

RECONCEPTUALIZING THE STATUTE OF  
LIMITATIONS DOCTRINE IN THE INTERNATIONAL  
LAW OF FOREIGN INVESTMENT PROTECTION:  
REFORM BEYOND HISTORICAL LEGACIES

PEDRO J. MARTINEZ-FRAGA\* AND JOAQUÍN MORENO PAMPÍN\*\*

*Customary international law is in a seemingly irreconcilable conflict on the fundamental issue of whether it recognizes an international law equivalent to the statutes of national-domestic limitations. Most arbitral awards aris-*

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\* Pedro J. Martinez-Fraga is a partner in Bryan Cave Leighton Paisner LLP's International Arbitration and Litigation Practice Group. Based in Miami, he is the firm's co-leader of the Arbitration and Litigation Practice Group globally. Mr. Martinez-Fraga is the co-founder of Bryan Cave Leighton Paisner's Miami office. Also, Mr. Martinez-Fraga is a World Bank (International Bank for Reconstruction and Development) conciliator and arbitrator. On December 16, 2015 (effective February 23, 2016), President Barack Obama appointed Mr. Martinez-Fraga as one of four U.S. delegate members to the Panel of Conciliators of the International Centre for Settlement of Investment Disputes (World Bank). He is the first Hispanic to have been so appointed in the history of the Washington Convention of 1965. He has represented seven countries as lead counsel, and served as an arbitrator in major ICC and ICSID (World Bank) proceedings. Mr. Martinez-Fraga serves on the Advisory Council to the Restatement (Third) of International Commercial Arbitration for the American Law Institute. He has written more than fifty articles published in fifteen countries and translated into five languages, as well as five books on public and private international law. Two of his books have been translated into Mandarin by the Chinese Academy of Social Sciences of the People's Republic of China. He is an N.Y.U. Scholar-in-Residence (September 2017) and currently an Adjunct Professor at the New York University (NYU) School of Law. He also serves as a full Visiting Professor at the University of Navarra School of Law in Pamplona, Spain, and as an Honorary Professor of Law at the Universidad de San Ignacio de Loyola in Lima, Peru. He served as an Adjunct Professor at the University of Miami School of Law from 2002–2010. He has been a member of the American Law Institute since 1999, and a member of the Center for Human Rights Advisory Counsel of the American Bar Association. Mr. Martinez-Fraga graduated from St. John's College (BA, 1984) with institutional honors, and from Columbia University School of Law (J.D. 1987), where he was a Harlan Fiske Stone Scholar. He also holds Licenciatura, Magister, and Ph.D. (*cum laudè*) degrees from the Universidad Complutense de Madrid.

\*\* Joaquín Moreno Pampín is a Foreign Legal Consultant in Bryan Cave Leighton Paisner LLP's International Arbitration Group. Moreno Pampín graduated from Universidad Católica Andrés Bello in Venezuela (JD), and Universidad Metropolitana in Venezuela (LL.M.).

ing from treaty-based investor-state arbitrations hold that no such doctrine is cognizable under customary international law. This proposition directly and explicitly conflicts with claims tribunal awards that recognize the limitations period doctrine. The uncertainty generated by this conflict is compounded because the treaty-based international law of investment protection in turn holds that the limitations doctrine is governed by the limitations period, if any, contained in a particular treaty. Yet, only 106 of the approximately 3,000 bilateral and multilateral investment protection treaties in force have limitations periods. The balance theoretically would allow for the filing of stale claims in perpetuity or otherwise engraft on an ad hoc basis random limitations periods. Thus, the lack of uniformity and governing standard has given rise to uncertainty and insecurity: the very policy objectives that the limitations period doctrine itself seeks to eradicate. This Article asserts that the fragmented status of public international law with respect to the limitations period doctrine is attributable to (i) the wholesale importation of national-domestic law on limitations into public international law without having considered the policies and aspirations of international law, and (ii) the economic agendas of industrialized states to the exclusion of the interests of developing states and economies in transition. A historical, descriptive, and prescriptive methodology is applied in the development of this proposition. An analytical framework based upon the objectives of the international law of investment protection that tempers national law influences, and the distinct objectives of capital-exporting states, is proposed.

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“A map of the world that does not include Utopia is not even worth glancing at.”

—Oscar Wilde, *The Soul of Man Under Socialism*<sup>1</sup>

## I. INTRODUCTION AND BACKGROUND

Does a limitations period attach to treaty-based arbitral claims that allege breach of an investment treaty protection standard? More simply stated, does the public international law of foreign investment protection recognize a limitations period doctrine? There are four answers to this query: “yes,”<sup>2</sup> “no,”<sup>3</sup> “maybe,”<sup>4</sup> and “it depends.”<sup>5</sup> Although disconcerting at

1. OSCAR WILDE, *THE SOUL OF MAN UNDER SOCIALISM* 28 (1915).

2. As a matter of *conventional* international law, the response to the query is in the affirmative. Jackson Ralston observed of the *Gentini Case*, 10 R.I.A.A. 551 (It.-Venez. Mixed Cl. Comm’n 1903), that the Umpire “pointed out the distinction between the rules of prescription, which were such as would be established by a government, and the principle of prescription which he said was ‘well recognized in international law,’ and could be applied as well in a conflict to which a state was a party as to conflict between private individuals.” Jackson H. Ralston, *Prescription*, 4 AM. J. INT’L L. 133, 133 (1910).

3. As for *customary* international law, the answer is in the negative. *See, e.g., Bosca v. Republic of Lith., Award*, ¶ 120 (Lith.-It. Arb. Tribunal 2013), [https://www.italaw.com/sites/default/files/case-documents/italaw7179\\_1.pdf](https://www.italaw.com/sites/default/files/case-documents/italaw7179_1.pdf) (observing that “there is no deadline prescribed by the Agreement, Rules or general principles of international law.”). The International Committee of the Red Cross notes that “[i]n international law, prescription [i.e., a statute of limitations] is generally not known. [Moreover,] [t]he Geneva Conventions and their Additional Protocols do not address the issue.” Int’l Comm. of the Red Cross, *Prescripción*, Ref. LG 1999-004g-SPA (Feb. 24, 1999), <https://www.icrc.org/spa/resources/documents/misc/5tdmqx.htm> (translated by author). However, with regard to war crimes and crimes against humanity, the non-existence of a limitations period is directly provided for in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, *opened for signature* Nov. 26, 1968, 754 U.N.T.S. 73 (entered into force Nov. 1970).

4. Most bilateral investment treaties (BITs) do not contain a limitations period. Where none is provided, ascertaining an applicable period—if one exists—depends on whether the treaty suggests that a limitations period derived from an external source of law should govern. For this reason, the answer to the query is also a “maybe.” *See, e.g., Nordzucker AG v. Republic of Poland, Partial Award*, ¶¶ 219–23 (Ger.-Pol. Ad Hoc Arb. Trib 2008), [https://www.italaw.com/sites/default/files/case-documents/italaw3030\\_1.pdf](https://www.italaw.com/sites/default/files/case-documents/italaw3030_1.pdf). In *Nordzucker AG, Poland* had argued that the claimant’s cause of action was time-barred, prompting the tribunal to note that, “[t]he BIT not containing any rule on the matter of time bar, the Tribunal does not consider it

first glance that a question would give rise to four ostensibly contradictory answers, what is even more arresting is that all four responses are technically correct. Further, the current status of public international law fails to provide States and investors with transparent directions regarding limitations periods that would consistently guide investor-claimants and host-State-respondents with respect to when any of the four “correct responses” apply.<sup>6</sup>

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appropriate to refer to Polish domestic law, at least not exclusively.” *Id.* ¶ 221. The tribunal ultimately rejected Poland’s argument, holding that the claim was not time-barred. *See id.* at ¶ 23.

5. Depending on the presence of a Most Favored Nation (MFN) clause in the treaty and a limitations period in a second treaty to which a respondent-State is also a signatory, the response to the query must also be “it depends.” By way of example, the U.S.-Columbia Free Trade Agreement contains an MFN clause. *See* Trade Promotion Agreement art. 12.3, U.S.-Colom., Nov. 22, 2006, [https://ustr.gov/sites/default/files/uploads/agreements/fta/colombia/asset\\_upload\\_file145\\_10148.pdf](https://ustr.gov/sites/default/files/uploads/agreements/fta/colombia/asset_upload_file145_10148.pdf) (entered into force May 15, 2012) [hereinafter U.S.-Colombia FTA]. This standard allows a prospective claimant to incorporate substantive claims from other bilateral investment treaties to which the prospective respondent is a signatory. *See id.* art. 12.3(2)(c). If we consider the Colombia-United Kingdom BIT, there is a five-year limitations period under an article that is separate and distinct from the articles under which the BIT contains the Fair and Equitable Treatment (FET) and Denial of Justice standards of protection. *See* Bilateral Agreement for the Promotion and Protection of Investments Between the Government of the United Kingdom of Great Britain and Northern Ireland and Republic of Colombia arts. II(4)(b), IX(14), XV(4), Mar. 17, 2010, U.K.T.S. No. 24 (entered into force Oct. 10, 2014) [hereinafter U.K.-Colombia BIT]. This placement has more than aesthetic consequences. Because the limitations period is found in an article that is separate and distinct from the actual articles and paragraphs identifying FET and Denial of Justice, the proposition that the five-year limitations period is procedural and not substantive is considerably bolstered. Moreover, the limitations period in this BIT has been placed in the article listing procedural, not substantive, rights. Therefore, it follows that a prospective claimant under the Treaty seeking to name Colombia as a respondent may draw from the FET and Denial of Justice standards of protection contained in the U.K.-Colombia BIT, and argue that no limitations period applies because the Treaty’s MFN clause would apply only to the substantive standards and not to the procedural strictures contained in the treaty.

6. The conceptual void and undue contamination with national law that gives rise to uncertainty with respect to the essential configuration and application of the LPD is more than of mere academic interest. By way of example, as of the date of this writing still an unpublished decision, on February 23, 2018 the Tribunal in the case of *Salini Impregilo S.p.A. Argentina* (ICSID Case No. ARB/15/36) decided on February 23, 2018, identified this vacuum

The public international law rubric governing the application of the limitations period doctrine<sup>7</sup> demands conceptual reconfiguration. Six aspects of the current legal regime demonstrate the need for reform. First, a substantial number of arbitral awards arising from treaty-based investor-State arbitrations hold that the limitations period doctrine (LPD) finds no place in customary international law.<sup>8</sup>

Second, while customary international law may not supply respondent/host-States with the affirmative defense of a limitations period attaching to presumably stale claims,<sup>9</sup> the same cannot be said of conventional public international law. This dichotomy gives rise to a conceptual asymmetry that has more

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and sought to address the limitations defense by reaching out and importing into a private claim against a state the venerable chestnut state-to-state doctrine of *extinctive prescription*. The paucity of doctrinal writings on the LPD was such that the Tribunal drew upon Crawford on State Responsibility in an effort to circumvent LPD altogether and attempt to ferret the actual elements of extinctive prescription. It observed that the decisive factor is “not the length elapsed time itself, but whether the respondent has suffered prejudice because it could reasonably have expected that the claim would no longer be pursued.” Armed with this rubric, the limitations-based jurisdictional challenge was rightfully denied, but for the wrong reasons. State-to-state remedies while a helpful step in the right direction, should not be viscerally engrafted upon the investor-state configuration of the public international law of investment protection. See Luke Eric Peterson, *In A New Ruling, A Tribunal Chaired By James Crawford Weighs In On Prescription, 18 Month Local Remedies Requirement, And Doctrine Of Forum Non Conveniens*, IA REPORTER (Feb. 27, 2018), <https://www.iareporter.com/articles/in-a-new-ruling-a-tribunal-chaired-by-james-crawford-weighs-in-on-prescription-18-month-local-remedies-requirement-and-doctrine-of-forum-non-conveniens/>.

7. The term “limitations” as used in this piece refers to the international law equivalent of the national law iteration of statutes of limitations unless otherwise stated to suggest the acquisition of a right pursuant to continued, prolonged, and open assertions of such right.

8. See *Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Decision on Jurisdiction, Admissibility and Liability, (April 21, 2015), [http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C2441/DC9888\\_en.pdf](http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C2441/DC9888_en.pdf); see also *Bosca v. Republic of Lith.*, Award, ¶ 120 (Lith.-It. Arb. Tribunal 2013), [https://www.italaw.com/sites/default/files/case-documents/italaw7179\\_1.pdf](https://www.italaw.com/sites/default/files/case-documents/italaw7179_1.pdf). (“Neither the ICSID Convention, nor the BIT, nor international law in general contains any statute of limitations in relation to treaty claims.”)

9. Claims tribunal cases and the writings of publicists extending back four hundred years have given rise to a line of customary international law pronouncements in support of the proposition that customary international law recognizes the LPD. See *infra* Section III. Thus, even customary international law is fractured as to this foundational proposition.

than just theoretical consequences. Moreover, circumscribing the universe of the LPD to treaty-based claims undermines basic principles of uniformity and, therefore, generates want of predictive value and transparency; limitations periods are found only in BITs and multilateral trade agreements providing for procedural rights in the form of international arbitration. The public international law of limitations periods is fragmented where monolithic consolidation is compelled.<sup>10</sup>

This state of affairs is compounded by a line of “authority” arising from claims tribunal cases that contradict the arbitral award jurisprudence in holding that the LPD does have a place, indeed a prominent one, in customary international law.<sup>11</sup>

Third, there is a paucity of doctrinal writings on the subject of limitations periods in the context of public interna-

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10. Notably, BITs and multilateral trade treaties are often the product of ad hoc negotiations between two or more signatory states. For example, the 3,000 or so BITs comprising the universe of public international law governing foreign investment protection were *each* uniquely and separately negotiated between the two signatory States without consultation with other States or reference to an international convention or protocol. The negotiation efforts were and are not centralized or otherwise subject to a uniform standards or criteria. PEDRO J. MARTINEZ-FRAGA & C. RYAN REETZ, *PUBLIC PURPOSE IN INTERNATIONAL LAW: RETHINKING REGULATORY SOVEREIGNTY IN THE GLOBAL ERA* 254–55 (2015). Thus, the limitations period in such treaties was arrived at exclusively as a consequence of a qualified and particular negotiation process pertaining to the needs of only the two States involved and pursuant to further qualifications attaching as a result of a particular historical moment during which the negotiations were conducted and concluded. Accordingly, we find the identical protection standard having varying limitations periods depending on the treaty consulted, or having none at all. *See, e.g.*, Mexico-Uruguay BIT art. 8(2)(C), June 30, 1999, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2010> (entered into force July 1, 2002) (setting a limitations period of three years). Meanwhile, the Uruguay-Vietnam BIT art. 9(3), Dec. 5, 2009, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2383> (entered into force Sept. 9, 2012), established a two-year limitations period. In the same vein, while the Japan-Ukraine BIT art. 18(6), Feb. 5, 2015, <http://investmentpolicyhub.unctad.org/IIA/treaty/3550> (entered into force Nov. 26, 2015), stated a three-year limitations period, the Japan-Saudi Arabia BIT art. 14(9), Apr. 30, 2013, <http://investmentpolicyhub.unctad.org/IIA/treaty/2160> (entered into force Apr. 7, 2017), established a five-year time frame. The four BITs contained similar wording with a different time period.

11. *See infra* Section III.

tional law.<sup>12</sup> The scarcity of academic writings has perpetuated legacy precepts and methodologies in the theoretical conception and practical application of LPD in the international law of foreign investment protection that, in turn, have led to uncertainty and conceptual deficits.<sup>13</sup>

Fourth, the limitations period contained in treaties has been analyzed, developed, and applied based on national-domestic law limitations period models. The incorporation of national-domestic policy parameters in the LPD within the ambit of public international law creates a deficit that omits consideration of policy imperatives unique to the workings of the international law of investment protection.

Fifth, the current international law of LPD assumes that the dynamic of a domestic commercial transaction between private actors, negotiating at arm's length, also governs the international law of investment protection. This premise misapprehends the actual asymmetries that characterize the investor/host-State relationship. Even when an investor is a multinational, it can hardly hold itself to be at arm's length or *in pari materia* with respect to a host-State's regulatory authority.<sup>14</sup> The reflexive importation of this national-domestic law assumption undermines the very policies that the LPD seeks to further.

Sixth, the current LPD in the international law of investment protection has been unduly influenced by industrialized (capital-exporting) States that have sought to further their ec-

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12. The sparse academic journal work on the subject is mostly limited to abbreviated *descriptive* accounts devoid of prescriptive aspirations. See, e.g., B. E. King, *Prescription of Claims in International Law*, 15 BRIT. Y.B. INT'L L. 82, 82-97 (1934); E.G.L., *The Statute of Limitations and the Conflict of Laws*, 28 YALE L.J. 492, 492-98 (1919); Arthur Nussbaum, *The Significance of Roman Law in the History of International Law*, 100 U. PA. L. REV. 678, 678-87 (1952). Most of the writings are from the beginning of the twentieth century, and scholars, generally, dedicate few words to the subject.

13. Academics who have addressed the workings of the LPD in international law have not raised the practical and theoretical aspiration of having a uniform system, whereby limitations periods attaching to specific claims would be determined pursuant to consideration of a uniform standard based on policies relating to the elements of the particular claim asserted.

14. This disparity is all the more salient in the case of "sunken investments," where the investment has been concluded in tangible, "brick and mortar" premises such as in the construction of power plants, infrastructure, or hydrocarbon processing facilities.



onomic interests at the expense of developing (capital-importing) States. This lack of symmetry and bilateralism in part explains why only 106 of the total of 2,860<sup>15</sup> BITs in force contain a limitations period at all, let alone one that is based on the policy objectives of the international law of investment protection.<sup>16</sup>

Indeed, the predecessors to BITs—Friendship, Commerce and Navigation (FCN) treaties—all lacked limitations periods.<sup>17</sup> Thus, under a contemporary analysis, claims arising from those treaties may be brought in perpetuity. They would never be stale.

A new framework is necessary. This writing posits that limitations periods within the public international law of investment protection are not susceptible to an “either/or” approach that categorically classifies them as *substantive* or *procedural* in nature. Instead, the Article asserts that limitations periods are neither procedural nor substantive, but rather a hybrid of both that allows for duality and flexibility, in part depending on treaty construction (i.e., the placement of the limitations term within a particular treaty).

It also suggests that the policies underlying the national-domestic LPD are not applicable to its public international law counterpart. A standard that is consolidated, monolithic, and guided by common principles that are uniformly applied is warranted if public international law generally, and the LPD within the framework of the international law of investment protection in particular, are to redeem the promise of fostering certainty and security. As a predicate to arriving at the elements of such a standard, this contribution shall comprise five distinct but deeply related sections.

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15. According to United Nations Conference on Trade and Development (UNCTAD), the international investment regime consists of more than 3,200 agreements, including over 2,860 BITs and over 340 “other international investment agreements” (e.g., free trade agreements, economic partnership agreements or framework agreements with an investment dimension). See UNCTAD, *International Investment Policymaking in Transition: Challenges and Opportunities of Treaty Renewal*, at 1, IIA Issues Note, No. 4, UNCTAD/WEB/DIAE/PCB/2013/9 (2013).

16. See *infra* note 147.

17. This proposition is based on the authors’ empirical research, which reviewed all publicly available FCN treaties.

First, it will be necessary to trace the historical contours of the formulation and use of the LPD in public international law. In this regard, emphasis will be placed on the precepts, analyses, and findings of the scholarship on the subject that commenced with the eighteenth-century writings of Grotius, as well as the contributions of Pufendorf and Vattel, with reference to the methodologies of modern commentators. Here it will be observed that during the four-hundred-year time frame dating to the present, scholars debated and analyzed the international law LPD through the lense of the national-domestic statutes of limitations pertaining to the domestic law of property, contract, and tort (negligence). Moreover, in fashioning rules attaching to the LPD in international law, no weight was accorded to the policies and objectives of international law. Indeed, modern scholarship on the issue has not moved beyond Grotius' writings, notwithstanding the advent of economic globalization.

As part of the LPD's historical analysis, the precursors to modern BITs, FCN treaties, which came into force between 1850 and 1967, are studied to determine the manner and extent to which FCN treaties influenced the workings of the LPD in BITs and the international law of investment protection. It will be asserted that the absence of limitations periods in FCNs underscores the doctrinal anomalies arising from conflicting national-domestic law and international law principles. This historical review also analyzes the role of the LPD in seminal draft multilateral treaties that shaped the workings of first and second generation BITs.

First-generation BITs then are scrutinized in connection with the LPD and the corresponding dispute resolution clauses. Here, particular emphasis is placed on the Federal Republic of Germany and Pakistan BIT. This pioneer BIT was issued to exemplify the extent to which the policies of capital-exporting States influenced the LPD's development in the international law of investment protection. In the same vein, the Article carefully analyzes the first treaty to have a limitations period, the Canada-Ukraine BIT.

An empirical analysis of the fragmented constellation of BITs and free trade agreements shall ensue in an effort to identify common patterns and asymmetries in the treatment of the LPD and limitations terms within the rubric of conventional international law. It is asserted that doctrinal uniformity

is an imperative. Specifically, it is suggested that the particular nature of the LPD is such that it defies single category classification as either procedural or substantive. In fact, a dual approach to the classification of limitations periods would be conducive to greater certainty and security, as well as provide conceptual support for the public policies underlying the international law of investment protection, which coexist with national laws but do not share in the latter's theoretical or practical workings. This section is based on an empirical study of exactly 2,061<sup>18</sup> BITs, and the North America Free Trade Agreement (NAFTA)<sup>19</sup> because it also integrates international investment protection principles.<sup>20</sup>

Second, the LPD in customary international law is analyzed through the lenses of two emblematic cases, the *Gentini* case and the *Williams* case, as well as the Claims Tribunals' more general legacy regarding the treatment of LPD in customary international law.

Third, a brief analysis concerning the need for uniformity and a standard policy derived from treaty-based awards is undertaken. The extent to which policies governing the LPD in public international law compel shedding recourse to principles historically arising from national-domestic frameworks is examined. Here it is maintained that national-domestic legal principles concerning limitations periods find no place in the international law of investment protection and merely serve to wrest uniformity and predictive value from the theoretical and practical workings of the LPD.

Fourth, the Article considers the manner in which arbitral tribunals in investor-State arbitrations have attempted to mitigate the consequences of the application of a national-domestic law by enlarging relevant timeframes beyond the limitations period, devising a continuing damage theory to prolong an otherwise inadequate limitations term, and fashioning a "reasonableness" standard.

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18. The figure includes the 2,061 BITs in force. See *infra* Appendix A, which depicts the number of BITs executed since 1959, aggregated by type.

19. See *infra* Appendix B, where the North America Free Trade Agreement (NAFTA) is analyzed.

20. See, e.g., North American Free Trade Agreement ch. 11, Dec. 8, 1993, 32 I.L.M. 289 (entered into force Jan. 1, 1994) [hereinafter NAFTA].

Fifth, a paradigm shift is proposed. This reconceptualization of the LPD within the framework of the international law of investment protection is premised on (i) understanding limitations periods in international law as completely severed from the principles and doctrines of their national-domestic counterparts, (ii) a recognition of the *duality* (a hybrid of both, substantive and procedural precepts) of the LPD, (iii) suggested methodologies for engrafting uniformity and thereby promoting certainty and security, and (iv) analysis of fifteen non-exhaustive propositions premised on the policies and objectives of international investment protection law that may best serve to harmonize the competing interests of capital-exporting and capital-importing States. This final section suggests a rebuttable presumption as part of the effort to use the LPD to level the playing field between capital-exporting and capital-importing States.

## II. ONCE UPON A TIME: THE HISTORICAL WORKINGS OF THE LIMITATIONS PERIOD DOCTRINE IN PUBLIC INTERNATIONAL LAW

### A. *Historical Origins*

#### 1. *Hugo Grotius and the LPD*

Addressing the difficulty arising from a right to property based on sustained and uninterrupted use for an extended period of time (years), Grotius references Vasquez's contention that such rules are of no force in an "international" context because their normative basis stems from national law rather than long, continuous, and uninterrupted possession.<sup>21</sup> Grotius specifically observes that "they are of no force . . . between two independent nations or sovereigns, or between a free nation and a sovereign: between a sovereign and an individual who is not his subject, or between two subjects belonging to

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21. See 2 HUGO GROTIUS, DE JURE BELLI AC PACIS [ON THE LAW OF WAR AND PEACE] ch. IV, para. I (Oliver H.G. Leigh ed., Archibald Colin Campbell trans., M. Walter Dunne Publisher 1901) (1625). The acquisition of rights through long, continuous, uninterrupted, and public use serves as a useful analytical model for the examination of the LPD pursuant to which rights are lost through inaction, irrespective of whether the loss of such rights arises from negligence, by design, or by mere happenstance. For that reason, this piece treats the scholarship of the LPD and the affirmative acquisition of rights as relevant to understanding the extent to which the international law regarding both doctrines relied on national-domestic legal rules.

different kings or nations.”<sup>22</sup> Quite remarkably, however, Grotius agrees with Vasquez, but for reasons that fail to contribute to the development of an international law addressing the LPD.

