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Maximising Investment Protection under the Minimum Standard: A Case Study of the Evolutive Interpretation and Application of Customary International Law in Investment Arbitration

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Wind Turbine Landscape Photography (cc)

1. Introduction

The customary minimum standard of treatment requires states to treat aliens on their territory in accordance with a certain minimum level of decency. Whilst the existence of this customary standard has become widely accepted, the determination of its content remains a controversial affair. As the *Windstream* tribunal put it: the issue ‘is not whether the rule exists, but rather how the content of a rule that does exist … should be established’.[1]

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[1] *Windstream Energy LLC v Canada*, UNCITRAL, Award of 27 September 2016, para 350.

This Reflection analyses how investment arbitration tribunals have expanded the scope and content of the customary minimum standard of treatment through its interpretation and application in individual cases. The evolution of the minimum standard provides a case study of how rules of custom develop, which can inform current debates about whether international customary law can and ought to be 'interpreted'. Some scholars have argued that the content of a customary rule can only be 'identified' in accordance with the requirements of state practice and *opinio juris*,[2] whilst others consider that there is a distinct process of interpretation, which establishes the correct meaning of a customary rule that was already found to exist.[3] The latter approach raises further questions as it creates a need for suitable methods and rules governing the interpretative process.

In this Reflection, I argue that the content of the minimum standard evolved through a process that merged elements of identification, interpretation, and application, but rarely involved comprehensive inquiries into state practice and *opinio juris*.[4] I discuss two factors that might explain why tribunals were able to develop the minimum standard without significant substantiation in the form of state practice and *opinio juris*. First, the standard's relevance in investment arbitration has often been triggered by treaty provisions referring to the minimum standard, which led tribunals to establish its content in accordance with methods of treaty interpretation rather than the classic methods for the identification of custom. Second, early authoritative formulations of the minimum standard included explicitly subjective elements, which inevitably caused arbitrators to apply a personal sense of justice. Both elements enabled the expansion of the scope and content of this customary standard by arbitral tribunals, sometimes in defiance of more limited interpretations advocated by states.

2. The Evolution of the Minimum Standard in Arbitral Practice

The customary international minimum standard of treatment obliges states to treat foreign nationals residing on their territory in accordance with a minimum standard of conduct. It is an example of a classic rule of custom, expressing the lowest common denominator binding on all states regardless of their national law or bilateral agreements. Nevertheless, the interpretation and application of the

[2] Massimo Lando, 'Identification as the Process to Determine the Content of Customary International Law' (forthcoming 2022) Oxford J of Legal Studies.
[3] Panos Merkouris, 'Interpreting Customary International Law. You'll Never Walk Alone' in Panos Merkouris, Jörg Kammerhofer and Noora Arajärvi (eds), *The Theory, Practice and Interpretation of Customary International Law* (CUP 2022).
[4] See for a discussion of 'shortcuts' applied by international courts and tribunals when ascertaining the existence and content of customary international law: Vladyslav Lanovoy, 'Customary International Law in the Reasoning of International Courts and Tribunals' in Panos Merkouris, Jörg Kammerhofer and Noora Arajärvi (eds), *The Theory, Practice and Interpretation of Customary International Law* (CUP 2022).

minimum standard have remained a controversial affair. In 1926, the US-Mexico Claims Commission provided an influential description in its *Neer* decision, rendered in a case which concerned the treatment of individuals. The Commission stated that the minimum standard is breached by conduct that amounts 'to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of government action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency'.[5]

More recently, there has been some discussion as to whether this *Neer* standard still captures the content of the minimum standard under contemporary customary law.[6] The *Glamis Gold* tribunal answered this question in the affirmative, noting that 'it is difficult to establish a change in customary international law'.[7] The tribunal considered that the 'standard for finding a breach of the customary international law minimum standard of treatment … remains as stringent as it was under *Neer*'.[8] At the same time, the *Glamis Gold* tribunal accepted the possibility that 'as an international community, we may be shocked by State actions now that did not offend us previously'.[9] Along similar lines, the *Cargill* tribunal reasoned that 'the required severity of the conduct as held in *Neer*' still captures the content of the minimum standard of treatment, although the principle underlying the *Neer* formulation should be adapted 'to the more complicated and varied economic positions held by foreign nationals today'.[10]

