הפקולטה למשפטים
FACULTY OF LAW
كلية الحقوق

האוניברסיטה העברית בירושלים
THE HEBREW UNIVERSITY OF JERUSALEM
الجامعة العبرية في القدس

The Hebrew University of Jerusalem

The Faculty of Law

The Clinical Legal Education Center

The International Trade and Investment Law Clinic

Fair and Equitable Treatment and Regulatory Space: A Comparative Analysis of Different Models

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Prepared by

Pinchas Ancselovits, Meori Elias, Nadav Klein, and Ohad Roisblatt

Beneficiary: Office of the Chief Economist, The Ministry of Finance[*]

Government of Israel

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Executive Summary:

The fair and equitable treatment (FET) standard has become a major basis of investment treaty arbitration claims, with almost half of all recorded Investor-State Dispute Settlement (ISDS) claims based on the failure to meet FET obligations. The ambiguity surrounding the meaning of the FET standard and its components has left it prone to wide interpretation by tribunals and state parties involved in investment treaty arbitration claims. This lack of clarity has brought about significant regulatory chill among state parties to international investment agreements, in fear that their domestic regulation has become susceptible to costly arbitration claims by foreign investors and therefore the impact on the state's regulatory space could be major and unpredictable.

This memorandum surveys the existing formulations of FET clauses in investment treaties and studies the variety of components said to be part of the FET standard, in order to find the FET formulation that creates the desired balance between the protection of foreign investors' interests and the state's right to regulate. In order to avoid the problematic results of legal uncertainty that are analyzed in this memorandum, it is suggested that FET clauses should be as detailed as possible in order to increase legal certainty in regard to their content, to the benefit of both investors and host states. In order for the state to create certainty in regard to its regulatory space, legal certainty in treaty language is necessary. Therefore, the preferred model of FET, according to the analysis proposed in this memorandum, is FET linked to Minimum Standard of Treatment (MST) with specific clarifications. Connecting the FET standard to the MST may add some legal certainty and shed light on the parties' intentions concerning the scope of FET. However, this formulation still leaves room for interpretation of the clause by tribunals, as the components and precise meaning of MST are still unclear today. It is the opinion of this memorandum that states seeking to protect their regulatory space should strive to further clarify the obligations and the components under FET to be included, but also excluded, from their FET clauses, in the spirit of the emerging trends explained in the memorandum.

Table of Contents

1. Introduction 5

2. An Overview of Fair and Equitable Treatment in International Investment Agreements 8

2.1 Understanding the General Legal Environment – Fair and Equitable Treatment as Part of Public International Law 8

2.2 The Customary Minimum Standard of Treatment 9

2.3 The Fair and Equitable Treatment Principle in Substance 12

3. The Components of Fair and Equitable Treatment and Regulatory Space 15

3.1 Legality 18

3.2 Procedural Due process 20

3.2.1 Denial of justice (Judicial Due Process): 20

3.2.2 Procedural fairness 25

3.3 Legitimate Expectations 27

3.4 Stability, Predictability, and Consistency 34

3.5 Transparency 37

3.6 Good Faith 39

3.7 Arbitrariness 42

3.8 Non-Discrimination 43

3.9 Proportionality and Reasonableness 45

3.10 Conclusion 48

4. The Different Models of Fair and Equitable Treatment 50

4.1 Fair and Equitable Treatment Linked to the Minimum Standard of Treatment - A Narrower Approach 53

4.1.1 Fair and Equitable Treatment linked to the Minimum Standard of Treatment as a "ceiling" 53

4.1.2 Fair and Equitable Treatment linked to the Minimum Standard of Treatment as a "floor" 55

4.1.3 Fair and Equitable Treatment linked to the Minimum Standard of Treatment with specific clarification concerning its boundaries 56

4.1.4 The Components of the Minimum Standard of Treatment 58

4.2 Unqualified Fair and Equitable Treatment 59

4.2.1 Unqualified Fair and Equitable Treatment as linked to Minimum Standard of Treatment 61
4.2.2 Unqualified Fair and Equitable Treatment as an Autonomous Standard 63
4.2.3 The Components of the Autonomous Fair and Equitable Treatment 64
4.3 No Fair and Equitable Treatment Obligation..... 64
4.3.1 Application of the Minimum Standard of Treatment 67
4.3.2 Importation of Fair and Equitable Treatment through the Most Favored Nation Clause 69
4.4 Conclusion 72
5. Emerging Trends 73
5.1 The Comprehensive Economic and Trade Agreement - CETA 73
5.2 The Indian 2016 Model Bilateral Investment Treaty..... 75
5.3 Recent Argentinian Treaties 78
6. Conclusions..... 82

1. Introduction

The fair and equitable treatment (FET) standard[1] has attracted a great deal of attention over the last fifteen years as the leading basis of liability in many investment treaty arbitration claims.[2] Importantly, the content and meaning of the FET standard and its application in practice have become a crucial part in the debate over the impact of investment treaties on the state's right to regulate.[3]

Formulations of FET clauses in international investment agreements (IIAs) vary from vague and simple statements of the parties' obligations to ensure "fair and equitable treatment",[4] to extensive, specific, clauses that define a narrow list of obligations under the standard.[5] The lack of clarity regarding FET provisions is further compounded by the different interpretations of FET clauses by arbitral tribunals and the overall complexity of the international investment legal system, with its lack of uniformity and binding precedent.[6] As the precise meaning of the FET standard remains unclear, arbitral tribunals are free to interpret its provisions widely and inconsistently, essentially limiting state sovereignty with respect to domestic regulation:

> *The meaning of the "fair and equitable treatment" standard may not necessarily be the same in all the treaties in which it appears. The proper interpretation may be influenced by the specific wording of the particular treaty, its context, negotiating history or other indication of the parties' intent. The attempts to clarify the normative content of the standard itself have, until recently, been relatively few. There is a view that the vagueness of the phrase is intentional to give arbitrators*

[1] According to Stephan Schill and Mark Jacob in *Fair and Equitable Treatment: Consent, Practice, Method,* Amsterdam Center for International Law No. 2017-20 (2017), FET is defined as "the core substantive concept of international investment law. It generally assures non-relational (i.e. absolute) minimum treatment, which makes it the bedrock of the modern protection of investors operating abroad." See page 2.

[2] UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, FAIR AND EQUITABLE TREATMENT, UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II, p.1,10 (2012).

[3] Rudolf Dolzer *Fair and Equitable Treatment: Today's Contours,* 12 SANTA CLARA J. INT'L L. p. 10-11 (2014); CATHERINE TITI, THE RIGHT TO REGULATE IN INTERNATIONAL INVESTMENT LAW, 143, (2014).

[4] Austria-Jordan BIT (2001), Article 3.1: "Each Contracting Party shall accord to investments by investors of the other Contracting Party fair and equitable treatment and full and constant protection and security." (*Available at:* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/194/download)

[5] EU-Canada Free Trade Agreement (CETA) (2016) European Union-Canada, Article 8.10 (*Available at*: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22017A0114(01)).

[6] Susan D. Franck *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions* 72 FORDHAM L. REV. 1521, p. 1544-1547, 1611-1613 (2005).

> *the possibility to articulate the range of principles necessary to achieve the treaty's purpose in particular disputes. However, a number of governments seem to be concerned that, the less guidance is provided for arbitrators, the more discretion is involved and the closer the process resembles decisions ex aequo et bono, i.e. based on the arbitrators' notions of "fairness" and "equity".*[7]

While some states, scholars and business groups see IIAs "as a transfer of regulatory power away from national public authorities to arbitrators,"[8] others claim that these agreements do not pose a risk to regulatory space, and furthermore, that they provide an adequate balance between states' clashing interests.[9] In any case, the growing number of domestic measures challenged through investor-state arbitration claims has been said to have resulted in "regulatory chill" in some states - the avoidance of regulation in "fear of having to be respondents in ISDS claims."[10] Legal analysis of investment treaties has increasingly focused on the effects of *particular* standards of treatment within the treaties rather than the effects of the treaty as a whole. States seeking protection of their regulatory space have accordingly shifted their focus to the analysis and rephrasing of their FET clauses.[11]

This memorandum aims to find the formulation of FET clauses in investment treaties that adequately reflects the desired balance between investor protection, on the one hand, and the state's right to regulate, on the other hand. To this end, in section 2, the memorandum deals with the general framing of FET and the question at hand in the sphere of public international law, presenting the content and scope of the customary minimum standard of treatment (MST)[12] and its interaction with FET. Then, in section 3, the memorandum breaks down the main components of FET, as identified in state practice, treaties, and arbitral jurisprudence and examines their

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[7] OECD, FAIR AND EQUITABLE TREATMENT STANDARD IN INTERNATIONAL INVESTMENT LAW, 2-3, (2004) No. 2004/3 Working Papers on International Investment Law; See also: PATRICK DUMBERRY, FAIR AND EQUITABLE TREATMENT- ITS INTERACTION WITH THE MINIMUM STANDARD AND ITS CUSTOMARY STATUS 30-38 (2018).

[8] David Gaukrodger *The Balance between Investor Protection and the Right to Regulate in Investment Treaties: A Scoping Paper*, Working Papers on International Investment. OECD. No. 2017/02, p. 6-9 (2017).

[9] Ibid..

[10] UNCTAD reports that out of 553 alleged breaches of IIAs, 460 were on the basis of FET or MST (see https://investmentpolicyhubold.unctad.org/ISDS/FilterByBreaches); Ashley Schram et al. *Internalization of International Investment Agreements in Public Policymaking: Developing a Conceptual Framework of Regulatory Chill* Global Policy 9:2, p. 193-195 (2018).

[11] See UNCTAD report *supra* note 2, 10-11; Dumberry, *supra* note *7*, p. 38-45.

[12] The customary law minimum standard (MST) refers to a rule of customary international law which governs the treatment of aliens, by providing for a minimum set of principles which States, regardless of their domestic legislation and practices, must respect when dealing with foreign nationals (see Section 2.2).

relative effect on states' regulatory space. Section four will then review the three main formulations of FET clauses in existence today - FET clauses that are linked to MST, autonomous FET clauses, and the outright exclusion of an explicit FET clause. Against this backdrop, section five analyzes three recently developed models of FET formulation and the implications of the drafting trends that they set. Finally, section six will conclude the memorandum's findings and provide general recommendations regarding the formulation of an adequate, balanced model of FET.

2. An Overview of Fair and Equitable Treatment in International Investment Agreements

2.1 Understanding the General Legal Environment – Fair and Equitable Treatment as Part of Public International Law

Before examining FET in detail, this section will first lay out the legal framework of IIAs in general, and the standards of treatment that they prescribe. This backdrop will serve to clarify the details described in the later sections, particularly concerning the tools used to interpret FET and its connection to the MST.

First, it is imperative to understand that investment treaties are "creatures of international law"[13] and are thus subject to its principles and standards.[14] IIAs aim "to create treaty rights between states under international law"[15] and therefore like other treaties, must be interpreted according to the customary rules of treaty interpretation, including those set out in the Vienna Convention on the Law of Treaties (VCLT).[16] In accordance with Article 31(1) VCLT, treaties must 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 light of its object and purpose."[17] In addition, Article 32 lays out the rules of interpretation in situations where Article 31 "leaves the meaning ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable."[18] FET, as a rule, frequently included in IIAs and specifically in Bilateral Trade Agreements (BITs), is thus to be interpreted in this manner.

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[13] Gleider I. Hernandez *The interaction between investment law and the law of armed conflict in the interpretation of full protection and security clauses, p. 48, in* FREYA BAETENS, INVESTMENT LAW WITHIN INTERNATIONAL LAW: INTEGRATIONIST PERSPECTIVES (2013).
[14] Ibid; *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka,* ICSID Case No. ARB/87/3, Award 27 January 1990, para. 39*; Duke Energy Electroquil Partners & Electroquil SA v. Republic of Ecuador,* ICSD Case No. ARB/4/19, Award, 18 August 2008, para. 173; *Continental Casualty Company v. Argentine Republic*, ICSD Case No. ARB/03/9, Award, 5 September 2008, Para. 164.
[15] Hernandez, *see supra* note 13, p. 46-47.
[16] Ibid..
[17] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, Article 31(1) (hereafter: VCLT) (*Available at*: https://www.refworld.org/docid/3ae6b3a10.html).
[18] Ibid, Article 32.

Not unlike other areas of public international law, but perhaps more pronouncedly, decisions of arbitral tribunals on investment disputes do not serve as formally binding precedents and do not possess law-making powers.[19] Nonetheless, they are strongly taken into account in drafting, negotiations, and renegotiations of investment treaties.[20] As explained below, the early phrasing of FET clauses, as in most first generation BITs, has been subject to considerable interpretation by international tribunals, which have generally applied the principles of international law and treaty interpretation in defining the vaguely phrased principle.[21]

Furthermore, customary international law is too an interpretative tool in the process of defining FET in BITs. According to Article 31(3)(c) VCLT, this can be done even when the relevant treaty does not refer to customary law.[22] In this manner, the customary law minimum standard of treatment (MST) has been connected to FET in order to clarify its scope even in BITs which did not expressly refer to the MST.[23]

2.2 The Customary Minimum Standard of Treatment

One of the fundamental controversies regarding the FET principle relates to the scope and nature of its connection to the customary Minimum Standard of Treatment (MST. As is further explained below, two main approaches concerning this issue may be distilled from arbitral jurisprudence and scholarly commentary. The first approach considers FET to be an autonomous standard, unrelated to MST, and the second approach claims that FET is strongly connected to the MST as either a "ceiling" or as a "floor." Given the important role that the MST has played in the ongoing interpretation of FET, this sub-section will delve into the content and boundaries of the MST so as to effectively apply the concept in the subsequent sections.

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[19] Martins Paparinskis *Investment treaty interpretation and customary investment law: Preliminary remarks*, p. 130-133, *in* CHESTER BROWN & KATE MILES, EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION (2011).
[20] Franck, *see supra* note *6*, p. 1611-1613.
[21] Section 3 will demonstrate how these rules of interpretation have allowed, for example, the importation of standards from third-party BITs to treaties that have avoided explicit inclusion of FET, and how FET clauses have been interpreted in consideration of the broader "circumstances of conclusion" in the treaty.
[22] VCLT, *supra* note 17, Article 31(3)(c); Paparinskis, *supra* note 19, p. 89.
[23] Paparinskis, *supra* note 19, p. 86-89.

The MST developed in the 19th and early 20th centuries between so-called 'civilized nations' in order to regulate the protection of 'aliens' (foreigners) and their commerce, primarily in the physical sense.[24] By the early 1900s, "international legal scholars"[25] in Europe and the United States appear to have reached a broad understanding of a minimum standard of treatment regarding physical safety and equality before the law, but the wider economic rights of aliens were barely considered.[26] The increasing need for the protection of foreigners' economic interests in the upsurge of international trade and investment in this era drove the major powers to develop the MST as it is often construed today.[27]

In its modern form, the MST is often considered to have been established by the American-Mexican Claims Commission in the *Neer v. United Mexican States* case from 1926.[28] The Tribunal asserted that:

> *The treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of government action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.*[29]

Although the case did not use the explicit expression 'MST', it has had considerable influence on the emergence of the concept.[30] It is often considered that since *Neer*, the MST has become a rule of customary international law which governs the treatment of aliens, by providing for a minimum set of principles which states, regardless of their domestic legislation and practices, must respect when dealing with foreign nationals. Essentially, it asserts a level of protection for foreigners, *below which the treatment provided for by the host state must not fall*.[31]

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[24] Andrew Newcombe and Lluis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment Chapter 1, Historical Development of Investment Treaty Law*, Kluwer Law International, p. 4 (2009).
[25] Ibid..
[26] Ibid, p. 11.
[27] Ibid, p. 11-12.
[28] Dumberry, *supra* note 7, p.12-13.
[29] *L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States*, Award, October 15, 1926, para. 4.
[30] MARTINS PAPARINSKIS, THE INTERNATIONAL MINIMUM STANDARD AND FAIR AND EQUITABLE TREATMENT, Oxford UP, p. 48-54, (2013). The importance of the *Neer* case does not stem from the fact that it determined the precise and full content of the principle but rather from its setting of a cornerstone for understanding the concept and its development.
[31] Roland Kläger, FAIR AND EQUITABLE TREATMENT IN INTERNATIONAL INVESTMENT LAW, (Cambridge: Cambridge University Press, 2011), part 3.1.

The customary nature of the MST has been recognized in state practice, arbitral jurisprudence and scholarly writings, continuing to this day.[32] In *Bilcon v Government of Canada*, as a recent example, the US argued that "the minimum standard of treatment is an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law in specific contexts."[33] Indeed, as is further explained in section 4 *infra,* due to its customary nature, some tribunals have applied the MST to FET clauses in IIAs that omit explicit treaty language to this effect. [34]

Although it is generally accepted that MST is an "umbrella concept" that incorporates different elements, its actual content remains controversial.[35] While some commentators argue that it may be clearly defined, others contend that its true and complete content is not entirely clear and is subject to broad interpretation.[36] UNCTAD, for instance, has noted that the MST is a guiding principle which does not offer "ready-made solutions". [37] At its narrowest reading, MST is construed as an obligation that requires host states to prevent denial of justice and arbitrary conduct, and to provide investors with due process and full protection and security.[38]

In order to summarize and understand the core of the discussion relating to the MST, a substantive and contentious issue must be noted: has the MST principle remained as it was formulated in the 1926 *Neer* case or has it evolved in different ways and changed its scope to a

[32] *Mondev International Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award, 2 October 2012; *Apotex Holdings Inc. & Apotex Inc. v. United States*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014; *Spence International Investments, LLC, Berkowitz, et al v. Costa Rica*, ICSID Case No. Unct/13/2, Interim Award, 30 May 2017; *Rusoro Mining Ltd. v. Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016; *Crystallex International Corporation v. Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v. Paraguay*, ICSID Case No. ARB/07/9, Further Decision on Objections to Jurisdiction, 9 October 2012; *El Paso Energy International Company v. Argentina*, ICSID Case No. ARB/03/15, Award, 31 October 2011; Joel P. Trachtman *The Obsolescence of Customary International Law*, *IN* C. BRADLEY (ED.), CUSTOM'S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD, 87–88 (2016).

[33] *Bilcon of Delaware et al v. Government of Canada,* PCA Case No. 2009-04, United States Article 1128 Submission, para. 4.

[34] UNCTAD report, *supra* note 2.

[35] Dumberry, *supra* note 7, p.7; *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012.

[36] M. Sornarajah *The Fair and Equitable Standard of Treatment: Whose Fairness? Whose Equity?*, *in* FEDERICO ORTINO ET AL. (EDS), INVESTMENT TREATY LAW: CURRENT ISSUES II, BIICL, pp. 176-182, p. 172.

[37] UNCTAD report, *supra* note 2, p. 46.

