



The Practice of States as Evidence of Custom: An Analysis of Fair and Equitable Treatment Standard Clauses in States' Foreign Investment Laws

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L'auteur explore la possibilité de considérer le traitement juste et équitable des régimes d'investissement comme une norme de droit coutumier international. Pour ce faire, il examine les clauses de traités bilatéraux d'investissement qui imposent l'obligation de respecter ce standard, les régimes juridiques encadrant les investissements étrangers dans de nombreux pays, ainsi que des décisions de tribunaux d'arbitrage portant sur cette même question. Cette enquête lui permet de démontrer que les États n'ont pas adopté de telles obligations de façon indépendante et cohérente. Finalement, il conclut que le traitement juste et équitable ne peut être qualifié comme faisant partie du droit coutumier international.

The article addresses a central question: did the fair and equitable treatment standard (FET) in investment regimes become a norm of customary international law? To answer this, Dumberry examines FET clauses in bilateral investment treaties and foreign investment laws of numerous states, as well as arbitral decisions involving allegations of breaches of FET obligations. His analysis shows that States have not engaged independently and consistently in the adoption of FET clauses. Consequently, Dumberry concludes that FET clauses cannot be considered customary international law.

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INTRODUCTION

A number of books,¹ including one of my own,² and numerous articles have been published recently on the fair and equitable treatment (FET) standard. This article addresses one aspect in relation to the specific question of whether or not the standard can be considered to have become customary international law. The article is part of my recent work on how customary rules are created and how they can be identified in the field of international investment law.³ These rules develop over time based on the uniform and consistent practice of a large number of representative States, which have the conviction (or the belief) that such practice is required by law (*opinio juris*).⁴ A number of scholars have openly endorsed the customary status of the FET standard because it is found in so many BITs.⁵ Only a few tribunals have so far addressed this question.⁶ Two awards (*Pope & Talbot*⁷ and *Merrill & Ring*⁸) have clearly adopted the position that the FET standard has become a rule of custom, while the reasoning of another (including *Mondev*⁹) may also be interpreted as an endorsement of this proposition. Other tribunals have, however, rejected

1 Ioana Tudor, *The Fair and Equitable Treatment Standard in International Foreign Investment Law* (Oxford: Oxford University Press, 2008); Gabriel Cavazos Villanueva, *The Fair and Equitable Treatment Standard: The Mexican Experience* (Saarbrücken: VDM Verlag, 2008); Roland Kläger, *Fair and Equitable Treatment in International Investment Law* (Cambridge: Cambridge University Press, 2011); Alexandra Diehl, *The Core Standard of International Investment Protection: Fair and Equitable Treatment* (Alphen aan den Rijn: Wolters Kluwer, 2012); Martins Paporinskis, *The International Minimum Standard and Fair and Equitable Treatment* (Oxford: Oxford University Press, 2013); Todd Weiler, *The Interpretation of International Investment Law: Equality, Discrimination and Minimum Standards of Treatment in Historical Context* (Leiden: Martinus Nijhoff, 2013); Andrea Schernbeck, *Der Fair and Equitable Treatment Standard in internationalen Investitionsschutzabkommen* (Baden-Baden: Nomos, 2013).

2 Patrick Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (Alphen aan den Rijn: Wolters Kluwer, 2013) [Dumberry, “Fair and Equitable Treatment Standard”].

3 Patrick Dumberry, *The Formation and Identification of Rules of Customary International Law in International Investment Law* (Cambridge: Cambridge University Press) [forthcoming in 2016] [Dumberry, “Formation and Identification of Rules”].

4 *Statute of the International Court of Justice in Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7, art 38.

5 Tudor, *supra* note 1 at 65–68, 74ff; Courtney C Kirkman, “Fair and Equitable Treatment: Methanex v United States and the Narrowing Scope of NAFTA Article 1105” (2002) 34 *Law & Pol’y Intl Bus* 343 at 392; Diehl, *supra* note 1 at 10–11, 125–153, 175–179; Todd Weiler, “NAFTA Investment Arbitration and the Growth of International Economic Law” (2002) 2 *Bus L Intl* 158 at 188; Ian A Laird, “Betrayal, Shock and Outrage - Recent Developments in NAFTA Article 1105” in Todd Weiler, ed, *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (Ardsley, N.Y.: Transnational Publishers, 2004) 49 at 70, 74; Jan Schokkaert & Yvon Heckscher, *International Investments Protection: Comparative Law Analysis of Bilateral and Multilateral Interstate Conventions, Doctrinal Texts and Arbitral Jurisprudence Concerning Foreign Investments* (Brussels: Bruylant, 2009) at 331; Alfred Siwy, “Investment Arbitration - Indirect Expropriation and the Legitimate Expectations of the Investor” in Gerold Zeiler et al, ed, *Austrian Arbitration Yearbook*, (Vienna: Manz’sche Verlags und Universitätsbuchhandlung, 2007) at 355–377.

6 See Dumberry, “Fair and Equitable Treatment Standard”, *supra* note 2 at 119–122.

7 *Pope and Talbot Inc. v Canada, Award in Respect of Damages* (31 May 2002) at para 62, United Nations Commission on Trade Law (UNCITRAL), 2002 IIC 195.

8 *Merrill and Ring Forestry L.P. v Canada*, Final Award (31 March 2010) at paras 201–211, UNICTRAL, 2010 IIC 427.

9 *Mondev International Ltd. v United States*, Award (11 October 2002) at para 110, ICSID, Case No ARB(AF)/99/2.

this claim.¹⁰

There is no doubt that a treaty-based norm such as the FET standard found in the overwhelming majority of BITs can transform into a new customary rule.¹¹ The phenomenon is widely recognised by scholars¹² and by the work of the ILC¹³ and the ILA.¹⁴ This possibility is also reflected in Article 38 of the *Vienna Convention on the Law of Treaties*.¹⁵ Yet, it is not the treaties themselves which lead to the formation of new custom. They are only the *starting point* of the eventual development of a new customary rule. It is the actual practice of States *after* the entry into force of the treaty that can be the 'formal' source of the development of a custom rule.¹⁶ Two conditions must be fulfilled for any treaty-based norm to transform into a customary rule.

First, it needs to be shown that a great number of States have entered into numerous BITs that contain the *same provision* (or very similarly-drafted clauses). In other words, the practice of States who are *parties* to BITs must be uniform, consistent, and representative. I have examined elsewhere whether the practice of States to include FET clauses in their BITs fulfills this first condition.¹⁷ My findings show that while such practice is clearly general, widespread and representative, it is still not consistent or uniform enough for the standard to be considered as having emerged as a customary rule. There are in fact many different types of FET clauses and these variations matter a great deal. Tribunals have indeed generally concluded that differently worded FET clauses impose different levels of investment protection on host States.¹⁸

The aim of the present article is to investigate the second condition necessary for any treaty-based norm to transform into a customary rule. It needs to be shown that States have adopted

10 *ADF Group Inc. v United States*, Award (9 January 2003) at paras 183, 185, ICSID, Case No ARB(AF)/00/1; *Cargill, Inc. v Mexico*, Award (18 September 2009) at para 276, ICSID, Case No ARB(AF)/05/02.

