Investment Law before Arbitration

I. Introduction

A broadly shared view among those engaged with investment law is that its key distinguishing feature is investor-State arbitration. Take the example of 'Investor-State Dispute Settlement Reform', the umbrella term for the current multilateral process of reform of international investment law.[1] Or the issues now discussed in multilateral fora, mostly relating to dispute settlement such as consistency of arbitral decisions, arbitral appointments, and the cost and duration of arbitral proceedings.[2] Indeed, even when multilateral debate is not explicitly directed at investor-State arbitration, the issues raised are driven and framed by reference to arbitral decisions.

Yet modern investment law has existed for at least as much time without arbitration as with it. The starting point of modern investment law is either the post-World War Two US Friendship, Commerce and Navigation (FCN) Treaties of the 1940s or the Germany-Pakistan Bilateral Investment Treaty (BIT) signed on 25 November 1959.[3] The age of investor-State arbitration, meanwhile, commenced either with the first treaty-based award in 1990, *Asian Agricultural Products Ltd v Sri Lanka* (*AAPL*),[4] or the 1999 award in *Azinian v Mexico*,[5] the first in the wave of decisions under the North American Free Trade Agreement setting modern assumptions about investment law. By those brackets, investment law 'before arbitration' existed for 30 years (if the Germany-Pakistan BIT and *AAPL* are the cut-off points) or even 50 years (if the FCN Treaties and *Azinian* are chosen instead). In short, pre-arbitration investment law

[1] UNCITRAL Working Group III: Investor-State Dispute Settlement Reform (2017 to present), https://uncitral.un.org/en/working_groups/3/investor-state (visited 1 September 2020).
[2] Ibid.
[3] Done at Bonn, 25 November 1959, entry into force 28 April 1962; 457 UNTS 23. But for evidence of earlier German investment treaties that did not enter into force see Braun, *Ausprägungen der Globalisierung: Der Investor als partielles Subjekt im Internationalen Investitionsrecht* (Berlin: Nomos, 2012) 56.
[4] *Asian Agricultural Products Ltd. (AAPL) v Sri Lanka*, ICSID Case no ARB/87/3, 27 June 1990, para 3.
[5] *Robert Azinian and ors v Mexico,* ICSID Case no ARB(AF)/97/2, Award, 1 November 1999.

constitutes an important stratum of practice in this field, particularly by contrast with the 20 years since 2000 shaped by arbitral decisions. Yet, it has played a comparatively limited role in contemporary scholarship.

What was investment law before arbitration about? What assumptions were driving the drafters of the first investment treaties? How did States expect investment law to operate? The paper addresses these questions by focusing on the perspective of the drafters of early British and German investment treaties. It examines archive materials of the Federal Republic of Germany (Germany) and the United Kingdom (UK) in the 1950-80s.[6] These materials are chosen for three reasons. First, Germany and the UK are bellwether States for generalizing about what investment law stood for before arbitration since the first BITs that set the standard for modern investment law were the European ones (even if post-War US FCN treaty practice provided their backdrop, and litigious US investors shaped modern assumptions about investment law around US treaties). Second, Germany and the UK were instrumental in key moments of development of modern investment law, as respectively the drafter of the first BIT and the home State of AAPL, the claimant in the first investor-State 'arbitration without privity'.[7] Both points make Germany and the UK useful case studies for approaches and assumptions of European (capital-exporting home)

[6] The focus is on negotiation files maintained by lead agencies, respectively the German Federal Ministry of Economic Affairs (*Bundeswirtschaftsministerium*, BMWi) and the UK Foreign & Commonwealth Office (FCO). For Germany, we reviewed many files from both the Bundesarchiv in Koblenz (where the BMWi files are kept), and the Political Archive of the Federal Foreign Office (*Auswärtiges Amt,* AA) in Berlin. The AA files also contain a substantial number of documents produced by the BMWi. The files examined extend up to the 1983 German negotiations with Panama. For the UK, FCO archives were examined until the 1981 negotiations with Malaysia. A limited number of files from HM Treasury were used as well to examine certain aspects of the negotiations in the 1970s and 80s on a multilateral investment treaty between the Arab League and the European Economic Community. The files may exclude discussions not referred to there and formally not listed as relating to investment treaties (such as general relations between States or internal deliberations of other agencies e.g. finance and justice ministries). Nevertheless, the files cover most negotiations in the early years of the programs. In both States, the lead agencies invited other departments to submit their views (e.g. the Bank of England offered comments in FCO 450/71, 74; FCO 69-958, 73), and a limited number of officials led drafting, coordination, and negotiation of the treaties in the two departments. Archives are cited in this article by reference to the number assigned to them by the UK FCO, Treasury (labelled 'T') or Inland Revenue (labelled 'IR') and the Political Archive (PA) of the German AA (referenced as PA AA). Copies of all archives are on file with the authors.
[7] Paulsson, 'Arbitration without Privity,' 10 *ICSID Review* 232 (1995), 236. A German lawyer, Heribert Golsong, a former General Counsel of the World Bank, was the counsel for AAPL, 'Heribert Golsong: 1927-2000' (2000) 17 (1) News from ICSID 7.

States regarding investment law. Moreover, while they are similar in important ways, the UK had the important interest of protecting investments in former colonies after decolonisation, whereas Germany did not. Third, the archives invite study and comparison not just because they are now accessible, unlike materials in other (particularly developing) countries, but also because early treaty making was often more contentious and time-consuming than the rush to sign BITs in the 1990s.[8] The files therefore include relevant foundational debates about the purpose of investment treaties.[9]

The paper does not address, except incidentally, the historical attitude to investor-State arbitration.[10] As one of us has argued elsewhere, arbitration was of limited importance to early British and German treaty drafters,[11] and we therefore focus on core aspects of the substance and scope of investment treaties. Even here, the aim is to use archival materials to provide a bird's-eye perspective on early investment law, so the paper does not seek to cover every provision in investment treaties or provide detailed exposition of the provisions covered. A final caveat is that the paper does not consider in detail the position of developing States' treaty counterparts (to the extent not reflected in the British and German materials), or other European States. The BITs of other European (home) States are in important respects similar, but assumptions of a 'European approach' may well need qualification by further research on distinct priorities adopted by Dutch, French, or Swiss negotiators.

The contribution is twofold. The first is historical: an explanation of what the (European) founders of modern investment law wanted it to be, and how that expectation compares with the current consensus. This fills a gap in historical scholarship, traditionally focused either on US treaty

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[8] Poulsen, Bounded Rationality and Economic Diplomacy: The Political Economy of Investment Treaties in Developing Countries (Cambridge University Press, 2015).

[9] For previous coverage, see Denza and Poulsen, 'The Euro-Arab Investment Treaty That Nearly Was' (2020) 69 *ICLQ* 267; Poulsen, 'Beyond Credible Commitments: (Investment) Treaties as Focal Points,' 64 *International Studies Quarterly* 26 (2019). For finer-grained examination of particular rules, see Pinchis-Paulsen, Fair and Equitable Treatment in International Trade and Investment Law: 1918-1956 (PhD dissertation, Kings College London, 2017) (copy on file); Ryk-Lakhman, The Protection of Foreign Investments in Armed Conflicts (PhD dissertation, University College London, 2019) (copy on file).