Other tribunals have moved away from the *Neer* standard more explicitly, prompting the *Lion Mexico* tribunal to note that 'reliance on the case has rightfully declined in the recent years'.[11] The *Mondev* tribunal held that '[t]o the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious',[12] whilst the *Resolute Forest Products* tribunal considered that it should acknowledge 'the dynamic character of customary international law'.[13] Accordingly, tribunals have formulated revised definitions of the minimum standard.[14] The *Merrill and Ring* tribunal summarised

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[5] *L.F.H. Neer and Pauline Neer v Mexico*, 15 October 1926, IV RIAA (2006) 61-62.
[6] Although it has been questioned to what extent the *Neer* standard ever expressed custom. *Windstream Energy LLC v Canada*, UNCITRAL, Award of 27 September 2016, para 352; *Merrill & Ring Forestry LP v Canada*, UNCITRAL, Award of 31 March 2010, para 204, questioning the customary status of the *Neer*-standard 'beyond the strict confines of personal safety, denial of justice and due process'.
[7] *Glamis Gold v United States*, UNCITRAL, Award of 8 June 2009, para 602.
[8] *Glamis Gold v United States*, UNCITRAL, Award of 8 June 2009, para 616. See also *Eli Lilly and Company v Canada*, ICSID UNCT/14/2, Final Award of 16 March 2017, para 222.
[9] *Glamis Gold v United States*, UNCITRAL, Award of 8 June 2009, para 616.
[10] *Cargill Incorp v Mexico*, ICSID ARB(AF)/05/2, Award of 18 September 2009, para 284.
[11] *Lion Mexico Consolidated LP v Mexico*, ICSID ARB(AF)/15/2, Award of 20 September 2021, para 254.
[12] *Mondev International Ltd v United States*, ICSID ARB(AF)/99/2, Award of 11 October 2002, para 116.
[13] *Resolute Forest Products Inc v Canada*, PCA 2016-13, Final Award of 25 July 2022, para 738.
[14] See notably the influential definition in *Waste Management, Inc v Mexico*, ICSID ARB(AF)/00/3, Award of 30 April 2004, para 98.

that ‘the standard protects against all such acts or behavior that might infringe a sense of fairness, equity and reasonableness’.[15] The *Bilcon* tribunal concluded that the minimum standard does not only prohibit outrageous conduct but instead ‘involves a more significant measure of protection’.[16] Although tribunals commonly note that there is a high threshold for a finding of a violation of the minimum standard,[17] this threshold has arguably been lowered in recent decades, and the elements of outrage or shock are no longer uniformly included.

When formulating their understanding of the content of the minimum standard, tribunals have sometimes referred to state practice and *opinio juris*, but they have rarely engaged in a thorough analysis of these elements. The *Merrill and Ring* tribunal mentioned that state practice and *opinio juris* would be the ‘guiding beacons’ of its interpretation of the minimum standard, but its assessment of these elements was mostly based on prior arbitral practice. In an attempt to identify state practice, the tribunal noted ‘a tendency of states to support the claims of their citizens in the ambit of diplomatic protection with an open mind’.[18] It also noted that the ‘requirement that aliens be treated fairly and equitably in relation to business, trade and investment … has become sufficiently part of widespread and consistent practice so as to demonstrate that it is reflected today in customary international law as *opinio juris*’.[19] A similar statement was made by the *Bilcon* tribunal when it held that the minimum standard ‘has evolved in the direction of increased investor protection precisely because sovereign states … have chosen to accept it’.[20] The *Windstream* tribunal noted that the content of a rule of customary international law ‘can best be determined on the basis of evidence of actual State practice establishing custom that also shows that the States have accepted such practice as law (*opinio juris*)’.[21] The tribunal noted, however, that the disputing parties had not produced such evidence, prompting it to look at other arbitral decisions and scholarship.[22]

