

COMMENT

THE FAIR AND EQUITABLE TREATMENT STANDARD: A SEARCH FOR A BETTER BALANCE IN INTERNATIONAL INVESTMENT AGREEMENTS

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I. INTRODUCTION.....	364
II. BACKGROUND	369
A. ORIGINS AND CHARACTERISTICS OF “FAIR AND EQUITABLE TREATMENT”: A BRIEF OVERVIEW	370
B. THE MINIMUM STANDARD OF TREATMENT AND THE <i>NEER</i> STANDARD	371
1. Relationship Between “Fair and Equitable Treatment” Clause and the Minimum Standard of Treatment.....	374
2. Relationship Between “Full Protection and Security” Clause and the Minimum Standard of Treatment.....	376
C. CONTEMPORARY FORMULATIONS OF THE “FAIR AND EQUITABLE TREATMENT” STANDARD: THE U.S. PERSPECTIVE	377
1. NAFTA Links the “Fair and Equitable Treatment” and “Full Protection and Security” Clauses to the Minimum Standard of Treatment Under Customary International Law.....	377
2. CAFTA and the 2004 and 2012 U.S. Model BITs Qualified the “Fair and Equitable Treatment” and “Full Protection and Security” Clauses and their Link to the Minimum Standard of Treatment Under	

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Customary International Law	379
3. The TPP Curtails the Ability of an Investor to Bring Claims Against States Under the “Fair and Equitable Treatment” Standard but Leaves the “Full Protection and Security” Standard Untouched.....	381
III. ANALYSIS	382
A. BECAUSE CONTEMPORARY U.S. IIA TREATY PRACTICE LEAVES THE “FAIR AND EQUITABLE TREATMENT” STANDARD UNDEFINED, THE REGULATORY ACTIONS OF STATES MAY STILL BE UNFAIRLY SUBJECTED TO ARBITRAL AWARDS IN FAVOR OF THE INVESTOR	383
B. TPP ARTICLE 9.6 LIMITS THE ABILITY OF AN INVESTOR TO BRING CLAIMS FOR VIOLATIONS OF “LEGITIMATE EXPECTATIONS,” BUT BECAUSE THE “FAIR AND EQUITABLE TREATMENT” STANDARD IN THE TPP STILL GENERALLY FOLLOWS PRIOR U.S. IIAS FORMULATIONS, ARTICLE 9.6 REMAINS AT ODDS WITH INTERNATIONAL PRINCIPLES OF STATE SOVEREIGNTY.....	387
C. THE FAILURE OF THE “FULL PROTECTION AND SECURITY” CLAUSE OF THE TPP TO GIVE EFFECT TO A STATE’S RIGHT TO REGULATE ALSO VIOLATES INTERNATIONAL PRINCIPLES OF STATE SOVEREIGNTY.....	392
D. INTERNATIONAL PRINCIPLES OF STATE SOVEREIGNTY REQUIRE A PROPORTIONATE APPROACH TO THE FET CLAUSE	395
IV. RECOMMENDATIONS	396
A. THE “FAIR AND EQUITABLE TREATMENT” CLAUSE SHOULD INCLUDE MORE SPECIFIC, SUBSTANTIVE OBLIGATIONS	398
B. THE U.S. IIA MODEL SHOULD INCLUDE MORE RESTRICTIONS ON ARBITRATORS IN THE INVESTOR-STATE DISPUTE SETTLEMENT MECHANISM, AS WELL AS A REVIEW MECHANISM.	399
V. CONCLUSION.....	400

I. INTRODUCTION

With over 3,200 international investment agreements (“IIAs”) in existence today, IIAs continue to remain a popular tool for

international investment policymaking.¹ These agreements are signed between two or more states in the form of stand-alone Bilateral Investment Treaties (“BITs”), Multilateral Investment Treaties (“MITs”), or investment chapters of broader trade and investment agreements, such as Free Trade Agreements (“FTAs”). By granting explicit protection to investments and creating a mechanism in which investors may access arbitration against a State in the event of a breach of a treaty obligation, IIAs provide a secure and predictable atmosphere for investment.² Granting such a high level of protection to promote foreign investment, however, comes at a cost for the host State.³ In IIAs, host States are commonly required to grant substantive and procedural guarantees to foreign investments.⁴ The guarantee to treat foreign investment fairly and equitably with full protection and security is a prime example of such protection.⁵

The benefits allotted to investors under IIAs are often inversely proportional to the policy space reserved for the host State – or in other words, the space reserved for a government to self-regulate in the public interest.⁶ On many occasions, these benefits directly conflict with the interests of States to enact public interest

1. See U.N. Conf. on Trade & Dev, *Recent Trends in IIAs and ISDS* 1, 1 (Feb. 2015), http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf [hereinafter UNCTAD, *Recent Trends*] (noting twenty-seven IIAs concluded in 2014 alone).

2. See Julien Chaisse, *The Shifting Tectonics of International Investment Law-Structure and Dynamics of Rules and Arbitration on Foreign Investment in the Asia-Pacific Region*, 47 GEO. WASH. INT’L L. REV. 563, 564 (2015) (observing investor protection is implemented pursuant to relative and absolute standards).

3. See U.N. Conf. on Trade & Dev., *Fair and Equitable Treatment: A Sequel, UNCTAD Series on Issues in International Investment Agreements II*, 10-12, U.N. Doc. UNCTAD/DIAE/IA/2011/5, U.N. Sales No. E.11.II.D.15 (2012) [hereinafter UNCTAD, *Fair and Equitable Treatment*] (suggesting the popularity of fair and equitable treatment claims could potentially create an imbalance between private and public interests).

4. See Filippo Fontanelli & Giuseppe Bianco, *Converging Towards NAFTA: An Analysis of FTA Investment Chapters in the European Union and the United States*, 50 STAN. J. INT’L L. 211, 212 (2014) (indicating States commit to series of substantive and procedural guarantees).

5. See UNCTAD, *Fair and Equitable Treatment*, *supra* note 3, at xiii (observing a majority of IIAs contain fair and equitable treatment to foreign investments clauses).

6. See Fontanelli & Bianco, *supra* note 4, at 212-13 (setting forth a hypothetical spectrum from absolute autonomy granting freedom for investors to absolute state control of foreign investments).

regulations for safety, public health, or environmental reasons.⁷ A rise in investor-state dispute settlement (“ISDS”) cases in recent years is attributed to the drastic increase in existing IIAs,⁸ as well as a discord between the interests of investors and States.⁹

According to the website of the United States Trade Representative, ISDS is defined as a “neutral, international arbitration procedure . . . [that] seeks to provide an impartial, law-based approach to resolve conflicts.”¹⁰ Modern IIAs ordinarily include detailed ISDS provisions which specify a forum to ensure host States uphold public treaties concerning international investments.¹¹ ISDS provisions in IIAs establish a mechanism that permits foreign investors to launch international arbitration claims against host States for breaching investment agreements.¹²

An emerging consensus for the need to reform the IIA and ISDS regime, as well as increased transparency in IIA treaty practice, foster a more conducive atmosphere for State autonomy and

7. See UNCTAD, *Fair and Equitable Treatment*, *supra* note 3, at 2 (finding a broad interpretation of minimalist treaty language can cause the fair and equitable treatment standard to be unpredictable).

8. See UNCTAD, *Recent Trends*, *supra* note 1, at 5 (reporting six hundred eight overall total known ISDS claims pursuant to IIAs, including record highs in recent years of fifty-four new ISDS cases in 2012, fifty-nine new ISDS cases in 2013, and forty-two new ISDS cases in 2014); see also Nigel Blackaby et al., *Arbitration under Investment Treaties*, in REDFERN AND HUNTER ON INTERNATIONAL LAW 8.10 (6th ed., 2014) (indicating that the current number of known treaty-based ISDS cases in 2014 has increased nearly tenfold since 2000).

9. See Tamara L. Slater, *Investor-State Arbitration and Domestic Environmental Protection*, 14 WASH. U. GLOBAL STUD. L. REV. 132-33 (2015) (explaining that so long as the foreign investor is covered by foreign investment protection provisions under an IIA between the investor’s home country and the host State, these provisions permit the foreign investor to file claims against the governments of States in an international arbitration forum).

10. See generally *FACT SHEET: Investor-State Dispute Settlement (ISDS)*, OFFICE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds> (last visited July 17, 2016) [hereinafter *FACT SHEET*] (expounding three rationales behind government implementation of ISDS: “1. [t]o resolve investment conflicts without creating state-to-state conflict, 2. [t]o protect citizens abroad, and 3. [t]o signal to potential investors that the rule of law will be respected”).

11. See Mark Weaver, *The Proposed Transatlantic Trade and Investment Partnership (TTIP): ISDS Provisions, Reconciliation, And Future Trade Implications*, 29 EMORY INT’L L. REV. 225, 228 (2014).

12. See *id.* at 235.

sustainable development.¹³ ISDS' critics disapprove of ISDS' level of protection commonly found in U.S. IIAs, such as the "fair and equitable treatment" ("FET") standard, serve as a tool for investors to restrict host States from enacting necessary domestic regulation.¹⁴ On the other hand, there is a palpable need to protect investments from arbitrary, discriminatory, or abusive acts of the host State.¹⁵ This school of thought maintains that a private, transnational system for dispute resolution is better suited to fairly resolve an investor's dispute with a State than the State's own domestic court system.¹⁶

Part II of this Comment surveys the various formulations and elements of the "fair and equitable treatment" and "full protection and security" clauses in modern IIAs. It begins with an explanation of the minimum standard of treatment—the international norm from which these two clauses derive in U.S. treaty practice.¹⁷ Part II of this Comment then examines these provisions as stated in the North American Free Trade Agreement ("NAFTA"), the Dominican Republic-Central America-U.S. Free Trade Agreement ("CAFTA"), the 2004 and 2012 U.S. Model BITs, and the Trans-Pacific

13. See UNCTAD, *Recent Trends*, *supra* note 1, at 1 ("The year saw important multilateral developments geared towards increased transparency in ISDS. These include the . . . United Nations Commission on International Trade Law (UNCITRAL) Rules on Transparency and the adoption of the Convention on Transparency in Treaty-based Investor-State Arbitration, which will be opened for signature later in 2015.").

14. See UNCTAD, *Fair and Equitable Treatment*, *supra* note 3, at 9-10 ("[I]t is necessary to strike a balance between the expectations of the investor and those of the host country and host community in order to establish approaches to interpretation reflecting the actual social and policy context in which foreign investors find themselves."); see also Slater, *supra* note 9, at 132-33 (indicating that critics are concerned that as corporations become larger and more influential in global politics and trade negotiations, they will disproportionately control and benefit from IIAs at the expense of state sovereignty).

15. See UNCTAD, *Fair and Equitable Treatment*, *supra* note 3, at 31 (finding the prohibition of arbitrary, unreasonable, and discriminatory measures does not delineate the FET standard's general scope).

16. See Slater, *supra* note 9, at 136 ("[I]nvestors often fear political influence, incompetence, or "home town justice" in domestic court systems.").