[10] See eg., St John, *The Rise of Investor-State Arbitration* (Oxford: Oxford University Press, 2017).

[11] Poulsen, above n 9.

practice,[12] or on earlier European investment law practice on multilateral treaties or diplomatic protection, also several layers removed from the creation of modern BITs.[13] The second contribution is to the contemporary debate about change in investment law, which focuses mainly on investor-State arbitration[14] and is, perhaps for that reason, sometimes rooted in inaccurate assumptions about what the regime was initially about. The main claim is that there is a significant difference between what the founders thought (substantive) investment law was about and the manner in which it is debated today, extending beyond mere mis- or over-interpretation of obligations to a complete change in assumptions about the role and relative importance of different building blocks of the investment treaty regime. Importantly, however, early drafters also carefully considered some of the most contentious issues emerging in modern investment law – including, perhaps surprisingly, treaty-shopping, shareholder protection, and the 'no greater rights' proviso.

The paper proceeds in four steps. The first part introduces different functions of investment law between the foundational years and contemporary practice, contrasting classic investment treaties, mainly focal points for diplomatic negotiations, with modern investment law, mainly a mechanism for expressing credible commitment shaped by dispute settlement (Section II). The rest of the paper demonstrates how these contrasting assumptions affect judgements on the importance of substantive rules: some rules were perceived as important mainly by early drafters (Section III), while others were accepted as important both by the original drafters and in contemporary practice (Section IV). We conclude by showing how the 'super-standard' in modern

[12] KJ Vandevelde, *The First Bilateral Investment Treaties: US Postwar Friendship, Commerce, and Navigation Treaties* (OUP 2017); Pinchis-Paulsen above n 9.

[13] Weiler, The Interpretation of International Investment Law: Equality, Discrimination and Minimum Standard of Treatment in Historical Context (Brill, 2013); Chernykh, 'The Gust of Wind: The Unknown Role of Sir Elihu Lauterpacht in the Drafting of the Abs-Shawcross Draft Convention' in Schill, Tams, and Hofmann (eds), *International Investment Law and History* (Edward Elgar, 2018); Ho, *State Responsibility for Breaches of Investment Contracts* (Cambridge University Press, 2018).

[14] E.g. Mbengue, 'Special Issue: Africa and the Reform of the International Investment Regime: An Introduction' (2017) 18 *JWIT* 371; Morosini and Badin, *Reconceptualizing International Investment Law from the Global South* (Cambridge University Press, 2017); Puig and Schaffer, 'Imperfect Alternatives: Institutional Choice and Reform of Investment Law' (2018) 112 *AJIL* 361; 'Special Issue: UNCITRAL and Investment Arbitration Reform: Matching Concerns with Solutions' (2020) 21 (2-3) *JWIT*; Alschner, 'The Impact of Investment Arbitration on Investment Treaty Design: Myth versus Reality' (2017) 42 *YJIL* 1; Behn and Langford, 'Managing Backlash: The Evolving Investment Treaty Arbitration?' (2018) 29 *EJIL* 1.

investment law – fair and equitable treatment – was practically ignored in early negotiations (Section V).

II. Risks and functions: then and now

What was investment law about when it first emerged? How does that conception compare to today's? Glossing over considerable complexity and variation, Table 1 provides a bird's-eye view: the core risks facing investors were different, and the main function and dispute resolution mechanism of investment treaties used to address those risks were different as well.

	Then	**Now**
Core risks for foreign investors	Direct expropriation Nationality-based discrimination Transfer restrictions	Regulatory instability
Core function of investment treaties	Focal points operating through informal diplomacy	Credible commitments operating through ISDS

Table 1. Investment law then and now: a bird's-eye view

When early investment treaty models were developed during the Cold War, foreign firms in developing countries faced three main risks: nationality-based discrimination, restrictions on transfer of capital, and lack of compensation for direct expropriation. These risks are still present in some contexts, but they are no longer as prominent.

Discrimination against foreign investors and investments was a considerable risk during the post-colonial era, as a growing number of developing countries sought to establish domestic industrial sectors and take control of their economies.[15] Since the 1980s, however, many

[15] CF Bergsten, 'Coming Investment Wars?' (1974) 53(1) *Foreign Affairs* 135, 136–142.

developing countries have become much more welcoming towards foreign investment. While some foreign firms still suffer discrimination - particularly pre-establishment, for instance, via screening rules - *in general* foreign investors are likely to receive treatment similar to local investors in the post-establishment phase [16] Nationality-based discrimination still occurs also post-establishment, but it is not nearly as pervasive today as when the investment treaty regime emerged. In fact, it is not uncommon for foreign firms to receive better treatment than locals, such as when receiving fiscal or regulatory incentives or favourable contractual terms. [17] By 2020, only nine investment treaty awards had found breaches of national treatment provisions.[18]

Similarly, after World War II, the majority of countries imposed restrictions on the outward transfer of capital, while sometimes also calling for restrictions on inflow of foreign capital.[19] During the 1980s, however, the idea of unrestricted capital flows began to take greater hold and States largely refrained from introducing limits on capital transfer. Restrictions on the ability to transfer capital do persist in some jurisdictions, but they are incomparable to the time when investment treaties emerged. Transfer risks are not a core issue in investor-State arbitration either, with only four awards finding breaches of transfer provisions to date.[20]

Finally, consider the case of uncompensated direct expropriation. The 1960-70s were characterised by frequent, large-scale nationalisations by newly-independent states pursuing

[16] Aisbett, McAusland, and Poulsen, 'Relative Treatment of Foreign Firms in Developing Countries: Firm-Level Evidence.' working paper (2020) (on file). The British and German treaties that this paper examines are limited to the post-establishment phase.
[17] E.g. Blomström and Kokko, 'The economics of foreign direct investment incentives,' *NBER Working Paper* 948 (2003); Tavares-Lehmann, Toledano, Johnson, and Sachs (eds.) *Rethinking Investment Incentives: Trends and Policy Options* (Columbia University Press, 2016).
[18] All statistics on claims referenced in this article are from UNCTAD's Investment Dispute Settlement Navigator on 24 October 2020.
[19] Abdelal, *Capital rules: the construction of global finance* (Harvard University Press 2007); Helleiner, *States and the Reemergence of Global Finance: from Bretton Woods to the 1990s* (Cornell University Press 1996); Waibel, 'BIT by BIT: The Silent Liberalization of the Capital Account' in Binder, Kriebaum, Reinisch, and Wittich (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009).
[20] E.g. *Continental Casualty Company v Argentina,* ICSID Case no ARB/03/9, Decision on the Application for Partial Annulments, 16 September 2011, Section II.C.(c); *Karkey v Pakistan*, ICSID Case No ARB/13/1, Award, 22 August 2017, para 655.

policies of economic nationalism, particularly in extractive industries.[21] Today, by contrast, uncompensated direct expropriation of foreign investments is far less prevalent.[22] Not surprisingly, this type of expropriation does feature in modern investor-State arbitration, as direct takings are exactly the type of major events where investors are most likely to request arbitration. However, by 2020, fewer than 50 awards had found breaches of direct expropriation provisions, half of which were in claims against two countries only (Russia and Venezuela).

