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Diversity in the Formulation of Fair and Equitable Treatment in International Investment Agreements

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The primary purpose of this paper is to know which formulation of FET standard among the diverse drafting approaches best serves the interests of both States and investors. In this respect, the paper first will have a review of general categorization of FET in a number of IIAs. Subsequently, it will focus on the two most controversial formulations of FET: (1) as a standalone clause and (2) with reference to the minimum standard of treatment under customary international law. In light of this, it will discuss the impact of the various FET drafts on the decisions of arbitral tribunals dealing with this standard. Lastly, the paper will also explore the most recent approaches to the formulation of FET to see if they are capable of brining clarity in the overall discussion of FET's formulation as well as interpretation. In short, these recent constructions of FET clauses may best serve these interests as they bring clarity.

Keywords
Fair and Equitable Treatment, International Investment Agreements, Formulation, Arbitral Practice

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I. Introduction

Fair and equitable treatment (FET) is a conventional standard embodied in most bilateral and multilateral investment treaties.[1] In bilateral investment treaties (BITs), Professor Coe's survey of treatment clauses in five hundred Bilateral Investment Treaties (BITs) spanning four decades has shown that approximately 90 percent contain FET clauses.[2] Likewise, Dumberry, in his survey of all available 1964 BITs existing in 2014, has found that only 50 BITs did not include any FET clause and the 25 others merely referred to the standard in the preamble.[3] Therefore, according to his finding only 5% of BITs in that time was without any formal or binding FET provision.[4] At present, according to UNCTAD database, there are 2852 BITs out of which 2298 are in force and more than 2000 of them include FET clauses.[5] In respect of multilateral agreements, they have also followed the pattern already established in BITs.[6]

Although there are significant similarities in their content and structure,[7] FET clauses in many investment treaties still lack a common standard clause. Adjudicators, therefore, must look at conventional bases and each particular clause because the particularity of a FET clause will determine the level of liability incurred by the State's conduct.[8] For this reason, the diversity in the formulation of FET has led to different outcomes in particular disputes. These differences present a serious challenge for tribunals trying to determine its scope each time.

Many scholars have already emphasized on the importance and implications of actual wording used in FET clauses. For example, Dolzer and Schreur have mentioned that "generalization about the standard should be treated with caution."[9] They also indicates that "variations in this area are quite significant and every type of clause to be interpreted in accordance with Article 31 of the Vienna Convention

1 R. Dolzer & M. Stevens, Bilateral Investment Treaties 58 (1995).

2 J. Coe Jr., *Remarks*, 96 Am. Soc. Int'l L. Proc. 17-8 (2002).

3 P. Dumberry, *Has the Fair and Equitable Treatment Standard Become a rule of Customary International Law?*, 8 J. Int'l Disp. Settlement 2-3 (2017).

4 *Id.*

5 UNCTAD, International Investment Agreements Navigator, https://investmentpolicy.unctad.org/international-investment-agreements.

6 R. Kläger, Fair and Equitable Treatment in International Investment Law 9 (2011).

7 P. Dumberry, The Formulation and Identification of Rules of Customary International Law in International Investment Law 148 (2016).

8 *Id.*

9 C. Schreuer & R. Dolzer, Principles of International Investment Law 121 (2008).

on the Law of the Treaties, duly taking into account its context, and as appropriate its history."[10] Likewise, Dumberry opines that "one cannot truly speak of virtually uniform practice of States when FET clauses containing different language actually mean different things."[11] In this respect, Klager maintains that "in part" different drafting approaches have led to different interpretations of FET.[12]

The OECD and the UNCTAD reports have also pointed on the importance and the consequences of such diversity. For example, The OECD report provides that: "Because of the differences in its formulation, the proper interpretation of the 'fair and equitable treatment' standard depends on the specific wording of the particular treaty."[13] The UNCTAD 2012 report in particular referring to the correct source of FET as in CIL or as self-standing states that this identification can have important consequences in terms of the standards' content and, in particular, related to the kind of State measures challenged.[14]

However, others have stressed that the existence of these diverse formulations does not alter the uniformity of the content of the standard.[15] For example, Diehl notes that "the differences [in diversity of FET formulations] noted above are merely drafting differences and do not touch upon the core of the FET standard."[16] Likewise, Islam has argued, "despite differences in construction, there remains sufficient similarity across different treaties to support the claim that there is an overarching and singular concept of FET that can be subject of detailed analyses."[17]

Overall, as the standard has been expressed in a number of ways in treaties, the primary concern has been whether the variation in FET formulation is just a matter of stylistic approach or this divergence relates to the substance of the content of the standard. In practice, as investment treaties have not adopted a uniform approach to the standard, tribunals have not adopted a uniform approach to its interpretation, either. As a reaction to such awards, states have begun to redraft their investment

10 *Id.*

11 Dumberry, *supra* note 7, at 149.

12 Kläger, *supra* note 6, at 14.

13 C. Small, *Fair and Equitable Treatment in International Investment Law* 40 (OECD Working Papers on International Investment No. 3, 2004), http://dx.doi.org/10.1787/675702255435.

14 UNCTAD, Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements II 8 (2012).

15 I. Tudor, The Fair and Equitable Treatment Standard in the International Law of Foreign Investment 36 (2008).

16 A. Diehl, The Core Standard of International Investment Protection: Fair and Equitable Treatment 135 (2012).

17 R. Islam, The Fair and Equitable Treatment (FET) Standard in International Investment Arbitration: Developing Countries in Context 54 (2018).

agreements in order to have influence over the interpretation of particular clause by arbitral tribunals.

This article will mainly focus on the differences between FET provisions that are (1) standalone and (2) with reference to the minimum standard of treatment (MST) under customary international law (CIL). Most of FET clauses, in particular in older treaties, have been drafted in the form of the so-called "bare" FET clauses that simply refer to FET without any further detail. It is argued that such clauses increase the scope for arbitral interpretation of them because the principle of fairness is broad enough that may led to the stipulation of many norms.[18] Meanwhile, the recent practice indicate a growing use of clauses that expressly refer to MST.[19] This approach as argued may be in part as a reaction to the broad interpretation of FET clauses in arbitral practice.[20]

The most recent formulations of FET have seen new developments in IIAs and further added to the discussion of FET drafting. For instance, the European treaty practice such as the CETA agreement with Canada, FTAs with Japan, Singapore and Vietnam have adopted the so-called closed list approach to FET by providing an exhaustive list of FET elements. Meanwhile, several other recent BITs as well as FTAs such as CPTPP, USMCA, and the RCEP agreements have continued to formulate FET with a reference to MST under CIL.