Grotius places considerable emphasis on a seemingly positivist treaty-based approach that, while having the virtue of consisting of a stark departure from natural law, relies on positivist methodology rather than on the different underlying policies attaching to national and international law, respectively.<sup>23</sup> Grotius develops a qualified principle—that rules based on national law lack normative standing in an international context—without resorting to substantive underlying policies. Instead, Grotius underscores an unvarnished re-affirmance of positivism:

As the unqualified admission of this principle would lead to great inconvenience, and prevent the disputes of kings and nations respecting the bounds of territory from ever being adjusted; in order to eradicate the seeds of perpetual warfare and confusion, so repugnant to the interest and feelings of every people; the settlement of such boundaries is not left to the claims of prescriptive right; but the territories of each contending party are, in general, expressly defined by certain treaties.<sup>24</sup>

Unlike Vattel, Grotius relies on positivism as a methodology for the development of a LPD among States that is not driven by the need to create uniformity.<sup>25</sup> In his writings, Gro-

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22. *Id.*

23. On the transfer of rights secured by uninterrupted possession, Grotius observes that “such points relating to persons and things, are not left to the law of nature, but are settled by the respective laws of each country.” *Id.*

24. *Id.*

25. As is more fully set forth below, Vattel understands the general concept of a limitations period doctrine as arising from natural law. From this proposition he adds that natural law encompasses the Law of Nations. Within this natural law rubric, however, Vattel concludes that the length of a limitations period governing the conduct of nations, as it does *not* attach to private commercial transactions between individuals, must be determined by dint of consent among adjoining nations and memorialized in treaty law. Such a determination, he argues, is beyond the scope of natural law. MONSIEUR DE VATTEL, *THE LAW OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* 192 (Joseph Chitty ed., T. & J.W. Johnson Publishers 1854) (1797). Grotius, writ-

tius recognizes the legitimacy of each country enacting unique limitations periods, and thus he does not distinguish between national and international law on this subject. He also does not contrast the relations among States with those governing commercial transactions among individuals within the narrow parameters of domestic law. Grotius instead focuses on the bare elements of (i) silence, (ii) knowledge, (iii) length of time, and (iv) possible exceptions, including the rights of future generations.<sup>26</sup>

Grotius's seemingly abbreviated treatment of the LPD is not without consequences. His dramatic statement concerning the need for certainty to avert war among States, and the apparent majesty and contribution of the doctrine to international law, is meaningful. It underscores the policy of certainty and security that will forever be associated with the doctrine. More consequential, however, is his treatment of the LPD as substantively identical in both national and international contexts. His contribution in this very narrow regard commands qualification.

Grotius paved the way for an analysis that calls for significant revision of the reflexive and non-discursive incorporation of national-domestic law into international law. Moreover, a positivist *legislative-oriented* treaty-based approach foreshadowed the parade of horrors that necessarily would take place in a fragmented international law treaty-based scheme where there is no correlation between the *disparate* limitations terms in treaties addressing *identical* subject matter. His analysis further invites questioning the extent to which national-domestic law precepts can actually meet international law demands beyond merely fulfilling statistical happenstance.

Sustained analysis of Grotius's writings on international law in the context of the LPD reflects that standard principles of civil commercial law, as well as liability and rules of property law, are seamlessly engrafted to the norms that are to govern the horizontal conduct of the community of nations instead of the vertical relationship between States and citizens. The conceptual inertia that identifies a migration of the principles of

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ing approximately one century before Vattel, conceives of the LPD in all respects as a matter of positive law. See GROTIUS, *supra* note 21, at ch. IV, paras. I–XI.

26. GROTIUS, *supra* note 21, at paras. V–VIII.

civil commercial liability and property law from the national-domestic sphere to the international realm is one that governs the theoretical and practical workings of the LPD in public international law. These writings with respect to the LPD comprise the origins of the entire contemporary dialogue between national-domestic law and the international law of investment protection.

## 2. *Pufendorf and the LPD*

The fragmented nature of the LPD within the framework of international law challenged early jurists attempting to first formulate its elements and to contextualize them within the then even more amorphous universe of the “Law of Nations.”<sup>27</sup> The issue confronted was simple: how can the Law of Nations institutionalize a principle that justifies the relinquishing of rights and corresponding obligations merely as a consequence of the passage of time? Moreno Quintana suggested that the law of rights and obligations on the part of States vesting merely as a result of the passage of time, in principle, appears to be foreign to international law.<sup>28</sup> Public international law’s concern in embracing the LPD appears to have been premised on the very atomized nature of international law itself.<sup>29</sup> Reliance on national-domestic rules in fashioning an international LPD system was *de facto* premised on five elements that characterize the fragmented universe of the LPD in international law: (i) lack of uniformity as to duration of a limitations term, (ii) the absence of a centralized legislator and legislative rubric, (iii) lack of consensus pertaining to a limitations period tolling, (iv) the effect of rights transferred to third parties resulting from maturation of a limitations period, and (v) asymmetries attaching to the relationship between capital-exporting States and capital-importing States. The fractured architecture of international limitations periods contributed to

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27. See BARON PUFENDORF, *OF THE LAW OF NATURE AND NATIONS* 439–49 (Basil Kennett trans., 1729); VATTTEL *supra* note 25, at 186–91.

28. Lucio M. Moreno Quintana, *Los Actos Jurídicos Internacionales*, 1 *HISPANIC-LUSO-AMERICAN Y.B. INT’L L.* 153, 158 (1959); see also MICHEL PERLOWSKI, *LES CAUSES D’EXTINCTION DES OBLIGATIONS INTERNATIONALES CONTRACTUELLES: ÉTUDE DE DROIT INTERNATIONAL PUBLIC* 32 (1928).

29. See Ramón Paniagua Redondo, *La Institución de la Prescripción Liberatoria en Materia de Obligaciones Internacionales en el Derecho Internacional Público*, 3 *SPANISH Y.B. INT’L L.* 203, 212–13 (1976).

the application of national-domestic principles in the development of the LPD in international law. Thus, Moreno Quintana's observation should be qualified to add that not just the nature of the LPD alone explains the lack of doctrinal development of international law concerning the doctrine, but also the very nature of both customary and conventional international law did not necessarily present a welcoming conceptual framework with respect to this particular doctrine.<sup>30</sup>

It would follow that the LPD has carved a space in international law as a result of a migration from national-domestic law. This origin would later result in the first principles governing the formation, transformation, and interpretation of LPD in public international law. Thus, the origins of the LPD in international law consisted of a very unique duality that rendered the doctrine the "Law of Nations" in the very literal sense of referring to the law of each geopolitical subdivision and at the same time *the law of all nations* (i.e., *international law*).

In the venerable chestnut *Of the Law of Nature and Nations*, Pufendorf dedicates an entire book and chapter to the subject.<sup>31</sup> Although both tainted and enriched by the seemingly byzantine debates of the day seen through the prism of the LPD,<sup>32</sup> Pufendorf manages to articulate six elements of the LPD, as well as a compelling rationale for justifying what he at first opines to be intuitively unjustifiable in the eyes of third parties. The principles establishing application of the doctrine merit citation of the original:<sup>33</sup>

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30. See generally Ralston, *supra* note 2; Quintana, *supra* note 28. Both articles summarize the prescription doctrine developed at the moment of their writing.

31. PUFENDORF, *supra* note 27, at 439–49.

32. Pufendorf explores the issue of a limitations period in international law, in part by considering whether the doctrine arises from civil law or positive law—a polemic that he believes cannot be conclusively resolved. He also considers the extent to which a bona fide purchaser may have the obligation to return property innocently received later in time when discovering that the seller was not the rightful proprietor; and whether it is against reason and the law of nations for a person, without knowledge, to forfeit his rights against a wrongdoer for public policy reasons. *Id.* at 442–45.

33. Citations to Pufendorf throughout this article retain much of the capitalization, abbreviation, and diction contained in the original English language translation, though spelling is altered in some cases for ease of comprehension.



V. The chief Reason, which the Learned in the Roman Law assign for the first introducing of Property, are to this purpose; That in order to the avoiding of confusion, and the cutting off of Disputes and Quarrels it is of great Consequence to the Publick Wealthfare, that the Properties of things should be fix'd and certain amongst the Subjects. *Which would be impossible, should perpetual indulgence be allow'd to the Negligence of former Owners, and should the new Possessors be left in continual Fear of losing what they held.*

Then again, Trade and Commerce could not otherwise subsist in the World: For who would ever contract with another? Who would ever make a Purchase, if he could never be secur'd in the quiet Possession of anything convey'd to him? nor would it be a sufficient Remedy in this Case, That if the thing should be thus challeng'd by a third Party, the Person from whom we receive it should be obliged to make it good; for after so long a course of Time thousands of Accidents might render him incapable of giving us this satisfaction. And what grievous Commotions must shake the Commonwealth, if at so vast a distance of Years, so many Contracts were to be this annulled, so many Successions to be declared void, and so many Possessors to be ejected? It was there for judg'd sufficient to allow such a Space, as large as in Reason could be desired, during which the lawful Proprietors might recover their own. But if thro' sloth And Neglect they suffer'd it to slip the Praetor might fairly reject their too late Importunity. And thou' it might so happen that now and then a particular Person lost his Advantage of recovering his Goods utterly against his Will, and without his Fault only because he was unable to find out the Possessor; yet the Damage and Inconvenience that the general Statute to some few private Men, is compensated by the Benefit it affords to the Publick. But we ought well to observe, that before we can charge the patient Proprietor with Carelessness and Sloth, we must suppose, that he had a convenient Season to assert his Diligence.

Hence it is highly agreeable to Reason and Equity, That the time during which a Country hath been the Seat of War, shall not avail towards Prescription: As *Honorius* particularly decreed, *That no one should reckon towards the procuring of Prescription that Space of Time in which the Vandels staid upon the Roman Ground.*<sup>34</sup>

Pufendorf understands the LPD as essential for the stability of “[t]rade and [c]ommerçe,” even though glaringly absent from his account is *any* reference to the word “international” or to any nomenclature or concept synonymous with it.<sup>35</sup> The analysis is articulated within the rubric of private transactions, which should be noted as the first of five elements that characterized Pufendorf’s understanding of the LPD. Any universality present in Pufendorf’s narrative on the subject is limited to concepts such as “equity,” “natural reason,” “the opinion of good and true men,” and “the consent of nations.”<sup>36</sup> The policy of States and the commerce between and among nations find no space in his narrative.

Second, from a contention-dispute perspective Pufendorf seems to understand the workings of the LPD as a *defense*,<sup>37</sup>

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34. PUFENDORF, *supra* note 27, at 442–43 (underlined emphasis added).

35. Pufendorf does, however, reference the term “world” in this chapter. *Id.* at 442.

36. In discussing how best to calculate a limitations term pursuant to which legitimate ownership of certain property would best resist a contrary claim of right, Pufendorf reasons:

But the particular Space of time within which such an innocent Possession grows up to the Force and Strength of Property, we do not find precisely determined, either by natural Reason, or the universal Consent of Nations; but it is to be adjudg’d by the Opinion of good and true Men upon the Case, not without some considerable degree of Latitude.

*Id.* at 446.

37. Early in chapter XII, Pufendorf observes that “[t]he Word *Praescriptio* in that Sense of the same Law imports strictly that Plea, Demur or Exception, by which the Person thus in Possession invalidates the Claim of the first Proprietier.” *Id.* at 439. Mr. Barbeyrac’s notes on Chapter X, sections i and ii, qualifies Pufendorf’s etymological reference by noting that “[t]he word *Prescription* will best express the Latin *Usucapio* in our Language [English], and therefore we shall treat of it under that Name, unless some special Reason oblige us to use the Word *Usucapion*.” *Id.* at 436 n.2.

even though he also references the LPD as a *right*.<sup>38</sup> In so doing, Pufendorf stays clear of any mention of the State, public purpose, or public policy, beyond that already identified in the context of the need for stability and certainty in the status of enforceable contractual rights.<sup>39</sup> Notably, irrespective of the definition of the LPD as a defense or a right, for Pufendorf, it is a principle that attaches to the person against whom a claim is asserted as the holder of the right or a defense.

Third, Pufendorf contextualizes the LPD as concerning private transactions. Book IV, Chapter XII, for example, is rife with references to the term “civil law.” The illustrations that the author crafts concern persons trafficking in goods in markets, and scenarios comprising “subsequent” and “original” proprietors.<sup>40</sup> Thus, the author’s conceptual categories are inextricably intertwined with (i) private transactions between individuals, and (ii) occurring in a national-domestic market-driven setting. Moreover, adding to this conceptual rubric are the terms “law of nature,” good faith (“*bona fides*”), and bad faith (“*mala fide*”).<sup>41</sup> Hence, the development of and reliance on precepts such as “a man doth not become just possessor of a thing barely by taking it to himself, but by holding it innocently.”<sup>42</sup>

Fourth, in addition to the elements of duration, negligence, state of mind of benefactor, good faith, and bad faith, Pufendorf heavily relies on *uninterrupted* or *continuous* conduct.<sup>43</sup> This element is qualified only with respect to the extent to which the interruption would be a *force majeure* warranting abatement of the limitations term.<sup>44</sup>

Fifth and final, Pufendorf argues that “[a] longer Space of Time is required for prescribing against one that is absent, then one that is present. So again, moveable things may pass

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38. Pufendorf writes: “Besides, amongst the reasons on which the *Right of Prescription* is founded, one is the Negligence of the Owner, in seeking after them.” *Id.* at 440.

39. *Id.* at 439.

40. *Id.* at 441–42.

41. *Id.* at 441.

42. *Id.* For a critique of this view, Pufendorf notes that Tacitus “calls this way of proceeding, *Diutina licentia*, A long continued licentiousness and injustice.” *Id.*

43. *Id.* at 442.

44. *Id.* at 443.

into Prescription sooner than immoveable.”<sup>45</sup> The categories of (i) moveable, (ii) immoveable, (iii) present, and (iv) absent further constitute elements of the LPD as Pufendorf conceives this doctrine.

Pufendorf’s account of the LPD is comprehensive when compared to modern iterations of the doctrine in both national-domestic and international law. No adjustments to the doctrine’s foundational elements are present. It is precisely because of this extraordinary relevance that the contemporary paradigm governing limitations periods in public international law compels revision.

### 3. *Vattel and the LPD*

Writing almost half a century after Pufendorf’s death in 1694, M. de Vattel in his classic, *The Law of Nations*,<sup>46</sup> categorizes the LPD as an identifiable right arising from natural law and for this reason constitutes the “law of nations.”<sup>47</sup> Vattel uses natural law to buttress the policy objectives of stability and security. He proceeds to fashion a definition of prescription (i.e., limitations) based on the legal fiction of “presumed consent”:

*Prescription* is the exclusion of all pretensions to a right—and exclusion founded on the length of time during which that right has been neglected, or according to Wolff’s definition, it is the laws of an inherent right by virtue of a presumed consent. This definition too is just; that is, it explains how a right maybe forfeited by long neglect; and it agrees with the nominal definition we give to the term *prescrip-*

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45. *Id.* at 442.

46. VATTEL, *supra* note 25. Notably, Vattel does aspire to relate the “law of nations” to the “conduct and affairs” of States, arguably more directly than his predecessors—including Pufendorf. Vattel affirmatively endeavors to identify policies and legal principles relating to the affairs of States that are inapposite to the workings of these legal tenets within a national framework. *Id.* at 189.

47. *Id.* at 190. Vattel underscores that “the Law of Nations *is but the law of nature* applied to nations in a manner suitable to the parties concerned . . . . And so far is the nature of the parties from affording them an exemption in the case, that usucaption and prescription are much more necessary between sovereign states than between individuals.” *Id.* (emphasis added) (citations omitted).

tion, in which we confined ourselves to the meaning usually annexed to the word.<sup>48</sup>

The chapter discussing the LPD circumscribes most of the effort to understanding the doctrine through the lenses of (i) natural law, and (ii) national-domestic law addressing the relationship between individuals.<sup>49</sup> Moreover, with rare exceptions, Vattel's analysis of the doctrine is mostly limited to property rights and the manner in which "nature," having established the concept of private property over personal and real property, also has supplemented this "gift" with the qualification that ownership is not to be negligent in the care and publication of such property.<sup>50</sup> Thus, according to Vattel, natural law carves out a doctrinal space that (i) explains ownership or entitlement, (ii) gives rise to specific affirmative acts or obligations that attach to such principles, and (iii) duly explains losing such ownership rights as a consequence of the abandonment of the specific obligations summarized in (i).<sup>51</sup>

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48. VATTEL, *supra* note 25, at 187. Vattel's reference to "Wolff's definition" refers to CHRISTIAN L. B. DE WOLFF, INSTITUTIONS DU DROIT DE LA NATURE ET DES GENS, DANS LESQUELLES, PAR UNE CHAÎNE CONTINUE, ON DÉDUIT DE LA NATURE MÊME DE L'HOMME TOUTES SES OBLIGATIONS & TOUTS SES DROITS 13 (Elie Luzac ed., 1772). Christian Wolff (1679–1754), as he is known in English, was a German philosopher best known for his work on dogmatic rational thought, and his work was cited by Immanuel Kant as a significant contribution to his magnum opus the *Critique of Pure Reason*. See Norman Kemp Smith, *Preface to the Second Edition* of IMMANUEL KANT, CRITIQUE OF PURE REASON 33 (Norman Kemp Smith trans., Macmillan & Co. 1929) (1781).

49. *Id.* at 186–89.

50. VATTEL, *supra* note 25, at 188.

51. Vattel notes that:

Far from giving such a right, the law of nature lays an injunction on the proprietor to take care of his property, and imposes on him the obligation to make known his rights, that others may not be led into error: it is on these conditions alone that she approves of the property vested in him, and secures him in the possession. . . . We must not therefore conceive the right of private property to be a right of so extensive and imprescriptible a nature, that the proprietor may, at the risk of every inconvenience thence resulting to human society, absolutely neglect for a length of time, and afterwards reclaim it, according to his caprice. With what other view than that of the peace, the safety, and the advantage of human society, does the law of nature ordain that all men should respect the right of private property in him who makes use of it?

*Id.* at 187 (emphasis added).

These elements are qualified where the holder of the rights can justify the inaction while substantiating the source of her proprietary rights.<sup>52</sup>

In sharp contrast to Pufendorf, Vattel does attempt to contextualize the LPD with respect to international law, albeit fleetingly and at the conclusion of a single paragraph.<sup>53</sup> This reference to international law, however, is extremely important. It provides a pristine illustration of the methodological and doctrinal fallacies that ultimately attached to, and to date form part of, the doctrinal conceptualization and practical application of the LPD in international law. The analysis on this point commands close scrutiny.

Vattel imports into public international law a national-domestic law treatment of the LPD. To the extent that he adjusts the doctrine because of differences between private persons transacting business in a national-domestic setting and the laws governing the relations of States, he does so merely by emphasizing how the public policy imperatives underlying national-domestic law apply *with all the more force* where the relationships of States are at issue. Vattel does not see beyond national law, even though he is quite deeply aware that, somehow, the underlying precepts of international law concerning the LPD must differ from those of its national counterpart. Regrettably, he views these differences as *quantitative* and not *qualitative* in nature:

Since prescription is subject to so many difficulties, it would be very proper that adjoining nations should by *treaty* adopt some rule on this subject, particularly *with respect to the number of years required to found a lawful prescription*, since this latter point cannot in general be determined by the law of nature alone. If, in default of treaties, custom has determined anything in this matter, the nations between whom this custom is in force, ought to conform to it.<sup>54</sup>

By offering a methodology-agreement among nations on a limitations period memorialized in treaty law, Vattel foreshadows the modern fragmented international law of the LPD. A treaty-based limitations period must avoid giving rise to a

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52. *Id.* at 188.

53. *Id.* at 192.

54. *Id.* at 191.

system lacking uniformity. Vattel contemplates a multi-lateral approach based on consent and treaty law to provide for uniformity. It can be inferred from his writings that the possibility of a fragmented universe of treaty law with respect to the LPD is but a heretical proposition. Indeed, such a specter causes him to undertake a dramatic excursion from his “Natural Law” comfort zone and turn to a positivist approach under the guise that the appropriate years attaching to a particular limitations period *cannot in general be determined by the law of nature alone*.<sup>55</sup>

The challenges endemic to international law embracing a formal and substantive standard as to the LPD is hardly foreign to Vattel, although he elects not to elaborate on the difficulties and limits his analysis to the obstacles arising from the asymmetries between States. We thus learn that “between nations, the right[ ] of . . . prescription [is] often more difficult in [its] application, so far as [it is] founded on a presumption drawn from long silence.”<sup>56</sup> He continues to observe that “nobody is ignorant how dangerous it commonly is for a weak State even to hint a claim to the possession of a powerful monarch. In such a case, therefore, it is not easy to deduce from long silence a legal presumption of abandonment.”<sup>57</sup> Here, he also emphasizes the dichotomy between a sovereign’s inherent inability to alienate rights and its right not to act.<sup>58</sup> Vattel concludes that a sovereign’s inaction may wrongfully be construed as abandonment.<sup>59</sup>

Despite identifying *practical* differences concerning the workings of the LPD in a national context and in international law, Vattel’s substantive enterprise on this narrow subject is somewhat disappointing. He merely engages in the wholesale importation into international law of the very *same* and *unqualified* elements present in national-domestic law. The hesitance to develop a separate set of elements defining the doctrine in the context of the dealings between nations for Vattel is rooted in the conceptual straight jacket of Natural Law.<sup>60</sup>

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55. See *id.* at 186–90.

56. *Id.* at 190.

57. *Id.*

58. *Id.*

59. *Id.*

60. Vattel seeks to reconcile with a utilitarian approach to natural law principles. He posits that the use of a limitations period in an international context (i.e., in dealings between nations) should be subject to a “clear and

Vattel holds fast to orthodox syllogistic reasoning in exhausting the very limits of the Natural Law in an effort to introduce the LPD into the laws governing the conduct of States. Accordingly, he reasons that “[a]fter having shown that *usu-captio* and *prescriptio* are founded in the law of nature, it is easy to prove that they are equally a part of the law of nations, and ought to take place between different states.”<sup>61</sup> He further adds as a minor premise to the syllogism that “[f]or, the law of nations is but the law of nature applied to nations in a manner suitable to the parties concerned.”<sup>62</sup> The reference to as “applied to nations in a manner suitable to the parties concerned” is a concession to the need for uniformity that can only arise from a positivist approach: namely, negotiations culminating in treaty law.

The consequential effects of this reasoning are twofold. First, Vattel engrafts on international law<sup>63</sup> the identical public policy needs for certainty and stability that he identifies as incident to national-domestic law.<sup>64</sup> Similarly, the elements of the

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convincing” evidentiary standard of proof. *Id.* at 191. This inference, however, is drawn from the premise that the consequences of a sovereign’s acts and omissions are far beyond those incident to the commercial transactions between private actors. *Id.*

61. *Id.* at 190.

62. *Id.* (citation omitted).

63. As with Grotius and Pufendorf, Vattel never uses the term “international law.” He infers that the “Law of Nations” is the equivalent to the “law among nations” and, therefore, is the law that should govern the conduct of nations. *Id.* at Preliminaries (“The law of Nations is the science which teaches the rights subsisting between nations or states, and the obligations correspondent to those rights.”). This methodology of thought is important for present purposes because it identifies the core problem that these authors observe as plaguing the international law regulating the LPD.

64. This argument is more exigent when it concerns the conduct of States, but is in effect the identical policy that has been referenced. As to States, Vattel notes how

[t]heir quarrels are of much greater consequences; their disputes are usually terminated only by bloody wars; and consequently the peace and happiness of mankind much more powerfully required that possession on the part of sovereigns should not be easily disturbed,—and that, if it has for a considerable length of time continued uncontested, it should be deemed just and indisputable. Were we allowed to recur to antiquity on every occasion, there are few sovereigns who could enjoy their rights in security, and there would be no peace to be hoped for on earth.

*Id.* at 190.



doctrine remain identical to those comprising national-domestic law.<sup>65</sup>

4. *The Modern Commentators and the LPD: A Brief Look from 1767 to Date*

The LPD has not changed since Vattel's writings on the subject. A legacy LPD pervading public international law that is the product of national-domestic law concepts persists. Vattel's exception to natural law reasoning and principles constituted a conceptual warning that, absent consent among nations, a fragmented and unworkable system would ensue. The pronouncement on what was to come fell on deaf ears. The LPD has not developed beyond the contributions of Grotius, Pufendorf, and Vattel. No allowance has been made for the aspirations that international law harbors. There is no modification to the elements, theoretical conception, or rules of practical application pertaining to the doctrine developed to meet the objectives of international law.

