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## (Re)Calibration, Standard-Setting and the Shaping of Investment Law and Arbitration

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# (RE)CALIBRATION, STANDARD-SETTING AND THE SHAPING OF INVESTMENT LAW AND ARBITRATION

ERIC DE BRABANDERE\*

**Abstract:** Calibrating or (re)calibrating investment law and arbitration—depending on whether the exercise takes place for the first or a subsequent time—is different from rebalancing investment law and arbitration. A balancing exercise denotes a situation in which different elements are equal or in the correct proportions to maintain a sort of equilibrium. This Essay argues that investment law and arbitration are not necessarily about creating a situation in which all “elements” are in balance and that (re)calibrating is an interesting starting point for a discussion about the contemporary regime of investment law and arbitration, and especially to explore, understand, or visualize the current and future developments in the field. The central questions in this Essay include determining what the standards are and who sets them. This Essay examines (re)calibration and looks at the process from the vantage point of the standards which are used for such (re)calibration and evaluates how the standards have evolved substantially over the years and how new treaties—in an exercise of (re)calibration—are in fact following or adapting to these new standards.

## INTRODUCTION—(RE)CALIBRATION AND THE INVESTMENT TREATY REGIME

Calibrating or (re)calibrating investment law and arbitration—depending on whether the exercise takes place for the first or a subsequent time—is different from rebalancing investment law and arbitration. A balancing exercise denotes a situation in which different elements are equal or in the correct proportions to maintain a sort of equilibrium. Investment law and arbitration—with the exception perhaps of certain elements of arbitral procedure—are not always about creating situations in which all elements, such as investor protection, investor obligation, or even the host State and the foreign investor, are equal. A balancing exercise within certain specific are-

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as of investment law is not *per se* unnecessary or useless. The idea of finding ways to include investor obligations in investment, by finding an equilibrium between the rights and obligations of States' treaties, or balancing the various interests at stake in international investment law, are useful exercises and analytical angles to look at investment law and arbitration.

Nevertheless, investment law and arbitration are not necessarily about creating a situation in which all "elements" are in balance. From that perspective, when one seeks to analyse how international investment law and arbitration are currently regulated and shaped, the idea of "balance" as an evaluative device is limited. (Re)calibrating is an interesting starting point for a discussion about the contemporary regime of investment law and arbitration, and especially to explore, understand, or visualise the current and future developments in the field.

Calibration forms part of "metrology" or the "science and practice of measurement" and implies the comparison of the values obtained by a measuring instrument with those of a standard, which usually is a known internationally or nationally set standard.<sup>1</sup> Calibration, at least in its metrological sense, is a rather neutral act in that it merely denotes the measurement/comparison act and does not comprise any adjustment on the measurement so obtained, which is termed verification and validation.<sup>2</sup> The whole idea behind calibration is to reset the measured device in accordance with the results of the measurement. This all may seem very protracted, yet it denotes the objective of this Essay, which is to enquire how one measures or (re)calibrates investment law and arbitration, or, in other words, by which standards, modifications, and adjustments to international investment law and arbitration are being made or suggested, and by which standards can international investment law and arbitration be evaluated. The end objective is to provide critical insights into how standards are (re)set in international investment law and arbitration, and thus how this system is shaped.

This enquiry is important in the current debate on investment law, in which both opponents, proponents, and scholars, are constantly making claims about how investment law should be.<sup>3</sup> The enquiry is also important

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<sup>1</sup> See JOINT COMM. FOR GUIDES IN METROLOGY, INTERNATIONAL VOCABULARY OF METROLOGY—BASIC AND GENERAL CONCEPTS AND ASSOCIATED TERMS 1, 28 (3rd ed., 2012), [https://www.bipm.org/utils/common/documents/jcgm/JCGM\\_200\\_2012.pdf](https://www.bipm.org/utils/common/documents/jcgm/JCGM_200_2012.pdf) [<https://perma.cc/Z6WW-WJ9U>] [hereinafter JOINT COMM. FOR GUIDES IN METROLOGY] (explaining that this vocabulary is for "common reference" of terms in metrology, and defining "calibration").

<sup>2</sup> See *id.* at 31 (providing a definition for "verification," "validation," and "metrological comparability of measurement results").

<sup>3</sup> See Barnali Choudhury, *Exception Provisions as a Gateway to Incorporating Human Rights Issues into International Investment Agreements*, 49 COLUM. J. TRANSNAT'L L. 670, 670 (2011) (explaining the claim that "international investment law *should* be reconceptualized in order to

because modifications to investment law norms are very often justified or legitimized based on the fact that there is an international standard that actually dictates the modification/calibration.

The central question then is what the standard is and by whom it is set. A purely legalistic system—internal perspective would start with an enquiry about the traditional sources of international investment law, to see whether these contain any standards by which one could (re)calibrate the current norms and rules in international investment law most often contained in investment treaties. Customary international law—while of importance in relation to certain aspects of investment law and arbitration<sup>4</sup>—provides some guidance in terms of standard setting, but one finds remarkably very little references to “objective” standards such as those found in customary law.<sup>5</sup> This is probably due not only to the vagueness of custom in this area, but also the criticism on the formation of customary international investment law, which has targeted the Western dominance in setting customary protection standards and the role of arbitral tribunals in deciding—right or wrong—what customary international investment law is.<sup>6</sup> The same goes for general principles of international law.<sup>7</sup>

This leaves us mainly with international treaty law. But treaties precisely compose the regime governing international investment law and arbitration,<sup>8</sup> which is the subject of the “measurement act.”<sup>9</sup> This implies that States set the norms in international investment law, and that these norms may at the same time be considered the standards by which investment law can be tested against. This legal circularity is inevitable, but of course not helpful in the present enquiry. Moreover, the norms contained in treaties are inevitably variable and fluctuate. The fluctuation takes place over time and

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realize both the economic and social aspects of foreign investment”) (emphasis added); Veijo Heiskanen, *The Doctrine of Indirect Expropriation in Light of the Practice of the Iran–United States Claims Tribunal*, 8 J. WORLD INV. & TRADE 215, 216 (2007) (“[I]nvestment law should aim at least at a minimum, if not optimum, level of predictability.”).

<sup>4</sup> See generally Jean d’Aspremont, *Customary International Investment Law: Story of a Paradox*, in INTERNATIONAL INVESTMENT LAW: SOURCES OF RIGHTS AND OBLIGATIONS 5–47 (Eric De Brabandere & Tarcisio Gazzini eds., 2012) (discussing the evolution of customary international law) [hereinafter SOURCES OF RIGHTS AND OBLIGATIONS].

<sup>5</sup> The only exception perhaps is reference to international law in certain protection standards such as fair and equitable treatment, which I will discuss in more detail later.

<sup>6</sup> See *id.* at 5–47 (providing an overview of customary international law).

<sup>7</sup> See Stephan W. Schill, *General Principles of Law and International Investment Law*, in SOURCES OF RIGHTS AND OBLIGATIONS, *supra* note 4, at 133 (explaining the general principles of international law).

<sup>8</sup> See generally JESWALD W. SALACUSE, *THE LAW OF INVESTMENT TREATIES* 44 (2009) (providing an overview of international treaty and arbitration law).

<sup>9</sup> See JOINT COMM. FOR GUIDES IN METROLOGY, *supra* note 1, at 30–31 (providing definitions for measuring standards).

in accordance with geographical and political preferences.<sup>10</sup> I acknowledge that investment treaties are drafted, and re-drafted, to conform to the standards contained in other treaties because these are considered to be the “standards” of international investment law. This Essay then investigates how recent modifications to investment law and arbitrations norms have been made and justified outside of the standards set by other treaties, either by reference to internal or external standards.

There are indeed standards that are being used to justify, legitimize, or explain modifications to the investment law regime. These standards are also used to evaluate the regime in the sense of measuring the extent to which the contemporary investment law and arbitration regimes meet certain standards—the internationally accepted metrological value of what investment law norms should be. (Re)calibration has taken place over the past years on various grounds, and is based on the consideration that adjustments have been necessary to conform to these standards. This has been the case based on (1) the standards set in customary international investment law, and (2) norms, rules, principles, and practices originating from non-investment law regimes within public international law. Beyond these two legal standards, there is a third “standard”: the political, economic and policy standards outside of any legal constraints. These are inherent in the nature of international investment law that is largely treaty-based and open to a voluntarist approach to setting the contents of investment treaties. Setting investment protection standards is

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<sup>10</sup> Treaties moreover are not necessarily subjected to any form of consistency when viewed from the perspective of one state. While those states that have developed model investment agreements very often (try to) stick to their model in treaty negotiations, this is not always tenable. One sees variations in treaties signed between a state having a model BIT and other states. *Compare* Agreement Between the Belgium-Luxembourg Economic Union and the Republic of Columbia on the Reciprocal Promotion and Protection of Investments, BLEU-Colom., art. VIII, Feb. 4, 2009, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/342> [<https://perma.cc/W5HQ-UPL9>] (containing extensive provisions on labour standards), *with* Agreement Between the Belgium-Luxembourg Economic Union and the Sultanate of Oman on the Promotion and Reciprocal Protection of Investments, BLEU-Oman, art. 5, Dec. 16, 2008, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/397> [<https://perma.cc/KT8P-KEDZ>] (containing a different provision on labour). The Belgium-Luxembourg Economic Union, however, has a Model BIT from 2002 which contains different provisions. *See* Belgium-Luxembourg Economic Union Model Bilateral Investment Treaty, 2002, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2831> [<https://perma.cc/P5A4-9GGC>] [hereinafter BLEU Model Agreement] (containing a different labour provision); *see also* Nathalie Bernasconi-Osterwalder & Lise Johnson, *Belgium's Model Bilateral Investment Treaty: A Review* (Mar. 2010), [https://www.iisd.org/sites/default/files/publications/belgiums\\_model\\_bit.pdf](https://www.iisd.org/sites/default/files/publications/belgiums_model_bit.pdf) [<https://perma.cc/Z4HR-S76V>] (providing further discussion on the BLEU Model Agreement). Some authors, however, have considered that the web of investment treaties has resulted in a multilateralization of investment law and arbitration. *See generally* STEPHAN W. SCHILL, *THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW* (2009) (exploring the relationship between investment treaties and the multilateralization of international investment law).

an inherently political conversation, as a consequence of the voluntarist reality of standard-setting in treaties.<sup>11</sup> From that perspective, there is no *mandatory* standard for norms in investment law and arbitration and expectations or judgements that one may have—as scholars, practitioners, civil society, or policy makers—as to whether, for example, a certain investor protection treaty norm is “right” or “wrong” is inhibited by a biased and pre-determined idea of what that standard is or should be.

