vagueness and breadth were essential for the West to instrumentalize the standard. Despite being claimed not to give free rein to decision-makers, it is nothing less than a *carte blanche* (BERNASCONI-OSTERWALDER, 2016; NEWCOMBE; PARADELL, 2009).

Not surprisingly, then, foreign investors often invoked the FET clause as a basis for their claims in the Argentinean arbitration saga and, again, with no surprise at all, arbitrators repeatedly found the host state breached the standard and determined the payment of millionaire compensations. Influenced by the imperial origins of international investment law, they relied on a private vocabulary and praised excessively high standards of protection to completely obliviate the sovereign right of host countries to regulate their economy. We will see in the next chapter that Argentinean sovereignty was ripped off to serve Western interests, legitimized through the FET standard.

CHAPTER 3

How the origins of international investment law are reflected in arbitration awards: Placing the protection of private property and foreign investors at the heart of the Argentinean arbitration saga

3.1 Introduction

A legitimacy deficit has taken over investment law and arbitration; scholars and practitioners denounce that the international investment regime is not protective of the general interests of host states – including development needs –, while overly zealous of foreign investors.[150] They evoke several reasons that contributed to this crisis.[151] Some argue that arbitrators excessively interfere in the power host states have to regulate in favor of public interest and to act in response to national threats.[152] Others focus on the existence of contradictory awards discussing similar questions of law and facts, creating instability and lack of predictability in the system.[153] There are still those who concentrate on the pervasive influence of neoliberalism, persuading arbitrators to interpret standards of treatment to advance neoliberal preferences.[154] A different line of critique comes from those who understand that the imperialist origins of international investment law have reproduced inequalities inherent in the colonial encounter on the regime's current manifestation, privileging the rights of investors over host states' needs.[155]

---

[150] See Islam (2018), Sornarajah (2015), Miles (2013), Mayeda (2007), and Van Harten (2007).

[151] It is beyond the limited space of this work to discuss in-depth the rich debate on the legitimacy deficit of the international investment regime. For a detailed account of these critiques, see Koskenniemi (2017a); Titi (2014); Burke-White (2010); Picherack (2008); and Franck (2005). For a perspective from the Global South, see Morosini; Badin (2017). For a voice against the legitimacy deficit, see Alvarez; Topalian (2012). Recent awards show a willingness to react to the legitimacy crisis. Some arbitrators acknowledge that standards of treatment shall also be protective of host states; they go beyond the mere economic value of the investment. Nonetheless, awards still replicate centuries-old imperialist patterns, even if under a veil of a supposedly more balanced approach. We will discuss it below.

[152] See Titi (2014) and Picherack (2008). Fearing that arbitrators may interfere in their power to regulate in favor of public interests, host states may decide not to adopt more stringent policies or legislation - even if to further legitimate public interests. They are concerned that any of these acts could result in a breach of standards inserted into BITs; this situation is called regulatory chill.

[153] Regarding the Argentinean cases, scholars commonly acknowledge the contradictory interpretation of the state of necessity claim. See Burke-White (2010) and Franck (2005).

[154] See Perrone (2016) and Sornarajah (2015).

[155] Miles (2013) and Anghie (2004) are two of the most representative authors. We analyzed in-depth the imperialist origins of international investment law in chapter 1.

Regardless of the chosen path to discuss the legitimacy issue, there is broad consensus that arbitrations that emerged out of the 2001 Argentinean financial meltdown contributed to the crisis international investment law has been facing (BURKE-WHITE, 2010; VAN HARTEN, 2007). Dozens of cases arose to challenge governmental acts taken to overcome the situation; the reasoning adopted by arbitrators to find breaches of the BITs and to sentence Argentina to pay multimillionaire compensations was highly criticized, for decision-makers explicitly disputed the sovereign right of a state to regulate its economy (VAN HARTEN, 2007).

Much has indeed been written about the Argentinean arbitration saga. Scholars have relied on many different arguments to criticize these awards and to place them at the heart of the legitimacy crisis; we will explore some of these critiques below. However, virtually no attention has been paid to the origins of the system as an effort to understand how these awards contributed to the legitimacy deficit.[156] Those who claim we cannot fully understand the present without considering the influences exercised by an imperialist past have inspired us to suggest a fresh look over these awards.

In previous chapters, we discussed the profound impact of the past on the current manifestation of international investment law. As the product of centuries-old power struggles, investment law is deeply rooted in power relations and Western expansionism, so much so that its modern manifestation reflects this imperialist history. An informal imperialism, in a subtle form, has long been in the background of investment law; it has been so entrenched into the system that the processes and the language developed during imperial times continue to be used in the formulation of international rules for foreign investments protection (MILES, 2018).[157] We explored the construction of the FET standard to demonstrate how imperialist roots have influenced investment law as we know it today. From its inception, shaped by the colonial encounter, to the current expansive interpretation given by arbitral tribunals, the standard embodies pervasive power struggles (SORNARAJAH, 2015; MILES, 2013).

[156] For an effort to understand the legitimacy crisis revisiting the past, see Kaushal (2009).
[157] For an in-depth account of *informal imperialism*, see Gallagher and Robinson (1953).

Departing from this background, we suggest a return to the awards related to the 2001 Argentinean crisis to understand in what manner the imperial past has found way in the current manifestation of the regime – especially in investor-state arbitration –, influencing how arbitrators interpret investment-related claims and perpetuating a constant bias against capital-importing countries inherent in the legitimacy crisis.

To illustrate how this influence operates we will rely on the work advanced by Kate Miles.[158] When discussing the imperialist origins of investment law, she argues that "(…) the political context in which the rules emerged shaped international investment law in fundamental ways, and that these origins still resonate within its modern principles, structures, agreements, and dispute resolution systems." (MILES, 2013, p.3). In a later work, Miles suggested that – in spite of depoliticization claims – some characteristics illustrate how the investment regime still carries much of the protection designed throughout the last centuries by capital-exporting countries to attend their interests, regardless of the needs of capital-importing countries:

> Responding to the changing political conditions of the mid-20th century, the World Bank and capital-exporting states initiated these treaty regimes to reassert investor protection levels enjoyed under the doctrine of diplomatic protection, but which were crumbling in the wake of de colonization. Much as in previous centuries, at the centre of the mechanisms designed for the protection of foreign investment were notions of control and order from the perspective of investors and their home states, together with the privileging of private rights. In particular, along with the need for high-level standards of substantive protection, the rationale for these treaty regimes was also framed as serving the need for the 'depoliticization' of investment disputes and for the imposition of the rule of law in host states. The result was the introduction of a reinvented foreign investment protection treaty in the form of the BIT and a new dispute resolution mechanism – investor-state arbitration. (MILES, 2018, p. 160)

Miles (2013) mainly turns to the protection of the environment to develop her argument, including the analysis of awards rendered by tribunals that had to decide whether the acts of host states to regulate environmental issues would constitute breaches of BITs

[158] Miles (2013) is a seminal work on the imperial origins of international investment law. We discussed in-depth her arguments in chapter 1.

standards.[159] We decided instead to turn to the sovereign right of host states to regulate their economy, especially in times of financial crisis. We conducted an exhaustive review of the Argentinean awards to understand whether the imperialist burden is still present in this context. We analyzed the decisions looking for elements that answer whether arbitrators (i) read standards of investors protection in an excessively high-level fashion, (ii) privileged private rights over public ones, (iii) analyzed the cases relying on notions of control and order from the perspective of investors and their home states, and (iv) backed up a depoliticized discourse, advancing a liberal rule of law over the host state. We found abundant evidence confirming all these categories.

We present evidence that the imperialist origins of international investment law still find a way to reproduce themselves in the current manifestation of the regime, shaping the interpretation of investment-related claims and perpetuating a continuing bias against capital-importing countries. Arbitrators have taken part in a long-time "*unresolved power dynamics*" (MILES, 2013, p. 387) and, influenced by an imperialist past, they constantly place investors and their property at the center of the protection.

Reanalyzing the awards through the lenses of the past, we identified that arbitrators disfigured Argentinean sovereignty. It was no more than a formality never translated into real power: arbitrators treated Argentina as an equal sovereign as any (capital-exporting) country, only as long as her sovereignty did not conflict with (business) interests of foreign investors (ANGHIE, 2004). If any difference emerged, then, almost invariably, the latter prevailed. The FET, opened to different interpretations, was perfect for this dynamic. Arbitrators interpreted the standard to reflect the interests of foreign investors; this interpretation represented to Argentina, and to host states in general, no more than non-empowerment and submission to standards created by the other (ANGHIE, 2004). It is not a surprise that investors brought a claim related to the

[159] Miles (2013) analyses paradigmatic environmental cases to develop her arguments, such as Tecnicas Medioambientales Tecmed, S.A. v. United Mexican States and Compañía del Desarrollo de Santa Elena S.A. v. Costa Rica. She argues that the broad interpretation of some standards, including the FET, can place a heavy burden on host states and limit their policy space: "In other words, if a more stringent environmental regulatory regime is brought in to achieve a legitimate public purpose, such as the mitigation of climate change impacts, it will need to meet the stable legal and business environment test before a host state can legislate in this way without triggering a right of compensation. Without doubt, this is potentially a substantial restraint on the ability of governments to make policy decisions and legislate in the public interest." (MILES, 2013, p. 171)

breach of the FET standard in all cases we analyzed. And, save a few exceptions, arbitrators repeatedly acknowledged the breach of the FET.

We will analyze each of these awards below.[160] For now, it suffices to say that, knowing the history of international investment law, we understand how these awards replicate a long history of capital-importing countries' subjugation to capital-exporting desires; they are another brick in the construction of the legitimacy crisis. Any attempt to understand this situation or any suggestion to overcome it shall not overlook the past; otherwise, it will be no more than palliative and capital-importing countries will be forever locked in this subordinated condition.

Our argument comes with three caveats. First, we acknowledge that decision-making is multifaceted. Arbitrators decide a case based on different aspects: the applicable law, the evidence gathered, the claims presented, among others. The influence that the past exerts on arbitrators is one element of decision-making; we understand it is a fundamental part of the decision-making, still, we acknowledge it is only one piece among several others. Second, we did not have access to the case records, and, therefore, any attempt to reassess whether the law was rightly applied to the facts would be incomplete.[161] What we propose is to identify whether the imperial origins of investment law influence decision-making, and we do it analyzing the selected awards according to the parameters we detail below. Third, we also acknowledge arbitrators are not the only ones to be blamed for the legitimacy crisis. Nonetheless, arbitrators have discretion when interpreting the law, and we suggest the imperial origins of the system influence them to consistently read the standards of protection in a way to privilege foreign investors.

This is how this chapter will continue. First, we will address the unprecedented financial crisis that devasted Argentina. Next, we will discuss the Argentinean arbitration saga and how the country unexpectedly found itself at the center of a story of repeated

[160] We detailed in section 3.4.2 below the step-by-step of the legal analysis we conducted.
[161] There is no general presumption of transparency in the ICSID Convention and Arbitration Rules; the parties tailor the level of confidentiality or transparency of each case. It is usually agreed that at least part of the information and documents shall remain confidential, for the privileged nature of state issues. For further information, see: <https://icsid.worldbank.org/en/Pages/process/Confidentiality-and-Transparency.aspx>. Last accessed: August 8, 2019.

condemnations. Finally, we will analyze the awards related to the Argentinean crisis to understand whether the imperialist origins of international investment law influence decision-making and perpetuate the subjugation of capital-importing countries.

3.2 A brief report on the 2001 Argentinean financial crisis

Argentina experienced several economic crises throughout its history; none like the one she faced at the turn of the 21st century (CONDE, 2003). The collapse of the country economy in 2001 was one of the most spectacular crises in modern history, not only for the severity of the economic downturn *per se*, leading to the disintegration of the system as it was known to both the people and to businesses, but also for the social chaos she faced in the period of few months (VAN HARTEN, 2007; BLUSTEIN, 2005). We will briefly assess both its roots and the utterly turbulent outcome.

The roots of the 2001 crisis may be traced back to the exchange-rate-based stabilization program launched at the beginning of the 1990s, architected by the finance minister Domingo Cavallo, during Carlos Menem administration – known for the austerity tone adopted throughout his government.[162] This program ceased (at least for a while) with decades of high inflation in the country. The finance minister developed the program amid a hyperinflation crisis, and it involved not only the parity Peso-U.S. dollar (at 1:1) – by far the most recognizable feature of the stabilization measures –, but also market-oriented structural reforms to promote efficiency and to increase productivity in the economy, including the deregulation and privatization of economic sectors and the reopening of the country´s access to capital markets (GERCHUNOFF; LLACH, 2018; STURZENEGGER; ZETTELMEYER, 2006; IMF, 2004).[163] As for the privatization of public companies, it accounted for the entrance of

[162] Domingo Cavallo was a respected economist trained under orthodox free-market-views.

[163] The parity Peso – U.S. dollar was established by Law n. 23,928, enacted on March 27, 1991, regulated by Decree n. 529/1991 and Decree n. 2,128/1991. Note that article 4 of Law n. 23,928 required the central bank to maintain dollars or gold in reserve to support the number of pesos printed, limiting, therefore, the ability to issue money; the government, in essence, renounced to monetary policy as a macroeconomic instrument. Cavallo understood it as a means to discipline an *undisciplined government*. See chapter 2 of Blustein (2005) and Gerchunoff; Llach (2018) for an in-depth account of this period. Law n. 23,696, enacted on August 18, 1989, is known as the "*ley de la reforma del Estado*", and it aimed at reforming structural features of the Argentinean state. It involved, among others, the privatization of public companies. In this context of privatization, fundamental economic sectors were later regulated, such as the natural gas sector, through Law n. 24,076, enacted on June 9, 1992.

foreign investments and technologies, and both suited well the economic expansion the country lived in the first years of the 1990s (CONDE, 2003).

Argentina grew significantly due to the stabilization program. Inflation declined to single digits from 1993 onwards, after reaching a 27% monthly rate at the beginning of 1991. Improvements in tax collection and privatization revenues lead to a more balanced budget. Growth was solid throughout the decade, averaging nearly 6% per year (real growth rates), with a brief interruption in 1994 due to the Mexican *tequila crisis*; good economic results were resumed soon after this international situation, with the help of fiscal tightening policies and international financial organizations, such as the International Monetary Fund (IMF), which provided Argentina with sufficient funds to preserve the convertibility system. A more investment-friendly climate was celebrated worldwide, attracting large international investment inflows both in the form of portfolio and direct investments (STURZENEGGER; ZETTELMEYER, 2006; IMF, 2004).

Argentina was on the path of (allegedly) sound economic reforms. The country was celebrated for hewing to the Washington Consensus, following the main elements of a recipe endorsed by the IMF, the World Bank, and the U.S. government: the eradication of inflation, privatization of public companies, deregulation of the economy and the removal of trade and investment barriers (BLUSTEIN, 2005).[164] Argentina was the poster child for the Washington Consensus, so much so that Menem was invited to present a speech at the Annual Meetings of the Boards of Governors of the IMF and the World Bank in 1998, a gesture seen as an endorsement of the Argentinean politics and economic measures the country adopted (GERCHUNOFF; LLACH, 2018; BLUSTEIN, 2005). Following so closely the neoliberal mantra led the country to years of bonanza; the economy was well-functioning almost as in autopilot (*piloto automático* - GERCHUNOFF; LLACH, 2018, p. 516).

[164] When the crisis came in 2001, the economic policies Argentina adopted throughout the 1990s "*had "made in Washington"* stamped all over them"; the Argentinean crisis was then a disaster for U.S. foreign policy. See Krugman (2002). The Washington Consensus is defined in footnote n. 71 above.

However, euphoria regarding the impressive Argentinean results masked some vulnerabilities that were never managed.[165] The growth rate decreased in the last months of 1994. In this same year, budget deficits reemerged – mainly financed through public debt –, and a social security reform was carried out, reducing contributions to the system and leading to a further burden on government expenditure. After the 1995 election, both federal and provincial government spending increased – if public debt reached 60 billion pesos, in 1999 it doubled.[166] Argentine authorities decided not to confront powerful interests to adopt a more prudent fiscal policy (STURZENEGGER; ZETTELMEYER, 2006; BLUSTEIN, 2005; CONDE, 2003).

The international scenario was also turbulent. The Russian default in 1998 and the devaluation of the Brazilian real in January 1999 led to the decrease in the price of exports and to a sudden stop of capital flows to emerging countries – Argentina included (CONDE, 2003). The globalization of financial capital has a dark side that became explicit in this context: Investors tend to succumb to mass panic, pulling their money out of emerging economies in the context of economic crisis, inflicting an even greater punishment to these countries. In spite of these external shocks, Argentina maintained the policies she adopted throughout the decade, issuing bonds to attract foreign investors and to finance public expenditure (BLUSTEIN, 2005).

The economic situation deteriorated in 1998.[167] Throughout the year, tax collection faced a significant reduction, growth slowed down and imports surpassed exports by 8 billion U.S. dollars. In 1999, Fernando De La Rúa was elected president after ten years of Peronist administration, and fiscal responsibility was his main priority to regain the confidence of international markets. It is true that fiscal policy had improved during the 1990s, but De La Rúa managed to conduct further significant tax increases and expenditure cuts; the President went as further as to authorize the treasury to cut wages of public workers and pensions to balance the budget. It was not enough to

[165] In retrospective, the IMF suggests that Argentina did not implement reforms to support the convertibility regime; among them fiscal, social security, labor market, and financial reforms. See IMF (2004).
[166] For a further account of these numbers, see Conde (2003, p. 763).
[167] Blustein (2005) highlights the international financial market and Wall Street failed to report about the worrying situation Argentina was beginning to face, for they were interested in the selling of the bonds the country issued. They were biased in not threatening the good image the country had conquered, even if it meant to sweep the real economic situation Argentina was living under the carpet.

bring back confidence and a massive sell-off of Argentine bonds ensued; financial sources were drying. These harsher measures had negative consequences within the population. In 2000, the value of Argentinean bonds fell, economic growth decreased for the second year in a row (gross domestic product fell to -0.8) and unemployment reached 15% in May (GERCHUNOFF; LLACH, 2018; BLUSTEIN, 2005; IMF, 2004).[168]

Amid an economic recession and the loss of voluntary sources of financing, Argentina had to turn to IMF for financial support.[169] The economic situation was (rapidly) intensifying; for instance, in January 2001 government deficit had already achieved half of the total estimated for the first quarter of the year. The country requested the last arrangement approved by the financial organization – as a matter of fact, of a precautionary nature – to be further enlarged. The IMF conceded and provided exceptional financial supports to Argentina throughout 2001.[170] However, Argentina failed to comply with the agreed targets, even though harsh austerity measures were taken throughout the year as an attempt to balance the country's budget. By late November 2001, it was clear that further disbursements from the financial organization would, at least, be delayed. In December, amidst the collapse of both economic activity and market confidence, the IMF decided to cut off the financial support to the country (STURZENEGGER; ZETTELMEYER, 2006; BLUSTEIN, 2005; IMF, 2004).