17. *Free Trade in the Pacific: A Small Reason to be Cheerful*, *ECONOMIST* (Nov. 19, 2011), <http://www.economist.com/node/21538758> [hereinafter *Free Trade in the Pacific*]; Jessica Glenza, *TPP Deal: US and 11 Other Countries Reach Landmark Pacific Trade Pact*, *GUARDIAN* (Oct. 5, 2015), <http://www.theguardian.com/business/2015/oct/05/trans-pacific-partnership-deal-reached-pacific-countries-international-trade>.

Partnership (“TPP”).¹⁸

The TPP is a massive trade agreement comprised of thirty chapters¹⁹ expected to set binding policy for its Member States on a wide variety of topics ranging from investment, the environment, intellectual property, and many others.²⁰ The following twelve States concluded TPP negotiations on October 5, 2015: Australia, Canada, Japan, Malaysia, Mexico, Peru, Vietnam, Chile, Brunei, Singapore, New Zealand, and the United States.²¹ These States signed the TPP on February 4, 2016 but some of these governments require that the agreement undergo a ratification period.²² The ratification period, if successful, will ensure approval of the final text of the TPP by the Member States’ respective governments and allow implementation of the TPP to proceed.²³

Part III analyzes Article 9.6 of the TPP, which adds innovative

18. North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA]; The Dominican Republic-Central America-U.S. Free Trade Agreement, Aug. 5, 2004, 06 U.S.T. 63 [hereinafter CAFTA]; Trans-Pacific Partnership, Office of the U.S. Trade Representative, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> (last visited June 16, 2016) [hereinafter TPP]; 2004 U.S. Model Bilateral Investment Treaty, U.S. Dep’t of State, art. 5 (2) (b), <http://www.state.gov/documents/organization/117601.pdf> (last visited July 16, 2016) [hereinafter 2004 U.S. Model]; 2012 U.S. Model Bilateral Investment Treaty, U.S. Dep’t of State, art. 5 (2) (b), <http://www.state.gov/documents/organization/188371.pdf> (last visited July 16, 2016) [hereinafter 2012 U.S. Model].

19. TPP.

20. See Meredith Wilensky, *Reconciling International Investment Law and Climate Change Policy: Potential Liability for Climate Measures Under the Trans-Pacific Partnership*, 45 ENVTL. L. REP. 10683, 10683 (2015) (observing the TPP goes beyond just trade).

21. See Glenza, *supra* note 17; see also *Free Trade in the Pacific*, *supra* note 17 (noting the combined gross domestic product (“GDP”) of the TPP’s Member States totals 40% of the world’s GDP).

22. See Rebecca Howard, *Trans-Pacific Partnership Trade Deal Signed, But Years of Negotiations Still to Come*, REUTERS (Feb. 4, 2016), <http://www.reuters.com/article/us-trade-tpp-idUSKCN0VD08S> (reporting the ratification period will span for two years and involve at least six countries approving the TPP’s final text).

23. See Jonathan T. Stoel & Michael Jacobson, *U.S. Free Trade Agreements and Bilateral Investment Treaties: How Does Ratification Differ?*, KLUWER ARB. BLOG (Oct. 28, 2014), <http://kluwerarbitrationblog.com/2014/10/28/u-s-free-trade-agreements-and-bilateral-investment-treaties-how-does-ratification-differ/> (contending the United States’ approval of the TPP is influenced by the United States’ political environment).

language limiting the scope of an investor's ability to assert claims against Member States for alleged violations of their "legitimate expectations."²⁴ This section argues that, notwithstanding the novel provisions, the FET clause as articulated in the TPP continues to violate international law, vis-à-vis its inconsistency with the principles of state sovereignty.²⁵ Furthermore, Part III also argues that although the TPP exemplifies a step forward in narrowing the scope of liability of States under the FET clause, regulatory government action can still be unfairly subjected to arbitral awards in IIA arbitration.²⁶

Lastly, Part IV recommends how future IIAs may more fairly balance the State's interest in enacting public policy regulations and the investor's interest in protecting their foreign assets. Part IV also advocates the creation of a more structured arbitral tribunal in investment treaty disputes that incorporates a review mechanism to improve consistency, transparency, and fairness.

II. BACKGROUND

Part II provides a short primer on the "fair and equitable treatment" and "full protection and security" standards within the modern international investment law regime. Many other articles have offered more extensive accounts of the development of this regime;²⁷ therefore, this section focuses on more relevant aspects of

24. See TPP, art. 9.6(4).

25. See Roman Kwiecień, *Does the State Still Matter? Sovereignty, Legitimacy, and International Law*, 32 POLISH Y.B. INT'L L. 45, 57 (2012) (drawing the following conclusions about state sovereignty: "1) sovereignty is a natural feature of every State; 2) owing to sovereignty every State is its own judge; 3) all States are equal on account of their sovereignty; 4) limitations on State sovereignty are constituted by the sovereignty of other States.").

26. See UNCTAD, *Fair and Equitable Treatment*, supra note 3, at 1 (finding the FET standard shields investors from States' arbitrary, discriminatory or abusive actions).

27. See Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1524-45 (2005) (discussing of the progression of the BIT regime and the nuts and bolts of the investment arbitration process); see also Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. 45, 49-75 (2013) (studying the different approaches that guided and continue to persuade the international investment law regime).

investor-state regulatory disputes to U.S. IIA treaty practice and the TPP. Part B explains the concept of the international minimum standard of treatment, to which the standards of “fair and equitable treatment” and “full protection and security” are commonly linked in U.S. IIAs. Part C then examines the evolution of the specific language of these two standards in contemporary U.S. IIA treaty practice.

A. ORIGINS AND CHARACTERISTICS OF “FAIR AND EQUITABLE TREATMENT”: A BRIEF OVERVIEW

The notion of fair and equitable treatment existed long before modern-day IIAs;²⁸ these clauses appeared in early international agreements such as United States Friendship, Commerce, and Navigation treaties; the Havana Charter for an International Trade Organization (1948); and the 1967 Organization for Economic Cooperation and Development (“OECD”) Draft Convention on the Protection of Foreign Property (“Draft OECD Convention”).²⁹ In fact, most OECD countries modeled their IIAs after the Draft OECD Convention.³⁰ Today, the FET clause is commonly found in most bilateral, multilateral, and regional treaties in force.³¹

In modern practice, the FET standard shields investors against severe instances of arbitrary, discriminatory, or abusive acts of a host State.³² According to Christoph Schreuer, the FET standard is “the

28. See generally *Working Papers on International Investment, Fair and Equitable Treatment Standard in International Investment Law 3* (OECD, Working Paper No. 2004/3, 2004), http://www.oecd.org/daf/inv/investment-policy/WP-2004_3.pdf [hereinafter *OECD Working Paper*] (recounting an expansive account of the origins and applications of the FET standard).

29. See, e.g., *OECD Draft Convention on the Protection of Foreign Property*, art. 1(a), Oct. 12, 1967, 7 I.L.M. 117, 119 (1968) [hereinafter *OECD Draft Convention*] (“Each Party shall . . . ensure [FET] to the property of the nationals of the other Parties. . . the most constant protection and security to such property and shall not in any way impair the management, maintenance, use, enjoyment or disposal thereof by unreasonable or discriminatory measures.”).

30. See UNCTAD, *Fair and Equitable Treatment*, *supra* note 3, at 5.

31. See, e.g., Christoph Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 J. WORLD INV. & TRADE 357, 358-59 (2005) (stating examples of multilateral treaties containing the FET include the Convention Establishing the Multilateral Investment Agency of 1985 (the “MIGA Convention”), NAFTA, and the Energy Charter Treaty of 1994).

32. UNCTAD, *Fair and Equitable Treatment*, *supra* note 3, at 1.

most important standard in investment disputes.”³³ The difficulty with the FET standard lies in its ambiguity; it is not a clearly defined statement of a legal obligation.³⁴

Tribunals have substantial discretion when reviewing the “fairness” and “equity” of State conduct on a case-by-case basis.³⁵ However, the lack of clarity surrounding the FET standard has spurred considerable disagreement between tribunals in IIA cases about whether the FET standard is encompassed within the minimum standard of treatment of foreign nationals under customary international law or whether it is an obligation of the State independent of customary international law.³⁶

B. THE MINIMUM STANDARD OF TREATMENT AND THE *NEER* STANDARD

Generally speaking, minimum standards of treatment outline the benefits or protections that a member state of a treaty must extend to all non-domestic investors.³⁷ With regard to IIAs, minimum standards of treatment provide a treaty-defined baseline by which a State must treat foreign investors.³⁸ The broad, largely undefined

33. See Schreuer, *supra* note 31, at 357 (highlighting the near-universal presence of the FET standard in treaties dealing with the protection of investments and its common invocation in the majority of cases brought to arbitration); see also Blackaby et al., *supra* note 8, at 8.96 (concluding that the FET standard is the most regularly invoked treaty standard in investment arbitration, as well as the standard most frequently found to be breached).

34. See Srilal M. Perera, *Equity-Based Decision-Making and the Fair and Equitable Treatment Standard: lessons From the Argentine Investment Disputes - Part I*, 13 J. WORLD INV. & TRADE 210, 217 (2012) (noting that because a breach of a standard in an IIA constitutes a breach of that IIA, the FET standard is subject to the applicable norms of public international law; thus, this is presumably why many investment disputes have centered not merely on whether the FET standard was breached, but whether such a breach must be justified by reference to the relevant or applicable principles of customary international law).

35. See Blackaby et al., *supra* note 8, at 8.97 (observing it would be challenging to reduce FET to an exact “statement of a legal obligation”).

36. See UNCTAD, *Fair and Equitable Treatment*, *supra* note 3, at 6.

37. See ANDREW NEWCOMBE & LLUÍS PARADELL, *LAW & PRACTICE OF INVESTMENT: STANDARDS OF TREATMENT* 232-33 (2009) (providing that minimum standards of treatment measure state conduct against non-contingent, objective standards).

38. S.D. Meyers, Inc. v. Canada, UNCITRAL, Partial Award, ¶ 259 (Nov. 13, 2000), <http://www.italaw.com/sites/default/files/case-documents/ita0747.pdf> (defining the minimum standard of treatment as “a floor below which treatment of

content of the minimum standard has been controversial, but it is commonly accepted that a minimum standard of treatment exists in customary international law and it is significant to the construction of IIA obligations.³⁹ Many arbitral tribunals have grappled with the issue of devising an explanation of the minimum standard of treatment in investment arbitration cases.⁴⁰ *Neer v. Mexican United States*, a case at the center of the discourse surrounding the minimum standard of treatment, provides insight into the competing schools of thought about the minimum standard of treatment.⁴¹

In 1924, a group of armed men attacked and killed Paul Neer, a U.S. citizen working in Mexico.⁴² A judicial investigation by Mexican authorities ensued but resulted in few arrests and all suspects were ultimately released.⁴³ The United States brought a claim against Mexico in the United States-Mexico General Claims Commission, effectively for the denial of justice.⁴⁴ The Commission determined that although “better methods might have been used” in investigating the matter, the Mexican authorities had not responded “in an outrageous way, in bad faith, in willful neglect of their duties, or in a pronounced degree of improper action,” and ruled in favor of

foreign investors must not fall, even if a government were not acting in a discriminatory manner.”).

