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Sebastián López Escarcena

Pontifical Catholic University of Chile, rlopeze@uc.cl

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INVESTMENT DISPUTES *OLTRE LO STATO*: ON GLOBAL ADMINISTRATIVE LAW, AND FAIR AND EQUITABLE TREATMENT

SEBASTIÁN LÓPEZ ESCARCENA *

Abstract: Global Administrative Law is an academic project that attempts to describe the emergence of a regulatory space beyond the state and to prescribe solutions to the problems it diagnoses through certain normative principles like participation, transparency, reasoned decision-making, judicial review, accountability, proportionality, and legitimate expectations. In the case of investment treaty arbitration, the principles advanced by Global Administrative Law are akin to the constitutive elements of the fair and equitable treatment that international arbitral tribunals have identified in investor-state disputes. As classified by international law scholars, these constitutive elements of fair and equitable treatment include due process, arbitrariness, non-discrimination, vigilance, legitimate expectations, stability and predictability, transparency, good faith, and proportionality. Incidentally, some of these principles have found conventional support in state practice. This Essay answers the question of whether this dogmatic similarity is a mere coincidence or proof of the influence exerted by the tenets of Global Administrative Law over the way the fair and equitable treatment clause has been construed. For that purpose, it briefly explains Global Administrative Law, its approach to investment treaty arbitration, and the fair and equitable treatment standard of international investment law.

INTRODUCTION

Global Administrative Law (GAL) is arguably the most influential doctrine recently proposed as an alternative to international law. It essentially affirms that there is a law that is applicable to processes of an administrative character, which involve legal and political structures that exceed those

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* Associate professor at the Faculty of Law of the Pontificia Universidad Católica de Chile, and associate fellow/membre associé at the Centre for Global Governance Studies of the Katholieke Universiteit Leuven, Belgium, and at the Research Institute in International and European Law of the Université Paris 1 “Panthéon-Sorbonne,” France. PhD (Edinburgh); LLM (Leiden); Abogado (Chile); LLB, BA (Catholic University, Chile). Email: rlopeze@uc.cl. This Essay is part of a research project financed by the Chilean National Fund for the Development of Science and Technology (FONDECYT or Fondo Nacional para el Desarrollo de la Ciencia y la Tecnología): FONDECYT Regular N° 1150302.

of a purely intrastate nature. Kate Miles summarized its endeavors as follows:

The term itself embodies an investigation into the nature and connections between forms of transnational regulation, international institutions, private industry standards, international review mechanisms, transnational networks, new actors on the international plane and the emergence of shared administrative law principles within these forms of governance. Its particular focus is on the legal mechanisms, principles, and practices that address issues of transparency, public participation, accountability, and review within national administrative law systems and at the global level. It is concerned with issues of legitimacy, power, good governance, and democracy.¹

GAL was born to study regulations partially ignored by international law. Concurrently promoted by North America and Western Europe, at present its strongest branches are in the United States and Italy. This might surprise most scholars trained in the Civil Law tradition, but not Italian lawyers, many of whom know Santi Romano's (1875–1947) work on law beyond the state—or *oltre lo stato*.² Both the North American and Western European prongs of GAL have analyzed the procedural practice of global bodies from the perspective of adjective principles like transparency, reasoned decision-making, judicial review, and accountability, and sometimes of substantive principles like proportionality, and respect for legitimate expectations. From this perspective, GAL is not only aimed at describing certain phenomena, but also at prescribing solutions to what it perceives as problems, in the form of normative principles. In this attempt, GAL scholarship covers several areas of comparative and international law. Regarding investment treaty arbitration, it has criticized the democratic deficit of investor-state dispute settlement (ISDS).

To improve ISDS' lack of legitimacy, GAL has proposed using the above-mentioned principles in different ways. Interestingly enough, these principles are very similar to those constitutive elements of the fair and equitable treatment ("FET") standard that ISDS case law has identified, and that international legal scholars have classified as the general requirement

¹ KATE MILES, *THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT AND THE SAFEGUARDING OF CAPITAL* 331–32 (2015) [hereinafter *THE ORIGINS OF INTERNATIONAL INVESTMENT LAW*]; see also Kate Miles, *International Investment Law and Universality: Histories of Shape-Shifting*, 3 *CAMBRIDGE J. INT'L & COMP. L.* 986, 1008 (2014) [hereinafter Miles, *International Investment Law*].

² See generally SANTI ROMANO, *SCRITTI MINORI* (1950) [hereinafter *SCRITTI MINORI*].

of due process: the prohibition of arbitrariness; the duty of non-discrimination; the obligation of vigilance; the respect of legitimate expectation; the duties of stability and predictability; the obligation of transparency; the general principle of good faith, and, more recently, that of proportionality. Some of these constitutive elements, developed in veritable investment disputes *oltre lo stato*, have even been included in last-generation bilateral investment treaties (BIT) or investment chapters of economic integration agreements (EIA), such as free trade agreements (FTA). But, can we thank or blame GAL for any of this? The present Essay answers this question. It analyzes the general premises of GAL and its take on investment treaty arbitration, before turning to the dogmatics of FET and examining how its case law relates to GAL's principles.

Part I offers an introduction to GAL.³ Part II examines international investment treaties from the standpoint of GAL.⁴ Part III discusses FET, as part of the international minimum standard offered by BIT and the investment chapters of EIA.⁵ Finally, Part IV analyzes whether FET, as currently applied, has been somehow influenced by GAL.⁶

I. WHAT IS GLOBAL ADMINISTRATIVE LAW?

Benedict Kingsbury, Nico Krisch, and Richard Stewart defined GAL in their 2005 framing article for the project on the topic promoted by New York University.⁷ According to them, GAL comprises of “the mechanisms, principles, practices, and supporting social understandings that promote or affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, rea-

³ See *infra* notes 7–31, and accompanying text.

⁴ See *infra* notes 32–55, and accompanying text.

⁵ See *infra* notes 56–83, and accompanying text.

⁶ See *infra* notes 84–118, and accompanying text.

⁷ Benedict Kingsbury, Nico Krisch & Richard Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 1, 16–18 (2005) [hereinafter Kingsbury et al., *The Emergence of GAL*]; see *Global Administrative Law—Project*, INST. FOR INT’L LAW & JUSTICE, <https://www.iilj.org/gal/project/> [<https://perma.cc/4NX8-4MWN>] (introducing the GAL Project and Kingsbury, Krisch and Stewart). The term GAL was coined in 2002, in a symposium of the Administrative Law Review. Lorenzo Casini, *Global Administrative Law Scholarship*, in RESEARCH HANDBOOK ON GLOBAL ADMINISTRATIVE LAW 548, 549 (Sabino Cassese ed., 2016) [hereinafter RESEARCH HANDBOOK ON GLOBAL ADMINISTRATIVE LAW]. Kingsbury, Krisch and Stewart’s paper has been translated into French and Spanish. See Benedict Kingsbury, Nico Krisch & Richard Stewart, *L’Emergence d’un Droit Administratif Global*, in UN DROIT ADMINISTRATIF GLOBAL? / A GLOBAL ADMINISTRATIVE LAW? 335 (Clémentine Bories ed., 2012) [hereinafter UN DROIT ADMINISTRATIF GLOBAL?]; Benedict Kingsbury, Nico Krisch & Richard Stewart, *El Surgimiento del Derecho Administrativo Global*, 24 REVISTA DE DERECHO PÚBLICO DE LA UNIVERSIDAD DE LOS ANDES, COLOMBIA 4 (2010).

soned decision, and legality, and by providing effective review of the rules and decisions they make.”⁸ As its name indicates, rather than international, GAL is both global and administrative in nature. This means, first, that GAL offers analytical tools to address the problems that arise out of globalization, taken not from international law, but from administrative law (‘administrative’).⁹ Second, that it includes new sources and subjects to the traditional lists of international law (‘global’).¹⁰ Concerning sources, besides public international law, GAL encompasses a renewed version of *jus gentium*, described as a type of *lex mercatoria*; a so-called international public law that governs the exercise of this kind of authority; domestic public or administrative law, from a comparative perspective; and the norms generated by autonomous systems.¹¹ With regard to subjects, GAL studies formal intergovernmental organizations, which are international institutions *par excellence*, such as the United Nations (U.N.) or the Organization of American States (OAS); hybrid public-private organizations or purely private entities that exercise public authority, such as the International Organization for Standardization (ISO); transgovernmental and transnational networks, which are less structured forms of governance between states, international organizations and/or other actors, like the Basel Committee on Banking Supervision; and more complex forms of governance, such as global hybrid,

⁸ Kingsbury et al., *The Emergence of GAL*, *supra* note 7, at 17.

⁹ *Id.* at 16–18; see Benedict Kingsbury & Megan Donaldson, *Global Administrative Law*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW §§ 10–19 (Rüdiger Wolfrum ed., 2011) [hereinafter MAX PLANCK ENCYCLOPEDIA]; see also Lorenzo Casini, *Beyond Drip-Painting? Ten Years of GAL and the Emergence of a Global Administration*, 13 INT’L J. CONST. L. 473, 473–74, 477 (2015) [hereinafter Casini, *Beyond Drip-Painting*]; Casini, *supra* note 7, at 548–53, 555–56.

¹⁰ See Benedict Kingsbury, *The Administrative Law Frontier in Global Governance*, 99 AM. SOC’Y INT’L L. PROC. 143, 144 (2005) [hereinafter Kingsbury, *The Administrative Law*]; see also Sabino Cassese, *Administrative Law Without the State? The Challenge of Global Regulation*, 37 N.Y.U. J. INT’L L. & POL. 663, 669–70 (2005) [hereinafter Cassese, *Administrative Law Without*]; Sabino Cassese, *Global Administrative Law: The State of the Art*, 13 INT’L J. CONST. L. 465, 466 (2015) [hereinafter Cassese, *Global Administrative Law*]; Kingsbury & Donaldson, *supra* note 9, § 1; Benedict Kingsbury et al., *Global Governance as Administration—National and Transnational Approaches to Global Administrative Law*, 68 L. & CONTEMP. PROBS. 1, 5 (2005) [hereinafter Kingsbury et al., *Global Governance as Administration*]; Benedict Kingsbury, *The Concept of ‘Law’ in Global Administrative Law*, 20 EUR. J. INT’L L. 23, 25–26 (2009) [hereinafter Kingsbury, *The Concept of ‘Law’*]; Benedict Kingsbury, *Weighing Global Regulatory Rules and Decisions in National Courts*, 1 ACTA JURIDICA 90, 92 (2009) [hereinafter Kingsbury, *Weighing Global Regulatory*]; Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 EUR. J. INT’L L. 1, 5 (2006).

¹¹ See Kingsbury & Donaldson, *supra* note 9, §§ 20–25; Kingsbury, *The Administrative Law*, *supra* note 10, at 146–49; Kingsbury et al., *The Emergence of GAL*, *supra* note 7, at 29–31; Kingsbury, *Weighing Global Regulatory*, *supra* note 10, at 92–93; see also Kingsbury, *The Concept of ‘Law,’ supra* note 10, at 52–55.

multi-level or informal regulatory regimes, including the decision-making procedures for fisheries in the World Heritage Convention.¹²

As an academic theory and project, GAL has proven to be highly successful. To some degree, this is due to its use of the word *de mode* “global,” and for its pragmatic and casuistic approach. It has also been criticized, and sometimes rightly so.¹³ Among other issues, questions have been raised as to its lack of dogmatic novelty and of clear analytical boundaries, and the needless use of the fashionable term GAL in many scholarly publications.¹⁴ Nevertheless, within a few years GAL has become a proper school of legal thought, with one main branch in North America and another one in Western Europe.¹⁵ These informal chapters have developed concurrently, but with certain differences. For instance, GAL scholarship in the United States has focused on the procedural part, but in Italy, France, and Spain, the substantive side has been favored.¹⁶ Interestingly enough, of all the countries in Western Europe where GAL has received scholarly attention, it is Italy

¹² See Casini, *Beyond Drip-Painting*, *supra* note 9, at 475–77; see also Kingsbury et al., *Global Governance as Administration*, *supra* note 10, at 5; Kingsbury, *The Administrative Law*, *supra* note 10, at 143–48; Kingsbury et al., *The Emergence of GAL*, *supra* note 7, at 16–27, 31–37; Krisch & Kingsbury, *supra* note 10, at 2–5; Richard Stewart, *The Global Regulatory Challenge to U.S. Administrative Law*, 37 N.Y.U. J. INT’L L. & POL. 695, 699–703 (2005) [hereinafter Stewart, *The Global Regulatory*]; Richard Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, 68 L. & CONTEMP. PROBS. 63, 63–68 (2005) [hereinafter Stewart, *U.S. Administrative Law*].

¹³ See generally B.S. Chimni, *Co-option and Resistance: Two Faces of Global Administrative Law*, 37 N.Y.U. J. INT’L L. & POL. 799 (2005) (criticizing GAL from the perspective of the Third World Approaches to International Law, better known by its acronym of TWAIL).

¹⁴ See, e.g., Clémentine Bories, *Histoire des Phénomènes Administratifs au-delà de la Sphère Étatique: Tâtonnements et Hésitations du Droit et/ou de la Doctrine*, in UN DROIT ADMINISTRATIF GLOBAL?, *supra* note 7, at 25, 49–50; Laurence Dubin, *Le Droit Administratif Global, Analyse Critique de son Existence et son Articulation avec le Droit International Public*, in UN DROIT ADMINISTRATIF GLOBAL?, *supra* note 7, at 95, 101–06; Mathias Forteau, *Le Droit Administratif Global, Signe d’une Evolution des Techniques du Droit International?*, in UN DROIT ADMINISTRATIF GLOBAL?, *supra* note 7, at 169, 178–83; Casini, *supra* note 7, at 563. See generally Joseph Weiler, *GAL at a Crossroads: Preface to the Symposium*, 13 INT’L J. CONST. L. 463 (2015).