With the reduction in the risks of nationality-based discrimination, capital transfer restrictions, and uncompensated direct expropriation, the most prevalent remaining political risk for foreign investors today is regulatory instability.[23] This is also a core challenge facing modern investment treaty tribunals.[24] Just as the reduction of tariffs has left non-tariff barriers as the principal concern in the trade regime, the reduction of the core investment risks during the Cold War has left adverse regulatory change as the principal concern in the investment regime. This has made provisions on indirect expropriation and fair and equitable treatment crucial in investor-State arbitration, but particularly the latter was seen as unimportant in early treaty practice, as we show below.

It is not just the substantive risks for foreign investors that have changed, but also the basic function of investment treaties as instruments of investment diplomacy.[25] In modern debates about investment treaties, it is often argued that their main – or indeed only – value for investor-state relations derives from the possibility of formal investor-State arbitration. Yet, as mentioned above, early investment treaties did not include this mechanism. This was not because the

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[21] E.g. Bonnitcha, Poulsen, and Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford University Press, 2017) 8; Schachter, 'Compensation for Expropriation' (1984) 78 *AJIL* 121.

[22] E.g. Guriev, Kolotilin, Sonin, 'Determinants of Nationalization in the Oil Sector: A Theory and Evidence from Panel Data.' 27 *Journal of Law, Economics, & Organization* 301 (2011).

[23] See e.g. MIGA, *World Investment and Political Risk* (World Bank: MIGA, 2011), Figure 1.8; MIGA, *World Investment and Political Risk* (World Bank: MIGA, 2013) Figure 1.9; Kusek and Silva, 'What investors want: Perceptions and experiences of multinational corporations in developing countries,' *World Bank Policy Research WP 8386* (2018)*,* Figure 23.

[24] See discussions in e.g. Ortino, *The Origin and Evolution of Investment Treaty Standards: Stability, Value, and Reasonableness* (Oxford University Press, 2020), ch. 1.

[25] This section builds on Poulsen, above n 9.

mechanism had not been invented at the time, but rather because the core purpose of the treaties was not centred around formal adjudication. Instead, the treaties' substantive obligations were intended to operate as standard-setting 'focal points' in two ways.[26] The first was to contribute to general rules on investment protection. With custom on expropriation unsettled, a large stock of bilateral agreements could help make Western standards focal as the 'correct' customary legal standard.[27] Although not phrased in terms of focal points, this function of early investment treaties is also a common theme in modern commentary.[28] Alongside this, an equally important, if now underappreciated, aim of the treaties was to act as focal points in negotiations over specific investment disputes, particularly for home state officials involved in such negotiations on behalf of foreign firms as part of informal diplomatic engagement. Even the United Kingdom, which included investor-State arbitration in its first BIT model in 1971, did not regard the mechanism as crucial, since the treaties were mainly expected to be invoked in informal deliberations with partner states by UK officials, particularly embassy staff.[29] Given this function of fostering dispute settlement outside formalised institutions, the substantive provisions of investment treaties were crucial in early drafting, while arbitration clauses were secondary.[30]

Both the socio-economic context for foreign investment and the underlying assumptions about the purpose of treaty-making in the investment regime have thereby changed radically since the emergence of investment treaties. This is important background to understanding which

[26] Ibid. The idea that a core – if not the main – function of law, including (international) law, is to act as a coordinating focal point among parties that want to avoid conflict, is not a new one. See generally Richard McAdams, *The Expressive Powers of Law: Theories and Limits* (Harvard University Press, 2015).
[27] See Dolzer, 'New Foundations of the Law of Expropriation of Alien Property' (1981) 75 AJIL 553, 565-8; generally sources in Poulsen above n 9.
[28] See e.g. Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (Portland: Hart, 2009); Schill, *The Multilateralization of International Investment Law* (Cambridge University Press, 2009).
[29] Poulsen above n 9.
[30] For discussion of emergence of investor-state arbitration, see St John, *The Rise of Investor-State Arbitration* (Oxford: Oxford University Press, 2017); St John, 'The Creation of Investor-State Arbitration' in Ortino and Schultz, eds. *Oxford Handbook of International Arbitration* (Oxford: Oxford University Press, 2020).

clauses and issues were crucial in early investment treaty drafting, which clauses were secondary, and how this compares to today.

III. Elements important only in early practice

Perhaps the most striking aspect of early travaux préparatoires is how much time early investment treaty negotiations spent on questions in investment law that are rarely discussed today. Two stand out: national treatment and free transfers.

Contrasting with today, the national treatment clause was highly politicised and controversial during early drafting. To the extent that (post-establishment) national treatment issues have been controversial in investor-State arbitration (such as the correct comparator for the discrimination analysis,[31] or the ability to consider public interest criteria in according differential treatment to investments),[32] early drafting was largely silent on these issues.[33] Yet, this was mostly because of the depth of disagreement about whether to grant national treatment at all, and, in some cases, on the circumstances in which the obligation would be provided. In the case of the UK, drafters found the clause important but realised it was highly controversial, as it clearly contradicted post-colonial states' objectives of promoting domestic production. It was in some respects the most controversial aspect of the UK model[34] and therefore had to be dropped in some early negotiations.[35] Germany took a more hawkish position, perhaps because a lack of colonial links

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[31] See, eg, *Apotex Holdings Inc v USA* (ICSID Case No ARB(AF)/12/1), Award, 25 August 2014 [8.15]. Generally on discrimination issues, see *Quiborax SA and or v Bolivia,* ICSID Case no ARB/06/2, Award, 16 September 2015 [247].
[32] See, eg, A Mitchell, D Heaton and C Henckels, Non-Discrimination and the Role of Regulatory Purpose in International Trade and Investment Law (Edward Elgar 2016).
[33] There are some exceptions: for example, the 1979 Germany-Oman BIT provides that '[m]easures that have to be taken for reasons of public security, public health or morality shall not be deemed 'treatment less favorable" for purposes of national treatment, albeit with no discussion of the rationale; PA AA 121344.
[34] FCO 59/1195; FCO 59/630 3883; FCO 59/1294. Indeed, with Korea, the UK ultimately agreed on a rule that explicitly reserved the right to treat foreigners less favourably than nationals, given Korea's desire to move away from its earlier practice of granting more favourable treatment to US investors: FCO 59/1293; UK-Korea BIT, Article 3(2).
[35] E.g. with Indonesia: FCO 59/1292.

with partner states left it with fewer commercial and diplomatic networks. Bonn saw the national treatment clause as indispensable[36] and was prepared to terminate negotiations when the partner state was unwilling to include the clause.[37] In negotiations with the Philippines, for instance, mere MFN treatment was deemed insufficient because it would leave open the possibility for the other state to adopt new laws that changed the treatment of German investments.[38] Still, despite its strength of feeling on the issue, Germany accepted specific exceptions to national treatment with Singapore,[39] agreed to Oman's exceptions in relation to tax because 'there is strong interest in signing an IIA with an Arab country',[40] and secured agreement with Benin by proposing that the obligation would apply only where foreign investments had 50% or greater national ownership.[41] In all cases, considerable time and effort were spent on exchanging drafts on what was one of the most controversial aspects of early investment treaties, but has been unimportant in modern investment law to date.