My intention is not to make any strong normative propositions as to whether the (re)calibration exercises in general, or in relation to the specific issues discussed here are “right” or “wrong.” Instead this Essay examines (re)calibration, and looks at the process from the vantage point of the standards which are used for such (re)calibration and evaluates how the standards have evolved substantially over the years, and how new treaties—in an exercise of (re)calibration—are in fact following or adapting to these new standards. Part I of this Essay addresses the genealogy and rationale of investment treaties and their standards.<sup>12</sup> Part II examines the recent redefinitions of investment protection standards such as fair and equitable treatment (“FET”).<sup>13</sup> Part III of this Essay situates FET in relation to questions regarding the obligations of foreign investors.<sup>14</sup> Part IV then evaluates the evolution and transparency in investment treaty arbitration.<sup>15</sup>

## I. THE GENEALOGY AND STANDARDS OF INVESTMENT TREATIES

The most remarkable evolution in the field of international investment law was the massive proliferation of Bilateral Investment Treaties (“BITs”), multilateral investment treaties, and other trade-related treaties that contain investment protection provisions such as Preferential Trade Agreements (“PTAs”) or Free Trade Agreements (“FTAs”). The United Nations Conference on Trade and Development (“UNCTAD”) estimates the number of BITs at 2,952—of which 2,358 are in force—and some 380 other treaties

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<sup>11</sup> The use of the term “voluntarism” in this context merely denotes the idea that States are in relative absolute liberty to decide and agree on the contents of international investment treaties. My use of the term voluntarism does not imply any take on the normative aspects of the debate or on the origin of the norms contained in the treaties. See generally Alain Pellet, *The Normative Dilemma: Will and Consent in International Law-Making*, 12 AUSTL. Y.B. INT’L L. 22 (1992) (providing an overview of the discussion surrounding the voluntarist approach to treaties); Fernando R. Teson, *International Obligation and the Theory of Hypothetical Consent*, 15 YALE J. INT’L L. 84 (1990) (discussing the voluntarist approach to treaties and the normative aspects of the debate).

<sup>12</sup> See *infra* notes 16–46 and accompanying text.

<sup>13</sup> See *infra* notes 47–79 and accompanying text.

<sup>14</sup> See *infra* notes 80–95 and accompanying text.

<sup>15</sup> See *infra* notes 96–116 and accompanying text.

which contain investment protection provisions—of which 310 are in force.<sup>16</sup> For the sake of simplicity, I will use here the notion of international investment agreement (“IIA”) to denote those treaties that contain investment protection clauses aimed at promoting and protecting foreign investors and their investments.

IAs are not homogenous categories of treaties containing exactly the same provisions. It is therefore difficult and risky to generalize about these two types of treaties. Similarly, there are many differences between contemporary IAs and earlier IAs, for instance in respect to access to investor-state arbitration for the settlement of disputes.<sup>17</sup> This Essay will describe generally the approaches of BITs to the regulation and protection of foreign investment.

Although originating from the practice of Friendship, Commerce and Navigation (“FCN”) Treaties,<sup>18</sup> BITs are the result of the severance between trade and investment as a result of the multilateralization of international trade through the signature of the General Agreement on Tariffs and Trade (“GATT”).<sup>19</sup> Because of the multilateralization of international trade, the specific protection afforded to foreign investors was left unregulated at the international treaty level, paving the way for the contemporary regulation of foreign investment through bilateral investment treaties.<sup>20</sup> But, significantly, the protection of foreign investment is not the objective of a treaty. Rather, the objective of a treaty is broader and more philanthropic as it involves the promotion of foreign investment and capital flows between two or more States and the economic development of States.<sup>21</sup> The investment protection

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<sup>16</sup> See *International Investment Agreements Navigator*, INV. POLICY HUB, UNCTAD, <http://investmentpolicyhub.unctad.org/IIA> [<https://perma.cc/8XTA-WANY>] (summarizing the bilateral investment treaties and treaties with investment provisions as of Oct. 1, 2018).

<sup>17</sup> Compare Office of the U.S. Trade Representative and U.S. Dep’t of State, 2012 U.S. Model Bilateral Investment Treaty, art. 23–36, <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> [<https://perma.cc/2ZQK-QZF9>] [hereinafter 2012 U.S. Model BIT] (containing fourteen articles relating to investor–State dispute settlements), with Treaty Concerning the Reciprocal Encouragement and Protection of Investment, Arg.-U.S., art. VII, Nov. 14, 1991, 31 I.L.M. 124 (containing only one article involving investor–State dispute settlements).

<sup>18</sup> See Todd S. Shenkin, *Trade-Related Investment Measure in Bilateral Investment Treaties and the GATT: Moving Toward a Multilateral Investment Treaty*, 55 U. PITT. L. REV. 541, 548–49 (1994) (providing an overview of the Friendship, Commerce, and Navigation Treaties (“FCN”) and BIT practice, specifically regarding the United States).

<sup>19</sup> Alizera Falsafi, *Regional Trade and Investment Agreements: Liberalizing Investment in a Preferential Climate*, 36 SYRACUSE J. INT’L L. & COM. 43, 46 (2008).

<sup>20</sup> See Sergio Puig, *The Merging of International Trade and Investment Law*, 33 BERKELEY J. INT’L L. 1, 8–11 (2015) (explaining how international trade regulation developed in contrast to international investment law).

<sup>21</sup> See SALACUSE, *supra* note 8, at 191 (explaining the “promotion” aspect of investment treaties).

provisions and the access to arbitration for foreign investors usually provided in IIAs are merely a means to achieve this goal. While the general objectives of stimulating capital flows and attracting foreign capital—viewed from the perspective of the host State—may nowadays seem somewhat remote, it is nonetheless in the DNA of IIAs. The remoteness between the overarching objective and the practical reality that IIAs are mainly used for investment protection is understandable, since many IIAs bear as title, “Agreement for the Promotion and Protection of Investment.”<sup>22</sup> Although implying a double objective: promotion and protection, in practice the vast majority of IIAs contain mainly investment *protection* provisions.<sup>23</sup>

### A. Investment Protection Standards in Investment Treaties

IIAs mainly provide for the protection of foreign investment.<sup>24</sup> The majority of investment treaties contain relatively similar standards or norms geared towards such protection, some of which have their origin in customary norms dating back to the late nineteenth century and early twentieth century.<sup>25</sup> Most contemporary treaties require investors and investments to be accorded FET, full protection and security (“FPS”), national treatment (“NT”) and most favoured nation treatment (“MFN”), prohibit direct and indirect expropriations unless certain strict conditions are met.<sup>26</sup> These trea-

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<sup>22</sup> See, e.g., Agreement for the Promotion and Protection of Investment for the Promotion and Protection of Investment between the Republic of Austria and the Federal Republic of Nigeria, Austria–Nigeria, Aug. 8, 2013, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2972> [<https://perma.cc/WV22-V4R8>].

<sup>23</sup> There are several IIAs that not only have “promotion” of investment as an overarching objective, but also have specific provisions aimed at the promotion. See Agreement on Encouragement and Reciprocal Protection of Investments, Arg.-Neth., art. 2, Oct. 20, 1992, 2242 U.N.T.S. 205, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/107> [<https://perma.cc/PR6B-3CE4>] (“Either Contracting Party shall, within the framework of its laws and regulations, promote economic cooperation through the protection in its territory of investment of investors of the other Contracting Party. Subject to its right to exercise powers conferred by its laws or regulations, each Contracting Party shall admit such investments.”).

<sup>24</sup> See SALACUSE, *supra* note 8, at 191 (describing the various steps states take to govern foreign investment).

<sup>25</sup> See generally Kenneth J. Vandevlede, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. OF INT’L L. & POL’Y 157 (2005) (providing a historical overview of IIAs).