The historical writings on the LPD have been incorporated into international law and mechanically regurgitated as if these principles were intuitive and beyond the realm of discursive reasoning.<sup>66</sup> These contributions viewed the doctrine

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65. Vattel notes that, in the context of laws governing conduct between nations, the doctrine only applies to "cases of long-continued, undisputed, and uninterrupted possession . . . [where] prescription is established on these grounds, because it is necessary that affairs should sometime or other be brought to a conclusion, and settled on a firm and solid foundation." *Id.* at 191.

66. Nineteenth century legal commentators adopted the same visceral, boiler-plate approach to the LPD in the context of international law. For example, Henry Wheaton, in his seminal work *Elements of International Law*, does not discuss the LPD in the context of international law. Rather, he simply assumes that there is no difference on this point between the domestic and international spheres. In fact, he limits international analysis of the doctrine to the law governing conflicts and choice of law as to private commercial transactions. See HENRY WHEATON, *Elements of International Law* 223–24 n.92 (8th ed. 1866). Friedrich Karl von Savigny does not measurably differ in his analysis of the LPD, noting that "[m]any said that laws as to prescription are laws of procedure, and must therefore be applied to all the actions brought within their territory, without respect to the local law of the obligation. According to the true doctrine, the local law of the obligation must determine as to the term of prescription, not that of the place of the action . . . ." FRIEDRICH KARL VON SAVIGNY, *PRIVATE INTERNATIONAL LAW, AND THE RETROSPECTIVE OPERATION OF STATUTES: A TREATISE ON THE CONFLICT OF*

as conceptually arising from rules of domestic property law, as well as from principles of commercial entitlement to goods that do not comport with the objectives of international law. This dissonance is rendered all the more evident when considered in the context of the international law of investment protection. When thus considered, it becomes apparent that the legacy national-domestic principle of the LPD was not designed (i) to identify and (ii) to address merely the consequences arising from a State's excessive exercise of regulatory sovereignty. For this reason, the application of the domestic law-based LPD to treaty-based protection standards<sup>67</sup> cannot further the policies of international law and merely serves to foster asymmetries between capital-exporting and capital-importing States.

The national-domestic rules of law concerning the LPD are conceptually applicable to events defined by illicit or excessive exercise of regulatory sovereignty. The legacy of the LPD can only *accidentally* comport with the competing policies of capital-exporting and capital-importing States concerning the regulation of foreign direct investment (FDI). Modern authority addressing the LPD has not pursued the necessary paradigm shift.

Bin Cheng, by way of example, engages in an orthodox analysis that limits his enterprise to commentary on different policies arising from the legal effects of maturation of a limitations period only arising because of the passage of time and circumstances in which the limitations doctrine attaches as a result of *negligence* imputable to the actor whose rights have

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LAWS 249, 267-272 (1880) [hereinafter SAVIGNY, PRIVATE INTERNATIONAL LAW]. He superficially touches on the LPD without drawing distinctions between the domestic and international contexts. For Savigny, the doctrine is but a qualified relic of Roman law and fodder for the development of principles governing conflicts of law. See generally FRIEDRICH CARL VON SAVIGNY, SISTEMA DEL DERECHO ROMANO ACTUAL (José Luis Monereo Pérez ed., 2005); SAVIGNY, PRIVATE INTERNATIONAL LAW, *supra*.

67. The standards of protection are (i) FET; (ii) Full Protection and Security; (iii) Protection Against Arbitrary or Discriminatory Measures; (iv) National Treatment; and (v) MFN. These core standards were followed by the addition of: (i) Free Transfers; and (ii) Umbrella Clauses. Also, the international minimum standard of protection and Denial of Justice serve as basic elements of the treaty protection standard reservoir.

been adversely compromised.<sup>68</sup> Hence, Cheng does not analyze the question that, in part, occupies this contribution, namely: to what extent does the historical legacy of a LPD rooted in national law continue to have resonance in modern international law?<sup>2</sup>

Ian Brownlie's treatment of the LPD in international law is analytically no different from Cheng's approach.<sup>69</sup> His methodology is purely descriptive, deliberately omitting the *historical* and *prescriptive*.<sup>70</sup> Upon recognizing this single paragraph reference as "helpful and revealing, some of the problems to be faced," Brownlie limits his analysis to a recitation of orthodox views on (i) acquiescence by the displaced competitor, (ii) the conditions for acquisitive prescription,<sup>71</sup> (iii) adverse holding or negative prescription,<sup>72</sup> and (iv) acquiescence and recognition.<sup>73</sup> Nowhere does he distinguish these norms from the

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68. BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 378–79 (George W. Keeton & Georg Schwarzenberger eds., Cambridge Univ. Press 2006) (noting that Cheng includes the historical and prescriptive, whereas Brownlie focuses only on the descriptive aspect).

69. Compare IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 146–51 (Cambridge Univ. Press 7th ed. 2008) with CHENG, *supra* note 68, at 378–79.

70. Brownlie does supplement his descriptive account with a single paragraph briefly noting to history. At the least, the doctrine reveals clearly that the concept is regarded by jurists as having three forms:

1. Immemorial possession. This is understood to give title when a state of affairs exists of which the origin is uncertain and may have been legal or illegal but is presumed to be legal.
2. Prescription under conditions similar to those required for *usucapio* in Roman law: uninterrupted possession, *justus titulus* even if it were defective, good faith, and the continuance of possession for a period defined by law.
3. *Usucapio*, modified and applying under condition of bad faith. Thus Hall, Oppenheim, and Fauchille do not require good faith in the context of international law.

BROWNLIE, *supra* note 70, at 146–47.

71. Here, Brownlie relies considerably on W.E. Beckett's contributions to IV RECUEIL DES COURS (1934). See BROWNLIE, *supra* note 70, at 148 n.190.

72. Brownlie here draws from the Island of Palmas Case (Neth. v. U.S.), 2 R.I.A.A. 829 (Perm. Ct. Arb. 1928). See BROWNLIE, *supra* note 70, at 150 n.206.

73. Here, Brownlie relies principally on YEHUDA Z. BLUM, HISTORIC TITLES IN INTERNATIONAL LAW (1965); ERIC SUY, LES ACTES JURIDIQUES UNILATÉRAUX EN DROIT INTERNATIONAL PUBLIC 61–68 (1962); ROBERT YEWDALL JENNINGS, THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW 36–40

national-domestic application for purposes of contextualizing them within international law.

In this same vein, Malcolm N. Shaw undertakes an identical analysis drawing on common sources and reaching identical conclusions. He explains that “[t]he general rule in such circumstances [the relevant time period at which to ascertain legal rights and obligations concerning territorial title] is that in a dispute the claim or situation in question (or relevant treaty, for example) has to be examined according to the condition and rules in existence at the time it was made and not at a later date.”<sup>74</sup> He illustrates by noting that “in the *Island of Palms* case, the Spanish claim to title by discovery, which the United States declared it had inherited, had to be tested in the light of international legal principles in the sixteen century when the discovery was made. This aspect of the principle is predicated upon the presumption of, and need for, stability.”<sup>75</sup>

Contemporary commentators’ adherence to a descriptive analytical framework shuns any likelihood of viewing the LPD, whether in the context of losing existing rights or acquiring new ones, beyond the legacy orthodox configuration arising from national-domestic law, particularly as concerns civil law, liability rules, negligence, and property law.<sup>76</sup>

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(1963); HERSCH LAUTERPATCH, *RECOGNITION IN INTERNATIONAL LAW* 409–12 (1947); Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, 32 BRIT. Y.B. INT’L L. 20, 58–63 (1955); Kaiyan Homi Kaikobad, *Some Observations on the Doctrine of Continuity and Finality of Boundaries*, 54 BRIT. Y.B. INT’L L. 119 (1983); I.C. MacGibbon, *The Scope of Acquiescence in International Law*, 31 BRIT. Y.B. INT’L L. 143 (1954); and Georg Schwarzenberger, *Title to Territory: Response to a Challenge*, 51 AM. J. INT’L L. 308, 316–23 (1957). See BROWNIE, *supra* note 70, at 151–52 n.213.

74. MALCOLM N. SHAW, *INTERNATIONAL LAW* 508 (Cambridge Univ. Press 6th ed. 2008).

75. *Id.* at 508 (citation omitted) (citing *Eritrea v. Yemen (Phase One: Territorial Sovereignty and Scope of the Dispute)*, 114 I.L.R 1, 46, 115 (Perm. Ct. Arb. 1998); *Delimitation of the Border Between Eritrea and Ethiopia, Judgment*, 130 I.L.R. 1, 34 (Eth.-Eri. Boundary Comm’n 2002); *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria, Judgment*, 2002 I.C.J. Rep. 303, 404–05 (Oct. 10)).

76. See generally LASSA OPPENHEIM, 1 *INTERNATIONAL LAW: A TREATISE* 400 (1905) (stating that “prescription in International Law has the same basis as prescription in Municipal Law –namely, the creation of stability of order”).

## B. *First Generation Treaties, Precursors to BITs*

### 1. *Friendship, Commerce, and Navigation Treaties*

During the approximately 190-year time frame between 1778 and 1967, the conventional international law landscape virtually disregarded the LPD.<sup>77</sup> For present purposes, it serves as an analytical model to approach treaty law during this time frame as susceptible to classification under three categories: (i) precursors to contemporary BITs, or more generally treaties purporting to set economic policies with respect to FDI; (ii) treaties addressing fact-specific reparation concerns that do not purport to establish macro or micro-economic policies; and (iii) extradition treaties.<sup>78</sup> The precursors to contemporary BITs in turn are either Friendship, Commerce and Navigation treaties (FCN)<sup>79</sup> or draft multilateral conventions primarily concerned with the protection of foreign investments.<sup>80</sup>

77. See, e.g., Redondo, *supra* note 29, at 224–25. Redondo notes:

The only serious attempt by means of which the statute of limitations would have formed part of the conventional law was undertaken by the Third Codification Commission of International Law, under the auspices of the League of Nations. Unfortunately the Commission did not reach an agreement, for that reason it was a mere attempt of unification. Otherwise, we would have had a clear universal standard text about the statute of limitations.

*Id.* (translated by author).

78. See, e.g., Convention on Extradition and Judicial Assistance in Criminal Matters, Fr.-Lat., Oct. 29, 1924, 93 L.N.T.S. 265 (1924) [hereinafter France-Latvia Extradition Treaty]; Treaty of Versailles, June 28, 1919, S. doc. 51, 66th Cong., 1st Sess.; Extradition Treaty, Greece-Ger., Mar. 12, 1907, 1907 R.G.B.I. 38 (Ger.) [hereinafter Greece-Germany Extradition Treaty]; Tratado de Derecho Civil Internaional de Montevideo, Feb. 12, 1889, No. 3192 of 6/12/1894 (Arg.); Convention Between the United States of America and the Republic of Chile. Arbitration of Macedonian Claims, 12 Stat. 1083 (1859).

79. See, e.g., Treaty of Amity and Commerce, U.S.-Prussia, Sept. 10, 1785, in 1 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 1477–85 (William M. Malloy ed., 1910), S. Res. 252, 60th Cong. (1909); Treaty of Amity and Commerce, U.S.-Swed., Apr. 3, 1783, 8 Stat. 60 (1783); Treaty of Amity and Commerce, U.S.-Fr., Feb. 6, 1778, in 1 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 468–78, *supra*.

80. See, e.g., Org. for Econ. Cooperation & Dev. [OECD], *Draft Convention on the Protection of Foreign Property*, 2 INT'L LAW 331, 331–353 (1968) (adopted by the OECD Council Oct. 12, 1967) [hereinafter OECD Draft Convention]; Draft Convention on Investment Abroad, 1959, in U.N. CONFERENCE ON TRADE & DEV. [UNCTAD], INTERNATIONAL INVESTMENT INSTRU-

The FCNs altogether omit *any* reference to the LPD. In this regard, they mirror a majority of BITs that do not at all address the issue.<sup>81</sup> The FCNs here analyzed cover a ninety-nine year time frame, from 1850 to 1949.<sup>82</sup> While the treaties are common in form, they materially differ in substance. For example, with respect to the range of foreign investment protection standards common to most FCNs, they do differ to some extent as to specific protection standards.<sup>83</sup>

The FCNs' collective lack of a limitations period highlights the anomaly arising from conflating public international law and national-domestic law principles. The effects of this paradox are best exemplified by developing to their logical and necessary consequences the theoretical and practical implications of treaties lacking limitations periods, yet according the citizenry of signatory States procedural rights in the form of recourse to national courts.<sup>84</sup>

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MENTS: A COMPENDIUM, at 395, U.N. Doc. UNCTAD/DITE/2(Vol. V), U.N. Sales No. E.01.II.D (2001) [hereinafter Abs-Shawcross Convention]; Havana Charter for an International Trade Organization, Mar. 24, 1948, U.N. Doc. E/Conf. 2178 (hereinafter the Havana Charter); Code of Private International Law, 86 L.N.T.S. 111 (1928).

81. Only 106 of a total of 2,061 BITs in force as of the date of this writing contain a limitations period. (Authors hand-searched the BITs and reached this figure).

82. *Compare* Friendship, Commerce and Navigation Treaty, U.S.-Hawaii, Dec. 20, 1849, 9 Stat. 977 (1850) [hereinafter U.S.-Hawaii FCN] *with* Friendship, Commerce and Navigation Treaty, It.-U.S., Feb. 2, 1948, 63 Stat. 2255, T.I.A.S. No. 1965, 79 U.N.T.S. 171 (entered into force 26 July 1949) [hereinafter Italy-U.S. FCN].

83. For example, the Peru-U.S. FCN, while providing for the equivalent to the contemporary national treatment standard and full protection and security, does not contain a fair and equitable treatment protection standard. Friendship, Commerce and Navigation Treaty, U.S.-Peru, July 26, 1851, 10 Stat. 926, T.S. No. 276 [hereinafter U.S.-Peru FCN]. Moreover, while article XV of the treaty refers to the protection of property belonging to all citizens irrespective of any status consideration, no explicit protection is extended to direct or indirect expropriation or to conduct tantamount to an expropriation. *Id.* art. XV. In this same vein, the Italy-U.S. FCN, *supra* note 82, contains a robust expropriation provision, according citizens of the signatory States two procedural options in cases of dispute: (i) to proceed in an international venue (i.e., the ICJ); or (ii) pursuant to another methodology upon consent of the parties—presumably arbitration, although the term “arbitration” is nowhere referenced in this treaty. *Id.* art. V.

84. Most, but not all, FCNs provide for dispute resolution in the form of access to national courts. *See, e.g.*, Treaty of Friendship, Commerce, and Navigation art. VII, U.S.-Nicar., Jan. 21, 1956, 9 U.S.T. 449, 367 U.N.T.S. 3 (en-

Where the FCN refers the parties to national-domestic courts, it follows that the claims to be asserted in domestic tribunals can only arise from an alleged breach of a *treaty* standard of protection. Therefore, domestic tribunals are being asked to adjudicate public international law treaty claims. In such instances, are the parties to assume that national-domestic limitations periods would attach to the treaty-based claim? If so, then the parties, and moreover the entire international community, face the dissonance arising from (i) a public international law treaty-based claim, (ii) filed in a national-domestic tribunal, but (iii) attaching a limitations period that is segregated from the treaty giving rise to the claim(s) in the first instance.

This scenario is conducive to uncertainty and insecurity. The configuration also assumes that national-domestic laws somehow would provide for either a conflicts-of-law or choice-of-law rubric that introduces a limitations period that in turn garners a modicum of a reasonable relationship between the limitations period and the substantive treaty violation claim alleged. Only pursuant to statistical happenstance is this scenario possible. Indeed, it is unlikely and fraught with more questions than its workings could ever aspire to answer.

A second approach, more consistent with the contemporary status and understanding of customary and conventional international law,<sup>85</sup> would be to conclude that the FCNs do

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tered into force May 24, 1958); Agreement Between the U.S. and the Republic of Korea Regarding Friendship, Commerce and Navigation art. XIV, Nov. 28, 1956, 8 U.S.T. 2217, 302 U.N.T.S. 281 (entered into force Nov. 7, 1957); Amity and Commerce Treaty art. IV, U.S.-Siam, Dec. 16, 1920, 42 Stat. 1928 (entered into force Sept. 1, 1921) [hereinafter U.S.-Siam FCN]; U.S.-Peru FCN, *supra* note 83, art. XV; U.S.-Hawaii FCN, *supra* note 82, at art. VIII; Peace, Friendship, Limits, and Settlement (Treaty of Guadalupe Hidalgo) art. XIV, U.S.-Mex., Feb. 2, 1848, 9 Stat. 922 (entered into force May 30, 1848) [hereinafter U.S.-Mex. FCN]. A significant, albeit minority, position that is more conceptually coherent is to accord the parties access to dispute resolution by referring to international fora, or even implicitly to a dispute resolution methodology premised on the parties' consent. While it stands to reason that this latter methodology is "arbitration," the term is conspicuously omitted from the treaties. *See, e.g.*, Italy-U.S. FCN, *supra* note 82, art. XXVI.

85. While customary international law does not recognize the LPD, *see* *Bosca v. Republic of Lith.*, Award, ¶ 120 (Lith.-It. Arb. Tribunal 2013), [https://www.italaw.com/sites/default/files/case-documents/italaw7179\\_1.pdf](https://www.italaw.com/sites/default/files/case-documents/italaw7179_1.pdf); *Gavazzi v. Rom.*, ICSID Case No. ARB/12/25, Decision on

not contemplate a limitations period. This rationale at first glance is compelling.

Contemporary doctrine suggests that an affirmative claim for relief arising from an alleged breach of a treaty protection standard is governed by the limitations period contained in the treaty at issue.<sup>86</sup> Therefore, in the case of FCNs, the *only* logical conclusion is that there is no limitations period attaching to *any* claim arising from an alleged violation of a protection standard contained in an FCN. This conclusion, although analytically sound, is not functional because it *completely* undermines the cornerstone policy objective of certainty and security stemming from finality. Put simply, this methodology is unworkable unless the community of nations signatory to FCNs expressly opted for a framework that did not include limitations periods attendant to claims arising from such treaties. The contemporaneous preparatory drafts and writings on the subject, however, do not suggest any such consensus. To the contrary, emphasis is placed on the need to procure stability and security through finality. The possibility of claims in perpetuity arising from an alleged breach of a standard of protection embodied in an FCN was simply unthinkable. It remains conceptually and practically untenable.

A third scenario also presents considerable surface appeal. It would be consistent and intuitively coherent to posit that where the FCN at issue provides for procedural rights in the form of recourse to national-domestic courts, national limitations periods would apply to the treaty-based claims to be processed by such national-domestic tribunals. One such approach would be to select a national-domestic limitations period to attach to such treaty-based claims based on analogy to

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Jurisdiction, Admissibility and Liability, ¶ 147 (Apr. 21, 2015), [http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C2441/DC9888\\_En.pdf](http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C2441/DC9888_En.pdf), conventional international law explicitly and unequivocally proclaims that the limitations period in a treaty governs any claim arising from such a treaty. See *Corona Matertials, LLC v. Dom. Rep.*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, ¶ 192 (May 31, 2016), [http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3665/DC8252\\_En.pdf](http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3665/DC8252_En.pdf); see also 32 *INSTITUTE DE DROIT INTERNATIONAL, ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL: SESSION DE LA HAYE—JUILLET-AOUT 1925*, 467 (1925) [hereinafter *ANNUAIRE*].

86. *ANNUAIRE*, *supra* note 85, at 480.



national-domestic causes of action. Thus, by way of example, the taking of property under public international law contained in an FCN as a protection standard would be analogized to its national-domestic “counterpart equivalent” in the form of civil theft or conversion. Accordingly, the limitations period attaching to these domestic causes of action would apply. Pursuant to this approach, the challenges are both numerous and significant.

Assuming this default “domestic analogy” methodology, there likely would be uncertainty regarding which domestic cause of action actually would be “analogous.” Indeed, it is not beyond man’s wit to assume that domestic laws generally are not at all “analogous” to international rules of law. Also, even assuming that the challenges presented by the need to analogize were systematically and uniformly met in all cases, the anomaly of having an international claim adjudicated by a national-domestic tribunal applying a domestic limitations period would still taint the theoretical and practical workings of the treaty. A limitations period having only *subjective* and *formal* conceptual ties to a treaty-based claim would be governing the extent to which such a claim is viable without ever having even reached the merits of the actual averment. These complexities are compounded and made worse when contextualized by two qualifications.

First, each signatory State to a treaty likely would have different domestic policies addressing the respective counterpart domestic cause of action. Thus, even where it is *assumed* that uniformity can be attained because all States would reach identical or materially identical conclusions concerning an “analogy analysis,” the actual domestic cause of action that serves as the analogous domestic proposition likely would be governed by a *different* limitations period. Because of this lack of uniformity alone the analysis fails.

Second, also assuming a hypothetical where externalities are removed that otherwise would give rise to different conclusions among States to an “analogy analysis,” different domestic policies would govern the very elements of any limitations period analysis. Applicable exceptions, in the form of tolling periods, applicability of continuing tort and abatement doctrines, and circumstances giving rise to the running of the limitations period itself, provide helpful illustrations. This approach is not conceptually and practically sustainable if the

objective of a limitations period doctrine in public international law includes certainty, uniformity, security, and stability arising from finality.

A third scenario that may be used to reconcile the absence of a limitations period in the FCNs with procedural rights referencing recourse to national-domestic courts, is to conclude that signatory States waived jurisdictional defenses when they agreed by treaty law to place at a prospective claimant's disposition the jurisdiction of national-domestic courts. In this same vein, it is conceptually coherent that a treaty would not provide benefits in the form of procedural rights only to have those rights completely undermined as a result of technical principles such as foreclosing actions based on the application of a statute of limitations defense. Although somewhat attractive at first glance, the proposition does not work.

This analysis merely raises the following question: if the signatory States waived any and all limitations period-based impediments to the fulfillment of procedural rights in the form of jurisdiction to national-domestic courts, then why is it that the FCNs do not so state? In fact, a plain language analysis, as Article 31 of the Vienna Convention on the Law of Treaties commands, would lead to a diametrically contrary conclusion.<sup>87</sup> The actual language material to the jurisdiction of national-domestic tribunals contained in FCNs neatly falls into two categories. The first category consists of examples where the FCN's operative language providing recourse to jurisdiction before national-domestic courts underscores that such rights are *in pari materia* with those accorded to citizens of that jurisdiction. The emphasis precisely is placed on having the same and identical rights. At no time is it suggested that the rights granted to non-citizens would be *any* greater than those accorded to citizens.<sup>88</sup> Hence, an Article 31 plain meaning *con-*

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87. Vienna Convention on the Law of Treaties art. 31, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) ("GENERAL RULE OF INTERPRETATION. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").

88. *See, e.g.*, U.S.-Mex. FCN, *supra* note 84, art. XIV, which provides:

Both the contracting parties promise and engage to give their special protection to the persons and property of the Citizens of each other of all occupations who may be in their territories, *subject to the jurisdiction* of the one or of the other, transient or dwelling therein,

*struction* forecloses the waiver approach to limitations periods in FCNs.

The U.S.-Thailand FCN is emblematic of a second type of language contained in procedural rights or dispute resolution clauses present in FCNs.<sup>89</sup> Notably, the procedural rights incident to dispute resolution are amplified pursuant to the incorporation of a MFN clause. In this regard, certainly, non-citizens enjoy greater rights than citizens, but presumably such rights are circumscribed to treaty-based substantive standards and not to procedural rights. With some qualification, limitations periods are deemed to be procedural and not substantive.<sup>90</sup> Because of this classification framework, the MFN clauses in FCNs of this ilk are proscribed from importing procedural rather than substantive rights, as is the case with limi-

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leaving open and free to them the tribunals of Justice for their Judicial recourse, *on the same terms which are usual, and customary* with the natives or Citizens of the Country in which they may be; for which they may employ in defence of their rights such advocates, Solicitors, Notaries, Agents and Factors as they may judge proper, in all their trials at Law; and the Citizens of either party, or their Agents *shall enjoy in every respect the same rights and privileges* either in prosecuting or defending their rights of person or of property, as to Citizens of the Country where the cause may be tried.

(emphasis added). The references to the term “subject to the jurisdiction,” and the qualification of that term with the language “on the same terms which are usual, and customary” and “shall enjoy in every respect the same rights and privileges,” leaves no room for a waiver argument that would benefit non-citizens over citizens.

89. The U.S.-Siam FCN, *supra* note 84, art. IV, reads, in pertinent part:

The nationals of each of the High Contracting Parties shall have free access to the Courts of Justice of the other in pursuit and defense of their rights; *they shall be at liberty, equally with nationals of the State of residence and with the nationals of the most favored nation*, to choose and employ lawyers, advocates and representatives to pursue and defend their rights before such Courts. There shall be imposed upon the nationals of either of the High Contracting Parties no conditions or requirements in connection with such access to the Courts of Justice of the other *which do not apply to nationals of the State of the residence or to the nationals of the most favored nation*.

(emphasis added).