[38] Dumberry, *supra* note 7, p. 9

certain extent? This is a thorny, controversial issue that also affects, to a degree, the interpretation of the content and scope of FET, as further explained in Section 4.

2.3 The Fair and Equitable Treatment Principle in Substance

Having introduced the concept of MST, the discussion will now proceed to focus on the FET principle and its substantive meaning in modern international investment law.

Contemporarily, FET is often included as a part of the protection provided to foreign investors in IIAs, although some recent treaties do not expressly refer to FET. According to publicly available information, out of a sample of 2,785 existing IIAs, 2,646 included some form of an FET clause, while only 139 omitted FET or avoided it explicitly.[39]

Notwithstanding the ubiquity of FET clauses in investment treaties, questions remain regarding the substantive meaning of the principle.[40] In most cases, the wording of the clause does not offer detailed guidance on the manner in which arbitral tribunals should interpret these provisions and does not explicitly describe the parties' obligations under the clause. Instead, most FET clauses (77.02%)[41] simply prescribe 'fair and equitable treatment' without further explanation, thereby leaving states, investors and other stakeholders with no clear legal security, raising concerns regarding potential limitation of regulatory space.[42] Consequently, there has been a growing trend in recent years of states revising FET models and adding specific content concerning the obligations of parties to BITs. This move towards specification has also been evident in cases where States removed FET clauses from their model BITs and stated precisely what may or *may not* be interpreted into the BIT.[43]

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[39] Data derived from original database in Thompson, Broude, Haftel, *Once Bitten, Twice Shy? Investment Disputes, State Sovereignty and Change in Treaty Design*¸ Forthcoming in INTERNATIONAL ORGANIZATION (2019), (*Available at*: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3367800); see also, UNCTAD database (*Available at*: https://investmentpolicyhubold.unctad.org/IIA/mappedContent#iiaInnerMenu).
[40] Dumberry, *supra* note 7, p. 38-45.
[41] *See supra* note 39.
[42] UNCTAD report, *supra* note 2, p. 20-22.
[43] UNCTAD, *supra* note *2*, p.29.

As explained below in Section 4, FET clauses have traditionally been phrased in three main formulations (see examples in Table 1 below).

The first formulation considers FET to be a reflection of the MST principle under customary international law by explicitly connecting between the principles in IIA wording.[44] However, as will be demonstrated in Section 4.1, major controversy surrounds the question of whether the FET principle is included under the MST umbrella as a 'ceiling' or as a 'floor'.

The second formulation is the "unqualified FET clause"[45] which entails a simple requirement to provide fair and equitable treatment without further detail concerning the clause's provisions.[46] This is conveyed through mostly ambiguous phrasing and in some cases, an explicit exclusion of MST or an addition of substantive content pertaining to the meaning of the FET clause.[47]

The third treaty formulation of FET consists of no FET clause at all. The discussion of this drafting below encompasses BITs that have purposefully excluded the standard on the whole, in some cases with additional content to explain what may or may not be interpreted into the treaty.[48] Further analysis of these three models of FET will be discussed in Section 4.

Given that under the rules of international law, as expressed in the abovementioned language of the VCLT, the starting point for the elucidation of treaty standards, is the language of the treaty itself, a careful analysis of the differences in the existing formulations of FET is crucial in developing an FET model with the purpose of creating a reasonable balance between the interests of investors and the state's regulatory space. On this point, the OECD has noted that, "a finding that an FET clause is autonomous from the MST principle increases the scope for arbitral interpretation of the clause", while a reference to the MST may serve to circumscribe the scope of the provision and thereby narrow the tribunal's room for interpretation. Furthermore, vague and pliable phrasing in itself could potentially lead to discriminatory interpretation against states on the basis of their own domestic regulations which were not mutually understood as problematic in the initial signing of their treaty.

[44] Andrew Newcombe & Lluis Paradell, *supra* note 24, p. 234.
[45] OECD, *supra* note 8, p. 11.
[46] Ibid.
[47] Dumberry, *supra* note 7, p. 32-33.
[48] UNCTAD report, *supra* note 2, p. 18-20.

Table 1: FET Models and Examples

FET Formulation	Example from BIT
FET linked to the MST	Canada-Kuwait BIT (2011) Article 6.1 "Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection of security."
Unqualified FET	Austria-Guatemala BIT (2006) Article 3.1: "Each Contracting Party shall accord to investments by investors of the other Contracting Party fair and equitable treatment and full protection and security"
No FET	Croatia-Ukraine BIT (1996): no reference to FET.

Mindful of the above, the following sections of this memorandum will also examine whether the current movement of States towards increasing specification in the wording of FET clauses is effective in expanding state regulatory space.[49]

[49] For further analysis on this point, see: Caroline Henckels, *Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP*, 19 JOURNAL OF INTERNATIONAL ECONOMIC LAW, p. 27 (2016).

3. The Components of Fair and Equitable Treatment and Regulatory Space

This section focuses on the different components of the FET principle. The inferences from this analysis are then used to assess the abovementioned drafting strands of FET and their impact on states' regulatory space.

Consistent with the above description of MST, this discussion identifies and elucidates the various aspects and elements included in the broad notion of 'fair and equitable treatment' from the analysis of state practice, arbitral jurisprudence and scholarly commentary. In turn, this methodology allows to pinpoint and more accurately ascertain the impact of the FET standard, and each of its elements, on regulatory space.

As a preliminary observation to this discussion it is important to note that there is no general agreement on which components are included in the FET principle. Schill, for one, has identified five different components of FET,[50] whereas the OECD Working Papers on International Investment recognized eight elements when assessing the content and meaning of FET.[51] The UNCTAD 2012 report on FET also counted eight components under the concept of FET, but these were not the same elements identified by the OECD.[52] The difference in these breakdowns results from a debate over particular standards and rules and whether they form a distinct part of FET or not (such as 'legitimate expectations').

The interaction between the various elements of FET is also important. The components of the FET principle, as described below, are interrelated. As a result, it is often difficult to separate or 'pigeonhole' the exact elements of FET in a manner that although analytically neat would be artificial in practice. Notable in this regard is the *Mondev v USA* case, where in order to define the

[50] The components identified by Schill are: (1) the requirement of stability, predictability and consistency of the legal framework, (2) the protection of legitimate expectations, (3) the requirement to grant procedural and administrative due process and the prohibition of denial of justice, (4) the requirement of transparency, and (5) the requirement of reasonableness and proportionality. See: Benedict Kingsbury and Stephan Schill *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*, New York University Public Law and Legal Theory Working Papers, 18 (2009). See also Schill, *supra* note *1*.

[51] David Gaukrodger, *Addressing the balance of interests in investment treaties,* OECD Working Papers on International Investment 2017/03, p. 40-51 (2017).

[52] UNCTAD report, *supra* note 2, p. 61-88.

due process component the Tribunal cited an ICJ case[53] which stated that the "[…] the Tribunal regards the Chamber's criterion as useful also in the context of denial of justice."[54] This is also seen in the thin line between transparency, good faith and protection of the investor's legitimate expectations.

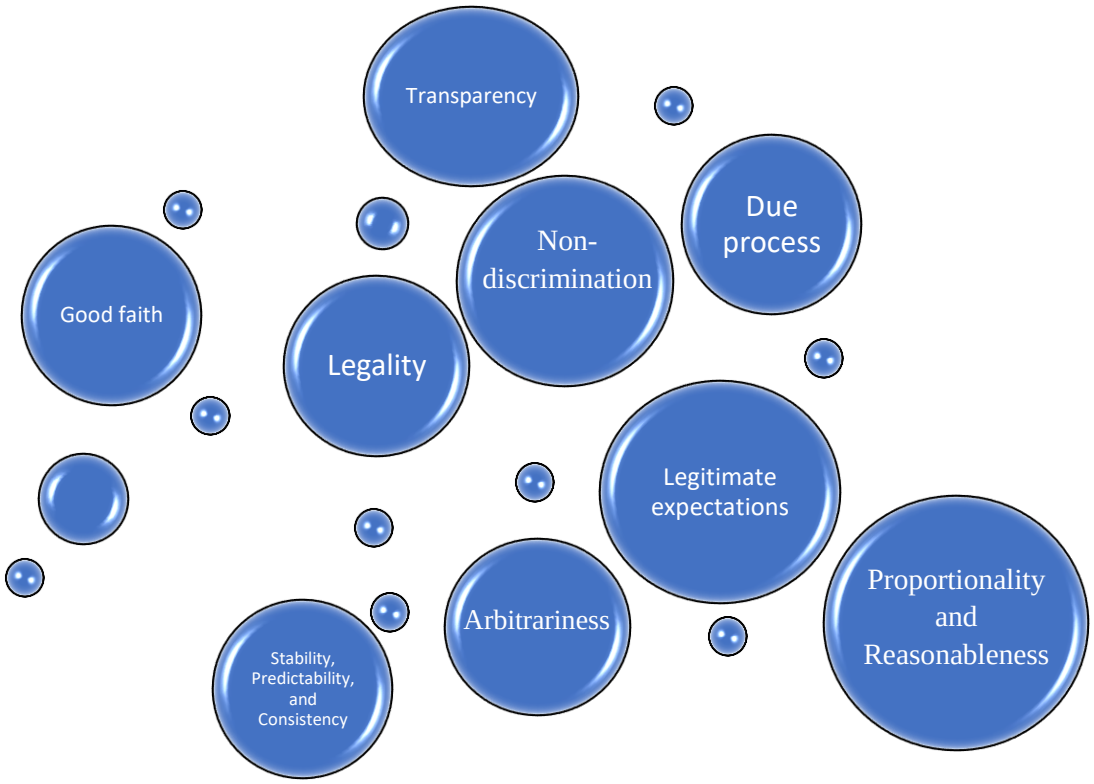
For the sake of completeness, this section adopts an expansive reading of the potential components of the FET standard, which covers all the commonly identified components in jurisprudence.[55] These components, in no hierarchical order are: 1) legality 2) procedural due process 3) legitimate expectations 4) stability, predictability, and consistency 5) transparency 6) good faith 7) arbitrariness 8) non-discrimination 9) proportionality and reasonableness.

For each component, this section will first provide a simple definition, and will then analyze relevant jurisprudence and commentary to determine what it includes and identify the potential controversy over the content and meaning, with a special emphasis on regulatory space. Lastly, the section will discuss the components' impact on the host state's regulatory space. It should be noted that most arbitral jurisprudence is based on NAFTA and is therefore limited both textually and geographically.

Importantly, for each component of FET, this analysis will attempt to determine the effect on the state's regulatory space. As further explained below, various components have different ramifications for the host states' regulatory space. This also affects the drafting of modern IIAs which include or specifically exclude certain components, as is addressed in the next section.

[53] *Elettronica Sicula S.p.A. (ELSI) Case (United States of America v. Italy)* [1989] ICJ Rep.
[54] *Mondev International Ltd. v. United States*, *supra* note *32*, Award, 2 October 2012, Para 127.
[55] Kingsbury and Schill, *supra* note 50, p. 19.; see also the OECD 2017 report, *supra* note 8.

FET Components: potential components of the FET commonly identified by jurisprudence.



3.1 Legality

In the context of FET, the principle of legality as a derivative of the concept of the rule of law, requires the host state's actions to conform to any legal obligation, both domestic and international.[56] The idea is that public authority should be exercised along the line of pre-established substantive and procedural rules.[57]

Following this rationale, several tribunals have found that a breach of domestic law by the host state may give rise to a violation of the FET standard.[58] For example, in *Pope & Talbot Inc. v Canada*, following the signing of a five-year agreement between Canada and the United States,

[56] Kingsbury and Schill, *supra* note 50, p. 19.
[57] Ibid.
[58] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, para. 43.

Canada was required to collect a fee for the export of softwood lumber in excess of certain established quantities. Pope & Talbot claimed that certain aspects of this export regime and its application violated Canada's obligations under NAFTA Article 1105. The Tribunal found that Canada's Softwood Lumber Division (SLD) treated the investor in an unfair manner, subjecting it to threats, denying reasonable requests for pertinent information, and requiring it to incur unnecessary expense and disruption.

Regarding the principle of legality, the Tribunal stated:

> *The SLD refused to provide any kind of legal justification, relying instead on naked assertion of authority and on threats that the Investment's allocation could be canceled, reduced or suspended for failure to accept verification.*[59]

Furthermore, as stated in *GAMI Investments Inc v. Mexico,* the FET standard can also be interpreted to include an obligation to actively apply domestic law on investments.[60] Normatively, this would not add to the state's burden (or, conversely, restrict its regulatory space), but subjecting domestic legality to international arbitral scrutiny may increase exposure to liability, increasing the costs of non-compliance.

While the precise extent to which international tribunals have the power to interpret the correct application of domestic law remains unclear, it seems that under the general requirement of legality, a violation of domestic law could be considered a transgression of the FET principle and may be reviewed by an international tribunal. In this respect, the concept of legality serves to broaden the width of the FET principle. To be sure, not every violation of domestic law is necessarily a breach of FET. In this regard, the Tribunal in *Joseph Charles Lemire v. Ukraine*[61] explained that it is necessary that the state incurs in "a blatant disregard of applicable tender rules".[62]

The tribunal in *Noble Ventures Inc v. Romania* demonstrated how the legality requirement could be conversely used rather to narrow the scope of the FET principle, stating that domestic regulations were not necessarily "'opposed to the rule of law'… they were initiated and conducted

[59] *Pope & Talbot v. Canada*, UNCITRAL (NAFTA), Award on the Merits of Phase 2, 10 April 2001, para. 174.
[60] *GAMI Investments Inc. v. Mexico*, UNCITRAL (NAFTA), Final Award, 15 November 2004, para. 91.
[61] *Joseph Charles Lemire v. Ukraine*, *supra* note *58,* Award, 28 March 2011.
[62] Ibid, para. 43.

according to the law and not against it."[63] This essentially means that there was no breach because the state acted according to domestic law, specifically considering the state's law is similar to that found in other states.

In summary, the legality principle enables an international tribunal to examine a state's action or inaction, if that action or inaction were opposed to the state' domestic law. It should be emphasized, as was stated with regard to the *GAMI Investments Inc. v. Mexico* ruling, that both a breach of domestic law and a failure to enforce domestic law by the state could be considered a breach of the FET standard according to this head of claim.

Regarding the impact on the state's regulatory space, since the legality component examines whether an action or inaction by the state was compatible with its domestic law, it does not add an obligation that did not previously exist. However, under an IIA, this transgression would be examined by an international tribunal and not the state's court system, with potentially higher costs.

3.2 Procedural Due process

3.2.1 Denial of justice (Judicial Due Process):

Denial of justice is traditionally defined as any gross misadministration of justice by domestic courts resulting from misconduct or inadequacy of the host state's judicial system.[64] It is generally recognized in jurisprudence that only gross or manifest instances of injustice are considered a denial of justice and that a simple error, misinterpretation or misapplication of domestic law is not denial of justice as such. However, jurisprudence shows that this definition leaves a lot to be desired and is determined on a case-by-case basis, as stated for example in *Mondev v. US.*[65] There, the tribunal stated that "[t]his is admittedly a somewhat open-ended standard, but it may be that in practice no more precise formula can be offered to cover the range of possibilities."[66]

[63] *Noble Ventures Inc v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, para 178; it should be noted that the Tribunal ruled this with regards to an arbitrariness claim and not specifically to the legality component.
[64] Focarelli, *Denial of Justice*, Max Planck Encyclopedia of Public International Law, Online Edition (2009).
[65] *Mondev International Ltd. v. United States, supra* note 32.
[66] Ibid, para. 127.

As regards the development and evolution of denial of justice and the threshold of its invocation, there is some disagreement. It should also be noted that this discussion is relevant not only to treaty-based FET but also to the custom-based MST. On the one hand, it could be argued that the modern concept of the denial of justice is an evolving standard and its evolution is bound to continue, therefore it is possible that its meaning will develop continuously. This approach seems to have been adopted in the aforementioned *Mondev case,* where Mexico argued that the customary international law standard "is relative and that conduct which may not have violated international law [in] the 1920s may very well be seen to offend internationally accepted principles today".[67] This view is also supported outside of NAFTA, for example in *Railroad Development Corporation v. Guatemala*.[68] At the same time, some states espouse a different view. For instance, Canada claimed that the standard for the invocation and proof of a violation of FET on grounds of denial of justice is only as high in the 21st century as it was in the days of *Neer*.[69] As stated above, this proposition was rejected by the *Mondev* Tribunal,[70] which asserted rather that, "the content of the minimum standard today cannot be limited to the content of customary international law as recognized in arbitral decisions in the 1920s."[71] Although it should be noted that many tribunals following the *Mondev* "evolutionary" approach did not find the host state responsible for any breach of the FET standard,[72] meaning it could be argued that these tribunals only claim this in their rhetoric, but not in their rulings.

The denial of justice component is also reflected in recent treaty practice, in the Argentina-Japan BIT, it is seen in article 4(2)(a) which includes specific clarification that FET includes the obligation not to deny justice:

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[67] JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 68 (2005).

[68] *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012); The *Neer* Tribunal (*supra* note *29*, para. 4) stated a much narrower view of the denial of justice claim by stating that "in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency".
As was argued by Canada in the *Mondev case*, see *supra* note 32, Second Submission of Canada (pursuant to NAFTA art. 1128), para. 43-53. See *Neer*, *supra* note 29.

[70] Ibid, para. 115.

[71] Ibid, para. 116, 123.

[72] Patrick Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105*, Kluwer Law International, 11-12 (2013).

> *"fair and equitable treatment" includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and.*[73]

A prominent example of the application of the denial of justice claim can be found in *Robert Azinian v. Mexico,* which was the result of a decision by the Mexican City of Naucalpan to terminate without cause a contract with DESONA, a company in charge of operating a landfill and waste management system for the city.[74] The company shareholders, as American citizens, invoked their rights in Mexican courts, followed by an arbitration proceeding, claiming that the concession cancellation amounted to a violation of NAFTA chapter 11. Although it was not argued by the claimants, the Tribunal clarified the existence of a denial of justice offense, and that it can be successfully invoked "if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way'; or in the presence of a 'clear and malicious misapplication of the law."[75] This line of cases clarifies that not every limitation, restriction, or qualification on the investors' ability to access courts amounts to a denial of justice according to the FET standard.