<sup>26</sup> See generally Andrea K. Bjorklund, *National Treatment*, in STANDARDS OF INVESTMENT PROTECTION 29 (August Reinisch ed., 2008) [hereinafter STANDARDS OF INVESTMENT PROTECTION] (discussing national treatment); Giuditto Cordero Moss, *Full Protection and Security*, in STANDARDS OF INVESTMENT PROTECTION, *supra*, at 131 (analysing the full protection and security standard in investment arbitration); Anne K. Hoffmann, *Indirect Expropriation*, in STANDARDS OF INVESTMENT PROTECTION, *supra*, at 151 (discussing expropriation); Katia Yannaca-Small, *Fair and Equitable Treatment Standard: Recent Developments*, in STANDARDS OF INVESTMENT PROTECTION, *supra*, at 111 (providing a discussion on fair and equitable treatment (“FET”));



ties also contain clauses related to transfer of funds, transparency, and compensation for losses owing to war, armed conflict, revolution, a state of national emergency, and other exceptional circumstances.<sup>27</sup> Alongside protection standards, investment treaties very often contain direct access for foreign investors to international arbitration with certain variations as to the conditions under which such access can be effectuated.<sup>28</sup>

A central question is: how are protection standards and access to arbitration, and the specific contours of these defined in IIAs? The starting point for the protection offered to foreign investors can be found in certain customary norms. In the late nineteenth century and early twentieth century there were multiple cases that applied the customary norms concerning the protection of aliens under international law, and notably the so-called international minimum standard (“IMS”) and the standard of full protection and security (“FPS”).<sup>29</sup> In 1926, the US/Mexico General Claims Commission issued its decision in *L. F. H. Neer & Pauline Neer v. United Mexican States*, which has since been often quoted as representing the international minimum standard.<sup>30</sup> The US/Mexico General Claims Commission described the IMS as follows:

[T]he propriety of governmental acts should be put to the test of international standards, and (second) that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to

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Andreas R. Ziegler, *Most-Favoured Nation (MFN) Treatment*, in STANDARDS OF INVESTMENT PROTECTION, *supra*, at 59 (exploring most-favoured-nation (MFN) treatment).

<sup>27</sup> See generally Abba Kolo & Thomas Wälde, *Capital Transfer Restrictions Under Modern Investment Treaties*, in STANDARDS OF INVESTMENT PROTECTION, *supra* note 26, at 205 (providing a discussion on the transfer of funds); Facundo Pérez-Aznar, *Investment Protection in Exceptional Situations: Compensation-for-Losses Clauses in IIAs*, 32 ICSID REV.-FOREIGN INV. L.J. 696 (2017) (providing a discussion on compensation for losses clauses).

<sup>28</sup> See, e.g., Model Text for the Canadian Bilateral Investment Treaty; Model Text for the Chile Bilateral Investment Treaty; Model Text for the France Bilateral Investment Treaty; Model Text for the South Africa Bilateral Investment Treaty, Model Text for the Switzerland Bilateral Investment Treaty; Model Text for the United Kingdom Bilateral Investment Treaty; Model Text for the United States Bilateral Investment Treaty, <http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu> [<https://perma.cc/G7PX-YB3B>] (providing links to the model BITs; to open the relevant BIT, select the state concerned, and then under ‘Investment Related Instruments (IRIs),’ locate the specific model BIT).

<sup>29</sup> See d’Aspremont, *supra* note 4, at 10–11 (discussing the origin and the debate surrounding international minimum standards); see also Eric De Brabandere, *Host States’ Due Diligence Obligations in International Investment Law*, 42 SYRACUSE J. INT’L L. & COM. 319, 324–25 (2015) [hereinafter De Brabandere, *Host States’ Due Diligence Obligations*] (describing how “many cases” confirm the obligations States have with regard to an alien’s property).

<sup>30</sup> This is not, however, without controversy with respect to the application of that decision to modern investment law. See ROLAND KLÄGER, FAIR AND EQUITABLE TREATMENT IN INTERNATIONAL INVESTMENT LAW 51–53 (2011) (discussing further the controversy with respect to the application of that decision to modern investment law).

an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds from deficient execution of an intelligent law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial.<sup>31</sup>

The duty to protect the security of aliens and their property from acts of the State or of third parties in their territory also has long been accepted in international law.<sup>32</sup> One finds references to such a standard in many cases, notably in the decisions of several Claims Commissions established in the nineteenth century and early twentieth century.<sup>33</sup> Additionally, the rules in relation to expropriation, and especially the conditions under which a lawful expropriation can occur, currently found in the vast majority of contemporary IIAs, can be traced back to a customary norm in this respect.<sup>34</sup>

Irrespective of their “source” origin, some of these norms, and other norms currently included in IIAs find their origins in other regulatory regimes in international law, such as international trade law. I am not targeting the use of analogies derived from other regimes which bare similarity—normative or systemic—with investment law,<sup>35</sup> but rather the incorporation of such norms and rules from other regimes in IIAs. An example is MFN, which has traditionally been included in international trade agreements,<sup>36</sup> and the inclusion

<sup>31</sup> L.F.H. Neer & Pauline Neer (U.S.A.) v. United Mexican States, 4 R.I.A.A. 60, 61–62 (Gen. Cl. Comm’n 1926).

<sup>32</sup> Riccardo Pisillo-Mazzeschi, *The Due Diligence Rule and the Nature of the International Responsibility of States*, 35 GERMAN Y.B. INT’L L. 9, 24–25 (1992); see De Brabandere, *Host States’ Due Diligence Obligations*, *supra* note 29, at 319–61 (explaining the framework of arbitral tribunal decisions that have applied the due diligence standard in international investment law).

<sup>33</sup> E.g., H.G. Venable (U.S.A.) v. United Mexican States, 4 R.I.A.A. 219 (Gen. Cl. Comm’n 1927); George Adams Kennedy (U.S.A.) v. United Mexican States, Concurring opinion by American Comm’r, 4 R.I.A.A. 194 (Gen. Cl. Comm’n 1927); Laura M. B. Janes et al. (U.S.A.) v. United Mexican States, 4 R.I.A.A. 82 (Gen. Cl. Comm’n 1925); Home Frontier and Foreign Missionary Soc’y of the United Brethren in Christ (U.S. v. Gr. Brit.), 6 R.I.A.A. 42 (Gr. Brit. U.S. Mixed Comm’n 1920); Sambiaggio Case (It. v. Venez.), 10 R.I.A.A. 499, 524 (Mixed Cl. Comm’n, 1903); see Pisillo-Mazzeschi, *supra* note 32, at 27–28 (providing a general overview of the various case law to this effect).

<sup>34</sup> See, e.g., G.A. Res. 1803 (XVII), ¶ 4 (Dec. 14, 1962) (providing the U.N.’s Declaration on Permanent Sovereignty over Natural Resources). See generally Eli Lauterpacht, *Issues of Compensation and Nationality in the Taking of Energy Investments*, 8 J. ENERGY & NAT. RESOURCES L. 241 (1990) (noting that “under customary international law . . . ‘appropriate’ compensation [must] be paid”).

<sup>35</sup> Martins Paparinskis, *Analogies and Other Regimes of International Law*, in THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW 73–107 (Zachary Douglas, Joost Pauwelyn & Jorge E. Viñuales eds., 2014) [hereinafter THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW].

<sup>36</sup> U.N. Conference on Trade and Development (UNCTAD), *Most-Favoured-Nation Treatment*, UNCTAD Series on Issues in International Investment Agreements II, at 1, 9–12, U.N. Doc.

of which discloses, as said before, the FCN Treaties origin of contemporary investment treaties. The same can be said in relation to national treatment.<sup>37</sup> More recently, one sees the inclusion of norms relating to labour standards, human rights, and the environment. This inclusion is a consequence of the incorporation, of general international law norms or norms from specific sub-fields of international law, such as international human rights law and international environmental law in investment law and IIAs.<sup>38</sup>

When looking to some of the recent (re)calibration exercises in relation to specific issues in the field of international investment law and arbitration, the position of international investment law will thus be primordial. Viewing international investment law as a field within public international law, facilitates the incorporation of international law standards and norms that are, in principle or in origin, alien to the regulation of foreign investment *sensu stricto*. On the contrary, a focus on the private dimension of investment law, or the specific features of the system will result in the impenetrability of international investment law from any generalist international law influence, but not from other contract or private law rules and practices.<sup>39</sup>

### B. Access to Arbitration Under Investment Treaties

Turning to the settlement of investment disputes under IIAs—the procedural side of investment law—one can clearly detect the origins of the current inclusion of investment treaty arbitration in IIAs. The standing of individuals and corporations in international investment arbitration is inspired mainly by a perceived fear of lack of independence of domestic courts and tribunals<sup>40</sup> and the ineffectiveness of the customary system of diplomatic protection.<sup>41</sup> To avoid the rather cumbersome and uncertain pro-

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UNCTAD/DIAE/IA/2010/1 (Nov. 2010), [http://unctad.org/en/Docs/diaeia20101\\_en.pdf](http://unctad.org/en/Docs/diaeia20101_en.pdf) [<https://perma.cc/6JC2-94NF>].

<sup>37</sup> See Mark Wu, *The Scope and Limits of Trade's Influence in Shaping the Evolving International Investment Regime*, in THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW, *supra* note 35, at 169–209 (providing an overview of trade and investment regimes, and describing the interaction between these two regimes).

<sup>38</sup> See, e.g., 2012 U.S. Model BIT, *supra* note 17, arts. 12–13 (including the environment in Article 12, and labour in Article 13).

