

THE FIRST 3VB AND QUEEN MARY LECTURE

“INSTEAD OF PRINCIPLES... SLOGANS”

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A INTRODUCTION

1. I start with the explanation that I owe you: what is the meaning of my title “*Instead of principles, slogans...*” It comes from an article written by the British/American theatre critic, Eric Bentley. The full quote is this: “*Ours is the age of substitutes: instead of language, we have jargon: instead of principles, slogans: and, instead of genuine ideas, bright ideas*”. He wrote that in 1952 but lived until 2020 (aged 103), when investment arbitration was in full swing. So by irrefutable logic, he must have intended those remarks, which he never retracted, to apply equally to investment treaty arbitration.
2. And so it is. The presentation of an investment treaty claim and defence follows a basic structure. First, we have the very long factual narrative. No discipline attends its length or relevance to anything in particular. It tells the whole story, in the estimation of the party composing it, and without much refinement it could be published in a journal of economic history, so long as that journal isn’t peer-reviewed. On the other hand, much discipline is applied to ensure that the story is told with perfect consistency by the legal team and the witnesses of fact, right down to the common typographical errors appearing in pleadings and witness statements.
3. Then we have the slogans. Transparency! From the claimant we’re told that the factual narrative set out in the first 200-pages of the memorial, demonstrates a paradigm case of lack of transparency. Cross-references to the odious examples of non-transparency at page 157 of the factual narrative are helpfully provided; but regrettably, nothing at all can be said about the threshold for liability for a lack of transparency. So you can imagine the relief, on the part of the tribunal, when its told that no such inquiry is necessary in this case, because the lack of transparency is so flagrant that it would satisfy any of the tests that have never

been articulated. In any event, if Justice Potter Stewart of the US Supreme Court was able to identify hard-core pornography in 1964 on the basis of --“*I know it when I see it*” – the tribunal should have no qualms in awarding several hundred million dollars in compensation, armed with the same analytical device.

4. From the respondent’s side, there are different slogans, but they’re shouted with the same deafening rigour. The sovereign right to regulate! This apparently unlocks every secret of state responsibility. Imagine if you just forked out several hundred pounds for a new edition of Chitty on Contracts, and you discover that it just repeats the phrase “*pacta sunt servanda*” thousands of times across the two volumes, as if it were guest-edited by Jack Nicholson’s character in the “*Shining*”. I would suggest to you that, (a) you would not be impressed, and (b), you might not find a satisfactory answer to every problem of contract law, despite the foundational importance of “*pacta sunt servanda*” to it.
5. The slogans are different but they share the same level of sophistication. And they also share a stock of rhetorical phrases to back them up: “It is generally accepted in the jurisprudence that...” “Nowhere in the treaty does it say that...” “It is beyond doubt that...”
6. I regret to say that I find all this to be a sorry state of affairs. I’m not going to dwell on it for very long; the purpose of this lecture is to sketch a way forward. But I think we need to have the honesty and the courage to say that the development of a coherent corpus of investment law by tribunals has not been a roaring success. Imagine a state official planning the reform of a subsidy program, who wants to know, with some degree of certainty, whether it will pass scrutiny under the fair and equitable standard of treatment. Imagine an investor, who wants to know whether to accept a settlement offer by the state for prejudice caused to the investment. Those questions simply cannot be answered to anyone’s satisfaction at the moment, due to the indeterminacy of investment law, and the primordial importance of the particular composition of any tribunal called upon to decide the case.
7. Much is made of the prospects of a *jurisprudence constante*, but if the first precedent in the series contained no real analysis of the problem, and the next precedents in the series simply invoke the authority of the first, then what you’re left with is the consistent application of an unprincipled approach to that problem.

