Chapter 2.3.2
The Fair and Equitable Treatment Standard

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A. INTRODUCTION

The central concern of tribunals tasked with the resolution of investor-state disputes is the need to strike a balance between, on the one hand, the investors' desire for a fair and consistent regulatory framework, and on the other, the host states' mandate to implement legal and regulatory changes.

One of the essential protections enshrined in the provisions of fair trade agreements, multi-lateral and bilateral investment treaties (collectively referred to as international investment agreements or **IIAs**) is the obligation to accord fair and equitable treatment to foreign invest-ments. The fair and equitable treatment (**FET**) standard is, in many ways, the essential encapsulation of the balancing act described above.

The FET standard is described in IIAs in deceptively simple terms. For example, the UK model BIT provides that investments shall "*at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory [of the reciprocating host state]*".[2] In a multilateral treaty context (namely, Article 10(1) of the Energy Charter Treaty), the FET standard is expressed as follows:

> *Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area.* ***Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment.*** *Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoy-ment or disposal. In no case shall such Investments be accorded treatment less favour-able than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party. [Emphasis added]*

Despite (or perhaps, because of) the simplicity with which the FET standard is articulated in IIAs, its interpretation and application by tribunals over the years has been anything but simple. As McLachlan et al observe: "*Of all the catalogue of rights vouchsafed to investors under bilateral investment treaties (BITs), none has proved more elusive, or occasioned as much recent controversy as the guarantee of 'fair and equitable treatment'*".[3]

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1 Unless otherwise stated, the views and opinions expressed in this chapter are the authors' own.

2 2008 UK Model BIT, Art 2(2).

3 Campbell McLachlan, Laurence Shore, et al., *International Investment Arbitration: Substantive Principles*,

Indeed, of the substantive treaty protections enshrined in IIAs, it is the FET standard that has gained particular prominence. The primary reason for this is that the FET standard is the substantive protection most frequently,[4] and most successfully, invoked by claimants in investor-state dispute settlement (**ISDS**) proceedings. The broad wording of the FET standard in most IIAs means that tribunals have interpreted it to impose a wide variety of requirements on host states. As a result, the application of the FET standard has drawn criticism for appearing to create uncertainty or impose undue constraints on state conduct. However, as explored below, such criticism may be misplaced; the FET standard has proven to be an appropriately elastic concept, capable of evolution in accordance with shifting political, social, economic and environmental demands on investors and host states alike.

B. HISTORICAL ORIGINS OF THE FET STANDARD

I. Introduction

This section first sets out the historical origins of the FET standard with reference to the pre- and post-Second World War periods and the emergence of the modern FET standard recognizable today.

II. Pre- and Post-Second World War Periods

Reference to "equitable treatment" predates modern IIAs and can be traced back to the aftermath of the First World War and the Covenant of the League of Nations, in which Article 23(e) provides that the Members of the League of Nations:

> *will make provision to secure and maintain freedom of communications and of transit and* ***equitable treatment*** *for the commerce of all Members of the League. In this connection, the special necessities of the regions devastated during the war of 1914-1918 shall be borne in mind*. [Emphasis added]

During the same period, early bilateral US treaties on Friendship, Commerce and Navigation (FCN) included reference to the protection of persons and the property of aliens under international law.[5]

In turn, the Second World War and its devastating effects on the world economy, as well as the emergence of divergent economic blocs along ideological lines, led to further efforts on trade

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Oxford International Arbitration Series (Oxford University Press, 2nd ed. 2017) p. 268.

4 Rahim Moloo & Nathaniel Khng, *An Empirical Comparison of the Expropriation and Fair and Equitable Treatment Standards in International Investment Law*, Working Paper (2015), cited in Lucy F. Reed and Simon Consedine, 'Chapter 20: Fair and Equitable Treatment: Legitimate Expectations and Transparency', in Meg Kinnear, Geraldine R. Fischer, et al. (eds), *Building International Investment Law: The First 50 Years of ICSID*, (Kluwer Law International 2015) p. 283.

5 See, e.g., OECD (2004), *Fair and Equitable Treatment Standard in International Investment Law*, OECD Working Papers on International Investment, 2004/03, OECD Publishing. http://dx.doi.org/10.1787/675702255435, p. 4.

and investment. The nascent FET standard was further developed at the 1947 International Conference on Trade and Employment. What is generally considered to be the first reference to FET is contained in the 1948 *Havana Charter for an International Trade Organization* (**Havana Charter**). The Havana Charter was the culmination of multilateral efforts to promote peace and stability through international trade and economic cooperation.[6] The objectives of the contracting parties included "*to contribute to a balanced and expanding world economy*",[7] "*[t]o foster and assist industrial and general economic development*", particularly in developing states,[8] and "*[to] enable countries, by increasing the opportunities for their trade and economic development, to abstain from measures which would disrupt world commerce, reduce productive employment or retard economic progress*".[9]

According to Article 11 2. (a)(i), the International Trade Organization (**ITO**) was, where appropriate, expected to "*make recommendations for and promote bilateral or multilateral agreements on measures designed… to assure **just and equitable treatment** for the enterprise, skills, capital, arts and technology brought from one Member country to another*". Additionally, the functions of the ITO included to undertake studies, make recommendations, and promote IIAs "*to assure **just and equitable treatment** for foreign nationals and enterprises*".[10] However, due to various unresolved issues, the Havana Charter was ultimately unsuccessful as it was not ratified by several major developed states.[11]

Also in 1948, the *Economic Agreement of Bogotá* was adopted at the Ninth International Conference of American States, which covered inter alia protections for foreign investors in the region. According to Article 22, para. 3 (in Spanish):

> *Los capitales extranjeros recibirán **tratamiento equitativo**. Los Estados, por lo tanto, acuerdan no tomar medidas sin justificación o sin razón válida o discriminatorias que lesionen los derechos legalmente adquiridos o los intereses de nacionales de otros países en las empresas, capitales, especialidades, artes o tecnologías que éstos hubieren suministrado.*
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> *Foreign capital shall receive **equitable treatment**. The States therefore agree not to take unjustified, unreasonable or discriminatory measures that would impair the legally*

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6 Article 1, Havana Charter.

7 Article 1(1), Havana Charter.

8 Article 1(2), Havana Charter.

9 Article 1(5), Havana Charter.

10 Article 72(c)(i), Havana Charter.

11 See, e.g., OECD (2004), *Fair and Equitable Treatment Standard in International Investment Law*, OECD Working Papers on International Investment, 2004/03, OECD Publishing. http://dx.doi.org/10.1787/675702255435, p. 3.

> *acquired rights or interests of nationals of other countries in the enterprises, capital, skills, arts or technology they have supplied* (OECD translation).[12] [Emphasis added]

Like the Havana Charter, the Economic Agreement of Bogotá ultimately did not enter into force.

Meanwhile, FCN treaties ratified in the period subsequent to the Havana Charter and the *Economic Agreement of Bogotá* began to feature references to "equitable" and "fair and equitable treatment",[13] which it has been suggested refers to the same standard of protection.[14] The inclusion of such terms reflected efforts to "*establish a rule of law*" and combat the "*inability of previous treaties to protect businesses from discriminatory treatment in foreign markets*".[15]

III. The Emergence of the Modern FET Standard

In Europe, similar multilateral efforts to protect private foreign investment were underway, culminating in 1959 with the issuance of the *Draft Convention on Investments Abroad* (**Abs-Shawcross Convention**) under the leadership of Hermann Abs, then Chairperson of Deutsche Bank in Germany, and Lord Shawcross, the former Attorney-General of the United Kingdom.[16] According to Article I of the Draft Convention:

> *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 shall not in any way be impaired by unreasonable or discriminatory measures.* [Emphasis added]

This led to a German proposal that the OECD "*develop a convention on the international protection of private property*."[17] Following intensive discussions in the 1960s, in 1967 the OECD Council adopted the *Draft Convention on the Protection of Foreign Property and Resolution of the Council of the OECD on the Draft Convention* (**OECD Convention**). The OECD Convention was not an instrument opened for signature but was rather established to represent the pre-

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12 *Id.*, at p. 4.

