Columbia Law School
Scholarship Archive

LL.M. Essays & Theses Student Scholarship

2022

# The Role of Arbitral Tribunals in Determining the Scope of the Fair and Equitable Treatment Standard

Thomas Ferguson Whip

Follow this and additional works at: https://scholarship.law.columbia.edu/llm_essays_theses

Part of the Dispute Resolution and Arbitration Commons, and the International Law Commons

# THE ROLE OF ARBITRAL TRIBUNALS IN DETERMINING THE SCOPE OF THE FAIR AND EQUITABLE TREATMENT STANDARD

Thomas Ferguson Whip

Submitted in partial fulfillment of the requirements

for the degree of Master of Laws in the

School of Law

Columbia University

# Table of Contents

**I. Introduction ..... 3**
**II. Methodology and Data ..... 5**
**III. Effect of Language Adopted in FET Clauses: Outcomes and Methodology ..... 6**
III.1. The conventional wisdom ..... 6
III.2. Typology of FET clauses ..... 6
III.3. Breaches by category of FET clause ..... 8
III.3.1. Summary ..... 8
III.3.2. Low proportion of breaches where FET linked to the MST (Category 4) ..... 9
(a) Limitations of overall data set ..... 9
(b) NAFTA and the 2001 Notes of Interpretation ..... 10
(c) Do clauses linked to the MST impose a lower standard? ..... 12
(d) Conclusion ..... 16
III.3.3. Absence of decisions regarding clauses with additional substantive content ..... 17
III.3.4. Clauses linked to international law – divergent results ..... 18
(a) Textual factors ..... 18
(b) Underlying treaties ..... 20
(c) Potential explanations ..... 20
III.4. Tribunals' interpretive methodology – components of FET ..... 21
III.4.1. Identifying the source of the FET standard ..... 22
III.4.2. Identifying the applicable sub-standards ..... 23
**IV. Stability and predictability of legal and business environment ..... 25**
IV.1. Introduction ..... 25
IV.2. Statistical analysis ..... 26
IV.3. Arbitral jurisprudence ..... 26
IV.3.1. Origins of the obligation ..... 26
IV.3.2. Energy Charter Treaty jurisprudence ..... 29
**V. Conclusion ..... 32**

# I. Introduction

Whether or not investor-State dispute settlement ("**ISDS**") faces a "legitimacy crisis,"[1] there is a "growing consensus" that it requires reform.[2] The development of the fair and equitable treatment standard ("**FET standard**") by arbitral tribunals been a salient factor in fomenting this consensus and is the subject of several reform proposals.[3] A number of scholars, including Professors Sornarajah[4] and Gus van Harten,[5] claim the interpretative process undertaken by tribunals in relation to the FET standard has contributed to ISDS' legitimacy crisis because it involves applying subjective notions of what adjudicators perceive to be desirable developments of the law. On the other hand, Professors Christoph Schreuer[6] and Susan Franck[7] opine that the FET standard is flexible by design because it permits a tribunal to adapt and apply written texts to

[1] Susan Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005), 1589.
[2] Stephen W. Schill, *Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward*, (E15Initiative). International Centre for Trade and Sustainable Development/World Economic Forum (July 2015) (http://e15initiative.org/publications/reforming-investor-state-dispute-settlement-isdsconceptual-framework-and-options-for-the-way-forward/).
[3] Energy Charter Secretariat, *Decision of the Energy Charter Conference: Modernisation of the Energy Charter Treaty*, CCDEC 23 STR (November 28, 2017) (https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2017/CCDEC201723.pdf).
[4] M. SORNARAJAH, RESISTANCE AND CHANGE IN THE INTERNATIONAL LAW ON FOREIGN INVESTMENT (CUP 2015), 246-27 ("A new door was to be opened if investment arbitration was to remain viable. . . . It was opened largely through the awards of individual arbitrators who had a dominant influence in shaping its early course. . . . The creation of a law based on the fair and equitable standard is a vindication of the view presented in this that the primary thrust in investment arbitration has been to promote investment protection according to a desired model, and not to bring about a law that balances the interests of the foreign investor with other interests of the host state, its people and the international community as a whole.").
[5] GUS VAN HARTEN, THE TROUBLE WITH FOREIGN INVESTOR PROTECTION (OUP 2020) 62, 64 ("As a source of wide- ranging power to discipline states, the 'fair and equitable treatment' protection has been especially useful to ISDS arbitrators because it is so vague. Obviously, fairness and equity can mean different things to different people. . . . Holding countries to such an unforgiving requirement seems dismissive of the need to revise laws and regulations in response to changing circumstances and to plan for the cost of these decisions.").
[6] Christoph Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 J. WORLD INV. & TRADE (3) (2005), 357, 364-65 ("The standard of fair and equitable treatment is relatively imprecise. Its meaning will often depend on the specific circumstances of a case at issue. . . . this lack of precision may be a virtue rather than a shortcoming. . . . The principle of fair and equitable treatment allows for independent and objective third-party determination of this type of behavior on the basis of a flexible standard.").
[7] Franck *supra note* 1, 1589 ("Overly specific definitions [of the FET clause] will sacrifice the flexibility and equity that exists in the present system and may also prematurely stunt the development of new areas of law. Perhaps, more importantly, in an attempt to cover every possible scenario, over-definition can create absurd results; instead of being a 'cure' to a legitimacy crisis, this can defeat the purpose and intent of the role and create further difficulties. Even if the provisions of investment treaties are 'broad'. 'vague,' or 'uncertain,' this does not make the standards illegitimate.").

changing realities and to engage in a "gap filling" function.[8] Despite the discord between these positions, both share the premise that tribunals have been fundamental in elaborating the scope and content of the FET standard.[9] The scholarship to date, however, provides an incomplete account of *how* tribunals have developed the FET standard. Without understanding this process, the capacity for reforms of the FET standard to effectively circumscribe tribunals' interpretive discretion and enhance predictability and legal correctness[10] will be constrained.

To address this lacuna, I conducted a comprehensive empirical analysis of the evolution of the FET standard. Using data generated from this analysis, coupled with doctrinal reviews of ISDS jurisprudence, this paper discusses two key findings. First, it evaluates the extent to which the language adopted in FET clauses influences (i) the probability that FET claims will succeed and (ii) tribunals' interpretive methodologies (Section III). It concludes, contrary to conventional wisdom, that the treaty language has exerted limited influence on both fronts. Second, it traces the evolution of stability and predictability as a component of fair and equitable treatment (Section IV). The origin of the purported obligation to afford investors a stable and predictable legal and business framework can be traced to a series of awards that relied on ambiguous preambular statements in United States bilateral investment treaties (**BITs**) to justify its development. In turn, the sub-standard has been reinforced by the profusion of Energy Charter Treaty cases since 2008, where there is arguably a more solid foundation for such an interpretation.

---

[8] Stephen Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, 73 BRITISH Y.B. INTL LAW (1999) 99, 104 ("Investment treaties and contracts are almost invariably prepared in advance of the projects to which they will be applicable; and, usually, the parties to these treaties and contracts cannot predict the range of possible occurrences which may affect the future relationship between the State and particular investors. Accordingly, States and investors may support the fair and equitable standard precisely because they believe it does not provide a detailed a priori solution to certain issues which could arise in the future.").

[9] *See* United Nations Conference on Trade and Development, *Fair and Equitable Treatment: A Sequel*, UNCTAD/DIAE/IA/2011/5 (2012), 62 (https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf) ("**UNCTAD FET Study**").

[10] European Commission and Government of Canada, *Discussion paper – Establishment of a multilateral investment dispute settlement system* (14 December 2016), ¶¶ 5-9 (https://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155267.12.12%20With%20date_%20Discussion%20paper_Establishment%20of%20a%20multilateral%20investment%20Geneva.pdf).