90. See, e.g., SAVIGNY, PRIVATE INTERNATIONAL LAW, *supra* note 66, at 201 (“[m]any say the laws as to prescription are laws of procedure.”); see also Mary Bird Perkins, *Limitation of Actions in the Conflict of Laws*, 10 LA. L. REV. 374, 374–75 (1950) (“[t]he general rule in Anglo-American common law, contrary to that prevailing on the continent, is that statutes of limitation are procedural law . . .”).

tations periods.<sup>91</sup> Therefore, this second category of FCNs cannot be construed as providing the universe of prospective claimants with greater rights than host-State nationals in the form of waiver of any prospective limitations period that may be contained by one of the signatories in connection with another treaty in which such a procedural right may have been waived.

To the extent that, under any theory, the workings of the treaty would allow for the prosecution of treaty-based claims in a national-domestic court where otherwise a national-domestic cause of action would be time-barred, an additional conceptual challenge would have to be met. Namely, to what extent may a treaty create specific jurisdiction based upon the disal-

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91. In *Berschader v. Russian Federation*, SCC Case No. 080/2004, Award, ¶ 179 (Arb. Inst. of the Stockholm Chamber of Commerce 2006), [https://www.italaw.com/sites/default/files/case-documents/ita0079\\_0.pdf](https://www.italaw.com/sites/default/files/case-documents/ita0079_0.pdf), the Tribunal reasoned that

[w]hile it is universally agreed that the very essence of an MFN provision in a BIT is to afford to investors all material protection provided by subsequent treaties, it is much more uncertain whether such provisions should be understood to extend to dispute resolution clauses. It is so uncertain, in fact, that the issue has given rise to different outcomes in a number of cases and to extensive jurisprudence on the subject. The issue has caused the drafters of the United Kingdom model BIT to neutralise this ambiguity by confining in Article 3(3) that, for avoidance of doubt, MFN treatment shall apply to certain specified provisions of the treaty including the dispute settlement provisions.

(emphasis added). In *Emilio Agustin Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, ¶ 41 (January 25, 2000), [http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C163/DC565\\_En.pdf](http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C163/DC565_En.pdf), the tribunal rejected the respondent's argument that:

The Kingdom of Spain rejects these contentions. In its view, the treaties made by Spain with third countries are in respect of Argentina *res inter alios acta* and, consequently, cannot be invoked by the Claimant. Respondent further argues that *under the principle ejusdem generis the most favored nation clause can only operate in respect of the same matter and cannot be extended to matters different from those envisaged by the basic treaty*. In Spain's view, this means that the reference in the most favored nation clause of the Argentine-Spain BIT to "matters" *can only be understood to refer to substantive matters or material aspects of the treatment granted to investors and not to procedural or jurisdictional questions*.

(emphasis added).

lowance of particular jurisdictional defenses in cases where otherwise jurisdiction would not attach?

The predecessors to BITs served to foster the cross-pollination between national-domestic and international law in addressing the LPD. Furthermore, the construction of the most likely coherent and internally consistent frameworks for construing the workings of the LPD within the “system” of FCNs leads to a rubric that undermines uniformity. It thus sacrifices what have been identified in orthodox writings on the subject as the LPD’s foundational policy objectives: certainty and security. It is the absence of these two aspirational precepts that Grotius compellingly argued would give rise to “bloody war among nations.”<sup>92</sup> The precursors to BITs merely contributed to perpetuating the flawed methodology of importing into public international law long-standing national-domestic law principles. In addition, the FCNs and the writings on the LPD during the 1625-to-1949<sup>93</sup> time frame do not concern themselves with a fragmented system characterized by lack of uniformity that disavows the security and certainty policy objectives, which in turn drive the theoretical development and practical application of the LPD in public international law.<sup>94</sup>

## 2. *Twentieth Century Draft Multilateral Investment Protection Treaties: Non-BITs, Conceptual Precursors and Contributors to BITs*

Three draft multilateral conventions, which aim to promote commerce pursuant to foreign investment protection

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92. See *supra* text accompanying note 63 (noting that Vattel mentioned it as “tranquility and happiness”).

93. The 324-year period corresponds to the time that elapsed from the first the publication of Grotius’ *On the Law of War and Peace* (1625), GROTIUS, *supra* note 21, until the last FCN signed, between the U.S. and Italy (1949), Italy-U.S. FCN, *supra* note 82.

94. More than forty FCNs remain in force as of the date of this writing. See John F. Coyle, *The Treaty of Friendship, Commerce, and Navigation in the Modern Era*, 51 COLUM. J. TRANSNAT’L L. 302, 310 (2013). The list includes, among others, the FCNs signed by the United States with Argentina, Austria, Belgium, Bolivia, Bosnia and Herzegovina, Brunei, Colombia, Costa Rica, Croatia, Denmark, Estonia, Ethiopia, Finland, France, Germany, Greece, Honduras, Iran, Ireland, Israel, Italy, Japan, Korea, Kosovo, Latvia, Liberia, Luxembourg, Macedonia, Montenegro, Netherlands, Norway, Oman, Pakistan, Paraguay, Serbia, Slovenia, Spain, Suriname, Switzerland, Taiwan, Thailand, Togo, and the United Kingdom. *Id.* at 310 n.31.

standards together with dispute resolution procedural rights, are instrumental in discerning a common pattern of treatment of the LPD in the public international law of foreign investment protection. The *Havana Charter* (1948),<sup>95</sup> *Abs-Shawcross* (1959),<sup>96</sup> and OECD (1967)<sup>97</sup> draft conventions represent multilateral iterations of FCNs. To some extent, for reasons discussed below, the *Havana Charter* presents a qualified exception to these parallels. Configured very much like FCNs, the draft conventions lack a limitations period. Also, as with the FCNs, this omission is intriguing and conceptually problematic because the draft conventions all contain dispute resolution clauses.<sup>98</sup> The dispute resolution clauses do not shed any light on the limitations period attaching to prospective claims under those procedural rights. The multilateral nature of these agreements further complicates any treatment of the limitations period term that would in all likelihood be based upon the domestic laws of the respective signatory States. Hence, they would reflect two idiosyncrasies: the general char-

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95. Havana Charter, *supra* note 80.

96. Abs-Shawcross Convention, *supra* note 80.

97. OECD Draft Convention, *supra* note 80.

98. The clause in the Havana Charter, however, only applies to States and does not accord nationals of the signatory States standing to file arbitral claims. See Havana Charter, *supra* note 80, art. 93. The Abs-Shawcross Convention allows parties to submit disputes to an arbitral tribunal if there is consent; otherwise, either party may submit the dispute to the International Court of Justice (ICJ). See Abs-Shawcross Convention, *supra* note 80, art. VII. The OECD Draft Convention, in the notes and comments to Article 7, qualifies the international nature of the procedural rights granted to citizens of signatories in ways that underscore the national-domestic law cross-pollination legacy; the convention calls for a construction of the dispute resolution clause that compels the exhaustion of local remedies in the national court system of respective signatory, stating:

Nothing in the Convention, whether in this or any other Article, affects the normal operation of the Local Remedies' rule. The rule implies that all appropriate legal remedies short of the process provided for in the Convention must be exhausted -local remedies or other: for instance where, in an agreement between a Party and a national of another Party, there is a provision for the submission of all disputes to arbitration, then that provision replaces the local remedies that would otherwise exist.

OECD Draft Convention, *supra* note 80, Notes and Comments to art. VII (emphasis added).

acteristics of national-domestic law and those of the particular State at issue.<sup>99</sup>

a. The Havana Charter

The *Havana Charter*, which predates the *Abs-Shawcross Draft Convention* by approximately one decade, is closer to contemporary multilateral treaties, such as the North America Free Trade Agreement (NAFTA) and the Dominican Republic-Central America Free Trade Agreement (DR-CAFTA), than to BITs or FCNs dating to the first half of the twentieth century. Much like contemporary multilateral trade agreements, virtually the entire *Havana Charter* is dedicated to economic development other than pursuant to FDI.<sup>100</sup> The *Havana Charter's* principal focus concerns post-World War II economic reconstruction. Thus, Chapter I, Article I, detailing “Purpose and Objective” comprises multiple references to the need (i) to enhance production, (ii) “to foster and assist industrial and general economic development,” (iii) to provide countries with access on equal terms to markets, and (iv) to promote “on a reciprocal and mutually advantageous basis the reduction of

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99. Neither the Havana Charter nor the Abs-Shawcross Convention reference domestic tribunals. However, absent, an understanding that the draft convention affirmatively contemplates that prospective claims will not be subject to the LPD—a proposition that does not appear likely—the only recourse for parties to a dispute under the draft convention would entail consideration of domestic law rubrics likely requiring choice of law analysis on the point. The OECD draft convention *does* explicitly reference domestic tribunals, and does so in the context of underscoring an exhaustion of remedies at the local level as a predicate to accessing an international venue. *See* OECD Draft Convention, *supra* note 80, at Preamble.

100. NAFTA, for example, consists of twenty-two chapters, eight sections, and seven annexes, and only accords two chapters (eleven and nineteen), to the international law of foreign investment protection. In fact, that treaty’s language further subordinates the international law of investment protection to international trade law by providing that “[i]n the event of any inconsistency between this Chapter [eleven] and another Chapter, the other Chapter shall prevail to the extent of the inconsistency.” *See* NAFTA, *supra* note 20, art. 1112. In this same vein, the Dominican Republic-Central America Free Trade Agreement (DR-CAFTA), which consists of twenty-two chapters and three annexes, only accords two chapters (ten and twenty) to the public international law of foreign investment protection. The agreement provides, in Article 10.2, Relation to Other Chapters (1), that: “[i]n the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency.” DR-CAFTA art. 10.2, Aug. 5, 2004, 19 U.S.C. §§ 4001–4112.

tariffs and other barriers to trade and the elimination of discriminatory treatment in international commerce.”<sup>101</sup> Notably, the term “investment” does not appear in the draft charter.

Notwithstanding a virtual absence of any reference to investments or the law of investment protection, Article 29 of the Charter does articulate what were to become core public international law investment protection standards: FET and non-discriminatory treatment.<sup>102</sup> Presumably, these standards of protection, albeit within the rubric of the *Havana Charter* applying to international law, would be asserted as the applicable causes of action to claims perfected based upon the judicial dispute resolution methodology set forth in Articles 92–95 that, in part, referenced the jurisdiction of the International Court of Justice (ICJ).<sup>103</sup> Two significant features, however, distinguish the *Havana Charter* from contemporary multilateral trade treaties such as NAFTA and DR-CAFTA. First, the *Havana Charter*, as briefly referenced above, has *no* limitations period.<sup>104</sup> Second, the *Havana Charter* does not provide nationals of the signatory States with standing to assert claims as private individuals against a signatory State pursuant to the dispute resolution provision contained in Articles 92–95.<sup>105</sup>

From an empirical perspective, the absence of a limitations period in the *Havana Charter* is not susceptible to a conclusive explanation. While there are compelling theories ranging from intentional exclusion to omission by happenstance,

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101. See *Havana Charter*, *supra* note 80, art. I, ¶¶ 1–6 (detailing the agreement’s “Purpose and Objectives”).

102. See *id.* at art. 29, ¶ 1(a) (referring to the “general principles of non-discriminatory treatment”), ¶ 2 (establishing that “each Member shall accord to the trade of the other Members fair and equitable treatment”).

103. See *id.* art. 95, ¶ 4 (section titled “Settlement Differences”).

104. See NAFTA, *supra* note 20, art. 1116(2) (“An investor may not make a claim if more than *three years have elapsed from the date* on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.”) (emphasis added).

105. The language set forth in chapter VIII, arts. 92–95 of the *Havana Charter* refers to “[m]embers . . . in relation to other Members to the Organization,” which concerns only countries. See *Havana Charter*, *supra* note 80, art. 71 (defining Membership). Nowhere in articles 92–95 is it suggested that private citizens of signatory States are vested with standing to bring claims, even though the draft charter *does* contain language that addresses micro-economic industry sector concerns that would directly affect private sector actors and not just the macro-economics of member States.



none are completely satisfactory. Certainly, the many hands that went into the negotiation of the draft charter were well acquainted with orthodox pronouncements on the subject of the LPD. It would be unreasonable to conclude that the much needed policies of certainty and security that Grotius described as essential to States upon penalty of blood and treasure did not loom large in the drafters' minds. It is equally inimical to conclude that the representatives of the fifty-three member States in addition to the United Nations delegates simply failed to note that no limitations period attached to the draft charter's dispute resolution clause.

What can be gleaned from the *Havana Charter*, however, is that a readily accessible conceptual framework relating to the workings of the LPD in public international law had not been developed. Treaty-based causes of action that contemplated ICJ adjudication were not vested with a limitations period, notwithstanding a general consensus in the academic arena that the consequences of not having the benefits of the LPD in public international law would lead to much more serious consequences than the omission of the doctrine in the context of commercial transactions between private actors.<sup>106</sup>

This state of affairs hypothetically would necessarily task the ICJ with the obligation of determining on an *ad hoc* basis, and without treaty guidance, the application of the LPD as a jurisdictional defense. This treatment of the LPD in conventional international law cannot be ignored when evaluating (i) the lack of uniformity in the contemporary configuration of over 3,000 BITs in existence with respect to the LPD, (ii) the absence of a workable international law framework addressing

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106. See ANNUAIRE, *supra* note 85, at 559 ("The practical considerations of order, stability and peace, must include the extinctive prescription part of the principles of the civilized nations.") (translated by author); see also Code of Private International Law, *supra* note 80, which had twenty participant countries, but only seventeen of them became parties. See OAS A-31 Convention on Private International Law (Bustamante Code) (February 20, 1928). The Code aspires to set forth an integrated procedural framework for the exercise of private international law claims and international judicial assistance. This private international law convention memorialized in the form of a Code does provide for application of an LPD, and in this sense, it establishes that the international community at the time (1928) did embrace more than a general consciousness of academic writings about the LPD. The Code accords an entire chapter comprising five articles to the doctrine (Articles 227-231).

the LPD, (iii) the conceptual reliance on national-domestic law strictures—most notably in domestic rules of property law and in civil law liability paradigms—and (iv) the presence of limitations-period time frames in BITs and multilateral treaties, as well as their omissions, that do not have a rational relationship to the policies underlying the treaties' objectives. Even where there is no explicit reference to historical instruments or predecessor treaties in the preparatory works of more contemporary conventional international law, the mere existence of "predecessor" instruments creates factual premises from which empirical evidence may be inferred.

#### b. The Abs-Shawcross/OECD Drafts

The *Abs-Shawcross* ("the ASC") and the *Organization for Economic Cooperation and Development* (OECD) draft conventions<sup>107</sup> are closer to multilateral iterations of FCNs than to precursors of contemporary multilateral trade agreements such as NAFTA and the DR-CAFTA, in high relief with the *Havana Charter*.<sup>108</sup> Both of these conventions emphasize almost exclusively investment protection and do not at all reference international trade law and attendant industry sectors. Therefore, they constitute a rich historical petri dish on the development of pre-first generation BITs with respect to the LPD.<sup>109</sup>

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107. Both draft conventions are collectively referred to as "the Conventions."

108. The Havana Charter, for example, is expansive in its subject matter. It addresses most major international trade law issues and collateral practical concerns ranging from deflationary pressure and fair labor standard concerns, to the development of domestic resources and productivity, the removal of maladjustments within the balance of payments, safeguards for members subject to external inflationary or deflationary pressure, and the reduction of tariffs, and elimination of preferences. See Havana Charter, *supra* note 80, chs. II, IV. The treatment of foreign investment, however, is limited to a single article. See *id.* ch. III, art. 12.

109. The ASC and OECD Conventions are more than mere FCN reconfigurations with a multilateral format. While the FCNs included, but certainly were not limited to, foreign investment protection, the ASC and OECD Conventions represent the commencement of a more narrowly defined policy. Specifically, the policy concentrates on facilitating FDI between capital-exporting and capital-importing States, and in this regard, bears structural similarities to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, March 18, 1965, 4 I.L.M. 524 (1965) [hereinafter ICSID Convention]. The convention is also known as the "Washington Convention." Two categories that were sharply

The very narrow subject matter of both conventions provides a particular context in which to analyze the glaring absence of limitations periods common to each as to State-to-State dispute resolution in the case of the OECD and to claims by private actors who are nationals of the signatory States. As with the *Havana Charter*, the conventions provide signatory States with procedural rights in the form of dispute resolution recourse to international fora.<sup>110</sup> Unlike the *Havana Charter*, however, both the ASC and OECD also accord nationals, as private actors of the signatory States, with the ability to assert arbitral claims based upon alleged treaty breaches individually as private parties against the signatory States.<sup>111</sup> This set of procedural rights accorded to private individuals is significant because it materially multiplies the number of prospective claims far beyond the number of signatory States to the Conventions.

The unique configuration of arbitral proceedings having a private party as a claimant and a host-State as a respondent, in the case of the ASC without the protection of a limitations period outright, places prospective host-States, who are signatories to the convention, at a distinct disadvantage with respect to the likely set of signatories that comprise capital-exporting States. If the genesis of BITs principally rests on the aspiration of capital-exporting States to maximize their economic relationship with capital-importing States, as for example Miles suggests, then supplying prospective claimants from presumably capital-exporting States with no limitations period in which to bring any such claim may not be “fair,” but it does offer a coherent explanation generated by design, rather than the

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defined without duality in the ASC today characterize the approach of States such as India, China, and even the United States.

110. The ASC provides for arbitration by consent of the interested parties, in conformity with Article 10 and the Annex related to the arbitral tribunal; where consent is lacking, either party may submit the dispute to the ICJ. Abs-Shawcross Convention, *supra* note 80, at art. 7, ¶ 1; *see also* OECD, *supra* note 80, art. 7(a) (referring any dispute between the parties to arbitration).

111. *See* Abs-Shawcross Convention, *supra* note 80, art. 7; *see also* OECD, *supra* note 80, art. 7(b). (Previously, only a country could sue another country, individuals, had to be represented by its country of nationality, as happened in the *Nottebohm* case).

more implausible account that the omission is the product of oversight or happenstance.<sup>112</sup>

However, the presence of a limitations period in the OECD only with respect to prospective private claimants, although severely qualified,<sup>113</sup> supports the proposition that the absence of a limitations period in certain investment protection treaties is due to legacy prejudice favoring capital-exporting States. Even commentators contemporary with the ASC acknowledge that it was confected in an economic and political climate in which capital-exporting States sought to maximize economic development opportunities in sectors such as oil and banking by crafting an international investment code in the form of a multilateral convention.<sup>114</sup>

A diametrically opposed economic policy underlies the OECD Draft Convention. The OECD Draft Convention was the work-product of fifteen member States and not just a small group of European business leaders under the leadership of the then Chairperson of Deutsche Bank in the Federal Republic of Germany and the former Attorney General of the United

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112. See KATE MILES, *THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENTAL AND THE SAFEGUARDING OF CAPITAL* (2013). Particularly, Miles argues that “international law on foreign investment protection was developed in the 19th century as a mechanism to protect the interest of capital-exporting States.” *Id.* at 69.

113. OECD, *supra* note 80, arts. 7(c)–(d) state:

(c) The declaration referred to in paragraph (b)(1), whether general or particular, may be made or revoked at any time. In respect of claims arising out of or in connection with rights acquired during the period of the validity of such declaration, it shall continue to apply for a period of five years after its revocation.

(d) At any time after the expiry of the period of six months referred in paragraph (b)(ii), the Party concerned may institute proceedings in accordance with paragraph (a). In this case proceedings instituted in accordance with paragraph (b) shall be suspended until the proceedings instituted in accordance with paragraph (a) are terminated.

114. See Georg Schwarzenberger, *The Abs-Shawcross Draft Convention On Investments Abroad: A Critical Commentary*. 9 J. PUB. L. 147, 147 (1960) (“Capital export since 1945 has primarily taken the forms of foreign aid and governmental loans. International institutions have also played a minor, but significant role. But a large demand on the part less developed countries for more capital remains unsatisfied. If the Western world desires to meet this demand at least in part, a considerable portion of the capital required must come from private sources. Yet, understandably, the private investor is somewhat hesitant to see history repeat itself at his expense.”).

Kingdom.<sup>115</sup> Accordingly, it embodied a more tempered economic development policy perspective that sought greater symmetry and bilateralism between the interests of capital-exporting and capital-importing States.<sup>116</sup>

This more balanced approach understandably would curtail the jurisdictional ability of private member-State actors (i.e., investors-claimants) from asserting claims without temporal limitation arising from the LPD. It would equally make sense, or at least provide for greater coherence, for States, as opposed to individuals, to be able to assert claims against other States under both the OECD and ASC Draft Conventions without limitations periods, even though this deficit in the application of a LPD would remain conceptually problematic.

### c. The Absence of the LPD Public Purpose Exception

The absence of a limitations period as to State actions and individual claims concerning the ASC, and with respect to State actions in the case of the OECD together with a materially qualified limitations period in the latter concerning claims by individual nationals, also comports with the absence of *any* reference to the *public purpose* doctrine<sup>117</sup> in both instruments. There is a material relationship between the treatment of the LPD in both instruments and the absence of any *public purpose*

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115. See Abs-Shawcross Convention, *supra* note 80, preliminary statement.

116. See U.N. DEP'T OF ECON. & SOC. AFFAIRS, WORLD ECONOMIC SURVEY 1965, at 8, U.N. Doc. ST/ECA/91, U.N. Sales No. 66.II.C.1 (1965). Even though the OECD Draft Convention is the product of a plurality of States and, therefore, the driving economic policy tenets are hardly monolithic, on balance they still do provide greater protection to capital-exporting States. Most of the member States at the time (1961) were capital export States: Austria, Belgium, Denmark, France, Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Luxembourg, The Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, and United Kingdom.

117. See *generally* MARTINEZ-FRAGA & REETZ, *supra* note 10. The authors observe that the public purpose doctrine, in its orthodox form, unduly expands the scope of regulatory sovereignty because the doctrine is self-judging (i.e., subjective) and conducive to all-or-nothing results (i.e., lacking in proportionality). Therefore, the doctrine spawns process legitimacy concerns in addition to denaturalizing the elements of the expropriation treaty protection standard contained in virtually all BITs, FTAs, and multilateral trade-investment treaties.

qualification to the expropriation protection standard in these draft conventions.

As of the dates of the ASC and OECD Draft Conventions—1959 and 1967, respectively—it was a settled principle of public international law that a State may legitimately expropriate the property of an alien (i.e., non-national) only where the taking occurred subject to (i) due process, (ii) non-discriminatory treatment, (iii) compensation, and (iv) for a public purpose.<sup>118</sup> While both the ASC and OECD generously provide for investment protection standards found in modern BITs and multilateral treaties,<sup>119</sup> the ASC, contrary to virtually *all* public international law authority, excludes *public purpose* as one of four rudimentary elements qualifying the legitimacy of the expropriation standard of protection that it articulates.<sup>120</sup> The stark omission of *public purpose* in the ASC's definition of the expropriation protection standard did not elude the eye of commentators contemporary with the publication of the draft convention. Shwarzenberger, by way of illustration, observes:

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118. See Brownlie, *supra* note 70, at 533–34. Brownlie notes that “[t]he rule supported by all leading ‘Western’ governments and many jurists in Europe and North America is as follows: the expropriation of alien property is lawful if prompt, adequate, and effective compensation is provided for.” *Id.* at 534. Moreover, he points out that “[t]he formula appears in a Note from the U.S. Secretary of State, Cordell Hull, to the Mexican Government dated 22 August 1938: Hackworth, iii, 658-9.” *Id.*

119. The Abs-Shawcross Convention, *supra* note 80, contains the following protection standards: (i) FET (Art. I); (ii) most constant protection and security (Art. I); (iii) protection against unreasonable or discriminatory measures (Art. I); (iv) expropriation (Art. III); and (v) MFN clause (Art. VI). The OECD, *supra* note 80, contains the following protection standards: (i) FET (Art. 1); (ii) most constant protection and security (Art. 1); (iii) protection against unreasonable or discriminatory measures (Art. 1); (iv) national treatment standard (Art 1); (v) expropriation (Art. 3); and (vi) freedom of transfer (Art. 4).

120. See Abs-Shawcross Convention, *supra* note 80, art. III, provides for the expropriation standard of protection:

No Party shall take any measures against nationals of another Party to deprive them directly or indirectly of their property except under due process of law and provided that such measures are not discriminatory or contrary to undertakings given by that Party and are accompanied by the payment of just and effective compensation. Adequate shall have been made at or prior to the time of deprivation for the prompt determination and payment of such compensation, which shall represent the genuine value of the property affected, be made in transferable form, and paid without delay.

