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Investor–State Arbitrations: Can the 'Fair and Equitable Treatment' Clause Consider International Human Rights Obligations?

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Abstract

The recent investor–state arbitration claim of *Piero Foresti, Laura De Carli and others* v. *Republic of South Africa* considers the extent to which international human rights obligations might be compromised by investor protections. In this regard, the paper examines the investor protection known as fair and equitable treatment (FET). It addresses this treatment obligation in the context of the South Africa–Italy bilateral investment treaty, and its invocation by investors who feel wronged by South Africa's black economic empowerment policies. It analyses the main interpretative theories of the FET clause, and concludes that it is to be interpreted as a self-contained treaty standard. This *sui generis* approach to interpreting FET clauses more accurately reflects the intentions of the state parties. Such a view supports the conclusion that international human rights should be considered in the interpretation of the FET clause.

Key words

black economic empowerment; fair and equitable treatment clause; human rights; investment law; investor–state arbitration

In the last four decades,[1] the pace of international investor–state adjudication has steadily increased. Despite some recent figures showing a decline,[2] this method of dispute settlement resolution offers procedural advantages and has been shown to lead to substantial payouts.[3] Nevertheless, it is almost inevitable that through an increase of such mixed arbitrations, tribunals will be called upon to grapple with sensitive policy issues.

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1 Based on the 1966 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 575 UNTS 159 (ICSID Convention); see ICSID, 'About ICSID', available at http://icsid.worldbank.org/ICSID/ICSID/AboutICSID_Home.jsp (last visited 30 July 2008).

2 UNCTAD, 'Latest Developments in Investor–State Dispute Settlement', (2008) *IIA Monitor* No. 1, available at www.unctad.org/Templates/StartPage.asp?intItemID=2310&lang=1 (last visited 30 August 2008).

3 For example, the tribunal in *CMS Gas Transmission Co. v. Argentina* (12 May 2005) ICSID No. ARB/01/8, 44 ILM 1205, at 1209, awarded US$149 million to the investors against Argentina; and in *CME Czech Republic B.V. (Netherlands) v. Czech Republic*, Final Award (14 March 2003) 9 ICSID 264 (hereinafter CME), US$350 million was awarded against the Czech Republic. See G. Mayeda, 'Playing Fair: The Meaning of Fair and Equitable Treatment in Bilateral Investment Treaties', (2007) 41 (2) *Journal of World Trade* 274.

In the recent claim of *Piero Foresti, Laura De Carli and others* v. *Republic of South Africa* (*Foresti* v. *South Africa*),[4] Italian mining companies (the Investors) found themselves subjected to the black economic empowerment (BEE) policies of South Africa. This, the Investors argue, amounts to a violation of the terms of the bilateral investment treaty (BIT) between South Africa and Italy. The novelty of *Foresti* v. *South Africa* is patent, as observed by Peterson: 'no arbitral tribunal is known to have grappled with the question as to how to reconcile a state's affirmative action policies with its investment treaty obligations'.[5] As is typical of most mixed arbitrations, the Investors seek to rely on a number of clauses contained in the South Africa–Italy BIT in order to impugn the conduct of the host state. Rather than consider all these arguments, this article focuses on the claim that the legal requirements of hiring black or historically disadvantaged persons violate the fair and equitable treatment (FET) clause of the South Africa–Italy BIT.

The aim of this article is to consider the legal framework in which substantive protections (namely international human rights obligations) can be considered under the FET clause in investor–state arbitrations and then the way in which South Africa can refute the claim made by the Investors. First, based on public information, it examines the Investors' claim; as mentioned above, never before have investors challenged a host state's affirmative action policies as being inconsistent with their international investment treaty obligations. In doing so, *Foresti* v. *South Africa* deals with substantive rather than procedural protections. Second, this paper considers a brief overview of the main interpretive theories that have been applied to FET clauses and the notion of 'legitimate expectations'; however, this paper argues that the FET clause is to be interpreted as a self-contained treaty standard. It is this approach that will allow for the *sui generis* nature of the Investors' claim in *Foresti* v. *South Africa* to be considered, and for the intentions of the states parties, as codified in the Vienna Convention on the Law of Treaties (VCLT),[6] to be determined more accurately. Third, in drawing on this legal framework, the article considers the incorporation of South Africa's affirmative action policies at the domestic level. This forms an important evidentiary element in construing the intentions of the states parties, and thus the protections that had been consented to, at the time the BIT was concluded, and hence the scope of the FET clause. As investors are subject to, and not yet subjects of, international law, this article seeks to refute the argument that the Investors were entitled to a 'legitimate expectation' that progressive policies aimed at ameliorating racial discrimination would not be introduced. Finally, it outlines the role that international non-treaty obligations can play in interpreting treaties, namely how international human rights obligations might be considered under the FET clause.

4 *Piero Foresti, Laura De Carli and others v. Republic of South Africa*, ICSID Case No. ARB(AF)/07/1.
5 L. Peterson, 'South Africa's Bilateral Investment Treaties – Implications for Development and Human Rights', (2006) *Dialogue on Globalization*, No. 26, at 32.
6 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331, at 340.

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1. *Piero Foresti, Laura De Carli and others* v. *Republic of South Africa*

At the outset it should be noted that the availability of official information on *Foresti* v. *South Africa* is limited. This being the case, to a large degree secondary sources have been relied on to piece together its details.