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[15] *Merrill & Ring Forestry LP v Canada*, UNCITRAL, Award of 31 March 2010, para 210. Patrick Dumberry, 'The Prohibition against Arbitrary Conduct and the Fair and Equitable Treatment Standard under NAFTA Article 1105' (2014) 15 JWIT 117, argues that the *Merrill & Ring* award went further than contemporaneous awards by dropping all qualifiers requiring a certain severity before conduct would be found in breach of the minimum standard.
[16] *Bilcon of Delaware* et al *v Canada*, PCA 2009-04, Award on Jurisdiction and Admissibility of 17 March 2015, para 433. See also para 444.
[17] Eg *Ibid,* para 441, 444; *Eco Oro Mineral Corp v Colombia*, ICSID ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, para 753.
[18] *Merrill & Ring Forestry LP v Canada*, UNCITRAL, Award of 31 March 2010, para 205.
[19] *Ibid.*, para 210.
[20] *Bilcon of Delaware* et al *v Canada*, PCA 2009-04, Award on Jurisdiction and Admissibility of 17 March 2015, para 438.
[21] *Windstream Energy LLC v Canada*, UNCITRAL, Award of 27 September 2016, para 351.
[22] *Ibid.*

The evolutive development of the minimum standard has coincided with findings of breaches in a variety of cases, as demonstrated by the following three examples. First, the *Bilcon* tribunal found that an environmental review process resulting in the rejection of a quarry and marine terminal project had failed to give the investors 'a fair *opportunity* to have the specifics of that case considered, assessed and decided in accordance with applicable laws'.[23] According to the tribunal, 'the Investors were encouraged to engage in a regulatory approval process costing millions of dollars and other corporate resources that was in retrospect unwinnable from the outset, even though the Investors were specifically encouraged by government officials and the laws of federal Canada to believe that they could succeed'.[24]

The *Windstream* tribunal evaluated a moratorium on offshore wind power projects imposed by the Canadian authorities. The tribunal considered that the adoption of the moratorium in itself was not in breach of international obligations, but the failure of the authorities to resolve the 'legal and contractual limbo' in which the investor found itself after the moratorium had been imposed 'was unfair and inequitable'. According to the tribunal, Canada's failure to clarify the situation by completing the necessary scientific studies and adopting a decisive regulatory framework (allowing or excluding offshore wind energy generation) violated the minimum standard.[25]

The majority of the *Eco Oro* tribunal found that Colombia's prohibition of mining activities in a high-altitude wetland zone also breached the minimum standard. Specifically, Colombia's failure to present a delimitation of the environmental zone in which no mining should take place conflicted with the host state's obligation to 'provide Eco Oro with a stable and predictable regulatory environment'.[26] Colombia did not clarify when the delimitation would be announced, although it refused to grant Eco Oro a concomitant time extension for the filing of its Construction and Works Plan, without which the investor would forfeit its concession. Meanwhile, the government's inaction contributed to illegal mining in the area, which had more damaging effects on the ecosystem than mining in compliance with an approved environmental impact assessment. In the view of the tribunal, the conduct of the Colombian authorities was 'grossly inconsistent', and they had 'failed to act coherently, consistently

[23] *Bilcon of Delaware* et al *v Canada*, PCA 2009-04, Award on Jurisdiction and Admissibility of 17 March 2015, para 603.
[24] *Ibid.*, para 453.
[25] *Windstream Energy LLC v Canada*, UNCITRAL, Award of 27 September 2016, para 379. A follow-up claim is currently pending before a new tribunal, see https://www.iareporter.com/articles/offshore-wind-investor-argues-that-cancellation-of-fit-contract-following-first-treaty-arbitration-against-canada-amounts-to-a-renewed-nafta-breach-wendy-miles-is-tapped-to-chair-tribunal/.
[26] *Eco Oro Mineral Corp v Colombia*, ICSID ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, para 805.