The omission of this constitutive element of lawful expropriation from Article III is surprising. According to the commentary attached, this article is meant to follow closely a provision which is uniform in recent United States treaties of friendship and commerce. Yet, even in the earlier treaties, the “public interest” clause is implied in phrases such as the “full protection and security required by international law.” In a number of these treaties it has, however, been considered advisable expressly to stipulate that the property of nationals and companies of either party shall not be taken within the territories of the other party “*except for a public purpose.*”

*It is arguable that it is wiser not to press compliance with so subjective a factor, the absence of which it is normally hard to prove.* However, both state practice and international judicial practice known cases in which the complete absence of a public interest in purported acts of expropriation has been clearly established. In such extreme cases, it is most convenient to be relieved of the necessity to consider any other grounds which may also give to the action taken its confiscatory character. It is also a tenable proposition that the element of public interest can perhaps be inferred from other terms employed in Article III. Yet, why infer what, without apparent difficulty, can be stated unequivocally in a few words?<sup>121</sup>

The omission of *public purpose* as a qualification of the ASC’s expropriation standard of protection cannot be understood as independent from the omission of a limitations period. The absence of both doctrines from the ASC materially provides prospective claimants-nationals of capital-exporting States with a strategic advantage over prospective respondent host-States. The *public purpose* doctrine as an element of an expropriation standard of protection weakens the protection standard by providing host-States with unbridled authority to dilute the protection standard by merely quantifying the taking as one in furtherance of a public purpose.

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121. Schwarzenberger, *supra* note 114, at 156 (second emphasis added) (citations omitted).

A State's pronouncement that a taking is for a *public purpose* cannot be challenged because the determination of "public purpose" is subjective in nature and not susceptible to an objective standard capable of being scrutinized pursuant to discursive reasoning.<sup>122</sup> Consequently, a respondent-host-State's exceptions to claims premised on breach of a treaty protection against unlawful takings are materially strengthened in instances where *public purpose* comprises part of the standard defining an illicit taking. Conversely, by omitting *public purpose* from the expropriation protection standard, as with the removal of a limitations period, the ASC decisively has tilted the relative rights and obligations under the Draft Convention in favor of prospective claimants (i.e., nationals of capital-exporting States).

Similarly, it is not accidental that the OECD contains an orthodox definition of expropriation in its corresponding standard of protection.<sup>123</sup> The presence of *public purpose* in the OECD's Draft Convention comports with its incorporation of a limitations period attaching to claims that may be brought by private actors under the Draft Convention's dispute resolution provision. As noted, the OECD's Draft Convention finds greater equipoise between the interests of capital-exporting States and those attendant to capital-importing States. In addition, because of the OECD's fifteen member state configuration, its Draft Convention enjoys a greater plurality of perspectives than the ASC's Draft Convention. Even though the majority of the OECD's member States are capital-exporting, the organization's economic philosophy is far from monolithic because its mission statement aspires to more than just maximize the economic gains of its core membership.<sup>124</sup>

The studiously selective use of the LPD and the public purpose doctrine in the Draft Conventions comports with the proposition that the precursors to modern BITs and multilat-

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122. MARTINEZ-FRAGA & REETZ, *supra* note 10, at 6–7, 350–51.

123. OECD, *supra* note 80, art. III ("No Party shall take any measures depriving, directly or indirectly, of his property a national of another Party unless the following conditions are complied with: (i) The measures are taking in the *public interest* and under due process of law.") (emphasis added).

124. See Org. for Econ. Cooperation & Dev. [OECD], *OECD 50th Anniversary Vision Statement*, at 2 ("The Organisation's essential mission is to promote stronger, cleaner, fairer economic growth and to raise employment and living standards.").



eral trade treaties were influenced by national-domestic law legal doctrines and the economic interests of capital-exporting States.

#### d. Non-Economic Policy Setting Treaties

Unlike BITs and multilateral-trade treaties, treaties that are concerned with non-economic issues such as extradition and other treaties that address economic concerns, but only in the context of a particular historical event, do tend to have limitations periods.<sup>125</sup>

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125. As to extradition, examples that predate even the precursors to BITs and multilateral trade-investment treaties are most helpful. *See, e.g.*, Greece-Germany Extradition Treaty, *supra* note 78, art. 4 (“Extradition shall not be granted . . . [i]f at the time when the request is made exemption from the prosecution or punishment has already been acquired by lapse of time under the laws of the country to which the request is made.”); France-Latvia Extradition Treaty, *supra* note 78, art. 5 (stipulating that “Il n’y aura pas lieu à l’extradition si la prescription de l’action ou de la peine, depuis les faits imputés, le dernier acte de poursuite ou la condamnation est acquise d’après la législation de l’Etat requis.” [“There shall be no place for extradition if the prescription of the action or of the sentence, from the imputed facts, the last act of the prosecution, or the conviction is acquired according to the legislation of the requesting State”]) (Translated by authors).

For examples of single-instance non-policy-setting treaties dating to the turn of the twentieth century, see Convention Between the United States of America and the Republic of Chile. Arbitration of Macedonian Claims, 12 Stat. 1083 (1859) (providing, in pertinent part, that “the contracting parties further agree that the exception of prescription, raised in the course of controversy, and which has been a subject of discussion between their respective Governments, shall not be considered by the arbiter in his decision, since they agree to withdraw it and exclude it from the present question”).

Likewise, the Treaty of Peace between the Allied and Associated Powers and Germany established that:

[a]ll periods of prescription, or limitation of right of action, whether they began to run before or after the outbreak of war, shall be treated in the territory of the High Contracting Parties, so far as regards relations between enemies, as having been suspended for the . . . war. They shall begin to run again at earliest three months after the coming into force of the present Treaty. This provision shall apply to the period prescribed for the presentation of interest or dividend coupons or for the presentation for repayment of securities drawn for repayment or repayable on any other ground.

Treaty of Versailles, *supra* note 78, art. 300.

C. *The First Generation Bilateral Investment Treaties*

1. *The Treaty Between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments: The First BIT*

The Federal Republic of Germany-Pakistan bilateral investment treaty was the first of its kind. Thus, without qualification, it holds a special place because it is the first BIT of the first generation of BITs. Its configuration is orthodox in every regard. The Federal Republic of Germany was a capital-exporting State at the time the BIT was executed in 1959.<sup>126</sup> Pakistan remains a capital-importing State. Consequently, at the time that the BIT entered into force, it was contemplated that nationals of the Federal Republic of Germany would comprise a class of investors who would invest in Pakistan. Pakistan was the contemplated host-State under the BIT's practical workings.

With the exception of FET,<sup>127</sup> the Ger.-Pak. BIT contains a rich gamut of investment protection standards. Conspicu-

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126. The Federal Republic of Germany at the time (1959) had a population of 55,123,400 people; it was the second leading exporter, globally registering U.S. \$11,415 billion; it had a GDP per capita equivalent to 1990 U.S. \$7.177; and a life expectancy of 69.31 years. (Enciclopedia Universal Ilustrada Europeo-Americana, Espasa-Calpe, Appendix 1959-1960). Pakistan, in turn, had a population of 43,894,437, with exportations over the U.S. at \$250 million; a GDP per capita equivalent to 1990 U.S. \$633; and a life expectancy of 45.29 years (World Bank Data, <https://data.worldbank.org/indicator/SP.DYN.LE00.IN>). The Federal Republic of Germany-Pakistan BIT remains in place today, continuing to govern the relationship between unified Germany and Pakistan. See Treaty for the Promotion and Protection of Investments, Pak.-Ger., Nov. 25, 1959, 457 U.N.T.S. 24 (entered into force Nov. 28, 1962). On December 1, 2009, the Parties signed a new BIT which, upon entering into force, shall cause the 1959 iteration to be terminated. Agreement on the Encouragement and Reciprocal Protection of Investments art. 13(3), Pak.-Ger., Dec. 1, 2009, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/5505>.

127. Ronald Kläger does not attribute the absence of the FET standard in the Federal Republic of Germany-Pakistan BIT to “any aversions against the standard . . . [rather, it is absent] because the general pattern was not fully established when most of these treaties were concluded . . . . Thus, a number of the BITs negotiated, for example, by the Federal Republic of Germany until the early 1960s do not contain references to FET.” RONALD KLÄGER, ‘FAIR AND EQUITABLE TREATMENT’ IN INTERNATIONAL INVESTMENT LAW 10 (2011). Ioana Tudor observes that the OECD Draft Convention containing an FET provision became a model for preparing agreements on the protec-

ously absent is *any* reference to a limitations period. This absence is all the more pronounced because of the BIT's rather elaborate dispute resolution clause, providing for State-to-State recourse, as well as nationals-to-State arbitration.<sup>128</sup>

The Federal Republic of Germany-Pakistan BIT is the first bilateral investment treaty that purges all other collateral subject-matter concerns contained in the FCN predecessors. The BIT, like most BITs that follow, exclusively addresses investment protection and initiates the *modern era* of the international law of foreign investment protection. It is also the first single treaty to house the core standards of protection that comprise virtually all BITs today.<sup>129</sup>

The BIT's configuration does not provide a factual or conceptual premise from which to infer that mere happenstance explains the omission of a limitations period. From a technical perspective, the BIT's terms were carefully crafted to furnish a prospective claimant with ample substantive and procedural recourse. In this regard, it also heralds the start of an age of bilateral agreements and treaties that accord unilateral benefits and obligations separately to prospective claimants

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tion of foreign property. IOANA TUDOR, *THE FAIR AND EQUITABLE TREATMENT STANDARD IN THE INTERNATIONAL LAW OF FOREIGN INVESTMENT* 19 (1st ed. 2008). Therefore, it is not surprising that the Federal Republic of Germany, eight years earlier in concluding its BIT with Pakistan, omitted this standard of protection.

128. The dispute resolution clause also encourages conciliation, presumably as a jurisdictional predicate to the filing of a formal proceeding. The clause addresses with considerable detail the methodology for the appointment of arbitrators, as well as default provisions for constituting a panel in the absence of the parties' agreement. (Germany-Pakistan BIT, Article 11). This approach constituted a helpful model until the creation of the International Centre for Settlement of Investment Disputes (ICSID) in 1965 pursuant to the Washington Convention. *See* ICSID Convention, *supra* note 109. By eliminating all references to domestic courts, the drafters ensured that any claim under the BIT would be processed in a neutral international venue. Here it is clear that the negotiating dynamic was led by the Federal Republic of Germany as a capital-exporting State—that is, an industrialized State with greater negotiating leverage—to ensure that it would not find itself litigating alleged treaty standards of protection claims, such as expropriation, before the national courts of Pakistan.

129. The authors have not been able to identify a single treaty prior to the Federal Republic of Germany-Pakistan BIT that contains the five protection standards, see *supra* note 67, together with a single subject matter of investment protection, and attendant dispute resolution clause calling for arbitration.

and respondents, respectively, upon the perfection of a claim.<sup>130</sup> In developing and negotiating the BIT's substantive and procedural rights, the Federal Republic of Germany, the capital-exporting State, secured an unprecedented measure of protection for its prospective investments that included, by design, the absence of a claims limitations period. The status of public international law at the time, as now, provided that conventional international law with respect to applicable limitations periods is governed by the treaty terms, without more.<sup>131</sup> The practice of excluding a limitations period in the treaty found historical support in predecessor FCNs.<sup>132</sup> The absence of a limitations period has contributed to carving out of BITs any semblance of actual bilateralism between the signatories. This omission in the very first BIT became the norm in treaty negotiation.

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130. The "bilateral" nomenclature attaching to BITs is largely a misleading euphemism. Upon the perfection of a claim, it becomes evident that the treaty provides the preempted claimant with all material rights, mostly in the form of protection standards, while allocating all material obligations to the host State signatory. At the time of the perfection of a claim under a BIT, the claimant's treaty-based obligations are generally limited to rudimentary compliance with the host State's laws. For this reason, practically all BITs are more accurately described as bilateral agreements to have unilateral rights ripen once a claim is perfected under the treaty.

131. See *Nordzucker AG v. Republic of Poland*, Partial Award, ¶¶ 219–23 (Ger.-Pol. Ad Hoc Arb. Trib 2008), [https://www.italaw.com/sites/default/files/case-documents/italaw3030\\_1.pdf](https://www.italaw.com/sites/default/files/case-documents/italaw3030_1.pdf). The arbitral tribunal notes that

[t]he BIT not containing any rule on the matter of time bar, the Tribunal does not consider it appropriate to refer to . . . domestic law, at least not exclusively. *The issue is to be resolved on the basis of the international law that governs the BIT.* International law has no rule that specifies the time period which must elapse in order to render extinctive prescription operative. Instead of rules providing for precise time limitations, international law refers to a general principle that a claimant shall not unreasonably delay the pursuit of its claim.

*Id.* ¶ 221 (emphasis added).

132. See *supra* text accompanying note 82.

2. *The Treaty Between the Government of Canada and Government of Ukraine for the Promotion and Protection of Investments: The First BIT to Have a Limitations Period*

Executed in 1994, the Canada-Ukraine BIT<sup>133</sup> is the first BIT to have a limitations period.<sup>134</sup> There exists a thirty-five-year hiatus between the execution of the Federal Republic of Germany-Pakistan BIT (1959) and the signing of the Ukraine-

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133. Agreement between the Government of Canada and the Government of Ukraine for the Promotion and Protection of Investments, Oct. 24, 1994, 2025 U.N.T.S. 385 (entered into force June 24, 1995) [hereinafter Canada-Ukraine BIT].

134. Here, two observations are appropriate. First, it is necessary to dispel confusion with respect to the identity of the first BIT to contain a limitations period. Mistaken identification of the first BIT to have this distinction arises from an error contained in a 2012 OECD-sponsored publication, see Joachim Pohl et al., *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey* (OECD Working Papers on Int'l Inv., Paper No. 2012/02). The authors report that

[s]lightly over 100 treaties—7% of the sample of treaties with ISDS sections—contain statutes of limitation that bar access to international arbitration if a claim has not been brought within a specified period of time. *The 1992 NAFTA treaty and the Canada-Czech Republic BIT* (1992) were the first to include such clauses. The proportion of treaties that contain such clauses has only begun to increase significantly since 2004 in bilateral treaties in general and in BITs in particular. *Multilateral agreements, including CAFTA (2004), NAFTA (1992), the Investment Agreement for the COMESA Common Investment Area (2007) and the ASEAN Comprehensive Investment Agreement (2009) all set limitation periods, while the Energy Charter Treaty (ECT) (1991) does not.*

*Id.* at 16 (emphasis added). Notably, the authors acknowledge having identified the Canada-Czech Republic BIT as the first to have a limitations period, even though the OECD concedes that it did not have access to the actual treaty text for purposes of corroborating its conclusion. *See id.* at 16 n.30. The Canada-Czech Republic BIT (1992) *does not* have a statute of limitations. *See* Agreement for the Promotion and Protection of Investments, Can.-Czech, May 6, 2009, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/606> (entered into force Jan. 22, 2012).

Second, the authors of this writing distinguish between BITs and multilateral trade agreements also providing for investment protection as a collateral matter, such as NAFTA (1992), CAFTA (2004), the Investment agreement for the COMESA Common Investment Area (2007), and the ASEAN Comprehensive Investment Agreement (2009). For this reason, the authors identified the Canada-Czech Republic BIT as the first to include a limitations period.

Canada BIT (October 24, 1994). This hiatus, as well as the three-year limitations period contained in the Canada-Ukraine treaty, exemplifies the challenges that the LPD has met within the framework of the international law of investment protection.

Between 1959 and 1994, approximately 814 BITs were signed.<sup>135</sup> The absence of a limitations period in these instruments speaks to a constellation of BITs that provided capital-exporting State signatories with an unqualified time frame in which to assert claims. In doing so, these instruments helped to establish (i) that the historical policies that capital-exporting States drafted with the objective of maximizing investments in capital-importing States were dominant regarding the LPD's development in this field, and (ii) the preeminence of national-domestic law principles in the doctrine's international investment law formation and transformation. Capital-importing State signatories to BITs were willing to forgo the much-vaunted policy objectives of security, certainty, and finality, leaving themselves perpetually exposed to claims by nationals of the capital-exporting signatory BIT counterparts, rather than jeopardize the *perceived* likely FDI arising from the BIT's execution.<sup>136</sup>

The three-year statute of limitations contained in the Canada-Ukraine BIT cannot be construed as the commencement of the doctrinal spring for the development of the LPD. While

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135. Investment Policy Hub, *International Investment Agreements Navigator*, UNCTAD, <http://investmentpolicyhub.unctad.org/IIA/mappedContent> (last accessed Feb. 24, 2018).

136. The stereotypical configuration of the BIT as executed between a capital-exporting State and a capital-importing State is progressively fading. Professor José Álvarez is on point in observing:

More countries than ever before are, like the PRC (People's Republic of China) and the United States, capital-exporters as well as capital-importers. The position of such countries in the investment regime might be said to approximate that of the individual in John Rawls' "original position," that is, someone who is placed behind a veil of ignorance and does not know the social or economic position she occupies within society and is therefore incentivized to articulate principles of justice that are fair to all.

See José E. Álvarez, *The Once and Future Foreign Investment Regime*, in *LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF MICHAEL REISMAN* 607, 634 (2011). The stereotypes, however, do apply to the first generation of BITs.

the presence of a limitations period in a BIT is welcomed, an incident robust debate underlying the limitations period is necessary if the doctrine's development is to ensue. There is no available empirical material conclusively establishing how the Canada-Ukraine BIT arrived at the three-year limitations period. A plausible theory generously explains its origins while serving as further evidence of the reasons underlying the doctrine's stagnation in the international investment protection arena.

Most likely, the Canada-Ukraine BIT borrowed its limitations period from NAFTA's Chapter 11, Art. 1116(2). Two reasons support this contention. First, NAFTA predates the signing of the Canada-Ukraine BIT by ten months.<sup>137</sup> Moreover, the limitations issues in NAFTA were aggressively negotiated since June 4, 1992.<sup>138</sup>

Second, the limitations clause language in both treaties is the same in every material regard.<sup>139</sup> It is unlikely that during the thirty-five-year hiatus between the signing of the Federal Republic of Germany-Pakistan BIT and the execution of the Canada-Ukraine BIT—a time frame during which no single BIT contained a limitations period clause but for NAFTA, which was executed ten months earlier and of which Canada was a party—did not have a causal effect on the nearly identical limitations clause contained in the Canada-Ukraine BIT. The nearly contemporaneous execution of both treaties, Canada's role in both instruments, and the formal and substantive similarities between the language of the two clauses constitutes compelling empirical evidence in support of the proposition that the limitations period in the Canada-Ukraine BIT

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137. NAFTA, *supra* note 20, was signed on December 8, 1993, while the Canada-Ukraine BIT, *supra* note 133, was signed on October 24, 1994.

138. See *Virginia Composite Investment Draft*, NAFTA COMM'N art. XX07, ¶ 4(b) (June 4, 1992), <http://www.naftaclaims.com/commissionfiles/11-June041992.pdf>.

139. Compare Canada-Ukraine BIT, *supra* note 133, art. XIII (3)(d) (providing, in part, that “not more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage”) (emphasis added), with NAFTA, *supra* note 20, art. 1116(2) (providing that “an investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage”) (emphasis added).

originated in NAFTA. Therefore, the elements considered in the drafting of NAFTA's three-year limitations clause are pivotal to understanding the conceptual underpinnings of BITs contemporary with this writing.

Despite a paucity of materials, there is a considerable basis suggesting that the three-year limitations period contained in NAFTA was hardly the product of discursive reasoning aimed at developing a limitations period that incorporated the aims and policy of public international law, let alone the international law of foreign investment protection. Instead, the existing drafts point to a negotiation process, led by the United States and Canada, on the drafting of procedural rights in the form of a dispute resolution clause.<sup>140</sup>

The earlier of the two drafts, dated June 4, 1992, suggests that Canada took the lead in drafting Article XX07—the draft iteration of the current Section B of NAFTA's Chapter 11—titled: “Settlement of Disputes between a Party and an Investor of another Party,” which includes paragraph 4, subsection (4)(b).<sup>141</sup> That subsection provided for an aggressive, respondent-friendly limitations period of only two years.<sup>142</sup> A subsequent draft dated August 4, 1992, provides for the current three-year limitations period found in NAFTA's Section B, Art. 1116, Chapter 11, despite formal language differences between this draft and the final exemplar.<sup>143</sup> The principal dynamic driving the negotiation of a limitations period appears

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140. See, e.g., *Virginia Composite Investment Draft*, *supra* note 138, at 18 (“Settlement of Disputes Between Parties”), art. XX07 (“Settlement of Disputes Between a Party and an Investor of Another Party”) (denoting that these sections are marked “USA” and “CDA,” respectively).

141. *Id.* at 18 (noting that Canada took the lead concerning the two year limitation period).

142. See *Virginia Composite Investment Draft*, *supra* note 138, art. XX07 (4)(b) (providing that “more than two years have elapsed since the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach that is at issue in the dispute”).

143. Compare *Watagate Daily Update Investment Draft*, NAFTA COMM'N art. 2124 (Aug. 4, 1992), <http://www.naftaclaims.com/commissionfiles/16-August041992.pdf> (providing that “[a]n investor shall not be entitled to submit an investment dispute to arbitration if more than three years have elapsed since the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that it has incurred loss or damage”) with NAFTA, *supra* note 20, art. 1116 (“An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first



to be little more than an effort by Canada to place a limit on the United States' (i.e., the principal capital-exporting State signatory of the trilateral treaty) ability to bring claims. Notably, it was Canada that first proposed the two-year limitations period.<sup>144</sup> There is no literature addressing how the two-year limitations time frame was determined. Analysis of the empirical evidence, however, points to the mechanical incorporation of national-domestic LPD rules.

The August 4, 1992, draft articulated for the first time the three-year limitations period that ultimately found its way to the final iteration of NAFTA's Chapter 11, Section B, Art. 1116.<sup>145</sup> As with the two-year limitations period, the notes and draft of NAFTA do not speak to the reasons underlying the extension of the two-year period by an additional year. The reasons underlying the adequacy or legal sufficiency of a three-year time frame also remain opaque. It would not make sense for the U.S. negotiating team to have lobbied for so brief a limitations period. Instead, Mexico and then Canada—in that order—were the more likely candidates to serve as prospective respondent-host-States and, as a result, would have probably sponsored the inclusion of a limitations period in the first instance.

The evidence does suggest, however, that Canada took the initiative in drafting Article XX07 containing the initial two-year limitations period.<sup>146</sup> The absence of discussion in NAFTA's preliminary drafts would argue in favor of concluding that, instead of engaging in sustained deliberations concerning the relative merits of the LPD within the framework of the international law of foreign investment protection, it is more likely that what actually took place was the historical conceptual approach consisting of merely the wholesale importation of domestic law into public international law.

It is significant that under Ontario law, pursuant to the Limitations Act of 1990, basic civil claims contained a two-year

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acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.”).

144. In fact, the acronym “CDA” for Canada precedes Article XX07 of the *Virginia Composite Investment Draft*, *supra* note 138.

145. Compare *Watergate Daily Update Investment Draft*, *supra* note 143, art. 2118, with NAFTA, *supra* note 20, art. 1116(2).

146. See *supra* text accompanying notes 138 & 140.

limitations period.<sup>147</sup> In this same vein, the Civil Code of Québec, enacted on January 1, 1994, and circulated for discussion during the four years prior to its enactment, prescribes a three-year limitations period for all civil actions.<sup>148</sup> The ubiquitous nature of the two and three-year limitations periods found in the NAFTA drafts and the three-year time frame actually contained in NAFTA have deep roots in the national-domestic laws of Canada's two largest provinces: Ontario and Québec. Thus, the presence of a three-year limitations period in the Canada-Ukraine BIT can most likely be explained as (i) a direct borrowing from NAFTA Art. 1116, (ii) which in turn has its origins in the national-domestic law of Canada.

NAFTA's three-year limitations period has not commanded attention. Jake Coe advances the orthodox panoply of arguments in favor of the three-year limitations period without consideration of the issue that here occupies this writing:

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147. The Limitations Act, R.S.O. 1990, c. L. 15 (Can.) was repealed in part and amended in part by a later version, see Limitations Act, S.O. 2002, c. 24, Sched. B (Can.). The writings concerning the 2002 amendment bespeak a need to codify the fragmented limitations period framework. A review of the 2002 Limitations Act also sheds light on the statutes of domestic Canadian limitations periods under the law of Toronto in 1991-1992 (Article 45 (h)), the time frame during which NAFTA's limitations period was being negotiated according to the June 4th and August 4th, 1992 drafts. See *Virginia Composite Investment Draft*, *supra* note 138; *Watergate Daily Update Investment Draft*, *supra* note 143. The 2002 Limitations Act foundationally prescribes a two-year limitations period for several civil claims. See Limitations Act, S.O. 2002, Article 4, Basic Limitation Period (Can.).

148. The Civil Code of Québec, S.Q. 1991, c 64 (Can.) was introduced into the National Assembly of Quebec on December 18, 1990, by Gil Remillard, who was then Quebec's Minister of Justice. It received royal assent on December 8, 1991, but did not come into force until January 1, 1994, as the necessary legislation to provide transitional rules determining what matters would be subject to the new Code, which was not passed until 1992. See *Act Respecting the Implementation of the Reform of the Civil Code*, S.Q. 1992, c. 57 (Can.). Thus, this text providing for a three-year limitations period as the foundational limitations period for domestic claims under the law of Quebec was very much present in the minds of Canada's NAFTA negotiating team as the limitations issue domestically reached its legislative apogee at the very same time (1992) that the NAFTA limitations period was being negotiated.

