

# Chapter 2

## FET and the Ongoing Debate on Its Normative Basis

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**Abstract** This chapter investigates the main academic opinions on the FET normative basis, pinpointing how none of them is able to give a completely suitable solution to the question. It is argued that FET has penetrated into the fabric of general international law by means of the category of principles peculiar to a certain field of international law, i.e. those principles having their own foundations in the international legal order itself, but which, through the mediation of the judge, end up being shaped according to the features typical of a specific normative field.

**Keywords** Legal writings • Custom • Treaties • Rule of law • Custom • Judicial practice

## 2.1 Introduction

Although the State obligation to treat foreign investments fairly and equitably is common to most investment treaties, clauses containing this provision are somewhat vague going so far as to have inspired a large number of interpretations by legal writers. To date, doctrinal discussion rests on five main alternatives, whose terms may be summarized as follows: FET has been described as (i) an ‘evaluation rule’ establishing a goal that is expressed at some level of generality; (ii) a term of art for a reference to other standards of treatment; (iii) part of the corpus of customary law; (iv) a self-standing treaty clause to be understood in accordance with the interpretation criteria laid down in the VCLT; or (v) an embodiment of the principles behind the rule of law as it may be understood in the major domestic legal systems of liberal democracies. While each of these views will be assessed in depth hereinafter, this book’s argument is that FET has penetrated into the fabric of general international law, but by means of a source somewhat neglected in legal doctrine. We refer to the category of *general principles peculiar to a certain field of international law*, i.e. those principles having their own foundations in the international legal order itself, but which, through the mediation of the judge, end up being shaped according to the features typical of a specific normative field. An argument of this kind is convenient from more than one angle. First, it makes it possible to overcome any difficulties closely related to the alleged existence of a custom or a general principle common to domestic systems, and which mainly depend on the lack of the traditional requirements necessary to this end. Second, it is the argument which provides most insight into the current FET content. Third, it may be applied with regard to all the FET core elements, viz. due process of law, legitimate expectations, and proportionality.

## 2.2 FET as an ‘Evaluation Rule’

Despite being very recent, the first opinion to be considered is that advanced by Michael Reisman in 2015.<sup>1</sup> This is because he assumes *a priori* the futility of pinpointing the FET content. In detail, the underlying argument moves from the distinction between what Reisman calls ‘verification rules’ and ‘evaluation rules’. *Verification rules*, in his words, are intended to ‘authorize those charged with applying them to do nothing more than verify compliance with an explicit metric.’<sup>2</sup> A sound example would be that ‘an intercontinental ballistic missile is to be fired by the officer in the silo only upon receiving a coded signal from the President of the United States.’<sup>3</sup> *Evaluation rules*, contrariwise, indicate a goal to be accomplished

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<sup>1</sup> Reisman 2015.

<sup>2</sup> *Idem*, p. 617.

<sup>3</sup> *Idem*.

and that is expressed at some level of generality. Article 39 of the Charter of the United Nations (UN) would embody a rule of this kind, insofar as it vests the Security Council with the duty to determine the existence of any threat to the peace, breach of the peace, or act of aggression, and to make recommendations, or decide what measures shall be taken (in accordance with Articles 41 and 42 of the same Charter) to maintain or restore international peace and security; indeed, those who are called on to apply the said provision, viz. permanent representatives in the UN Security Council, should consider a range of variables, including general evaluative concepts such as fairness, equity and justice. To sum up, while verification rules basically exclude (or reduce to a minimum) any discretion by those applying them, evaluation rules do the opposite, meaning that the way these rules are applied is very flexible and should echo in principle any values existing at the time of their application.

The point is that it is in the nature of the linguistic structure of an evaluation rule that it retains the potential for re-evaluation. Even if the rule seems to have morphed in successive applications, into what is then taken as a verification rule, it always remains open to reconsideration in terms of other variables, including popular morality and ethics.<sup>4</sup>

Following the above perspective, FET would represent a typical example of evaluation rule, since it requires arbitral tribunals dealing with it to take account of all the changing cultural values. As a consequence, despite the importance of judicial practice in the identification of the standard content, any efforts 'to contain and roll back the democratic evolution of the international community's expectations of, and demand for, FET [...] have, until now, proved futile.'<sup>5</sup>

The opinion under consideration is not altogether convincing. As to its premises, the impression one gets is that the distinction between verification rules and evaluation rules is nothing but a different way to express the distinction between 'rules' and 'principles' as rooted in legal theory, i.e. a distinction relying on the extent to which they work differently. While *rules* impose a specific course of conduct, *principles* have a restricted regulatory range, since they essentially aim to prescribe a direction that must be followed. Hence, they would work like *directives*, guidance criteria which the judge is expected to take into account in the exercise of his duties (*Richtungsbegriffe*, according to the expression used by German scholars of procedural law). Such a distinction, introduced by Ronald Dworkin<sup>6</sup> and followed by many other legal theorists later on,<sup>7</sup> while raising some criticism over the years, remains a useful conceptual tool to discuss the role of principles in the international legal order as well as in international investment law.<sup>8</sup>

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<sup>4</sup> *Idem*, p. 618.

<sup>5</sup> *Idem*, p. 633.

<sup>6</sup> Dworkin 1977, pp. 24–26.

<sup>7</sup> *See*, e.g., Iovane 2008.

<sup>8</sup> An appropriate use of this distinction within international investment law may be found in Di Benedetto 2013, pp. 220 et seq.

Still, this remains a terminological question which does not entail any particular problems. Rather, what is hardly acceptable is the conclusion of Reisman's proposition, that is to say, the idea whereby the nature of FET as an evaluation rule/general principle would make pointless any efforts towards the identification of its elements. No doubt FET is an evolving concept, capable of changing as State practice changes, but this does not impede its content from being grasped, at least with regard to the minimum reach. All the opinions that will be assessed in the next paragraphs move from this premise.

### 2.3 FET as a Term of Art for a Reference to All Other Standards of Investment Protection

Due to the vagueness surrounding the FET content, one issue is whether this content could be determined in combination with a reference to other standards of protection of foreign investments.<sup>9</sup> A distinguished scholar like Francis A. Mann, in a note appearing in the *British Yearbook of International Law* in 1981, answered in the affirmative, regarding FET as an overarching obligation which embraces all the other standards and is distinct, as such, from any existing international law; hence, in line with his approach, should one of these standards be infringed, an FET violation would occur as well.<sup>10</sup> On the other hand, following this approach, the question concerning the FET legal nature should not arise at all, since this nature would be the same as the standard it refers to.

Apparently, several elements of both treaty and judicial practice support this allegation. One element can be found in Article 10, para 1, of the 1991 Energy Charter Treaty, which is a composite provision that refers not only to FET, but also to constant protection and security, to a prohibition of unreasonable or discriminatory measures, to treatment required by international law and to the observance of obligations entered into.<sup>11</sup> Unsurprisingly, in *Petrobart*, this provision was regarded

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<sup>9</sup> Schreuer 2007.

<sup>10</sup> Mann 1981, p. 243. More in detail, this author, who based his analysis on the 1980 UK treaty with the Philippines, observes as follows: 'It is submitted that the right to fair and equitable treatment goes much further than the right to most-favoured nation and to national treatment [...]. So general a provision is likely to be almost sufficient to cover all conceivable cases, and it may be that other provisions of the Agreement affording substantive protection are no more than examples or specific instances of this overriding duty.' Shihata 1993, p. 78, also refers to FET as an 'overarching principle'.

<sup>11</sup> In detail, the text of this provision states as follows: 'Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case

as a clear indication of the overarching nature of FET.<sup>12</sup> Likewise, the *Noble Ventures* tribunal advanced the opinion whereby FET would cover all potential standards:

Considering the place of the fair and equitable standard at the very beginning of Art. II (2) [of the Romania-United States BIT],<sup>13</sup> one can consider this to be a more general standard which finds its specific application in *inter alia* the duty to provide full protection and security, the prohibition of arbitrary and discriminatory measures and the obligation to observe contractual obligations toward the investor.<sup>14</sup>

Further, the *SD Myers*<sup>15</sup> and *Pope and Talbot*<sup>16</sup> tribunals approvingly quoted the opinion here discussed.

Now, on closer inspection, Mann's argument, as well as arbitral decisions falling in the same line of thought, is questionable. Of course, as appropriately observed, in 1981 (that is, at the time this argument was spelled out) 'BITS were a minor and still uncertain legal phenomenon [and] the wave of BIT was just starting to sweep the world'.<sup>17</sup> In other words, Mann basically spoke in a *de lege ferenda* perspective, so much so that his book *The Legal Aspects of Money* (published one year after the note of 1981) advanced a much narrower idea of FET, which was regarded as a clause amounting to no more 'than a confirmation of the obligation to act in good faith, or to refrain from abuse or arbitrariness.'<sup>18</sup> With this caveat in mind, the following remarks should be drawn.

Having specific regard to the interaction between FET and other standards of legal protection, it is firstly noticeable that several BITs tend to combine FET with the national treatment (NT) and MFN clauses, i.e. those two traditional standards that serve to ensure legal equality between foreign and domestic investors on the one hand and between foreign investors and investors of a third State on the other hand. Article 4 of the 1991 Norway-Peru BIT is quite revealing. According to this Article each contracting party

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(Footnote 11 continued)

shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.'

<sup>12</sup> *Petrobart v. The Kyrgyzstan*, Arbitration Institute of the Stockholm Chamber of Commerce, Award of 29 March 2005, p. 76.

<sup>13</sup> According to this article '[i]nvestment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.'

<sup>14</sup> *Noble Ventures. Inc. v. Romania*, ICSID Case No. ARB/01/11, Award of 29 March 2005, para 182.

<sup>15</sup> *S.D. Myers Inc v. Canada*, UNCITRAL (NAFTA), Partial Award of 13 November 2000, para 265.

<sup>16</sup> *Pope and Talbot v. Canada*, UNCITRAL (NAFTA), Award on the Merits on Phase 2 of 10 April 2001, para 111, note 105.

<sup>17</sup> Reisman 2015, p. 629, note 49.

<sup>18</sup> Mann 1982, p. 510. For a critical assessment of Mann's theory, see Thomas 2002, pp. 51 et seq.; Weiler 2013, pp. 195–196.

I[...] will accord in its territory for the investments made by investors of the other Contracting Party fair and equitable treatment. 2. The treatment referred to in paragraph 1 of this Article shall as a minimum not be less favourable than that which is granted with regard to investments by investors of any third State.

