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## International Contractualism Revisited: Non-Pecuniary Remedies under the Fair and Equitable Treatment Standard

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# International Contractualism Revisited: Non-Pecuniary Remedies under the Fair and Equitable Treatment Standard

Patrick J. Rodriguez\*

## Abstract

*For years, the international investment regulatory regime has puzzled onlookers with its complexity. Because the system is defined by its vast network of bilateral investment treaties (BITs), the rights and obligations of foreign investors differ greatly from those of all other participants in international trade. At the heart of this confusion is the fair and equitable treatment (FET) standard. While in theory the FET standard purports to promote global economic growth through the broad protection of foreign direct investment (FDI) in developing nations, the standard's inherent vagueness leaves arbitration tribunals with little guidance to resolve investor-state conflicts. At the same time, concerns over private tribunals' ability to pass judgment over the policy decisions of sovereign states threatens the legitimacy of the process, thereby limiting the remedies available to wronged investors.*

*By reconciling the FET standard with the powers of arbitration tribunals, this Comment seeks to provide practitioners greater clarity as to the ability of international law in remedying controversies between states and individual investors. As such, a survey of the relevant treaties and accompanying tribunal decisions has yielded the following conclusions: (i) notwithstanding any radical shift in international arbitral jurisprudence, heterogeneities in treaty drafting, namely the decision to integrate the FET standard with customary international law (CIL), have defeated the hope of synthesizing a unified theory of FET; (ii) despite ambiguity in the FET standard, violations of the standard would benefit from the imposition of non-pecuniary remedies; and (iii) a contractual approach in the application of these non-pecuniary remedies will strengthen the reasoning of arbitral decisions. By utilizing the principles of contract law, tribunals will be better positioned to preserve their legitimacy, remedy ongoing violations of international treaties, and provide states and investors with predictable statements of law.*

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## I. INTRODUCTION

The world of international investment arbitration is in a crisis of legitimacy. The second half of the twentieth century has seen the rise of bilateral investment treaties (BITs) as the primary regulatory guarantee of foreign-investor rights. Nonetheless, the proliferation of these treaties has slowed in recent years.<sup>1</sup> Several reasons could explain this development. First, when about three thousand of these treaties presently exist, there is a limit to how many new combinations of countries can reach a new agreement.<sup>2</sup> Second, and perhaps more important, is the general sense that BITs are failing to accomplish their goal, namely the stimulation of global economic development through foreign investment. This perception has even caused several countries to abandon the BIT model of regulation completely.<sup>3</sup> For many states, the political costs of the regime are beginning to outweigh the economic benefits.

At the center of the controversy is the fair and equitable treatment (FET) standard. A vaguely written phrase appearing in nearly every bilateral investment agreement currently in force, this standard has puzzled commentators and tribunals for years. Nonetheless, the term, appearing in the vast majority of complaints filed, is a staple of foreign investor arbitral litigation.<sup>4</sup> For many, the hope of unifying tribunal treatment of the FET standard has all but evaporated as foreign investors (usually corporations) have a variety of BITs from which to choose. As explained below, heterogeneities in BIT drafting confer on investors differing rights and legal obligations, thereby resulting in forum shopping. At the same time, arbitration tribunals risk infringing on the host state's ability to regulate itself without interference from international institutions.

One solution to this problem is the so-called "contractual approach." The general purpose of the contractual approach is to strengthen the legitimacy of the tribunal and reduce the untoward influence of forum shopping by applying the tools and principles of contract law. This Comment seeks to contribute to the discussion by extending the analytical reach of the contractual approach to remedies. Specifically, I argue that international agreements do permit the use of non-pecuniary measures (such as an injunction) in remedying violations of the FET standard, and that, in some cases, such measures will produce better outcomes than monetary damages.

This Comment suggests that non-pecuniary remedies offer an alternative avenue for parties in FET litigation. Section II provides a brief overview of the

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<sup>1</sup> Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of the States*, 104 AM. J. INT'L L. 179, 191–92 (2010).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 180.

development and structure of the international arbitral regime by comparing investment regulatory architecture with that of more traditional notions of international trade. Section III provides an outline of the current problems and solutions posed in interpreting the FET standard, including a summary of the functional merits of the contractual approach. Finally, Section IV applies existing international law as well as the contractual approach to non-pecuniary remedies. In particular, I address the basis for non-pecuniary remedies in international law and point to examples where an injunction may aid the investment regime.

## II. INTERNATIONAL INVESTMENT ARBITRATION

Following the end of World War II, the international community sought to promote economic development by substantially reducing tariffs and other barriers to trade.<sup>5</sup> The logic underlying this impetus towards free trade is grounded in long-standing economic principles and is not seriously contested as a matter of policy.<sup>6</sup> Put simply, if one country is more efficient at producing a good or service than another country, both countries can benefit by specializing in their respective comparative advantage and trading at an economic surplus. In reality, however, this classical (or Ricardian<sup>7</sup>) model of international trade does not accurately describe all the circumstances where trade may be beneficial. For example, the introduction of transaction costs (say, in the form of the cost of transportation) may make trade infeasible even when one country has a comparative advantage over another. In such a situation, the Ricardian model would conclude that a beneficial trade would be impossible.

One of the most popular solutions to the existence of these transaction costs is foreign direct investment (FDI).<sup>8</sup> In general, FDI refers to the process through which nationals of one state own and operate businesses in another state. As long as a comparative advantage is portable, a firm can maintain the gains won from trade by establishing a business in a foreign country. Thus, the transaction costs

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<sup>5</sup> See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT] (recognizing that the contracting parties are dedicated to “raising the standards of living, ensuring full employment and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods”).

<sup>6</sup> See generally DAVID RICARDO, ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION (1817); Alan O. Sykes, *Comparative Advantage and the Normative Economics of International Trade Policy*, 1 J. INT'L ECON. L. 49 (1998). For a discussion of some of the counterarguments to popular criticisms of free trade, see MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 6–20 (3d ed. 2005).

<sup>7</sup> See generally RICARDO, *supra* note 6.

<sup>8</sup> TREBILCOCK & HOWSE, *supra* note 6, at 442–43.

accompanying the negotiation of trade deals and the transportation of goods across international borders would be greatly reduced.<sup>9</sup>

As relevant to the discussion below, the distinction between FDI and traditional forms of international trade has legal as well as economic consequences. Most importantly, international trade (through which an individual of one state seeks to exchange goods, services, or currency with an individual of another state) is regulated primarily through multilateral trade agreements, namely the World Trade Organization (WTO) Agreements.<sup>10</sup> On the other hand, FDI is regulated largely through BITs, which individual states negotiate on a state-by-state basis.<sup>11</sup> The growth in the use of BITs closely followed the explosion in foreign investment at the end of the twentieth century. Between 1990 and 2000, foreign investment quadrupled.<sup>12</sup> During the same period, the number of BITs grew from five hundred to two thousand.<sup>13</sup> Presently, the current number of BITs is estimated to be three thousand.<sup>14</sup> The underlying economic reasoning for this boom is relatively clear; capital-importing countries sought to stimulate the inflow of foreign investment by affording potential investors protection from the hazards accompanying political instability and high economic volatility.<sup>15</sup>

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<sup>9</sup> Critics of FDI suggest that this form of capital exportation is undesirable because it contributes to income inequality within the capital-exporting nation. *Id.* at 12. Indeed, President Trump has identified the outflow of U.S.-based factories as a central international economic concern. Binyamin Appelbaum et al., *Donald Trump's Inaugural Speech, Annotated*, N.Y. TIMES (Jan. 20, 2017), <https://perma.cc/78NA-S566>. While it is true that low-income American earnings have decreased relative to high-income American earnings in recent years, most empirical studies attribute this change largely to technological development and declining rates of unionization. TREBILCOCK & HOWSE, *supra* note 6, at 13. To the extent that such declines in low-income earnings are caused by the outsourcing of low-skilled jobs to other countries, the problem is distributive, and, as a result, it is unlikely that trade and investment protectionism is the clear policy solution. Protectionist tools like tariffs and import quotas preserve domestic jobs only at the expense of higher prices paid by consumers, thereby restricting the total amount of goods and services consumers can enjoy. *Id.* at 177–78. Other domestic tools, such as the income tax system, may be better suited to address these distributive concerns without disturbing the socially beneficial effects of international competition.