or definitively', infringing 'a sense of fairness, equity and reasonableness' and showing 'a flagrant disregard for the basic principles of fairness'.[27]

In each of these cases, tribunals found violations of the minimum standard of treatment without an extensive analysis of state practice and *opinio juris*. The customary minimum standard does not, however, contain a catalogue of conduct that is unacceptable under customary international law. The standard is essentially empty, as it does not prescribe or prohibit a particular type of conduct but only affirms that host state conduct should never drop below a minimum threshold of decency recognised under international law.[28] Consequently, establishing where this threshold lies can be a more consequential exercise than merely confirming that the minimum standard exists. Determining the contents of the standard might therefore require an assessment of state practice and *opinio juris*.

Alternatively, one could argue that the contents of the minimum standard can be established through interpretation. In the view of Panos Merkouris and Nina Mileva, one of the functions of the interpretation of custom is the concretisation of the applicable rule: '[s]ince customary rules are general by their nature, the act of interpretation is necessary to formulate them more concretely'.[29] Massimo Lando objects to this position, arguing that 'changing the level of abstraction of customary rules could be justified only by reference to evidence of state practice and *opinio juris*'.[30]

In theory, every allegation of a breach of the minimum standard could be evaluated by reference to state practice and *opinio juris*, although establishing these elements will be more difficult at more concrete levels of abstraction.[31] In the cases mentioned above, it could have involved an assessment of the law and practice of other states in respect of the type of environmental licensing at issue. Arbitral practice, however, demonstrates that tribunals do not require such evidence before adopting a concretisation of the minimum standard relevant to the dispute. Such concretisation is not necessarily an exercise of interpretation either; instead, it can often be qualified as an application of the standard.[32]

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[27] *Ibid.*, para 821.
[28] *Urbaser v Argentina*, ICSID ARB/07/26, Award of 8 December 2016, para 610, noting that the term minimum standard is 'devoid of substance'.
[29] Panos Merkouris and Nina Mileva, 'Introduction to the Series: Customary Law Interpretation as a Tool' (2022) 11 ESIL Reflections 1, 2. See also the argument on the 'plasticity' of custom in Orfeas Chasapis Tassinis, 'Customary International Law: Interpretation from Beginning to End' (2020) 31 EJIL 235.
[30] Massimo Lando, 'Identification as the Process to Determine the Content of Customary International Law' (forthcoming 2022) Oxford J of Legal Studies.
[31] See also Riccardo di Marco, 'Customary International Law. Identification versus Interpretation' in Panos Merkouris, Jörg Kammerhofer and Noora Arajärvi (eds), *The Theory, Practice and Interpretation of Customary International Law* (CUP 2022) 430, noting that 'there would exist an infinity of customary rules, all different from each other but each of them extremely specific and very particular, being applicable to only one specific case: the one in which it was identified. This would defeat the very function of having a rule …'.
[32] See on the distinction between interpretation and application, Anastasios Gourgourinis, 'The Distinction between Interpretation and Application of Norms in International Adjudication' (2011) 2 JIDS 31.

The process through which tribunals employ the minimum standard in a concrete dispute merges aspects of identification, interpretation, and application – and the boundaries between these different phases cannot always be clearly drawn.

The need for concretisation is not the only reason why tribunals developed the scope and content of the minimum standard without comprehensive substantiation in the form of state practice and *opinio juris*. This development is further explained by two other factors: the conflation of customary and treaty standards, and the incorporation of subjective parameters of injustice into definitions of the minimum standard.