Free transfers clauses are rarely invoked today either, but these provisions were crucial in early investment treaty negotiations given the constraints on capital transfers until the 1980s. There were significant differences in the British and German approaches. German businesses regarded them as critical. When Kenya proposed significant changes regarding the provision governing transfer of capital, for instance, Germany responded with 'minimum transfer clauses' (instead of 'free transfer clauses') for capital and associated returns as a compromise, since transparency and foreseeability for potential investors at the time of investment had to be the indispensable

[36] PA AA 403-413.35 PHI, Memo on the progress of negotiations. Also PA AA, 422, 41335, GRO, 1978-80,. Materials on the German British Consultations about investment protection on 14/15 July 1980 in London, Memo on the Consultations, Bonn, 24.07.1980.
[37] PA AA, 422, 41335, GRO, 1978-80.
[38] PA AA 403-413.35.
[39] Treaty between Germany and Singapore Concerning the Promotion and Reciprocal Protection of Investments, done at Singapore, 3 October 1973, entry into force 1 October 1975; 1008 UNTS 229, Article 3.
[40] PA AA Zwischenarchiv 121344.
[41] PA AA Zwischenarchiv 121312. Benin initially rejected the proposal but later changed course: see Treaty between Germany and Benin Concerning the Promotion and Reciprocal Protection of Capital Investment, done at Cotonou, 29 June 1978, entry into force 18 July 1985; 1459 UNTS 284, Article 2.

minimum.[42] In British practice, the clause also had some importance but Whitehall was constrained by its own capital restrictions. The UK proposed the clause to Caribbean governments, for instance, but with a proviso allowing restrictions on free transfer 'in exceptional financial or economic circumstances'. Caribbean governments objected, but on the grounds that their own economic circumstances were already exceptional and would remain so indefinitely. In response, the UK protested that permitting restrictions under any circumstances would 'leave the Article without any real content', and that British investors 'would be unlikely to put capital into the Caribbean countries without some reasonable assurance regarding the transferability of their capital and the returns from it'.[43] Despite this support for the free transfers clause, the UK suggested elsewhere that even discriminatory restrictions could be imposed under its 'exceptional circumstances' proviso against investors from specific countries, 'provided that this is not done for an irrelevant motive'.[44] The British case is discussed in more detail below, as the UK's own transfer restrictions at the time raised concerns in Whitehall that resonate with modern debates about 'no greater rights'. But these examples suffice to show how the historical moment in which investment law emerged prompted extensive deliberations on issues that are largely, though not completely, absent from recent investment policy debates and arbitral practice.

IV. Elements of continuous importance

Suffice to say, not everything has changed. In fact, early British and German drafters displayed considerable foresight on critical issues in modern investment law. We focus on (A) the scope of treaty protection, including the possibility of treaty-shopping and the protection of shareholders; (B) expropriation, including its definition and compensation; and (C) questions of reciprocity of

[42] PA AA Zwischenarchiv 121333. Germany also rejected requests from Bangladesh and Nepal to make transfers 'subject to existing national laws', to avoid the clause losing all value; PA AA 121312; PA AA 121341.
[43] FCO 59/1200.
[44] FCO 69/662.

investment treaties and the relationship between international and domestic rules, including discussions around 'no greater rights'.

A. Scope of Investment Treaties

The question of the scope of investment treaties has, not surprisingly, been important in both eras, as it frames the gateway through which treaty protections are invoked – whether in diplomatic resolution or formal adjudication, and regardless of the nature of the risk being addressed. Early considerations on some of these issues continue to resonate today. Particularly interesting in light of current debates are questions relating to forum-shopping and the protection of shareholders.[45]

British and German officials, as well as some of their counterparts, appreciated the possibility of forum-shopping in early negotiations, although they appeared to differ on its likelihood and adverse consequences. In the UK, officials were concerned that a British investor could incorporate in a BIT partner state, 'round-trip' an investment back into the UK, and rely on the free transfers clause to repatriate returns, side-stepping UK exchange control legislation.[46] One proposed solution at the time was to narrow the definition of 'investor', limiting BIT protections to investors 'ordinarily resident in or carrying on business in' their claimed home state.[47] Concerns were also raised that the UK should not 'go out of its way to facilitate the process of companies routing overseas investments through subsidiaries in third countries.'[48] In the draft multilateral

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[45] For current debates on shareholder protection, see, eg, D Gaukrodger, 'Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law' (OECD Working Papers on International Investment, 2014/02).

[46] Although not focused on transfer restrictions, this has materialised in recent years with law firms advising UK utility firms to re-incorporate so as to achieve protection under British investment treaties. 'Utilities advised to look offshore in face of Labour Threat,' *Financial Times,* February 28, 2018; 'Power giants National Grid and SSE go offshore to escape Jeremy Corbyn's clutches,' *The Times.* November 24, 2019; Clifford Chance, *UK Nationalisation: The Law and the Cost – 2019 Update.* July 2019 ("These additional protections afforded by investment treaties produce the surprising result that, for example, a Chinese investor in a UK water company which is nationalised at below [fair market value] could have a stronger claim, substantively and procedurally, than a British pension fund in the same position ….", p12.

[47] FCO 69/958.

[48] Ibid.

investment treaty negotiated in the late 1970s between the European Economic Community and the Arab League – where German and UK officials were the lead European drafters[49] – the Arab League also expressed concerns over reliance on BITs by investors from third States.[50] After initial reluctance,[51] the UK accepted a Germany-proposed exception to the definition of 'company', which excluded companies controlled by nationals of third states without 'normal economic relations'.[52] In other negotiations, though, the UK showed less concern for the possibility of treaty-shopping. Malaysia, for instance, questioned the territorial extension of the proposed UK treaty to Hong Kong, since this would permit greater Chinese influence in their economies (via nominally British investments).[53] The UK was willing to give way on the issue, however, noting pragmatically that Hong Kong's businesses were sufficiently 'smooth operators' to incorporate in a European country that already had a BIT with Malaysia.[54] Germany's partners also sometimes foresaw problems of corporate restructuring. When Swaziland, for instance, raised concerns about protections to companies with only tenuous connections to its claimed home state, Germany agreed that the BIT was intended only to protect companies with longer-term operations in their home states, and added that establishment of a 'front' company to benefit from the treaty could not be excluded but, 'based on experience, such cases are rare'.[55]

