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Unraveling the Longstanding Riddle About the Doctrine of Legitimate Expectation Under International Investment Law: Ascertainning Legal Tests for the Customary International Law's Minimum Standard of Treatment

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Unraveling the Longstanding Riddle About the Doctrine of Legitimate Expectation Under International Investment Law: Ascertaining Legal Tests for the Customary International Law's Minimum Standard of Treatment

*Haneul Jung & Nu Ri Jung**

Abstract

*In 2018, the ICJ rendered a judgment in *Bolivia v. Chile* that effectively denied the status of the doctrine of legitimate expectation as a customary international law. The ICJ's judgment came as a surprise to many in the international arbitration community because a whole host of international tribunals established under various investment treaties have found that this doctrine, as well as the broader principle of "fair and equitable treatment," has effectively attained the status as the "minimum standard of treatment" under customary international law. Given the lack of elaborated reasoning, however, the ICJ's ruling fails to resolve the recurring debate over the legal status of the doctrine. This paper addresses this issue squarely, by first examining the historical development and the nature of the doctrine, and then the conflicting lines of jurisprudence that arose out of a number of investment arbitrations. Thereafter, this paper attempts to provide an answer to the longstanding question as to whether the doctrine of legitimate expectation has now attained status as customary international law. Finally, based on a systematic analysis of various investment treaties and numerous arbitral awards from the perspective of public international law, this paper tackles the old conundrum by providing a pragmatic guidance on ascertaining applicable legal tests for the "minimum standard of treatment" under contemporary customary international law.*

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I. INTRODUCTION

On October 1, 2018, the International Court of Justice (ICJ) rendered its judgment in the case of *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*.¹ The judgment contained many significant findings, but one particular finding drew attention from the international arbitration community. That is, the ICJ for the first time rendered its finding on the contested doctrine of legitimate expectation, a principle that has long been considered to form an essential aspect of the international investment law requiring host states to accord “fair and equitable treatment” to foreign investors. In response to Bolivia’s invocation of this doctrine, the ICJ ruled as follows:

The Court notes that references to legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment. It does not follow from such reference that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation.²

Nevertheless, Bolivia had good reasons to invoke the doctrine of legitimate expectation before the “World Court.” As elaborated in this paper, Bolivia’s invocation of “legitimate expectation” as a doctrine under customary international law does not strike as a surprising attempt to the international arbitration community. International tribunals established under various

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¹ *Obligation to Negotiate Access to the Pacific Ocean (Bol. v. Chile)*, Judgment, 2018 I.C.J. Rep. 153 (Oct. 1, 2018).

² *Id.* para. 162. Note that the ICJ’s ruling is not a perfect example of clarity. For example, it is unclear what exactly the ICJ meant by “general international law”; does it mean international law *other than* the investment treaties in general, or a more specific source such as customary international law? As enshrined in Article 38 of the Statute of the International Court of Justice (ICJ Statute), the primary source of international law comprises international conventions (e.g., treaties), “a general practice accepted as law,” and “the general principles of law recognized by civilized nations.” Considering that the ICJ juxtaposed investment treaties with the “general international law,” the ICJ’s reference to “general international law” may mean either customary international law or general principles of law (or both). In any case, international debates surrounding the doctrine of legitimate expectation mostly concern the doctrine’s legal status as customary international law.

investment treaties have increasingly (although not uniformly) considered this doctrine to have attained the status as the “minimum standard of treatment” under customary international law. Given that the ICJ’s two-sentence ruling on “legitimate expectation” in *Bolivia v. Chile* does not offer much analysis, the international debate on the legal status of “legitimate expectation” remains unresolved.³

This paper examines the contested doctrine of “legitimate expectation” squarely, and seeks to draw an answer to the long-lasting debate over the status of this doctrine as customary international law. For that, this paper first observes the historical development and the nature of the “legitimate expectation” doctrine, and then evaluates the conflicting lines of jurisprudence that arose out of a number of investment treaty arbitrations. Thereafter, this paper attempts to answer the longstanding question of whether the doctrine of legitimate expectation has now attained a status of customary international law. Finally, based on a systematic analysis of various investment treaties and numerous arbitral awards rendered by investment tribunals from the perspective of public international law, this paper tackles the old conundrum by providing a pragmatic guidance on ascertaining applicable legal tests for the “minimum standard of treatment” under contemporary customary international law.

II. HAS THE DOCTRINE OF “LEGITIMATE EXPECTATION” ATTAINED THE STATUS AS THE CUSTOMARY INTERNATIONAL LAW STANDARD OF MINIMUM TREATMENT?

A. Legitimate Expectation as Part of the Fair and Equitable Treatment

The doctrine of legitimate expectation stems from international investment law’s “fair and equitable treatment” (FET) standard.⁴ By definition, the FET standard requires host states to accord “fair and equitable treatment” to foreign investments within their territories.⁵ The

³ Tomáš Mach, *Legitimate Expectations as Part of the FET Standard: An Overview of a Doctrine Shaped by Arbitral Awards in Investor-State Claims*, 2018(1) ELTE L. J. 105, 121 (2018) (“The nature of the origin of the doctrine of legitimate expectations remains unclear in terms of the categorization of sources of norms (from the formal point of view) under international law.”).

⁴ See Aceris Law LLC, *Legitimate Expectations in Investment Arbitration*, ACERIS LAW (Oct. 14, 2018), <https://www.acerislaw.com/legitimate-expectations-in-investment-arbitration/> (“Today, arbitral tribunals consider almost unanimously that legitimate expectations form part of the FET standard contained in the BITs and should be interpreted within its limits.”); see also U.N. Conf. on Trade & Dev., *Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements II*, at 9, U.N. Doc. UNCTAD/DIAE/IA/2011/5 (2012), https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf [hereinafter *UNCTAD FET*].

⁵ Ying Zhu, *Fair and Equitable Treatment of Foreign Investors in an Era of Sustainable Development*, 58 NAT. RESOURCES J. 319, 321 (2018).

FET standard can be found in most existing investment treaties.⁶ Although with varying languages, most investment treaties require a host state to afford FET to investments from the other contracting state, in one way or the other.⁷ Naturally, breach of the FET standard has long been the most frequently referred basis for claims raised in investment arbitrations.⁸ Indeed, as the tribunal in *AWG Group Limited v. The Argentine Republic* described, the FET standard has “an almost ubiquitous presence” in investment arbitrations.⁹ The *AWG* tribunal further considered that the FET standard has been so widely and generally used and so flexibly applied, that this standard forms “a basic standard of treatment to be accorded to” foreign investors.¹⁰ In the tribunal’s view, the fundamental purpose of international investment law—promoting and protecting foreign investment—could not be achieved without the FET standard.¹¹ In this light, the *AWG* tribunal went as far as to state that “it is no exaggeration to

⁶ See *UNCTAD FET*, *supra* note 4, at xiii (“The obligation to accord FET to foreign investments appears in the great majority of international investment agreements (IIAs.)”); see also Theodore Kill, *Don’t Cross the Streams: Past and Present Overstatement of Customary International Law in Connection with Conventional Fair and Equitable Treatment Obligations*, 106 MICH. L. REV. 853, 854 (2008) (“Modern bilateral investment treaties (‘BITs’) almost uniformly feature a provision that requires the host state to provide ‘fair and equitable treatment’ to the investors and investments of the other treaty party.”).

⁷ Some tribunals found that, depending on the specific treaty language, investment treaties can extend FET obligations not only to investments that have been made, but also to investments in the process of being made. In *Nordzucker v. Poland*, the tribunal focused on the first sentence of Article 2(1) of the Germany-Poland BIT (i.e., “Each Contracting Party shall in its territory promote as far as possible investments by investors of the other Contracting Party and admit such investment in accordance with its respective laws.”), which was juxtaposed with the second sentence of Article 2(1) (i.e., “Investments that have been admitted in accordance with the respective law of one Contracting Party shall enjoy the protection of its treaty.”). The third sentence of Article 2(1) provided that “Each Contracting party shall in any case accord investments fair and equitable treatment.” The tribunal considered that the second sentence concerns “investments made” that are subject to all the provisions of the investment treaty, and that the first sentence concerns ‘investments in making’ subject to the conditions enshrined in that first sentence. Thus, any ‘investment in making’ must be admitted in accordance with the host state’s relevant laws as a matter of treaty obligation. At the same time, by virtue of the expression of the phrase “in any case,” the tribunal considered that the FET obligation in the third sentence also applies to “investments in making” as well as to “investments made.” See *Nordzucker v. Poland*, UNCITRAL, Partial Award (Jurisdiction), paras. 176-83 (Dec. 10, 2008).

⁸ See *Zhu*, *supra* note 5, at 321 (“Today, most bilateral and multilateral investment treaties provide FET clauses, and FET has been the most frequently invoked standard in investment arbitration.”); see also *UNCTAD FET*, *supra* note 4, at xiii (“Among the IIA protection elements, the FET standard has gained particular prominence, as it has been regularly invoked by claimants in investor-state dispute settlement (‘ISDS’) proceedings, with a considerable of success.”).

⁹ *AWG Group Ltd. v. The Arg. Republic*, UNCITRAL, Decision on Liab., para. 187 (July 30, 2010) [hereinafter *AWG Group Decision on Liab.*].

¹⁰ *Id.* para. 188.

¹¹ *Id.*

say that the obligation of a host state to accord fair and equitable treatment to foreign investors is the *Grundnorm* or basic norm of international investment law.”¹²

In interpreting the meaning of the FET, tribunals primarily referred to the ordinary meaning of the term “fair and equitable” pursuant to Article 31 of the Vienna Convention on the Law of Treaties. Thus, the tribunal in *MTD*, for example, considered that “[i]n their ordinary meaning, the terms ‘fair’ and ‘equitable’ [] means ‘just,’ ‘even-handed,’ ‘unbiased,’ ‘legitimate.’”¹³ Still, what constitutes such a “fair, equitable, just, even-handed, unbiased, and legitimate” treatment is highly fact-specific.¹⁴ Tribunals repeatedly stressed that “[a] judgment of what is fair and equitable cannot be reached in abstract; it must depend on the facts of the particular case”¹⁵ and that “the standard is to some extent a flexible one which must be adapted to the circumstances of each case.”¹⁶

In the course of applying the FET standard to the given facts of each case by tribunals, however, the FET standard gave birth to a somewhat concrete set of principles. Tribunals have found that the FET standard entails various obligations owed to foreign investors by host states, such as respecting foreign investors’ legitimate and reasonable expectations, requiring good faith conduct, refraining from taking arbitrary or discriminatory measures, and refraining from exercising coercion, transparency, and due process, to name a few.¹⁷ Among such obligations, the doctrine of respecting foreign investors’ legitimate expectations is widely regarded as the “basic touchstone of fair and equitable treatment.”¹⁸

¹² *Id.*

¹³ See, e.g., *MTD Equity Sdn. Bhd. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, para. 113 (May 25, 2004); *Azurix Corp. v. The Arg. Republic*, ICSID Case No. ARB/01/12, Award, para. 360 (July 14, 2006) [hereinafter *Azurix Award*]; *Siemens A.G. v. The Arg. Republic*, ICSID Case No. ARB/02/8, Award, para. 290 (Jan. 17, 2007) [hereinafter *Siemens Award*].