Foresti v. *South Africa*[7] is a case brought by the Italian owners of two granite firms against the South African government claiming approximately €266 million in compensation.[8] The demand for compensation is based on two discrete claims: first, that the divestiture of 26 per cent of the company's shares by the government violated the expropriation provisions of the BIT;[9] and, second, that so, too, did the imposition of selective hiring requirements. *Foresti* v. *South Africa* merits academic discussion, as 'foreign investors, for the first time, . . . [are seen to be invoking] international law protections in an effort to challenge central tenets of the . . . Black Economic Empowerment policy'.[10] This challenge, *Mining Weekly* speculates, will be vigorously defended by the South African government, as the BEE policies aim to redress the inequalities that remained post-apartheid.[11]

This article focuses on the argument that the BEE policies breach the FET clause contained in Article 2(3) of the South Africa–Italy BIT.[12] By way of background, the BEE policies allow for the imposition of 'ambitious quotas for the hiring of black managers'.[13] This is achieved under the Mineral and Petroleum Resources

7 The claim was registered with ICSID on 8 January 2007 under the subject matter of 'quarrying and trading enterprise'. The tribunal was constituted on 18 September 2007 and its first session was held in London on 11 December 2007. The president is Vaughan Lowe and the other two arbitrators are Charles Brower and Joseph Matthews. Regarding the constitution of the tribunal, see ICSID Convention, Arts. 37–40. Rules of Procedure for Arbitration Proceedings of ICSID were adopted by the Administrative Council of the Centre pursuant to Art. 6(1) of the ICSID Convention. See also ICSID, *Annual Report 2007*, available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnualReports# (last visited 25 June 2008), 47; ICSID, Case Information: Piero Foresti, Laura De Carli and others v. Republic of South Africa, available at http://icsid.worldbank.org/ICSID/FrontServlet (last visited 10 April 2008).

8 M. Judin, 'The International Centre for Settlement of Investment Disputes – *Piero Foresti, Laura De Carli and others v. Republic of South Africa*', available at www.elawnet.co.za/elawnetdata/publications/publicooo079_pub.pdf (last visited 24 June 2008).

9 The Investors' primary claim is that the expropriation clause in the BIT was violated when they were 'forced to divest 26% of their investments to [Black or] Historically Disadvantaged South Africans'. This expropriation claim is based on Arts. 2(3) and 3(1) of the South Africa–Italy BIT. The claimants maintain that 'the [Mineral and Petroleum Resources Development Act 2002 (South Africa)] extinguished their ownership of mineral rights in South Africa, without providing "prompt, adequate and effective compensation"', as required by Art. 4(2). While it does not form the focus of this paper, the argument of expropriation is central to the claim being made by the Investors in *Foresti v. South Africa* (L. Peterson, 'European Mining Investors Mount Arbitration over South African Black Empowerment, *Investment Treaty News*, 14 February 2007, available at www.iisd.org/pdf/2007/itn_feb14_2007.pdf (last visited 30 June 2008)).

10 Peterson, *supra* note 5, at 32.

11 L. Peterson, 'Italian Government Distancing Itself from Dispute between Italian Miners and South Africa', *Investment Treaty News*, 16 March 2007, available at www.iisd.org/pdf/2007/itn_mar16_2007.pdf (last visited 30 August 2008).

12 Art. 2(3) states: 'Each Contracting Party shall at all times ensure just and fair treatment of the investments of investors of the other Contracting Party. Each Contracting Party shall ensure that the management, maintenance, use, transformation, enjoyment or assignment of the investments effected in their territory by investors of the other Contracting Party, as well as companies and enterprises in which these investments have been effected, shall in no way be subject to unjustified or discriminatory measures.'

13 Peterson, *supra* note 5.

Development Act, which provides that '[t]he Minister may facilitate assistance to any historically disadvantaged person to conduct prospecting or mining operations' under 'such terms and conditions as the Minister may determine'.[14] Through this procedure, affirmative action policies have been implemented in various legislative provisions and will be considered in detail (section 3.1, *infra*).

From a procedural perspective, although South Africa is not a party to the Convention of the International Centre for the Settlement of Investment Disputes (ICSID),[15] both parties have consented to adjudication pursuant to the Additional Arbitration Rules.[16] The first session of the tribunal was held on 11 December 2007, and the proceedings are currently pending.[17] The fact that, to date, tribunals have, in the words of Peterson, 'scarcely wrestled with such thorny legal questions',[18] renders the consideration of the governing principles on which *Foresti* v. *South Africa* might be decided highly topical and relevant to the realm of human rights and international investment law. As it currently stands, the Italian government, after having submitted an aide-memoire with regard to *Foresti* v. *South Africa*, shifted *Foresti* v. *South Africa* from the state-to-state plane to become a matter between a state and a non-state actor, and 'is now taking a hands-off approach'.[19] *Foresti* v. *South Africa* will be closely watched by other mining companies in similar situations,[20] and if the Investors prove to be successful, perhaps will even be duplicated.

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14 Arts. 12(1) and 12(2) of the Mineral and Petroleum Resources Development Act 2002 (South Africa) (MPRDA) respectively.

15 ICSID, List of Contracting States and Other Signatories of the Convention, available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ContractingStates&ReqFrom=Main (last visited 27 June 2008).

16 Art. 8(3)(c) of the South Africa–Italy BIT states, 'In the event that such dispute cannot be settled amicably within six months of the date of the written application for settlement, the investor in question may submit at his choice the dispute for settlement to: . . . the International Centre for Settlement of Investment Disputes (ICSID), for the implementation of the arbitration procedures under the Washington Convention of 18 March 1965, on the settlement of investment disputes between States and Nationals of other States, if or as soon as both the Contracting Parties have acceded to it. As long as this requirement is not met, each Contracting Party agrees that the dispute may be submitted to arbitration pursuant to the rules of the Additional Facility of ICSID, of 1978.'

17 On 2 November 2009, the claimants requested the discontinuance of the ICSID arbitral proceedings in *Foresti v. South Africa*. In early December 2009, an announcement on the ICSID website indicated that South Africa had objected to such a request and on 20 November 2009 had filed an application for a default award. The tribunal has given the claimants until mid-January 2010 to respond (E. Whitsitt, 'An End to European Mining Claims in South Africa?', Investment Treaty News, 6 December 2009, available at www.investmenttreatynews.org/cms/news/archive/2009/12/04/an-end-to-european-mining-claims-in-south-africa.aspx).

18 L. Peterson, 'South African Arbitration May Raise Delicate Human Rights Issues', *Investment Treaty News*, 14 February 2007, available at www.iisd.org/pdf/2007/itn_feb14_2007.pdf (last visited 30 June 2008). The existence of a stabilization clause, protecting investors' interests from subsequent changes to the host state's law that might affect investment, does not seem to be in question in *Foresti* v. *South Africa*. See A. Shemberg, 'Stabilization Clauses and Human Rights', (2008) IFC/SRSG Research Paper, available at ila-hq.org/pdf/British%20Branch%20Events/Papers_2008/IFC-SRSG%20Stabilization%20%20Final.pdf (last visited 25 July 2008).