A circumstance of this kind, however, fails to answer the issue debated here. First, the content of these standards is shrouded in ambiguity as well. The NT clause, for instance, while having the *apparent* advantage of referring to the host State's internal law, only rarely specifies which national provisions should be taken into account for it to be applied.<sup>19</sup> Similar problems arise with reference to the actual scope of protection offered by an MFN provision, the interpretation of which ranges from a relatively expansive approach to a more restrictive one.<sup>20</sup> Second, also provided that a violation of one of such standards would be able to entail an FET violation, the opposite is not always true. Indeed, the right to FET goes much further than the right to NT and MFN: the FET obligation can be violated even where the foreign investor is treated the same as investors from the host State or benefits from an MFN clause.<sup>21</sup>

Equal conclusions are applicable to the relationship between FET and the standard of non-discrimination treatment (NDT). To a certain extent, the latter standard resembles those mentioned above (NT and MFN), but it differs insofar as it limits itself to imposing a 'negative duty' on the host State: the duty to refrain from taking discriminatory measures against foreign investments.<sup>22</sup> Several courts regard this standard as a mere example of FET; and this even where the investment treaty in question governs the two principles separately. For example, the *CMS Gas Transmission Company* tribunal stated that

the standard of protection against arbitrariness and discrimination is related to that of fair and equitable treatment. Any measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment.<sup>23</sup>

Along the same logic, one may mention *Rumeli Telekom A.S. et al.*:<sup>24</sup>

The Arbitral Tribunal notes that the violations alleged by Claimants and allegedly constituting unreasonable, arbitrary or discriminatory measures, have also been invoked by Claimants as constituting a violation of the fair and equitable treatment principle. The Arbitral Tribunal considers that these violations are better qualified and dealt with as issues falling under *the fair and equitable treatment standard, which also includes in its generality the principle of no-unreasonable, arbitrary or discriminatory measures.*<sup>25</sup>

<sup>19</sup> Mauro 2003, p. 174.

<sup>20</sup> In this regard, see Fietta 2005; Savarese 2011.

<sup>21</sup> See Collins 2016, p. 128. The same circumstance is recognized by Mann himself, 1981, p. 243.

<sup>22</sup> Cf. Charpentier 1963; Heiskanen 2008.

<sup>23</sup> *CMS Gas Transmission Company v. Argentina*, Award of 12 May 2005, para 290.

<sup>24</sup> *Rumeli Telekom A.S. et al. v. Kazakhstan*, Award of 29 July 2008.

<sup>25</sup> Emphasis added.

Contrariwise, other tribunals examine the two standards separately, arguing that the violation of one of them would not automatically imply the violation of the other. The decision in *LG&E Energy Corporation* is to be mentioned:

[C]haracterising the measures as not arbitrary does not mean that such measures are characterized as fair and equitable or regarded as not having affected the stability of the legal framework under which gas transportation companies in Argentina operated.<sup>26</sup>

Now, in this author's view, a number of reasons suggest regarding the last-mentioned trend as the most fitting. First, while the rationale behind NDT seems to be straightforward, the application of the different legal elements which constitute a non-discrimination obligation has proven challenging.<sup>27</sup> Second, unlike NDT, FET imposes not only a 'negative duty' of avoiding acting in a certain way, but also and above all a 'positive duty' to take specific actions in order to enhance the investments' protection: the obligation to guarantee due process of law clearly exemplifies this.<sup>28</sup> In other words, should a BIT link the two standards to each other, the FET normative content would end up being identified only partially.

Full protection and security (FPS) is an additional standard in respect of which FET has been put into connection. This standard entails an obligation of due diligence by the host State, namely the obligation to take any measures which are necessary to protect the investor and his investments from injurious acts by government agents or third parties.<sup>29</sup> Still, as to the possibility of defining FET in combination with a reference to this standard, the arbitral case law is far from clear. In detail, some courts treat the two standards together, in the sense that a breach of FET would amount to an absence of FPS (and *vice versa*).<sup>30</sup> This depends on the tendency of these courts to follow an expansive approach in the interpretation of FPS, going so far as to include certain elements (like legal and economic stability) which are also part of FET.<sup>31</sup> On the other hand, several tribunals come to the

<sup>26</sup> *LG&E Energy Corporation v. Argentina*, Award of 3 October 2006.

<sup>27</sup> Diebold 2011.

<sup>28</sup> In this regard, see Chap. 3.

<sup>29</sup> Cordero Moss 2008; Schreuer 2010.

<sup>30</sup> One may mention *Wena Hotels LTD v. Egypt*, ICSID Case No. ARB/98/4, Award of 8 December 2000, paras 84–95. In the same vein, see *Occidental Exploration and Protection Company v. Ecuador*, UNCITRAL, Award of 1 July 2004, para 187 ('The tribunal accordingly holds that the Respondent has breached its obligations to accord fair and equitable treatment under Article II(3)(a) of the Treaty. In the context of this finding the question of whether in addition there has been a breach of full protection and security under this Article becomes moot as a treatment that is not fair and equitable automatically entails and absence of full protection and security of the investment').

<sup>31</sup> One example is *Azurix v. Argentina*, ICSID Case No. ARB/01/12, Award of 14 July 2006, para 408: 'The tribunal is persuaded of the interrelationship of fair and equitable treatment and the obligation to afford the investor full protection and security. The cases referred to above show that full protection and security was understood to go beyond protection and security ensured by the police. It is only a matter of physical security; the stability afforded by a secure investment environment is as important from an investor's point of view. The tribunal is aware that in recent free trade agreements signed by the United States, for instance, with Uruguay, full protection and

opposite solution, especially because, almost always, BITs set out these two standards separately;<sup>32</sup> assuming this, for example, the *Eureko* Tribunal highlighted that the stability of the investment climate is part of FET only, and may not be included in FPS accordingly.<sup>33</sup>

The need to differentiate the two standards under consideration has been highlighted also by a part of scholarship; it has been argued that while FET would entail essentially a ‘negative obligation’ to refrain from conduct that is unfair and unjust, FPS would require a positive act, i.e. the commitment to create a factual and legal framework that guarantees and protects investors from adverse circumstances, including the provision of national means of recourse.<sup>34</sup> Indeed, the positive or negative nature of the obligation (to which one may refer in order to distinguish FET from the NDT) does not solve the question at issue here. As has been claimed, FET is a complex criterion which entails both positive and negative obligations. Regardless of this, also as a result of its scarce application in most recent practice, the meaning of the term of art ‘full protection and security’ is open to widely varying interpretations. Hence, should one accept the idea according to which FPS is no more than a specific instance of FET, the content of the latter would nevertheless remain vague and unclear.

Last but not least, the relationship between FET and expropriation must be considered. In *PSEG* such a relationship was described in the following terms:

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(Footnote 31 continued)

security is understood to be limited to the level of police protection required under customary international law. However, when the terms ‘protection and security’ are qualified by ‘full’ and no other adjective or explanation, they extend, in their ordinary meaning, the content of this standard beyond physical security. To conclude, the tribunal, having held that the Respondent failed to provide fair and equitable treatment to the investment, finds that the Respondent also breached the standard of full protection and security under the BIT’.

<sup>32</sup> *Jan de Nul v. Egypt*, ICSID Case No. ARB/03/13, Award of 6 November 2008, para 269: ‘The notion of continuous protection and security is to be distinguished here from the fair and equitable standard since *they are placed in two different provisions of the BIT*, even if the two guarantees can overlap. As put forward by the Claimants, this concept relates to the exercise of due diligence by the State’ (emphasis added). The decision in *Houben v. Burundi*, ICSID Case No. ARB/13/7, Award of 2 January 2016, must be cited to the same effect. Its paras 155–156 state as follows: ‘Le Tribunal est conscient qu’une ligne de jurisprudence s’est développée en matière CIRDI qui génère certaines confusions et un certain chevauchement entre ces différentes normes de protection trouvées dans la plupart des TBI, en particulier en ce qui concerne le standard du traitement juste et équitable et le standard de la sécurité et protection constante. Le défendeur lui-même, bien qu’ayant proposé une définition autonome du standard de sécurité et protection constante comme couvrant l’obligation pour l’Etat d’accueil de «protéger les investissements étrangers de dommages physiques causés par des tierces parties», n’a pas été à l’abri de certaines approximations concernant le contenu de ces deux standards. Le Tribunal considère, pour sa part, que si le TBI a pris soin de prévoir deux standards de protection, c’est que chacun recouvre une protection différente, par application du principe général de l’effet utile dans l’interprétation des traités internationaux.’

<sup>33</sup> *Eureko v. Poland*, Ad Hoc Arbitration, Partial Award of 19 August 2005, paras 248–253.

<sup>34</sup> Schreuer 2010, pp. 13–14.



The standard of fair and equitable treatment has acquired prominence in investment arbitration as a consequence of the fact that other standards traditionally provided by international law might not in the circumstances of each case be entirely appropriate. This is particularly the case when the facts of the dispute do not clearly support the claim for direct expropriation, but there are notwithstanding events that need to be assessed under a different standard to provide redress in the event that the rights of the investor have been breached.<sup>35</sup>

Put simply, a tribunal might deny the existence of an expropriation, but still find a violation of FET. The opposite, however, is not equally true, in the sense that an uncompensated expropriation almost always ends up involving an FET violation. Bearing this in mind, the two standards, while necessarily connected with each other, remain separate. This is to say that FET may be part of the requirements for a legal expropriation,<sup>36</sup> but without any implications on its autonomous relevance. Neither is it possible to affirm that the connection between such standards answers the question concerning the FET content. In the words of Christoph Schreuer,

protection against expropriation has by no means become superfluous through the introduction of FET. At times, reliance on FET may not be possible. Most but not all treaties provide protection against unfair and inequitable treatment. Investment insurance typically covers expropriation but not the violation of FET. Under some treaties, jurisdiction for investor-State arbitration exists only with respect to expropriation, sometimes only for the amount of compensation due, but not for violation of FET. In order to establish the tribunal's jurisdiction the claimant will have to base its claim on expropriation.<sup>37</sup>

## 2.4 FET and Custom. FET as a Specific Instance of the International Minimum Standard

Also moving from the difficulty of identifying the FET content by means of a combination with other standards of treatment,<sup>38</sup> several authors make reference to customary international law and regard FET either (i) as an embodiment in matter

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<sup>35</sup> *PSEG v. Turkey*, ICSID Case No. ARB/02/04, Award of 19 January 2009, para 238.

<sup>36</sup> One may mention all those provisions on expropriation, like Article 1110(1) of NAFTA or Article IV(1) of the 1991 Argentina-US BIT, which contain a reference to FET.

<sup>37</sup> Schreuer 2008, p. 3.

<sup>38</sup> Such a circumstance has been highlighted in *PSEG v. Turkey*, ICSID Case No. ARB/02/04, Award of 19 January 2009. Its para 239 states as follows: 'Because the role of fair and equitable treatment changes from case to case, it is sometimes not as precise as would be desirable. Yet, it clearly does allow for justice to be done in the absence of the more traditional breaches of international law standards. This role has resulted in the concept of fair and equitable treatment acquiring a standing on its own, separate and distinct from that of other standards, albeit many times closely related to them, and thus ensuring that the protection granted to the investment is fully safeguarded'. A normative confirmation of the same circumstance may be found in some recent investment agreements, such as the 2012 China-Japan-Korea Trilateral Investment

of foreign investments of the ‘international minimum standard’ (IMS) or (ii) as an autonomous custom. With regard to the first opinion, it is worth recalling that IMS is the traditional rule whereby any State, when dealing with foreign nationals and their property, must respect a minimum set of principles. Hence, this standard owns an *absolute* (rather than a *relative*) character, since it would be completely independent of the host State’s legal system. Along with a significant diplomatic<sup>39</sup> and treaty practice,<sup>40</sup> the customary nature of the rule may be inferred from a copious arbitral case law. The long-standing decisions in *Neer* and *Roberts* passed by the United States-Mexico General Claims Commission in 1926 are fairly informative.<sup>41</sup> In similar terms, they recognize that the *ultimate test* to evaluate the merits of a complaint for mistreatment of an alien is whether he is treated in accordance with ordinary standards of civilization in light of international law.<sup>42</sup> These same decisions, on the other hand, are significant insofar as they contribute to clarify the IMS content. In detail, the *Neer* tribunal stated as follows:

The treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful 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. Whether the insufficiency proceeds from the deficient execution of a reasonable law or from the fact that the laws of the countries do not empower the authorities to measure up to international standards is immaterial.<sup>43</sup>

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(Footnote 38 continued)

Agreement. According to its Article 5, a determination that there has been a breach of a standard different from FET does not *ipso facto* entail a violation of the latter.