The primary purpose of this research is to analyze which formulation of FET among the diverse drafting approaches best serves the interest of both States as well as investors. In this respect, the paper first provides a general overview of these formulations in IIAs. Subsequently, it will focus on the two most controversial classifications of FET: referring to MST under CIL and the standalone one. In this respect, the impact of the various FET drafts on the decisions of arbitral tribunals dealing with this standard will be discussed. Further, the paper will go over the most recent drafting approaches of FET in Part five of this paper to see if they are capable of providing specificity and therefore reducing the confusion over the application as well as interpretation of the standard.

18 D. Gaukrodger, *Addressing the Balance of Interests in Investment Treaties: The Limitation of Fair and Equitable Treatment Provisions to the Minimum Standard of Treatment under Customary International Law* 5 (OECD Working Papers on International Investment No. 3, 2017).

19 *Id*.

20 *Id*.

II. An Overview of FET's Standing in International Investment Agreements

The formulation of FET in IIAs has been diverse. To simplify this diversity, some scholars have categorized the various formulations of the FET standard in existing international investment treaties. For example, Salacuse classified FET into two types: (a) FET merely refers to the minimum standard treatment (MST) under CIL or (b) the standard is autonomous and additional to general international law.[21] Laird has summarized three FET variations: (a) the additive provision, showing that the provision of FET is in addition to whatever treatment international law requires; (b) the inclusive provision, indicating that the FET standard is subsumed under international law, not a separate or autonomous standard of treatment; and (c) the CIL provision, meaning the FET standard is CIL.[22] He also mentioned that when a claim is made solely under the FET standard, arbitral tribunals have not applied these three variations differently. In other words, as he further argued, whether one chooses any of the three formulations, the question about the substantive content of the FET standard remains.[23] Marshall provided seven categories of FET in investment treaties as follows:

(a) Treaties that grant FET without referring to international law or to any other criteria to determine its content;
(b) Treaties that combines FET with no less NT/MFN [national treatment/most-favored-nation] treatments;
(c) Treaties that couple FET with the prohibition of unreasonable or discriminatory measures;
(d) Treaties that require FET in accordance with the principles of international law;
(e) Treaties that similarly require FET in accordance with the principles of international law, but that in addition expressly identify some requirements of the standard. These specific inclusions may broaden the scope of the standard;
(f) Treaties that make the fair and equitable treatment standard contingent on the domestic legislation of the host country; and
(g) Some recent BITs and free trade agreements provide a more precisely defined scope of the fair and equitable treatment standard. They oblige the contracting parties to accord covered investments treatment in accordance with the

21 J. Salacuse, The Law of Investment Treaties 222-7 (2010).

22 I. Laird, *Betrayal, Shock and Outrage - Recent Developments in NAFTA Article 1105*, *in* NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects 51-4 (T. Weiler ed., 2004).

23 *Id*.

> minimum standard of treatment under customary international law. Some also make it express that fair and equitable treatment is part of the minimum standard and does not create additional substantive rights.[24]

In contrast, Islam has succinctly divided FET into three classes: (a) FET minus, referring to those treaties where the framers have connected the definition of the standard to other concepts that define and appear to limit its scope; (b) simple FET, where the FET clause is formulated without any reference to international law, CIL, or any other limitation; and (c) FET plus, referring to treaties that combine the FET standard with an additional substantive obligation, such as full protection and security, prohibition of denial of justice, prohibition of arbitrary or discriminatory measures, obligation of MFN, or guarantee of protection and security.[25] In addition, in 2007, the UNCTAD had found seven categories or variations of the FET formulations in bilateral investment treaties. [26]

In general, there are three categories of IIAs with respect to FET. First, treaties without reference to FET, which mark the early days of investment practice. There are a few such treaties, especially BITs, due to the lack of a fully established general pattern at that time rather than an aversion to the standard.[27] The negotiated BITs of the Federal Republic of Germany until the early 1960s[28] or even some later BITs like the 1977 Japan-Egypt BIT are the examples.[29] The same is evident in some of those multilateral agreements having various common elements and touching international investment, such as the General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS), and the Agreement on Trade-Related Aspects of Investment Measures (TRIMS).[30] In such treaties, investor protection may still be possible through reliance on FET in other treaties through MFN clauses[31] or the recognized elements of FET as custom and if FET itself

24 F. Marshall, Fair and Equitable Treatment in International Investment Agreements 4-5 (2007).

25 Islam, *supra* note 17, at 55.

26 UNCTAD, Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking 30-3 (2007).

27 S. Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, 70 Brit. Y.B. Int'l L. 113-4 (1999).

28 Among them are the first modern BIT between Germany and Pakistan of 1959 and other BITs between Germany and Malaysia, Liberia, Morocco, Thailand (renewed in 2002 and containing an express reference to FET), Togo, and Guinea. *See id*. at 126-7.

29 UNCTAD, Fair and Equitable Treatment 23 (Vol. III, 1999). *See also* UNCTAD, *supra* note 9, at 28.

30 F. Tschofen, *Multilateral Approaches to the Treatment of Foreign Investment*, 7 ICSID Rev.- Foreign Inv. L. J. 401 & 404 (1992). It provides a more complete list of multilateral agreements and the standards of treatment entailed.

31 *See*, *e.g.*, Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award, ¶ 575 (July 29, 2008). *See also* Patrick Dumberry, Fair and Equitable Treatment: Its Interaction with the Minimum Standard and its Customary Status 51 (2017); Kläger, *supra* note 3, at 10.

has become part of international law. Absent such agreements by the host countries, there seem to be no assurances that an investor is meant to have the same legal guarantees.[32]

Second, persuasive references, which do not bring direct obligations on host States, mention FET only in a preamble or show the intent that such treatment of foreign investors is believed to be an option.[33] Among BITs, a noticeable example is the preamble of the BIT between Azerbaijan and Pakistan.[34] In multilateral agreements, for instance, Article 11(2) of the Havana Charter has recommendations "to assure just and equitable treatment."[35] Here, if the International Trade Organization were adopted, it would not have been given the authority to obligate the member States to treat foreign investors just and equitably but only to have recommendations, thereby promoting multilateral and bilateral agreements.[36] Likewise, Article 12 of the MIGA Convention, in guaranteeing an investment, mentions, "the Agency shall satisfy itself as to (v) the investment conditions in the host country, including the availability of FET and legal protection for the investment."[37] Here also, Article 12 (d) is no more than a persuasion to adopt their own regulatory framework concerning the treatment of foreign capital.[38]