<sup>10</sup> Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter WTO].

<sup>11</sup> This was not always the case. Before the Uruguay Round of trade negotiations, the GATT regulated some elements of international investment. A more comprehensive attempt came in 1997 with the Multilateral Agreement on Investment, but, for various reasons, the participating states withdrew their support for the treaty in 1998. TREBILCOCK & HOWSE, *supra* note 6, at 452–60.

<sup>12</sup> RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 1 (3d ed. 2005).

<sup>13</sup> *Id.*

<sup>14</sup> Richard C. Chen, *A Contractual Approach to Investor-State Regulatory Disputes*, 40 YALE J. INT'L L. 295, 302 (2015).

<sup>15</sup> Lisa E. Sachs & Karl P. Sauvant, *BITs, DTTs, and FDI Flows: An Overview*, in *THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT* xxvii (Karl P. Sauvant & Lisa E. Sachs eds., 2009).

As a result of this ad hoc development of the BIT regulatory regime, foreign direct investors are entitled to vastly different rights and remedies as compared to other participants in international trade. In addition to enumerating several specific obligations that a host country must provide a foreign investor, including the FET standard,<sup>16</sup> BITs also provide for a unique enforcement mechanism for substantive rights. Whereas the WTO agreements rely upon a Dispute Settlement Body composed of WTO Members to adjudicate trade disputes, BITs overwhelmingly call for private arbitration tribunals through the International Centre for Settlement of Investment Disputes (ICSID).<sup>17</sup> Furthermore, BITs permit individuals and corporations to sue the host state directly as opposed to requiring intervention on behalf of the foreign investor by its home state.<sup>18</sup> Because these treaties allow aggrieved individuals to bring private claims, BITs abridge the conventional requirement that only states can enforce international law. Accordingly, “[t]he result is dispute resolution which is arbitration in procedural terms, but which in substance has been said to share more characteristics of the direct right of action before human rights courts.”<sup>19</sup>

This complex network of international obligations implicates fundamental questions about the balance between state sovereignty and investor protection as well as the role of private arbitration tribunals in the creation and enforcement of international law. Unlike, for example, common law courts bound by the principle of *stare decisis*, arbitration tribunals are not required to respect the decisions of past tribunals as precedent. While some commentators have suggested that arbitration tribunals have developed a consistent standard with which to interpret these

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Whether these treaties are effective at promoting FDI is an empirical question that has yielded mixed results. *See id.* And even if BITs do encourage FDI, the effect on gross domestic product (GDP) can be limited if other infrastructural issues within the host nation are left unaddressed. Recent empirical literature emphasizes that while FDI often results in growth in the capital-importing country’s GDP, the size of this effect often depends on the host country’s financial market development, institutional development, and macroeconomic policies. *See generally* Polpat Kotrajaras et al., *Does FDI Enhance Economic Growth?: New Evidence from East Asia*, 28 ASEAN ECON. BULL. 183 (2011).

<sup>16</sup> Other protections include prompt and adequate compensation for expropriation, freedom from unreasonable discrimination, most-favored-nations treatment for investors, and assured full protection and security of investments. Sachs & Sauvant, *supra* note 15, at xxxvii.

<sup>17</sup> Alexandra R. Harrington, Comment, *They Fought for Trade but Did Trade Win?: An Analysis of Trends Among Trade Disputes Brought by WTO Member States Before the WTO Dispute Resolution Body*, 16 MICH. ST. J. INT’L L. 315, 318 (2007). If either of the relevant states is not an ICSID member, the case will appear before the United Nations Commission on International Trade Law (UNCITRAL). Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV.-F.I.L.J. 232, 237 (1995).

<sup>18</sup> Paulsson, *supra* note 17. Some, but not all, BITs call for aggrieved individuals to exhaust local remedies before turning to international arbitration tribunals. *Id.* at 239–40.

<sup>19</sup> CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 5 (2007).

treaties,<sup>20</sup> the individualized nature of BITs weighs against the notion that tribunals can rely on universal principles of investment law to resolve every case. After all, international law requires terms to be interpreted in accordance with their “ordinary meaning.”<sup>21</sup> As discussed below with respect to both the FET standard and available remedies, heterogeneities in treaty drafting may limit the ability of tribunals to apply the reasoning involved with one BIT to another. Furthermore, inconsistent application of BIT protections can incentivize forum shopping. If the investor is a multinational corporation, it may have a number of BITs under which it can pursue a claim. If one BIT has been interpreted in the past more favorably than others, the investor will focus its efforts on those favorable provisions. States have responded to this behavior by limiting the use of BITs in a number of ways. One method is increasing reliance on regional trade and investment agreements, such as the North American Free Trade Agreement (NAFTA)<sup>22</sup> and the Association of Southeast Asian Nations (ASEAN).<sup>23</sup> Another solution is simply to amend BITs to reflect the policy preferences of the contracting states rather than those of the investors or arbitration tribunals.<sup>24</sup> Nonetheless, the persistence of BITs as the main form of foreign investment regulation leaves investors and arbitration tribunals with a substantial ability to shape domestic policy. As a result, this Comment discusses an unfamiliar power: the use of non-pecuniary measures in relieving violations of the FET standard.

### III. THE FAIR AND EQUITABLE TREATMENT STANDARD

#### A. An Overview of the FET Standard

Although referenced in early attempts to adopt multilateral trade and investment instruments, the FET standard is foremost the product of the

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<sup>20</sup> See, for example, Kenneth J. Vandeveld, *A Unified Theory of Fair and Equitable Treatment*, 43 N.Y.U.J. INT'L L. & POL. 43 (2010).

<sup>21</sup> Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

<sup>22</sup> North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 605 [hereinafter NAFTA].

<sup>23</sup> Agreement among the Government of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore and the Kingdom of Thailand for the Promotion and Protection of Investments, Dec. 15, 1987, 31 I.L.M. 506.