<sup>39</sup> It is interesting to note that the (re)calibration of investment law and arbitration, if grounded in external norms and rules, takes place more in the framework of public international law rather than commercial law or private law.

<sup>40</sup> CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 61–63 (2d ed., 2017) (discussing the limited jurisdiction of arbitration tribunals, and providing an example in which a judge noted that one of the goals of BITs was to address any uneasiness a party may have in local courts).

<sup>41</sup> See ERIC DE BRABANDERE, INVESTMENT TREATY ARBITRATION AS PUBLIC INTERNATIONAL LAW: PROCEDURAL ASPECTS & IMPLICATIONS 60 (2014).

cedure of diplomatic protection, investment treaties habitually grant investors the right to bring directly a claim against the host State before an international arbitration tribunal.<sup>42</sup> Investor access to investment treaty arbitration is, simply put, the withdrawal of the procedural barriers imposed by the rules on diplomatic protection through the explicit consent by States. This then allows the foreign investor of one State to bring a claim directly against another State without the former State's intervention.

The method used to settle international investment disputes in IIAs—investment treaty arbitration—is modelled on the rules and principles of international commercial arbitration.<sup>43</sup> International commercial arbitration and investment treaty arbitration share many common features.<sup>44</sup> Many of these common features are moreover inherent to the very concept of arbitration. Via both mechanisms, parties decide to bring a claim before a party-appointed panel of arbitrators and in principle define the applicable law and the procedural rules. Likewise, the conduct of the proceedings is influenced by the common principles of arbitral procedures, such as those governing the constitution of the tribunal, the challenge of arbitrators, and the rules in respect of the rendering to the final award.<sup>45</sup>

The way in which the arbitration of investment disputes under IIAs is perceived and treated is of particular importance for the way in which procedural questions are dealt with by arbitral tribunals and in IIAs. In contrast to investment protections standards, investment treaty arbitration is, in practice, heavily influenced by whether one considers the public or private dimension of the arbitral proceedings to be predominant or to provide a better explanatory or regulatory framework for settling investor-State disputes. The consideration one picks will influence the way in which the procedure is shaped in practice and in theory.<sup>46</sup>

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<sup>42</sup> See *id.* at 21.

<sup>43</sup> Inspiration was also sought in the Statute of the International Court of Justice, and the Permanent Court of Arbitration 1962 Rules of Arbitration and Conciliation for Settlement of International Disputes Between Two Parties of Which Only One Is a State, notably in the creation of the International Centre for Settlement of Investment Disputes (ICSID). See Antonio R. Parra, *The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes*, 41 INT'L LAW. 47, 49, 55–57 (2007) (describing the ICSID Convention's inaugural meeting where the provisional rules and regulations were drafted, and additional amendments to the ICSID rules and regulations); see also Sergio Puig, *No Right Without a Remedy: Foundations of Investor-State Arbitration*, in THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW, *supra* note 35, at 235 (contextualizing the signing of the ICSID).

<sup>44</sup> See DE BRABANDERE, *supra* note 41, at 4–7.

<sup>45</sup> *Id.*

<sup>46</sup> It is not a coincidence that the modification of arbitration rules to incorporate transparency-related rules occurred because of the State or public perspective behind such modifications. See *id.* at 148 (providing an overview and discussion of the modification of arbitration rules and the policies behind such modifications). Nor is it surprising that the differentiation made between invest-

## II. REDEFINING INVESTMENT PROTECTION STANDARDS IN INVESTMENT TREATIES

### *A. Fair and Equitable Treatment in Investment Treaties*

The obligation to treat foreign investors fairly and equitably is stipulated in the vast majority of BITs and in some regional or sectoral multilateral investment agreements, such as the North American Free Trade Agreement (“NAFTA”) or the Energy Charter Treaty (“ECT”).<sup>47</sup> In a passage which has been repeatedly quoted by subsequent tribunals,<sup>48</sup> the tribunal in *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States* explained that the fair and equitable treatment (FET) standard “requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment”.<sup>49</sup> More recently, the tribunal in *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* stated that:

[T]he different factors which emerge from decisions of investment tribunals as forming part of the FET standard. . . . [C]omprise the obligation to act transparently and grant due process, to refrain from taking arbitrary or discriminatory measures, from exercising coercion or from frustrating the investor’s reasonable expectations with respect to the legal framework affecting the investment.<sup>50</sup>

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ment treaty arbitration and regular commercial arbitration is used to justify, for example, the authority for arbitral tribunals to accept *amicus curiae* briefs. See, e.g., *Methanex Corp. v. United States*, Decision on Petitions from Third Persons to Intervene as ‘Amici Curiae,’ ¶ 32 (Jan. 15, 2001), [https://www.italaw.com/sites/default/files/case-documents/ita0517\\_0.pdf](https://www.italaw.com/sites/default/files/case-documents/ita0517_0.pdf) [<https://perma.cc/WNN5-39H2>] [hereinafter *Methanex* Decision].

<sup>47</sup> Eric De Brabandere, *States’ Reassertion of Control over International Investment Law: (Re)Defining ‘Fair and Equitable Treatment’ and ‘Indirect Expropriation,’* in REASSERTION OF CONTROL OVER THE INVESTMENT TREATY REGIME 285 (Andreas Kulick ed., 2017) [hereinafter De Brabandere, *States’ Reassertion of Control over International Investment Law*] (citing Roland Kläger, *Fair and Equitable Treatment: A Look at the Theoretical Underpinnings of Legitimacy and Fairness*, 11 J. WORLD INV. & TRADE 435, 436 (2010)). This section and the next section draws partly on Prof. De Brabandere’s research previously published in *States’ Reassertion of Control over International Investment Law, supra*.

<sup>48</sup> See, e.g., *Sempra Energy Int’l v. The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Annulment Award, ¶ 298 (Sept. 28, 2007) (quoting *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, ¶ 154 (May 29, 2003)).

<sup>49</sup> *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, ¶ 154 (May 29, 2003).

<sup>50</sup> *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, ¶ 178 (Aug. 27, 2009).

The FET standard is a flexible and rather vague concept. Therefore, the framing and labelling of the different sub-elements continue to vary considerably and are heavily influenced by arbitral jurisprudence. Based on the abovementioned cases and scholarship, it is generally accepted that the following obligations form part of fair and equitable treatment: observance of the investor's legitimate expectations, non-discrimination, proportionality, due process, transparency, freedom from coercion and harassment, stability, predictability, and a general duty of due diligence.<sup>51</sup> The two most important components of FET in practice are the requirement of a certain form of legal stability, and the protection of the legitimate expectation of foreign investors.<sup>52</sup> Yet, in the practice of arbitral tribunals there is a tendency to a more cautious approach to FET. This is evidenced through the recognition of the States' right to regulate and thus for States to maintain sufficient regulatory space.<sup>53</sup>

The question whether FET exists as a self-contained standard<sup>54</sup> or whether it is merely a rebadged version of the international minimum standard ("IMS")<sup>55</sup> is still subject to much debate. Recently, tribunals have considered the FET to be the "new" customary minimum standard of treatment,<sup>56</sup> but it is clear that outside the treaty and arbitral practice it is difficult to find evidence of such a new customary standard. Commentators suggest the evolving nature of the IMS appears well established today, and seems to have evolved to the point where the current arbitral jurisprudence has refused to discern any practical difference between the interpretation of FET in line with the evolved minimum standard and the application of FET as a self-contained norm.<sup>57</sup>

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<sup>51</sup> ANDREW NEWCOMBE & LUIS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 277–79* (Kluwer Law Int'l ed., 2009); see Yannaca-Small, *supra* note 26, at 118 (providing an overview of the contents of the standard in function of arbitral practice).

<sup>52</sup> See Yannaca-Small, *supra* note 26, at 121–26.

<sup>53</sup> See Ursula Kriebaum, *FET and Expropriation in the (Invisible) EU Model BIT*, 15 J. WORLD INV. & TRADE 454, 471 (2014) (noting the overall trend towards a "cautious approach" to the FET standard through "stress[ing] the need for States to maintain regulatory space").

<sup>54</sup> See generally Christoph Schreuer, *Full Protection and Security*, 1 J. INT'L DISP. SETTLEMENT 353 (2010) (discussing the debate surrounding the FET).

<sup>55</sup> Kläger, *supra* note 47, at 436–38.

<sup>56</sup> See *Bilcon of Del. Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, ¶¶ 432–433 (Mar. 17, 2015) [hereinafter *Bilcon Award*] (describing how NAFTA Article 1105 incorporates fair and equitable treatment, and that it is "identical to the minimum international standard"); see also *Merrill & Ring Forestry L.P. v. Canada*, ICSID Case No. UNCT/07/1, Award, ¶ 210 (Mar. 31, 2010) [hereinafter *Merrill Award*] (noting that fair and equitable treatment of aliens has become "sufficiently part of widespread and consistent practice" such that it is now "reflected . . . in customary international law").

<sup>57</sup> Kläger, *supra* note 47, at 439.

### B. Causes, Concerns and the Recalibration of FET

The contemporary meaning of the FET standard rests heavily on the interpretations by the arbitral tribunals tasked with settling disputes between foreign investors and host States in relation to that standard of treatment. This, in essence, is the result of the often general and vague formulations of the FET standard, which leaves much room for expansive interpretations by tribunals of what constitutes “unfair and inequitable” treatment.