<sup>39</sup> One example is the opinion expressed by the American State Department with regard to the existence of an International Minimum Standard. See 77 *American Journal of International Law* 1, 1983, pp. 135 et seq. The view that FET is part of the customary MST was also put forward by the Swiss Foreign Office in 1979 (‘On se réfère ainsi au principe classique du droit des gens selon lequel les Etats doivent mettre les étrangers se trouvant sur leur territoire et leurs biens au bénéfice du ‘standard minimum’ international, c’est-à-dire leur accorder un minimum de droits personnels, procéduraux et économiques’; *Annuaire Suisse de Droit International* 1980, p. 178.)

<sup>40</sup> One may mention the Treaty of Amity, Economic Relations, and Consular Rights between the U.S. and Italy (February 2, 1948). Its Article 5, para 2, states as follows: ‘The nationals of each High Contracting Party shall receive, within the territories of the other High Contracting Party, the most constant protection and security for their persons and property, and shall enjoy in this respect the full protection and security required by international law’. In legal doctrine, see Lanfranchi 1968.

<sup>41</sup> *Neer v. Mexico*, Award of 15 October 1926, in *Reports of International Arbitral Awards*, vol. IV, p. 60; *Roberts v. Mexico*, Award of 2 November 1926, *idem*, p. 77.

<sup>42</sup> *Roberts*, p. 80: ‘[F]acts with respect to equality of treatment of aliens and nationals may be important in determining the merits of a complaint of mistreatment of an alien. But such equality is not the ultimate test of the propriety of the acts of the authorities in the light of international law. That test is, broadly speaking, whether aliens are treated in accordance with ordinary standards of civilization.’

<sup>43</sup> *Neer*, pp. 61–62.

On these assumptions, FET would plausibly do nothing but extend IMS, as it has evolved in current international law, to the treatment of foreign investments.<sup>44</sup> A number of significant circumstances seem to support such a conclusion. A first circumstance lies in Article 1105(1) of NAFTA (entitled ‘Minimum Standard of Treatment’)<sup>45</sup> and its binding interpretation issued by the NAFTA Free Trade Commission on July 21, 2001. According to this interpretation:

Article 1105 (1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another 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 the customary international law minimum standard of treatment of aliens.<sup>46</sup>

The same wording may be found in Articles 5 of the 2004 Canada’s Model Foreign Investment Protection Agreement,<sup>47</sup> Article 5 of the 2012 United States Model Bilateral Investment Treaty<sup>48</sup> and, more recently, in Article 9.6 of the 2015 Trans-Pacific Partnership Treaty (not yet in force).<sup>49</sup> Further, some arbitral

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<sup>44</sup> Cf. e.g. Fatouros 1962, pp. 135–141, 214–215; Kohona 1987, p. 91; Mo 1991, p. 52; Juillard 1994, pp. 131–135; Sacerdoti 1997, p. 341; Leben 1999, p. 13; OECD 2004; Orakhelashvili 2008; Montt 2009, p. 69.

<sup>45</sup> In particular, the Article states that ‘[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.’

<sup>46</sup> On the history of Article 1105 of NAFTA, see Thomas 2002.

<sup>47</sup> In detail, Article 5 (‘Minimum Standard of Treatment’) states as follows: ‘1. Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security. 2. The concepts of ‘fair and equitable treatment’ and ‘full protection and security’ in para 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.’

<sup>48</sup> In detail, Article 5 (‘Minimum Standard of Treatment’) states as follows: ‘1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. 2. For greater certainty, para 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. The obligation in para 1 to provide: (a) ‘fair and equitable treatment’ includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and (b) ‘full protection and security’ requires each Party to provide the level of police protection required under customary international law.’

<sup>49</sup> In detail, this Article (‘Minimum Standard of Treatment’) states as follows: ‘1. Each Party shall accord to covered investments treatment in accordance with applicable customary international law principles, including fair and equitable treatment and full protection and security. 2. For greater certainty, para 1 prescribes the customary international law minimum standard of treatment of aliens as the 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. The

decisions come to a closely comparable result. In *Deutsche Bank v. Sri Lanka*,<sup>50</sup> for example, the tribunal argued that ‘the actual content of the treaty standard of fair and equitable treatment is not materially different from the content of the minimum standard of treatment in customary international law, as recognized by numerous arbitral tribunals and commentators.’<sup>51</sup> Last but not least, one may consider all those treaty provisions which do not *expressly* put FET and IMS on an equal footing, but do so *implicitly* by evoking international law. Arguably, should a treaty provision accord FET to investors and their investments *in accordance with principles of international law*, a reference to the IMS rule would be supposed.<sup>52</sup>

Now, besides the fact that some decisions expressly reject any possible equation between the two standards,<sup>53</sup> one difficulty with an approach like this, which remains ‘rather dogmatic and conceptual’,<sup>54</sup> lies in the absence of a general consensus on what constitutes IMS under customary international law. Indeed, this standard is itself ambiguous and lacks a precise content. Suffice it to mention the variety of interpretations of the standard given by several NAFTA tribunals shortly after the Free Trade Commission’s clarification. Three lines of thought may be

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(Footnote 49 continued)

obligations in para 1 to provide: (a) ‘Fair and Equitable Treatment’ includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.’

<sup>50</sup> *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award of 31 October 2012.

<sup>51</sup> Paras 418–419.

<sup>52</sup> Article 3 of the 1991 BIT Argentina-France is a good example: ‘Each Contracting Party shall undertake to accord in its territory and maritime zone just and equitable treatment, *in accordance with principles of international law*, to the investments of investors of the other Party and to ensure that the existence of the rights so granted is not impeded either *de jure* or *de facto*’ (emphasis added). As to the case law, one may mention, among others, the decision in *OI European Group B. V. v. Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015, para 481: ‘[T]he Treaty [...] only offers protected investors FET ‘in accordance with international law.’ The Treaty therefore does not guarantee FET in abstract, but rather only as recognized by international law. And the level of protection that international law offers and ensures to foreign nationals is precisely what is known as the minimum customary standard.’ The same decision, para 489, adds that ‘[w]hat is relevant is not the standard as it was defined in the 20th century, but rather the standard as it exists and is accepted today—since both Customary International Law and the standard itself are constantly evolving. And it is quite possible that the minimum customary standard and the FET envisaged in the treaties have converged, according the investor with substantially equivalent levels of protection.’

<sup>53</sup> See, for example, *Crystallex International Corporation v. Venezuela*, ICSID Case No. ARB (AF)/11/2, Award, 4 April 2016, para 530: ‘the tribunal is of the opinion that the FET standard embodied in the Treaty cannot [...] be equated to the ‘international minimum standard’ under customary international law, but rather constitute an autonomous treaty standard.’

<sup>54</sup> *SAUR International S.A. v. Argentina*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability of 6 June 2012, para 491. By the same token, see *Rusoro v. Venezuela*, ICSID Case No. ARB(AF)/12/5, Award of 22 August 2016, para 520.

identified in this connection: first, IMS is equated to the *Neer* standard;<sup>55</sup> second, IMS goes beyond the *Neer* standard;<sup>56</sup> third, IMS is in fact no different from an obligation to provide FET.<sup>57</sup> Seen from this perspective, also the opinion advanced by Patrick Dumberry is not of much more assistance. According to this author, while ‘there are *in general*, good reasons to interpret the term ‘fair and equitable treatment’ found in most BITs, as a reference to something *other than* the minimum standard of treatment under custom [...] any possible ambiguities disappear when [as in the case under NAFTA Article 1105] there is clear and undeniable evidence that the intention of the State parties was in fact that the FET standard be considered as a reference to the minimum standard of treatment under custom.’<sup>58</sup> This opinion reflects the more general idea that the question concerning the status of FET in international law would only be relevant in situations where there is no treaty ‘that governs the relationship between a foreign investor and the host country of the investment’ or a treaty ‘*does* govern the relationship between a foreign investor and the host country [without containing] any FET clause’.<sup>59</sup> Yet, as will be further

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<sup>55</sup> *Glamis Gold, Ltd. v. United States*, UNCITRAL (NAFTA), Award of 8 June 2009, para 22: ‘[A]lthough situations presented to tribunals are more varied and complicated today than in the 1920s, the level of scrutiny required under *Neer* is the same. Given the absence of sufficient evidence to establish a change in the custom, the fundamentals of the *Neer* standard thus still apply today: to violate the customary international law minimum standard of treatment codified in Article 1105 of the NAFTA, an act must be sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons—so as to fall below accepted international standards and constitute a breach of Article 1105(1)’.

<sup>56</sup> *Waste Management v. Mexico*, ICSID Case No. ARB (AF)/00/3, Award of 30 April 2004. According to this decision, in particular, ‘[b]oth the Mondev and ADF tribunals rejected any suggestion that the standard of treatment of a foreign investment set by NAFTA is confined to the kind of outrageous treatment referred to in the *Neer* case’ (para 93). Indeed, ‘despite certain differences of emphasis a general standard for Article 1105 is emerging. Taken together, the S.D. Myers, Mondev, ADF and Loewen cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process’ (para 98). More recently, the same view has been advanced by an UNCITRAL Tribunal in *Grand River Enterprises Six Nations, Ltd. et al. v. United States*, Award of 12 January 2011, para 166: ‘Article II(2) of the BIT refers to the “principles of international law” in accordance with which fair and equitable treatment is to be bestowed. To determine these principles the tribunal must consider the present status of development of public international law in the field of investment protection. It is the tribunal’s view that public international law principles have evolved since the *Neer* case and that the standard today is broader than that defined in the *Neer* case on which Respondent relies.’

<sup>57</sup> *Merril & Ring v. Canada*, UNCITRAL Rules, Award of 31 March 2010, paras 182 et seq.

<sup>58</sup> Dumberry 2013, p. 44; in other words, in this author’s view, ‘the debate as to whether the FET is an autonomous standard or linked to the minimum standard of treatment under international law is simply *not relevant* in the context of Article 1105’ (p. 45).

<sup>59</sup> Dumberry 2016, pp. 4–5.

clarified here shortly, also in these cases, and thus regardless of whether FET is or is not ruled in a treaty provision, the question concerning its content remains unanswered in any event. And, indeed, the wording of treaty clauses existing in the matter is too vague for the FET content to be identified.

