that there is evidence of a long-term trend in the cases towards de facto convergence in terms of the categories of state behaviour that may raise concerns under FET. A remaining difference seems to be that a higher threshold for the seriousness of state conduct must be established if a FET standard is limited to the minimum standard of treatment under customary international law. In particular, investors making claims under NAFTA, where the FET obligation is limited to the minimum standard in customary international law, have been less successful than investors seeking relief under other treaties standards on the basis of a breach of FET. There is no guarantee, however, that a higher threshold for finding a breach of state action will be adopted in interpreting an FET obligation tied to customary law.

5.5.5 What the FET standard requires

*General requirements*

In terms of its specific content, the following synthesis of the categories of requirements imposed by FET was recently provided by UNCTAD:

a. Prohibition of manifest arbitrariness in decision-making, that is measures taken purely on the basis of prejudice or bias without a legitimate purpose or rational explanation;

b. Prohibition of the denial of justice and disregard of the fundamental principles of due process;

c. Prohibition of targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;

d. Prohibition of abusive treatment of investors, including coercion, duress and harassment;

e. Protection of the legitimate expectations of investors arising from a government’s specific representations or investment-inducing measures, although balanced with the host State’s right to regulate in the public interest.

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129 Ibid., at 60–1.
130 Ibid., at 62–3. The OECD takes the view that the fair and equitable treatment standard goes beyond customary international law to impose the following additional requirements:
1. An obligation of vigilance and protection (i.e. an obligation to exercise due diligence in protecting foreign investments);
2. An obligation of transparency in the treatment of foreign investors;
3. An obligation of good faith, which includes an obligation to protect the basic expectations of investors created by the treaty;
4. An obligation to respect ‘autonomous fairness elements’, which seems to include fairness obligations beyond those required by international law and that are generally recognised in the legal systems of states with well-developed legal systems.
Protection of legitimate expectations

It is the obligation to protect the legitimate expectations of investors that has the greatest potential to cause difficulty for host developing countries. The concept of legitimate expectations is complex and has not been treated in a uniform way by investor–state tribunals. The key elements of the approaches taken to determining what are an investor’s legitimate expectations are identified below:

- **Legitimate expectations of investors require host states to provide a stable and predictable investment environment**: Some investment tribunals have interpreted this aspect of the FET obligation broadly as requiring the host state to ensure that the conditions that induced the investor to invest are not to be disturbed.131 Such a wide interpretation of the principle of fair and equitable treatment provides tribunals with substantial scope to grant relief whenever the legal and regulatory frameworks of a host state are changed. Some tribunals have expressly determined that a breach of legitimate expectations may occur in these circumstances, even if the state is acting in the good faith pursuit of a legitimate regulatory goal.132 Such a broad approach to protection has been criticised as unreasonable on the basis that it prevents any regulatory reform.133

- **Legitimate expectations must include an expectation of the risk of regulatory change over time**: In response to the concerns noted in the previous point, some tribunals have recognised that while investors may generally expect a stable and predictable regulatory regime, especially the maintenance of the conditions upon which they based their initial decisions to invest, regulatory change is to be expected over time and this consideration should inform what is a legitimate expectation of investors.134 More generally, in some cases tribunals have said that in identifying an investor’s legitimate expectations, it is necessary to take into account the facts relating to the investment as well as ‘the political, socioeconomic, cultural and historical conditions prevailing in the host state’. In Vivendi II, for example, it was recognised that a newly elected government that advocated different policies from its predecessors should be permitted to adopt a different approach to regulation.135 In order to achieve its regulatory objective, however, a state must act in a manner otherwise consistent with all IIA obligations, including the other requirements of FET. In Vivendi II, the new government’s change in policy affected a contract that the investor had entered into. The tribunal suggested that the state should

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132 Enron v. Argentina, op. cit., at paras. 164–168. This part of the decision was upheld by an annulment panel: Enron v. Argentina, Decision on the Application for Annulment, 30 July 2010, at paras. 298–316.

133 This approach was suggested in UNCTAD (2012), Fair and Equitable Treatment, op. cit.

134 E.g. Saluka v. Czech Republic UNCITRAL, Partial Award, 17 March 2006, at paras. 304–8; Glamis Gold, op. cit.

be able to seek to renegotiate the contract, but that the renegotiations should be transparent and non-coercive. They should not be accompanied by ‘threats of rescission’ based on unfounded allegations.