<sup>24</sup> For example, the United States Model BIT equates “fair and equitable treatment” with the minimum standard of treatment given to foreign nationals under customary international law. Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment (2012), <https://perma.cc/NS27-S727> [hereinafter U.S. Model BIT].



increasing network of BITs.<sup>25</sup> The term became prevalent after it first appeared in the Havana Charter of 1948.<sup>26</sup> Although the Charter never became law, the concept proved influential on the Abs-Shawcross Draft Convention<sup>27</sup> and the OECD Draft Convention on the Protection of Foreign Property.<sup>28</sup> The Abs-Shawcross Convention was one of many failed international attempts at a multilateral investment agreement.<sup>29</sup> By incorporating the notion of fair and equitable treatment, the authors intended to express “fundamental principles of international law regarding the treatment of the property, rights, and interests of aliens,” which had “a broad basis in the practice of civilized states and the findings of international tribunals.”<sup>30</sup> The international community tried to articulate a multilateral standard again in the OECD Draft Convention in 1967.<sup>31</sup> There, Comment 4 of the Draft explained that “fair and equitable treatment” requires conduct that “conforms in effect to the ‘minimum standard’ which forms part of customary international law.”<sup>32</sup>

After Switzerland first integrated the FET standard into its BIT program in 1961,<sup>33</sup> the term’s appearance became a staple of BIT drafting.<sup>34</sup> Currently, the vast majority of BITs require that some form of “fair and equitable treatment” be given to foreign investors, and, as of 2008, international tribunals have issued over

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<sup>25</sup> For a thorough history of the incorporation of the FET standard into BITs, see generally Stephen Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, 70 BRIT. Y.B. INT’L L. 99 (1999); KENNETH J. VANDEVELDE, *BILATERAL INVESTMENT TREATIES: HISTORY, POLICY AND INTERPRETATION* (2010).

<sup>26</sup> Final Act of the U.N. Conference on Trade and Employment, Havana Charter for an International Trade Organization art. 11(2)(a)(i), Mar. 24, 1948, 62 U.N.T.S. 26 (calling for international agreements “to assure just and equitable treatment for the enterprise, skills, capital, arts and technology brought from one Member country to another”).

<sup>27</sup> Herman Abs & Lord Hartley Shawcross, *Draft Convention on Investments Abroad*, 9 J. PUB. L. 116, 116 (1960) (“Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties. Such property shall be accorded the most constant protection and security within the territories of the other Parties and the management, use, and enjoyment thereof shall not in any way be impaired by unreasonable or discriminatory measures.”).

<sup>28</sup> Organization for Economic Co-operation and Development (OECD), Draft Convention on the Protection of Foreign Property, art. 1(a), Oct. 12, 1967, 7 I.L.M. 117, 119 [herein after OECD Draft Convention].

<sup>29</sup> George K. Foster, *Recovering “Protection and Security”: The Treaty Standard’s Obscure Origins, Forgotten Meaning, and Key Current Significance*, 45 VAND. J. TRANSNAT’L L. 1095, 1138 (2012).

<sup>30</sup> Ignaz Seidl-Hohenveldern, *The Proposed Convention to Protect Private Foreign Investment: A Round Table*, 9 J. PUB. L. 115, 119 (1960).

<sup>31</sup> Foster, *supra* note 29, at 1139.

<sup>32</sup> OECD Draft Convention, *supra* note 28, at 15, cmt. 4(a).

<sup>33</sup> Treaty Relating to the Protection and the Encouragement of Investments of Capital, Switz.-Tunis., art. 1, Dec. 2, 1961, RO 1964.

<sup>34</sup> Vandeveld, *supra* note 20, at 6.

fifty awards interpreting the standard.<sup>35</sup> Because only a fraction of ICSID tribunal awards are actually published, a comprehensive survey of FET treatment in these opinions is impossible.<sup>36</sup> Regardless, the FET standard is one of the most commonly cited provisions in international investment arbitration.<sup>37</sup> Despite the term's ubiquity, tribunals, practitioners, and observers have struggled to identify a consistent meaning for the standard. As such, the following subsections describe the current state of the FET standard as well as competing interpretations as to what is or should be its meaning.

## B. FET and Customary International Law

A frequent question arising out of the study of the FET standard is whether the provision simply incorporates customary international law (CIL)<sup>38</sup> concerning the minimum standard of treatment of foreign nationals. U.S. BIT policy explicitly adopts CIL in the text of its bilateral and regional investment agreements. For example, the U.S.-Uruguay BIT provides that “[e]ach Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.”<sup>39</sup> In particular, the provision “prescribes the customary international law minimum standard of the treatment of aliens.”<sup>40</sup>

International courts and tribunals developed the minimum standard of treatment not for international trade and investment but rather for the treatment of individuals. Thus, it is unsurprising that much of the existing case law on the minimum standard of treatment comes from criminal incidents. The *Neer v. United Mexican States*<sup>41</sup> case in 1926 demonstrates the deferential nature of this aspect of CIL.<sup>42</sup> In *Neer*, the U.S. claimed Mexico violated the minimum standard of

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<sup>35</sup> *Id.* at 44.

<sup>36</sup> *Id.* at 44 n.2.

<sup>37</sup> *Id.*

<sup>38</sup> Experts have defined the development of CIL as the “process of continuous [state] interaction” through which international practice gives rise to “expectations of pattern and uniformity in decision . . . commonly regarded as law.” Myres S. McDougal, *The Hydrogen Bomb Tests and the International Law of the Sea*, 49 AM. J. INT’L L., 356, 357, 358 n.7 (1955). For a discussion explaining how state expectations become binding law, see Roni Cohen, *Regulating Hate Speech: Nothing Customary About It*, 15 CHI. J. INT’L L. 229 (2014). To qualify as international law, a norm must (1) engender widespread and uniform adherence among nations (*usus*), and (2) impose upon nations a sense of legal obligation (*opinio juris*). *Id.* at 233.

<sup>39</sup> Treaty on the Encouragement and Reciprocal Protection of Investment art. 5, U.S.-Uru., Nov. 4, 2005, 44 I.L.M. 268.

<sup>40</sup> *Id.*

<sup>41</sup> *Neer v. United Mexican States (U.S. v. Mex.)*, 4 R.I.A.A. 60 (Gen. Claims Comm’n 1926).

<sup>42</sup> *Id.*

treatment because it failed to investigate and prosecute those responsible for the death of a U.S. national. In holding that Mexico did not violate the standard, the Mexico-U.S. General Claims Commission described the standard as such:

[T]he propriety of the governmental acts should be put to the test of international standards. . . . [T]he treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of standards that every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds from the deficient execution of an intelligent law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial.<sup>43</sup>

With this understanding of the minimum standard of treatment, it is clear why states would be eager to connect the FET standard to CIL. Under CIL, a sovereign state has no inherent legal obligation to allow aliens or their property within the state's borders. Should a state permit a foreign national to enter the country, the alien is expected to take the law "as is."<sup>44</sup> The minimum standard of treatment is only violated when "the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome that offends judicial propriety."<sup>45</sup> Therefore, the argument goes, if the FET standard merely incorporates the minimum standard of treatment, states would be justified in pursuing a variety of policies that foreign investors would find unsatisfactory.

The question posed to commentators and tribunals is whether the FET standard, absent any objective indicia, only incorporates the minimum standard of treatment as described above. As a textual matter, that assertion is unlikely. States are bound by customary international law regardless of whether they choose to incorporate it into their agreements (thereby rendering such an assurance in a BIT superfluous), and even if the treaty stands as only an affirmation of CIL, the choice to use the term "fair and equitable treatment" appears on its face to be an unlikely substitute for "minimum standard of treatment" in light of the phrase's ordinary meaning.<sup>46</sup> At the same time, the dictionary definitions of the terms "fair"

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<sup>43</sup> *Id.* at 61–62.

<sup>44</sup> ANDREW NEWCOMBE & LLUÍS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT* 4 (2009).

<sup>45</sup> *Waste Mgmt., Inc. v. Mexico (U.S. v. Mex.)*, ICSID Case No. ARB(AF)/00/3, Award, 11 ICSID Rep. 361, ¶ 98 (2004) [hereinafter *Waste Management*].