19 Peterson, *supra* note 11.

20 For example, Malaysia has similarly excluded measures designed to promote the economic empowerment of the Bumiputras ethnic group from the scope of its BITs. H. Mann, 'International Investment Agreements, Business and Human Rights: Key Issues and Opportunities', IISD (2008), available at www.iisd.org/pdf/2008/iia_business_human_rights.pdf (last visited 24 June 2008), at 11–12; M. Sornarajah, *The International Law on Foreign Investment* (2004), 120–1, 366–7.

2. THE 'FAIR AND EQUITABLE TREATMENT' CLAUSE

The precise meaning and nature of the FET clause has, to date, remained unclear. This was emphasized by Rosalyn Higgins, a former president of the International Court of Justice (ICJ), who commented that FET to nationals and companies 'are legal terms that are well known in the field of overseas protection',[21] but there has been a failure to explain what FET specifically entails. Scholars such as Dolzer, Falsafi, and Bronfman regard FET as having been included in BITs as an 'all-encompassing' provision that embraces generality.[22] Dolzer refers to it as concerning perhaps 'a very broad number of governmental acts',[23] while Falsafi considers that it 'may unduly be injected into the corpus of international law as a customary rule binding on all states'.[24] The generality of the FET clause has mainly provided for investors 'to round out [any given] case and to argue, on an additional basis, in favour of a violation of [FET]'.[25] Also to the advantage of investors, the FET clause has commonly been considered to provide more for procedural than for substantive fairness.[26] In subsection 2.1 the argument of the 'legitimate expectations' of investors under the FET clause will be considered.

Despite the uncertainty in which the FET clause is shrouded, what is certain is that the FET standard is not rooted in the domestic law of the host state, but

21 *Oil Platforms Case (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment of 12 December 1996, [1996] ICJ Rep. 803, at 858 (Judge Higgins, Separate Opinion); see also R. Dolzer, 'Fair and Equitable Treatment: A Key Standard in Investment Treaties', (2005) 39 *International Law* 87.

22 'It appears that the authors of BITs considered that it was desirable to include a general standard, in addition to the specific rules, which would cover such issues and matters relevant for the desirable extent of protection which did not fall under the specific rules.' Dolzer, *supra* note 21, at 89. 'Essentially, the purpose of the clause as used in BIT practice is to fill gaps which may be left by the more specific standards, in order to obtain the level of investor protection intended by the treaties.' Ibid., at 90. See also A. Falsafi, 'The International Minimum Standard Treatment of Foreign Investors' Property: A Contingent Standard' (2007) 30 (2) *Suffolk Transnational Law Review* 317; M. Bronfman, 'Fair and Equitable Treatment: An Evolving Standard', in A. von Bogdandy and R. Wolfrum (eds.), (2006) 10 *Max Planck Yearbook of United Nations Law* 618. 'While there is still no precise definition of the content of this standard, its inclusion in bilateral investment treaties serves several purposes, not only as a basic standard but also an auxiliary element for the interpretation of specific provisions of the treaty or in order to fill gaps in the treaty.' J. Head, *Principles and Practice of International Commerce and Investment* (2007), 547.

23 Dolzer, *supra* note 21, at 88.

24 Falsafi, *supra* note 22, at 317. Due to its inclusion in almost two thousand bilateral investment agreements, it has reached the status of customary international law: S. Schwebel, 'The Reshaping of the International Law of Foreign Investment by Concordant Bilateral Investment Treaties', in S. Charnovitz, D. Steger, and P. van der Bossche (eds.), *Law in the Service of Human Dignity* (2005), 241, at 244–5; A. Alvarez-Jiménez, 'Minimum Standard of Treatment of Aliens, Fair and Equitable Treatment of Foreign Investors, Customary International Law and the Diallo Case before the International Court of Justice' (2008) 9 (1) *Journal of World Investment and Trade* 52.

25 Dolzer, *supra* note 21, at 87. See also Falsafi, *supra* note 22, at 317, where it is claimed that '[i]t is no coincidence that almost all claims of expropriation arising from investment treaties are coupled with an alleged breach of the obligation of fair and equitable treatment.'

26 For example, consider T. Franck, *Fairness in International Law and Institutions* (1995), at 440, where Franck states that the purpose of international law is to 'create a legitimate framework within which future, unanticipated disputes can be addressed through further discourse or institutions and rules of process-legitimacy'. In a working paper by the Organisation for Economic Co-operation and Development (OECD) there is no provision for substantive protection to be afforded to the profitability of investments by the principle of FET. See OECD, 'Fair and Equitable Treatment Standard of International Investment Law', Working Papers on International Investment No. 2004/03, 9. See also Mayeda, *supra* note 3, at 284–7.

rather in international law.[27] With regard to this, Tudor claims that as the 'FET standard is part of the body of international law, most of the times the state took a direct engagement (signing a BIT) to respect this international obligation, therefore domestic law cannot justify its failure to comply with the obligation'.[28] In *Foresti* v. *South Africa*, South African law therefore remains relevant, but it is the principles of international law that will determine the precise scope and application of the FET clause.

It is important to bear in mind that the very nature of the adjudicative process provides for a distinct lack of rigour in enunciating the basis on which decisions are reached. Nevertheless, three main interpretative theories are deemed to have evolved, and include FET (i) as an independent self-contained treaty standard; (ii) as an international minimum standard required by customary international law (CIL); and (iii) as considered in the context of general principles of international law, including all sources.[29] The congenital problem is that all these interpretations suffer from the desire to create some sort of overarching principle for determining the application of FET clauses. The thrust of the situation is that every FET clause, to some degree, needs to be considered as *sui generis*. In this respect, the first interpretation conforms most closely and will be outlined in subsection 2.2, and the *sui generis* nature of *Foresti* v. *South Africa* will be discussed in subsection 2.3.

2.1. 'Legitimate expectations' – of the investors?

