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# *Access to Justice, Denial of Justice and International Investment Law: A Reply to Francesco Francioni<sup>†</sup>*

Jürgen Kurtz\*

Francesco Francioni's article opens with a critical and timely reminder for those who study and practise in international investment law. He reminds us that '[d]enial of justice lies at the heart of the development of international law on the treatment of aliens and of foreign investment'.<sup>1</sup> Francioni's article is thematically structured across this concern of denial of justice and its reflection in different areas of international law. In particular, he examines its history, later crystallization as a doctrinal category of redress for foreign investors, and whether the system of investment treaty protection itself requires reform to offer remedies for individuals adversely impacted on by foreign investment in a host state.

I plan to respond briefly to each of these important points, but will also address a broader issue necessarily implicated in Francioni's analysis. This is the charged question of how conflict between the systems of investment law and human rights protections might arise and be managed.

To begin with, Francioni's call for justice as a foundational underpinning – in all its manifestations and complexity – stands in contrast with other historical accounts of the field. Some of these simply take the post-Second World War constructions of treaty protection for foreign investors as their starting point, largely ignoring the customary predicates of this movement.<sup>2</sup> Other authors focus on one (if well known) manifestation of the relationship between customary protections for aliens and the later network of treaties designed to protect foreign investors: the

<sup>†</sup> Francioni, 'Access to Justice, Denial of Justice and International Investment Law', 20 *EJIL* (2009) 729, <http://ejil.oxfordjournals.org/cgi/reprint/20/3/729>.

\* Senior Lecturer and Director, International Investment Law Research Programme, Institute for International Law and the Humanities, University of Melbourne Law School, Australia. Email: [j.kurtz@unimelb.edu.au](mailto:j.kurtz@unimelb.edu.au).

<sup>1</sup> Francioni, 'Access to Justice, Denial of Justice and International Investment Law', 20 *EJIL* (2009) 729.

<sup>2</sup> C. McLachlan *et al.*, *International Investment Arbitration: Substantive Principles* (2007), at chap. 1.

contestation over whether and how compensation should be paid for state takings of foreign-owned property.<sup>3</sup>

The reality of the historical evolution of the field is far more complex. Customary protections were not originally directed at foreign economic actors, nor were they concerned with the sanctity of the investor's property holding in a state. In the early 19th century, there was strong consensus on the protection of property rights in various legal systems across the globe. This reflects the primacy of liberalism as a system of political and economic ordering in the major European powers in this era and its extension through the colonial satellites of those powers.<sup>4</sup> The dominant concern in this period was a very different one: the personal safety of foreign individuals in states outside the colonial network, especially in Latin America. Typical complaints centred on the unlawful arrest and detention of individual aliens and the execution of police and judicial power. Custom, with its emerging claim that aliens were entitled to a 'minimum standard of treatment' by host states, was an early attempt to map the boundaries of permissible state conduct *vis-à-vis* individuals (albeit with a sole focus on *foreign* individuals in a state). We have then an important parallel with the later human rights movement, a dimension which few others

have recognized or explored in any great detail.<sup>5</sup>

Moreover, the cases which test the customary prohibition on denial of justice in this period echo the language and strategic concern of the modern human rights movement. Their factual matrices – arrest of foreigners without charge and extended periods of detention<sup>6</sup> – anticipate later prohibitions in the International Covenant on Civil and Political Rights of 1966.<sup>7</sup> Rights are even invoked in claims to legality just as the system begins to focus on property protection. In the famous diplomatic exchange following the Mexican nationalization of American oil interests in the 1930s, US Secretary of State Hull expresses surprise at Mexico's 'astonishing theory' that the principle of equality – that Mexican and American property interests were subject to the same takings regime – should be invoked not 'to protect both human and property rights' but 'as a chief ground

<sup>3</sup> M. Sornarajah, *The International Law on Foreign Investment* (2nd edn, 2004), at chaps 2, 8–10.

<sup>4</sup> F. Dunn, *The Protection of Nationals Abroad: A Study in the Application of International Law* (1932), at 54; C. Lipson, *Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries* (1985), at 4, 16–18.

<sup>5</sup> For a very notable exception see H. Steiner *et al.*, *International Human Rights in Context: Law, Politics and Morals* (3rd edn, 2008), at 87–93.