13 See, e.g., US FCN treaties with Ireland (1950), Greece (1954), Israel (1954), France (1960), Pakistan (1961), Belgium (1963) and Luxembourg (1963).

14 K. Vandevelde, *The Bilateral Treaty Program of the United States*, Cornell International Law Journal, 21 (1988) pp. 201-76 cited by OECD (2004), *Fair and Equitable Treatment Standard in International Investment Law*, OECD Working Papers on International Investment, 2004/03, OECD Publishing. http://dx.doi.org/10.1787/675702255435, p. 4.

15 Gerald D. Silver, *Friendship, Commerce and Navigation Treaties and United States Discrimination Law: The Right of Branches of Foreign Companies to Hire Executives "Of Their Choice"*, 57 Fordham Law Review 765 (1989), p. 767-768.

16 Hermann Abs and Hartley Shawcross, *Draft Convention on Investments Abroad*, in "The Proposed Convention to Protect Private Foreign Investment: a Round Table", 1 Journal of Public Law (Emory Law Journal) (Spring 1960), pp. 115-118.

17 OECD (2004), *Fair and Equitable Treatment Standard in International Investment Law*, OECD Working Papers on Int'l Investment, 2004/03, OECD Publishing. http://dx.doi.org/10.1787/675702255435, p. 4.

vailing views and trends on international economic cooperation and to be of use to states in "*the preparation of agreements on the protection of foreign property*".[18]

According to Article 1 a) of the OECD Convention, "*[e]ach Party shall at all times ensure **fair and equitable treatment** to the property of the nationals of the other Parties*." The accompanying notes and comments to the OECD Convention state that the language of "fair and equitable treatment" was already "customary" in bilateral IIAs and refers to "*the standard set by international law for the treatment due by each State with regard to the property of foreign nationals*."[19] Moreover, the FET standard, subject to "*essential security interests*", "*conforms in effect to the 'minimum standard' which forms part of customary international law*".[20] Relevantly, the notes and comments also make it clear that each state is obligated to ensure FET in respect to the property of foreign nationals and will, "*of course, incur responsibility for any acts or omissions which may be properly attributed to it under customary international law*."[21]

Crucially, OECD Member States appear to have indeed used the OECD Convention as a model for their IIAS, typically requiring the parties to ensure the fair and equitable treatment of nationals of the other state, with arguably the effect of a greater harmonization of international investment law.[22] Indeed, IIAs which do not refer to fair and equitable treatment constitute "*the exception rather than the rule*",[23] with over 300 mentions of FET in IIAs between the 1960s and the 1990s.[24] Consequently, it has been stated that the OECD Convention represents the origin of the FET clause found in contemporary IIAs.[25]

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18 OECD, Resolution of the Council on the Draft Convention on the Protection of Foreign Property, OECD/LEGAL/0084, p. 4.

19 OECD, *Draft Convention on the Protection of Foreign Property and Resolution of the Council of the OECD on the Draft Convention – Text with Notes and Comments* (1967), p. 9.

20 Regarding the so-called "minimum standard", see section [III 2 C.] below [*is this also referred to in another chapter?*].

21 OECD, *Draft Convention on the Protection of Foreign Property and Resolution of the Council of the OECD on the Draft Convention – Text with Notes and Comments* (1967), p. 27.

22 See, e.g., P. Dumberry, *Fair and Equitable Treatment - Its Interaction with the Minimum Standard and Its Customary Status*, 1 International Investment Law and Arbitration 2 (2017, I. Laird, B. Sabahi, eds), p. 21.

23 Y. Levashova, *Chapter 3: The Fair and Equitable Treatment Standard in International Investment Agreements*, The Right of States to Regulate in International Investment Law: The Search for Balance Between Public Interest and Fair and Equitable Treatment (Kluwer Law International, 2019) pp. 45 – 72 citing S. Vascianne, *Fair and Equitable Treatment Standard in International Investment Law and Practice* [1999] 70 British Yearbook on International Law, 129.

24 M. Khalil, *Treatment of Foreign Investment in BITs*, 8 ICSID Review 355 (1992).

25 P. Dumberry, *Fair and Equitable Treatment - Its Interaction with the Minimum Standard and Its Customary Status*, 1 International Investment Law and Arbitration 2 (2017, I. Laird, B. Sabahi, eds), p. 21 citing S. Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice* (1999) 70 British YIL 99, p. 113.

IV. Conclusion

The history of the FET standard can thus be traced extensively within the international investment law context. Yet it is the post-Second World War period in which significant developments were made that ultimately led to the emergence of the FET standard as it is recognised today.

C. FORMULATIONS OF THE FET STANDARD IN CURRENT TREATY PRACTICE

I. Introduction

This section sets out the main categories of FET standard identified in contemporary IIAs based on the formulation of the texts with reference to the key sources and examples thereof.

II. Categories of FET Standards

Although there may have been some degree of harmonization, the FET standard today is far from completely uniform. For example, variation in translations between languages is not uncommon, with "fair and equitable treatment" commonly referred to in French treaties as "*traitement juste et équitable*",[26] in Spanish treaties as "*trato justo y equitativo*",[27] and in German treaties as "*faire und billige Behandlung*".[28] Indeed, scholarly analysis of the FET standard provisions contained in IIAs has identified several different categories.[29] Of the IIAs that include reference to FET, the United Nations Conference on Trade and Development (**UNCTAD**) has identified four main formulations of and approaches to the FET standard:

> *(a) Unqualified obligation to accord fair and equitable treatment;*
> *(b) FET obligation linked to international law;*
> *(c) FET obligation linked to the minimum standard of treatment of aliens under customary international law; [and]*
> *(d) FET obligation with additional substantive content such as denial of justice.*[30]

Additionally, some IIAs refer to the FET standard solely in the treaty preamble and accordingly do not impose any binding obligations on the relevant host state, so called "*hortartory references*".[31] This category of IIA will not be considered in this section which instead focuses on the above categories identified by UNCTAD.

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26 See, e.g., Switzerland–Chile BIT (1999), Article 4(2).

27 See, e.g., Spain–Mexico BIT (2006), Article IV(1).

28 See, e.g., German Model BIT (2005), Article 2(2).

29 See, e.g., P. Dumberry, *Fair and Equitable Treatment - Its Interaction with the Minimum Standard and Its Customary Status*, 1 International Investment Law and Arbitration 2 (2017, I. Laird, B. Sabahi, eds), p. 22.

30 UNCTAD, *Fair and Equitable Treatment*, (2012) UNCTAD Series on Issues in International Investment Agreements II 28, pp. xiii-xiv.

31 R. Kläger, *'Fair and Equitable Treatment' in International Investment Law* (Oxford University Press, 2011), p. 11.

1. Unqualified FET Standard

The unqualified FET standard represents the most "minimalist" of the FET standards.[32] According to UNCTAD, many IIAs employ a "simple unqualified formulation" that sets out the host state's obligation to accord FET to protected investments.[33] By way of example, UNCTAD cites Article 3 of the Belgium-Luxembourg Economic Union-Tajikistan BIT (2009):

> *All investments made by investors of one Contracting Party shall enjoy a **fair and equitable treatment** in the territory of the other Contracting Party.* [Emphasis added]

The question that has arisen is whether an unqualified FET standard: i) should be interpreted in light of the "minimum standard" or ii) whether it is an independent, autonomous standard to be interpreted on a case-by-case basis and referring to general notions of fairness and equity.[34] As Tudor states in respect to these notions:

> *… **fairness** may transmit to the FET standard **the idea of reasonableness and justice** as well **an evolutionary and flexible character**, because what is fair in a determinate time and place may not be in a different setting...*[35] [Emphasis added]

> *[whereas] the meaning of **equity** that may apply to investment law is that of **equitableness** and the characteristic that it may have transmitted to FET is that **of giving to each party to a (sic) an arbitration what is due**.*[36] [Emphasis added]

The first approach can be justified based on the wording of the influential but non-binding OECD Convention.[37] However, the second approach affords a tribunal considerable discretion in making its assessment of whether the conduct of a host state is in breach of its FET obligations.[38] In such case, the rules of treaty interpretation as set forth in Articles 31-32 of the 1969 Vienna Convention on the Law of Treaties (**Vienna Convention**) apply, including analysis of the ordinary meaning of the terms of the IIA, the relevant context, the object and purpose of the IIA and even the preparatory works.