¹⁴ See *AWG Group Decision on Liab.*, *supra* note 9, para. 188 (“[FET’s] application is crucially dependent on an evaluation of the facts of each case.”).

¹⁵ *Mondev Int’l Ltd. v. U.S.*, ICSID Case No. ARB(AF)/99/2, Award, para. 118 (Oct. 11, 2002) [hereinafter *Mondev Award*].

¹⁶ *Waste Mgmt. Inc. v. United Mex. States (“No. 2”)*, ICSID Case No. ARB/(AF)/00/3, Award, para. 99 (Apr. 30, 2004) [hereinafter *Waste Mgmt. II Award*].

¹⁷ See, e.g., *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pak.*, ICSID Case No. ARB/03/29, Award, para. 178 (Aug. 27, 2009); *Sergei Paushok, CJSC Golden E. Co. and CJSC Vostokneftegaz Co. v. Gov’t of Mong.*, Award on Jurisdiction and Liab., para. 253 (Apr. 28, 2011); *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, para. 420 (Oct. 31, 2012); *Mobil Exploration and Dev. Inc. Suc. Arg. and Mobil Arg. S.A. v. Arg. Republic*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liab., para. 914 (Apr. 10, 2013) [hereinafter *Mobil Arg. Decision on Jurisdiction and Liab.*]; *Jan Oostergetel v. The Slovak Republic*, UNCITRAL, Final Award, para. 221 (Apr. 23, 2012).

¹⁸ The tribunal in *El Paso v. Arg.* explicitly endorsed the claimant’s submission that the basic touchstone of FET is to be found in legitimate and reasonable expectations of

Thus, an FET standard “requires the Contracting Parties to provide to international investments treatment that does not affect the *basic expectations* that were taken into account by the foreign investor to make the investment.”¹⁹ Stated differently, an FET obligation may be breached by way of “frustrating the expectations that the investor may have legitimately taken into account when making the investment.”²⁰ A foreign investor may derive legitimate expectations either from specific commitments made to it by the host state with respect to the investment, or from general rules that are put in place with a specific aim to induce foreign investments on which the foreign investor reasonably relied in making the investment.²¹

Most investment tribunals nowadays consider that the doctrine of legitimate expectation constitutes an important, if not the most important, element of the FET standard.²² Regardless, being a byproduct of the FET standard’s application to specific facts, the doctrine of legitimate expectation should be examined and applied on a case-by-case basis. For example, the tribunal in *El Paso v. Argentina* considered that “FET is linked to the objective reasonable legitimate expectations of the investors and that these have to be evaluated considering all circumstances.”²³ In principle, therefore, a tribunal should examine whether it would be fair and equitable to honor the specific legitimate expectation that a foreign investor had in connection with its investment in the host state. This examination should inevitably involve evaluation of all pertinent facts.

However, investment tribunals are increasingly and mechanistically applying the doctrine of legitimate expectation without going through the process of interpreting and applying the FET clause to the specific facts at hand.²⁴ Despite there being disagreements,²⁵ several tribunals went as far as

investors. *See El Paso Energy International Company v. Arg. Republic*, ICSID Case No. ARB/03/15, Award, para. 339 (Oct. 31, 2011) [hereinafter *El Paso Award*]. *See also Mobil Arg. Decision on Jurisdiction and Liab.*, *supra* note 17, para. 914.

¹⁹ *Técnicas Medioambientales Tecmed, S.A. v. Mexico*, ICSID Case No. ARB (AF)/002/2, Award, para. 154 (May 2003) (emphasis added).

²⁰ *Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award, para. 256 (Oct. 9, 2014) (“The Tribunal will first consider the alleged breach of the FET standard. In the Tribunal’s opinion, this standard may be breached by frustrating the expectations that the investor may have legitimately taken into account when making the investment.”).

²¹ *See Isolux Infrastructure Netherlands, BV v. Kingdom of Spain*, SCC Case No. V2013/153, Award, para. 775 (July 12, 2016).

²² *See, e.g., EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, para. 216 (Oct. 8, 2009) (“The Tribunal shares the view expressed by other tribunals that one of the major components of the FET standard is the parties’ legitimate and reasonable expectations with respect to the investment they have made.”).

²³ *El Paso Award*, *supra* note 18, para. 364. *See also Inversión y Gestión de Bienes, IGB, S.L. and IGB18 Las Rozas, S.L. v. Kingdom of Spain*, ICSID Case No. ARB/12/17, Award, para. 138 (Aug. 14, 2015).

²⁴ Haneul Jung, *Empirical Analysis of Rules of Extra-Textual Interpretation based on the relevant WTO Jurisprudence*, 1 TRADE LAW & POL’Y REV. 1, 13 n.40 (2021) (S. Kor.)

to consider that the doctrine of legitimate expectation is not merely a byproduct of applying the FET standard to particular facts of the case, but is rather an indispensable component of the FET standard itself.²⁶

B. FET Standard: An “Autonomous Treaty Obligation” or a “Customary International Law”?

1. Historical Development

Most investment treaties that incorporate the FET standard use expressions such as “fair and equitable treatment” to give effect to the FET standard as a matter of autonomous treaty obligation.²⁷ Meanwhile some treaties adopt the FET standard by way of making reference to the customary international law principle of “minimum standard of treatment” (MST). The most representative example in this regard can be found in Article 1105 (entitled “Minimum Standard of Treatment”) of the North American Free Trade Agreement (NAFTA).

Originally, Article 1105 of NAFTA provided, “[e]ach Party shall

(available in Korean), <https://disputecase.kr/476?category=900436>.

²⁵ See *AWG Group Decision on Liab.*, *supra* note 9, para. 3 (“The assertion that fair and equitable treatment includes an obligation to satisfy or not to frustrate the legitimate expectations of the investor at the time of his/her investment does not correspond, in any language, to the ordinary meaning to be given to the term ‘fair and equitable.’”).

²⁶ For example, the tribunal in *Bau v. Thailand* rejected as being “unacceptable” the respondent’s argument that “the obligations of the host state towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations that the investors may have or claim to have.” The tribunal then went on to find that “‘legitimate expectations’ come within FET’s parameters.” See Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau Ag (In Liquidation) v. Kingdom of Thailand, UNCITRAL, Award, para. 11.7 (July 1, 2009).

²⁷ See *UNCTAD FET*, *supra* note 4, at xiv (“Historically, the FET standard—regardless of how it is expressed—came into existence as an expression of the minimum standard of treatment. However, where the FET obligation is not expressly linked textually to the minimum standard of treatment of aliens, many tribunals have interpreted it as an autonomous, or self-standing one. Instead of deriving the content of the standard from its original source (customary international law), these tribunals chose to focus on the literal meaning of the provision itself.”). It is particularly so in those BITs where the FET provisions are simply stated without reference to other sources (e.g., international law including customary international law). See, e.g., Article 3(2) of the 2003 Indian Model BIT (“Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment in the territory of the other Contracting Party.”); Article 2(2) of the 2008 German Model BIT (“Each Contracting State shall in its territory in every case accord investments by investors of the other Contracting State fair and equitable treatment as well as full protection under this Treaty.”); Article 3(1) of the China-Zimbabwe BIT (1996) (“Investments and activities with investments of investors of either Contracting Party shall be accorded fair and equitable treatment and shall enjoy protection in the territory of the other Contracting Party.”); Article 4(1) of the China-Switzerland BIT (2009) (“Investments and returns of investors of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.”).

accord to investments of investors of another Party treatment in accordance with *international law*, including *fair and equitable treatment* and full protection and security.”²⁸ Article 1105 of NAFTA was soon revised following three arbitral awards (i.e., *Metalclad*,²⁹ *S.D. Myers*,³⁰ and *Pope & Talbot*³¹) that basically interpreted Article 1105 of NAFTA as incorporating the autonomous FET standard. Although the facts of these cases were all substantially different,³² each of these tribunals found that the scope of Article 1105 was broad, and thus that its protection of foreign investors had been breached.³³ The three tribunals found that “fair and equitable treatment” in Article 1105 of NAFTA constituted an independent standard well above the historical minimum standard under customary international law.³⁴

On 31 July 2001, in the midst of the *Pope & Talbot* arbitration, the Free Trade Commission (FTC) established under the auspice of NAFTA adopted a binding interpretive statement—referred to as “Notes of Interpretation” (Notes)—on Article 1105 of NAFTA. The Notes provide, in relevant part, that: “Article 1105(1) prescribes the *customary international law* minimum standard of treatment of aliens as the minimum standard of treatment.”³⁵ Subsequently, it further provides that the concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to, or beyond, the treatment required by customary international law to comply with the MST.³⁶ Some commentators criticize that the FTC’s authoritative interpretation effectively amends NAFTA text; they argue that any textual amendment that did not go through the formal

²⁸ North American Free Trade Agreement, Can.-Mex.-U.S., art. 1105, Dec. 17, 1992, 32 I.L.M. 289 (1993) (emphasis added).

²⁹ See *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000).

³⁰ See *S.D. Myers Inc. v. Government of Canada*, UNCITRAL, Partial Award (Nov. 13, 2000).

³¹ See *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award on the Merits of Phase 2 (Apr. 10, 2001).

³² Michelle E. Gray, *Broadening NAFTA Article 1105 Protections: A Small Price for International Investment*, 48 HOUS. L. REV. 383, 397 (2011) (noting that “[t]he *Metalclad* arbitration concerned a disputed endeavor by Metalclad Corporation to develop and operate a waste disposal facility in Mexico. The *S.D. Myers* arbitration involved an American company located in Canada that was practically rendered obsolete because of a ban on the exportation of a certain chemical substance. And the *Pope & Talbot* arbitration originated from a dispute regarding Canada’s implementation of the Canada-U.S. Softwood Lumber Agreement, which restrained the export of softwood lumber from certain Canadian provinces”).

³³ *Id.*

³⁴ Steven R. Ratner, *Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law*, 102 AM. J. INT’L L. 475, 514 (2008).