Notably, the protection of shareholders also received some attention. In relation to minority shareholders, Indonesia disputed the UK's proposed clause that granted the right to claim for expropriation of assets held by an Indonesian company in which the UK-registered claimant owned shares. The UK pressed the clause on the grounds that foreign investment in Indonesia

[49] Denza and Poulsen 2020.
[50] FCO 98/2270. The Arab side reportedly said that they had specific countries in mind (FCO 98/2270), but the countries were not indicated.
[51] FCO 69/958.
[52] FCO 98/2270.
[53] Singapore and Indonesia had similar concerns; FCO 59/630, FCO 59/1190, FCO 59/1194, FCO 59/1196.
[54] FCO 59/630.
[55] PA AA Zwischenarchiv 121390. Germany's proposal to define investors as 'carrying on a business' in the home state was not picked up in the eventual treaty, Treaty between Germany and Swaziland concerning the Encouragement and Reciprocal Protection of Investments, done at Mbabane, 5 April 1990, entry into force 7 August 1995: Article 1(4).

typically operated via locally-incorporated companies, but admitted that the clause should perhaps not apply to an investor owning only a single share.[56] Jamaica objected to a similar clause, noting the possibility for abuse by a company that might, 'foreseeing that a dispute was imminent', obtain a small UK-owned stake to bring itself under the protection of a UK-Jamaica BIT.[57] While the UK had dismissed the Jamaican concerns as exaggerated, with Indonesia it floated the idea of a 10% shareholding threshold to activate BIT protection. The UK rejected the approach in the Germany-Egypt BIT of protecting only companies with a 'substantial interest', since this would simply lead to disputes over which interests were 'substantial'.[58] In relation to majority or controlling shareholders, likely connecting with the idea of BITs as focal points for customary standards, the UK feared that partner states would not accept BIT clauses effectively offering protection to companies not incorporated in the UK but controlled by UK nationals as going beyond customary law.[59] Indeed, the UK itself rejected a proposed Korean definition of corporate nationality based purely on the state of the controlling shareholder, 'express[ing] some surprise at the width of this concept' and doubting the political acceptability of coverage of 'companies controlled by Koreans which might be established in the USA, Japan, Taiwan or anywhere else in the world'.[60]

Other issues related to the scope of treaties, and still topical today, featured in early negotiations as well. For instance, the UK fought hard to retain as wide a definition of investment as possible, including coverage of portfolio investment,[61] whereas Germany appeared to support protecting only capital investments, excluding portfolio investments.[62] Equally, the UK sought to retain a definition of corporate nationality based on the place of incorporation, rather than the seat of management, and argued that this was required because of its practice on diplomatic protection

[56] FCO 59/630. See also 59/630, where the UK doubts that its BITs should apply to very small minority interests.
[57] FCO 59/1200. The debate there related to a definition of British companies that covered companies 'wherever incorporated' as long as they entailed some level of British ownership. See also FCO 59/1200.
[58] FCO 69/630.
[59] FCO 59/630; see also negotiations with Egypt, FCO 59/1294.
[60] FCO 59/1293.
[61] FCO 69/662; T 450/72; FCO 69/960.
[62] PA AA, 422, 41335, GRO, 1978-80.

of companies, again apparently wanting to align BIT definitions with custom.[63] In the 1980s, however, negotiators were instructed to accept any reasonable definition of 'company' offered.[64] Protection of sovereign investments was also considered, particularly favoured by the Arab League.[65] Notwithstanding UK resistance,[66] the Euro-Arab draft treaty included protection for sovereign investments. After taking 'proper account of the restrictive doctrine of state immunity', a State was to be deemed an investor when a state-owned organization was a 'separate legal entity from the State itself'.[67] Additionally, investments of the state itself would have received limited protection:[68] 'investments and returns of any other Contracting Party (including its Central Bank) … shall have full and complete immunity from any measure, direct or indirect, which might in any way restrict or impair the ownership, control, enjoyment, disposal or transfer of such investments and returns.[69] If adopted, Euro-Arab treaty would have significantly altered the dynamics of investor-State dispute settlement, in a manner more attuned to the contemporary role of sovereign investors.[70]

B. Expropriation

Given the centrality of expropriation debates during the Cold War, it is not surprising that early British and German drafters would only conclude BITs if the partner state agreed on the core of the expropriation clause.[71] As discussed in section II above, the early drafters saw BITs as

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[63] This concern manifested elsewhere; see e.g. discussions above on how UK viewed its model expropriation clause as restating (its view of) customary law.
[64] FCO 69/662.
[65] T 450/71.
[66] T 450/71.
[67] FCO 69/958; FCO 98/2270.
[68] T 450/71.
[69] FCO 98/2270.
[70] Denza and Poulsen 2020.
[71] T 450/71 ('British investors appear to attach great importance' to expropriation protection); FCO 59/630 ('we have always considered that an agreement could not be concluded with a country which did not broadly accept our understanding of international law on expropriation'). Germany declined a treaty with Brazil over objection to the expropriation clause (PA AA, B33, 322), and rejected Nepal's proposed changes to compensation. Germany also rejected Gabon's request for additional time to pay compensation, since, in Germany's view, an expropriating

performing the important function of combatting a perceived weakening of customary international law on expropriation, as well as addressing the prominent risk of direct expropriation. While that particular risk has largely subsided today, compensation for expropriation, including indirect expropriation, remains important, even if sometimes for different reasons, as the main functions performed by investment treaties have changed.

First, claims of indirect expropriation are central to many contemporary BIT cases, since these claims target the risk of regulatory instability facing investors today. The main issue of contemporary relevance is the *definition* of indirect expropriation.[72] Alongside its modern relevance, though, indirect expropriation also carried some importance for the early drafters. Even if direct expropriations were more salient, indirect expropriations were also considered in State practice,[73] and investment treaties could assist in informal negotiations over these disputes just as much as for direct expropriation. The issue was clearly in the mind of UK and German officials. Whitehall officials acknowledged the difficulties of defining indirect expropriation,[74] disagreed over whether to attempt it,[75] and criticised some proposed language as circular or superfluous.[76] The eventual decision was to leave 'expropriation' undefined, thereby making reference to the customary notion known to international lawyers,[77] and to address conduct possibly captured by indirect expropriation under other rules (e.g. unreasonable interferences).[78] In German practice, definitional issues occasionally arose as part of negotiations and the concept was important to Bonn. For instance, Germany insisted on protection against indirect expropriation, including a

government simply had to have funds available before expropriating; PA AA, Zwischenarchiv, 121341; PA AA, B33, 15164.

[72] See the key early decisions in *Metalclad v Mexico,* ICSID Case no ARB(AF)/97/1, Award, 30 August 2000, paras 102-12; *Methanex v US,* UNCITRAL Case, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005 Part IV-Chapter D, paras 6-18; *Saluka v Czech Republic,* UNCITRAL Case, Partial Award, 17 March 2006, paras 253-265, summarised in *Blusun SA and ors v Italy,* ICSID Case no ARB/14/3, Award, 27 December 2016, paras 398-409.