## II. Methodology and Data

The data analyzed in this paper is drawn from a survey of publicly available investor-State proceedings where (i) the claimant alleged a violation of the FET standard, and (ii) the tribunal rendered an award on the merits. As such, it does not take into consideration proceedings that were, for example, settled or discontinued at the request of the parties, or where a tribunal determined that it lacked jurisdiction. ICSID's most recent caseload report, which records cases registered or administered by ICSID between 1972 and 2021, indicates that 48% of proceedings have resulted in merits awards.[11]

Within these parameters, we have reviewed 138 awards across a range of metrics. This paper includes the results of our analysis of the following:

(i) the specific language adopted in the applicable FET clause;

(ii) whether tribunals expressly conclude that the FET standard is derived from the customary international law minimum standard of treatment for aliens (**MST**), or constitutes an autonomous treaty standard;

(iii) the extent to which tribunals refer to previous awards in reaching these interpretations;

(iv) relatedly, when tribunals do refer to previous awards, whether they rely on awards that concern identical or divergent FET clauses to establish the *source* of the FET standard (i.e. autonomous from, or derived from, the MST) and the *components or sub-standards* that the FET standard encompasses.[12]

---

[11] International Centre for the Settlement of Investment Disputes, *The ICSID Caseload – Statistics*, 19 (February 7, 2022) (https://icsid.worldbank.org/sites/default/files/documents/The_ICSID_Caseload_Statistics.1_Edition_ENG.pdf) ("**ICSID Caseload Statistics**").

[12] For example, denial of justice, legitimate expectations, stability and predictability.

## III. Effect of Language Adopted in FET Clauses: Outcomes and Methodology

### III.1. The conventional wisdom

The conventional wisdom is that the specific language adopted in FET clauses is significant because it may have consequences for (i) investors' prospects of establishing a violation of the FET standard, and (ii) the interpretative methodology adopted by tribunals in identifying the applicable legal standard.[13] Our quantitative analysis indicates that this view is misguided. While different categories of FET clauses have given rise to varying rates of violations, this outcome is best understood as the result of extra-textual factors and the limited data set available for some categories. In addition, our analysis illustrates that tribunals' interpretive methodologies are not materially affected by the drafting of the applicable FET clause.

### III.2. Typology of FET clauses

To conduct a quantitative analysis assessing the effect of the language adopted in FET clauses, this paper adopts a typology of FET clauses commonly found in investment treaties. Despite some commentators suggesting that FET clauses incorporate only "relatively modest" variations as compared to other substantive standards,[14] Table 1 identifies five distinct formulations.[15]

*Table 1: Categories of FET Clauses*

| | Category | Example clause |
|---|---|---|
| 1. | Unqualified FET Clause | Each Contracting Party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party and shall not impair, by unreasonable discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors.[16] |
| 2. | FET Clause Linked to International Law as a *Reference* | Each of the Contracting Parties undertakes to grant, within its territory and its maritime area, fair and equitable treatment *according to the principles of international law* to investments made by investors of |

[13] UNCTAD FET Study, *supra* note 9, 17; Rudolf Dolzer & Christoph Schreuer, Principles of International Investment Law, 132 (OUP, 2nd ed., 2008).
[14] *See*, e.g., *Id.* 261.
[15] This classification slightly modifies the approach UNCTAD FET Study. Relevantly, it distinguishes between clauses that merely refer to international law (Category 2) and clauses that refer to international law as a floor (Category 3).
[16] Art. 3(1) of the Netherlands-Czech Republic BIT (1991).

| | Category | Example clause |
|---|---|---|
| | | the other Party, and to do it in such a way that the exercise of the right thus recognized is not obstructed de jure or de facto.[17] |
| 3. | FET Clause Linked to International Law as a *Floor* | Investments shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall *in no case be accorded treatment less favorable than that required by international law*.[18] |
| 4. | FET Clause Linked to The Minimum Standard of Treatment (**MST**) Under Customary International Law | 1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.<br>2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investors. 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 that standard, and do not create additional substantive rights…[19] |
| 5. | FET Clause with Additional Substantive Content | a. Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 through 6.<br>b. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes:<br>(a) denial of justice in criminal, civil or administrative proceedings;<br>(b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;<br>(c) manifest arbitrariness;<br>(d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;<br>(e) abusive treatment of investors, such as coercion, duress and harassment; or<br>(f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article."[20]<br>…<br>4. When applying the above fair and equitable treatment obligation, the Tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated. |

[17] Art. 3(1) of the Argentina-France BIT (1991) (emphasis added).
[18] Art. 3(a) of the United States of America-Ecuador BIT (1993) (emphasis added).
[19] Art. 10.5(1)-(2) of the United States-Oman FTA (2015). This clause also specifies, in paragraph (2), additional substantive content said to be consistent with the customary international law MST.
[20] Art. 8.10 of Comprehensive Economic and Trade Agreement (2016) (Canada-European Union).

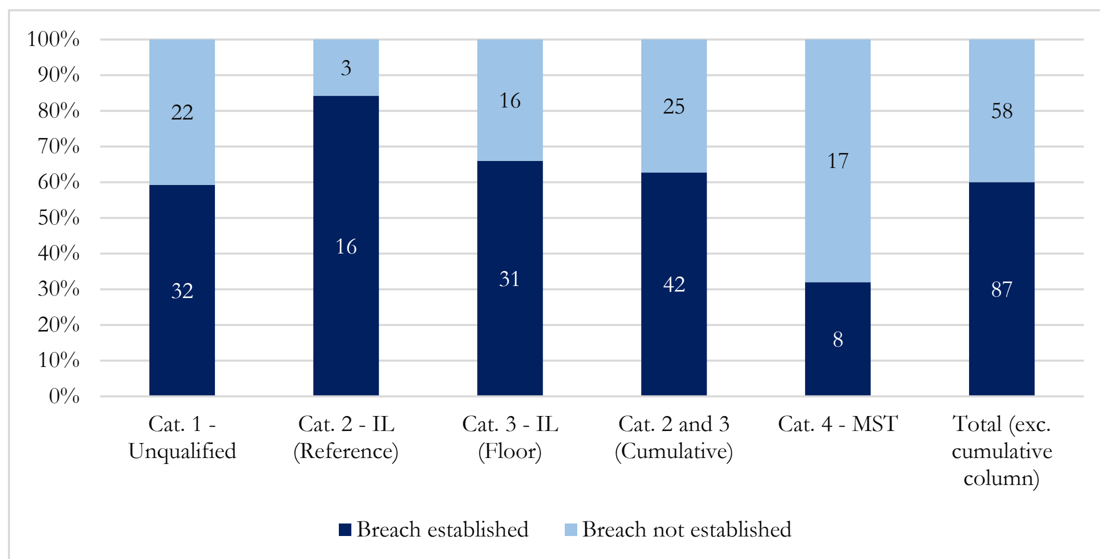
## III.3. Breaches by category of FET clause

### III.3.1. Summary

In the 138 surveyed awards where tribunals have made a final determination concerning an alleged breach of an FET clause, investors have succeeded in 82 cases (59.42%). As set out in

Figure 1, the probability that a tribunal will find a breach of the FET standard varies markedly across the categories of FET clauses,[21] particularly clauses linked to the customary international law MST (Category 4) and clauses that require treatment *in accordance with* international law (Category 2).

*Figure 1: Proportion of FET violations by category of FET clause*[22]




On its face, this variance suggests that the type of FET clause adopted influences the probability that a breach of the standard will be established. However, as discussed below, the existence of a clear causal link between a treaty's specific language and the outcome of FET claims is difficult to sustain upon closer analysis. This conclusion is subject to one important caveat: a tribunal is yet to consider the effect of an FET clause with additional substantive content (Category 5). These clauses are typically intended to constrain tribunal's interpretive discretion, enhance

[21] As discussed below, a tribunal is yet to issue an award in relation to an FET clause with additional substantive content (Category 5).
[22] The superimposed figures identify the number of successful and unsuccessful claims for each category of clause.

predictability and confine investor protection to clear grounds of wrongful conduct. Whether these clauses are capable of achieving these aims remains an open question.

### III.3.2. Low proportion of breaches where FET linked to the MST (Category 4)

Investors' FET claims have been least successful where the FET clause is linked to the MST under customary international law (Category 4), with a violation established in just 32% of cases. Although this result suggests tribunals typically construe clauses that equate FET with the customary international law MST as imposing a lower threshold for State conduct, the reality is more complex.