<sup>6</sup> E.g., *Harry Roberts (USA) v. United Mexican States*, IV RIAA 77, 80 (Mex.–US General Claims Commission, 1926) (finding that detention of a US national for a period of 19 months without trial breached the customary standard); *B.E. Chattin (USA) v. United Mexican States*, IV RIAA 282, 298 (Mex.–US General Claims Commission, 1927) (finding that a US national was detained for 7 months without charge, that hearings in open court lasted some 5 minutes before conviction and sentencing to 2 years' imprisonment).

<sup>7</sup> Art. 9(1)–(3) of the International Covenant on Civil and Political Rights (ICCPR) 1966 (which, unlike select other ICCPR provisions such as Art. 25, covers both citizens and foreigners in a signatory state).

of depriving and stripping individuals of their conceded rights'.<sup>8</sup>

The relevance of this mapping extends beyond an accurate accounting of the historical evolution of the field.<sup>9</sup> It allows us to investigate a range of normative possibilities which might flow from a deeper integration of the contemporary human rights movement and investment treaty protections. Francioni directs us first to an important, if perhaps controversial, mechanism by which those fields might converge. Dispute settlement in investment law grants foreign investors a privileged right to initiate claims for breach of treaty protection directly against a host state. For Francioni, this unique characteristic of investment law is reminiscent of the direction (if not detail) of human rights law, given the strong focus on private actors as the 'title holder of rights'.<sup>10</sup>

There are, however, critiques which oppose Francioni's positive reception of the right of foreign investors to initiate international adjudication. Tom Ginsburg has argued that investment treaties comprise enclave protection separate from

domestic legal processes in a host state.<sup>11</sup> By allowing foreign investors to exit the domestic institutional regime (through arbitration), bilateral investment treaties (BITs) are said to act as substitutes rather than complements to the domestic legal system. Institutional reform is a public good for many underdeveloped states and BITs could then have the adverse impact of lessening the incentives of foreign investors to coordinate with and lobby domestic actors for improvements in governance reform (and especially the judicial system). The predicted end-point then is an outcome at odds with the objectives of international law commitments on civil and political rights. We may find a steady but slow process of decline in the quality of domestic judicial processes available to citizens in a host state.

On balance, this critique is too broadly drawn for at least two reasons. First, the outcome of investor–state dispute settlement is rarely a zero-sum game, with the investor always preferring to bypass the (disfavoured) domestic system and initiate action in the (favoured) international sphere. The decision by a foreign investor to pursue a dispute through international processes is not one taken lightly, especially given the likely harm to the investor's reputation among government agencies. Indeed, the fact-sets of arbitral case law to date – including the various actions brought against Argentina in the aftermath of its 2001 financial crisis – are often marked by strenuous efforts by claimants to seek tailored redress in the

<sup>8</sup> 'Letter from Cordell Hull, US Secretary of State to Eduardo Hay, Mexican Minister of Foreign Affairs dated 22 August 1938', 32 *AJIL Supplement* (1938) 191, at 198.

<sup>9</sup> I have omitted due to space limitations the important concerns surrounding the means of enforcement of the customary 'minimum standard of treatment'. The problems of gunboat diplomacy and the responses of Latin American jurists – so central to the accounts of Critical Legal Studies scholars – are recounted in a range of international law textbooks. In contrast, Francioni's chosen subject has attracted far less attention, especially but not exclusively among investment law commentators.

<sup>10</sup> Francioni, *supra* note 1, at 732.

<sup>11</sup> Ginsburg, 'International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance', 25 *Int'l Rev Law and Economics* (2005) 107, at 119.

administrative and judicial systems of the regulating state. Secondly, and as pointed out by Francioni, the customary concern of denial of justice has itself been folded into modern investment treaty protection, especially the guarantee of fair and equitable treatment. Domestic judicial rulings can themselves form cause for complaint under this treaty standard, evidencing a further important mechanism to connect the domestic and international adjudicatory spheres.