Third, the legally binding references to FET are found in most IIAs. Here, variance is not only in FET wordings but also in its adjacent context in which it is contained.[39] As regard FET wordings in BITs, for instance, the BIT between Iran and Pakistan uses only the words "fair treatment."[40] Likewise, Norway-Lithuania BIT employs "equitable and reasonable treatment."[41] Further, there are some deviations to the FET phrase due to its translation into other languages, such as French, Spanish, Italian, and German.[42] As for multilateral agreements, the Economic

32 KLÄGER, *supra* note 6, at 11.

33 *See*, *e.g.*, 1972 ICC Guidelines for International Investment, § V, art. 3(a)(i); the 1992 World Bank Guidelines on the Treatment of Foreign Direct Investment, art. III (2); the 1995 Pacific Basin Charter on International Investments 2; and the 2000 Cotonou Agreement, art. 15 of Annex II.

34 Preamble of 1995 Azerbaijan-Pakistan BIT provides: "Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investments and maximum effective utilization of economic resources."

35 Havana Charter for the Establishment of an International Trade Organization 1948, art. 11(2).

36 Small, *supra* note 13, at 3.

37 Multilateral Investment Guarantee Agency Convention, art. 12(2).

38 KLÄGER, *supra* note 6, at 12

39 UNCTAD, *supra* note 26, at 30 & 33. For another in-depth analysis of drafting formulations in bilateral, regional and multilateral agreements, *see* TUDOR, *supra* note 15, at 52.

40 1995 Islamic Republic of Iran-Pakistan BIT, art. 4(1).

41 1992 Norway Lithuania BIT, art. III.

42 *See, e.g.*, 1999 Switzerland Chile BIT, art. 4(2); 2006 Spain Mexico BIT, art. IV; 1990 Italy Argentina BIT, art. 2(2); and 2005 German Model BIT, art. 2(2).

Agreement of Bogota, for instance, uses the words "equitable treatment."[43] However, these omissions or translingual variations of FET do not affect the treaty practice to apply them interchangeably.[44]

For contextual variations, FET is either separated from other standards or combined with other principles in a clause. For example, the 2011 India-Nepal BIT requires that investments "shall at all times be accorded fair and equitable treatment."[45] Here, FET is a standalone standard without any combination or references to it. In several other clauses, however, FET is joined with other standards or investment assurances, such as MFN, NT, avoidance of arbitrary and discriminatory treatment, and the guarantee of full protection and security (FPS). For example, the 2015 Denmark-Macedonia BIT combines FET with NT/MFN standards.[46] Likewise, the 2017 Hungry-Tajikistan BIT displays one of the FET examples with FPS.[47] In other variations, for instance, in the 2019 Hong Kong SAR-United Arab Emirates BIT, FET is juxtaposed with FPS in addition to refraining from unreasonable and discriminatory treatment.[48] Thus, these kinds of clauses and FET formulations show that, to some extent, the scope of the mentioned standards overlap. However, it does not mean that all have one single obligation covered in a clause because it appears to be a matter of style, not substance.[49]

In addition, a group of IIAs combines FET with reference to general international law (which means all sources including CIL as in Article 38 of the Statute of International Court of Justice) or CIL (which means based on the requirements of State practice and *opinio juris*). Again, in the context of BITs, according to Professor Coe's survey, nearly 12 percent of BITs in some way link FET with international law.[50] One example is the latest China-Turkey BIT in 2015, which stipulates: "Investments of investors of each Contracting Party shall at all times be accorded

43 Economic Agreement of Bogota (1948), art. 22(3).

44 Kläger, *supra* note 6, at 15.

45 2011 India-Nepal BIT, art. 3(2). Some other almost identical examples are the 2001 Belgium/Luxembourg Saudi Arabia BIT, art. 3(1); and at the multilateral level, the 1993 Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA), art. 159(1) (a).

46 2015 Denmark-Macedonia, The former Yugoslav Republic BIT, art. 3 (1). *See also* 2001 Bangladesh-Iran BIT, art. 4; and 1999 Switzerland-Chile BIT, art. 4(2);

47 2017 Hungry-Tajikistan BIT, art. 2(2). *See also* 2003 Japan-Vietnam BIT, art. 9(1); 2001 Cambodia-Cuba BIT, art. 2(2).

48 2019 Hong Kong SAR-United Arab Emirates BIT, art.3 (2). For the multilateral level, *see*, *e.g.*, Article 1 of the 1967 OECD Draft Convention on the Protection of Foreign Property and Article 3(1) of the 1994 MERCOSUR Colonia Protocol.

49 Kläger, *supra* note 6, at 17.

50 Coe, *supra* note 2, at 18.

fair and equitable treatment in accordance with the principles of international law."[51] As for FTAs, a similar stipulation of FET "in accordance with international law" is provided in Article 1105 of the North American Free Trade Agreement (NAFTA).[52] This linkage to international law has brought confusion over whether it relates to general international law or CIL. As a reaction to this challenge, some countries, including NAFTA members, have pursued a restrictive approach to express the belief that international law refers to MST under CIL.[53] The Free Trade Commission (FTC) Notes[54] and the 2004 US Model BIT[55] are the primary examples.

Interestingly, some investment treaties have taken an even more restrictive approach than those mentioned above by imposing FET on the domestic legislation of the host country. For example, the 2008 India-Senegal BIT demonstrates this rare approach by providing that: "The investments [...] shall always be treated fairly and equitably [...] in accordance with its laws and regulations."[56] This FET formulation is in sharp contrast to the broader protection of FET under international law, which supports the level of protection independent of the host State's domestic law. Therefore, this kind of FET drafting seems to be against an independent FET standard through which the host State's conduct can be assessed.[57]

From analyzing the various formulations of FET, one may conclude this standard appears in most IIAs.[58] On the one hand, there seems to be a considerable degree of consensus on the importance of FET as a standard of investment protection.[59] On the other, the diverse formulation of the standard has been controversial with regard to the required and specific level of protection. Among all variations, standalone formulations of FET and FET with reference to international law are the most controversial ones as the former proved to be such in tribunals constituted under

51 2015 China-Turkey BIT, art. 2 (2). *See also* 1998 France-Mexico BIT, art. 4(1).