(a) Limitations of overall data set

The statistical significance of this result is limited by two factors. First, there have only been 26 awards rendered concerning an FET clause expressly linked to the customary international law MST. Given the limited number of investment treaties that incorporate Category 4 FET clauses, this result is not entirely surprising. Data compiled by the United Nations Conference on Trade and Development indicates that just 3.19% of treaties include a Category 4 FET clause, with the significant majority of those treaties only being concluded after 2007.[23] Second, of the 26 relevant awards we have identified, 22 are NAFTA disputes.[24] The absence of a diversity of treaties means it is more difficult to reach general conclusions about the typical effect of linking the FET standard with the customary international law MST. Third, NAFTA' FET provision was the subject of a famous exercise in post-ratification 'interpretation' by its signatories, which may have influenced

[23] See UNCTAD, Investment Policy Hub, *International Investment Agreements Navigator*, (https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping#section-38). UNCTAD identified 82 treaties that refer to the customary international law MST out of 2574 mapped treaties. Of those 82 treaties, 60 were signed after 2007.

[24] The balance of the awards concern the Netherlands-Venezuela BIT (1991) (*Mobil Cerro Negro Holding, Ltd., Mobil Cerro Negro, Ltd., Mobil Corporation and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award of the Tribunal, 9 October 2014); the Oman-United States FTA (*Adel A Hamadi Al Tamimi v. Sultanate of Oman,* ICSID Case No. ARB/11/33, Award, 3 November 2015); and the Free Trade Agreement between Central America, the Dominican Republic and the United States of America (2004) (*Railroad Development Corporation (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012 and *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award, 19 December 2013).

the approach adopted by NAFTA tribunals in a manner not attributable to the inherent meaning of Category 4 clauses.

(b) NAFTA and the 2001 Notes of Interpretation

Despite the limitations of the global data set for Category 4 clauses, outcomes in NAFTA proceedings may still provide some insights regarding tribunals' approach to the customary international law MST. First, as discussed above, the proportion of successful NAFTA claims is materially lower than for other categories of FET clauses. Second, investors have succeeded at an even lower rate when decisions rendered prior to the NAFTA Free Trade Commission's well-known *Notes of Interpretation of Certain Chapter 11 Provisions* (**Interpretive Note**) are excluded.[25]

Although titled 'Minimum Standard of Treatment,' Art. 1105(1) of NAFTA does not expressly refer to customary international law.[26] Instead, it relevantly requires each State party to "accord to investments of investors of another Party treatment *in accordance with international law*, including fair and equitable treatment" (emphasis added). In the Interpretive Note, the Free Trade Commission purported to issue a binding interpretation[27] stipulating that "Article 1105(1) prescribes the customary international law minimum standard" and the "concept()" of FET does not require treatment "in addition to or beyond that which is required by the customary international law minimum standard of aliens."

Before the Interpretive Note was promulgated, investors' FET claims succeeded in three of four cases.[28] Notably, in each of these cases, the tribunal did not equate Art. 1105 with the

[25] NAFTA Free Trade Commission (July 31, 2001) (http://2009-2017.state.gov/documents/organization/38790.pdf).
[26] The clause 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."
[27] Pursuant to Art. 1131(2), which provides that "(a)n interpretation by the [Free Trade] Commission of a provision of [NAFTA] shall be binding on" NAFTA tribunals. However, amendments to NAFTA can only be adopted pursuant to Art. 2202, which agreements to be "approved in accordance with the applicable legal procedures of each Party" to "constitute an integral part" of NAFTA.
[28] *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000 (***Metalclad v Mexico***), *S.D. Myers, Inc. v. Government of Canada*, Partial Award (Merits), 13 November 2000 (***SD Meyers v Canada***); and *Pope & Talbot v. Government of Canada*, Interim Award, 26 June 2000.
The investors' FET claim was unsuccessful in *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999.

customary international law MST. The *Metalcad v Mexico* and *S.D. Myers Inc. v Canada* tribunals did not expressly indicate whether they considered Art. 1105 to be linked to either international law, the customary international law MST or constitute an autonomous standard.[29] In *Pope & Talbot Inc. v. Canada*, on the other hand, the tribunal engaged in a detailed consideration of this issue, ultimately concluding that Art. 1105 incorporated "fairness elements" derived from contemporaneous BITs that were "additive" to requirements under customary international law.[30]

Although the Commission's power to issue the Interpretive Note has been questioned,[31] subsequent NAFTA tribunals have abided by it. Indeed, our analysis shows that only two of 18 subsequent decisions have not expressly connected Art. 1105 with the customary international law MST.[32] Of these decisions, violations of the FET standard have only been established in 3 cases (16.66%).[33]

To more accurately assess the effect of linking clauses to the MST under customary international law, at least in the context of NAFTA, it is therefore appropriate to exclude awards issued prior to the Interpretive Note because they either fail to clearly identify the content of Art. 1105 (*Metalclad*, *S.D. Meyers* and *Azinian*) or expressly declined to equate it with the MST (*Pope & Talbot*). Indeed, the *Loewen v USA* tribunal has observed that these decisions "must be disregarded" to the extent that they did not derive the Art. 1105 from the customary international law MST.[34]

---

[29] See at *SD Meyers v Canada,* ¶¶ 258-269 and *Metalcad v Mexico*,¶¶ 74-101.

[30] *Pope & Talbot v. Government of Canada*, Award on the Merits of Phase 2, 10 April 2001, ¶ 118.

[31] See, for example, Charles N. Brower II, 'Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105' (2006) 46 VIRGINIA J. INT' L. 347, 354-356; *Merrill & Ring Forestry L.P. v. The Government of Canada*, ICSID Case No. UNCT/07/1, Award, 31 March 2010, ¶ 192 ("(T)he FTC Interpretation seems in some respect to be closer to an amendment of the treaty, than a strict interpretation.")]

[32] Namely, *United Parcel Service of America, Inc. (UPS) v. Government of Canada*, Award on the Merits, 24 May 2007 (no detailed discussion of the source of the FET standard) and *Marvin Roy Feldman Karpa v. United Mexican States,* ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002 (breach of FET standard not alleged as dispute concerned taxation measures, which are excluded from the scope of Art. 1105).

[33] *Pope & Talbot v. Government of Canada,* Award in Respect of Damages, 31 May 2002; *Cargill v. Mexico* (ICSID Case No. ARB(AF)/05/2); *Clayton and Bilcon of Delaware Inc. v. Canada* (PCA Case No. 2009-04).

[34] *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003. The exception was *Azinian*: see ¶ 98 ("The effect of the Commission's interpretation is that "fair and equitable treatment" and "full protection and security" are not free-standing obligations. They constitute obligations only to the extent that they are recognized by customary international law... To the extent, if at all, that NAFTA Tribunals in [*Metalclad*, *S.D. Meyers* and *Pope & Talbot*…] may have expressed contrary views, those views must be disregarded.")

Table 2, below, divides cases that concerned clauses linked to the MST by reference to the applicable treaty, as well as distinguishing NAFTA awards between those rendered before and after the Interpretive Note.

*Table 2: Outcomes of Category 4 cases*

| Cases by treaty | FET violations | FET violation | No FET violation |
|---|---|---|---|
| All cases | 32% | 8 | 17 |
| NAFTA – all cases | 27.27% | 6 | 16 |
| NAFTA – post-Interpretive Note | 20% | 3 | 15 |
| All cases – NAFTA (post-Interpretive Note) and other treaties[35] | 23.81% | 5 | 16 |

The results affirm that the proportion of violations established where the applicable FET clause is linked to the MST is significantly lower than the average for Category 1 (65.96%), Category 2 (84.21%), and Category 3 (56.25%) clauses, and that this variance is even more pronounced when NAFTA awards issued prior to the Interpretive Note are excluded.

(c) Do clauses linked to the MST impose a lower standard?

While relatively few cases have considered clauses linked to the MST, the degree of variance *may* support the view that tribunals typically construe clauses that expressly refer to the MST under customary international law as imposing a lower burden on States than other formulations.

A number NAFTA awards appear to support this proposition. In *Waste Management v Mexico*, an award rendered three years after the Interpretive Note, the tribunal held:[36]

> [T]he 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

[35] *See* note 24.
[36] *Waste Management v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶ 98.

> failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.

This conclusion was endorsed in *Thunderbird v Mexico*, where the tribunal held that "the threshold for finding a violation of the minimum standard of treatment still remains high," notwithstanding its evolution since the *Neer* decision.[37] Similarly, in *Clayton Bilcon v Canada*, the tribunal held that "Article 1105 is… identical to the minimum international standard,"[38] which had "evolved in the direction of increased investor protection,"[39] but that Art. 1105 still imposed a "high threshold" and "(a)cts or omissions constituting a breach must be of a serious nature."[40]

Two of the four non-NAFTA tribunals that have considered clauses linked with the customary international law MST also expressly imposed 'high thresholds.' In *Adel A Hamadi Al Tamimi v. Sultanate of Oman* (2015)*,* a case arising under the US-Oman FTA, the tribunal stated:"It is broadly accepted that the minimum standard of treatment under customary international law imposes a relatively high bar for breach."[41] To establish a breach of this standard, it found that a claimant must have "acted with a gross or flagrant disregard for the basic principles of fairness, consistency, even-handedness, due process, or natural justice expected by and of all States under customary

[37] *International Thunderbird Gaming Corporation v. The United Mexican States*, Arbitral Award, 26 January 2006 (citing *USA (L.F. Neer) v. Mexico* (1926), 4 R.I.A.A. 60 (Gen. Cl. Comm'n 1926)). Cf. *Glamis Gold Ltd. v. United States of America,* Award, 8 June 2009, ¶ 433 ("Given the absence of sufficient evidence to establish a change in the custom, the fundamentals of the Neer standard thus still apply today: to violate the customary international law minimum standard of treatment codified in Article 1105 of the NAFTA, an act must be sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons—so as to fall below accepted international standards and constitute a breach of Article 1105(1).")
[38] At ¶ 433.
[39] At ¶ 438.
[40] At ¶¶ 441 and 443. The tribunal did qualify this finding somewhat, holding "that there is no requirement in all cases that the challenged conduct reaches the level of shocking or outrageous behaviour" (at ¶ 444).
[41] ICSID Case No. ARB/11/33, Award, 3 November 2015, ¶ 382.

international law."[42] In the *Railroad Development Corporation (RDC) v. Republic of Guatemala* (2012), which concerned alleged breaches of the Dominican Republic-Central America-United States Free Trade Agreement (**CAFTA-DR FTA**), tribunal adopted the standard articulated in *Waste Management v Mexico* (extracted above).[43]

The reasoning of the tribunals in the remaining non-NAFTA decisions is, however, more difficult to decipher. *TECO v Guatemala* (2013) also concerns the CAFTA-DR FTA.[44] Despite apparently detailed submissions by the parties on this point, the tribunal did not clearly address the content of the MST. Instead, its brief analysis of the standard commenced by noting that it was "mindful of the deference that international tribunals should pay to a sovereign State's regulatory powers,"[45] before concluding:[46]

> As a consequence, although the role of an international tribunal is not to second-guess or to review decisions that have been made genuinely and in good faith by a sovereign in the normal exercise of its powers, it is up to an international arbitral tribunal to sanction decisions that amount to an abuse of power, are arbitrary, or are taken in manifest disregard of the applicable legal rules and in breach of due process in regulatory matters.

Similarly, in *Mobil and Others v Venezuela*,[47] the tribunal did not ascertain the parameters of the customary international law MST.[48] It merely held that the FET standard "may be breached by

[42] ¶ 390. In defining this standard, it should be noted that the tribunal also had regard to a provision of the US-Oman FTA that affirmed that parties' "discretion" in relation to "environmental matters" as "further relevant context": see ¶¶ 388-389.
[43] ICSID Case No. ARB/07/23, Award, 29 June 2012, ¶ 219.
[44] *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award, 19 December 2013, ¶¶ 361-367
[45] ¶ 490.
[46] At ¶ 493.
[47] *Mobil Cerro Negro Holding, Ltd., Mobil Cerro Negro, Ltd., Mobil Corporation and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award of the Tribunal, 9 October 2014. The case concerned alleged violations of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Republic of Venezuela (**Netherlands-Venezuela BIT**).
[48] The applicable FET clause in the Netherlands-Venezuela BIT does not expressly refer to the customary international law MST. However, a protocol to the BIT provides that "(t)he Contracting Parties agree that the

frustrating the expectations that the investor may have legitimately taken into account when making the investment," which "may result from specific formal assurances given by the host state in order to induce investment."[49] Together, these awards complicate the proposition that tribunals construe clauses linked to the customary international law MST in a consistent fashion.

In addition, a number of awards regarding treaties that do not expressly refer to the customary international law MST have concluded that the MST and autonomous treaty standards are converging or indistinguishable. In *CMS v Argentina*, for example, the tribunal stated that it was "mindful of discussions" concerning whether the treaty FET standard was identical with the customary international law MST, "particularly with reference to the NAFTA Free Trade Commission's Note of Interpretation."[50] It determined that the standards, at least in the circumstances of the particular case, were "not different."[51] Subsequent tribunals have also held that the standards are "substantially similar,"[52] "not materially different"[53] "essentially the same,"[54] "increasingly aligned" and without any "material difference."[55]

Nonetheless, the perception that the customary international law MST requires a lower standard of State conduct appears to have fostered a shift in the United States' treaty practice, with its 2004 and 2012 model BITs incorporating an express reference to customary international law.[56]

---

treatment of investments shall be considered to be fair and equitable as mentioned in Article 3, paragraph 1, if it conforms to… the minimum standard for the treatment of foreign nationals under international law."

[49] ¶ 256.

[50] ¶ 283.

[51] ¶ 284.

[52] *Azurix Corp. v. The Argentine Republic (I)*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 361.

[53] *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, ¶ 611.

[54] *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, ¶ 337.

[55] *Murphy Exploration & Production Company – International v. The Republic of Ecuador (II)*, PCA Case No. 2012-16, Partial Final Award, 6 May 2016, ¶ 208 ("The international minimum standard and the treaty standard continue to influence each other,3 and, in the view of the Tribunal, these standards are increasingly aligned. This view is reflected in the *jurisprudence constante* not only of NAFTA caselaw, as discussed above, but also in the arbitral caselaw associated with bilateral investment treaties. Some tribunals have gone so far as to say that the standards are essentially the same. The Tribunal finds that there is no material difference between the customary international law standard and the FET standard under the present.")

[56] Art. 5.1 of the 2012 Model BIT, which is supplemented by an interpretive annex, provides (emphasis added):

*Article 5: Minimum Standard of Treatment*

Several members of the Advisory Committee on International Economic Policy, which was commissioned by the State Department to review the United States' Model BIT, suggested that clauses linked to the MST "provid[e] fewer protections to investors than the fair and equitable treatment and full protection and security provisions as defined by international law in general (i.e., including but not limited to custom)."[57] This amendment "may be understood as a response" to the view that "a definition of 'fair and equitable treatment' unbounded by custom had left the door open to adventurist arbitrators to exercise an unfettered discretion as to the appropriateness of State policy."[58]

(d) Conclusion

It is clear that tribunals, on average, appear significantly less inclined to conclude that States have breached FET clauses linked to the customary international law MST. However, it is not possible to conclude that this outcome is because tribunals consistently construe such clauses as imposing a lower threshold for State conduct. First, the majority of relevant cases have arisen under NAFTA, which weakens the probative value of the overall data set. Second, it is at least as plausible that NAFTA tribunals approach to Art. 1105 has been driven by a response to the strong institutional signal delivered by the Interpretive Note. Finally, jurisprudence from non-NAFTA tribunals is too inconsistent to support a definitive conclusion.

---

*1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.*
*2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. 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 that standard, and do not create additional substantive rights…*

[57] Advisory Committee on International Economic Policy, *Report of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty* (September 30, 2009) (https://2009-2017.state.gov/e/eb/rls/othr/2009/131118.htm).
[58] CAMPBELL MCLACHLAN, LAURENCE SHORE, AND MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (OUP, 2nd ed., 2017), ¶¶ 7.36, 7.38.