As UNCTAD points out, affording arbitral tribunals such broad discretion has the potential to lead to surprising extensions of the FET standard to encompass state conduct not previously

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[32] UNCTAD, *Fair and Equitable Treatment*, (2012) UNCTAD Series on Issues in International Investment Agreements II 28, p. 20.

[33] Ibid.

[34] UNCTAD, *Fair and Equitable Treatment*, (2012) UNCTAD Series on Issues in International Investment Agreements II 28, p. 21.

[35] Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (OUP, 2008), p. 127.

[36] *Id.*, at p. 128.

[37] Ibid.

[38] M. Malik, *IISD Best Practices Series Bulletin #3 — Fair and Equitable Treatment* (The International Institute for Sustainable Development, 2009).

considered to fall within their remit, increasing the risks for states.[39] Such extensions have arguably resulted in the FET standard being the most controversial substantive standard of protection in investment arbitration.[40]

2. FET Standard Linked to International Law

UNCTAD identifies two forms of FET clauses that refer to international law.[41] The first approach is demonstrated by Article 3(2) of the Croatia-Oman BIT (2004):

> *[…] 2. Investments or returns of investors of either Contracting Party in the territory of the other Contracting Party shall be accorded* ***fair and equitable treatment in accordance with international law*** *and provisions of this Agreement.* [Emphasis added]

Such an approach sets a clear limit in comparison to the unqualified FET standard, in which the clause is to be interpreted in accordance with the principles of international law, including customary international law,[42] i.e., based on actual state practice and *opinio juris*. According to UNCTAD, such an approach may entail a "laborious" review of the international law sources to determine whether a host state's conduct was in breach of its FET obligations.[43]

The second approach identified by UNCTAD is typical of a "first wave" of U.S. IIAs concluded in the 1980s[44] and is exemplified by Article 2(3)(a) of the Bahrain-United States BIT (1999):

> *Each Party shall at all times accord to covered investments* ***fair and equitable treatment*** *and full protection and security,* ***and shall in no case accord treatment less favorable than that required by international law****.* [Emphasis added]

Here, the reference to international law contained in the FET standard "*appears to set the floor of protection that can be claimed by an investor*," but the interpretation of the clause is not strictly linked to the stipulations of international law.[45] According to UNCTAD, such formulation

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39 UNCTAD, *Fair and Equitable Treatment*, (2012) UNCTAD Series on Issues in International Investment Agreements II 28, p. 22.

40 M. Porterfield, *A Distinction Without a Difference? The Interpretation of Fair and Equitable Treatment Under Customary International Law by Investment Tribunals*, International Institute for Sustainable Development (22 March 2013) <https://www.iisd.org/itn/en/2013/03/22/a-distinction-without-a-difference-the-interpretation-of-fair-and-equitable-treatment-under-customary-international-law-by-investment-tribunals/#_ftn3>.

41 Ibid.

42 Ibid.

43 UNCTAD, *Fair and Equitable Treatment*, (2012) UNCTAD Series on Issues in International Investment Agreements II 28, p. 23.

44 Y. Levashova, *Chapter 3: The Fair and Equitable Treatment Standard in International Investment Agreements*, The Right of States to Regulate in International Investment Law: The Search for Balance Between Public Interest and Fair and Equitable Treatment (Kluwer Law International, 2019) pp. 45 – 72, p. 58.

45 UNCTAD, *Fair and Equitable Treatment*, (2012) UNCTAD Series on Issues in International Investment

of the FET standard effectively takes the clause closer to the unqualified form discussed in section III 2 A. above.[46] Recent research indicates that such formulations are typical of IIAs of the 1990s, but that some countries such as France have continued to employ this approach in their IIAs.[47]

Certain FET clauses specifically refer to customary international law, such as Article 10.5 (1) of the Dominican Republic – Central America – United States Free Trade Agreement (**CAFTA**):

> *Each Party shall accord to covered investments treatment in accordance with* ***customary international law****, including* ***fair and equitable treatment*** *and full protection and security.* [Emphasis added]

It has been noted that in practice arbitrators also interpret the FET standard linked to customary international law in the same manner as the autonomous form discussed in section III 2 A. above, i.e., in line with previous arbitral practice and doctrine rather than by reference to evidence of state practice or *opinio juris*.[48] FET clauses linked to customary international law will be discussed further in section III 2 C. below.

3. FET Standard Linked to Minimum Standard of Treatment

A relatively small but significant minority of IIAs contain an FET standard that specifically refers to the minimum standard of treatment under customary international law.[49] In brief, the minimum standard of treatment is a generally recognized[50] rule of customary international law that "*foreign investors are entitled to a certain level of treatment, and any treatment which falls short of this level, gives rise to responsibility on the part of the host State*."[51]

Agreements II 28, p. 23.

46 Ibid.

47 Y. Levashova, *Chapter 3: The Fair and Equitable Treatment Standard in International Investment Agreements*, The Right of States to Regulate in International Investment Law: The Search for Balance Between Public Interest and Fair and Equitable Treatment (Kluwer Law International, 2019) pp. 45 – 72, p. 58.

48 M. Porterfield, *A Distinction Without a Difference? The Interpretation of Fair and Equitable Treatment Under Customary International Law by Investment Tribunals*, International Institute for Sustainable Development (22 March 2013) <https://www.iisd.org/itn/en/2013/03/22/a-distinction-without-a-difference-the-interpretation-of-fair-and-equitable-treatment-under-customary-international-law-by-investment-tribunals/#_ftn3>.

49 P. Dumberry, *Fair and Equitable Treatment - Its Interaction with the Minimum Standard and Its Customary Status*, 1 International Investment Law and Arbitration 2 (2017, I. Laird, B. Sabahi, eds), p. 21 citing S. Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice* (1999) 70 British YIL 99, pp. 22-23.

50 See, e.g., *Id.*, pp. 6-7. [Id. is unclear here]

51 OECD (2004), *Fair and Equitable Treatment Standard in International Investment Law*, OECD Working Papers on International Investment, 2004/03, OECD Publishing. http://dx.doi.org/10.1787/675702255435, pp. 8-9.

The relationship between the FET standard and the minimum standard was the focus of debate within the context of Article 1105 "Minimum Standard of Treatment" of the North American Free Trade Agreement (**NAFTA**), which provides:

> *1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including **fair and equitable treatment** and full protection and security.* [Emphasis added]

Although the clause itself refers to a FET standard linked to international law as discussed above in section III 2 B, an arbitral tribunal controversially found the FET standard to be "additive" to the minimum standard.[52] This led the NAFTA Free Trade Commission to swiftly issue a Note of Interpretation in 2001 to confirm that this was in fact not the case:

> *The concepts of "**fair and equitable treatment**" and "full protection and security" **do not require treatment in addition to or beyond** that which is required by the **customary international law minimum standard of treatment** of aliens*.[53] [Emphasis added]

According to UNCTAD, the NAFTA Free Trade Commission has influenced the language of subsequent IIAs involving NAFTA and non-NAFTA states alike, such as in Chapter 11, Article 6(2)(c) of the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (2009), which provides:

> *the concepts of "**fair and equitable treatment**" and "full protection and security" **do not require treatment in addition to or beyond that which is required under customary international law**, and do not create additional substantive rights.* [Emphasis added]

In the case of subsequent IIAs concluded by the US, in addition to the FET clause incorporating the above approach, an explanatory note has also been annexed to the IIA, stating that the reference to "customary international law" in the FET clause is to "*all principles of customary international law for the protection of the economic rights and interests of aliens*".[54]

As UNCTAD posits, this explicit link between the FET standard and the minimum standard of treatment aims to prevent the surprise over extension of the FET standard and to "rein in" the discretion of arbitral tribunals by providing a "higher threshold" with clearer guidance in respect to the minimum standard of treatment.[55] However, a new problem that then arises is how to interpret the "highly indeterminate" minimum standard of treatment itself, in circumstances where no clear consensus exists.[56] While some tribunals have interpreted the minimum

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52 *Pope and Talbot v. Canada* (Award on the Merits of Phase 2, UNCITRAL, 10 April 2001) [117].