8. That is the short and destructive part of the lecture; I now move onto the long and constructive part. You might think that I painted an unrealistically bleak picture of investment law, to then present myself as the white knight coming to its rescue. Three points in response. **First**, if it is a bleak state of affairs, then to some extent I'm pointing the finger at myself: I've been an arbitrator now in more than 50 investment treaty cases. **Second**, I don't think the picture I paint is unrealistically bleak. The number of times in tribunal deliberations I've heard arbitrators talk about their gut feelings is staggering. I've sat in far more commercial arbitrations than in investment treaty cases, and yet in those deliberations I've rarely had the nightmare vision of sitting under a palm tree trying to dispense justice. **Third**, there is nothing original in what I am about to say. It all can be traced back to Aristotle. So far from being a white knight, I'm really just an impostor.
9. I'll start my constructive remarks with a quote from the person who was first to arrive on our doorstep with gifts, and offers to babysit, when our first child was born in Cambridge. That was James Crawford. If you knew James a little then you would realise that the babysitting offer had to be construed as availability between two and six in the morning when he would otherwise be answering his emails, but you would also know that the sentiment was pure and genuine. I would like to dedicate this lecture to his memory.
10. James Crawford wrote the following in 2015:

When my students ask me 'how did I become an international lawyer', there is a short answer. You become a [domestic] lawyer first. Many people are still under the illusion that it is possible to be an international lawyer without being a [domestic] lawyer. I think that's wrong, and I've dedicated my career to trying to show it is wrong.

[James Crawford, 'Deference or Difference? The Relationship Between English and International Courts and Tribunals', in Stephen Moriarty (ed), *The Commercial Bar Association (COMBAR) 1989–2014: Celebrating the First 25 Years* (Hart 2016).]
11. In these words of wisdom lie the answers to the problems of incoherency, lack of sophistication and indeterminacy that plague international investment law. The answer, in other words, is to look for inspiration in the methods and experience of domestic law; to be a domestic lawyer first. For every contentious legal issue arising in an investment case, there is a close analogy in domestic law. And by tapping into the vast intellectual resources that have accumulated in resolving domestic law problems, the international investment lawyer can dispense with gut feelings as a reliable guide.

12. So with James Crawford's words in mind, I am going to structure my remaining thoughts around the following three propositions.
13. **First**, before seeking inspiration from comparative law, before transplanting anything, we must define the fundamental attributes of an investment treaty claim by reference both to the practice and the institutional framework. I will define the fundamental attributes of an investment treaty claim as the pursuit of a private remedy (compensatory damages) for prejudice to private interests (assets constituting an investment) caused by a wrong committed by a public authority.
14. **Second.** A definition of the fundamental attributes of an investment treaty claim is obviously not sufficient. We also need to have a moral or instrumental justification for shifting losses from foreign investors to a state's taxpayers. In other words, we need to have a theory for why we are doing what we are doing. My second proposition is that investment treaty arbitration is an instance of corrective justice.
15. **Third**, it follows from the foregoing conclusions that the closest domestic law analogy to an investment treaty claim is a tort action against a public authority, which also rests upon the idea of corrective justice. A look at comparative practice in this respect, shows that the liability of the public authority is based on fault. My third proposition is that investment protection obligations give rise to fault-based liability.
16. In the final part of the lecture, I want to demonstrate how these three propositions can provide solutions to some of the controversies in investment law. I will address the question of when the cause of action for breach of the treaty is complete, the elements of the FET standard, the scope of the umbrella clause, the role of the doctrine of legitimate expectations and the distinction between lawful and unlawful expropriation.

B FIRST PROPOSITION

17. I start with my first proposition and observe at the outset that we now have the data. The practice of investment treaty arbitration has been revealed in hundreds of awards. The institutional framework for investment treaty arbitration has not undergone major revisions since the first investment treaties. It is possible that major revisions are on the horizon: for instance, the Comprehensive Economic and Trade Agreement between the EU and Canada, when it is fully implemented, will replace ad hoc tribunals with a permanent court. But I am

here to make sense of what we have, rather than suggest a reform agenda. So what do we know from the extensive practice of investment treaty arbitration and the institutional framework that supports it?