<sup>46</sup> *See* Vienna Convention, *supra* note 21, at art. 31. *See also* F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, 52 BRIT. Y.B. INT'L L. 241, 244 (1981) ("The terms 'fair and equitable treatment' envisage conduct which goes far beyond the minimum standard and afford protection to a greater extent and according to a much more objective standard than any previously employed form of words. A tribunal would not be concerned with a minimum, maximum, or average standard. It will have to decide whether in all the circumstances the conduct in issue is fair and

and “equitable” give little guidance as to how a tribunal should dispose of any particular case,<sup>47</sup> and tribunals may be willing to ignore textual heterogeneities when doing so will promote judicial economy and uniformity within the law.

Indeed, if the tribunal were to treat every textual heterogeneity as legally relevant, any hope at a standardized application of the FET standard, regardless of whether it invokes CIL, would be impossible. For example, while the U.S.-Argentina BIT<sup>48</sup> explicitly links FET to CIL, the Czechoslovakia-Netherlands BIT<sup>49</sup> does not. Even statements of the FET standard itself are inconsistent.<sup>50</sup> The Lithuania-Norway BIT, for example, requires that the contracting parties accord each state’s investors with “equitable and reasonable treatment and protection.”<sup>51</sup>

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equitable or unfair and inequitable. No standard defined by other word is material. The terms are to be understood and applied independently.”).

<sup>47</sup> For a survey of such definitions, see Vasciannie, *supra* note 25, at 103–05. Given the inherent vagueness of the terms “fair” and “equitable,” tribunals could potentially outlaw a great deal of state practices if the tribunals choose to read the terms broadly. The *Metalclad* Case, *Metalclad Corp. v. The United Mexican States (U.S. v. Mex.)*, ICSID Case No. ARB(AF)/97/1, Award, (Aug. 30, 2000), 5 ICSID Rep. 209, is perhaps the best example of this expansive reading. In 1996, Metalclad Corporation, an American company, brought a claim against Mexico for violating NAFTA’s FET provision. *Id.* at ¶ 1. Metalclad argued that it failed to realize a foreign investment in Mexico because the state of San Luis Potosí, Central Mexico denied the company a municipal construction permit for environmental reasons. *Id.* The NAFTA tribunal, siding with Metalclad, concluded that Mexico failed to “ensure a transparent and predictable framework for [Metalclad’s] business planning,” which violated the principle of fair and equitable treatment. *Id.* Unhappy with the tribunal’s ruling, the NAFTA Free Trade Commission issued a binding interpretation requiring tribunals to consider the minimum standard of treatment in connection with the FET standard. NAFTA Free Trade Commission, *Statement on NAFTA Article 1105 and the Availability of Arbitration Documents*, (July 31, 2001), <https://perma.cc/N8F7-6UAL>.

<sup>48</sup> Treaty with Argentina Concerning the Reciprocal Encouragement and Protection of Investment, Arg.-U.S., art. II(2)(a), Nov. 14, 1991, 31 I.L.M. 124 [hereinafter U.S.-Argentina BIT] (“Investment shall at all times be afforded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than required by international law.”).

<sup>49</sup> Agreement on the encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, Czech-Neth.-Slovk., art. 3(1), Apr. 29, 1991, 2242 U.N.T.S. 205 (“Each Contracting Party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party and shall not impair, by unreasonable measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors.”).

<sup>50</sup> Perhaps the most abstract restatement of the FET standard is the Bangladesh-Iran BIT. Agreement on the Reciprocal Promotion and Protection of Investment, Bangl.-Iran, art. 4, Apr. 29, 2011, <https://perma.cc/G5X2-RWNG> (providing for “fair treatment not less favourable than accorded to its own investors or investors of any third state, whichever is more favourable”). Here, the text of the treaty seems to incorporate a most favored nation principle in the treatment of investors.

<sup>51</sup> Agreement between the Government of the Kingdom of Norway and the Government of the Republic of Lithuania on the Promotion and Mutual Protection of Investments, Lith.-Nor., art. III, Dec. 20, 1992, 2665 U.N.T.S. 181 (“Each contracting party shall promote and encourage in its territory investments of investors of the other contracting party and accept such investments in

It is not clear textually that “reasonable” is legally equivalent to “fair.” At first glance, the term “fair” may envisage treatment beyond that contemplated by the ordinary meaning of “reasonable.” After all, Lithuania and Norway drafted their BIT in 1992, well after the widespread incorporation of “fair and equitable treatment” into global investment policy. If the two nations wished to incorporate the standard directly, they were probably aware of how to draft it.

The textual heterogeneities become even more confused when one injects differing languages. For example, French treaties refer to treatment that is “juste et equitable,” and Spanish treaties call for treatment that is “justo y equitativo.”<sup>52</sup> On the other hand, German treaties use the term “gerecht und billig behandeln.”<sup>53</sup> Perfect translations might be impossible if a textualist tribunal is willing to humor developmental quirks in the underlying words. And if every treaty is distinguishable on this textual basis, then the FET standard runs the risk of evaporating into meaninglessness. The tribunal in *Parkerings-Compagniet AS v. Lithuania*<sup>54</sup> addressed this problem directly. The claimant, a parking facilities developer, claimed that the Lithuania-Norway BIT’s “equitable and reasonable treatment” standard was in fact more demanding than the FET standard.<sup>55</sup> The tribunal dismissed this argument on the grounds that the Vienna Convention instructs tribunals to look at the ordinary meaning of the words in “their context and in light of [the treaty’s] object and purpose.”<sup>56</sup> As a result, the tribunal interpreted “equitable and reasonable” as equivalent to “fair and equitable.”<sup>57</sup> The implication of the ruling, combined with the analysis from above, is that tribunals will tolerate these heterogeneities to a degree. When the differences in wording are extreme (for example, if the provision specifically incorporates CIL), then tribunals will justify a separate analysis.

Still, even when the agreement explicitly calls for the use of CIL, it is unclear how a tribunal should apply the principle to treatment of foreign investments.

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accordance with its laws and regulations and accord them equitable and reasonable treatment and protection.”).

<sup>52</sup> DOLZER & SCHREUER, *supra* note 12.

<sup>53</sup> See, for example, Vertrag zwischen der Bundesrepublik Deutschland und der Republik Madagaskar über die gegenseitige Förderung und den gegenseitigen Schutz von Kapitalanlagen, Ger.-Madag., art. 2, Aug. 1, 2006, <https://perma.cc/CN4B-LUJH>.

<sup>54</sup> *Parkerings-Compagniet A.S. v. Republic of Lith. (Nor. v. Lith.)*, ICSID Case No. ARB/05/8, Award (Sept. 11, 2007) [hereinafter *Parkerings-Compagniet*].

<sup>55</sup> *Id.* at ¶ 198.

<sup>56</sup> *Id.* at ¶ 275.

<sup>57</sup> *Id.* at ¶ 278. Nonetheless, the tribunal indicated that if the claimant had introduced any evidence that Norway and Lithuania intended a separate meaning at the time of signing, the tribunal might have decided otherwise. *Id.* at ¶ 277. This type of analysis is consistent with the contractual approach set forth *infra* in Section III.D.