53 NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions* (31 July 2001) <http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp>.

54 See, e.g., *Rwanda-United States BIT* (2008), Annex A.

55 UNCTAD, *Fair and Equitable Treatment*, (2012) UNCTAD Series on Issues in International Investment Agreements II 28, pp. 28-29.

56 Ibid.

standard of treatment as imposing a similar standard to that of the FET standard, others have construed the minimum standard of treatment in a far more restrictive way.

Under the more restrictive interpretation, tribunals have applied the reasoning espoused in the 1926 case of *Neer v Mexico,* which set a very high bar for establishing a breach (requiring that there be conduct that amounts to "*an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental actions so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency*").[57] The approach in *Neer* was adopted in several subsequent cases, including *Glamis Gold v United States,* which is discussed in further detail in section IV 3 below.[58] Similarly, in the more recent case of *Berkowitz et al. v Costa Rica,* the tribunal found that a breach of the minimum standard of treatment "*requires an act that is sufficiently egregious and shocking so as to fall below accepted international standards*."[59]

In contrast, under the more expansive approach, tribunals have held that the minimum standard of treatment has evolved and expanded over time, and reference to both fair and equitable treatment and the minimum standard of treatment in IIAs is to be understood as broadening the scope of the minimum standard of treatment. In other words, because the customary international law standard has evolved and has become indistinguishable from the autonomous FET standard, a reference to the minimum standard of treatment does not alter the scope or level of protection of the FET standard. For example, in *Railroad Development v Guatemala*, the tribunal refused to constrain its interpretation of the minimum standard of treatment to align with the reasoning espoused in *Neer*, observing that "*what customary international law projects is not a static photograph of the minimum standard of treatment of aliens as it stood in 1927, when the Award in the Neer case was rendered*."[60] The tribunal concluded that the minimum standard of treatment is "*constantly in a process of development*",[61] and ultimately adopted the following, less restrictive, approach articulated by the tribunal in the case of *Waste Management v Mexico*:[62]

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57 *L.F.H. Neer and Pauline Neer (U.S.A.) v. United Mexican States* (1926) 4 R.I.A.A. 60, 61-62 ('*Neer v Mexico*').

58 *Glamis Gold, Ltd. v. United States of America* (Award, ICSID, 8 June 2009) [614]-[616] ('*Glamis Gold v United States*').

59 *Spence International Investments, LLC, Berkowtiz, et al v. Republic of Costa Rica* (Award, ICSID, Case No UNCT/13/2, 30 May 2017) [282] ('*Berkowitz et al. v Costa Rica'*).

60 *Railroad Development Corporation (RDC) v. Republic of Guatemala* (Final Award, ICSID, Case No ARB/07/23, 29 June 2012) [218] ('*Railrod Development v Guatemala'*). See also *Mondev International Ltd. v. United States of America* (Final Award, ICSID, Case No ARB(AF)/99/2, 11 October 2002) [115]-[117].

61 *Railroad Development v Guatemala* [218].

62 *Waste Management, Inc. v. United Mexican States* (Award, ICSID, Case No ARB(AF)/00/3, 30 April 2004) [98] ('*Waste Management v Mexico*').

> *[...] the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if 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 which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candor in an administrative process.*[63]

Similarly, in the recent case of *Thomas Gosling and others v Republic of Mauritius*, the tribunal observed that "*what was considered minimum treatment in the nineteenth century is not the minimum required in the twenty-first, particularly in the context of a treaty specifically providing for fair and equitable treatment*."[64]

Faced with a formulation of the FET standard that is expressly tied to the minimum standard of treatment, an investor seeking to rely on an expansive interpretation might assert that the drafting states elected to refer to both the FET standard and the minimum standard of treatment in order to afford investors a broader guarantee than if they had limited the clause to the minimum standard of treatment alone. Conversely, because of the potential for a more restrictive approach to the minimum standard of treatment to be adopted (for example, requiring "egregious" or "shocking" conduct to support a finding of breach), the formulation of the FET standard which is linked to the minimum standard of treatment under customary international law has been said to show a clear preference by the drafting states to limit the protection provided to investors.[65]

In view of these competing interpretations, the interaction between the FET standard of protection and the minimum standard of treatment remains unsettled. Consequently, where there is an express link to the minimum standard of treatment, a degree of unpredictability as to the scope of the protection persists.

4. FET Standard with Additional Substantive Content

In 2012, UNCTAD identified an emerging trend in IIAs of specifying additional substantive content to FET clauses to clarify the contents of the FET obligation and to increase consistency and predictability in the application of the FET standard.[66] Among the substantive additions identified by UNCTAD were chiefly:

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63 *Railroad Development v Guatemala* [219].

64 *Thomas Gosling and others v. Republic of Mauritius* (Award, ICSID, Case No ARB/16/32, 18 February 2020) [243].

65 R. Kläger, *'Fair and Equitable Treatment' in International Investment Law* (Oxford University Press, 2011), p. 20.

66 UNCTAD, *Fair and Equitable Treatment*, (2012) UNCTAD Series on Issues in International Investment Agreements II 28, p. 29.

- Prohibition of denial of justice;
- Prohibition of arbitrary, unreasonable or discriminatory measures;
- Irrelevance of concurrent breach of another treaty norm; and
- Accounting for the level of development.

a. Prohibition of Denial of Justice

A denial of justice will typically have occurred if the host state has failed to comply with "*the most basic due process requirements*", such as the refusal of courts to decide the investor's case or an unreasonable delay in proceedings.[67] UNCTAD cites Focarelli's definition of a denial of justice as "*any gross misadministration of justice by domestic courts resulting from the ill-functioning of the State's judicial system*".[68]

UNCTAD has identified two forms of this substantive addition. By way of example of the first, Article 5(2)(a) of the Rwanda-United States BIT (2008) provides the following:

> *"**fair and equitable treatment**" **includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings** in accordance with the **principle of due process** embodied in the **principal legal systems of the world***… [Emphasis added]

Such a FET clause formulation indicates that the specific prohibition on the denial of justice includes but does not limit the host state's FET obligation but rather forms a part of the more general FET standard of protection.[69] However, UNCTAD also notes that, given that only "*grave instances of injustice*" constitute a denial of justice, this may indicate the standard to be applied to the other aspects of the FET standard.[70]

As for the second type, UNCTAD refers to Article 11 of the ASEAN Comprehensive Investment Agreement (2009) which provides:

> *1. Each Member State shall accord to covered investments of investors of any other Member State, **fair and equitable treatment** and full protection and security.*
>
> *2. For greater certainty:*
>
> *(a) **fair and equitable treatment requires each Member State not to deny justice** in any legal or administrative proceedings in accordance with the principle of due process …* [Emphasis added]

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67 *Id.*, at p. 80.

68 *Id.*, at p. 81.

69 *Id.*, at p. 30.