### III.3.3. Absence of decisions regarding clauses with additional substantive content

To date, no publicly available awards have considered an alleged violation of an FET clause that incorporates additional substantive content (Category 5). This form of drafting is typically intended to exhaustively codify the heads of claim encompassed by the FET standard – such as "denial of justice" and "manifest arbitrariness" – and thereby constrain tribunals' interpretive discretion. The European Commission, for example, describes the FET clause in the Canada-EU Free Trade Agreement (**CETA**), extracted above,[59] as providing:[60]

> a precise and specific standard of treatment of investors and investment. Unlike other agreements, the standard of "fair and equitable treatment" in CETA is a clear, closed text which defines precisely the standard of treatment, without leaving unwelcome discretion to the Members of the Tribunal.

Even though a significant number of ICSID cases have been registered in the last decade,[61] it is unsurprising that tribunals are yet to consider an alleged violation of an FET clause with additional substantive content. Such clauses represent a recent innovation in treaty drafting: in its 2012 report on the FET standard, UNCTAD described such clauses as an "emerging trend."[62] As a result, disputes under relevant treaty regimes are unlikely to have crystallized and progressed to a merits determination before an investment tribunal. Moreover, these clauses will often represent a specific manifestation of treaty drafters' broader attempts to preserve States' right to regulate and

---

[59] See *Table 1*, Category 5.
[60] European Commission, *Investment provisions in the EU-Canada free trade agreement (CETA)* (http://trade.ec.europa.eu/doclib/html/151918.htm). In the Joint Interpretative Instrument to CETA, the parties also state in relation to the FET standard:

> *c) CETA includes clearly defined investment protection standards, including on fair and equitable treatment and expropriation and provides clear guidance to dispute resolution Tribunals on how these standards should be applied.*
>
> *d) … The European Union and Canada are committed to review regularly the content of the obligation to provide fair and equitable treatment, to ensure that it reflects their intentions (including as stated in this Declaration) and that it will not be interpreted in a broader manner than they intended.*

[61] ICSID Caseload Statistics, *supra* note 11, 7.
[62] UNCTAD FET Study, *supra* note 9, 29.

re-balance substantive standards in favour of States. It is therefore plausible that they are accompanied by other substantive or procedural limits on investors, which reduces the likelihood that investors will commence proceedings.

Despite the clear intent of clauses with additional substantive content, it remains to be seen whether they will significantly constrain tribunals and enhance predictability. As McLachlan, Shore and Weiniger note, the terms adopted in Art. X.9(2) of CETA and comparable clauses are "themselves broad and open-textured, susceptible of a variety of meanings in their application to particular circumstances."[63] Indeed, the substantive content of such clauses can be traced to standards developed by arbitral tribunals interpreting unqualified FET clauses and FET clauses linked with international law. Further, the absence of a reference to international law or customary international law will not necessarily prevent tribunals from referring to jurisprudence considering these sources (see Section III.4).

### III.3.4. Clauses linked to international law – divergent results

Perhaps the most surprising finding from the data set is the significant variation in the proportion of violations arising from clauses that require treatment *in accordance with* international law (Category 2), as compared with clauses that refer to international law as a *floor* for treatment (Category 3). Considering the ordinary meaning of the terms adopted in the clauses, it seems probable that breaches would be established at either an approximately consistent rate or slightly less often in relation to Category 2 clauses. However, claimants have established a breach of Category 2 clauses in 84.21% of cases, compared to 65.96% of cases concerning Category 3 clauses. The cases do not reveal a clear explanation for this trend.

(a) Textual factors

Contrary to what these outcomes might suggest, Category 3 clauses can be construed as permitting treatment in addition to what is required by international law, thereby affording

[63] *Supra* note 58, ¶ 7.44.

tribunals' greater interpretive discretion.[64] Several tribunals that have conducted a close analysis of these provisions reached this conclusion. In *Lemire v Ukraine*, for example, the tribunal held that the customary international law MST and the applicable treaty standard could not be "assimilate[ed]":[65]

> What the US and Ukraine agreed when they executed the BIT, was that the international customary minimum standard should not operate as a ceiling, but rather as a floor. Investments protected by the BIT should in any case be awarded the level of protection offered by customary international law. But this level of protection could and should be transcended if the FET standard provided the investor with a superior set of rights.

In *Azurix v Argentina*, the tribunal also held that the purpose of Art. II.2(a) of the US-Argentina BIT was "to set a floor, not a ceiling" and "permits to interpret (sic) fair and equitable treatment and full protection and security as higher standards than required by international law."[66] However, it went on to find that these standards "substantially similar."[67] This position was also endorsed in *Duke Energy v Ecuador*, where the tribunal concurred with the proposition that the treaty standard functioned as a floor, but that the two standards were "essentially the same."[68]

As such, whether particular tribunals construe the treaty standard as setting a floor for treatment or conclude that the two standards are similar, the rate at which Category 2 and 3 violations have been established should not be so disparate.

---

[64] UNCTAD FET Study, *supra* note 9, 23.
[65] ¶ 253 (Ukraine-US BIT) ("What the US and Ukraine agreed when they executed the BIT, was that the international customary minimum standard should not operate as a ceiling, but rather as a floor. Investments protected by the BIT should in any case be awarded the level of protection offered by customary international law. But this level of protection could and should be transcended if the FET standard provided the investor with a superior set of rights.")
[66] ¶ 361.
[67] ¶ 361.
[68] ¶ 337 (US-Argentina BIT).

(b) Underlying treaties

The divergence between these categories is even more confounding when considering the applicable treaties in cases considering clauses referring to international law as a floor. As set out in ***Table 3***, these cases exclusively arise from (i) the Energy Charter Treaty and (ii) US BITs concluded between 1984 and 1994.

*Table 3: Treaties referring to international law as a floor (Category 3)*

| Cases by treaty | No. of cases[69] | Breach | No breach | % |
|---|---|---|---|---|
| Energy Charter Treaty | 25 | 17 | 8 | 68% |
| US BITs (1984-1994)[70] | 22 | 14 | 8 | 63.63% |
| **Total** | **47** | **31** | **16** | **65.96%** |

As discussed below, the Energy Charter Treaty is commonly seen as "particularly favorable" for fair and equitable treatment claims.[71] Indeed, in 2017, the parties to the Treaty commenced a 'modernisation' process, partly in response to concerns about tribunals' interpretation of the FET standard.[72] Notably, however, claimants have only had marginally more success under the Energy Charter Treaty as compared with US BITs.

(c) Potential explanations

In light of the factors discussed above, the most plausible explanation for the divergence between the two categories of FET clauses is that treaty language has only a limited effect on

[69] This column records the number of cases where the tribunal reached a final determination in relation to an alleged violation of the FET standard. For example, it therefore cases where the tribunal held the respondent had expropriated the claimant's property and found it unnecessary to reach a final determination in relation to the FET standard.
[70] Art. 10 ("Promotion, Protection and Treatment of Investment").
[71] Moshe Hirsch, *Between Fair and Equitable Treatment and Stabilization Clause: Stable Legal Environment and Regulatory Change in International Investment Law*, J. OF WORLD INV. & TRADE 12(6) 801, 806 (2011).
[72] Energy Charter Secretariat, *Decision of the Energy Charter Conference: Modernisation of the Energy Charter Treaty*, CCDEC 23 STR (November 28, 2017) (https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2017/CCDEC201723.pdf).

tribunals' construction of the FET standard. Admittedly, only a small number of awards have been rendered in relation to FET clauses that require treatment in accordance with international law and this could distort these results. On the other hand, the scale of the disparity, supports this explanation. Further, as addressed in Section III.4, tribunals have often paid little regard to the language of FET clauses in identifying its constituent sub-standards.