Custom is developed as part of a decentralized system of international law.<sup>58</sup> Consequently, application of CIL can be “imprecise, vague, and hard to interpret.”<sup>59</sup> Custom changes over time, and although the *Neer* case articulates a relatively high threshold to trigger a violation of the minimum standard of treatment of aliens, that standard may not necessarily persist through the years.<sup>60</sup> The NAFTA Free Trade Commission sought to address the problem by issuing the following binding interpretation:

Article 1105.1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of another Party. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment . . . beyond that which is required by the customary international law minimum standard of treatment of aliens.<sup>61</sup>

As noted by one investment-law specialist, Ignacio Pinto-León, this interpretation is troublesome because it yields three binding inferences: (1) the minimum standard of treatment of aliens contains FET; (2) FET is part of the minimum standard of treatment of aliens; and (3) FET does not require anything more than complying with customary law.<sup>62</sup> In essence, this iteration of the standard is circular because it defines custom as FET, yet it also defines FET as nothing more than what is required by custom.<sup>63</sup>

In summary, attempts to pin the FET standard to CIL have been mixed at best. Without some textual indicia in the BIT to indicate that the parties intend to restrict FET to CIL, tribunals are unlikely to make the connection. Even when such indicia are present, tribunals are left in an analytical quandary because it is unclear how CIL should affect the outcome of the case. In practice, this results in the use of circular logic that ultimately tends to reduce the likelihood that a

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<sup>58</sup> Ignacio Pinto-León, *Fair and Equitable Treatment Under International Law: Analyzing the Interpretation of NAFTA Article 1105.1 by NAFTA Chapter 11 Tribunals*, 15 CURRENTS: INT'L TRADE L. J. 3, 27 (2006); Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 784 (2001).

<sup>59</sup> Pinto-León, *supra* note 58, at 7 (internal citations omitted).

<sup>60</sup> Compare *Neer*, *supra* note 41, with *Waste Management*, *supra* note 45.

<sup>61</sup> NAFTA Free Trade Commission, *supra* note 47.

<sup>62</sup> Pinto-León, *supra* note 58, at 9–10.

<sup>63</sup> For examples of rulings employing this circular logic, see *ADF Group, Inc. v. United States* (Can. v. U.S.), ICSID Case No. ARB(AF)/00/1, Award (Jan. 9, 2003), 6 ICSID Rep. 449 (2003); *GAMI Inv. v. Mex.* (U.S. v. Mex.), final Award (Nov. 15, 2004), 13 ICSID Rep. 144 (2004); *Loewen Grp. v. United States*, (Can. v. U.S.), ICSID Case No. ARB(AF)/98/3, Award (June 26, 2003), 7 ICSID Rep. 421 (2003); *Methanex Corp. v. United States* (Can. v. U.S.), Final Award of the Tribunal on Jurisdiction and Merits, 16 ICSID Rep. 32 (NAFTA Ch. 11 Arb. Trib. 2005); *Mondev Int'l, Ltd. v. United States* (Can. v. U.S.), ICSID Case No. ARB(AF)/99/2, Award (Oct. 11, 2002), 6 ICSID Rep. 181 (2002).

complainant will prevail.<sup>64</sup> However, the standard in these circumstances remains highly uncertain to governments and investors, and as a result, such an interpretation may defeat the general purpose of the investment agreement, which is to stimulate FDI. The next subsection deals with instances where the arbitration tribunal must dispose of the case without the mandate to employ the minimum standard of treatment.

### C. The List Approach

Without help from CIL, tribunals are left with little guidance to resolve a dispute over the FET standard. However, tribunals (for the most part)<sup>65</sup> have resisted attempts to distill an answer directly from the text. While almost all tribunals will articulate some abstract understanding of what is fair and equitable,<sup>66</sup> they will also employ more specificity when possible. According to Professor Rudolf Dolzer, the fundamental question is whether “the investor [was] in effect treated in a hospitable climate in a fair manner.”<sup>67</sup> In answering this question, Dolzer observes a multifaceted, list-based jurisprudence that reduces the objective conduct of the host state into several distinct categories.<sup>68</sup> For the purposes of this Comment, it is not necessary to enumerate every category outlined by Dolzer; rather, I will focus on the underlying principles.

The cornerstone of the “list approach” is the ruling in *Tecmed v. Mexico*.<sup>69</sup> There, the tribunal articulated an expansive list of the expectations accompanying the obligation of fair and equitable treatment:

The Arbitral Tribunal considers that this provision of the Agreement, in light of good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally

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<sup>64</sup> Before the NAFTA FTC imposed its mandatory interpretation, seventy-five percent of claimants prevailed on a FET violation. Afterward, the percentage fell to 25%. Pinto-León, *supra* note 58, at 18.

<sup>65</sup> See *Rompertrol Group N.V. v. Rom. (Neth. v. Rom.)*, ICSID Case No. ARB/06/3, Award (May 6, 2013) [hereinafter *Rompertrol*] (stating the tribunal will “follow the ordinary meaning of the words used, in their context, and in the light of the object and purpose of the BIT”).

<sup>66</sup> See, for example, *Swisslion DOO Skopje v. Former Yugoslav Republic of Maced. (Switz. v. Maced.)*, ICSID Case No. ARB/09/16, Award, ¶ 273 (July 6, 2012) (adopting “the view . . . that the standard basically ensures that the foreign investor is not unjustly treated, with due regard to all surrounding circumstances, and that it is a means to guarantee justice to foreign investors”).

<sup>67</sup> Rudolf Dolzer, *Fair and Equitable Treatment: Today's Contours*, 12 SANTA CLARA J. INT'L L. 7, 33 (2013).

<sup>68</sup> *Id.* at 16.

<sup>69</sup> *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States (Spain v. Mex.)*, ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003), 10 ICSID Rep. 130 (2003) [hereinafter *Tecmed*].

transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations . . . The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.<sup>70</sup>

The passage, although lengthy, warrants repeating here not only as an informative example of the list approach but also as the most cited arbitral award on FET jurisprudence.<sup>71</sup> Should the objective actions of the host state violate any one of these obligations, then the state has violated the FET standard. Implicit in the tribunal's reasoning is a rejection of a more textualist standard, such as that adopted in *Rompetrol Group N.V. v. Romania*.<sup>72</sup> This serves to address concerns arising from heterogeneities in drafting. Furthermore, the common thread uniting all of these subcategories, to some extent, is the investor's legitimate expectations. That is, states under certain circumstances are required to maintain the expectations held by the investor at the time of its investment.

The tribunal in *Suez v. Argentina*<sup>73</sup> revisited the topic and presented the elements of the violation as the following: (1) the host state's objective actions informed the investor's legitimate expectations; (2) the foreign investor relied on those actions to its detriment; (3) the host state frustrated those expectations; (4) the host state's actions were without communication to or the consent of the investor; and (5) the investor sustained damages.<sup>74</sup> There are several ways a host state could inform an investor's legitimate expectations, including the appearance of consistency and stability in the state's legal order<sup>75</sup> as well as the state's

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<sup>70</sup> *Id.* at ¶ 154.

<sup>71</sup> Dolzer, *supra* note 67, at 14.

<sup>72</sup> *Rompetrol*, *supra* note 65.

<sup>73</sup> *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic, (Spain, Fr. v. Arg.)*, ICSID Case No. ARB/03/19, Decision on Liab. (July 30, 2010) [hereinafter *Suez*].

<sup>74</sup> *Id.* at ¶ 226; *see also* Dolzer, *supra* note 67, at 20.