But the record on this second front is less than compelling, at least as measured in outcomes. Francioni directs us to the principal case in which the treatment of a foreigner in a host state's judicial system has come under direct scrutiny by a modern investor–state arbitral tribunal. In *Loewen v. USA*, a NAFTA Chapter 11 Tribunal found that a ruling by a Mississippi state court ordering a Canadian company to pay punitive damages was 'clearly improper and cannot be squared with minimum standards of international law and fair and equitable treatment'.<sup>12</sup> The Tribunal was especially scathing of the fairness of the methods employed by the American plaintiff's attorney and countenanced by the trial judge 'as the antithesis of due process'<sup>13</sup> by allowing the jury to be influenced by 'persistent appeals to local favouritism against a foreign litigant'.<sup>14</sup> Despite these damning findings of fact, the Tribunal ultimately ruled in favour of the respondent state. The formal justification given for this surprising result is the assumption that, as the foreign investor

had not exhausted all local remedies, its claim of denial of justice was necessarily precluded. Francioni is fiercely critical of this outcome, noting the paradox that similar claims have been less deferential to state sovereignty where assessed in an inter-state setting by the International Court of Justice.<sup>15</sup> I share Francioni's dissatisfaction with the *Loewen* ruling, but would level a harsher criticism at that Tribunal. For Francioni, the error lies in the fact that the Tribunal did not recognize the futility or unavailability of a domestic remedy on the facts of this particular case, a typical exception to an exhaustion of local remedies rule.<sup>16</sup> To my mind, the *Loewen* Tribunal was mistaken in the very act of transporting a distinct customary concept on diplomatic protection – exhaustion of local remedies – to guide an interpretation of a substantive treaty norm on fair and equitable treatment which incorporates an entirely separate area of customary law (on state responsibility).<sup>17</sup> *Loewen* must however be placed in context, not as a matter of excusing the Tribunal's poor reasoning but to better explain it.

We are not dealing here with simple ignorance on the part of the adjudicator

<sup>12</sup> *The Loewen Group, Inc. and Raymond L. Loewen v USA*, Award (ICSID Case No. ARB(AF)/98/4, 26 June 2003), at para. 134.

<sup>13</sup> *Ibid.*, at para. 122.

<sup>14</sup> *Ibid.*, at para. 137.

<sup>15</sup> Francioni, *supra* note 1, at 734–735.

<sup>16</sup> In order to stay execution of the jury award of US\$500 million, the investor was required to post a bond of 125% of that judgment award (US\$625 million). Given the relatively small market capitalization of the investor, there was no realistic prospect of an appeal. For further criticism of *Loewen* on the exhaustion point see Bjorklund, 'Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims', 45 *Virginia J Int'l L* (2005) 809, at 854–856.

<sup>17</sup> For an account along these lines see McLachlan *et al.*, *supra* note 2, at 232–233.

of the tenets of public international law, a criticism which can be levelled at other tribunals operating in the system.<sup>18</sup> The motivation instead turns on the systemic implications of an adverse ruling against a powerful state party – here the US – in an exceptionally sensitive area of governance.<sup>19</sup> The notion that an international legal tribunal could sit in review of a domestic American judgment was itself a surprise to many American jurists.<sup>20</sup> Consider the deep impact of the impression that a mere *ad hoc* arbitral panel could act as an assessor of the capacity of a sophisticated legal system with multiple levels of appellate review to deliver

‘justice’ among the parties. With this backdrop in mind, *Loewen* is perhaps best understood as a case in which the Tribunal has acted strategically to tailor its judgment to generate acceptance and prompt continued compliance by a dominant state party.<sup>21</sup> *Loewen* is also not an outlier in this respect. We can see similar tendencies in other select NAFTA Chapter 11 cases with the US as respondent. There is, of course, a critical problem with tribunals which act strategically to tailor their judgments to accommodate the preferences of select stakeholders. Their jurisprudential outputs inevitably suffer significant reduction in quality, a factor to bear in mind as we engage with the jurisprudence and when offering normative prescriptions for reform.

That jurisprudence is, thankfully, hydra-headed. Francioni directs us to *Mondev v. USA*, another NAFTA Chapter 11 case which has attempted to map the contours of the customary injunction against denial of justice.<sup>22</sup> As in *Loewen*, the *Mondev* Tribunal finds against the investor. But the importance of *Mondev* transcends its particular outcome. *Mondev* is distinguished by a far more rigorous interpretative method and, in particular, a surprising preparedness to draw on the corpus of human rights law. We find explicit citation of the right to access to justice guaranteed under the European Convention on Human

<sup>18</sup> E.g., *CMS Gas Transmission Company v. Argentine Republic*, Decision of the *Ad Hoc* Annulment Committee (ICSID Case No. ARB/01/8, 25 Sept. 2007), at para 31 (criticizing the CMS Tribunal’s conflation of a treaty exception with the customary plea of necessity).