39. See NEWCOMBE & PARADELL, *supra* note 37, at 234-35 (listing the variations of the minimum standard of treatment commonly found in IIAs as follows: (1) treatment in accordance with the customary international law minimum standard of treatment of foreign nationals and their property (or sometimes simply “treatment in accordance with international law”); (2) a guarantee of FET; (3) a guarantee against impairment by arbitrary or discriminatory measures; (4) a requirement of host States to accord some form of “full protection and security” to investments; (5) “compensation standards that apply to extraordinary losses;” and (6) more favorable treatment clauses).

40. See William L. Owen, *Investment Arbitration Under NAFTA Chapter 11: A Threat to Sovereignty of Member States?*, 39 CAN.-U.S. L.J. 55, 60-64 (2015) (indicating treaty parties’ leading investment obligations contained in Chapter 11 cases includes the minimum standard of treatment).

41. See *Neer v. United Mexican States (U.S. v. Mex.)*, 4 R.I.A.A. 60, 60-66 (Gen. Claims Comm’n 1926).

42. See *id.* at 60-61.

43. See *id.* at 61.

44. See *id.* at 60; see also Jan Paulsson & Georgios Petrochilos, *Neer-ly Mised?*, 42 FOREIGN INV. L.J. 242, 243 (2007) (“[T]he United States brought a claim against Mexico for an ‘unwarrantable lack of intelligent investigation in prosecuting the culprits’”).

Mexico, concluding the dispute.⁴⁵

After languishing nearly eighty years in relative obscurity, Canada's pleadings in NAFTA cases such as *S.D. Meyers v. Canada*⁴⁶ and *Pope & Talbot, Inc. v. Canada*⁴⁷ revived discussion of the *Neer* standard.⁴⁸ Some IIA arbitral tribunals have since emulated Canada's approach, citing a very high bar for the minimum standard of treatment⁴⁹ as derived from the 1926 *Neer* case.⁵⁰ Other tribunals have distinguished the *Neer* formulation on the basis that customary international law has evolved since 1926 and the *Neer* standard should be confined to the context of State action in criminal cases.⁵¹

Whether the *Neer* case is equated with the international minimum standard of treatment or not, the *Neer* case is notorious for its articulation of the now broadly-recognized principle that State

45. See *Neer*, 4 R.I.A.A. 60, at 62; see also Paulsson & Petrochilos, *supra* note 44, at 244 (identifying two legal propositions upon which the claim was determined by the Commission: (1) the actions of Mexican authorities in investigating the matter must not only comply with domestic law but must be tested against "international standards," and (2) demarcation of a "line between an 'unsatisfactory use of power included in national sovereignty' and an 'international delinquency'").

46. *S.D. Meyers Inc. v. Government of Canada*, UNCITRAL, Partial Award (Nov. 13, 2000).

47. *Pope & Talbot, Inc. v. Canada: Award on the Merits of Phase 2* (James Crawford & Karen Lee eds., Apr. 10, 2001) [hereinafter *Pope & Talbot, Inc.*].

48. See Paulsson & Petrochilos, *supra* note 44, at 247 (explaining that Canada's reliance on the *Neer* standard in *S.D. Meyers* and *Pope & Talbot* was pivotal in bringing the *Neer* standard back to life).

49. See, e.g., *Genin v. Republic of Estonia*, ICSID Case No. ARB/99/2, ¶ 367 (June 25, 2001) (paraphrasing the *Neer* standard as the standard of conduct required under the FET provision of the U.S.-Estonia BIT).

50. *Neer*, 4 R.I.A.A. 60, at 61-62 ("treatment of an alien [by a State], in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency").

51. See Paulsson & Petrochilos, *supra* note 44, at 250; see also NEWCOMBE & PARADELL, *supra* note 32, at 236 (suggesting that the decision-makers in *Neer* did not purport to set a complete definition of the minimum standard of treatment); see also *Mondev Int'l, Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, ¶¶ 115-16 (Oct. 11, 2002) (qualifying the facts of the *Neer* case from the facts of the present case because the physical security of a foreign national was at issue in *Neer* rather than the treatment of foreign investment, while also noting the considerable advancement substantive and procedural rights of the individual had undergone in international law).

treatment of foreign nationals and their property is to be determined against an international minimum standard.⁵² Many contemporary IIAs reflect this principle by explicitly equating the “fair and equitable treatment”⁵³ and “full protection and security”⁵⁴ standards with the minimum standard of treatment in the text of the treaty itself, as will be discussed below.

1. Relationship Between “Fair and Equitable Treatment” Clause and the Minimum Standard of Treatment

The FET standard exists in the majority of IIAs.⁵⁵ Despite the various formulations of the FET provision in current treaty practice, the two leading approaches seem to either provide for FET of investment without limitation, or equate the FET standard with the minimum standard of treatment.⁵⁶ The distinction between these approaches in practice is negligible.⁵⁷ The three general schools of thought emerged in interpreting the FET standard are as follows: (1) FET is an independent treaty standard with an autonomous meaning and provides treatment protections above and beyond the minimum standard of treatment; (2) FET reflects the minimum standard of treatment, thus an element of the ever-evolving minimum standard of treatment; or (3) assuming FET is an independent treaty standard exceeding the traditional requirements of the minimum standard of treatment, FET has emerged as customary international law.⁵⁸

Furthermore, tribunals have identified the protection of investors’ “legitimate expectations” as the key element of the FET standard.⁵⁹ Legitimate expectations usually stem from investor reliance on State conduct in the form of verbal or written representations, pledges or

52. See NEWCOMBE & PARADELL, *supra* note 37, at 236-37.

53. See UNCTAD, *Fair and Equitable Treatment*, *supra* note 3, at 21.

54. See *id.*

55. See *id.* at xiii.

56. See NEWCOMBE & PARADELL, *supra* note 37, at 263.

57. See *id.*

58. See *id.*

59. Blackaby et al., *supra* note 8, at 477; e.g., *Saluka Invs. B.V. v. Czech*, UNCITRAL, Partial Award, ¶ 264 (Mar. 17, 2006)

(“The standard of ‘fair and equitable treatment’ is therefore closely tied to the notion of legitimate expectations which is the dominant element of that standard.”).

undertakings, or government regulation.⁶⁰ Several NAFTA tribunals have summarized the requirements of “legitimate expectations” to include four elements: the existence of conduct or representations made by the host State; reliance by the investor on such conduct or representations to make the investment; the reliance was “reasonable;” and the investor suffered damages because of the host State’s subsequent repudiation of these representations.⁶¹

IIA jurisprudence emphasizes that State conduct needs to be specific and unambiguous to give rise to a violation of the investor’s legitimate expectations.⁶² IIA arbitral tribunals deemed instances of State conduct involving contractual commitments with foreign investors, informal representations, or the existence of general legislative and regulatory framework sufficient to constitute a violation of the “legitimate expectations” element of FET.⁶³

The investors’ legitimate expectations, however, should be examined objectively⁶⁴ and balance the investors’ interests in maintaining stability and certainty with the likelihood that regulatory regimes change over time.⁶⁵ Investors who reasonably relied on a State’s assurances or enticements to invest may have a right to compensation; should the State fail to follow through with those

60. See Blackaby et al., *supra* note 8, at 473 (noting that government acts contrary to any undertakings and assurances it may have granted to investors may amount to a violation of the State’s obligations to the investor).

61. *Accord Mobil Invs. Canada Inc. v. Canada*, ICSID No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, ¶¶ 152, 154 (May 22, 2012); see Patrick Dumberry, *The Protection of Investors’ Legitimate Expectations and the Fair and Equitable Treatment Standard Under NAFTA Article 1105*, 31 J. INT’L ARB. 47, 65-66 (2013) (“All NAFTA tribunals that have examined the concept have endorsed the four-element definition of legitimate expectations adopted by the *Thunderbird* tribunal.”); see also *Int’l Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Partial Award, ¶ 147 (Jan. 26, 2006).

62. See *Feldman v. Mexico*, ICSID Case No. ARB (AF)/99/1, Award, ¶ 148 (Dec. 16, 2002) (describing the assurances received by the investor from the Mexican government in *Metalclad* as “definitive, unambiguous and repeated”).

63. See Michael Potesta, *Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept*, 28 ICSID REV. 88, 100-01, 103 (2013).

64. See *El Paso Int’l Co. v. Arg. Republic*, ICSID Case No. ARB/03/15, Award, ¶ 356 (Oct. 31, 2011) (clarifying that “legitimate expectations” is an objective concept that results from a balancing of interests and rights, and varies depending on the context).

65. See *NEWCOMBE & PARADELL*, *supra* note 37, at 281.

promises—even in the absence of bad faith.⁶⁶

2. Relationship Between “Full Protection and Security” Clause and the Minimum Standard of Treatment

Like the FET standard, the “full protection and security” standard is also largely undefined.⁶⁷ Although the standard does not provide guarantee or insurance against damage, at a minimum, it seeks to provide protection against physical damage caused by armed forces, police, insurgent movements, and civil commotion.⁶⁸ The minimum standard of treatment requires “due diligence” on behalf of States to exercise reasonable care within its means to protect investments, but tribunals have rejected a strict liability standard in this regard.⁶⁹

The relationship between “full protection and security” and FET has been the subject of ongoing debate both in treaty practice and arbitral tribunals.⁷⁰ Some tribunals have distinguished between the two obligations, some have conflated them, and some have interpreted the two principles in tandem without clarifying their evident affiliation.⁷¹

Expression of these two standards in treaty practice has also varied.⁷² In U.S. IIA practice, NAFTA explicitly tied both standards to international law.⁷³ U.S. BITs concluded prior to 2004 express the

66. See *Loewen Grp. v. United States*, ICSID Case No. ARB(AF)/98/3, Award, ¶ 132 (June 26, 2003) (declaring that bad faith or malicious intention is not an element of unfair and inequitable treatment amounting to a breach of international justice).

67. BLACKABY ET AL., *supra* note 6, ¶ 8.113 (“As is the case of ‘fair and equitable treatment,’ it is difficult to give a precise meaning to the notion of ‘full protection and security’”).

68. See R. Doak Bishop et al., *Violation of Investor Rights under Investment Treaties*, in *FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY* 752, 753 (2nd ed., 2014).

69. See *Asian Agric. Prods. Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, ¶ 85(B) 561-62 (June 27, 1990) (holding that because Sri Lanka did not do everything possible to counter the eradication of a shrimp farm and the deaths of over twenty employees during a counterinsurgency operation, Sri Lanka had violated its obligation to provide “full protection and security”).

70. See George Foster, *Recovering “Protection and Security”: The Treaty Standard’s Obscure Origins, Forgotten Meaning, and Key Current Significance*, 45 *VAND. J. TRANSNAT’L L.* 1095, 1098 (2012).