<sup>75</sup> This goes beyond political or economic stability. *See, for example*, *MTD Equity Sdn. Bhd. v. Republic of Chile (Malay. v. Chile)*, ICSID Case No. ARB/01/7, Decision on Annulment (Mar. 21, 2007), 13 ICSID Rep. 488 (2007) (holding that Chile's initial approval of a construction project and subsequent withdrawal due to the state's zoning laws constituted a violation of the FET standard).



contractual commitments.<sup>76</sup> Once the investor, in reliance on those legitimate expectations, takes action, the state is obligated to maintain those circumstances. This is not to say that the state loses its sovereign right to dictate domestic policy, but it must do so in a manner consistent with its obligations under the investor-protection regime.<sup>77</sup> The result, according to Dolzer, is a fact-specific balancing of the state's right to regulate against the investor's legitimate expectations.<sup>78</sup>

#### D. The Contractual Approach

Professor Richard C. Chen distinguishes between what he terms the “public law approach” and the “contractual approach.”<sup>79</sup> Under the public law approach, investors call on arbitration tribunals to pass judgment on the validity of state laws in the same way an individual may bring a lawsuit to challenge domestic regulations under constitutional or administrative law.<sup>80</sup> The contractual approach, on the other hand, calls on tribunals to treat violations of a BIT as a breach of contract.<sup>81</sup> Under this approach, the tribunal would apply the tools of contract interpretation, including the use of default rules such as foreseeability doctrine and efficient risk bearer analysis.<sup>82</sup> Chen acknowledges that the public law approach is the most popular approach and is acquiring general acceptance by both scholars and tribunals (as demonstrated in the previous subsection).<sup>83</sup> However, the argument for a contractual approach is a functional one.<sup>84</sup> Furthermore, because the general text of the FET standard is vague and tribunals are not bound by precedent, nothing short of state intervention can prevent tribunals from endorsing the contractual approach over the public law approach.<sup>85</sup> Therefore, because the contractual approach is functionally and analytically superior, tribunals would enhance their legitimacy and better serve the interest of the

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<sup>76</sup> This usually refers to either a host state's repudiation of a contract or the violation of an umbrella clause included in a BIT. Not all breaches of contract violate the FET standard. DOLZER & SCHREUER, *supra* note 12, at 152–54.

<sup>77</sup> ADC Affiliate Ltd. and ADMC Mgmt. Ltd. v. Republic of Hung. (Cyprus v. Hung.), ICSID Case No. ARB/03/16, Award of the Trib., ¶ 423 (Oct. 2, 2006), 15 ICSID Rep. 534 (2006).

<sup>78</sup> Dolzer, *Fair and Equitable Treatment*, *supra* note 67, at 28 (citing Saluka Invs. BV v. Czech (Neth. v. Czech), Partial Award (Mar. 17, 2006) 15 ICSID Rep. 250 (Perm. Ct. Arb. 2006) [hereinafter *Saluka*], and Lemire v. Ukr. (U.S. v. Ukr.), ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liab. (Jan. 14, 2010) [hereinafter *Lemire*]).

<sup>79</sup> Chen, *supra* note 14, at 297–99.

<sup>80</sup> *Id.* at 297.

<sup>81</sup> *Id.* at 298.

<sup>82</sup> *Id.* at 318–35.

<sup>83</sup> *Id.* at 297.

<sup>84</sup> *Id.* at 313.

<sup>85</sup> *Id.*

international community by applying contract rules.<sup>86</sup> The following paragraphs summarize Chen's functionality argument.

The central thesis of the functional argument is the notion that treaties should be interpreted with regard to the parties' intent.<sup>87</sup> Here, Chen distinguishes the contracting party from the aggrieved party.<sup>88</sup> An approach that favors the intent of the investor will unduly favor investor rights at the expense of state sovereignty.<sup>89</sup> Tribunals would "operate as if the only rights at stake were those of investors and as if [they] were enforcing narrowly drawn private law contracts divorced from public law context."<sup>90</sup> The solution, according to Chen, is to reconstruct the intent of the adopting states through objective evidence.<sup>91</sup>

The contractual approach is functionally superior because it serves to alleviate the ISCID's crisis of legitimacy. The public law approach forces tribunals to weigh the "incommensurable values" of state policy decisions.<sup>92</sup> In doing so, tribunals tend to substitute, or at least appear to substitute, their members' policy preferences in the place of principled and predictable application of law.<sup>93</sup> Furthermore, by emphasizing the intent of the states, the tribunals would evaluate the host state's conduct with respect to the limits the state has chosen to put on itself, thereby dismissing the notion that, under international law, the state and investor are equals.<sup>94</sup>

Observers of the application of the FET standard can already see how principles of contract law have affected the behavior of tribunals. For example, the ruling in *Suez* almost completely mirrors the elements of common law promissory estoppel.<sup>95</sup> On the other hand, Chen acknowledges that adoption of

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<sup>86</sup> *Id.* at 313–14.

<sup>87</sup> *Id.* at 315; Alex Glashauser, *What We Must Never Forget When It Is a Treaty We Are Expounding*, 73 U. CIN. L. REV. 1243, 1299 (2005) ("[M]ost commentators agree that the touchstone of treaty interpretation is the intent of the parties."); see also Vienna Convention, *supra* note 21, at 340, art. 31 (stating courts and tribunals should interpret a treaty "in their context and in the light of its object and purpose"); *Parkerings-Compagniet*, *supra* note 55, at ¶ 275.

<sup>88</sup> Chen, *supra* note 14, at 315–16.

<sup>89</sup> *Id.*

<sup>90</sup> William W. Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 YALE J. INT'L L. 283, 297 (2010).

<sup>91</sup> When sufficient evidence exists as to the states' actual intent, the contractual rules described here are not needed. Chen, *supra* note 14, at 316. Furthermore, the adoption of default interpretative rules should encourage parties to be more specific during the drafting stage. *Id.*

<sup>92</sup> *Id.*; see also *Saluka*, *supra* note 78; *Lemire*, *supra* note 78.

<sup>93</sup> Chen, *supra* note 14, at 317.

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

<sup>95</sup> See *Suez*, *supra* note 73; RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981) ("A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be

the contractual approach requires repudiation of the public law approach, which has dominated existing FET jurisprudence. Although rejecting the public law approach is not illegal, its likelihood depends on a tribunal's willingness to ignore or refute persuasive precedent. The next Section applies the contractual approach to circumstances not contemplated by Chen: the realm of remedies. In particular, I analyze the extent to which the contractual approach will justify the use of non-pecuniary remedies to alleviate violations of the FET standard.

#### IV. A CONTRACTUAL APPROACH TO NON-PECUNIARY REMEDIES

The previous Sections assessed the current state of international investment arbitration under the FET standard. As the law currently stands, a tribunal must grapple with the competing interests of state sovereignty, investors' rights, economic development, and that tribunal's own sense of legitimacy. In some circumstances, this requires the abstract weighing of political and economic ideals. In other circumstances, a tribunal will simply resort to unpredictably circular logic. In the best-case scenario, the tribunal will apply reasoned, generally accepted principles to the specific facts of a case, but as the previous Sections show, international law often escapes such categorizations. This is especially true for the FET standard.