52 NAFTA art. 1105(1). It provides: "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."

53 Kläger, *supra* note 6, at 18.

54 *See* Notes of Interpretation of Certain Chapter 11 Provisions (NAFTA FTC Notes of Interpretation) (adopted by the NAFTA Free Trade Commission on July 31, 2001). NAFTA FTC Notes Article 1105 (1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party; (2) 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; (3) A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1). *See id.*

55 2004 US Model BIT, art. 5.

56 2008 India-Senegal BIT, art. 3(2). *See also* 2001 Cambodia-Cuba BIT, art. III.

57 Vasciannie, *supra* note 27, at 99; Dolzer & Stevens, *supra* note 1, at 58.

58 A. Lowenfeld, International Economic Law 475 (2d ed. 2008).

59 UNCTAD, *supra* note, 26, at 43.

BITs and the later as seen in the experience of NAFTA countries in arbitral practice and their subsequent reactions. Moreover, most BITs do not equate FET with reference to international law as being the MST under CIL.

III. FET as a Standalone Standard

FET has been recognized as an autonomous or standalone standard by arbitral tribunals, especially in the context of BITs. As most scholars and tribunals alike believe, the main reason for such recognition is the actual wording of the FET, where there is no reference or condition to CIL in BITs. For example, Schreuer and Dolzer affirmed the above point arguing, "if the parties to a treaty want to refer to CIL, one would assume that they will refer to it as such rather using a different expression."[60] Moreover, they continue to state that "as a matter of textual interpretation, it seems implausible that a treaty would refer to a well-known concept like the 'minimum standard of treatment in customary international law' by using the expression 'fair and equitable treatment."[61] Thus, it might be unnecessary to restate customary rules that would be in any event binding. Schreuer and Dolzer's argument can also indicate the contentious debate on the very existence of MST between developed and developing countries.[62]

Likewise, for Mann, it is misleading to equate FET with MST, as the former goes beyond the latter and provides greater protection. Mann believes the terms are to be understood and applied independently and autonomously.[63] However, he seems to modify his opinion about FET as an autonomous standard in his another publication. Here, he notes that "in some cases, it is true, treaties merely repeat, perhaps in slightly different language, what in essence is a duty imposed by customary international law."[64]

In arbitral practice, many tribunals have also interpreted an autonomous or unqualified FET provision delinked from MST or CIL. In other words, they have focused on the plain meaning of the terms "fair and 'equitable," thereby resulting in a low liability threshold and causing a risk that State regulatory measures will

60 Schreuer & Dolzer, *supra* note 9, at 124. *See also* Dolzer & Stevens, *supra* note 1, at 60.

61 *Id.*

62 Diehl, *supra* note 16, at 151. *See also* Vasciannie, *supra* note 27, at 131 & 144.

63 F. Mann, *British Treaties for the Promotion and Protection of Investment*, 52 Brit. Y.B. Int'l L. 243 (1981).

64 F. Mann, The Legal Aspects of Money 510 (1982).

be determined to have breached it.[65] For instance, the tribunal in *Micula v. Romania* agreed with this point that: "The respondent does not contest the claimants' portrayal of the standard as an autonomous one, different from the international minimum standard."[66] Further, the tribunal also mentioned that "the Tribunal must first turn to the plain meaning of the terms "fair and equitable" to establish the content of the standard."[67] Likewise, the tribunal in Teinver v. Argentina separated autonomous FET from MST saying that: "the tribunal is of the view that fair and equitable treatment is not only the minimum standard of treatment at international law, as that term is not used in the Treaty."[68] These decisions have shown when FET is drafted in a standalone form; tribunals have interpreted them autonomously and delinked from MST under CIL.

However, where the FET standard is linked to international law, arbitral tribunals have adopted three decisions: (a) that equate FET to MST; (b) for autonomous FET; and (c) that chose not to decide about this relationship.[69] For example, the CMS tribunal adopted the first approach, stating that FET "is not different from the international law minimum standard and its evolution under customary law."[70] The *Azurix* tribunal adopted the second approach, reasoning that "the clause, as drafted, permits to interpret fair and equitable treatment and full protection and security as higher standards than required by international law. The purpose of the third sentence is to set a floor, not a ceiling in order to avoid "a possible interpretation of these standards below what is required by international law."[71] Likewise, the tribunal in *BG v. Argentina* exemplifies the third approach, concluding that "the measures adopted by Argentina fall below the international minimum standard, and it is consequently not necessary for this award to examine whether the Argentina-UK BIT provides a more generous independent standard of protection."[72]

65 *See*, *e.g.*, Saluka Investments BV v. Czech Republic, UNCITRAL, Partial Award, ¶¶ 292-294 (Mar. 17, 2006). *See also* recent cases in ECE Projektmanagement v. The Czech Republic, UNCITRAL, PCA Case No. 2010-5, Award, ¶¶ 4.756, 4.760 (Sept. 19, 2013); and Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica, ICSID Case No. ARB/13/2, Award, ¶¶ 452-453 (Mar. 7, 2017).

66 Ioan Micula et al. v. Romania, ICSID Case No. ARB/05/20, Final Award, ¶ 503 (Dec. 11, 2013).

67 *Id* at 504.

68 Teinver S.A.et al. v. The Argentina Republic, ICSID Case No. ARB/09/01, Award, ¶ 666 (July 21, 2017).

69 For this classification, *see* El Paso Energy International Company v. The Argentina Republic, ICSID Case No. ARB/03/15, Award, ¶¶ 331-334 (Oct. 31, 2011).

70 CMS Gas Transmission Company. v. Republic of Argentina, ICSID Case No. ARB/01/8, Award, ¶ 284 (May 12, 2005), 14 ICSID Rep. 158 (2009).

71 Azurix Corp v. The Argentina Republic, ICSID Case No. ARB/01/12, Award, ¶ 361 (July 14, 2006), 14 ICSID Rep. 374 (2009).

72 BG Grp plc v. Argentina, UNCITRAL, Final Award, ¶ 291 (Dec. 24, 2007).

The above discussions on arbitral practice demonstrate that when FET is in standalone formulation in investment treaties, tribunals have mostly given an autonomous interpretation to it. While, if standalone FET is joined with the qualifier "in accordance with international" or "no less than international law," tribunals have equated it to MST, given autonomous interpretation or simply not taken any position for that relationship.