71. *Id.* at 1098-99.

72. NAFTA; Foster, *supra* note 70, at 1144.

73. Foster, *supra* note 70, at 1146; see NAFTA.

standards, then assert that the treatment and protection accorded must be at least that required by international law.⁷⁴ Modern-day U.S. IIAs build upon this method by specifying an obligation to provide a level of police protection required under customary international law.⁷⁵

C. CONTEMPORARY FORMULATIONS OF THE “FAIR AND EQUITABLE TREATMENT” STANDARD: THE U.S. PERSPECTIVE

The two important components of the content of the FET standard in IIA treaty practice are the principles of good governance, against which State conduct will be assessed⁷⁶ and the threshold of liability to be imposed upon the State.⁷⁷ The most common formulations of the FET standard are either the unqualified FET approach or the approach granting treatment in accordance with international law and specifying inclusion of FET.⁷⁸ The source of the FET obligation determines the severity of State conduct necessary for a tribunal to find a violation of FET.⁷⁹

1. NAFTA Links the “Fair and Equitable Treatment” and “Full Protection and Security” Clauses to the Minimum Standard of Treatment Under Customary International Law

The practice of linking FET to the minimum standard of treatment under customary international law has been at the center of much discussion and jurisprudence, specifically in the context of NAFTA.⁸⁰ Article 1105 of NAFTA, titled “Minimum Standard of Treatment,” expressly follows this practice while also incorporating the concepts of fair and equitable treatment and full protection and

74. Foster, *supra* note 70, at 1146.

75. *E.g.*, 2012 U.S. Model, art. 5.

76. *See, e.g.*, UNCTAD, *Fair and Equitable Treatment*, *supra* note 3, at 12 (listing due process, non-frustration of legitimate expectations, and absence of arbitrariness).

77. *Id.*

78. *See* NEWCOMBE & PARADELL, *supra* note 37, at 260 (explaining that if the minimum standard of treatment now requires FET then there is effectively no distinction between the two approaches, however even if FET goes beyond the minimum standard of treatment, in most cases the application of the two standards is likely to yield the same result).

79. *See* Waste Mgmt. Inc. v. United Mexican States, ICSID Case No. ARB/00/3, Award, ¶ 98 (Apr. 30, 2004), 11 ICSID Rep. 386 (2007).

80. 2012 U.S. Model, art. 5.

security.⁸¹ NAFTA Article 1105(2) further requires impartial treatment and protection from social and political duress of investments belonging to American, Canadian, and Mexican investors.⁸²

A string of ISDS cases involving expansive interpretations of Article 1105 followed the adoption of NAFTA. In 2000, the NAFTA arbitral tribunal in *Metalclad Corp. v. Mexican United States* found the Mexican Government in breach of the FET clause under NAFTA Article 1105 when it failed to provide a “transparent and predictable framework” to the investor.⁸³ The following year, the NAFTA arbitral tribunal in *S.D. Meyers, Inc. v. Canada* equated FET with the international minimum standard of treatment, as derived from the *Neer* standard.⁸⁴ That same year the NAFTA arbitral tribunal in *Pope & Talbot, Inc. v. Canada*, following the approach of *S.D. Meyers*,⁸⁵ found the FET standard to be an additional, higher standard than the international minimum standard.⁸⁶

In response to conflicting arbitral awards adopting expansive interpretations of Article 1105,⁸⁷ the NAFTA Free Trade

81. NAFTA, art. 1105. (stating “[each] 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.”).

82. *Id.* (stating “each Party shall accord to investors of another Party, and to investments of investors of another Party, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife”).

83. *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, ¶¶ 99-101 (Aug. 30, 2000) (finding Mexico’s dereliction of duty to ensure a transparent and predictable framework for Metalclad’s business planning and investment amounted to unfair and inequitable treatment).

84. *S.D. Meyers Inc. v. Government of Canada*, UNCITRAL, Partial Award, ¶ 263 (Nov. 13, 2000) (holding “a breach of Article 1105 only occurs when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective”).

85. *Pope & Talbot, Inc.*, *supra* 48, at 110.

86. *Id.* (explaining “the . . . fairness elements in Article 1105 . . . are *additive* to the requirements of international law. That is, investors under NAFTA are entitled to the international law minimum, *plus* the fairness elements.”).

87. Gabrielle Kaufman-Kohler, *Interpretative Powers of the Free Trade Commission and the Rule of Law*, in 7 IAI SER. FIFTEEN YEARS OF NAFTA CHAPTER 11 ARBITRATION 175, 182 (Emmanuel Gaillard & Frédéric Bachand eds., 2011) (pointing out that the Interpretative Note was delivered after the awards in *Metalclad* and *S.D. Meyers*, in the midst of *Pope & Talbot*, and at a time when a

Commission (“FTC”)⁸⁸ issued its “Notes of Interpretation of Article 1105(1),” dismissing the view that the FET standard was “additive” to the international minimum standard of treatment.⁸⁹ Subsequent NAFTA tribunals have generally accepted the Commission’s Notes as binding upon them.⁹⁰ The FTC’s interpretation did not altogether settle the debate surrounding the relationship between the FET standard and the minimum standard of treatment, but NAFTA tribunals have accepted that Article 1105(1) provides at least the minimum standard of treatment, and the minimum standard of treatment may evolve over time.⁹¹ As will be seen in CAFTA and other subsequent IIAs, the U.S. Model integrated the approach of the NAFTA Interpretive Note equating the FET standard to the minimum standard of treatment under customary international law.⁹²

2. CAFTA and the 2004 and 2012 U.S. Model BITs Qualified the “Fair and Equitable Treatment” and “Full Protection and Security” Clauses and their Link to the Minimum Standard of Treatment Under Customary International Law

NAFTA Chapter 11 disputes shaped the attitudes of the U.S. in post-NAFTA IIAs and brought forth modifications to the next generation of the U.S. Model BIT.⁹³ The 2004 U.S. Model BIT⁹⁴

number of Chapter 11 proceedings were pending).

88. NAFTA, art. 2001 (establishing the FTC as a body of cabinet-level officials of the Parties responsible for supervising and resolving disputes and other issues affecting the implementation, interpretation, and application of NAFTA).

89. Org. of American States, *North American Free Trade Agreement Notes of Interpretation of Certain Chapter 11 Provisions* § 2 (July 31, 2001) [hereinafter *NAFTA Notes of Interpretation*] (explaining that “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.”).

90. See, e.g., *Methanex Corp. v. United States*, UNCITRAL, Final Award, pt. IV-ch. D, ¶ 20, (Aug. 3, 2005) (asserting the FTC interpretation was binding either under Art. 39 of the Vienna Convention (providing for an amendment by agreement), or Art. 31(3)(a) (providing for subsequent agreement between the parties regarding the interpretation of a treaty to be taken into account)).

91. See *Waste Mgmt. Inc. v. United Mexican States*, ICSID Case No. ARB/00/3, Award, ¶ 98 (Apr. 30, 2004), 11 ICSID Rep. 386 (2007). (relying on the *S.D. Meyers*, *Mondev*, *ADF*, and *Loewen* cases to reiterate the content of Article 1105 including elements similar to those identified by tribunals in interpreting the FET standard in other IIAs).

92. E.g., 2012 U.S. Model, art. 5.

93. See Benedict Kingsbury & Stephan Schill, *Investor-State Arbitration as*

preceded CAFTA,⁹⁵ signed in 2005, but both documents identically lay out the provisions of the Minimum Standard of Treatment in Article 5 and Article 10.5, respectively.⁹⁶ In 2012, the U.S. further updated its model BIT, yet Article 5 of the 2004 and 2012 U.S. Model BITs also remained identical.⁹⁷ These articles resembled, but built upon, NAFTA Article 1105 in several ways.

First, this generation of U.S. IIAs incorporated a footnote to the article's heading explicitly stating that the minimum standard of treatment is to be interpreted in accordance with an annex.⁹⁸ The annex explains that the term "customary international law" in the FET clause refers to all principles of international law for the protection of the economic rights and interests of foreign nationals.⁹⁹ Next, Article 10.5.1 mirrors NAFTA Article 1105(1), but the second and third paragraphs include new language offering further explanation of fair, equitable treatment, full protection, and security standards.¹⁰⁰

CAFTA Article 10.5.2 outlines the preceding provision, Article 10.5.1, which stipulates that the minimum standard of treatment of foreign nationals in customary international law should be applied to investments covered by the treaty.¹⁰¹ The standard clarifies that "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

Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law, 14 INT'L COUNCIL FOR COMMERCIAL ARBITRATION CONG. 5, 8.

94. See generally 2004 U.S. Model.

95. CAFTA.

96. *Id.* arts. 5, 10.5. Because both CAFTA Article 10.5 and Article 5 of the 2004 U.S. Model BIT are identical, this comment will only reference CAFTA going forward rather than both CAFTA and the 2004 U.S. Model BIT. The corresponding sections of the 2004 U.S. Model BIT are implied.

97. Compare 2012 U.S. Model, art. 5, with 2004 U.S. Model, art. 5.

98. CAFTA, art. 10.5 (directing that Article 10.5 Minimum Standard of Treatment shall be interpreted in accordance with the interpretive clause on "Customary International Law" in Annex 10-B).

99. CAFTA, at Annex 10-B; UNCTAD, *Fair and Equitable Treatment*, *supra* note 3, at 9-10.

100. See CAFTA, art. 10.5.1.

101. See *id.* art. 10.5.2.

rights.”¹⁰² The provision then notes that FET includes the obligation to provide due process in court proceedings¹⁰³ and “full protection and security” includes the obligation to provide a level of police protection to investors and their property in accordance with international law.¹⁰⁴ Finally, the third paragraph seeks to narrow the applicability of an umbrella clause by limiting the possibility of a de facto breach of this provision by violations of a different article within CAFTA or other IIAs;¹⁰⁵ however, this is outside the scope of this Comment.

3. The TPP Curtails the Ability of an Investor to Bring Claims Against States Under the “Fair and Equitable Treatment” Standard but Leaves the “Full Protection and Security” Standard Untouched

Article 9.6 of the TPP incorporates language found in CAFTA Article 10.5, but with some additions.¹⁰⁶ Article 9.6 of the TPP follows the approach of prior U.S. IIAs by linking “fair and equitable treatment” and “full protection and security” to the minimum standard of treatment under customary international law.¹⁰⁷ For example, the TPP includes the FET and “full protection and security” language under the Minimum Standard of Treatment heading and contains a footnote denoting interpretation in accordance with “Annex 9-A (Customary International Law).”¹⁰⁸

However, Article 9.6.4¹⁰⁹ imposes limitations on the scope of an investor’s claim of a breach of “legitimate expectations” while Article 9.6.5¹¹⁰ limits the liability of the State in indirect expropriation claims made by the investor. Although the concept of

102. *Id.*

103. *Id.*

104. *Id.*

105. *See* CAFTA, art. 10.5.3.