Afraid of imminent default, the population rushed to the banks in the last days of November; the government immediately imposed a restriction on banks – known as *corralito* – to restrict savers from withdrawing their own deposits.[171] Popular uprisings eroded, people took *Plaza de Mayo* banging pots and pans, shops and government

---

[168] For complete data on unemployment rates since 1974, see the website of the National Institute of Statistics and Censuses of Argentina (*Instituto Nacional de Estadísticas y Censos)*: <https://www.indec.gob.ar/ftp/cuadros/menusuperior/archivo/shempleo1.xls>. Last accessed: September 13, 2019.

[169] If Argentina did not conduct the reforms the Fund understood necessary, the institution had the option to suspend or to terminate the financial support. However, the IMF kept providing the financial support Argentina asked for, even if there were signs that the economy was on the verge of a new recession: *Argentina had a story to tell the world*. See Blustein, 2005, chapter 3.

[170] For a better account of the relationship between Argentina and the IMF throughout this period, see IMF (2004). IFM and Argentina agreed on an extra disbursement on the account that the country was facing a liquidity crisis and that any exchange rate or debt sustainability issue could be dealt with harsher fiscal measures and structural reforms. The IMF (2004, p. 5) disbursed extra funds "on the basis of largely noneconomic considerations and in hopes of seeing a turnaround in market confidence and buying time until the external economic situation improved."

[171] Decree n. 1,570/2001 imposed the freeze of bank accounts.

buildings were looted and sacked, and 30 people died in these episodes.[172] De la Rúa had no alternative but to resign on December 21, 2001, and, soon after, the interim president, Adolfo Rodríguez Saá, decided to default the outstanding debt, which involved more than USD100 billion of official bilateral and privately held debt (VAN HARTEN, 2007; STURZENEGGER; ZETTELMEYER, 2006; BLUSTEIN, 2005).

Saá lasted 10 days as Argentina´s President. The next President, Eduardo Duhalde, terminated the convertibility system and devalued the peso on January 6, 2002,[173] by means of Law n. 25,561; among others, Argentina declared public emergency in the same legal act, as well as authorized the renegotiation of public contracts.[174] Duhalde forced the *pesification* of dollar-denominated assets and liabilities in February 2002; the economy was extensively dollarized for a decade, and, therefore, the costs of leaving the system behind were high: In 2002, the real GDP lost 10.9 points, the ratio Peso–U.S. dollar increased to 206.5, after a decade of parity, and the Federal government debt reached up to 149.9 percent of the country´s GDP (STURZENEGGER; ZETTELMEYER, 2006, p. 166-169).[175] When Peso declined in value against the U.S. dollar, savings were cut off by 70% overnight. As the Peso lost value, so did the savings in U.S. dollars hold by Argentineans; if once there was parity among the currencies, in a sudden the former was devaluated (VAN HARTEN, 2007; IMF, 2004)

At the beginning of 2002, the economy was in collapse.[176] The purchase power of consumers plunged, while the average of consumer prices went from -1.1 in 2001 to 25.9 in 2002 (STURZENEGGER; ZETTELMEYER, 2006, p. 166). Emergency food aid was distributed to the people while jobs vanished; hundreds of businesses went

[172] For a report at the time of the events, see Flirting… (2002). Last accessed: August 23, 2019.
[173] Law n. 25,561, enacted on January 6, 2002, terminated the convertibility. The parity Peso – U.S. dollars is appointed as one of the main reasons that conducted Argentina to the financial crisis, for it wrecked the competitivity of Argentinean exports. To terminate parity was then one of the first measures the country took as an attempt to boost the economy. See Blustein (2005), chapter 5.
[174] Resolution n. 20/2002 established the guidelines for renegotiation of public contracts.
[175] When devaluation took place in early 2002, the debt ratio blasted. For further information on the Argentinean debt dynamics, see Sturzenegger and Zettelmeyer (2006), p. 169.
[176] Developing countries are highly vulnerable to financial crises, and their long-term consequences are harsh on the people; they usually involve rising unemployment, reduced state spending, increasing poverty and, at the end of the day, deaths. See Actionaid (2009).

bankrupt and the unemployment rate reached 21% in May 2002.[177] The people spontaneously gathered on neighborhood committees to plan for protests outside banks against the government.[178] The crisis persisted for months, and by November 2002, more than half the population was living in poverty. It was only by 2004 that the economy showed the first recovery signs (VAN HARTEN, 2007; BLUSTEIN, 2005; CONDE, 2003).

The 2001 Argentinean crisis is one of the most remarkable financial crises of modern times (GERCHUNOFF; LLACH, 2018; VAN HARTEN, 2007). It emerged from a myriad of domestic and international factors that conducted Argentina to the most severe economic situation of her history. Argentina is a reminder that the model proposed by the Washing Consensus may not be suitable for all countries (BLUSTEIN, 2005). It is, to say the least, unfair to blame the country as the single responsible for this emergency.[179] Yet, some arbitrators seem to ignore these facts.

3.3 The Argentinean arbitration saga: A story of repeated condemnations and millionaire compensations

In the last two decades, investors have initiated dozens of arbitrations against the Argentine Republic to dispute the government's response to the financial crisis that hit the country in late 2001. These cases turned Argentina into the most recurrent defendant in investor-state arbitrations, acting as a respondent in more than 60 cases.[180] Investors mainly alleged that the sovereign acts Argentina adopted to

---

[177] Two articles of the Economist evidence the climate of this period in Argentina. See Flirting… (2002) and A decline… (2002). Last accessed: August 23, 2019. For data on unemployment, see footnote n. 168.

[178] The rage of Argentinean people as to the economic and social situation the country was facing was blatant. A piece of graffiti could be seen on a sidewalk across from *Casa Rosada* (the executive office of the president of Argentina) in early January 2002: "We are going to keep on coming. Signed, the People." See Rohter (2002).

[179] For instance, the IMF publicly acknowledged that the organization also contributed to the 2001 crisis, *erring* on supporting unsatisfactory policies: "The IMF on its part erred in the precrisis period by supporting the country's weak policies too long, even after it had become evident in the late 1990s that the political ability to deliver the necessary fiscal discipline and structural reforms was lacking" (IMF, 2004, p. 3). Blustein (2005) suggests that the rise and fall of the Argentinean economy throughout the 1990s shall also be placed on the shoulder of the international community – both the official and private sectors. He highlights that this crisis is an eye-opener to the need for systemic change.

[180] Argentina is a defendant in 61 arbitrations. See: <https://investmentpolicy.unctad.org/country-navigator/10/argentina> and <https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx>. Both last accessed: July 12, 2019. A full list of the arbitrations is presented in Appendix 1.

overcome the situation impaired their rights secured under several BITs. Tribunals repeatedly found investors successful, sentencing Argentina to pay millionaire compensations.

The arbitrations involve a wide range of investments, from different economic sectors – including gas (the BG case; the CMS case; the Enron case; the LG&E case; the Sempra case; the Total case; the Mobil case), water and sewage (the Impregilo case; the SAUR case; the Suez case (i); the Urbaser case), insurance (the Continental case), electricity (the EDF case; the El Paso case; the National Grid case), civil construction (the Hochtief case), public transportation (the Metalpar case), and aviation (the Teinver case). In general lines, foreigners made these investments in the context of the stabilization program launched at the beginning of the 1990s; as we saw above, this program was aligned with the Washington Consensus, and it involved the massive privatization of different economic sectors. International investors were attracted by the opportunity to invest in newly privatized companies, as well as by other benefits that the Argentinean government offered to them – including the parity Peso–U.S. dollar, and, in some cases, the possibility to calculate service tariffs in U.S. dollars and to revise them from time to time according to the U.S. Producer Price Index.[181]

When the 2001 crisis emerged, Argentina adopted measures that drawn back some of these commitments. The parity Peso–U.S. dollar was terminated, and the Argentinean currency was allowed to freely float. Argentina withdrew the benefits foreseen in legal frameworks and concession contracts while requesting to renegotiate public contracts in terms that were not so favorable to investors' interests. The situation changed due to an unprecedented crisis; nonetheless, investors understood that these measures impaired their rights secured under investment treaties, and, as a consequence, they filed several arbitration proceedings against the host state.

Common to these governmental measures is their political nature. When analyzing the choice of exchange rate regime or the regulation of public contracts, arbitrators are

[181] Concession agreements and the legal framework established for specific economic sectors (gas, water, electricity) included these benefits. For example, the Impregilo case is based on alleged breaches to contractual arrangements; the Total case, the CMS case, and the Enron case are based on allegations that the legal framework was unilaterally altered.

revolving issues that are political by nature: “[w]hat effectively had been under review in these disputes was the host state’s response to a major economic crisis, leading arbitral control to the heart of governmental policy” (TITI, 2015, p. 274). Decisions regarding the economy are within state security concerns. Thus, it is not unusual for host states to fear that investment treaties and arbitrations could unduly limit their ability to regulate for the public interest. When sensitive issues and policies are involved, some degree of deference by investment tribunals would certainly be desirable (TITI, 2015). Yet, deference seems to be missing in the Argentinean arbitration saga.

In all the cases we analyzed, investors claimed that these (essentially political) measures that Argentina adopted expropriated their investments while treating them unfair and inequitably. They also claimed the breach of other standards, such as the prohibition of arbitrary and discriminatory treatment, full protection and security, and the umbrella clause. Arbitrators rejected the expropriation claim in all of them, but two.[182] Whenever arbitrators found Argentina liable for the damages investors allegedly suffered, it was based on the FET standard. One cannot miss an evident paradox: The FET was so important to sentence Argentina to pay damages, yet the country was the birthplace of the Calvo Doctrine.[183]

Considering the 20 cases we analyzed, arbitrators found Argentina liable in 19 of them for having breached at least one of the standards of protection included in the relevant BITs – the FET always included.[184] The millionaire damages Argentina was sentenced to pay have reached values as high as USD 320 million.[185] The country ended up with

[182] In the SAUR and Teinver cases, arbitrators understood that the measures adopted by host states expropriated the investments.
[183] We discussed the Calvo Doctrine in chapter 2.
[184] The Metalpar case is the only one to find that Argentina did not breach the relevant BIT. In the Teinver case, arbitrators found Argentina liable for acts not related to the 2001 crisis. In the Urbaser case, arbitrators found a breach of the FET standard, but they did not fix any compensation. In the Continental case, arbitrators found that Argentina breached the FET, but only regarding a small part of the claims brought by investors. In the Sempra and Enron cases, arbitrators initially found Argentina liable for breaching the relevant BITs; nonetheless, both awards were later annulled and new arbitrations were discontinued before new awards on merits.
[185] Tribunals not rarely fixed compensations in amounts over hundreds of millions of U.S. dollars. See Appendix 2 for a list of all the compensatory damages Argentina was sentenced to pay.

a total debt of approximately USD 2 billion as a consequence of these awards.[186] The media coverage of these awards was extensive.[187]

In this context, it should not come with a surprise that these cases have been highly debated and criticized. A detailed analysis of these critiques is beyond the scope of this work. Nonetheless, we highlight that the debate commonly focuses either on understanding the reasoning and methodologies adopted by arbitrators, especially when debating the contours of the FET clause and how it has been interpreted to protect the expectations of investors while reducing the Argentinean power to regulate;[188] or on exploring contradictory holdings in the awards, specifically when it comes to the state of necessity argument advanced by Argentina.[189] They are doubtless rich lines of research and they both have extracted valuable lessons to improve the investment system.[190]

Nevertheless, we suggest to analyze them from a different perspective. For the origins of international investment law have not been fully explored when analyzing the Argentinean saga, we will turn to the past as a way to better understand the present.

---

[186] Compare this number with the total reserves of Argentina in 2018: The country holds USD 66 billion. USD 2 billion represents around 3% of the country´s reserve. Take also into consideration that the country negotiated a USD 57 billion credit line with the International Monetary Fund in 2018 – whose payment has been recently suspended. We then realize that the reserve of a country may be easily compromised by foreign commitments. In this context, USD 2 billion represents a considerable amount.

[187] The most recent case to be widely reported by the press was the Teinver case. Some of the most important Argentinean newspapers - El País, Clarín, La Nación, Página12, and El Cronista - emphasized the amount to be paid to foreign investors.

[188] Awards are inconsistent regarding the regulatory change issue. It is debatable whether any adverse change in the regulatory framework is enough to breach the standard (the Sempra case), or if only changes that are unfair, unreasonable or not proportional breach the standard (the El Paso case). Moreover, they also disagree over which state actions breach the FET standard, including specific contractual commitments (the Continental case), promises and representations (the Sempra case), and general legislative and regulatory frameworks (the Total case). See Ortino (2018), Echaide (2017), Potestà (2013), and Mayeda (2009).

[189] Argentina commonly presented a state of necessity defense. Arbitrators discussed both customary law on the issue and non-precluded measures included in some of the Argentinean BITs. In the CMS case, the Enron case and the Sempra case, arbitrators analyzed a non-precluded measure provision inserted in the United States-Argentina BIT so narrow as to turn the defense virtually unreachable by any country. In LG&E v Argentina, arbitrators analyzed the same measures, and they understood Argentina was not liable for damages during the emergency period. Different tribunals reached different conclusions as to the same facts regarding the same country in the same period of time. These awards are contradictory and bring uncertainty to the system. See Viñuales (2015), Contreras (2013), Burke-White (2010) and Franck (2005). For a dissonant voice, see Alvarez and Khamsi (2008).

[190] There are several suggestions on how to improve the international investment regime based on the Argentinean awards. They go from the plea to incorporate the right to regulate into international investment agreements - safeguarding the right of host states to protect their national interests -, to the creation of an appellate Court to avoid conflicting decisions. See Titi (2014) and Franck (2005).

3.4 The FET as an instrument of imperialism: How arbitration awards reflect the origins of international investment law

International investment norms replicate long-time patterns, relying on concepts such as property and private rights to further political and commercial purposes of investors and home states. These rules engage a mainstream discourse on the evolutionary nature of international law, dismissing alternative views. Investors are placed at the center of the protection, and the whole framework – somehow – is developed for their protection. Host states' needs are virtually ignored and placed at the margin, for they only prevail when not conflicting with the rights of investors (MILES, 2018).

Investor-state arbitration contributes to the subjugation of host states (MILES, 2018; SORNARAJAH, 2015). Detaching dispute resolution from the place where investment is made and transferring the means of enforcement to investors brings the past closer, boosting the protection of private rights and privileging investments over host states. Substance and procedure are fused; the decision on substantive rights is placed at the hands of private arbitrators within a proceeding under control and initiative of investors: "(…) in adding procedural control to substantive rights, investor-state arbitration contributes, perhaps completes, a process of evermore pronounced private rights principles within international law" (MILES, 2018, p. 163).

We add that "the arbitration system could also involve itself in ideological predisposition towards favorable stances to particular interest groups" (SORNARAJAH, 2015, p. 27); what is easy to be seen in the realm of investment disputes, for they involve deeply political issues. Philosophical, economic and political attitudes underlie investment disputes, reflecting long-time controversies (SORNARAJAH, 2010).

It is in this context that we suggest the imperial origins of international investment law shape decision-making. We present evidence that the imperialist origins of international investment law influence the interpretation of investment-related claims, inducing arbitrators to consistently place foreign investors at the center of the protection. We place another brick in the construction of the argument that historical ideas still influence modern practices (MILES, 2018).

We aim at identifying and tracing this influence in awards rendered in the context of the 2001 Argentinean crisis. We will focus our analysis on how arbitrators interpret the FET standard, using it as an instrument of imperialism. Arbitrators used a standard to further private rights and privilege the protection of investments, not so different from what capital-exporting countries have been advancing for centuries. The FET remains a controversial standard, and tribunals fail in clarifying its content and scope *vis a vis* the right of the host state to regulate (ORTINO, 2018). Consciously or not, arbitrators construct and shape this standard according to the case at their hands, always looking through the eyes of investors and attending the most powerful interests at stake.

3.4.1 Prelude: The right to regulate *vis a vis* the protection of investors

The capacity of a state to regulate is a main attribute of sovereignty under international law. States are sovereign entities that have the power to regulate within its boundaries in the name of public interest. States are responsible to guard general public interests, and, to achieve this objective, they are entitled to exercise regulatory powers. They are free to engage in economic, political, legislative and any other regulatory activity they understand relevant for their interests, including the regulation of financial and economic matters (PELLET, 2015; VIÑUALES, 2014; TITI, 2014; MANN, 2003).[191]

Deciding to execute investment treaties is part of state sovereignty. As sovereign entities, they may opt to restrict their sovereignty in the relationship with other sovereign states (SORNARAJAH, 2003). BITs include standards of protection that may limit the regulatory power of host states, including national treatment, most-favored-nation, and expropriation; in all these situations, the decision of the host state to engage with regulatory activities may harm the interests of investors. Thus, harsh investment protection may discourage the host state to adopt regulatory measures for the protection of public interest (TITI, 2016).[192]

[191] It includes the choice of exchange rate regime; this issue was recurrent in the Argentinean crisis, due to the government's decision to terminate the convertibility regime. See IMF (2004).
[192] For example, when the host state enacts legislation that provides more favorable tax conditions for national companies, a foreign investor may claim that this measure breaches the national treatment standard. Tax legislation is part of a sovereign state regulatory power; however, when there is a valid BIT in force, this kind of legislation has to be assessed against the rights of foreign investors.

In the investment context, Titi (2014) defined the term as the right of host states to derogate international commitments without incurring in the payment of compensation:

> A term which has not yet found its place in legal dictionaries, the right to regulate denotes the legal right exceptionally permitting the host state to regulate in derogation of international commitments it has undertaken by means of an investment agreement without incurring a duty to compensate. (TITI, 2014, p. 33)

If not long ago the right to regulate was little evoked in the context of the international protection of investments, it is now part of positive law – including recent concluded BITs – and of investment-states disputes, argued by host states to exempt the alleged breach to BITs (PELLET, 2015; TITI, 2014).

In the context of the Argentinean financial crisis, the right of the host country to regulate was widely debated. Argentina argued she adopted the measures to overcome the crisis and to safeguard public interest; nonetheless, arbitrators placed investors and their property at the center of protection, repeatedly declaring that these measures breached the FET standard. Arbitrators could have read the applicable law in a state-friendly manner, acknowledging an exceptional time (TITI, 2014); yet they rejected the Argentinean argument, confining the policy space of the host country. [193]

3.4.2 Revisiting the arbitral awards

We argued that the imperial origins of international investment law shape how arbitrators interpret the FET standard; we will now identify and trace this influence in the awards rendered in the context of the 2001 Argentinean crisis. We conducted a legal analysis of the awards, through a comparative investigation based on pre-established categories and subcategories.

[193] "A tribunal may opt for a more or less state-friendly interpretation of the applicable law (…)" (TITI, 2014, p. 41). This balanced approach is seen, for example, in the Urbaser, Metalpar, and Continental cases. However, more than a dozen tribunals chose a less friendly approach. We will discuss it below.

Argentina is a respondent in 61 known investment-related arbitrations; 55 tribunals constituted under the auspices of the International Centre for Settlement of Investment Disputes ("ICSID") and 6 tribunals constituted under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).[194] As we aim at studying the interpretation of the FET standard, we selected the cases in which arbitrators rendered an award on merits. When arbitrators discontinue a case or when they find to have no jurisdiction, we exclude the case from our analysis; in both situations, arbitrators do not decide on the merits of the dispute – including alleged breaches to the FET standard.[195] We also excluded cases at initial procedural stages, for in these cases arbitrators have not rendered yet any decision on discontinuance, jurisdiction or merits. We identified a total of 23 cases with awards on merits.