In relation to the FET standard, two issues have triggered specific State reactions. First, the minimalist<sup>58</sup> and open-ended formulations of FET in investment treaties has resulted in an interpretation of the FET standard that includes a vast variety of sub-categories or elements. Certain States consider this result as going beyond their original intention. The inclusion, notably, of the requirement of a stable legal framework<sup>59</sup> and the extensive reliance on the legitimate expectations of the foreign investor,<sup>60</sup> has been the subject of much criticism over the past years.<sup>61</sup>

The second issue, which is very much the consequence of the first, is the expansive interpretation of FET provisions, which has resulted from tribunals’ purely semantic approaches to defining what constitutes “unfair and inequitable” treatment. Because of the vagueness of the standard and the lack of precise guidance on how to interpret the standard—apart from the IIAs’ preambles—tribunals consider on a case-by-case basis whether the treatment accorded to the foreign investor is “unfair” and/or “inequitable.”<sup>62</sup> Such a semantic approach and the resulting expansive interpretation of what

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<sup>58</sup> U.N. Conference on Trade and Development (UNCTAD), *Fair and Equitable Treatment—UNCTAD Series on Issues in International Investment Agreements II*, at 1, 11, U.N. Doc. UNCTAD/DIAE/IA/2011/5 (Feb. 2012) [hereinafter *Fair and Equitable Treatment*] (explaining the broad interpretation of the FET standard has created an unbalanced and open-ended approach to arbitral awards).

<sup>59</sup> See *Occidental Exploration & Prod. Co. v. Republic of Ecuador*, LCIA Case No. UN3467, Final Award, ¶ 183 (July 1, 2004) (noting that “[t]he stability of the legal and business framework is thus an essential element of fair and equitable treatment”); see also *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, ¶ 274 (May 12, 2005) (noting that, in order to maintain fair and equitable treatment, there must be a “stable framework for investments”).

<sup>60</sup> See, e.g., *Saluka Invs. B.V. v. Czech Republic*, Partial Award, ¶¶ 301–302 (Perm. Ct. Arb. Mar. 17, 2006) (noting how fair and equitable treatment is “closely tied” to legitimate expectations of the foreign investor).

<sup>61</sup> See *Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Separate Opinion of Arbitrator Pedro Nikken, ¶¶ 21–29 (July 30, 2010) (explaining the “legitimate expectations” element). See generally Moshe Hirsch, *Between Fair and Equitable Treatment and Stabilization Clause: Stable Legal Environment and Regulatory Change in International Investment Law*, 12 J. WORLD INV. & TRADE 783 (2011).

<sup>62</sup> See *Fair and Equitable Treatment*, supra note 58, at 10 (noting the “open-ended nature of the FET standard”).

constitutes “fair and equitable treatment,” while not necessarily contrary to the rules on treaty interpretation, has nevertheless resulted in a clear tendency to restrict the scope of the FET provision and clearly define the standard “without leaving unwelcome discretion to arbitrators.”<sup>63</sup> More generally, an impression underlying the criticism of FET is that the State’s right to regulate has been unduly restricted because the legitimate regulatory acts of the State was found to be in breach of the FET standard or of another provision prohibiting indirect expropriations.<sup>64</sup>

In an attempt to reduce the concerns expressed in the previous section, there are various strategies States have adopted and can adopt relating to both their future and existing FET and indirect expropriation provisions.<sup>65</sup> One of these options consists of States redefining and reformulating the specific contents and formulations of FET and the prohibition of indirect expropriation. Although it is also clear that the inclusion of FET as a norm of investment protection is not a mandatory “standard” of investment treaties since recent treaty practice has shown that States can sign investment treaties without any FET clause,<sup>66</sup> the basis on which redefinition or reformulation has taken and is taking place hinges on—roughly—two justifications of what the FET standard should be.

First, certain States have re-emphasised the customary nature of the standard, and hence have tried to make clear that FET is not a standard that is broader than the customary international law standard of treatment. This is an attempt to objectivize FET and provide legitimacy to the inclusion of such a standard in IIAs. Consequently, FET is included in IIAs simply because this is what international law requires from host States towards foreign investors. Certain States have linked the content of FET to international law or to an international customary norm.<sup>67</sup> To link FET to the IMS

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<sup>63</sup> *Commission Concept Paper on Investment in TTIP and Beyond—The Path for Reform*, at 2, (May 12, 2015), [http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc\\_153408.PDF](http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF) [<https://perma.cc/Q8H2-EXVU>] [hereinafter *Commission Concept Paper*].

<sup>64</sup> *See id.* (noting that the stakeholders have a right to regulate, and expressing concern over FET abuse).

<sup>65</sup> *See generally* De Brabandere, *States’ Reassertion of Control over International Investment Law*, *supra* note 47 (examining FET and indirect expropriation).

<sup>66</sup> *See, e.g.*, Model Text for the Indian Bilateral Investment Treaty 2015, [https://mygov.in/sites/default/files/master\\_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf](https://mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf) [<https://perma.cc/8FA8-BQXL>] [hereinafter 2015 Indian Model BIT] (containing no mention of FET).

<sup>67</sup> *See, e.g.*, Treaty Concerning the Encouragement and Reciprocal Protection of Investment, art. 2, Bahr.–U.S., Sept. 29, 1999, S. TREATY DOC. No. 106-25, <https://www.state.gov/documents/organization/43479.pdf> [<https://perma.cc/5EK8-289G>] (linking FET to customary international law); Decret n° 96-914 du 9 octobre 1996 portant publication de l’accord entre le Gouvernement de la République Française et le Gouvernement de la République d’ Albanie sur l’encouragement et la protection reciproques des investissements [Decree No. 96-914 of 9 October 1996 Establish-



found in customary international law, with the further clarification that FET under international law requires nothing more than the IMS narrows the scope of the standard. It also indirectly gives content to FET and removes the possibility of applying a semantic methodology to identify the content of the standard. But this leaves open the question of the precise content of the customary norm and the usual problems accompanying the formation and identification of custom.

It is in this context that the aforementioned NAFTA Free Trade Commission's interpretative note on the FET standard needs to be viewed.<sup>68</sup> NAFTA's response to the FET standard's interpretation is highlighted because NAFTA's preferred interpretation of the FET standard has found its way into a number of other model and actual BITs, notably the 2012 U.S. Model BIT, as well as the 2004 Canadian Model BIT.<sup>69</sup> This language dom-

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ing Publication of the Agreement Between the Government of the French Republic and the Republic of Albania on the Reciprocal Encouragement and Protection of Investments], art. 3, June 13, 1995, J.O., 18 Oct. 1996, p. 15273, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/13> [<https://perma.cc/A55D-VDR8>]; 2012 U.S. Model BIT, *supra* note 17, art. 5 (linking FET to international customary law).

<sup>68</sup> See North American Free Trade Agreement, Can.-Mex.-U.S., art. 1105(1), Dec. 17, 1992, 32 I.L.M. 289, 639 [hereinafter NAFTA] (stipulating that “[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security”). Arbitral tribunals that have dealt with that provision in the early stages of NAFTA investment disputes gave different interpretations of the NAFTA's FET provision. In order to clarify the interpretation of Article 1105(1), the NAFTA Free Trade Commission (“FTC”) issued a binding interpretation on July 21, 2001, which provides:

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
2. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).

FTC Interpretation of Chapter Eleven of the NAFTA (July 15, 2001), <https://www.state.gov/documents/organization/38790.pdf> [<https://perma.cc/97RN-YGJ8>].

<sup>69</sup> See 2004 Canadian Model Agreement for the Promotion and Protection of Investments, art. 5, [www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf](http://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf) [<https://perma.cc/E595-G742>] [hereinafter 2004 Canadian Model BIT] (providing the phrase, “[e]ach Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security”); 2012 U.S. Model BIT, *supra* note 17, art. 5 (including the phrase, “[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security”).

inated various other treaties involving non-NAFTA States.<sup>70</sup> Such clauses, viewed in the context of recent arbitral jurisprudence, no longer are effective in achieving both the limitation of the content of FET and the attempts to limit the discretion tribunals otherwise would have in interpreting the standard. Indeed, certain tribunals have considered the FET to be the “new” customary minimum standard of treatment,<sup>71</sup> and in doing so have simply bypassed the narrowing down of FET attempted by the States which adopted such a formulation.<sup>72</sup>

A second and more voluntarist approach to redefining FET is in large part not linked to any particular pre-set standard in international law. Whatever one considers as the customary norm, the international minimum standard could hardly be considered a peremptory norm in international law. States have the liberty to offer more or less protection to foreign investors in their treaties. The policy implications of such a choice are of course important, as are the practical implications in case of a dispute between foreign investors and host States based on the violation of FET. But, outside of the above-mentioned example, redefinitions or reformulations of FET, are difficult to evaluate as a matter of consistency or not being in line with “the” standard in investment law.

This voluntarist approach can be exemplified by the recent attempts to rethink investor protection under the FET standard in treaties signed and negotiated by the European Union.<sup>73</sup> Because of the unsettled and multi-threaded aspect of the FET standard, there is an increasing tendency by States to narrow the ambit of FET. The most recent treaties show a clear tendency by States to move away from open-ended formulations of FET clauses to formulations by which the specific content of what constitutes FET is explicitly included. A recent example is the Comprehensive Economic and Trade

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<sup>70</sup> See *Fair and Equitable Treatment*, *supra* note 58, at 25 (noting which non-NAFTA countries have included the language of the NAFTA FTC’s Note into its IIAs).