106. TPP, art. 9.6.

107. *See id.*

108. *See id.*

109. *Id.* art. 9.6.4 (“For greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor’s expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.”).

110. *Id.* art. 9.6.5 (“For greater certainty, the mere fact that a subsidy or grant has not been issued, renewed or maintained, or has been modified or reduced, by a Party, does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.”).

expropriation is related to the “fair and equitable treatment” standard, expropriation is not the focus of this Comment and will not be further discussed. Instead, this Comment will focus on the effect of TPP Articles 9.6.1 through 9.6.4 on the interests of the State and the foreign investor.

III. ANALYSIS

Some academics and scholars have noted that international investment law and IIAs are undergoing a significant shift from a preference for private law considerations and investment interests to a greater regulatory space for States.¹¹¹ Although the added language of the TPP in Article 9.6.4 narrows the scope of liability of States under the “legitimate expectations” element of the “fair and equitable treatment” clause, the remaining inconsistencies and controversies surrounding the “fair and equitable treatment” and “full protection and security” standards are still not sufficiently addressed.¹¹² Thus, because the first three paragraphs of TPP Article 9.6 generally embody previous formulations of the “fair and equitable treatment” and “full protection and security” clauses, Article 9.6 as a whole fails to bring consonance between treaty-based law and the domestic administrative law of States.¹¹³

This section begins in Part III.A by analyzing both the structural significance and arbitral interpretations of the FET clause in investment disputes to determine the effects contemporary formulations of the FET clause may have on the outcomes of future investment disputes. It argues that the U.S. approach continues to favor the interests of the investor and leaves the “fair and equitable treatment” and “full protection and security” standards far too abstract. Part III.B demonstrates that despite the additional TPP provision reducing the liability of states with regard to alleged

111. See Roberts, *supra* note 27, at 78. Markus Wagner, *Regulatory Space in International Trade Law and International Investment Law*, 36 U. PA. J. INT'L L. 1, 23 (2014).

112. See generally Andrew P. Tuck, *The “Fair and Equitable Treatment” Standard Pursuant to the Investment Provisions of the U.S. Free Trade Agreements with Peru, Colombia and Panama*, 16 L. & BUS. REV. AMS. 385, 407 (2010) (discussing the evolution of the FET clause in NAFTA as compared to subsequent FTAs between the U.S. and other South American countries).

113. See Perera, *supra* note 34, at 218-19.

violations of an investor's "legitimate expectations," Article 9.6 continues to disproportionately limit the regulatory sphere of host states in favor of the investor. Part III.C similarly contends that the "full protection and security" clause of the TPP also continues to restrain the ability of a State to regulate itself in accordance with international principles of state sovereignty because this clause remains unchanged from previous articulations. Finally, Part III.D maintains the international principles of state sovereignty require a more proportionate, definitive approach to the FET clause.

A. BECAUSE CONTEMPORARY U.S. IIA TREATY PRACTICE LEAVES THE "FAIR AND EQUITABLE TREATMENT" STANDARD UNDEFINED, THE REGULATORY ACTIONS OF STATES MAY STILL BE UNFAIRLY SUBJECTED TO ARBITRAL AWARDS IN FAVOR OF THE INVESTOR

In IIAs subsequent to NAFTA, it has been the general approach of the U.S. to expressly link the FET standard to the minimum standard of treatment under customary international law,¹¹⁴ yet the relationship between these standards remain a point of controversy.¹¹⁵ For example, the method implemented in CAFTA seeks to limit the FET standard to an international minimum standard, prevailing under customary international law.¹¹⁶ However, despite CAFTA's express inclusion of "denial of justice" as one of those standards, it does not clarify whether customary international law incorporates an all-inclusive international minimum standard expressly relevant to the FET standard.¹¹⁷

This formulation attempts to assist tribunals in two ways: first, by specifically noting denial of justice as an example of gross misconduct violating the minimum standard of treatment of foreign nationals; and second, by specifying that the minimum standard of treatment cannot exceed what customary international law proclaims to be the content of the minimum standard of treatment.¹¹⁸ The

114. Compare *NAFTA Notes of Interpretation*, *supra* note 89, at 140 and NAFTA, art. 1105, with CAFTA, art. 10.5, and 2012 U.S. Model, art. 5.

115. See Schreuer, *supra* note 31, at 385 (stating that this formulation is established in the context of NAFTA, but in other contexts, particularly BITs, "the answer depends on the wording of the particular clause").

116. See Perera, *supra* note 34, at 218.

117. See *id.*

118. See UNCTAD, *Fair and Equitable Treatment*, *supra* note 3, at 28 (noting

problem with this approach is that it presupposes the existence of a general consensus as to what constitutes the minimum standard of treatment of foreign nationals under customary international law when the minimum standard of treatment standard itself is not a clearly defined concept.¹¹⁹

Although some arbitral tribunals look to previous decisions for guidance, the lack of an official doctrine of precedent in investment treaty arbitration further complicates the meaning and scope of the FET standard.¹²⁰ This exposes the standard to unpredictable interpretations resulting in inconsistent and uncertain application of the FET standard.¹²¹ Inconsistency and uncertainty in application allows for conflicted, unprecedented, or potentially unfair interpretations of the FET standard that may further hinder the interests of the State in its ability to self-regulate.¹²²

Notwithstanding the descriptions outlined in current U.S. IIA

that the practice of linking the FET standard to the minimum standard of treatment under customary international law is intended to preclude an overly broad reading of the FET standard).

119. See *El Paso Int'l Co. v. Arg. Republic*, ICSID Case No. ARB/03/15, Award, ¶ 335 (Oct. 31, 2011) (commenting that the discussion of the approaches between the FET standard and the minimum standard of treatment under international law are somewhat futile because the scope and content of the minimum standard is as little defined as the BITs' FET standard; the true question is to decide what substantive protection is granted to foreign investors through the FET).

120. See *Blackaby et al.*, *supra* note 8, ¶ 8.76; see also *Perera*, *supra* note 34, at 251 (stating that some tribunals have sought to resolve investment disputes through an autonomous interpretation of the FET clause with no obligation to further justify the finding by reference to international law, while others have attempted to validate their findings on the basis of international law); see also UNCTAD, *Fair and Equitable Treatment*, *supra* note 3, at 6 (noting that the contemporary meaning of the FET standard rests on interpretations by individual ad hoc arbitral tribunals with no effective appellate review).

121. Compare *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, ¶ 154 (May 29, 2003) (detailing the exigencies of FET in such a way that implies a program of good governance that no State is capable of guaranteeing at all times) and *MTD Equity Sdn. Bhd. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, ¶ 113 (May 25, 2004) (expanding on the broad conception of FET that the State has a duty to adopt a proactive behavior in favor of the foreign investment outlined by the tribunal in the *Tecmed* Award), with *Blackaby et al.*, *supra* note 8, ¶¶ 66-67 (distancing itself from the very broad definition laid out by the tribunal in *Tecmed* on which the *MTD* tribunal relied).

122. See *Perera*, *supra* note 34, at 217.

treaty practice, the FET clause is still left undefined.¹²³ The two main sources of uncertainty include which sources of law to use for interpretation and application of the standard¹²⁴ as well as the actual substantive content of the standard itself.¹²⁵ Attempts at expressly defining FET have not come about until somewhat recently.¹²⁶ Despite any clarifying language, most tribunals have construed the FET standard broadly to include various specific requirements.¹²⁷ Thus, the question left open in a claim alleging a violation of the FET standard is whether the actions of the host state constitute unfair and inequitable treatment to the investment to such an extent that

123. See *id.* at 218 (maintaining that the U.S. Model still does not specifically prevent the acknowledgement of alternative minimum standards or factors which, in the opinion of those who would adjudicate specific situations, could be viewed as amounting to an international minimum standard under customary international law).

124. See Blackaby et al., *supra* note 8, ¶ 8.64 (explaining that a tribunal will generally apply and accord a controlling role to international law regardless of whether a BIT stipulates the applicable law).

125. See UNCTAD, *Fair and Equitable Treatment*, *supra* note 3, at 1; see also Schreuer, *supra* note 31, at 366 (explaining tribunals have traditionally looked to the “plain meaning” approach of the Vienna Convention when interpreting the preambles of IIAs to decipher the object and purpose of the FET standard as a method to provide broad objective protections to investors); see also Vienna Convention on the Law of Treaties art. 32, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention] (“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”).

126. See, e.g., *El Paso Int’l Co. v. Arg. Republic*, ICSID Case No. ARB/03/15, Award, ¶ 330-79 (Oct. 31, 2011) (relaying a historical overview of the FET standard as discussed in prior arbitral awards before setting forth their own interpretation of the standard); see generally ALEXANDRA DIEHL, *THE CORE STANDARD OF INTERNATIONAL INVESTMENT PROTECTION* 15-179 (Kluwer Law Int’l 2012) (providing an extensive overview of the FET standard, including the sources of FET, its content, and scope).

127. *CMS Gas Transmission Co. v. Arg. Republic*, ICSID Case No. ARB/01/8, Award, ¶ 274 (May 12, 2005) (holding that “[t]here can be no doubt, . . . , that a stable legal and business environment is an essential element of fair and equitable treatment.”); see, e.g., *LG&E Energy Corp. v. Arg. Republic*, ICSID Case No. ARB/02/1, Award, ¶ 131 (Oct. 3, 2006) (finding that the FET standard consisted of “the host state’s consistent and transparent behavior, free of ambiguity that involves the obligation to grant and maintain a stable and predictable legal framework . . .”); see UNCTAD, *Fair and Equitable Treatment*, *supra* note 3, at xiii (summarizing the State’s obligation to act “consistently, transparently, reasonably, without ambiguity, arbitrariness or discrimination, and in an even-handed manner, to ensure due process in decision-making and respect investors’ legitimate expectations”).

they violate the minimum standard of treatment under customary international law.¹²⁸

Because the precise meaning FET clause remains abstract in the U.S. Model and tribunals are left with such broad discretion in interpreting the FET standard, tribunals may, and have, follow an approach consistent with the interests of the investor in cases involving regulatory enactments of the host State.¹²⁹ In these cases, even when no explicit law has been breached, if an investor suffers substantial losses due to a host State's exercise of its regulatory powers, the investor's losses are directly attributed to the State as a result of its "unfair" and "inequitable" actions.¹³⁰

The FET standard is perhaps the only way in which an investor may attribute his losses to the State in these scenarios.¹³¹ Tribunals justify this approach by lending considerable weight to the object and purpose of IIAs as favoring the protection of investments.¹³² For example, after an abbreviated analysis, the tribunal in *Azurix v. Argentine Republic* paid substantial attention to interference with investment under the Argentina-U.S. BIT, while minimal concern was shown for Argentina's objectives.¹³³

128. See *Mondev Int'l, Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, ¶ 127 (Oct. 11, 2002) (stating that "[in]the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the . . . investment has been subjected to unfair and inequitable treatment.").