In the past, the majority of claims brought by investors within the ambit of FET related to the violation of the investor's 'legitimate expectations'. Investors, generally, have argued that they were entitled to rely on certain expectations being satisfied, such as no material change in the legal regime applicable to them. Thus it seems that 'legitimate expectations' are the lowest common denominator that can be seen to constitute a violation of most FET clauses. Under most circumstances, if a breach of a 'legitimate expectation' were to be established, then it can be accepted as a violation of the FET clause.[30]

In general, investors depend on the pre-investment state of the law of the host state when deciding whether or not to invest in the territory of that host state. If a

27 Peterson, *supra* note 5, at 33; Falsafi, *supra* note 22, at 354; Dolzer, *supra* note 21, at 88. See also *ADF Group Inc. v. United States of America* (16 December 2002), ICSID Case No. ARB (AF)/ 00/ 1 (16 December 2002), (2004) 6 ICSID Rep. 470, at para. 195; *Mondev International Ltd. v. United States of America* (11 October 2002), ICSID Case No. ARB (AF)/99/2, (2003) 42 ILM 85, para. 106.

28 I. Tudor, *The Fair and Equitable Treatment Standard of the International Law of Foreign Investment* (2008), 144.

29 For discussion on the three theories see C. Yannaca-Small, 'Fair and Equitable Treatment Standard in International Investment Law' (2004), Working Papers on International Investment No. 2004/3, at 8–40. Bronfman also claims there to be a fourth theory that focuses on the FET clause being an independent rule of CIL, but this has been considered under interpretation (ii). Bronfman, *supra* note 22, at 632.

30 FET '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': *Tecnicas Medioambientales TECMED S.A. v. Mexico* (29 May 2003), ICSID Case No. ARB (AF)/00/2, at para. 154 (hereinafter *Tecmed*). It might also have 'been established that the guarantees given in this connection under the legal framework and its various components were crucial for the investment decision'. *CMS v. Argentina*, (2005) 44 ILM 1205, para. 275. The requirement of 'transparency' has also been linked to 'legitimate expectations': *Metalclad Corporation v. United Mexican States* (1999), ICSID Case No. ARB(AB)/97/1, para. 76. See also B. Choudhury, 'Evolution or Devolution? Defining Fair and Equitable Treatment in International Investment Law', (2005) 6 (2) *Journal of World Investment and Trade* 308.

dispute were to arise, investors would want to be able to rely on a guarantee of stability that the domestic law as it stood when the investment was acquired would not be materially altered.[31] In the words of Dolzer, underlying the applications of FET 'are the basic themes of stability of the law and, seen from the investor's perspective, predictability of the requirements to be met and the rights to be granted'.[32] The *Tecmed* tribunal claimed that the concern was the foreign investor's ability 'to know beforehand'[33] and the *CME* tribunal held that a violation of the FET standard can occur by the 'evisceration of the arrangements in reliance upon [which] the foreign investor . . . [had been] induced to invest'.[34] This approach was also applied in *MTD Equity* v. *Chile*,[35] but it was the *Saluka* tribunal that defined legitimate and reasonable expectations to include 'that the [host state] will not act in a way that is manifestly inconsistent, non-transparent, unreasonable (i.e. unrelated to some rational policy), or discriminatory (i.e. based on unjustifiable distinctions)'.[36] In relation to *Foresti* v. *South Africa*, the Investors are likely to argue a breach of their 'legitimate expectations', based on the BEE policies not having been explicitly provided for in the domestic law of South Africa at the time the South Africa–Italy BIT was signed, and hence claim that this amounts to a breach of the FET clause.[37]

Historically, it can be concluded that the FET clause was used to provide procedural protections to investors. However, an important consideration is whether or not, under the FET clause, not only procedural but also substantive protections can be provided for. This, in turn, may create a parallel shift in the usage of the FET clause from being more 'investor-friendly' to enjoying a more balanced adaptation.

2.2. The FET clause as a self-contained treaty standard

One interpretation of the FET clause, as expressed by Bronfman, Vasciannie, and the United Nations Conference on Trade and Development (UNCTAD), is that it is a self-contained treaty standard. The FET clause is

> to be interpreted according to the real intention of the parties. In other words, grant the best protection to the investor, which implies the fairest and most equitable conduct by the host state in regard to the specific facts of the case.[38]

This approach is confirmed by the UNCTAD study, which looks to the meaning of the words themselves: 'the central issue remains simply whether the actions in question are in all circumstances fair and equitable or unfair and inequitable', and asserts firmly that the FET 'is not synonymous with the international minimum

31 Dolzer, *supra* note 21, at 103.
32 Ibid., at 104. The 'stability of the legal and business framework is an essential element of fair and equitable treatment in this case': *LG&E v. Argentina* (2003), ICSID Case No. ARB/02/1, at para. 124.
33 *Tecmed*, *supra* note 30, para. 154.
34 CME, *supra* note 3, para. 611.
35 *MTD Equity Sdn. Bhd. v. Chile (Malay. v. Chile)* (25 May 2004), ICSID Case No. ARB/01/7, at para. 115.
36 *Saluka Investments B.V., v. Czech Republic* (Partial Award) (17 March 2006), under UNCITRAL Rules, at para. 309.
37 It is to be noted that of importance to 'legitimate expectations' is the level of knowledge required by investors of the law of the host state at the time the investment was acquired. For example, see *GAMI Investments Inc. v. United Mexican States* (15 November 2004), ICSID Case No. ARB(AF)/ 98/ 3; (2005) 44 ILM 545.
38 Bronfman, *supra* note 22, at 678. See also S. Vasciannie, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice', (2000) 70 *British Yearbook of International Law* 103.