<sup>71</sup> *Bilcon Award*, *supra* note 56, ¶ 422; see *Merrill Award*, *supra* note 56, ¶ 210 (describing how fair and equitable treatment is in international customary law “today”).

<sup>72</sup> See Matthew C. Porterfield, *A Distinction Without a Difference? The Interpretation of Fair and Equitable Treatment Under Customary International Law by Investment Tribunals*, INV. TREATY NEWS (Mar. 22, 2013), <https://www.iisd.org/itn/es/2013/03/22/a-distinction-without-a-difference-the-interpretation-of-fair-and-equitable-treatment-under-customary-international-law-by-investment-tribunals/> [<https://perma.cc/RXX2-AUES>] (providing solutions to avoid potentially overly broad interpretations of the FET).

<sup>73</sup> At the same time, one should keep in mind that many newly signed treaties still very much stick to the “old” formulations. European States for instance still use the generic FET (and indirect expropriation clauses) discussed above in their bilateral treaties. See Kriebaum, *supra* note 53, at 454.

Agreement (“CETA”) between Canada and the E.U.<sup>74</sup> Article 8.10 of CETA enumerates the types of measures that can constitute a breach of FET.<sup>75</sup> The list contains many elements which are usually considered part of FET, yet notably absent from the list is the “stability” element, which as noted, has been considered problematic. Another notable absence is the “legitimate expectation” element which is also a highly-criticized FET component.<sup>76</sup>

The clause clearly is a reaction to what the European Commission has termed “abuses.”<sup>77</sup> The “shift” away from traditional European BITs is a

<sup>74</sup> Comprehensive Economic and Trade Agreement, Can.-E.U., Oct. 30, 2016 (provisionally entered into force Sept. 21, 2017), [http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf) [<https://perma.cc/S9HE-K9HY>] [hereinafter CETA].

<sup>75</sup> CETA, art. 8.10 provides:

1. Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 through 6.
2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if 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.

*Id.*

<sup>76</sup> Nevertheless, Article 8.10(4) of CETA provides that:

When applying the above fair and equitable treatment obligation, a Tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.

*Id.* The “legitimate expectations” component of FET is thus abandoned as a “core” element of FET and relegated to a mere potential or subsidiary issue the arbitral tribunal may consider in assessing whether FET, as defined, in the previous paragraphs has been breached. *See id.*

<sup>77</sup> *Commission Concept Paper*, *supra* note 63, at 2; *see* Patrick Dumberry, *Drafting the Fair and Equitable Treatment Clause in the TPP and RCEP: Lessons Learned from the NAFTA Article 1105 Experience*, 12 *TRANSNAT’L DISP. MGMT.* 1, 22 (2015) (noting how NAFTA tribunals considered transparency and legitimate expectations as “factors”). *See generally* Elizabeth Boomer, *Rethinking Rights and Responsibilities in Investor–State Dispute Settlement: Some Model International Investment Agreement Provisions*, 11 *TRANSNAT’L DISP. MGMT.* 1 (2015) (proposing language for a model BIT); Zhang Wenjuan, *Will Greater Specificity with Respect to the Fair and Equitable Treatment Obligation Lead to Greater Predictability in Investment Treaty Cases?*, 12 *TRANSNAT’L DISP. MGMT.* 1 (2015) (arguing for more specific language in BITs to ensure consistent treatment in tribunals).

clear and conscious political and policy decision of the European Commission made based—mainly—on the general criticism of international investment law and arbitration and the broadness of the protection offered to foreign investors, notably following what the E.U. considered to be overbroad interpretations of FET by arbitral tribunals. The (re)calibration exercise in this particular situation has taken place not necessarily at the level of setting a new FET standard in light of the customary international law standard, but rather in light of what the E.U. and Canada considered to be politically, economically and policy-wise justifiable and “necessary.” It may of course well be that inspiration was sought in what the negotiators considered to be the “customary law” standard of FET, but, contrasted to the practice of NAFTA, for example, it is remarkable that no reference to “international law” has been added in the CETA FET provision. It would thus seem that there was not a deliberate choice to include a standard of treatment because such standard is part of customary law. This may also have been a deliberate move to counter certain case-law, which considered the FET definition in older IIAs to be the “new” customary minimum standard of treatment,<sup>78</sup> in order to avoid broad interpretations of the FET standard.<sup>79</sup>

### III. FOREIGN INVESTOR OBLIGATIONS IN INVESTMENT LAW AND INVESTMENT TREATIES

A second area in which (re)calibration has recently occurred relates to the obligations of foreign investors, notably in the areas of human rights, labour standards, and the protection of the environment. The interconnectiveness between human rights and international investment law and arbitration is a relatively recent field of enquiry, both on the academic and policy levels. At the same time, the (relatively) recent attention given to the human rights aspects of foreign investment in the specific context of international investment law and arbitration and the inclusion of specific provisions in IIAs to that effect has to be seen as being on a continuum with the broader

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<sup>78</sup> *Bilcon Award*, *supra* note 56, ¶ 433; *see Merrill Award*, *supra* note 56, ¶ 210 (identifying fair and equitable treatment as part of international customary law “today”).

<sup>79</sup> The most recent version of the FET provision in the Transatlantic Trade and Investment Partnership contains a similar—yet not completely identical—provision. *See EUROPEAN COMM’N, Transatlantic Trade and Investment Partnership: Trade in Services, Investment and E-Commerce: Chapter II*, art. 3 (Nov. 12, 2015) [http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc\\_153955.pdf](http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf) [<https://perma.cc/NX3N-UHFL>]. A similar provision was also included in the final draft of the *Trans-Pacific Partnership (TPP)* accepted in November 2015. *See Trans-Pacific Partnership*, annex 9–A, Feb. 4, 2016 (no longer in effect), <https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf> [<https://perma.cc/SV7A-62LM>].

“corporate social responsibility” debate which takes place in a larger context than solely investment law.

The question of whether corporations and foreign investors have any obligations under international human rights law is a relatively old debate in international law and international relations.<sup>80</sup> Since the beginning of the twenty-first century, numerous avenues for increasing the accountability of corporations were explored in the legal literature, and several international instruments were adopted in an effort to regulate the conduct of non-State actors, in particular, the conduct of transnational corporations in the human rights sphere.<sup>81</sup> But the transition from that debate to the obligations of foreign investors in IIAs is relatively new.

This evolution is in many respects interesting and perhaps remarkable as it implies the incorporation of IIAs and international investment law of norms and rules, typically discussed in a different context. Foreign direct investment and human rights seem to be relatively separate fields of international law. Traditionally, international investment treaties were silent on issues of human rights. The main multilateral investment treaties, NAFTA and ECT, to name but a few, make no mention of human rights.<sup>82</sup> Although States have recently and effectively included references to human rights norms in their IIAs, the vast majority of contemporary BITs do not mention human rights. While human rights obligations for foreign investors are only rarely included in investment treaties themselves, there are several recent examples of investment treaties containing clauses which refer to the obligations of foreign investors in the area of human rights.<sup>83</sup>

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<sup>80</sup> See Eric De Brabandere, *Non-State Actors, State-Centrism and Human Rights Obligations*, 22 LEIDEN J. INT'L L. 191 (2009) (discussing whether corporations and foreign investors have obligations under human rights law).

<sup>81</sup> See Eric De Brabandere & Maryse Hazelzet, *Corporate Responsibility and Human Rights—Navigating Between International, Domestic and Self-Regulation*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTERNATIONAL INVESTMENT LAW (Yannick Radi ed., forthcoming Dec. 2018) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2913616](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2913616) [<https://perma.cc/TMJ9-MD7S>] (providing a discussion about the debate and proposed solutions concerning how to hold international corporations responsible).

<sup>82</sup> See generally NAFTA, *supra* note 68 (providing no mention of human rights); Energy Charter Treaty, Dec. 17, 1994, 2080 U.N.T.S. 100 (failing to mention human rights).

<sup>83</sup> The idea of incorporating, in an investment treaty, references to human rights obligations of foreign investors, or more broadly corporate social responsibility, is not new. A notable attempt to do so was the Multilateral Agreement on Investment (“MAI”), proposed by the Organisation for Economic Cooperation and Development (“OECD”). The draft of the now defunct MAI contained a provision which was based on the “association” of the treaty with the OECD Guidelines on Multinational Enterprises to that agreement. See Org. for Econ. Cooperation & Dev. [OECD], *The Multilateral Agreement on Investment: Draft Consolidated Text*, § X, DAF/MAI(98)7/REV1 (Apr. 22, 1998), <http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf> [<https://perma.cc/25MS-XZ39>] (noting

Several treaties incorporated foreign investors' human rights obligations through clauses that contain obligations for States to "encourage" investors operating in their territory to voluntarily comply with corporation social responsibility ("CSR") standards, including human rights.<sup>84</sup> There are however, more recent types of clauses that contain clear references to *obligations* of foreign investors. The following examples, which remain relatively limited in number compared to the bulk of existing investment treaties,<sup>85</sup> show a gradual inclusion and further refinement of provisions relating to the human rights obligations of foreign investors.