<sup>19</sup> *Loewen*, *supra* note 12, at para. 242 ([t]oo great a readiness to step from outside into the domestic arena, attributing the shape of an international wrong to what is really a local error (however serious), will damage both the integrity of the domestic judicial system and the viability of the NAFTA itself). See also Wallace, ‘Fair and Equitable Treatment and Denial of Justice: *Loewen v US* and *Chattin v Mexico*’, in T. Weiler (ed.), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (2005), at 669 (concluding that the *Loewen* ruling can be attributed to ‘fear, exaggerated in my view, of the expected reactions from political leaders in the United States, from the NGOs and others – which might jeopardize the very continuation of NAFTA Chapter 11 and perhaps even the NAFTA’).

<sup>20</sup> Liptak, ‘NAFTA Tribunals Stir Worries’, *The New York Times*, 18 Apr/ 2004, available at: [www.nytimes.com](http://www.nytimes.com) (last accessed 25 Aug. 2009).

<sup>21</sup> For a fuller exploration of this phenomenon see Guzman, ‘International Tribunals: A Rational Choice Analysis’, UC Berkeley Public Law Research Paper No. 117613 (2008), at 10–11.

<sup>22</sup> *Mondev International Ltd v. USA*, Award (ICSID Case No. ARB(AF)/99/2, 11 Oct. 2002).

Rights as well as select cases brought in the European Court of Human Rights.<sup>23</sup> The *Mondev* Tribunal ultimately accepts such sources as offering only guidance by analogy when ruling on denial of justice in the NAFTA. Francioni is supportive of this cautious strategy. His preferred approach is to identify a generalist standard on access to justice as articulated in human rights law which would include, but not be limited by, the law and practice in the European context.<sup>24</sup> This seems appropriate, given the charged and complex problems surrounding the phenomenon of legal transplant. But there is little to indicate that Francioni's cautious normative claim has gained much traction. Amongst the few investor–state arbitral awards which have examined human rights law to date, one can discern a stubborn insistence on looking only to the European rights tradition.<sup>25</sup>

We now turn to a different interface between the investment treaty regime and the human rights system, distinct from the narrow focus on doctrinal

redress for 'denial of justice'. This is the inevitable flip-side of the positive account of investor–state arbitration – as a formal conferral of rights on a non-state actor – raised much earlier in Francioni's article. The ability to initiate investor–state arbitration is granted only to the foreign investor, with little potential for counterclaim by the host state, and is matched against wide, often ambiguous, treaty protections. This then is a legal regime which can be invoked to challenge a wide variety of state laws and regulations, even when justified by the corpus of human rights law. Francioni elects, perhaps pragmatically, to focus on the thinnest stratum of that possible conflict. He explores various mechanisms by which citizens adversely impacted on by foreign investment in a host state might themselves secure procedural rights to access to justice. He traverses such options as recourse to specialized human rights mechanisms (including the Inter-American Court of Human Rights) and the initiation of *amicus curiae* submissions before arbitral tribunals. On the latter at least, Francioni may be far too cautious in his positive assessment of shifts in the system.<sup>26</sup> We find firm evidence that *amicus curiae* submissions have not only been permitted in the system but, on occasion, have directly influenced the interpretative choices made by select arbitral tribunals.<sup>27</sup>

<sup>23</sup> *Ibid.*, at para. 143.

<sup>24</sup> Francioni, *supra* note 1, at 736.

<sup>25</sup> E.g., *Tecnicas Medioambientales Tecmed S.A. v. Mexico*, Award (ICSID Case No. ARB(AF)/00/2, 29 May 2003), at para. 122; *Continental Casualty Company v. The Argentine Republic*, Award (ICSID Case No. ARB/03/9, 5 Sept. 2008), at para. 181 and n. 270 (ruling that it would apply a 'significant margin of appreciation' – as developed in the case law of the European Court of Human Rights – in assessing whether an emergency measure was justified by a treaty exception for 'public order' or 'essential security interests'). There are other cases which have, in abstract, examined human rights provisions. *Continental* is, perhaps, together with *Bivwater Gauff* (referred to in note 27 below), unique in drawing on a human rights concept and directly operationalizing it in the investment treaty setting.