Nevertheless, there are remarks by tribunals about the possibility of a denial of justice claim being raised against a legislative body when it limits access to state courts, as was stated in *Iberdrola v. Guatemala;* "[t]he Tribunal concludes that there is not only a denial of justice in relation to the actions of the judiciary, but also, among other hypotheses, when a state prevents an investor's access to the courts of that State; in that case there will be denial of justice even if the act comes from the executive or legislative body."[76] A similar view was presented by the Tribunal in *Rumeli Telekom v. Kazakhstan.* There the tribunal stated that, "Courts are not the only state organs the conduct of which can amount to a denial of justice. Administrative organs can also engage the State's international responsibility by denying justice."[77] In spite of this ruling, a denial

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[73] Argentina-Japan BIT (2018), not in force, (*Available at:* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5799/download).
[74] *Robert Azinian v. Mexico*, ICSID Case No. ARB(AF)/97/2, Award, (November 1, 1999).
[75] Ibid, para. 101.
[76] *Iberdrola v. Guatemala*, ICSID Case No. ARB/09/5, Award, para. 444 (August. 17, 2012). It should be noted that this award was later annulled (Decision on annulment 13.1.15, *available at*: https://www.italaw.com/cases/1518).
[77] Ibid, p. 75; *Rumeli Telekom A.S. et al. v. Kazakhstan*, ICSID Case No. ARB/05/16, Award (29 July, 2008).

of justice claim was not recognized by the *Iberdola* Tribunal more broadly,[78] and so although no binding precedent exists in international arbitration, it could be argued that such conflicting rulings by different tribunals mark the broadening of the denial of justice claim.

Such broadening is nevertheless circumscribed in several dimensions. First, before attempting to invoke a denial of justice claim, an investor is expected to know the regulatory environment in the state in which it invests, and to relate to the situation as a business risk.[79] For example, in *Mondev,* the existence of a national rule conferring immunity from jurisdiction to public agencies was not regarded as contrary to the FET principle. Essentially this means that the investor is required to understand the particular situation in each state, before it chooses to invest. Failure to do so could preclude the possibility of a denial of justice claim.[80]

Regarding the application of a denial of justice claim, an extreme example of the application of the rejection of the claim can be seen in *Loewen v. United States*,[81] which was the first NAFTA case which challenged a domestic court's ruling. Loewen, a Canadian investor, challenged a US domestic civil court's decision by stating that "the trial court, by admitting extensive anti-Canadian and pro-American testimony and prejudicial counsel comment" amounted to discrimination and therefore violated the FET standard".[82]

The Tribunal stated that "Neither state practice, the decisions of international tribunals nor the opinion of commentators support the view that bad faith or malicious intention is an essential element of unfair and inequitable treatment or denial of justice amounting to a breach of international justice. Manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety is enough".[83] Therefore, it is important to note that the result of the action in question is examined, rather than the intent of the breaching party.

Regarding the question of when it is possible to raise a denial of justice claim before an international tribunal and when the party should argue its claim domestically, the *Loewen* Tribunal

[78] FULVIO MARIA PALOMBINO, FAIR AND EQUITABLE TREATMENT AND THE FABRIC OF GENERAL PRINCIPLES, p. 72 (2017).
[79] Ibid, p. 73.
[80] Ibid..
[81] *Loewen v. United States*, ICSID Case No. ARB/98/3, Award, (June. 26, 2003).
[82] Ibid, para. 39.
[83] Ibid, para. 132.

ruled that the claimant must have exhausted all available local remedies, such as the right to appeal in a higher instance before attempting to invoke a denial of justice claim before an international tribunal.[84] This ruling could cause uncertainty and conflict between arbitral awards when considering other decisions such as *Azinian*, in which the tribunal found that domestic court rulings can later exclude review by the international Tribunal or at least have some kind of binding effect on the arbitral proceedings.[85]

The *Azinian* decision raised questions on the legitimate extent of review by international tribunals on domestic court rulings, and discussed the fear that the international tribunal could become a substitute for a public court of appeal. This has been criticized by scholarly writings, where a different approach was presented, which would allow for the tribunal to review all relevant circumstances.[86] A later ruling narrowed this approach by stating that an international tribunal could rule against a domestic court finding not only in cases were a denial of justice claim is raised but different kinds of "deficiencies" in substance as well. Furthermore, it was found that the international tribunal would be limited by the domestic court only with regard to matters of domestic law.[87] Unlike the *Azinian* ruling, the *Helnan* ruling received approving references.[88] A most recent ruling dealing with the effect of domestic court rulings is *Fouad Alghanim v. Jordan*.[89] The *Fouad Alghanim* Tribunal examined a decision by the Jordanian Income and Sales Department (ISTD) to tax the claimant on its profits which it gained from a previous transaction in which it sold its stakes in a Jordanian telecommunication company (UMC). The claimant first filed an administrative objection, then an appeal through the Jordanian Tax Court of Appeals and the Court of Cassation. Yet these objections were not successful and in 2013 the claimant initiated an ICSID proceeding against Jordan, under the Jordan-Kuwait BIT. When the Tribunal addressed the question of whether the Jordanian Court ruling could amount to a denial of justice claim, the

[84] Ibid; see also *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9.; the analysis found in: Hanno Wehland, *Domestic Courts and Investment Treaty Tribunals: The Effect of Local Recourse Against Administrative Measures on the Breach of Investment Protection Standards*, Kluwer Law International (2019).
[85] Ibid, Hanno Wehland, p. 213-214.
[86] Ibid..
[87] *Helnan International Hotels v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, award of 3 July 2008.
[88] Hanno Wehland, *supra* note 84, p. 216.
[89] *Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/13/38, para. 4.

Tribunal referred to the *Azinian* decision.[90] Although not entirely clearly, the *Fouad Alghanim* Tribunal stated that if the domestic courts judgement do not give rise to a denial of justice claim the Tribunal would not interfere with its decision, since it found that the Court's decision was not arbitrary, it dismissed the claim.[91] Although these three decisions slightly differ in their approach they all accept that at least in some circumstances, the results of an investor's claim before a domestic court could affect the merits of its treaty claims in front of an international tribunal, seemingly turning the latter into a court of appeals.

This difficult situation with regard to the state's domestic courts, and in which there is a conflict of views, highlights the discussion around this point, specifically the fact that no clear view has yet emerged and each different approach may lead an investor to a different course of action.

It would seem that this does not have any direct implication on the state's regulatory space, yet it could be said that the more binding the domestic court decisions would be, the more regulatory space the state would have, since it would greatly narrow the judicial review by international tribunals.

3.2.2 Procedural fairness

Aside from denial of justice as discussed above, the right of due process has also been recognized to comprise fairness in administrative proceedings, especially *audi alteram partem* (the right to be heard).[92] This has been recognized in several awards and has broadened beyond the judicial system to include legislative bodies as well (unlike the situation described in the discussion under denial of justice above). Violation of the right to be heard requires the fulfillment of two cumulative conditions: First, the right to be heard needs to be positively (expressly or tacitly) provided by the host state.[93] Second, the administrative decision should cause a serious economic loss to the investor.[94]

[90] Ibid, para. 318.
[91] Ibid, para. 486.
[92] Palombino, *supra* note 78, p. 78
[93] If that is not the case, a denial of justice claim could become available to the investor, see: *Mondev International Ltd. v. United States, supra* note 32.
[94] Palombino, *supra* note 78, p. 79.

The case of *Genin v. Estonia*[95] is illustrative of the first condition. There, the central bank of Estonia cancelled the license of a financial institution in Estonia (EIB) in which an American citizen was a main shareholder. The Claimant argued that no notice was given, to announce that EIBs license was at risk, and no opportunity was given to it to make a representation in that regard.[96] Nonetheless, since the host state's action adhered to its domestic law, under the assumption that that law does not require any form of public participation in administrative decisions, and no other law was agreed upon by the parties, no breach of the FET standard was found.[97] However, more recently in *Urbaser and CABB v. Argentina* (2016) the Tribunal dealt with a similar legal situation but came to an opposite conclusion, finding that a lack of transparency, even when the states actions were done according to the State's domestic law, was still a violation of the FET standard.[98]

Examining the second cumulative requirement, the decision must, at least potentially, be able to cause serious economic damage to the investor.[99] This requirement is seen in *Metalclad Corporation v. Mexico.*[100] *Metalclad*, a United States company received from the Mexican government authorization for a construction of a landfill in Mexico on a land it had bought, and a promise that no additional permits were required (first requirement). But shortly after Metalclad had begun work, it was notified that it was prevented from operating. The Tribunal found that the procedure did not allow claimant to fully present its case, stating that "[T]he permit was denied at a meeting […] which Metalclad received no notice, to which it received no invitation, and at which

[95] *Genin et al. v. Estonia*, ICSID Case No. ARB/99/2, Award of 25 June 2001.
[96] Ibid, para. 358.
[97] Ibid. para. 350.
[98]The dispute arose as a result of Argentina's financial crisis in 2001-2002. The claimant was a shareholder in a concessionaire that supplied water and sewerage services in Buenos Aires. Argentina's emergency measures caused the concession financial loss and it eventually became insolvent. The claimant commenced ICSID arbitral proceedings against Argentina for violations of the Spain-Argentina BIT. The *Urbaser* Tribunal found that not providing transparent treatment in the renegotiation of a supply contract by the State can amount to a breach of the transparency requirement by the State and of due process. See: *Urbaser S.A. et al. v. Argentina*, ICSID Case No. ARB/07/26, Award of 8 December 2016, para. 842.
[99] Palombino, *supra* note 78, p. 79.
[100] *Metalclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/11, Award of 30 August 2000.

it was given no opportunity to appear".[101] In the end, a violation of the FET standard was found, considering Claimant's justified reliance and the fact it "has completely lost its investment".[102]

Considering what was previously stated regarding a breach of domestic law, it should be mentioned that even if there was no breach by the host state, there can still be a violation of due process if the state applies its domestic law in bad faith, using it against the investor, as was stated in *Rumeli v. Kazakhstan*,[103] and considering the *Urbaser* interpretation of the component as well.

Significantly for the issue of regulatory space, it should be clarified that while the FET standard protects the investor from a situation where its investment is damaged or lost and no due process is given, it does not safeguard investors from *any and all* changes to domestic regulation. As seen in *Metalclad* under the first requirement, great weight is given to the investor's reliance on the state's promise and its understanding of the state's regulatory situation. It is incumbent upon investors to understand the regulatory environment in which they operate.

3.3 Legitimate Expectations

The protection of investors' 'legitimate expectations' is another principle considered to be part of the FET principle by various tribunals. Traditionally, claims relating to a breach of investors' legitimate expectations arise in situations when an investor suffers losses due to changes in the host state's regulatory measures and submits that these regulatory changes are in contrast to his legitimate expectations that such changes will not occur. In other words, when a host state's conduct negatively affects an investment in a manner which was unforeseen at the time of the investment, an investor may allege that the state violated the legitimate expectations that it held when initially making the investment. In such situations, the questions are thus first, whether and to what degree the FET standard includes protection of such legitimate expectations and second, what kinds of expectations are considered 'legitimate' to begin with.[104]

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[101] Ibid, para. 91.
[102] Ibid, para. 113.
[103] *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v. Kazakhstan*, *supra* note *77*, Award, 29 July 2008, para. 653; See also the *Azinian* case, *supra* note *74*, Award of November 1, para. 102-103.
[104] UNCTAD report, *supra* note 2, p. 64.

It should be noted that the inclusion of this component into the FET standard is one of the more contentious issues concerning FET. Accordingly, this subsection will first analyze the content and scope of legitimate expectations as part of FET, and then describe the dispute surrounding its inclusion in the FET standard.

Tecmed v. Mexico[105] is one of the leading authorities in arbitral jurisprudence on legitimate expectations. The *Tecmed* Tribunal found that protection of the investor's legitimate expectation is part of the FET standard. It then greatly broadened the range of this requirement, encompassing almost all known components of FET under this 'umbrella' component.[106] It is worth noting that the *Tecmed* tribunal linked its decision to the MST by basing its conclusion on the *Neer* and *ELSI (United States of America v. Italy)* decisions, making a big leap in the 'evolutionary' approach mentioned earlier on the issue of denial of justice.[107]

The investor's legitimate expectations may include: consistency, transparency, arbitrariness, protection of the investor's reliance, usage of the state's legal instrument only in conformity with the function usually assigned to it and compensation when it is deprived of such expectations. Furthermore, the standard is not limited but includes "all rules and regulations that will govern investments, as well as the goals of the relevant policies and administrative practices or directives".[108]

Following the *Tecmed* award, *Saluka v. Czech Republic* noted that the concept of legitimate expectations is a "dominant element of that standard", thereby recognizing legitimate expectations as an integral part of FET.[109] In *International Thunderbird Gaming v. Mexico,* it was further held that "the concept of 'legitimate expectations' relates […] to a situation where a Contracting Party's

[105] In the case, the claimant (Tecmed) purchased an existing hazardous waste landfill, the it purchased the necessary permit from the federal authority in Mexico. Unlike the previous purchaser of the permit, Tecmed received a renewable one year permit. It should also be note that Tecmed did not protest or raise this issue during that time. The State refused to renew the permit in the second year, following this decision Tecmed initiated the arbitration proceedings. The Tribunal found that the State breached its FET obligation, specifically the protection of the claimants legitimate expectations, one of which was that the States laws would be used for their stated purpose. See: *Tecmed v. Mexico*, ICSID Case No ARB (AF)/00/2, Award, 29 May 2003.
[106] Ibid, para. 154.
[107] See Section 3.2.1.
[108] *Tecmed v. Mexico, supra* note 105, para. 166.
[109] *Saluka v. Czech Republic,* UNCITRAL Rules, Partial Award, (March. 17, 2006), para. 301, 304.

conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the [state] to honor those expectations could cause the investor (or investment) to suffer damages".[110] This proposition was followed by other tribunals, such as *Foresight Luxemburg Solar v. Spain*.[111]

An assessment of jurisprudence reveals attempts to narrow the scope of the FET principle, with the legitimate expectation component, by identifying factors that delimit its scope and simplify its application:

According to one 'objective' view, as reflected in *MTD v Chile* among others, the investor's expectations are examined in an objective manner, according to the standard of a "reasonable investor."[112] A violation of FET occurs only when the respondent's behavior "conflicts with what a reasonable and unbiased observer would consider fair and equitable".[113] This is seen in the *Suez* case as well.[114] Although this is an objective test, a subjective element remains, since an investor cannot argue against rules or regulation which were, or ought to have been, well known to him before making the investment.[115]

[110] *International Thunderbird Gaming Corp v. Mexico*, UNCITRAL (NAFTA), Arbitral Award, 26 January 2006, para. 147.
[111] *Foresight Luxembourg v. Kingdom of Spain*, SCC Case No. 2015/150, final award, para. 352.
In 2007, Spain enacted Royal Decree (RD) 661/2007 to attract investments in renewable electricity generation and meet its renewable energy target under EU law. This established fixed feed-in tariffs to be paid for facilities and for the lifetime of the facilities and provided priority of access to the electricity grid. Between 2009 and 2010, the claimants acquired Spanish companies operating three such facilities. Different domestic reasons resulted in Spain creating a new and different legal framework for the production of renewable energy between 2010 and 2013. In response to these changes, the Claimant initiated an arbitration proceeding which included a breach of FET claim.
[112] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment (March. 21, 2007) stating: "[t]he obligations of the host state towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have."; This is also seen in *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, para. 141.
[113] *Tecmed v. Mexico*, *supra* note 105, para. 166.
[114] *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentina*, ICSID Case, No. ARB/03/19, Decision on Liability, (July. 30, 2010), para. 222.
[115] Palombino, *supra* note 78, p. 91.

Another limiting element of the notion of legitimate expectations concerns the temporal aspect. Some tribunals, such as *Duke Energy v. Ecuador*[116] have stressed that the investor's expectations are examined as they were at the time of the investment.

A third element that circumscribes the scope of legitimate expectations, and thus the scope of FET, concerns the reasonableness of the investor's expectations. The above-mentioned *Duke* tribunal also emphasized that the investors' expectations must be "legitimate and reasonable". The reasonableness of an investor's expectations must take into account the political, socio-economic, cultural, and historical conditions of the host state.[117]

Another important distinction was made in *Continental Casualty v. Argentina,*[118] where the tribunal analyzed the State's different statements and commitments and concluded that "general legislative statements engender reduced expectations".[119] This means that the host state must give a specific commitment on which the investor relied for legitimate expectations to be ascertained. This was also stressed in *Methanex* where the Tribunal rejected claimant's argument and gave particular importance to the fact that *Methanex* had not been given any specific commitment by the United States that it could reasonably have relied upon.[120] This was also specifically mentioned in the European Union report on the EU-Canada free Trade Agreement (CETA) which stated that "[t]he concept of "legitimate expectations" is limited to situations where a specific promise or representation was made by the State."[121] In *Glamis Gold* this point was underlined by requiring the existence of "at least a quasi-contractual relationship between the state and the investor, whereby the state has purposely and specifically induced the investment."[122] Overall, an investor may derive legitimate expectations from personally directed commitments, or non-personal regulation that is meant to induce foreign investment,[123] which in the least requires that the

[116] *Duke Energy v. Ecuador*, *supra* note 14, para. 340.
[117] Ibid, para. 340.
[118] *Continental Casualty v. Argentina*, ICSID Case No.ARB/03/9, Award, 5 September 2008.
[119] Ibid, para. 261.
[120] *Methanex Corporation v. United States of America*, UNCITRAL, final award on jurisdiction and merits, 30 August 2005, para. 7.
[121] Investment provisions in the CETA, *supra* note 5, p. 2.
[122] *Glamis Gold Ltd. v. the United States*, UNCITRAL (NAFTA), Award, 8 June 2009, para. 766.
[123] UNCTAD report, *supra* note 2, p. 69; See also Kingsbury and Schill, *supra* note 50, p. 26.

confidence the framework generated can be established convincingly, for example against an unexpected permanent and fundamental change in regulation.[124]

As previously mentioned concerning other components, an important threshold to an FET claim is that the investor must be aware of the general regulatory environment in the host country.[125] In *Methanex*, the company entered into a country in which "it was widely known, if not notorious, that governmental environmental and health protection institutions at the federal and state level […] continuously monitored the use and impact of chemical compounds and commonly prohibited or restricted the use of some of those compounds for environmental and/or health reasons."[126]

Moreover, investors' expectations must be balanced against the legitimate regulatory activities of host countries.[127] Tribunals have addressed the balance which must be kept between the regulatory powers of the state on the one hand and the goals and legitimate expectations of foreign investors, on the other. Notable in this respect is *Saluka,*[128] where the Tribunal recognized the right of a state to enact public interest legislation even if the result would negatively affect foreign investors, as long as this is done in good faith, since depriving the state of this freedom would "impose upon host states obligations which would be inappropriate and unrealistic." [129] Furthermore, in *Foresight Luxemburg Solar v. Spain* it was stated that "there are limits to the legal stability that an investor can legitimately expect […] in the absence of a specific commitment to the investor by the host state, the investor cannot expect the legal or regulatory framework to be frozen. In such circumstances, a host state has space to reasonably modify the legal or regulatory framework without breaching an investor's legitimate expectations of stability".[130]

[124] Kingsbury and Schill, *supra* note 50, see notes 267-277.
[125] CETA, *supra* note 5.
[126] *Methanex, supra* note 120, para. 10.; See also *Genin v. Estonia*, *supra* note 95, Award, 25 June 2001, para. 348.
[127] *Anglo American PLC v. Bolivarian Republic of Venezuela,* ICSID Case ICSID Case No. ARB(AF)/14/1, Award, (January. 1, 2019). The *Anglo American* ruling shows a recent narrow interpretation of this requirement, see p. 468.
[128] *Saluka v. Czech Republic*, *supra* note 109.
[129] Ibid, para. 304.
[130] *Foresight Luxembourg v. Spain*, *supra* note 111, para. 356.