Considering we chose the 2001 Argentinean financial crisis as our case-study, we excluded the cases which are not related to this situation. Out of 23 cases, three are related to other issues than the financial crisis; these were, therefore, excluded.[196] Finally, in two other cases, the parties agreed that these disputes should be decided together. Consequently, the tribunal rendered only one award for the two of them.[197] Thus, we ended up with 20 selected cases and a total of 19 awards for analysis.[198]

Selected cases at hand, we returned to the main categories in Miles (2018). As these categories are open-ended, we understood necessary to create subcategories. We identified common features in the awards, and from those relatable traits we inductively

---

[194] The ICSID is an institution which provides facilities to arbitrate investment disputes; it is not a permanent arbitration court. The parties to the case constitute a tribunal for that dispute, which is later discontinued. For information, see The Rules of Procedure for Arbitration Proceedings of ICSID, available at: <http://icsidfiles.worldbank.org/ICSID/ICSID/StaticFiles/basicdoc/partF-chap01.htm>. Besides ICSID, they may opt for arbitration regulated by the UNCITRAL Arbitration Rules, a set of procedural arbitrations rules. The rules are used in *ad hoc* (non-administered) arbitrations in administered arbitrations before institutions that admit external regulation rules. See <https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration>. Last accessed: August 26, 2019.

[195] See articles 43 to 45 of the Rules of Procedure for Arbitration Proceedings of ICSID.

[196] The three cases are the following: Compañía de Aguas del Aconquija, S.A. & Compagnie Génerale des Eaux v. Argentine Republic, ICSID case n. ARB/97/3; Siemens A.G. v Argentine Republic, ICSID case n. ARB/02/8; and Azurix Corp. v. Argentine Republic, ICSID case n. ARB/01/12.

[197] Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID case no. ARB/03/19; and AWG Group v. Argentine Republic, no reference (constituted under UNCITRAL Arbitration Rules). They both were decided together in one single award.

[198] Some ICSID awards were subject to annulment request (UNCITRAL cases are not subject to annulment). The request is applied on limited grounds, none of which includes the reassessment of the merits (see article 50 of the Rules of Procedure for Arbitration Proceedings of ICSID). We analyzed the decisions on annulment; they do not change our conclusions.

created subcategories for the main categories. The subcategories helped us to translate the categories into practice; they are concrete acts we found in the awards that exemplify the main categories.

The following list displays the categories proposed by Miles (2018) and the subcategories we inductively created to analyze the cases. We understand that finding these categories and subcategories in the awards was an indication that the imperial origins of international investment exert some influence on arbitrators when they decide investment-related disputes.

Table 2. Categories and subcategories used to analyze the awards related to the Argentinean crisis

Categories created by Miles (2018)	Subcategories we created
evidence that standards of investors' protection were read in an excessively high-level fashion	arbitrators read the FET as ample and vague arbitrators include under the FET the protection of the expectations of investors
indications that private rights were privileged over public ones	arbitrators understand that the creation of favorable conditions to the investment and the development of an economic cooperation between investors and home state are the main goals of BITs arbitrators claim foreign investors and their investments are the ultimate beneficiaries of BITs
arbitrators analyzed the case relying on notions of control and order from the perspective of investors and their home state	arbitrators minimize the severity of the 2001 crisis or they cast doubt on sovereign acts that Argentina adopted to overcome the emergency situation arbitrators rely on a private-oriented and depreciatory vocabulary, analyzing the case through the eyes of investors
signs that a depoliticized discourse was backed up by arbitrators, advancing a liberal rule of law over host states	arbitrators minimize the relationship between the FET and the international minimum standard arbitrators support the narrative that power struggles between capital importing and exporting countries are left in the past

Source: created by the author

Before we continue, we draw attention to the fact that use of FET as an instrument of imperialism was possible due to how tribunals are constituted. Arbitrators interpret the law as it is presented to them, and, therefore, we cannot ignore the fact that BITs and the standards of protection were constructed in a context of pervasive imperialism – we discussed this issue in-depth in chapters 1 and 2 above. Arbitrators are not the only ones to be blamed for the pervasive manifestation of imperialism in the investment regime, for awards are necessarily based on the law.

Nonetheless, the arbitrators' lack of independence has contributed to the imperial origins of international investment law to find a way into decision-making.[199] Unlike international Courts, arbitrators are appointed for *ad hoc* tribunals and they are not granted tenure or a fixed income. They are, therefore, interested in maintaining the system running, so they continue being appointed and receiving payment for the services they render. The perception of investors that the system is attractive for them is essential, so they continue resorting to this kind of dispute resolution mechanism (VAN HARTEN, 2007). To read the FET from the perspective of investors thus contributes to maintaining investor-state arbitration attractive for those with the means to initiate it.

Other aspects contribute to a lack of independence. Arbitrators involved in investor-state arbitrations usually come from a selective and small group (a "*club of arbitrators*" - VAN HARTEN, 2007, p. 173). Many are practicing lawyers who may use the FET in a way that benefits investors and encourage them to initiate new claims. As many are also academics, not rarely they use the awards as a means to reinforce their own ideas. More, as the *club* is indeed not large, they are repeatedly appointed to tribunals, and it is not unusual to see them confirming their past understandings in new awards (SORNARAJAH, 2015; VAN HARTEN, 2007).[200] All these combined, it is clear that

[199] An in-depth discussion on the selection of arbitrators and their lack of independence is beyond this work. We suggest Sornarajah (2015) and Van Harten (2007) for a deeper account of the issue.

[200] The Argentinean experience is, in fact, illustrative of this phenomenon. Considering the 20 cases we selected for analysis, the following professionals served as arbitrators in more than one occasion: (i) Gabrielle Kaufmann-Kohler (the EDF case; the Suez case (i); the Suez case (ii)); (ii) Francisco Orrego-Vicuña (the CMS case; the Enron case; the Sempra case); (iii) Albert Jan van den Berg (the BG case; the Enron case; the LG&G case; (iv) Marc Lalonde (the CMS case; the Sempra case); (v) Francisco Rezek (the CMS case; the LG&E case); (vi) Giorgio Sacerdoti (the Continental case; the Total case); (viii) Brigitte Stern (the El Paso case; the Impregilo case); (ix) Charles N. Brower (the Hochtief case; the Impregilo case); (x) Jeswald W. Salacuse (the Suez case (ii); the Suez case (i)); and (xi) Henri Alvarez (the Teinver case; the Total case).

arbitrators' lack of independence has contributed to the imperial origins of investment law to have found a way into decision-making.

3.4.2.1 evidence that the protection of investors was read in an excessively high-level fashion

Arbitrators interpreted the FET in an excessively high-level fashion. They placed the standard on a level virtually impossible to be attained by host states. Arbitrators read the standard so widely as to include the protection of the expectations of investors; when they opt for such interpretation, they place a heavy burden over host states, whose acts repeatedly fell short of an impeccable *fair* and *equitable* conduct that shall even considerate the expectations of private actors. And they did it following past decisions, excessively relying on precedents.

Arbitrators recognize, generally when tracing the first lines of the standard, that the content of FET is imprecise. There are multiple ways to include the FET into a BIT, as the exact language used by treaty-makers is not uniform.[201] As for the BITs related to the Argentinean financial crisis, all of them contemplate the FET in a simple form;[202] none of these treaties define the FET and only two of them – those executed with the

[201] The Total case (Decision on Liability, dated December 27, 2010, p. 45).

[202] Seven BITs are relevant for our analysis. The FET standards are the following:
(1) Clause IV(1) of the Argentina-Spain BIT, "Each Party shall guarantee in its territory fair and equitable treatment of investments made by investors of the other Party."; (2) Clause II(2.a) of the Argentina-United States BIT, "Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security, and shall in no case be accorded treatment less than that required by international law"; (3) Clause 2(1) of the Argentina-Germany BIT, "In any case each Party shall accord fair and equitable treatment to investments."; (4) Clause 3 of the Argentina-France BIT, "Each of the Contracting Parties undertakes within its territory and its maritime zone to grant Fair and Equitable Treatment according to the principles of International Law to the investments made by the investors of the other Party, and to do so in such a way that the exercise of the right thus granted is not impaired de facto or de jure."; (5) Clause 2(2) of the Argentina-Italy BIT, "Ciascuna Parte Contraente assicurerà sempre un trattamento giusto ed equo agli investimenti di investitori dell'altra. Ciascuna delle Parte Contraenti si asterrà dall'adottare provvedimenti ingiustificati o discriminatori che ledano la gestione, il mantenimento, il godimento, la trasformazione, la cessazione e la liquidazione degli investimenti effettuati nel suo territorio da investitori dell'altra Parte Contraente."; (6) Clause 2(2) of the Argentina-United Kingdom BIT, "Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy protection and constant security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party."; (7) Clause II(1) of the Argentina-Chile BIT, "Cada una de las Partes Contratantes promoverá las inversiones dentro de su território de nacionales o sociedades de la outra Parte Contratante y les admitirá de conformidade con sus disposiciones legales vigentes. En todo caso tratará las inversiones justa y equitativamente."

United States and France – go a bit further, just to make a generic reference to international law.[203] To state in the FET clause that investors shall not be accorded treatment below international law or that the standard shall be applied according to the principles of international law is not enough to overcome an inherent vagueness. Doubts abound whether referring to (the principles of) international law in such a simplistic manner means equating the FET to the international minimum, which in its turn has always been a controversial standard, as we saw in chapter 2.

In all the cases we analyzed, arbitrators somehow acknowledged this imprecision. With no clear parameter in the treaties, arbitrators referred to the FET as a vague and ambiguous expression, an indeterminate legal concept, with an inherent flexibility that turns it difficult, if not impossible, to anticipate abstractly how investors' legal position could be infringed.[204]

Arbitrators did not overlook the difficulty surrounding the standard's concept, expressly endorsing that the FET is not an easy term to be defined.[205] In the LG&E case, the tribunal recognized it was indeed "difficult to establish an unequivocal and static concept" of the FET standard.[206] Arbitrators drew special consideration to the fact that different countries and cultures could interpret terms such as *fair* and *equitable* in the most diverse fashion.[207] In this context, we can say that arbitrators were aware the standard was open to multiple interpretations.

Nonetheless, despite all shades of grey, arbitrators did not hesitate to refer to the FET as a crucial element to the protection of foreign investors. In spite of the ambiguity

---

[203] The following awards acknowledge the BIT is silent on the FET definition: The Mobil case (Decision on Jurisdiction and Liability, dated April 10, 2013, p. 268); The El Paso case (Award, dated October 31st, 2011, p. 118-119); The Suez case (i) (Decision on liability, dated July 30, 2010, p. 65); The BG case (Final Award, dated December 24, 2007, p. 91-92); The LG&E case (Decision on Liability, dated October 3rd, 2006, p. 234).

[204] Referring to FET as a vague and ambiguous expression: The Suez case (i) (Decision on liability, dated July 30, 2010, p. 65); the Enron case (Award, dated May 22, 2007, p. 81); The Sempra case (Award, dated September 28, 2007, p. 87). Referring to FET as an indeterminate legal concept: The SAUR case (Decisión sobre Jurisdicción y sobre Responsabilidad, dated June 6th, 2012, p. 130). Referring to FET as a flexible concept: The Total case (Decision on Liability, dated December 27, 2010, p. 45-46)

[205] The Impregilo case (Award, dated June 21st, 2011, p. 67); The Suez case (i) (Decision on liability, dated July 30, 2010, p. 71).

[206] The LG&E case (Decision on Liability, dated October 3rd, 2006, p. 234).

[207] The Suez case (i) (Decision on liability, dated July 30, 2010, p. 71).

encompassing it, arbitrators suggested that the standard would still serve the greater purpose of justice - the latter, paradoxically, is just as ambiguous as the FET.[208] The tribunal of the Suez case (i) has even referred to the FET as the *grundnorm* of international investment law – in a reference to the basic norm referred to by Hans Kelsen, the one from which the norms of a legal system are created.[209]

Even though arbitrators knew so little about the FET, they found a fundamental role in the standard when it came to the protection of investors. To give some contour to an imprecise standard, arbitrators referred to the FET as a compilation of specific elements of protection. Arbitrators generally equated the FET with the protection against arbitrariness, arguing that host states should treat investors with even-handedness, reasonableness, and proportionality.[210] They also commonly equated the FET with full protection and security,[211] stability and predictability,[212] and the protection against discriminatory, inconsistent and non-transparent behavior.[213]

To define the FET as a compilation of standards of protection served to further ingrain vagueness and imprecision. With no fixed content, decision-makers read the standard according to their understanding of *fair* and *equitable*. The tribunal in the Siemens case defines that fair and equitable is "treatment in an even-handed and just manner, conducive to fostering the promotion and protection of foreign investment and stimulating private initiative".[214] Even more broadly, the tribunal in the Mobil case suggests that host states may breach the FET when it unreasonably interferes with the investment, "bringing about an unjust result regarding an investor´s expectations"[215]. The same tribunal furthers that the FET is designed to guarantee that investors obtain duly reparation when other more precise standards are not violated.

---

[208] The Sempra case (Award, dated September 28, 2007, p. 87).
[209] The Suez case (i) (Decision on liability, dated July 30, 2010, p. 65).
[210] The El Paso case (Award, dated October 31st, 2011, p. 134); The National Grid case (Award, dated November 3rd, 2008, p. 67).
[211] The SAUR case (Decisión sobre Jurisdicción y sobre Responsabilidad, dated June 6th, 2012, p. 130).
[212] The BG case (Final Award, dated December 24, 2007, p. 97); the Sempra case (Award, dated September 28, 2007, p. 39); the LG&E case (Decision on Liability, dated October 3rd, 2006, p. 234); the CMS case (Award, dated May 12, 2005, p. 81).
[213] The Teinver case (Award dated July 21, 2017, p. 235-238); The LG&E case (Decision on Liability, dated October 3rd, 2006, p. 236).
[214] Siemens A.G. and the Argentine Republic, ICSID case n. ARB/02/8, Award dated February 6th, 2007, p. 91-92. This case is not included in the list of analyzed awards because it refers superficially to the 2001 crisis. Nonetheless, we include this excerpt as an illustration of how the FET may lack precision
[215] The Mobil case (Decision on Jurisdiction and Liability, dated April 10, 2013, p. 236).

Both decisions lack precision. Arbitrators rely on terms as broad as *fair* and *equitable*; they evoke expressions as *unreasonable interference*, *unjust result* and *treatment in an even-handed and just manner*, which are also subject to different meanings. They do not clarify how these terms should be interpreted, nor do they establish their boundaries and contours. Nothing more than words that could mean virtually anything – repeating a long-time pattern, from the international minimum to the FET standard.

The vagueness and imprecision surrounding the FET opened the doors for arbitrators to include under the standard one element of protection that would not normally be inferred from the terms *fair* and *equitable*: the protection of the legitimate expectations of investors. In all the 19 analyzed awards, arbitrators acknowledged that protecting legitimate expectations was an integral part of the FET standard – if not the most important one[216].

In all selected awards – with no exception –, arbitrators understood that FET includes the protection of investors' legitimate expectations. The award rendered in the Mobil case made it clear that the protection of legitimate expectations is key to the standard, regardless of how the clause is constructed: "(…) the legitimate expectations of the investors have generally been considered central in the definition of FET, whatever its scope".[217]

There are different manners to protect the legitimate expectations of investors. Some arbitrators adopt a strict approach, others a softer one (ORTINO, 2018); the former focus on the existence of any adverse regulatory change from the conditions initially known by investors,[218] and the latter on the fairness, reasonableness or proportionality of the regulatory change.[219] Arbitrators also considered the different relationships

[216] The Enron case (Award, dated May 22, 2007, p. 83) refers to the protection of the expectations of investors and the requirement of a stable framework as key elements of the FET; the tribunal in the LG&E case (Decision on Liability, dated October 3rd, 2006, p. 235) refers to them as essential elements of the FET.
[217] The Mobil case (Decision on Jurisdiction and Liability, dated April 10, 2013, p. 268).
[218] The Sempra case (Award, dated September 28, 2007, p. 88); The Enron case (Award, dated May 22, 2007, p. 83); The LG&E case (Decision on Liability, dated October 3rd, 2006, p. 234); and The CMS case (Award, dated May 12, 2005, p. 80-81).
[219] The Teinver case (Award dated July 21, 2017, p. 230); the Urbaser case (Award, dated December 8th, 2016, p. 163-165); The Impregilo case (Award, dated June 21st, 2011, p. 67); The Total case (Decision on Liability, dated December 27, 2010, p. 49); The Mobil case (Decision on Jurisdiction and

between the parties (POTESTÀ, 2013); whether Argentina entered into specific contractual commitments with investors,[220] made promises or representations on which investors relied at the time when the investment was carried out,[221] or, yet, created a general legislative and regulatory framework which was in force when investors decided to make the investment.[222] Regardless of the approach or the situation between investors and Argentina, all tribunals acknowledged the protection of legitimate expectations as part of the FET standard.

Tribunals generally understood that reasonable expectations to be protected are those that the host state explicitly assumed and that the investors took into consideration when carrying out the investment.[223] Most commonly, tribunals asserted that the expectation of a stable framework for the investment was legitimate, and the FET clause should protect it.[224] Arbitrators argued that not only a stable environment was conducive to attracting foreign investments,[225] but without it, investors "would ever have agreed to invest" in the host state[226]; supporting this argument meant that they

Liability, dated April 10, 2013, p. 236); The El Paso case (Award, dated October 31st, 2011, p. 131); The Continental Case (Award, dated September 5, 2008, p. 115); The Metalpar case (Award on the Merits, dated June 6th, 2008, p. 47).

[220] The Urbaser case (Award, dated December 8th, 2016); The Mobil case (Decision on Jurisdiction and Liability, dated April 10, 2013); The Impregilo case (Award, dated June 21st, 2011); The Continental Case (Award, dated September 5, 2008).

[221] The Impregilo case (Award, dated June 21st, 2011); The El Paso case (Award, dated October 31st, 2011). The BG case refers to a speech by the Argentinean President before the Congress in 1992 regarding the BITs: "A través de ellos, los estados aceptan mantener inalterables durante su vigencia ciertas normas de tratamiento de inversiones, con lo que se espera establecer un clima de estabilidad y confianza para atraer inversiones." (Final Award, dated December 24, 2007, p. 94).

[222] The Teinver case (Award, dated July 21, 2017); The Total case (Decision on Liability, dated December 27, 2010); The Enron case (Award, dated May 22, 2007); The LG&E case (Decision on Liability, dated October 3rd, 2006).

[223] The Total case (Decision on Liability, dated December 27, 2010, p. 50-51); The National Grid case (Award, dated November 3rd, 2008, p. 69); The LG&E case (Decision on Liability, dated October 3rd, 2006, p. 235). In the Enron case, arbitrators summarized these characteristics: "What seems to be essential, however, is that these expectations derived from the conditions that were offered by the State to the investor at the time of the investment and that such conditions were relied upon by the investor when deciding to invest." (Award, dated May 22, 2007, p. 84).