70 Ibid.

Here, the reference to "requires" as opposed to "includes" with no reference to the minimum standard of treatment is arguably a clearer delimitation of the FET standard to denial of justice only.[71]

b. Prohibition of Arbitrary, Unreasonable or Discriminatory Measures

An arbitrary measure is irrational, serves no legitimate purpose, constitutes a wilful disregard of due process of law, and inflicts damage on the investor, such as blatantly disregarding applicable tender rules.[72] An unreasonable measure has been considered to be synonymous with an arbitrary one,[73] and may have occurred where no reasonable relationship exists between the purported justification and a legitimate governmental policy.[74] A discriminatory measure is one that "*evidently singles out (de jure or de facto) the [investor]*" and for which there is no legitimate justification.[75]

Reference to a specific prohibition on arbitrary, unreasonable, or discriminatory measures can be found in Article II(2)(b) of the Romania-United States BIT (1994), which provides:

> *(b) Neither Party shall in any way impair by* ***arbitrary or discriminatory measures*** *the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments.* [Emphasis added]

The prohibition on arbitrary, unreasonable, or discriminatory measures is considered to be "intrinsic" to the FET standard.[76] Accordingly, this inclusion plays a limited role in setting out the scope of the host state's FET obligations, which are broader than and go beyond the notions of arbitrariness, unreasonableness and discrimination.[77] Indeed, state conduct may entail a breach of the FET standard, but not be unreasonable, arbitrary or non-discriminatory.[78] UNCTAD recommends states that seek to limit the FET standard to a prohibition of arbitrary, unreason-

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71 UNCTAD, *Fair and Equitable Treatment*, (2012) UNCTAD Series on Issues in International Investment Agreements II 28, pp. 30-31.

72 *Id.*, at pp. 78-79.

73 P. Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105*, (Kluwer Law International, 2013), pp. 183-184.

74 Ibid, citing V. Heiskanen, *Arbitrary and Unreasonable Measures*, in Reinisch (ed), Standards of Investment Protection 87 et seq., 104 (Oxford Univ. Press 2008).

75 UNCTAD, *Fair and Equitable Treatment*, (2012) UNCTAD Series on Issues in International Investment Agreements II 28, p. 82.

76 *Id.*, at p. 31.

77 Ibid.

78 See, e.g., *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v Argentina* (Decision on Liability, ICSID, Case No ARB/02/1, 3 October 2006) ('*LG&E v Argentina*').

able or discriminatory measures to consider doing away with the use of a FET clause altogether and insert a separate, qualified provision to the effect.[79]

c. Irrelevance of Concurrent Breach of Another Treaty Norm

Certain IIAs include an FET standard clarifying that a breach of another provision of the IIA does not in and of itself automatically constitute a breach of the FET standard.[80] For example, Article 4(3) of the Mexico-Singapore BIT (2009) provides:

> *A determination that there has been **a breach of another provision** of this Agreement, or of a separate international agreement, **does not establish** that there has been **a breach of this Article**.* [Emphasis added]

This has relevance for the debate as to whether the FET standard forms a part of customary international law, as the violation of a treaty obligation does not necessarily entail a violation of a rule of customary international law.[81] As UNCTAD notes, this has particular importance in the non-IIA context, such as in respect to host state breaches of, e.g., World Trade Organization law, which would otherwise risk exposing host states to claims under the FET standard for violations of the state's non-IIA treaty obligations.[82]

d. Accounting for the Level of Development

The final category identified by UNCTAD is a FET formulation in which the finding of a violation of the FET standard must have considered the level of development of the host state.[83] For example, Article 14 (3) of the Investment Agreement for the COMESA Common Investment Area (2007) provides:

> *For greater certainty, **Member States understand** that different Member States have different forms of administrative, legislative and judicial systems and **that Member States at different levels of development may not achieve the same standards at the same time**.* [Emphasis added]

This formulation acknowledges the differences of development between states and the realities of doing business in a developing state. In contrast to the floor set by minimum standard of treatment, such a formulation also provides flexibility in the interpretation of the FET standard and explicitly prevents any unreasonable expectations on the part of the investor.[84] However,

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79 UNCTAD, *Fair and Equitable Treatment*, (2012) UNCTAD Series on Issues in International Investment Agreements II 28, p. 31.

80 *Id.*, at p. 33.

81 Ibid.

82 Ibid.

83 Ibid.

84 UNCTAD, *Fair and Equitable Treatment*, (2012) UNCTAD Series on Issues in International Investment Agreements II 28, p. 34.

some have argued that even in the absence of such language, the efficiency and conduct an investor may legitimately expect from the host state should also take into account the level of that state's development.[85]

III. Conclusion

Although FET clauses are a "well-established feature" of IIAs and one that is considered likely to remain in future,[86] it is clear from the above that there are a variety of diverse categories and formulations of the FET standard, encompassing certain limitations or clarifications, although not every formulation has produced a limiting effect in practice. The next section will consider the evolution of the interpretation of the FET standard by arbitral tribunals, exploring some of the emerging trends in recent arbitral jurisprudence, with a particular focus on "legitimate expectations".

D. THE EVOLVING INTERPRETATION OF THE FET STANDARD BY ARBITRAL TRIBUNALS

I. Introduction

The best way to understand the contemporary meaning of the FET standard is to examine its interpretation by arbitral tribunals over the years. As Dumberry notes: "*Tribunals play a critical role in determining the substantive content of the FET standard precisely because of the flexible nature of the standard*."[87]

Indeed, because of its flexible language and potentially broad application, tribunals have been tasked with applying the FET standard in nearly every treaty-based arbitration proceeding. In 2020, UNCTAD reported that tribunals rendered at least 71 substantive decisions in investor–state disputes in 2019, and 39 of these were in the public domain at the time of the report. Of the 25 available decisions on the merits (ie, cases which proceeded beyond the jurisdictional phase), 14 accepted at least some investor claims, and in these cases, tribunals most frequently found breaches of the FET standard.[88]

This section explores how arbitral tribunals have interpreted the FET standard over the years, from the identifiably pro-investor approach adopted by tribunals in early decisions, to the shift towards a more deferential or permissive approach towards state conduct in more recent decisions.

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85 Ibid.

86 R. Kläger, *'Fair and Equitable Treatment' in International Investment Law* (Oxford Univ. Press, 2011), p. 21.

87 P. Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105*, (Kluwer Law International, 2013), p. 128.

88 UNCTAD, *World Investment Report 2020* (2020) 111 [https://unctad.org/system/files/official-document/wir2020_en.pdf accessed on 3 April 2022]. See also A. Reinisch, *Standards of Investment Protection* (Oxford University Press, 2008) 2. According to Reinisch, "*investor claims involving breaches of FET standards have taken the pivotal position once occupied by claims for expropriation with approximately 62% of successful awards since 2006*".

II. Early Pro-Investor Interpretation of the FET Standard

In early cases involving the application of the FET standard (between approximately 2000 and 2005), there was a clear focus on the preservation of legislative and regulatory stability for investors.[89]

1. Case Study - *Tecmed v Mexico*

In *Tecmed v Mexico,*[90] the tribunal was tasked with considering an alleged breach of the FET standard pursuant to the Spain-Mexico BIT. The claimant investor, Tecmed (a Spanish entity), had purchased a hazardous waste landfill from a Mexican agency, and subsequently obtained the permit necessary to operate the landfill from the relevant federal agency, being the Mexican Environmental Protection Agency (EPA). In connection with its operation of the landfill, Tecmed breached some terms of the permit, prompting opposition from community groups to continued operation of the landfill. After Tecmed's first year operating the landfill, the EPA granted Tecmed's request to renew the permit. However, when Tecmed sought a second renewal, the EPA denied the request and ordered Tecmed to close the facility. Tecmed initiated proceedings on the grounds that Mexico's actions, including, in particular, the decision by the EPA to deny renewal of the permit and close the landfill, amounted to a breach of Mexico's obligations under the Spain-Mexico BIT.