IV. FET as Minimum Standard under Customary International Law

The main question discussed here is whether FET is connected with the MST under CIL or not. The answer is crucial in international investment law because it will determine the liability of States.[73] The Organization for Economic Co-operation and Development (OECD) Commentary to the 1967 Draft Convention is the first to answer the question in the positive, stating: "the standard required conforms in effect to the minimum standard which forms part of CIL."[74] According to Thomas, the OECD Commentary indicates that FET refers to the general principle of international law even if it is not explicitly stated.[75] Likewise, Picherack believed that during the 1950s and 1960s, FET "was likely then intended to serve as a reference to minimum standard of treatment exiting in international law."[76] Similarly, Paparinskis demonstrated that "if one takes the pre-and post-Second World War materials pre-dating investment arbitration, it seems permissible to conclude that the ordinary meaning of FET was a reference to a customary minimum standard, in particular regarding the administration of justice."[77]

However, the OECD Commentary, as Kill argued, reflected the views of the Organization's developed member countries in the 1960s and embodied their conception of CIL at the time. It had nothing to do with what developing countries

73 UNCTAD, *supra* note 29, at 8.

74 Organization for Economic Co-operation and Development (OECD), Draft Convention on the Protection of Foreign Property (1967), at 15, cmt. 4(a).

75 J. Thomas, *Reflections on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators*, 17 ICSID Rev. 48 (2002).

76 J. Picherack, *The Expanding Scope of the Fair and Equitable Treatment Standard: Have Recent Tribunals Gone Too Far?*, 9 J. World Inv. & Trade 264 (2008).

77 M. Paparinskis, The International Minimum Standard and Fair and Equitable Treatment 160-3 (2013).

considered to be their legal obligation then.[78] Furthermore, as Newcombe and Paradell opined, the use of a distinct and "more politically neutral term" (i.e., FET) has a background of "political sensitiveness" towards MST and is "historically viewed with suspicion because of the legacy of gun-boat diplomacy and imperialism."[79] In other words, in the opinion of Newcombe and Paradell, the use of FET by Western developed countries was considered a "convenient, neutral and acceptable reference" to the MST.[80] Several other scholars, similar to Kill's argument, convincingly established the view that Western States increasingly used FET in their BITs to encounter the claim of non-existence of MST by developing States[81] or, more specifically, because of the ambiguities surrounding the concept of MST itself.[82]

The second example, which links FET to MST, is the practice under NAFTA (replaced by USMCA on July 1, 2020).[83] Here, as mentioned previously, NAFTA Article 1105, titled "Minimum Standard of Treatment," referred to FET "in accordance with international law."[84] In this respect, Palombino explained that even if FET is supposed to be interpreted in accordance with "general principles of international law," it does not mean only MST, but also "whole international law."[85] Given this ambiguous "reference to international law" and in the aftermath of some controversial cases,[86] NAFTA parties, through the FTC Notes of Interpretation, have emphasized that FET refers to MST under CIL.[87] Dumberry thus has been of the view that "any possible ambiguities disappear when (as in the case under NAFTA Article 1105) there is clear and undeniable evidence that the intention of the

78 T. Kill, *Don't Cross the Streams: Past and Present Overstatement of Customary International Law in Connection with Conventional Fair and Equitable Treatment Obligations*, 106 Mich. L. Rev. 879 (2008).

79 A. Newcombe & L. Paradell, Law and Practice of Investment Treaties: Standards of Treatment 263-4 (2009).

80 *Id*. *See also* S. Montt, State Liability in Investment Treaty Arbitration 69-70 (2009); AWG Grp v. Argentina, UNCITRAL, Decision on Liability, 30 July 2010 (Judge Nikken's separate opinion), at 14-5.

81 Thomas, *supra* note 75, at 48. *See also* Paparinskis, *supra* note 77, at 163.

82 T. Weiler, The Interpretation of International Investment Law: Equality, Discrimination and Minimum Standards of Treatment in Historical Context 199, 211-2, 216, 227, 239-40 (2013); Vasciannie, *supra* note 27, at 157-8.

83 North American Free Trade Agreement (NAFTA: signed on Dec. 17 1992; entered into force on Jan. 1, 1994). For similar references to MST, *see also* UNCTC, Bilateral Investment Treaties 42 (1988); WTO, Note by the Secretariat, Working Group on the Relationship between Trade and Investment, Non Discrimination, Most-Favoured-Nation Treatment and National Treatment (June 4, 2002).

84 NAFTA art. 1105(1).

85 F. Palombino, Fair and Equitable Treatment and the Fabric of General Principles 32 (2018). *See also* Urbaser S.A. et al. v. The Argentina Republic, ICSID Case No. ARB/07/26, Award (Dec. 8, 2016), 18 ICSID Rep. 568 (2020).

86 The arbitral cases in Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB (AF)/97/1, Award (Aug. 30, 2000), 5 ICSID Rep. 212 (2002); S.D. Myers Inc. v. Canada, UNCITRAL, First Partial Award (Nov. 13, 2000); and Pope & Talbot v. Canada, UNCITRAL, Interim Award (June 26, 2000).

87 FTC Notes, *supra* note 54.

State parties was in fact that the FET standard be considered as a reference to the minimum standard of treatment under custom."[88]

However, even after the FTC Notes, some tribunals such as *Mondev*,[89] *ADF*,[90] and *Loewen*[91] raised the phenomenon of evolutionary MST under CIL. Even the *Merrill* tribunal[92] introduced the idea of convergence of MST and FET at the same level. Later, for further emphasis, NAFTA parties such as the United States and Canada added FET in accordance with MST to their model BITs.[93] In their Free Trade Agreements (FTAs), they tried to define CIL in accordance with the requirements enumerated in Article 38 of the Statute of the International Court of Justice, emphasizing State practice and *opinio juris*.[94] This progress did not stop here; it went on to become the practice of some other countries outside NAFTA, including CAFTA-DR,[95] the TPP draft (replaced by CPTPP 2018),[96] ASEAN treaties,[97] and some BITs[98] and FTAs.[99] In other words, the treaty model restricting FET to MST under CIL has been gaining influence in all regions.[100]

In the context of BITs, most do not link FET with MST; instead, arbitral tribunals interpret them as recognizing an autonomous FET.[101] However, even in this context, a few cases have come close to this practice, such as NAFTA. For example, in *Deutsche Bank v. Sri Lanka*, the tribunal reasoned that "the actual content of the

88 P. Dumberry, The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105, 44 (2013). He views "the debate as to whether the FET is an autonomous standard or linked to the minimum standard of treatment under international law is simply not relevant in the context of Article 1105." *See id.* at 45.