18. In the overwhelming majority of cases the remedy sought is compensatory damages. The old adage from the era of diplomatic protection that restitution-in-kind is the primary remedy has been emphatically rejected by this practice. And the fact that declaratory relief is the most common remedy in state-to-state disputes has not been replicated in a situation where non-state actors are invoking the international responsibility of states.
19. I would suggest that this practice was inevitable given the basic architecture of an investment treaty:
 - 19.1. Standing to pursue an investment treaty claim depends upon having made a covered investment. Private commercial interests are thus at the core of the claimant's concerns, rather than an abstract interest in good governance or good international relations.
 - 19.2. Investment arbitration adopts the same procedural mechanism as commercial arbitration, which is also concerned with private commercial interests.
 - 19.3. That procedural mechanism envisages that an ad hoc tribunal is created with a specific mandate to resolve the dispute submitted to it. The mandate ends when a final decision is rendered. A tribunal cannot supervise forward-looking remedies once an award has been rendered. A tribunal's remedial powers are also conditioned by what can realistically be enforced, either within the host state, or in another jurisdiction under the framework of the New York Convention or the ICSID Convention. These considerations point to damages as the most viable remedy (indeed Article 54 of the ICSID Convention says expressly that other State parties are only obliged to enforce the pecuniary obligations in any ICSID award).
20. So I return to our working definition of an investment treaty claim as involving the pursuit of a private remedy (compensatory damages) for prejudice to private law interests (assets constituting an investment) in relation to a wrong committed by a public authority. The closest analogy in domestic law is a tort claim against a public authority for damage to property. Again, this conclusion is unremarkable if we recall that in the first half of the

twentieth century, the term used to describe international responsibility for injuries to aliens was “delictual responsibility” or “international civil responsibility”.

21. Here are two observations that immediately follow from this characterization of an investment treaty claim.
22. **First**, the burgeoning academic literature that characterises investment treaty arbitration as species of global administrative law or public law needs to be treated with caution. To put it bluntly, it was a nice idea, but it doesn’t fit the practice or the institutional framework, and therefore has precious little explanatory power on how actual cases should be decided. The remedies in investment treaty arbitration do not follow a public law model: they are not directive; they are compensatory. The primary function of public law remedies is to prevent wrongs from being done or from continuing; they are most often in the form of orders to compel a state official or state organ to do what should be done or refrain from doing what ought not to be done. The public law arsenal includes mandatory orders, prohibitory orders, quashing orders, substitutionary orders, declarations and recommendations.
23. The structure of investment arbitration, like private law litigation, is backward looking: the tribunal has to account for a relevant past event, adjudge whether it is a breach of a legal obligation, and, if it is, make an order for compensation as between the claimant and respondent.
24. Over and above the remedial question, investment treaty arbitration is not a mechanism that is apt to provide access to justice to a wide circle of litigants who are impacted by state measures according to the less stringent requirements for standing in public law. The fact that the litigants have to fund the work of the tribunal as well as the costs of their own representation is a significant barrier to wide participation in the process. And the procedural powers of an arbitral tribunal are too limited to intervene in matters of general public interest: necessary third parties cannot be compelled to participate; interested third parties are hampered from participating; the broad investigatory powers typically conferred to judges of administrative courts at least in continental systems are completely absent; and related proceedings brought by other interested parties cannot generally be consolidated.
25. The **second** thing to take away from this working definition of an investment treaty claim is that we have to be much more vigilant in using public law concepts, like legitimate expectations, to justify a state’s obligation to pay compensation. I’ll return to this at the end

but here is a preview. The concept of legitimate expectations finds no express mention in investment treaties; nor is it part of customary international law as confirmed by the ICJ in the case between Bolivia and Chile. And yet it is the most common basis for condemning a state to pay damages in investment treaty arbitration. The only legitimate basis for relying upon this concept is that it is a general principle of law recognized by the major legal systems of the world. So if we are going to rely upon it, then we have to be sensitive to how it is actually applied by other legal systems. My complaint is that it has been distorted beyond recognition by arbitrators, in part because it is taken out of its remedial context in public law. More about that later.

C SECOND PROPOSITION

26. So I turn to my second proposition. Now that we have a working definition of an investment claim that fits the practice and the institutional framework, what principle can justify imposing a liability to pay damages in any given case?
27. I hope we can agree on the starting point which is that there is no moral argument that could justify an obligation of universal compensation; in other words, to compensate every person for every loss no matter how it occurred. Losses do not disappear. They are shifted. When a state compensates a foreign investor, the losses are shifted to the state's taxpayers.
28. So we need a moral argument to justify the shifting of losses in this situation. The good news is that we don't have to reinvent the wheel. The principal contenders are corrective justice and distributive justice, and these theories have been debated for centuries in relation to tort law.
29. A corrective justice claim is grounded in an individual interaction between a particular claimant and a particular respondent. The premise is that each party has an equal right to a negative freedom not to have its existing stock of resources interfered with by others. If the respondent infringes the claimant's equal right to that negative freedom, then the claimant has a corrective justice claim against the respondent (and no one else) for reparation.
30. A distributive justice claim is based upon a person's status as a member of a political community. The premise is that each person in that community has an equal right to a positive freedom to have access to the resources necessary to live a dignified life. The criterion of equality requires that all the resources in the community must be distributed