Ultimately, the tribunal found that Mexico breached the FET standard because, in particular, the EPA failed to "*report, in clear and express terms…its position as to the effect of [Tecmed's] infringements on the renewal of the Permit*" and to provide "*clear signs*" of its intention to deny renewal.[91] Underlying the tribunal's finding was the perception that the EPA's decision was driven by social and political concerns, and that environmental and health issues were deployed as artificial pretexts for the closure of Tecmed's facility.[92] As the Tribunal stated, Tecmed's "*fair expectations…were that the Mexican laws applicable to [its] investment…would be used for the purpose of assuring compliance with environmental protection, human health and ecological balance goals*," and not for the purpose of "*clos[ing] down a site whose operation had become a nuisance for political reasons…*".[93]

In this context, the tribunal found that under the BIT, Mexico was obliged to provide foreign investors treatment "*that does not affect the basic expectations that were taken into account by*

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89 See, e.g. *CMS Gas Transmission Co. v Argentina* (Award, ICSID, Case No ARB/01/08, 12 May 2005) ('*CMS v Argentina'*) [274]; *LG&E v Argentina* [125]-[127]; *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v Argentina* (Award, ICSID, Case No ARB/01/3, 22 May 2007) ('*Enron v Argentina*') [260].

90 *Técnicas Medioambientales Tecmed S.A. v The United Mexican States* (Award, ICSID, Case No ARB(AF)/00/2, 29 May 2003) ('*Tecmed v Mexico*').

91 *Id.,* at 162.

92 *Id.,* at 157.

93 *Id.,* at 157 and 164.

the foreign investor to make the investment", and further, that the investor should be provided with transparency with regard to its investment. In particular, the tribunal found that Tecmed could reasonably expect to know in advance "*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*".[94]

2. Case Study - *Occidental Exploration v Ecuador*

In *Occidental Exploration v Ecuador*, the tribunal considered an alleged breach of the FET standard under the Ecuador-United States BIT. Occidental's claim arose in relation to Ecuador's decision to cease paying VAT refunds in respect of services provided by Occidental to Ecuador's state-owned oil company, and later, Ecuador's demands for Occidental to repay previously refunded amounts. The tribunal upheld Occidental's claim, observing that Ecuador was under an obligation "*not to alter the legal and business environment in which the investment has been made*,"[95] and finding that by changing the VAT framework, Ecuador had failed to afford Occidental the requisite degree of stability.

Similar reasoning was applied in a string of other cases that were determined between approximately 2005 and 2007, which involved claims against Argentina in respect of measures adopted during a major economic crisis in the late 1990s.[96] For example, in *LG&E v Argentina*, the tribunal described the FET standard as requiring "*consistent and transparent behaviour*" and obliging states to "*grant and maintain a stable and predictable legal framework necessary to fulfill the justified expectations of the foreign investor*".[97] Likewise, in *CMS v Argentina,* the tribunal described the maintenance of a "*stable legal and business environment*" as an essential aspect of the FET standard. Against this backdrop, the tribunal found that by entirely altering the legal framework that had underpinned the claimant's decision to invest, Argentina had breached the FET standard.

From these cases, it was evident that tribunals were construing the scope of the FET standard with two key factors in mind. First, the specific expectations of the claimant investor with regard to their investment (in each case). Second, the extent to which the state's conduct in each case actually impacted the relevant investment. However, based on this early jurisprudence, it would have appeared to many that the sovereign mandate of the host state to legislate and regulate in the public interest was being steadily eroded for the sake of guaranteeing foreign investors stability.

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94 *Id.,* at 154.

95 *Occidental Exploration and Production Co. v. Ecuador* (Final Award, LCIA, Case No UN3467, 1 July 2004) ('*Occidental Exploration v Ecuador*') [183]-[185].

96 See, e.g. *CMS. v Argentina* [274]; *LG&E v Argentina* [125]-[127]; *Enron v Argentina* [260].

97 *LG&E v Argentina* [125]-[127].

These decisions gave rise to the perception that the FET standard was being interpreted, or would be interpreted by tribunals in the future, in a manner which "*unduly favours investor interests and overrides legitimate regulation in the public interest*",[98] and which had the potential to inappropriately constrain the sovereignty of host states.[99] Notwithstanding the caveats and constraints that emerged from decisions such as *CMS v Argentina*,[100] there were concerns that – overall – the breadth of the FET obligation, as construed by tribunals in these cases, was excessive.[101] Many perceived the effect of the decisions as effectively preventing the state from making any kind of legislative or regulatory modification which might adversely affect the investment. This prompted some commentators to point out that host states also required a degree of stability and certainty, in terms of understanding what actions could validly be undertaken without contravening investment protections like the FET standard. In this context, there were efforts to reframe the discussion by changing the focus from the investor's right to stability to the state's right to regulate.

III. Stricter Approach Towards the FET Standard in NAFTA Cases

In contrast to the cases summarized above, several claims brought under NAFTA in the early 2000s were determined by tribunals adopting a more cautious approach towards the FET standard. A good example of this approach is the case of *Glamis Gold v United States*.

The case centered upon the retraction of development approval for a gold mine, on the basis of environmental concerns and new legislation enacted to protect sacred Native American sites. The project had initially been approved, but that approval was subsequently withdrawn by the US Department of the Interior. Coinciding with the withdrawal of the approval was the passage of regulations which required all future open-pit metallic mines, and open-pit metallic mines located near Native American sites, to be backfilled. According to the tribunal, the effect of this legislation was to "*permanently prevent the approval of the Glamis Gold Mine project and any other metallic mineral projects that presented an immediate threat to [Native] sacred sites located in areas of special concern*".[102]

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98 UNCTAD, *Fair and Equitable Treatment*, (2012) UNCTAD Series on Issues in International Investment Agreements II 28, p. 11.

99 'Chapter 1: Introduction', in Yulia Levashova , *The Right of States to Regulate in International Investment Law: The Search for Balance Between Public Interest and Fair and Equitable Treatment*, International Arbitration Law Library, Volume 50 (Kluwer Law International 2019) p. 3.

100 The tribunal acknowledged that the FET standard did not mean that a country's legal framework could not adapt to new developments, drawing the line at conduct which had the effect of entirely undoing the existing legal regime, in contradiction with previous commitments.

101 UNCTAD, *Fair and Equitable Treatment*, (2012) UNCTAD Series on Issues in International Investment Agreements II 28, p. 11.

102 *Glamis Gold v United States* [177].

The claimant asserted that the host state owed an obligation under the FET standard, to "*protect legitimate expectations through establishment of a transparent and predictable business and legal framework*".[103] The claimant argued that, based on the prevailing regime governing mining projects at the time its plan was submitted, and the fact that it had initially obtained approval, it had legitimate expectations that the project would be approved. However, the tribunal rejected this part of the claimant's argument. In so doing, the tribunal reiterated the conclusion reached by tribunals in three earlier NAFTA cases, to the effect that any legitimate expectation must be based on a specific assurance or commitment given by the host state to the investor so as to "*induce its expectations*".[104] For the tribunal in *Glamis Gold v United States*, such commitments would need to be "*definitive, unambiguous and repeated*" in order to generate reasonable expectations in the mind of the investor, and – in this case – such commitments were not given by the host state.[105]

From cases such as *Glamis Gold v United States*, one can observe a movement away from the interpretation of the FET standard as requiring host states to guarantee transparency, stability or predictability in all cases. Rather, NAFTA tribunals were finding that notions of stability or predictability could not be understood without also considering the reasonableness of the investor's specific expectations, and this was to be assessed by reference to the specific assurances or commitments that the host state had given to the investor. As such, the relevant touchstone was not the subjective hopes of the investor as to the profitability or longevity of its investment, but rather, the objective expectations of the investor, based on the conduct of the host state:

> *… a State may be tied to the objective expectations that it creates in order to induce investment. Such an upset of expectations thus requires something greater than mere disappointment; it requires, as a threshold condition, the active inducement of a quasi-contractual expectation.*[106]

In this way, the *Glamis Gold v United States* decision underscored that the appropriate standard of predictability and stability (and therefore, the scope of the FET standard) would need to be determined by reference to what precise commitments had been made to a specific class of investors in each case. In other words, the requirement for host states to provide a stable framework for foreign investment is not a 'one size fits all' obligation, applicable to any investment covered under the treaty.

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103 *Id.,* at 568.