129. Richard C. Chen, *A Contractual Approach to Investor-State Regulatory Disputes*, 40 YALE J. INT'L L. 295, 305-07 (2015) (characterizing the "investor rights approach" as the view that the fundamental purpose of IIAs is to secure the rights of investors and determines disputes through that lens).

130. See *id.* at 305 (explaining that "[the] investor rights approach sees the primary function of international investment law as protecting the fundamental rights of investors and analyzes disputed issues through that lens").

131. See *id.* (arguing that "the general principle [of investor rights approach] was that, similar to other individual rights that can be asserted as trump cards against the state rights granted under investment treaties may often take precedence over state interests").

132. See, e.g., *GS Société Générale de Surveillance S.A. v. Republic of the Phil.*, ICSID Case No. ARB/02/6, Objections to Jurisdiction, ¶ 116 (Jan. 29, 2004), 8 ICSID Rep. 518 (2005) (explaining that "[the] BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble it is intended 'to create and maintain favorable conditions for investments by investors of one Contracting Party in the territory of the other.'").

133. *Azurix Corp v. Arg. Republic*, ICSID Case No. ARB/01/12, Award, ¶¶

Because Article 9.6 of the TPP follows the approach of the U.S. Model linking the FET standard to the international minimum standard of treatment, where the meaning of the FET standard remains uncertain tribunals may still find for the investor in cases in which a host State enacted regulation in the public interest.¹³⁴ This interference with the right of a State to govern itself is inconsistent with international principles of state sovereignty.¹³⁵

B. TPP ARTICLE 9.6 LIMITS THE ABILITY OF AN INVESTOR TO
BRING CLAIMS FOR VIOLATIONS OF “LEGITIMATE
EXPECTATIONS,” BUT BECAUSE THE “FAIR AND EQUITABLE
TREATMENT” STANDARD IN THE TPP STILL GENERALLY FOLLOWS
PRIOR U.S. IIAS FORMULATIONS, ARTICLE 9.6 REMAINS AT ODDS
WITH INTERNATIONAL PRINCIPLES OF STATE SOVEREIGNTY

States once had a sizeable degree of regulatory autonomy, especially when enacting regulation concerning non-economic values such as human health, safety, the environment, or social mobility.¹³⁶ However, the upsurge in IIAs over the last few decades has led to investor complaints against these types of regulation.¹³⁷ According to the tribunal in *El Paso Energy International Co. v. Argentina*, “some

372-377 (July 14, 2006); see Chen, *supra* note 129, at 306 (determining that because the purpose of the U.S.-Argentine BIT was to encourage and protect investment, it would be incoherent with such purpose to consider that a party to the BIT only breaches its FET obligation when it has acted in bad faith or its conduct can be qualified as outrageous or egregious).

134. See, e.g., Chen, *supra* note 129, at 310 (arguing that “once each side of the equation is determined, the proponents of proportionality provide no guidance regarding how interests that are so different in kind should be valued and weighed against each other. Indeed, while there may be extreme cases of disproportionality on which the majority of decision-makers could agree, the basic act of balancing is a fundamentally indeterminate exercise”).

135. See *id.* at 317 (explaining that when a tribunal treats investors and states as equal in status,[it] overlooks the latter’s prerogative to regulate in the public interest).

136. See Wagner, *supra* note 111, at 1 (stating regulation of domestic economic and regulatory activities was originally a matter of a state’s regulatory power, subject mostly to domestic legal and political constraints; international obligations only existed to the extent that a State entered into a binding international obligation).

137. See *id.* at 5 (confirming that “[the] increase in bilateral and multilateral investment agreements over the last decades, guaranteeing rights to foreign investors, has led to complaints not only against alleged expropriations, but also against domestic regulations where no property was actually seized”).

tribunals have however extended the scope of the FET to a point where . . . the sovereign power of the State to regulate its economy is negated”¹³⁸

While the TPP includes additional language meant to clarify ambiguities surrounding the FET clause, the wording of Articles 9.6.1, 9.6.2, and 9.6.3 almost directly mirror the formulation used in U.S. IIAs since 2004.¹³⁹ As discussed in Part III.A, this language still leaves the FET clause undefined and open to broad and inconsistent interpretation by arbitral tribunals.¹⁴⁰ It does not reference limits of liability, the applicable corresponding standard, or the degree of damages that should be awarded if a breach of the FET clause in a specific BIT is established.¹⁴¹ However, arbitral practice has established some typical factual circumstances to which the FET standard is commonly applied, including the protection of the investor’s “legitimate expectations.”¹⁴²

One area in which the FET clause of the TPP does provide significant substantive clarity is Article 9.6.4 concerning an investor’s “legitimate expectations.”¹⁴³ The traditional standard concerning an investor’s “legitimate expectations” was contemplated in *Técnicas Medioambientales Tecmed, S.A. v. Mexico*, which specified:

[a] foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the

138. *El Paso Int'l Co. v. Arg. Republic*, ICSID Case No. ARB/03/15, Award, ¶ 340 (Oct. 31, 2011).

139. CAFTA, arts. 10.5.1-10.5.3; 2012 U.S. Model, arts. 5.1-5.3.

140. *See* CAFTA, art. 10.5.

141. *See* Perera, *supra* note 34, at 219 (explaining that because of these fundamental omissions, it cannot be concluded with any certainty that the type of relief that the parties intended to include or exclude).

142. *See* Schreuer, *supra* note 31, at 386 (“Treaty provisions guaranteeing this standard have to be construed with the help of unusual principles of interpretation, notably their ordinary meaning, [and] their context . . . Context includes the treaty’s other provisions, notably other standards of treatment.”); *see also* *Glamis Gold, Ltd. v. United States*, UNCITRAL, Award, ¶ 621 (June 8, 2009) (noting that an investor’s legitimate expectations relate to a tribunal’s examination under Article 1105(1)).

143. *See* Wagner, *supra* note 111, at 50 (defining “legitimate expectations” as “the extent to which an investor relies on expectations at the beginning of an investment and to what extent the investor could foresee changing circumstances in the regulatory structure.”).

foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.¹⁴⁴

However, this perspective shifted in *Methanex Corp. v. United States*, which inquired the validity of California's ban on a fuel additive.¹⁴⁵ After considering the circumstances in place prior to the investment, the tribunal determined that compensation required a showing of "specific commitments" that "had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation."¹⁴⁶ Additionally, in *Saluka Invs. v. Czech Republic*, the tribunal recognized that legitimate investment-backed expectations should be accorded protection while also recognizing that regulatory frameworks are subject to change over time.¹⁴⁷ This approach paves the way for increased consistency in differentiating situations "in which compensation is required, from those in which the investor must simply bear the risk associated with investment."¹⁴⁸

Some tribunals have recognized that investors are not immune to changing market conditions or regulatory environments and states

144. *Medioambientales Tecmed S.A.*, Case No. ARB(AF)/00/2, Award, ¶ 154; see *MTD Equity Sdn. Bhd.*, Case No. ARB/01/7, Award, ¶ 113 (noting that in terms of a BIT, FET should be construed to mean "even-handed and just manner"); see also *Occidental Exploration & Production Co. v. Republic of Ecuador*, UNCITRAL, LCIA Case UN 3467, Final Award, ¶ 91 (July 1, 2004)(noting an obligation of the host State not to alter the legal and business environment in which the investment has been made); see also *GAMI Invs., Inc. v. United Mexican States*, UNCITRAL, Final Award, ¶ 91 (Nov. 15, 2004)(holding that a government's failure to abide by its own law in a manner adversely affecting a foreign investor may lead to a violation of the fair and equitable standard).

145. See *Methanex Corp.*, ¶ 7 (noting that in *Methanex* the Claimant specifically did not allow any criminal act under the laws of the U.S. or State of California; nonetheless, the tribunal found Respondent's conduct to constitute corruption).

146. *Methanex Corp.*, ¶ 7.

147. *Saluka Invs. B.V.*, ¶ 264 ("[W]hen, how and at what point an otherwise valid regulation becomes, in fact and effect, an unlawful expropriation, international tribunals must consider the circumstances in which the question arises. The context within which an impugned measure is adopted and applied is critical to the determination of its validity.").

148. See *Wagner*, *supra* note 111, at 52.

may change their regulatory structure over time.¹⁴⁹ “What is more important then is not that the regulatory landscape changes, but that the circumstances change either dramatically, or abruptly, or both.”¹⁵⁰

The number of tribunals that have recognized a difference among circumstances in which compensation is necessary versus those in which an investor must simply bear the risks of investment is still somewhat small.¹⁵¹ On the contrary, several tribunals have followed the approach outlined in *Pope & Talbot*, which rationalized the dangers of “a blanket exception for regulatory measures would create a gaping loophole in international protections” for investors.¹⁵² The problem with this perspective is that it merely looks to the economic effect of any State measure without considering the broader context in which the measure took place.¹⁵³

Although formulating a bright-line tactic in assessing these circumstances is a near-impossible task, the drafters of the TPP took a valuable step in providing guidance to tribunals on the matter by adding the additional provisions found in Articles 9.6.¹⁵⁴ These provisions are completely new additions to the FET clause in U.S.

149. See *Feldman v. Mexico*, ICSID Case No. ARB (AF)/99/1, Award, ¶ 112 (Dec. 16, 2002) (acknowledging that there are many ways in which governmental authorities may significantly reduce the economic benefits of an investor, but at the same time, States must be free to act in the broader public interest through domestic administrative law and may be inhibited from doing so when an adversely-affected business may seek compensation).

150. See *Wagner*, *supra* note 111, at 50-51.

151. See *id.* at 52 (noting that few tribunals have had the opportunity to decide a case where true regulatory changes have occurred).

152. See *Pope & Talbot, Inc.*, *supra* 48, ¶ 99; see also *Glamis Gold, Ltd.*, ¶¶ 761-67, 798-99, 800-28 (suggesting that an investor’s expectations must be based on definitive, unambiguous, and repeated specific commitments (or assurances) made by the host state to have purposely and specifically induced the investment by the investor); see also *Dumberry*, *supra* note 61, at 71 (noting that the findings in *Glamis* “have been endorsed by subsequent tribunals implicitly or explicitly with occasional slight differences in the use of terminology”).

153. See *Wagner*, *supra* note 111, at 52-53 (noting that the factors that are to be weighed when determining whether an expropriation has taken place cannot be viewed in the abstract, but rather based on the facts presented to the tribunal).

154. See, e.g., TPP, arts. 9.6.4, 9.6.5 (exempting the mere fact a contracting State takes or fails to take an act or grant privilege in favor of an investor’s expectations does not necessarily violate the treaty).