among its members in proportion to their relative ranking under some criterion such as merit or need. All persons who have too little in accordance with that criterion, have a distributive justice claim against all those who have too much. The selection of a distributive criterion is quintessentially a political question.

31. That brief sketch is hopelessly simplistic but will suffice to demonstrate that corrective justice is the only viable justification for a duty to compensate in investment treaty arbitration. An ad hoc international tribunal would never have access to the information required to do distributive justice. You have to take stock of all the resources available in a community; apply the distributive criterion to all qualifying persons in that community; and then make concurrent assessments against all those who have too much, and disbursements to all those who have too little. This is the essence of a no-fault compensation scheme for road traffic accidents, for example. By contrast, the relative wealth or division of resources among the parties to an individual interaction is irrelevant to corrective justice.
32. For these reasons, it is generally accepted that courts and tribunals are better equipped to deal with claims of corrective justice; indeed, third party adjudication is essential to corrective justice because, in treating the parties as equals, each is precluded from unilaterally determining the consequences of their normative relationship. The court must declare the meaning of corrective justice in the context of the specific dispute.
33. By contrast, only a legislature or an administrative agency would have the competence and access to information required to select a distributive criterion to promote a particular collective goal, and then to administer that distributive justice scheme. And as this is a political decision, it is important that the institution in question is accountable to the community for that choice. Again by contrast, no extrinsic purpose or goal intrudes upon a corrective justice claim: we are interested solely in the normative correlativity of doing and suffering as each party pursues its own goal.
34. So the interim conclusion is that the moral justification for shifting losses from a foreign investor to a state in investment treaty arbitration is corrective justice. The interaction between an investor and the host state engages the Kantian notion of practical reason: each actor must treat the other's proprietary interests in a manner that does not violate their formal equality as free wills. The freedom of one agent must be capable of coexisting with the freedom of another. If that formal equality is violated, then the secondary obligation of

the state to pay damages to the investor for the breach of an investment protection obligation is justified as a claim of corrective justice.

35. This is important because, once we agree on why we are doing what we are doing, we are then in a position to ask the right questions. Experience without theory is blind.
36. And again, the work has already been done for us. A leading philosopher on corrective justice formulated the questions as follows:

First, corrective justice requires an analysis of what is to count as a loss. There is an important difference between being harmed and not being benefited by the actions of others. **Secondly**, it requires an account of what makes a loss wrongful, for the duty to repair under corrective justice is restricted to wrongful losses. **Thirdly**, it requires a theory of responsibility, for the duty to make repair under corrective justice falls only to those who are responsible for the losses for which repair is sought.

[Jules Coleman, 'The Practice of Corrective Justice' in David Owen (ed), *Philosophical Foundations of Tort Law* (Oxford University Press 1995).]

37. Those are the basic questions that tort law seeks to answer. And they also need to be answered by investment law.
38. I am going to focus on the second question, which is what makes a loss wrongful. This is the most impoverished part of the analysis in investment treaty arbitration. Why? Because we would be too quick to give the following answer. What makes a loss wrongful is that it was caused by a breach of an investment protection obligation. All that is left to do, then, is interpret the text of that obligation, and apply it.
39. That might be an acceptable answer if the investment treaty were a commercial contract. But it is not. It does not establish a series of bilateral legal relations between parties that are privity to a commercial bargain. Investors are not parties to the treaty at all. An investment treaty creates an independent regime of delictual responsibility for the abuse of sovereign power. It also creates a new cause of action for a limited class of persons – foreign investors – to invoke that responsibility. In this respect an investment treaty claim resembles the tort of breach of statutory duty: certain standards of protection are fixed in a statute for a class of persons, who are also conferred the right to enforce those standards by a cause of action in tort.
40. So the ordinary meaning of language used to formulate the investment protection obligations is important. But so are the legal principles intrinsic to the liability regime created

by investment treaties. Either we debate these principles out in the open, and try to reach a consensus on them, or we leave it to arbitrators to contemplate their gut feelings under the shade of a palm tree.