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standard'.[39] Mann adds that in relation to the meaning of the words, 'No standard defined by other words is likely to be material. The terms are to be understood and applied independently and autonomously'.[40] Others have shifted away from interpreting the words themselves, but have stated that in adopting such a vague concept, the state parties must have intended the FET clause to be a self-contained standard, otherwise they would have inserted a precise interpretation of the FET guarantee.[41]

The conceptualization of the FET clause can be characterized as developing in an evolutionary manner, and time has affected the traditional understanding attributed to it as a self-contained treaty standard. For example, in the words of Vasciannie, 'The plain meaning approach [whether particular treatment meted out to that investor is both 'fair' and 'equitable'] is, no doubt, entirely consistent with canons of interpretation in international law'.[42] In *Tecnicas* v. *United Mexican States*,[43] the FET clause as an independent self-contained treaty standard was mentioned in the alternative. Also, in 2004, a more significant stance was taken in *OEPC* v. *Republic of Ecuador*,[44] where the tribunal directly linked the FET clause of a BIT, worded as a free-standing requirement, to the particular language of the BIT's Preamble: '. . .fair and equitable treatment is desirable in order to maintain a stable framework for investment and maximum utilization of economic resources'.[45] However, in 2007, the *PSEG* v. *Republic of Turkey*[46] tribunal claimed that the FET acquired 'a standing on its own, separate and distinct from that of other standards, albeit many times closely related to them'.[47] It must be said that this approach to interpreting FET clauses is used relatively infrequently and tends only to be mentioned in the alternative or as an aside. However, the conceptual method of interpreting FET clauses in this manner has much to commend it; this allows for the *sui generis* nature of the dispute and the intentions of the state parties, as provided for under the VCLT, to be at the forefront.

2.3. The *sui generis* nature of *Foresti* v. *South Africa*

Every FET clause, to some degree, needs to be considered as *sui generis*. In interpreting the FET clause, primary resort should properly be had to Articles 31 and 32 of the VCLT as indicative of the intentions of the state parties to the BIT. Article 31(1)

39 UNCTAD, *Fair and Equitable Treatment* (1999), 40.

40 F. Mann, 'British Treaties for the Formation of Investment', (1991) 52 *British Yearbook of International Law* 244. Sornarajah claims that Mann's statement 'could not have anticipated the manner in which it was later employed in NAFTA litigation'. Sornarajah, *supra* note 20, at 333. Indeed, Mann later stated that '[s]ome cases, it is true, merely repeat, perhaps in slightly different language, what in essence is a duty imposed by customary international law'. F. Mann, *The Legal Aspect of Money: With Special Reference to Comparative Private and Public International Law* (1992), at 510.

41 R. Dolzer, and M. Stevens, *Bilateral Investment Treaties* (1995), 60.

42 Vasciannie, *supra* note 38, at 103.

43 *Tecmed, supra* note 30.

44 *Occidental Exploration and Production Company (OEPC) v. Republic of Ecuador* (1 July 2004), Final Award, Case No. UN 3467.

45 Ibid., at para 185. Therefore, in para. 183, the tribunal directly concluded that '[t]he stability of the legal and business framework is thus an essential element of fair and equitable treatment.'

46 *PSEG Global Inc. v. Republic of Turkey* (19 January 2007), ICSID Case No. ARB/ 02/ 4.

47 Ibid., at para. 239.

provides for a treaty to be interpreted in 'good faith in accordance with the ordinary meaning' of the treaty in reference to its 'context and in light of its object and purpose'. In order to understand the intentions of South Africa and Italy under the South Africa–Italy BIT, Article 31(3)(c) of the VCLT allows, 'together with the context', for account to be taken of 'any relevant rules of international law applicable in the relations between the parties'. In the words of van Aaken, 'A distinction has to be drawn conceptually between the *application* of other (general or special) norms of international law in investment disputes directly on the one hand and the *interpretation* of [an] investment norm by considering non-investment law, indirectly, mainly through Art. 31(3)(c) . . . [of the VCLT] on the other hand'.[48] Nevertheless, there may be only a fine line between applying non-investment law directly and importing it through interpretation.[49] Klabbers adds that 'the interpreter can literally include anything – or, as the case may be, exclude things'.[50] Even the International Law Commission (ILC) claims that 'Article 31(3)(c) deals with the case where material sources external to the treaty are relevant to its interpretation. These may include other treaties, customary rules or general principles of law.'[51] Thus Article 31(3)(c) has been described as operating like a 'master key' in the house of international law.[52] For the purposes of this article, Article 32 of the VCLT might also be considered a 'supplementary means of interpretation' where an Article 31 interpretation is (i) 'ambiguous or obscure' or (ii) 'leads to a result which is manifestly absurd or unreasonable'. The subsequent sections will, directly or indirectly, refer to the intentions of the state parties in *Foresti* v. *South Africa*. It is important to bear this in mind, as it is their intentions and the protections that they had intended to provide that will or will not allow for a human rights framework, within international investment law, to be considered.

This approach emphasizes a fundamental and primary role of states in determining the application of BITs, and confirms the fact that although investors are subject to international law, they are not yet subjects of it. Thus the protections extended to the Investors should be determined on the basis of the intentions of the state parties, not those of the Investors themselves. Such a consideration provides for the correct understanding of how an FET clause is to be interpreted. The question to be posed is – how is the FET clause in the Italy–South Africa BIT to be interpreted

48 A. van Aaken, 'Fragmentation of International Law: The Case of International Investment Law', Law and Economics Research Paper Series, Working Paper No. 2008-1, available at http://ssrn.com/abstract=1174482 (last visited 20 August 2008), at 10 (emphasis in original); see also J. Klabbers, 'Reluctant Grundnormen: Articles 31(3)(c) and 42 of the Vienna Convention on the Law of Treaties and the Fragmentation of International Law', in M. Craven, M. Fitzmaurice, and M. Vogiatzi (eds.), *Time, History and International Law* (2006), 144.

49 Van Aaken, *supra* note 48, at 11.

50 Klabbers, *supra* note 48, at 161.

51 ILC, 'Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', adopted by the ILC at its Fifty-Eighth session, in 2006, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/61/10, para. 251), at para. 18.

52 ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission, finalized by M. Koskenniemi, A/CN.4/L.682 of 13 April 2006, para. 419.

when considering what protections Italy and South Africa *intended* to extend to the Investors?

3. Investors as subject to, not subjects of, International Law

3.1. At the domestic law level of the host state: affirmative action policies under South African law

Although the tribunal will undoubtedly apply international law in determining the purport of the FET clause in question for the reasons provided for above, the affirmative action policies in South Africa provide insight into the intention of the state parties both now and at the time of concluding the BIT.