11 See Dumberry, "Formation and Identification of Rules", *supra* note 3.

12 Richard R Baxter, "Treaties and Custom" (1970) 129 *Recueil des Cours de l'Académie de droit international* 27 at 57 ff; Mark E Villiger, *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources*, 2nd ed (Zürich: Verlag, 1997) at 167 ff; Yoram Dinstein, "The Interaction between Customary International Law and Treaties" (2006) 322 *Recueil des cours de l'Académie de droit international* 243 at 371 ff; Abdullah Al Faruque, "Creating Customary International Law through Bilateral Investment Treaties: a Critical Appraisal" (2004) 44 *Indian J Intl L* 292 at 298–299.

13 International Law Commission, *Formation and Evidence of Customary International Law*, UNGAOR, 68th Sess, Supp No 10, UN Doc A/CN.4/659, (2013) 1 at 33. A number of contemporary examples of such a phenomenon are examined in: Michael Wood, *Third Report on Identification of Customary International Law*, UNILCOR, 67th Sess, UN Doc A/CN.4/682, (2015) 1 at 27.

14 International Law Association, "Statement of Principles Applicable to the Formation of General Customary International Law" (Final Report of the Committee on the Formation of Customary International Law), delivered at the 69th International Law Association London Conference, London, 29 July 2000), online: ILA <www.ila-hq.org> [ILA Final Report] at 46.

15 *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) ("Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such").

16 See Villiger, *supra* note 12 at 26.

17 Dumberry, "Formation and Identification of Rules", *supra* note 3. See also: Patrick Dumberry, "Has the Fair and Equitable Treatment Standard become a Rule of Customary International Law? An Empirical Study of the Practice of State Parties to BITs" *Journal of Dispute Settlement* (2016) [Dumberry, "Fair and Equitable Treatment Standard in Customary International Law: an Empirical Study"].

18 See Dumberry, "Fair and Equitable Treatment Standard", *supra* note 2 at 40–44.

in their own practice *outside* treaties the type of conduct prescribed for in these instruments. Thus, what matters is the existence of a consistent practice of States in instruments *other* than BITs.¹⁹ It must be demonstrated that these States have adopted “a practice in-line with that prescribed (or authorized) by the treaty, but which is in fact independent of it because of the general rule that treaties neither bind nor benefit third parties.”²⁰ For instance, the fact that States that are *not parties* to BITs (or States parties to BITs *not* containing any FET clause) are generally, uniformly and consistently providing the FET protection to foreign investors would be particularly convincing to evidence the customary nature of the standard. Such practice could be found, for instance, in States’ domestic legislations or in State contracts entered into by those States with companies and individuals.

The present article will investigate *one aspect* of the domestic legislation of host States and assess whether they typically include any FET protection. I have thus examined domestic laws specifically dealing with foreign investments. These foreign investment laws (often referred to as ‘code of investments’) are of great importance in terms of investment protection. Thus, as noted by one writer, such legislation is “normally a country’s most authoritative, complete, and detailed statement of government policy toward foreign investment” and is in fact “often the only statement of policy readily available to the investor, as well as to government officials with whom the investor must deal.”²¹ To the best of my knowledge, this article presents the first empirical study systematically analysing foreign investment laws (165 laws from 160 States) in relation to the FET standard.²² This article also provides the first thorough analysis of all (publicly available) arbitration cases arising from foreign investment laws involving allegations of breach of the FET obligation.

My findings will show that States rarely offer FET protection to foreign investors under their own foreign investment laws. While I have not examined the content of States’ *entire* domestic legislations (a matter discussed further below), the evidence presented in this paper suggests that the second condition for a treaty-based norm to transform into a customary rule has not been fulfilled and that no customary rule on the FET standard has emerged.

A. A STUDY OF FOREIGN INVESTMENTS LAWS

A number of writers have acknowledged the fact that the practice of States *outside* the treaty framework matters in terms of evidencing custom.²³ For instance, Alexandra Diehl refers to the fact that “prospective BIT signatories reform their local laws and practices in order to live up to treaty standards like the FET standard” as “surely part of the ‘state practice’ that needs

19 Dinstein, *supra* note 12 at 376–377; Villiger, *supra* note 12 at 183–184; Richard R Baxter, “Multilateral Treaties as Evidence of Customary International Law” (1965-1966) 41 *Brit YB Intl L* 275 at 296–297.

20 ILA Final Report, *supra* note 14 at 46; see Villiger, *supra* note 12 at 182.

21 Jeswald W Salacuse, *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital* (Oxford: Oxford University Press, 2013) at 91.

22 To be fair, an earlier study conducted in 1992 had already examined the foreign investment legislations of 51 developing countries. See Antonio R Parra, “Principles Governing Foreign Investment, as Reflected in National Investment Codes” (1992) 7 *ICSID Rev* 428 at 435–437.

23 Jose E Alvarez, “A Bit on Custom” (2009) 42:1 *NYUJ Intl L & Pol* 17 at 52–53.

to be examined with respect to relevant customary law principles.”²⁴ She concludes that such practice “further speaks in favour of assuming that the FET standard is a customary rule of law.”²⁵ However, this is really just an assumption. For instance, she refers to an UNCTAD report indicating that 92% of the 2,395 changes in national laws from 1991 to 2005 were “aimed at making the investment climate more welcoming to FDI.”²⁶ There seems to be little doubt about the fact that the majority of domestic regulatory changes are favourable to foreign investments.²⁷ Yet, Diehl simply *assumes* that these States are increasingly providing FET protection in their own domestic laws, without having undertaken any comparative analysis of these laws to determine whether this is actually the case.²⁸

Some writers have suggested that the FET standard is indeed found in the domestic laws of most developed and developing States.²⁹ Yet, they acknowledge not having concretely conducted such a comparative analysis of these different domestic laws. An in-depth investigation of all domestic legal orders is clearly beyond the scope of the present article.³⁰ Suffice it to say that one study of the domestic legislations of a number of capital-importing States by Stephen Vasciannie showed in fact that the ‘overwhelming majority’ of these States do not provide FET protection to foreign investors.³¹ Similarly, in another earlier study conducted in 1992 of the foreign investment laws of 51 developing countries, Antonio Parra found that only three of them incorporated the FET standard.³²

As mentioned above, I have undertaken a thorough analysis of the content of States’ domestic laws dealing *specifically* with foreign investments. I have conducted a survey of all investment laws contained in the World Bank’s *Investment Laws of the World* compilation, which is updated twice a year.³³ The compilation contained a significant number of the investment laws, but not all of them. Some investment laws were also retrieved online through official government

24 Diehl, *supra* note 1 at 136.

25 *Ibid.*

26 *Ibid.*

27 See Salacuse, *supra* note 21 at 37, 91, referring to other statistics mentioned in: UNCTAD, *World Investment Report 2011* (Geneva: United Nations Publications, 2011) at 94; UNCTAD, *World Investment Report 2010* (Geneva: United Nations Publications, 2010) at 76–77. See also Wenhua Shan, “General Conclusions” in Wenhua Shan, ed, *The Legal Protection of Foreign Investment: A Comparative Study* (Oxford: Hart Publishing, 2012) 73 at 75 (the author notes that in 2009, 102 regulatory changes were adopted in the world, 71 of which were favourable to investors).