### III.4. Tribunals' interpretive methodology – components of FET

Tribunals have played a dominant role in defining the content of the FET standard, particularly in enumerating the 'heads of claim' or 'sub-standards' it is said to encompass.[73] In doing so, tribunals typically rely on previous awards. The *Crystallex v Veneuzuela* award notes, for example, that tribunals have "extracted a number of elements which they considered inherent components of the standard. The Tribunal considers the findings of these tribunals in this respect to be instructive as they evidence what is nowadays considered to be the core of the 'fair and equitable treatment' standard."[74] This is despite the rules of virtually every arbitral institution expressly providing that those awards have no precedential value.[75]

In referring to previous awards, tribunals have rarely had regard to the fact that the specific wording of the applicable FET clauses in prior awards differed. Our empirical analysis demonstrates that this finding holds true in relation to how tribunals have identified:

---

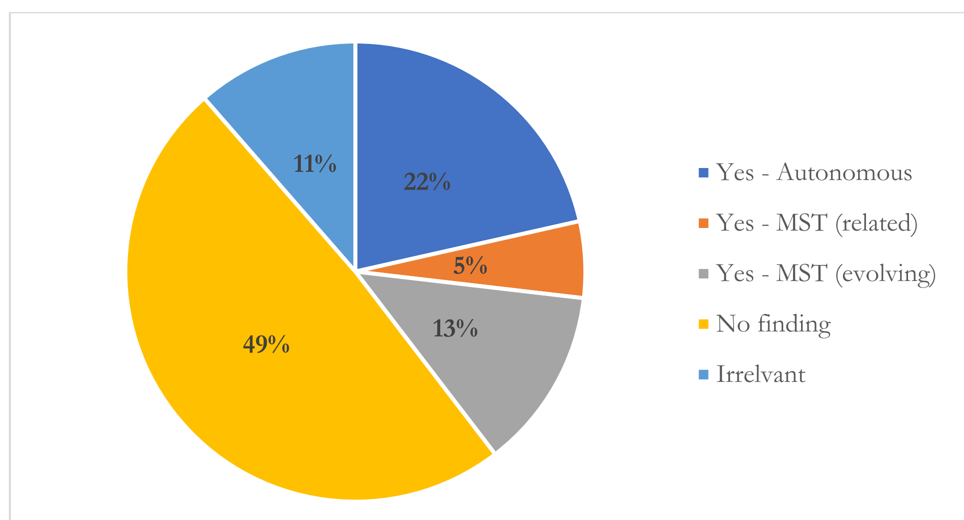
[73] Schreuer observes that "[d]espite its generality and lack of precision, international tribunals have given some specific meaning to the concept [of the FET standard]" (*Fair and Equitable Treatment in Arbitral Practice*, J. OF WORLD INV. & TRADE 6(3) 357, 368 (2011)). Similarly, UNCTAD notes that "investment tribunals have largely been responsible for developing the content of the standard" (UNCTAD FET Study, *supra* note 9, 62).
[74] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (Apr. 4, 2016), ¶ 539.
[75] The rules make clear that award is only binding on the parties. *See, e.g.*, ICSID Convention, art. 53(1) ("The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention."); UNCITRAL Arbitration Rules, art. 34 (2) ("All awards shall be made in writing and shall be final and binding on the parties."); ICC Arbitration Rules, art. 35(6) ("Every award shall be binding on the parties."). *See also Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision on Jurisdiction (May 29, 2009), ¶ 58 ("In accordance with Article 53(1) of the ICSID Convention, these decisions are binding only on the parties, so we are not bound by them (or any other ICSID award) as precedent."); *Quasar de Valors SICAV S.A. and others v. Russia*, SCC Case No. 24/2007, Award on Preliminary Objections (Mar. 20, 2009), ¶ 16 ("The Tribunal is not obligated to adopt the conclusions of other courts or tribunals. . . . The arbitrators do not in any event operate in a hierarchical and unitary system which requires them to follow precedents.").

(i) the applicable source of the FET standard – i.e. an autonomous treaty standard or linked to the customary international law MST; and
(ii) the sub-standards or components of the FET standard, such as legitimate expectations, denial of justice or due process, and good faith.

### III.4.1. Identifying the source of the FET standard

As Figure 2 illustrates, 49% of tribunals have not specified whether they derived the applicable FET standard from the customary international law MST or whether the investment treaty in question generates an autonomous standard, with a further 11% holding that making such a finding is irrelevant.[76]

*Figure 2: Source of FET Standard*



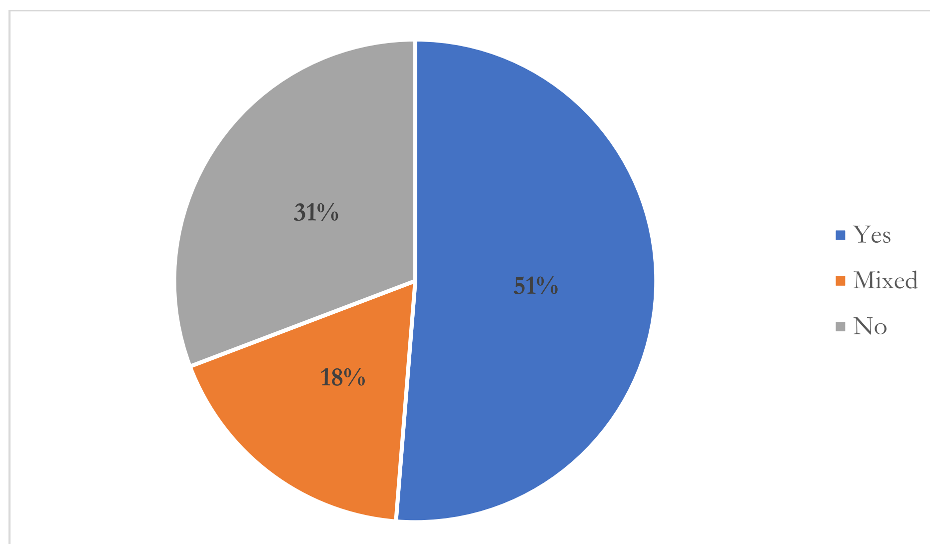

Among tribunals that determined that determined this question was irrelevant, the predominant explanation appears to be that the customary international law MST and autonomous treaties to have converged (see cases discussed in section 2(c)). For example, in *Rumeli v Kazakhstan*, the tribunal held that the "the treaty standard of fair and equitable treatment [under the Kazahkstan-Turkey BIT] is not materially different from the minimum standard of treatment in customary international law."[77] By considering whether the relationship between the standards, these tribunals have at least superficially complied with the requirements of Articles 31 and 32 of the *Vienna*

[76] These figures are drawn from our review of 149 awards.
[77] *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, ¶ 611.

*Convention on the Law of Treaties*. However, the same cannot be said for the 49% of awards that failed to do so; rather, these awards strengthen the assessment that tribunals have been undisciplined in establishing the source of the FET standard.

Another source of methodological concern is tribunals' reliance on awards that consider FET clauses with different language from the applicable BIT to identify the source of the FET standard, as set out in *Figure 3*.[78] In the 39 cases where tribunals placed reliance on prior awards for this purpose, 18% relied exclusively on awards arising under FET clauses with different language, while a further 31% relied on awards that related both identical and different FET clauses. This approach controverts the conventional view that treaty language influences how tribunals determine the FET standard.