South African law, as it stands, considers compliance requirements for BEE policies through various legislation, most importantly the Broad-Based Black Economic Empowerment Act 2003 (BEE Act).[53] Article 2 provides for the objectives to include broad-based BEE facilitation and '(a) promoting economic transformation ... to enable meaningful participation of black people in the economy; [and] (b) achieving a substantial change in the racial composition of ownership and management structures'. The BEE Act is based on the South African constitution[54] that came into operation in 1996, prior to the signing of the South Africa–Italy BIT,[55] and 'refers to affirmative action ... as a means to ensure the achievement of substantive equality'[56] and 'not as an exception to a notion of formal equality'.[57] Section 9 of the constitution specifically deals with equality and non-discrimination. Section 9(2), the so-called affirmative action provision but not termed as such,[58] provides that in order to 'promote the achievement of equality, legislative and other measures designed to protect or advance persons ... disadvantaged by unfair discrimination may be taken'. Unfair discrimination by anyone is prohibited, according to Section 9(2), which includes the Investors.

At the time the South Africa–Italy BIT came into force, national legislation had not been enacted to give effect to the above provisions. This was not done until 2000, in the form of the Promotion of Equality and Prohibition of Unfair Discrimination Act.[59] Thus the Investors may argue that the subsequent BEE laws amount to a violation of their 'legitimate expectations', such as that the legal regime would not change as at the time the BIT was signed. However, as stated above, South Africa's constitution provides for so-called affirmative action measures to redress the inequalities that existed post-apartheid, and it was in force before the signing of South Africa–Italy

53 Broad-Based Black Economic Empowerment Act 2003 (South Africa).
54 The Constitution of the Republic of South Africa, 1996, adopted by the Constitutional Assembly and certified (at the second attempt) by the Constitutional Court as being in accord with the Constitutional Principles contained in the interim Constitution.
55 This was signed on 9 June 1997.
56 O. Dupper, 'Affirmative Action in South Africa: (M)Any Lessons for Europe?' (2006) 39 (2) *Verfassung und Recht in Übersee* 135. Affirmative action is also referred to as 'positive action' (at 139).
57 Ibid., at 143.
58 G. Carpenter, 'South Africa and the Human Rights Experience since 1994', (2004) 45 (2) *Codicillus* 3.
59 Promotion of Equality and Prohibition of Unfair Discrimination Act 2000 (South Africa). This Act specifically targets unfair discrimination by private persons or bodies.

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BIT. Based on existing jurisprudence and the circumstances surrounding *Foresti* v. *South Africa*, a reasonable person might expect South Africa to have implemented domestic laws, as it did, to address the racial inequalities. Thus the likely argument of the Investors, that the FET clause entitles them to assume that their 'legitimate expectations' would be respected, prima facie should not hold true; more specifically, the question of whether or not the South African government's introduction of the BEE policies would constitute a violation of the Investors' 'legitimate expectations' would likely be decided in the negative. Thus it is to be concluded that due to the nature of the policies and, a fortiori, South Africa's unique position post-apartheid would not allow for such expectations of the Investors to be considered 'legitimate'.

3.2. At the international law level: racial discrimination and the principle of *jus cogens*

Two arguments may be advanced in support of the South African government's affirmative action policies. The first considers whether or not, at the outset, the treaty norm preventing the introduction of such policies falls foul either of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)[60] definition or of a principle of *jus cogens* prohibiting racial discrimination. This revolves around the argument that 'legitimate expectations' cannot be considered to include an entitlement to be free from policies that seek to remedy racial discrimination, and that the FET clause cannot preclude such policies, as it would contradict a principle of *jus cogens* against racial discrimination. Although this argument appears seemingly attractive, this section sets out to prove how unlikely it is to provide an answer to the government's policies. This is because it is not clear that the prohibition on racial discrimination contains a positive power to implement policies seeking to eliminate it. Furthermore, even if such a principle were found to exist, it is highly unlikely that it could be said to constitute a principle of *jus cogens* such that it would invalidate any provision of the BIT prohibiting the implementation of such policies.

The most widely accepted definition of racial discrimination is that given in Article 1(1) of the ICERD:[61] 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life'. Variations of this definition have been adopted to accommodate given situations, but for the purposes of this article, this definition is to be considered applicable.

As mentioned, norms that can override treaty obligations are principles of *jus cogens* (also referred to as 'peremptory norms'). These are non-derogable rules of international 'public policy'. Byers claims them to 'render void other, non-peremptory

60 1969 International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195.
61 M. Shaw, *International Law* (2003), at 266.

rules which are in conflict with them'.[62] The principles of *jus cogens* can now be found in the VCLT,[63] but even before, Abi-Saab claimed that if the normative category of *jus cogens* were to be an 'empty box, the category would still [be] useful; for without the box, it cannot be filled'.[64] The 'empty box' analogy has been subject to varying interpretations. Judge Tanaka in the *South West Africa* case[65] stated, 'surely the law concerning the protection of human rights may be considered to belong to the *jus cogens*'.[66] Dugard claimed that '[t]he elimination of racial discrimination and apartheid features prominently in the international public order and . . . [i]t is therefore impossible to deny to this principle the rank of *jus cogens*'.[67] Crawford also viewed the principles of racial equality and non-discrimination as belonging to general international law and even *jus cogens*.[68] According to the ILC, '[t]hose peremptory norms that are clearly accepted and recognized include . . . racial discrimination'.[69] The Inter-American Court of Human Rights also held that '[t]he effects of the fundamental principle of equality and non-discrimination encompass all states, precisely because this principle . . . belongs to the realm of *jus cogens* and is of a peremptory character'.[70] Enough jurisprudence and various views suggest that racial discrimination belongs to the 'broad' principle of *jus cogens*.

An alternative view, advanced by Peterson and Gray, chooses to focus on the actions of investors as violating the principle of *jus cogens* prohibiting racial discrimination. In this regard, they stated that 'it is less clear how an investor's alleged violation of such norms would impact an investment treaty arbitration. The treaty itself would not be invalidated, but the jurisdiction of the tribunal and the substantive merits of the investor's claims might be invalidated'.[71] However, such an approach raises considerable theoretical questions, notably how, in the absence of precedent

62 M. Byers, 'Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes Rules*', (1997) 66 *Nordic Journal of International Law* 211.