³⁵ NAFTA FTC, Notes of Interpretation of Certain Chapter 11 Provisions, § B, July 31, 2001 (emphasis added).

³⁶ *Id.*

treaty amendment process is invalid.³⁷ In practice, however, investment tribunals have generally respected the FTC's interpretive authority.³⁸ For example, the tribunal in *Mondev v. U.S.A.* held that the Notes had resolved that Article 1105 refers to customary international law and not any autonomous treaty obligation.³⁹

In fact, the Notes expressly construed that the FET provision in Article 1105 of NAFTA requires only "the customary international law minimum standard of treatment and does not require any standard of treatment that goes beyond that."⁴⁰ The difficulty with this line of thinking, however, is that it presupposes the existence of a general consensus as to what constitutes the MST of aliens under customary international law.⁴¹ Unfortunately, the reality is that the MST standard is highly indeterminate, lacks clearly defined content, and requires interpretation.⁴² Even the Notes that expressly limited the scope of the FET standard enshrined in Article 1105 of NAFTA to the customary international law standard of MST failed to definitively resolve the riddle. Many investment tribunals continued to find that the FET as confined to customary international law's MST standard still provides the foreign investors protections essentially equivalent to the autonomous FET standard.

2. Conflicting Jurisprudences

There is a widely shared understanding that the original principles of the MST standard as part of customary international law are captured by the 1926 arbitral award in *Neer (U.S.A.) v. Mexico*.⁴³ In the *Neer* arbitration, the United States claimed that Mexico had breached its international obligation

³⁷ Jason Webb Yackee, *Controlling the International Investment Law Agency*, 53 HARV. INT'L L.J. 391, 441 (2012).

³⁸ *Id.*

³⁹ Ratner, *supra* note 34, at 514. *See also* *Mondev Award*, *supra* note 15, paras. 121-22 ("[The FTC] makes it clear that Article 1105(1) refers to a standard existing under customary international law . . . [T]he FTC interpretation makes it clear that in Article 1105(1) the terms 'fair and equitable treatment' and 'full protection and security' are, in the view of the NAFTA Parties, references to existing elements of the customary international law standard and are not intended to add novel elements to that standard.").

⁴⁰ Valentina S. Vadi, *Towards a New Dialectics: Pharmaceutical Patents, Public Health and Foreign Direct Investments*, 5 NYU J. INTELL. PROP. & ENT. L. 113, 167 (2015).

⁴¹ *UNCTAD FET*, *supra* note 4, at 28.

⁴² Nevertheless, from the perspective of host states, linking the FET standard to the MST of aliens may be seen as a progressive development, given that this will likely induce tribunals to apply higher thresholds to find a breach, as compared with the so-called autonomous FET standard. *Id.* at 28-29.

⁴³ L. F. H. Neer & Pauline Neer v. United Mexican States, 4 Rep. Int'l Arb. Awards 60, 60-66 (Oct. 15, 1926) [hereinafter *Neer Award*]. The *Neer* case is generally considered to constitute the starting point for the international discussion of the standard of treatment for aliens, although *Neer* did not involve the concept of FET in the context of an investor-state dispute. *See* Christoph Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6(3) J. WORLD INV. & TRADE 357, 368 (2005).

to accord the MST to the U.S. citizens due to the Mexican authorities' "unwarrantable lack of diligence or an unwarrantable lack of intelligent investigation" into the murder of an American, Paul Neer, on Mexican soil.⁴⁴ In rejecting the United States' MST claim, the General Claims Commission that adjudicated the matter (*Neer* Commission) applied the following legal test to determine violation of an MST obligation: "the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."⁴⁵ In accordance with the approach of the *Neer* Commission, the MST was long deemed to protect foreign investors "only in instances of "egregious and shocking" conduct or "manifestly unfair or inequitable conduct."⁴⁶

Yet, "the content of the minimum standard should not be rigidly interpreted, and it should reflect evolving international customary law."⁴⁷ The customary international law standard of MST must have evolved since 1926. One of the most significant evolutions in international law in the past century has been its increasing focus on the rights of individuals, leading to "major international conventions on human rights as well as to the development of rules of customary law in this field."⁴⁸ Thus it would be reasonable to assume that such an overall evolution must have also led to the improvement of the MST, applicable to nationals and foreigners alike.⁴⁹ In this light, many tribunals have ruled that the MST standard of today offers broader protection than what the *Neer* Commission found back in 1926.⁵⁰ Indeed, there is a line of arbitral findings that the contemporary

⁴⁴ *Neer* Award, *supra* note 43, at 61.

⁴⁵ *Id.* at 60-61. Note that the *Neer* Commission laid out this standard through a discussion on "denial of justice". See Aceris Law LLC, *Denial of Justice in Investment Arbitration – Claims Commissions, L. Fay H. Neer and Pauline Neer (USA) V. United Mexican States*, ACERIS LAW (Aug. 5, 2017), <https://www.acerislaw.com/denial-of-justice-in-investment-arbitration/>.

⁴⁶ *Vadi*, *supra* note 40, at 167.

⁴⁷ *Int'l Thunderbird Gaming Corp. v. The United Mexican States*, UNCITRAL, Arbitral Award, para. 194 (Jan. 26, 2006).

⁴⁸ *Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Award, ¶ 201 (Mar. 31, 2010) [hereinafter *Merrill Award*].

⁴⁹ *Id.*

⁵⁰ See, e.g., *id.* para. 213 ("[T]he applicable minimum standard of treatment of investors is found in customary international law and that, except for cases of safety and due process, today's minimum standard is broader than that defined in the *Neer* case and its progeny."); *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, para. 567 (Sept. 22, 2014) [hereinafter *Gold Award*] ("As held by the tribunal in *Mondev* when disregarding the *Neer* standard as controlling today, 'both the substantive and procedural rights of the individual in international law have undergone considerable developments.'"); *Anglo American PLC v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/14/1, Award, para. 442 (Jan. 18, 2019) [hereinafter *Anglo Award*]; *CC/Devas*

MST standard is no longer limited to conduct by host states that are “outrageous” or “in bad faith” or “willful neglect of duty,” and that the modern MST involves a more serious measure of protection,⁵¹ although a number of tribunals effectively maintained the *Neer* standard by imposing the burden of proof on claimants to demonstrate the precise content of the MST standard under contemporary customary international law.⁵²

That being so, tribunals and commentators have not been able to reach a consensus on the relationship between the FET standard and the MST standard. Common sense signals that the customary international law standard of MST establishes a “floor” (and certainly not the “ceiling”) to the FET standard even when the relevant investment treaty does not explicitly confine the scope of the FET obligation to customary international law. Although questions of the FET standard’s breach must be examined on a case-by-case basis, the MST standard will almost always (if not always) constitute the “minimum” or “floor” for the FET standard.⁵³ To many tribunals, the FET and MST standards were *distinguishable* both legally and conceptually.⁵⁴ A number of tribunals have thus explicitly distinguished the FET standard as an autonomous treaty obligation from the customary international law standard of MST, with the FET standard encompassing the MST standard but also providing protections beyond the MST standard.⁵⁵

(Mauritius) Ltd., *Devas Employees Mauritius Private Limited., and Telecom Devas Mauritius Limited. v. The Republic of India*, PCA Case No. 2013-09, Award on Jurisdiction and Merits, para. 457 (July 25, 2016) [hereinafter *Devas Award on Jurisdiction and Merits*]; *Waste Mgmt. II Award*, *supra* note 16, paras. 92-3, 98; *Mobil Arg. Decision on Jurisdiction and Liab.*, *supra* note 17, para. 910.

⁵¹ See, e.g., *Bilcon of Delaware et al. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, para. 433 (Mar. 17, 2015); *Chemtura Corporation v. Government of Canada*, UNCITRAL, Award, para. 215 (Aug. 2, 2010) [hereinafter *Chemtura Award*]; *Waste Mgmt. II Award*, *supra* note 16, para. 93; *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (redacted version), para. 296 (Sept. 18, 2009) [hereinafter *Cargill Award*]; *ADF Group Inc. v. United States of America*, ICSID Case No. ARB (AF)/00/1, Award, paras. 179-81 (Jan. 9, 2003) [hereinafter *ADF Award*].

⁵² See, e.g., *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, paras. 22, 614-27 (June 8, 2009) [hereinafter *Glamis Award*].

⁵³ See, e.g., *Quiborax S.A., Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, para. 291 (Sept. 16, 2015); *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, para. 258 (May 22, 2007); *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, para. 253 (Jan. 14, 2010); *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, paras. 383-84 (Nov. 3, 2015).

⁵⁴ See, e.g., *Mondev Award*, *supra* note 15, para. 116. It appears that the tribunal in *Mondev* attempted to draw an interpretative guidance about the “fair and equitable treatment” in the context of the contemporary international law as developed since *Neer*.

⁵⁵ See, e.g., *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Award, para. 425 (Sept. 6, 2019) (“(FET) is mentioned expressly as a separate obligation The express inclusion of this commitment

At the same time, however, there is also a whole host of cases in which investment tribunals held that the autonomous FET standard and the contemporary MST standard are essentially the same. To be clear, the relevant tribunals' views in this regard are also slightly diverging from one another. For example, some tribunals such as the ones in *Genin v. Estonia*⁵⁶ or *Siemens v. Argentina*⁵⁷ basically considered the FET and MST to be *legally the same*, while other tribunals such as the ones in *Saluka v. Czech Republic*⁵⁸ or *Azurix v. Argentina*⁵⁹ considered that they are *legally*

. . . also clarifies that its standard is autonomous, and beyond the MST.”); Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, para. 807 (Nov. 10, 2017) (“[T]he Tribunal considers the absence of any reference to international law . . . as a strong indication that the Contracting Parties did not intend to limit the FET standard contained therein to the minimum standard.”); *Oko Pankki Oyj, VTB Bank (Deutschland) AG, and Sampo Bank Plc v. The Republic of Estonia*, ICSID Case No. ARB/04/6, Award, paras. 230, 238 (Nov. 19, 2007) (“[T]he Tribunal considers that the FET standard in the Estonia-Germany BIT bears an autonomous meaning and that it is not to be assimilated to the lesser minimum standard of treatment under customary international law. . . . Whilst, in the Tribunal’s view, its meaning significantly overlaps with the minimum standard under customary international law, this FET standard clearly provides a greater protection for the foreign investor.”); *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, para. 530 (Apr. 4, 2016) (“The Tribunal is of the opinion that the FET standard embodied in the Treaty cannot—by virtue of that formulation or otherwise—be equated to the ‘international minimum standard of treatment’ under customary international law, but rather constitutes an autonomous treaty standard.”); *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, para. 384 (Nov. 3, 2015) (“Breach of the minimum standard of treatment thus requires more than a minor derogation from the ideal standard of perfectly fair and equitable treatment.”); *Deutsche Telekom AG v. The Republic of India*, PCA Case No. 2014-10, Interim Award, para. 331 (Dec. 13, 2017) (“The Tribunal observes that the BIT does not refer to ‘international minimum standard’ or similar formulations, unlike other treaties. The BIT simply speaks of ‘fair and equitable treatment.’ The question is thus what ‘fair and equitable’ means.”).