89 Mondev International Ltd. v. United States of America, ICSID Case No. ARB (AF)/99/2, Award (Oct. 11, 2002), 6 ICSID Rep. 192 (2004).

90 ADF Group, Inc v. United States of America, ICSID Case No. ARB (AF)/00/1, Award (Jan. 9, 2003), 6 ICSID Rep. 470 (2004).

91 Loewen Group Inc. v. United States of America, ICSID Case No. ARB (AF)/98/3, Award (June 26, 2003), 7 ICSID Rep. 442 (2005).

92 Merrill & Ring Forestry L.P. v. Canada, UNCITRAL, Award (Mar. 31, 2010).

93 United States Model BIT (2012) art. 5; Canada Model BIT (2014), art. 6.

94 A. Tuck, *The "Fair and Equitable Treatment" Standard Pursuant to the Investment Provisions of the U.S. Free Trade Agreements with Peru, Colombia and Panama*, 16 L. & Bus. Rev. Am. 385 (2010). *See* the FTAs entered into by the United States with Australia (2004), Central America (CAFTA, 2004), Chile (2003), Morocco (2004), Singapore (2003) and Oman (2009).

95 The Dominican Republic-Central America-United States Free Trade Agreement (Aug. 5, 2004).

96 2016 Trans-Pacific Partnership (TPP) Agreement, art. 9.6.

97 The agreements of the Association of Southeast Asian Nations (ASEAN) with Korea (2009) art. 5 and India (2014), art. 7.

98 *See*, *e.g.*, 2012 Canada-China BIT, art. 4.

99 2003 Singapore-US FTA, art. 15(5); 2006 Oman-US FTA, art. 11.5 & annex 11-A; and 2015 P.R. China-R.O. Korea FTA, art. 12.5.

100 *See*, *e.g.*, Gaukrodger, *supra* note 18, at 18.

101 Newcombe & Paradell, *supra* note 79, at 263-4.

treaty standard of fair and equitable treatment is not materially different from the content of the minimum standard of treatment in CIL, as recognized by numerous arbitral tribunals and commentators."[102] However, the tribunal's reasoning on how particular types of FET clauses relate to the international MST is confusing. Such confusion may be because the content of both standards is still vague and not fully thought out. In another example, the tribunal in *Alex Genin and others v. Estonia* reasoned that FET requires an "international minimum standard that is separate from domestic law, but that is, indeed a minimum standard."[103] Even in some recent cases, arbitrators have shown little interest in the relationship between the two standards and have instead focused on the content of FET alone.

Finally, given the divergent approaches into classes, such as the NAFTA-like tendencies and the practice under the BITs, the question of whether or not FET is referenced to MST remains unsettled. Indeed, if considering the above positions, this lack of uniformity stems from the specific formulations and intentions of the parties in different IIAs. For example, unlike NAFTA, the contracting parties to BITs are not bound by interpretations of provisions issued by bodies constituted under NAFTA, such as the FTC. Again, unlike NAFTA, most BIT provisions do not refer FET to MST. This omission underscores the limited guidance as to the intention of the contracting parties. The situation, in turn, leads the tribunals established under the BITs to decide cases based on the particular wording of the treaties before them and the principles of treaty interpretation set forth in the Vienna Convention on the Law of Treaties (VCLT).[104] Therefore, tribunals have had different interpretations of the FET based on various formulations of the standard. As a result, a number of States today have become more precise in drafting FET clauses in IIAs in order to restrict the broad interpretation of FET by arbitral tribunals.

V. The Recent Formulations of FET

In recent, a number of States have slowly started moving away from the traditional standalone FET clauses and added precise and additional contents to the standard in

[102] Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/2, Award, ¶¶ 418-419 (Oct. 31, 2012).

[103] Genin et al. v. Republic of Estonia, ICSID Case No. ARB/99/2, Award, ¶ 367 (June 25, 2001), 6 ICSID Rep. 241 (2004).

[104] VCLT art. 31. It provides: "General rule of interpretation: 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

their FTAs and BITs. Before classifying and analyzing recent IIAs, it is important to point out the core problems of the FET standard and the reasons behind the recent changes in the formulation of the standard. The first problem is the relation of FET with MST under either international law, or CIL. The second is the content of the FET standard itself. Now, the recent IIAs have attempted to take a position for both of these problems. First, a larger number of recent treaties so far have clarified that FET relates to MST under CIL or international law. In this way, they have indicated that FET "includes" or "requires" the prohibition of denial of justice as recognized in CIL. For simplicity, this group can be referred to clauses referring to "MSTDJ approach." One important reason for such an adoption is the past arbitral practice particularly in the context of NAFTA where they broadened the FET standard beyond the MST under CIL. Second, a smaller number of recent treaties, particularly in the context of European treaty practice, have opted to be away from the relation of FET with MST, CIL, and even international law. Instead, they have focused on adopting a particular list of elements of FET standard. This group can be referred to as "the closed list approach." Here, there are two reasons for such an adoption. First, it is a reaction to arbitral tribunal decisions particularly in the context of BITs, where they had interpreted some controversial elements of FET such as legitimate expectation, stability and transparency without any limitations of these elements.[105] Second, the negotiating parties of these treaties have preferred not to mention the vague terms such as 'MST,' 'CIL,' and "international law," as these terms based on the experience from some arbitral cases seem to be unclear as well as cumbersome for tribunals to search for such sources.[106]

To begin with the first, the MSTDJ approach can be seen in some of the recent FTAs as well as BITs. In recent, FTAs, PACER plus (2017), Singapore-Sri Lanka FTA (2018), Australia-Peru FTA (2018), Central America-Republic of Korea FTA (2018), CPTPP (2018), USMCA (2018), Australia-Indonesia CEPA (2019), Armenia-Singapore Agreement on Trade in Services and Investment (2019), China-Mauritius FTA (2019), RCEP (2020), and Republic of Korea-Indonesia CEPA (2020) have adopted such a clause.[107] For instance, CPTPP after referring to MST under CIL in its Article 9.6.2 (a) adds that FET "includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of

[105] Picherack, *supra* note 76, at 270-1.