63 Nevertheless, principle of *jus cogens* 'found its way into positive international law during the preparations for the [VCLT] . . . the concept was moulded into articles 53 and 64' (ILC, *supra* note 52, at para. 362). According to Art. 53 of the VCLT, a peremptory norm is 'a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.

64 G. Abi-Saab, 'The Third World and the Future of International Legal Order', (1973) 29 *Revue égyptienne de droit international* 53; see also A. Bianchi, 'Human Rights and the Magic of *Jus Cogens*', (2008) 19 EJIL 491.

65 *South West Africa Case (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase, Judgment of 18 July 1966, [1966] ICJ Rep. 298.

66 Ibid., at 296 (dissenting opinion of Judge Tanaka).

67 J. Dugard, *Recognition and the United Nations* (1987), 158. Bos commented that it is in the very nature of *jus cogens* to bind every state, even a persistent objector. M. Bos, 'The Identification of Custom in International Law' (1982) 25 *German Yearbook of International Law* 43. See also L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law* (1988).

68 J. Crawford, *The Creation of States in International Law* (1979), 226–7.

69 ILC, The Report of the International Law Commission on the Work of its Fifty-Third Session, Official Records of the General Assembly, Fifty-Sixth session, Supplement No. 10 (A/56/10), at 208. Also, emphasized by scholars, see, e.g., I. Brownlie, *Principles of International Law* (2003), 515. Protection from racial discrimination has also been referred to as an *erga omnes* obligation; see *dictum* in *Barcelona Traction, Light & Power Co.*, [1970] ICJ Rep. 3, (1970) 64 AJIL 653 (paras. 33–35). However, *erga omnes* rules need not necessarily also be of a *jus cogens* character. Byers, *supra* note 62, at 237.

70 *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion, judgment of 17 September 2003, Inter-American Court of Human Rights (ser. A) No. 18, at para. 110.

71 L. Peterson and K. Gray, *International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration* (2003), at 19.

or commentary, principles of *jus cogens* can be extended to oust the jurisdiction of the tribunal or invalidate the claim of investors. Perhaps the better view is to focus on the acts of the South African government in introducing the policy, and to consider whether or not they were entitled to do so. Such a position is reinforced by the fact that in order to determine a violation of a provision of the BIT, a review of the acts of the host state needs to be considered and whether or not these fall foul of the provisions of the BIT.

However, in asserting that any principle of *jus cogens* prohibiting racial discrimination translates into a positive power, allowing for a state to engage in positive policies aimed at rectifying historic injustices and economic disparity between races is questionable. Operating on the assumption that the ILC and others are correct in claming that racial discrimination is a principle of *jus cogens*, the question remains whether or not the principle coincides with the term 'racial discrimination' as understood in the ICERD definition to encompass a denial of the obligation to hire black or historically disadvantaged persons, and further whether or not this definition includes the positive power to permit a state to implement policies that seek to eliminate such discrimination. In determining a breach of any given BIT, focus must be placed on the actions of the state respondent, not the investor. Additionally, any argument that the prohibition on racial discrimination qua a principle of *jus cogens* permitting the implementation of such powers is, leaving aside thorny questions of the legitimacy of the concept of *jus cogens* itself, fraught with insurmountable conceptual difficulties.

3.3. Applicable non-investment treaty obligations?

Having considered and dismissed as unlikely the possibility that a principle of *jus cogens* prohibiting racial discrimination could provide the South African government with the power to enact policies seeking to remedy such discrimination, this section considers the second argument in support of the South African government's affirmative action policies – whether or not, on the interpretation of the clause itself, it could have been within the consent of the parties that they should not be permitted to introduce such policies to ameliorate racial discrimination, as long as they are not highly discriminatory, arbitrary, or in some other way offensive to notions of fairness and equity.

Coming to this conclusion will be aided by the other non-investment treaty obligations of both South Africa and Italy. By way of background, it is not new for tribunals to take non-investment treaty obligations into account when considering investor–state arbitrations. In *Maffezini* v. *Spain*, it was noted that international environmental law supported the legitimacy of a foreign investor being required to undertake an environmental impact assessment report, prior to establishing its business.[72] In *Parkerings*, the United Nations Educational, Scientific and Cultural Organisation (UNESCO) World Cultural Heritage was relied on by the tribunal in

72 Ibid., at para. 67.

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establishing that no discrimination had occurred.[73] The same UNESCO designation also had an impact on the damages determination in *SPP* v. *Egypt*.[74]

The FET clause, like any other clause in an international treaty, is to be interpreted according to the VCLT, as has been specified above. On a plain reading of any given FET clause, it becomes immediately clear that the words are characterized by a high degree of ambiguity. Thus, relying on Article 31(3)(c) or Article 32, as the case may be, one is entitled to take into consideration the surrounding circumstances. If the provisions are properly applied, there is scope within the terms of BITs, in the words of Mann, for 'international human rights law [to] impose . . . a positive duty on states to adopt and enforce measures necessary to ensure that the economic activities carried on by business within their territory do not negatively impact the human rights of its people'.[75] In relation to *Foresti* v. *South Africa*, various non-investment treaty obligations evince the intentions of South Africa and Italy. The prohibition of discrimination on racial grounds, *inter alia*, can be found in Articles 55 and 56 of the UN Charter,[76] Articles 2 and 7 of the Universal Declaration of Human Rights (UDHR),[77] the International Covenant on Civil and Political Rights (ICCPR),[78] the ICERD, and the Discrimination (Employment and Occupation) Convention (ILO Convention).[79, 80] Of these, only the UN Charter and ILO Conventions were signed and ratified by South Africa and Italy prior to the signing of the South Africa–Italy BIT, dated 9 June 1997.[81] The combination of these instruments seems to suggest that the state parties would not have intended to hamper each other's legitimate policies aimed at the eradication of such discrimination, and, indeed, this seems to

73 *Parkerings-Compagniet AS v. Republic of Lithuania* (11 September 2007), ICSID Arb Case No. ARB/05/8, sec. 8.3.1.