IIA treaty practice.¹⁵⁵ A proper assessment of the factors surrounding a State measure and an adversely-impacted investor under this approach would require consideration of the specific facts by the adjudicators.¹⁵⁶

However, by specifically articulating that despite any potential loss on the part of the investor, the State did not violate the FET clause simply because its actions (or lack thereof) did not coincide with the expectations of an investor, the TPP sets a higher bar against which the harm to the investor and the State action (or inaction) should be measured.¹⁵⁷ Thus, Article 9.6.4 seems to follow the approach outlined in the *Methanex* and *Saluka* line of cases significantly loosening the grip on the power accorded investors by the “legitimate expectations” clause.¹⁵⁸ This approach is perhaps also derived from several findings by NAFTA tribunals in the last twenty years stating that “legitimate expectations” is an element, not a stand-alone element, of the FET standard under Article 1105.¹⁵⁹

Like the FET clause, the “full protection and security” clause as formulated within the U.S. Model also competes with the interests of the State to regulate itself in the public interest. Despite the additional language of the TPP, the “full protection and security” clause of the TPP remained untouched.¹⁶⁰

155. Compare NAFTA, art. 1105.1 (“Each 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.”), with CAFTA, art. 10.5.1 (“Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.”), and 2012 U.S. Model, art.5.1 (“Each Party shall accord to covered investments treatment in accordance with customary international law, including and full protection and security.”).

156. See Wagner, *supra* note 111, at 53.

157. See TPP, art. 9.6.4 (“For greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor’s expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.”).

158. *Id.*; *Methanex Corp.*, ¶ 23; *Saluka Invs. B.V.*, ¶ 288.

159. See Dumberry, *supra* note 61, at 60 (noting that most commentators support the concept that “legitimate expectations” is an element of FET).

160. Compare TPP, arts.9.6.1-9.6.2, with 2012 U.S. Model, arts. 5.1-5.2.

C. THE FAILURE OF THE “FULL PROTECTION AND SECURITY”
CLAUSE OF THE TPP TO GIVE EFFECT TO A STATE’S RIGHT TO
REGULATE ALSO VIOLATES INTERNATIONAL PRINCIPLES OF STATE
SOVEREIGNTY

The “full protection and security” clause can be found in the majority of modern-day IIAs.¹⁶¹ Although many IIAs clarify that this obligation is linked to the minimum standard of treatment, this formulation leaves unclear the exact degree by which a host State’s actions will be deemed to have violated their duty to provide protection and security.¹⁶² Scholars have argued that the host State is only required to exercise an objective minimum standard of due diligence to the level of a host State in its particular circumstances.¹⁶³ On the other hand, several arbitral awards have required that States provide a guarantee of regulatory and legal security for investments as part of their protection and security obligations.¹⁶⁴

The tribunal in *Saluka Invs. v. Czech* held that the guarantee also applied to investments affected by civil strife and physical violence.¹⁶⁵ The tribunals in *Lauder v. Czech Republic*¹⁶⁶ and

161. See NEWCOMBE & PARADELL, *supra* note 37, at 233.

162. See *id.* at 309 (noting that the standard of due diligence required by the host state is a modified objective standard which varies under the circumstances); see also Nick Gallus, The Influence of the Host State’s Level of Development on International Investment Treaty Standards of Protection, 6 J. WORLD INV. & TRADE 711, 711-12 (2005) (noting that despite the similarity among BITs, investors in developing countries still cannot determine the level of protection that their investments will receive).

163. See NEWCOMBE & PARADELL, *supra* note 37, at 309 (suggesting that the standard of due diligence is a modified objective standard); see also IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 509 (Oxford U. Press, 6th ed. 2003).

164. See *CME Czech B.V. v. Czech*, UNCITRAL, Partial Award, ¶ 613 (Sept. 13, 2001) (“The host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor’s investment withdrawn or devalued.”); see also *Vivendi Universal S.A. v. Arg. Republic*, ICISD Case No. ARB/97/3, Award, ¶ 7.4.16 (Aug. 20, 2007).

165. See *Saluka Invs. B.V.*, ¶ 484 (“The practice of the arbitral tribunals seems to indicate . . . that the ‘full security and protection’ clause is not meant to cover just any kind of impairment of an investor’s investment, but to protect more specifically the physical integrity of an investment against interference by the use of force.”).

166. *Lauder v. Czech*, UNCITRAL, Final Award, ¶ 314 (Sept. 3, 2001) (holding the investment treaty did not create a duty of due diligence on the Czech

*Elettronica Sicula S.p.A. (U.S. v. Italy)*¹⁶⁷ found the guarantee to incorporate obligations concerning judicial proceedings. The tribunal in *Azurix Corp. v. Argentina* took this one step further and found the obligation to provide “full protection and security” and the FET standard to be interrelated such that if there is a breach of FET, then there is also a breach of full protection and security.¹⁶⁸

The “Full Protection and Security” clause in the TPP mirrors that found in CAFTA and the U.S. Model BITs linking the clause to the minimum standard of treatment under customary international law.¹⁶⁹ Although post-NAFTA U.S. IIAs utilize an even more limiting approach by specifying that “full protection and security” only requires States to provide the level of police protection required under customary international law, this formulation still does not ensure adequate protections to States against investors because arbitral jurisprudence has progressively refined the understanding of the term.¹⁷⁰

Governmental regulatory acts which disturb the legal stability of an investment have been the subject of recent cases,¹⁷¹ but the propensity of tribunals to equate the obligation to provide full

Republic to intervene in a dispute between two companies; the only duty of the Czech Republic was to make its judicial system available for the parties to bring their claims, and for such claims to be properly examined and decided in accordance with domestic and international law).

167. *Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy)*, Judgment, 1989 I.C.J. Rep. 15, ¶¶ 111-112 (finding no violation occurred because no “national standard” of more rapid determination of administrative appeals existed and that “full protection and security” must conform to the minimum international standard, supplemented by the criteria of national treatment and most-favored-nation treatment).

168. *See Azurix Corp.*, Case No. ARB/01/12, Award, ¶ 408 (determining that the FET standard and the obligation to afford “full protection and security” are interrelated, and therefore, because Argentina failed to provide FET to the investment, Argentina also breached the standard of full protection and security).

169. *See* CAFTA, art. 10.5.2(b) (“Full protection and security requires each Party to provide the level of police protection required under customary international law.”) (internal quotations omitted); *see also* 2012 U.S. Model, art. 5.2(b).

170. *See* COMBE & PARADELL, *supra* note 37, at 312 (noting that arbitral tribunals have understood full protection and security to go beyond security protections and includes a secure investment environment provided by the State).

171. *See* RUDOLF DOLZER & CHRISTOPH H. SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 160-62 (Oxford U. Press 2d ed. 2012) (detailing that the collection of arbitral jurisprudence demonstrates that the standards of protection in treaty umbrella clauses remains in a state of flux).

protection and security with the FET standard as opposed to an independent treaty standard has led to much ambiguity.¹⁷² This raises issues of “delimitation in relation to the scope of other treaty clauses” like FET, for example.¹⁷³ Therefore, because the text of the TPP concerning the obligation to provide full protection and security has not changed since the time of CAFTA, the TPP does not adequately protect the rights of States.¹⁷⁴ Opponents may argue that the obligation to provide protection against physical or legal infringement is not an absolute standard; rather, it is a standard of due diligence on the part of the host State.¹⁷⁵ This perspective fails to recognize that the due diligence standard is still an expansive tool for investors.¹⁷⁶

The concepts of “full protection and security,” “fair and equitable treatment,” their relationship to one another, and to the “international minimum standard of treatment” remain largely abstract. Therefore, a stronger, more balanced formulation of these standards is necessary to bring the interests of States in their freedom to self-regulate in line with the interests of the investor in protecting their investments. While States may not implement laws that unduly harm the investments of investors, investors must be cognizant of the rights of the State and recognize the risks of investment.¹⁷⁷ For these reasons, scholars advocating on the behalf of States’ interests have called for

172. See *Azurix Corp.*, Case No. ARB/01/12, Award, ¶ 408 (“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”).

173. See Dolzer & Schreuer, *supra* note 171, at 160-62.

174. See *id.* at 169 (claiming that emergency clauses cannot be constructed in a manner that places the investor into a less favorable legal situation than that accorded under customary law).

175. See Perera, *supra* note 34, at 245 (describing one dissenting judge’s opinion that the obligation to exercise due diligence, in the context of protecting foreign investments, was derived from customary international law).

176. See *Asian Agric. Prod. Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, ¶ 85(B) (opining that Sri Lanka should have attempted to use reasonably available communication to mitigate damages to an investment during a military operation in an area occupied by rebels such that it was out of the government’s control); see also DOLZER & SCHREUER, *supra* note 171, at 160-62 (“Lack of resources to take appropriate action will not serve as an excuse for the host State.”).

177. See Chen, *supra* note 129, at 317.

application of the “proportionate approach” with regard to the FET clause, as will be discussed below.¹⁷⁸

D. INTERNATIONAL PRINCIPLES OF STATE SOVEREIGNTY REQUIRE A PROPORTIONATE APPROACH TO THE FET CLAUSE

Critics of the traditional approach favoring the rights of investors argue that tribunals in international investment disputes have gone astray by failing to recognize that one side of the dispute is a foreign state behaving in its regulatory capacity.¹⁷⁹ Contrary to the view of the investor rights approach, it is argued that the sole objective of IIAs is not only the protection of foreign investments, but rather an essential “element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties’ economic relations.”¹⁸⁰ The public law perspective considers that when a tribunal regulates in the public interest, “such actions are generally within its discretion as sovereign and subject to only limited constraints.”¹⁸¹

These truths call for a balanced, proportional tactic in interpreting the substantive treaty protections of investments. Interpretations overstating the protections to be accorded to foreign investments may discourage host States from entering into IIAs thereby frustrating the overall goal of expanding and strengthening the parties’ mutual economic relations.¹⁸² The proportionality takes both the investors rights and the rights of States into consideration by balancing the rights of investors against public policy concerns.¹⁸³ It

178. *See id.* at 308-12 (discussing the application of a proportionality test when applying an FET clause).

179. *See id.* at 307 (“Critics of the investor rights approach believe that tribunals go astray by failing to appreciate the significance of the fact that one side of the dispute is a sovereign state acting in its regulatory capacity.”).

180. *Id.*; *see* William W. Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 *YALE J. INT’L L.* 283, 285 (2010) (“It is time to recognize that contemporary investor-state arbitrations are not merely another form of private law commercial arbitration, with one party now being a state, but that they are more fittingly understood as a form of dispute settlement that . . . also operates in a public law context.”).

181. Chen, *supra* note 129, at 307.

182. *See id.*

183. *See* Roberts, *supra* note 27, at 66 (noting that an investor’s rights are not absolute but subject to the State’s legitimate power to harm— or to redefine the

acknowledges that sovereign states must sometimes regulate in ways that adversely affect some individuals but should not be disproportionate to the benefits gained.¹⁸⁴

The first tribunal to apply the proportionality test was the tribunal in *Tecmed v. Mexico*, which looked to decisions by the European Court of Human Rights analogizing human rights claims concerning the deprivation of property when evaluating a claim of expropriation.¹⁸⁵ Later tribunals adapted this principle to the issue of FET.¹⁸⁶ The proportionality approach has the potential to reconcile the reasoning of tribunals, thereby enhancing the legitimacy of their decision-making.¹⁸⁷ Successful implementation of public-private partnerships and sustainable development in modern times depends on the acceptance of the proportionality approach, both in IIA practice and by investment tribunals.¹⁸⁸

IV. RECOMMENDATIONS

The inclusion of the FET standard in a vast majority of bilateral, regional, and multilateral IIAs indicates acceptance and recognition by States of FET as a standard of treatment and protection for foreign investments.¹⁸⁹ However, the lack of coherence surrounding the FET standard created the need for a more balanced approach in addressing the interests of investors and States.¹⁹⁰ Despite the bold efforts of

relationship between private and public interests).