¹⁵ See Antoine Guilmain, *Du Droit Cosmopolitique au Droit Global: Pour une Rupture Epistemologique dans L’approche Juridique*, 26 REVUE QUEBECOISE DE DROIT INT’L 219, 231–34 (2014); Daniel Mockle, *Le Debat sur les Principes et les Fondements du Droit Administratif Global*, 53 CAHIERS DE DROIT 3, 5–10 (2012). See generally Casini, *supra* note 7. Authors in Africa, Asia, Latin America and Oceania have also written about GAL. See, e.g., Dave Gunton et al., *A Global Administrative Law Bibliography*, 68 L. & CONTEMP. PROBS. 357 (2005); see also GAL Bibliography, INST. FOR INT’L LAW & JUSTICE, <http://www.iilj.org/gal/resources/bibliography/> [https://perma.cc/RL47-LCX8] (providing a bibliography of GAL); GAL Publications, ISTITUTO DI RICERCA SULLA PUBBLICA AMMINISTRAZIONE, <http://www.irpa.eu/en/gal-publications> [https://perma.cc/3QZ6-4LZW].

¹⁶ See Casini, *supra* note 7, at 555–60.

where it has flourished the most.¹⁷ Why has such a loose legal doctrine like GAL been so well received by the largely theoretical Italian legal scholarship? The answer to this question can be found in Santi Romano's writings. In 1917, he inaugurated the academic year of the Institute of Political and Social Sciences of Italy with a speech titled *Oltre lo Stato*.¹⁸ In it, Romano talked about the survival of guilds, labor unions and other associations of individuals outside the state-centered law then dominant in Europe and elsewhere in the Civil Law tradition.¹⁹ That same year, he published his *opus magna: L'Ordinamento Giuridico*.²⁰

In this book, Romano departed from a simple, yet striking premise. If the legal maxim *ubi societas ibi ius, ubi ius ibi societas* is true, then law presupposes an organized social order, and vice versa. Hence, law is more than just a simple set of norms—it is an institution. In Romano's view, law emerges when a social group passes from an inorganic or unorganized phase to an organic or organized one. This passage from one phase to another is called institutionalization. In other words, an institution is a society that has achieved order via an organization. From this standpoint, any socially organized force could qualify as a legal order. This means that law does not necessarily derive from the state.²¹

Only somewhat known in the English-speaking world, Romano has exerted a strong influence in Italian public law scholarship.²² Sabino Cassese published in 2006 a book titled after Romano's 1917 lecture.²³

¹⁷ The GAL casebook offers a good overview of this approach. See generally GLOBAL ADMINISTRATIVE LAW: THE CASEBOOK (Sabino Cassese et al. eds., 2012). Each year, a GAL seminar is organized in Viterbo, Italy. For more on Italian GAL scholarship, see Casini, *supra* note 7, at 556–58.

¹⁸ Later published in SCRITTI MINORI, *supra* note 2.

¹⁹ See generally SCRITTI MINORI, *supra* note 2.

²⁰ See generally SANTI ROMANO, L'ORDINAMENTO GUIRIDICO (1917) [hereinafter L'ORDINAMENTO]. This book was later translated to Spanish, French, German and Portuguese. See generally SANTI ROMANO, DIE RECHTSORDNUNG (1975); SANTI ROMANO, EL ORDENAMIENTO JURÍDICO (1963); SANTI ROMANO, L'ORDRE JURIDIQUE (1975); SANTI ROMANO, O ORDENAMENTO JURIDICO (2008).

²¹ See Norbert Bobbio, TEORIA GENERALE DEL DIRITTO 8–9 (1993). See generally L'ORDINAMENTO, *supra* note 20.

²² See Rafael García Pérez, *Intro.* to PAOLO GROSSI, DE LA CODIFICACIÓN A LA GLOBALIZACIÓN DEL DERECHO (2010). One hundred years after it was originally published in Italy, Romano's book was translated to English. SANTI ROMANO, THE LEGAL ORDER (2017). See generally Paolo Grossi, *Santi Romano: Un Messaggio da Ripensare nella Odierna Crisi delle Fonti*, 60 RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE 377 (2006) (discussing Santi Romano); Filippo Fontanelli, *Santi Romano and L'Ordinamento Giuridico: The Relevance of a Forgotten Masterpiece for Contemporary International, Transnational and Global Legal Relations*, 2 TRANSNAT'L LEGAL THEORY 67 (2011).

²³ SABINO CASSESE, OLTRE LO STATO (2006) [hereinafter OLTRE LO STATO]. This book was later translated to French. See generally SABINO CASSESE, AU-DELÀ DE L'ÉTAT (2011).

Cassese's *Oltre lo Stato* examines the precarious globalization of law of the last decades, analyzing different ways in which the phenomenon of law beyond the state manifests itself internationally and the challenges that this new reality presents, both theoretically and practically.²⁴ This was not Cassese's first reference to Romano's work. In 2002, he published a book called *La Crisi dello Stato*, an overt allusion to Romano's inaugural lecture of the 1909 academic year at the University of Pisa: *Lo Stato Moderno e la sua Crisi*.²⁵

Despite differences in their approaches, the North American and Western European prongs of GAL normally concur that every exercise of authority that has an impact on public or private actors must be studied.²⁶ In their first publications, GAL scholars started analyzing international organizations from the new perspective offered, examining the procedural practice of global bodies from the standpoint of particular adjective principles like participation, transparency, reasoned decision-making, judicial review, and accountability.²⁷ Kingsbury's notion of 'publicness,' meaning the public

²⁴ See generally *OLTRE LO STATO*, *supra* note 23. Romano's lasting impression on Italian Scholarship can be seen in some of the titles of Giacinto della Cananea's publications. GIACINTO DELLA CANANEA, *DUE PROCESS OF LAW BEYOND THE STATE: REQUIREMENTS OF ADMINISTRATIVE PROCEDURE* (2016) [hereinafter *DUE PROCESS OF LAW*]; Giacinto della Cananea, *Beyond the State: the Europeanization and Globalization of Procedural Administrative Law*, 9 EUR. PUB. L. 563 (2003); Giacinto della Cananea, *Procedural Due Process of Law Beyond the State, in THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS: ADVANCING INTERNATIONAL INSTITUTIONAL LAW* (Armin von Bogdandy et al. eds., 2010) [hereinafter *THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS*]. For more on della Cananea's interesting work on the procedural principles of comparative public law see, for example, Giacinto della Cananea, *Minimum Standards of Procedural Justice in Administrative Adjudication, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW* (Stephan W. Schill ed., 2010) [hereinafter *INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW*]; Giacinto della Cananea, *The Genesis and Structure of General Principles of Global Public Law, in GLOBAL ADMINISTRATIVE LAW AND EU ADMINISTRATIVE LAW: RELATIONSHIPS, LEGAL ISSUES AND COMPARISON* (Edoardo Chiti & Bernardo Giorgio Mattarella eds., 2011).

²⁵ SABINO CASSESE, *LA CRISI DELLO STATO* (2002). Romano's lecture was later included in a book of his works. SANTI ROMANO, *Lo Stato Moderno e la sua Crisi*, in *SCRITTI MINORI*, *supra* note 2.

²⁶ See Jean d'Aspremont, *Droit Administratif Global et Droit International, in UN DROIT ADMINISTRATIF GLOBAL?*, *supra* note 7, at 83, 88–90.

²⁷ See, e.g., Sabino Cassese, *Global Standards for National Administrative Procedure*, 68 L. & CONTEMP. PROBS. 109, 114–16, 120 (2005) [hereinafter Cassese, *Global Standards*]. See generally Benedict Kingsbury & Lorenzo Casini, *Global Administrative Law Dimensions of International Organizations Law*, 6 INT'L ORG. L. REV. 319 (2009); Cassese, *Administrative Law Without*, *supra* note 10; Stewart, *The Global Regulatory*, *supra* note 12; Stewart, *U.S. Administrative Law*, *supra* note 12. Later, substantive principles like proportionality, and respect for expectations, were included in these studies, but merely in an exceptional and incidental manner. See, e.g., Kingsbury et al., *The Emergence of GAL*, *supra* note 7, at 40–41; see also Cassese, *Global Standards*, *supra*, at 110–11, 120–21, 125–26 (exploring the relationship between domestic and interna-

character that a given regulatory regime must have for it to be considered part of GAL, supplemented the comparatively weak substantive nature of GAL. In his view, the principles that compose this notion are, *inter alia*, legality, rationality, proportionality, rule of law, and respect for human rights.²⁸ The application of these principles to the decision-making process of international organizations, especially those of an adjective character, is arguably GAL's main contribution to legal literature.²⁹ For it, GAL can be portrayed not only as a descriptive project, but also a prescriptive one.³⁰ In other words, it is a normative endeavor that conceives global or transnational governance as administration or regulation.³¹

II. INVESTMENT TREATY ARBITRATIONS FROM GAL'S PERSPECTIVE

In spite of its apparent originality, GAL is but one of the many attempts to replace the notion of international law. An early example of these efforts is Wilfred Jenks' (1909–1973) common law of mankind, which emphasized the relevance of individuals and non-legal entities in international law.³² Because Jenks' theory was ultimately about an international community governed by the rule of law, it can be regarded as a form of constitutionalism.³³ Considering its final objective, the common law of mankind is

tional law); Cassese, *Administrative Law Without*, *supra* note 10, at 684–87 (exploring the same relationship); Kingsbury, *The Administrative Law*, *supra* note 10, at 144, 146–47, 149.

²⁸ As stated by Kingsbury, the principle of legality means that the actors within a system must act in accordance to its rules; the principle of rationality is related to that of reasoned decision-making; the rule of law has a procedural nature; and the respect of human rights refers to the substantial content that is not covered by the notion of rule of law. Kingsbury, *The Concept of 'Law'*, *supra* note 10, at 31–33; Kingsbury, *Weighing Global Regulatory*, *supra* note 10, at 113–18.

²⁹ See Casini, *Beyond Drip-Painting*, *supra* note 9, at 474.

³⁰ See, e.g., René Fernando Uruña Hernandez, *Global Administrative Law and the Global South*, in RESEARCH HANDBOOK ON GLOBAL ADMINISTRATIVE LAW, *supra* note 7, at 392; Dublin, *supra* note 14, at 93–98.

³¹ Kingsbury et al., *Global Governance as Administration*, *supra* note 10, at 2–5; Kingsbury, *The Administrative Law*, *supra* note 10, at 143, 147–53; Kingsbury et al., *The Emergence of GAL*, *supra* note 7, at 15–20, 25–31, 42–53; Kingsbury, *Weighing Global Regulatory*, *supra* note 10, at 92; Krisch & Kingsbury, *supra* note 10, at 5–10; Stewart, *U.S. Administrative Law*, *supra* note 12, at 63–64, 71–73; see Richard Stewart, *The Normative Dimensions and Performance of Global Administrative Law*, 13 INT'L J. CONST. L. 499, 500–02 (2015) (discussing the “normative benefits” of GAL). See generally EYAL BENVENISTI, *THE LAW OF GLOBAL GOVERNANCE* (2014).

³² See generally C. WILFRED JENKS, *THE COMMON LAW OF MANKIND* (1958). Jenks later restated and developed some of his ideas on the issue in other publications. See generally C. WILFRED JENKS, *A NEW WORLD OF LAW* (1969); C. WILFRED JENKS, *THE WORLD BEYOND THE CHARTER* (1968); C. WILFRED JENKS, *LAW IN THE WORLD COMMUNITY* (1967) C. WILFRED JENKS, *FREEDOM AND WELFARE* (1963).

³³ See generally Guy Fiti Sinclair, *The Common Law of Mankind: C. Wilfred Jenks' Constitutional Vision* (Jean Monnet Working Paper Series, No. 3/16, 2016), <http://www.jeanmonnetprogram.org/wp-content/uploads/JMWP-03-Sinclair.pdf> [<https://perma.cc/4SDD-DFN9>]. With regard to con-

not essentially different from Immanuel Kant's (1724–1804) cosmopolitan law; Philip Jessup's (1897–1986) transnational law; Harold Berman's (1918–2007) world law; Rafael Domingo's new global law; and Antonio Cançado Trindade's new *ius gentium*.³⁴ Besides these individual attempts to find an alternative to international law, other collective undertakings have, in some cases, become proper schools of legal thought. Standing out among them, are the New Haven School of International Law and the recent projects on the Exercise of International Public Authority (IPA) of the Max Planck Institute in Heidelberg, Germany, and on Informal International Lawmaking ("IN-LAW") of The Hague Institute for the Internationalization of Law.³⁵ From all these academic efforts, transnational law, world law, and new *ius gentium* are of a largely descriptive character.³⁶ Furthermore, some of these academic initiatives have a solely top-down approach, like the common law of mankind, the New Haven School, world law, constitutionalism, new global law and new *ius gentium*. Others combine approaches from above with those from below, like cosmopolitan law, transnational law, IPA, and IN-LAW.

In this context, GAL can be characterized as a descriptive-prescriptive project operating both top-down and bottom-up.³⁷ As Kingsbury, Krisch,

stitutionalism, see ANDREAS KULICK, GLOBAL PUBLIC INTEREST IN INTERNATIONAL INVESTMENT LAW 85–91 (2012). For more contemporary scholarship on constitutionalism, see HERMANN MOSLER, THE INTERNATIONAL SOCIETY AS A LEGAL COMMUNITY (1980); Erika de Wet, *The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order*, 19 LEIDEN J. INT'L L. 611 (2006); Pierre-Marie Dupuy, *The Constitutional Dimension of the Charter of the United Nations Revisited*, 1 MAX PLANCK Y.B. UNITED NATIONS L. 1 (1997); Thomas Franck, *Is the U.N. Charter a Constitution?*, in LIBER AMICORUM TONO EITEL 95 (Jochen Frowein et al eds., 2003); Christian Tomuschat, *Obligations Arising for States Without or Against Their Will*, 241 RECUEIL DES COURS 195 (1993).

³⁴ See generally RAFAEL DOMINGO, ¿QUÉ ES EL DERECHO GLOBAL? (2008); PHILIP JESSUP, TRANSNATIONAL LAW (1956); IMMANUEL KANT, ZUM EWIGEN FRIEDEN: EIN PHILOSOPHISCHER ENTWURF (1795); ANTONIO CANÇADO TRINDADE, INTERNATIONAL LAW FOR HUMANKIND: TOWARDS A NEW JUS GENTIUM (2010); Harold J. Berman, *World Law*, 18 FORDHAM INT'L L.J. 1617 (1994). Kant and Domingo's books have been translated to English. See generally RAFAEL DOMINGO, THE NEW GLOBAL LAW (2010); IMMANUEL KANT, 'TOWARD PERPETUAL PEACE' AND OTHER WRITINGS ON POLITICS, PEACE, AND HISTORY (2006).