3. The Conflation of Customary and Treaty Standards

The prominence of the minimum standard of treatment in a variety of investment disputes is due to references to that standard in treaty provisions. An example is Article 1105 of the North American Free Trade Agreement (NAFTA), which obliged member states to accord 'treatment in accordance with international law, including fair and equitable treatment [FET] and full protection and security [FPS]'.[33] Tribunals applying a clause such as Article 1105 NAFTA are primarily tasked with interpreting and applying a treaty provision, including its reference to customary international law. In early NAFTA jurisprudence, a controversial question was whether Article 1105 imposed obligations beyond the customary minimum standard of treatment,[34] until the NAFTA member states confirmed that this was not the case.[35] This confirmation did not, however, end the debate on the meaning of FET and FPS as contained in the customary minimum standard of treatment.

The textual overlap between treaty standards and the customary minimum standard has led tribunals to conflate these types of norms, in two different ways. First, tribunals have conducted their interpretation of the minimum standard in accordance with rules of treaty interpretation, and second, tribunals applying the customary minimum standard have explicitly taken guidance from the findings of tribunals applying treaty-based versions of the FET and FPS standards.

[33] Article 14.6 USMCA has left this wording largely intact, although various clarifications and limitations have been added.
[34] See eg *Pope and Talbot Inc v Canada*, UNCITRAL, Award on the Merits of Phase 2 of 10 April 2001, para 110-118. See also *Merrill & Ring Forestry LP v Canada*, UNCITRAL, Award of 31 March 2010, para 212.
[35] NAFTA Free Trade Commission, 'Notes of Interpretation of Certain Chapter 11 Provisions', 31 July 2001. Whether references to 'international law' in FET and FPS treaty provision relate to the customary minimum standard has also been debated in other contexts, see eg *Infinito Gold Ltd v Costa Rica*, ICSID ARB/14/5, Award of 3 June 2021, para 327-350.

On the first point, the *Windstream* tribunal observed that since Article 1105 was a treaty provision, it should not 'entirely disregard the relevant rules of treaty interpretation'.[36] Other tribunals have likewise adopted approaches from the field of treaty interpretation when applying the minimum standard. The *Eco Oro* tribunal noted that it should interpret the treaty provision referring to the minimum standard in accordance with Article 31 of the Vienna Convention on the Law of Treaties (VCLT).[37] Consequently, the tribunal considered the ordinary meaning of the terms used to describe the customary minimum standard in the applicable treaty provision, as well as the object and purpose of the treaty as expressed in its preamble.[38] The *Díaz Gaspar* tribunal also referred to the purpose of the relevant bilateral investment treaty (BIT), understood as the creation of favourable investment conditions, when it applied the minimum standard incorporated in that treaty.[39]

Tribunals have not only borrowed methods from the field of treaty interpretation when interpreting and applying the customary minimum standard; they have also considered that the conclusion of numerous investment treaties with FET and FPS standards has shaped customary international law. The *Mondev* tribunal, for instance, noted that the widespread use of FET and FPS clauses in BITs 'will necessarily have influenced the content of rules governing the treatment of foreign investment in current international law'.[40] Tribunals have also referenced substantive findings made by other tribunals, irrespective of whether these findings were made under treaty-based or customary FET and FPS standards.[41] The *SAUR* tribunal concluded that an interpretation of FET in accordance with the VCLT and an interpretation in accordance with international custom would lead to the same result: 'dans les deux cas, le niveau de conduite exigible de l'État est le même'.[42]

The potential implications of importing interpretations of treaty-based standards when applying the customary minimum standard are demonstrated by the debate as to whether host states are obliged to maintain a stable business environment and to protect the investor's legitimate expectations. The *Cargill* tribunal was not convinced that such an obligation existed under customary