The contractual approach offers a variety of tools to alleviate the ICSID's crisis of legitimacy. In fact, the analysis in this Section shows that the approach will permit tribunals to reach previously unrecognized results: the ordering of non-pecuniary remedies. The argument that a tribunal may issue a non-pecuniary remedy (that is, an order requiring the host state to engage in or refrain from certain conduct) for FET violations flows from two premises: (1) states have consented to the use of non-pecuniary remedies through international law; and (2) in some circumstances, non-pecuniary remedies are a superior substitute for, or compliment to, damages for violations of the FET standard. As demonstrated below, the contractual approach is not necessary under international law to justify a tribunal's use of injunction. In fact, much existing law indicates otherwise. The value, therefore, of the contractual approach is to provide tribunals with an analytical toolset that provides for greater transparency and legitimate, judicially administrable principles. The remainder of the Section is dedicated to expanding upon these propositions in greater detail.

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avoided only by enforcement of such promise. The remedy granted for breach may be limited as justice requires.”).

## A. The Power to Order Non-Pecuniary Remedies

ICSID tribunals have always granted relief in the form of monetary damages; however, their charter suggests a broad ability to define the contours of the award.<sup>96</sup> Under Article 48 of the ICSID Convention, an award must “deal with every question submitted to the Tribunal, and state the reasons upon which it is based.”<sup>97</sup> Furthermore, each “award shall be binding on the parties and shall not be subject to any appeal or any other remedy except those provided for in this Convention.”<sup>98</sup> In other words, the Convention delegates broad authority to a tribunal to resolve disputes brought before it, and the parties are bound to follow the conclusions to which the tribunal arrives unless that conclusion violates another provision in the Convention.

Nowhere in the definition of a valid award does the Convention limit the scope of pecuniary or non-pecuniary measures. Instead, Article 54(1) dictates that “Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.”<sup>99</sup> The plain meaning of the text suggests that an award may include pecuniary obligations, and any pecuniary obligations will be treated as a final judgment in the host state. Nothing, however, suggests that an award is limited strictly to pecuniary obligations, and nothing suggests that a non-pecuniary award would be any less binding on a state.<sup>100</sup>

A survey of relevant tribunal decisions supports this point. The International Court of Justice (ICJ) has ordered specific performance in lieu of pecuniary relief on numerous occasions.<sup>101</sup> So too has the international community tolerated the issuance of non-pecuniary relief in non-ICSID arbitration.<sup>102</sup> In comparing these

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<sup>96</sup> MCLACHLAN ET AL., *supra* note 19, at 341–43; Christoph Schreuer, *Non-Pecuniary Remedies in ICSID Arbitration*, 20 ARB. INT’L 325, 325–26 (2004).

<sup>97</sup> ICSID Convention Regulation and Rules art. 48, April 10 2006, 1958, <https://perma.cc/PK77-DZZG> [hereinafter ICSID Convention].

<sup>98</sup> *Id.* at art. 53.

<sup>99</sup> *Id.* at art. 54(1).

<sup>100</sup> Professor Schreuer’s analysis of the Convention’s *travaux préparatoires* reinforces this argument. Schreuer, *supra* note 96, at 325–26.

<sup>101</sup> *See, for example*, Factory at Chorzów (Germ. v. Pol.), Merits, 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13); Temple of Preah Vihear (Cambodia v. Thai.), Judgment, 1962 I.C.J. Rep. 6 (June 15); United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. Rep. 3 (May 24); Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14 (June 27); Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. Rep. 3 (Feb. 14); LaGrand Case (Ger. v. U.S.), Judgment, 2001 I.C.J. Rep. 466 (June 27).

<sup>102</sup> *See, for example*, Arbitral Award in the Martini Case (It. v. Venez.), 3 May 1930, (1931) 25 Am. J. Int’l. L. 554; Trail Smelter Case (U.S. v. Can.), 3 R.I.A.A. 1905 (1941); Rainbow Warrior Affair

cases to those before the ICSID, the critical question is whether the nature of the ICSID Convention or the claim itself (that is, because BITs permit individuals to sue states directly) is substantially different than the ICJ or other tribunals.

The answer, according to ICSID tribunals, is no. In *Antoine Goetz v. Burundi*, an investor brought a claim against Burundi after the country revoked the investor's exemptions from certain taxes and customs.<sup>103</sup> The claimants requested the tribunal to require Burundi to reinstate these exemptions.<sup>104</sup> Finding Burundi's actions constituted an expropriation in violation of the Belgium-Burundi BIT, the tribunal warned:

[I]t falls to the Republic of Burundi, in order to establish the conformity with international law of the disputed decision to withdraw the certificate, to give adequate and effective indemnity to the claimants as envisaged in Article 4 of the Belgium-Burundi investment treaty, unless it prefers to return the benefit of the free zone [exemption] regime to them. The choice lies within the sovereign discretion of the Burundian government. If one of these two measures is not taken within a reasonable period, the Republic of Burundi will have committed an act contrary to international law the consequences of which it would be left to the Tribunal to decide.<sup>105</sup>

The tribunal, hinting that it would issue an order for specific performance, never followed through on its threat because the parties reached a settlement reinstating the tax exemptions a few months later.<sup>106</sup>

In 2005, the ruling in *Enron v. Argentina*<sup>107</sup> directly addressed whether ICSID tribunals could issue an injunction.<sup>108</sup> The claimants, contesting the newly imposed taxes as unlawful expropriations, asked the tribunal to enjoin Argentina permanently from collecting the taxes.<sup>109</sup> Argentina argued that the tribunal lacked jurisdiction to issue such an order.<sup>110</sup> The tribunal concluded: "An examination of the powers of international courts and tribunals to order measures concerning performance or injunction and of the ample practice that is available in this

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(N.Z. v. Fr.), Award, 20 R.I.A.A. 215 (1990) [hereinafter *Rainbow Warrior*]; *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. Government of the Libyan Arab Republic (U.S. v. Libya)*, Award on the Merits, 19 January 1977, 53 I.L.R. 389.

<sup>103</sup> *Goetz v. Republic of Burundi (Belg. v Burundi)*, ICSID Case No. ARB/95/3, Award (Feb. 10, 1999), 15 ICSID REV.-F.I.L.J. 457 (2000) [hereinafter *Goetz*].

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at ¶ 133.

<sup>106</sup> Schreuer, *supra* note 96, at 330.

<sup>107</sup> *Enron Corp. and Ponderosa Assets L.P. v. Arg. Republic, (U.S. v. Arg.)*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (Jan. 14, 2004), 11 ICSID Rep. 268 (2004) [hereinafter *Enron*].

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

respect, leaves this Tribunal in no doubt about the fact that these powers are indeed available.”<sup>111</sup>

Still, while the ICSID Convention and surrounding case law provide strong support for the notion that ICSID tribunals retain the ability to grant injunctions, states retain the right to limit the scope of this power. For example, Article 34 of the 2012 U.S. Model BIT provides specifically that:

(1) [w]here a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination, only: (a) monetary damages and any applicable interest; and (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution.<sup>112</sup>

Here, the U.S. strictly limits the remedies available to ICSID tribunals by requiring monetary damages.<sup>113</sup> To the extent that the tribunal believes restitution is appropriate, the U.S. may choose either to return expropriated property or to simply repay the monetary equivalent of that restitution.<sup>114</sup> The prevalence of these measures in existing BITs is unclear. For example, the U.S.-Argentina BIT, which was at issue in *Enron*,<sup>115</sup> has no such limits as currently written.<sup>116</sup> In fact, the only reference to awards that the treaty makes is to affirm (as is consistent with Article 53 of the ICSID Convention<sup>117</sup>) that “[a]ny arbitral award rendered pursuant to this Article shall be final and binding on the parties to the dispute.”<sup>118</sup> Thus, while the U.S. Model BIT’s reformulation of the tribunal’s ability to define an applicable award suggests that the state is aware, especially after *Enron*, of the broad grant of power to tribunals in the ICSID Convention, it has delayed in incorporating any meaningful limits into its existing treaties.