*Figure 3: Reliance on awards – source of FET standard*




### III.4.2. Identifying the applicable sub-standards

A similar phenomenon is evident in how tribunals have developed the 'sub-standards' or 'components' of the FET standard, such as legitimate expectations, transparency, stability and denial of justice. Except in the case of an FET clause with additional substantive content,[79] the

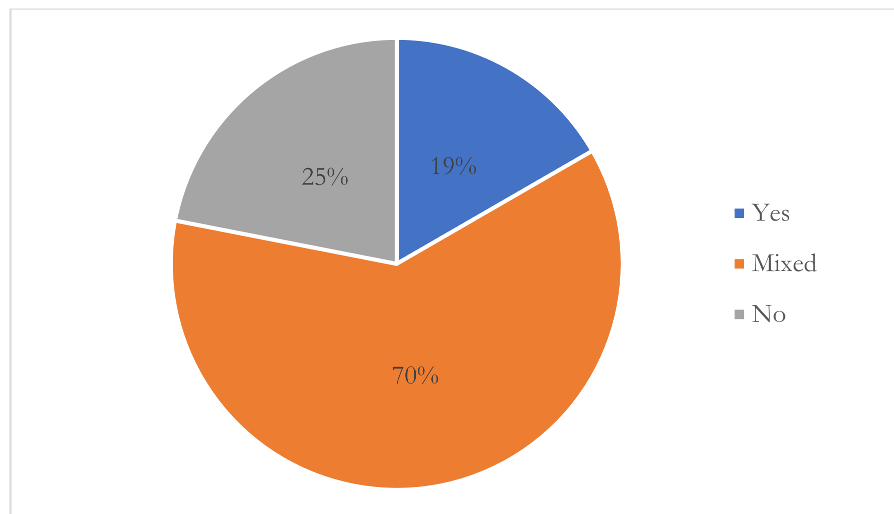
[78] These figures reflect where tribunals placed reliance on awards as providing the applicable standard, as opposed to awards that they cited but ultimately distinguished. Of course, it can be difficult to identify the precise purpose for which a tribunal has cited an authority.
[79] As discussed above, an arbitral tribunal is yet to consider such a clause.

components developed by tribunals cannot be sufficiently explained by the plain language in investment treaties. The most controversial example of this process is the rapid ossification of investors' legitimate expectations, which is now widely acknowledged as forming part of the FET standard.[80] This is despite it not being apparent how legitimate expectations can be derived from the ordinary meaning of either 'fair' or 'equitable'. [81]

The *Crystallex* tribunal's observation that the components of the FET standard have emerged through the accumulation of arbitral jurisprudence is vindicated by our statistical analysis. In 114 of 149 cases, when determining the existence and content of the components of the FET standard, tribunals relied on previous awards (76.51%). In doing so, only 19% of tribunals relied solely on awards that considered identical FET clauses (see Figure 4). The significant majority of awards instead relied on either a combination of awards with identical and differing FET clauses (70 %), or awards with solely differing FET clauses (25%). These findings, which are consistent with how tribunals have determined the *source* of the FET standard, reaffirm that the specific language adopted in FET clauses has played little role in constraining how tribunals approach the interpretation the FET standard.

[80] *See, e.g.*, *Walter Bau v. Thailand*, UNCITRAL, Award (Jul 1, 2009), ¶ 11.7 ("The Treaty promised FET and 'legitimate expectations' come within FET's parameters."); *Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01, Award (May 2, 2018), ¶ 360(1) ("There will be a breach of the FET standard where legal and business stability or the legal framework has been altered in such a way as to frustrate legitimate and reasonable expectations or guarantees of stability.'");
[81] There is one dissenting opinion that has actually made this point. See, e.g., *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Separate Opinion of Arbitrator Pedro Nikken (July 30, 2010), ¶ 3 ("The assertion that fair and equitable treatment includes an obligation to satisfy or not to frustrate the legitimate expectations of the investor at the time of his/her investment does not correspond, in any language, to the ordinary meaning to be given to the terms 'fair and equitable'.").

*Figure 4: Reliance on awards - FET components*




## IV. STABILITY AND PREDICTABILITY OF LEGAL AND BUSINESS ENVIRONMENT

### IV.1. Introduction

Claims concerning host States' duty to create a stable and predictable legal environment have closely paralleled, and often coincided with, claims related to investors' legitimate expectations. As with the concept of legitimate expectations, tribunals have failed to adopt a consistent and principled approach to defining host States' obligations regarding stability and predictability. The jurisprudence to date illustrates a number of competing interpretations. First, several tribunals have rejected the existence of an obligation to create a stable and predictable legal and business environment. Second, tribunals accepting the existence of such a duty have determined that it arises:

(i) as an inherent element of the FET standard;

(ii) only where investors' legitimate expectations, which form part of the FET standard, support such a duty; or

(iii) independently of the FET standard, typically where a substantive clause of an investment treaty expressly refers to stability and predictability.

### IV.2. Statistical analysis

Our statistical analysis identified 38 cases in which claimants alleged that a host State breached a duty to create a stable and predictable legal and business environment, including where the duty was said to arise autonomously or in connection with the FET standard.

This corpus of awards has a number of notable features. First, the composition of treaties is relatively narrow. The Energy Charter Treaty has applied in 17 cases, and a further 10 cases relate to United States BITs with Argentina (5 cases), Ecuador (3 cases), Turkey (1 case) and Poland (1 case). This means that a number of tribunals have had occasion to consider identical or similar treaty provisions, particularly under the Energy Charter Treaty. As discussed below, the Energy Charter Treaty and US BITs typically include preambular language referring to stability. In addition, the Art. 10(1) of the Energy Charter Treaty, which incorporates the FET standard, requires host States to "encourage and create stable, equitable, favourable and transparent conditions for Investors." This language has had significant implications for the rapid ossification of the duty to create a stable and predictable environment. Second, a significant proportion of cases involve a small number of host States, with several claimants often commencing proceedings in relation to the same State conduct. Argentina was the respondent in five awards rendered in relation to measures it adopted in response to its financial crisis in the early 2000s and fourteen awards relate to a series of amendments made by Spain to its regulatory regime for renewable energy projects. The similarities shared by these lines of authority has increased the dialogue among tribunals.

### IV.3. Arbitral jurisprudence

#### IV.3.1. Origins of the obligation

Despite the prevalence of Energy Charter Treaty cases, the first decision that gave substantive consideration to a host State's obligation to create a stable and predictable legal and business

environment under the Treaty was not issued until August 2008.[82] In the preceding years, several other awards played a crucial role in establishing the obligation.

The first of these awards was *Occidental v Ecuador,* which was rendered in July 2004. Relevantly, the tribunal held:[83]

> Although fair and equitable treatment is not defined in the Treaty, the Preamble clearly records the agreement of the parties that such treatment "is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources". The stability of the legal and business framework is thus an essential element of fair and equitable treatment.

The transformation of a treaty's preambular language into an "essential element" of a substantive protection in this manner is, absent additional justification, dubious. To buttress this conclusion, the tribunal observed that "various tribunals have recently insisted on the need for this stability."[84] However, it only identified two relevant awards: *Metalclad v Mexico*[85] and *Tecmed v Mexico*.[86] While both awards adopted expansive interpretations of the FET standard, neither clearly articulated an interpretive approach that justified construing stability and predictability as an element of the standard.

[82] Namely, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008.
[83] *Occidental Exploration and Production Company v. Republic of Ecuador (I)*, LCIA Case No. UN3467, Award, 1 July 2004, ¶ 183 (emphasis added).
[84] *Id.*
[85] *Metalclad v Mexico*, ¶ 99 ("Mexico failed to ensure a transparent and predictable framework for Metalclad's business planning and investment. The totality of these circumstances demonstrates a lack of orderly process and timely disposition in relation to an investor of a Party acting in the expectation that it would be treated fairly and justly in accordance with the NAFTA.")
[86] *Tecmed v Mexio*, ¶ 185 ("The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.")

Less than a year later, in May 2005, the *CMS v Argentina* tribunal adopted a similar interpretive approach and endorsed the proposition the stability and predictability constituted part of the FET standard. The Tribunal placed particular reliance on the US-Argentina BIT's Preamble: [87]

> The Treaty Preamble makes it clear, however, that one principal objective of the protection envisaged is that fair and equitable treatment is desirable "to maintain a stable framework for investments and maximum effective use of economic resources." There can be no doubt, therefore, that a stable a stable legal and business environment is an essential element of fair and equitable treatment."