On the other hand, even where a conventional provision requires FET to be understood by reference to general principles of international law, this includes ‘a reference to the whole of international law and not to a specific part of it [which would be the case with IMS].’<sup>60</sup>

### 2.4.1 *FET as an Autonomous Custom*

Unlike the views mentioned in the previous section, some authors argue that FET, as a result of a plentiful and consistent State practice, would eventually pass into the corpus of customary international law, giving rise to a new and autonomous rule.<sup>61</sup> It is an opinion which rests on the classical dualistic conception of this source of law, conceived as a set of two elements: an objective element (*diuturnitas*), understood as the existence of a uniform State practice, and a subjective element (*opinio juris sive necessitatis*), i.e. the opinion whereby that practice is mandatory.<sup>62</sup>

More squarely, the two-element approach is widely adopted in national and international judicial practice. Suffice it to mention Article 38, para 1(b) of the ICJ Statute (whereby the Court shall apply ‘international custom, as evidence of a general practice accepted as law’),<sup>63</sup> and the current work on the identification of customary international law carried out by the UN ILC, which during its sixty-eighth session (held in Geneva from 2 May to 10 June, and from 4 July to 12

<sup>60</sup> *Urbaser S.A. et al. v. Argentina*, ICSID Case No. ARB/07/26, Award of 8 December 2016.

<sup>61</sup> One may mention the case of *Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Award of 18 September 2007, para 296: ‘the tribunal finds the Respondent to be right in arguing that fair and equitable treatment is a standard that is none too clear and precise. This is because international law is itself not too clear or precise as concerns the treatment due to foreign citizens, traders and investors. This is the case because the pertinent standards have gradually evolved over the centuries. Customary international law, treaties of friendship, commerce and navigation, and more recently bilateral investment treaties have all contributed to this development.’

<sup>62</sup> Conforti and Labella 2012, p. 31; Treves 2012.

<sup>63</sup> One recent example may be found in *Jurisdictional Immunities of the State*, (Germany v. Italy: Greece intervening), Judgment of 3 February 2012, para 55: ‘[T]he Court must determine, in accordance with Article 38(1)(b) of its Statute, the existence of ‘international custom, as evidence of a general practice accepted as law’ conferring immunity on States and, if so, what is the scope and extent of that immunity. To do so, it must apply the criteria which it has repeatedly laid down for identifying a rule of customary international law. In particular [...], the existence of a rule of customary international law requires that there be ‘a settled practice’ together with *opinio juris*.’

August, 2016) adopted a set of sixteen draft conclusions on first reading.<sup>64</sup> Remarkably, draft conclusion 2 states that

[t]o determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*).

Draft conclusion 3 further specifies as follows:

1. In assessing evidence for the purpose of ascertaining whether there is general practice and whether the practice is accepted as law (*opinio juris*), regard must be had to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found. 2. Each element is to be separately ascertained. This requires an assessment of evidence for each element.

Of course, the need to identify customary rules is also peculiar to the law of foreign investments, where the underlying approach remains always the same: both elements (objective and subjective) are required, and the wording of some bilateral<sup>65</sup> and multilateral<sup>66</sup> investment treaties is a clear indication of this.

Now, having specific regard to the topic under consideration here, it is worth noting that, in respect of *diuturnitas*, the growing number of international agreements providing for an FET clause may in and of themselves serve as evidence of State practice,<sup>67</sup> but—as in part described earlier—at least in appearance these

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<sup>64</sup> See Report of the International Law Commission on the Work of its Sixty-Eighth Sess., Supp. No 10, 74, at 76, UN Doc. A/71/10 (2016).

<sup>65</sup> For example, according to Annex A to the treaty between the government of the United States of America and the government of the Republic of Rwanda concerning the encouragement and reciprocal protection of investment (2008), parties ‘confirm their shared understanding that ‘customary international law’ generally and as specifically referenced in Article 5 and Annex B results from a general and consistent practice of States that they follow from a sense of legal obligation.’

<sup>66</sup> For example, Annex 9-A of the 2016 Trans-Pacific Partnership Treaty (‘Customary International Law’) states as follows: ‘The Parties confirm their shared understanding that ‘customary international law’ generally and as specifically referenced in Article II.6 (Minimum Standard of Treatment) results from a general and consistent practice of States that they follow from a sense of legal obligation. The customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the investments of aliens.’

<sup>67</sup> Once again, the idea whereby treaties represent a manifestation of practice for the purpose of customary international law may be inferred from the ILC’s Report (*supra* note 64), p. 24, para 41 (h) (*Practice in connection with treaties*): ‘Negotiating, concluding and entering into, ratifying and implementing bilateral or multilateral treaties (and putting forward objections and reservations to them) are another form of practice. Such practice does not concern the law of treaties alone; it may also relate to the obligations assumed through the relevant international legal instrument.’ See also D’Amato 1988, p. 462: ‘What makes the content of a treaty count as an element of custom is the fact that the parties to the treaty have entered into a binding commitment to act in accordance with its terms. Whether or not they subsequently act in conformity with the treaty, the fact remains that they have so committed to act. The commitment itself, then, is the ‘State practice’ component of custom’.

clauses lack uniformity; indeed, while sometimes they mention FET alone<sup>68</sup> or in combination with a reference to international law,<sup>69</sup> more often they combine FET with other standards of treatment (like MFN,<sup>70</sup> NT,<sup>71</sup> NDT,<sup>72</sup> or FPS).<sup>73</sup> In brief, the question remains whether the existence of different categories of treaty FET clauses implies the absence of a uniform practice. For this question to be solved, the 2016 ILC Report is once again of guidance. In its terms, what is required is not a complete uniformity of practice, but rather a core of meaning that does not change.<sup>74</sup> The same indications may be found both in some arbitral decisions and in legal doctrine. As to case law, a passage of the *Mondev* decision is very significant.<sup>75</sup> In the view of the tribunal, the vast number of bilateral and regional investment treaties that *almost (but not always)* uniformly provide for fair and equitable treatment of foreign investments reveals ‘a remarkably widespread basis [on which] States have repeatedly obliged themselves to accord foreign investment such treatment’.<sup>76</sup> In the same vein, authors in favour of the customary nature of FET argue that practice uniformity should be assessed in a flexible way:

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<sup>68</sup> This minimal approach can be found in a number of investment agreements such as the already mentioned Article 2, para 2, of the 1993 Argentina-Great Britain BIT: ‘Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy protection and constant security in the territory of the other Contracting Party.’ The 1998 Australia-China BIT is relevant in the same vein. Its Article 3 states as follows: ‘A contracting party shall at all times ensure fair and equitable treatment in its own territory to investments and activities associated with such investments.’

<sup>69</sup> As has been frequently observed, Article 1105, para 1, of the NAFTA, is a good example in that respect.

<sup>70</sup> See *supra* para 2.3.

<sup>71</sup> *Idem*.

<sup>72</sup> *Idem*.

<sup>73</sup> *Idem*.

<sup>74</sup> Draft conclusion 8 states as follows: ‘1. The relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent. 2. Provided that the practice is general, no particular duration is required.’ The same approach has been followed by the ICJ: ‘It is not to be expected that in the practice of States the application of the rules in question should have been perfect [...] The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule’; (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*), Judgment of 27 June 1986, para 186.

<sup>75</sup> *Mondev International Ltd v. United States*, ICSID Case No. ARB(AF)/99/2, Award of 11 October 2002.

<sup>76</sup> Paragraph 117. Albeit in more general terms, the decision in *Merrill & Ring Forestry L. P. v. Canada*, NAFTA (UNCITRAL), Award of 31 March 2010, para 210, seems to express the same line of thought: ‘[A] requirement that aliens be treated fairly and equitably in relation to business, trade and investment [...] has become *sufficiently* part of widespread and consistent practice so as to demonstrate that it is reflected today in customary international law as *opinio juris*’ (emphasis added).



[T]he differences mainly concern the relationship of FET to principles of international law and to other standards. This relationship cannot and should not be clarified in a uniform and ever-congruent way and thus cannot stand in the way of the formation of custom because it is the very nature of a standard not to be uniform and specific but to be broad and open for fact-specific analysis. [...] What truly counts is [...] whether there is a uniform practice insofar as a high number of the BITs existing today provide for FET for investments and/or investors. As this is the case, *the first element of custom is fulfilled* – despite the fact that several categories of FET clauses exist.<sup>77</sup>

Let us turn now to the second constituent element of custom, viz. *opinio juris sive necessitatis*. In line with a typical feature of international law, a voluntary limitation of State sovereignty may never be merely supposed; hence, while implicitly rejecting the idea whereby the extensive BIT practice would in itself be a manifestation of *opinio juris*,<sup>78</sup> the same authors mentioned above bring this element back to an interest of States in a rule of customary international law providing for FET.<sup>79</sup>

States have a real interest in a set of basic principles on foreign investment in customary international law. Since FET is the core standard in the law of foreign investment, States especially have a real interest in a customary FET standard. Hence, the element of *opinio juris* is present. In light of the over-arching interest in a healthy investment climate [...], a reliable legal framework, fostered by a set of principles in customary international law and de-escalating potential conflicts in an area of overlapping treaties and sovereignties is in the interest of the community of States. It is even in the interests of developing States, as they would be able to present themselves as more reliable partners: in the absence of treaty protection, the FET of investments would be guaranteed pursuant to customary international law.<sup>80</sup>

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<sup>77</sup> Diehl 2012, pp. 135–136 (emphasis added.). For a similar opinion, see also Tudor 2008, pp. 74 et seq. *Contra* Kishoiyian 1993, p. 372, according to whom ‘there is not sufficient consistency in the terms of the investment treaties to find in them support for any definite principles of customary international law [T]he foregoing analysis of BITs has manifested so much uncertainty and contradiction, so much fluctuation and discrepancy in the rapid conclusion of BITs, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not easy to discern in all the treaties any constant and uniform usage, accepted as law regulating foreign investment.’

<sup>78</sup> Once again, this idea may be found in *Mondev* (note 53), paras 110–111: ‘[NAFTA Parties] appear to question whether the parties to the very large numbers of bilateral investment treaties have acted out of a sense of legal obligation when they include provisions in those treaties such as that for ‘fair and equitable’ treatment of foreign investment [...] The question is entirely legitimate. It is often difficult in international practice to establish at what point obligations accepted in treaties, multilateral or bilateral, come to condition the content of a rule of customary international law binding on States not party to those treaties. Yet the United States itself provides an answer to this question, in contending that, when adopting provisions for fair and equitable treatment and full protection and security in NAFTA (as well as in other BITs), the intention was to incorporate principles of customary international law.’

<sup>79</sup> The idea whereby *opinio juris* should reflect an interest of the community of States to establish a rule of customary international law is to be traced back to Doehring 2004, margin no. 317.

<sup>80</sup> Diehl 2012, p. 145.

For a number of reasons, an approach of this kind is not altogether persuasive. First, the frequency with which States conclude investment treaties would indeed tacitly reveal the absence of customary principles in the matter, ‘inasmuch as it could be assumed that such clauses were adopted precisely because they set a standard other than that required by custom.’<sup>81</sup> Second, ‘only through the presence of *opinio juris sive necessitatis* can a customary rule be inferred from treaty practice’;<sup>82</sup> this is widely supported in State practice<sup>83</sup> as well as in the above-mentioned ILC Report.<sup>84</sup> Accordingly, it is hardly acceptable that such an *opinio* stems from a general and undefined interest of the international community as a whole nor, *a fortiori*, from the mere existence of a copious treaty practice, which does not generate *per se* a presumption of *opinio*.<sup>85</sup> As clearly stated by the ICJ in the renowned *Diallo* case:

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<sup>81</sup> *Cargill v. Mexico*, ICSID Case No. ARB(AF)/05/2, Award of 18 September 2009, para 276. In the same vein, see Sornarajah 2010, p. 232: ‘The view is stated that the large number of bilateral investment treaties that have been signed in recent years has led or will lead to the creation of customary principles of international law on the protection of foreign investments. The frequency with which this view is stated is puzzling in view of the fact that the evidence and the theory are against the possibility of investment treaties creating customary international law [...] Had the rules on investment protection been clear, there would have been no reason for such treaties.’