³⁵ See generally HAROLD LASSWELL & MYRES MCDUGAL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY (1992); THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS, *supra* note 24; INFORMAL INTERNATIONAL LAWMAKING (Joost Pauwelyn et al. eds., 2012).

³⁶ Cosmopolitan law, the common law of mankind, the New Haven School, constitutionalism, new global law, IPA, and IN-LAW are of a descriptive-prescriptive nature, instead. They share a normative intention expressed in the form of certain legal principles, offered as solutions to the problems identified in the respective legal diagnostic mode.

³⁷ In theory the former is possible; however, it is not recommended for GAL. Thus, in practice, only the latter is a possibility.

and Stewart said in their influential 2005 paper, the top-down approach “would more closely resemble contemporary international law patterns.”³⁸ For this reason, it would suffer from a more accentuated democratic deficit than one based on the domestic *fora*: i.e., on comparative law.³⁹ And this would surely be an issue, for GAL proposes a way of analyzing and eventually overcoming the lack of democratic legitimacy and accountability of several organs of the global administrative space, where the national-international and public-private distinctions are not applicable.⁴⁰ For this purpose, it offers a number of mostly procedural principles, which include participation, transparency, reasoned decision-making, judicial review and accountability in general, as well as some substantive principles, like proportionality and respect for legitimate expectations, on the other.⁴¹ The global administrative space proposed by GAL is, thus, a binary order. That is, one in which different legal systems or *jura particularia* coexist with a group of common principles or *jus commune*, much like local laws did in Europe with vulgarized Roman Law during the Middle Ages.⁴² This coexistence of a *jura particularia* with a *jus commune* would be made possible by the emerging global polity, where GAL has developed and now operates.⁴³

GAL scholarship has dealt with ISDS. The so-called GAL manifesto of 2005 already talked about “the far-reaching arbitral review established under investment treaties,” by which “investors can challenge administrative

³⁸ Kingsbury et al., *The Emergence of GAL*, *supra* note 7, at 57.

³⁹ *Id.*; see also Stewart, *The Global Regulatory*, *supra* note 12, at 506; Stewart, *U.S. Administrative Law*, *supra* note 12, at 72–73, 88–107.

⁴⁰ Kingsbury et al., *The Emergence of GAL*, *supra* note 7, at 23–27; see also Kingsbury et al., *Global Governance as Administration*, *supra* note 10, at 2–5; Kingsbury, *The Concept of ‘Law,’ supra* note 10, at 24–26; Kingsbury, *Weighing Global Regulatory*, *supra* note 10, at 91; Krisch & Kingsbury, *supra* note 10, at 1–5, 10–13; Stewart, *The Global Regulatory*, *supra* note 12, at 703–09; Stewart, *U.S. Administrative Law*, *supra* note 12, at 68–71.

⁴¹ See, e.g., Kingsbury et al., *The Emergence of GAL*, *supra* note 7, at 16–17, 26–29, 37–42; see also Cassese, *Administrative Law Without*, *supra* note 10, at 684–94; Cassese, *Global Standards*, *supra* note 27, at 110–11, 120–21, 125–26; Kingsbury & Donaldson, *supra* note 9, §§ 10, 26–54; Kingsbury, *The Administrative Law*, *supra* note 10, at 143, 146–47; Kingsbury, *The Concept of ‘Law,’ supra* note 10, at 23–26, 41–50; Kingsbury, *Weighing Global Regulatory*, *supra* note 10, at 92. For a discussion of GAL and accountability, see David Dyzenhaus, *Accountability and the Concept of (Global) Administrative Law*, 1 ACTA JURIDICA 3 (2009), Nico Krisch, *The Pluralism of Global Administrative Law*, 17 EUR. J. INT’L L. 247 (2006); Mockle, *supra* note 15, at 23–27.

⁴² See Sabino Cassese, *The Globalization of Law*, 37 N.Y.U. J. INT’L L. & POL. 973, 986–90, 992–93 (2006); see also OLTRE LO STATO, *supra* note 23, at 104; Cassese, *Global Administrative Law*, *supra* note 10, at 468.

⁴³ See Edoardo Chiti, *Where Does GAL Find Its Legal Grounding?*, 13 INT’L J. CONST. L. 486, 489–90 (2015). See generally SABINO CASSESE, *THE GLOBAL POLITY: GLOBAL DIMENSIONS OF DEMOCRACY AND THE RULE OF LAW* (2012).

action of the host-state before international arbitral tribunals if they believe their rights under the relevant investment treaty have been violated.”⁴⁴ As Kingsbury, Krisch, and Stewart said in their well-known paper: “Increasingly, decisions of these tribunals have extended procedural, as well as substantive, limitations on domestic regulators. This gives investors a very powerful tool, probably not always balanced by sufficient representation of public and other interests.”⁴⁵ That same year, Sabino Cassese had already mentioned the International Centre for Settlement of Investment Disputes (ICSID) as “[a] type of global organization [that] is comprised of neither states, nor of lower level, sub-state entities, but of other global organizations, acting alone or together.”⁴⁶ According to him, what this international organization offers is judicial review via arbitral panels. In his opinion, this situation raises several questions:

[W]ho ensures legal protection for those affected by such decisions? National courts or judicial bodies belonging to the global legal system? If it is the latter, does the complainant have the same rights as it would in a national court? What relationship ought to be established between national courts and global tribunals, when global administrative decisions are not the exclusive product of global institutions, but originate in joint, global-national, decisions?⁴⁷

Richard Stewart insisted upon the GAL nature of ISDS in two different articles, published in 2005.⁴⁸ Cassese did the same in *Oltre lo Stato*, a year later, and so did Kingsbury in 2009, in a few papers.⁴⁹ Gus Van Harten has offered a good depiction of ISDS as a type of GAL. In an article written with Martin Loughlin, and published in 2006, the authors asserted that investment treaty arbitration is an exemplary species of GAL:

Since the late 1960s, and especially in the 1990s, states have consented to an international regime in which foreign investors (read,

⁴⁴ Kingsbury et al., *The Emergence of GAL*, *supra* note 7, at 36. Lorenzo Casini referred to their paper as the “GAL manifesto.” See Casini, *supra* note 7, at 551, 554–55.

⁴⁵ Kingsbury et al., *The Emergence of GAL*, *supra* note 7, at 36–37, 46–47; see Kingsbury, *The Administrative Law*, *supra* note 10, at 153.

⁴⁶ Cassese, *Administrative Law Without*, *supra* note 10, at 674, 675–76, 678.

⁴⁷ *Id.* at 692.

⁴⁸ See Stewart, *U.S. Administrative Law*, *supra* note 12, at 67, 94, 102–03, 104; see also Stewart, *The Global Regulatory*, *supra* note 12, at 696–97, 699, 701–02, 708–09, 710–11, 738, 741–43, 751–53, 756–57.

⁴⁹ OLTRE LO STATO, *supra* note 23, at 48, 50, 60; Kingsbury, *The Concept of ‘Law,’ supra* note 10, at 31–33; Kingsbury, *Weighing Global Regulatory*, *supra* note 10, at 107–09; see also Kingsbury & Donaldson, *supra* note 9, § 30.

multinational enterprises) are granted the ability to make and enforce international claims against states in disputes arising from the state's regulation of investor assets. The arrangements for pursuing these claims are in certain crucial respects unusual. Four specific features should be highlighted. First, such claims are commonly not subject to customary limitations that apply to individual claims under other types of treaties, including the duty of an individual to exhaust local remedies Secondly, under investment treaties, investors can directly bring claims for damages, awarded as a public law remedy Thirdly, because investment treaties incorporate the procedural framework and enforcement structure of international commercial arbitration, investors can directly seek enforcement of the awards of arbitration tribunals before the domestic courts of a large number of countries, with limited judicial supervision by domestic courts Finally, investment treaties facilitate forum-shopping by investors, through the selective establishment of holding companies, thus expanding the reach of investment arbitration as an international mechanism of adjudicative review The effect of this combination of features, uniquely present in investment arbitration, is to subject the regulatory conduct of states to control through compulsory international adjudication to an unusual extent. And it is precisely because of the potential of these internationally generated adjudicative norms and mechanisms to exert a strong disciplinary influence over domestic administrative programmes that investment arbitration should be seen to constitute a powerful species of global administrative law.⁵⁰

In their paper, Van Harten and Loughlin concluded that, viewed as such, “the investment arbitration tribunal must be treated as a semi-autonomous international adjudicative body that reviews and controls state conduct in the public sphere.”⁵¹ A year after stating this, Van Harten reiterated his ideas on ISDS in a book, but instead as a sort of regulatory reviewing option for foreign investors that is intrinsically biased in their favor as it currently stands. This “businessman’s court” as he called ISDS, lacks the four criteria of any public law adjudication: accountability, openness, coherence and independence. Consequently, Van Harten concluded, ISDS needs to be reformed so as to recover its public law roots, by means of the

⁵⁰ Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT’L L. 121, 122 (2006).

⁵¹ *Id.* at 149.

establishment of an international investment court.⁵² This desire of returning to public law is at the heart of GAL.⁵³ It is also at the core of IPA and the *Lex Mercatoria Publica* Project.⁵⁴ Led by Stephen Schill, this initiative reaffirms that ISDS is a mechanism of global regulatory governance, not just a means of settling individual disputes. Arbitrators exercise public authority, mainly by reviewing the legality of state conduct and performing law-making functions in disputes between private and public actors, without the safeguards that characterize domestic public law adjudication, such as procedural transparency, third-party participation, limitations on damages as a remedy, etc. And this raises questions of legitimacy for ISDS. According to this project, the body of law that investment treaty arbitration generates is somehow akin to *lex mercatoria*, the national law produced by arbitral tribunals in international controversies of an exclusively private nature. Being

⁵² See generally GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW (2007); Daniel Kalderimis, *Investment Treaty Arbitration as Global Administrative Law: What This Might Mean in Practice*, in EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 145 (Chester Brown & Kate Miles eds., 2011). Unexpectedly, Van Harten does not mention GAL at all in his book. He later insisted on the biased nature of these international adjudicative bodies that provide ISDS. See generally Gus Van Harten, *Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law*, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW, *supra* note 24, at 627. For more on his approach to ISDS, see GUS VAN HARTEN, SOVEREIGN CHOICES AND SOVEREIGN CONSTRAINTS: JUDICIAL RESTRAINT IN INVESTMENT TREATY ARBITRATION (2013). For a summary of this and other critical views to investment treaties and ISDS see, for example, JOSÉ ALVAREZ, THE PUBLIC INTERNATIONAL LAW REGIME GOVERNING INTERNATIONAL INVESTMENT 75–94 (2011) and JONATHAN BONNITCHA, SUBSTANTIVE PROTECTION UNDER INVESTMENT TREATIES: A LEGAL AND ECONOMIC ANALYSIS 21–39 (2014).

⁵³ Other advocates of public law approaches to ISDS include Santiago Montt and Andreas Kulick. See generally SANTIAGO MONTT, STATE LIABILITY IN INVESTMENT TREATY ARBITRATION: GLOBAL CONSTITUTIONAL AND ADMINISTRATIVE LAW IN THE BIT GENERATION (2009); KULICK, *supra* note 33. Some scholars have questioned this type of analysis. See, e.g., VALENTINA VADI, ANALOGIES IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 188–207 (2016) [hereinafter ANALOGIES IN INTERNATIONAL]; José E. Alvarez, 'Beware: Boundary Crossings'—A Critical Appraisal of Public Law Approaches to International Investment Law, 17 J. WORLD INV. & TRADE 171, 181–91, 215–27 (2016); THE ORIGINS OF INTERNATIONAL INVESTMENT LAW, *supra* note 1, at 332–35. See generally José E. Alvarez, *Is Investor-State Arbitration 'Public?'*, 7 J. INT'L DISP. SETTLEMENT 534 (2016); Miles, *International Investment Law*, *supra* note 1.

⁵⁴ IPA has questioned GAL, though. For instance, Armin von Bogdandy has said that it blends international law and administrative law, without taking into account the fact that the legitimacy of origin is fundamentally different in international and domestic legal norms, for the former are grounded in state consent, while the latter in popular sovereignty. See Armin von Bogdandy et al., *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, in THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS, *supra* note 24, at 3, 24–25; see also Armin von Bogdandy, *General Principles of International Public Authority: Sketching a Research Field*, in THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS, *supra* note 24, at 727, 738–41; cf. Sabino Cassese, *Is There a Global Administrative Law?*, in THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS, *supra* note 24, at 761, 772–76 [hereinafter Cassese, *Is There a GAL?*].

ultimately aimed at formulating principles for ISDS, this academic project can also be characterized as descriptive-prescriptive in nature.⁵⁵

III. DOGMATICS OF THE FAIR AND EQUITABLE TREATMENT STANDARD

Investment treaties currently provide for an international minimum standard composed of different protections for aliens against political risk in host-states.⁵⁶ These protections include some with a certain pedigree in international law—the clauses on lawful expropriation, and on national and most-favored-nation (MFN) treatment.⁵⁷ Investment treaties also incorporate newer provisions that are specific to international investment law: arbitrary, unreasonable or discriminatory measures; full protection and security;

⁵⁵ See generally Benedict Kingsbury & Stephan W. Schill, *Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest—The Concept of Proportionality*, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW, *supra* note 24, at 75 [hereinafter Kingsbury & Schill, *Public Law Concepts*]; STEPHAN W. SCHILL, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW (2009) [hereinafter THE MULTILATERALIZATION]; Benedict Kingsbury & Stephan W. Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*, in EL NUEVO DERECHO ADMINISTRATIVO GLOBAL EN AMÉRICA LATINA 221 (Benedict Kingsbury et al. eds., 2009) [hereinafter Kingsbury & Schill, *Investor-State Arbitration*]; Stephan W. Schill, *Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach*, 52 VA. J. INT'L L. 57 (2011); Stephan W. Schill, *Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law*, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW, *supra* note 24, at 151 [hereinafter Schill, *Fair and Equitable Treatment*]; Stephan W. Schill, *System-Building in Investment Treaty Arbitration and Lawmaking*, 12 GERMAN L.J. 1083 (2011) [hereinafter Schill, *System-Building*].