Thus, even when specific guarantees were given to the investor regarding the stability of the regulatory environment, this is accepted in a limited manner, as the investor cannot expect the legal framework of the state to remain unchanged.[131]

While certain aspects of this component may be interpreted differently or criticized, the main dispute over this component surrounds the question of whether the protection of the investor's legitimate expectations is a part of the FET principle at all. On this point, Canada and the United States have repeatedly rejected the *Tecmed* decision, claiming that legitimate expectations, which is not included in the wording of the FET clause, is not part of the MST, and therefore not part of the relevant customary international law.[132] Specifically, they have rejected claims that the FET principle includes the requirement of a "stable government" and that it includes protection of the investor's expectations which were based on government assurances or commitments, as was the case for example in *Metalclad*.[133]

This controversy is rooted in the question of how the FET principle, if at all, evolves over time. On the one hand the FET principle could evolve through judicial interpretation and rulings as see in *Tecmed*. This would lead to a sort of *stare decisis* system in which international tribunals may rely on previous judgments, which could in turn bring far broader interpretation of the FET standard as seen for example in *Foresight,* where the tribunal stated that: "the Tribunal considers that it is well established that legal stability is part of the FET standard under the ECT".[134] A similar analysis was also upheld in *Mauritius v. India*.[135]

On the other hand, it could be argued that customary international law and FET should conform to state practice and *opinio juris*,[136] as seen for example in *Mesa Power Group LLC v. Government of Canada*.[137] Mesa Power Group was a US corporation that oversaw and developed renewable

[131] A similar ruling is seen in *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award, paras. 334–338 (September. 11, 2007) and in *Continental Casualty v. Argentina; Vivendi v. Argentina II; EDF v. Romania*.
[131] OECD 2017 report, *supra* note 8, p. 42.
[132] OECD 2017 report, *supra* note 8, p. 42.
[133] Ibid..
[134] *Foresight Luxembourg v. Spain*, *supra* note 111, para. 351.
[135] *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. India*, PCA Case No. 2013-09, award, July. 25 2016, para. 457-462.
[136] See also the discussion in Section 2.
[137] *Mesa Power Group LLC v. Canada*, PCA Case No. 2012-17.

energy projects. The government of Ontario issued a program to promote this sector, which included a domestic content requirement, meaning some of the equipment used must be made in Canada. The claimant filed six applications to be allowed to work under the program but was rejected. In its submissions, Canada claimed that in order to prove an existence of a "new" customary international rule, the party alleging its existence must "demonstrate the requisite state practice and opinio juris".[138] Furthermore it argued that "international investments tribunals are not a source of state practice for the purpose of establishing a new customary norm".[139] Lastly, it argued that "there is "no general and consistent state practice and opinio juris establishing an obligation under the minimum standard of treatment not to frustrate investors' expectations."[140] The *Tecmed* award was also criticized by tribunals. For example, in *MTD Equity v. Chile*, the Tribunal stated that "the TECMED Tribunal's apparent reliance on the foreign investor's expectations as the host state's obligations […] is questionable".[141] This argument is also seen in *Grand River v. US* where the United Stated argued that "[c]laimants submit no evidence of state practice establishing a legal obligation not to frustrate an investor's expectations formed at the time the investor made its investment. State practice, in fact, tends to support the opposite view."[142]

Another approach to this dispute, as argued above by both the United States and Canada for instance, suggests that the protection of the investors' legitimate expectations is to be viewed solely as a treaty-based concept. However, such interpretation would start a new controversy concerning the 'true meaning' of the text.[143] This would require analysis of the intention of the parties, which would revert back to a similar dispute, but perhaps with more emphasis on the state's *opinio Juris*.

In conclusion, the legitimate expectation component is the broadest component contained in the FET standard - an umbrella component which potentially encompasses all, or at least many other, elements of the FET standard as identified above. Nonetheless, the question of its inclusion in the FET standard remains unanswered. Even if the answer to this question were positive, jurisprudence is generally seen to delimit the spread of legitimate expectations as a component of

[138] Ibid, Canada's response to 1128 submission, June. 26 2018, para. 10.
[139] Ibid, para. 11.
[140] Ibid, para. 12.
[141] *MTD v. Chile*, *supra* note 112, para. 67.
[142] *Grand River Enterprises Six Nations v. United States of America*, US Rejoinder – Merits phase (May. 13 2009), p. 99.
[143] Kingsbury and Schill, *supra* note 50, p. 24.

FET, as described above. This uncertainty regarding the scope of the component and its inclusion into the FET remains, and since the implications of such an inclusion would greatly enhance the state's obligations under the FET, the component potentially has great impact on the state's regulatory freedom.

3.4 Stability, Predictability, and Consistency

The requirement to provide for a stable legal environment appears in many IIAs. A breach of such an obligation could occur by an unlawful breach or voidance of a contract, or any change in legislation which is unpredictable and would have a negative effect on the investment in question.[144] For example, in *PSEG v. Turkey,* in which as a result of the growing demand for electricity experienced by Turkey in the 1980s, it decided to privatize its energy sector and promote the participation of foreign investors in that sector. As part of this initiative, Turkey passed laws authorizing private companies to establish facilities for the generation of electricity. In 1994, the claimant, a US company, signed an agreement with the Turkish government. Subsequently, a dispute arose between the parties as to whether the Concession Contract included a final agreement on key commercial terms, what those terms were and other key elements in the agreement. During those years the legal framework in Turkey changed in other key factors resulting from legislation and supreme court rulings. In 2001 the claimant initiated arbitration pursuant to the Turkey-US BIT, including an allegation of an FET violation. In its ruling the Tribunal stated that "stability cannot exist in a situation where the law kept changing continuously and endlessly".[145]

'Predictability,' similar and quite overlapping with transparency, requires that the investor know beforehand and is able to prepare itself for the coming change.[146] The obligation of 'consistency' refers to the different agencies of the state which are required to act in a consistent manner while making or applying regulatory decisions and legislation.[147] The Tribunal in *Lauder*

[144] JASON HAYNES, *The Evolving Nature of the Fair and Equitable Treatment (FET) Standard: Challenging Its Increasing Pervasiveness in Light of Developing Countries' Concerns - The Case for Regulatory Rebalancing,* The Journal of World Investment & Trade 14, p. 114–146 (2013).
[145] *PSEG Global, Inc. v. Republic of Turkey,* ICSID Case No. ARB/02/5, Award, para. 250, 19 January 2007.
[146] *Tecmed v. Mexico, supra* note 105, para. 154.
[147] Ibid..

v. Czech Republic[148] stated that that FET could be violated if domestic agencies act inconsistently in applying domestic legislation.[149]

The requirement to provide for a stable legal environment would appear to be violated by an unlawful breach or voidance of a contract, or any change in legislation which is unpredictable and would have a negative effect on the investment in question.[150] As previously described in *PSEG v. Turkey.*[151] As components of FET, stability, predictability, and consistency are closely related to the protection of legitimate expectations.[152] The main difference is that in contrast to legitimate expectations, these do not revolve as closely around a particular investor's perspective, but instead subject the relevant regulatory framework of the state to a broader assessment.[153] This means, in short, a more general standard which focuses on the legal framework itself and not its relation to the investor.[154] Nevertheless, there is still much overlap between these components.

It is also noteworthy that stability, predictability, and consistency are closely linked to the "legality" requirement discussed above, since a basic requirement for the rule of law is to have clear knowledge of the legal situation in the present and in the close future, especially in the business sphere which may require major investment and planning.[155] As was stated in *CMS v. Argentina* "there can be no doubt [...] that a stable legal and business environment is an essential element of fair and equitable treatment."[156] This was also held by the *Metalclad* Tribunal when it stated that "[Mexico] failed to ensure a [...] predictable framework for Metalclad's business planning and investment" and was therefore in breach of the FET standard.[157]

As with the above discussed elements of FET, here as well, the requirement to provide a stable, predictable, and consistent environment straddles the dividing line between the state's regulatory

[148] *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 2 September 2001.
[149] Ibid, para. 292.
[150] HAYNES, *supra* note 144.
[151] *PSEG Global, Inc. v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, para. 250.
[152] *Frontier Petroleum Services Ltd. v. The Czech Republic*, Canada-Czech Republic BIT, Final Award (November. 12, 2010). para. 285.
[153] Kingsbury and Schill, *supra* note 50, p. 28.
[154] Schill, *supra* note 1, p. 28
[155] Ibid.
[156] *CMS Gas Transmission Company v Argentina*, ICSID Case no ARB 01 /08, Award (May. 12 2005), para 274.
[157] *Metalclad v. Mexico*, *supra* note *100*, para 99.

freedom and its ability to adjust its regulation for public aims or economic necessities and the obligation to provide its foreign investors with the FET requirements. The Tribunal in *AES Summit Generation v. Hungary*[158] stated that, "to conclude that the right to constant protection and security implies that no change in law which affects the investor's rights could take place, would be practically the same as to recognize the existence of a non-existent stability agreement"[159] and therefore a legal framework was "by definition subject to change as it adapts to new circumstances."[160]

It seems that a balanced interpretation of the element, as inferred from arbitral jurisprudence, would allow for some changes in domestic law that are made in good faith.[161] For example, a crisis or an emergency situation may call for different reactions beyond the normal deployment of public funds and authority, therefore requiring greater regulatory freedom.[162]

As regards consistency, it should be noted that domestic regulation and executive agencies are never completely free of inconsistencies, and should therefore be assessed in a measured manner.[163] This notion was accepted in *Feldman v Mexico,*[164] where the Tribunal asserted that:

> *Governments, in their exercise of regulatory power, frequently change their laws and regulations in response to changing economic circumstances or changing political, economic or social considerations. Those changes may well make certain activities less profitable or even uneconomic to continue.*[165]

This is also supported by recent trends which require state regulatory flexibility so as to support human rights.

Yet, the scope of these components remains contested since as stated above, an examination of jurisprudence shows that this standard is interpreted in a broad manner, leaving little room for adaptation of the host state to changing circumstances. Such a broad construction of this element

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[158] *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010.
[159] Ibid, para. 13.3.5.
[160] Ibid, para. 9.3.29.
[161] *Emilio Agustín Maffezini v. Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000, para. 64. See also, the *Saluka* decision in which in which the good faith requirement was used to allow limited State regulatory space. See *Saluka v. Czech Republic*, *supra* note 109, para. 304.
[162] *National Grid v. Argentina*, UNCITRAL, award, 3 November 2008, para. 180.
[163] Kingsbury and Schill, *supra* note 50, p. 29-30.
[164] *Feldman v The United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award of Dec. 16, 2002.
[165] Ibid, para. 112.

of FET is particularly problematic for developing countries and for countries undergoing financial crises and other forms of turmoil, when the state is required to make certain regulatory and legislative changes so as to promote other public aims as was the case in *Enron v. Argentina.*[166]

In conclusion, there is much similarity and overlap between these components and legitimate expectations, legality and transparency which are described above. Simply put, stability, predictability and consistency allow investors the opportunity to both plan and execute their investments and adjust to changes in the legal framework in host states.[167] The main areas of ambiguity over these components concern the extent to which the FET requirement from the host state is flexible and open to change. With regards to state regulatory space, it would seem that this component, even in its narrow application enables tribunals to examine almost any change in the host state's legal framework. Yet, this is balanced by the requirement of good faith and the analysis of the specific circumstances of each situation, in which some tribunals are seen to consider times of crisis as requiring more regulatory space.

3.5 Transparency

The transparency component of FET entails that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under an investment treaty should be capable of being readily known to all affected investors.[168]

As regards the content of this element, some tribunals, such as *Tecmed,* construed transparency as a requirement of the authorities of the host state to act consistently, without ambiguity and transparently, making sure the investor knew, in advance, the regulatory and administrative policies and practices to which it will be subject, so that it may comply. Similarly, the Tribunal in *Metalclad* stated that the transparency requirement dictates that "all relevant legal requirements" must be "readily known to all affected investors" with "no room for doubt or uncertainty."[169] In a

[166] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic,* ICSID Case No. ARB/01/3.
[167] Haynes, *supra* note 144, p. 135.
[168] *LG&E v. Argentine Republic,* ICSID Case No. ARB/02/1, decision on liability (October 3 2006), para. 128. See also *Waste Management Incorporated v Mexico,* Award ICSID Case No ARB(AF)-00-3 (2004), para. 98.
[169] *Metalclad v. Mexico, supra note* 100, Award, (Aug. 30, 2000), para. 91.

broader sense, the *Metalclad* Tribunal refers to this requirement as including all negative government measures that may affect the investor.[170]

Notably, this requirement is linked to the right to be heard discussed above,[171] and overlaps with the legitimate expectations, due process and stability components.[172]

As in previous components, the threshold of breach in this component is debated. While there is consensus over the notion that transparency, as such, is required to protect investors,[173] some commentators seem to adopt an unrealistically high requirement of "good governance", expecting the state to be completely transparent in all its actions and to publish legislative change in advance.[174] Mindful of such concerns, recently constituted investment tribunals espouse a more nuanced and narrow reading of transparency. For instance, the Tribunals in *Plama Consortium v. Bulgaria, Chemtura Corp. v. Canada, and Al Tamimi v. Oman*,[175] stressed that mere uncertainty in the law, or inconsistent representations by the governmental officials, do not constitute a violation of the transparency standard.

Accordingly, as stated also in the *Tecmed* case,[176] the transparency component may be viewed as a procedural requirement similar to the due process component but more nuanced, requiring sufficient reasoning and the obligation to act in a comprehensible and predictable way.[177] This is also seen in *Lemire v. Ukraine* ,[178] in which it was found that the state issued certain radio broadcasting licenses not in a transparent manner and without following the requirements or procedures established in its domestic law.[179]

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[170] Ibid, para. 99.
[171] Ibid..
[172] See Sections 3.3, 3.2 and 3.4.
[173] Roland Kläger, *Revising Treatment Standards-Fair and Equitable Treatment in Light of Sustainable Development, in* SHIFTING PARADIGMS IN INTERNATIONAL INVESTMENT LAW (2016).
[174] For example, as seen in José E. Alvarez, *Contemporary Foreign Investment Law: An Empire of Law or the Law of Empire*, AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW, p. 963-964 (2009).
[175] *Plama Consortium, Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (Aug. 27, 2008), para 218; *Chemtura Corp. v. Government of Canada.*, UNCITRAL, Award (Aug. 2, 2010), para. 147; *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award (Nov. 3, 2015), para. 399.
[176] *Tecmed v. Mexico*, *supra* note 105 para. 123, 160,
[177] Kingsbury and Schill, *supra* note 50, p. 34-35.
[178] *Joseph Charles Lemire v. Ukraine*, *supra* note 58.
[179] Ibid, para. 417.

Overall, there is a general trend which aspires to reconcile between the foreign investor's legitimate interests and the host state's regulatory space.[180] In order to balance investor protection and state regulatory space, the threshold for breaching the transparency component, which was quite low in the past, is now considered much higher. Simply put, it seems that the transparency requirement is read as part of the procedural requirements of the state and not a substantive requirement like stability, predictability and consistency. In this manner, the component's requirements are greatly confined.

3.6 Good Faith

Good faith is a general principle of public international law[181] that applies to investment protection law.[182] Therefore, it is important to distinguish between the use of good faith as a guiding principle in the interpretation of treaties, as seen for example in *Mauritius v. India*,[183] and its application as a substantive component of the FET standard.[184]

As pointed out in *Sempra v. Argentina*, the principle of good faith is at the "heart of the concept of fair and equitable treatment" and "permeates the whole approach to the protection" of foreign investments.[185] There seems to be a consensus that investment tribunals have interpreted good faith as inherent to the FET standard.[186] But, as is be explained further, the main dispute surrounding this component is whether good faith is only a general guideline to the FET standard or a 'standalone' substantive component.[187]

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[180] Ying Zhu, *Fair and Equitable Treatment of Foreign Investors in an Era of Sustainable Development*, 58 NAT. RESOURCES J. 319 (2018). See also Section 3.9.
[181] See for example Kläger *supra* note 31 at 131.
[182] R. DOLZER AND C. SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW, OXFORD UNIVERSITY PRESS, 144 (2008).
[183] *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. India*, PCA Case No. 2013-09, award (25.7.16), para. 457.
[184] For an elaboration on the general use of the good faith principle see: Kläger, *supra* note 31, p.185, 131.
[185] *Sempra Energy International v. Argentine Republic*, Argentina-United States BIT, ICSID Case No. ARB/02/16, Award, para. 297-299 (September. 28, 2007); In the previous paragraph, the Tribunal held that the principle of good faith is thus relied on as the common guiding beacon that will orient the understanding and interpretation of obligations.
[186] Dolzer and Schreuer, *supra* note 182, p. 5.
[187] Ibid, p.199.

The good faith requirement as a separate component of the FET standard refers to the duty to act for cause, and not for purely arbitrary reasons.[188] Construed this way, the good faith element of FET is closely related to other elements such as consistency, transparency, arbitrariness and legitimate expectations.[189] On this point, the *Saluka* Tribunal emphasized that host state public policy must be reasonably implemented with good faith, meaning that the investor can expect those policies to refrain from explicitly violating the requirements of consistency, transparency, equality and non-discrimination as far as it affects it.[190]

Furthermore, the good faith component includes the requirement of the host state to use legal instruments only for the purposes for which they were created,[191] and an obligation not to purposefully cause unnecessary damage to the investment itself.[192] In *Frontier v. Czech Republic*, the Tribunal found a breach of this requirement by asserting that state organs conspired to "inflict damage upon or to defeat the investment […] for reasons other than the one put forth by the government".[193] This case concerned a Canadian investor who had entered into a joint venture with a Czech entity to invest in the aviation industry in the Czech Republic, and, in particular, to take over an insolvent aircraft manufacturer. A dispute arose concerning the performance of the joint venture. An arbitration proceeding initiated in Stockholm, yet although an award was granted to the claimant, the Czech courts refused enforcement of the award on the ground of public policy under the New York Convention. Following the refusal of enforcement, Frontier commenced an UNCITRAL investment arbitration under the Canada-Czechoslovakia BIT, claiming that refusal to enforce the award was a violation of the FET.