<sup>82</sup> Conforti and Labella 2012, p. 33. More in detail, according to the same authors, ‘[d]omestic courts often resort to treaties in their decisions as evidence of a customary international rule. However, treaties can be construed as either confirming pre-existing customary principles or as creating new rules applicable only to contracting States. Only an assessment of *opinio juris sive necessitatis* can determine which of these two effects was intended by the contracting States, and thereby establish whether the treaty supports or contradicts the existence of a customary rule’ (pp. 33–34).

<sup>83</sup> One may mention *Camuzzi International S.A. v. Argentina*, ICSID Case No. ARB/03/2, Decision on Objections to Jurisdiction, 11 May 2005, para 144: ‘There is no obstacle in international law to the expression of the will of States through treaties being at the same time an expression of practice and of the *opinio juris* necessary for the birth of a customary rule if the conditions for it are met.’

<sup>84</sup> Draft Conclusion 11 states as follows: ‘1. A rule set forth in a treaty may reflect a rule of customary international law if it is established that the treaty rule: (a) codified a rule of customary international law existing at the time when the treaty was concluded; (b) has led to the crystallization of a rule of customary international law that started to emerge prior to the conclusion of the treaty; or (c) has given rise to a general practice that is accepted as law (*opinion juris*), thus generating a new rule of customary international law. 2. The fact that a rule is set forth in a number of treaties may, but does not necessarily, indicate that the treaty rule reflects a rule of customary international law.’

<sup>85</sup> For the suggestion of the existence of such a presumption in similar cases, see Crawford 2013, paras 167–174.

The fact [...] that various agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal regimes governing investment protection, or that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, is not sufficient to show that there has been a change in customary rules of diplomatic protection; it could equally show the contrary.<sup>86</sup>

Likewise, already in 1986, Oscar Schachter observed that ‘the repetition of common clauses in bilateral treaties does not create or support an inference that those clauses express customary law [because to] sustain such claim of custom one would have to show that apart from the treaty itself, the rules in the clauses *are considered obligatory*.’<sup>87</sup>

Third, and most importantly, the classification of FET as an autonomous custom does not answer the question concerning its normative content. As already said, most treaty norms providing for an FET clause do not pinpoint its elements, but

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<sup>86</sup> *Guinea v. Congo (Preliminary Objections)*, Judgment of 24 May 2007, para 90. In the same vein one may mention the more ancient decision in *North Sea Continental Shelf (Germany v. Denmark; Germany v. Netherlands)* Judgment of 20 February 1969, para 76: ‘Over half the States concerned, whether acting unilaterally or conjointly, were or shortly became parties to the Geneva Convention, and were therefore presumably so far as they were concerned, acting actually or potentially in the application of the Convention. From their action no inference could legitimately be drawn as to the existence of a rule of customary law.’

<sup>87</sup> Schachter 1984, p. 126 (emphasis added). The same remark in relation to FET clauses may be found in Kläger 2011, p. 269 (‘[E]ven if the overwhelming State practice—which is indeed represented by the sheer number of BITs incorporating fair and equitable treatment—may ease the requisition of an *opinio iuris*, demonstrating that evidence of the latter is still a matter of great difficulty. This is also because the rise of arbitral decisions in recent years has created some new controversies which also contributed to an increased textual diversity in relation to fair and equitable treatment clauses.’) and, more recently, in Dumberry 2016, p. 1, 23 (‘There is indeed no indication in treaty text (or in the *travaux préparatoires* or anywhere else) showing that States include FET clauses in their BITs out of a sense of conviction that this is the type of protection they *have* to provide to foreign investors *under international law*. While the present author has found a number of clear examples of such existing *opinio juris* in BITs in other contexts, none was found regarding the FET clause. States sign BITs to protect their own interests, not out of sense of obligation’). A less pessimistic opinion may be credited to Valenti 2014, p. 26, 32 (‘[O]ne must acknowledge that [the] insertion of [FET] into BITs is a widespread practice of States. However, it is not easily proven that such a practice is backed by a sense of legal obligation (*opinio juris*), which must also be found before concluding by stating the customary status of the rule. Given the uncertainty surrounding the subjective element of custom with reference to the FET, we do not believe that it has already attained the customary status. In our opinion, however, the evolution that the standard has undergone, especially the progressive definition of its content by the arbitral practice and scholarly conceptualization, reveals that it would be ready to take this qualitative step.’)

limit themselves to imposing its observance.<sup>88</sup> From this point of view, the opinion of Carlo Santulli whereby FET provisions would be rules of ‘renvoi mobile’ to customary law, i.e. as this law changes so does the content of the provision, is not of much more assistance.<sup>89</sup>

## 2.5 FET as a Self-Standing Treaty Clause

According to a further and more formalistic proposal, also supported by some judicial decisions,<sup>90</sup> FET would embody a self-standing treaty clause, the content of which should be determined on a case-by-case basis, that is to say in light of the particular circumstances in which any given BIT is concluded. To this end, one

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<sup>88</sup> Not by chance, in order to answer this objection, the same authors claiming the customary nature of FET resort to the different category of general principles common to domestic systems. For example, Tudor 2008, p. 54, argues as follows: ‘Establishing that FET is part of customary law does not exclude it from being a general principle of law. This duality is recognized by the very structure of Article 38, which considers custom and general principles in two separate paragraphs. The relevance of recognizing a dual nature—custom/general principle—to the FET is, first, that the function and nature of these two sources are different and second, that this duality testifies to the FET’s importance and almost unavoidable presence in international law. As a custom, the FET standard has to comply with [two] requirements [...], i.e., State practice and *opinio juris*. As a general principle of law, it enjoys an independent status and its opposability to States does no longer depend on its effective acceptance at the international level but on its place at the domestic level. Therefore, it remains relevant to examine the FET as a general principle of law even once its roots in both conventional and customary law are established. ‘Likewise, Diehl 2012, pp. 178–179, observes that ‘the FET standard is a ‘twofold sources-standard’, that is, a standard based on two sources of public International law: The fact that customary International law is largely shaped by the *outward* behaviour of States as it is reflected in their practice on the international plane, whereas general principles of law find their pivotal underpinning in the *internal* structure of the States’ own legal orders, is not merely of terminological importance. If a standard is customary international law only, States are largely free to change or to destroy it by modifying their behaviour in inter-State relations. A general principle of law, by contrast, can only be overcome if a sufficiently relevant number of States change their internal legal orders in order to do away with it. Furthermore, the classification of the FET standard as a general principle of law enables arbitral tribunals to not only draw on the case law of other international courts and tribunals, but to look to domestic jurisprudence for guidance on how to interpret this broad standard.’ In any case, on the possibility of referring to general principles common to domestic systems in matter of FET, *see infra*.

<sup>89</sup> Santulli 2015, p. 84: ‘Le renvoi effectué par la clause de traitement juste équitable est mobile en ce sens qu’il permet de tenir compte des évolutions postérieures (de la pratique comme de la perception des valeurs protégées) à la conclusion de l’accord—a *fortiori* ne se réfère-t-il pas à des conceptions plus anciennes.’

<sup>90</sup> *See*, for instance, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award of 6 May 2013, para 197: ‘[The tribunal] sees no benefit in engaging in an abstract debate as to whether Article 3(1) [of the Netherlands-Romania BIT], 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 (in keeping with the

must resort to the interpretation criteria set out in the VCLT,<sup>91</sup> especially to its Article 31, which defines a single rule of interpretation comprising various elements.<sup>92</sup>

In line with the first of these elements, the terms ‘fair’ and ‘equitable’ demand to be defined in their ordinary meaning;<sup>93</sup> still, such a meaning is anything but capable of providing assistance. As noted by the *Saluka* tribunal:

[t]he ‘ordinary meaning’ of the ‘fair and equitable treatment’ standard can only be defined by terms of almost equal vagueness. In *MTD*, the tribunal stated that: ‘in the ordinary meaning, the terms ‘fair’ and ‘equitable’ [...] mean ‘just’, ‘even handed’, ‘unbiased’, ‘legitimate’. On the basis of such and similar definitions, one cannot say more than the tribunal did in *S.D. Meyers* by stating that an infringement of the standard requires ‘treatment in such an unjust or arbitrary manner that the treatment rises to a level that is unacceptable from an international perspective.’<sup>94</sup>

In other words, albeit at the risk of using a tautology, the question pertaining to the FET content is not susceptible to be solved on a purely semantic level. And the

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(Footnote 90 continued)

approach adopted by other arbitral tribunals) to follow the ordinary meaning of the word used, in their context, and in the light of the object and purpose of the BIT.’

<sup>91</sup> This opinion has been clearly maintained by Bronfman 2006. To his mind, the FET clause should be understood ‘according to the real intention of the parties. In other words, it grants the best protection to the investor, which implies the fairest and most equitable conduct by the host State in regard to the specific facts of the case’ (p. 678). More recently the same opinion has been shared by Kläger 2011, p. 280: ‘[F]air and equitable treatment represents a conventional norm which, due to its general texture, serves as a gateway for the integration of principled arguments that guide its application. The fact that fair and equitable treatment is systematically interlinked to arguments derived from legal principles, based on other conventional agreements, custom or general principles of law, does not change the position of fair and equitable treatment in the system of international law sources. Taking into account also the principles of fair and equitable treatment and their normative status helps to avoid the difficulties in the classification of fair and equitable treatment and provides a more comprehensive picture of fair and equitable treatment and the international law sources.’ With regard to the case law, *Petrobart v. The Kyrgyzstan*, Arbitration Institute of the Stockholm Chamber of Commerce, Award of 29 March 2005, p. 26, seems to be quite revealing: ‘[T]here is no specific definition of this obligation under international law. Its meaning therefore should be determined by applying the applicable rules of interpretation in light of the circumstances of the present case.’

<sup>92</sup> In general, on treaty interpretation in investment arbitration, see Weeramantry 2012.

<sup>93</sup> Article 31, para 1, VCLT, states as follows: ‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’

<sup>94</sup> *Saluka v. Czech Republic*, UNCITRAL, Partial Award of 17 March 2006, para 297.

fact that several scholars of legal theory have dealt with the concept of fairness is of little guidance, considering the high degree of abstraction of their contributions.<sup>95</sup>

That being said, and turning again to Article 31 VCLT, FET should also be understood in light of both the object and purpose of the given BIT, as they are reflected in the preamble.<sup>96</sup> In detail, recourse to preambles for interpretive reasons is very frequent in international case law,<sup>97</sup> and investment arbitral jurisprudence is no exception, especially where the FET content comes under consideration.<sup>98</sup> One may mention, for example, the cases *Lauder*<sup>99</sup> and *CME*.<sup>100</sup> Yet, on closer

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<sup>95</sup> See, e.g., Rawls 2001; Franck 1995. Both these authors were quoted by an ICSID Tribunal, but precisely with the view to highlighting the limited relevance of their volumes for the FET scope to be established. Reference is made to *Suez et al. v. Argentina*, ICSID Case No. ARB/03/19, Decision on Liability of 30 July 2010, para 221: ‘What, then, is the meaning of ‘fair and equitable treatment’ with respect to the investments undertaken by the Claimants? Philosophers and scholars have devoted tomes to the subject of fairness. While their work is helpful in understanding the abstract concept and its implications, it does not answer a fundamental and practical question that every arbitral tribunal must answer: By what criteria, standard, or test is an arbitral tribunal to determine whether the specific treatment accorded to the investments of a particular foreign investor in a given context is or is not “fair and equitable”? To say that “fair and equitable” means “just”, “even-handed”, “unbiased”, or “legitimate”, as some tribunals have done, is quite frankly to state a tautology. Such formulations are not judicially operational in the sense that they lend themselves to being readily applied to complex, concrete investment fact situations, like those found in the present cases.’