104 *Id.,* at 620. See also: *Metalclad v. Mexico* (Award, ICSID, Case No ARB(AF)/97/1, 30 August 2000) [89]; *ADF Group Inc. v. United States* (Award, ICSID, Case No ARB (AF)/00/1, 9 January 2003) [189]; and *Thunderbird v. Mexico (*Award, UNCITRAL (NAFTA), 6 January 2006) [112].

105 *Glamis Gold v United States* [802].

106 *Id.,* at 799.

IV. Current Practice

From cases determined in recent years, one can observe a 'levelling' out as between the early, pro-investor approach adopted by tribunals in cases such as *Tecmed v Mexico,* and the more constrained (arguably, pro-state) approach adopted in NAFTA cases like *Glamis Gold v United States*. However, the overall trajectory has been one which tends to support an active, supportive articulation of the state's right to regulate, and against this, investors have been required to clear more 'hurdles' (particularly in terms of demonstrating the legitimacy of their expectations) in order to successfully establish an FET claim. In this respect, the tribunal's observations in the case of *Saluka v Czech Republic* (though made in 2006) remain an accurate encapsulation of the approach towards the FET standard in modern treaty practice:

> *No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor's expectations was justified and reasonable, the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well.*[107]

The tribunal in *Saluka v Czech Republic* went on to describe the task of construing the FET standard as a process which involves: "*a weighing of the [investor's] legitimate and reasonable expectations on the one hand and the [host State's] legitimate regulatory interests on the other".*[108] In recent years, tribunals have placed an increased emphasis on the latter interest. For example, tribunals have expressly recognized that particular weight should be given to governmental regulatory decisions taken in good faith in the interests of public morals, health or the environment.[109]

Against this backdrop, a question which continues to vex tribunals and commentators alike is where exactly to draw a boundary between acceptable and unacceptable state conduct (in terms of breaching or not breaching the FET standard), in circumstances where the relevant legislative or regulatory change has been made in response to a legitimate, even urgent, public interest objective. In other words, is there an exceptional category of state conduct which should never be held in breach of the FET standard, despite the harm caused to foreign investments, where the public interest justification for the relevant measure is so pressing as to effectively 'trump' the FET claim? The test which continues to be invoked in order to deal with these questions is the application of the 'legitimate expectations' principle.

The enduring relevance of the notion of 'legitimate expectations' cannot be overstated. As an elastic concept, it is particularly useful when tribunals are attempting to apply the FET standard

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107 *Saluka Investments BV v. Czech Republic*, Partial Award, Case No 2001–04, 15 ICSID Rep 274, IIC 210 (UNCITRAL, 2006, Watts C, Behrens & Fortier) ('*Saluka v Czech Republic'*) [305].

108 *Id.,* at 306.

109 See, for example, *Apotex Holdings Inc v. United States of America* (Award, ICSID, Case No *ARB(AF)/12/1,* 2014) [9.37]-[9.39]; *Al Tamimi v. Oman* (Award, ICSID, Case No ARB/11/33, 2015) [389].

in circumstances where the relevant state conduct (ie, the regulatory or legislative change) is underpinned by pressing public interest objectives. An example would be circumstances where the host country is under an international obligation to achieve a specific regulatory outcome, such as an international environmental, public health or human rights protection obligation. The 2016 case of *Philip Morris v Uruguay* provides an instructive example of the application of the legitimate expectations principle in such cases.

1. Case Study - *Philip Morris v Uruguay*

In 2008 and 2009, Uruguay enacted a series of measures which were designed to reduce tobacco consumption in the context of what was seen as a public health crisis. Uruguay first prohibited the marketing of more than one variant of cigarette under the same brand, and second required that health warnings take up 80% of the cigarette packet.[110] Philip Morris brought a claim of expropriation under the BIT between Switzerland and Uruguay, seeking compensation for the impact of these measures on its investment.[111] In asserting its right to regulate, Uruguay emphasized the public health benefit of these measures and highlighted its obligations under the World Health Organization's 2003 Framework Convention on Tobacco Control.[112]

In its decision, the tribunal acknowledged that although the FET standard required a certain degree of legal stability, this standard did not affect "*the State's right to exercise its sovereign authority to legislate and to adapt its laws to changing circumstances*".[113] The tribunal attached significant weight to the public health objective underpinning the regulatory measures, and linked this back to the claimant's expectations at the time of investing, finding that, in light of "*widely accepted articulations of international concern for the harmful effect of tobacco*", investors in the tobacco industry ought to have expected increasingly stringent regulations.[114] As such, the onus was largely placed on the investor to have considered the social and economic conditions of the host state, including the likelihood of a change to the regulatory framework, and to adjust its expectations accordingly.[115] In this way, the tribunal drew a clear distinction between expectations derived from the general laws or regulations in place at the time of the investment decision (which would not, without more, constitute legitimate, defensible

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110 M.D. Brauch, 'Philip Morris v. Uruguay: All Claims Dismissed; Uruguay to Receive US$7 Million Reimbursement' (Investment Treaty News (online), 10 Aug. 2016) https://www.iisd.org/itn/2016/08/10/philip-morris-brands-sarl-philip-morrisproducts-s-a-and-abal-hermanos-s-a-v-oriental-republic-ofuruguay-icsid-case-no-arb-10-7/.

111 *Philip Morris Brands SÀRL, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay* (Award, ICSID, Case No ARB/10/7, 8 July 2016) ('*Philip Morris v Uruguay*').

112 *Id.,* at 395 - 396.

113 *Id.,* at 411.

114 *Id.,* at 430.

115 *Id.,* at 427.

expectations) and legitimate expectations derived from a specific representation or commitment made by the host state. In its decision, the tribunal urged other investment tribunals to "*pay great deference to governmental judgments of national needs in matters such as the protection of public health*".[116]

2. Case Study - Claims by Renewable Energy Investors

The global energy transition is driving significant structural changes to the energy investment landscape, away from 'traditional' (high-carbon) energy sources and towards 'clean' (low-carbon) energy supply and efficiency, including from renewable sources. Private investment, including foreign direct investment, will continue to play a crucial role in facilitating the transition, by filling the gap in new or reallocated investment capital that is required to keep the goals of the Paris Agreement (and other climate commitments) in sight.

It is perhaps unsurprising that an increase in investment in the renewable energy sector has generated an increase in related disputes, including investor-state disputes. But beyond what might be perceived as a commensurate 'uptick', the increase of new ISDS cases brought by investors in the renewable energy sector in recent years (as a proportion of ISDS cases generally) has been dramatic. The statistics of claims commenced under the Energy Charter Treaty (**ECT**) provide a clear illustration of the scale of this increase. Available data suggests that of all claims initiated under the ECT since its inception in 1994, approximately 60% are claims made by investors in the renewable energy sector (up to 1 June 2022).[117] The increase is particularly noteworthy when considering claims commenced in the past decade only. Of all claims commenced under the ECT since 2012, claims relating to reforms affecting the renewable energy sector make up just under 70%.[118]

There are several characteristics of the renewable energy sector which have made investments in that sector particularly susceptible to the type of state conduct which gives rise to ISDS claims. Although the cost of renewable energy technology has decreased significantly in recent years, new projects (particularly those involving new technology) can be capital-intensive, and the sector remains – at least in part – reliant on favorable regulatory frameworks and supportive government policies. However, support of this nature can be a double-edged sword. Indeed, the vast majority of claims commenced by investors in the renewables sector under the ECT involve circumstances where the host state had implemented subsidies or other incentive regimes,

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116 *Id.,* at 399.

117 *Statistics of ECT Cases (as of 01/06/2022)*, Energy Charter Secretariat (2022), https://www.energycharter-treaty.org/fileadmin/user_upload/All_statistics_-_1_June_2022.pdf.