[106] F. Jadeau & F. Gélinas, *CETA's Definition of the Fair and Equitable Treatment Standard: Toward a Guided and Constrained Interpretation,* 1 Transnat'l Disp. Mgmt. 10-3 (2016).

[107] For details on these FTAs, *see* UNCTAD, International Investment Agreements Navigator, https://investmentpolicy.unctad.org/international-investment-agreements.

due process embodied in the principle legal systems of the world."[108] In this category, some FTAs such as Australia-Indonesia CEPA, RCEP, and Republic of Korea-Indonesia CEPA have used a shorter reference to denial of justice providing that "fair and equitable treatment" requires each party to not deny justice in any legal or administrative proceedings."[109] Here, the application of the words such as "include" and "require" are to be differentiated. The word "include" could mean that it is not just "denial of justice" and therefore the tribunals can also consider other elements of MST under CIL. In this regard, "requires" is more specific to "denial of justice" only. Moreover, a number of the above-FTAs have included limitations on the application of FET's element of legitimate expectations by investors and "the mere change in law" in host States. The FTAs such as USMCA and Australia-Indonesia have only the limitation on legitimate expectations of investors. For instance, Article 14.7 (4) of the Australia-Indonesia CEPA provides:

> For greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.[110]

Meanwhile, the FTAs such as CPTPP, Australia-Peru and China-Mauritius have included the limitation of "the mere change in law" in addition to the above. For example, the CPTPP article 9.6 (5) provides:

> For greater certainty, the mere fact that a subsidy or grant has not been issued, renewed or maintained, or has been modified or reduced, by a party, does not constitute a breach of this Article, even if there is a loss or damage to the covered investment as a result.[111]

In the context of BITs, several BITs such as the Argentina-United Arab Emirates BIT (2018), the Armenia-Republic of Korea BIT (2018), the Myanmar-Singapore BIT (2019), and the Japan-Morocco BIT (2020) have also adopted MSTDJ type of clauses

[108] Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP: signed on Mar. 8, 2018), art. 9.6: 2(a).

[109] Australia-Indonesia Comprehensive Economic Partnership Agreement (signed on Mar. 4, 2019), art. 14.7:2 (a); Regional Comprehensive Economic Partnership (RCEP: signed on Nov.15, 2020), art. 10.5: 2 (a); and Republic of Korea-Indonesia Comprehensive Economic Partnership Agreement (signed on Dec.12, 2020), art. 7.6: 2 (a).

[110] Australia-Indonesia CEPA, *supra* note 107, art. 14.7:(4). *See also* United States-Mexico-Canada Agreement (USMCA: signed on Nov. 30, 2018), art. 14.6:(4).

[111] CPTPP, *supra* note 108, art. 9.6:5. *See also* Australia-Peru Free Trade Agreement (singed on Feb. 12, 2018), art. 8.6: 5; and China-Mauritius Free Trade Agreement (signed on Oct. 17, 2019).

by emphasizing that FET "includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings [...]."[112] Some other BITs of this category have included the limitations over "legitimate expectations of investors and "the mere change in law" in host state in addition to the MSTDJ provision. In this respect, Argentina-Japan BIT (2018) and Indonesia-Singapore BIT (2018) have only added the restriction over legitimate expectations of investors,[113] while the Australia-Hungry BIT (2019) has mentioned both.[114]

It should be noted that the affirmation of MST and prohibition of denial of justice as in MSTDJ approach, "do not establish a single international standard in this context."[115] The reason is that the prohibition of denial of justice can vary from state to state, while the MST is a floor, an absolute bottom, below which conduct is not accepted by the international community and therefore does not vary from state to state.[116] This approach can be applauded for bringing flexibility in the interpretation of the FET standard considering the level of development in the host state.[117] However, this approach still keeps the discussion and ambiguity related to MST alive and tribunals may still find new ways to interpret them broadly as mentioned earlier in the instance of NAFTA tribunals through the introduction of evolutionary MST.

The second recent trend is the "list approach" where a small number of FTAs as well as BITs have adopted so far. In FTAs, the Canada-EU CETA (2016), the EU-Singapore Investment Protection Agreement (2018), and the EU-Viet Nam Investment Protection Agreement (2019) have embraced such a drafting.[118] These types of clauses, as mentioned above, have excluded the qualifiers such as MST, CIL or international law. Instead, they have enumerated specific FET elements. For example, Article 8.10(2) of the CETA agreement specified the following measure(s) as constituting the breach of FET standard:

> (a) denial of justice in criminal, civil or administrative proceedings;
> (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;

112 2018 Argentina-United Arab Emirates BIT, art. 5.2 (a); 2018 Armenia-Republic of Korea BIT, art. 2.3 (a); and 2019 Myanmar-Singapore BIT; and 2020 Japan-Morocco BIT, art. 4.3 (a).

113 2018 Argentina-Japan BIT, art. 4(4); and 2018 Indonesia-Singapore BIT, art. 3.2 (c).

114 2019 Australia-Hungry BIT, art. 4(4) & (5).

115 UNCTAD, *supra* note 14, at 34.

116 *Id.* at 34-5.

117 *Id.*

118 Canada-EU Comprehensive Economic and Trade Agreement (signed on Oct. 30, 2016), art. 8.10; EU-Singapore Investment Protection Agreement (signed on Oct. 15, 2018), art. 2.4; and EU-Viet Nam Investment Protection Agreement (signed on June 6, 2019), art. 2.5.