In addition, the tribunal pointed to "the significant number of treaties" that "unequivocally shows (sic) that fair and equitable treatment is inseparable from stability and predictability."[88] This reasoning is insufficient and, potentially, circular. While a number of other contemporaneous treaties may have incorporated preambular language referring to stability and predictability, the tribunal failed to cite any such treaties or clarify how those treaties influenced the proper interpretation of the US-Argentina BIT. Finally, the tribunal pointed to "many arbitral decisions and scholarly writings [that] point in the same direction."[89] As in *Occidental*, the *CMS* primarily – and uncritically – cited *Tecmed* and *Metalcad* in support of this view.[90]

The ossification of the duty of stability and predictability continued apace with the *LG&E v Argentina* award, which was issued in July 2006. There, the tribunal relied on *Occidental, CMS* and *Metalclad* to find that the "stability of the legal and business framework is an essential element" and an "emerging standard of fair and equitable treatment."[91] Although its reasoning is far from

[87] *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶ 274 ("***CMS v Argentina***").
[88] ¶ 276.
[89] *Id.*
[90] At ¶¶ 278-9.
[91] *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 125.

pellucid on this point, the tribunal appeared to suggest that the obligation to provide a stable legal and business environment may be distinct from the investor's legitimate expectations.[92]

This distinction, which had been elided by previous tribunals and has become an important question in Energy Charter Treaty jurisprudence, was brought into sharper focus by *PSEG v Turkey*.[93] The tribunal explicitly rejected the investor's claims regarding alleged violations of its legitimate expectations, holding that "(l)egitimate expectations by definition require a promise of the administration on which the Claimants rely to assert a right that needs to be observed" and Turkey had made no such commitments.[94] However, among other violations, the Tribunal found that "the fair and equitable treatment obligation was seriously breached by what has been described above as the "roller-coaster" effect of the continuing legislative changes."[95] In doing so, it emphasised that the treaty required Turkey to "ensure a stable and predictable business environment for investors to operate in."[96]

### IV.3.2. Energy Charter Treaty jurisprudence

The Energy Charter Treaty is the most-litigated investment treaty, with at least 145 cases instituted to date,[97] and has played a fundamental role in ongoing debate concerning the relationship between stability and the FET standard. As noted above, there is a perception that the Treaty as "particularly favorable" for fair and equitable treatment claims[98] and the Secretariat has commenced a modernization process considering, among other potential reforms of the FET standard.

---

[92] ¶ 127 ("In addition to the State's obligation to provide a stable legal and business environment, the fair and equitable treatment analysis involves consideration of the investor's expectations when making its investment in reliance on the protections to be granted by the host State." Emphasis added).
[93] *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007.
[94] ¶¶ 141-142.
[95] ¶ 250.
[96] ¶ 253.
[97] International Energy Charter Secretariat, *List of Cases* (https://www.energychartertreaty.org/cases/list-of-cases/). 9% of all cases instituted under the ICSID Convention and Additional Facility Rules arise from the Energy Charter Treaty: ICSID Caseload Statistics, *supra* note 11, 23.
[98] Moshe Hirsch, Between Fair and Equitable Treatment and Stabilization Clause: Stable Legal Environment and Regulatory Change in International Investment Law, *The Journal of World Investment & Trade*, *12*(6), vii-806 (2011).

Like typical investment treaties, the Energy Charter Treaty seeks to seeks to encourage the protection and promotion of foreign direct investment.[99] However, in a number of significant respects, it is a "unique instrument."[100] First, rather than applying to 'investments' as a broadly defined concept, the it has a limited, sectoral scope. This reflects the energy sector's significant early-stage capital requirements,[101] high levels of regulation and the resulting need for long-term cooperation. Second, the Treaty was "primarily conceived of as a means of economic regeneration"[102] for former Soviet States and seeks "to catalyse economic growth by means of measures to liberalise investment and trade in energy."[103] Third, the Treaty has 53 current contracting parties, including the European Union and Euratom, which is far more than most multilateral investment agreements.[104]

The European Energy Charter, a political document that preceded the Charter, affirmed the parties' intentions, *inter alia*, to "provide for a stable, transparent legal framework for foreign investments, in conformity with the relevant international laws and rules on investment and trade."[105] These objectives are re-affirmed in Article 2 of the Treaty, which provides:

> This Treaty establishes a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the [European Energy] Charter.

---

[99] *See* Preamble.
[100] Dr. Urban Rusnák, Secretary General of the Energy Charter Secretariat, *Foreword to the Consolidated Energy Charter Treaty with Related Documetns* (January 15, 2016), 2 ((https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf); KAJ HOBER, THE ENERGY CHARTER TREATY: A COMMENTARY (OUP, 2020), 1.
[101] See, e.g., *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018, ¶ 540.
[102] Antonia Layard, *The European Energy Charter Treaty: Tipping the Balance between Energy and the Environment*, 4 EUR. ENERGY AND ENV. L. REV., 150-156 (1995).
[103] Energy Charter Treaty, Preamble.
[104] Contracting Parties and Signatories of the Energy Charter Treaty (https://www.energychartertreaty.org/treaty/contracting-parties-and-signatories/).
[105] Art. 4.

Finally, Art. 10(1) requires the Contracting Parties to "encourage and create stable, equitable, favorable and transparent conditions for Investors of other Contracting Parties to make investments in its Area." While a number of investment treaties includes references to stability and predictability in their preambles, few do so in their substantive investment protection provisions.

Together, these factors have had significant implications for tribunals' interpretation of the FET standard. For example, in *Eiser v Spain*, the Tribunal held:[106]

> These [European] Energy Charter provisions illuminate the nature of the legal regime referred to in ECT Article 2, by emphasizing national legal frameworks that are stable, transparent, and compliant with international legal standards. They show that, in interpreting ECT's obligation to accord fair and equitable treatment, interpreters must be mindful of the agreed objectives of legal stability and transparency… Taking account of the context and of the ECT's object and purpose, the Tribunal concludes that Article 10(1)'s obligation to accord fair and equitable treatment necessarily embraces an obligation to provide fundamental stability in the essential characteristics of the legal regime relied u'pon by investors in making long-term investments.

Similarly, in *Antin v Spain*, the Tribunal observed:[107]

> The Tribunal deems it important to emphasize that the content and scope of the FET standard must be assessed within the context of the Treaty in which it is found.

[106] *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, ¶ 379.
Cf. Thomas Roe, Matthew Happold & James Dingemans QC, *Substantive law*, in SETTLEMENT OF INVESTMENT DISPUTES UNDER THE ENERGY CHARTER TREATY 104–135 (2011) (The Treaty's object and purpose and preambular language "might at first seem to commend an insistence on very high standards of fairness and equity towards investors, so as to encourage such investment and long-term co-operation. But when one recalls the Treaty's 38 lack of binding obligations concerning the making of investments, it may equally be thought that to impose very high standards of conduct towards investors is just as likely to deter some states from the desired liberalisation and long-term co-operation.").
[107] *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018, ¶ 533.

> Reference to decisions on the stability of a regime based on treaties whose text is substantially different and where no specific obligation of stability is contained may be of no assistance in the interpretation of this specific feature of the ECT. Not only does the ECT expressly state that its purpose is to provide a legal framework to promote long-term cooperation in the energy field in accordance with the objectives and principles of the Charter —which stresses the need for a stable and transparent legal framework, — it also contains a specific obligation —as opposed to a mere declaration in the preamble, and with language that suggests and imperative and not merely a recommendation— to encourage and create stable conditions for investments. Regardless of how the relationship between stability of the legal framework and the obligation to accord FET is conceived, it seems clear that, in the context of the ECT, the concepts are associated in a manner that merits their joined assessment.'

Numerous tribunals have endorsed this construction.[108]

## V. CONCLUSION

As the preceding analysis illustrates, effectively circumscribing investor-State tribunals' interpretation of the FET standard has proved difficult. To date, treaty language has had a remarkably limited effect in influencing both the rate at which FET violations are established and tribunals' interpretive methodologies. Moreover, in identifying the scope of the FET standard, tribunals have often failed to sufficiently interrogate whether previous awards are legally principled or distinguishable because of divergent treaty language. This phenomenon is evident in the rapid emergence and ossification of the obligation to create a stable legal and business environment.

[108] See, e.g., *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain,* ICSID Case No. ARB/15/36, Award, 6 September 2019, 508 ("The Tribunal agrees with both Parties and the tribunals in *Antin*, *Masdar*, *Novenergia*, and *Eiser* that Article 10(1) of the ECT includes an obligation to provide fundamental stability of the economic and legal regime in place, and that the FET protects against changes in the "*essential characteristics of the regulatory regime relied upon by investors*.").

That said, it is notable that a tribunal is yet to consider an FET clause with additional substantive content. Whether such clauses are sufficiently clear to ameliorate ISDS' legitimacy crisis remains to be seen.