<sup>96</sup> Article 31, para 2, VCLT, states as follows: ‘The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.’ For a comment on this Article, see Dörr and Schmalebach 2012, pp. 62 et seq.

<sup>97</sup> The ICJ Judgment in *Nationals of the United States of America in Morocco (France v. United States)*, Judgment of 27 August 1952, p. 196, is quite revealing: ‘The purposes and objects of this Convention were stated in its Preamble [...] In these circumstances, the Court cannot adopt a construction by implication of the provisions [...] of the Convention which would go beyond the scope of its declared purposes and object.’

<sup>98</sup> In this regard, see Ciurtin 2015, pp. 64, 74. As far as international contracts are concerned, and despite the absence in the matter of a provision akin to that set forth in the VCLT, Crivellaro 2001 argues that preambles should serve the same interpretive purpose.

<sup>99</sup> *Lauder v. Czech Republic*, UNCITRAL, Final Award of 3 September 2001, para 292: ‘Article II (2)(a) of the Treaty sets forth that “[i]nvestments shall at all times be accorded fair and equitable treatments [...]’. As with any treaty, the Treaty shall be interpreted by reference to its object and purpose, as well as by the circumstances of its conclusion (Vienna Convention on the Law of Treaties, Articles 31 and 32). The preamble of the Treaty states that the Parties agree ‘that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources’.

<sup>100</sup> *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award of 13 September 2001, para 155: ‘The Treaty further provides that investments are to be ensured ‘fair and equitable treatment.’ Treaty at Article 3(I). The Treaty’s Preamble underscores the importance of this obligation, acknowledging that ‘fair and equitable treatment’ of investments plays a major role in realizing the Treaty’s goal of encouraging foreign investment.’

inspection, the terms of the question do not change. Such preambles appear equally vague,<sup>101</sup> limiting themselves to identifying with the economic cooperation and the need to foster the exchange of capital and technologies the main reasons underpinning the adoption of an investment treaty.<sup>102</sup> Of course, the above circumstance does not reduce the relevance of the treaty's object and purpose in the matter at issue, but their function seems to be a more limited one, i.e. to guarantee a FET interpretation which is compatible with them. One example is the decision in *Lemire*, where the words used in the preamble of the 1994 Ukraine-United States BIT ('fair and equitable treatment of investment is desirable in order to maintain stable framework for investment') were regarded as symptomatic of the tie existing between FET and the notion of legitimate expectations.<sup>103</sup>

In some respects at least (i.e. insofar as the VCLT's interpretation criteria are relied on), close to the opinion now scrutinized is that recently put forward by Martins Paparinskis,<sup>104</sup> and which assumes that FET, in its ordinary meaning under Article 31, para 1, VCLT, would be a term of art for a reference to customary minimum standard:

If one takes together the pre- and post-Second World War materials pre-dating investment arbitrations, it seems permissible to conclude [so], in particular regarding administration of justice. More recent practice confirms this view by necessary implication. The considerable number of arbitral decisions that read in the elements of customary law of denial of justice (particularly regarding the exhaustion of remedies) in the treaty rules on fair and equitable

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<sup>101</sup> One may mention the Preamble of the 1993 Argentina-France BIT: 'Desiring to develop economic cooperation between the two States and to create favourable conditions for French investments in Argentina and Argentinian investments in France, Convinced that the promotion and protection of such investments are likely to stimulate transfers of capital and technology between the two countries in the interest of their economic development [...].'

<sup>102</sup> Such a sceptical view has been advanced, for instance, in *Suez and AWG*, ICSID Case No. ARB/03/19, Award of 30 July 2010, para 218: 'When one examines the stated purposes of the three BITs, one sees that they all have broader goals than merely granting specific levels of protection to individual investors. In the case of the Argentina-France BIT and the Argentina-Spain BIT, the Contracting States are seeking to further economic cooperation between them. The protection and promotion of foreign investment, while important to attaining that goal, are only a means to that end. Similarly, the Argentina-U.K. BIT is seeking to increase the prosperity of the two States. Through these treaties, the Contracting States pursue the broader goals of heightened economic cooperation between the two States concerned with a view toward achieving increased economic prosperity or development.'

<sup>103</sup> *Joseph Charles Lemire v. Argentina*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability of 14 January 2010, para 264: 'Words used in treaties must be interpreted through their context. The context of Article II.3 is to be found in the Preamble of the BIT, in which the contracting parties state '*that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment...*'. The FET standard is thus closely tied to the notion of legitimate expectations—actions or omissions by Ukraine are contrary to the FET standard if they frustrate legitimate and reasonable expectations on which the investor relied at the time when he made the investment.'

<sup>104</sup> Paparinskis 2013.

treatment necessarily engage in a reference to custom. It would be *prima facie* impossible to derive different standards of exhaustion merely from the neutral expression of treaty language.<sup>105</sup>

On the other hand, the same author underlines that, should an argument of this kind be rejected, customary international law (in the interpretation of FET clauses) could be ‘taken into account’ in any event; which would be merely a consequence related to the systemic interpretation rule enshrined in Article 31(3)(c) of the VCLT.<sup>106</sup> According to this rule, when interpreting a treaty provision, any relevant rules of international law applicable in the relations between the parties shall be taken into account. Indeed, the term ‘relevant rules of international law’ has been understood more broadly or narrowly by legal writers, but there is no doubt that its minimum reach refers to general international law (including both customary international law and general principles of law).<sup>107</sup> Moving from these premises, Paparinskis concludes that, whatever approach one adopts, the content of FET is likely to be always the same; the vagueness of the standard ‘makes the argument about perceptible differences between the ordinary meaning and (context-level) customary law complicated to demonstrate’.<sup>108</sup>

Nonetheless, also the opinion under consideration proves unconvincing. While being supported by a sophisticated and rigorous argumentation, it ends up sharing the traditional trend of several legal writers (as well as of a number of arbitral tribunals) to regard FET as the transposition of IMS in international investment law; therefore, the same criticism applies.<sup>109</sup>

## 2.6 FET and the ‘Rule of Law’ Argument

In more pragmatic terms, some scholars, like Stephan Schill, tend to enhance the increasing arbitral case law effort to identify the constituent elements of FET, like due process of law (understood in a broad sense), legitimate expectations and proportionality, namely some of the most fundamental pillars underpinning the rule of law as it may be understood in the major domestic legal systems of liberal democracies. By doing so, their central argument is that all these canons are transposable to the international level, *going so far as to be subsumed under FET*,

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<sup>105</sup> *Idem*, p. 163.

<sup>106</sup> *Idem*, p. 166. In detail, Article 31, para 3, VCLT, states as follows: ‘There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.’ For a comment on this Article, see Dörr and Schmalebach 2012, pp. 70 et seq.

<sup>107</sup> Focarelli 2015, p. 407.

<sup>108</sup> Paparinskis 2013, p. 167.

<sup>109</sup> See Sect. 2.3.



and that this would be possible thanks to the bridge offered by general principles common to domestic systems under Article 38, para 1(c), of the ICJ Statute.<sup>110</sup>

More in detail, a comparative approach to the rule of law standard would influence the FET interpretation in two main respects:

First, it may enable investment tribunals to positively deduce institutional and procedural requirements from the domestic rule of law standards for a context-specific interpretation of fair and equitable treatment. [...] Second, a comparative analysis of the implications of the rule of law under domestic law may be used to justify the conduct of a State vis-à-vis a foreign investor under the fair and equitable treatment standard. If similar conduct [...] is generally accepted by domestic legal systems as being in conformity with their understanding of the (national) concept of the rule of law, investment tribunals can transpose such findings to the level of investment treaties as an expression of a general principle of law.<sup>111</sup>

An argument of this kind has the advantage of grasping a circumstance which is increasingly evident in the practice of arbitral tribunals. Nonetheless, with a view to establishing whether it is appropriate, one should prove the existence of a twofold condition: (a) a commonly accepted notion of rule of law at national level, and (b) the possibility of regarding the principles behind it as operative at international level as well.

As far as the first question is concerned, attention must primarily be paid to the trend (common to both European and non-European countries) of using the terms 'legal State' and 'rule of law' in a quite controversial and ambiguous way. This terminological difference, indeed, is not accidental and refers to two political and legal traditions which significantly differ from each other: the German experience of the second half of the 19th century and that rooted in the political and constitutional history of Great Britain. Accordingly, the question arises as to whether the two notions debated here, that in turn were reflected in the national legal experience of other countries, may be compounded into a single, shared notion of the rule of law, at least in terms of reference values.

The German concept of *Rechtsstaat*, whose spiritual father is undoubtedly Immanuel Kant and his 'Theory of the State', mainly developed in the aftermath of the Restoration which followed the 1848 revolts and was conceived as both a response to the absolute State, and a reworking of the classical liberal thought and the principles behind it, namely the public protection of fundamental rights and the separation of powers. These two principles, in particular, resulted in two additional axioms. The first one relates to Jellinek's theory of 'subjective public rights', and rests on the circumstance that sovereignty, as well as the power to establish individual rights and ensure their protection, belongs to Parliament only. The second

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<sup>110</sup> Schill 2010, pp. 151 et seq. With regard to FET as the perfect prism through which evaluating the relevance of general principles within international investment law, see also Gazzini 2009, pp. 116 et seq.; Battini 2008, p. 12; McLachlan 2008, pp. 395 et seq.; Schill 2012, pp. 162 et seq.; Jacob and Schill 2015, pp. 700 et seq. More generally on the contribution of international investment law to the rule of law, see Happ 2016, pp. 279 et seq.

<sup>111</sup> Schill 2010, pp. 151, 175.

axiom is reflected in the principle of legality (*Gesetzmässigkeit*), whereby the Executive and the Judiciary are required to rigorously comply with the acts of Parliament, this being a legitimacy condition of their acts.<sup>112</sup> The term *Rechtsstaat*, which was exported from Germany to the rest of continental Europe (giving birth for example to the Italian *Stato di diritto*), is expressly mentioned in Article 28, para 1, of the current German Constitution, which states as follows:

The constitutional order in the *Länder* must conform to the principles of a republican, democratic, and social State governed by the rule of law, within the meaning of this Basic Law.

The English variant of the rule of law is different from the German legal State, since it shares the idea according to which sovereignty belongs to Parliament, but claims the normative supremacy of the latter over the Executive alone: given the common law countries' features and, in particular, the absence of a written Constitution, courts are the main bodies entrusted with the normative function and the protection of individual rights. This is also the reason why, according to a widespread opinion, the difference between the German and Anglo-American doctrine of rule of law lies in the fact that where the former is contained in the codified legislation, the latter may be found in the courts' decisions.<sup>113</sup>

Despite the polysemy of traditions which flow into the notion of the rule of law, the opinion has been put forth whereby these traditions would be based on the same philosophical and political assumptions and stand for the same grounding values.