⁵⁶ Such risk includes potential state-interference with the property of aliens, based on ideological hostility towards foreign investment, nationalism, and changes in industry patterns and the orientation of domestic state policies. See SEBASTIÁN LÓPEZ ESCARCENA, INDIRECT EXPROPRIATION IN INTERNATIONAL LAW 2, 114, 120, 203–08 (2014); see also PAUL E. COMEAUX & N. STEPHAN KINSELLA, PROTECTING FOREIGN DIRECT INVESTMENT UNDER INTERNATIONAL LAW: LEGAL ASPECTS OF POLITICAL RISK at xvii (1997); SABRINA ROBERT-CUENDET, DROITS DE L'INVESTISSEUR ÉTRANGER ET PROTECTION DE L'ENVIRONNEMENT: CONTRIBUTION À L'ANALYSE DE L'EXPROPRIATION INDIRECT 101–02 (2010); JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES 26–29, 285 (2010); M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 69–79 (2010); THE MULTILATERALIZATION, *supra* note 55, at 3; cf. FRANCISCO GONZÁLEZ DE COSSÍO, ARBITRAJE DE INVERSIÓN 6–7 (2009) [hereinafter ARBITRAJE DE INVERSIÓN]; Cédric Dupont, Thomas Schultz & Merih Angin, *Political Risk and Investment Arbitration: An Empirical Study*, 7 J. INT'L DISP. SETTLEMENT 136, 138 n.8 (2016).

⁵⁷ See, e.g., ARNAUD DE NANTEUIL, DROIT INTERNATIONAL DE L'INVESTISSEMENT 306–30, 358–84 (2017); RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 98–120, 198–212 (2012); ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 147–232, 321–98 (2009); KENNETH VANDEVELDE, BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION 271–309, 339–86 (2010) [hereinafter BILATERAL INVESTMENT TREATIES]; SALACUSE, *supra* note 56, at 245–55, 285–328; SORNARAJAH, *supra* note 56, at 335–45, 363–452; STANDARDS OF INVESTMENT PROTECTION 29–86, 151–204 (August Reinisch ed., 2008) [hereinafter STANDARDS OF INVESTMENT PROTECTION].

the so-called umbrella clause; free transfer of funds; and, of course, FET.⁵⁸ The breach of these stipulations, either individually or collectively, will engage the international responsibility of the state.⁵⁹ Most of these protections, if not all, are a common feature of BITs, and of the investment chapters of EIAs, like FTAs. Almost three decades after an international tribunal under the auspices of ICSID settled an investment treaty arbitration for the first time, the ever-growing ISDS case law has transformed these protections into discrete standards.⁶⁰ Although an unlawful expropriation continues to be the most severe form of interference that any investor can suffer, it is relatively uncommon and not easy to prove when it actually occurs.⁶¹ For this reason, claimants have turned to a younger protection: FET.⁶²

This standard first appeared in Article 11(2) of the 1948 Charter for an International Trade Organization, better known as the Havana Charter. That same year, the Ninth International Conference of American States adopted the Economic Agreement of Bogotá. Its Article 22 provided for equitable treatment. After both agreements failed to enter into force, the United States included the term in its friendship, commerce and navigation treaties (“FCN”), the forerunners of BITs. Today, FET is usually found within the substantive provisions of BITs and FTAs, concluded and in force worldwide.⁶³

⁵⁸ See, e.g., DE NANTEUIL, *supra* note 57, at 334–58, 384–93; DOLZER & SCHREUER, *supra* note 57, at 130–97, 212–15; NEWCOMBE & PARADELL, *supra* note 57, at 233–319, 399–479; BILATERAL INVESTMENT TREATIES, *supra* note 57, at 189–271, 316–35, 387–94, 508–15; SALACUSE, *supra* note 56, at 205–44, 256–84, 329–39; SORNARAJAH, *supra* note 56, at 349–62; STANDARDS OF INVESTMENT PROTECTION, *supra* note 57, at 87–150, 205–43.

⁵⁹ See generally JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY (2002).

⁶⁰ See generally Asian Agric. Products Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Final Award (June 27, 1990), 4 ICSID Rep. 246 (1997). For more on the relevance of this case, see Joost Pauwelyn, *Rational Design or Accidental Evolution? The Emergence of International Investment Law*, in THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW: BRINGING THEORY INTO PRACTICE 11, 25–34 (Zachary Douglas et al. eds., 2014) (hereinafter THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW).

⁶¹ For more on the subject of expropriation in international investment law, see ARNAUD DE NANTEUIL, L’EXPROPRIATION INDIRECTE EN DROIT INTERNATIONAL DES INVESTISSEMENTS (2014); LÓPEZ ESCARCENA, *supra* note 56; SUZY NIKIÈMA, L’EXPROPRIATION INDIRECTE EN DROIT INTERNATIONAL DES INVESTISSEMENTS (2012); ROBERT-CUENDET, *supra* note 56.

⁶² For further discussion on FET, see ALEXANDRA DIEHL, THE CORE STANDARD OF INTERNATIONAL INVESTMENT PROTECTION: FAIR AND EQUITABLE TREATMENT (2012); ROLAND KLÄGER, ‘FAIR AND EQUITABLE TREATMENT’ IN INTERNATIONAL INVESTMENT LAW (2011); MARTINS PAPARINSKIS, THE INTERNATIONAL MINIMUM STANDARD AND FAIR AND EQUITABLE TREATMENT (2013) [hereinafter THE INTERNATIONAL MINIMUM]; IOANA TUDOR, THE FAIR AND EQUITABLE TREATMENT STANDARD IN THE INTERNATIONAL LAW OF FOREIGN INVESTMENT (2008).

⁶³ For more on the history of FET, see CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 283–91 (2017); Nicolas Angelet, *Fair*

Until 2000, however, FET was regarded as little more than a statement of purpose of the host-state towards the foreign investor, rather than a proper legal protection with a concrete content. Since then, non-compliance with the FET clause has become the most alleged breach in ISDS.⁶⁴ Arbitral pan-

and Equitable Treatment, in MAX PLANCK ENCYCLOPEDIA, *supra* note 9, § 9; Rudolf Dolzer, *Fair and Equitable Treatment: A Key Standard in Investment Treaties*, 39 INT'L LAW. 87, 89 (2005) [hereinafter Dolzer, *FET: A Key*]; Rudolf Dolzer, *Fair and Equitable Treatment: Judicially Manageable Criteria*, in LE DROIT INTERNATIONAL ÉCONOMIQUE À L'AUBE DU XXIÈME SIÈCLE: EN HOMMAGE AUX PROFESSEURS DOMINIQUE CARREAU ET PATRICK JUILLARD 83, 84–86 (Jean-Marc Sorel ed., 2009) [hereinafter Dolzer, *FET: Judicially Manageable Criteria*]; Ioana Knoll-Tudor, *The Fair and Equitable Treatment Standard and Human Right Norms*, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 310, 311–16 (Pierre-Marie Dupuy et al. eds., 2009); Christoph Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 J. WORLD INV. & TRADE 357, 357–59 (2005); Thomas Westcott, *Recent Practice on Fair and Equitable Treatment*, 8 J. WORLD INV. & TRADE 409, 410–11 (2007); Kenneth Vandeveld, *A Unified Theory of Fair and Equitable Treatment*, 43 N.Y.U. J. INT'L L. & POL. 43, 44–49 (2010) [hereinafter Vandeveld, *A Unified Theory of FET*]; Stephen Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, 70 BRITISH Y.B. INT'L L. 99, 107–30 (2000); Katia Yannaca-Small, *Fair and Equitable Treatment Standard*, in ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES 385, 386–87 (Katia Yannaca-Small ed., 2010) [hereinafter Yannaca-Small, *Fair and Equitable Treatment Standard*]; Katia Yannaca-Small, *Fair and Equitable Treatment Standard: Recent Developments*, in STANDARDS OF INVESTMENT PROTECTION, *supra* note 57, at 111–12 [hereinafter Yannaca-Small, *FET Standard: Recent Developments*]; ALVAREZ, *supra* note 52, at 187–88; BONNITCHA, *supra* note 52, at 143–44; DE NANTEUIL, *supra* note 57, at 334; DIEHL, *supra* note 62, at 313–15; DOLZER & SCHREUER, *supra* note 57, at 130–32; ARBITRAJE DE INVERSIÓN, *supra* note 56, at 137–39; NEWCOMBE & PARADELL, *supra* note 57, at 255–56; SALACUSE, *supra* note 56, at 218–20; TUDOR, *supra* note 62, at 1–4, 15, 19–20, 36–39, 45–46; BILATERAL INVESTMENT TREATIES, *supra* note 57, at 195–202; *cf.* THE INTERNATIONAL MINIMUM, *supra* note 62, at 84–96.

⁶⁴ See e.g., Emilio Agustín Mafezzini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Award, ¶ 83 (Nov. 13, 2000), 5 ICSID Rep. 396 (2002); S.D. Myers, Inc. v. Government of Canada, UNCITRAL, Partial Award, ¶¶ 262–266 (Nov. 13, 2000) 40 I.L.M. 1408 (2001); Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/7, Award, ¶¶ 74–101 (August 30, 2000), 5 ICSID Rep. 212 (2002); see also Rudolf Dolzer, *The Impact of International Investment Treaties on Domestic Administrative Law*, 37 N.Y.U. J. INT'L L. & POL. 953, 961–64 (2006) [hereinafter Dolzer, *Impact of International Investment Treaties*]; Francisco González de Cossío, *Trato Justo y Equitativo en Arbitraje de Inversión: Un Ejercicio Interpretativo*, 39 JURÍDICA ANUARIO DEL DEPARTAMENTO DE DERECHO INTERNACIONAL DE LA UNIVERSIDAD IBEROAMERICANA 277, 277 (2009) [hereinafter de Cossío, *Trato Justo y Equitativo*]; Jean Kalicki & Suzana Medeiros, *Fair, Equitable and Ambiguous: What Is Fair and Equitable Treatment in International Investment Law?*, 22 ICSID REV.—FOREIGN INV. L.J. 24, 24–41 (2007); J. Roman Picherak, *The Expanding Scope of the Fair and Equitable Treatment Standard: Have Recent Tribunals Gone Too Far?*, 9 J. WORLD INV. & TRADE 255, 255–56 (2008); BONNITCHA, *supra* note 52, at 144–45; DOLZER & SCHREUER, *supra* note 57, at 130; DIEHL, *supra* note 62, at 312–13; NEWCOMBE & PARADELL, *supra* note 57, at 255; SALACUSE, *supra* note 56, at 218–20; SORNARAJAH, *supra* note 56, at 349–59; BILATERAL INVESTMENT TREATIES, *supra* note 57, at 202–03; Dolzer, *FET: A Key*, *supra* note 63, at 87, 94–100; Dolzer, *FET: Judicially Manageable Criteria*, *supra* note 63, at 83–88; Schill, *Fair and Equitable Treatment*, *supra* note 55, at 151–52; Schreuer, *supra* note 63, at 357, 368–73; Westcott, *supra* note 63, at 409–10, 415–25; Yannaca-Small, *Fair and Equitable Treatment Standard*, *supra* note 63, at 385–87; *cf.* ALVAREZ, *supra* note 52, at 177, 187–88; TU-

els in ISDS have construed FET as a proper standard and applied it to the most diverse scenarios, without normally offering a specific notion of this otherwise undefined conventional standard.⁶⁵ Instead, arbitrators have decided FET claims on a case-by-case basis. At first, a plain-meaning approach to this protection was not completely discarded.⁶⁶ Soon, arbitrators realized that the open-ended wording of FET clauses allowed them to identify different elements composing this standard, which international legal scholarship promptly started classifying as distinct principles. The constitutive elements frequently overlap with each other, explaining the fact that their individual or collective breach will amount to a violation of an FET

DOR, *supra* note 62, at 3–4, 15. On awards finding a breach of the FET, see, for example, THE INTERNATIONAL MINIMUM, *supra* note 62, at 1, 4–5.

⁶⁵ See Dolzer, *FET: Judicially Manageable Criteria*, *supra* note 63, at 93–94; *cf.* DOLZER & SCHREUER, *supra* note 57, at 141–44; KLÄGER, *supra* note 62, at 32–35, 40–47. On FET as a standard, see DIEHL, *supra* note 62, at 8–11, 17–34; NEWCOMBE & PARADELL, *supra* note 57, at 255, 261–63, 275–78; DOLZER & SCHREUER, *supra* note 57, at 132–34; TUDOR, *supra* note 62, at 111–33; Angelet, *supra* note 63, §§ 4, 7; de Cossío, *Trato Justo y Equitativo*, *supra* note 64, at 278–82; Knoll-Tudor, *supra* note 63, at 318–21; *cf.* KLÄGER, *supra* note 62, at 122–25. For more on the relationship between FET and the international minimum standard of treatment, see ALVAREZ, *supra* note 52, at 182–84, 187–205, 209–27; BONNITCHA, *supra* note 52, at 146–56; GEBHARD BÜCHELER, PROPORTIONALITY IN INVESTOR-STATE ARBITRATION 183–86 (2015); DE NANTEUIL, *supra* note 57, at 335–41; DOLZER & SCHREUER, *supra* note 57, at 134–41; ARBITRAJE DE INVERSIÓN, *supra* note 56, at 141–54; KLÄGER, *supra* note 62, at 48–88; MCLACHLAN ET AL., *supra* note 63, at 355–57; NEWCOMBE & PARADELL, *supra* note 57, at 257–61, 263–70, 272–75, 277–78; SALACUSE, *supra* note 56, at 222–28; SORNARAJAH, *supra* note 56, at 349–54; BILATERAL INVESTMENT TREATIES, *supra* note 57, at 190–95; Angelet, *supra* note 63, §§ 8–13, 38; Barnali Choudhury, *Evolution or Devolution? Defining Fair and Equitable Treatment in International Investment Law*, 6 J. WORLD INV. & TRADE 297, 298–302, 317–19 (2005); Dolzer, *FET: A Key*, *supra* note 63, at 92–93; de Cossío, *Trato Justo y Equitativo*, *supra* note 64, at 282–84; Kalicki & Medeiros, *supra* note 64, at 41–45; Picherak, *supra* note 64, at 257–72, 285–87; Schreuer, *supra* note 63, at 359–64; Vasciannie, *supra* note 63, at 104–05; Yannaca-Small, *Fair and Equitable Treatment Standard*, *supra* note 63, at 387–93; Yannaca-Small, *FET Standard: Recent Developments*, *supra* note 63, at 113–18; Westcott, *supra* note 63, at 411–12, 427–29; *cf.* MONTT, *supra* note 53, at 62–74, 298–310, 318–23. See generally THE INTERNATIONAL MINIMUM, *supra* note 62. Departing from most of the doctrine, some authors consider FET to have a customary nature distinct from that of the international minimum standard of treatment. A few even claim that FET has acquired the status of a general principle of law. See DIEHL, *supra* note 62, at 125–79, 311–12; MCLACHLAN ET AL., *supra* note 63, at 272–75, 277; TUDOR, *supra* note 62, at 53–104; Knoll-Tudor, *supra* note 63, at 316–18; *cf.* BONNITCHA, *supra* note 52, at 153; KLÄGER, *supra* note 62, at 261–73; NEWCOMBE & PARADELL, *supra* note 57, at 270–72; Angelet, *supra* note 63, § 7; Kingsbury & Schill, *Investor-State Arbitration*, *supra* note 55, at 231–34.