28 Diehl, *supra* note 1 at 136, 169–175.

29 Tudor, *supra* note 1 at 104 (“In the case of the FET standard, the situation as it stands today is that most developed and developing countries do recognize in their domestic laws that FET is to be applied to foreign investors. This is the case even though the term FET itself may not be employed as such but the content of FET, namely procedural and substantive guarantees for foreign investors, is found in national provisions”); Diehl, *supra* note 1 at 174 (“As most developed and developing countries recognize in their domestic law that FET ought to be applied to foreign investments and investors, one has to conclude that FET is a general principle of law in the realm of foreign investment”).

30 The author intends in his future work to conduct a narrower analysis of a representative sample of the domestic legal orders of several States.

31 Stephen Vasciannie, “The Fair and Equitable Treatment Standard in International Investment Law and Practice” (1999) 70:1 *Brit YB Intl L* 99 at 160.

32 Parra, *supra* note 22 at 435–437. The article contains a review of the investment laws and codes of 51 developing countries (28 African States, 9 Asian, 6 European, 8 Latin American). The author also reviewed the laws of several industrialised countries (Australia, Canada, Japan, New Zealand, Spain, France, UK, US).

33 ICSID, *Investment Laws of the World* (Oxford: Oxford University Press, 2014).

websites or, in the alternative, through general online search engines.³⁴ Ultimately, I have examined 165 different domestic laws from some 160 States (a small number of States had more than one relevant legislation in force regulating foreign investments).³⁵

Some preliminary observations should be made at the outset. First, a number of States do not have any specific domestic laws on foreign investment.³⁶ This confirms the findings of a recent study showing that 11 out of the 22 jurisdictions examined by the reporters had no special laws regulating foreign investments.³⁷ But (as discussed further below) that does not mean that investors get no legal protection at all when they make an investment in these countries.³⁸ Second, a large number of existing foreign investment laws that I have examined (59) did not contain any specific provisions dealing with substantive investment protection. This is, for instance, the case of Canada's *Investment Act, 1985*. Again, not much can be deduced from that simple fact. In fact, legal protections for foreign investors making an investment in Canada are found elsewhere in Canada's legislation.³⁹

The present section examines those 100 laws which include some relevant provisions on investment protection. The first noteworthy aspect of these laws is that the vast majority of them contain clauses prohibiting general discrimination between domestic and foreign investors. They also generally contain 'national treatment' clauses whereby foreign investors are provided with a treatment no less favourable than that existing for national investors. I have however found an explicit 'full protection and security' clause in a few laws only (15).⁴⁰ Finally, a number of other laws contain more general provision on the projection of investor's rights.⁴¹

34 My analysis was limited only to those laws which were at the time available in French, English and Spanish, i.e. the overwhelming majority.

35 It should be added that a small number of laws were not available, including those of Andorra, Iceland, and Cyprus.

36 This is the case for the following States (the list is not exhaustive): Austria, Bahrain, Belgium, Dominica, France, Ireland, Italy, Jamaica, Luxembourg, Nauru, Netherlands, Norway, Portugal, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Sweden, Switzerland, United Arab Emirates.

37 Wenhua Shan, "Legal Framework Governing Foreign Investment" in Shan, *supra* note 27, 7 at 8, 10.

38 Ralph Alexander Lorz, "Report on Germany", in Shan, *supra* note 27, 359 at 360; Shotaro Hamamoto, "Report on Japan" in Shan, *supra* note 27, 445 at 446.

39 J Anthony van Duzer, "Report on Canada" in Shan, *supra* note 27, 445 at 446 (noting that "Canada has not enacted specific legislation to give effect to its international investment obligations but takes the position that its domestic regime is consistent with its international obligations, including the standards for investor protection").

40 Albania, *Law on Foreign Investments No 7764*, 2 November 1993, art 2(2) [*Albania LFI*]; Angola, *Basic Law for Private Investment No 20/11*, 20 May 2011, art 5 [*Angola BLP*]; Azerbaijan, *Law on Protection of Foreign Investments*, 15 January 1992, clause 9 [*Azerbaijan LPFI*]; Bangladesh, *Foreign Private Investment (Promotion and Protection) Act*, 1 April 1980, art 4 [*Bangladesh FPIA*]; Cape Verde, *External Investment Law No 89/IV/93*, 13 December 1993, art 7(1) [*Cape Verde EIL*]; Cuba, *Ley No 118 de la Inversión Extranjera*, 29 March 2014, art 4.1; El Salvador, *Ley de Inversiones Decreto No 732*, 11 November 1999, art 13; Guinea-Bissau, *Law which Defines the Regime Applicable to Foreign Investments*, art 14; Hungary, *Act XXIV of 1998 regarding Investments by Non-Residents in Hungary with Subsequent Amendments and Supplements*, art 1(1); Kosovo, *Law No 04/L-220 on Foreign Investment*, 9 January 2014, art 3(2); Laos, *Law on the Promotion of Foreign Investment No 11/NA*, 22 October 2004, arts 4, 12(2) [*Laos LPFI*]; Macedonia, *The Foreign Investment Law*, arts 6–7; Moldova, *Law on Foreign Investments No 998-XII*, 1 April 1992, art 39(1) [*Moldova FIL*]; Serbia and Montenegro, *Law on Foreign Investments*, 25 January 2003, art 9 [*Serbia and Montenegro FIL*].

41 See, for instance, the laws of Belarus, Estonia, Georgia, Guyana, Iraq, Kazakhstan, Lithuania, Macedonia, Malawi, Mongolia, Panama, Russia, Rwanda, Slovenia, Turkmenistan, Uzbekistan, Vietnam, Niger.