Under such a perspective, the rule of law is a normative and institutional structure of the European modern State, within which [...] the legal system is entrusted with the task of protecting individual rights, by constraining the inclination of political power to expand, to act arbitrarily and to abuse its prerogatives.<sup>114</sup>

More squarely, *two* principles underlie the rule of law so conceived: 'differentiation of power' and 'diffusion of power'. In particular, the principle of differentiation plays a dual role, being aimed at separating both the legal-political system from other social sub-systems (like the economic or religious one) and the State function consisting in enacting legislation (*legis latio*) from that of enforcing it

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<sup>112</sup> As observed by Gosalbo-Bono 2010, p. 242, an obligation like this 'was the most effective defence against political misuse of powers and constituted the supreme guarantee for the protection of individual rights. However, the nineteenth century A.D. theory of the *Rechtsstaat* failed to take into account the potential arbitrary use of legislative power [...] and was too optimistic in taking for granted the trust of the citizens since it assumed a perfect correspondence between the will of the State, legality, and moral legitimacy'.

<sup>113</sup> On this point, see Dedov 2014, p. 63.

<sup>114</sup> Zolo 2007, p. 19. In the same vein one may consider Dedov 2014, p. 62, once again: 'It is not a mistake to say that the legal State doctrine almost has the same meaning. As it usually happens, two different legal systems (the common law system and the civil law system) give different names to a doctrine in question while they move in the same direction purporting to prevent abuse of power and arbitrariness and to impose limits on politics in accordance with short-term interests.'

(*legis executio*). The principle of diffusion of power serves, on the other hand, to limit State powers (by means of explicit restraints), and to expand consistently the scope of individual freedoms, making them more and more independent of political interference.

The last-mentioned principle entails in turn a number of further principles which include, *inter alia*, due process of law, reasonable expectations and proportionality, that is to say those same principles referred to above. Nonetheless, this circumstance is not enough to suggest that similar guarantees should be granted at the international level. Going more into detail, the ideal of the rule of law is also relevant within the international legal order; both the United Nations<sup>115</sup> and the European Union,<sup>116</sup> for example, make the promotion of this ideal one of their priorities. Yet, in order to transpose the guarantees in question to the international level, it must be proved that they belong to general international law, and in particular to the category of general principles. No doubt, especially where the latter are understood in terms of principles common to domestic systems, such a task is anything but easy. As appropriately observed by Martins Paparinskis,

[t]o the extent that the argument is made in legal terms, it has to fulfil the requirements of the traditional methodology: examine diverse approaches in different legal systems (not limited to the few convenient accessible traditional claimant States); identify whether sufficient similarities exist for generalization; extrapolate the principle; consider the possibility and manner of expressing it in the very different international legal context, demonstrate its relevance and role for the interpretation of treaty law. While there is no reason why such a legal argument could not be successfully made, the not entirely unfounded criticism of the traditional standard as a crude restatement on the international level of constitutional law of certain claimant States would require each methodological step to be made with particular diligence. It is not obvious that this can be done or has been done in existing practice.<sup>117</sup>

On the other hand, the possibility of relying on sources of this kind cannot, generally speaking, be rejected. The very fact that several FET clauses refer to international law is meaningful, since such an indication—it is worth restating—'must be understood as a reference to the sources of [the international legal order]

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<sup>115</sup> See UN General Assembly, 'The Rule of Law at the National and International Levels', A/RES/68/116, 16 December 2013.

<sup>116</sup> By the celebrated judgment of 23 April 1986 known as *Les Verts* (Case 294/83 *Les Verts v. Parliament*, para 23), the European Court of Justice referred to the European Community as a 'Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty.' From that moment on, much water has flowed under the bridge and several references to the rule of law may be found within the EU's realm. This is recalled by Article 2 of the Treaty on European Union (TEU), as well as by the Preambles to the same Treaty and to the Charter of Fundamental Rights of the EU. This is also why, under Article 49 TEU, respect for the rule of law is a precondition for EU membership. Last but not least, the 2014 European Commission Communication, COM(2014)158, to the EU Parliament and the Council ('A new EU Framework to Strengthen the Rule of Law') is of relevance. On the whole matter, see Pech 2009.

<sup>117</sup> Paparinskis 2013, p. 20.

as a whole’,<sup>118</sup> therefore including all sources set out in Article 38(1) of the Statute of the International Court of Justice, among them general principles of law.

### 2.6.1 *Rule of Law and General Principles Common to Domestic Systems*

Scholars of international law have long argued that the expression ‘general principles of law’ may be relied on to identify a twofold category of law sources: (a) general principles common to domestic systems and (b) general principles of international law, with their own foundations in the international legal order itself.<sup>119</sup>

The inquiry into the legal basis and function of the first variant of principles began in 1920, on occasion of the adoption of the Permanent Court of International Justice (PCIJ) Statute. As is well known, in fact, its Article 38, para 1(c), which has been retained in the ICJ Statute as well, refers to ‘general principles of law recognized by civilized nations’, placing them among the sources to which the Court may refer in order to resolve any disputes of which it is seized. Not surprisingly, with a view to limiting judicial discretion in this respect, these principles were expected to be inferred from the internal law of international society members, and thus by adopting a ‘domestic analogy’.

From that moment on, legal doctrine began to show a significant interest in the subject matter, suggesting two main systematic models. Some authors consider these principles as mere *material* sources of international law that like other factors, such as the need for justice and necessity, consist of those means from which the substance of a rule of international law is derived.<sup>120</sup> Contrariwise, other authors tend by and large to bring them back to formal sources of international law.<sup>121</sup> In detail, the first mentioned opinion is clearly anchored in the drafting history of Article 38, para 1(c), i.e. the idea whereby the source it provides for does not stand on the same footing as customary and conventional international law.<sup>122</sup> Indeed, general principles would mainly serve the purpose of filling any normative gaps of international law—because of the absence of customary or conventional rules

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<sup>118</sup> *Merrill & Ring Forestry L. P. v. The Government of Canada*, NAFTA (UNCITRAL), Award of 31 March 2010, para 184.

<sup>119</sup> Several writers in the legal doctrine have highlighted such a circumstance. We refer, *inter alia*, to Gaja 2008 and Crawford 2012, p. 37.

<sup>120</sup> As to the distinction between formal and material sources, see Salmond 1924, p. 164.

<sup>121</sup> For an overall overview of the debate existing in the matter cf., *inter alia*, Vitanyi 1982; Focarelli 2015, pp. 296 et seq.

<sup>122</sup> We refer to the work carried out by the Advisory Committee of Jurists appointed by the Council of the League of Nations to draft the PCIJ Statute and which engaged in a discussion on what to do, should a rule of customary or conventional law to be applied to a given dispute be lacking. On this point, see recently Vos 2013, pp. 111–113.

applicable in a given case—and to avoid a *non liquet* on the part of international judges. Accordingly, decisions resorting to principles would be *dispositive* in nature, insofar as they create a norm which may be applied to a given case only.<sup>123</sup> A similar reductive approach to the matter is also typical of those authors who, inspired by opinions maintained less recently at the time of the PCIJ, limit its application to cases where a treaty provision, such as that set forth in Article 38, expressly allows it.<sup>124</sup>

Turning to the argument that most enhances the role of principles, one may firstly recall the view whereby the international legal system would be provided with a Constitution, understood in formal terms. Hence, general principles common to domestic systems would enter into the international legal order by means of a provision of this Constitution.<sup>125</sup> In the opinion of other authors, instead, general principles would be no more than a *sui generis* category of international customary rules:

State practice in this case consists exclusively of the existence and consistent application of these rules within the national legal systems. *Opinio juris sive necessitatis* clearly exists with respect to [...] the old rules of legal logic and justice [such as *nemo iudex in res sua*, *in claris non fit interpretatio*, *ne bis in idem*, etc.]. These are rules viewed as universal by all State organs and applied in any legal system, including the international system. With respect to other consistent domestic rules, evidence of *opinio juris sive necessitatis* at the international level will be required on a case-by-case basis.<sup>126</sup>

Until quite recently, the question relating to the legal nature of principles common to domestic systems has played little practical significance. Two reasons explain this. First, the use of such principles by international tribunals has proved anything but easy. Indeed, the polysemy of meanings that principles are able to take on within the different national legal systems makes their identification particularly arduous. Second, even when principles were used, they primarily served interpretive purposes, that is to say 'to bolster a proposition that could already be formulated on the basis of other rules or principles.'<sup>127</sup>

The issue has been revitalized by the emergence of new areas of international law and the awareness that, in order to fill a large number of gaps, custom and treaties in force are inadequate. In this context, general principles clearly work as a subsidiary means of law-creation, which resorts to principles common to domestic systems (of both civil and common law) and, through the custom, transpose them to the international legal order. This applies to various areas.

International criminal law, a field which has proved particularly deficient from the very start, is one of the areas to be considered. International criminal tribunals have frequently resorted to general principles of criminal law recognized in the

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<sup>123</sup> Anzilotti 1964, p. 107. In the same vein, see Morelli 1967, p. 46.

<sup>124</sup> Treves 2005, p. 249.

<sup>125</sup> Ballardore Pallieri 1962, p. 24.

<sup>126</sup> Conforti and Labella 2012, p. 40.

<sup>127</sup> Cassese 2005, p. 192.

main legal systems of the world. Not by chance, Article 21, para 1(c) of the Statute of the International Criminal Court (ICC), also in the wake of Article 38 of the ICJ Statute, refers to this category of source, stating that the Court shall apply:

general principles of law derived [...] from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

In the same vein, one may consider international investment law. Also within this context, in fact, there is significant room for the use of general principles common to domestic systems. In the terms of Article 42, para 1, of the ICSID Convention,

the tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.<sup>128</sup>

Arguably, the expression ‘rules of international law’ refers, *inter alia*, to principles common to domestic systems. Evidence of it can firstly be found in the Report of the Executive Directors of the World Bank on the ICSID Convention.<sup>129</sup> This Report, in effect, interprets Article 42, para 1,

in the sense given to it by Article 38 (1) of the Statute of the International Court of Justice, allowance being made for the fact that Article 38 was designated to apply to inter-State disputes.

From this point of view, general principles common to domestic systems would come into consideration, assuming that reference to Article 38 covers all sources of international law as set forth in this Article.<sup>130</sup> The same conclusion, moreover, can be inferred from a copious arbitral case law which on the one hand is in line with the World Bank Report, and on the other hand shares the idea whereby a general principle is applicable insofar as it is provided for in most national legal systems of the world. *Amco* is the first (and for some authors<sup>131</sup> also the most relevant) arbitral

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<sup>128</sup> On this point, *see, e.g.*, Kahn 1968, p. 27; Schreuer et al. 2009, pp. 545 et seq. and 603 et seq.

<sup>129</sup> Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of other States, para 41, available at [http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR\\_English-final.pdf](http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf).