⁵⁶ *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, para. 367 (June 25, 2001) (“Under international law [fair and equitable treatment] is generally understood to ‘provide a basic and general standard which is detached from the host State’s domestic law.’ While the exact content of this standard is not clear, the Tribunal understands it to require an “international minimum standard” that is separate from domestic law, but that is, indeed, a minimum standard. Acts that would violate this minimum standard would include acts showing a willful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith.”).

⁵⁷ *Siemens Award*, *supra* note 13, ¶¶ 291-300.

⁵⁸ *Saluka Inv. B.V. v. Czech Republic*, UNCITRAL, Partial Award, paras. 286-95 (Mar. 17, 2006) [hereinafter *Saluka Partial Award*].

⁵⁹ *Azurix Award*, *supra* note 13, ¶ 361 (“The last sentence ensures that, whichever content is attributed to the other two standards, the treatment accorded to investment will be no less than required by international law. The clause, as drafted, permits to interpret fair and equitable treatment and full protection and security as higher standards than required by international law. The purpose of [this] sentence is to set a floor, not a ceiling, in order to avoid a possible interpretation of these standards below what is required by international law. While this conclusion results from the textual analysis of this provision, the Tribunal

distinctive.⁶⁰ At any rate, even the tribunals that considered the autonomous FET standard and the customary MST standard to be legally distinctive from each other still considered that the “actual content” of the FET standard is not materially different from the “content” of the MST under customary international law. The tribunal in *Rosoro Mining v. Venezuela* even found that the MST “has developed and today is *indistinguishable* from the FET standard and grants investors an equivalent level of protection.”⁶¹ The tribunal in *Rumeli v. Kazakhstan* went further by finding that the perceived difference between the FET standard and the MST standard “is more theoretical than real.”⁶² Several other arbitral tribunals have also considered that the actual content of the FET standard is not different from the content of the MST as it evolved under customary international law.⁶³

The tribunals that endorse the liberal scope of the customary international law standard of MST tend to find the driver of the MST’s evolution from the autonomous FET standard itself. As early as 2002, the tribunal in *Pope v. Canada* considered that relevant state practice demonstrates the evolution of the MST standard as customary international law.⁶⁴ The tribunal in *Pope v. Canada* particularly noted that the number of investment treaties then effective was in excess of 1,800 already and that the relevant state practice in the field of international investment law is “now represented by those treaties.”⁶⁵ The tribunal in *OAo Tatneft v. Ukraine* likewise considered that “[e]ven though fair and equitable treatment is not always regarded as an integral part of customary law, it

does not consider that it is of material significance for its application of the standard of fair and equitable treatment to the facts of the case. As it will be explained below, the minimum requirement to satisfy this standard has evolved and the Tribunal considers that its content is substantially similar whether the terms are interpreted in their ordinary meaning, as required by the Vienna Convention, or in accordance with customary international law.”)

⁶⁰ See *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, ¶ 589 (July 24, 2008) [hereinafter *Biwater Award*].

⁶¹ *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, ¶ 520 (Aug. 22, 2016) (emphasis added).

⁶² *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, ¶ 611 (July 29, 2008).

⁶³ See, e.g., *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award ¶ 419 (Oct. 31, 2012); *EDF Int’l S.A., SAUR Int’l S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, ¶ 999 (June 11, 2012); *Biwater Award*, *supra* note 60, ¶ 592; *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, ¶ 337 (Aug. 18, 2008); *Cargill, Inc. v. Republic of Poland*, ICSID Case No. ARB(AF)/04/2, Final Award, ¶ 453 (Feb. 29, 2008); *CMS Gas Transmission Co. v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award, ¶ 284 (May 12, 2005) [hereinafter *CMS Award*].

⁶⁴ *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award in Respect of Damages, ¶ 59 (May 31, 2002) [hereinafter *Pope Award in Respect of Damages*].

⁶⁵ *Id.* ¶ 62.

reflects the evolution that the very rules of customary law have experienced in the light of current treaties and jurisprudence.”⁶⁶

In addition, the tribunal in *ADF Group v. U.S.A.* held that judicial or arbitral case laws could also form the basis for the evolving customary international law standard of the MST.⁶⁷ Perhaps the tribunal in the 2016 case of *Murphy v. Ecuador* most aptly summarized the underlying rationale by the investment tribunals that foster this line of reasoning:

The international minimum standard and the treaty standard continue to influence each other, and, in the view of the Tribunal, these standards are increasingly aligned. This view is reflected in the *jurisprudence constante* not only of NAFTA caselaw, as discussed above, but also in the arbitral caselaw associated with bilateral investment treaties. Some tribunals have gone so far as to say that the standards are essentially the same. The Tribunal finds that there is no material difference between the customary international law standard and the FET standard under the present BIT.⁶⁸

As a corollary of the foregoing approaches, the doctrine of legitimate expectation, which is the “basic touchstone” and the key component of the FET standard, has also been found to constitute a part of the customary international law principle of MST by the relevant tribunals.⁶⁹

In sum, contrary to the ICJ’s ruling in *Bolivia v. Chile*, many arbitral

⁶⁶ OAO Tatneft v. Ukraine, PCA Case No. 2008-8, Award on the Merits, para. 481 (July 29, 2014) [hereinafter *OAO Award on the Merits*].

⁶⁷ ADF Award, *supra* note 51, para. 184.

⁶⁸ Murphy Exploration & Production Company International v. Republic of Ecuador, PCA Case No. 2012-16, Partial Final Award, para. 208 (May 6, 2016).

⁶⁹ See, e.g., The Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3, Award, para. 197 (May 6, 2013) (“The Tribunal . . . sees no benefit in engaging in an abstract debate as to whether Article 3(1), and in particular its reference to ‘fair and equitable treatment,’ was or was not intended by the Parties simply to incorporate the ‘minimum standard’ under customary international law, still less to engage in any debate as to what that ‘minimum standard’ should now be understood to be. It prefers instead . . . to follow the ordinary meaning of the words used, in their context, and in the light of the object and purpose of the BIT. In doing so, it will take into particular account the two general elements that other tribunals have found come into play in connection with claims to ‘fair and equitable treatment,’ namely the way in which the foreign investor or the foreign investment have been treated by the organs of the host State, measured against the expectations legitimately entertained by the foreign investor in making that investment.”); *Waste Mgmt. II Award*, *supra* note 16, para. 98 (“[T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant . . . In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.”); *Siemens Award*, *supra* note 13, para. 299 (“[T]o the extent that it has been an issue, the tribunals concur in that customary international law has evolved . . . That tribunal also understood that the conduct of the State has to be below international standards . . . and that . . . the current standard includes the frustration of expectations that the investor may have legitimately taken into account when it made the investment.”).

tribunals considered that the FET standard, along with its “basic touchstone” that is the doctrine of legitimate expectation, has now attained the status of customary international law. This view is based on the state practices as supposedly evidenced by thousands of investment treaties enshrining the autonomous FET standard, as well as by the *jurisprudence constante* established through the very line of arbitral awards endorsing the liberal scope of the MST standard.⁷⁰

3. Whether the Doctrine of Legitimate Expectation Falls Within the Scope of the Customary International Law Standard of Minimum Treatment

As an initial matter, the notion that the scope of the contemporary MST covers the doctrine of legitimate expectation as allegedly evinced by the *jurisprudence constante* seems highly questionable. While decisions by international tribunals can serve only as “subsidiary means for the determination of rules of law” and not as international law itself,⁷¹ (as described above) conflicting lines of jurisprudence adopted by several investment tribunals, as well as by the ICJ in *Bolivia v. Chile*, exist.

Moreover, another notion that the sheer number of investment treaties codifying the FET standard *ipso facto* represents the relevant “state practice” (or *opinio juris*, for that matter) also appears to be questionable. For starters, the investment tribunals that considered the MST standard indistinguishable from the FET standard did not delve much deeper than offering cursory references to the prevalence of the investment treaties codifying the FET standard.⁷² In contrast, the ICJ in *Bolivia v. Chile* summarily dismissed Bolivia’s position that the FET standard (along with

⁷⁰ In addition, at least one tribunal indicated that the fact that the virtually identical role is served by the FET standard and by the MST standard within the context of international investment law could support the notion that their contents must be equivalent. *See El Paso Award, supra* note 18, para. 336 (“[I]t is the view of the Tribunal that the position according to which FET is equivalent to the international minimum standard is more in line with the evolution of investment law and international law and with the identical role assigned to FET and to the international minimum standard. The Tribunal wishes to emphasize what is, in its view, the specific role played by both the general international minimum standard and the FET standard as found in BITs. The role of these similar standards is to ensure that the treatment of foreign investments, which are protected by the national treatment and the most-favored investors’ clauses, do not fall below a certain minimum, in case the two mentioned standards do not live up to that minimum.”). This particular reasoning, however, appears to be both backward and circular in nature, if cited specifically, to endorse the notion that the MST and FET standards are equivalent.

⁷¹ *See* Statute of International Court of Justice art. 38(1)(d), June 26, 1945, 59 Stat. 1055, 1 U.N.T.S. 993 [hereinafter *ICJ Statute*] (“The Court, whose function is to decide in accordance with international law . . . shall apply . . . judicial decisions . . . as subsidiary means for the determination of rules of law.”).

⁷² *See, e.g.,* Pope Award in Respect of Damages, *supra* note 64, para. 62; ADF Award, *supra* note 51, para. 184; OAO Award on the Merits, *supra* note 66, para. 481; Mondev Award, *supra* note 15, paras. 116-17; Chemtura Award, *supra* note 51, para. 121; Merrill Award, *supra* note 48, para. 193.

the doctrine of legitimate expectation) has now attained the status of customary international law by virtue of the prevalence of the investment treaties codifying the FET standard.⁷³ That much is clear. The ICJ did not provide any elaborated reasoning to further support its finding. Still, the ICJ's underlying rationale can be unveiled through the specific sources of law that it applies under the ICJ Statute, other generally accepted principles of international law, and its previous judgments.