The next sections specifically examine my findings on the FET standard (Section a) and the transparency obligation (Section b).

a) Explicit Reference to the FET Standard is Found in only a Small Number of Laws

Out of the 165 laws examined, I have found that only a few of them (10) expressly refer to the FET standard. While a number of these clauses are basic stand-alone FET provisions,⁴² others are linked to the standard of protection existing under 'international law.'⁴³ One variant of the latter type of clause is a so-called 'no less' FET clause whereby international law is referred to as a threshold for the level of treatment to be accorded to foreign investors.⁴⁴ I have found another 'no less' clause where the threshold it set against 'international treaties' signed by that State, not international law per se.⁴⁵ In another clause, the law refers to the standard of protection existing under 'international law' (i.e. the minimum standard of treatment) without, however, using the words FET.⁴⁶ Finally, the drafting of another FET clause suggests that the State considers it has an obligation to provide this standard of protection to investors under international law.⁴⁷ The most explicit FET clause was found in Angola's *Private Investment Law* which specifically lists the types of protection which are covered by the provision:

Under the terms of the Constitution and the principles shaping the country's legal, political and economic order, the Angolan State ensures that, irrespective of the origin of capital, incorporated companies and enterprises and their assets are given fair and equitable treatment, which is not arbitrarily discriminatory, guaranteeing them protection, security, access to resources and courts, not hindering their management, maintenance and operations.⁴⁸

42 *Bangladesh FPIA*, supra note 40 at art 4; *Cape Verde EIL*, supra note 40 at art 7(1).

43 Democratic Republic of the Congo, *Code des investissements Loi n°004*, 21 February 2002, art 25; Venezuela, *Decreto con Rango y Fuerza de Ley de Promocion y Proteccion de Inversiones No 356*, 3 October 1999, art 6.

44 Kosovo FIL, supra note 40 at art 3(1)–(3): ("Republic of Kosovo shall accord fair and equitable treatment to foreign investors and their investments in Kosovo with any local investors and local investments. Republic of Kosovo shall also provide foreign investors and their investments with full and constant protection and security in accordance with the applicable legislation. In no case shall the treatment, protection or security required by this paragraph be less favorable than that required by generally accepted norms international law or any provision of the present law." Another clause in the law indicates that foreign investors are provided with 'a set of fundamental rights and guarantees' ensuring them that their investments will be 'protected and treated with fairness in strict accordance with the accepted international standards and practices.")

45 Uzbekistan, *Law on Foreign Investments*, 30 April 1998, art 9 ("foreign investors and foreign investments shall be guaranteed fair and equitable treatment and full and constant protection and security. Such treatment may not be less favorable than that provided for by international treaties of the Republic of Uzbekistan").

46 *Albania LFI*, supra note 40 at art. 2(3). See also *ibid* at art 2(2) ("in every case foreign investments shall have a treatment no less favorable than which the generally accepted norms of international law guarantee").

47 Equatorial Guinea, *Ley de Regimen de Inversiones*, 30 April 1992, art 12(1) ("In conformity with its public international law obligations, the State commits to a fair and equitable treatment for all investors in its national territory.").

48 *Angola BLPI*, supra note 40 at art 15.

Finally, it should be added that a number of other laws contain some much vaguer reference to the host State's obligation to apply the law 'equitably' to foreign investors and the rule of law.⁴⁹ One example is Zimbabwe's legislation entitled *The Promotion of Investment: Policy and Regulations (1989)*, which provides that "the government recognises the importance that investors, and particularly foreign investors, attach to fair and stable standards for the treatment of investment."⁵⁰ Another example is Indonesia's law indicating that "[i]nvestment shall be organized based on the principle of: legal certainty, openness, accountability, the equal treatment without discriminating the country of origin, togetherness, impartiality, [...] independency".⁵¹ Other laws refer to the right to have access to courts⁵² and to receive an equitable treatment before them.⁵³ A number of laws also indicate the existence of a right to receive compensation for damages resulting from illegal actions taken by the State.⁵⁴

b) Some Laws Contain References to a Transparency Obligation

While only 10 laws refer specifically to the FET standard, the second important finding of this study is the fact that a few others (14) nevertheless contain references to a 'transparency'

49 Chad, *Loi n° 006/PR/2008 instituant la Charte des investissements*, 15 Decembre 2008, art 7 ("referring to the State's obligation to ensure 'l'application uniforme, juste et équitable des règles du jeu par l'ensemble des acteurs du système économique"). See also, art 8 ("L'État veille à la protection de la sécurité juridique et judiciaire et au renforcement de l'État de droit [et ainsi s'engage à] créer les conditions juridiques de base nécessaires pour attirer les investissements privés et renforcer les droits des investisseurs [...] renforcer la capacité des magistrats dans le traitement des affaires commerciales [...] veiller à l'exécution diligente des décisions de justice et d'arbitrage"). Another example is Gabon, *Loi n°15/1998 instituant la Charte des Investissements*, art 1 [Gabon CdI] referring to the State's obligation to ensure "l'application équitable et transparente du droit [de l'OHADA et CIPRES]; l'indépendance et la compétence professionnelle des tribunaux et juridictions spécialisées". See also: Cameroon, *Law No. 2002/004 on the Investment Charter of the Republic of Cameroon*, 19 April 2002, art 8(1) ("the fundamental mission of the State shall be notably to administer the nation, ensure the exercise of justice and guarantee the safety of persons and of property. To this end, the State shall undertake to: [...] put an end to all forms of bureaucracy or police harassment and notably remove all obstacles to the movement of persons and property [freedom from coercion]; internally fight corrupt behaviour and/or misappropriation of public property [due process]; accelerate the processing of administrative papers [due process]; expedite the hearing of court cases and ban all forms of discrimination in the application of the law").

50 Zimbabwe, Ministry of Finance, Economic Planning, and Development, *The Promotion of Investment: Policy and Regulations*, (Harare: Zimbabwe Investment Centre, Ministry of Finance, Economic Planning, and Development, 1989) at para 39 (the provision further indicates that "in the light of this recognition", "[it] undertakes to maintain a legal framework that gives due protection to investment in Zimbabwe, whether local or foreign" and that "[t]he legal system and independent judiciary of Zimbabwe give protection to private property rights").

51 Indonesia, *Law No 25 of 2007 concerning Investment*, 26 April 2007, art 3 [Indonesia LCI]. See also art 4(2) (the State "warrant legal certainty, business certainty, and business security to any investors"), and art 14 ("every investor shall be entitled to obtain: right certainty, legal certainty and protection certainty, open information about business sector is running, service and various forms of facility according to the rules of law").

52 See e.g. Fiji, *Foreign Investment Act*, 19 March 1999, art 15(2); Guinea, *Code des investissements, Loi n°L/95/029/CTRN du 30 juin 1995*, art 6(3); Vietnam, *Law on Investment*, 29 November 2005, arts 19(4)–(5) [Vietnam LI].

53 Côte d'Ivoire, *Code des Investissements*, 7 June 2012, art 20; Laos LPFI, *supra* note 40 at art 12(10) (referring to the right to request an 'equitable decision' (or to complaint to) the relevant authorities).