⁶⁶ See Peter Muchlinski, 'Caveat Investor?' *The Relevance of the Conduct of the Investor Under the Fair and Equitable Treatment Standard*, 55 INT'L & COMP. L.Q. 527, 531–36 (2006); see also MCLACHLAN ET AL., *supra* note 63, at 291–92; NEWCOMBE & PARADELL, *supra* note 57, at 264–68; SALACUSE, *supra* note 56, at 221–22, 228–31; Choudhury, *supra* note 65, at 297–98; Dolzer, *FET: A Key*, *supra* note 63, at 88; de Cossío, *Trato Justo y Equitativo*, *supra* note 64, at 278; Picherak, *supra* note 64, at 260–65; Schreuer, *supra* note 63, at 364–67; Vasciannie, *supra* note 63, at 102–05; *cf.* DIEHL, *supra* note 62, at 313–24, 327–28; KLÄGER, *supra* note 62, at 40–47, 59–61. With regard to FET and justice, see KLÄGER, *supra* note 62, at 129–53.

clause.⁶⁷ Surprisingly, these principles offer a marked similarity with those proposed by GAL. Yet, is this affinity due to the influence of this school of thought, or a mere coincidence?

Unlike national and MFN treatment, FET is a generally absolute or non-contingent standard, such that it is one with its own normative content, whose exact meaning depends on the circumstances in which it is applied.⁶⁸ As classified by international law scholars, the main elements or principles of FET include the following duties, generally known as: due process; arbitrariness; non-discrimination; vigilance; legitimate expectations; stability and predictability; transparency; good faith; and, lately, proportionality. Each of these duties requires a short explanation. Due process is a basic requirement of the rule of law. Its violation constitutes the international wrongful act of denial of justice. This duty may be breached by the judiciary, as well as by the executive.⁶⁹ The obligation of due process is closely

⁶⁷ See BONNITCHA, *supra* note 52, at 156–227; DE NANTEUIL, *supra* note 57, at 340–56; DIEHL, *supra* note 62, at 328–30, 338–502; DOLZER & SCHREUER, *supra* note 57, at 141–60; ARBITRAJE DE INVERSIÓN, *supra* note 56, at 154–67; MCLACHLAN ET AL., *supra* note 63, at 295–317; NEWCOMBE & PARADELL, *supra* note 57, at 275–98; SALACUSE, *supra* note 56, at 228–43; SORNARAJAH, *supra* note 56, at 354–59; TUDOR, *supra* note 62, at 154–81; Angelet, *supra* note 63, §§ 14–28; Choudhury, *supra* note 65, at 302–17; Dolzer, *FET: A Key*, *supra* note 63, at 87–88, 94–100; Dolzer, *FET: Judicially Manageable Criteria*, *supra* note 63, at 88–95; de Cossío, *Trato Justo y Equitativo*, *supra* note 64, at 285–93; Kalicki & Medeiros, *supra* note 64, at 45–52; Knoll-Tudor, *supra* note 63, at 321–35; Picherak, *supra* note 64, at 270–85; Schreuer, *supra* note 63, at 364–67, 373–85; Westcott, *supra* note 63, at 414–26; Yannaca-Small, *Fair and Equitable Treatment Standard*, *supra* note 63, at 393–409; Yannaca-Small, *FET Standard: Recent Developments*, *supra* note 63, at 118–29; *cf.* ALVAREZ, *supra* note 52, at 205–06, 207–17; KLÄGER, *supra* note 62, at 115–21, 154–257, 273–80; THE INTERNATIONAL MINIMUM, *supra* note 62, at 99–100, 210–16, 238–59; BILATERAL INVESTMENT TREATIES, *supra* note 57, at 202–12, 234–43, 402–04, 509–15; Schill, *Fair and Equitable Treatment*, *supra* note 55, at 155–70. See generally Vandevelde, *A Unified Theory of FET*, *supra* note 63.

⁶⁸ See ALVAREZ, *supra* note 52, at 206, 209; DIEHL, *supra* note 62, at 8–11, 29–30; DOLZER & SCHREUER, *supra* note 57, at 132–34; MCLACHLAN ET AL., *supra* note 63, at 11–13; SALACUSE, *supra* note 56, at 220–21; TUDOR, *supra* note 62, at 2; BILATERAL INVESTMENT TREATIES, *supra* note 57, at 190–91; Angelet, *supra* note 63, §§ 3, 34; de Cossío, *Trato Justo y Equitativo*, *supra* note 64, at 282; Vasciannie, *supra* note 63, at 105–07; Yannaca-Small, *Fair and Equitable Treatment Standard*, *supra* note 63, at 385; Yannaca-Small, *FET Standard: Recent Developments*, *supra* note 63, at 111; *cf.* KLÄGER, *supra* note 62, at 303–05.

⁶⁹ See KLÄGER, *supra* note 62, at 118, 213–27; TUDOR, *supra* note 62, at 157–63; *cf.* DIEHL, *supra* note 62, at 431–503; THE INTERNATIONAL MINIMUM, *supra* note 62, at 204–16, 250–51. On due process in FET, see DE NANTEUIL, *supra* note 57, at 341–45; DOLZER & SCHREUER, *supra* note 57, at 154–56; ARBITRAJE DE INVERSIÓN, *supra* note 56, at 159–63; MCLACHLAN ET AL., *supra* note 63, at 272, 317–322, 356; SALACUSE, *supra* note 56, at 241–43; SORNARAJAH, *supra* note 56, at 357–59; BILATERAL INVESTMENT TREATIES, *supra* note 57, at 509–15; Angelet, *supra* note 63, §§ 16–19, 21–22, 36; Choudhury, *supra* note 65, at 305–08; Dolzer, *FET: Judicially Manageable Criteria*, *supra* note 63, at 92–93; de Cossío, *Trato Justo y Equitativo*, *supra* note 64, at 288–90; Kalicki & Medeiros, *supra* note 64, at 48–52; Kingsbury & Schill, *Investor-State Arbitration*, *supra* note 55, at 238–40; Knoll-Tudor, *supra* note 63, at 322–25; Schill, *Fair and Equita-*

connected to the concept of arbitrariness.⁷⁰ Due process is also related with the duty of non-discrimination.⁷¹ Sometimes mentioned as obligation of vigilance, due diligence is a vital part of the FET standard that links to the requirement of reasonableness.⁷²

The respect of legitimate expectations has gradually emerged as one of the main constitutive elements of FET. In this regard, the specific treatment expected by the foreign investor must be based on the host-state's legal framework, or on an undertaking made either explicitly or implicitly.⁷³ This duty to respect legitimate expectations generally adopts the form of an obligation of consistent conduct by the authorities of the country in which the

ble Treatment, *supra* note 55, at 166–67; Schreuer, *supra* note 63, at 381–83; Vandevelde, *A Unified Theory of FET*, *supra* note 63, at 49–50, 89–96; Yannaca-Small, *Fair and Equitable Treatment Standard*, *supra* note 63, at 394–96; Yannaca-Small, *FET Standard: Recent Developments*, *supra* note 63, at 119–20; see also CHARLES KOTUBY & LUKE SOBOTA, *GENERAL PRINCIPLES OF LAW AND INTERNATIONAL DUE PROCESS: PRINCIPLES AND NORMS APPLICABLE IN TRANSNATIONAL DISPUTES* 54–86 (2017); JAN PAULSSON, *DENIAL OF JUSTICE IN INTERNATIONAL LAW* 38–53, 57–73 (2005); cf. BONNITCHA, *supra* note 52, at 157–58, 194–210, 288–98.

⁷⁰ Arbitrariness is defined in the *ELSI* case, which ultimately followed the *Neer* claim: i.e. an act that shocks, or at least surprises, a sense of juridical propriety. *Eletronica Sicula S.p.A. (ELSI)* (U.S. v. Italy), 1989 I.C.J. 15, Judgment, ¶ 128 (July 20, 1989); see also KLÄGER, *supra* note 62, at 117, 187–97; THE INTERNATIONAL MINIMUM, *supra* note 62, at 239–43; TUDOR, *supra* note 62, at 177–80; cf. DIEHL, *supra* note 62, at 448–53. For more on arbitrariness in FET, see Choudhury, *supra* note 65, at 311–14; DE NANTEUIL, *supra* note 57, at 345–46; ARBITRAJE DE INVERSIÓN, *supra* note 56, at 154–57; MCLACHLAN ET AL., *supra* note 63, at 322–27; SALACUSE, *supra* note 56, at 238–41; TUDOR, *supra* note 62, at 177–80; BILATERAL INVESTMENT TREATIES, *supra* note 57, at 202–09; de Cossío, *Trato Justo y Equitativo*, *supra* note 64, at 285–87; Kalicki & Medeiros, *supra* note 64, at 48–52; Knoll-Tudor, *supra* note 63, at 333–35; Schill, *Fair and Equitable Treatment*, *supra* note 55, at 167–68; Yannaca-Small, *Fair and Equitable Treatment Standard*, *supra* note 63, at 408–09; Yannaca-Small, *FET Standard: Recent Developments*, *supra* note 63, at 120–21. See generally Jacob Stone, *Arbitrariness, the Fair and Equitable Treatment Standard, and the International Law of Investment*, 25 LEIDEN J. INT'L L. 77 (2012).

⁷¹ See KLÄGER, *supra* note 62, at 117, 187–97; TUDOR, *supra* note 62, at 177–80; cf. THE INTERNATIONAL MINIMU, *supra* note 62, at 245–47. With regard to non-discrimination in FET, see BONNITCHA, *supra* note 52, at 158–60; DE NANTEUIL, *supra* note 57, at 346–47; ARBITRAJE DE INVERSIÓN, *supra* note 56, at 158–59; MCLACHLAN ET AL., *supra* note 63, at 322–27; NEW-COMBE & PARADELL, *supra* note 57, at 289–91; SALACUSE, *supra* note 56, at 238–41; BILATERAL INVESTMENT TREATIES, *supra* note 57, at 202–09, 392–95; de Cossío, *Trato Justo y Equitativo*, *supra* note 64, at 288; Knoll-Tudor, *supra* note 63, at 333–35; Vandevelde, *A Unified Theory of FET*, *supra* note 63, at 52, 63–66; Yannaca-Small, *Fair and Equitable Treatment Standard*, *supra* note 63, at 408–09; Yannaca-Small, *FET Standard: Recent Developments*, *supra* note 63, at 120–21.

⁷² See TUDOR, *supra* note 62, at 2, 156–57. On the obligation of vigilance in FET, see ARBITRAJE DE INVERSIÓN, *supra* note 56, at 165–66; de Cossío, *Trato Justo y Equitativo*, *supra* note 64, at 292–93; Knoll-Tudor, *supra* note 63, at 322; Schill, *Fair and Equitable Treatment*, *supra* note 63, at 407–08; Yannaca-Small, *FET Standard: Recent Developments*, *supra* note 63, at 118–19; cf. Vandevelde, *A Unified Theory of FET*, *supra* note 63, at 54–63. See generally Eric De Brabandere, *Host States' Due Diligence Obligations in International Investment Law*, 42 SYRACUSE J. INT'L L. & COM. 319 (2015).

⁷³ See KLÄGER, *supra* note 62, at 164–87; cf. DIEHL, *supra* note 62, at 387–411, 429–30.

investment was made. In practice, problems do not so much arise from changes in host-state legislation, but from inconsistent positions taken by organs of the executive. In any case, this is not an absolute obligation: it does not amount to a freezing of the host-state's legal system in the investor's benefit. A reasonable evolution of the correspondent domestic law is part of what the investor must legitimately expect.⁷⁴ This explains why the failure to provide a stable and predictable legal and administrative framework can amount a violation of the FET standard.⁷⁵ The obligation of transparency is thus also related with the respect for legitimate expectations, as it requires host-states to have a clear and unambiguous system of law and administration, easily accessible to foreign investors.⁷⁶ Good faith is a general

⁷⁴ See TUDOR, *supra* note 62, at 2, 163–68; *cf.* DIEHL, *supra* note 62, at 338–61; THE INTERNATIONAL MINIMUM, *supra* note 62, at 251–59. Concerning legitimate expectations in FET, see DE NANTEUIL, *supra* note 57, at 352–56; DOLZER & SCHREUER, *supra* note 57, at 145–49, 152–54; ARBITRAJE DE INVERSIÓN, *supra* note 56, at 157–58; MCLACHLAN ET AL., *supra* note 63, at 279–80, 314–17, 356; NEWCOMBE & PARADELL, *supra* note 57, at 279–89; SALACUSE, *supra* note 56, at 231–37; SORNARAJAH, *supra* note 56, at 354–57; TUDOR, *supra* note 62, at 163–68; Angelet, *supra* note 63, §§ 6, 23–26; Choudhury, *supra* note 65, at 308–11; Dolzer, *FET: Judicially Manageable Criteria*, *supra* note 63, at 89–91; de Cossío, *Trato Justo y Equitativo*, *supra* note 64, at 287–88; Kalicki & Medeiros, *supra* note 64, at 45–48; Kingsbury & Schill, *Investor-State Arbitration*, *supra* note 55, at 236–38; Knoll-Tudor, *supra* note 63, at 326–29; Picherak, *supra* note 64, at 272–78; Schill, *Fair and Equitable Treatment*, *supra* note 55, at 163–66; Schreuer, *supra* note 63, at 374–80; Westcott, *supra* note 63, at 414–15; Yannaca-Small, *Fair and Equitable Treatment Standard*, *supra* note 63, at 396–407; Yannaca-Small, *FET Standard: Recent Developments*, *supra* note 63, at 124–26; see also MONTT, *supra* note 53, at 222–27, 359–66; BONNITCHA, *supra* note 52, at 167–94, 275–88; BILATERAL INVESTMENT TREATIES, *supra* note 57, at 234–43; Vandeveld, *A Unified Theory of FET*, *supra* note 63, at 51, 66–83. See generally Michele Potestá, *Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept*, 28 ICSID REV.—FOREIGN INV. L.J. 88 (2013); Elizabeth Snodgrass, *Protecting Investor's Legitimate Expectations: Recognizing and Delimiting a General Principle*, 21 ICSID REV.—FOREIGN INV. L.J. 1 (2006).