It is well-established that a customary international law will emerge only where there is a widely shared “state practice” accompanied by *opinio juris*, or an understanding that such practice is required as a matter of law.⁷⁴ Indeed, Article 38(1)(b) of the ICJ Statute clarifies that an international custom constituting international law is evidenced by “a general practice accepted as law.”⁷⁵ This fundamental requirement applies with equal force to investment-treaty arbitrations both as a matter of international law and practice. In *United Parcel Service of America Inc. v. Canada*, the tribunal confirmed that “[t]o establish a rule of customary international law two requirements must be met; consistent state practice and an understanding that that practice is required by law.”⁷⁶ As the *U.P.S.* tribunal specifically observed, the ICJ in *Libya v. Malta* stressed that “[i]t is of course axiomatic . . . that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States.”⁷⁷ According to the *U.P.S.* tribunal:

[M]ultilateral treaties may have an important role in recording and defining rules deriving from custom, or indeed in developing them. That statement of principle demonstrates that the obligations

⁷³ It is noteworthy that the ICJ judgement in *Bolivia v. Chile* does not categorically find that there is no such a doctrine as the “legitimate expectation” under international law. See Amy Sander, *Obligation to Negotiate and Consult: Worthwhile Tool or Exercise in Futility?*, 113 AM. SOC'Y INT'L L. PROC. 35, 42 (2019). Instead, the ICJ in *Bolivia v. Chile* considered that arbitral awards upholding the doctrine based on the prevalence of the treaty clauses providing for fair and equitable treatment do not turn this doctrine into an obligation under customary (general) international law.

⁷⁴ Int'l Law Comm'n, Draft Conclusions on Identification of Customary International Law, with Commentaries, U.N. Doc. A/73/10, at 122-23 (2018) (“[T]he two constituent elements of customary international law [are]: a general practice and its acceptance as law (the latter often referred to as *opinio juris*).”). As two constituent elements of customary international law, a general practice refers to the practice of state that contributes to the formation, or expression, of rules of customary international law, and *opinio juris* means that the practice in question must be undertaken with a sense of legal right or obligation. *Id.* at 130-38.

⁷⁵ See ICJ Statute, *supra* note 71, art. 38(1)(b) (“The Court, whose function is to decide in accordance with international law . . . shall apply . . . international custom, as evidence of a general practice accepted as law.”).

⁷⁶ *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on Jurisdiction, ¶ 84 (Nov. 22, 2002).

⁷⁷ *Id.* (quoting Case Concerning the Continental Shelf (*Libya v. Malta*), Judgement, 1985 I.C.J. Rep. 13, 29-30, para. 27 (June 3)).

imposed by customary international law may and do evolve. The law of state responsibility of the 1920s may well have been superseded by subsequent developments. It would be remarkable were that not so. But relevant practice and the related understandings must still be assembled in support of a claimed rule of customary international law.⁷⁸

A treaty obligation can “no doubt” become a part of customary international law,⁷⁹ and states’ manifested acceptance of certain legal obligations by way of signing or ratifying relevant treaties can also provide evidence of certain *opinio juris*.⁸⁰ Nevertheless, while they may provide evidence of legally binding custom, treaties do not create customary international law *per se*.⁸¹ The fact that states have prevalently concluded such treaties certainly does not *per se* establish that any obligation codified therein (e.g., FET standard) arises out of a sense of legal obligation apart from the autonomous treaty obligation. Quite the contrary could be true because states may have concluded investment treaties containing the FET standard due to their belief that no such legal obligation exists on its own and thus they need to conclude a treaty to give legal effect to the FET standard. It follows that evidence of legally binding custom including those supposedly reflected by investment treaties must be weighed against other relevant evidence.

Evidence contravening the particular notion that the MST standard and FET standard are now essentially the same are ample and robust. As noted by the tribunal in *Amco v. Indonesia*, the members of the United Nations (U.N.) have rejected such presumptions as early as 1974.⁸² Indeed, Article 2 of the U.N. General Assembly Resolution No. 3281 (XXIX), entitled “Charter of Economic Rights and Duties of States,” provides in unequivocal terms that every state is entitled to “freely exercise full permanent sovereignty” in regards to its economic activities, and that “[n]o state shall be compelled to grant preferential treatment to foreign investment.”⁸³ Furthermore, the U.N. members confirmed that foreign

⁷⁸ *Id.*

⁷⁹ See North Sea Continental Shelf (Ger. v. Den. & Neth.), Judgement, 1969 I.C.J. Rep. 3, 41, ¶ 71 (Feb. 28, 1969); BRIAN D. LEPARD, CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS 191 (2010).

⁸⁰ LEPARD, *supra* note 79, at 191-94.

⁸¹ *Id.* at 191.

⁸² *Amco Asia Corp. v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Ad Hoc Committee Decision on the Application for Annulment, ¶ 60 (May 16, 1986).

⁸³ See G.A. Res. 3281(XXIX), Charter of Economic Rights and Duties of States, 29 U.N. GAOR Supp. No. 31, at 50-55, U.N. Doc. A/9631 (Dec. 12, 1974) (emphasis added):

Article 2

1. Every State has and shall *freely exercise full permanent sovereignty*, including possession, use and disposal, *over all its wealth, natural resources and*

investors including transnational corporations have no right to intervene in the internal affairs of a host state, and with respect to any ‘taking,’ any controversy “shall be settled under the domestic law of the nationalizing State and by its tribunals” absent *lex specialis* allowing or requiring otherwise.⁸⁴

Even enthusiastic supporters of the notion that *opinio juris* can be confirmed through signing or ratifying relevant treaties concur that “[U.N. General Assembly resolutions] can be strong evidence” of the views of U.N. member states, which, in turn, serve as “significant evidence of *opinio juris*” expressed by the U.N. members on pertinent topics.⁸⁵ The U.N. General Assembly Resolution No. 3281 unequivocally indicates that states’ *opinio juris* in respect of “Economic Rights and Duties of States” does not cover the understanding that the FET standard has attained customary international law status. Moreover, there is no material evidence (other than the perceived *lex specialis* that is investment treaties) supporting that the understanding enshrined in the U.N. General Assembly Resolution No. 3281 has evolved or otherwise changed since 1974.

Furthermore, the MST is *not* a standard that applies to foreign investments exclusively. Instead, the MST standard rather broadly concerns overall individual rights, including more fundamental rights such as human rights. In light of their “full” and “permanent” economic sovereignty, states must enjoy broader discretion when it comes to their treatment of foreign

economic activities.

2. Each State has the right:

- (a) To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. *No State shall be compelled to grant preferential treatment to foreign investment;*
- (b) To regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies. Transnational corporations shall not intervene in the internal affairs of a host State. Every State should, with full regard for its sovereign rights, co-operate with other States in the exercise of the right set forth in this subparagraph;
- (c) To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, *it shall be settled under the domestic law of the nationalizing State and by its tribunals*, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.

⁸⁴ *Id.*

⁸⁵ LEPARD, *supra* note 79, at 208-09.

investments as compared to their treatment of more inherent rights of individuals such as human rights.⁸⁶ In other words, a distinction might have to be drawn even within the MST standard between a treatment affecting a foreigner's fundamental rights and a treatment affecting a foreigner's investment rights. Yet, it appears that this important distinction has not been properly reflected on in the context of investor-state disputes. Notably, aside from their reliance on *lex specialis*, which is investment treaties, the investment tribunals that basically equated the MST standard with the FET standard have not been able to point to any general and actual "practice" of states voluntarily affording the FET standard to foreign investors. In fact, the tribunals that support the view that the MST standard has evolved to offer virtually identical protection with that of the autonomous FET standard have not presented "any evidence for their assumption that the [investment protection treaty] network has contributed, in fact, to the generation of customary law rules that could be taken into account within the concept of the evolved minimum standard."⁸⁷ Quite the contrary is true as, for example, the tribunal in *Grand River v. U.S.A.* confirmed what appears to be a common-sense knowledge that "[s]tates discriminate against foreign investments, often and in many ways, without being called to account for violating the customary minimum standard of protection."⁸⁸

⁸⁶ See, e.g., Ilias Bantekas, *The Public Interest Perspective of International Courts and Tribunals*, 38 ARIZ. J. INT'L & COMP. L. 61, 73 (2021) ("The regulatory power of states vis-à-vis their investment obligations is not tantamount to the obligation of states (both the home and host state) to fulfill their international human rights obligations under customary and treaty law."); Jack Alan Levy, *As between Princz and King: Reassessing the Law of Foreign Sovereign Immunity as Applied to Jus Cogens Violators*, 86 GEO. L.J. 2703, 2705 n.19 (1998) (noting the ICJ's holding in the *Barcelona Traction* case that: "while a state's protection of a person's basic human rights is an absolute legal obligation *erga omnes*, its treatment of foreign investment within its own territory is a qualified legal obligation"); Case Concerning the *Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain)*, Judgement, 1970 I.C.J. Rep. 3, 32 (Feb. 5); Subrata Roy Chowdhury, *Permanent Sovereignty over Natural Resources: Substratum of the Seoul Declaration*, in INTERNATIONAL LAW AND DEVELOPMENT 59, 64 (Paul de Waart et al. eds., 1988) ("The principle of permanent sovereignty recognizes . . . the right of a host State to regulate and exercise authority over, and supervise the activities of, foreign investors . . . within its territorial jurisdiction.").

⁸⁷ ROLAND KLÄGER, FAIR AND EQUITABLE TREATMENT' IN INTERNATIONAL INVESTMENT LAW 76 (2011).

⁸⁸ See *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award (redacted version), paras. 176, 208 (Jan. 12, 2011) ("[T]he content of the obligation imposed by Article 1105 must be determined by reference to customary international law, not to standards contained in other treaties or other NAFTA provisions, or in other sources, unless those sources reflect relevant customary international law. . . . Further, the concepts of 'fair and equitable treatment' and 'full protection and security' refer to existing elements of customary international law regarding the treatment of aliens and do not add to that standard. . . . The language of Article 1105 does not state or suggest a blanket prohibition on discrimination against alien investors' investment, and one cannot assert such a rule under customary international law. States discriminate against foreign investments, often and in many ways, without being called to account for violating the customary

Notably, tribunals have held that the principle of non-discrimination constitutes an essential element of the FET standard, just like the doctrine of legitimate expectation.⁸⁹ Considering that the only rational connection between the MST standard and the doctrine of legitimate expectation is the notion that the FET standard *as a whole* has attained a status as customary international law, this common-sense finding by the *Grand River* tribunal also counters the notion that the doctrine of legitimate expectation has now attained customary international law status.