[36] *Windstream Energy LLC v Canada*, UNCITRAL, Award of 27 September 2016, para 355.
[37] *Eco Oro Mineral Corp v Colombia*, ICSID ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, para 746.
[38] *Eco Oro Mineral Corp v Colombia*, ICSID ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, para 746-748.
[39] *Alejandro Diego Díaz Gaspar v Costa Rica*, ICSID ARB/19/13, Award of 29 June 2022, para 362.
[40] *Mondev International Ltd v United States*, ICSID ARB(AF)/99/2, Award of 11 October 2002, para 117. See also para 125. See also *Charles Arif v Moldova*, ICSID ARB/11/23, Award of 8 April 2013, para 529.
[41] Eg *Rusuro Mining Ltd v Venezuela*, ICSID ARB(AF)/12/5, Award of 22 August 2016, para 520. The claim that treaty-based FET standards refer to custom is also made by Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (OUP 2013) 160-166.
[42] *SAUR International SA v Argentina*, ICSID ARB/04/4, Décision sur la compétence et sur la responsabilité of 6 June 2012, para 494. See also *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v Bolivia*, ICSID ARB/06/2, Award of 16 September 2015, para 291-292.

international law, even if other tribunals had read it into treaty-based FET standards.[43] Likewise, the *Mobil* tribunal considered that its function was not 'to legislate a new standard which is not reflected in the existing rules of customary international law'. The tribunal had 'not been provided with any material to support the conclusion that the rules of customary international law require a legal and business environment to be maintained or set in concrete'.[44]

These findings contrast with the position taken by other tribunals, which found that the obligation to provide a stable business environment or to protect the investor's legitimate expectations was part of the minimum standard of treatment. The *Occidental* tribunal, for instance, merged the customary minimum standard with treaty obligations, finding that both standards protected 'the stability and predictability of the legal and business framework of the investment'.[45] Likewise, the *CMS* tribunal held that 'the Treaty standard of fair and equitable treatment and its connection with the required stability and predictability of the business environment … is not different from the international law minimum standard and its evolution under customary law'.[46]

The conflation of treaty standards and the customary minimum standard has contributed to an evolutive interpretation of the latter. Tribunals have approached the question of how the minimum standard should be interpreted in accordance with methods of treaty interpretation, and also borrowed from rulings made under treaty standards, enabling these tribunals to adopt teleological interpretations which did not rely on evidence of state practice and *opinio juris*.[47] The use of methods and findings from treaty law when interpreting customary rules raises complicated questions. From a perspective of 'systemic integration', it might make sense to interpret customary rules in light of relevant treaty rules applicable in the relations between the parties.[48] However, when states referenced the minimum standard in their treaties along the lines of Article 1105 NAFTA, they apparently sought to limit the scope of their obligations to the customary standard, rather than committing to potentially broader treaty standards. Accordingly, when interpreters would nonetheless conflate the minimum standard with such treaty standards, they would arguably deviate from the literal text of the relevant provision.

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[43] *Cargill Incorp v Mexico*, ICSID ARB(AF)/05/2, Award of 18 September 2009, para 290.
[44] *Mobil Investments Canada Inc & Murphy Oil Corp v Canada*, ICSID ARB(AF)/07/4, Decision on Liability and Principles of Quantum of 22 May 2012, para 153.
[45] *Occidental Exploration and Production Company v Ecuador*, UNCITRAL, Final Award of 1 July 2004, para 190.
[46] *CMS Gas Transmission Company v Argentina*, ICSID ARB/01/8, Award of 12 May 2005, para 284.
[47] See for a similar argument in respect of international humanitarian, human rights, and criminal law, Daniel Joyner, 'Why I Stopped Believing in Customary International Law' (2018) 9 Asian J of Int'l L 31.
[48] Panos Merkouris, 'Interpreting Customary International Law. You'll Never Walk Alone' in Panos Merkouris, Jörg Kammerhofer and Noora Arajärvi (eds), *The Theory, Practice and Interpretation of Customary International Law* (CUP 2022) 358.

4. The Role of Subjective Criteria in Definitions of the Minimum Standard

The evolutive development of the minimum standard in arbitral practice was further facilitated by the incorporation of subjective criteria of justice into definitions of the minimum standard. Already in the times of the *Neer* decision, the definition of the minimum standard contained subjective criteria which inevitably required a value judgment.