54 Russia, *Federal Law No 160-NZ on Foreign Investment in the Russian Federation*, 9 July 1999, art 5(2) ("pursuant to the civil laws of the Russian Federation a foreign investor shall have the right to receive compensation for damages inflicted on it as a result of illegal actions (failure to act) of any governmental or local authorities or any officer of such authorities"). See also: Uzbekistan, *Law No 611-I about guarantees and measures of protection of the rights of foreign investors*, 30 April 1998, art 10 [Uzbekistan LGMPRFI]; Montenegro, *Foreign Investment Law*, art. 30 *in fine*.

obligation (an element of protection sometimes identified with the FET standard).⁵⁵

In some laws reference to such a 'transparency' obligation is set out in general terms. For instance, Guyana's *Investment Act, 2004*, indicates that one of the objectives of the law is to increase "the predictability, stability and transparency of the legal regime for investment".⁵⁶ More specifically, under some other laws this 'transparency' obligation requires the publication of all laws, regulations and procedures that concern or affect investments.⁵⁷ Other laws extend such a publication obligation to court decisions affecting investors⁵⁸ as well as policies,⁵⁹ or even to "any other public information, which has a rational relationship to their investment interests."⁶⁰ Some laws even contain broader access to information obligations towards foreign investors.⁶¹ The law of Antigua & Barbuda certainly contains the broadest transparency obligation giving foreign investors the right to comment on proposed regulations and an obligation for the State to respond to queries from them:

The laws, regulations, administrative practices and procedures of general application, and judicial decisions that affect or pertain to investments or investors in Antigua and Barbuda are promptly published. Where the Government establishes policies that affect or pertain to investments or investors which are not expressed in laws or regulations or by other means listed in this paragraph, the Government will make them publicly available. As far as possible, the Government provides interested persons a

55 Shan, *supra* note 27 at 16 (A recent comparative study of the laws of different States indicates that "almost all the 22 jurisdictions have reported certain mechanisms to ensure transparency of foreign investment law and policies").

See, the different reports for a number of States (Argentina, Australia, Croatia, Czech Republic, Ethiopia, Italy, Peru).
56 Guyana, *Investment Act*, 31 March 2004, at art 3. See also, *Indonesia LCI*, *supra* note 51 at art 3(1) (indicating that 'Investment shall be organized based on' the principle of, *inter alia*, 'openness'); *Angola BLPI*, *supra* note 40 at art 15 (containing an explicit FET standard clause and specifically mentioning that investors have "access to resources").

57 Albania, *Decree No 7406 on the protection of Foreign Investments*, 31 July 1990, art 9; Antigua and Barbuda, *Investment Authority Act*, 17 November 2006, at 3, 32 (Schedule 4: Investment Code) [*Antigua IAA*]; Liberia, *Investment Act*, 15 May 2010, section 9.

58 Kyrgyzstan, *Law on Foreign Investments*, 24 September 1997, art 9(1); *Antigua IAA*, *supra* note 57 at 32 (Schedule 4: Investment Code).

59 *Antigua IAA*, *supra* note 57 at 32 (Schedule 4: Investment Code); Kazakhstan, *Law on Investments*, 8 January 2003, art 6.

60 *Liberia IA*, *supra* note 57 at section 9. See also: Southern Sudan, *Investment Promotion Act*, 2009, art 36.

61 Peru, *Ley Marco para el Crecimiento de la Inversión Privada Decreto Legislativo No 757*, 13 November 1991, art 35 ("documents, background information, studies, rulings, opinions, statistical data and any other information held by public entities must be furnished to any person who so requests them"). Others laws contain much vaguer obligations: *Gabon Cdl*, *supra* note 49 at art 6 ("La République gabonaise a mis en place une Agence de Promotion des Investissements chargée de promouvoir l'investissement national et international au Gabon ayant pour mission: la diffusion de l'ensemble de l'information pertinente auprès des investisseurs potentiels [et] la recherche, l'accueil, l'orientation et conseil aux investisseurs"); Ecuador, *Ley de Promoción y Garantía de Inversiones No 46 RO/ 219*, 19 December 1997, art 21 ("public bodies and entities must assist investors so that they may develop economically feasible technical projects; and provide them with information and materials subject to public availability and considered useful to support the implementation of an investment project"); Saudi Arabia, *Foreign Investment Act*, 28 March 2000, art 10 ("the Authority shall provide all those interested in investment with all necessary information, clarifications and statistics, together with all services and procedures to facilitate and accomplish all matters pertaining to the investments"); Turkmenistan, *Law on Foreign Investments No 184-III*, 3 March 2008, art 24(1) ("foreign investors, enterprises with foreign investments shall have a right for the access of information in an order specified by the legislation of Turkmenistan").

reasonable time for comment on any proposed measures and publishes in advance such laws, regulations administrative practices or procedures of general application that it proposes to adopt. On request by a member of the public the Government will provide, in a timely manner, information and responses to questions pertaining to any actual or proposed laws, regulations, administrative practices and procedures of general application, or pertaining to any judicial decision [except for confidential information, or which would impede law enforcement or the legitimate commercial interests of investors].⁶²

Finally, it should be noted that a number of laws contain a legal stability clause whereby the existing legislation of the host State at the time the investor makes an investment remains in place (sometime for a limited number of years) in the event that such laws were to change to the detriment of the investor.⁶³

B. ANALYSIS OF CASES ARISING FROM FOREIGN INVESTMENT LAWS DEALING WITH FET CLAUSES

As part of my study of foreign investment laws mentioned above, I have also examined all available arbitration cases arising from such laws which dealt with FET clauses.⁶⁴

A number of the awards I have examined simply refer to the domestic investment laws containing a FET clause without providing any analysis of the standard. For instance, this was the case in *Brandes v. Venezuela*, where the main question determined by the Tribunal was whether or not Venezuela had consented to arbitration under the *Law on the Promotion and Protection of Investments*.⁶⁵ The claimant argued that the context of the adoption of the law showed Venezuela's consent to arbitration⁶⁶ and that the law "was structured in a manner similar to bilateral investment treaties (providing for the definition of an international investment, fair and equal treatment, no discrimination between international and national investors, most favoured nation treatment, etc.)."⁶⁷ In its award, the Tribunal observed that "the law has the characteristic structure and contents of many bilateral investment treaties."⁶⁸ As an illustration, the Tribunal referred to Article 6 of the

62 *Antigua IAA*, *supra* note 57 at 32 (Schedule 4: Investment Code). See also: *Vietnam LI*, *supra* note 52 at art 19(3) ("[investors have a right to] have access to legal instruments and policies relating to investment; to data on the national economy, to data about each economic sector and to other relevant socio-economic information about investment activities; and to contribute opinions on laws and policies relating to investment").