41. Before I turn to my third proposition, a few words on another possibility that I have rejected by focusing on moral arguments such as corrective and distributive justice. It's wrong, in my view, to invoke an instrumentalist argument to justify shifting losses from foreign investors to a state's taxpayers. The idea that surfaces from time to time is that investment treaties are there to encourage investment and so expansive interpretations of the definition of an investment or the investment protection obligations can be justified on that basis. Such an argument is deeply flawed. **First**, it is tantamount to saying that the economic rationale of the treaty will be promoted if the particular investor wins or investors as a class win more generally. Dispute resolution is about doing justice in a particular case; it is not about stacking the cards in favour of one party based upon a consideration that is abstract to the specific interaction between the two specific litigants. To put the point another way: disputes must be resolved by the application of legal principles related to doing justice, and not the economic policy that motivated the states to sign up to an investment treaty in the first place. The **second** point is this. How can an ad hoc tribunal possibly adjudge that a decision in the particular dispute before it will enhance foreign investment flows into the host state? There is no empirical foundation for this leap of faith.
42. The mistake here is to rely upon considerations relevant to only one of the parties and external to the bilateral structure of the normative relationship created by the claimant's suffering of a wrong done by the respondent. In the investment context, the mistaken argument takes the form that liability would tend to promote foreign investment; in a domestic tort context, it is that liability would tend to promote the efficient allocation of resources. Investment law should look to neither of the litigants individually nor to the interests of the community as a whole; instead, it should fixate only upon the bipolar relationship of liability.

D THIRD PROPOSITION

43. My third proposition is that we need to look to comparative law on the circumstances in which a public authority can be liable in damages for a loss caused to a private party, to elucidate the conception of wrongdoing for investment treaty arbitration. And what we

discover very quickly when we take a look around is that fault is the essential touchstone of liability. There are a few narrow exceptions, like the French concept of *égalité devant les charges publiques*, or special liability regimes for losses caused by hazardous activities, but the overwhelming consensus in comparative law is that liability must be based on the fault of the state.

44. If the shifting of losses from foreign investors to taxpayers under an investment treaty can be justified as a claim of corrective justice; and corrective justice requires wrongdoing and therefore fault; and comparative law confirms that fault is a requirement to compel a public authority to compensate for a loss to a private party; then is there any reason for liability under an investment treaty to be anything but fault-based?
45. The answer is no. And I expect very few people would consciously support the idea that an investment treaty creates a regime of strict or absolute liability. But consciously or otherwise, some awards and academic positions rest upon a notion of strict liability, as we will see.
46. The best way to illustrate the difference between strict and fault-based liability in the context of a claim for damages against a public authority is by reference to EU law. You can see that I'm looking for trouble: I'm going to sing the virtues of EU law in a country that voted for Brexit, and before an audience whose primary contact with EU law is the decision in *Achmea*. But the reason that EU law is interesting in this respect is that the ECJ was put in a similar position to investment tribunals: a set of principles had to be developed from scratch to determine when the EU institutions should be liable in damages to private parties for the breach of EU law.
47. There are different tests for liability in damages under EU law depending on whether the decision-maker has a discretion or not. The relevant comparison for investment arbitration is the former because a state official or state organ always has a discretion from the perspective of investment law: the treaty establishes minimum standards of treatment but does not prescribe any concrete substantive rules for how a state should manage its economic affairs, unlike the EU legal order of course. The test developed by the ECJ is whether there has been a “*significantly flagrant violation of a superior rule of law for the protection of the individual*”. A superior rule of law for the protection of the individual includes legitimate expectations. But liability in damages does not follow simply from a breach of a legitimate expectation; it must be a “*significantly flagrant violation*”. Why? Because otherwise liability would be strict and not based on fault. The ECJ case law demonstrates that you cannot

simply take a ground for quashing an administrative decision, such as legitimate expectations, and then attach a damages remedy to it. In other words, a public law ground for challenging an administrative decision does not ipso facto supply the basis for compensatory damages. A further element is required to shift losses on the pretext of corrective justice and that is wrongdoing or fault: hence the additional requirement of a “*significantly flagrant violation*”.