74 *SPP v. Egypt* (14 April 1988), dec. on jurisdiction, 3 ICSID Reports 142/3. This was an arbitration under a contract rather than under an international investment agreement – see Mann, *supra* note 20, at 26. The investor's corruption activities were regarded as 'ordre public international law' that prevented the tribunals from having jurisdiction. See *World Duty Free v. Kenya* (4 October 2006), ICSID Case No. ARB/00/7; *Inceysa Vallisoletana v. Republic of El Salvador* (2 August 2006), ICSID Case No. ARB/03/26. There are also other direct claims regarding international human rights law, regarding water privatization, and certain environmental and cultural protection measures. Mann *supra* note 20, at 27–8.

75 Mann *supra* note 20, at 15.

76 1945 United Nations Charter, 59 Stat. 1031.

77 1948 Universal Declaration of Human Rights, GA Res. 217A (III), UN Doc A/810 at 71.

78 1976 International Covenant on Civil and Political Rights (ICCPR), GA Res. 2200A (XXI), 999 UNTS 171.

79 1960 Discrimination (Employment and Occupation) Convention (ILO No. 111), 362 UNTS 31.

80 South Africa ratified the ICCPR on 10 December 1998 (signed 3 October 1994); ICERD on 10 December 1998 (signed 3 October 1994); and the ILO Convention on 5 March 1997. The International Covenant on Economic, Social and Cultural Rights was signed on 3 October 1994, but has not been ratified. Italy ratified the ICCPR and the International Convention on Economic, Social and Cultural Rights on 15 September 1978 (signed 18 January 1967); ICERD on 5 January 1976 (signed 13 March 1968); and the ILO Convention on 12 August 1963. See University of Minnesota, Ratification of International Human Rights Treaties – South Africa, available at www1.umn.edu/humanrts/research/ratification-southafrica.html (last visited 28 July 2008); University of Minnesota, Ratification of International Human Rights Treaties – Italy, available at www1.umn.edu/humanrts/research/ratification-italy.html (last visited 28 July 2008). South Africa ratified the UN Charter on 7 November 1945 and Italy did so on 14 December 1955 – UN, UN Member States, available at un.org/members/list.shtml#s (last visited 28/07/2008). South Africa was excluded from the General Assembly in 1974 owing to its apartheid practices, but was readmitted in 1994. M. McGregor, 'Affirmative Action and Non-discrimination: South African Law Evaluated against International Law', (2006) 39 *Comparative and International Journal of Southern Africa* 385.

81 The UDHR creates aspirational goals, but is not a legally binding document in its own right. UN, Universal Declaration of Human Rights, available at http://html.knowyourrights2008.org/en/universal-declaration-of-human-rights/universal-declaration.html (last visited 28 July 2008); see also Overview of Rights, available at un.org/Overview/rights.html (last visited 28 July 2008).

be the modus operandi of both states. This would not mean that the parties would be free to enact any measure in regards to racial discrimination, but rather that a tribunal considering the policies enacted would address the question of whether or not the policies are justified and do not disproportionately discriminate against foreign investors.

As established above, it would be hard to draw the conclusion that the state parties intended, at the time of signing the South Africa–Italy BIT, to hamper their ability to live up to their international human rights obligations. Both South Africa and Italy were, at the time of signing the BIT, state parties to the ILO Convention. This Convention reaffirms the paramount role of equal opportunity.[82] Article 2 reads like an affirmative action policy, whereby

> Each Member ... undertakes to declare and pursue a national policy designed to promote, by methods of national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.[83]

Mann claims it to be the right of states to regulate, as it is an inherent aspect of state sovereignty based on the CIL concept of 'police powers'.[84] Based on the intentions of state parties, in the words of Peterson and Gray, investment treaty arbitrators not only can, but will, 'often enjoy the legal ability to take these human rights obligations of host states into account, as they interpret the host state's obligation to foreign investors'.[85] A general shift of opinion can be seen from the *Pan American Energy* v. *Argentina*[86] and *El Paso Energy International* v. *Argentina*[87] tribunals, where both state sovereignty and also a state's responsibility were taken into account.

The international obligations owed by South Africa and Italy that were in existence at the time of signing the South Africa–Italy BIT include equal rights and, with particular regard to *Foresti* v. *South Africa*, equal opportunity in the workforce. 'Affirmative action' was not explicitly mentioned, but can be inferred from the ILO Convention. The presumption is that South Africa's affirmative action policies might comply with its international obligations. However, as stated above, the tribunal will need to consider whether or not these policies were justified in the light of the circumstances and do not disproportionately discriminate against the Investors.

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82 The Preamble 'affirms that all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity' and 'discrimination constitutes a violation of rights'. Art. 1(1)(a) defined discrimination as including '[a]ny distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.'

83 The 'appropriate methods' are outlined in Art. 3 of the ILO Convention.

84 Mann, *supra* note 20, at 18.

85 Peterson and Gray, *supra* note 71, at 3.

86 *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic* (27 July 2006), ICSID Case No. ARB/03/13.

87 *El Paso Energy International Company v. Argentine Republic* (27 April 2006), decision on jurisdiction, ICSID Case No. ARB/03/15.

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4. Conclusion

The conceptual challenges posed in the field of international investment arbitration are manifold. Many are due to the conceptual weakness inherent in failing to adhere strictly to the traditional doctrines of public international law. As far back as 1983, Professor Weil, in his article 'Towards Relative Normativity in International Law',[88] warned of the dangers associated with failing to adhere to international law's principal tenets. In spite of such warnings, international tribunals and lawyers tend to continue to commit the same mistakes. In the context of FET clauses, this has been characterized by the search for an 'overarching' interpretation. Such an approach, it must be said, is both theoretically and conceptually unsound. This article has sought both to bring to light this weakness and to consider the other possible arguments which might be advanced in support of incorporating human rights into the context of the South Africa–Italy BIT. The broad conclusion drawn, among others, is that each individual FET clause must be considered in the light of the particular circumstances in which the given BIT is concluded.

88 P. Weil, 'Towards Relative Normativity in International Law', (1983) 77 AJIL 413.

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