[224] The Total case (Decision on Liability, dated December 27, 2010, p. 53); The BG case (Final Award, dated December 24, 2007, p. 98); The Enron case (Award, dated May 22, 2007, p. 83); The CMS case (Award, dated May 12, 2005, p. 83). The LG&E case (Decision on Liability, dated October 3rd, 2006, p. 235): "(…) the stability of the legal and business framework in the State party is an essential element in the standard of what is fair and equitable treatment. As such, the Tribunal considers this interpretation to be an emerging standard of fair and equitable treatment in international law."

[225] The Continental Case (Award, dated September 5, 2008, p. 115).

[226] The Suez case (i) (Decision on liability, dated July 30, 2010, p. 77-78).

neglected the different reasons that investors consider when deciding to invest, including return rates.[227]

Common to these awards is the lack of a rigorous analysis regarding how (and why) the FET standard included the protection of legitimate expectations. Arbitrators generally did not provide further justification as to the reasons why they included the protection of expectations under the FET standard - what is surprising, as neither the protection of expectations naturally arise from the terms *fair* and *equitable* under international law, nor the concept of the standard is detailed or makes reference to the protection of expectations in any of the relevant BITs (SORNARAJAH, 2015; POTESTÀ, 2013; PICHERACK, 2008).[228]

In spite of some recent decisions, the reference to legitimate expectations has widely relied on precedent[229]. Arbitrators make abundant reference to previous arbitration awards to legitimize that the FET standard should include the protection of expectations. There is little effort to go beyond the indication of past decisions, allegedly in the name of stability and predictability.[230] This is not to say that arbitrators

---

[227] In the Metalpar case, arbitrators saw beyond investors' perspective; investments are subject to instability for the pursue of returns: "However, they decided to invest in that country where, although there was a greater risk due to the instability problems Argentina had experienced in the past, there was also the possibility of obtaining greater returns." (Award on the Merits, dated June 6th, 2008, p. 53).

[228] Arbitrator Pedro Nikken conducted a rigorous analysis of the FET standard. In a separate opinion presented in the Suez case (i), he strongly asserted that the FET could not lose its essence as a standard of conduct of the State concerning investments. It should not be read as a source of subjective rights – expectations – for investors: "19. (…). The BITs contain a list of the States' obligations regarding their respective investments, not a declaration of rights for investors. Regardless of what is considered the autonomy of fair and equitable treatment with respect to the minimum standard, fair and equitable treatment represents the degree of due diligence that the States Parties to the BIT mutually pledged to observe with respect to the investments from nationals of both States."

[229] The tribunal in the Urbaser case developed a long discussion on the FET and how the expectations of investors should be analyzed in tandem with host state's needs (Award, dated December 8th, 2016, p. 178-179);The tribunal in the El Paso case discussed the creeping violation of the FET standard (Award, dated October 31st, 2011, p. 188-190); in the Total case, arbitrators developed a comparative analysis with domestic law to conclude that legitimate expectations are covered by the FET (Decision on Liability, dated December 27, 2010, p. 47-48); the tribunal in the Continental Case categorized all the different factors upon with the investors attempted to base its expectations, scrutinizing each of them in light of the context of the case (Award, dated September 5, 2008, p. 116-118).

[230] The National Grid case (Award, dated November 3rd, 2008, p. 69); The Total case (Decision on Liability, dated December 27, 2010, p. 79-80); The Enron case (Award, dated May 22, 2007, p. 83). The tribunal on the Suez case (i) was emphatic: "(…) a recognized goal of international investment law is to establish a predictable, stable legal framework for investments, a factor that justifies tribunals in giving due regard to previous decisions on similar issues. Thus, absent compelling reasons to the contrary, a tribunal should always consider heavily solutions established in a series of consistent cases" (Decision on liability, dated July 30, 2010, p. 66). However, relying on past decisions without further discussion does not contribute to a stable framework for investments; it may rather lead to a series of decisions that, lacking methodological rigor, create a wrongful precedent.

should not rely on previous decisions; however, it is expected some critical analysis of the standard at the context of the case at hand, avoiding empty reiterations. Schultz (2014, p. 303-311) has pointed out that the pursuit of consistency among decisions has only a relative value; he argues that "(…) it is not necessarily true that it is more important for a rule to be settled than it be settled right", meaning that the mere reference to previous decisions without a deeper understanding of the emerging rule arbitrators are crystallizing is not a moral positive.

We saw in chapter 2 that some awards rendered at the turn of the millennium referred to the protection of the expectations of investors. Following tribunals – without further questioning – followed these earlier awards. Even if pioneer awards lacked a more robust explanation or even methodological rigor, arbitrators followed them under a pretext of consistency and predictability of the investment system and to attend expectations regarding the meaning of the FET (POTESTÀ, 2013; PICHERACK, 2008). It was an uncritical mechanical process. Anthea Roberts, in a much-quoted passage, has compared the awards rendered by investor-state tribunals to a house of cards, constructed over a very light foundation:

> As investment treaties create broad standards rather than specific rules, they must be interpreted before they can be applied. Investor-state tribunals have accordingly played a critical role in interpreting, hence developing, investment treaty law. Yet their jurisprudence frequently resembles a house of cards built largely by reference to other tribunal awards and academic opinions, with little consideration of the views and practices of states in general or the treaty parties in particular. (ROBERTS, 2010, p. 179)

This over-reliance on precedents is astonishing, considering the nature of the FET and the dispute resolution mechanism. Investment treaties include the FET under different forms; nonetheless, the standard constantly relies on vague and imprecise wording. It means that the standard was not subject to one single interpretation. There is neither an appellate mechanism nor a system of binding precedent regarding investor-state arbitration demanding arbitrators to follow past decisions. Yet, "arbitral tribunals have managed to display considerable coherence in identifying and applying principles encompassed under the fair and equitable umbrella" (CAMPBELL, 2013, p. 364) – especially in what concerns the protection of the expectations of investors.

What we noted from the Argentinean cases was an effort from arbitrators to read the FET in an excessively high-level fashion, placing the standard on a level virtually impossible to be attained by host states. *Fair* and *equitable* are terms so ample that arbitrators could have walked down very different roads; nonetheless, they chose to read the standard from the perspective of investors, placing their expectations at the center of the FET, even though this was not the natural interpretation inferred from the standard under international law. Choosing to walk down this road, arbitrators elevated the protection under the FET standard to an exorbitant high-level, promoting the expectations of investors to some sort of property to be protected at all costs. It does not matter how the BIT includes the FET, nor the need of the host states to regulate for the public interest; the protection of investors' expectations almost invariably prevailed.[231] By including the protection of expectations under the standard, arbitrators imposed a heavy burden over host states, whose acts repeatedly fell short of an impeccable (and unnatural) *fair* and *equitable* conduct not foreseen in BITs.

There is a recent effort from arbitrators to rely on a more balanced approach.[232] As we said, the influence the imperial origins of international investment law exert is only one element of decision-making, and some arbitrators have indeed attempted to take into consideration the needs of the host state. Arbitrators have some margin of appreciation when they interpret a given law, and some of them have used it to rely on a more state-friendly interpretation. Some tribunals acknowledge that the FET must be subject to an objective interpretation while suggesting that the standard should not be equated to the idea that investors have of how to protect their rights; the interpretation shall not be "based on personal opinions of the arbitrators or personal expectations of a

[231] There were different manners to read the FET standard. Including the protection of legitimate expectations under the standard was only one way to read it. See the separate opinion of arbitrator Pedro Nikken in the Suez case (i) when discussing the limits of the standard: "27. I find, indeed, that the development of the doctrine of legitimate expectations is the result of the interaction of the claims of investors and their acceptance by arbitral tribunals, buttressed by the presumed moral authority of the decided cases. I believe that the standard of fair and equitable treatment has been interpreted so broadly that it results in arbitral tribunals imposing upon the Parties obligations that do not arise in any way from the terms that the Parties themselves used to define their commitments. Indeed, more attention has been paid to what the claimants have considered the scope of their rights than what the Parties defined as the extent of their obligations."

[232] The Urbaser case; The Teinver case; The Continental case; The Metalpar case.

party".[233] Tribunals also paid attention to the fact that the FET does not ensure that the regulatory regime will never change, as the host state has the right to change its laws.[234]

There is an attempt to give some perspective to the rights of host states and their power to regulate.[235] In four cases, arbitrators have not found a breach to the FET, or, having found a breach, exempted Argentina to pay compensation, under a more balanced approach.[236] See two excerpts of these awards:

> The investor is and must be aware of the State's commitment to deal with situations and problems that may emerge over the time and were impossible to anticipate. (…) What the fair and equitable treatment standard requires is that the basic expectations of the investor in respect of the fate of its investment are nevertheless taken care of by the host State when reacting to unforeseen circumstances. There is no bar for the host State to act accordingly merely because a situation of public concern emerged that was

[233] The Urbaser case (Award, dated December 8th, 2016, p. 161). In the Mobil case, arbitrators also acknowledged that the notion of legitimate expectations is an objective concept, which is the result of balancing interests and rights (Decision on Jurisdiction and Liability, dated April 10, 2013, p. 277). See also the El Paso case (Award, dated October 31st, 2011, p. 127).

[234] The Teinver case (Award dated July 21, 2017, p. 230); the Urbaser case (Award, dated December 8th, 2016, p. 166); The Mobil case (Decision on Jurisdiction and Liability, dated April 10, 2013, p. 275); The El Paso case (Award, dated October 31st, 2011, p. 132); The Total case (Decision on Liability, dated December 27, 2010, p. 52); The Continental Case (Award, dated September 5, 2008, p. 115); The BG case (Final Award, dated December 24, 2007, p. 94).

[235] The Teinver case (Award dated July 21, 2017); The Urbaser case (Award, dated December 8th, 2016).

[236] In the Teinver case, the tribunal declared Argentina to have breached the FET. Nonetheless, measures adopted in the context of the crisis – essentially, the refusal to increase airfare tariffs – were not deemed as unfair or inequitable; the tribunal declared that "some deference or leeway should be granted to Respondent in balancing" its interests against the needs of investors (Award dated July 21, 2017, p. 237-238). In the Urbaser case, investors presented a long list of measures Argentina adopted and that allegedly breached the FET. Nonetheless, the tribunal found that only one measure sufficed to breach the standard. The tribunal understood that investors also failed to comply with their obligations under the contract, and, therefore, the host state should not pay damages to investors. In the Continental case, except for a minor act committed by Argentina, the tribunal dismissed the claim that the measures the host country adopted breached the FET; the tribunal understood that the Argentinean acts were reasonable efforts: "For the purpose of this Award, we conclude that Argentina made reasonable efforts to take measures that would have, or might have maintained convertibility thus respecting its international obligations connected thereto. In conformity with the concept of "necessity" discussed above, we consider that the Government's efforts struck an appropriate balance between that aim and the responsibility of any government towards the country's population (…)." (Award, dated September 5, 2008, p. 101). In The Metalpar case, arbitrators also acknowledged that the acts Argentina took made it possible to overcome the crisis: "However, the Tribunal finds it evident (and it lacks evidence to reach a conclusion to the contrary) that the actions taken by the Argentine Government in late 2001 and early 2002 had a beneficial effect and made it possible to overcome the chaos the country experienced in those days." (Award on the Merits, dated June 6th, 2008, p. 57).

> not transparent to the investor at the outset. (The Urbaser case, award, dated December 8th, 2016, p. 165-166)
>
> Therefore, the Tribunal considers that it is unlikely that Claimants legitimately expected that their investments would not be subject to the ups and downs of the country in which they were made or that the crisis that could already be foreseen would not make it necessary to issue legal measures to cope with it.. Since in this case there is no arbitrary governmental conduct nor is there a contractual situation of any kind leading Claimants to entertain legitimate expectations that were violated by such conduct, the Tribunal concludes that Argentina did not violate the provision that requires it to afford fair and equitable treatment to Claimants' investments. (The Metalpar case, award on the Merits, dated June 6th, 2008, p. 47)

We note from these four disputes that arbitrators had enough maneuvering space to interpret the FET from a more balanced approach. Arbitrators acknowledged that the legitimate expectations of foreign investors could not supersede the host state's right to regulate, including the necessary measures to overcome a financial crisis. They decided that investors could not ignore the fact that the original conditions the host state granted to the investment may change, and, in this case, what investors initially expected should be molded to fit a new scenario.

In all the remaining cases, arbitrators found that the host state breached the FET standard, determining Argentina to pay compensation for investors. Except for the four disputes mentioned above, arbitrators adopted an interpretation less attentive to the needs of the host state. In these cases where they found Argentina liable for breaching the FET, arbitrators raised the argument of a balanced approach only as empty talk. The Mobil case illustrates this situation. The arbitrators suggested that a "balance should be established between the legitimate expectations of the foreign investor to make a fair return on its investment and the right of the host state to regulate its economy in the public interest"[237], while acknowledging that if "a State faces a serious economic crisis, this fact must be taken into consideration in assessing the scope of protection due to a foreign investor"[238]. Yet, they found that Argentina breached the FET standard. Arbitrators acknowledged that the financial crisis should not be

[237] The Mobil case (Decision on Jurisdiction and Liability, dated April 10, 2013, p. 279-280).
[238] The Mobil case (Decision on Jurisdiction and Liability, dated April 10, 2013, p. 281).

overlooked, still they ignored the emergency Argentina went through and placed – as usual – the expectations of investors at the center of protection. Tribunals easily found a way to declare that Argentina breached the FET.

The El Paso case is also illustrative. Arbitrators asserted that the measures Argentina adopted to overcome the crisis were insufficient to breach the FET.[239] Yet, arbitrators developed a whole new doctrine to argue that measures that did not suffice to breach the FET standard could still result in such violation when combined. They named it *creeping violation* of the FET.[240] The tribunal developed the idea that the host state could breach the FET through a series of acts, rather than a single measure (VESEL, 2014). Arbitrators present some consideration to the right of the host state to regulate only as a mere exercise of rhetoric; when confronting state acts that did not amount to a violation of the FET against the interests of investors, arbitrators reiterated that the latter should prevail. And they did it through a new doctrine to protect investors.

From the above, we suggest that arbitrators acknowledged the vagueness of the FET and relied on this characteristic to read it so broadly as to include the protection of the legitimate expectations of investors; it evidences that the protection of investors was read in high-level fashion.

3.4.2.2 indications that private rights were privileged over public ones

When private rights were opposed to public ones, arbitrators almost invariably decided to place the former in a privileged position. Referring to the preamble of BITs, they advanced that the creation of favorable conditions to the investment and the development of economic cooperation between investors and host states were the main goals of BITs, even if to pursue them meant limiting the right of the host state to regulate. After all, arbitrators understood foreign investors and their investments as the ultimate beneficiaries of the treaties.

---

[239] "In other words, a balance should be established between the legitimate expectation of the foreign investor to make a fair return on its investment and the right of the host State to regulate its economy in the public interest. (…) in order to conclude that a stable legal and business environment is an essential element of fair and equitable treatment, without taking into account the goal that any State has to pursue as well, which is to guarantee to its population maximum effective use of its economic resources" (Award, dated October 31st, 2011, p. 131-132). See also pages 168 and 188 of this same award.

[240] Award, dated October 31st, 2011, p. 188-190.

When discussing the concept and reach of the FET standard, tribunals suggested it had to be analyzed through BITs' preambles.[241] Almost invariably, arbitrators interpreted the FET as an instrument to serve what they understood as the main purposes of these treaties: the creation of favorable conditions for investments – including consistency, stability and predictability through a stable framework for investments[242] –, the promotion and protection of investments in order to encourage future flows,[243] and the intensification of an economic cooperation between investors and host states, advancing the economic development of host states.[244]

---

[241] Few tribunals discussed the legal reasons why they relied on the preamble to interpret the FET. The tribunals in Enron and Suez (i) cases refer to article 31 (1) of the Vienna Convention on the Law of Treaties – see note n. 135 above –, as an attempt to justify why returning to the preamble: "And finally, following the directives of Article 31(1) of the VCLT, the Tribunal must take account of the objects and purposes of the applicable BITs. Here, one must turn to the BIT preambles which express those objects and purposes." (the Suez case (i), Decision on liability, dated July 30, 2010, p. 72). Others tribunals did not refer to any legal provision to legitimize their choice, merely referring to the preamble when interpreting the FET. This is what happened in National Grid, Continental, and CMS cases: "Stability of the legal framework for investments is mentioned in the Preamble of the BIT. It is not a legal obligation in itself for the Contracting Parties, nor can it be properly defined as an object of the Treaty. It is rather a precondition for one of the two basic objects of the Treaty, namely the promotion of the investment flow, rather than being related to its other objective, that of granting protection for investments on a reciprocal basis." (The Continental case, Award, dated September 5, 2008, p. 115).

[242] The Teinver case (Award dated July 21, 2017, p. 229); The Mobil case (Decision on Jurisdiction and Liability, dated April 10, 2013, p. 275); the Enron case (Award, dated May 22, 2007, p. 83); The CMS case (Award, dated May 12, 2005, p. 80-81). The Total case: "The operative provisions of the France-Argentina BIT must in any case be read taking into account, within the object and purpose of the treaty, the reference in the Preamble to the desire of the Parties to create favorable conditions for the investments covered" (Decision on Liability, dated December 27, 2010, p. 50). The Mobil case seem to bring a balanced approach acknowledging that consistency, stability and predictability is one feature of BITs' protection; nonetheless, it ended up declaring that it is a main goal: "(…) meeting the investor's legitimate concern of legal consistency, stability and predictability is a major but not the only ingredient of an investment friendly climate in which the host state in turn can reasonably expect to attract foreign investment. (…). Even the Claimants accept the view that legal stability is not the only goal outlined in the BIT's Preamble, but maintain that providing a stable investment framework is certainly one of the BIT's most explicit goals." (Decision on Jurisdiction and Liability, dated April 10, 2013, p. 275)

[243] The Teinver case (Award dated July 21, 2017, p. 229); The LG&E case (Decision on Liability, dated October 3rd, 2006, p. 234); The Suez case (i) (Decision on liability, dated July 30, 2010, p. 65). The tribunal in the National Grid case was precise when discussing this issue: "These terms are used in a treaty which the State parties had signed for a purpose, namely, to promote and protect investments. (…) Another consideration of the Contracting Parties in the Preamble is "the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in both States" (Award, dated November 3rd, 2008, p. 67).

[244] The Teinver case (Award dated July 21, 2017, p. 229); The SAUR case (Decisión sobre Jurisdicción y sobre Responsabilidad, dated June 6th, 2012, p. 130-131). See the tribunal in the Suez case (i): "Thus the purpose of the treaty is not merely to protect investments but to advance economic cooperation between France and Argentina and to achieve economic development of the two states by stimulating transfers of capital and technology" (Decision on liability, dated July 30, 2010, p. 72).