For completeness' sake, the Civil Code of Québec replaced the Civil Code of Lower Canada, 29 Vict., ch. 41, first enacted in 1866. That Code *also* identified a three-year limitations period for both tort and contract causes of action. (Article 2925).

namely, the extent to which legacy national-domestic formulations of the LPD have been mechanically and viscerally engrafted on the international law of investment protection without other considerations, and the continuing effect of the economic aspirations of capital-exporting States on the LPD. He writes:

Events occurring in 1994 for example, even if constituting flagrant breaches of NAFTA, are now a decade old, and would at a minimum challenge the fact-finding mechanisms available to disputants and the tribunal. The composition of governments change, documents are archived and destroyed, and witnesses become unavailable. *These considerations arise in legal systems, and are dealt with by statutes of limitation and repose; and so it is with Chapter 11*<sup>149</sup>

While being mindful of the “considerations [that] arise in legal systems” as a factor in the formulation of a limitations period within the framework of the international law of investment protection, such considerations should only be a point of departure to be analyzed together with other factors speaking to the aspirations of this field.<sup>150</sup> As detailed below, domestic limitations law policies of an empirical/pragmatic nature, such as the proposition that memories fade and evidence disappears, need to be re-conceptualized and placed in a more comprehensive framework that speaks to the policies and economics of international investments, investment protection standards, as well as the practical workings of evidentiary proof in this particular field. In addition, the investor-State’s relative position of leverage resists being equated to the arm’s-length dynamic that characterizes transactions between private actors.

#### D. *The Empirical Status of the LPD in BITs*

*The first generation BITs*, (i.e., BITs executed between 1959 and December 31, 1993) are largely the product of (i) writings that, with respect to the LPD, do not distinguish between national-domestic and international law, and (ii) the aspirations

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149. Jack J. Coe, Jr., *The Mandate of Chapter Eleven Tribunals—Jurisdiction and Related Questions*, in *NAFTA INVESTMENT LAW AND ARBITRATION: PAST ISSUES, CURRENT PRACTICE, FUTURE PROSPECTS* 215, 246 (Todd Weiler ed., 2004) (emphasis added).

150. See *infra* Section IV(A).

of capital-exporting States regarding international investment. The failure evinced by 563 BITs lacking a limitations period finds its origins in these two propositions.<sup>151</sup>

The second generation of BITs, (BITs executed as of 1994 through the present), does not contribute to bringing uniformity, certainty, and security to the law of investment protection. The contrary is true. From 1994 through the present, 1,881 BITs have been executed.<sup>152</sup> By one count 1,498 entered into force,<sup>153</sup> and of this sum, *only* 106 have a limitations period.<sup>154</sup> Thus, 1,392 BITs that came into force between 1994 and the present have no limitations period. Furthermore, the 106 BITs containing limitations periods have different limitations terms for identical protection standards.<sup>155</sup>

This configuration is not conducive to certainty and security. Investor-State arbitral disputes arising from the 1,392 BITs that are currently in force and lack a limitations period invite inconsistent rulings on identical factual and legal issues. This serious problem is made worse because rulings on the application of a limitations period tend to be case dispositive. Such rulings under the current international law regime concerning the LPD tend to be “all or nothing” propositions because the doctrine of proportionality plays no role in contemporary LPD analysis. Therefore, tribunals are left with no uniform and common standard by which to undertake an LPD analysis that may maximize the likelihood of uniformity and, therefore, of security and certainty.

Cases arising under the remaining 106 BITs that have limitations periods are, regrettably, no more promising. These BITs have different limitations periods attaching to identical standards of protection. They range between two to five

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151. Two years beyond the first generation of BITs, the international constellation of BITs and treaties with investment provisions (TIPs) reflects a swelling of these instruments to exactly 563. Of these 563 BITs and TIPs, none contained a limitations period. The average limitations period contained in BITs and TIPs is a three-year period. *See infra* Appendix C (noting that the authors conducted a hand-search of all BITs referenced on Appendix C).

152. *See International Investment Agreements Navigator*, *supra* note 135.

153. *Id.* (noting that out of 1,881 BITs signed only 1,498 have been executed for different and often unrelated matters).

154. *See infra* Appendix C.

155. *Id.* (noting that out of 1,881 BITs signed, only 1,498 have been executed).

years.<sup>156</sup> Moreover, the two to five-year time frame on these limitations periods may lead to *relatively* uniform results but for the *wrong reasons*. As previously noted, these limitations periods were mechanically imported from national-domestic law.<sup>157</sup> Their conceptualization for this reason did not take into consideration *any* of the policies, objectives, and factors that are unique to the international law of foreign investment protection. Consequently, the limitations periods attaching to standards of protection are no different from those that govern national-domestic contract, property, and negligence claims between private individuals. These premises are fundamentally flawed and command revision.

### III. THE STATUS OF THE LIMITATIONS PERIOD DOCTRINE IN CUSTOMARY INTERNATIONAL LAW

Non-treaty pronouncements in the form of (i) judicial decisions, (ii) arbitral awards, and (iii) the ruling of Claims Tribunals, best describe, if not altogether constitute, the normative elements of customary international law.<sup>158</sup> The theoretical constitution and practical application of the LPD in public international law that has influenced the doctrine's role in the international law of investment protection can be gleaned from a handful of landmark pronouncements on the issue, all of which took place during a twenty-year time frame

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156. See *infra* Appendix C.

157. See *supra* text accompanying notes 137–39.

158. Even though Article 38 of the ICJ Statute—the most authoritative source for determining customary international law—lists “judicial decisions” as constituting part of customary international law, the article is silent regarding the role that arbitral awards have in customary international law. See Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, T.S. No. 993 (entered into force Oct. 24, 1945); see also, e.g., H.E. Gilbert Guillaume, *Can Arbitral Awards Constitute a Source of International Law under Article 38 of the Statute of the International Court of Justice?*, in PRECEDENT IN INTERNATIONAL ARBITRATION 105 (Yas Banifatime ed., 2007). The role of arbitral awards in customary international law is unclear, in part because of the *ad hoc* nature of investor-State arbitral tribunals formed *after* a dispute arises and exclusively configured during the life of a single dispute. In fact, arbitral awards only constitute persuasive authority with respect to subsequent tribunals processing the same or similar legal issues. See Pedro J. Martinez-Fraga, *A Defense of Dissents in Investment Arbitration*, 43 U. MIAMI INTER-AM. L. REV. 445, 465–66 (2012).

between 1885 and 1905.<sup>159</sup> This jurisprudence offers a unique perspective because its treatment of the LPD is not based on a limitations period contained in a treaty. Therefore, they represent copacetic paradigms of Claims Tribunals addressing the issue of limitations free from the conceptual shackles of any single treaty.

#### A. *The Gentini Case*

The *Gentini* case, a story that has been told many times, does not compel a lengthy factual recitation.<sup>160</sup> The case concerned claims against Venezuela brought by the Italian government on behalf of an Italian citizen alleging payment of a debt that had accrued thirty years earlier.<sup>161</sup> The case was filed with the Permanent Court of Arbitration (PCA) pursuant to the Italian-Venezuelan Mixed Claims Commission constituted under the protocols of February 13 and May 7, 1903. The case is particularly rich because, in canvassing the arguments of the Commissioners for the parties (i.e., counsel presenting the respective cases), the Umpire reviewed a fairly comprehensive spectrum of the writings of commentators and “precedent” purporting to address the role, if any, of the LPD in international law. The Umpire denied the claim as stale but not before articulating his own exegesis as to four separate but equally binding sources that, in the Umpire’s opinion, invited the claim’s dismissal.

First, the Umpire sought to distinguish Venezuela’s defense in *Gentini* from Mexico’s defense in the *Pious Fund* case, which was earlier decided by the PCA.<sup>162</sup> The Umpire distinguished *Pious Fund* by emphasizing that the tribunal in that

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159. See, e.g., *Gentini Case*, 10 R.I.A.A. 551 (It.-Venez. Mixed Cl. Comm’n 1903); *The Pious Fund Case* (U.S.-Mex.), 9 R.I.A.A. 1 (Perm. Ct. Arb. 1902); *Irene Roberts Case*, 9 R.I.A.A. 204 (U.S.-Venez. Claims Comm’n 1903–05); *Spader et al. Case*, 9 R.I.A.A. 223 (U.S.-Venez. Claims Comm’n 1903–05); *Cadiz v. Venezuela*, 29 R.I.A.A. 293 (U.S.-Venez. Claims Comm’n 1885); *Williams v. Venezuela*, 29 R.I.A.A. 279 (U.S.-Venez. Claims Comm’n 1885).

160. See CHENG, *supra*, note 68, at 376; Ralston, *supra* note 2, at 138; see also *Wena Hotels v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, ¶¶ 106–07 (Dec. 8, 2000), 41 I.L.M. 896 (2002).

161. *Gentini Case*, 10 R.I.A.A. 551, 554 (It.-Venez. Mixed Cl. Comm’n 1903).

162. Indeed, counsel for Italy had relied on *Pious Fund* for the proposition that the absence of an international law doctrine of limitations concerning a claim against a State renders it conceptually impossible for a claimant to

case was addressing domestic rules and not principles of law, noting that “[t]he permanent court of arbitration . . . never denied the *principle* of prescription, a principle well recognized in international law, and it is fair to believe that it would never do so.”<sup>163</sup> The Umpire added that “[s]uch denial tends to upset all government, since power over fixed areas depends upon possession sanctified by prescription, although the circumstances of its origin and the time it must run may vary with every case.”<sup>164</sup>

This very formal argument that cherry-picked a single sentence from the totality of the *Pious Fund* opinion in an effort to

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present a claim. Finding analytical support in *Pious Fund*, Italy’s counsel argued:

It did not require a lengthy argument from the honorable agent of the United States to obtain from the court a decree of payment from Mexico, including this maxim: Les règles de la prescription étant exclusivement du domaine du droit civil, ne sauraient être appliquées au présent conflit entre les deux États en litige [The rules of the prescription being exclusively from the domain of civil law, could not to be applied to the present conflict between the States in dispute]. This principle is besides absolutely logical and moral, since when it is a question of private credits and debits it may be presumed that he who has permitted the lapse of a long period without bringing his rights into court may have intended to renounce them; or it may be admitted that he should suffer the results of his negligence.

*Id.* at 553 (translated by author).

163. *Id.* at 556 (emphasis added). The argument was constructed on a strict linguistic analysis which, though technically correct, defies the spirit of the *Pious Fund* opinion. The Umpire observed:

It will be noted that the declaration of the court had reference not to the principle of prescription, but to the rules with which civil law had surrounded it. A “règle,” as we are told in Bourguignon & Bergerol’s *Dictionnaire des Synonymes* — est essentiellement pratique et, de plus, obligatoire \* \* \*; il est des règles de l’art comme des règles de gouvernement, while *principe* (*principe*) exprime une vérité générale, d’après laquelle on dirige ses actions, qui sert de base théorique aux divers actes de la vie, et dont l’application à la réalité amène telle ou telle conséquence [is essentially practical and, moreover, obligatory \* \* \*; it is a rule of art like a rule of government, which in principle expresses a general truth, according to who one who directs its action, serves as the theoretical base of the various acts of life, and whose application to reality brings this or that consequence].

*Id.* (translation by authors).

164. *Id.*

reach a diametrically opposed holding was understandably buttressed by extensive reliance on the works of publicists dating back to Grotius and Vico.<sup>165</sup> The Umpire struggled between articulating the proposition that somehow the LPD had a cognizable space in international law, and the application of that principle, particularly in the wake of the *Pious Fund* ruling. Second, the dismissals of the defenses were premised on “precedent” where Claims Tribunals had dismissed stale claims. Notably, none of the authority on which the Umpire premised his findings sought to distinguish between the application of the doctrine under international law and its workings in a national-domestic law setting.<sup>166</sup> To the contrary, the Umpire, citing to *Barberie v. Venezuela*, the authority most extensively relied upon in the opinion, selected language from that ruling that emphasized that national-domestic law *should serve* as a guidepost in the application of the doctrine in an international context:

*A stale claim does not become any less so because it happens to be an international one, and this tribunal, in dealing with it, cannot escape the obligation of a universally recognized principle simply because there happens*

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165. The Umpire’s reliance on the authority of publicists certainly comports with Article 38 of the ICJ statute. More importantly, however, it underscores a perceived need to supplement the analytical deficit endemic to any effort to distinguish its case from the *Pious Fund* framework. This analysis, however, was purely formal—it merely recited names—not a canvassing of doctrinal principles on the subject.

The expressions of many international law writers on this point, including Wheaton, Vattel, Phillimore, Hall, Poison, Calvo, Vico, Grotius, Taparelli, Sala, Coke, Sir Henry Maine, Brocher, Domat, Burke, Wharton, and Markby, are collated in the case of *Williams v. Venezuela*, 29 R.I.A.A. 279 (U.S.-Venez. Claims Comm’n 1885). To these names we may add ANDRES BELLO, *PRINCIPIOS DE DERECHO INTERNACIONAL* (1882), which states: “La prescripción es aún más importante y necesaria entre las naciones que entre los individuos, como que las desavenencias de aquellas tienen resultados harto más graves, acarreado muchas veces la guerra [Prescription is even more important and necessary among nations than among individuals, as the disagreements among them have much more serious results, many times leading to war]” (translated by author). Bluntschli, as the *Gentini* tribunal notes, “finds that a taking of territory, originally wrongful, becomes by time transformed into a legal condition.” *Gentini Case*, 10 R.I.A.A. 551, 556 (It.-Venez. Mixed Cl. Comm’n 1903).

166. *Gentini Case*, 10 R.I.A.A. 551, 559–61 (It.-Venez. Mixed Cl. Comm’n 1903).



to be no code of positive rules by which its action is to be.<sup>167</sup>

Thus, the use of this authority further weakens *Pious Fund's* gravitational pull on *Gentini*.

Third, the Umpire found national-domestic law, even that of non-party jurisdictions, helpful to his cause. Citing to the courts of equity in England and the United States, in particular to *Boubier*, the Umpire referenced how

[c]ourts of equity, though not within the terms of the statute, have nevertheless uniformly conformed to its spirit, and have, as a general rule, been governed by its provisions, unless especial circumstances of fraud or the like require in the interest of justice that they should be disregarded. (12 Pet., 56; 130 U.S., 43, etc.) Courts of equity will apply the statute by analogy, and in cases of concurrent jurisdiction they are bound by the statutes which govern actions at law. (149 U.S., 436; 169 U.S., 189). Some claims, not barred by the statute, a court of equity will not enforce because of public policy and the difficulty of doing full justice when the transaction is obscured by lapse of time and loss of evidence. This is termed the doctrine of laches.<sup>168</sup>

This third source, national courts applying equity, is closely related to, but still distinct from, the four premises upon which the dismissal of the claim rested: an equity-based argument de-

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167. *Id.* at 560 (emphasis added). This proposition stands in sharp relief to the arguments that counsel for Italy had earlier advanced on claimants' behalf in *Gentini*. Specifically, counsel argued that the limitations doctrine in an international context should be modified and distinguished from its national-domestic counterpart on grounds that are legitimately compelling:

But when the debtor is a government, and moreover, when the demand of the individual may be the subject of the claim, the reasons which may induce a creditor to postpone his action may be many and of varied nature; as, for instance, [i] the interruption of diplomatic relations between the Governments concerned, [ii] the lack of political influence of the creditor, [iii] the unfavorable financial conditions of the debtor government, [iv] the want of faith of the creditor in the impartiality of magistrates, who, unprotected by the feeling of permanency, might against their better judgment become pliant tools of a party, and many other similar motives.

*Id.* at 553.

168. *Id.* at 558.

rived from a very particular understanding of justice and the ethics attaching to the LPD.

By way of example, the Umpire mentioned how “[i]t thus appears that courts of equity, even when not bound by the statute recognizing its essential justice had followed it [application of the LPD] in spirit.”<sup>169</sup> In fact, beyond a perceived practical necessity, the opinion characterized the LPD as “laws of universal application [that] were not the arbitrary acts of power, but . . . were the outgrowth of a general feeling that equity demanded their enactment.”<sup>170</sup>

Accordingly, *Gentini* provides historical evidence that, at least Claims Tribunals under the auspices of the ICJ’s predecessor, the PCA in 1903, identify that the applicability of a limitations period in international law arguably had its normative foundations in (i) the writings of publicists, (ii) precedent in the form of Claims Tribunals awards issued in conjunction with the PCA, (iii) the national-domestic practice of equity courts in England and the United States, and (iv) more general “natural law like” propositions arising from specific conceptions of justice, equity, and a purportedly “shared understanding.”<sup>171</sup> To this extent, *Gentini* can be seen as contributing to the modern understanding of the LPD as based on (i) national law (e.g., a sense that finality is proper), (ii) a general proposition that finality is necessary, and (iii) the ethical-moral precept that it is somehow wrong or negligent for a claim not to be asserted within an unspecified, and perhaps undefinable period of time.

The *Gentini* analysis paints the perfect portrait of the legacy LPD that is pervasive in the modern international law of investment protection. It is a paradigm of the doctrine premised on national-domestic law principles, with intuitive components that are purely visceral, that overemphasize the policy of certainty and finality to the detriment of other considerations endemic to international law. Also, it describes a doctrine that is materially influenced by the economic agendas of capital-exporting States. By omission, the reasoning and holding in *Gentini* is also eloquent as to the general issues that should underlie any consideration of the application of the

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169. *Id.*

170. *Id.* at 557.

171. *Id.* at 558.

doctrine in an international law context: most notably, the policies incident to any particular branch of international law. Despite the Umpire's categorical reasoning and conclusion that the doctrine finds a place in international law even where the applicable treaty is silent on the issue, the award then, albeit timidly, qualifies the finding by asserting that the limitations period to be applied and "the circumstances of its origin and the time it must run *may vary with every case.*"<sup>172</sup>

Ironically, the losing arguments of counsel for Italy in *Gentini* were more progressive, clairvoyant, and relevant with respect to the development and application of a LPD in an international law context.

Counsel for Italy argued that policies underlying the application of the LPD in national-domestic cases were not transferable to the international law sphere.<sup>173</sup> Even though counsel framed these arguments within the terms of the substantive dispute at issue in *Gentini*, the overarching principle in his contention is foundationally the need to have different LPD analyses, attaching to national and international law rubrics, respectively. The Umpire never addressed these premises.

### B. *The Williams Case*

In *Williams v. Venezuela*, as in *Gentini*, a sovereign—in this instance the United States—brought a claim on behalf of a U.S. citizen against Venezuela alleging monies owed.<sup>174</sup> The action was filed with the American-Venezuelan Commission,<sup>175</sup> also as in *Gentini*, under the auspices of the PCA. The uncontested record established that "the claim was not brought to the attention of the Venezuelan Government, until twenty-six years *after* its inception."<sup>176</sup> The issue before the Claims Commission was framed in two sentences: Whether "[b]y lapse of time the means of defense have been impaired, and there is total want of excuse for the long delay by claim-

172. *Id.* at 556 (emphasis added).

173. *Id.* at 553–54.

174. 29 R.I.A.A. 279 (U.S.-Venez. Claims Comm'n 1885).

175. The Claims Commission was established under the Convention Between the United States of America and Venezuela, 28 Stat. 1053 (1888) (signed Dec. 5, 1885).

176. *Williams v. Venezuela*, 29 R.I.A.A. 279, 280 (U.S.-Venez. Claims Comm'n 1885) (emphasis added).

ant. Under such circumstances what does the law require at our hands?"<sup>177</sup> In doing so, the Claim Tribunal observed that

[b]eyond the requirement that its decisions must be accorded to justice, *the treaty furnishes no guide* to the commission respecting the operation of the lapse of time in extinguishing obligations. *It is left to the direction of international law on the subject.* Does it recognize the doctrine of such extinguishment as between States in controversies like this?<sup>178</sup>

The Claims Commission answered this second query in the affirmative.<sup>179</sup> It therefore follows with respect to the previous question that dismissal of the claim was warranted. The *Williams* case finds that international law provides for a limitations period, even in the absence of a treaty containing *any* limitations qualification, based on two sources: (i) the writings of commentators and (ii) the domestic common law of the United States. In fact, virtually the entire body of Commissioner Little's award is comprised by single paragraph summaries of the writings of jurists on the subject of the LPD, tracing the contours of four centuries of writings on the issue.<sup>180</sup> After synthesizing these writings, the Commissioner concluded that:

[o]n careful consideration of the authorities on the subject, much of whose discussion is only remotely applicable to the question as it is presented to us, we are of the opinion that by their decided weight—we might said by very necessity—*prescription has a place in the international system and its to be regarded in these adjudications.*<sup>181</sup>

Quite remarkably, the Claims Commission further qualified its conclusion by noting that the principles recognized in the writings "are general" and therefore, at least presumably at first glance, not applicable "to individual claims or to debts by one state on account of transactions with citizens of another state."<sup>182</sup>

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177. *Id.*

178. *Id.* (emphasis added).

179. *Id.* at 280.

180. *Id.* at 280-85

181. *Id.* at 290 (emphasis added).

182. *Id.*

Although aware of this basic conceptual challenge, the Commissioner reconciles it for purposes of the award and disavows the claim on the ground that limitations are grounded in natural law, a formulation that pervades the writings of virtually all of the jurists cited in the award.<sup>183</sup>

The *Williams* award served as a conceptual foundation for the *Gentini* analysis and holding. The two opinions import domestic and natural law into their international law analysis of the LPD. In either case, did the Commissioner or the Umpire look to international law itself for a response to its fundamental query? Does international law recognize the LPD in circumstances where the treaty at issue contains no such qualification? Rather, the analyses focused on national law and commentaries premised mostly on a natural law conceptualization of the doctrine. Other Claims Tribunal cases between 1885-1905 applied an identical methodology.<sup>184</sup>

### C. *The Paradox and Legacy of the Claims Tribunal Cases*

*Gentini* and *Williams* can be construed as proposing that international law—without specifying a particular field—recognizes and encourages the application of the LPD even where the treaty at issue does not prescribe a limitations period. The contribution to the workings of the LPD in international law arising from these cases influenced the lack of uniformity currently configuring the status of a LPD in public international law generally, and with respect to the international law of investment protection in particular. Closer reflection is necessary.

The Claims Tribunal cases extracted from the writings of jurists that the LPD is virtually sacrosanct because it makes possible *security* and *certainty* through finality. The argument was

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183. See, e.g., *id.* at 281 (“This [prescription of public law] is in principle very much the same as the prescription of the private law, which indeed may be said to be modeled upon the usage of the public law, and which usage grew out of the reason of the thing. . . .”) (quoting Phillimore) (emphasis in original); see also *id.* at 281–82 (“May usucaption and prescription be considered in regard to peoples and States as regular and normal means of acquiring property? If it is admitted that these two ways of acquiring are legitimate and based on natural law, one is logically bound to admit that they are equally conformable to the principles of the law of nations, and are to be applied to nations.”) (quoting Calvo).

184. See *supra* text accompanying note 163.

expanded to say that this *security* and *certainty* would also avoid territorial disputes among nations, as well as contribute to the stability of commercial transactions. With respect to this latter point, it was argued that only chaos would ensue were all contracts subject to challenge notwithstanding the passage of time, let alone capable of being rescinded. Thus, the principle of *security* was enshrined and accorded dispositive weight in any calculus considering the doctrine's application.

The Claims Tribunal cases, however, paradoxically undermined and disavowed the very principles of security and certainty that the Tribunal sought to foster pursuant to the LPD. By relying on natural law, without more, the Claims Tribunal awards contributed to a fragmented international law "jurisprudence" on the basic question of whether the LPD at all applies to customary international law or to conventional international law when a treaty is silent on the issue. The jurisprudence based on natural law made possible the leap from national-domestic to international law but only in general terms that failed to set limits. Consequently, the Claims Tribunal awards created an open-ended limitations period in international law. They prescribe the application of the LPD but omit setting an actual limitations time frame. In fact, the very authority and specific citation that the Commissioner in *Williams* relied upon demonstrates the implicit shortcomings of the strict natural law analysis that was observed:

Taparelli:

Hence the law of prescription—a necessary and just law—by means of which society stops, through certain limitations, all inquisitions of ancient rights.

. . .

Most reasonable is, therefore, the law of prescription in the natural order, *although nature itself does not overtly establish its strict necessity nor fix its proper limitations. This is to be performed by society as it grows more and more perfect*; and it is as much the more its office as it is therefrom and therein that the social complaint requiring such a remedy takes its rise. (Natural Law, Vol. 2, 979).<sup>185</sup>

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185. *Williams v. Venezuela*, 29 R.I.A.A. 279, 282 (U.S.-Venez. Claims Comm'n 1885) (emphasis added).