Lastly, the *Frontier* Tribunal found that the host state's refusal to negotiate in good faith to resolve the problem also constituted a violation of the FET standard.[194]

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[188] *Eureko B.V. v. Republic of Poland*, Partial Award, para. 233 (19 August, 2005).
[189] For example see the analysis done by the Tribunal in *Greentech and NovEnergia v. Italy* in which the good faith requirement is analyzed the same as the arbitrariness component: *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italian Republic*, SCC Case No. 2015 (23.12.15).
[190] *Saluka v. Czech Republic*, *supra* note 109, para. 307.
[191] *Frontier Petroleum Services Ltd. v. The Czech Republic*, *supra* note 152, para. 300.
[192] Dolzer and Schreuer See *supra* note *182*, p. 156.
[193] *Frontier Petroleum Services Ltd. v. The Czech Republic*, *supra* note 152, para 300.
[194] Ibid, para. 299. See also *Saluka v. Czech Republic*, *supra* note 109, para 307.

As mentioned above, the main debate surrounding the good faith component is whether it is a standalone element of the FET standard in MST or merely a general principle of international law which dictates the manner in which an existing obligation should be fulfilled, as was claimed by Canada in *Chemtura Corporation v. Canada*,[195] and similarly by the US in *Mesa Power Group v. Canada*.[196] In several rulings, such as *CMS v Argentina*, the Tribunal has also accepted this approach.[197] It would seem that the main problem with arguing that good faith is a separate component is that it is a somewhat circular argument since many tribunals base all FET requirements on the good faith principle,[198] therefore in order for rights to be abused or complied to in good faith, rights and obligations with certain content must exist.[199] On the other hand, as mentioned with respect to the legality component above,[200] there could be a separation between the general principle and a substantive component, and this was accepted in numerous awards.[201]

Consequently, interpreting good faith as a separate component would include requirements similar to the consistency, transparency, equality and non-discrimination components; an obligation to negotiate in good faith and an obligation not to purposefully harm the investment itself. Essentially, this interpretation would lead to an 'umbrella component' in the FET, and so it seems that a clear understanding of good faith would require the specific analysis of each of these components of the FET, all of which are described in this section. Therefore to fully address the impact of the good faith component on the FET, a discussion should be conducted according to each of these separate components. Yet, the discussion which has the most impact on regulatory space is whether at all the good faith requirement is a standalone component of the FET. If it is, it would add new substantive requirements from the host state, which differ from its existing requirements according to its own administrative law. Yet if good faith is not a separate

[195] *Chemtura Corporation v. Canada*, *supra note 175*, Rejoinder memorial, July 10 2009, para. 187 and counter memorial, para. 771-775.
[196] *Mesa Power Group LLC v. Canada*, *supra note* 137 submission of the United States Pursuant to NAFTA Article 1128 (2014) para. 7; See also, Dumberry, *supra* note 72, p. 9.
[197] *CMS Gas Transmission Company v Argentina*, *supra note* 156, p. 12.; See also Dolzer and Schreuer *supra* note 182, p.199, note 236.
[198] As seen for example both in *Neer* and *Tecmed* awards (*supra* note 29 and 105, respectively).
[199] Dolzer and Schreuer, *supra* note 182, p.200.
[200] See Section 3.1.
[201] See also Dolzer and Schreuer, *supra* note 182, p.199.

component, no new requirement would emerge since good faith is a known factor in most, if not all, domestic legal systems.

3.7 Arbitrariness

'Arbitrary' conduct in its plain meaning means a conduct that is "[b]ased on random choice or personal whim, rather than any reason or system".[202] Simply put, arbitrariness refers to objectives and motivations behind decisions made by the host State. On this point, the Tribunal in *Enron v. Argentina*,[203] stated that "the measures adopted might have been good or bad […] but they were not arbitrary in that they were what the Government believed and understood was the best response".[204] Meaning, the Tribunal examined a breach of the FET standard by examining the state's subjective intent in its decisions and not the decision itself. A similar view is seen by the ICJ in *Elettronica Sicula S.p.A. (ELSI) Case (United States of America v. Italy)*[205] when it defined arbitrariness as "a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety."[206]

Similar to other components described above, here too is a debate over the question whether arbitrariness is a component on its own accord, separate from other components that comprise the FET standard, or a part of other components, such as denial of justice. According to Canada, for instance, "while there is no prohibition of arbitrary conduct under customary international law, arbitrary conduct can be relevant if invoked in connection with a claim of breach of a rule that does form part of customary international law."[207] At the same time, other tribunals, such as *Unión Fenosa Gas v. Egypt*,[208]and in *Merrill v. Canada*,[209] found that arbitrariness is a part of the customary international law.

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[202] Oxford English Dictionary, Lexico, *(Available at:* https://www.lexico.com/en/definition/arbitrary).
[203] *Enron Corporation and Ponderosa Assets v. Argentina*, *supra* note 166.
[204] Ibid, para. 281.
[205] See the *ELSI case (United States of America v. Italy), supra* note 53.
[206] Ibid, para. 128. See also, *Loewen v. the US, supra* note 81, Award, 26 June 2003, para. 131; *Joseph C. Lemire v. Ukraine, supra note 58,* Decision on Jurisdiction and Liability, 21 January 2010, para. 385.
[207] OECD 2017, *supra* note 8, p. 47.
[208] *Unión Fenosa Gas v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4 para. 9.51.
[209] *Merrill v. Canada*, ICSID Case No. UNCT/07/1, Award, March 31, 2010, para. 208.

The threshold of the invocation of arbitrariness is also debated. The Tribunal in *S.D. Myers v. Canada* stated that a breach occurs "only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective."[210] A similar view was adopted by several NAFTA Tribunals, most notably in *Waste Management*,[211] and in *Glamis Gold v. US*, where the Tribunal stated that a breach of the standard "requires something greater than mere arbitrariness, something that is surprising, shocking, or exhibits a manifest lack of reasoning".[212] That said, the referenced Tribunals did not specify a clear application of this requirement and where it differs from 'regular' arbitrariness.

As regards the implications of this element of FET on the state's regulatory space, it seems that if a state can show a clear process of decision making and reasoning, the arbitrariness component would not impact it further than would most domestic law systems,[213] especially in NAFTA Tribunals considering the narrow approach described above.[214]

3.8 Non-Discrimination

The requirement to act in a non-discriminatory manner measures host states' treatment of foreign investors against the treatment of similarly situated domestic or other foreign investors.[215] Unlike MFN and national treatment, which deal expressly with nationality based discrimination, and with which there is nevertheless some overlap, the non-discrimination component in the FET principle appears to prohibit discrimination in the sense of specific targeting of a foreign investor on other manifestly wrongful grounds such as religion, gender and race. In other terms, a measure is likely to be found to violate FET if it evidently singles out the investor with no legitimate justification.[216]

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[210] *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, partial award, November 13 2000, para. 263.
[211] *Waste Management Incorporated v Mexico*, *supra* note 168, para. 98.
[212] *Glamis v. US*, *supra* note 122, Award, 8 June 2009, para. 617; See the *ELSI case (United States of America v. Italy)*, *supra* note 53.
[213] UNCTAD report, *supra* note 2 p.79.
[214] Dumberry, *supra* note 72, p. 8-9.
[215] *Saluka v. Czech Republic*, *supra* note 109, para. 461; *CMS Gas Transmission Company v. The Republic of Argentina*, *supra* note 156, para. 290.; See also: CHESTER BROWN & KATE MILES, EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION, 285 (2011).
[216] Ibid..

Roughly put, five different types of discrimination may be delineated and distilled from literature and arbitral jurisprudence: (a) discrimination contrary to international human rights, for example on the basis of sex or race, (b) unjustifiable or arbitrary regulatory distinction between investors or investments that are alike, (c) conduct targeted at specific persons or investors or investments motivated by bad faith or with intent to injure or harass, (d) discrimination in the application of domestic law, and (e) nationality based discrimination.[217]

There is a debate regarding the definition of "like" investors. A broad interpretation of this issue would place a greater burden on the state's regulatory space and widen the tribunals' judicial review over state actions. Such an approach was seen in *Occidental v. Ecuador* where the Tribunal compared a foreign oil company with the treatment to exporters in general.[218] Other tribunals adopted a more distinctive, nuanced approach which lessens the burden on the State.[219]

There is also a debate surrounding the fifth element, nationality based discrimination, and its overlap with the MFN clauses, and as a result whether such a discrimination is part of customary international law.[220]

In conclusion, since the non-discrimination component is breached when foreign investors receive different treatment on wrongful grounds, the broader the interpretation of who are "like" investors, the greater the burden is on the host State's regulatory space. As described above, the interpretation in *Parkerings-Compagniet v. Lithuania* is considered the appropriate application of this component, as such it would seem that it would require a similar requirement from that already

[217] For more explanation on the subject see: Newcombe and Paradell, *supra* note 24.
[218] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11.
[219] For example, differentiating between two car parking projects since one was within a site designated by UNESCO as a world heritage site; *Parkerings-Compagniet v. Lithuania* (ICSID Case No. ARB/05/8, Award, September 11 2007, para. 411-412).
[220] As described above, much of the debate over non-discrimination as a component of the FET standard concerns the fifth element. The difficulty to construe nationality based discrimination as part of FET standard concerns the existence of the general national treatment and MFN clauses and the concern that such a reading will deem the non-discrimination obligations in investment treaties redundant. (see UNCTAD report, *supra* note 2, p.81-82.) Since FET is considered by some to be part of the customary MST, but MFN and national treatment provisions are treaty based requirements,(see UNCTAD report, *supra* note 2, p. 290) tribunals that accept a narrower approach to FET would not include this type of discrimination in the FET standard.(Ibid). Accordingly, it is also disputed whether non-discrimination is part of customary international law, as is further discussed in the next section (see for example US and Canadas arguments in *Grand River v. US*, *supra* note 142, Counter-memorial, December 22 2008).

in place in most legal systems. Consequently, this component does not seem to add any new implications on the state's regulatory space other than the risk of a broad interpretation. However, as mentioned, this kind of interpretation has received wide criticism and a different approach is already seen in arbitral rulings.

3.9 Proportionality and Reasonableness

Although it is possible to differentiate between proportionality and reasonableness, as seen for example in *Greentech* which includes only one of them,[221] it seems that some arbitral tribunals do not make this distinction.[222] A unified analysis of these components follows the idea that there should be a balance between the interests of the host state and of the investor.[223] Consequently this section will analyze these elements in a unified manner.

In order to fully address the use of these requirements, the discussion below first explains each separately, and then discusses their application and connection.

The proportionality component requires that 1) the host state's measures which affect the investment follow a reasonable and traceable rationale; 2) that the chosen measure should not strain the investment more than necessary, and 3) that the interests of the host state and the foreign investor should be weighed against each other in deciding whether there was a breach.[224]

In public international law and many legal systems,[225] proportionality is used as a measure to ensure that state actions are appropriate for attaining the legitimate objectives pursued in the sense of not going beyond what is necessary to achieve them. In international investment law, proportionality revolves around a similar yet not identical idea, controlling the extent to which host states interfere with foreign investments with regards to its effect on the investors' interests. Simply put, the requirement of proportionality is used "to establish whether a limitation of rights

[221] For example, see the *Greentech Energy Systems case*, *supra note* 189.
[222] For example, see *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award (2007), para. 198.
[223] Kläger, *supra* note 31, p. 98.
[224] Ibid..
[225] Schill, *supra* note 1, p. 36.

is justifiable",[226] but in the context of host state-investor relations. In *MTD v. Chile*, [227] the Tribunal found that the FET standard included this requirement.[228]

On the other hand, the *Glamis Gold* Tribunal held that "it is not for an international tribunal to delve into the details of and justifications of domestic law".[229] In conclusion it should be mentioned that the use of the proportionality component in FET remains uncommon, and when it is used, it is more common to use only "proportionality in the strict sense" and not the clear analysis described above, or the three or four staged analysis more common in domestic constitutional law.[230]

The reasonableness component has three different parts and applications. The first part requires the state to adopt reasonable regulatory measures. The second part acknowledges the need to protect the legitimate or reasonable expectations of the investor. Finally, the third element requires the arbitrators to provide reasons for their awards.[231] Following this structure it seems that tribunals have assessed the reasonableness of state conduct and determined whether a given measure was reasonably related to a legitimate policy.[232]

Notable in this respect is *Micula v. Romania,*[233] where it was held that in revoking an investment incentive scheme four years prior to its scheduled expiry, Romania had infringed a bilateral investment treaty between Romania and Sweden. Romania had abolished the scheme as part of the process of accession to the EU in order to comply with EU State aid rules in its national legislation. The Tribunal stated that, to examine whether the State's actions were reasonable it requires two elements, "the existence of a rational policy; and the reasonableness of the act of the state in relation to the policy".[234] This was also seen in *Saluka* when the Tribunal stated that

[226] J. Rivers, *Proportionality and Variable Intensity of Review*, *Cambridge LJ*, 174–207, 174 (2006).
[227] *MTD Equity SDN BHD and MTD Chile SA v. Republic of Chile*, *supra* note 112, Award, 25 May 2004.
[228] See also *Total SA v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, para. 123; *Occidental v. Ecuador*, *supra* note 218, footnote 7, p. 70.
[229] *Glamis v. US*, *supra note 122*, Award, 8 June 2009, para. 762.
[230] VALENTINA VADI, PROPORTIONALITY, REASONABLENESS AND STANDARDS OF REVIEW IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION, p. 95-99 (2018).
[231] Ibid, p. 143-144.
[232] Ibid, p. 154.
[233] *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill Srl and SC Multipack Srl v. Romania*, ICSID Case No. ARB/05/20, Final Award, 11 December 2013.
[234] Ibid, para. 525

"treatment of a foreign investor had to be "justified by showing that it bears a reasonable relationship to rational policies not motivated by a preference for other investments over the foreign-owned investment."[235]

The two components, proportionality in its strict sense and reasonableness as it is applied, follow a similar analysis in which the Tribunal seeks to find a kind of balance between the two parties. This is evident in the Tribunal's analysis in *Pope & Talbot*,[236] and in the *Saluka* ruling where the Tribunal weighed "Claimant's legitimate and reasonable expectations on the one hand and the Respondent's legitimate regulatory interests on the other."[237] A similar analysis is seen in a more recent decision in *Greentech Energy v. Italy*,[238] where it was stated "that the interests of investors must be considered in determining whether a measure is reasonable".[239]

As seen above, the problem with the reasonableness standard is that it gives little guidance and clarity. On the other hand, the proportionality requirement, in its four stages or even only in its strict sense, makes quite a clear instrument to assess whether there was a breach, by comparing the means used to the envisaged ends. This is particularly useful in the common situation in which there is more than one regulatory option open to the host state, as was the case in *S.D. Myers v. Canada.*[240] Another example of this can be seen in *Middle East Cement Shipping and Handling Co S.A. v. Egypt*.[241] There, the Tribunal's decision involved the seizure and auctioning of the claimant's vessel in order to recover its debts to a state entity. A central issue was whether sufficient notice was given, since the Claimant could not be found. The notice was eventually given by attaching a copy of a distraint report to the vessel, which was in conformity with Egyptian law. The Tribunal, however, found this to be a failure to fulfill the FET standard, reasoning that "a matter as important as the seizure and auctioning of a ship of the Claimant should have been notified by a direct communication […] irrespective of whether there was a legal duty or practice to do so by registered mail with return receipt." Although proportionality was not mentioned

[235] Ibid. para. 307
[236] *Pope & Talbot v. Canada*, *supra note* 59, Award on the Merits of Phase 2, 10 April 2001, para. 123-125.
[237] *Saluka v. Czech Republic*, *supra* note 109, para. 306.
[238] *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italian Republic*, *supra* note 189.
[239] Ibid, para. 462.
[240] *S.D. Myers, Inc. v. Government of Canada*, *supra* note 210, para. 255.
[241] Schill, *supra* note 1, p. 38-39.

expressly, it is plain to see that the Tribunal thought that an act as severe as seizing a ship should have prompted a more measured approach on behalf of the host state.[242]

In conclusion, although these two components hold different substantive requirements and structure, they both require justification of actions and a balance between the interests of the parties.[243] Considering how reasonableness and proportionality, as elements of FET, affect state regulatory space, and the way they are used in more recent awards,[244] it seems that proportionality and reasonableness require more transparency from the state, as they allow for judicial review of the state's chosen actions when it is reviewed against its published policy, and their effect on the investor with regards to other possible solutions. These would then be balanced and examined against the foreign investor's interests.

3.10 Conclusion

As demonstrated above, FET has been interpreted to include different components applied in different manners both in jurisprudence and by states. The varied applications of these components by tribunals sometimes overlap, meaning that similar legal situations would be described by separate tribunals as referring to dissimilar components. For example, the breach of a procedural requirement may be construed as denial of justice, legitimate expectations, discrimination, stability and predictability or bad faith. On the other hand, there is also a substantive difference between these components; for instance, the protection of legitimate expectations and stability components which impact the host state's regulatory space in a much broader sense than the denial of justice component.

Our aim in this memorandum is to examine FET's effect of regulatory space, therefore in each component this was the main criteria of examination. The components which have the most significant impact on regulatory space are protection of the investors' legitimate expectations and

[242] Ibid; *Middle East Cement Shipping and Handling Co S.A. v. Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002.
[243] As described above; see also: Valentina Vadi, *supra* note 230, p. 265-266.
[244] See for example *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italian Republic*, *supra* note 189; and *Olin Holdings Ltd v. Libya, ICC Case No. 20355/MCP*.

stability, although wide interpretation of each component may still lead to a wide range of possible impacts which are not part of the domestic obligations of the state.

As described above, the interpretation given to each component of the FET may change significantly between the different tribunals and scholarly writings. In many cases, as presented in this section, there is still no clear interpretation, and recent relevant arbitral jurisprudence must be further analyzed until a clearer trend would emerge.

In addition to the debate regarding the content of the FET components, there is major disagreement regarding what components are part of the MST and therefore, part of the customary international law. Although it is claimed that at least denial of justice, arbitrary conduct and due process are part of the MST,[245] tribunals have interpreted the components of MST quite differently.[246] This debate is evident when comparing, for example, the *Grand River* Award,[247] and *Deutsche Bank v. Sri Lanka*.[248] This is also seen regarding the protection investors' legitimate expectations and the *Tecmed* award which are also widely debated.[249] This debate is crucial since it is a major factor in the question of which components are included in the FET in the different models described in the following section.

The next section will analyze how different models of the FET standard affect state regulatory freedom, using the components described above.