Some arbitrators mentioned the protection of foreign investors and their investment as the main goal of investment treaties. The tribunal in the Sempra case has indeed acknowledged that private entities were the *ultimate beneficiaries* of BITs.[245] In the Total case, the tribunal read the FET as an instrument to protect and promote investments. Arbitrators interpreted the standard as a one-sided instrument; they argued that BITs, irrespective *of their specific wording*, aimed at the protection of investments. In this equation, the host states' needs were virtually forgotten:

> The expectation of foreign investors in the gas sector about the long term maintenance of the above-mentioned principle was reinforced by the existence of Argentina's BITs. Irrespective of their specific wording, undoubtedly these treaties are meant to promote foreign direct investment and reflect the signatories' commitments to a hospitable investment climate. Imposing conditions that make an investment unprofitable for a long term investor (for instance, compelling a foreign investor to operate at a loss) is surely not compatible with the underlying assumptions and purpose of the BIT regime. (The Total case, decision on Liability, dated December 27, 2010, p. 50)

Other arbitrators focused on *economic cooperation* and the *development* of host states as the objects of the treaties. Even in this case, they also read the FET as an instrument to further ideas that better-suited investors' interests. Any other interest or need the host state could have had was obliterated in the name of *broader goals* – as if economic cooperation between the parties could overrule any other objective the treaties may have. See how the Suez case (i) discussed this issue:

> When one examines the stated purposes of both BITs, one sees that they have broader goals than merely granting specific levels of protection to individual investors. In the case of Argentina-France BIT and the Argentina-Spain BIT, the Contracting States are seeking to further economic cooperation between them. The protection and promotion of foreign investment, while important to attaining that goal, are only a means to that end. The Contracting States through these treaties pursue the broader goals of heightened economic cooperation between the two States concerned with a view toward achieving increased economic prosperity or development. The Tribunal must

[245] The Sempra case (Award, dated September 28, 2007, p. 115).

> take those broader goals into consideration when it interprets and applies the term “fair and equitable treatment” in this case. (The Suez case (i), decision on liability, dated July 30, 2010, p. 73)

What means *increased economic prosperity or development* is subject to the most different interpretations. Yet, it seems that tribunals interpreted it through the eyes of investors. Economic prosperity and development are terms opened to the most different interpretations, and they could lead to many different outcomes; nonetheless, in any scenario, they come in a context in which host sates have to deal with questions of public interest beyond the economic domain. Arbitrators may not close their eyes to the right of the host state to regulate for the public interest, neither to other facets of development – including the protection of social and human rights. Though, this is what happened. See how the decision in the Suez (i) case continues:

> Economic cooperation refers to working together in the economic domain. Implicit in the notion of economic cooperation between States is the commitment to give fair and equitable treatment to important economic actors, such as investors, of a Contracting Party with which a State has committed to cooperate. Indeed, it is difficult to see how cooperation in the economic and investment domain could ever take place unless such fair and equitable treatment is accorded by each State to protected investors and investments from the other state. Thus, this Tribunal considers that fair and equitable treatment of investments is the sine qua non of the economic cooperation envisaged by France, Spain, and Argentina in the two BITs applicable to this case. (The Suez case (i), decision on liability, dated July 30, 2010, p. 73)

Arbitrators interpreted economic cooperation as an objective that should be reached – *sine qua non* – through the FET standard; no other element of development is considered, but the economic. For decision-makers, host states would have even agreed to limit their sovereign rights when they decided to include this indeterminate and vague standard, precisely because it stimulates economic cooperation and development while protecting investors.[246]

[246] “Todo lo que puede inducirse del APRI es que tanto TJE como PPS son conceptos jurídicos indeterminados, que imponen estándares de comportamiento a los Estados en relación a las inversiones protegidas: prohíben que un Estado incurra en actos administrativos, legislativos o judiciales que no sean justos y equitativos o creen desprotección o inseguridad. Y los Estados aceptan esta limitación de sus poderes soberanos, inducidos por el sinalagma, puesto que el otro Estado contratante asume un compromisso recíproco, y en el convencimiento de que la promoción y protección

Two cases evidence how private rights prevailed over public ones in this context of furthering investors' protection and economic development;[247] and a third one demonstrates that a different solution was possible.[248] The three cases refer, in general lines, to investments made by foreign investors in the sector of water and sewage during the privatization wave that took place in Argentina during the 1990s. Investors objected to the measures adopted by the host country to overcome the 2001 financial crisis, arguing they harmed their investment; the claims included discussions on concession conditions, as well as on both quality and access to the water provided to the population. The tribunals reached different conclusions.

The tribunals in the SAUR case and the Urbaser case acknowledged the relevance of ensuring access to water; the former referred to it as a *fundamental right*,[249] and the latter as a *universal basic human right.*[250] However, when applying this right to the facts of the cases, the tribunals walked down different paths.

Balancing the access to water against investors' rights, the tribunal in the SAUR case declared that the right to water should be measured up against the rights granted to investors when the concession was executed. To ensure the population had access to water should not overcome the rights and guarantees given to foreign investors; investors' private rights were privileged over public ones, then.[251] On the other hand, the tribunal in the Urbaser case declared that the implementation of fundamental rights could not hurt the FET, because "*their occurrence must have been deemed to be accepted by the investor when entering into the investment and the Concession Contract*".[252] It then stated that investors' expectations should be protected;

---

de las inversiones extranjeras "estimula… el desarrollo económico." (The SAUR case, Decisión sobre Jurisdicción y sobre Responsabilidad, dated June 6th, 2012, p. 130-131).

[247] The SAUR case and the Impregilo case.

[248] The Urbaser case.

[249] The SAUR case, Decisión sobre Jurisdicción y sobre Responsabilidad, dated June 6th, 2012, p. 93.

[250] The Urbaser case (Award, dated December 8th, 2016, p. 164).

[251] "El derecho fundamental al agua y el derecho del inversor a la protección ofrecida por el APRI, operan sobre planos diferentes: la empresa concesionaria de un servicio público de primera necesidad se halla en una situación de dependencia frente a la administración pública, que dispone de poderes especiales para garantizar el disfrute por la soberanía del derecho fundamental al agua; pero el ejercicio de esos poderes no es omnímodo, sino que debe ser conjugado con el respeto a los derechos y garantías otorgados al inversor extranjero en virtud del APRI" (The SAUR case, Decisión sobre Jurisdicción y sobre Responsabilidad, dated June 6th, 2012, p. 93).

[252] The Urbaser case (Award, dated December 8th, 2016, p. 163).

nonetheless, these expectations could not overcome the sovereign right of the host state to preserve the access to water and sewage services, as contractual rights had to be adjusted to prevailing concerns of public interests.

Discussing the Urbaser and the Impregilo cases have another layer: The facts of these cases are essentially the same, as both Urbaser and Impregilo were stockholders of *Aguas Del Gran Buenos Aires S.A.* – the object of the concession contract for water and sewage services under discussion. While the tribunal in the Impregilo case privileged the expectation of a prompt renegotiation of the concession contract to restore the original economic balance,[253] the tribunal in the Urbaser case acknowledged that investors had to adjust their expectations to new emerging circumstances after a massive financial crisis - including the outcome of a renegotiation that could lead to a framework different from the initial one.[254]

In both Impregilo and SAUR cases, arbitrators privileged private rights. The right to water and the renegotiation of a new framework for the investment were placed in a lower position if compared to investors' rights. When they collided, the interests of investors prevailed. Guarantees and rights granted at the moment the investment was made were elevated to a greater condition, even superior to the access by the local population to a fundamental right; all in the context of reading the FET as an instrument to further economic cooperation and to protect investors. The Urbaser case evidenced that a different interpretation was possible, one that did not ignore the right of the host state to regulate for the well-being of its population.

---

[253] "(…) the New Regulatory Framework for the Provision of the Drinking Water and Wastewater Public Services, enacted in Decree No. 878/03, contained certain new elements which were unfavorable to AGBA. It provided for State intervention in corporate decisions (Section 47) and shifted the balance in favor of the users by introducing, for instance, a social tariff for low income residential owners (Section 55). (…) The New Regulatory Framework therefore changed the balance between the Province and the concessionaire in a manner which was clearly disadvantageous to the concessionaire." (The Impregilo case (Award, dated June 21st, 2011, p. 46)

[254] "Another illustration relates to a renegotiation subsequent to a major disruption of the contractual framework. Such a deal or the method to approach it may, under certain circumstances, violate the fair and equitable treatment standard. In such a case, however, this standard is to be reflected in light of the reasonable expectations of the investor in respect of the involvement of the host State in the negotiation and their possible outcome. It will not be measured in comparison to the expectations the investor had when entering initially into the contract, at a time it had no reason to think and consider the occurrence of such an event." (The Urbaser case, Award, dated December 8th, 2016, p. 166).

Privileging private rights over public ones was indeed an option embraced by arbitrators. The relevant BITs did not contain any clause through which Argentina agreed not to exercise its regulatory power; especially if a pressing social necessity arose demanding urgent measures. Nor arbitrators should have read a limitation to sovereign rights when there was none.[255] Still, so they read, closing their eyes to the most severe financial crisis that Argentina has ever faced and privileging, instead, investors' interests over public ones.

3.4.2.3 notions of control and order from the perspective of investors and their home states

Arbitrators interpreted the cases from the perspective of investors, neglecting the needs of the host country. We found indications that arbitrators diminished the host state before investors, disputing governmental acts and depreciating the capital-importing country, reading the cases from an idea of control and order that better suits investors' interests. When arbitrators minimize the severity of the financial crisis, or when they dispute sovereign acts to regulate the economy or, still, when they rely on a private-oriented and depreciatory vocabulary, they read the case through the eyes of investors.

We saw that the financial crisis Argentina faced in 2001 was unprecedented. Harsh economic and social instabilities followed, and a chaotic scenario emerged, drowning the country into a serious situation. Tribunals questioned both the severity of the crisis and the reasonability of the decisions taken to overcome this condition.

Arbitrators highlighted that Argentinean history was marked by economic instability, as evidence that a financial crisis was not something unprecedented in the country's past.[256] They also argued that the economic policies adopted by the country over the

[255] See the separate opinion of arbitrator Pedro Nikken in the Suez case (i): "32. BITs do not contain any clause in which Argentina agrees to be bound not to exercise its regulatory power, when necessary, particularly if it arose a pressing social necessity to do so, which in fact did occur."

[256] Both the tribunals in the Enron and Sempra cases, referred to a long period of economic turmoil in Argentina's past (The Enron case, Award, dated May 22, 2007, p. 42-43) and in the National Grid case reference was made to a period of severe economic crisis before the investment was carried out (Award, dated November 3rd, 2008, p. 71). Even though the Metalpar case followed a more balanced approach, the tribunal also acknowledged the host country economic past: "Without having to go back farther in history, it is sufficient to recall the difficult situations experienced by Argentina during the second part of

years would have led to the crisis.[257] In a context of repeated crisis and allegedly questionable domestic policies, arbitrators developed that the difficulties Argentina faced were not profoundly serious. They claimed there was no evidence that events were out of control or unmanageable.[258] The crisis would not have resulted in total economic and social collapse.[259] Nor it would have led to the disruption or disintegration of society or the total breakdown of the economy.[260] In the context of a *merely* austere situation, arbitrators claimed that investment treaties should prevail, for the aim of the legal regime is protecting investors and their investment.[261]

The measures adopted to overcome the crisis were claimed *radical*, and arbitrators objected whether they were the only means by which the country could have protected the public interest.[262] They questioned whether these measures were indeed the best option, for they modified the initial investment framework.[263] Measures that discarded original guarantees offered to investors – including the parity Peso-U.S. Dollars and

---

the twentieth century to know that, although extremely serious, the crisis of the early twenty-first century is not without precedent in Argentina." (Award on the Merits, dated June 6th, 2008, p. 50).

[257] The Impregilo case (Award, dated June 21st, 2011, p. 80). Arbitrators understood Argentina failed to exercise fiscal discipline, including control of provincial spending, and to adopt labor and trade policies consistent with the country's currency board, leading to high public indebtedness and to an inflexibility in the domestic market that hampered the country's ability to cope with external shocks. It is important to highlight that Arbitrator Stern expressly made the point in the award that she disagreed with this reading, for "the State's contribution to a situation of economic crisis should not be lightly assumed." (Award, dated June 21st, 2011, p. 81). The tribunals in the CMS case (Award, dated May 12, 2005, p. 95-96), in the Suez case (i) (Decision on liability, dated July 30, 2010, p. 90-91), in the National Grid (Award, dated November 3rd, 2008, p. 106-107) and in the EDF case (Award, dated June 11, 2012, p. 269-270) also asserted that government policies contributed to the crisis, while exogenous factors fueled additional difficulties. On the contrary, the tribunal in the Continental case highlighted that these policies were backed up by international organizations (Award, dated September 5, 2008, p. 105) and the tribunal in the Metalpar case asserted they had a beneficial effect, as they made possible to overcome the financial crisis (Award on the Merits, dated June 6th, 2008, p. 57).

[258] The Sempra case (Award, dated September 28, 2007, p. 98).

[259] The CMS case (Award, dated May 12, 2005, p. 102-103).

[260] The CMS case (Award, dated May 12, 2005, p. 102-103). The tribunal in the Sempra case also understood the crisis was not that severe, for the orderly constitutional transition was carried out (even if it involved five different presidents in a few days), elections occurred soon after and public order was eventually reestablished (Award, dated September 28, 2007, p. 98). On the other hand, the tribunal in the Metalpar case understood that analyzing the crisis' origins exceeded their field of action (Award on the Merits, dated June 6th, 2008, p. 51-52).

[261] The CMS case (Award, dated May 12, 2005, p. 102-103).

[262] The BG case (Final Award, dated December 24, 2007, p. 97) referred to them as radical. The EDF case (Award, dated June 11, 2012, p. 269) questioned whether they were the only means to overcome the crisis.

[263] The LG&E case (Decision on Liability, dated October 3rd, 2006, p. 237-238). On the contrary, the tribunal in the Metapar case acknowledged that even though they could not have been the best options, still they were aimed at overcoming a devastating situation – and so they did, as Argentina later found a new situation of stability (Award on the Merits, dated June 6th, 2008, p. 50).

the calculation of tariffs in U.S. Dollars – or that determined the renegotiation of original arrangements were found unfair and inequitable.[264]

Tribunals many times addressed that these measures went "too far by completely dismantling the very legal framework constructed to attract investors".[265] Arbitrators argued that a legal framework was constructed to attract foreign investors in the early 1990s and that investments were made taking into consideration this scenario; not even sound measures to overcome an unprecedented financial crisis could reject this foundation. Although they were adopted as a result of coherent decisions to overcome an emergency situation, these measures could not threat commitments that gave rise to the expectations of investors regarding future state conduct.[266]

Minimizing the crisis and disputing domestic policies, arbitrators relied on notions of control and order from the perspective of investors, bringing "arbitral control to the heart of governmental police" (TITI, 2015, p. 274); they read the facts from investors' perspectives, neglecting the impact of a massive financial crisis for the host country and relying on an idea of control and order that suited only investors. The situation in Argentina was chaotic, still, arbitrators repeatedly found that the interests of investors should be protected. By walking down this path, they paid little concern to the host country, who faced an unprecedented crisis and had not only the responsibility to protect its population from an even greater peril but also the burden to deal with consequences that followed from this period.[267]

---

[264] See section 3.2 above.

[265] The El Paso case, Award, dated October 31st, 2011, p. 189. See also: The BG case (Final Award, dated December 24, 2007, p. 98); The Sempra case (Award, dated September 28, 2007, p. 89-90); The Enron case (Award, dated May 22, 2007, p. 84-85); The LG&E case (Decision on Liability, dated October 3rd, 2006, p. 238).

[266] "In the Tribunal's view it is likely that the GOA tried to take the best measures to cope with the situation. As shown by the diverging views expressed on the subject by commentators of the Argentinian crisis of 2001, it is very difficult to assess whether those measures were the best. The only issue to be verified by the Tribunal in this context is whether these measures were taken arbitrarily. In the Tribunal's view, based on the documents and the oral hearing, it seems that the measures adopted were the result of reasoned judgment rather than simple disregard of the rule of law, which means that they cannot be considered arbitrary. However, the Tribunal's analysis, characterising the measures as not arbitrary does not mean that such measures are characterised as fair and equitable or regarded as not having affected the stability of the legal framework under which gas producing companies in Argentina operated." (The Mobil case, Decision on Jurisdiction and Liability, dated April 10, 2013, p. 255)

[267] In the Continental case, arbitrators read the crisis through a more balanced perspective. They acknowledged the crisis was indeed severe, leading to the abandonment of the cardinal tenet of the country's economic life. The Argentinean domestic economy was on the verge of collapse; it then followed soaring inflation, increasing unemployment, more than half of the population living below the poverty line, threats to the health of the most vulnerable members of the population and the widespread

The vocabulary used also suggests that arbitrators assessed the cases from the perspective of investor. Arbitrators opted for terms and expressions that evidenced they diminished the host state before investors' interests. Again, they relied on an idea of control and order that benefited investors; when they used a private-oriented vocabulary to discuss regulatory governmental measures or when they use a depreciatory vocabulary against the state, arbitrators indicate they assessed the case departing from a perspective that better suits the private investor. [268]

Examples of a private-oriented vocabulary abound in the awards. Investors were treated as *rational* actors pursuing profit.[269] Arbitrators read the legal framework for the investment – in areas of public interest – as part of a private relationship of economic rationality, within a market economy structure to recover investment costs and to make a reasonable return.[270] Arbitrators also asserted it was *natural* for investors to seek protection against risks inherent to the business, as for the expectations of investors are in effect calculations about the future[271].

Arbitrators also opted to use depreciative terms when discussing the role of the host state in the investment relationship. Arbitrators argued investors were *induced* to invest in Argentina,[272] and the host country would have *deliberately and actively sought to create expectations* in investors regarding the protection of the investment.[273] BITs

---

of unrest and disorders. The risk of insurrection and political disturbances was high, and public emergency was declared by Congress. Argentina needed a margin of appreciation to overcome this situation, and arbitrators considered that the efforts appropriately considered the responsibility of the government towards its population. A time of crisis is not the time for nice judgments: "(…) it is self-evident that not every sacrifice can properly be imposed on a country's people in order to safeguard a certain policy that would ensure full respect towards international obligations in the financial sphere, before a breach of those obligations can be considered justified as being necessary under this BIT" (Award, dated September 5, 2008, p. 80; 101).

[268] For a discussion on investor-state treaty arbitration as a form of public law adjudication, see Van Harten (2007).

[269] The Suez case (i) (Decision on liability, dated July 30, 2010, p. 77-78).

[270] The Total case (Decision on Liability, dated December 27, 2010, p. 73-74).

[271] The EDF case (Award, dated June 11, 2012, p. 228); The Suez case (i) (Decision on liability, dated July 30, 2010, p. 74).

[272] The EDF case (Award, dated June 11, 2012, p. 236); The Enron case (Award, dated May 22, 2007, p. 85); The BG case (Final Award, dated December 24, 2007, p. 123). The Total case: "(…) the government made specific commitments (…) for the purposes of inducing them to participate in the bidding process and to bring additional capital, technical and other know-how to modernize and efficiently run those utilities." (Decision on Liability, dated December 27, 2010, p. 66).