<sup>26</sup> Francioni, *supra* note 1, at 740–741.

<sup>27</sup> *Methanex Corporation v. USA*, Final Award, (UNCITRAL, 3 Aug. 2005), at part IV, chap. B, 13 (noting the 'carefully reasoned Amicus submission' of the International Institute for Sustainable Development contesting the idea that 'trade law approaches can be simply transferred to investment law'). For an analysis of the Methanex



There is merit in also exploring less visible mechanisms which might, at the margins, offer some scope to recalibrate the system and forestall greater conflict with human rights law. In particular, there are fascinating developments in the jurisdiction process and damages rulings of investor–state arbitral tribunals. We can discern a distinct strategy of crafting disincentives to the initiation by foreign investors of speculative litigation. For example, tribunals have begun actively to limit the jurisdictional reach of a range of investment treaties. There is a growing preparedness robustly to assess whether a claimant has in fact made an ‘investment’ in the signatory state. Select tribunals have fashioned their inquiry as extending beyond simple questions of form to include substantive *indicia*, not least whether there is a contribution to the host state’s economic development.<sup>28</sup> Certain tribunals have even been prepared to deny jurisdiction where a claimant has strategically manipulated its ownership structure to fall within the jurisdiction of a given treaty arrangement. In a very recent case of this sort,

a tribunal declined jurisdiction and ruled that an investor’s ‘false assertion of ownership’ constituted an ‘abuse of process’.<sup>29</sup> Finally, there is a growing preparedness carefully to assess questions of causation on the issue of damages<sup>30</sup> and to award costs against the losing investor (to discourage unmeritorious cases), a prominent departure from the old arbitral habit of apportioning costs between the parties.<sup>31</sup> Although in their infancy, these various gatekeeper mechanisms may go some way to filtering out problematic claims.

It is doubtful, however, whether these procedural options will be entirely sufficient mechanisms to mediate between investment treaty protections and human rights norms, at least in the hard cases. I have in mind here a conflict scenario where – having met all jurisdictional requirements – a host state publicly defends an allegation of investment treaty breach by claiming that its measure is compelled under a specific

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award and its ruling in line with this *amicus* submission see Kurtz, ‘The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents’, 20 *EJIL* (2009). See also *Biwater Gauff (Tanzania) Ltd v. Tanzania*, Award (ICSID Case No. ARB/05/22, 24 July 2008), at para. 392 (finding *amicus* submissions ‘useful’ and that such submissions ‘informed the analysis of claims’ by the Tribunal).

<sup>28</sup> E.g., *Saipem S.p.A v. Bangladesh*, Decision on Jurisdiction and Recommendation on Provisional Measures (ICSID Case no. ARB/05/07, 21 Mar. 2007), at para. 99; *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, Decision on Jurisdiction (ICSID Case No. ARB/05/10, 17 May 2007), at paras 130–131.

<sup>29</sup> *Europe Cement Investment & Trade S.A v. Turkey*, Award (ICSID Case No. ARB(AF)/07/2, 13 Aug. 2009), at 30.

<sup>30</sup> E.g., *Biwater*, *supra* note 27, at para. 798 (concluding that the investor’s loss had occurred prior to the findings of breach on the part of the respondent state and, accordingly, none of those violations had ‘in fact caused the loss or damage in question or [broken] the chain of causation that was already in place’).

<sup>31</sup> E.g., *Europe Cement*, *supra* note 29, at 32 (awarding costs against the investor so that this might ‘discourage others from pursuing such unmeritorious claims’); *Methanex*, *supra* note 27, at part II, chap. I, 29 (criticizing the investor’s conduct of the case as having ‘offended basic principles of justice and fairness required of all parties in every international arbitration’) and part V (awarding costs against the losing investor).