[245] Regarding NAFTA case law, see Patrick Dumberry, *supra* note 72, p. 10. Non NAFTA case law, are described as well, for example see *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka,* ICSID Case No. ARB/09/2, Award of 31 October 2012.
[246] Arguing that there is no great difference between the FET standard and the MST, it could be said that in time the FET standard would be integrated fully into the customary international law, as was ruled in *OI European Group B. V. v. Venezuela*, ICSID Case No. ARB/11/25, Award, March 10 2015, para. 489.
[247] *Grand River v. US, supra note 142,* award, November 12, 2011.
[248] *Deutsche Bank AG v. Sri Lanka, supra note 245*, Award of 31 October 2012, para. 418-419. Specifically the Tribunal's statement: "the actual content of the treaty standard of fair and equitable treatment is not materially different from the content of the minimum standard of treatment in customary international law."
[249] See Section 3.3.

4. The Different Models of Fair and Equitable Treatment

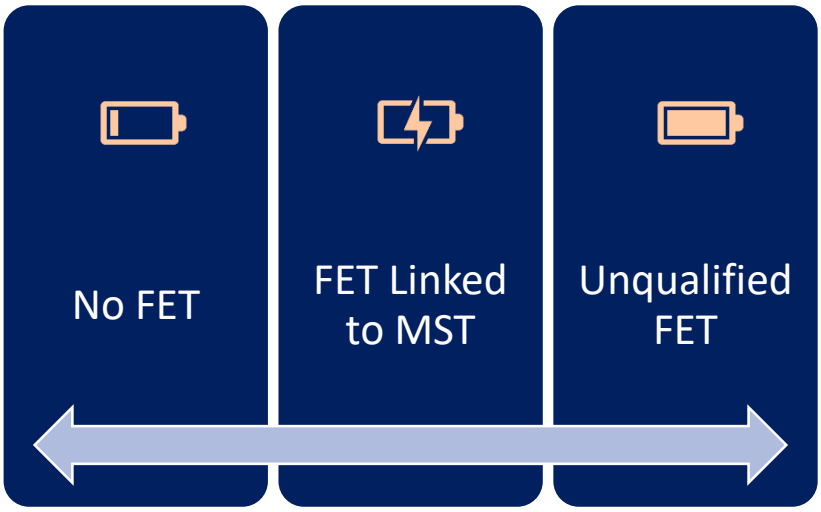
This Section deals with the ways in which the FET clause has been drafted in various treaties and agreements. In order to understand the main discussion in this section, it is important to distinguish between the two approaches of *interpretation* of FET which differ on the relation between FET and MST, and the three different *formulations* as they appear in IIAs, these being: FET linked to MST; Unqualified EFT; and No FET. The difference between the different FET formulations is in their impact on the states' regulatory space, as would be explained further in this section.

In *El Paso v. Argentine,* the Tribunal addressed two main approaches to the interpretation and implementation of the FET concept: "[a]s far as the relation between FET and the minimum standard of international law is concerned, two main approaches have been adopted by ICSID tribunals".[250] The first approach refers to FET linked to MST, and the second refers to FET as an autonomous concept as noted in Section 2.2.[251]

These approaches are reflected in three different models of FET implementation within IIAs. The first formulation links FET to the minimum standard as "ceiling or as "floor",[252] the second deals with "unqualified FET" meaning the FET stands independently of any minimum standard, and the last form of FET does not include an FET clause at all, which raises the question of whether the concept of the FET can be imported into the IIA.

[250] *El Paso Energy International Company v. Argentine Republic, supra note 32*, para. 331.
[251] Ibid.
[252] As further explained below, MST as floor means it is treated as a minimum below which a state cannot act, and MST as a ceiling means a state is required to act according to the MST but is not required to follow standards 'above' it.

FET Models: The existing formulas in IIAs are divided into three main models.



The scope and content of FET as well as its form within IIAs raises a problem of practical significance that arises from the potentially conflicting motivations of states and investors. Investors are likely to prefer a broad interpretation of FET that comprises various obligations to guarantee regulatory stability and protect legitimate expectations, so as to bring their cause-of-action within the scope of the treaty. The state, on the other hand, must find a balance between protecting investors, which might attract more foreign investments, and protecting its own investors' interests from future causes of action abroad. Contrary to that, the main trend today in states is to generally prefer to adhere to a narrower approach, although even this statement is questionable, and should be analyzed specifically according to each IIA.

This section outlines and analyzes the impact on the state's regulatory space of each of the three different FET models and the different subdivisions of each model. In addition, each analysis will be carried out according to the components presented in Section 3, with the aim of examining the extent of regulatory space that each model enables. The following table presents each of the formulation and subdivision of the FET models presented in this section.

Table 2: FET Models and Examples of the different sub-forms

FET Model		
FET linked to the MST	**Sub-form**	**Example from BIT:**
	FET linked to MST as "ceiling"	United States Mexico Canada Agreement (USMCA 2018) Article 14.2(2): "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 (MST), **and do not create additional substantive rights"**.
	FET linked to MST as "floor"	*Azurix v. Argentine* Tribunal (2003) interpreted the US – Argentina BIT (1991): "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."
	FET linked to MST with specific clarification about its boundaries	Morocco-Nigeria BIT (2016) Article 7(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" does not require treatment in addition to or beyond that which is required by that standard and does not create additional substantive rights. The obligation in paragraph 1 to provide: (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of a Party".
Unqualified FET	Linked to MST	Austria-Guatemala BIT (2006) Article 3.1: "Each Contracting Party shall accord to investments by investors of the other Contracting Party fair and equitable treatment and full protection and security"
	Autonomous concept	Chile-Malaysia BIT ART. 3(1): "Investments made by investors of either Contracting Party in the territory of the other Contracting Party shall receive treatment which is fair and equitable, and not less favourable than that accorded to investments made by investors of any third State."
No FET	Croatia-Ukraine BIT (1996): no reference to FET.	

4.1 Fair and Equitable Treatment Linked to the Minimum Standard of Treatment - A Narrow Approach

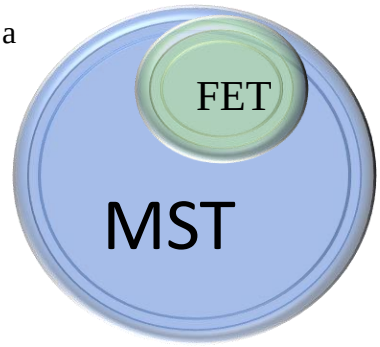
The model of FET linked to MST considers FET to be a reflection of the MST principle under customary international law.[253] Here, the FET is defined as either a part of the MST or as a standard completely identical to it in meaning, depending on the important question of whether the FET is linked to the MST as a "floor" or as a "ceiling."

The discussion in this sub-section divides the "FET Linked to the MST" model into three separate categories. The first relates to FET as a concept under the umbrella of the MST (a 'ceiling'). The second assigns some connection between the FET and the MST but has no clear boundaries (as a 'floor'). And finally, the third category attributes the relationship in question as a ceiling but with more specific clarifications about the content of the FET.

Understanding this distinction is practically important for the host state in considering its steps and understanding the effects of FET on its regulatory space. Inclusion of the link between the FET and the MST may affect and even be decisive in future causes of action that may arise following the signing of an IIA.

4.1.1 Fair and Equitable Treatment linked to MST as a "ceiling"

A significant set of IIAs, including the NAFTA, link FET to the MST as a "ceiling." This formulation generally requires each party to "accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security".[254]



[253] *El Paso Energy International Company v. Argentine Republic*, *supra note 32*, para. 331;
[254] The North American Free Trade Agreement (NAFTA) (1992), Article 1105 (1) (*Available at*: https://www.nafta-sec-alena.org/Home/Texts-of-the-Agreement/North-American-Free-Trade-Agreement); more agreements in which this language appears are: Canada-Moldova BIT (2018, not in force) (*Available at:* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-

This provision raises an important interpretive question; what is the relevance of referring to the FET principle when the treaty refers to the MST, a more commonly accepted concept with supposedly identical meaning?[255] Following several conflicting arbitral awards,[256] NAFTA's Free Trade Commission published in 2001 its *"Notes of Interpretation,* rejecting the proposition that article 1105(1) adds any additional element to the MST;[257]

> *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.*[258]

Essentially, this means that the NAFTA countries consider FET linked to MST as a "ceiling"- the MST 'caps' the treatment under FET.

Following the cited Free Trade Commission decision, additional agreements between the NAFTA countries were written in accordance with the same approach. Most recently, for example, Article 14.2(2) of USMCA, the 2018 trade agreement between the United States, Canada, and Mexico, maintained the same policy regarding the relationship between FET and the MST by stating that:

> *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 (MST), **and do not create additional substantive rights**.*[259]

files/5806/download); Canada-Mongolia BIT (2016) (*Available at:* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5373/download); Foreign Investment Promotion and Protection Agreement between Canada and Hong Kong (2016) (*Available at:* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5094/download), Kuwait-Mexico BIT (2013) (*Available at:* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4769/download).

[255] Dolzer and Schreuer, *supra* note 182, p.134.

[256] UNCTAD report, *supra* note 2, p.24.

[257] Ibid.

[258] NAFTA Free Trade Commission: Notes of interpretation of certain Chapter 11 provisions, 31 July 2001.

[259] United States–Mexico–Canada (USMCA) (2019, not in force), Article 14.2(2) (*Available at:* https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between).

It is also important to note that not only NAFTA countries share this interpretation of FET, and this approach has been increasingly adopted by non-NAFTA countries as well. This includes the Agreement between Japan and Kenya for the promotion and protection of investments,[260] the United Arab Emirates - Uruguay BIT (2018),[261] the Australia - Indonesia CEPA (2019),[262] and the Iran-Japan BIT (2016).[263]

Under this model the state is bound to the limitations set by the minimum standard in accordance with customary international law. This model actually reduces the FET content, and thus reinforces the regulatory space of the state. Furthermore, it reduces to the minimum the protection given by the home state to investors.

4.1.2 FET linked to MST as a "floor"

As with the previous drafting approach, here too the FET standard is drafted in a manner that clearly links it to the MST. In contrast to the previous approach, under this model, the state is obliged to grant investors no less, but *potentially more*, than required under customary international law.

Notable in this respect is the *Azurix v. Argentine* Tribunal which was tasked with the interpretation of the US – Argentina BIT and instructed that, "[i]nvestment shall at all times be accorded fair and equitable treatment, … and shall in no case be accorded treatment less than that required by international law."[264] The Tribunal explained that:

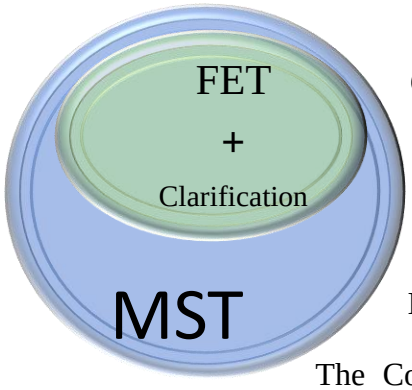
> *The clause, as drafted, permits to interpret fair and equitable treatment and full protection and security as* ***higher standards than required by international law****. The purpose of the third sentence* ***is to set a floor, not a ceiling****, in order to avoid*

[260] Article 5(1), Japan-Kenya BIT (2016) (*Available at:* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5374/download).
[261] Article 3(2), United Arab Emirates - Uruguay BIT (2018, not in force).
[262] Article 14.7(2)(c), Australia-Indonesia CEPA (2019) (*Available at:* https://dfat.gov.au/trade/agreements/not-yet-in-force/iacepa/Pages/indonesia-australia-comprehensive-economic-partnership-agreement.aspx).
[263] Article 5, Islamic Republic of Iran - Japan BIT (2016) (*Available at:* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3578/download).
[264] *Azurix v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, para. 361.

a possible interpretation of these standards below what is required by international law. [265]

This raises an analytical problem in distinguishing between FET linked to MST as a "floor" and referring to FET as an autonomous concept. In practice, it seems that both models will lead to a similar result in which there is a need to pour content and fill in the FET components. The full discussion of the idea of the autonomous FET can be found in Section 4.2.3.

4.1.3 FET Linked to MST with specific clarification concerning its boundaries



Given the ambiguity and difficulty to treat FET and MST in terms of floor or ceiling, more recent instruments have crafted the interaction between both standards by way of specifying the components included within the FET principle. In other words, this model provides clear boundaries of the MST but with clarifications and refinements as to the contents of the FET.

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) instructs with respect to FET that:

> *For greater certainty, paragraph 1 prescribes* ***the customary international law minimum standard*** *of treatment of aliens as the 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.*[266]

This paragraph ostensibly displays a model of linking to MST as a 'ceiling.' But the examination of the subsequent paragraph presents a slightly more advanced and nuanced approach that goes

[265] Ibid..

[266] Article 9.6(2), Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (2018) (*Available at:* https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/text-texte/index.aspx?lang=eng&_ga=2.219843610.244775792.1564775608-98375331.1564775608).

beyond the stipulation of the connection between these standards, dealing with their content as well. Thus, the next paragraph explicitly states:

> ***fair and equitable treatment includes*** *the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.*[267]

According to the model presented above, the FET is placed under the umbrella of the MST, and its contents are further clarified.

A similar structure can be identified in a growing number of recent IIAs including the Agreement Established in 2018 between Japan and Argentina,[268] the Morocco-Nigeria BIT (2016),[269] the United Arab Emirates - Uruguay BIT (2018),[270] and the Australia - Indonesia CEPA (2019).[271]

Also notable is Article 14.7 of the Australia-Indonesia CEPA (2019), which displays a slight change in structure and wording from the CPTPP presented above:

> *1. Each Party shall accord to covered investments* ***fair and equitable treatment*** *and full protection and security.*
> *2. For greater certainty:*
> *(a) "****fair and equitable treatment" requires each Party to not deny justice in any legal or administrative proceedings****;*
> *(c) the concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required under the customary international law minimum standard of treatment, and do not create additional substantive rights.*[272]

Ultimately, this third approach brings further clarity to the meaning and scope of FET and its interaction with other standards of investment protection, namely the MST. This clarity, in turn, allows the state to clearly delimit its obligations vis-à-vis the investor and thereby to better protect its regulatory space.

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[267] Ibid, Article 9.6(2)(a).
[268] Article 4(2), Japan-Argentina BIT (2018).
[269] Article 7, Morocco - Nigeria BIT (2016, not in force) (*Available at:* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5409/download).
[270] Article 3(2), United Arab Emirates - Uruguay BIT (2018).
[271] Article 14.7(2)(c), Australia - Indonesia CEPA (2019).
[272] Ibid..

4.1.4 The Components of the Minimum Standard of Treatment

As noted in Section 2 above, the contents of the MST principle are not precise and are subject to broad interpretation. In this sub-section, we will examine the practice of the NAFTA countries with respect to the components included under the MST umbrella according to their interpretation. NAFTA countries over the years have adhered to the model's application whereby the FET is linked to the MST and therefore the memorandum will examine their approach in this regard.

For instance, Mexico and the United States subscribe to a narrow reading of the MST. Mexico stated that the MST deals with "for example, the right to unhindered access to courts and to a fair trial".[273] The United States, in turn, has regularly stated that MST covers only a few areas;

> *[The MST] includes, for example, the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings," such as "when a State's judiciary administers justice to aliens in a "notoriously unjust" or "egregious" manner "which offends a sense of judicial propriety."*[274]

On this point, Canada asserted that the prohibition of arbitrary conduct, as such, cannot be treated as an independent rule under customary law, and can only be relevant if invoked in connection with a claim of breach of a rule that *does* form part of customary international law-such as denial of justice.[275]

As regards the protection of investors' legitimate expectations, it is far from clear that the MST does not protect legitimate expectations. Both Canada and the US, for instance, have stated that there is "no general and consistent state practice and *opinio juris* establishing an obligation under the minimum standard of treatment not to frustrate investors' expectations."[276] The US has regularly reaffirmed that as a matter of international law, although an investor may develop its own expectation about the legal regime that governs an investment, those expectations do not impose a legal obligation on the state.[277] In the *Grand River* award, the US claimed that;

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[273] *United Parcel Service of America (UPS) vs. Canada, Mexico*, Fourth Non-Disputing Party Submissions, October 20 2005, para. 14.
[274] *Mesa power Group v. Canada, supra* note 137, Second Submission of the United States of America, June 12 2015, p. 6-7, para 12.
[275] *UPS v. Canada*, *supra* note 273, Canada Counter Memorial, para. 928; OECD 2017, *supra* note 8, p. 47.
[276] *Mesa Power Group LLC v. Canada*, Second Submission of the USA, *supra* note 137, p. 9, para 18.
[277] *Mobil Investments Canada Inc. & Murphy Oil Corp. v. Canada*, *supra* note 35, para 153.

> *under customary international law, States may regulate to achieve legitimate objectives to benefit the public welfare and will not incur liability solely because the change interferes with an investor's "expectations" about the state of the business environment. The protection of public health falls squarely within that regulatory authority under international law*[278]

Canada and the United States have repeatedly rejected the *Tecmed* decision,[279] claiming that legitimate expectations, which is not included in the wording of the FET clause, is not part of the MST, and therefore not part of the customary international law.[280] We can see the same approach in the *Mesa Power Group* award, where the Tribunal stated that it "is aware of no general and consistent state practice and opinio juris establishing an obligation under the minimum standard of treatment not to frustrate investors' 'expectations."[281]

It follows from the above that notwithstanding the prevalence of reference to the MST and the relative consensus over its customary status, many questions remain. State practice as reflected in declarations, legal pleadings, and positions before international courts and tribunals indicate that states construe the MST narrowly. At its narrowest version, MST contains an obligation of host states to prevent the denial of justice, to provide due process, to prevent arbitrary conduct and to provide investors with 'full protection and security'.[282] But as noted above since the scope of MST is still controversial, a degree of uncertainty remains in the FET linked to MST formula.