⁷⁵ See DIEHL, *supra* note 62, at 366–87; TUDOR, *supra* note 62, at 169–72. With regard to stability and predictability in FET, see DOLZER & SCHREUER, *supra* note 57, at 145–49; ARBITRAJE DE INVERSIÓN, *supra* note 56, at 165; MCLACHLAN ET AL., *supra* note 63, at 279–80, 314–15; NEWCOMBE & PARADELL, *supra* note 57, at 295–96; TUDOR, *supra* note 62, at 169–72; Angelet, *supra* note 63, §§ 23, 26–28; Dolzer, *FET: A Key*, *supra* note 63, at 90–91; Dolzer, *FET: Judicially Manageable Criteria*, *supra* note 63, at 94–95; de Cossío, *Trato Justo y Equitativo*, *supra* note 64, at 291–92; Kingsbury & Schill, *Investor-State Arbitration*, *supra* note 55, at 234–36; Picherak, *supra* note 64, at 278–82; Schill, *Fair and Equitable Treatment*, *supra* note 55, at 160–62; Yannaca-Small, *Fair and Equitable Treatment Standard*, *supra* note 63, at 396–98; Yannaca-Small, *FET Standard: Recent Developments*, *supra* note 63, at 121–23; *cf.* BONNITCHA, *supra* note 52, at 184–90.

⁷⁶ See KLÄGER, *supra* note 62, at 118, 227–35; TUDOR, *supra* note 62, at 175–77; *cf.* DIEHL, *supra* note 62, at 441–47; THE INTERNATIONAL MINIMUM, *supra* note 62, at 247–50. For more on transparency in FET, see Choudhury, *supra* note 65, at 302–05; DE NANTEUIL, *supra* note 57, at 349–52; DOLZER & SCHREUER, *supra* note 57, at 149–52; ARBITRAJE DE INVERSIÓN, *supra* note 56, at 163–65; MCLACHLAN ET AL., *supra* note 63, at 320–22; NEWCOMBE & PARADELL, *supra* note 57, at 291–94; TUDOR, *supra* note 62, at 175–77; SALACUSE, *supra* note 56, at 237–38; BI-

principle of law requiring parties to a legal transaction to deal honestly and fairly with each other. Among other things, this means acting reasonably, taking into account the expectations of others and truthfully disclosing motives and intentions.⁷⁷ Bad faith, coercion, threats and harassment can lead to a violation of the FET standard.⁷⁸ Arbitral practice, however, shows that the breach of this clause does not require *mala fides*.⁷⁹ In tandem with another of its constitutive elements, compliance with FET may also depend on the violation of domestic law by host-states, for instance, by their judiciary or administrative agencies.⁸⁰

LATERAL INVESTMENT TREATIES, *supra* note 57, at 402–04; Angelet, *supra* note 63, §§ 23, 26; Dolzer, *FET: Judicially Manageable Criteria*, *supra* note 63, at 91–92; de Cossío, *Trato Justo y Equitativo*, *supra* note 64, at 290–91; Kingsbury & Schill, *Investor-State Arbitration*, *supra* note 55, at 241–42; Knoll-Tudor, *supra* note 63, at 332–33; Schill, *Fair and Equitable Treatment*, *supra* note 55, at 168–69; Schreuer, *supra* note 63, at 374–80; Picherak, *supra* note 64, at 282–85; Vandeveld, *A Unified Theory of FET*, *supra* note 63, at 52, 83–88; Yannaca-Small, *Fair and Equitable Treatment Standard*, *supra* note 63, at 396–98; Yannaca-Small, *FET Standard: Recent Developments*, *supra* note 63, at 121–23; cf. BONNITCHA, *supra* note 52, at 204–05, 207–08.

⁷⁷ See TUDOR, *supra* note 62, at 173–75; cf. DIEHL, *supra* note 62, at 348–58; KLÄGER, *supra* note 62, at 129–32; THE INTERNATIONAL MINIMUM, *supra* note 62, at 243–45. For more regarding good faith in FET, see BONNITCHA, *supra* note 52, at 160–61; DE NANTEUIL, *supra* note 57, at 347–48; DOLZER & SCHREUER, *supra* note 57, at 156–60; NEWCOMBE & PARADELL, *supra* note 57, at 277, 294–95; SALACUSE, *supra* note 56, at 243; TUDOR, *supra* note 62, at 173–75; Choudhury, *supra* note 65, at 315–16; Schreuer, *supra* note 63, at 383–85; Dolzer, *FET: Judicially Manageable Criteria*, *supra* note 63, at 88–89; Knoll-Tudor, *supra* note 63, at 331–32; Yannaca-Small, *Fair and Equitable Treatment Standard*, *supra* note 63, at 397; cf. BILATERAL INVESTMENT TREATIES, *supra* note 57, at 209–11; Vandeveld, *A Unified Theory of FET*, *supra* note 63, at 96–101. With regard to good faith in contractual relations, see Markus Kotzur, *Good Faith (Bona fide)*, in MAX PLANCK ENCYCLOPEDIA, *supra* note 9, §§ 1–21, 25–26; KOTUBY & SOBOTA, *supra* note 69, at 88–107.

⁷⁸ See KLÄGER, *supra* note 62, at 187–97; TUDOR, *supra* note 62, at 169; cf. DIEHL, *supra* note 62, at 447–48. For more on bad faith, coercion, threats and harassment in FET, see DE NANTEUIL, *supra* note 57, at 348–9; DOLZER & SCHREUER, *supra* note 57, at 159–60; ARBITRAJE DE INVERSIÓN, *supra* note 56, at 157; MCLACHLAN ET AL., *supra* note 63, at 322, 325–27; NEWCOMBE & PARADELL, *supra* note 57, at 294–95; Angelet, *supra* note 63, § 20; de Cossío, *Trato Justo y Equitativo*, *supra* note 64, at 287; Knoll-Tudor, *supra* note 63, at 329, 331–32; Schreuer, *supra* note 63, at 380–81, 383–85; cf. SALACUSE, *supra* note 56, at 243. See generally Deyan Draguiev, *Bad Faith Conduct of States in Violation of the 'Fair and Equitable Treatment' Standard in International Investment Law and Arbitration*, 5 J. INT'L DISP. SETTLEMENT 273 (2014).

⁷⁹ See ALVAREZ, *supra* note 52, at 206; MCLACHLAN ET AL., *supra* note 63, at 326–27; NEWCOMBE & PARADELL, *supra* note 57, at 277; SALACUSE, *supra* note 56, at 243; TUDOR, *supra* note 62, at 173–75; BILATERAL INVESTMENT TREATIES, *supra* note 57, at 211; Knoll-Tudor, *supra* note 63, at 331–32; Schreuer, *supra* note 63, at 383–85; Vandeveld, *A Unified Theory of FET*, *supra* note 63, at 55, 97; Yannaca-Small, *Fair and Equitable Treatment Standard*, *supra* note 63, at 397.

⁸⁰ See BONNITCHA, *supra* note 52, at 203–04; DE NANTEUIL, *supra* note 57, at 347–48; Choudhury, *supra* note 65, at 314–15; Dolzer, *FET: A Key*, *supra* note 63, at 92; Kingsbury & Schill, *Investor-State Arbitration*, *supra* note 55, at 240; Knoll-Tudor, *supra* note 63, at 329–30; see also MONTT, *supra* note 53, at 200–05, 310–17; cf. Schill, *Fair and Equitable Treatment*, *supra* note 55, at 162–63.

Finally, and more recently, proportionality has been included as another principle of FET. As a tool for reviewing state conduct, the proportionality analysis is aimed at assessing how the ends pursued by a public policy relate with the means chosen to achieve that result, so as to avoid them being excessive. For that purpose, it is comprised of three sub-principles, requiring state measures to be: appropriate to their legitimate objectives (suitability), the least burdensome possible on the affected persons (necessity), and respect a fair or reasonable balance between the community interests and individual rights involved (proportionality *stricto sensu*).⁸¹ Originating in German constitutional law, proportionality has reached ISDS mainly via the case law of the European Court of Human Rights on Article 1 of the First Optional Protocol of the Convention for the Protection of Human Rights and Fundamental Freedoms, which has focused on proportionality *stricto sensu*.⁸² In FET case law, proportionality is sometimes associated with the respect of the investors' legitimate expectations and with reasonableness in the conduct of states. In ISDS, arbitrators have normally stressed

⁸¹ See LÓPEZ ESCARCENA, *supra* note 56, at 192–93; CAROLINE HENCKELS, PROPORTIONALITY AND DEFERENCE IN INVESTOR-STATE ARBITRATION: BALANCING INVESTMENT PROTECTION AND REGULATORY AUTONOMY 23–29, 53–67 (2015); see also BÜCHELER, *supra* note 65, at 1–2, 37; ANALOGIES IN INTERNATIONAL, *supra* note 53, at 195–98; Kingsbury & Schill, *Investor-State Arbitration*, *supra* note 55, at 260–62; Kingsbury & Schill, *Public Law Concepts*, *supra* note 55, at 85–88; Erlend M. Leonhardsen, *Looking for Legitimacy: Exploring Proportionality Analysis in Investment Treaty Arbitration*, 3 J. INT'L DISP. SETTLEMENT 95, 111–13 (2012); Valentina Vadi, *The Migration of Constitutional Ideas to Regional and International Economic Law: The Case of Proportionality*, 35 NW. J. INT'L L. & BUS. 557, 568–70 (2015) [hereinafter Vadi, *Migration of Constitutional Ideas*]; cf. KULICK, *supra* note 33, at 186–92; Mads Andenas & Stefan Zleptnig, *Proportionality: WTO Law: In Comparative Perspective*, 42 TEX. INT'L L.J. 371, 388–98 (2007); Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72, 74–77 (2008).

⁸² See LÓPEZ ESCARCENA, *supra* note 56, at 192–93. The same is true for the application of this principle in the case law of the Inter-American Court of Human Rights on Article 21 of the American Convention on Human Rights. See generally Sebastián López Escarcena, *La Propiedad y su Privación o Restricción en la Jurisprudencia de la Corte Interamericana*, 21 IUS ET PRAXIS 531 (2015). For more concerning proportionality in comparative and international law, see BÜCHELER, *supra* note 65, at 28–83; DIEHL, *supra* note 62, at 333–35; HENCKELS, *supra* note 81, at 45–68; KOTUBY & SOBOTA, *supra* note 69, at 114–19; KULICK, *supra* note 33, at 173–83; Kingsbury & Schill, *Investor-State Arbitration*, *supra* note 55, at 250–76; Sweet & Mathews, *supra* note 81, at 73–74, 97–164; Kingsbury & Schill, *Public Law Concepts*, *supra* note 55, at 79–85; see also Andenas & Zleptnig, *supra* note 81, at 382–404, 408–24. See generally Eric Engle, *The History of the General Principle of Proportionality: An Overview*, 10 DARTMOUTH L.J. 1 (2012); Vadi, *Migration of Constitutional Ideas*, *supra* note 81. With regard to proportionality in investment treaty arbitration, see BÜCHELER, *supra* note 65, at 122–300; HENCKELS, *supra* note 81, at 70–168, 172–90; KULICK, *supra* note 33, at 183–85; ANALOGIES IN INTERNATIONAL, *supra* note 53, at 198–207; Kingsbury & Schill, *Investor-State Arbitration*, *supra* note 55, at 262–76; Kingsbury & Schill, *Public Law Concepts*, *supra* note 55, at 88–102; Leonhardsen, *supra* note 81, at 111–36; Vadi, *Migration of Constitutional Ideas*, *supra* note 81, at 577–83.

one of the sub-principles of proportionality over the others, without explicitly identifying any of them.⁸³

IV. THANKS TO GAL OR OUT OF NECESSITY?

FET is an abstract legal standard whose concrete normative content will depend on the facts of the investment dispute in which it is applied.⁸⁴ Some scholars agree that, as its name suggests, this standard is essentially concerned with the host-state's decision-making process of the executive, legislative or judicial powers, rather than with protecting substantive rights of the foreign investor.⁸⁵ In principle, this is a useful distinction. By restricting the arbitral review on FET to procedural issues, this approach is less intrusive of the host-states' sovereignty.⁸⁶ Nonetheless, the nature of FET can only generally be described as procedural because the application of this distinction to some of its constitutive elements raises concerns. For example, denial of justice can be understood as having both an adjective and a substantive meaning.⁸⁷ Arbitrariness, on the other hand, may exceed proce-

⁸³ See KLÄGER, *supra* note 62, at 118–19, 235–48; *cf.* DIEHL, *supra* note 62, at 335–37. For more on proportionality in FET, see MCLACHLAN ET AL., *supra* note 63, at 206, 234–35, 243–45; BILATERAL INVESTMENT TREATIES, *supra* note 57, at 212; THE INTERNATIONAL MINIMUM, *supra* note 62, at 90; Angelet, *supra* note 63, § 6; Kingsbury & Schill, *Investor-State Arbitration*, *supra* note 55, at 243, 271–74; Schill, *Fair and Equitable Treatment*, *supra* note 55, at 169–70; Yannaca-Small, *Fair and Equitable Treatment Standard*, *supra* note 63, at 403–07; Yannaca-Small, *FET Standard: Recent Developments*, *supra* note 63, at 126–29; see also BÜCHELER, *supra* note 65, at 182–210; Kingsbury & Schill, *Public Law Concepts*, *supra* note 55, at 96–98; *cf.* BONNITCHA, *supra* note 52, at 215–27, 298–314; MONTT, *supra* note 53, at 206–22, 351–58.