human rights obligation. I am intentionally broadening our inquiry beyond the parameters set out in Francioni's article. It is, however, a logical extension of the important set of questions addressed by him. A scenario of this sort would cause narrow legal conflict where, as characterized by the International Law Commission, 'a party to two treaties [can] comply with one rule only by thereby failing to comply with another rule'.<sup>32</sup> There are disputes on the radar which come very close to this explosive dynamic. In particular, there is a pending challenge by a range of Italian investors against a South African affirmative action programme designed to assist 'historically disadvantaged individuals'.<sup>33</sup> Affirmative programmes structured to guarantee substantive rather than simple formal equality for disadvantaged groups can be justified under a range of human rights obligations.<sup>34</sup> *Amicus* submissions simply designed to alert an arbitral tribunal

to the presence of these obligations will not resolve such hard conflict cases. A respondent state is likely, in any event, to raise these norms itself in defence to an investor's claim. It will fall instead to the adjudicator to identify and canvass mechanisms to balance these different regimes, given the absence of strong default rules on priority in international law. One possibility – much favoured by scholars<sup>35</sup> – is to use Article 31(3)(c) of the Vienna Convention on the Law of Treaties 1969. That Article obliges a treaty interpreter when interpreting primary treaty text to take into account 'any relevant rules of international law applicable in the relations between the parties'. Its purpose has been described as to enable 'systemic integration within the international law legal system'.<sup>36</sup> Prominently relied upon by the ILC in its recent report on fragmentation of international law, Article 31(3)(c) is said to enable a tribunal to interpret and apply a treaty instrument in relationship to its normative environment, 'other' international law.<sup>37</sup>

I conclude with a, perhaps pessimistic, assessment of the likely invocation of Article 31(3)(c) as an instrument of

<sup>32</sup> Report of the Study Group of the International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', UN Doc A/CN.4/L.682 (13 Apr. 2006), at para. 24.

<sup>33</sup> *Piero Foresti, Laura de Carli & Others v. South Africa*, ICSID Case No. ARB(AF)/07/01 (2007).

<sup>34</sup> E.g., Art.1(4) of the International Convention on the Elimination of All Forms of Racial Discrimination 1965; Art. 4(1) of the Convention on the Elimination of All Forms Discrimination Against Women 1979; High Commissioner for Human Rights, 'General Comment No. 18: Non-Discrimination', UN Doc HR1/GEN/1/Rev.7 (12 May 2004), at para. 10 ('the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination').

<sup>35</sup> For insightful analysis of the possibilities of using Art. 31(3)(c) in the investment treaty setting see van Aaken, 'Defragmentation of Public International Law Through Interpretation: A Methodological Proposal', 16 *Indiana J Global Legal Studies* (2009) 483, at 506–512; McLachlan, 'Investment Treaties and General International Law', 57 *ICLQ* (2008) 361, at 371–374.

<sup>36</sup> McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention', 54 *ICLQ* (2005) 279, at 280.

<sup>37</sup> ILC Study Group Report, *supra* note 32, at para. 423.



mediation in the investment treaty setting. A predicate to any claim of 'change from within' directs us to the question of 'who are the judges'? Investor–state arbitration is a specialized forum for the resolution of investment disputes, but this remains a system of arbitration with the unique practices, habits, and language that characterize that form of adjudication. At its most fundamental, arbitration is a dispute resolution system which prioritizes and values party autonomy, speed, and finality over correctness in adjudication. The crafting of an outcome—and its likely acceptance among dispute parties—has traditionally been regarded as far more important than the rigour of the process of legal reasoning and justification. All this translates into a surpris-

ing set of hermeneutic practices, not least a stubborn tendency to ignore the text of treaty norms while offering intuitive claims to justify given readings.<sup>38</sup> Text is of course only a starting point in the taxonomy of interpretative techniques in the Vienna Convention. Nonetheless, if a sub-set of adjudicators in this system cannot seem to recognize even this most basic tenet of treaty interpretation, it is perhaps unrealistic to expect them to discover and invoke the complex techniques countenanced by Article 31(3)(c). In short, without attending to the manner in which the construction of the system as one of arbitration impacts on jurisprudential outputs, we might find little purchase in offering select normative prescriptions to remedy conflict.

<sup>38</sup> For a fuller argument along these lines examining in the cases initiated in the aftermath of the Argentine financial crisis see Kurtz, 'Adjudging the Exceptional at International: Security, Public Order and Financial Crisis', Jean Monnet Working Paper 06/08 (2008), at 23–42.