48. I’ve avoided references to English law on this topic because unduly complex, and it puts the bar too high for a claim in damages against a public authority. But the idea of requiring more than a breach of a public law rule to justify the imposition of damages is even more emphatic under English law. Over at the Administrative Court you cannot obtain damages by relying on any public law ground, whether it be legitimate expectations, *Wednesbury* unreasonableness, or the like. English law doesn’t even attempt to supplement the public law ground with an element of fault to establish a cause of action in damages. Instead, you have to bring an entirely separate claim in tort; the most common action being in negligence.
49. It might also be instructive to compare investment law with human rights law. Most human rights by definition need to be protected by strict liability rules: the state cannot defend a claim of torture by saying that the torture was not deliberate, reckless or negligent. The test is simply whether the right has been interfered with; we’re not concerned by the quality of the interference. We’re not concerned, in other words, whether the state was at fault. But investment protection obligations are not human rights. A state unquestionably has the right to regulate its economy in a manner that causes losses to foreign investors. That does not per se violate the human dignity of anyone. It is only when the state has committed a wrong based on fault, that there is a justification for shifting those losses back to the state.
50. So to conclude my third proposition: each and every investment protection obligation creates a form of fault-based liability. Fault can be based on intention, negligence, recklessness, unconscionability and so on. But it cannot be ignored in adjudicating an investment treaty claim.

E THE THREE PROPOSITIONS APPLIED

51. Lawyers are practical people. Our vocation is to solve problems. You’ve been patient in listening to an abstract discussion of moral arguments and legal principles. Now I need to

earn the promised glass of champagne—the principal reason you’re here tonight—by trying to solve some problems. Five problems to be exact.

52. The **first** problem I want to address is the controversy over whether a claimant investor must have suffered a loss to complete the cause of action for breach of the treaty, as would be the case in a tort claim for negligence, for instance. It follows from what I have said about corrective justice that damage is absolutely a necessary element to the cause of action. That entails that the breach only occurs upon damage to the investment. That also means that standing to bring an investment treaty claim is reserved to claimants who have suffered a loss. This is not a forum for public interest type litigation. It follows that it is not permissible for a claimant to say that it’s seeking declaratory relief only and is thereby absolved from particularizing a loss. Damage is a constituent element of the cause of action. This may be relevant in the context of parallel proceedings if a claimant or its privy is seeking damages for breach of contract and for breach of the treaty. There is typically only one loss to be repaired in this situation, and if that is achieved in the contractual forum, then there is no treaty claim to pursue. If a treaty claim is pursued, then it should be dismissed as inadmissible, or stayed if the contractually-chosen forum has not yet rendered its decision.
53. The **second** problem relates to umbrella clauses. The jurisprudence is divided between the so-called “elevation theory” that says that contractual breaches are elevated to treaty breaches; and the “sovereign breach theory” that holds that only sovereign interference with the contract is actionable. The problem with the “elevation theory” is that it introduces a form of strict liability. Liability for breach of contract is strict: it’s no defence to say that the conduct in question was not intentional, was not negligent, and so on. If international responsibility under an investment treaty is parasitical upon a breach of contract, without any qualification, then it follows that such international responsibility is also strict. That does not fit the model of corrective justice.
54. The elevation theory is also plagued with other problems: as a tribunal you cannot selectively elevate the provisions of the contract relied upon by the claimant and enforce them through the umbrella clause without essentially rewriting the contractual bargain; often the actual parties to the contract are not the same parties before the investment tribunal; the contract may have its own dispute resolution provisions; the state as a subject of international law that entered into the treaty is not the same legal person as the executive organ that signed the contract. In contrast, the sovereign interference theory suffers from none of these problems and is consistent with a fault-based approach to liability. If a state uses its

sovereign powers to interfere with a contractual bargain, then fault is established because the state is stepping outside the contractual realm, to obtain an advantage that it could not secure within that realm. The equality of the parties to the contract is disrupted. International law needs to intervene.