[273] The Suez case (i) (Decision on liability, dated July 30, 2010, p. 76). See also the LG&E case (Decision on Liability, dated October 3rd, 2006, p. 237).

were referred to as instruments to bolster investment promotion and to use international law to protect foreign investors.[274] The measures adopted by Argentina in the 1990s toward foreign investors and their investments were claimed to overcome its *negative economic history*, still much present in the mind of the international financial and business community.[275] More, Argentina was accused of having *seduced* investors with the framework for investments, which was later dismantled: "[w]here there was certainty and stability for investors, doubt and ambiguity are the order of the day".[276] Finally, disregarding the emergency situation, arbitrators suggested that walking away from the framework was *disingenuous*.[277]

Arbitrators discussed the cases using notions of control and order from the perspective of investors. For them, the crisis was not that severe and government measures were inadequate. The relationship between investor-state was debated through a private-oriented vocabulary, much like an ordinary business transaction, and the measures the host state adopted to overcome the financial crisis were depreciated. They painted Argentina as a villain that seduced and then harmed investors.[278] Decision-making was constructed through notions that served the interests of investors, leading to the imposition of excessive limits over the Argentinean regulatory power.[279]

3.4.2.4 signs that a depoliticized discourse was backed up by arbitrators, advancing a liberal rule of law over the host state

Finally, when arbitrators understand unnecessary to discuss the relationship between the FET and the international minimum standard, they encourage a depoliticized narrative of international investment law, allegedly breaking with a past of power

---

[274] The Suez case (i) (Decision on liability, dated July 30, 2010, p. 37); The National Grid (Award, dated November 3rd, 2008, p. 71).
[275] The Suez case (i) (Decision on liability, dated July 30, 2010, p. 79).
[276] The Enron case (Award, dated May 22, 2007, p. 85). See also the BG case (Final Award, dated December 24, 2007, p. 97) and the Sempra case (Award, dated September 28, 2007, p. 89-90).
[277] The National Grid (Award, dated November 3rd, 2008, p. 71).
[278] Another path was certainly viable. Instead of focusing in a one-sided perspective, the tribunal in the Metalpar case changed the focus, turning to the risks investors consciously accepted; aware of Argentinean history and economic background, they invested in the country to pursue greater returns (The Metalpar case, Award on the Merits, dated June 6th, 2008, p. 54)
[279] "(…) however strong the regulatory powers of the State might be they are still governed by the law and the obligation to protect the rights acquired by individuals." (the Enron case, Award, dated May 22, 2007, p. 69). See also the Sempra case (Award, dated September 28, 2007, p. 48).

struggles and consolidating a truly international standard of protection detached from local politics; we know this story is not true. Regardless of whether they read the FET as equivalent to the international minimum or as an autonomous standard, they do it to maximize the individual preferences of investors over host states.

Tribunals claimed superfluous to explore the relationship between the FET standard and the international minimum.[280] So much so that the tribunal in the SAUR case has indeed argued that discussing the relationship between the standards is no more than a *dogmatic* and *conceptual* issue.[281] In this sense, very few lines were dedicated to this issue in the awards; the lack of methodological rigor is once again very much present, as arbitrators do not fully develop the reasons why examining the relationship between these two standards would be superfluous.

Arbitrators presented different (and little elaborated) reasons when suggesting *futile* to discuss both standards.[282] The Mobil case tribunal argued the international minimum and the FET would have similar contents – even though neither is defined.[283] The El Paso case tribunal claimed the relationship between both standards was unnecessary to be pursued, as the scope and content of the international minimum would be as little defined as the FET standard.[284] The BG case tribunal, on its turn, understood that when the host state conduct falls below the international minimum, no further inquiry

---

[280] The Mobil case (Decision on Jurisdiction and Liability, dated April 10, 2013, p. 266-267); The Impregilo case (Award, dated June 21st, 2011, p. 67); The BG case (Final Award, dated December 24, 2007, p. 92).
[281] The SAUR case (Decisión sobre Jurisdicción y sobre Responsabilidad, dated June 6th, 2012, p. 132).
[282] The El Paso case (Award dated October 31st, 2011, p. 117).
[283] The Mobil case: "Although the Azurix tribunal found that the FET clause in the BIT permits to interpret FET as a higher standard than required by international law, it stated after this declaration that 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 on the Law of Treaties (hereinafter the "Vienna Convention") or in accordance with customary international law. This Tribunal therefore does not find it necessary to further discuss whether FET is a standard which merely reflects the international minimum standard, as contained in customary international law, or offers an autonomous standard that is additional to general international law." (Decision on Jurisdiction and Liability, dated April 10, 2013, p. 266-267).
[284] The El Paso case: "The Tribunal considers this discussion to be somewhat futile, as the scope and content of the minimum standard of international law is as little defined as the BITs' FET standard, and as the true question is to decide what substantive protection is granted to foreign investors through the FET. The issue is not one of comparing two undefined or weakly defined standards; it is to ascertain the content and define the BIT standard of fair and equitable treatment." (Award dated October 31st, 2011, p. 117). The Enron case (Award, dated May 22, 2007, p. 81) and the Sempra case (Award, dated September 28, 2007, p. 87) also acknowledge how undefined or weakly defined the international minimum is; both refer to the international minimum as a standard that is "none too clear and precise".

would be necessary whether the FET represented a more generous or independent standard.[285] The SAUR case tribunal has even claimed that the aim of the parties was not so much to discuss the relationship between the standards, but rather the need for bad faith in the host state's acts.[286]

Regardless of this debate, arbitrators could not run from addressing whether the FET was equal to the international minimum, or, on the contrary, an autonomous standard. Some tribunals declared the FET equal to the international minimum, expressly detaching it from the domestic realm and acknowledging it should not "be viewed with reference to national law".[287] The arbitrators in the El Paso case initially rejected any comparison between the two standards; however, some paragraphs further, they acknowledge the FET is equivalent to the international minimum: "(…) the FET of the BIT is the international minimum standard required by international law, regardless of the protection afforded by the national legal orders".[288] Following this path, the tribunal in the Mobil case, after suggesting unnecessary the discussion, claimed that equating the FET to the international minimum was the best interpretation, as the role played by both standards "is to ensure that the treatment of foreign investments, which are protected by the national treatment and the most-favored investors' clauses, do not fall below a certain minimum".[289] In neither case the tribunals clearly defined the international minimum, or, at least, identified which was this certain minimum that host states should be abided by, irrespective of their domestic laws.

On the other hand, some tribunals understood the FET as an autonomous standard, one that goes beyond the international minimum.[290] In this case, arbitrators claimed the FET was not limited to the international minimum, and, therefore, it could be read beyond the latter contours – even though, once again, the international minimum was not defined. Acknowledging the FET as an autonomous standard opened the doors for

---

[285] The BG case (Final Award, dated December 24, 2007, p. 92).
[286] The SAUR case (Decisión sobre Jurisdicción y sobre Responsabilidad, dated June 6th, 2012, p. 132).
[287] The Mobil case (Decision on Jurisdiction and Liability, dated April 10, 2013, p. 267-268); The El Paso case (Award, dated October 31st, 2011, p. 117).
[288] The El Paso case (Award, dated October 31st, 2011, p. 118).
[289] The Mobil case (Decision on Jurisdiction and Liability, dated April 10, 2013, p. 267).
[290] The Impregilo case (Award, dated June 21st, 2011, p. 67); The Total case (Decision on Liability, dated December 27, 2010, p. 45-46; 55); The Suez case (i) (Decision on liability, dated July 30, 2010, p. 64); The National Grid case (Award, dated November 3rd, 2008, p. 68); The Enron case (Award, dated May 22, 2007, p. 82); The Sempra case (Award, dated September 28, 2007, p. 89).

arbitrators to read it in a very broad fashion, not even constrained by the outlines of a controversial standard such as the international minimum, which was advocated and used by capital-exporters countries for a long time to further their interests. See how the tribunal in the Enron case developed the argument:

> It might well be that in some circumstances where the international minimum standard is sufficiently elaborate and clear, fair and equitable treatment might be equated with it. But in other more vague circumstances, the fair and equitable standard may be more precise than its customary international law forefathers. This is why the Tribunal concludes that the fair and equitable standard, at least in the context of the Treaty applicable to this case, can also require a treatment additional to, or beyond that of, customary law. The very fact that recent FTC interpretations or investment treaties have purported to change the meaning or extent of the standard only confirms that those specific instruments aside, the standard is or might be a broader one. (The Enron case, award dated May 22, 2007, p. 82)

Arbitrators did not explain how they reached such a conclusion. They said that in circumstances where the international minimum was sufficiently elaborated and clear, the FET could be equated to it. Nonetheless, they did not present any examples of situations in which the international minimum – a customary law – would be better defined, nor did they elaborate why in this situation the FET could be deemed equal. More, they did not explain why in the opposite situation the FET could be more precise and/or it could go even further than – again – a customary law as the international minimum. Nothing is further explained; arbitrators seem to base the decision on their understanding of what *fair* and *equitable* is.

When arbitrators claim unnecessary to discuss the relationship between the international minimum and the FET, or when they handle the FET standard as an autonomous standard, they advance the idea that this standard is something new, completely alienated from the international minimum advocated by capital-exporting countries for so long – allowing, for example, the standard to include the protection of legitimate expectations[291]. They treat the FET as an unbiased and depoliticized

[291] Such a reading dismisses the long and painful story of the international minimum standard for capital importing countries. See the separate opinion of arbitrator Pedro Nikken in the Suez case (i): “12. However, this reasoning does not mind the painful history of the minimum standard for weaker States.

instrument that would equally benefits both investors and host state, breaking with a past of power struggles between capital importing and exporting countries – a past when countries could not agree on the contours of an international minimum treatment for aliens and ended up solving disputes at the barrel of a gun.

The reasons they evoke to dissociate both standards are not only very simplistic but also poorly developed. Claiming the standards would have similar contents or that the international minimum would be so vague as the FET, or, still, that the alleged conduct of the host state would already fall below the international minimum, do not suffice to break the chains between both standards, nor turn the quest regarding their relationship useless. As we saw in chapter 2, the FET has its origins in the international minimum standard; including the FET into BITs was indeed an attempt to camouflage its origins, undoubtful placed over the international minimum. Repudiating their common past and their similarities – not only their vagueness but also the characteristics they share – is a way to interpret the standard through a depoliticized narrative, as if the past did not matter to understand the current manifestation of the investment regime.

Even when they equate the FET with the international minimum, arbitrators still support a depoliticized discourse. Claiming the FET and the international minimum are essentially the same, they suggest that the proof of willingness – or bad faith – from the host state would be unnecessary for the breach of the standard.[292] However, we saw in chapter 2 that outrage was of the essence of the international minimum; backing up such a narrative, they support the view that the past is not useful to understand the

---

Indeed, the question of why in the BITs (except in recent U.S., Canadian and Norwegian models) of the international minimum standard cannot be answered properly if the historical controversy on the concept of minimum standard is completely ignored, as done in the Decision. The concept of minimum standard was rejected by the Latin American countries since the nineteenth century and, in general, by all developing countries that emerged from Decolonization. It should be remembered that Latin America, most notably Argentina, was the birthplace of the Calvo Doctrine under which foreigners would enjoy in a country the same rights as nationals, but not superior rights. The same doctrine was accepted throughout the twentieth century by most developing nations, as evidenced by the Charter of Economic Rights and Duties of States, approved overwhelmingly by the General Assembly of the United Nations on December 12, 1974, which accepted national treatment (and not the minimum standard), as applicable to the treatment of foreign investment (Art. 2.2.a) and cases of expropriation (Art. 2.2.c)."

[292] The tribunal in the SAUR case suggested that it was virtually unanimous that no bad faith or outrage was necessary to breach the FET standard: "Y en la actualidad, es prácticamente unánime la interpretación que no se exige un elemento volitivo reforzado en la conducta del Estado ofensor." (Decisión sobre Jurisdicción y sobre Responsabilidad, dated June 6th, 2012, p. 133)

present and advance an excessive high-level reading of the FET, creating an easier path for investors to claim the breach of the standard. Moreover, they also read the FET as to include the protection of legitimate expectations, ignoring that the international minimum never had such a wide reach; the protection of investors' expectations is a recent construction of arbitral jurisprudence at the turn of the millennium, uncommon for the period when the international minimum was developed.

Neoliberal expansionism found the way in the revival of the FET from the early Argentine awards onwards (SORNARAJAH, 2015). Rejecting the past, or reading it through lenses that are favorable to the investors, arbitrators furthers a liberal rule of law; States are claimed to act through contractual legal techniques (as BITs and the high standards of invertors' protection) and state regulation is subjected to the supervision of tribunals that praise an isolated interpretation of the standards of protection, detaching them from domestic rules and local politics (PERRONE, 2016).

We understand that arbitrators backed up a depoliticized discourse, advancing a liberal rule of law and placing another brick in the construction of the argument that the imperial origins of international investment law influence the decision-making. Attempting to break with a past of power struggles, arbitrators maximize the individual preferences of investors over the needs of host states, aligned with a long-dated story.

3.5 Conclusion

International investment law is facing a legitimacy crisis. There are multiple ways to discuss this issue and we indeed acknowledge the different lines of critiques; however, we decided throughout this work to walk along those who understand the imperialist origins of international investment law have reproduced inequalities inherent in the colonial encounter on the regime's current manifestation, privileging investors' rights over host states' needs.

Having this background in mind, we initially discussed the origins of investment law and how the FET standard was used as an instrument of imperialism. From this discussion, we suggested to investigate in this last chapter whether this imperialist past has found a way in the current manifestation of the regime, focusing on investor-state

arbitration; using the 2001 Argentinean financial crisis as a case study, we queried whether the imperial origins of the regime have influenced arbitrators, perpetuating a constant bias against capital-importing countries.

We dialogue with Miles (2018) to develop our argument. Departing from the characteristics she presented as representative of a still present imperial past, we analyze the decisions looking for elements that answer whether arbitrators (i) read standards of investors protection in an excessively high-level fashion, (ii) privilege private rights over public ones, (iii) analyze the cases relying on notions of control and order from the perspective of investors and their home states, and (iv) back up a depoliticized discourse, advancing a liberal rule of law over the host state. We found abundant evidence.

The tribunals read the FET standard in an excessively high-level fashion, virtually impossible to be attained by the host state. Arbitrators included the protection of investors' expectations under the FET standard, even if BITs did not bring any indication in this regard. Referring to the preamble of the investment treaties as legal justification, arbitrators interpreted the FET to privilege private rights over public ones: When the interests of investors were opposed to the needs of host states, the former repeatedly prevailed. The Argentinean policy space was severely limited.

Tribunals minimized the financial crisis Argentina faced in 2001. Foreign investors successfully disputed governmental measures adopted to overcome this period and arbitrators constantly relied on a private-oriented and depreciatory vocabulary against the host state to find that Argentina breached the FET standard; it all indicates that arbitrators assessed the cases from the perspective of investors. Tribunals also commonly backed up a depoliticized narrative, which furthered the idea that the past of power struggles was left behind.

Arbitrators did not treat Argentina as an equal sovereign to any capital-exporting country; when Argentinean interests conflicted with the interests of foreign investors, the latter almost invariably prevailed. Arbitrators consistently upheld the pleads of investors to have their investments preserved, even if it meant punishing a country for taking the measures to reestablish public order. We identified the four categories

indicated by Miles (2018) in the awards, as evidence that the regime would still carry much of the protection designed throughout the last centuries by capital-exporting countries to attend their own interests; all of them were clearly present in the decisions, indicating that arbitrators took part in a long-time "*unresolved power dynamics*" (MILES, 2013, p. 387).

The FET was used to instrumentalize this dynamic. It is not a surprise that investors alleged this standard was breached in all the cases we analyzed; and, save few exceptions, arbitrators repeatedly acknowledged the breach and determined the payment of some compensation (PERRONE, 2017). Arbitrators interpreted the FET to reflect foreign investors' interests, representing to Argentina, and host states in general, no more than non-empowerment and submission to standards created by the other (ANGHIE, 2004).

Argentina's sovereignty was disfigured amidst her most emblematic financial crisis, while (literally) billions of U.S. dollars were awarded to investors. This situation was possible for the current manifestation of international investment law carries much of an imperial heritage that subjugates capital-importing countries to capital-exporters' desires. Nothing different from past centuries. As long acknowledged by Anghie (2004), imperialism is, in fact, a constant.

CONCLUSION

It is common to hear that an international tribunal has a life of its own. Once it is established, it has the power to develop the law, and, in much extensive reading, it would have the "*ability to develop the law even against the wishes of the states that created jurisdiction in them*" (SORNARAJAH, 2015, p. 26). The awards of the 2001 Argentinean crisis illustrate that investor-state tribunals are very much alive, impacting on national states and their societies.

We initiated this Master´s thesis acknowledging that the international investment law is facing a legitimacy crisis. Scholars and practitioners denounce that the international investment regime does not protect the general interests of host states, being too zealous of the interests of foreign investors. The arbitrations that resulted of the 2001 Argentinean financial meltdown contributed to this crisis. Scholars have relied on many different arguments to criticize these awards and to place them at the heart of the legitimacy crisis (SORNARAJAH, 2015; TITI, 2014; BURKE-WHITE, 2010; MAYEDA, 2007). Yet, we found a gap in these studies: Very little attention has been paid to the imperial origins of the international investment law.

We proposed to analyze each of these awards to investigate whether the imperial roots of the international investment law had indeed been visible in the arbitrators' decisions. If we found indications that the origins of the regime have showed themselves in decisions, then we would have evidence to claim that the international investment law is not impartial as many claims it to be. Before doing this though, we had to take some steps back to conduct our investigation.

Initially, we discussed how international investment law is rooted in power relations and Western expansionism. We analyzed how these power struggles have made themselves present in contemporary times. For instance, both BITs and investor-state arbitration carry a past of power struggles; they are designed to reflect long-time interests of capital-exporting countries. We discussed in-depth this issue in chapter 1, and we concluded the section acknowledging that the legal protection to foreign investments does not constitute a depoliticized site. Right the contrary, international

investment law has a pervasive political nature; it is a product of hegemonic contestation – as Koskenniemi (2004) suggested.

We then analyzed in-depth the FET in chapter 2. We turned to this standard because investors repeatedly relied on it to claim that the measures Argentina adopted to overcome the financial crisis broke previous promises. Arbitrators used the FET as an instrument of informal imperialism; it was not the first time, though. The FET originates from the international minimum standard that was itself used by Western countries in the nineteenth century to serve their expansionist intent. The minimum standard of treatment has faced objection since its inception, as home states felt unease to embrace a vague international standard that threatened their sovereignty. To overcome such disagreement, the international minimum standard was substituted by the FET. Despite the new terminology, the FET inherited the imperial nature of the international minimum. The FET is a vague, broad and catch-all concept. The choice for ambiguous words such as fair and equitable was not by chance; the vagueness and breadth were essential for the West to instrumentalize the standard the way it has been used nowadays.

With this background, we turned to the arbitration awards related to the 2001 Argentinean financial crisis. We proposed to understand whether and through what means the imperial past found its way in the current manifestation of the regime, especially when it comes to arbitrations between investors and host states. We asked whether these imperial origins influenced arbitrators during decision-making, something that we did only through the analysis of the arbitrators' decisions.

We dialogued with Miles (2018 and 2013) to develop our study. Departing from characteristics she presented as representative of a still present imperial past, we analyzed the decisions looking for elements that answer whether arbitrators (i) read standards of investors protection in an excessively high-level fashion, (ii) privileged private rights over public ones, (iii) analyzed the cases relying on notions of control and order from the perspective of investors and their home states, and (iv) backed up a depoliticized discourse, advancing a liberal rule of law over the host state.