Furthermore, states' understanding of the MST standard as expressly captured in several investment treaties also undermines the notion that the MST standard now encompasses the FET standard. For example, the FTC's Notes on the interpretation of Article 1105(1) of NAFTA, which served to change the definition of the MST in the very same clause from that of "international law" to that of "customary international law,"⁹⁰ specifies that "[t]he concepts of 'fair and equitable treatment' . . . do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."⁹¹ Likewise, paragraph 2 of Article 11.5 of the Korea-United States Free Trade Agreement ("KORUS FTA") explicitly provides that "[t]he concepts of 'fair and equitable treatment'" as part of the MST "do not require treatment in addition to or beyond that which is required by [the customary international law minimum standard of treatment of aliens], and do not create additional substantive rights." The MST provisions of the KORUS FTA were further amended on January 1, 2019, inserting the following new paragraph: "[f]or greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an *investor's expectations* does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result."⁹² Accordingly, under this revised fourth paragraph of Article 11.5, a failure to meet investors' legitimate

minimum standard of protection.").

⁸⁹ See *UNCTAD FET*, *supra* note 4, at 81-82 ("Tribunals have held that the FET standard prohibits discriminatory treatment of foreign investors and their investments."). See also *Saluka Partial Award*, *supra* note 58, para. 461; *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, para. 123 (June 26, 2003); *Waste Mgmt. II Award*, *supra* note 16, para. 98; *CMS Award*, *supra* note 63, para. 287. There could also be a technical overlap between the principle of non-discrimination and the doctrine of legitimate expectation depending on circumstances.

⁹⁰ Chad D. Hansen, *Mondev International LTD. v. United States: A Case Study of the Potential Risks of NAFTA's Ever-Expanding Arbitration Provisions*, 29 N.C. J. INT'L L. & COM. REG. 351, 385-86 (2003).

⁹¹ NAFTA FTC, *supra* note 35.

⁹² Protocol between the Government of the United States of America and the Government of the Republic of Korea Amending the Free Trade Agreement between the United States of America and the Republic of Korea, para. 4(2) (Sept. 3, 2018), <https://ustr.gov/sites/default/files/files/agreements/FTA/KORUS/KORUS%20Protocol%20Amending%20Agreement%20-%20Signed.pdf> (emphasis added).

expectations does not violate the customary MST standard.⁹³ This amendment in the KORUS FTA is basically mirrored in Article 14.6 of NAFTA's successor, the United States-Mexico-Canada Agreement (USMCA). These newest provisions specifically rule out any room for interpretative expansion of the MST beyond the customary international law standard. Most remarkably, the contracting states of these major treaties have manifestly differentiated the customary MST standard from the autonomous FET standard, by expressly excluding the "basic touchstone" of the FET standard, which is the doctrine of legitimate expectation, from the scope of the MST standard.

The USMCA as well as the amended KORUS FTA or the previous NAFTA Notes all refer to the customary international law standard of minimum treatment, instead of creating any autonomous obligation through treaty language.⁹⁴ The descriptions embedded in these treaty provisions directly reveal the contracting states' understanding (and *opinio juris* so to speak) of what constitutes the MST standard under customary international law. The contracting states of these key treaties, as well as of many other investment treaties with similar clauses,⁹⁵ have repeatedly and specifically

⁹³ Congressional Research Service, *U.S.-South Korea (KORUS) FTA*, IN FOCUS, IF10733, at 1 (Dec. 28, 2018), https://www.everycrsreport.com/files/2018-12-28_IF10733_5414a2917e96d62b72baed8eaa55b54b44fbdeea.pdf.

⁹⁴ For example, Annex 14-A (entitled "Customary International Law") of the USMCA, according to which Article 14.6 (entitled "Minimum Standard of Treatment") must be interpreted, stipulates that "[t]he Parties confirm their shared understanding that 'customary international law' generally and as specifically referenced in Article 14.6 (Minimum Standard of Treatment) results from a general and consistent practice of States that they follow from a sense of legal obligation."

⁹⁵ One other example can be found in Article 5 of the 2012 U.S. Model BIT. Its first paragraph provides that: "Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security." The second paragraph states, in relevant part, that: "For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights." Article 2 of the Korea-Uruguay BIT (2009) provides almost the same provisions in its second and third paragraphs. Its second paragraph stipulates that: "[e]ach Contracting Party shall accord to investments of an investor of the other Contracting Party treatment in accordance with customary international law, including fair and equitable treatment and full protection and security." The third paragraph begins with the following sentences that: "For greater certainty, paragraph 2 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of an investor of the other Contracting Party. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights." Similarly, Article 6 of the 2014 Canadian Model Foreign Investment Promotion and Protection Agreement states in the first paragraph that: "[e]ach Party shall accord to covered investment treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable

confirmed their understanding that the MST does not include the doctrine of legitimate expectation.

To conclude, while the FET standard certainly covers the MST standard, it does not work *vice versa*. Customary international law's MST standard, as it stands today, does not seem to include the doctrine of legitimate expectation.

III. DETERMINING BREACH OF THE CUSTOMARY INTERNATIONAL LAW STANDARD OF MINIMUM TREATMENT

A. *The Conundrum: Burden of Proof*

If the customary MST standard is different from the autonomous FET standard, what exactly is the MST standard applicable to foreign investors or foreign investments? As previously discussed, the *Neer* Commission considered that treatment of foreigners that is “outrageous,” “in bad faith,” “willful neglect of duty,” or “insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency” would fail to live up to the MST standard.⁹⁶ Tribunals and commentators are generally in agreement that this very high standard of 1926 must have evolved thereafter, especially in light of the significant evolution of international law in the field of the rights of individuals, and that broader protection is now granted to foreign investors by virtue of the MST standard.⁹⁷ The difficult part, however, is ascertaining the precise content of the customary MST standard applicable to foreign investors or investments as of today.⁹⁸

Various investment tribunals including the tribunal in *Glamis* considered that the burden of solving this conundrum rests on claimants. According to the tribunal in *Glamis*, while in some cases “the evolution of custom may be so clear as to be found by the tribunal itself,” in most cases

treatment and full protection and security.” Its second paragraph confirms that: “[t]he concepts of ‘fair and equitable treatment’ and ‘full protection and security’ in paragraph 1 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.”

⁹⁶ *Neer Award*, *supra* note 43, para. 4.

⁹⁷ *See, e.g.*, *Merrill Award*, *supra* note 48, paras. 201, 213; *Gold Award*, *supra* note 50, para. 567; *Anglo Award*, *supra* note 50, para. 442; *Devas Award on Jurisdiction and Merits*, *supra* note 50, para. 457; *Waste Mgmt. II Award*, *supra* note 16, paras. 92-93, 98; *Mobil Arg. Decision on Jurisdiction and Liab.*, *supra* note 17, para. 910.

⁹⁸ Relatively speaking, not many customary international laws have been developed in the field of international economics or international investment. *See* Haneul Jung, *Expansibility of State Responsibility in Investor-State Dispute Settlement: Pre-visiting the “Elliot Case”*, 61(1) THE KOREAN JOURNAL OF INTERNATIONAL LAW 222, 226 n.19 (2016) (S. Kor.) (available in Korean) (citing Patrick Dumberry, *Are BITs Representing the “New” Customary International Law in International Investment Law?*, 28 PENN ST. INT’L L. REV. 675 (2010); and Jean d’Aspremont, *International Customary Investment Law: Story of a Paradox*, ACIL RES. PAPER No. 2011-08 (2011).

“the burden of doing so falls clearly on the party” asserting what constitutes the currently applicable MST standard.⁹⁹ Likewise, the tribunals in *Cargill v. Mexico* and *Methanex v. U.S.A.* considered that “where a custom is not clear, or is disputed, then it is for the party asserting the custom to establish the content of that custom”; as such, the burden of proving changes in a custom “falls clearly on the Claimant.”¹⁰⁰ There is also a view that as long as the *existence* of applicable customary international law is undisputed the burden of ascertaining the *standard* of that customary law rests on both claimants and respondents invoking that standard.¹⁰¹

In general, investment tribunals appear to agree that the *initial* burden rests upon claimants under MST-incorporating investment treaties to establish *prima facie* cases of their claims by proving (i) what specific elements constitute the MST standard as it stands today, and (ii) whether and how that standard has been breached by the host state. At first glance, this straightforward conclusion seems to be free of error. As confirmed by the Appellate Body of the World Trade Organization (WTO) in *US–Wool Shirts and Blouses*, “it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defense.”¹⁰² Further, the “normal

⁹⁹ Glamis Award, *supra* note 52, para 21.

¹⁰⁰ Cargill Award, *supra* note 51, paras. 271, 273 (“The Tribunal acknowledges that the proof of change in a custom is not an easy matter to establish. However, the burden of doing so falls clearly on Claimant. If Claimant does not provide the Tribunal with the proof of such evolution, it is not the place of the Tribunal to assume this task. Rather the Tribunal, in such an instance, should hold that Claimant fails to establish the particular standard asserted.”). See also *Methanex Corp. v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits, para. 26 in Part IV (United Nations Comm’n on Int’l Trade Law Aug. 3, 2005) (“Customary international law has established exceptions to this broad rule and has decided that some differentiations are discriminatory. But the International Court of Justice has held that “[t]he Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party.”).

¹⁰¹ *Windstream Energy LLC v. Government of Canada*, Case No. 2013-22, Award, para. 350 (Perm. Ct. Arb. Sept. 27, 2016) (“The Tribunal agrees that it is in the first place for the party asserting that a particular rule of customary international law exists to prove the existence of the rule. However, in the present case the issue is not whether the relevant rule of customary international law exists; the minimum standard of treatment contained in Article 1105(1) of NAFTA is indeed a rule of customary international law, as interpreted by the FTC in its Notes of Interpretation. The issue therefore is not whether the rule exists, but rather how the content of a rule that does exist – the minimum standard of treatment in Article 1105(1) of NAFTA – should be established. The Tribunal is therefore unable to accept the Respondent’s argument that the burden of proving the content of the rule falls exclusively on the Claimant. In the Tribunal’s view, it is for each Party to support its position as to the content of the rule with appropriate legal authorities and evidence.”).