55. The **third** problem is the scope of the FET standard. What elements are encompassed by the obligation to accord fair and equitable treatment? I can't, in the time available, elaborate a comprehensive restatement of the FET standard, but I can provide an example of what is not part of the FET standard and why. In my introduction I referred to "transparency" as one of the slogans applied to the lengthy factual narrative to compel a state to pay damages. If you accept my arguments about investment arbitration as an instance of corrective justice, and the centrality of fault to the justification for shifting losses from one party to another, then it is obvious that "transparency" cannot serve as a touchstone of liability. "Transparency", if it is not simply a slogan, is an aspect of good governance. But lack of transparency does not, in comparative law, translate into a ground for imposing liability in damages upon a state. How would causation to a particular loss, for example, ever be established?
56. Returning to the example of EU law, it will be recalled that damages liability can be imposed against the EU on the basis of a flagrant violation of a superior rule of law for the protection of the individual. But the ECJ has held in a number of cases, that the duty to give reasons, which might be said to be a more precise application of transparency, cannot serve as a superior rule of law for this purpose. You cannot, in other words, get damages for a failure to state reasons.
57. So the notion of "transparency", whatever it means, cannot be retained as an element of the FET standard. Does this go against the authority of the case law? Yes and no. Let us recall that the idea that transparency was somehow actionable in damages under the FET standard, was introduced by the tribunal in the *Metalclad* case by reliance on that term in another part of the NAFTA. That aspect of the award was annulled by the court in British Columbia. Subsequent tribunals seem to have been unperturbed by that development and have held by bare assertion that transparency is part of the FET standard. I tend to think that several awards that provide no justification for a proposition, do not add up to a compelling reason for deference.

58. The **fourth** problem relates to something that has a more secure lodging within the FET standard, and that is the doctrine of legitimate expectations. The difficulty is that it has become unhinged from comparative law and corrective justice. If the test is simply to ask whether the investor has a legitimate expectation, and then whether it has been breached, then the tribunal is effectively putting the investor in the same position, as if the expectation were grounded in a contract with the public authority in question.
59. We cannot erode the distinction between public law regulations and private law contracts in this way. The default position in respect of a public regulation is that it can be changed unilaterally at any time by the public authority that promulgated it. The default position for a private law contract is that it cannot be changed unilaterally by either party. This fundamental difference translates into an additional requirement for fixing the liability of a public authority for failing to respect a legitimate expectation in comparative law, and that requirement is fault. That means that the state's reasons for changing the regulatory regime must be part of the analysis.
60. How, then, is fault established for a breach of legitimate expectations in comparative law? As an example, let's go to EU law again in relation to changes of policy embodied in a regulation or directive. **First**, the claimant has to establish a legitimate expectation by reference to a course of conduct or assurance to the effect that the policy would not change. If the claimant can establish a legitimate expectation in this manner, then the *prima facie* label is attached to it because there is then a **second** stage, which is the balancing exercise to determine whether an overriding public interest should trump the legitimate expectation. The test applied at this second stage is described by some commentators as the "*significant imbalance test*", and by others as a test of proportionality. If the claimant prevails at this stage, then an administrative-type remedy would be available, which is typically the annulment of the offending regulatory provision or decision. In order to get to an award of damages, the claimant must overcome a **third** hurdle, which is that the breach of legitimate expectations is sufficiently serious to justify damages liability.
61. Many investment tribunals have dispensed with the second and third stages of the analysis undertaken by the ECJ, and thus have introduced a form of strict liability for changes to general economic policies. This is surprising, to say the least, because there are compelling arguments to justify a more invasive approach to judicial review by a permanent court at the apex of the European legal order, when compared with the ad hoc mechanism of investment treaty arbitration.