[73] Some historical examples are discussed in GC Christie, 'What Constitutes a Taking of Property under International Law?' (1962) 38 BYIL 307, 313–316.

[74] FCO 59/630.

[75] FCO 59/699.

[76] Ibid.

[77] FCO 59/700.

[78] Cf. E Denza and S Brooks, 'Investment Protection Treaties: United Kingdom Experience' (1987) 36 ICLQ 908, 911-2. In the 1981 British negotiation brief, however, indirect expropriation was not addressed: FCO 69/662.

definition of indirect expropriation ('restricting tantamount to the taking away of any property right'),[79] although it did not pursue clarity further.

Second, much of the early negotiations centred on aspects of compensation for expropriation. Here, the core aim was to make the 'Western' standard of full compensation the applicable legal standard in expropriation disputes. The UK insisted on its standard compensation formula of 'prompt, adequate, and effective',[80] and Germany also asked for partner states to accept the German definition of full compensation, since '[s]uch a definition makes it easier to determine the amount of compensation and thus helps to prevent disputes later'.[81] Since the drafters did not expect any tribunal to 'fill in the blanks' of the expropriation provision, clarity of textual expression was important given that expropriation was the most important risk against which the treaties were intended to protect.[82] Beyond the compensation formula itself, the UK practice addressed the question of interest in detail, early on insisting that an interest rate must be specified to prevent the clause becoming 'valueless'.[83] This prompted sometimes intensive negotiations.[84] Another common element of the compensation clause, the right of domestic review, also led to

[79] PA AA, 121346; Treaty between Papua New Guinea and Germany Concerning the Encouragement and Reciprocal Protection of Investments, done at Port Moresby, 12 November 1980, entry into force 3 November 1983; Article 4, ad Article 4. The UK took the view that its definition provided less protection than the German one: PA AA, 422, 41335, GRO, 1978-80, UK Consultations, subject: German British Consultations about investment protection on 14/15 July 1980 in London, dated 24.07.1980 ('The British investment guarantee scheme explicitly qualifies measures preventing the effective exercise of rights as indirect expropriation. As a rule, such a condition must last for at least one year to qualify as indirect expropriation.').

[80] Sierra Leone objected to the wording as a matter of principle, given the contemporaneous developments in the UN; FCO 69/692.

[81] PA AA, Zwischenarchiv 121341. Nepal and Portugal objected, for instance, but ultimately gave into German demands. In the case of Portugal, this resulted in a compensation standard that went beyond its domestic law.

[82] For instance, in the Euro-Arab negotiations, the formula of 'genuine value' was considered 'infinitely better than "actual loss sustained", which could be interpreted very narrowly'; T 4570/71.

[83] FCO 59/630.

[84] The UK was not always successful in achieving its specific objectives on interest. With Indonesia, for example, UK requests were withdrawn, as long as a right to domestic review was available and the remaining overall balance of the BIT was satisfactory: FCO 59/630; FCO 69/662; IR 40/17786. Singapore suggested a specific rate of interest (6%), which the UK considered both lower than the commercial rate and excessively rigid, but in the end the UK could only persuade Singapore to agree to payment of interest at domestic law rates: FCO 59/1196. And in Korea, the UK ultimately withdrew its proposal – leaving the interest rate unspecified – after Seoul objected to the uncertainty of a 'normal commercial' rate and suggested that prompt compensation would make interest unimportant in any event: FCO 59/1293. Romania could accept payment of interest only after compensation was agreed upon, so the rule therefore required interest incurred on compensation 'once finally established": FCO 59/1446.

disagreements in negotiations. Egypt, for instance, wondered whether the right to prompt domestic review of expropriations included a right to challenge the domestic legality of an expropriating law. The UK explained that it did not, and suggested that the reference to review 'under the law of the Contracting Party' made clear the purpose of the provision.[85]

Compensation is still a central legal issue in investment law. However, the shift in function of investment treaties towards formalised dispute settlement, combined with implementation of the distinction between primary and secondary rules of international law in arbitral practice, has meant that the considerable efforts of the early drafters in technical negotiations on compensation for expropriation have been largely side-stepped.[86] Instead, in many cases, debates over the existence and meaning of 'full' compensation within the primary rule on expropriation under investment treaties have been eclipsed by reference to the secondary rules of State responsibility governing remedies for conduct in breach of the treaty, directly applying custom to issues of interest and valuation dealt with in the treaties.[87] In other cases, the treaty-based clauses negotiated with considerable effort by early drafters have been consulted by tribunals,[88] but the debate has turned to fact-specific application, rather than interpretation, of a treaty-based standard, and to the accounting techniques and valuation methods needed for that application.[89] In yet other cases, even where a treaty clause on compensation has been applied, the relevant aspects of the drafters' negotiations have seemingly been forgotten. For example, Egypt refused to accept the payment of

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[85] FCO 59/1294. Romania also objected, but here the disagreement was the explicit requirement of having the right to approach 'independent' courts, since (it said) its domestic courts were necessarily independent. A more generic expression of due process guarantees was therefore included in its UK treaty; FCO 59/1446; see 1976 UK-Romania BIT, above n 71, Article 4(1). In Germany's negotiations with Nepal, Germany contended that '[e]xperience has shown that investors attach importance to the legality of expropriation being subject to review by due process of law', and thus insisted on retaining a reference to due process in the review provision; PA AA, Zwischenarchiv 121341.

[86] ILC, Articles on responsibility of States for internationally wrongful acts, YBILC Vol 2 Pt 2 (2001), UN Doc A/CN.4/SER.A/2001/Add.1 26, Article 36, Commentaries 18-26, starting from *ADC Affiliate Ltd v Hungary*, ICSID Case No ARB/03/16, 2 October 2006 [481].

[87] See a recent summary in *ConocoPhillips Petrozuata BV and Ors v Venezuela*, ICSID Case No ARB/07/30, Award, 8 March 2019 [207]-[229] (under annulment challenge); also A Reinisch and C Schreuer, *International Protection of Investments: Substantive Standards* (OUP 2020) 242-250.

[88] See, eg, S Ratner, 'Compensation for Expropriations in a World of Investment Treaties: Beyond the Lawful/Unlawful Distinction' (2017) 111 AJIL 7, 16.

[89] Reinisch and Schreuer above n 87, 228-242.

interest as an international obligation in negotiations with the UK, so British negotiators 'traded' the provision on interest for an Egyptian commitment on national treatment.[90] Twenty-five years later, applying the standard of compensation in Article 5 of the Egypt-UK BIT, the tribunal in *Wena Hotels Limited v Egypt* held that the clause was 'silent on the subject of interest' and that customary international law permitted compound interest.[91] Egypt did not appear to have invoked the travaux préparatoires that would have demonstrated that the proposal to pay interest for expropriation under international law had been rejected. In other words, what Egypt won in inter-State negotiations, it lost when the focus shifted to investor-State arbitration. This illustrates that, even when challenges raised in contemporary practice were accurately identified and competently addressed by the original drafters, various considerations minimise the effect of that drafting, from macro-level shifts in the structure of dispute settlement and taxonomy of international law to dispute-specific choices of failure to introduce favourable preparatory materials.