118 80 of 116 claims (68.9%) registered from and including 2012 up to 1 June 2022, according to the ECT's list of cases, https://www.energychartertreaty.org/fileadmin/DocumentsMedia/Statistics/Chart_ECT_cases_-_1_June_2022.pdf. The 80 claims included in this percentage are those with the subject matter of the dispute described as "Legal reforms affecting the renewable energy sector" or "Legal reforms affecting the pricing of electricity and the renewable energy sector".

designed to encourage investment in the renewable energy industry, only to scale back (or in some cases, wholly dismantle) the favorable regulatory framework at a later point in time.

The award in the case of *Charanne v Spain* was the first decision to be rendered out of the dozens of similar claims by renewable energy investors commenced against Spain in relation to an incentive regime coined the 'Special Regime'.[119] The Special Regime, which was introduced in 2007, provided various incentives to new investors in Spain's solar energy industry, including a generous feed-in tariff (fixed for twenty-five years). The Special Regime succeeded in attracting a significant number of foreign investors. However, it soon became apparent that the high feed-in tariffs paid to solar energy producers were creating a deficit in the energy market, exacerbated by the impact of the global financial crisis. This issue was not unique to the Spanish model; tariff deficits began to occur in many European states that had enacted similar incentive schemes. In response to the deficit, Spain took action to modify the Special Regime, starting with reforms in 2010 which included the elimination of the feed-in tariff beyond the initial twenty-five-year period, a cap on the number of operator hours eligible for the feed-in tariff, and the introduction of a transmission fee.

The investors in *Charanne v Spain* claimed that the modifications to the Special Regime amounted to a breach of the FET standard. In essence, the investors asserted that the introduction of the Special Regime (in the circumstances) constituted a specific commitment, giving rise to a legitimate expectation that Spain would maintain a stable and predictable regulatory framework, based on that which existed at the time of the decision to invest. The tribunal, however, disagreed, finding that Spain had not made a specific commitment to the claimants that the Special Regime would not be modified (and consequently, they ought to have anticipated the possibility that modifications such as those implemented in 2010 would be made). Moreover, the Tribunal determined that 2010 changes were proportionate, reasonable, motivated by a rational public interest objective, and did not undermine the 'essential characteristics' of the regime.[120] The claim was dismissed.

However, the changes which Spain made to the Special Regime in 2010 were followed by further, more dramatic changes, from 2012 onwards. By 2014, Spain had eliminated the fixed feed-in tariffs altogether and imposed a tax on electricity production. In the years that followed the decision in *Charanne v Spain*, numerous other claims against Spain in relation to the Special Regime were decided. Of the 24 such cases which have proceeded to an award on the merits, 20 have been decided in favor of the claimant investors. Critically, many of these subsequent decisions concerned the amendments to the Special Regime which were made from 2012 onwards, including the abolishment of the fixed feed-in tariffs.

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119 *Charanne B.V. & Construction Investments S.A.R.L v. The Kingdom of Spain* (Award, SCC, Case No V 062/2012, 21 January 2016) ('*Charanne v Spain*') (Unofficial English translation by Mena Chambers).

120 *Id.,* at 534 - 539.

For example, in *NextEra v Spain,* the investor focused its claim on Spain's conduct after the initial round of amendments to the Special Regime in 2010.[121] The claimant argued that in the wake of the 2010 modifications, Spain had given NextEra assurances of regulatory certainty and stability in respect of the Special Regime going forward. The Tribunal found that, as a result of such assurances, NextEra had a legitimate expectation that "*the [Special Regime] would not be changed in a way that would undermine the security and viability of their investment*."[122] Against this backdrop, the tribunal found that the subsequent (and more significant) amendments to the Special Regime amounted to a fundamental and radical change of the regulatory framework, in breach of the FET standard:

> *In short, the regime was fundamentally and radically changed. Claimants were deprived of the security and certainty that, in light of the assurances they had received from Spanish authorities about guaranteeing the legal security of investments underway as well as the forecasts under which the investments were made and affirming legal and regulatory stability, they could have expected. The changes went beyond anything that might have been reasonably expected by Claimants when they undertook their investment.*[123]

A comparative analysis of the cases triggered by Spain's implementation of, and amendment to, the Special Regime illustrates why the scope and content of the FET standard, and the legitimacy of investor expectations, must be assessed on a case-by-case basis. In *Charanne v Spain*, Spain was found not to have frustrated the investor's expectations, by scaling back the Special Regime whilst maintaining what the Tribunal described as its essential characteristics. Without an explicit commitment by Spain that the regime would not be modified, such changes should have been contemplated and incorporated into the investor's expectations accordingly. However, in the subsequent cases (including *NextEra*), the fact that Spain provided the investor with specific assurances as to future stability, combined with the more dramatic changes to the same regime, resulted in a finding of breach.

V. Conclusion

Early cases considering the application of the FET standard tended to adopt an 'investor friendly' approach, with tribunals construing the standard as imposing weighty obligations on contracting states (for example, the obligation to provide treatment that does not affect the investor's "basic expectations").[124]

However, there was then a discernible shift towards a much narrower conception of conduct amounting to a breach of the FET standard, particular in the determination of claims brought

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121 *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain* (Decision on Jurisdiction, Liability and Quantum Principles, ICSID, Case No ARB/14/11, 12 March 2019) ('*NextEra v Spain*').

122 *Id.,* at 596.

123 *Id.,* at 599.

124 *Tecmed v Mexico* [154].

under NAFTA. These cases saw tribunals adopting a more restrictive approach towards what investors claimed to be legitimate expectations, finding that such expectations needed to be based on "*definitive, unambiguous and repeated*" commitments by the host state.[125]

Although there has since been a 'levelling out' of the divergent interpretations of the FET standard outlined above, the trend has continued to be generally favourable to states, with tribunals placing a significant emphasis on states' right to regulate, particularly where the impugned conduct or measure is underpinned by a clear public interest objective.

In recent cases concerning changes to renewable energy incentive schemes, tribunals have held that investors in a 'highly regulated' sector must undertake a diligent analysis of the legal and regulatory framework for their investment, and such an analysis should consider the possibility of change. For example, in *Charanne v Spain,* the tribunal held that, in the absence of an explicit commitment to the contrary (or conduct amounting to a promise), changes which are reasonable and foreseeable should be contemplated by investors and incorporated into their expectations.

D. SUMMARY

This chapter first traced the historical origins of the FET standard with reference to the significant developments of the pre- and, in particular, post-Second World War periods and the emergence of the modern FET standard recognizable today. This chapter also analyzed the main categories of the FET standard identified in contemporary IIAs, based on the formulation of the text.

Because the provisions of IIAs are not uniformly drafted, the precise meaning and interpretation of investment protections, including the FET standard, will vary. Although the FET standard has traditionally been interpreted expansively by arbitral tribunals, a number of recent IIAs have sought to link the scope of the FET standard to the "minimum standard of treatment" under customary international law. This has generated considerable uncertainty as to how the FET standard will be interpreted by tribunals in circumstances where the relevant IIA has drawn an explicit link between the FET standard and the minimum standard of treatment. Notwithstanding, the case law supports the conclusion that even a narrow construction of the FET standard will prohibit manifestly unfair treatment, including measures which amount to a sudden and unpredictable elimination of the essential characteristics of the existing regulatory framework.

This chapter also analyzed the evolution of the interpretation of the FET standard by arbitral tribunals in recent decades, identifying a general trend towards a more 'state-friendly' interpretation of the standard, and a significant emphasis on the regulatory prerogative of host states, particular with respect to sensitive public policy areas such as public health and protection of the environment.

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125 *Glamis Gold v United States* [802].

Finally, this chapter considered the interpretation of the FET standard in the context of the recent ‘green wave’ of claims brought by investors in the renewable energy sector. This influx of cases has shown the system of ISDS to be an effective means for investors to ‘enforce’ the specific commitments made by host states in their efforts to increase investment in clean energy. The decisions rendered to date illustrate two key takeaways; first, that determining whether there has been a breach of the FET standard is an extremely fact-sensitive enquiry, and second, that the FET standard is an elastic and ever-evolving standard, capable of application to disputes concerning investments in new technologies and developing sectors, as the global energy market undergoes a rapid existential transformation.