62. The **fifth** and final problem relates to that old chestnut, being the distinction between lawful and unlawful expropriations. It turns out that we can make sense of this by recognizing that an entitlement to compensation for a lawful expropriation is a necessary element of a distributive justice scheme, whereas a claim to damages for an unlawful expropriation is a corrective justice claim.
63. A state must have the power to expropriate private property to act in the collective interest. If it had to rely on a voluntary sale to acquire property that is deemed to be essential for a particular public project, then the owner of that property would be in a position to demand an excessive price for that property, and thus an undue share of the public benefit from the project would be transferred to the owner. But the distributive justice claim that justifies the expropriation of the private property for the greater public good is only sound if the owner is not singled out to shoulder the full costs of the redistribution of resources. Compensation must therefore be paid for the taking of the property. This is normally implemented by an administrative body that has access to information concerning all the owners of private property that are to be affected by the public project.
64. The typical provision on expropriation in an investment treaty sets out the requirements for the lawful exercise of the power to expropriate. If the power to expropriate is not exercised lawfully, then there is a breach of the treaty, and the investor has a corrective justice claim for damages. The tribunal does not, however, have the competence to fix the amount of compensation for a lawful expropriation. The amount of compensation for a lawful expropriation is elaborated in the context of a distributive justice scheme by a state agency with superior knowledge of the competing demands of the various interested parties. The tribunal must give deference to that determination. It can only intervene if the compensation is so inadequate that it amounts to an international wrong and thus generates a claim for corrective justice.

F CONCLUSION

65. It's time to conclude. I've argued that the normative practice of investment treaty arbitration most closely resembles a tort claim against a public authority in comparative law. I've also argued that the best moral justification for loss shifting between respondent and claimant for breach of an investment treaty is the same moral justification that provides the most

compelling justification for tort law. That justification is corrective justice. Corrective justice rests upon a concept of wrongdoing, and fault is central to it.

66. I've thus taken inspiration from the normative practice of private law, and the theoretical justification that supports it, to explicate investment treaty arbitration. Some critics will call this a pernicious privatization of a branch of public international law. But those critics will have to face up to a paradox, which is this. By conceptualizing investment law as a species of global administrative law or the like, by looking at investment law through the lens of public law, by integrating public law concepts into a framework for liability in damages, you're advocating for a more invasive review of action by public authorities, that produces results that would be rejected by every other legal system.
67. If investment law is about the public law ideal of good governance, then a review of administrative action based upon transparency is not so problematic, even if attaching a remedy of damages to it remains incoherent. If investment law is about corrective justice, then transparency can have no role to play because it focuses on only one of the parties—being the state—and does not link the doing and the suffering of injustice within a bipolar legal relationship. It cannot, in other words, feature as a ground of liability, because it does not connect the injustice and its rectification. There is no correlativity to both parties, which is essential to corrective justice.
68. We know enough about how investment treaty arbitration works by now to understand that it would make a terrible institution for promoting and safeguarding principles of good governance. It cannot realistically administer public law-type remedies in a timely fashion to intervene in an administrative process in the host state. A five-year arbitration costing more than 10 million dollars in legal fees, and generating thousands of pages of written pleadings, is not the right mechanism for quashing a decision of a public official and sending it back for reconsideration. It is arguably not the right mechanism for anything today as it drowns in its own excesses. But whereas sensible and realistic reforms from inside the system could save investment treaty arbitration from itself and make it fit for the purpose of doing corrective justice; you could not transform it into a viable supervisory jurisdiction for enforcing principles of good governance in the host state, without turning the tables and starting anew.
69. Other critics might say that if investment law is about corrective justice, then we ignore the instrumental goals underlying the treaties: typically, the promotion of foreign investment. I

should say that this goal may well be advanced by having a mechanism to decide investment disputes justly and fairly; my point is rather that this policy objective can have no role to play in the actual adjudication of a particular case. My reasons are similar to those I provided for excluding transparency from the liability calculus. But there's an additional reason to tread carefully here.

70. Take the problem of a change to the regulatory regime. Decisions imposing liability on a host state in this situation are often justified by reference to the instrumental goal of the treaty: the investor relied upon a regulatory framework designed to encourage investment and sunk its capital into a project; the investor should therefore be immune from the negative consequences of any change to that regulatory regime.
71. If the change to the regulatory framework was arbitrary or discriminatory, then there is a straightforward corrective justice claim for reparation. There would be fault on the part of the state in this situation. But where the change is otherwise unimpeachable, but liability is nonetheless imposed based upon the investor's expectation about the immutability of the original regulation, the effect is to impose strict liability on the state for regulatory change.
72. My final words belong to Marx; not the one with the beard but the one with the fake moustache. *"Those are my principles, and if you don't like them... well, I have others."*

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