C. *Reciprocity and No greater rights*

Many of the reforms to investment treaties in recent decades have been prompted by a greater appreciation for the reciprocal nature of investment treaties, as developed countries have faced somewhat unexpected claims from partner state investors. In turn, this has raised questions about the apparently preferential treatment given to foreigners under treaties compared with standards enjoyed by locals under domestic law.[92] On one view expressed in these contemporary debates, if investment treaty standards were tied to domestic law standards, the perceived problems of

[90] FCO 59/1294.
[91] *Wena Hotels Limited v Egypt,* ICSID Case no ARB/98/4, Award, 8 December 2000, paras 128-129; *Wena Hotels Limited v Egypt,* ICSID Case no ARB/98/4, Decision on Annulment, 5 February 2002, paras 51-3.
[92] See, eg, Alvik, The Justification of Privilege in International Investment Law: Preferential Treatment of Foreign Investors as a Problem of Legitimacy, EJIL 289–312 (2020).

reciprocal claims against a traditional home state would be lessened.[93] Notably, these questions were also keenly appreciated – at least in some areas – by early UK and German drafters.

In Germany's (unsuccessful) negotiations with Costa Rica, for instance, a question arose about the obligation of immediate payment of compensation following war or riots, due to possible conflict with the Constitution of Costa Rica (which grants some leeway in such situations).[94] On the German side, the Ministry of Finance insisted on immediate compensation, even following riots, while the Ministry of Economy did not want Germany to be internationally perceived as asking for preferential treatment. The compromise proposal would have adopted Costa Rica's constitutional language, although negotiations ceased soon afterwards.[95] A similar theme was raised with Germany by Brazil, noting that the grant of preferential treatment to foreigners over locals by the expropriation clause could violate constitutional guarantees of equal treatment.[96] In the UK practice, Caribbean governments suggested that a request for standards of compensation for expropriation that went beyond their constitutional standards was 'offensive'.[97] The UK itself admitted that it could not insist on the point, particularly because those standards had only recently been agreed between the UK and the Caribbean nations as part of the independence process: '[r]eally this was never on'.[98] Germany's proposal to Costa Rica to include domestic constitutional language on expropriation into a treaty, and the UK's recognition of constitutional law as an upper bound on foreign investment protection, prefigure the modern 'no greater rights' debate.[99]

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[93] Kleinheisterkamp, 'Investment Treaty Law and the Fear for Sovereignty: Transnational Challenges and Solutions' *Modern Law Review*, 78 (2015), 793-825.

[94] Costa Rica's Constitution of 1949 with Amendments through 2011 <https://www.constituteproject.org/constitution/Costa_Rica_2011.pdf?lang=en> (visited 24 October 2020) Article 45: 'In the case of war or internal commotion, it is not indispensable that the indemnification be prior. Nevertheless, the correspondent payment will be made at the latest two years after the state of emergency situation has been concluded' (translation).

[95] A BIT was eventually concluded in 1994. It does not seem to provide for any special treatment of the issue: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/833> art 2(3). But the war clause is expressed in its usual non-discriminatory terms, so it might not impose an obligation of immediate payment just for foreigners.

[96] PA AA, B33, 322.

[97] FCO 59/1200.

[98] Ibid.

[99] See US Senate Committee on Finance, 'Report 107-139 on the Bipartisan Trade Promotion Authority Act of 2002' (28 February 2002) <www.gpo.gov/fdsys/pkg/CRPT-107srpt139/pdf/CRPT-107srpt139.pdf> (visited 24

In relation to free transfers clauses, meanwhile, questions of reciprocity and domestic law was a major issue in early British investment treaties, as noted above. This was a particularly controversial issue in the Euro-Arab investment negotiations during the 1970s due to the presence of major capital exporters – such as Saudi Arabia – on the Arab side.[100] In the context of restrictive exchange control legislation in place, the UK admitted that it could not demand complete foreign exchange freedom from its partners when it would not provide such freedom in its own laws.[101] While acknowledging that it would also benefit UK investors to repatriate their money,[102] the UK 'attached the greatest importance to maintaining … freedom to introduce exchange controls'[103] and was concerned that restrictions on 'inflows of funds from Arab Central Monetary Institutions'[104] and outward exchange controls would be affected.[105] One of the draft articles in the Euro-Arab agreement provided a standalone 'guarantee … [for] the unrestricted transfer' of investments and their returns, except where there would be problems for balance of payments or monetary stability.[106] Notwithstanding that freezing could occur 'under the authority of a Security Council Resolution, as a measure of self-defence or in reliance on international rules on retaliation',[107] the UK intended to make a reservation to the article.[108] The issue even caused disagreements with Germany, as the UK was concerned that Bonn would become the 'champion of a right for the investor to free transfer without limit'[109] – something the UK's own restrictions prevented.

Reciprocity also played a role in UK negotiations with Singapore, where the UK agreed that transfers of large compensation payments following expropriation might be difficult for some

October 2020) 11–17; Colombian Constitutional Court, Case No C-358/96 (1996) www.corteconstitucional.gov.co/relatoria/1996/C-358-96.htm; Kleinheisterkamp, above n 93.

[100] Denza and Poulsen, above n 9.

[101] FCO 59/699.

[102] T 450/71.

[103] T 4570/71.

[104] FCO 69/958.

[105] T 4570/71.

[106] FCO 69/958.

[107] FCO 69/960.

[108] T 450/71.

[109] FCO 98/2270.

countries with limited foreign exchange reserves, and was willing to accept payment over a longer period. Arguably against its interests as the more likely home state, the UK also rejected a proposal for home states to veto the application of changes in host state exchange control laws to covered investments. According to the UK, host states needed to be able to act quickly, without waiting for consent from the home state, to address foreign exchange crises. Furthermore, the UK was willing to remove text that would have frozen domestic exchange control laws at the time of treaty conclusion, replacing it with a provision that subjected capital transfers only to the domestic law as at the time of transfer. [110]

In short, not all major and controversial issues arising in modern investor-State arbitration and policy debates are novel. Early drafters at least partially considered the possibility of treaty-shopping and the protection of shareholders, for instance, as well as definitional issues of indirect expropriation, compensation standards, and – notably – discussions around 'no greater rights'.