Even though most contemporary tribunals have dropped the *Neer* standard as a conclusive formulation of the minimum standard, similarly subjective wording continues to be used. The *Mondev* tribunal, when describing the denial of justice element of the minimum standard, noted that '[t]he test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome'.[49] The *Glamis Gold* tribunal considered that if the *Neer* standard were applied 'with current sentiments and to modern situations', one 'may find shocking and egregious events not considered to reach this level in the past'.[50] More recently, the *Eco Oro* tribunal reasoned that '[t]he conduct in question must engender a sense of outrage or shock, amount to gross unfairness or manifest arbitrariness falling below acceptable standards, or there must have been a lack of due process which has led to an outcome which offends a sense of judicial propriety'.[51]

According to these formulations, the relevant inquiry was whether the impugned state conduct evoked a strong sentiment of injustice. In this way, the minimum standard had evolved from a universal minimum code of conduct, considered to be generally adhered to by states, into a flexible and subjective standard of justice. Instead of establishing that specific conduct was generally rejected by states and considered in breach of international law, tribunals would now have to exercise their own judgment to determine whether that conduct was acceptable and just. Inevitably, this interpretative shift increased the discretion of arbitrators to determine the parameters of the assessment and to widen the scope and content of the minimum standard.[52]

According to Panos Merkouris and Nina Mileva, the interpretation of custom has an 'evolutive' function in addition to the 'concretising' function: 'interpretation is essential for it to be possible for a customary

[49] *Mondev International Ltd v United States*, ICSID ARB(AF)/99/2, Award of 11 October 2002, para 127.
[50] *Glamis Gold v United States*, UNCITRAL, Award of 8 June 2009, para 614.
[51] *Eco Oro Mineral Corp v Colombia*, ICSID ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, para 755.
[52] See for a game theory analysis of how international courts exercise their discretion in respect of the interpretation of custom, Anne van Aaken, 'Interests, Strategies and Veto Players: The Political Economy of Interpreting Customary International Law', ESIL Reflections 11:2 (2022).

rule to be adjusted to new developments of fact or law in the international legal community'.[53] Such 'evolutive' interpretation necessarily carries a degree of proactive development. As noted by Başak Etkin, 'all interpretation is somewhat constructive' and 'the lines between modification and evolution through interpretation are blurred'.[54] It might be questioned whether arbitral tribunals have the authority to expand international law through an evolutive interpretation of customary rules and, if so, how they should determine the right course of evolutionary progress.[55]

Even if it were accepted that custom has a *telos*, identifying such purpose will always be a controversial affair.[56] The divergent findings of tribunals assessing the object and purpose of investment protection treaties demonstrate the potential for diversity: whilst some tribunals have identified investment protection as the crucial aim of such treaties, others have ruled that these treaties actually pursue broader goals of economic cooperation and development, which may sometimes impose limits on the more instrumental goal of investment protection.[57] Similarly, also in respect of customary rules, it will often be difficult 'to establish the teleology of a norm on the basis of the common conviction of states'.[58]

As the minimum standard essentially lacks content, arbitral practice has injected subjective parameters of justice into the analysis. This is not necessarily problematic, as investment arbitration tribunals are primarily tasked with resolving concrete investor-state disputes rather than formulating rules of customary international law. The *Windstream* tribunal considered that 'just as the proof of the pudding is in the eating (and not in its description), the ultimate test of correctness of an interpretation