As the categories that Miles (2018) proposed are open-ended, we saw as necessary to create subcategories. We identified common features in the awards, and from those relatable traits we inductively created subcategories for the main categories. The subcategories helped us to translate Miles' categories into practice; they are concrete acts that we found in the awards which exemplify the main categories. The subcategories we created and the whole discussion over the awards were developed in-depth throughout chapter 3. We indeed found these categories and subcategories in the awards; and we understood it as an indication that the imperial origins of international investment influenced arbitrators when they decided investment-related disputes.

The tribunals read the FET in an excessively high-level fashion, making it virtually impossible to be attained by host states, including the protection of investors' expectations. The FET was interpreted to privilege private rights over public ones: When investors' interests were opposed to host states' needs, the former repeatedly prevailed. Argentinean policy maneuver – including the power to regulate its economy during a severe financial crisis – was severely limited.

Tribunals minimized the financial crisis that Argentina faced in 2001, assessing cases through the investors' perspective. Investors disputed the measures adopted to overcome the financial crisis and arbitrators relied on a private-oriented and depreciatory vocabulary to find Argentina liable for the alleged damages. All in a context of depoliticized narrative that tribunals backed up, furthering the idea that the past of power struggles in international investment law was left behind.

When tribunals opted to read the FET in such a broad fashion, privileging investors over host states, and beyond the law applicable to the dispute, they limited Argentina's regulatory power. The policy space of host states – as a sovereign entity – to adopt the measures to overcome a massive crisis was excessively shortened; arbitrators repeatedly deemed them *unfair* and *inequitable*, even though the law applicable to the cases did not bring any indication in this sense.

From the above, we found indication that the imperialist origins of investment law influence decision-making. Tribunals have a life of their own, and they have lived

influenced by the past of power struggles inherent to the investment regime. We identified the four categories indicated by Miles (2018) in the awards, as evidence that the regime would still carry much of the protection designed throughout the last centuries by capital-exporting countries to attend their own interests.

We understand that our arguments have limitations, and we discussed them in chapter 3. We acknowledge that this study could be further explored, and we suggest future steps to strengthen our arguments. As we appointed earlier, we are aware that decision-making is multifaceted. In this sense, a more complete study should also take into consideration the claims and arguments of the parties to the cases, as well as the evidence gathered by them. We have only had access to the applicable BITs and the awards of the selected cases; if we had access to case records – or at least, to some available parts –, we would have been able to portray a better picture of the decision-making process. Analyzing all the different layers of decision-making would contribute to confirm whether arbitrators were influenced by the imperial origins of the system. Moreover, we understand that a comparative analysis would also give a stronger basis to our conclusions. We believe that a comparison between the Argentinean experience with those of other countries that have also become respondent in investor-state arbitrations due to measures adopted to overcome a financial crisis would strengthen our findings. It would be even more interesting to select cases in which traditionally capital-exporting countries have become respondents in arbitrations; this is the case, for example, of the European countries that suffered the effects of the 2008 sovereign debt crisis. It is important to trace a parallel between how Western and non-Western countries were treated in similar situations – for instance, how arbitrators interpreted the FET and other standards of investors' protections in these two situations.

Acknowledging that the imperial origins of international investment influence arbitrators is highly relevant to discuss the legitimacy crisis that the regime is facing; we hope to have contributed placing another brick on this argument. Finally, we highlight that any response to the legitimacy crisis that does consider the imperial origins of international investment law is superficial. The regime is rooted in the imperial expansionism of the West. The current manifestation of the international investment law, especially BITs and investor-state arbitration, carries much of centuries-old power struggles. The regime is indeed biased towards investors, for it has been designed to serve their

interests. While structural changes are not conducted, any response will be no more than partial excuses; they will continue legitimizing that the sovereignty of host countries are ripped off before private interests. Imperialism will continue being a constant.

REFERENCES

International treaties

Treaty of Friendship, Commerce and Navigation, Between the United States and the Argentine Confederation, signed at San José July 27, 1853, 10 Stat. 1005, Treaty Series 4.

Treaty of Peace, Friendship, Commerce and Navigation, Between the United States of America and the Republic of Bolivia, signed at La Paz May 13, 1858, 12 Stat. 1003, Treaty Series 32.

Treaty of Peace, Friendship, Commerce, And Navigation, Between the United States of America and His Majesty the Emperor of Brazil, signed at Rio de Janeiro December 12, 1828, 8 Stat. 390, Treaty Series 34.

General Convention of Peace, Amity, Commerce and Navigation, Between the United States of America and the Republic of Chile, signed at Santiago May 16, 1832, 8 Stat. 434, Treaty Series 40.

General Convention of Peace, Amity, Navigation and Commerce, Between the United States of America and the Republic of Colombia, signed at Bogotá October 3, 1824, 8 Stat. 306, Treaty Series 52.

General Convention of Peace, Friendship, Commerce and Navigation, Between the United States of America and the Peru-Bolivian Confederation, signed at Lima November 30, 1836, 8 Stat. 487, Treaty Series 274.

General Convention of Peace, Amity, Commerce and Navigation, Between the United States of America and the Federation of the Centre of America, signed at Washington December 5, 1825, 8 Stat. 322, Treaty Series 39.

Treaty of Friendship, Commerce and Navigation, Between the United States of America and the Republic of Costa Rica, signed at Washington July 10, 1851, 10 Stat. 916, Treaty Series 62.

General Convention of Amity, Commerce and Navigation; Extradition, Between the United States of America and the Dominican Republic, signed at Santo Domingo February 8, 1867, 15 Stat. 473, Treaty Series 73.

General Treaty of Amity, Navigation and Commerce, Between the United States of North America and the Republic of San Salvador, signed at Nicaragua January 2, 1850, 10 Stat. 891, Treaty Series 308.

Treaty of Peace, Friendship, Navigation and Commerce, Between the United States of America and the Republic of Ecuador, signed at Quito June 13, 1839, 8 Stat. 534, Treaty Series 76.

General Convention of Peace, Amity, Commerce and Navigation, Between the United States of America and the Republic of Guatemala, signed at Guatemala March 3, 1849, 10 Stat. 873, Treaty Series 149.

Treaty of Amity, Commerce and Navigation; Extradition, Between the United States of America and the Republic of Hayti, signed at Port-au-Prince November 3, 1864, 13 Stat. 711, Treaty Series 164.

Treaty of Friendship, Commerce and Navigation, Between the United States of America and the Republic of Honduras, signed at Comayagua July 4, 1864, 13 Stat. 699, Treaty Series 172.

Treaty of Amity, Commerce and Navigation, Between the United States of America and the United Mexican States, signed at México April 5, 1831, 8 Stat. 410, Treaty Series 203.

Treaty of Friendship, Commerce and Navigation, Between the United States of America and the Republic of Nicaragua, signed at Managua June 21, 1867, 15 Stat. 549, Treaty Series 257.

Treaty of Friendship, Commerce and Navigation, Between the Governments of the United States of America, and of the Republic of Paraguay, signed at Asunción February 4, 1859, 12 Stat. 1091, Treaty Series 272.

Treaty of Friendship, Commerce and Navigation, Between the United States of America, and of the Republic of Peru, signed at Lima July 26, 1851, 10 Stat. 926, Treaty Series 276.

Treaty of Peace, Friendship, Navigation and Commerce, Between the United States of America, and of the Republic of Venezuela, signed at Caracas January 20, 1836, 8 Stat. 466, Treaty Series 366.

Books and Journal Articles

A DECLINE without parallel. **The Economist**, London, February 28, 2002. Available at: <https://www.economist.com/special-report/2002/02/28/a-decline-without-parallel>. Last accessed: September 21, 2019.

ACTIONAID. **Where does it hurt?** The Impact of the Financial Crisis on Developing Countries. London, 2009.

ALLISON, G. **Destined for War: Can America and China Escape Thucydides´s Trap?** Houghton Mifflin Harcourt, 2017.

ALVAREZ, J. **The Public International Law Regime Governing International Investment**. AIL-Pocket, 2011.

ALVAREZ, J.; KHAMSI, K. **The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime**. IILJ, Working Paper 2008/5, 2008. Available at:<https://www.iilj.org/publications/the-argentine-crisis-and-foreign-investors-a-glimpse-into-the-heart-of-the-investment-regime/>. Last accessed: August 30, 2019.

ALVAREZ, J.; TOPALIAN, G. The Paradoxical Argentina Cases. **World Arbitration & Mediation Review**, v. 6, n. 3, p. 491-543, 2012.

ANAND, R. Attitude of the Asian-African States toward Certain Problems of International Law. **The International and Comparative Law Quarterly**, v. 15, n. 1, p. 55-75, 1966.

ANGHIE, A. **Imperialism, Sovereignty and the Making of International Law**. Cambridge University Press, 2004.

_____. Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law. **Harvard International Law Journal**, v. 40, n. 1, p. 1-71, 1999.

ARGENTINA´S beleaguered government imposes capital controls. **The Economist**, London, September 2, 2019. Available at: <https://www.economist.com/finance-and-economics/2019/09/02/argentinas-beleaguered-government-imposes-capital-controls>. Last accessed: September 21, 2019.

BAILY, S. **The United States and the Development of South America, 1945-1975**. New Viewpoints, 1976.

BENTON, L. **Law and Colonial Cultures**: Legal Regimes in World History, 1400-1900. Cambridge University Press, 2002.

BERNASCONI-OSTERWALDER, N. Giving arbitrators *carte blanche* – fair and equitable treatment in investment treaties. In: LIM, C. **Alternative Visions of the International Law on Foreign Investment: Essays in Honour of Muthucumaraswamy Sornarajah**. Cambridge University Press, 2016, p. 324-345.

BÉRTOLA, L.; OCAMPO J. **The Economic Development of Latin America Since Independence**. Oxford University Press, 2012.

BLANDFORD, A. The History of Fair and Equitable Treatment before the Second World War. **ICSID Review**, v. 32, n. 2, p. 287-303, 2017.

BLUSTEIN, P. **And the Money Kept Rolling In (And Out)**: The World Bank, Wall Street, the IMF and the Bankrupting of Argentina. Public Affairs, 2005.

BOASE, M. A genealogy of censurable conduct: Antecedents for an international minimum standard of investor conduct. In: SCHILL, S.; TAMS, C.; HOFMANN, R. **International Investment Law and History**. Edward Elgar Publishing, 2018, p. 321-366.

BONNITCHA, J.; POULSEN, L.; WAIBEL, M. **The Political Economy of the Investment Treaty Regime**. Oxford University Press, 2017.

BORCHARD, E. Minimum Standard of the Treatment of Aliens. **Michigan Law Review**, v. 38, n. 4, p. 445-461, 1940.

BROADBERRY, S.; O´ROURKE, K. **The Cambridge Economic History of Modern Europe Volume 2**: 1870 to the Present. Cambridge University Press, 2010.

BROWNLIE, I. **Principles of Public International Law**. Oxford University Press, 2008.

BRUNNÉE, J.; TOOPE, S. International Law and Constructivism: Elements of an Interactional Theory of International Law. **Columbia Journal of Transnational Law**, v. 39. p. 19-74, 2000.

BULMER-THOMAS, V. **The Economic History of Latin America Since Independence**. Cambridge University Press, 2003.

BURKE-WHITE, W. The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System. In: WAIBEL, M; KAUSHAL, A; et.al. **The Backlash against Investment Arbitration**. Kluwer Law International, 2010, p. 407-432.

BYERS, M. Custom, Power, and the Power of Rules. **Michigan Journal of International Law**, v. 17, p. 109–180, 1995.

CAMPBELL, C. House of Cards: The Relevance of Legitimate Expectations under Fair and Equitable Treatment Provisions in Investment Treaty law. **Journal of International Arbitration**, v. 30, n. 4, p. 361-380, 2013.

CAVALLAR, G. Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans? **Journal of the History of International Law**, v. 10, p. 181-209, 2008.

CHIMNI, B. Third World Approaches to International Law: A Manifesto. **International Community Law Review**, v. 8, p. 3-27, 2006.

CIEL – CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW. **International Law on Investment**: The Minimum Standard of Treatment. Available at: <https://www.ciel.org/wp-content/uploads/2015/03/investment_10 Nov03.pdf>. 2003. Last accessed: May 21, 2019.

CONDE, R. La Crisis Argentina de 2001-2002. **Cuadernos de Economía**, v. 121, p. 762-767, 2003.

CONTRERAS, F. El Estado De Necesidad Y Las Cláusulas de Emergencia Contempladas En Los APPRI: Los Casos Argentinos Ante El CIADI. **Revista Española de Derecho Internacional**, v. 65, n. 1, p. 101-129, 2013.

CRAVEN, M. Colonialism and Domination. In: FASSBENDER, B.; PETERS, A. **The Oxford Handbook of the History of International Law**. Oxford University Press, 2012, p. 863-890.

DUMBERRY, P. Fair and Equitable Treatment: Its Interaction with the Minimum Standard and Its Customary Status. **International Investment Law and Arbitration**, v. 1, n. 2, p. 1-82, 2017.

DUPUY, P. Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskenniemi. **The European Journal of International Law**, v. 16, n. 1, p. 131-137, 2005.

EASTERLY, W. **The Elusive Quest for Growth: Economists' Adventures and Misadventures in the Tropics**. MIT Press, 2002.

ECHAIDE, J. Condicionantes sistémicos para um concreto ejercicio del derecho humano al agua: Un análisis del caso de "Suez v. Argentina" ante el Centro Internacional de Arreglos de Diferencias Relativas a Inversiones (CIADI). **Agua Y Territorio**, n. 10, p. 72-88, 2017.

EL-ERIAN, M. Argentina´s economic crisis is the result of avoidable mistakes. **The Guardian**, London, September 10, 2019. Available at: <https://www.theguardian.com/business/2019/sep/10/argentina-economic-crisis-imf-debt-default>. Last accessed: September 22, 2019.

FAHNER, J. The Contested History of International Investment Law: From a Problematic Past to Current Controversies. **International Community Law Review**, v. 17, p. 373-388, 2015.

FASSBENDER, B.; PETERS, A. Towards a Global History of International Law. In: _____. **The Oxford Handbook of the History of International Law**. Oxford University Press, 2012, p. 1-18.

FELLER, A. Some observations on the Calvo Clause. **The American Journal of International Law**, v. 27, p. 461-468, 1933.

FLIRTING with anarchy in Argentina. **The Economist**, London, January 3, 2002. Available at: <https://www.economist.com/leaders/2002/01/03/flirting-with-anarchy-in-argentina>. Last accessed: September 21, 2019.

FRANCK, S. The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions. **Fordham Law Review**, v. 73, p. 1521-1625, 2005.

FRANCO, F. Oportunidades e desafios das TWAIL no contexto latino-americano a partir de perspectivas dos povos indígenas ao direito internacional. **Revista de Direito Internacional**, v. 12, n. 2, p. 227-244, 2015.

FRIEDEN, J. International Investment and Colonial Control: A New Interpretation. **International Organization**, v. 48, n. 4, p. 559-593, 1994.

FRIEDMANN, W. The Changing Dimensions of International Law. **Columbia Law Review**, v. 62, n. 7. p. 1147-1165, 1962.

GALLAGHER, J.; ROBINSON, R. The Imperialism of Free Trade. **The Economic History Review**, v. 6, n. 1. p. 1-15, 1953.

GARCIA-MORA, M. The Calvo Clause in Latin American Constitutions and International Law. **Marquette Law Review**, v. 33, n. 4. p. 205-219, 1950.

GATHII, J. TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography. **Trade, Law and Development**, v. 3, n. 1, p. 26–64, 2011.

_____. Imperialism, Colonialism, and International Law. **Buffalo Law Review**, v. 54, n. 4, p. 1013-1066, 2007.

GERCHUNOFF, P.; LLACH, L. **El Ciclo de La Ilusión Y el Desencanto**: Políticas Económicas Argentinas de 1880 a Nuestros Días. Crítica, 2018.

GIBSON, C. Beyond Self-Judgement: Exceptions Clauses in US BITS. **Fordham International Law Journal**, v. 38, n. 1, p. 1-55, 2015.

GONZÁLEZ, E. El dólar se tiñe de azul en Argentina. **El País**, Buenos Aires, September 18, 2019a. Available at: <https://elpais.com/internacional/2019/09/17/argentina/1568739115_233044.html>. Last accessed: September 21, 2019.

_____. Los sindicatos paralizan de nuevo Buenos Aires. **El País**, Buenos Aires, September 10, 2019b. Available at: <https://elpais.com/internacional/2019/09/10/argentina/1568131438_849167.html>. Last accessed: September 21, 2019.

_____. La pobreza en Argentina crece más de 6 puntos en 2018, hasta el 32%. **El País**, Buenos Aires, March 28, 2019c. Available at: <https://elpais.com/internacional/2019/03/28/argentina/1553792656_629543.html?rel=mas>. Last accessed: September 21, 2019.

_____. Argentina registra en 2018 una inflación del 47,6%, la más alta em 27 años. **El País**, Buenos Aires, January 15, 2019d. Available at: <https://elpais.com/internacional/2019/01/15/argentina/1547578125_658156.html>. Last accessed: September 21, 2019.

HAERI, H. A Tale of Two Standards: ‘Fair and Equitable Treatment’ and the Minimum Standard in International Law. **Arbitration International**, v. 27, issue 1, p. 27-46, 2011.

HOPKINS, A. Informal Empire in Argentina: An Alternative View. **Journal of Latin American Studies**, v. 26, n. 2, p. 469-484, 1994.

HUNTER, I. The Figure of Man and the Territorialisation of Justice in 'Enlightenment' Natural Law: Pufendorf and Vattel. **Intellectual History Review**, v. 23, n. 3, p. 289-307, 2013.

INTERNATIONAL MONETARY FUND – IMF. **The IMF and Argentina, 1991-2001: Evaluation Report**. International Monetary Fund, Publication Services, 2004.

ISLAM, R. **The Fair and Equitable Treatment (FET) Standard in International Investment Arbitration**: Developing Countries in Context. Springer, 2018.

JOHNSON, O.; GIMBLETT, J. From Gunboats to BITs: The Evolution of Modern international Investment Law. In: SAUVANT, K. P. **Yearbook on International Investment Law & Policy**. Oxford University Press, 2012, p. 649-692.

KAMMERER, J. Imprints of Colonialism in Public International Law: On the Paradoxes of Transition. **Journal of the History of International Law**, v. 18, p. 239-247, 2016.

KARABELL, Z. The United States Will Miss China´s Money. **Foreign Policy**, Washington, D.C., August 19, 2019. Available at: <https://foreignpolicy.com/2019/08/19/the-united-states-will-miss-chinas-money/>. Last accessed: August 22, 2019.

KAUSHAL, A. Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime. **Harvard International Law Journal**, v. 50, n. 2, p. 491-534, 2009.

KOSKENNIEMI, M. International Law as "Global Governance". In: DESAUTELS-STEIN, J.; TOMLINS, C. **Searching for Contemporary Legal Thought**. Cambridge University Press, 2017, p. 199-218.