(c) manifest arbitrariness;
(d) targeted discrimination on manifestly wrongful grounds, such as gender, race, or religious belief;
(e) abusive treatment of investors, such as coercion, duress and harassment; or
(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.[119]

In this respect, paragraph 3 gives "specialized committees" authority to review the content of FET regularly or upon request of a Party and submit them to the CETA Joint Committee for the decisions.[120]

CETA similar to some of the agreements in MSTDJ approach have also added limitations on both "investor's legitimate expectations" as well as "the mere change in law" of the host state, however, with additional clarity and specifications. For legitimate expectations, CETA model, as compared to MSTDJ, addresses the following lighter and clearer limitations:

> When applying the above fair and equitable treatment obligation, a 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.[121]

In the above, as can be compared, unlike MSTDJ approach, CETA has not completely excluded the legitimate expectation element of FET standard. As for "the mere change in law," CETA again provides clearer and more balanced limitations describing it in this way:

> For greater certainty, the fact that a measure breaches domestic law does not, in and of itself, establish a breach of this Article. In order to ascertain whether the measure breaches this Article, a Tribunal must consider whether a Party has acted inconsistently with the obligations in paragraph 1.[122]

The other two FTAs with Singapore and Viet Nam have similarly followed the CETA formulation, however, with a little change. For instance, unlike CETA, these two FTAs in the enumerated list of FET elements have not added "a fundamental breach

[119] CETA, *supra* note 118, art. 8.10 (2).
[120] *Id*. art. 8.10 (3).
[121] CETA, *supra* note 118, art. 8.10 (4).
[122] *Id*. art. 8.10 (7).

of transparency."[123] However, unlike CETA, they have mentioned "similar bad faith conduct" along with "harassment, coercion, and abuse of power."[124] Moreover, with respect to the limitation of "legitimate expectations," these two FTAs have added even more specific conditions and attempted to balance the right of States as well as investors. For instance, the EU-Singapore FTA has used the words "specific or unambiguous representations" instead of only "specific representations."[125] Both FTAs have further mentioned that when there is a "written agreement" or "specific and clearly spelt out commitment in a contractual written obligation" towards the investors, that part shall not breach that agreement or frustrate or undermine the said commitment through the exercise of its governmental authority.[126] Subsequently, these commitments or written agreements have also included other specific conditions in order to be valid and considered by a tribunal.[127]

In BITs, some States have also adopted the list approach recently. Most of these BITs were concluded between European and other countries such as Islamic Republic of Iran-Slovakia BIT (2016), the Serbia-Turkey BIT (2018), the Lithuania-Turkey BIT (2018), the Belarus-Hungry BIT (2019), the Cabo Verde-Hungry BIT (2019), and the Hungry-Kyrgyzstan BIT (2020).[128] However, the Rwanda-United Arab Emirates BIT (2017) and the Israel-United Arab Emirates BIT (2020) have similarly chosen this approach.[129] In some of these BITs, a few notable changes can be seen for instance, in the list of FET elements as compared to the CETA and other FTAs. For example, the BITs of Hungry with Belarus and Kyrgyzstan have included "obstacles to effective access to justice" alongside "fundamental breaches of due process and transparency."[130] The Belarus-Hungry BIT has also defined the element of "manifest arbitrariness" referring to "measures taken purely on the basis of prejudice or bias without a legitimate purpose or rational explanation."[131] Likewise, Islamic Republic of Iran-Slovakia BIT has only provided "targeted discrimination on the grounds of nationality" as compared to "targeted discrimination on manifestly

123 EU-Singapore FTA, *supra* note 118, art. 2.4 (2); and EU-Viet Nam FTA, *supra* note 118 art. 2.5 (2).

124 EU-Singapore FTA, *supra* note 118, art. 2.4.2(d); and EU-Viet Nam FTA, *supra* note art. 2.5.2(e).

125 EU-Singapore FTA, *supra* note 118, art. 2.4 (3).

126 *Id*. art. 2.4 (6); and EU-Viet Nam FTA, *supra* note 118 art. 2.5 (6).

127 *Id*.

128 For details on these BITs, *see* UNCTAD, International Investment Agreements Navigator, https://investmentpolicy.unctad.org/international-investment-agreements.

129 *Id*.

130 2019 Belarus-Hungry BIT, art. 2.3 (b); and 2020 Hungry-Kyrgyzstan BIT, art. 2.3 (b).

131 2019 Belarus-Hungry BIT, art. 2.3 (c).

wrongful grounds, such as gender, race or religious belief" in other treaties.[132] Further, the Lithuania-Turkey, Belarus-Hungry, and Hungry-Kyrgyzstan BITs have included the "right to regulate" for host states and its implication on an investor's expectations as well as justifying a "Party's decision not to issue, renew or maintain a subsidy with specific conditions.[133]

The above examples of FTAs and BITs show that states are becoming more specific and taking an active role in the interpretation of the content of FET standard. As Reinisch pointed, the list approach to FET constitutes an example of the "potential feedback between treaty-makers and investment tribunals."[134] In this respect, the role of arbitral tribunals in extracting new elements of FET standard and making them available for states as an option to include in their IIAs is applaudable and seems to be inevitable, as majority of the elements in the enumerated lists of FET in these FTAs and BITs have been transported from investment arbitral cases.[135]

VI. Conclusion

The formulation of FET in international investment law has been varied. First, a small number of treaties do not include FET. Second, there are multilateral treaties that have adopted a persuasive or hortatory approach towards FET. Finally, there are FETs in BITs and FTAs that are binding and varied.

This paper focused on the two most controversial formulations of FET: the standalone formulation of FET and FET referenced to MST under CIL. The former has proved to be problematic in terms of broad interpretation, while the latter's relation with FET is still unsettled. In recent developments, there seems to be mainly a dichotomy in drafting FET in IIAs. On one hand, a larger group of these IIAs has taken the side of MSTDJ approach linking FET to MST and denial of justice for considering the level of development as discussed in the UNCTAD report while accepting the risk of vague notions such as MST or CIL. On the other, a smaller group of IIAs have instead chosen to be away from these vague notions. Instead,

132 2016 Islamic Republic of Iran-Slovakia BIT, art. 3.2 (d).

133 2018 Lithuania-Turkey BIT, art. 3; 2019 Belarus-Hungry BIT, art. 3; and 2020 Hungry-Kyrgyzstan BIT, art. 3.

134 A. Reinisch, *The Likely Content of Future EU Investment Agreements, in* International Investment Law: A Handbook 1894 (M. Bungenberg et al. eds., 2015).

135 P. Dumberry, *Fair and Equitable Treatment, in* Foreign Investment under The Comprehensive Economic and Trade Agreement (CETA) 95-104. (S. Schacherer & M. Mbengue eds., 2018).

they are focusing on providing a list of elements of FET and further limitations on some controversial elements of FET such as legitimate expectations and stability in the legal framework. Although the "MSTDJ approach" seems to have gradually gained more support from States, the "list approach" may best serve the interest of both States as well as investors for its clarity with regard to elements of FET as well as taking a step further from ambiguous qualifiers such as MST, CIL and international law. In fact, the list approach has already started its influence in some BITs apart from the earlier FTAs such as CETA. Nevertheless, in most of recent formulation of the FET standard, the MSTDJ drafting, despite of all its flaws, is still the prevalent one.

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