Article 15.1 of the 2012 Model BIT of the Southern African Development Community ("SADC") establishes the duty for investors, "to respect human rights in the workplace and in the community and State in which they are located" and further provides that:

Investors and their investments shall not undertake or cause to be undertaken acts that breach such human rights. Investors and their investments shall not assist in, or be complicit in, the violation of the human rights by others in the Host State, including by public authorities or during civil strife."<sup>86</sup> A more specific provision in relation to the labour standards is also included<sup>87</sup> which prohibits investors from operating their investment . . . in a manner inconsistent with international environmental, labour, and human rights obligations binding on the Host State or the Home State, whichever obligations are higher.<sup>88</sup>

These provisions were incorporated and further specified in the recently negotiated Draft Pan-African Investment Code ("PAIC"). The draft has not

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that the "[g]uidelines are part of the OECD Declaration on International Investment and Multinational Enterprises of 21 June 1976 as amended").

<sup>84</sup> See, e.g., Canada-Peru Free Trade Agreement, Can.-Peru, art. 810, May 29, 2008, <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/peru-perou/fta-ale/08.aspx?lang=eng> [<https://perma.cc/XZT3-47GP>].

<sup>85</sup> See, e.g., Makane Moïse Mbengue & Stefanie Schacherer, *The 'Africanization' of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime*, 18 J. WORLD INV. & TRADE 414, 435 (2017) (discussing various treaties).

<sup>86</sup> S. AFR. DEV. CMTY., SADC Model Bilateral Investment Treaty Template with Commentary, art. 15.1, July 2012, [www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf](http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf) [<https://perma.cc/V3YL-3CMF>].

<sup>87</sup> *Id.* art. 15.2.

<sup>88</sup> *Id.* art. 15.3.

been adopted yet, nor has it been used in practice.<sup>89</sup> The draft text contains not less than six provisions dealing with investor obligations. Besides provisions dealing with corporate governance obligation of investors, socio-political obligations, bribery, and the use of natural resources<sup>90</sup>, two provisions deal with human rights obligations of foreign investors in particular. Article 22 of the PAIC entitled, “Corporate Social Responsibility” provides, amongst others, an obligation for foreign investors to “abide by the laws, regulations, administrative guidelines and policies of the host State.” Article 24 in turn deals with “Business Ethics and Human rights” and sets several principles that “should govern compliance by investors with business ethics and human rights . . . .”

India also recently adopted a similar approach in its 2016 Model BIT.<sup>91</sup> The model treaty has not been used in practice yet either, but it contains several articles which comprise, in more detail, the obligations of foreign investors. Article 12 of the treaty contains a general obligation for foreign investors to respect the domestic laws of the host State and a non-exhaustive list of more specific legislation, such as labour laws, and legislation relating to human rights.<sup>92</sup> Article 13 is quite unique, and relates to the responsibility of the home State of the investor and the mandatory submission of civil liability actions against the investor in its home State for “acts, decisions or omissions made in the Home State in relation to the Investment where such acts, decisions or omissions lead to significant damage, personal injuries or loss of life in the Host State.”<sup>93</sup> The home State of the investor in turn, is to “ensure that their legal systems and rules allow for, or do not prevent or unduly restrict, the bringing of court actions on their merits before their domestic courts” for such civil liability actions.<sup>94</sup> This clause is in line with the possibility for States, based on their legislative authority, to adopt legislation to regulate the extraterritorial activities of their nationals—both physical and legal persons. It departs from the general rule however, that the *possibility* under general international law is transformed into a treaty *obligation*.

These examples mainly show that IIAs are undergoing a transformation from the original purpose of promoting and protecting foreign in-

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<sup>89</sup> Moreover, not much information on the negotiation of the draft is publicly available, with the exception of the March 2016 draft text. *See generally* U.N. Econ. Comm’n for Africa, Draft Pan-African Inv. Code, U.N. Doc. E/ECA/COE/35/18 (Mar. 26, 2016).

<sup>90</sup> *Id.* arts. 19–21, 23.

<sup>91</sup> *See generally* 2015 Indian Model BIT, *supra* note 66.

<sup>92</sup> *Id.* art. 12.1(i)(v).

<sup>93</sup> *Id.* art. 13.1.

<sup>94</sup> *Id.* art. 13.2.

vestment to broader regulatory instruments governing the protection of foreign investment and the general activities of foreign investors in host States. It will be important to see whether this evolution will be sustained in the years to come. This (re)calibration is not completely unsurprising from a general international law perspective since corporate social responsibility and the obligations of corporations in the area of human rights more generally has long since been on the international agenda. The norms in relation to corporate social responsibility—binding or not—were set years ago outside of the formal context of international investment law.<sup>95</sup> While perhaps at first difficult to reconcile with the original idea behind IIAs, such an evolution can be seen from the perspective that international investment law and IIAs operate within a general international law framework. It nonetheless shows that the way in which international treaties are currently being redrafted is set against, not only the typical norms that were included in such treaties over the past decades, but more importantly by reference to standards which have been set in a different context within international law.

#### IV. TRANSPARENCY IN INVESTMENT TREATY ARBITRATION

A third area that recently underwent an evolution from a procedural perspective, is the transparency of investment treaty arbitration. The evolution has been visible for more than a decade and resulted in a now almost universal (re)calibration of the way in which arbitral proceedings are conducted in investment treaty arbitration. This is evidenced by the modification in 2006 of the International Centre for Settlement of Investment Disputes (“ICSID”) Arbitration Rules<sup>96</sup> and the adoption in July 2013 of specific rules on “transparency in treaty-based investor–State arbitration” by UNCITRAL,<sup>97</sup> that have now been incorporated in the Mauritius Convention.<sup>98</sup> It is to be noted that it

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<sup>95</sup> See generally Peter Muchlinski, *Human Rights, Social Responsibility and the Regulation of International Business: The Development of International Standards by Intergovernmental Organisations*, 3 NON-ST. ACTORS & INT’L L. 123 (2003) (examining the norms of international investment law in relation to corporation social responsibility).

<sup>96</sup> See generally Aurélie Antoniotti, *The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules*, 21 ICSID REV.–FOREIGN INV. L.J. 427 (2006) (discussing the modifications to the ICSID Rules and Regulations).

<sup>97</sup> See Press Release, United Nations Information Service, UNCITRAL Adopts Transparency Rules for Treaty-Based Investor-State Arbitration and Amends the UNCITRAL Arbitration Rules (July 12, 2013) (reporting UNCITRAL’s adoption of specific rules); see also U.N. Comm’n on Int’l Trade L., Rep. of Working Group II (Arbitration and Conciliation) on the Work of its Fifty-Eighth Session, U.N. Doc. A/CN.9/765, art. 1 (2013) (discussing UNCITRAL’s incorporation of transparency rules into its Arbitration Rules).

<sup>98</sup> G.A. Res. 69/116, United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, U.N. Doc. A/68/496 (Oct. 18, 2017) [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/69/116](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/69/116) [<https://perma.cc/AC45-2T6V>].



is precisely and only for *treaty-based* investment arbitration that the new UNCITRAL rules have been adopted, as the title indicates, which shows that the treaty foundation of investment treaty arbitration has heavily influenced the adoption of these rules. More recently, both the Arbitration Institute of the Stockholm Chamber of Commerce (“SCC”), and the Singapore International Arbitration Centre (“SIAC”) amended their arbitration rules to accommodate the possibility for third parties to make *amicus curiae* submissions.<sup>99</sup> SIAC developed and adopted a specific set of procedural rules for “investment arbitration” (SIAC Investment Arbitration Rules).<sup>100</sup> Appendix III (entitled “Investment Treaty Disputes”) to the SCC Arbitration Rules also contains the procedure for *amicus curiae* submissions.<sup>101</sup> Contrary to the ICSID Arbitration Rules and the SIAC Investment Arbitration Rules, Appendix III of the SCC Arbitration Rules applies only to treaty-based investment arbitrations.<sup>102</sup>

This example illustrates how external standards have through incorporation resulted in a new standard in investment arbitration. Traditionally, international commercial arbitration is conducted in a relatively<sup>103</sup> confidential and private manner, even in the absence of an explicit confidentiality provision in the arbitration agreement. Neither the existence of a dispute, nor the procedural details of the settlement of the dispute are made public; nor is any access of non-disputing parties to the proceedings. The majority of the arbitration rules provide that awards may not be published without the parties’ agreement,<sup>104</sup> and even in the absence of such explicit rules, it is accepted that proceedings are conducted in a confidential way.<sup>105</sup>

<sup>99</sup> See generally DE BRABANDERE, *supra* note 41.

<sup>100</sup> See generally 2017 Investment Arbitration Rules of the Singapore International Arbitration Centre (Jan. 2017), <http://siac.org.sg/images/stories/articles/rules/IA/SIAC%20Investment%20Arbitration%20Rules%20-%20Final.pdf> [<https://perma.cc/8FYM-GUS5>].

<sup>101</sup> See 2017 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, app. III, art. 3 (Jan. 2017), [https://sccinstitute.com/media/293614/arbitration\\_rules\\_eng\\_17\\_web.pdf](https://sccinstitute.com/media/293614/arbitration_rules_eng_17_web.pdf) [<https://perma.cc/ZA7U-WMLU>] [hereinafter SCC Arbitration Rules] (describing how third parties “may apply” to submit arguments in an ongoing arbitration).