The omission is likely attributable to two factors. First, from a practical perspective, the resolution of claims that contained undisputed records of the passage of more than two decades, as were the issues confronting the Claims Tribunals, did not require the tribunal to go further and articulate a limit on the applicable limitations period. The Claims Tribunals were not asked to make such a pronouncement, and they understandably did not *sua sponte* do so.

Second, were the Claims Tribunals to formulate a rule that would set a limit to the limitations period applicable to the case as a matter of “settled international law” under its existing legacy methodology, the Claims Tribunals would have to turn to national-domestic law for analytical assistance. In fact, the Claims Tribunals did rely on national-domestic law for analytical help only to arrive at the unqualified proposition that international law recognizes the LPD.<sup>186</sup> Using national-domestic law to fashion a limitations rule having an actual term of years more precipitously would have led to the lack of uniformity and want of conceptual coherence now present in international law on the subject.

Recourse to national-domestic law for formulating a term of years to be applied to a presumably international law rule of limitations would lead to the creation of different rules depending on the domestic national law of the State being sued. Thus, taken to its logical consequences, only out of mere statistical happenstance would a consistent limitations rule emerge. Mere statistical coincidence thus would constitute the normative foundation for uniformity.

The necessary analysis that would have formed a uniform system was never undertaken and has still not been addressed. It would require *turning away* from a national-domestic law paradigm. Such analysis would invite consideration of issues germane to the policies of international law, which are separate and distinct from those of national-domestic law and only intercept on general matters that would be considered under any rubric.

The Claims Tribunal cases do leave us with the *rule of law* stating that customary international law recognizes the LPD as applying to disputes concerning treaties that omit *any* refer-

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186. *Supra* Section III(A) (noting that *Gentini* understands the doctrine as based on national law).

ence to that doctrine. No alternative construction of this authority is possible.

This proposition, however, directly and explicitly conflicts with contemporary arbitral awards arising from investor-State arbitrations. These arbitral awards hold that customary international law does not recognize the LPD, and further state that such a doctrine *only* forms part of conventional international law when the treaty at issue contains a limitations period clause.

#### IV. A CUSTOMARY INTERNATIONAL LAW AND THE LIMITATIONS PERIOD DOCTRINE THAT IS INTERNALLY INCONSISTENT: THE NEED FOR UNIFORMITY AND POLICY

The current status of the LPD in customary international law is uncertain. This uncertainty, from a descriptive perspective, arises from a conflict between the work of publicists<sup>187</sup> and the Claims Tribunal cases on the one hand, and the holdings of treaty-based investor-State arbitration awards on the other. The Claims Tribunal cases uniformly state that customary international law recognizes and applies the LPD in instances concerning treaty-based disputes even where the treaty at issue lacks any reference to a limitations period.<sup>188</sup> The arbitral awards state that conventional international law recognizes and applies the LPD in instances concerning treaty-based arbitrations only where the treaty at issue contains a limitations period. They further assert that customary international law does not recognize the LPD.

These conflicting statements can perhaps be reconciled by noting that the arbitral awards concern the public international law of investment protection, while the writings of publicists and the Claims Tribunal cases make no such qualification. In fact, it may be asserted that the Claims Tribunal cases address mostly either territorial disputes or conflicts arising from commercially-based transactions that do not at all address investment protection standards.<sup>189</sup> Despite its surface appeal, this explanation is belied by the arbitral awards themselves. These awards hold that the LPD finds no space in cus-

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187. *See supra* text accompanying note 163.

188. *See supra* Section III(C).

189. *See supra* note 67.



tomary international law generally.<sup>190</sup> The arbitral awards addressing the LPD do not distinguish between customary international law, international law, and the international law of investment protection.<sup>191</sup> Therefore, the arbitral awards cannot be reconciled with the Claims Tribunal cases on that basis. The problem is more complex and so too is the solution.

A. *According to Treaty-based Awards, There Is No Public International Law Equivalent to a Statute of Limitations Other Than a Limitations Period Contained in a Treaty*

In a claim arising under the Lithuania-Italy BIT, the Tribunal rejected respondent's limitations defense observing that [c]ontrary to the Respondent's assertion, the claimant's claim is not subject to the Lithuanian statute of limitations. In accordance with the agreement, the Tribunal applies international law, not Lithuanian domestic law, to these proceedings and there is no deadline prescribed by the Agreement, Rules or *general principles of international law*.<sup>192</sup>

Moreover, in that case, the Tribunal held that it was reasonable for the claimant to have waited to initiate any arbitration until litigation before the courts of Lithuania concerning the privatization at issue in the arbitration was concluded.<sup>193</sup> The Tribunal specifically noted that

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190. See *infra* note 198 (discussing *Ergoalians TOB v. Republic of Mold.* (Ad Hoc Arb. Trib. Oct. 23, 2013), <https://www.italaw.com/sites/default/files/case-documents/italaw4220.pdf>).

191. See *Bosca v. Republic of Lith.*, Award, ¶ 120 (Lith.-It. Arb. Tribunal 2013), [https://www.italaw.com/sites/default/files/case-documents/italaw7179\\_1.pdf](https://www.italaw.com/sites/default/files/case-documents/italaw7179_1.pdf); see also *Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Decision on Jurisdiction, Admissibility and Liability, ¶ 147 (April 21, 2015), [http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C2441/DC9888\\_en.pdf](http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C2441/DC9888_en.pdf). (Authors noted that both opinions referred only to international law).

192. *Bosca v. Republic of Lith.*, Award, ¶ 120 (Lith.-It. Arb. Tribunal 2013) (emphasis added), [https://www.italaw.com/sites/default/files/case-documents/italaw7179\\_1.pdf](https://www.italaw.com/sites/default/files/case-documents/italaw7179_1.pdf).

193. *Id.* The award did not discuss the extent to which the judicial proceeding included the *identical* parties, causes of action, subject matter, and prayer for relief.

[t]he Claimant notified the respondent of his intention to commence arbitration as early as 2007 when litigation in the Lithuanian courts relating to the Alita privatization was on-going. It was not unreasonable, in the Tribunal's view, to wait for those decisions to be rendered before undertaking a separate proceeding in an international setting.<sup>194</sup>

Thus, the Tribunal concluded that "the Claimant's claim [was] admissible."<sup>195</sup>

Similarly, the Tribunal in *Gavazzi v. Romania*, rejected respondent's limitations defense and stated that "arbitration proceedings [are] governed by international law, only international law—and no domestic law—can introduce time-bars. [Citation omitted] Neither the ICSID Convention, nor the BIT, nor international law in general contain any statute of limitations in relation to treaty claims. Without such clear legal provisions, no time-bar can operate to bar an ICSID arbitration"<sup>196</sup>

This authority restates the proposition that there is no limitations period in public international law or within the ICSID Convention's framework, except where present in a treaty. Also, because international law governs treaty-based proceedings, a respondent is foreclosed from relying on national-domestic limitations periods to limit the prosecution of such claims.

Because of the absence of an international counterpart to a domestic limitations period within the rubric of customary international law, treaty-based claims are governed by the limitations period contained in the particular treaty at issue.

This line of authority cannot be reconciled with the Claims Tribunal cases. Therefore, the current status of the limitations period doctrine within the framework of public international law is uncertain. One line of authority, the Claims Tribunal cases together with *some* publicists, holds that customary international law recognizes and applies the LPD in disputes based on a treaty where the treaty is silent as to a limitations

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194. *Id.*

195. *Id.* ¶ 121.

196. *Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Decision on Jurisdiction, Admissibility, and Liability, ¶ 147 (Apr. 21, 2015) (emphasis added) (citation omitted), [http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C2441/DC9888\\_En.pdf](http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C2441/DC9888_En.pdf).

period.<sup>197</sup> A second line of equally normative authority holds that customary international law does not recognize the LPD in disputes based on a treaty where the treaty is silent as to a limitations period.<sup>198</sup> The fragmented configuration and absence of sound doctrinal underpinnings beyond reliance on national-domestic law and the policies favoring the interests of capital-exporting States have led tribunals to grope for makeshift formulas. The three most notable are discussed below.

#### V. ARBITRAL TRIBUNALS IN INVESTOR-STATE ARBITRATIONS ATTEMPTED TO MITIGATE THE CONSEQUENCES OF A NATIONAL-LAW BASED LIMITATIONS ANALYSIS

A review of the awards addressing the limitations defense suggests that investor-state arbitral tribunals adhere to textual analysis of the Vienna Convention.<sup>199</sup> These tribunals further treat, as they should, the limitations defense as normatively endemic to (i) the applicable treaty-based *procedural* rights and (ii) a substantive element of applicable treaty protection standards. In this same vein, the absence of a limitations period itself is amenable to a textual construction that still keeps the analysis within the purview of public international law. In an effort to render reasoned awards as well as reconcile adherence to public international law with the paucity of doctrinal development concerning the limitations period in investor-state arbitration, tribunals have fashioned norms that tend to enlarge the limitations period in order to render it amenable to the policy objectives of treaty-based disputes. Two salient ex-

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197. See *supra* note 165.

198. See *Nagel v. Czech Republic*, SCC Case No. 049/2002, Final Award, ¶ 334 (Arb. Inst. of the Stockholm Chamber of Commerce 2006), <https://www.italaw.com/sites/default/files/case-documents/ita0551.pdf> (holding “that in respect of a claim arising from an international treaty the limitation rules of domestic law are not directly relevant and that international standards would have to be applied”); see also *Ergoalians TOB v. Moldova*, ¶122 (Ad Hoc Arb. Trib. Oct. 23, 2013), <https://www.italaw.com/sites/default/files/case-documents/italaw4220.pdf> (holding that “when it comes to statutes of limitations relating to claims under investment treaties, domestic statutes of limitations of either party do not apply; instead, international law applies to determining the relevant statutes of limitations, and there is no such statute under international law that would apply to claims under the Energy Charter Treaty”).

199. Vienna Convention on the Law of Treaties, at Article 31. See *supra* note 87

amples merit analysis. First, a number of arbitral awards have held that in cases where the treaty at issue contains a limitations period, facts beyond the term of such a period can be considered.<sup>200</sup> This apparent but not actual expansion of the limitations term to incorporate facts beyond the term to contextualize factual premises within the limitations period is an admission that a national-domestic based limitations period in a treaty is simply inadequate. Second, tribunals have adopted a “continuing damage” theory akin to the U.S. common law “continuing tort doctrine,” which expands the limitations period far beyond the average three-year limitations term in post-1994 second generation BITs.<sup>201</sup> Third, tribunals have sought recourse in a “reasonableness analysis” to go beyond the constraints imposed by the importation of national-domestic law limitations period analysis.<sup>202</sup>

#### A. *Facts Beyond the Limitations Period Considered*

At least one tribunal has found that the unique factual configuration attaching to a Denial of Justice treaty claim commands a more flexible statute of limitations period. In *Eli Lilly and Company v. the Government of Canada*, the Tribunal addressed the relevant dates for the commencement of a limitations period in an action regarding the judicial invalidation of patents.<sup>203</sup> The Tribunal observed that “claimant did not suf-

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200. See *Grand River Enter. Six Nations, Ltd. v. United States*, ICSID Case No. UNCT/14/2, Decision on Objections to Jurisdiction, ¶ 86 (July 20, 2016) (emphasis added) (citation omitted), <https://www.italaw.com/sites/default/files/case-documents/ita0381.pdf>, which reads in part:

In *Mondev*, the Tribunal considered (and rejected) the Claimant’s claim that it had suffered a denial of justice in connection with state court proceedings occurring after NAFTA entered into force, although the dispute underlying the litigation arose years before. In *Feldman*, the Tribunal awarded damages in respect of discrimination occurring during the three-year limitations period, but *its analysis of this and other claims again required consideration of earlier events*.

201. See *supra* text accompanying note 151; see also *infra* table annexed to Appendix C .

202. See, e.g., *Wena Hotels v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, ¶¶ 106–07 (Dec. 8, 2000), 41 I.L.M. 896 (2002); *Craig v. Ministry of Energy of Iran*, 3 Iran-U.S. Cl. Trib. Rep. 280 (1983).

203. *Lilly v. Canada*, ICSID Case No. UNCT/14/2, Final Award (Mar. 16, 2017), <https://www.italaw.com/sites/default/files/case-documents/italaw8546.pdf>.

fer, and could not have suffered, the loss of which it complains here (i.e., invalidation of the Zyprexa and Strattera Patents) before those patents were invalidated.”<sup>204</sup> Accordingly, the Tribunal concluded that the events following the date on which the Supreme Court denied claimant’s leave to appeal the invalidation of the Strattera Patent and the Zyprexa Patent fell within the three-year limitations period set forth in NAFTA Articles 1116(2) and 1117(2).<sup>205</sup>

The *Eli Lilly* award also bolsters the proposition that, at least within the framework of NAFTA tribunals, claimants may rely on predicate facts beyond the limitations period as part of a viable claim:

In this context, many previous NAFTA tribunals that have found it appropriate to consider earlier events that provide the factual background to a timely claim. As stated by the tribunal in *Glamis Gold v. United States*, a claimant is permitted to cite “factual predicates” occurring outside the limitations period, even though they are not necessarily the legal basis for its claim.<sup>206</sup>

The tribunal in *Grand River v. United States* reached the same conclusion, drawing on past decisions:

The *Mondev* and *Feldman* tribunals both considered the merits of claims regarding events occurring dur-

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204. *Id.* ¶ 170.

205. *Id.* It is also worth noting that the *Lilly* Tribunal acknowledged that public international law rejects a continuing tort theory. This position was not fully developed, nor is there any authority supporting the suggestion. To the contrary, a number of tribunals have identified different permutations of this theory. The *Eli Lilly* Tribunal’s exact language merits review:

The Tribunal notes submissions of Respondent, Mexico, and the United States stating that the limitation period under Articles 1116(2) and 1117(2) is not subject to suspension, prolongation or other qualification, *and that in particular, a continuing course of State conduct cannot stop or renew the time-bar clock.* In the present case, Claimant has not advanced a theory of continued breach or otherwise advocated the suspension or extension of the limitation period. Nor does the Tribunal adopt any such approach in reaching its decision. This case is simpler: the alleged breach for each investment—the invalidation of the patent—occurred at a single point in time within the three-year period.

*Id.* ¶ 172 n.159 (emphasis added).

206. *Id.* ¶ 172 (citation omitted).

ing the three-year limitations period, even though they were linked to, and required consideration of, events prior to the limitations period or to NAFTA's entry into force. In *Mondev*, the Tribunal considered (and rejected) the Claimant's claim that it had suffered a denial of justice in connection with state court proceedings occurring after NAFTA entered into force, although the dispute underlying the litigation arose years before. In *Feldman*, the Tribunal awarded damages in respect of discrimination occurring during the three-year limitations period, but its analysis of this and other claims again required consideration of earlier events.<sup>207</sup>

The need to go beyond a three-year limitations period in an international dispute is driven by many factors,<sup>208</sup> including the very nature of international investments themselves. A salient feature of an international investment triggering treaty-based protection standards is longevity.<sup>209</sup> Many if not most such investments have micro and even macro-economic effects. Therefore, the analyses in *Eli Lilly*, *Mondev*, and *Feldman* are understandable but remain less than comprehensive in addressing the inadequacies arising from a national-domestic law legacy analysis.

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207. Grand River Enter. Six Nations, Ltd. v. United States, ICSID Case No. UNCT/14/2, Decision on Objections to Jurisdiction, ¶ 86 (July 20, 2016) (emphasis added) (citation omitted), <https://www.italaw.com/sites/default/files/case-documents/ita0381.pdf>.

208. See Clayton v. Canada, Case No. 2009-04, Award on Jurisdiction and Liability, ¶ 282 (Perm. Ct. Arb. 2015), <https://www.italaw.com/sites/default/files/case-documents/italaw4212.pdf> (holding that “[w]hile Article 1116(2) bars breaches in respect of events that took place more than three years before the claim was made, events prior to the three-year bar, however, are by no means irrelevant. They can provide necessary background on context for determining whether breaches occurred during the time-eligible period.”)

209. See, e.g., Salini v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52–54 (July 23, 2001), 42 I.L.M. 609 (2003). Christoph Schreuer observes that there are five “features” that are “typical” to “most of the operations” that have been the subject of ICSID proceedings: (i) “a certain duration” of the enterprise, (ii) “a certain regularity of profit and return,” (iii) an “assumption of risk,” (iv) a “substantial” commitment by the investor, and (v) some “significance for the host State’s development.” Christoph Schreuer, *Commentary on the ICSID Convention*, 11 ICSID REV.: FOREIGN INV. L.J. 318, 372 (1996).

### B. *Continuing Damage Analysis*

Notwithstanding the *Eli Lilly* Tribunal's dicta in a footnote, which suggests that a "continuing tort theory" finds no space in public international law,<sup>210</sup> that proposition directly and explicitly conflicts with more sustained analyses on the subject.

Perhaps the most relevant "case law" examination on the issue of timeliness in the NAFTA context is found in the *United Parcel Service of America Inc. (UPS) v. Government of Canada*.<sup>211</sup> That case concerned Canada Post's monopoly with respect to small parcel deliveries, which was based on a statute that in effect foreclosed the investor from conducting business in that jurisdiction.<sup>212</sup> A remarkable aspect of the factual narrative underlying that case—as it relates to the issue of the preclusive effect of the relevant statute of limitations—is that the statutory framework predated the filing of the investor's claim by three years.<sup>213</sup> The Tribunal in *UPS* qualified the extent to which a continuing course of conduct may constitute new and recurring breaches that renew the limitations period. It specifically held that, where a continuing breach is present, the claimant is limited to securing compensation accruing only within the three-year time frame—in the NAFTA context—prior to the filing of the claim, stating:

Although we find that there is no time bar to the claims, the limitation period does have a particular application to a *continuing course of conduct*. If a violation of NAFTA is established with respect to any particular claim, any obligation associated with losses arising with respect to that claim can be based only on losses incurred within three years of the date when the claim was filed. *A continuing course of conduct might generate losses of a different dimension at different times*. It is incumbent on claimants to establish the

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210. *Lilly v. Canada*, ICSID Case No. UNCT/14/2, Final Award, ¶ 170 n.159 (Mar. 16, 2017), <https://www.italaw.com/sites/default/files/case-documents/italaw8546.pdf>.

211. *United Parcel Serv. of Am. Inc. v. Canada*, ICSID Case No. UNCT/02/1, Award on the Merits (May 24, 2007), [http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C5546/DC8855\\_En.pdf](http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C5546/DC8855_En.pdf).

212. *Id.* at ¶¶ 28-30, 38.

213. *Id.* at 38.

damages associated with asserted breaches, and for continuing conduct that must include a showing of damages not from the inception of the course of conduct but only from the conduct occurring within the period allowed by article 1116(2). This is not, however, a matter we need to address further at this point apart from the specific claims.<sup>214</sup>

While the *UPS* tribunal ultimately dismissed the NAFTA claims on the merits, the award serves as foundational authority for a *continuing course of conduct* or “*continuing tort*” approach.<sup>215</sup>

As with tribunals that seek to expand the limitations period in order to more comprehensively understand the facts purportedly governed by the limitations term, a continuing damages analysis underscores a rudimentary need for a longer limitations period, or a limitations period that is sufficiently flexible so as to expand its terms where circumstances may so warrant. The configuration of an investment, the regulatory act or acts at issue, the nature of the damages alleged, the particular circumstances configuring a case, and the standard or standards of protection allegedly breached may all suggest that a three-year limitations period imported into a treaty from national-domestic law is simply inadequate. Instead of addressing the conceptual cause of a pragmatic deficit, *ad hoc* tribunals charged only with processing a single set of claims pertaining exclusively to one dispute cannot but limit themselves to addressing the symptom and not the underlying disease. A continuing damages approach merely mitigates the systemic effects of a conceptual shortcoming.

### C. *A Reasonableness Standard Can be Discerned Concerning Limitations Periods in Public International Law*

There is no authority setting forth a customary international law equivalent to a limitations period. Similarly, public

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214. *Id.* ¶ 30 (emphasis added).

215. The U.S. common law has long recognized a continuing tort doctrine that tolls application of domestic statutes of limitations. *See, e.g.*, *Nat'l R.R. Passenger Corp. v Morgan*, 536 U.S. 101 (2002); *United Airlines v. Evans*, 431 U.S. 553 (1977); *Hilao v. Estate of Marcos*, 103 F.3d 767, 773 (9th Cir. 1996); *see also* Elad Peled, *Rethinking the Continuing Violation Doctrine: The Application of Statutes of Limitations to Continuing Tort Claims*, 41 OHIO N.U.L. REV. 343 (2015).



international law does not identify an operative standard that may apply to limitations period issues or analyses. Scrutiny of the corpus of treaty-based arbitral awards addressing the limitations period issue, however, reveals the recurring application of a “*reasonableness*” standard. This standard has been applied without reference to national law and in instances where the treaty at issue lacks a limitations period.

The analysis in *Wena Hotels Limited v. Arab Republic of Egypt* is helpful in this regard.<sup>216</sup> There, the claimant asserted a claim under the U.K.-Egypt BIT concerning the seizure of two properties in 1991 in the hospitality sector, the Luxor and Nile hotels.<sup>217</sup> Respondent argued that the claim commanded immediate dismissal because Article 172(1) of the Egyptian Civil Code specifically provided that

[a] case filed for damages claimed for an illegal act shall fall by prescription by lapse of three years from the day the wronged person learns of the damages taking place and of the person who is responsible for it, in all events the case shall fall within the lapse of 15 years from the day the illegal act takes place.<sup>218</sup>

Moreover, respondent further argued that even if the Tribunal were to refrain from applying Egypt’s domestic statute of limitations, the Tribunal would “still have the discretion to determine whether there has been unreasonable delay in the submission of the Claimant’s claims to ICSID.”<sup>219</sup> In *Wena*, the request for arbitration was registered in 1998, seven years after the seizures of the Luxor and Nile hotels. The Tribunal did not apply the statute of limitations defense, and in so proceeding, determined that under the specific facts of that case a seven-year time frame separating the maturation of claims and the actual registration of an ICSID arbitration request was eminently reasonable. It engaged in a two-prong analysis that (i) traced the development of the general principle that there is no statute of limitations in international law, and (ii) analyzed

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216. *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, ¶¶ 102–09 (Dec. 8, 2000), 41 I.L.M.896 (2002).

217. *Id.* ¶¶ 28–50 (describing seizure of hotels).

218. *Id.* ¶ 102.

219. *Id.*

the reasonableness in delaying the filing of the claim for seven years, but did so within an equity framework.<sup>220</sup>

First, the Tribunal sought analytical support from *Alan Craig v. Ministry of Energy of Iran*, Chamber Three of the Iran-U.S. Claims Tribunal, where despite the applicability of Iranian law, the Tribunal declined to apply an Iranian statute of limitations and noted that “[m]unicipal statutes of limitation have not been considered as binding on claims before an international tribunal, although such periods may be taken into account by such a tribunal when determining the effect of an *unreasonable* delay in pursuing a claim.”<sup>221</sup>

In addition, the Tribunal recognized that this was a long standing principle based on the venerable *Gentini* case where, the Mixed Claims Commission noted that international tribunals are free to consider equitable principles of limitations in evaluating stale claims.<sup>222</sup>

The *Wena* Tribunal first borrowed from the Italy-Venezuela Mixed Claims Commission and engaged in a two-part reasonableness analysis within an equity framework. Two propositions were identified as relevant. First, was the notion of “repose” violated? Specifically, respondent Egypt “*reasonably* believe[d] that a dispute has been abandoned or laid to rest long ago [such that Egypt] should not be surprised by [the dispute’s] subsequent resurrection.”<sup>223</sup>

Second, the Tribunal queried whether the extent to which the seven-year hiatus between the accruing of the claim and the registration of the arbitration request caused any harm.<sup>224</sup> It answered both questions in the negative.<sup>225</sup>

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220. *Id.* ¶¶ 106-107.

221. *Id.* at ¶ 106 (citing *Craig v. Ministry of Energy of Iran*, 3 Iran-U.S. Cl. Trib. Rep. 280 (1983); GEORGE H. ALDRICH, *THE JURISPRUDENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL* 480–82 (1996)).

222. *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, ¶ 106 (Dec. 8, 2000), 41 I.L.M.896 (2002). (citing *Gentini* Case, 10 R.I.A.A. 551, 560–61 (It.-Venez. Mixed Cl. Comm’n 1903)).

223. *Id.* ¶ 105 (emphasis added).

224. *Id.* ¶ 106.

225. *Id.*

## VI. A PARADIGM SHIFT BASED ON THE POLICIES OF THE PUBLIC INTERNATIONAL LAW OF INVESTMENT PROTECTION

The current status of the LPD within the framework of the public international law of investment protection is not workable. Indeed, the deficits in the theoretical and practical approach to the doctrine are such that the modern regime governing the doctrine in the international law of investment protection actually gives rise to *insecurity* and *uncertainty*. Yet, the jurisprudence and writings concerning the workings of the LPD in international law generally state in unison that *security* and *certainty* are the two primordial objectives of the limitations doctrine.