⁸⁴ In other words, FET does not empower international arbitral tribunals to decide *ex aequo et bono*. See DOLZER & SCHREUER, *supra* note 57, at 139–41; ARBITRAJE DE INVERSIÓN, *supra* note 56, at 146–47; NEWCOMBE & PARADELL, *supra* note 57, at 275–78; Angelet, *supra* note 63, § 4; Kalicki & Medeiros, *supra* note 64, at 25–26; Knoll-Tudor, *supra* note 63, at 318–21; Muchlinski, *supra* note 66, at 530–31; Schill, *Fair and Equitable Treatment*, *supra* note 55, at 151–52; Schreuer, *supra* note 63, at 364–67; see also DIEHL, *supra* note 62, at 8–11, 29–30; DOLZER & SCHREUER, *supra* note 57, at 132–34; TUDOR, *supra* note 62, at 116–19, 123–32; Dolzer, *FET: A Key*, *supra* note 63, at 88; Yannaca-Small, *FET Standard: Recent Developments*, *supra* note 63, at 111.

⁸⁵ See, e.g., MCLACHLAN ET AL., *supra* note 63, at 11–12, 296, 355–56; Angelet, *supra* note 63, §§ 2, 15, 21; Kingsbury & Schill, *Investor-State Arbitration*, *supra* note 55, at 243–47; Schill, *Fair and Equitable Treatment*, *supra* note 55, at 181–82.

⁸⁶ For other benefits of following the distinction between procedure and substance in comparative due process of law, see, for example, DUE PROCESS OF LAW, *supra* note 24, at 7–8; Cananea, *supra* note 24, at 57–58. For more on the standards of review and deference in international adjudication, see, for example, HENCKELS, *supra* note 81, at 29–43.

⁸⁷ See, e.g., BONNITCHA, *supra* note 52, at 161–64, 201–23; Schill, *Fair and Equitable Treatment*, *supra* note 55, at 159–60, 166–67; *cf.* MONTT, *supra* note 53, at 348–51; THE INTERNATIONAL MINIMUM, *supra* note 62, at 71–73, 189–97, 210–16. *But see* DE NANTEUIL, *supra* note 57, at 342–44; DIEHL, *supra* note 62, at 455–67, 503; KLÄGER, *supra* note 62, at 213–27; PAULSON, *supra* note 69, at 57–59, 73–84, 87–90.

dural fairness if linked with the principles of rationality and reasonableness.⁸⁸ Moreover, the claim that FET is mostly related with the decision-making process of host-states depends on the exceptional application of the proportionality analysis to this standard because this principle does involve a substantive review of the host-states' conduct.⁸⁹

Incidentally, some of the constitute elements of FET have found conventional support in state practice.⁹⁰ For instance, the latest version of the US BIT expressly declares that FET "includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world."⁹¹ Exceptionally, the treaties of other states also include this phrase, with slight variations.⁹² But it is not only BITs that add

⁸⁸ See, e.g., BONNITCHA, *supra* note 52, at 161–64, 210–23; cf. NEWCOMBE & PARADELL, *supra* note 57, at 250–51; Stone, *supra* note 70, at 89–90; Vadi, *Migration of Constitutional Ideas*, *supra* note 81, at 573–83.

⁸⁹ See BONNITCHA, *supra* note 52, at 161–64, 210–27, 298–314; KLÄGER, *supra* note 62, at 118–19, 235–56; see also DE NANTEUIL, *supra* note 57, at 341–45; HENCKELS, *supra* note 81, at 70–75; NEWCOMBE & PARADELL, *supra* note 57, at 255, 275–78; Kingsbury & Schill, *Investor-State Arbitration*, *supra* note 55, at 243; Schill, *Fair and Equitable Treatment*, *supra* note 55, at 154–55, 169–70.

⁹⁰ With regard to FET in recent investment treaties, see 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).

⁹¹ U.S. Dep't of State, 2012 U.S. Model Bilateral Investment Treaty art. 5(2)(a), <https://www.state.gov/documents/organization/188371.pdf> [<https://perma.cc/SZG4-37GL>]. This declaration was already incorporated into an earlier version of the US Model BIT and into its FTAs as of 2003. See Free Trade Agreement art. 10.4(2)(a), U.S.-Chile, June 6, 2003, https://ustr.gov/sites/default/files/uploads/agreements/fta/chile/asset_upload_file1_4004.pdf [<https://perma.cc/XZC3-VYLU>]; Free Trade Agreement art. 15.5(2)(a), U.S.-Sing., May 6, 2003, https://ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset_upload_file708_4036.pdf [<https://perma.cc/H28C-Z25R>]. See generally Treaty Concerning the Encouragement and Reciprocal Protection of Investment art. 5(2)(a), U.S.-Uru., Nov. 4, 2005, T.I.A.S. No. 06-1101, <https://www.state.gov/documents/organization/183240.pdf> [<https://perma.cc/W7SX-32AZ>].

⁹² The same phrase can be found, for example, in Colombia's Model Bilateral Investment Treaty from 2007. REPUBLIC OF COLOM., MODEL BILATERAL INVESTMENT TREATY art. 3(4)(c) (2007). From 2007 onwards, Colombia has included this declaration in some of its BITs. See, e.g., Bilateral Investment Treaty art. 4(2), Japan-Colom., Sept. 12, 2011, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/797> [<https://perma.cc/YFE6-LSUG>]; Bilateral Agreement for the Promotion and Protection of Investments art. 2(4)(b), U.K.-Colom., Mar. 10, 2010, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3253> [<https://perma.cc/QU5C-2VB6>]; Bilateral Investment Treaty art. 3(4)(a), Colom.-India, Nov. 10, 2009, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/796> [<https://perma.cc/P9LV-26XB>]; Bilateral Investment Treaty art. 2(4)(c), China-Colom., Nov. 22, 2008, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/720> [<https://perma.cc/E336-AN4R>]; Bilateral Investment Treaty art. 4(2)(a), Colom.-Peru, Dec. 11, 2007, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/798> [<https://perma.cc/J28P-9JFY>]. The BITs of other states sometimes have a similar wording in their FET clauses. See, e.g., Free Trade Agreement art. 12.4(2)(a), Hond.-Peru, May 29, 2015, <http://investmentpolicy>

this statement. The Japan-Mongolia Economic Partnership Agreement (EPA), the Trans-Pacific Partnership (TPP) and the China-Hong Kong Closer Economic Partnership Arrangement (CEPA), among others, incorporate this declaration.⁹³ The Comprehensive Economic and Trade Agreement between Canada and the European Union (CETA) goes further, stating that:

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.⁹⁴

hub.unctad.org/Download/TreatyFile/5341 [https://perma.cc/D9RQ-5U3F]; Agreement for the Promotion and Protection of Investments art. 2.3(a), Korea-Kenya, July 8, 2014, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/5261> [https://perma.cc/AT5U-HHQE].

⁹³ See Closer Economic Partnership Agreement art. 4(2)(i), China-H.K., June 28, 2017, https://www.tid.gov.hk/english/cepa/legaltext/files/cepa14_main.pdf [https://perma.cc/MVU3-YC2C]; Trans Pacific Partnership art. 9.6(2)(a), Feb. 4, 2016, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3573> [https://perma.cc/DB7F-KJDN]; Agreement for an Economic Partnership art. 10.5(1) note 2, Japan-Mong., Feb. 10, 2015, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3372> [https://perma.cc/GF56-XAMR]; see also Free Trade Agreement art. 10.7(2)(a), Korea-N.Z., Mar. 23, 2015, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3592> [https://perma.cc/VE7A-HLMC]; Free Trade Agreement art. 11.5(2)(a), Austl.-Korea, Apr. 8, 2014, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2971> [https://perma.cc/E8QV-4UQE]; Free Trade Agreement art. 10.5(2)(a), Mex.-Pan., Apr. 3, 2014, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/5579> [https://perma.cc/FXG5-TXZC]; Economic Partnership Agreement art. 9.7(2)(a), Sing.-Taiwan, Nov. 7, 2013, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/5584> [https://perma.cc/4ZUY-PQYQ]; Free Trade Agreement art. 805(2), Can.-Colom., Nov. 21, 2008, <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/fta-ale/08.aspx?lang=eng> [https://perma.cc/3X2K-V796].

⁹⁴ Comprehensive Economic and Trade Agreement art. 8.10, Can.-E.U., Oct. 30, 2016, <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/> [https://perma.cc/Y7E8-ML2G] [hereinafter CETA]; cf. Framework Agreement on Comprehensive Partnership and Cooperation art. 14(2), Viet.-E.U., June 27, 2012, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3244>

Moreover, CETA declares that “[w]hen applying the above fair and equitable treatment obligation, the 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.”⁹⁵ The objective of incorporating these statements in FET clauses is none other than to guide the interpretation of these provisions by decision-makers. In the case of CETA, if mentioning due process, arbitrariness, non-discrimination and legitimate expectations was not enough, the same provision then adds “[f]or greater certainty” that “a breach of another provision of this Agreement, or of a separate international agreement,” on one hand, and “the fact that a measure breaches domestic law,” on the other, does not “in and of itself” establish a violation of this article.⁹⁶ In this regard, CETA ends up declaring that “[t]he Parties shall regularly, or upon request of a Party, review the content of the obligation to provide fair and equitable treatment.”⁹⁷

Can any of these judicial and conventional developments of FET be attributed to the GAL Project? Not really. First, several of the constitute elements of this standard can already be found in the ISDS case law that preceded the publication of the Kingsbury, Krisch, and Stewart’s GAL manifesto or Cassese’s *Oltre lo Stato*. And, second, it is pointless to look for references to the main authors of this school in subsequent judicial decisions because arbitrators in investment disputes tend to rely on international case law, when available. Decision-makers and state officers have taken the constitutive elements of this standard of treatment, mostly, from comparative

[<https://perma.cc/8M7K-TT6A>]. Neither of these treaties has been entered into force. For more on CETA and FET, see BÜCHELER, *supra* note 65, at 183–86; Armand de Mestral, *When Does the Exception Become the Rule? Conserving Regulatory Space Under CETA*, 18 J. INT’L ECON. L. 641, 641–45, 647–54 (2015); Caroline Henckels, *Protecting Regulatory Autonomy Through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP*, 19 J. INT’L ECON. L. 27, 28–40 (2016); Ursula Kriebaum, *FET and Expropriation in the (Invisible) EU Model BIT*, 15 J. WORLD INV. & TRADE 454, 454–56, 468–82 (2014). For more concerning CETA, the EU-Vietnam FTA and FET, see Gus Van Harten, *The European Union’s Emerging Approach to ISDS: A Review of the Canada-Europe CETA, Europe-Singapore FTA, and Europe-Vietnam FTA*, 1 U. BOLOGNA L.R. 138, 154–57 (2016).

⁹⁵ CETA, *supra* note 94, art. 8.10(4); *cf.* Viet.-E.U., *supra* note 94, art. 14(6).

⁹⁶ CETA, *supra* note 94, arts. 8.10(6), 8.10(7); *cf.* Viet.-E.U., *supra* note 94, art. 14(7).

⁹⁷ CETA, *supra* note 94, art. 8.10(3). With regard to reassertion of control over investment treaties, see the contributions of Martins Paparinskis, Mavluda Sattorova, Elini Methymaki and Antonios Tzanakopoulos, Ruminana Yotova, and Nikos Lavranos in REASSERTION OF CONTROL OVER THE INVESTMENT TREATY REGIME (Andreas Kulick ed., 2016).

public law. Analogies are frequently used in ISDS.⁹⁸ Arbitrators tend to resort to their own legal background when fulfilling their decision-making duties, and engage in judicial dialogue with other international tribunals; sometimes, even with domestic courts.⁹⁹ In this way, ISDS becomes a *de facto* or soft precedent. Without being binding on third parties to a particular dispute, judicial decisions in investment treaty arbitrations operate as authoritative legal statements that strongly influence future case law, progressively shaping the outcomes of ISDS.¹⁰⁰ Should we thank or blame GAL for this? Again, there is no clear answer. GAL has been more successful in describing phenomena than in prescribing principles for what they

⁹⁸ See generally Martins Paparinskis, *Analogies and Other Regimes of International Law*, in THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW, *supra* note 60, at 73; Vadi, *Migration of Constitutional Ideas*, *supra* note 81.

⁹⁹ Even though this is a common phenomenon in comparative and international law, the name judicial dialogue has mostly been used in the context of human rights law. See generally PAOLA ANDREA ACOSTA ALVARADO, DIÁLOGO JUDICIAL Y CONSTITUCIONALISMO MULTINIVEL: EL CASO INTERAMERICANO (2015); LAURENCE BURGOGUE-LARSEN, EL DIÁLOGO JUDICIAL: MÁXIMO DESAFÍO DE LOS TIEMPOS JURÍDICOS MODERNOS (2013); Sabrina Ragone, *Las Relaciones de los Tribunales Constitucionales de los Estados miembros con el Tribunal de Justicia y con el Tribunal Europeo de Derechos Humanos: Una Propuesta de Clasificación*, in DIÁLOGO JURISPRUDENCIAL EN DERECHOS HUMANOS (Eduardo Ferrer Mac-Gregor & Alfonso Herrera Garcia eds., 2013) [hereinafter DIÁLOGO JURISPRUDENCIAL EN DERECHOS HUMANOS]; Javier Garcia Roca, *El diálogo entre el Tribunal de Derechos Humanos, los Tribunales Constitucionales y otros órganos jurisdiccionales en el espacio convencional europeo*, in DIÁLOGO JURISPRUDENCIAL EN DERECHOS HUMANOS, *supra*. Valentina Vadi calls it “judicial borrowing.” See ANALOGIES IN INTERNATIONAL, *supra* note 53, at 88–110, 138–64; see also DE NANTEUIL, *supra* note 57, at 131–34.