4.2 Unqualified FET

Here we will deal with IIAs in which FET appears without any textual additions, i.e., FET appears without an explicit link to MST or a detailed list that specifies the extent of protection that the FET

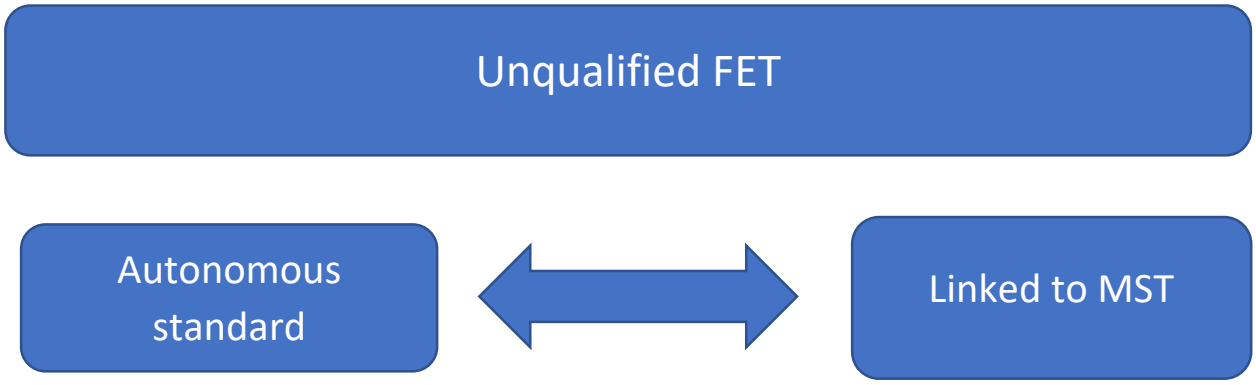
[278] *Grand River v. US*, *supra* note 142, US Counter-Memorial, p. 99.
[279] See Section 3.3.
[280] OECD 2017, *supra* note 8, p. 42.
[281] *Mesa Power Group LLC v. Canada*, *supra* note 137 Second Submission of the US, para. 12.
[282] Dumberry, *supra* note 72, p.9.

provision provides investors. This FET formulation was prevalent in first generation BITs and today still appears in some 2,000 treaties according to readily available information.[283]

One example of this FET formulation is Article 3 of the China-Czech Republic BIT from 2005, which states; "*Each Contracting Party shall in its territory accord to investments and returns of investors of the other Contracting Party treatment which is fair and equitable*."[284]

Another example is from the BIT between the State of Japan and South Korea. The agreement states in Article 10.1 that; "*Each Contracting Party shall accord to investments in its territory of investors of the other Contracting Party fair and equitable treatment and full and constant protection and security*."[285]

The unqualified FET formulation has proven problematic as it lacks clarity concerning the source of the standard, and raises questions concerning its link to MST or usage as an autonomous standard. Therefore, unqualified FET is prone to varied interpretations by states and tribunals that impact the scope of protection to investors and regulatory space of the host state, ultimately limiting legal certainty on the whole.



[283] According to the UNCTAD Investment Policy Hub (*Available at*: https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping).
[284] Czech Republic - China BIT (2005) (*Available at:* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/725/download).
[285] Japan - South Korea BIT (2003) (*Available at:* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1727/download); this formulation is also found in Art. 2(2) of the Israel-Albania BIT (2007) (*Available at:* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/17/download).

Until 2004, as arises from an extensive study by the OECD, the conventional approach to unqualified FET was the interpretation that it was linked to MST.[286] However, after 2004, investment tribunals began to interpret the FET as an autonomous standard. Interpreting the FET as an autonomous standard allowed tribunals not to be limited by the scope of protection provided to investors as recognized by international law. as a result, tribunals had the freedom to recognize new components as included under the scope of protection provided by the FET.

Arguably, both approaches to the interpretation of unqualified FET promote regulatory space. However it is a reasonable claim that the link between FET and the MST, which is a well-known standard with clearer borders, will limit the uncertainty in the interpretation of FET.[287]

In contrast, the possibility that FET is an independent standard allows the interpretation that FET contains new and extensive meanings. On the other hand, proponents of the unqualified FET strand of drafting argue that linking FET to the treaties to MST can lead to uncertainty because of the development of international law.[288]

4.2.1 Unqualified FET as FET linked to MST

Historically, unqualified FET was mostly interpreted as linked to the MST, irrespective of the absence of any explicit language to that effect. This was reflected in the commentary to the 1967 OECD Draft Convention on the Protection of Foreign Property, which included an unqualified FET formulation. According to the commentary to Article 1 "[t]he standard required conforms in effect to the "minimum standard", which forms part of international law."[289] This idea was

[286] OECD 2017, *supra* note 8, p.10.
[287] Giorgio Sacerdoti, *Bilateral treaties and multilateral instruments on investment protection* (Volume 269), *in*: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW, The Hague Academy of International Law, p. 341 (1997). (*Available at:* https://referenceworks. online.com/entries/the-hague-academy-collected-courses/the-standards-of-treatment-of-foreign-investments-bits-and-multilateral-instruments-269-ej.9789041111111.251_460.5#1).
[288] KENNETH VANDEVELDE, BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION, OXFORD, (2010) p. 135.
[289] OECD, Draft Convention on the Protection of Foreign Property and Resolution of the Council of the OECD on the Draft Convention (1967), Notes and Comments to Art. 1, para 4(a).

repeated in 1984 when the OECD Committee on International Investment and Multinational Enterprises stated that;

> *[A]ccording to all Member countries which have commented on this point, fair and equitable treatment introduced a substantive legal standard referring to general principles of international law even if this is not explicitly stated.*[290]

This approach was expressed in many arbitral decisions, such as *AAPL v. Sri Lanka,* where the arbitrators cited with approval the OECD Draft Convention, saying that "fair and equitable treatment demanded the exercise of due diligence as derived from customary international law".[291] In *Genin v. Estonia*, the Tribunal asserted that FET "require[s] an "international minimum standard" that is separate from domestic law, but that is, indeed, a minimum standard".[292]

Interpreting unqualified FET as linked to the MST rather than as an autonomous standard that is not connected to customary law affects the scope of protection to an investor by FET and has an impact on the host state's regulatory space. As noted, linking FET to MST generally enforces less restrictions on the host state in asserting its domestic authority. In addition, FET linked to international law raises the threshold under which a state would be considered as violating the FET principle. This idea is grounded in the *Neer* Case, which required the acts of the state to be exceptional.[293] In contrast, when the FET is considered an autonomous condition, tribunals can classify more actions as harm and violation. However, it is important to remember, as mentioned above, that there is some uncertainty regarding the scope of the components of FET linked to MST, and in turn regarding the regulatory space of the host state.[294]

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[290] OECD, INTERGOVERNMENTAL AGREEMENTS RELATING TO INVESTMENT IN DEVELOPING COUNTRIES (1985).
[291] *Asian Agricultural Products Ltd (AAPL) v. Sri Lanka*, ICSID Case No. ARB/87/3, Award, June 21 1990, p. 634, 639.
[292] *Genin v. Estonia*, *supra* note 95, Award, 25 June 2001, para. 367.
[293] *L. F. H. Neer and Pauline Neer v. Mexico*, Award, October 15, 1926, para. 4
[294] In the case that an unqualified FET formulation is interpreted to be linked to MST, it is likely to include the same components found in FET that is *explicitly* linked to MST, as discussed above.

4.2.2 Unqualified FET as an Autonomous Standard

Arbitral decisions after 2004 represent a new trend of interpreting 'Unqualified' FETs as an autonomous standard, detached from the MST.[295] When assessing the prevailing state of play concerning FET in 2004, the OECD noted that "no case has been found which applies the "fair and equitable treatment" standard of a bilateral investment treaty as an autonomous treaty standard.'[296]

The decision of the Tribunal in *MTD v. Chile* deals with the question of how to interpret FET clauses in BITs, as a standard linked to MST or as an autonomous one. The Tribunal rejected the attempt to link the relevant BIT to the case with NAFTA (where the FET is liked to MST). The tribunal noted that BITs should be interpreted "in accordance with the norms of interpretation established by the Vienna Convention on the Law of the Treaties, which is binding on the state parties to the BIT."[297]

This approach was also expressed by the arbitrators in *Enron v. Argentina*:

> *[T]he fair and equitable standard may be more precise than its customary international law forefathers. This is why the Tribunal concludes that the fair and equitable standard, at least in the context of the Treaty applicable to this case, can also require a treatment additional to, or beyond that of, customary law.*[298]

The approach that FET is an autonomous standard is reinforced by studies of tribunal practice which indicate that; "the vast majority of non-NAFTA tribunals have interpreted an 'unqualified' FET clause as having a distinct and separate meaning from the minimum standard of treatment."[299]

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[295] OECD 2017, *supra* note 8, p.10.
[296] OECD 2004, *supra* note 7, p. 23.
[297] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, *supra note 112*, para 112.
[298] *Enron Corporation and Ponderosa Assets v. Argentina*, *supra note* 166, Award (May 22 2007), para. 258. Claims arising out of certain tax assessments allegedly imposed by Argentinean provinces in respect to a gas transportation company in which the claimants participated through investments in various corporate arrangements, as well as the Government's alleged refusal to allow tariff adjustments in accordance with the US Producer Price Index.
[299] Patrick Dumberry, *supra* note 72, p. 307.

4.2.3 The Components of Autonomous Fair and Equitable Treatment

As the autonomous interpretation of FET is not limited by the boundaries set by the MST, tribunals have interpreted it to include various components.

In *Saluka,* for one, after the Tribunal recognized that unqualified FET is an autonomous standard, it stated that the host state has the obligation to "treat foreign investors so as to avoid the frustration of investors' legitimate and reasonable expectations."[300] The Tribunal then continued to describe what it considers legitimate expectations that investors can hold, and stated that the host state needs to act in a manner of "good faith, due process, and non-discrimination."[301] The Tribunal added that the investor deserves reasonable and justifiable policies that are consistent, transparent, and even-handed.[302]

Finally, the Tribunal stated that "according to the "fair and equitable treatment" standard, the host state must never disregard the principles of procedural propriety and due process".[303]

In the *MTD* case the tribunal adds in addition to good faith, due process, and nondiscrimination that were recognized by the tribunal in *saluka* obligation of the host state to act in a proportional manner.[304]

In *Enron v. Argentina,* the Tribunal acknowledged an obligation of the host state to maintain a 'stable framework for the investment.[305]

Interpreting FET as an autonomous standard narrows the regulatory space of the host state, as reflected by the fact that only under the autonomous interpretation of FET, tribunals recognized Legitimate Expectations and maintaining a stable framework for the investment as components of FET. As mentioned in Section 3, these two components grant the investors legal causes for arbitration that narrow the regulatory space of the host state.

In conclusion, tribunals have recognized eight components as part of the autonomous FET: (1) Due Process (2) Legitimate Expectations (3) Stable Framework for Investors (4) Transparency (5)

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[300] *Saluka v. Czech Republic, supra note* 109, Para. 302.
[301] Ibid., para. 303.
[302] Ibid., para 307.
[303] Ibid., para 308.
[304] *MTD v. Chile, supra* note 112, para. 108.
[305] *Enron Corporation and Ponderosa Assets v. Argentina, supra* note 166, para. 260.

Good Faith (6) Non-Discrimination (7) Proportionality (8) Transparency. The mapping of these components is the result of an analysis of different tribunal awards. Lacking a uniform authority with regard to the interpretation of Autonomous FET, uncertainty remains in regard to the components included in the FET.

4.3 No FET Obligation

The third common formulation of FET refers to IIAs that do not incorporate an explicit FET clause at all. This section will first present the formulation and the questions that arise in its interpretation, and then discuss how tribunals have applied MST to it, in order to clarify the scope of protection given to investors, and how they import FET clauses from third-party agreements to BITs and IIAs.

As a preliminary observation to this analysis, it is important to emphasize that the category of IIAs that do not contain an FET clause includes older agreements that omitted the standard because it was not common at the time[306] as well as contemporary IIAs that intentionally exclude FET, sometimes even stating that the standard is left out purposefully and must not be imported into the treaty.[307] In more recent cases, it is likely that the FET standard was excluded from agreements with the purpose of avoiding regulatory constraints on host states. [308]

According to available information, some 30 BITs, signed since 2005, have omitted explicit FET clauses, less than half of the amount recorded from 1990 to 2004.[309] This is in line with the rising trend of specifying IIA obligations and the development of the perception of FET as a crucial component in IIAs. [310] "No state has systematically excluded FET clauses from [all of] its treaties".[311] Therefore, when States *do* omit the FET from their treaties, they do not demonstrate

[306] This is likely the case with early BITs such as the 1959 Germany-Pakistan BIT (*Available at* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1387/download).
[307] For example see Art. 4.3 in the 2019 Brazil-United Arab Emirates BITs, (*Available at* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5855/download).
[308] UNCTAD report, *supra note 2*, p.18.
[309] Thompson, Broude, Haftel, *supra* note 39; UNCTAD database (*Available at* https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping#section-38).
[310] PATRICK DUMBERRY, INTERNATIONAL INVESTMENT LAW AND ARBITRATION (2017) p.68.
[311] Ibid..

an overall policy, but rather a specific alteration of the general trend in order to fit the relevant circumstances and perhaps satisfy the second party to the treaty. Exclusion of FET aids the negotiation process with developing states who generally oppose the standard. This is the case with Germany, for example, whose nine BITs that exclude FET were signed with developing states.[312]

The important question that tribunals face in interpreting BITs/IIAs with no FET clauses is whether the exclusion is exhaustive. This is to be interpreted in accordance with the rules set in VCLT, through treaty language and any agreement or practice between the parties.[313] When the treaty language clearly demonstrates that the FET was excluded on purpose, arbitral tribunals cannot import the standard into the treaty. The Brazil-Guyana BIT (2018) for example, states;

> *For greater certainty, the standard of fair and equitable treatment and full protection and security **shall not be used or raised** by either Party to this Agreement as a ground for any dispute settlement procedure in relation to the application or the interpretation of this agreement.*[314]

Such phrasing clarifies to both parties that they will not receive protection of fair and equitable treatment and that FET may not be imported into the BIT. This effectively elucidates the parties' intentions that no protection of fair and equitable treatment is to be expected by either side. Hence, tribunals interpreting FET clauses of this sort will likely reach a dead end, as it would be difficult to interpret the parties' intentions contrary to the text.

When the treaty language does not state the parties' purpose in this manner, tribunals must search for clarity in more subtle clauses in the treaty, in preliminary agreements and in notes. Old generation BITs may have omitted the standard for reasons other than the desire to deliberately avoid granting FET, but this cannot be easily assumed when the BIT in question was signed by the time that the FET standard had already gained its prominence in IIAs. As FET in itself is *not* deemed customary international law, it cannot be interpreted to exist in a BIT that does not explicitly include it under the presumption that the states meant to include it and mistakenly forgot

[312] Ibid..
[313] VCLT *supra* note 17, Article 31.
[314] Article 4.4, Brazil-Guyana BIT, (*Available at*: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5763/download).

to, or simply assumed that it was to be included due to its customary nature.[315] Indeed "[n]o arbitration case was found where a tribunal held that such an FET obligation exists in a situation of a BIT containing no FET clause."[316]

However, recent BITs are often interpreted in a manner that provides a certain measure of protection despite the exclusion of an FET clause. Investors can claim protection under the MST, due to its customary nature, or request to import FET clauses to the relevant BIT through its MFN clause.[317] The following subsections will describe these interpretations, discuss their legitimacy and examine their effects on state regulatory space. It is important to note that this subsection will not address the components of this formulation of FET to the same resolution as the former subsections, because when BITs do not include explicit FET clauses, the former interpretations (FET linked to MST or autonomous FET) are applied with their components, as discussed.

4.3.1 Application of the MST as an alternative to FET

In principle, as customary law, the MST is applicable to IIAs irrespective of whether their treaty language clearly allows it or not. While MST can provide some form of protection in the case where FET is not explicitly granted, as explained above, its scope may be limited, as its exact meaning is unclear and it generally provides narrower protection than FET.

Even in the absence of an FET clause in the investment treaty, "a state has a duty to protect aliens and their investment" under customary international law and the MST.[318] Thus customary standards of protection bind states, subject to treaty language that may exclude it explicitly. This was the case in *Amco v. Indonesia*, in which the arbitral Tribunal dealt with an expropriation of Amco's construction project by the Indonesian government and discussed whether a breach of

[315] Dumberry, *Has the Fair and Equitable Treatment Standard Become a Rule of Customary International Law?,* OXFORD JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 176, p. 23 (2017)
[316] Ibid, p. 22.
[317] MOST-FAVOURED-NATION TREATMENT: A SEQUEL, UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II 13 (2010); An MFN clause is defined as "a treaty provision whereby a state undertakes an obligation towards another state to accord most-favoured treatment in an agreed sphere of relations."
[318] *Amco Asia Corporation et al v. The Republic of Indonesia,* ICSID Case No. ARB/81/1, Award (20 November 1984) para. 172.

international law had occurred.[319] In this case, the Tribunal held that although there was no BIT between the state parties, and therefore no FET (nor full protection and security obligation) under a relevant treaty, the state was nonetheless obliged to comply with customary international law.[320]

However, the ability to enforce the MST depends on the scope of the ISDS clause in the relevant BIT- the wider the scope, the easier it would be to apply the MST.[321]

> *"[T]he jurisdiction of any international tribunal is based on the consent of the parties and is limited by the terms of their consent. Thus, a treaty clause that provides consent for 'all disputes relating to investments' to be submitted to arbitration will provide the basis of a tribunal's jurisdiction ratione materiae, extending beyond the claims based on the treaty, and could potentially cover claims based on other sources of rights and obligations, such as contracts, municipal law and customary international law."*[322]

On the other hand, a BIT with no FET clause but a narrow ISDS clause could make it difficult for investment tribunals to apply the MST. For example, Article 6.21 of the India-Singapore CECA limits the tribunal's jurisdiction to disputes "concerning an alleged breach of an obligation […] under this Chapter,"[323] In this case, it is less likely that an investor's argument to apply the MST would be accepted.

In the case of a BIT with no FET clause and a wide ISDS clause, investors are likely to be granted protection under the MST. While the scope of this protection may be narrower than the autonomous FET,[324] it may still limit regulatory space more than the state party to the IIA may have expected. Therefore, States seeking to limit the regulatory constraints set by the FET standard must also limit the scope of their ISDS clauses.

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[319] Ibid..
[320] Ibid..
[321] UNCTAD report *supra* note 2, 18.
[322] Kate Parlett, *Claims under Customary International Law in ICSID Arbitration*, ICSID REVIEW 13.2, 437 (2016).
[323] India Singapore Comprehensive Economic Cooperation Agreement, (*Available at* https://investmentpolicyhubold.unctad.org/Download/TreatyFile/2707).
[324] UNCTAD report, *supra* note 2, 18.