Four fundamental factors account for the uncertainty and insecurity that characterizes the contemporary doctrine's regime. First, the LPD in the international law of investment protection is based upon the wholesale importation of national-domestic law. Specifically, (i) the economic interest of capital-exporting States, (ii) the national-domestic rules of property law, (iii) the national-domestic principles of contract law, and (iv) the national-domestic law of negligence all underlie the modern limitations period regime.

Second, the contemporary doctrine's framework in the international law of investment protection was fashioned without considering the multiple direct and collateral policy objectives that comprise this area of law. This shortcoming is of a foundational nature.

Third, the current doctrine's rubric within the international law of investment protection is fragmented. First generation BITs (1959-1993) *do not have any* limitations periods. Thus, disputes arising from approximately 563 BITs have no polestar with respect to (i) the possible preservation of claims in perpetuity, (ii) the incorporation of limitations period terms haphazardly arising from national-domestic law, or (iii) a limitations term introduced into the proceeding based upon arbitral discretion. All three possibilities are fundamentally flawed. Second generation BITs (modern BITs between 1994 and the present) reflect that *only* 106 out of 1,498 BITs, or 7.08%<sup>226</sup> have a limitations period.<sup>227</sup> Moreover, the 7.08%

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226. Once we add to the BITs the total number of TIPs containing a limitations period, the figure changes to a total of 1,524, where 132 contains

with a limitations period contained limitations terms ranging between two and five years attaching to identical standards of foreign investment protection.<sup>228</sup> Both the length of these terms and the different terms attaching to the same protection standards are practically and conceptually problematic.

Within the modern generation of BITs, we also find that the placement of the limitations period in the various treaties differs. At times the limitations period is referenced together with the relevant standard of protection to which it attaches.<sup>229</sup> In these cases the limitations period should be construed as *substantive* (i.e., forming part of the actual investment protection standard). In other modern BITs, the limitations period is placed together with procedural jurisdictional predicates and procedural rights.<sup>230</sup> In such cases, the limitations period must be construed as *procedural*. We thus find that the LPD within the international law of investment protection can be construed as both *substantive* and *procedural* under the current “legacy approach,” although it is not recognized as such. The non-disclosure and conceptual categorization of this duality under the existing regime is insufficient because it also creates *uncertainty* and *insecurity* in MFN treaty practice.<sup>231</sup>

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limitations terms (8.66%) (explaining that the authors hand-searched the aforementioned BITs and reached these conclusions as a result).

227. See *supra* Section II(D); see also *infra* Appendix A & Appendix C.

228. See Appendix C.

229. See, e.g., U.S.-Colombia FTA, *supra* note 5, ch. 10 (containing the investment provisions), art. 10.18 (containing the limitations period), Nevertheless, Chapter Twelve, concerning “Financial Services” in Art. 12.1.2(b), states that “Section B (Investor-State Dispute Settlement) of Chapter Ten (Investment) is hereby incorporated into and made a part of this Chapter solely for claims that a Party has breached Articles 10.7 (Expropriation and Compensation), 10.8 (Transfers), 10.12 (Denial of Benefits), or 10.14 (Special Formalities and Information Requirements), as incorporated into this Chapter.” *Id.* art. 12.1(2)(b). Article 12.1.2(b) does not mention a limitations period. In that vein, there is no limitations period applicable to the financial services chapter.

230. See U.K.-Colombia BIT, *supra* note 5, art. IX (containing the limitations period titled “Settlement of Disputes between one Contracting Party and an Investor of the other Contracting Party,” listing procedural but not substantive rights).

231. There are scenarios where an MFN clause in one treaty can import a substantive standard of protection from another treaty while excluding a limitations period from the imported standard of protection. Such would be the interaction, for example, between the MFN clause of the U.S.-Colombia FTA, *supra* note 5, ch. 12, and the FET standard of protection in the U.K.-

Fourth, there are two conflicting lines of authority on so rudimentary an issue as whether customary international law *at all* recognizes the limitations period doctrine. The negative effects of these four features of the current LPD regime in the international law of investment protection are compounded and made worse because of the nature of the *ad hoc* based tribunal framework in international investor-State arbitration. These tribunals struggle to engraft relativity and flexibility to what essentially is a static and inflexible paradigm that leaves little room for policy considerations or the reformulation of normative paradigms. The tribunals are charged with the practical workings of “problem solving” and not “policy making.”

These uncertainties compel a comprehensive review and revision of the LPD within the international law of investment protection.

#### A. *A Prescriptive Approach*

Set forth below is a *non-exhaustive* list of propositions that should form part of any LPD analysis. This catalogue of premises assumes that doctrinal developments in any field of law generally, but certainly in the international law of investment protection in particular, require the doctrinal precept at issue to have a rational relationship with respect to the subject matter and objectives of the particular legal regime at issue. The following fifteen propositions purport to meet this threshold standard.

First, an investor shall be accorded a rebuttable presumption that a claim has been timely filed. Conversely, a claim brought beyond the terms set forth in the applicable treaty shall not give rise to a *prima facie* presumption of negligence

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Colombia BIT, *supra* note 5, art. II (containing an FET standard titled “Promotion, Admission and Protection of Investments”). The latter agreement also contains a presumably corresponding limitations term in Art. IX, which concerns the “Settlement of Disputes between one Contracting Party and an Investor of the other Contracting Party,” and happens to form part of the procedural dispute resolution allocation of procedural rights. *Id.* art. IX. In this scenario, the limitations period constitutes a procedural term. There are scenarios, however, in which the MFN clause in one treaty will import a limitations period from a second treaty where that limitations period is placed together with the standard of protection being imported. Under this scenario, the limitations period would constitute a *substantive* right.

on the investor's part for failing to bring the claim any earlier.<sup>232</sup>

Second, the LPD within the international law of investment protection needs to bespeak uniformity. This uniformity must be attendant to (i) any conceptual standard concerning application of a limitations period, as well as to (ii) the specific substantive protection standards.

Third, the LPD should not be *exclusively* based upon national-domestic rules adopted from property, contract, and tort law. These legal principles were not developed to apply to claims arising from an alleged violation of a treaty-based protection standard caused by the excessive or illicit exercise of a State's regulatory sovereignty—hence the theoretical and practical incongruity of the LPD's ability to foster certainty and security.

Fourth, the LPD should be, where appropriate, analyzed within the context of the international law *proportionality doctrine*. An "all or nothing" approach to the application of the LPD to dismiss a claim without the benefits of having undertaken a comprehensive approach to the consideration of relevant factors germane to this field of law (e.g., investment protection) can only foster uncertainty and insecurity.

Fifth, any analysis of the application of the LPD must consider the extent to which recourse to a non-domestic tribunal was at all possible during the time frame at issue. In this regard, the Tribunal should be particularly flexible in favor of allowing claims to proceed, particularly where a Denial of Justice claim is being prosecuted.

Sixth, the specific universe of foreseeable economic or in-kind consequences stemming from an alleged violation of a protection standard at issue must be weighed against dismissal of a claim on limitations grounds. Policy considerations pertaining to (i) the particular industry sector at issue, (ii) the

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232. The literature on the LPD speaks in terms of "negligence" in failing to assert a claim. See, e.g., VATTEL, *supra* note 25, at 187-92. This understanding of negligence arises from national-domestic law constructs. Common law negligence is based on elements concerning a (i) duty/obligation, that (ii) was breached, which (iii) gives rise to damages, and (iv) the proximate cause of those damages was the breach of duty. In an international law scheme, however, these elements cannot be readily transposed because the duties and causal relationships between investors and States differ from those between private individuals.

investor's contribution to that sector, and (iii) the extent to which the investment's nature would render the investment most vulnerable to excessive or illicit exercise of regulatory sovereignty all need to be considered.

Seventh, the unique nature of investments generally must be considered in applying a limitations analysis. For example, greater flexibility in the application of the doctrine in favor of an investor should ensue in instances where the investment is particularly dependent upon the regulatory protection of the host-State.

Eighth, circumstances attaching to a claimant's ability to bring claims, including economic, political, social, and other duress, as well as the ability to collect against the host-State, should be considered. This analysis also must evaluate a claimant's subjective, but reasonably based, perception that the filing of a claim before an international tribunal would likely cause the State to retaliate against the claimant or claimant's affiliates.

Ninth, the effects of asymmetrical disparities and resources between the claimant-investor and the host-State, where relevant, need to be considered. The investor-host-State relationship cannot be assumed to be an arm's-length relative position of power.

Tenth, the formulation or application of the LPD should consider the investment's macro-economic contributions were the investment to be withdrawn or the chilling effect that dismissal may have on future investors, particularly with respect to the industry sector at issue.

Eleventh, the formulation or application of the LPD should consider the investment's micro-economic contributions were the investment to be withdrawn or the chilling effect that dismissal may have on future investors, particularly with respect to the industry sector at issue.

Twelfth, treaty-based arbitration should be governed by a policy favoring liberal access to a dispute resolution methodology. There should always be a presumption in favor of access to a neutral international venue. Procedural rights in treaties are frustrated in instances providing for a limitations term that would be akin to the national-domestic law equivalent in the fields of contract, property, negligence, or tort law. Thus, the formulation and application of the LPD requires considera-

tion of the alleged regulatory act's consequences on FDI with respect to the host-State and other developing economies. Application of the LPD should be abated in cases where the alleged regulatory act caused or continues to cause claimant damages on a recurring basis.

Thirteenth, from an analytical perspective, the LPD should not be conceptualized, classified, and applied as either substantive or procedural. Instead, the LPD, much like the wave-particle duality attaching to the physical phenomenon of the nature of light, should be viewed as having a dual characteristic depending on the placement of the limitations period in a particular treaty. It is only proper to allow for the conceptual flexibility that renders it possible for the LPD to be treated as either procedural or substantive. This transparency of nature and purpose fosters security and certainty.

Fourteenth, the current two to five-year regime found in second generation BITs having its genesis in national-domestic law is simply too abbreviated a time frame to serve as a limitations term. This calculus generally may work in the context of arm's-length transactions between private entities or individuals. It cannot be assumed that the same limitations term would equally apply and yield similar efficiencies in the context of the asymmetries that pervade the unique and disparate relationship between a private actor and a State. More generous and qualified limitations terms would contribute to leveling the playing field.

Fifteenth, and finally, in determining the application of a limitations period that would cause a claim's dismissal, the tribunal should consider any evidence tending to demonstrate that a capable claimant intentionally withheld the filing of a claim in order to benefit from the disappearance or lessening of evidence potentially adverse to the prosecution of a claim based upon breach of a treaty standard of protection. The tribunal also should consider whether the delayed filing of the claim caused or would cause respondent damages or prejudice.

## VII. CONCLUSION

A uniform standard is an imperative. Of the approximately 3,000 BITs signed, only 106 have limitations periods. This configuration means that in every case having to do with



approximately 96.5% of all BITs, tribunals are free to fashion a limitations period without the benefit of any standard. Alternatively, the tribunals are placed in the untenable position of not applying any limitations period. Neither option is viable because both foster uncertainty and insecurity.

Reform is necessary. A revision of the theoretical and practical underpinnings of the LPD, however, cannot revert to the legacy model that looks to national-domestic law for analytical support. Similarly, a paradigm based on the aspirations of capital exporting States alone is not functional.

The international law of investment protection must look to *international law*, particularly post the advent of economic globalization and transnational integration. The elements of the LPD must draw on the policies and aspirations of investment protection law itself. Otherwise the relative positions of power between the parties and access to resources cannot be harmonized in an equipoise that best reconciles the seemingly incompatible obligations (i) to protect foreign investments, and (ii) to engage in regulatory sovereignty. The abandonment of legacy analyses is difficult and fraught with challenges. But at this stage in the development of global commerce and the integration of 192 States into a singular and purportedly uniform transnational economy, there is no other recourse. The LPD's promise to foster certainty and security is only thus redeemable.

APPENDIX A  
THE INVESTMENT TREATIES IN FIGURES

Since 1959, the date of entry into force of the first BIT (signed between Germany and Pakistan)<sup>233</sup> until today (August 2017), the United Nations Conference on Trade and Development (UNCTAD) has recorded the following data:<sup>234</sup>

Period	Bilateral Investment Treaties (BITs)	Treaties with Investment Provisions (TIPs)	Totals	Status
1959 - 2017	357	10	367	S.N.I.F. <sup>235</sup>
1959 - 2017	170	—	170	Term. <sup>236</sup>
1959 - 1994	563	—	563	I.F. <sup>237</sup>
1994 - 2017	1,498	26	1,524	I.F.

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233. Treaty for the Promotion and Protection of Investments, Pak.-Ger., Nov. 25, 1959, 457 U.N.T.S. 24 (entered into force Nov. 28, 1962).

234. We found inconsistencies in the data; nevertheless, UNCTAD is the best source available to date. See <http://investmentpolicyhub.unctad.org/IIA>. By way of example, NAFTA is not listed among the TIPs. In fact, the first TIP listed is the India-Singapore treaty, signed in 2005.

235. As used in this table, "S.N.I.F." stands for "signed but not in force."

236. As used in this table, "Term." stands for "terminated."

237. As used in this table, "I.F." stands for "in force."

APPENDIX B  
NORTH AMERICA FREE TRADE AGREEMENT

The North America Free Trade Agreement (NAFTA) was signed on December 17, 1992, and entered into force since January 1, 1994.<sup>238</sup> NAFTA's Chapter Eleven, which concerns the treaty's investment protection, is comprised of thirty-nine articles across three sections, and four annexes. NAFTA can be schematically summarized as follows:

A. Standards of protection identified:

1. *National Treatment Standard*: Each Party shall accord to investors of another Party treatment no less favorable than that accorded to its own investors.<sup>239</sup>
2. *Most Favored Nation Clause*: Each party shall accord to investors of another Party treatment no less favorable than accorded to investors of a non-Party.<sup>240</sup>
3. *Standards of Treatment*: Each Party shall accord to investors the better treatment required in connection with the National Treatment standard and the Most Favored Nation standard.<sup>241</sup>
4. *Minimum Standard of Treatment*: Each Party shall accord to investments of investors of another Party a treatment in harmony with international law, including *fair and equitable treatment* and *full protection and security*.<sup>242</sup>
5. *Performance Requirements*: No Party may impose any rules on the operation of a foreign investment, regardless of whether those rules are imposed on its own investors.<sup>243</sup>
6. *Free Transfers*: This standard refers to the right to repatriate profits, dividends, capital, and in general, all the monies perceived by the investor.<sup>244</sup>
7. *Protection Against Expropriation and Adequate Compensation*: No Party may direct or indirectly nationalize or expropriate an investment of an investor of another Party,

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238. NAFTA, *supra* note 20.

239. *See id.* art. 1102.

240. *See id.* art. 1103.

241. *See id.* art. 1104.

242. *See id.* art. 1105.

243. *See id.* art. 1106.

244. *See id.* art. 1109.

except for (i) a public purpose, (ii) on a non-discriminatory basis, (iii) with due process, and (iv) through a prompt, adequate and effective compensation.<sup>245</sup>

B. Settlement of Disputes:

1. *Arbitration*: An investor of a Party may submit to arbitration any claim arising from a breach of a treaty-based obligation caused by the other Party.<sup>246</sup>

2. *Limitations Period*: It was the first time that Parties of a treaty negotiated a limitations period in order to bar the claims against that Parties. Indeed, in the “Investment Draft” dated on August 4, 1992, the Parties established the three-year term.<sup>247</sup> Specifically, the article indicates “[a]n investor may not make a claim *if more than three years have elapsed* from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.”<sup>248</sup>

3. *Arbitration Rules*: In order to file a claim for dispute resolution, NAFTA provided the investors with the possibility to submit their claims under (i) ICSID Convention, (ii) the Additional Facility Rules of ICSID, or (iii) the UNCITRAL Arbitration Rules.<sup>249</sup>

4. *Governing Law*: An Arbitral Tribunal established under Section B of Chapter Eleven, shall decide any dispute in accordance with this Agreement and the *applicable rules of international law*.<sup>250</sup>

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245. *See id.* art. 1110.

246. *See id.* art. 1116.

247. *Watergate Daily Update Investment Draft*, *supra* note 143, art. 2124.

248. *See* NAFTA, *supra* note 20, art. 1116.2 (emphasis added).

249. *See id.* art. 1120.

250. *See id.* art. 1131 (emphasis added).

APPENDIX C  
TREATIES IN FORCE CONTAINING LIMITATIONS PERIODS  
(Order by date of signature)

Bilateral Investment Treaties (BITs)	Term (in years)	Year
1. Canada - Ukraine	3	1994
2. Mexico - Switzerland	3	1995
3. Canada - Trinidad and Tobago	3	1995
4. Canada - Philippines	3	1995
5. Canada - Ecuador	3	1996
6. Barbados - Canada	3	1996
7. Canada - Venezuela	3	1996
8. Canada - Panama	3	1996
9. Canada - Egypt	3	1996
10. Argentina - Mexico	4	1996
11. Canada - Thailand	3	1997
12. Canada - Croatia	3	1997
13. Canada - Lebanon	3	1997
14. Armenia - Canada	3	1997
15. Canada - Uruguay	3	1997
16. Canada - Costa Rica	3	1998
17. Mexico - Netherlands	3	1998
18. Austria - Mexico	4	1998
19. Germany - Mexico	4	1998
20. Belgium-Luxembourg Economic Union - Mexico	3	1998
21. France - Mexico	4	1998
22. Finland - Mexico	4	1999
23. Mexico - Uruguay	3	1999
24. Mexico - Portugal	3	1999
25. Austria - Cuba	5	2000
26. Austria - Uzbekistan	5	2000
27. Austria - Azerbaijan	5	2000
28. Austria - Bosnia and Herzegovina	5	2000
29. Mexico - Sweden	4	2000
30. Republic of Korea - Mexico	3	2000
31. Austria - Bangladesh	5	2000
32. Austria - Iran	5	2001
33. Cuba - Mexico	3	2001
34. Austria - Belize	5	2001
35. Austria - Georgia	5	2001
36. Czech Republic - Mexico	3	2002
37. Austria - Malta	5	2002
38. Austria - Namibia	5	2003
39. Austria - Yemen	5	2003
40. Republic of Korea - Viet Nam	3	2003
41. Austria - Ethiopia	5	2004
42. Colombia - Spain	3	2005
43. Iceland - Mexico	3	2005
44. Australia - Mexico	4	2005
45. Belgium-Luxembourg Economic Union - Peru	3	2005
46. United States of America - Uruguay	3	2005
47. Austria - Guatemala	5	2006
48. Mexico - United Kingdom	3	2006

49.	Colombia - Switzerland	5	2006
50.	Mexico - Trinidad and Tobago	3	2006
51.	Mexico - Spain	3	2006
52.	Canada - Peru	3	2006
53.	Belgium-Luxembourg Economic Union - R. of Korea	5	2006
54.	Azerbaijan - Hungary	3	2007
55.	India - Mexico	3	2007
56.	Cambodia - Japan	3	2007
57.	China - Republic of Korea	3	2007
58.	Colombia - Peru	39 months <sup>251</sup>	2007
59.	Japan - Lao's Peoples Democratic Republic	3	2008
60.	Rwanda - United States of America	3	2008
61.	China - Mexico	3	2008
62.	Belarus - Mexico	3	2008
63.	Japan - Peru	3	2008
64.	China - Colombia	3	2008
65.	Canada - Latvia	3	2009
66.	Canada - Czech Republic	3	2009
67.	Canada - Romania	3	2009
68.	Uruguay - Viet Nam	2 <sup>252</sup>	2009
69.	Republic of Korea - Rwanda	3	2009
70.	Canada - Jordan	3	2009
71.	Republic of Korea - Uruguay	3	2009
72.	Colombia - India	3	2009
73.	Mexico - Singapore	3	2009
74.	St. Vincent and the Grenadines - Taiwan	3	2009
75.	Austria - Kazakhstan	5	2010
76.	Colombia - United Kingdom	5	2010
77.	Chile - Uruguay	3	2010
78.	Egypt - Switzerland	5	2010
79.	Austria - Tajikistan	5	2010
80.	China - Uzbekistan	3	2011
81.	Japan - Papua New Guinea	5	2011
82.	Colombia - Japan	3	2011
83.	Canada - Kuwait	3	2011
84.	Japan - Kuwait	5	2012
85.	Iraq - Japan	5	2012
86.	Switzerland - Tunisia	5	2012
87.	Bahrain - Mexico	3	2012
88.	Benin - Canada	3	2013

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251. The Colombia-Peru BIT is the only treaty with a term of three years and three months. *See* Agreement between the Government of the Republic of Peru and the Government of the Republic of Colombia on the Promotion and Reciprocal Protection of Investments art. 40, Colom.-Peru, Dec. 11, 2007, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/798> (entered into force Dec. 30, 2010).

252. The Uruguay-Viet Nam BIT is the treaty with the shortest limitations period, allowing only two years. Agreement for the Protection and Promotion of Investments art. 9 (3), Uru.-Viet., May 12, 2009, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2383> (entered into force Sept. 9, 2012).

89.	Kuwait - Mexico	3	2013
90.	Japan - Saudi Arabia	5	2013
91.	Canada - Tanzania	3	2013
92.	Japan - Mozambique	3	2013
93.	Guatemala - Trinidad and Tobago	3	2013
94.	India - United Arab Emirates	5	2013
95.	Japan - Myanmar	3	2013
96.	Cameroon - Canada	3	2014
97.	Georgia - Switzerland	5	2014
98.	Egypt - Mauritius	3	2014
99.	Canada - Serbia	3	2014
100.	Japan - Kazakhstan	3	2014
101.	Canada - Senegal	3	2014
102.	Canada - Mali	3	2014
103.	Canada - Cote d'Ivoire	3	2014
104.	Japan - Ukraine	3	2015
105.	Canada - Hong Kong China SAR	3	2016
106.	Canada - Mongolia	3	2016

Treaties with Investment Provisions (TIPs)		Term (in years)	Year
1.	NAFTA	3	1994
2.	Singapore - United States of America FTA	3	2003
3.	Chile - United States of America FTA	3	2003
4.	Morocco - United States of America FTA	3	2004
5.	DR-CAFTA	3	2004
6.	Oman - United States of America FTA	3	2006
7.	Peru - United States of America FTA	3	2006
8.	Colombia - United States of America	3	2006
9.	Panama - United States of America FTA	3	2007
10.	India - Korea CEPA	3	2009
11.	India - Malaysia FTA	3	2011
12.	China, Japan, Korea, Trilateral Invest. Agreee.	3	2012
13.	Colombia - Republic of Korea FTA	3 and 6 mth. <sup>253</sup>	2013
14.	Colombia - Costa Rica FTA	3	2013
15.	New Zealand - Taiwan ECA	3	2013
16.	Canada - Honduras FTA	3	2013
17.	Pacific Alliance Additional Protocol	3	2014
18.	Mexico - Panama FTA	3	2014
19.	Australia - Republic of Korea FTA	3	2014
20.	Canada - Republic of Korea FTA	3	2014
21.	Japan - Mongolia EPA	4	2015
22.	Republic of Korea - New Zealand FTA	3 and 6 mth. <sup>254</sup>	2015
23.	Republic of Korea - Viet Nam FTA	3	2015
24.	Eurasian Economic Union - Viet Nam FTA	3	2015
25.	China - Republic of Korea	3	2015
26.	Australia - China FTA	3 or 4 <sup>255</sup>	2015

253. The Colombia-Republic of Korea FTA contains a limitations period of three years and six months, see Free Trade Agreement art. 12 (9), Colom.-S. Korea, Feb. 21, 2013, [http://www.sice.oas.org/TPD/Col\\_kor/Draft\\_Text\\_06.2012\\_e/June\\_2012\\_Index\\_PDF\\_e.asp](http://www.sice.oas.org/TPD/Col_kor/Draft_Text_06.2012_e/June_2012_Index_PDF_e.asp). This agreement has not yet entered into force. *Id.*

254. The Republic of Korea-New Zealand FTA also contains a limitations period of three years and six months. *See* Free Trade Agreement art. 10.22, S. Kor.-N.Z., Mar. 23, 2015, <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/nz-korea-free-trade-agreement/text-of-the-new-zealand-korea-fta-agreement/> (entered into force Dec. 20, 2015).

255. The Australia-China FTA clearly specifies that “[n]o claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 9.12.2 and knowledge that the claimant (for claims brought under Article 9.12.2(a)) or the enterprise (for claims brought under Article 9.12.2(b)) has incurred loss or damage. In no event may a claim be submitted to arbitration under this Section after four years since the occurrence of the measures and/or events giving rise to the breach alleged under Article 9.12.2. Free Trade Agreement art. 19.14(1), Austl.-China, June 17, 2015, <http://dfat.gov.au/trade/agreements/chafta/official-documents/Documents/chafta-agreement-text.pdf> (entered into force Dec. 20, 2015).