63 *Azerbaijan LPFI*, *supra* note 40 at clause 10; Bosnia and Herzegovina, *Law on the Policy of Foreign Direct Investment*, 18 May 1998, art 20; Comoros, *Code des investissements*, 2007, art 21; Latvia, *Law of the Foreign Investments*, 1991, art 8(4); Egypt, *Law Promulgating the Law on Investment Guarantees and Incentives*, 11 May 1997, art 2; Georgia, *Law On Promotion and Guarantees of Investment Activity No 473*, 12 November 1996, art 15(1); *Kosovo FIL*, *supra* note 40 at art 6(2); *Moldova FIL*, *supra* note 40 at art 43; Palestine, *Law on the Encouragement of Investment No 1*, 23 April 1998, art 33; Panama, *Investment Stability Law No 54*, 22 July 1998, art 10; *Serbia and Montenegro FIL*, *supra* note 40 at art 9; Slovenia, *Foreign Investments Law 1988, as amended, 1993*, art 7; Tanzania, *Investment Act*, 25 August 1997, art 19(2); Turkmenistan LFI, *supra* note 61 at art 8(5); *Uzbekistan LGMPRFI*, *supra* note 54 at art 3; *Vietnam LI*, *supra* note 52 at art 11.

64 My analysis was based on 19 available cases found on the "Italaw" website (Italaw, online: <www.italaw.com>) under the heading "International Investment Agreement".

65 *Brandes Investment Partners LP v Venezuela*, Award (14 May 2012), ICSID, Case No ARB/08/3 [*Brandes*].

66 *Ibid* at para 27.

67 *Ibid* at para 63.

68 *Ibid* at para 89. See also para 90 ("indicating that the 'provisions are actually similar to those usually appearing in a

law providing that "... international investments shall be entitled to fair and equal treatment, in accordance with international law standards and criteria, and shall not be subject to arbitrary or discriminatory measures ..."⁶⁹ The Tribunal did not discuss the FET standard in its award.⁷⁰

A more interesting case is *Lahoud v. Democratic Republic of Congo*.⁷¹ It arose from acts and omissions of the DRC that led to the eviction of the company owned by the plaintiffs, and the looting and destruction of the entire property, in violation of its obligations under its 'Code des Investissements'.⁷² One of the arguments raised by the claimants was that the respondent had breached its FET obligation existing under international law and under the DRC's Code of Investments,⁷³ which includes an FET clause.⁷⁴

The Tribunal referred to the FET standard in the context of its analysis of the different question of the applicable law to the dispute. It noted that the dispute had to be decided based on the provisions contained in the Code (including the FET clause) given the fact that the claimants had filed their claim based on the dispute settlement clause contained in that instrument.⁷⁵ It is in this specific context that the Tribunal noted that the reference in the Code to the FET standard being in "conformity with principles of international law" should not be considered as an agreement between the parties on the applicable law to settle the dispute.⁷⁶ It ultimately decided, in accordance with Article 42 of the ICSID Convention, to apply both Congolese law and international law. The Tribunal explained that international law should prevail over domestic law in cases of contradiction between the two and also whenever it was necessary.

What is interesting about this case is the Tribunal's examination of the concept of the FET standard strictly from the lens of international law, even if the standard was expressly mentioned in the Congolese domestic law under which the Tribunal had jurisdiction over the dispute.⁷⁷ Obviously the reason for this is because the Code explicitly refers to the obligation to accord FET to investors *in conformity with international law*.⁷⁸ In any event, as mentioned by the Tribunal, the standard "*puise son origine en droit international et y a été développée au point de figurer quasi systématiquement dans les nombreux accords bilatéraux et multilatéraux de promotion et de protection des investissements aujourd'hui en vigueur*."⁷⁹ The Tribunal also noted later in the

bilateral investment treaty of 2005"] [0 ilateral investment treaty')y 2005) the Code explicitly refers to the obligation to provide investors with FET).

69 *Ibid* at para 89.

70 The Tribunal came to the conclusion that Venezuela had not consented to ICSID jurisdiction under the Law and that it did not have jurisdiction over the dispute. See *Brandes, supra* note 65 at para 121.

71 *Antoine Abou Lahoud and Leila Bounafteh-Abou Lahoud v Democratic Republic of the Congo*, Award (7 February 2014), ICSID, Case No ARB/10/4 [*Lahoud*].

72 *Ibid* at para 4.

73 *Ibid* at para 179.

74 *Ibid* at para 359. See *Congo CDI, supra* note 43 at art 25 ("La République Démocratique du Congo s'engage à assurer un traitement juste et équitable, conformément aux principes du droit international, aux investisseurs et aux investissements effectués sur son territoire, et à faire en sorte que l'exercice du droit ainsi reconnu ne soit entravé ni en droit, ni en fait").

75 *Lahoud, supra* note 71 at para 360.

76 *Ibid* at para 361.

77 *Ibid* at para 438.

78 Code des Investissements, art. 25.

79 *Lahoud, supra* note 71 at para 361.

award that the concept of FET was not defined under the Code anyway (nor under BITs for that matter).⁸⁰ The Tribunal ultimately concluded that the actions taken by the Congolese State were in breach of the FET standard.⁸¹

Claimants have raised arguments related to the FET standard in a few other cases arising from foreign investment laws which did not, however, contain any FET clause.⁸² Yet, in none of them have the tribunals examined the issue. In addition, two other cases (also involving foreign investment laws *not* containing any FET clauses) include comments made by claimants in the context of their pleadings that suggest that they believed that the FET standard was in fact a general principle of law.

The first case is *PNG v. Papua New Guinea* involving a company incorporated under the laws of Singapore, and Papua New Guinea, as the respondent.⁸³ The claimant commenced proceedings under two laws of the respondent (the ‘Investment Disputes Convention Act 1978’ and the ‘Investment Promotion Act 1992’) which had allegedly been breached.⁸⁴ It appears that none of these instruments contained a reference to the FET standard. The claimant argued that the enactment of one domestic legislation amounted to, *inter alia*, a violation of “other guarantees and standards of treatment that must be accorded by the Respondent to foreign investors,” including the FET standard.⁸⁵ The passage suggests that the claimant viewed the FET standard as either a rule of customary international law or a general principle of law. The Tribunal did not further discuss these issues in its award.⁸⁶ The second case is that of *Getma v. Guinea*.⁸⁷ This case involved three French corporations claiming that the Republic of Guinea had breached several provisions of its Code of Investment.⁸⁸ Interestingly, the claimant argued that the claim was based on general principles of law applicable to foreign investments (“*principes internationaux de protection des investissements*” or “*les principes généraux applicables aux investissements*”), which included the FET standard.⁸⁹ In its award on jurisdiction, the Tribunal did not examine the question whether

80 *Ibid* at paras 365, 438.

81 *Ibid* at paras 445, 488.

82 *ABCI Investments NV v Tunisia*, Decision on Jurisdiction (18 February 2011), ICSID, Case No ARB/04/12; *Khan Resources Inc, Khan Resources BV, and Cauc Holding Company Ltd v Mongolia*, Award on the Merits (2 March 2015), UNCITRAL at paras 99, 106, 111, 193, UNICTRAL, Permanent Court of Arbitration Case No. 2011-09.