[53] Panos Merkouris and Nina Mileva, 'Introduction to the Series: Customary Law Interpretation as a Tool', ESIL Reflections 11:1 (2022), 3.
[54] Başak Etkin, 'The Changing Rivers of Customary International Law: The Interpretative Process as Flux', ESIL Reflections 11:5 (2022), 3. Ideally, such evolution through interpretation should correlate with new state practice and *opinio juris*: 'interpretation intertwined with new practice and *opinio juris* together in a double helix carry the norm to new dimensions'.
[55] See Alireza Falsafi, 'The International Minimum Standard of Treatment of Foreign Investors' Property: A Contingent Standard' (2007) 30 Suffolk Transnat'l L R 317, 357: '[t]his approach is vulnerable to the substitution of the subjective perception of the observer for the international law on the treatment of foreign investors' property'. See also *Mondev International Ltd v United States*, ICSID ARB(AF)/99/2, Award of 11 October 2002, para 120: 'an arbitral tribunal may not apply its own idiosyncratic standard in lieu of the standard laid down in Article 1105 (1) [NAFTA]' but should instead find the relevant standard 'by reference to international law, i.e., by reference to the normal sources of international law determining the minimum standard of treatment of foreign investors'.
[56] Massimo Lando, 'Identification as the Process to Determine the Content of Customary International Law' (forthcoming 2022) Oxford J of Legal Studies: '[t]he existence of different plausible rationales for indeterminate customary rules counsels against using teleological means to determine their content'.
[57] *Saluka Investments BV v Czech Republic*, UNCITRAL, Partial Award of 17 March 2006, para 300.
[58] Ivo Tarik de Vries-Zou, 'Common Convictions and the Interpretation of Custom', ESIL Reflections 11:4 (2022), 8. When discussing the *opinio juris* underpinning the customary rule itself rather than its purpose, I fully agree with De Vries-Zou that 'custom is not based on intent, but rather the common conviction of states'.

is not in its description in other words, but in its application on the facts'.[59] Likewise, the *Mondev* tribunal acknowledged that passing judgment on what is fair and equitable, not in the abstract but in relation to the facts of a particular case, 'is part of the essential business of courts and tribunals'.[60]

At the same time, overly evolutive interpretations and applications by tribunals will likely result in a pushback by states. The NAFTA member states have on several occasions sought to limit the arbitral expansion of the minimum standard, notably through the adoption of the 2001 interpretative notes.[61] NAFTA's successor, the United States–Mexico–Canada Agreement (USMCA), incorporates the 2001 notes, provides a description of FET and FPS, and specifies that a breach of the investor's expectations does not automatically imply a breach of the minimum standard. It is doubtful whether the interventions under NAFTA have been successful, and it remains to be seen how the USMCA will be interpreted and applied. As long as the minimum standard is linked to dynamic convictions of justice, it gives adjudicators wide discretion in shaping its content. However, under the USMCA, only the United States and Mexico allow for investment arbitration, and the investor's ability to invoke the minimum standard of treatment in investment arbitration is strictly circumscribed.[62]

5. Concluding remarks

Contemporary arbitral practice demonstrates that the scope of the minimum standard of treatment has been significantly expanded through its interpretation and application in concrete disputes. Two factors have facilitated this evolutive development. First, the minimum standard has been conflated with treaty standards, enabling tribunals to apply methods of treaty interpretation and to borrow from findings made by other tribunals under treaty standards. Second, the incorporation of subjective parameters into the definition of the minimum standard has invited tribunals to follow their own sense of justice when assessing whether the standard has been breached.

The evolution of the minimum standard demonstrates that adjudicators with the power to interpret and apply customary rules can effectively push the development of the law, irrespective of the traditional methods governing the identification of custom. For the purpose of settling complex, fact-heavy disputes between investors and host state authorities, a flexible standard of justice is probably more helpful than a referral to the conduct and normative convictions of other states, even if it were possible

[59] *Windstream Energy LLC v Canada*, UNCITRAL, Award of 27 September 2016, para 362.
[60] *Mondev International Ltd v United States*, ICSID ARB(AF)/99/2, Award of 11 October 2002, para 118.
[61] NAFTA Free Trade Commission, 'Notes of Interpretation of Certain Chapter 11 Provisions', 31 July 2001.
[62] See Article 14.D.3 para (1), which does not reference Article 14.6, and Article 14.E.2 para (2), which does cover Article 14.6, only applies in the context of 'covered government contracts'.

to establish these elements at the required level of concretisation. At the same time, it is questionable whether the employment of a flexible standard of justice still qualifies as an application of customary international law or whether it instead approximates an assessment *ex aequo et bono*.

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