184. See Chen, *supra* note 129, at 308 (describing proportionality).

185. See *Medioambientales Tecmed S.A.*, Case No. ARB(AF)/00/2, Award, ¶ 122 (“There must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure.”).

186. See *Saluka Invs. B.V.*, ¶ 305 (formulating a balancing test to determine a breach of FET by weighing the investor’s legitimate and reasonable expectations against the State’s legitimate regulatory interests).

187. See *Kingsbury & Schill*, *supra* note 93, at 51-52 (noting that adopting a proportionality test has the potential to “enhance the legitimacy of legal institutions that undertake it”).

188. See *id.*

189. See *Perera*, *supra* note 34, at 251 (noting the FET standard, with a few changes in language, has now been incorporated as a standard clause in IIAs which shows that States generally accept the FET standard as recognition of a fundamental principle for the protection of investments).

190. See *El Paso Int’l Co.*, Case No. ARB/03/15, ¶ 358 (indicating the “importance of establish[ing] a balance between the legitimate expectation of the foreign investor to make a fair return on its investment and the right of the host

TTP drafters to create a more balanced approach, the terms “fairness” and “equity” in the FET clause remain undefined and will continue to cause significant interpretative problems in the course of dispute resolution.¹⁹¹ Furthermore, the TPP lacks an explanation of the consequences of liability-creating conduct leaving the determination of damages in the hands of arbitral tribunals with little-to-no-restraints;¹⁹² future IIAs must mention the consequences of liability-creating conduct.

While it is clear that the TPP attempts to provide some additional parameters concerning the FET clause, the formulation utilized in the TPP will not effectively limit the broad discretion given to tribunals in reviewing the administrative actions of the host State.¹⁹³ However, opportunities still exist to implement provisions that further strengthen the autonomy of States against the limitations imposed by ISDS provisions; negotiations for future agreements concerning investment such as the Transatlantic Trade and Investment Partnership (“T-TIP”)¹⁹⁴ and other agreements are ongoing.

Some feasible remedies for future IIAs include replacing the FET standard with more specific obligations. For example, formulating the requirements included in the FET standard in the form of an exhaustive list, instituting a review mechanism or appellate body for tribunals to promote full transparency and accountability, or codifying FET-citing cases to provide some form of consistency and predictability could all serve to clarify the FET standard and ensure more consistent application in investment arbitration.¹⁹⁵

State to regulate its economy in the public interest”).

191. See Perera, *supra* note 34, at 253 (stating that a lack of a concrete understanding of the FET standard has led to inconsistent application by tribunals looking for the nearest approximation).

192. See *id.* at 253; see generally TPP.

193. See *id.*

194. *Transatlantic Trade and Investment Partnership (T-TIP)*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/ttip> (last visited June 26, 2016) [hereinafter T-TIP] (explaining that T-TIP is a comprehensive FTA currently being negotiated between the European Union and the United States with the aim of “providing greater compatibility and transparency in trade and investment regulation, while maintaining high levels of health, safety, and environmental protection”).

195. See Perera, *supra* note 34, at 255.

A. THE "FAIR AND EQUITABLE TREATMENT" CLAUSE SHOULD INCLUDE MORE SPECIFIC, SUBSTANTIVE OBLIGATIONS

The current general practice of the U.S. in explicitly referencing the source of an FET obligation has proven only marginally successful in limiting arbitral discretion.¹⁹⁶ Thus, States wishing to provide additional guidance to tribunals while restricting their ability to interpret the FET standard in an overly expansive manner may wish to specify precise elements of the content of the standard.

One way to qualify the FET standard would be to exchange the general FET provision with a number of more unambiguous obligations.¹⁹⁷ One example of this approach can be seen in the EU-Canada Comprehensive Economic and Trade Agreement ("CETA"). Article 9, Paragraph 2, Treatment of Investors and of Covered Investments, states:

Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 where a measure or series of measures constitutes: (a) Denial of justice in criminal, civil or administrative proceedings; (b) Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings. (c) Manifest arbitrariness; (d) Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; (e) Abusive treatment of investors, such as coercion, duress and harassment; or (f) A breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.¹⁹⁸

The list may be exhaustive or it need not be limited to those elements listed in CETA.¹⁹⁹

196. See UNCTAD, *Fair and Equitable Treatment*, *supra* note 3, at 108 (stating that the rather ambiguous rules of international law and the minimum standard of treatment have pushed tribunals to develop their own substantive content for the FET standard).

197. See *id.* (positing that the FET standard could be replaced with more specific obligations and prohibitions developed around the doctrine).

198. *Comprehensive Economic and Trade Agreement (CETA)*, EUR. COMM'N, <http://ec.europa.eu/trade/policy/in-focus/ceta/> (last visited July 21, 2016) [hereinafter *CETA*].

199. See UNCTAD, *Fair and Equitable Treatment*, *supra* note 3, at 108-09 (suggesting a list of elements outlining the prohibition of the "denial of justice and flagrant violations of due process; manifestly arbitrary treatment; evident discrimination; manifestly abusive treatment involving continuous, unjustified coercion or harassment; infringement of legitimate expectations based on

On the other hand, a traditional FET clause could be supplemented by further interpretative guidance.²⁰⁰ For example, IIAs could incorporate statements to the effect that the clause does not preclude the State from adopting regulatory or other measures that pursue legitimate policy objectives, the investor's conduct and the country's level of development and level of business risk are relevant to the tribunal's analysis, or equitable considerations and other relevant circumstances of the case should be taken account in the event that a breach is found.²⁰¹ The TPP somewhat follows this approach by denoting that simply because a breach of another provision in the TPP or a separate international agreement has been determined, does not mean that a de facto breach of Article 9.6 is established.²⁰²

The main purpose of such a modification would "be to rein in arbitrators' creativity and remove other factors and criteria that some tribunals have relied upon in order to find a violation of FET, such as transparency, consistency, legality and stability of regulatory framework."²⁰³ Additionally, IIAs could include a provision clarifying that the FET standard does not preclude States from adopting regulatory measures.²⁰⁴

B. THE U.S. IIA MODEL SHOULD INCLUDE MORE RESTRICTIONS ON ARBITRATORS IN THE INVESTOR-STATE DISPUTE SETTLEMENT MECHANISM, AS WELL AS A REVIEW MECHANISM.

Most arbitration panels are comprised of a short list of judges who are also legal practitioners. Among the small pool of arbitrators, it is likely that certain judges are selected by the disputing parties for their demonstrated tendencies to favor one side or the other.

investment-inducing representations or measures, on which the investor has relied").

200. *See id.* at 109 (noting that the elements can be broadened or narrowed by the contracting parties).

201. *See id.* at 110 (describing different provisions that can be included in an IIA to supplement the traditional FET clause).

202. *See* TPP, art. 9.6.3 ("A determination that there has been a breach of another provision in this Agreement, or of a separate international agreement, does not establish that she has been a breach of this Article.").

203. *See* UNCTAD, *Fair and Equitable Treatment*, *supra* note 3, at 109.

204. *See id.* at 113 (noting that because the preservation of the right to regulate is significant to other IIA obligations in addition to FET, it may be appropriate to apply the right-to-regulate language to the treaty as a whole).

Furthermore, these arbitrators are not precluded from acting as lawyers in other ISDS claims.²⁰⁵ This system of selection should be overhauled in favor of a system that minimizes the potential for conflicts of interest or bias. This may be accomplished by restricting the number of times an individual may be selected as an arbitral judge within a specified period of time. A version of this recommendation can be seen in the EU-Singapore FTA.²⁰⁶

Second, for improved fairness and consistency in practice, modern IIAs should implement a review mechanism.²⁰⁷ Currently, no IIA exists that contains an appellate mechanism.²⁰⁸ Although the Appellate Body of the World Trade Organization is not without its flaws, this approach provides a better framework for ensuring correctness predictability than the current ISDS system.²⁰⁹ The current ISDS system need not rise to the formality of the WTO Appellate Body, per se, but a bilateral appellate mechanism, and its role and practical operation, should be clearly established. This creation would “ensure consistency in the interpretation of [IIAs] and increase legitimacy both on substance and through institutional design by strengthening independence, impartiality, and predictability.”²¹⁰

V. CONCLUSION

In sum, despite the potential of Article 9.6.4 to contain an investor’s “legitimate expectations” to a reasonable level, the FET

205. See *Investment in TTIP and Beyond – The Path for Reform*, EUR. COMM’N (May 5, 2015), http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.pdf [hereinafter *EC Concept Paper*] (“The ad hoc nature of their appointment is perceived by the public as interfering in their ability to act independently and to properly balance investment protection against the right to regulate.”).

206. See generally *Annex 15-B Code of Conduct for Arbitrators and Mediators*, EUR. COMM’N ¶ 15 (June 25, 2015), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=961> (“All former arbitrators must avoid actions that may create the appearance that they were biased in carrying out their duties or derived any advantage from the decision or ruling of the arbitration panel.”).

207. See EC Concept Paper, *supra* note 171, at 9 (advocating for a bilateral appellate mechanism).

208. See *id.* (“There is no appellate mechanism included in any existing investment treaties.”).

209. See *id.* (explaining that an appellate mechanism would review awards for errors of law, manifest error of fact, and incorrect interpretation of domestic law).

210. *Id.*

clause as a whole within the TPP continues to elude the clarity and specificity necessary to ensure a proper balance of interests between the State and the investor in IIA practice. The FET standard as historically maintained in the U.S. Model may serve as a tool for investors to file large claims against the State for regulation it may have enacted in the public interest. This function remains at odds with the international principles of state sovereignty. Because Articles 9.6.1, 9.6.2, and 9.6.3 of the TPP largely emulate prior formulations of the FET standard within previous U.S. Models, the TPP therefore also comes into conflict with these values within international law.

An overhaul of the U.S. Model in favor of a more proportionate approach is necessary to safeguard the mutual goal of continued economic expansion and development between investors and states—particularly in light of contemporary public private-partnerships, sustainable development, and climate change. Future IIAs may shield states against the broad powers granted to investors by incorporating a stronger, more specific formulation of the FET standard that expressly states the consequences of liability-creating conduct on behalf of the State. Furthermore, the creation of a more structured arbitral tribunal and review mechanism within the investor-state dispute settlement mechanism would promote better consistency, transparency, and fairness in investment treaty arbitration. These modifications would bring the FET clause in U.S. investment treaty practice in line with international principles of state sovereignty by providing a more effective framework to balance the interests of the investor and State.