¹⁰² See Appellate Body Report, *United States–Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, ¶ 14, WTO Doc. WT/DS33/AB/R (adopted May 23, 1997). The Appellate Body went on to further explain that: “If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the

international legal standard” applicable to “any adversarial proceedings” requires that a complainant or claimant must initially establish a *prima facie* case of its complaint or claim in order for them to have the burden of proof (on defense) to shift to the respondent.¹⁰³ However, the burden of proof does not always attach to a claim or defense as a whole. Instead, a claim or defense is separable between questions of facts and laws. An obligation to adduce evidence to demonstrate a certain claim or defense is distinct from the obligation to ascertain applicable legal standards. That legal obligation ultimately rests upon competent tribunals of public international law. According to the generally-accepted principle of *jura novit curia* (i.e., “the court knows the laws”),¹⁰⁴ international tribunals are under obligation to *ex officio* ascertain the applicable law and relevant legal interpretation irrespective of whether the parties to the dispute have or have not proffered the correct legal test.¹⁰⁵

other party, who will fail unless it adduces sufficient evidence to rebut the presumption.” *Id.*

¹⁰³ See Appellate Body Report, *European Communities–Measures Concerning Meat and Meat Products (Hormones)*, ¶ 98, WTO Doc. WT/DS26/AB/R, WT/DS48/AB/R (adopted Feb. 13, 1998). See also Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, ¶ 7.13, WTO Doc. WT/DS353/R (adopted Mar. 23, 2012) (“We have also kept in mind that a *prima facie* case is one which, in the absence of effective refutation by the other party, requires a panel, as a matter of law, to rule in favor of the party presenting the *prima facie* case . . . The normal international legal standards governing the discharge of the burden of proof unquestionably apply to the WTO dispute settlement procedures as an important element of its functions concerning dispute resolution under the rule of law and due process.”).

¹⁰⁴ AARON X. FELLMETH & MAURICE HORWITZ, *GUIDE TO LATIN IN INTERNATIONAL LAW* 147 (2009) (defining the term *iura novit curia* (i.e., *jura novit curia*) as “[a] doctrine providing that, because a tribunal is presumed to know and apply the law, the parties to a dispute are not required to invoke all applicable legal rules explicitly or to convince the tribunal of the law’s content. A major implication of this doctrine is that a judicial or arbitral tribunal is not bound by the construction of the law or legal instrument proposed by any of the parties to the dispute.”).

¹⁰⁵ See Appellate Body Report, *European Communities–Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶¶ 104-05, WTO Doc. WT/DS246/AB/R (adopted April 20, 2004) (“As a general rule, the burden of proof for an ‘exception’ falls on the respondent, that is, as the Appellate Body stated in *US–Wool Shirts and Blouses*, on the party ‘assert[ing] the affirmative of a particular . . . defense.’ From this allocation of the burden of proof, it is normally for the respondent, first, to *raise* the defense and, second, to *prove* that the challenged measure meets the requirement of the defense provision. We are therefore of the view that the European Communities must prove that the Drug Arrangements satisfy the conditions set out in the Enabling Clause. Consistent with the principle of *jura novit curia*, it is not the responsibility of the European Communities to provide us with the legal interpretation to be given to a particular provision in the Enabling Clause; instead, the burden of the European Communities is to adduce sufficient evidence to substantiate its assertion that the Drug Arrangements comply with the requirements of the Enabling Clause.”). See also *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, 25 ¶ 29 (June 27) (“It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court.”); *Fisheries*

The problem is that ascertaining the MST standard inevitably involves adducing evidence for the existence and content of the relevant custom, which is essentially a question of fact. Nevertheless, that does not detract from the reality that the MST standard is a legal standard, and ascertaining its content is a question of law. It follows that the burden of ascertaining the correct legal test for the MST ultimately rests upon investment tribunals, even if each tribunal's ability to ascertain the MST standard will have to be bound by the ability of the parties to the dispute to adduce the relevant evidence of the evolved custom. As a practical matter, therefore, ascertaining the MST standard applicable to the given facts of a case requires a joint effort by both the tribunal and parties.

Yet "the proof of change in a custom is not an easy matter to establish"¹⁰⁶ to say the least, especially in the field of international investment law. Parties and tribunals have always struggled in ascertaining specific elements of the MST standard beyond what was found in the *Neer* case back in 1926; a pragmatic guidance on this topic will certainly benefit the international investment dispute system as a whole.

B. A Pragmatic Guidance on Ascertaining the Legal Tests Applicable to the Customary Minimum Standard of Treatment

A sound first step for solving this complex riddle would be putting the issue in the proper perspective. Even if no one disputes that treaty and customary international law are two different sources of international law, too often do tribunals and commentators place and evaluate the FET and MST on the same plane. However, a customary international law exists separately (although not entirely independently) from international treaties. To the extent that an investment treaty merely incorporates a customary international law (such as the MST) by way of making reference without adding or diminishing any content thereof, the incorporation merely builds a nexus between the treaty and the customary international law existing outside the four corners of the treaty. As an example, although an aggrieved foreign investor would not have a direct standing to bring a claim against the host state under general international law, a treaty-based standing can be extended to the investor by an investment treaty with an investor-state dispute settlement procedure. As the tribunal in *KT Asia v. Kazakhstan*

Jurisdiction Case (U.K. v. Ice.), Judgment, 1974 I.C.J. 3, 9, ¶ 17 (July 25); FELLMETH & HORWITZ, *supra* note 104 (citing *Velásquez Rodríguez Case* for the principle of *iura novit curia*); *Velásquez Rodríguez v. Honduras*, Merits, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 163 (July 29, 1988) ("The precept contained [in Article I(1) of the American Convention on Human Rights] constitutes the generic basis of the protection of the rights recognized by the Convention and would be applicable, in any case, by virtue of a general principle of law, *iura novit curia*, on which international jurisprudence has repeatedly relied and under which a court has the power and the duty to apply the juridical provisions relevant to a proceeding, even when the parties do not expressly invoke them.").

¹⁰⁶ Cargill Award, *supra* note 51, para 271.

properly confirmed, but for the triangular relationship established by the investment treaty among the investor, the state of the investor's nationality, and the host state, "the investor would have no right to bring a claim against the [host] state" for any violation of the treaty.¹⁰⁷ Indeed, under investment treaties that provide only state-to-state dispute settlement procedure but not investor-state dispute settlement procedure,¹⁰⁸ aggrieved investors would in principle have no standing to institute an international lawsuit for a breach of the treaty against the host state.¹⁰⁹ This truth holds even more so for a

¹⁰⁷ *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, ¶ 143 (Oct. 17, 2013) ("There is no doubt that it is the investor which asserts its claim in investment arbitration, which distinguishes the latter from diplomatic protection. Yet, that does not mean that there is no bond of nationality in investor-state arbitration. There is a bond defined by the investment treaty. But for that bond, the investor would have no right to bring a claim against the other state. In that sense, there is a triangular relationship in investment treaty arbitration that is different from the one which exists in matters of diplomatic protection under customary international law.").

¹⁰⁸ Some BITs have only the state-to-state dispute settlement procedure but not the investor-state dispute settlement procedure. Michele Potestà, *State-to-State Dispute Settlement Pursuant to Bilateral Investment Treaties: Is There Potential?*, in *INTERNATIONAL COURTS AND THE DEVELOPMENT OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF TULLIO TREVES* 753, 754 (Nerina Boschiero et al. eds., 2013). Today most investment treaties include both state-to-state and investor-state dispute settlement procedures, but still some of the recent investment chapters in comprehensive trade and investment treaties do not contain investor-state dispute settlement procedures, while providing for state-to-state dispute settlement procedures only. NATHALIE BERNASCONI-OSTERWALDER, *STATE-TO-STATE DISPUTE SETTLEMENT IN INVESTMENT TREATIES* 1 (2014), <https://www.iisd.org/sites/default/files/publications/best-practices-state-state-dispute-settlement-investment-treaties.pdf>. Examples of investment treaties without investor-state dispute settlement procedures include Germany-Pakistan BIT (1959), Korea-Pakistan BIT (1988), Australia-United States FTA (2004), Japan-Philippines Economic Partnership Agreement (2006), Australia-Malaysia FTA (2012) and the United States-Canada investment relationship in the USMCA (2020).

¹⁰⁹ Counsel may attempt to incorporate investor-state dispute settlement procedure from other investment treaties by relying on most-favored nation (MFN) treatment clauses of the underlying investment treaty. The outcome of such an attempt would depend on various factors including the arbitrators' personal viewpoint(s) on the applicability of MFN clauses or the specific language constituting the relevant MFN clauses. Several tribunals held that the MFN treatment concerns treatment to the investment, and as such, it relates to substantive, rather than procedural, rights of the investors. *See, e.g.*, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, ¶¶ 191-92 (Feb. 8, 2005); *Telenor Mobile Communications A.S. v. The Republic of Hungary*, ICSID Case No. ARB/04/15, Award (Sept. 13, 2006). At the same time, several other tribunals held that there is no conceptual limitation of an MFN clause so as not to apply it to procedural rights. *See, e.g.*, *Austrian Airlines v. The Slovak Republic*, Final Award, UNCITRAL, ¶ 124 (Oct. 9, 2009); *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction, ¶¶ 130-32 (Oct. 1, 2007). Against this backdrop, tribunals would be inclined to rely on the explicit language of the applicable MFN clause (e.g., a clause applying the MFN to "all matters" would have more chance of being considered as applicable to dispute settlement provisions as well). *See, e.g.*, *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 49, 54-56, 64 (Jan. 25, 2000). However, this makes no difference for the purpose of the discussion in this paper, because an MFN clause is a treaty

claim arising out of customary international law. In this sense, the primary purpose of codifying the MST standard in an investment treaty is to allow private investors to bring claims against the host state for breaches of the customary MST standard through the treaty's investor-state dispute settlement procedure. Otherwise, the investors would have no standing or recourse against the host state for violation of the MST standard. The foregoing reality informs a pragmatic starting point for evaluation of an investor's claim arising out of the MST standard—taking the shoes of the state of the investor's nationality, from which the investor's right to the claim originates.

Basically, the MST was developed to respond to situations where national treatment provided inadequate protection for aliens and their property, and was intended to function in a schema of state-to-state dispute settlement, organized as the mechanism of diplomatic protection.¹¹⁰ In fact, the United States in *Neer* sought to exercise its diplomatic protection against Mexico.¹¹¹ A breach of the customary MST vis-à-vis a foreign investor would provide a legitimate basis for the exercise of diplomatic protection by the state of the investor's nationality against the host state, with or without an underlying investment treaty.¹¹² Conversely, an internationally wrongful act of the host state, which is deemed to be serious enough to induce the state of the investor's nationality to exercise diplomatic protection against the host state, may (although not always or necessarily) also give rise to the investor's claim under the investment treaty, including the MST claim (if so raised), especially if the wrongful act caused "significant injury" to the investor within the meaning of Article 19 of the Draft Articles on Diplomatic Protection.¹¹³

provision just like an investor-state dispute settlement provision. An investor would have no standing against the host state but for a treaty provision granting such a standing, in one way or the other.