<sup>130</sup> Schreuer et al. 2009, p. 604: ‘The reference to the enumeration of sources of international law as contained in Article 38(1) of the ICJ Statute by no means resolves the problem of establishing the rules of international law relevant to the particular dispute. It is debatable whether the list provided there paints a complete picture of contemporary international law and whether the neat categories suggested there conform to the complex realities of international legal practice. Nevertheless, this reference demonstrates that an ICSID tribunal is directed to look at the full range of sources of international law in a similar way as the International Court of Justice.’

<sup>131</sup> *See, e.g.*, Tudor 2008, pp. 91 et seq.

decision that clearly illustrates the traditional manner in which general principles of this kind work.<sup>132</sup> In its terms, these principles are expected to be common to the main national legal orders and their existence should be ascertained by relying on comparative methods. Hence, the tribunal concluded that 'the full compensation of prejudice, by awarding to the injured party the *damnum emergens* and *lucrum cessans* is a principle common to the main systems of municipal law, and therefore, a general principle of law which may be considered as a source of international law.'<sup>133</sup> The ICSID award in *Inceysa* is equally revealing, insofar as it states that general principles of law should be regarded

as general rules on which there is international consensus to consider them as universal standards and rules of conduct that must always be applied and which [...] are important rules of law on which the legal systems of the States are based.<sup>134</sup>

Now, the opinion claiming the existence of an international rule of law which would be relevant also within the field of foreign investments usually relies on the 'domestic analogy' argument, in the sense of viewing FET through the lens of the rule of law domestic standards and regarding the latter as principles common to most legal systems of the world. This opinion, however, is far from convincing. Indeed, as has been rightly observed,

the more specific requirements of the rule of law often reflect a State's particular historical and constitutional evolution, and differ from State to State. The international rule of law cannot be identified with any one national meaning of the concept, and in this, as in other areas of public international law, principles, concepts and rules of national legal systems are at best an approximate guide to the content of the international analogue.<sup>135</sup>

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<sup>132</sup> *Amco Asia Corp, Pan American Development Ltd and PT Amco Indonesia v. Indonesia*, ICSID, Award of 31 May 1990.

<sup>133</sup> On this point, see what has been observed in the introduction.

<sup>134</sup> *Inceysa v. El Salvador*, ICSID Case No. ARB/03/26, Award of 2 August 2006, para 227. For a case where the existence of a general principle has been rejected, given the absence of a general consensus within national legal systems, see *Klöckner v. Cameroon*, Decision on Annulment of 31 May 1985, para 72: 'In the latter case, is it possible to hold that the Award has 'applied the law of the Contracting State' as required in Article 42(1)? It is true that the principle of good faith is 'at the basis' of French civil law, as of other legal systems, but this elementary proposition does not by itself answer the question. In Cameroonian or Franco-Cameroonian law does the 'principle' affirmed or postulated by the Award, the "duty of full disclosure", exist? If it does, no doubt flowing from the general principle of good faith, from the obligation of frankness and loyalty, then *how*, by what *rules* and under what *conditions* is it implemented and within what *limits*? Can a duty to make a "full disclosure" even to one's own prejudice, be accepted, especially without limits? Is there a single legal system which contains such a broad obligation? These are a few of the questions that naturally come to mind and that the Award provides no basis for answering.'

<sup>135</sup> Watts 1994, p. 16. A similar opinion has been recently advanced by Hachez 2013, pp. 307 et seq. In this author's view, indeed, 'one must recognize that the international legal order is profoundly different from the domestic legal orders in the context of which the ideal of rule of law was first expressed, then theorized.' Of course, the term 'international rule of law' may refer also to other questions, as that to establish whether the law is actually ruling at the international level. In this regard, see recently Krieger and Nolte 2016.

For example, the scope of principles like that of reasonable expectations proves to be very wide in some national legal systems and very narrow in others.<sup>136</sup>

In light of the above, the question remains as to whether one may rely on the different category of general principles of international law.

### 2.6.2 *Rule of Law and General Principles of International Law*

General principles of international law, unlike principles common to domestic systems, are identified on the basis of the normative dynamics peculiar to the international legal order itself, and epitomize, as such, an autonomous source of general international law (that is, independent of custom).<sup>137</sup> Bearing in mind the already mentioned distinction between rules and principles<sup>138</sup> and following the opinion advanced by Antonio Cassese, there are two classes of general principles.<sup>139</sup>

The *first variant* includes *general principles of international law*, namely those principles that can be inferred by way of induction and generalization from conventional and customary rules and which inform the international legal order as a whole. One example is the ICJ Judgment in *Corfu Channel*.<sup>140</sup> In this case, in order to assert the Albanian authorities' obligation of notifying the existence of a minefield in their own territorial waters and warning the approaching British warships of the imminent danger to which the minefield exposed them, the ICJ: (i) took the moves from a treaty provision applicable only in war times (the Hague Convention of 1907, No. VIII); (ii) identified the general principles underlying this provision (i.e. 'elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to knowingly allow its territory to be used for acts contrary to the rights of other States');<sup>141</sup> and finally (iii) extracted from these principles the rule to be applied in the case in hand. It is a line of argument that increasingly occurs in international jurisprudence, and which may be split into two stages: in the first stage, *by way of induction*, the judge infers the principle from pre-existing rules; in the second stage, *by way of deduction* and therefore on the basis of the

<sup>136</sup> See *infra* Chap. 4, Sect. 4.1.

<sup>137</sup> Among the authors supporting the existence of this category of general principles, see Quadri 1968, pp. 119 et seq. See also Strozzi 1992.

<sup>138</sup> See *supra* Sect. 2.2

<sup>139</sup> Cassese 2005, p. 189. See also Cassese 1995, pp. 126 et seq.

<sup>140</sup> *Corfu Channel (United Kingdom v. Albania)*, Judgment of 9 April 1949, p. 22.

<sup>141</sup> *Idem*.



principle which has been identified, he lays down the rule applicable to a given case.<sup>142</sup> This is anything but surprising. As already mentioned, if one assumes that general principles may be regarded as guiding criteria, it follows that applying a principle means giving to it a concrete content.<sup>143</sup> This particular approach adopted by the international judge, as well as ensuring the completeness of the legal order, serves to stimulate the emergence of new rules, especially in those areas of law where the law-ascertainment role is played by specialized tribunals. It is a very meaningful circumstance that allows the introduction of the *second variant* of general principles.

We refer to the hypothesis where the *regula iuris*, deduced from a general principle of international law and aimed at governing a certain case within a given area of law, becomes *stable* by way of a constant and uniform case law and ends up embodying a *general principle peculiar to that area of law only* (e.g. the law of international responsibility, humanitarian law and so on).<sup>144</sup> It is a fairly graspable phenomenon which, as far as principles are concerned, reflects the 'relative' nature of the concept of 'general'. As is known, indeed, the same rule can be 'regarded as a general principle in relation to more specific rules, and as a special rule with respect to a more general rule'.<sup>145</sup> One example in this connection is once again Article 21 of the Statute of the ICC, which vests the latter with the power to apply general principles of international humanitarian law. A decision of the International Labour Organization Administrative Tribunal of 1989 is equally instructive; its para 4 refers to 'the general principles of law that govern the international civil service'.<sup>146</sup>

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<sup>142</sup> Such an opinion has been widely developed by Iovane 2008. In the same line of thought, see also Cannizzaro 2016, pp. 136 et seq.

<sup>143</sup> Guastini 2011, p. 693. A similar opinion may be found in Cassese 1995, pp. 128–129: 'Principles do not differ from treaty or customary rules simply in that they are more general and less precise [...] Rather, principles differ from legal rules in that they are the expression and result of conflicting views of States on matters of crucial importance. When States cannot agree upon definite and specific standards of behaviour because of their principles, opposing attitudes, but need, however, some sort of basic guideline for their conduct, their actions and discussions eventually lead to the formulation of principles [P]rinciples have great normative potential and dynamic force: among other things, one can deduce from them specific rules, to the extent that these rules are not at variance with State practice.'

<sup>144</sup> In this regard, what Cassese 2005, p. 189, highlights, is quite revealing: 'Normally principles are spelled out by courts, when adjudicating cases that are not entirely regulated by treaty or customary rules. In this respect courts have played and are increasingly playing an essential role: they identify and set out principles 'hidden' in the interstices of the normative network, thus considerably contributing to the enrichment and development of the whole body of international law. It cannot be denied that by so acting courts fulfil a meritorious function very close to, and almost verging on, the creation of law.'

<sup>145</sup> Bobbio 1994, p. 275. (own translation)

<sup>146</sup> Judgment of 27 June 1989, No. 962.

### 2.6.2.1 FET as a General Principle Specific to International Investment Law

In this author's view, FET is undoubtedly part of the category of general principles specific to a certain field of international law. For its content to be identified, the judge has firstly taken into account the rule of law principles and regarded them as an embodiment of the values underpinning the normative framework of the current international legal order. These values, which apply to the relations between States as well as between States and individuals, include *inter alia* due process of law, legitimate expectations and proportionality. Secondly, on the basis of these principles, that same judge has formulated a number of rules peculiar to the matter of foreign investments. Lastly, by way of a constant and uniform case law, these rules have become stable and have been subsumed, as such, under FET, i.e. a composite principle peculiar to international investment law or, to put it differently, its *Grundnorm*. Remarkably, also authors (like Stephan Schill) mainly relying on general principles common to domestic systems in order to identify the FET content, do not exclude the relevance of 'a cross-regime comparison with other international law regimes that incorporate rule of law standards';<sup>147</sup> the jurisprudence of the European Court of Human Rights (ECtHR) concerning Article 6 of the European Convention on Human Rights (ECHR) would be relevant in this connection.<sup>148</sup> Moreover, insofar as the same authors deem it necessary 'to keep in mind the specific context of investment treaties',<sup>149</sup> they are unwittingly admitting the existence of general principles of international law, the concretization of which cannot but change as the normative field where they are applied changes.

A final remark seems appropriate. It may be contended that our argument demands a careful demonstration. This will be done hereinafter, but with a caveat. Even where the 'reasoning by principles' is not *expressly* articulated in all the aforementioned steps, its relevance for our purposes does not diminish. A reasoning of this kind must be considered in its entirety, above all having regard to its final capacity of enhancing the normative force of these principles and, accordingly, of finding a rule pertinent to the particular case. In such pragmatic terms, it is difficult to reject the idea whereby the FET content has been progressively shaped by arbitral tribunals by means of a reasoning which is both inductive and deductive.

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<sup>147</sup> Schill 2010, p. 176.

<sup>148</sup> Idem: 'This provision can be viewed as an expression of a more general standard of an institutional and procedural understanding of the rule of law. The rich jurisprudence of the ECtHR could thus be used to further concretize fair and equitable treatment, for example with respect to the timely administration of justice or the right to a fair trial. Similarly, comparative recourse could be had to the emerging principles of European administrative law or the jurisprudence of the WTO Appellate Body in order to further develop the rule of law requirements with respect to the exercise of public power.'

<sup>149</sup> Schill 2010, p. 176.

## 2.7 Conclusion

The analysis conducted in this chapter has tried to dispel any doubts concerning the FET normative basis. Plausibly, what is required to this end is to accept the close link existing between FET and general principles of international law, in the sense that the latter, through the medium of the judge, seems to have been refashioned in order to operate under the former. In these terms, all the shortcomings generally associated with the main academic views may be overcome, and the very content of FET, at least in its minimum reach, is in the end straightforward.

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