83 *PNG Sustainable Development Program Ltd. v Papua New Guinea*, Award (5 May 2015), ICSID, Case No ARB/13/33.

84 *Ibid* at para 41.

85 *Ibid* at para 40 (the claimant also mentioned a number of “other guarantees and standards of treatment”: “(ii) guarantee of free repatriation of returns on investments; (iii) specific undertakings given to the Claimant (i.e., the umbrella clause); (iv) the full protection and security standard; (v) the rule against arbitrary, discriminatory or unreasonable measures; (vi) national treatment guarantee; and (vii) the rule of free entry and sojourn of personnel”).

86 *Ibid* at para 417 (the Tribunal ultimately dismissed the claim based on the ground that it had no jurisdiction over the dispute under the two domestic laws invoked by the claimant).

87 *Getma International and others v Guinea*, Decision on Jurisdiction (29 December 2012), ICSID, Case No ARB/11/29.

88 *Ibid* at para 23.

89 *Ibid* at para 61 (“L’action est fondée sur les principes internationaux de protection des investissements. Getma International invoque les règles et principes du droit international, la notion de « *Contrat d’Etat* », les principes généraux applicables aux investissements (tels que la bonne foi, les attentes légitimes ou le traitement juste et équitable) ainsi que de la doctrine en matière de droit des investissements internationaux et de la jurisprudence CIRDI”).

or not the FET standard could be considered as such.

In sum, claimants have alleged violations of the FET standard contained in foreign investment laws in only a few cases. In none of them has a tribunal discussed whether such protection exists under general international law (i.e. outside specific provisions contained in a domestic law or under a BIT).

CONCLUSION

The evidence presented in this article does not support the proposition that the FET obligation has been generally and consistently adopted by States *outside* BITs. This is at any rate the case for States' foreign investment laws. Thus, my analysis of some 165 foreign investment laws shows that only a few of them actually include FET clauses (and that a few others refer to some sort of transparency obligation). Yet one has to be careful in drawing any conclusions from the fact that one State's domestic legislation does *not* include any FET protection. As put by one writer, such absence is 'not decisive in itself' since "some States may well believe fairness and equity to be inherently interwoven within the fabric of their legal system, and therefore beyond the need for an explicit statement."⁹⁰ In other words, just because the FET standard is not *per se* expressly mentioned in a State's foreign investment legislation, one cannot automatically conclude that the standard is absent from its domestic legal order. The standard may very well exist under that State's constitution.⁹¹ Conversely, the fact that another State's legislation provides for such protection is no guarantee that investors actually receive FET treatment.

I have also analysed the question of whether State contracts entered into between States and companies (and individuals) contain FET clauses.⁹² The Energy Charter Treaty Secretariat has developed a set of Model Agreements on issues such as cross-border pipelines and cross-border electricity projects.⁹³ None of them include an FET clause. The same is true for the 2011 International Bar Association Mining Law Committee's 'Model Mining Development Agreement (MMDA) Version 1.0,' which is described as a "collection of examples from existing mine development agreements and other materials that are designed" as a template for negotiation rather than a ready-to-be-used agreement model.⁹⁴ I have also conducted research on a number

⁹⁰ Vasciannie, *supra* note 31 at 160.

⁹¹ Tudor, *supra* note 1 at 104.

⁹² It is doubtful whether *confidential* State contracts can actually be considered as a relevant evidence of State practice. This is because of the publicity requirement whereby the practice that counts towards the formation of custom must be communicated to another State, or made public to a certain extent. See Dumberry, "Formation and Identification of Rules", *supra* note 3.

⁹³ According to the Secretariat, these Models were 'prepared based on best international practices and with the aim of reflecting as much as possible the interests of the different parties concerned' and developed to provide 'interested parties to energy-related projects with a neutral and non-prescriptive starting point for negotiations, and thus, facilitating project-specific talks.' See Energy Charter Model Agreements, online: <www.energycharter.org/what-we-do/trade-and-transit/model-agreements/>.

⁹⁴ Model Mining Development Agreement Project, "MMDA 1.0 User's Guide", online: <www.mmdaproject.org/>. See also International Institute for Sustainable Development, "Model Mining Development Agreement-Transparency Template" (May 2012) at 111, online: <https://www.iisd.org/sites/default/files/publications/mmda_transparency_report.pdf>. It should be added that one provision deals, more generally, with discriminatory and arbitrary treatment (Article 14.0, 'Fair and Economical Project Operation').

of online databases containing contracts involving States⁹⁵ and found that none of them contain a reference to the standard.⁹⁶ Finally, I have found no arbitration award mentioning the presence of an FET clause in a contract and no case where a claimant has alleged the existence of any such FET obligation to be respected by the host State under a State contract.⁹⁷

All of these elements support the proposition that I have advanced elsewhere that the FET standard has *not* become a rule of customary international law.⁹⁸ The FET obligation remains today a *treaty-based* standard of protection *not* available to foreign investors under general international law. I have thus found no arbitration case where a tribunal has held that an FET obligation exists where the BIT contains no FET clause or in the absence of any BIT.⁹⁹ To the best of my knowledge, no State has ever endorsed the customary nature of the FET standard.

It is true that I have not conducted a systematic comparative analysis of all States' constitutions and laws to determine whether they include elements of FET protection. Some writers have suggested that some of the elements contained in the FET standard are indeed found in the domestic laws of most developed and developing States.¹⁰⁰ The *Total* and *Gold Reserve* Tribunals have recently concluded that the concept of legitimate expectations was contained in the domestic legal orders of civil and common law jurisdictions.¹⁰¹ For Stephan Schill, the FET

95 See Resource Contracts, online: <www.resourcecontracts.org>; Open Oil Repository, online: <openoil.net/wiki/Main_Page>; Open Land Contracts, online: <www.columbia.edu/cu/openlandcontracts/>.

96 See also UNCTAD, *States Contracts, UNCTAD Series on issues of international investment agreements*, UNCTAD/ITE/IIT/2004/11 (Sales No. E.05.II.D.5) (2004), at 27 (referring to different types of clauses often found in contracts, but not mentioning the FET standard as one such clause). See also, for the same conclusion, these two other publications: Open Oil, "Oil Contracts: How to Read and Understand Them" (2013) at 177ff, online: <openoil.net/understanding-oil-contracts/>; Document Cloud, "Mining Contracts: How to Read and Understand Them" (2014) at 177ff, online: <<https://www.documentcloud.org/documents/1279596-mining-contracts-how-to-read-and-understand-them.html>>.

97 I have examined all publicly available State contract cases on the Italaw website (Italaw, *supra* note 64).

98 Dumberry, "Fair and Equitable Treatment Standard in Customary International Law: an Empirical Study", *supra* note 17; Dumberry, "Formation and Identification of Rules", *supra* note 3.