¹¹⁰ Margaret Clare Ryan, *Glamis Gold, Ltd. v. The United States and the Fair and Equitable Treatment Standard*, 56 MCGILL L.J. 919, 955 (2011).

¹¹¹ CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 215-17 (2007).

¹¹² Gloria L. Sandrino, *The NAFTA Investment Chapter and Foreign Direct Investment in Mexico: A Third World Perspective*, 27 VAND. J. TRANSNAT'L L. 259, 265-66 (1994) ("The law of state responsibility of injury to aliens and alien property . . . underlies the traditional principles of customary international law. This doctrine emphasizes restricting the extent to which the host state can interfere with private property, thereby protecting the private property of aliens. In this regard, a breach of the international minimum standard 'provides a legitimate basis for the exercise by the home State of the right of diplomatic protection of the alien.'").

¹¹³ Article 2 of the Draft Articles on Diplomatic Protection stipulates that "[a] State has the right to exercise diplomatic protection in accordance with the present draft articles." Commentary to Article 2 explains that exercise of diplomatic protection by the state of nationality is discretionary, as stated as follows: "A State has the right to exercise diplomatic protection on behalf of a national. It is under no duty or obligation to do so. The internal law of a State may oblige a State to extend diplomatic protection to a national, but international

For the avoidance of doubt, this certainly does not mean that all internationally wrongful acts establishing basis for exercising diplomatic protection would amount to a breach of the MST standard. Rather, such *patterns* of exercising diplomatic protection by states can establish pragmatic reference points, as opposed to standalone legal standards, for examination of MST claims. That is, if the fact before an investment tribunal is similar to a pattern that gives rise to invocation of diplomatic protection by states, the tribunal might also want to assess if such sovereign interventions are triggered by any “sense of legal obligation” to do so. If the answer turns out to be “yes,” then the tribunal and parties would have a good starting point to evaluate the MST claim in question through the prism of customary international law.

The difficulty of proving the content of the MST standard in the context of an investor-state dispute always rests on a lack of relevant precedent that can serve as evidence of evolved custom and prevailing *opinio juris*. In contrast, a large number of relevant precedents can be found in the context of state-to-state disputes triggered by states’ exercise of diplomatic protection.¹¹⁴ An abundance of precedents in numerous

law imposes no such obligation.” Article 19 of the Draft Articles on Diplomatic Protection nevertheless specifies that “[a] State entitled to exercise diplomatic protection . . . should . . . give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred.” The “significance” of the injury invoking Article 19 must not be limited to the seriousness of the injury itself and must also concern seriousness of the violation that caused injury. This understanding is supported by Commentary to Article 19, which discusses a “human rights” violation as the primary example of such significant injury. As explained earlier, the MST standard covers “human rights” and more.

¹¹⁴ See, e.g., John R. Dugard, First Report on Diplomatic Protection, U.N. Doc. A/CN.4/506 & Add. 1, ¶ 10 (2000) (“There is much practice and precedent on diplomatic protection.”), https://legal.un.org/ilc/documentation/english/a_cn4_506.pdf; John R. Dugard, *Introductory Note for Articles on Diplomatic Protection*, U.N. AUDIOVISUAL LIBR. INT’L L. (2006) (“[D]iplomatic protection remains a mechanism of international law that is still employed by States to secure just treatment for their nationals abroad.”), <https://legal.un.org/avl/ha/adp/adp.html>; Bruce W. Klaw, *State Responsibility for Bribe Solicitation and Extortion: Obligations, Obstacles, and Opportunities*, 33 BERKELEY J. INT’L L. 60, 100-01 (2015) (“By treaty and under customary international law, injured natural and legal persons generally may request from the State of their nationality, and their State may give, diplomatic protection against an act or omission by a foreign State Diplomatic protection has long been used as a means of obtaining redress for violations of international law, including for economic injuries to nationals of the home State.”); Anthea Roberts, *State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority*, 55 HARV. INT’L L.J. 1, 17, 30 (2014) (“General rules about diplomatic protection can be superseded by particular treaty provisions, but investment treaties typically permit investor-state arbitration without ruling out diplomatic protection claims. [] The most obvious form of state-to-state claims are diplomatic protection claims where the home state initiates arbitration with respect to treaty violations affecting its nationals.”). See also *Mavromattis Palestine Concessions* (Greece v. Gr. Brit.), Judgment, 1924 P.C.I.J. (ser. B) No. 3, ¶ 21 (Aug. 30) (“It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain

situations in which diplomatic protection has been exercised by states via various judicial and non-judicial means can serve as an effective source of evidence for both the existence and content of the evolved custom (as well as for *opinio juris*, for that matter), which, in turn, can inform and guide tribunals' assessments of an MST claim.¹¹⁵

IV. CONCLUSION

Although the ICJ in *Bolivia v. Chile* effectively rejected the notion that the doctrine of legitimate expectation has attained customary international law status, even the judgment of the "World Court" does not seem to have settled the longstanding controversies surrounding the nature and legal status of the doctrine. As explained in this paper, however, the principal reasoning of the investment tribunals that endorsed the MST standard's status as customary international law, viz. the requisite state practice and *opinio juris* are demonstrated by the prevalence of the investment treaties codifying the FET standard, does not seem to withstand the scrutiny.

In the meantime, the divergence between the awards rendered by certain investment tribunals and the manifested intent of the contracting states on interpretation of the MST standard has reached a new height. In

satisfaction through ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on its behalf, a State is in reality asserting its own rights – its rights to ensure, in the person of its subjects, respect for the rules of international law.”), http://www.worldcourts.com/pcij/eng/decisions/1924.08.30_mavrommatis.htm; The Case Concerning Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Judgment, 1970 I.C.J. 3 (2d Phase), ¶ 78 (Feb. 5) (“The Court would here observe that, within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting.”).

¹¹⁵ It must be clarified that this paper does not intend to, and in fact does not need to, engage with a separate set of discussions about the relationship between states' rights to exercise diplomatic protection and investors' rights to institute investment arbitrations under investment treaties. There is a whole host of arbitral awards and scholarly works on this topic. As an example, the tribunal in *ADM v. Mexico* considered that the investment treaties prescribe “substantive obligations which remain inter-State, without accruing individual rights,” and that a claimant in an investor-state dispute settlement procedure is “in reality stepping into the shoes and asserting the rights of the home State.” See *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB (AF)/04/5, Award, ¶ 168 (Nov. 21, 2007). However, the tribunal in *Corn Products v. Mexico* considered that the substantive rights conferred upon the investors under the investment treaties are separate and distinct from those of the State of which they are nationals by highlighting the elemental differences between exercising diplomatic protection and instituting investor-state arbitration. See generally *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/04/1, Decision on Responsibility (redacted version) (Jan. 15, 2008). Without any implication beyond what is relevant herein, on this point the authors simply acknowledge that a beneficiary's means of pursuing its international rights as an individual can and will differ from the way that the same right can be pursued by the benefactor as a sovereign nation. That does not, however, stand in tension with the presupposition that the factual precedents of diplomatic protection can serve as a helpful source and guidance in evaluating an MST claim.

2015, the European Union, during its negotiation with the United States on the Transatlantic Trade and Investment Partnership (TTIP), proposed a novel dispute settlement mechanism under the TTIP's investment chapter.¹¹⁶ According to the European Union's textual proposal, a new court system is to be established to resolve disputes between investors and states, expressly requiring that judges in this so-called Investment Court System "shall have demonstrated expertise in public international law,"¹¹⁷ in contrast to the existing investor-state dispute settlement system, where arbitrators do not necessarily have to possess any knowledge of public international law.¹¹⁸ The requirement of public international law expertise is supposedly meant to ensure that public international law perspectives, which states and critics argue have been lacking,¹¹⁹ are duly represented in investment tribunals. Likely underlying this interesting yet alarming development is the controversies surrounding the doctrine of legitimate expectation, wherein numerous instances the doctrine has been invoked to challenge the exercise of sovereign powers.¹²⁰ Certainly, the demonstrated lack of confidence by major states in an international dispute settlement mechanism as active as investment treaty arbitration is deeply concerning.

In defense of the investment tribunals that endorsed the customary international law status of the doctrine of legitimate expectation, establishing a legal test for the MST standard is a daunting task. While tribunals are burdened with the ultimate responsibility to ascertain the legal test for the MST by virtue of the principle of *jura novit curia*, as a practical matter, tribunals' evaluations are inevitably limited in scope by the evidence adduced by parties of evolved custom and *opinio juris*. It is

¹¹⁶ This proposal is aligned with the European Commission's press release in September 2015, proposing the creation of a public permanent multilateral investment court that would comprise standing first instance and appeals facilities, as an alternative to the traditional investor-state dispute settlement mechanism. European Commission Press Release IP/15/5651, Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations (Sept. 16, 2015), http://europa.eu/rapid/press-release_IP-15-5651_en.htm (proposing an "Investment Court System" that would replace investor-state dispute settlement in "all ongoing and future EU investment negotiations, including the [TTIP]" and eventually all "EU agreements, EU Member States' agreements with third countries and . . . trade and investment treaties concluded between non-EU countries").

¹¹⁷ Transatlantic Trade and Investment Partnership, Chapter II - Investment of the European Union's Proposal for Investment Protection and Resolution of Investment Disputes, § 3, arts. 9(4), 10(7), Nov. 12, 2015, http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf.

¹¹⁸ Frank Emmert & Begaiym Esenkulova, *Why Can't We Be Friends? Protecting Investors While Also Protecting Legitimate Public Interests and the Sustainable Development of Host Countries in Investor-State Arbitration*, 48 TEX. J. BUS. L. 48, 80 (2019).

¹¹⁹ Catherine A. Rogers, *Apparent Dichotomies, Covert Similarities: A Response to Joost Pauwelyn*, 109 AM. J. INT'L L. UNBOUND 294, 297 (2016).

¹²⁰ TEERAWAT WONGKAEW, PROTECTION OF LEGITIMATE EXPECTATIONS IN INVESTMENT TREATY ARBITRATION: A THEORY OF DETRIMENTAL RELIANCE 8 (2019).

difficult to fault tribunals when the guidance on evidence production is completely lacking. As explained in this paper, the rich precedents of diplomatic protection could serve as a helpful source of evidence for proving the existence and content of the relevant custom or *opinio juris*. Such an evidentiary basis can inform and guide tribunals and parties in ascertaining the legal tests applicable to the MST claims.