- **Legitimate expectations must take into account the level of development of the host state**: What an investor may legitimately expect from a developing country and its institutions cannot be the same as it would expect from a developed country.\(^\text{136}\) This is really only a specific example of the approach mentioned in the previous point.

- **Legitimate expectations may be produced by specific acts of the host state in relation to the investor**: Specific representations by host country officials and contractual commitments are generally accepted as providing a basis for legitimate expectations.\(^\text{137}\) With respect to contractual commitments, contractual performance may be a reasonable expectation, but not all breaches of contract should be treated as breaches of FET.\(^\text{138}\)

- **An investor’s behaviour may be relevant to determining the investor’s legitimate expectations**: With regard to defining an investor’s legitimate expectations, the investor’s own behaviour will be relevant in some circumstances. For example, if the investor has engaged in fraud or misrepresentation, or otherwise acted so as to cause the state to act, it will be more difficult for the investor to establish that the state’s action was inconsistent with its expectations.\(^\text{139}\) In addition, the investor must have relied on what are alleged to be its legitimate expectations in making the investment in order to succeed in claiming a breach of FET on this basis.\(^\text{140}\) Some tribunals have taken a different approach to this issue. Where a breach of FET is found, they have taken into account the behaviour of the investor and the interests of the state in assessing the damages to be paid to the investor. Tribunals have required investors to have carried out due diligence investigations to inform their expectations and where an investor has not acted reasonably in this regard, the tribunal has reduced the damages awarded to the investor.\(^\text{141}\)

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\(^{136}\) Genin v. Estonia, ICSID Case No. ARB/99/2, Award, 25 June 2001, at para. 367; Parkers-Compagnien v. Lithuania, ICSID Case No. ARB/05/8, Award, 11 September 2007, at para. 344. It is not clear to what extent this is conceptually consistent where the standard is equated to the customary international law minimum standard which is intended to create a floor below which no state may go (UNCTAD (2012), *Fair and Equitable Treatment*, op. cit., at 34–5).

\(^{137}\) Ibid.

\(^{138}\) C Schreuer (2007), ‘Fair and Equitable Treatment: Interactions with Other Standards’, *4 Transnational Dispute Management* 17.

\(^{139}\) For example, in EDF v. Romania, ICSID Case No. ARB/05/13, Award, 8 October 2009, the tribunal determined that Romania’s prohibition of duty-free businesses at domestic airports was held to be a reasonable response to contraband activities being carried out by those business.


\(^{141}\) MTD v. Chile, ICSID Case No. ARB/01/07, Award, 25 May 2004: damages reduced by 50 per cent where an independent assessment would have revealed that this authorisation received was not permitted by local law.
An investor’s legitimate expectations must be weighed against host states' legitimate interest in regulating for the public good: A number of tribunals have recognised that in determining whether there has been a breach of FET, it is necessary to weigh whatever legitimate expectations an investor is found to have with the interest of the state in regulating. This does not mean that states may act however they choose to achieve their regulatory objectives. A state must act in a good faith and in a manner otherwise consistent with all IIA obligations, including the other requirements of FET.\textsuperscript{142}

\begin{center}
\textbf{Box 5.7 Options for a fair and equitable treatment provision}
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1. No FET obligation;

2. FET obligation linked to the minimum standard of treatment of aliens under customary international law;

3. FET obligation linked to international law;

4. Unqualified FET obligation to accord fair and equitable treatment (the autonomous standard);

5. FET obligation (whether or not linked to international law or the minimum standard of treatment of aliens under customary international law) with additional substantive content, such as a prohibition of denial of justice or treatment of investor and its investments that is manifestly arbitrary, discriminatory or abusive, to clarify its meaning; and

6. No FET obligation but specification of prohibited state actions as in option 5.

5.5.6 Discussion of options

1. \textit{No FET obligation}

The minimum standard of treatment under customary international law would still apply even if no FET obligation were included in a treaty. Probably this standard could not be enforced through investor–state arbitration under an IIA, though this would depend on the scope of the dispute settlement provisions in the IIA. Not including an FET obligation would be inconsistent with the dominant IIA practice and would undoubtedly be a concern for capital-exporting states. Nevertheless, in light of its unpredictability, some capital-importing states may seek to exclude it.

If an IIA contains no FET obligation, but (i) the IIA contains an MFN obligation; and (ii) the state party had entered into another IIA that contained an FET provision,

\textsuperscript{142} Saluka v. Czech Republic, op. cit., at paras. 304–8.