99 It is true that in a handful of cases, foreign investors have been allowed to benefit from FET protection in situations where the BIT under which they started the proceedings did *not* contain any FET clause. Importantly, however, this was made possible through the use of the MFN clause contained in the BIT. Such importation of an FET obligation had therefore nothing to do with the (alleged) customary status of the standard. See e.g. *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Kazakhstan*, Award (29 July 2008) at para 611, ICSID, Case No ARB/05/16 (interpreting the Kazakhstan-Turkey BIT); *Bayindir Insaat Turizm Ticaret ve Sanayi A Ş v Pakistan*, Award (27 August 2009) at paras 164, 173, ICSID, Case No ARB/03/29 (interpreting the Turkey-Pakistan BIT). These cases and others are examined in Patrick Dumberry, "The Importation of the Fair and Equitable Treatment Standard Through MFN Clauses: An Empirical Study of BITs", *ICSID Review-Foreign Investment Law Journal* (2016); 229-259.

100 One recent analysis examined the domestic legal orders of OECD members and concluded that there exists a minimum standard of procedural due process. See Giacinto della Cananea, "Minimum Standards of Procedural Justice in Administrative Adjudication" in Stephan W Schill, ed, *International Investment Law and Comparative Public Law* (Oxford: Oxford University Press, 2010) 39 at 39ff, and 69–70 (the right to be heard, to have access to files and the duty to take such evidence into account when taking a decision and the duty for the administration to give reason to decisions).

101 *Total S.A. v Argentine Republic*, Decision on Liability (27 December 2010) at paras 111, 128–130, ICSID, Case No ARB/04/1; *Gold Reserve Inc. v Bolivarian Republic of Venezuela*, Award (22 September 2014) at paras 575–576, ICSID, Case No ARB/09/1. The award further refers to the work of the following authors: Florian Dupuy, *La protection de l'attente légitime des parties au contrat. Etude de droit international des investissements à la lumière du droit comparé* (PhD Thesis, Université Paris-Panthéon-Assas, 2007) [unpublished] at 71–102; Stephan W Schill,

standard has a “*quasi* constitutional function that serves as a yardstick for the exercise of the host states’ administrative, judicial or legislative activity vis-à-vis foreign investors”¹⁰² where the standard is “functionally equivalent to the understanding of the requirements deduced from the rule of law under domestic legal systems.”¹⁰³ Based on his analysis of the relevant case law, he identifies “seven specific normative principles” which are considered by tribunals ‘as elements’ of the FET standard and which all “figure prominently as sub-elements or expressions of the broader concept of the rule of law in domestic legal systems.”¹⁰⁴ A number of scholars have also taken the position that the FET standard contained in BITs is the equivalent of the rule of law found in the domestic laws of many countries.¹⁰⁵ Without taking a position on this question, suffice it to say that even if it were correct, it would not necessarily provide solid evidence that the FET standard has been generally, consistently and uniformly adopted by States in their own domestic legal orders. In fact, it would simply show that the FET standard exists under the domestic legal orders of those States where the rule of law *does apply*.¹⁰⁶ Of course, not all States apply the rule of law.

But let us assume, for the sake of argument, that the practice of including FET protection in domestic laws is indeed general, representative, uniform and consistent. Would that suffice to prove the existence of any custom? It should be recalled that for any customary rule to crystallise, it must be shown that States believe that they have an *obligation under international law* to provide FET protection to foreign investors *despite* having no formal *treaty* obligation to do so.¹⁰⁷ To the best of my knowledge, there is simply no evidence that States believe they have any obligation to provide FET protection (or its equivalent) to investors in their own domestic legal orders.

Finally, it should be added that any demonstration of the existence of a general, representative, uniform and consistent practice of States to include FET protection in their domestic laws would be of great importance regarding *another* important question: The issue of whether the standard can be considered as a *general principle of law*.¹⁰⁸ A number of writers have adopted the position

“Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law” in Stephan W Schill, ed, *International Investment Law and Comparative Public Law* (Oxford: Oxford University Press, 2010) 151 at 156–157 [Schill, “Fair and Equitable Treatment”]; Michele Potestà, “Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept” (2013) 28:1 ICSID Rev 88 at 88–122.

102 Stephan W Schill, “Fair and Equitable Treatment as an Embodiment of the Rule of Law” in Rainer Hofmann & Christian J Tams, eds, *The International Convention on the Settlement of Investment Disputes (ICSID): Taking Stock After 40 Years* (Baden-Baden: Nomos, 2007) 15 at 34.

103 Stephan W Schill, “Fair and Equitable Treatment as an Embodiment of the Rule of Law” (2006) NYU IILJ Working Paper 2006/6 at 37 [Schill, “FET as Rule of Law”].

104 Schill, “Fair and Equitable Treatment”, *supra* note 101 at 79-80. The principles are the following: (1) the requirement of stability, predictability and consistency of the legal framework, (2) the principle of legality, (3) the protection of investor confidence or legitimate expectations, (4) procedural due process and denial of justice, (5) substantive due process or protection against discrimination and arbitrariness, (6) the requirement of transparency and (7) the requirement of reasonableness and proportionality.

105 Diehl, *supra* note 1 at 330, 336; Kenneth J Vandeveld, “A Unified Theory of Fair and Equitable Treatment” (2010) 43:1 NYUJ Intl L & Pol 43 at 106.

106 Schill, “FET as Rule of Law”, *supra* note 103 at 9 (indicating that the concept of rule of law is found in “all domestic legal systems that adhere to liberal constitutionalism”). See also *Ibid* at 182.

107 Michael Wood, *Second Report on Identification of Customary International Law*, UNILCOR, 66th Sess, UN Doc A/CN.4/672 at paras 67–68.

108 See Diehl, *supra* note 1 at 169–179.

that the FET standard should indeed be considered as a general principle of law.¹⁰⁹ According to the OECD, this is also the position held by its member States.¹¹⁰ This question is however beyond the scope of this article.

109 *Ibid* at 174, 176; See also, the analysis of Kläger, *supra* note 1 at 271ff; Jeswald W. Salacuse, *The Law of Investment Treaties* (Oxford: Oxford University Press, 2010) at 219 (speaking of the FET standard as “a principle of international law and a fundamental norm of the emerging global regime for international investment”); Patrick Juillard, “Évolution des sources du droit des investissements” (1994) 250 *Recueil des cours de l’Académie de droit international* 9 at 131–133 (speaking of the FET as one of the “principes généraux du droit international” rather than as a general principle of law); Schill, *supra* note 101 at 154 (referring to the FET standard as a “general principle of international investment law”).

110 OECD, *International Investment Law: A Changing Landscape* (Paris: OECD Publishing, 2005) at 97 (referring to a 1984 study and indicating that OECD Member countries commented that the FET standard “introduced a substantive legal standard referring to general principles of international law even if this is not explicitly stated [it can be regarded as] a general clause which can be used for all aspects of the treatment of investments, in the absence of more specific guarantees”).