V. Elements important only in modern practice – the case of fair and equitable treatment

Finally, we turn to one aspect of investor-State arbitration that *does* stand out compared to the attention and priorities of early drafters: the fair and equitable treatment (FET) clause.[111] FET has become the most important substantive obligation in modern investment protection law. It is the key rule invoked in investor-State dispute settlement, and has in practice been the most common

[110] FCO 59/630; FCO 59/630; see also FCO 59/1293 and 59/1446.
[111] The MFN clause could also be briefly discussed as falling in the same category. The clause has become important in formalised dispute settlement today in relation to arguments about importation of protections from other investment treaties: see, eg, S Batifort and B Heath, "The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization" (2017) 111 *AJIL* 873. However, MFN does not appear to have played a major role in the early UK treaty practice. Meanwhile, although Germany's general position was that an MFN clause was essential (PA AA, 121346), the archives do not reveal any extensive discussion or a clear explanation of Germany's reasons.

cause for successful claims.[112] For early British and German drafters, however, it played almost no role. It was boilerplate and subject to little, if any, discussion in negotiations.[113] Germany initially agreed to Paraguay's request to remove the FET clause entirely, for instance, commenting that its legal content was difficult to determine anyway.[114] Later, though, Germany contended that despite its vague wording it had some value as a guiding principle, and should therefore be included.[115] In early British negotiations, the language of 'fair treatment' cropped up to describe the appropriate treatment by a State of foreign investors in a non-technical manner.[116] Beyond this, the provision did not play an important role in negotiations. If anything, the interesting point is the consistent *lack* of attention to its content and legal implications even when the negotiators discussed the standard. For instance, in the UK's negotiations with Zaire (eventually abandoned), the latter's counter-proposal omitted the promise of 'traitement juste et équitable'. The UK negotiators objected, but only because Zaire had already agreed to FET in a treaty with France.[117] In the context of the free transfer provision in agreements with Caribbean countries, the scope of a provision that required the exercise of rights equitably and in good faith was discussed. The UK noted only that 'equitably' did not imply an obligation of non-discrimination.[118] During the discussion over 'unreasonable or discriminatory measures', the UK noted that 'no self-respecting state' would disagree with such a clause.[119] The UK described unreasonableness as a 'useful catch-all', which 'could be particularly helpful to our Missions in the event of trouble',[120] and perhaps there is a suggestion of a similar view on FET.

[112] UNCTAD, 'Investor-State Dispute Settlement: Review of Developments in 2017' IIA Issues Note (June 2018, Issue 2) 5; Bonnitcha, Poulsen and Waibel, above n 21, Figure 4.2.
[113] Waibel, 'Fair and Equitable Treatment as Boilerplate' 30 (2019) *The American Review of International Arbitration* 85.
[114] PA AA 403-413. GK/PAR, Memo on the proposals made by Paraguay, Bonn, 18.07.1977.
[115] PA AA 403-413. GK/PAR, Opinion on the proposals made by Paraguay, Bonn, 16.01.1980, 3.
[116] See, eg, FCO 59/699: 'the Agreement ... will help to secure fair treatment of private investment'.
[117] FCO 59/1193. In its negotiations over the 1959 UK-Iran Treaty of Commerce, Establishment and Navigation, the UK preferred the term 'FET' rather than the Iranian proposal for 'fair treatment': Board of Trade 11/5634.
[118] FCO 59/1197.
[119] FCO 69/662.
[120] FCO 69/662.

The closest that the British came to explaining the content of FET was in discussions with the Caribbean and Malawian governments. The UK sometimes described its model treaty in general terms as 'a reiteration in treaty form of legal standards based on customary international law'.[121] In response to more specific inquiries on 'full protection and security', the UK stated that it 'was intended to set out the rule of customary law regarding the treatment to be accorded by a State to the property of aliens'.[122] Since the clause included both full protection and security and FET treatment standards, perhaps the negotiators also viewed the latter as related to pre-existing custom. Nevertheless, the discussion was only in relation to full protection and security, and the substantive concern of the partner states was not over any perceived vagueness or lack of content of the FET obligation, but over the political difficulty in granting *full* protection to foreigners (implying that this was a higher standard than received by locals). The UK's response was simply to propose removal of the word 'full', since 'it was arguable that "full" implied too stringent an obligation'.[123]

The little attention given to FET makes it challenging to extrapolate the meaning that Germany and the UK attributed to it. At most, in negative terms, the lack of attention does not fit any of the usual readings of the historical evolution of the term.[124] It was not viewed in negotiations as a far-reaching rule of great importance in the structure of investment treaties, and certainly not the central role that it enjoys today. Apart from the possible implications noted above, it was not discussed as a term referring to or drawing upon customary international law, unlike the definition of expropriation for instance. Indeed, as a matter of exclusion, the formula of 'fair and equitable treatment' may sit on the outlying border between a very vague international obligation and

[121] FCO 59/699.
[122] FCO 59/630; FCO 59/1200.
[123] FCO 59/1200.
[124] Paparinskis, The International Minimum Standard and Fair and Equitable Treatment (Oxford University Press 2013) chapter 3; Pinchis, 'The Ancestry of "Equitable Treatment" in Trade' (2014) 15 JWIT 13.

formulation of a general aim.[125] Either way; the different perceptions of importance of FET during the original drafting and in current practice is a clear example of the shift in perspective brought about by the change in the risks and functions that BITs were perceived to address or perform. The vagueness of the provision made it largely unhelpful as a focal point, but vagueness is less of a concern for investor-claimants when enforceable dispute settlement is now expected to 'fill in the blanks' and is occasionally even beneficial.[126]

VI. Conclusion

Modern investment law seems to be all about investor-State arbitration. Whether the argument is about reforming, criticising, analysing, or even practicing investment law, its strength is evaluated by reference to eventual consideration by adjudicators. Early UK and German negotiations and deliberations show that this is different from the 'founders' view' of investment law, shaped by assumptions of the regime as a focal point for setting general standards and negotiating settlements. On many points (such as expropriation), UK and German attitudes and preferences overlapped, but on others judgements differed, both regarding the relative importance of rules (such as national treatment) and their policy wisdom (such as free transfer). Overall, however, a clear picture emerges of where early priorities and attention differ from those of today, and where there are overlaps.

To the original drafters, national treatment and free transfer were key, whereas in contemporary practice, FET (barely mentioned by drafters) is central. Expropriation is still important but mainly in its indirect form. Still, drafters often accurately identified the key issues that were to arise in dispute settlement several decades later, such as the definition of indirect

[125] The ICJ has discussed the distinction in several cases, most recently in *Immunities and Criminal Proceedings (Equatorial Guinea v France)* [2018] ICJ 292, para 92. Roughly two decades before the period under examination, the UK's agent Fitzmaurice described clauses requiring 'treatment in accordance with common right, equity, justice, love and friendship and so on' as 'not, in our view, couched in the language of precise obligation at all' (*Ambatielos case (Greece v UK)* ICJ Pleadings 406, 412).
[126] Poulsen, above n 9.

expropriation, questions of compensation and interest, forum shopping, and protection of minority shareholders. Notably, they also considered the possibility that the treaties had potential to provide greater rights than in their domestic law. But careful drafting with an eye to the setting of negotiations often did not have the intended effect in dispute settlement, where reference to custom for substance and remedies, adjudicative application of vague rules to complex factual circumstances, and the role of non-legal (valuation) techniques are more important in driving results. This paper has demonstrated how assumptions about the functions and normal operation of international rules directly shape judgements about what rules matter. Future research will be able to supplement or challenge this analysis, both by engaging with further archival materials of other European as well as developing countries, and by spelling out normative implications for the current reform efforts.