¹⁰⁰ ERIC DE BRABANDERE, INVESTMENT TREATY ARBITRATION AS PUBLIC INTERNATIONAL LAW 93–99 (2014); Florian Grisel, *The Sources of International Investment Law*, in THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW, *supra* note 60, at 223–33; ALVAREZ, *supra* note 52, at 231–35; DE NANTEUIL, *supra* note 57, at 125–31; DOLZER & SCHREUER, *supra* note 57, at 33–34; KLÄGER, *supra* note 62, at 34–38; MCLACHLAN ET AL., *supra* note 63, at 87–91; MONTT, *supra* note 53, at 20, 107, 113; NEWCOMBE & PARADELL, *supra* note 57, at 59–61, 102–07; ROBERT-CUENDET, *supra* note 56, at 5–6; THE MULTILATERALIZATION, *supra* note 55, at 321–39; Kingsbury & Schill, *Investor-State Arbitration*, *supra* note 55, at 221–23; Schill, *System-Building*, *supra* note 55, at 1094–108. See generally Tai-Heng Cheng, *Precedent and Control in Investment Treaty Arbitration*, 30 FORDHAM INT’L L.J. 1014 (2007); Jeffery P. Commission, *Precedent in Investment Treaty Arbitration. A Citation Analysis of a Developing Jurisprudence*, 24 J. INT’L ARB. 129 (2007); Judith Gill, *Is There a Special Role for Precedent in Investment Arbitration?*, 25 ICSID REV.—FOREIGN INV. L.J. 87 (2010); Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 2 J. INT’L DISP. SETTLEMENT 5 (2011); Marc Jacob, *Precedents: Lawmaking Through International Adjudication*, 12 GERMAN L.J. 1005 (2011); Lucy Reed, *The De Facto Precedent Regime in Investment Arbitration: A Case for Proactive Case Management*, 25 ICSID REV.—FOREIGN INV. L.J. 95 (2010); Christoph Schreuer & Matthew Weiniger, *A Doctrine of Precedent?*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 1189 (Peter Muchlinski et al. eds., 2008). For more on the use of precedents in international law from the standpoint of IPA, see ARMIN VON BOGDANDY & INGO VENZKE, IN WHOSE NAME?: A PUBLIC LAW THEORY OF INTERNATIONAL ADJUDICATION 115–19 (2014).

call the global administrative space. For example, Cassese claimed in 2010 that, “[a] global administrative law has thus developed, in terms of which global regimes are encouraged, and sometimes compelled, to ensure and promote the rule of law and procedural fairness, transparency, participation, and the duty to give reasons throughout all areas of their activity.”¹⁰¹ This is an accurate portrayal of FET, which has been gradually transformed by ISDS case law from a rather empty declaration of good intentions to an essential standard of treatment of BITs and EIAs embodying the rule of law—in the form of an overarching duty of procedural fairness favoring aliens that qualify as investors of the other state party to the correspondent treaty.¹⁰² The constitutive elements or principles of FET allow decision-makers to apply a clause conventionally devoid of meaning, keeping in mind the ultimate goal of international investment law: promoting foreign investment by protecting aliens in host-states. How? By offering good governance to foreign investors in the form of a clear, stable and predictable legal and administrative framework implemented by host-states in a transparent and coherent manner.¹⁰³ From this perspective, investment treaties are nothing less than instruments of self-discipline and dispute avoidance.¹⁰⁴

Some scholars have rightly claimed that the constitutive elements of FET materialize the rule of law principles that are inherent to investment

¹⁰¹ Cassese, *Is There a GAL?*, *supra* note 54, at 774.

¹⁰² In this regard, Martins Paparinskis’ observations on the interpretative “road[s] not taken” by arbitrators when dealing with FET are quite interesting. See THE INTERNATIONAL MINIMUM, *supra* note 62, at 112–20.

¹⁰³ See LÓPEZ ESCARCENA, *supra* note 56, at 7, 114, 195–96, 200, 203–04, 210–11, 228; see also DIEHL, *supra* note 62, at 8–11, 243–49, 328–37; DOLZER & SCHREUER, *supra* note 57, at 20–27; SALACUSE, *supra* note 56, at 6–9, 109–11, 114; BILATERAL INVESTMENT TREATIES, *supra* note 57, at 1–4, 11; THE MULTILATERALIZATION, *supra* note 55, at 4–6; Angelet, *supra* note 63, § 5; Dolzer, *Impact of International Investment Treaties*, *supra* note 64, at 953–56, 970–72; Rudolf Dolzer, *The European Approach to BITs*, 24 ICSID REV.—FOREIGN INV. L.J. 368, 369 (2009); Jan Paulsson, *The Power of States to Make Meaningful Promises to Foreigners*, 1 J. INT’L DISP. SETTLEMENT 341, 346–47, 349 (2010); Schill, *Fair and Equitable Treatment*, *supra* note 55, at 176–81; Stone, *supra* note 70, at 77–78; Vandeveld, *A Unified Theory of FET*, *supra* note 63, at 49–53; Kenneth Vandeveld, *Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties*, 36 COLUM. J. TRANSNAT’L L. 501, 522–25 (1998); Kenneth Vandeveld, *Model Bilateral Investment Treaties: The Way Forward*, 18 SW. J. INT’L L. 307, 313–14 (2011) [hereinafter Vandeveld, *Model Bilateral Investment*]; James Zhan, *The Spread of BITs and Their Changing Face*, 24 ICSID REV.—FOREIGN INV. L.J. 339, 339 (2009); cf. BONNITCHA, *supra* note 52, at 39–45, 133–39; DIEHL, *supra* note 62, at 336; Kingsbury & Schill, *Investor-State Arbitration*, *supra* note 55, at 221–23. *But see* MONTT, *supra* note 53, at 74–80, 125–61, 165–229. See generally Thomas Schultz & Cédric Dupont, *Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study*, 25 EUR. J. INT’L L. 1147 (2014).

¹⁰⁴ See Paulsson, *supra* note 103, at 346; see also DIEHL, *supra* note 62, at 359–60; SALACUSE, *supra* note 56, at 114; THE MULTILATERALIZATION, *supra* note 55, at 4–6.

treaties.¹⁰⁵ Schill argued that the underlying assumption of this approach is that FET is a standard that has a normative meaning that differs from other protections offered by investment treaties.¹⁰⁶ In his view:

Understanding fair and equitable treatment in such a fashion attributes to the standard a quasi-constitutional function that serves as a yardstick for the exercise of the host states' administrative, judicial, and legislative activity vis-à-vis foreign investors. In this perspective, arbitral jurisprudence does not appear as a fragmented and disordered aggregate of awards but as part of the emerging global regime governing foreign investments and limiting conduct of host states relating to it.¹⁰⁷

Due to FET's lack of clear prescriptive content, "arbitral tribunals run the risk of facing the reproach that they handle the standard as a malleable tool of *ex post facto* control of host states' measures based on the arbitrators' personal conviction and understanding about what is fair and equitable."¹⁰⁸ According to Schill, uniting the constitutive elements of FET under the concept of rule of law would allow decision-makers to overcome the shortcomings of arbitral practice affecting this standard.¹⁰⁹ The best way of doing this is by applying the proportionality analysis to FET.¹¹⁰ To this end,

¹⁰⁵ See NEWCOMBE & PARADELL, *supra* note 57, at 164–65.

¹⁰⁶ See Schill, *Fair and Equitable Treatment*, *supra* note 55, at 154, 176–81. This article is sometimes quoted in its earlier version, as a working paper: Stephan W. Schill, *Fair and Equitable Treatment Under Investment Treaties as an Embodiment of the Rule of Law* (Inst. for Int'l Law & Justice Working Paper 2006/6), <http://www.iilj.org/wp-content/uploads/2016/08/Schill-Fair-and-Equitable-Treatment-under-Investment-Treaties-as-an-Embodiment-of-the-Rule-of-Law-2006-2.pdf> [<https://perma.cc/39HM-B298>].

¹⁰⁷ Schill, *Fair and Equitable Treatment*, *supra* note 55, at 154, 159–74; see also Kingsbury & Schill, *Investor-State Arbitration*, *supra* note 55, at 243–47. Although published in an edited book, this paper is normally quoted as a working paper: Benedict Kingsbury & Stephan W. Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law* (Inst. for Int'l Law & Justice Working Paper 2009/6), http://iilj.org/wp-content/uploads/2016/08/Kingsbury-Schill-Investor-State-Arbitration-as-Governance-IIIJ-WP-2009_6-GAL.pdf [<https://perma.cc/5QU8-9NBS>].

¹⁰⁸ Schill, *Fair and Equitable Treatment*, *supra* note 55, at 157.

¹⁰⁹ See *id.* at 155–59; see also Kingsbury & Schill, *Investor-State Arbitration*, *supra* note 55, at 223.

¹¹⁰ See Schill, *Fair and Equitable Treatment*, *supra* note 55, at 154–55, 157–59, 169–70. Stephan Schill is not the only author who has favored the application of the proportionality analysis in ISDS. See, e.g., Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, CHI. J. INT'L L. 471, 483–89 (2009). See generally Kingsbury & Schill, *Public Law Concepts*, *supra* note 55. Schill advocated for this solution even from a GAL perspective. See Kingsbury & Schill, *Investor-State Arbitration*, *supra* note 55, at 250–76. Among the supporters of applying the proportionality analysis in ISDS, some advocate an unrestrained approach but others support a more cautious one. See, e.g., KULICK, *supra* note 33, at 168–221. See generally Federico Ortino, *Investment Treaties, Sustainable Development*

Schill proposed a mixture of bottom-up and bottom-down approaches, using “a comparative law methodology that attempts to extract general principles of public law from those domestic and international legal regimes that embrace an institutional design prescribing rule of law standards for the exercise of public power in administrative and judicial proceedings and through legislation.”¹¹¹ It should be noticed that Schill considered “the rule of law understanding underlying the jurisprudence of investment tribunals,” in its core, “as primarily procedural and institutional in nature.”¹¹²

Other authors have also acknowledged the connection between FET and the rule of law.¹¹³ In Kenneth Vandeveld’s view, for instance, ISDS case law has implicitly construed this investment protection as requiring treatment in accordance with the rule of law.¹¹⁴ Therefore, he claimed, “the concept of legality is the unifying theory behind the fair and equitable treatment standard.”¹¹⁵ According to him, international arbitral tribunals interpreting FET “have incorporated the procedural and substantive principles of the rule of law into that standard.”¹¹⁶ That is to say, due process, on the one hand, and reasonableness, consistency, non-discrimination and transparency, on the other.¹¹⁷ In Vandeveld’s opinion, this approach would match the general purpose of investment treaties, which partially subordinate the sovereign’s power to the legal constraints of provisions that reflect the principles of the rule of law.¹¹⁸

and Reasonableness Review: A Case Against Strict Proportionality Balancing, 30 LEIDEN J. INT’L L. 71 (2017).

¹¹¹ Schill, *Fair and Equitable Treatment*, *supra* note 55, at 154, 174–76; *see also* Kingsbury & Schill, *Investor-State Arbitration*, *supra* note 55, at 243–50.

¹¹² Schill, *Fair and Equitable Treatment*, *supra* note 55, at 182; *cf.* Brower & Schill, *supra* note 110, at 487.

¹¹³ *See* DIEHL, *supra* note 62, at 328–37; DOLZER & SCHREUER, *supra* note 57, at 134, 142; MCLACHLAN ET AL., *supra* note 63, at 12–13, 274–76, 356–57; Angelet, *supra* note 63, §§ 5, 10, 13, 39; *see also* MONTT, *supra* note 53, at 6–17, 21–23, 165–77, 198–227, 293–366 (discussing a different approach to FET, based on the notions of arbitrariness and GAL); NEWCOMBE & PARADELL, *supra* note 57, at 295–96; *cf.* KLÄGER, *supra* note 62, at 125–28, 310–16; THE INTERNATIONAL MINIMUM, *supra* note 62, at 19–20.

¹¹⁴ Vandeveld, *A Unified Theory of FET*, *supra* note 63, at 49.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 52.

¹¹⁷ *See generally id.*

¹¹⁸ *Id.* at 54; *see* BILATERAL INVESTMENT TREATIES, *supra* note 57, at 1–4, 11; Vandeveld, *Model Bilateral Investment*, *supra* note 103, at 313–14; *see also* ALVAREZ, *supra* note 52, at 75, 95–119, 151–71; *cf.* LÓPEZ ESCARCENA, *supra* note 56, at 208–11. *See generally* Charles N. Brower & Lee A. Steven, *Who Then Should Judge?: Developing the International Rule of Law Under NAFTA Chapter 11*, 2 CHI J. INT’L L. 193 (2001) (discussing the North American Free Trade Agreement (NAFTA)).

CONCLUSION

Much like earlier or contemporary academic attempts to replace international law, GAL offers a refreshing invitation to think outside the box. And, as most of these initiatives, GAL has both a descriptive side, and a prescriptive one. To the regret of GAL's supporters, however, the normative traction of this doctrine is weak—if existent at all. The central premises of GAL are well illustrated by its take on ISDS. But even though the description of the phenomenon and the challenges it poses to international law is accurate, the similarity between the principles identified by GAL authors and the constitute elements advanced by the ISDS case law on FET is, at most, a coincidence. Decision-makers in investment treaty arbitration have adopted an administrative stance on this standard, but their mixed bottom-up/top-down approach is based not on GAL, but on public comparative law, and on previous judicial decisions of other international tribunals. Investment treaties do not define FET, nor mention the rule of law as one of their objectives. The generic original purpose of these international agreements provides an inkling of how to construe this clause. And what better way to promote/protect foreign investment than by building up the rule of law across the world? In a way, this has been the main goal of a select group of international legal scholars, at least since Kant. Apparently, arbitrators in ISDS share this ambition and contribute to it in each of their judicial decisions on FET, transforming otherwise isolated awards in real building blocks of this rule of law coming from above, but nurtured from below. ISDS has gradually developed common normative principles of an administrative character, which force those states that are parties to investment treaties to improve the treatment offered to foreign investors, if they want to avoid incurring international responsibility. By indirectly importing comparative/international principles via transnational judicial law-making, arbitrators emerge as true rule-makers. The democratic deficit and lack of accountability this situation entails are evident. In this respect, GAL's assessment is precise. A solution for it, however, has yet to be found.