<sup>102</sup> See *id.* app. III, art. 1 (providing that scope is limited to claims “based on a treaty”).

<sup>103</sup> See Alberto Malatesta, *Confidentiality in International Commercial Arbitration*, in THE RISE OF TRANSPARENCY IN INTERNATIONAL ARBITRATION: THE CASE FOR THE ANONYMOUS PUBLICATION OF ARBITRAL AWARDS 39, 42 (Alberto Malatesta & Rinaldo Sali eds., 2013) [hereinafter THE RISE OF TRANSPARENCY IN INTERNATIONAL ARBITRATION].

<sup>104</sup> See, e.g., UNCITRAL Arbitration Rules as Revised in 2010, G.A. Res 65/22, U.N. Doc A/RES/65/22, art. 34(5) (Jan. 10, 2011), <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf> [<https://perma.cc/D5CZ-CMBQ>] (“An award may be made public with the consent of all parties . . .”).

<sup>105</sup> Paolo Comoglio & Chiara Roncarolo, *Presenting the Guidelines for the Publication of Arbitral Awards: Aiming to the Circulation of a Solid Arbitral Case Law*, in THE RISE OF TRANSPARENCY IN INTERNATIONAL ARBITRATION, *supra* note 103, at 1–2.

For various reasons, investment treaty arbitration has departed from the commercial arbitration principles of privacy and confidentiality.<sup>106</sup> Most importantly, the public international law character of investment treaty arbitration has been used to differentiate it from international commercial arbitration. The fact that the questions put to an investment tribunal generally concern State's international legal obligations and that the acts complained of relate to issues of general public interest, such as environmental legislation, labour standards, or other social and economic rights, militates in favour of both transparency of and non-party access to the proceedings.<sup>107</sup> These features of investment arbitration stand in sharp contrast to dispute settlement in international commercial arbitration. The use of the method of international commercial arbitration to settle investment disputes which have a public international law character naturally results in a certain tension between the public international law nature of the dispute—because such disputes are concerned with the assessment of a State's exercise of its sovereign powers under international law, and the private character of the dispute settlement method. It is precisely in tempering this tension that the pendulum will move to one or the other side depending only on a predetermined conception of whether investment treaty arbitration is or should be public and/or private.

The gradual move towards transparency first occurred almost two decades ago by arbitral tribunals that were “forced” to take a stance on certain issues relating to transparency through the submission of *amicus curiae* briefs by—mainly—NGOs. In 2001, in the ground-breaking *Methanex Corp. v. United States* decision,<sup>108</sup> a NAFTA Chapter 11 Arbitral Tribunal operating under the UNCITRAL Arbitration Rules concluded that it had the power to accept *amicus curiae* briefs. It found this power by referring to the case law of the Iran–US Claims Tribunal and the cases before the WTO. The Tribunal noted that Article 15 of the UNCITRAL Arbitration Rules gave the Tribunal broad discretion in terms of procedural rules.<sup>109</sup> It is im-

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<sup>106</sup> See DE BRABANDERE, *supra* note 41, at 149–53.

<sup>107</sup> See Christina Knahr & August Reinisch, *Transparency Versus Confidentiality in International Investment Arbitration—The Biwater Gauff Compromise*, 6 L. & PRAC. INT'L CTS. & TRIBUNALS 97, 113 (2007) (noting how investment tribunals work akin to a “judicial review” on government actions, and as such can address environmental and health concerns); see also Meg Kinnear, Eloise Obadia & Michael Gagain, *The ICSID Approach to Publication of Information in Investor-State Arbitration*, in THE RISE OF TRANSPARENCY IN INTERNATIONAL ARBITRATION 107, *supra* note 103, at 107–08 (noting that tribunals consider different elements when their decisions “affect[] public interest”).

<sup>108</sup> *Methanex Decision*, *supra* note 46, ¶ 32 (interpreting UNCITRAL Arbitration rules in the context of NAFTA Chapter 11).

<sup>109</sup> See *id.* ¶¶ 29–32 (discussing the scope of article 15(1) of the UNCITRAL Arbitration Rules).

portant to point out that the Tribunal in *Methanex* invoked the need for greater transparency and supported its conclusion relating to the “public interest” the authority for the tribunals to receive NGO submissions.<sup>110</sup>

Since *Methanex*, States have, through the NAFTA Free Trade Commission, issued a statement confirming that no provision in NAFTA limits the discretionary authority or arbitral tribunals to accept submissions of non-disputing parties.<sup>111</sup> This has been followed by the inclusion of transparency rules in IIAs<sup>112</sup> and finally in arbitration rules, as mentioned above.

The foundation for moving to transparency is inhibited by the positioning of investment treaty arbitration within the broader public international law sphere. Before this evolution in investment treaty arbitration, other dispute settlement bodies had already adopted rules and a policy of transparency. For example, NGO participation in proceedings through the submission of briefs was raised before and accepted by the WTO dispute settlement bodies in the *Shrimp-Turtles* dispute in 1998.<sup>113</sup> In this report, the WTO Appellate Body argued that there is no rule in the WTO Dispute Settlement Understanding that prohibits panels from accepting information voluntarily submitted to it.<sup>114</sup> At the same time, it should also be noted that transparency *sensu lato* of international inter-State proceedings is not a fully accepted principle. For instance, the International Court of Justice and even international inter-State arbitration, while being transparent in the sense of allowing the general public access to information about the cases on its docket, including access to decisions and memorials, have traditionally been closed

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<sup>110</sup> See *id.* ¶ 49 (noting that the implications of the case extend beyond the parties, and that the “arbitral process could benefit from being perceived as more open and transparent”).

<sup>111</sup> Statement of the Free Trade Commission on Non-Disputing Party Participation, ¶ A.1 (Oct. 7, 2003), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Nondisputing-en.pdf> [<https://perma.cc/U89R-4W2U>].

<sup>112</sup> See, e.g., 2012 U.S. Model BIT, *supra* note 17; 2004 Canadian Model BIT, *supra* note 69; Office of the U.S. Trade Representative & U.S. Dep’t of State, 2004 U.S. Model Bilateral Investment Treaty, <https://www.state.gov/documents/organization/117601.pdf> [<https://perma.cc/M4VA-XSZP>].

<sup>113</sup> See generally Appellate Body Report, *U.S. – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998).

<sup>114</sup> See *id.* ¶ 108 (noting that the panel may consider information regardless of “whether [it was] requested by the panel or not”). As far as the submission of *amicus curiae* briefs to the Appellate Body itself is concerned, the Appellate Body decided in a subsequent case that it had, relatively similarly to the panels, the authority to accept and consider *amicus curiae* briefs if it finds it “pertinent and useful to do so.” Appellate Body Report, *U.S. – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the U.K.*, ¶ 42, WTO Doc. WT/DS138/AB/R (adopted May 10, 2000); see also Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 52, WTO Doc. WT/DS135/AB/R (adopted Mar. 12, 2001) (describing the additional procedure in accepting third party submissions).

in relation to *amicus curiae* submission.<sup>115</sup> The standard used to then make investment treaty arbitration more transparent is not based on a similar standard being applied in other international law proceedings. Rather, it is a combination of these international rules and practices combined with considerations related to the public nature of the dispute at stake. In that sense, the (re)calibration of investment treaty arbitrations has its foundation in standards imported from public law more generally.<sup>116</sup>

## CONCLUSION

Contemporary discussions of the adjustments made to various norms and principles of investment law and arbitration can benefit from an appraisal from the perspective of calibration rather than balancing. In comparison to balancing, calibration has the benefit of looking to the reasons behind adjustments to investment law and arbitration. Looking into what standards are used to compare or evaluate where the current investment law regime comes from and what these standards are, acknowledges the current exercise in (re)calibrating international investment law and arbitration. These standards provide an explanatory framework to understand these changes and enables one to better place the limits of the debate on whether international investment law and arbitration should move in one or the other direction.

Specifically, in relation to FET, the “shift” away from traditional European IIAs was a conscious political and policy decision, notably following what the European Union considered to be over-broad interpretations of FET by arbitral tribunals. Setting a new FET standard in light of the customary international law standard has not been explicit, as is noticeable from the absence of any reference to international law in the definition of FET.

Regarding investor obligations IIAs current transformation and (re)calibration evidences that the way in which international treaties are currently being redrafted is made by reference to standards which have been set in a different context within international law.

Finally, the move to transparency is arguably inhibited by the position of investment treaty arbitration within the broader public international law

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<sup>115</sup> See Eric De Brabandere, *NGOs and the “Public Interest”: The Legality and Rationale of Amicus Curiae Interventions in International Economic and Investment Disputes*, 12 CHI. J. INT’L L. 85, 91–93 (2011) (discussing submissions by NGOs to the International Court of Justice).

<sup>116</sup> Alessandra Asteriti & Christian J. Tams, *Transparency and Representation of the Public Interest in Investment Treaty Arbitration*, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 787 (Stephan W. Schill ed., 2010).

sphere. While the standard of transparency outside of the formal investment law regime is not entirely set as it is in investment treaty arbitration, especially in relation to *amicus curiae* briefs, the openness and public access to information regarding the procedures has clearly been drawn from other inter-state litigation mechanisms.

Although there is no general standard to which investment treaties should conform, political, economic, and policy standards outside of any legal constraints of course continue to play an important role in shaping investment treaties.