_____. It´s not the Cases, It´s the System. **Journal of World Investment & Trade**, v. 18, p. 343-353, 2017a.

_____. Histories of International Law: Significance and Problems for a Critical View. **Temple International and Comparative Law Journal**, v. 27, n. 2, p. 215-240, 2013.

_____. Empire and International Law: The Real Spanish Contribution. University of **Toronto Law Journal**, v. 61, n. 1, p. 1-36, 2011.

_____. International law and hegemony: a reconfiguration. **Cambridge Review of International Affairs**, v. 17, n. 2, p. 197–218, 2004.

_____. **The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960**. Cambridge University Press, 2001.

KRIEBAUM, U. The Relevance of Economic and Political Conditions for Protection under Investment Treaties. **The Law and Practice of International Courts and Tribunals**, v. 10, p. 383-404, 2011.

KRUGMAN, P. Crying with Argentina. **The New York Times**, New York, January 1, 2002. Available at: <https://www.nytimes.com/2002/01/01/opinion/crying-with-argentina.html>. Last accessed: August 22, 2019.

KULICK, A. Narrating narratives of international investment law: History and epistemic forces. In: SCHILL, S.; TAMS, C.; HOFMANN, R. **International Investment Law and History**. Edward Elgar Publishing, 2018, p. 41-69.

LILLICH, R. The Diplomatic Protection of Nationals Abroad: An Elementary Principle of International Law Under Attack. **The American Journal of International Law**, v. 69, n. 2, p. 359-365, 1975.

LORCA, A. Eurocentrism in the History of International Law. In: FASSBENDER, B.; PETERS, A. **The Oxford Handbook of the History of International Law**. Oxford University Press, 2012, p. 1035-1058.

_____. Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation. **Harvard International Law Journal**, v. 51, n. 2, p. 475-552, 2010.

LOUREIRO, F. The Alliance For or Against Progress? US – Brazilian Financial Relations in the Early 1960s. **Journal of Latin American Studies**, v. 46, n. 2., p. 323-351, 2014.

LOWE, V. The Politics of Law-Making: Are Method and Character of Norm Creation Changing? In: BYERS, Michael. **The Role of Law in International Politics: Essays in International Relations and International Law**. Oxford University Press, 2001. p. 207-226.

MANN, H. Is Fair and Equitable Fair, Equitable, Just, or Under Law? **Proceedings of the Annual Meeting (American Society of International Law)**, v. 100, p. 74-77, 2006.

_____. The Right of States to Regulate and International Investment Law: A Comment. In: UNCTAD – United Nations Conference on Trade and Development. **The Development Dimension of FDI: Policy and Rule-Making Perspectives**. United Nations, 2003, p. 211-223.

MANNING-CABROL, D. The imminent death of the Calvo Clause and the rebirth of the Calvo principle: Equality of foreign and national investors. **Law and Policy in International Business,** v. 26, n. 4, p. 1169-1200, 1995.

MARTINEAU, A. A Forgotten Chapter in the History of International Commercial Arbitration: The Slave Trade´s Dispute Settlement System. **Leiden Journal of International Law**, v. 31, p. 219-241, 2018.

MAYEDA, G. International Investment Agreements Between Developed and Developing Countries: Dancing with the Devil? Case Comment on the Vivendi, Sempra and Enron Awards. **McGill International Journal of Sustainable Development Law and Policy**, v. 4, n. 2, p. 191-230, 2009.

_____. Playing Fair: The Meaning of Fair and Equitable Treatment in Bilateral Investment Treaties. **Journal of World Trade**, v. 41, n. 2, p. 273-291, 2007.

MILES, K. History and international law: Method and mechanism – empire and 'usual' rupture. In: SCHILL, S.; TAMS, C.; HOFMANN, R. **International Investment Law and History**. Edward Elgar Publishing, 2018, p. 136-163.

_____. **The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital**. Cambridge University Press, 2013.

MOROSINI, F.; BADIN, M. Reconceptualizing International Investment Law from the Global South: An Introduction. In: MOROSINI, F.; BADIN, M. **Reconceptualizing International Investment Law from the Global South**. Cambridge University Press, 2017, p. 1-46.

NEWCOMBE, A.; PARADELL, L. **Law and Practice of Investment Treaties: Standards of Treatment**. Kluwer Law International, 2009.

ODUMOSU, I. The Law and Politics of Engaging Resistance in Investment Dispute Settlement. **Penn State International Law Review**, v. 26, n. 2, p. 251-287, 2007.

ORFORD, A. **The Past as Law or History? The Relevance of Imperialism for Modern International Law**. IILJ, Working Paper 2012/2, 2012. Available at:<http://iilj.org/wp-content/uploads/2016/08/Orford-The-Past-as-Law-or-History-2012-1.pdf>. Last accessed: February 13, 2019.

ORTINO, F. The Obligation of Regulatory Stability in the Fair and Equitable Treatment Standard: How Far Have We Come? **Journal of International Economic Law**, v. 21, n. 4, p. 845-865, 2018

PAHUJA, S. The Postcoloniality of International Law. **Harvard International Law Journal**, v. 46, n. 2, p. 459-469, 2005.

PAPARINSKIS, M. **The International Minimum Standard and Fair and Equitable Treatment**. Oxford University Press, 2013.

PELLET, A. Police Powers or the State's Right to Regulate. In: KINNEAR, M. et. al. **Building International Investment Law: The First 50 Years of ICSID**. Wolters Kluwer, 2015, p. 447-462.

PERRONE, N. The Emerging Global Right to Investment: Understanding the Reasoning Behind Foreign Investor Rights. **Journal of International Dispute Settlement**, v. 8, n. 4, p. 673-694, 2017.

_____. The International Investment Regime After the Global Crisis of Neoliberalism: Rupture or Continuity? **Indiana Journal of Global Legal Studies**, v. 23, n. 2, p. 603-628, 2016.

PICHERACK, J. The Expanding Scope of the Fair and Equitable Treatment Standard: Have Recent Tribunals Gone Too Far? **The Journal of World Investment & Trade**, v. 9, n. 4, p. 255-291, 2008.

POTESTÀ, M. Legitimate Expectations in Investment Treaty Law: Understanding the Roots and Limits of Controversial Concept. **ICSID Review**, v. 28, n. 1, p. 88-122, 2013.

ROBERTS, A. Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States. The American Journal of International Law, **The American Journal of International Law**, v. 104, n. 2, p. 179-225, 2010.

RODRIK, D. Goodbye Washington Consensus, Hello Washington Confusion? A Review of the World Bank´s Economic Growth in the 1990s: Learning from a Decade of Reform. **Journal of Economic Literature**, v. 44, n. 4, 2006, p. 973-987.

ROHTER, L. Argentina´s Crisis: It´s Not Just Money. **The New York Times**, New York, January 13, 2002. Available at: <https://www.nytimes.com/2002/01/13/weekinreview/the-world-argentina-s-crisis-it-s-not-just-money.html>. Last accessed: August 23, 2019.

ROOT, E. The Basis of Protection to Citizens Residing Abroad. **Proceedings of the American Society of International Law at Its Annual Meeting (1907-1917)**, v. 4, 1910, p. 16-27.

ROY, S. Is the Law of States for Injuries to Aliens a Part of Universal International Law? **The American Journal of International Law**, v. 55, n. 4, p. 863-891, 1961.

SCHILL, S.; TAMS, C.; HOFMANN, R. International Investment Law and History: An Introduction. In: SCHILL, S.; TAMS, C.; HOFMANN, R. **International Investment Law and History**. Edward Elgar Publishing, 2018, p. 3-40.

SCHRIJVER, N**. Sovereignty over natural resources: Balancing rights and duties.** Cambridge University Press, 1997.

SCHULTZ, T. Against Consistency in Investment Arbitration. In: DOUGLAS, Z.; PAUWELYN, J.; VIÑUALES, J. **The Foundations of International Investment Law: Bringing Theory into Practice**. Oxford University Press, 2014, p. 297-316.

SHAWN, M. **International Law**. Cambridge University Press, 2014.

SHEA, D. **The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy**. University of Minnesota Press, 1955.

SHIHATA, I. Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA. **ICSID Review – Foreign Investment Law and Journal**, v. 1, n. 1, p. 1-25, 1986.

SORNARAJAH, M. **Resistance and Change in the International Law on Foreign Investment**. Cambridge University Press, 2015.

_____. **The International Law on Foreign Investment**. Cambridge University Press, 2010.

_____. Right to Regulate and Safeguards. In: UNCTAD – United Nations Conference on Trade and Development. **The Development Dimension of FDI: Policy and Rule-Making Perspectives**. United Nations, 2003, p. 205-209.

STURZENEGGER, F.; ZETTELMEYER, J. **Debt Defaults and Lessons from a Decade of Crisis**. The MIT Press, 2006.

SUMMERS, L. The Calvo Clause. **Virginia Law Review**, v. 19, p. 459-484, 1933.

THOMPSON, A. Informal Empire? An Exploration in the History of Anglo-American Relations, 1810-1914. **Journal of Latin American Studies**, v. 24, n. 2, p. 419-436, 1992.

TITI, C. Economic Crisis, Sovereign Debt Restructurings and the Shifting Landscape of International Investment Law. In: SERRANO, A. **The Reform of International Economic Governance**. Routledge, 2016, p. 235-246.

_____. Are Investment Tribunals Adjudicating Political Disputes? **Journal of International Arbitration**, v. 32, n. 3, p. 261-288, 2015.

_____. **The Right to Regulate in International Investment Law**. Nomos and Hart Publishing, 2014.

TUÑÓN, I. **Infancia(s)**: Progresos y retrocesos em clave de desigualdade. Fundación Universidad Católica Argentina, 2019.

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT - UNCTAD. **The World Investment Report 2019: Special Economic Zones**. Available at: <https://unctad.org/en/PublicationsLibrary/wir2019_en.pdf>. Last accessed: September 7, 2019.

_____. **The World Investment Report 2018: Investment and New Industrial Policies**. Available at: <https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf>. Last accessed: February 20, 2019.

_____. **Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements II**. Available at: <https://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf>. Last accessed: June 7, 2019.

VANDEVELDE, K. A Brief History of International Investment Agreements. **U. C. Davis Journal of International Law & Policy**, v. 12, n. 1, p. 157-194, 2005.

VAN HARTEN, G. **Investment Treaty Arbitration and Public Law**. Oxford University Press, 2007.

VASCIANNIE, S. The Fair and Equitable Treatment Standard in International Investment Law and Practice. **British Yearbook of International Law**, v. 70, n. 1, p. 99-164, 1999.

VESEL, S. A 'Creeping' Violation of the Fair and Equitable Treatment Standard? **Arbitration International**, v. 30, n. 3, p. 553-564, 2014.

VIDIGAL, G.; STEVENS, B. Brazil's New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the Future? **Journal of World Investment & Trade**, v. 19, p. 475-512, 2018.

VIÑUALES, J. La Costumbre Internacional en el Derecho de las Inversiones. **Revista Latinoamericana de Derecho Internacional**, n. 2, 2015. Available at: <http://www.revistaladi.com.ar/numero2-vinuales/>. Last accessed: September 2, 2019.

_____. Sovereignty in Foreign Investment Law. In: DOUGLAS, Z.; PAUWELYN, J.; VIÑUALES, J. **The Foundations of International Investment Law: Bringing Theory into Practice**. Oxford University Press, 2014, p. 317-362.

WEILER, T. **The Interpretation of International Investment Law: Equality, Discrimination and Minimum Standards of Treatment in Historical Context**. Martinus Nijhoff Publishers, 2013.

_____. An Historical Analysis of the Function of the Minimum Standard of Treatment in International Investment Law. In: WEILER, T.; BAETENS, F. **New Directions in International Economic Law**. Martinus Nijhoff Publishers, 2011, p. 335-381.

APPENDIX 1

List of arbitrations related to international investment disputes in which Argentina acts as a respondent, as of September 2019

- 20 selected cases for analysis

ICSID based arbitrations

1. CMS Gas Transmission Company v. Argentine Republic, ICSID case no. ARB/01/8
2. Continental Casualty Company v. Argentine Republic, ICSID case no. ARB/03/9
3. EDF International S.A., SAUR International S.A. and Leon Participaciones Argentinas S.A. v. Argentine Republic, ICSID case no. ARB/03/23
4. El Paso Energy International Company v. Argentine Republic, ICSID case no. ARB/03/15
5. Enron Creditors Ponderosa Assets, L.P. v. Argentine Republic, ICSID case no. ARB/01/3
6. HOCHTIEF Aktiengellschaft v. Argentine Republic, ICSID case no. ARB/07/31
7. Impregilo SPA v. Argentine Republic, ICSID case no. ARB/07/17
8. LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc. v. Argentine Republic, ICSID case no. ARB/02/1
9. Metalpar S.A. and Buen Aire S.A. v. Argentine Republic, ICSID case no. ARB/03/5
10. Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina Sociedad Anónima v. Argentine Republic, ICSID case no. ARB/04/16
11. SAUR International S.A. v. Argentine Republic, ICSID case no. ARB/04/4
12. Sempra Energy International v. Argentine Republic, ICSID case no. ARB/02/16
13. Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A v. Argentine Republic, ICSID case no. ARB/03/17

14. Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID case no. ARB/03/19
15. Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic, ICSID case no. ARB/09/1
16. Total S.A. v. Argentine Republic, ICSID case no. ARB/04/1
17. Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic, ICSID case no. ARB/07/26

UNCITRAL based arbitrations

18. AWG Group v. Argentine Republic, no reference (constituted under UNCITRAL Arbitration Rules)
19. BG Group Plc. v. Argentine Republic, no reference (constituted under UNCITRAL Arbitration Rules)
20. National Grid P.L.C. v. Argentine Republic, no reference (constituted under UNCITRAL Arbitration Rules)

- **41 remaining cases, not included in our analysis**

ICSID based arbitrations

1. Nationale-Nederlanden Holdinvest B.V. and others, v. Argentine Republic, ICSID case no. ARB/19/11
2. MetLife, Inc., MetLife Servicios S.A. and MetLife Seguros de Retiro S.A.; MetLife, Inc., MetLife Servicios S.A. and MetLife Seguros de Retiro S.A. v. Argentine Republic, ICSID case no. ARB/17/17
3. Abertis Infraestructuras, S.A v. Argentine Republic, ICSID case no. ARB/15/48
4. Salini Impregilo S.p.A. v. Argentine Republic, ICSID case no. ARB/15/39
5. Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic, ICSID case no. ARB/14/32
6. Repsol, S.A. and Repsol Butano, S.A. v. Argentine Republic, ICSID case no. ARB/12/38
7. Impregilo S.p.A. v. Argentine Republic, ICSID case no. ARB/08/14

8. Ambiente Ufficio S.p.A. and others v. Argentine Republic, ICSID case no. ARB/08/9

9. RGA Reinsurance Company v. Argentine Republic, ICSID case no. ARB/04/20

10. France Telecom S.A. v. Argentine Republic, ICSID case no. ARB/04/18

11. Aguas Cordobesas S.A., Suez, and Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic, ICSID case no. ARB/03/18

12. Pioneer Natural Resources Company, Pioneer Natural Resources (Argentina) S.A. and Pioneer Natural Resources (Tierra del Fuego) S.A. v. Argentine Republic, ICSID case no. ARB/03/12

13. Camuzzi International S.A. v. Argentine Republic, ICSID case no. ARB/03/7

14. Empresa Nacional de Electricidad S.A. v. Argentine Republic, ICSID case no. ARB/99/4

15. Mobil Argentina S.A. v. Argentine Republic, ICSID case no. ARB/99/1

16. Houston Industries Energy, Inc. and others v. Argentine Republic, ICSID case no. ARB/98/01

17. Lanco International, Inc. v. Argentine Republic, ICSID case no. ARB/97/6

18. Giovanni Alemanni and others v. Argentine Republic, ICSID case no. ARB/07/8

19. Abaclat and others v. Argentine Republic, ICSID case no. ARB/07/5

20. Asset Recovery Trust S.A. v. Argentine Republic, ICSID case no. ARB/05/11

21. TSA Spectrum de Argentina, S.A. v. Argentine Republic, ICSID case no. ARB/05/5

22. Compañía General de Electricidad S.A. and CGE Argentina S.A. v. Argentine Republic, ICSID case no. ARB/05/2

23. Daimler Financial Services AG v. Argentine Republic, ICSID case no. ARB/05/11

24. Wintershall Aktiengesellschaft v. Argentine Republic, ICSID case no. ARB/04/14

25. CIT Group Inc. v. Argentine Republic, ICSID case no. ARB/04/9

26. BP America Production Company and others v. Argentine Republic, ICSID case no. ARB/04/8

27. Azurix Corp. v. Argentine Republic, ICSID case no. ARB/03/30

28. Unisys Corporation v. Argentine Republic, ICSID case no. ARB/03/27

29. Electricidad Argentina S.A. and EDF International S.A. v. Argentine Republic, ICSID case no. ARB/03/22
30. Enersis S.A. and others v. Argentine Republic, ICSID case no. ARB/03/21
31. Telefónica S.A v. Argentine Republic, ICSID case no. ARB/03/20
32. Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic, ICSID case no. ARB/03/13
33. Gas Natural SDG, S.A. v. Argentine Republic, ICSID case no. ARB/03/10
34. Camuzzi International S.A. v. Argentine Republic, ICSID case no. ARB/03/2
35. AES Corporation v. Argentine Republic, ICSID case no. ARB/02/17
36. Compañía de Aguas del Aconquija S.A. v. Argentine Republic, ICSID case no. ARB/97/3
37. Siemens AG v. Argentine Republic, ICSID case no. ARB/02/8
38. Azurix Corp v. Argentine Republic, ICSID case no. ARB/01/12

UNCITRAL based arbitrations

39. ICS Inspection and Control Services Limited v. Argentine Republic, no reference (constituted under UNCITRAL Arbitration Rules)
40. ICS Inspection and Control Services Limited (I) v. Argentine Republic, no reference (constituted under UNCITRAL Arbitration Rules)
41. Bank of Nova Scotia v. Argentine Republic v. Argentine Republic, no reference (constituted under UNCITRAL Arbitration Rules)

APPENDIX 2

List of the compensatory damages Argentina was sentenced to pay in the selected cases for analysis

Case	Total amount to be paid by Argentina (in USD)
The Teinver case	320.760.000,00
The Hochtief case	13.410.000,00
The Urbaser case	no compensatory damages fixed
The LG&E case	57.400.000,00
The Mobil case	196.241.000,00
The Impregilo case	21.294.000,00
The SAUR case	39.990.111,00
The Total case	269.928.000,00
The EDF case	136.138.430,00
The Suez case (i)	225.696.464,00
The Suez case (ii)	37.261.504,00 (with respect to Vivendi); 223.043.289,00 (with respect to Suez); 123.276.448,00 (with respect to AGBAR)
The El Paso case	43.030.000,00
The Continental case	2.800.000,00
The Metalpar case	no compensatory damages fixed
The Sempra case	case discontinued after the annulment of the award
The CMS case	135.348.100,00
The BG case	185.285.485,85
The National Grid case	53.592.439,25
The Enron case	case discontinued after the annulment of the award
Total	**2.084.495.271,10**