The example above demonstrates that the availability of non-pecuniary remedies will very likely depend on the text of individual BITs. Furthermore, as states continue to alter their investment regulatory regimes through either amendment or withdrawal from the BIT system entirely, academic efforts to generalize whether any given tribunal is authorized to grant an injunction will be necessarily limited. Not only do states adopt different BIT drafting strategies,<sup>119</sup> but these efforts may also be inconsistent over time. In these cases, practitioners

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<sup>111</sup> *Id.* at ¶ 79.

<sup>112</sup> U.S. Model BIT, *supra* note 24, at art. 34.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Enron*, *supra* note 107.

<sup>116</sup> U.S.-Argentina BIT, *supra* note 48.

<sup>117</sup> ICSID Convention, *supra* note 97.

<sup>118</sup> U.S.-Argentina BIT, *supra* note 48, at art. VII(6) (further requiring that “[e]ach Party undertakes to carry out without delay the provisions of the award and to provide in its territory for its enforcement”).

<sup>119</sup> See Section III, *supra*.

will not be able to rely on past experience or even past arbitral rulings to reach an answer; rather, they must look to the relevant treaty provisions at issue. This may strengthen the foreign investor's incentive to forum shop.

## B. Requirements for the Use of Non-Pecuniary Remedies under the FET Standard

If ICSID tribunals are capable of issuing non-pecuniary remedies, under what circumstances, if any, can a tribunal resort to such remedies? Thus far, all cases discussing the use of an injunction have concerned expropriation as the underlying breach of the BITs. However, there is no reason to think that the standard applied in expropriations cases would not also apply to FET breaches. The tribunal in *Enron* signaled that it would adopt the standard endorsed by the non-ICSID tribunal in the *Rainbow Warrior Affair*.<sup>120</sup> The tribunal in *Rainbow Warrior* established a two-part inquiry: whether (1) the state's "wrongful act has a continuing character;" and whether (2) "the violated rule is still in force at the time in which the order is issued."<sup>121</sup>

Applying this test to the facts of any number of FET violations would likely qualify for non-pecuniary relief. Take, for example, the facts of *Rompetrol*.<sup>122</sup> There, the Dutch company TRG claimed that the Romanian General Prosecutor's Office violated (among other things) the applicable BIT's FET provision during a series of investigations into the company, including the detention and interrogation of the company's controlling stake owner, Dinu Patriciu, a Romanian national.<sup>123</sup> The tribunal acknowledged that a "pattern of wrongful conduct" may rise to the level of an FET violation if the state fails to protect adequately the investor's interests.<sup>124</sup> Finding that the investigations failed to maintain the company's legitimate expectations, the Tribunal concluded that Romania had violated the FET standard.<sup>125</sup>

In *Rompetrol*, the FET provision was still in effect at the time the Court issued its order, and more importantly, the ongoing nature of the investigations makes the violation a likely candidate for non-pecuniary relief under *Rainbow Warrior*. This point is further strengthened by the fact that the claimant was unable to

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<sup>120</sup> *Rainbow Warrior*, *supra* note 102; *see Enron*, *supra* note 108, at ¶ 81 ("What kind of measures might or might not be justified, whether the acts complained of meet the standard set out in *Rainbow Warrior*, and how the issue of implementation that the parties have also discussed would be handled, if appropriate, are all matters that belong to the merits.").

<sup>121</sup> *Rainbow Warrior*, *supra* note 102, at 270.

<sup>122</sup> *Rompetrol*, *supra* note 65.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at ¶ 278.

<sup>125</sup> *Id.*

recover damages. Unlike the *Suez* tribunal, the tribunal in *Rompetrol* did not require a showing of damages to qualify for a FET violation.<sup>126</sup> Instead, should the claimant seek a monetary reward, the tribunal required a showing that the violation caused some economic loss.<sup>127</sup> Because the claimant failed to do so, its request for damages was denied, and the investor was left without a remedy.<sup>128</sup> In this scenario, a narrowly drafted injunction may better serve the claimant's interests.<sup>129</sup>

The example above demonstrates circumstances where the issuance of non-pecuniary measures would not only be a valid exercise of international law but also lead to a more equitable outcome than if only monetary awards were available. Furthermore, while *Rompetrol* points to a situation where an injunction is used as a sword, other circumstances suggest the injunction may be used as a shield. A risk-averse investor will almost always elect to pursue damages. If the investor runs into trouble with the state, it would likely wish to receive a cash award instead of continuing with the relatively risky endeavor within the state. In many circumstances, this outcome may be desirable because it encourages states to conform to legitimate investor expectations, puts the wronged investor in the same position as if the state had honored its commitments, and maintains the state's sovereign power to dictate domestic policy. However, at the same time, such an outcome runs against the ultimate goal of BITs, which is to develop nations through the importation of capital. Therefore, a state may prefer an injunction because the remedy would preserve the incentive for investors to remain in the host nation to continue their enterprise.

Here, the tools of contract law show the most promise. The law of specific performance has long considered this problem, and while the piecemeal solution in *Antoine Goetz*<sup>130</sup> allowed the parties to reach an agreement, the outcome gives little insight into the tribunal's decision-making process. Application of the principles of specific performance<sup>131</sup> will add some clarity to the tribunal's analysis. Emphasis on the adequacy of damages<sup>132</sup> purports to focus the tribunal on the difficulty of proving damages, the difficulty of procuring a suitable substitute for the breaching party's performance, and the likelihood that an award of damages will actually be collected. In the case of developing nations, all of these problems

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<sup>126</sup> *Rompetrol*, *supra* note 65.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> The injunction would have to be narrow because no tribunal should consider completely enjoining a country from conducting criminal investigations within its own borders.

<sup>130</sup> *Goetz*, *supra* note 103.

<sup>131</sup> RESTATEMENT (SECOND) OF CONTRACTS § 359(1) (1981) ("Specific performance or an injunction will not be ordered if damages would be adequate to protect the expectation interest of the injured party.").

<sup>132</sup> *Id.* at § 360.



may be present, and to some degree, these concerns have been latent in many of the decisions discussed above. Bringing these considerations to the forefront stands only to aid parties in predicting the behavior of tribunals, thereby allowing states and potential FET litigants to plan accordingly.

## V. CONCLUSION

This Comment has explored the current contours of the fair and equitable treatment standard. In particular, the Comment has focused on how modern iterations of the standard have brought an institutional crisis of legitimacy upon the international investment arbitration regime. For years, tribunals have found themselves facing a troublesome decision. Those bound by customary international law find themselves incapable of providing predictable and consistent statements of law that serve the complaints of investors. On the other hand, those bound by the public law approach risk compromising the sovereignty of states. For the time being, the schism between CIL and the list approach makes a uniform application of the FET standard impossible. Although there is no single solution that is likely to resolve the conflict of these interests, a starting point is the imposition of predictable principles onto tribunal decisions to reduce the existence or appearance of circularity or political impropriety. As such, this Comment's novel contribution is the extension of the contractual framework to remedies. Relying on the ICSID's broad grant to settle disputes through awards, this Comment argues that non-pecuniary obligations can, in limited circumstances, accomplish what other applications of the FET standard cannot. By emphasizing the states' consensual limitations on how they regulate, tribunals may meaningfully restore their legitimacy.