4.3.2 Importation of FET through the MFN Clause

The MFN clause generally "ensures that a host country extends to the covered foreign investor and its investments, as applicable, treatment that is no less favorable than that which it accords to foreign investors of any third country."[325] If a BIT includes an MFN clause but not an FET clause, investors from a state party to the BIT can request to import the FET from a third party "treaty entered into by the host state" under the argument that the latter provides more favorable treatment than the former.[326] This practice is widely accepted by case law and scholars, although it has potential to greatly limit regulatory space by applying the FET standard where States have "deliberately refused to include a FET clause".[327]

Notable in this regard is *Bayindir v Pakistan*, which involved a BIT between Pakistan and Turkey that did not include an FET clause. There, the claimants sought the importation of an FET clause from a third-party treaty to the relevant BIT through its MFN clause. The Tribunal ruled on this issue that the investors "were entitled to rely on Pakistan's obligation to act in a fair and equitable manner contained in other BITs concluded by Pakistan."[328] What enabled this importation was the analysis of the treaty language, which showed no limitation of this practice, and furthermore, the BIT's preamble, which reflected the importance of FET to the sides despite its explicit exemption from the treaty. From this analysis it was concluded that "the parties to the Treaty did not intend to exclude the importation of a more favorable substantive standard of treatment accorded to investors of third countries".[329] In this case, the combination of the MFN and the preamble allowed the importation of FET, but the tribunal noted that the preamble would not suffice on its own.[330]

Tribunals are generally more inclined to import the FET through MFN when the preamble reflects the parties' acknowledgement of the FET. However in *LESI v Algeria*, which concerned

[325] UNCTAD report 2010, *supra* note 317.
[326] Patrick Dumberry, *Shopping for a better deal: the use of MFN clauses to get 'better' fair and equitable treatment protection*, ARBITRATION INTERNATIONAL 33(1), 2 (2016); *Patrick Dumberry, The Importation of the FET standard through MFN Clauses: An Empirical Study of BITs*, ICSID REVIEW, p. 3-4 (2016).
[327] Dumberry, *The Importation of the FET Standard*, Ibid, p. 2.
[328] *Bayindir, supra* note 112, para. 230.
[329] Ibid, para. 150 and 157.
[330] Ibid, para. 230.

the Algeria-Italy BIT, The tribunal justified the importation of the FET through MFN based on its preamble, despite the fact that it did *not* provide clear indication of the States' interest to include FET, but rather comprised of general, broad language that is found in most BITs.[331] More interestingly, the Tribunal decided that the existence of the MFN clause in itself allows investors to benefit from FET clauses found in Algeria's other treaties, and it seems that the general preamble played a smaller role in this interpretation.[332]

In *Ickale v Turkmenistan*, however, the Tribunal chose a much more restricted approach to the issue, based on the interpretative nature of the preamble and the question of 'similar situations'. The MFN clause in the relevant BIT between Turkey and Turkmenistan established "treatment no less favorable than that accorded in similar situations to investments of its investors of any third country, whichever is the most favorable".[333] Contrary to the *LESI* case, the Tribunal here carefully interpreted the MFN clause and decided that according to its "ordinary meaning" as required by Article 31 of the VCLT, the clause limits the prohibition of discriminatory treatment of investments only to "similar situations".[334] Therefore, in order to import treaty standards from third party agreements, the factual situation at hand must be similar to another situation in which the demanded protection was provided to investors from another State.[335] Furthermore, the Tribunal stated that it would not allow the importation of protection standards simply because they were "not expressly excluded from the scope of the MFN clause".[336] As to the preamble to the BIT, which in that case *did* refer to FET directly, the Tribunal ruled that according to international law, the preamble does "not create binding legal obligations" in itself, and therefore cannot be used to import FET, which was excluded from the BIT.[337]

The reviewed case law demonstrates that while tribunals adopt different views to the qualifications on the importation of FET through MFN, it is generally accepted that FET can be imported to BITs that do not explicitly include it. This practice is problematic where one accounts

[331] Dumberry, *The Importation of the FET Standard*, *supra* note 326, p. 10-11; *L.E.S.I S.p.A. et Astaldi S.p.A v. Republique algerienne democratique et Populaire*, ICSID case No. ARB/05/3, para 151.
[332] Dumberry, Ibid, 10-11; *LESI v Algeria*, Ibid, para. 150.
[333] *Ickale Insaat Limited Sirketi v. Turkmenistan*, ICSD Case No. ARB/10/24, para. 326.
[334] Ibid, para. 328.
[335] Ibid..
[336] Ibid, para. 330.
[337] Ibid, para. 337.

for the growing practice to intentionally exclude FET, for it undermines the parties' consent, the corner stone of investment treaties.[338] The practice becomes even more controversial when investors try to import *better* FET clauses through the MFN in BITs that *do* include an FET clause. Tribunals have generally accepted that if the wording of the MFN clause is broad enough and does not exclude certain interpretations, investors can use the clause to receive "better substantive rights contained in another treaty entered into by the host state".[339] This essential bypass of the existing FET wording in a BIT is challenging for states that seek legal certainty in their agreements in order to prevent restrictions on their regulatory space.

Furthermore, it seems that in this process, tribunals have the freedom to choose the FET clause to be imported into a BIT, meaning that not only could an FET be included against the parties' intentions, the states have little control over which interpretation of the FET would be imported. In *Rumeli v Kazakhstan*, a balanced approach was chosen, as not only did the respondent not object to the importation of FET into its BIT which excluded it, Kazakhstan even requested the specific third-party FET to be applied and demanded that the clause be limited to the scope of FET linked to MST.[340] By agreeing to this, the tribunal managed to limit Kazakhstan's regulatory space while also limiting the scope of protection under FET to the minimum- essentially creating a well-balanced provision in this case, to satisfy both parties.[341]

As this is not the case in all tribunals, states seeking to limit restrictions on their regulatory space would be wise to use precise wording. Parties that choose to omit the FET should clarify within their agreements the protection that will and *will not* be provided to investors. Furthermore, to limit potentially expansive interpretation of BITs with no FET by investment tribunals, States may consider narrowing their MFN clauses to exclude certain measures of protection, or completely removing MFN clauses from their agreements. Such a change could be quite difficult to negotiate, although the recent Indian Draft Model BIT has done so, as will be discussed in the next section.

[338] Dumberry, *The Importation of the FET Standard*, *supra* note 326, p. 13-15.
[339] Dumberry, *Shopping for a Better Deal*, *supra* note 326, p. 4 and 11. 1
[340] *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v. Kazakhstan*, *supra note* 77, para 592-597.
[341] Ibid, para. 609-611.

4.4 Conclusion

In this section we have mapped three different FET formulations as they appear in recent IIAs. These formulations are FET Linked to MST; Unqualified FET; and No FET. We have also analyzed the subdivisions in each formulation, exploring the impact of each on the state's regulatory space. This evaluation was performed with the components described in detail in the previous section.

Furthermore, it is evident in all three of the common formulations that the more detail is given in regard to the content of the FET clause, the more legal certainty is provided to both investors and states. While the explicit link between the MST and FET may add an amount of certainty in regard to the content of the clause in a specific BIT, questions remain concerning the fundamental components of the MST. Nevertheless, when the FET is unqualified or omitted from the BIT, the MST is often applied and serves to provide investors with protection regardless of the state parties' intentions in phrasing the BIT. As is to be expected, the less specific the FET clause, the more room there is for tribunals' interpretation and application or importation of protective obligations, which in turn limits state regulatory space.

However, as discussed in the previous section, even when the FET clause *is* specified, protective standards can be imported to the BIT through the MFN clause, and in cases where the MST is not explicitly mentioned, its components may still be applied through interpretation. The following section will discuss contemporary IIAs that reflect the states' understanding of the risks that the three models discussed pose to their regulatory space, and their attempt to protect their regulatory space through the limitation of legal uncertainty.

5. Emerging Trends

The general indeterminacy surrounding the FET principle and its constituent components, and the wide interpretation of the principle by arbitral tribunals, has brought states to take protective measures in the form of new or revised IIAs, in order to prevent the limitation of their regulatory space. The following three FET models - the Comprehensive Economic and Trade Agreement between Canada and the EU (CETA), the 2016 Indian Model BIT, and the recent Argentinian Model and IIAs, reflect this movement towards specification in IIAs. Interestingly, each of the new models is based on one of the three basic models presented earlier, but adds unique additional content that serves to fix the flaws of the earlier models.

5.1 The Comprehensive Economic and Trade Agreement - CETA

In 2016, the European Union (EU) and Canada signed the Comprehensive Economic and Trade Agreement (CETA).[342] The wording of the agreement led to significant changes in the understanding of a number of fundamental principles, including FET. Here we focus on the FET clause found in Article 8.10 of the CETA, specifically on two fundamental characteristics of the clause - the absence of any reference to the MST, and the inclusion of a closed list of FET components.[343] These two characteristics represent a certain change in the European approach, and therefore a separate reference to this model is essential.

The final text of the clause in Article 8.10, entitled 'Treatment of Investors and of Covered Investments', reads as follows:

> *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.*[344]

[342] CETA, *supra* note 5.
[343] MAKANE MOÏSE MBENGUE AND STEFANIE SCHACHERER (EDS.), FOREIGN INVESTMENT UNDER THE COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT (CETA), SPRINGER 98-102 (2019).
[344] CETA, *supra* note 5, Article 8.10.

It is evident that there is no reference to a connection between the FET shown in this section and the MST as part of customary international law. The absence of reference leaves a seal that recognizes the evolving nature of the FET standard.[345] In other words, the most significant change in CETA in this context is the disconnection of the link between the contents of FET and the MST.[346] The FET stands alone as an independent, autonomous, concept and covers specific content under its umbrella.

The second notable feature about CETA is the list of components that define the FET.[347] Article 8.10(2) of the CETA is the first clause which contains a closed list of different situations involving a breach of the FET obligation.[348]

> *2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes:'*
> *(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.*
> *(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* [349]

The components of FET as presented in Article 8.10 are: denial of justice, due process, transparency, manifest arbitrariness, discrimination, abusive treatment. This is a direct, explicit application of some of the components discussed in Section 3, leaving no room for interpretation of their existence or the possibility of their importation into the BIT. In the absence of tribunal decisions concerning CETA, there are no new interpretations of the components shown in the closed list. Therefore, the remainder of the discussion in this section will deal with the general effect of this model on regulatory space.

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[345] Mbengue, *supra* note 343, p.103.
[346] Ibid..
[347] Dumberry, *supra* note 7, p. 4.
[348] Ibid, p.44.
[349] CETA, *supra* note 5, Article 8.10.

The substantive sub-section of the discussion relating to regulatory space is Article 8.10(2)(f). This Article allows the importation of additional elements under the FET umbrella and leaves a small opening to add elements to the closed list presented above. Through this opening, states can adopt additional content into the FET through a special committee established under this treaty. The Committee will draw conclusions and formulate recommendations regarding the new elements and submit them to the CETA Joint Committee for decision.

The very creation of the closed list presented in CETA increases certainty. A comparison of the models presented in Section 4 to the CETA model shows a trend of eliminating the ambiguity hovering around principles such as MST and FET. The window created by the special section constitutes a sort of equilibrium point that balances the state's need for regulatory freedom.

In sum, Article 8.10 is unique and innovative for several reasons when compared to other types of FET clauses that are typically found in IIAs. As noted above, the absence of a link to the MST, along with a closed list that infuses content with the FET principle, leads to the creation of a 'new generation' of investment protection clauses.[350] These clauses pour new and specific content into old principles and thus constitute an important development of the same principles. The FET clause is the best example for this issue. The uniqueness of CETA reduces regulatory space by adding transparency and certainty to a vague and controversial concept. Article 8.10 of the CETA seems to be the natural and logical outcome of states' increasing willingness to narrow the scope of the FET standard and to circumscribe its interpretation by tribunals.[351]

5.2 The Indian 2016 Model BIT

India's new Model BIT[352] includes no FET provision, and interestingly also omits an MFN clause. Importantly, this model does not raise the ambiguity that is characteristic to IIAs in the "no FET" category, as it replaces the common FET clause with a short list of obligations that grant protection to investors;

[350] Mbengue, *supra* note 343, p.101.
[351] Dumberry, *supra* note 7, p. 42.
[352] The Indian Model BIT (2016) (*Available at* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3560/download) - this model is also sometimes referred to as the 2015 Indian Model BIT.

Article 3.1: No party shall subject investments made by investors of the other party to measures which constitute a violation of customary international law through:

(i) Denial of justice in any judicial or administrative proceedings; or

(ii) fundamental breach of due process; or

(iii) targeted discrimination on manifestly unjustified grounds, such as gender, race or religious belief; or

(iv) (iv) manifestly abusive treatment, such as coercion, duress and harassment.

The provision adds in the accompanying footnote that: "for greater certainty, it is clarified that "customary international law" only results from a general and consistent practice of States that they follow from a sense of legal obligation."[353]

Unlike the classic models and even the BITs that explicitly link the FET to MST, the Indian model specifies the exact forms of protection granted under the umbrella of MST, stating some of the components discussed in Section 3 and even specifying the threshold of breach in each component. The clarification pertaining to the definition of customary international law minimizes even further the room for interpretation by tribunals and prevents investors from benefiting from the ambiguity of the MST. While there is no mention of FET in the Model, a certain measure of protection is given to investors, and the question of its adequacy is yet to be discussed in future jurisprudence.

Unlike its predecessors, the Indian Model BIT also adds legal certainty by omitting and explicitly rejecting certain principles. Transparency, for example, is requested of both parties to the model in Article 10, but protection of investors' legitimate expectations was not mentioned in the model. Contrary to classic 'No FET' models, investors will not be able to request the importation of protective standards that were not included in the Indian Model from third party BITs, as this model intentionally omitted the MFN clause and narrowed its ISDS clause to prevent such importation and interpretation.

Instead of the MFN clause, the Model developed its 'national treatment' clause, and added further clarification in order to minimize room for interpretation;

Article 4.1*: Each Party shall not apply to investor or to investments made by investors of the other Party, measures that accord less favourable treatment than*

[353] Ibid, Article 3.1, footnote 1.

> *that it accords, in like circumstances, to its own investors or to investments by such investors with respect to the management, conduct, operation, sale or other disposition of investments in its territory.*[354]
>
> ***Footnote 2**: For greater certainty, whether treatment is accorded in "like circumstances" depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate regulatory objectives. These circumstances include, but are not limited to, (a) the goods or services consumed or produced by the investment; (b) the actual and potential impact of the investment on third persons, the local community, or the environment, (c) whether the investment is public, private, or state-owned or controlled, and (d) the practical challenges of regulating the investment.*

While it seems that Article 4 provides protection that is similar to the MFN clause, the footnote provides detailed boundaries for the interpretation of 'like circumstances.' This tool, also seen in the *Ickale v Turkmenistan* in Section 4.3.2, allows India to block potential claims of discrimination and the importation of unwanted protective measures by tribunals.

The Indian Model's ISDS clause, Article 15, narrows the possible claims to arbitration to a closed list found in Chapter II of the Model, which includes the obligations of treatment of investments discussed above, national treatment, expropriation, transparency and more. The clause requires investors to first submit their claims in domestic Indian courts within one year of the alleged breach, and only allows investors to submit a claim to arbitration after it exhausted "all judicial and administrative remedies."[355] Not only does it prevent unnecessary arbitration claims, this narrow ISDS clause prevents application of standards outside the model, including components of MST that were not mentioned in the model and do not fit the requirements under footnote 1. In turn, this provides India with a large measure of regulatory space.

Ultimately, while it omits the FET, the Indian Model BIT provides extensive and precise detail concerning investment protection that seems to suffice in protecting investors, but more importantly protects India's regulatory space far more than the classic models of FET. It seems that the Indian Model was crafted following extensive research of FET models and arbitral jurisprudence on the issue, with the prominent aim of maximizing India's regulatory space. However, only future jurisprudence will tell how effective the model will be in serving India's goal.

[354] Ibid., Art. 4.1.
[355] Ibid., Art 15.1-15.2.

5.3 Recent Argentinian Treaties

In the early 2000s Argentina dealt with an economic crisis which subsequently led to lawsuits based on Argentina's BITs.[356] As a result, The Argentinian government did not sign new BITs between 2001 and 2016. The new Argentinian model reflects the Argentinian government's attempt to create BITs that aim to reduce the uncertainty in the treaty's interpretation, and to properly balance between the protection of investors, and the preservation of the regulatory space of the state.

In 2016 Argentina signed a new BIT with Qatar, which was then followed by the signing of two BITs with the United Arab Emirates and Japan in 2018.[357] These BITs differ slightly in their wording and include clarifications and restrictions on the scope of the FET.

The recent Argentinian drafting explicitly links FET to Customary International Law by articulating that the host state must treat an investor; "in accordance with customary international law, including fair and equitable treatment and full protection and security.[358]" The BITs with the UAE and Japan include a clarification that the protection provided by the FET excludes any protections that is beyond the protection provided by "customary international law minimum standard of treatment of aliens".[359] This essentially sets the MST as a ceiling, as explained earlier in Section 4.

The Argentina-Japan BIT articulates that "[f]or greater certainty, a change of the regulation of a Contracting Party does not constitute by itself a breach of the preceding sentence."[360] In the Argentina-Qatar and Argentina-UAE BITs, the wording is clearer in protecting the host states' ability to make regulatory changes, stating clearly that regulatory changes designed to protect

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[356] Yoram Z. Haftel and Hila Levi, *Argentina's Curious Response to the Global Investment Regime: External Constraints, Identity, or Both?*, JOURNAL OF INTERNATIONAL RELATIONS AND DEVELOPMENT, p. 4 (2019).
[357] Argentina-Qatar BIT (2016) (*Available at* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5383/download); Argentina-United Arab Emirates BIT (2018) (*Available at* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5761/download); Argentina-Japan BIT, *supra* note 73.
[358] Argentina-Japan BIT, *supra* note 73, Art. 4.1; Argentina-UAE, ibid, Art. 5.1. 1
[359] Argentina-Japan BIT, *supra* note 73, Art. 4.2(a); Argentina-UAE, *supra note* 357, Art. 5.2.
[360] Argentina-Japan BIT, *supra* note 73, Art. 4.1.

public order, health, environmental protection or economic policies, which do not discriminate between investors from different States will not be considered as a breach of the BIT.[361]

Argentina's recent BITs contain an MFN provision, and the BIT explicitly limit claims using the MFN clause by adding specific clarification.[362] This is evident in Article 4 of the Argentina-UAE BIT:

> *3. For greater certainty, treatment accorded in "like circumstances" pursuant to this Article will depend on all the circumstances, including the distinction between investors or investment on the basis of legitimate objectives of public welfare.*
>
> *4. For greater certainty, the provisions in this Article shall not apply to incorporate substantive provisions on treatment which are not contained in this Agreement or to exclude rights or powers of the host Party which are provided for herein.*[363]

By limiting the definition of "like circumstances," Argentina avoids wide interpretation of the clause that would grant investors unwanted protection. Moreover, Article 4.4 limits the claims for a breach of the MFN clause solely to provisions and standards of treatment that are included in the treaty. This ultimately prevents the importation of better FET provisions or other protective standards from third-party BITs.

> *7. The provisions of this Article shall not apply to invoke a more favourable treatment accorded by either Party under bilateral investment treaties or other agreements containing provisions relating to investments signed prior to the entry into force of this Agreement.*[364]

Article 4.7 of the Argentina-UAE limits the application of MFN even further, rejecting claims of breach that compare the standards of the BIT to earlier agreements. Without this clarification, investors could potentially compare the BIT to all of Argentina's earlier BITs, making the intentional limitation of investor protection in the new model effectively void. Had Argentina not included this clarification to the MFN clause, it would have had to terminate all prior agreements in order to reach the same effect. Therefore, the limitation provided in Article 4.7 seems to effectively protect Argentina's interests and prevent the importation of unwanted provisions to the BIT.

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[361] Argentina-UAE, *supra* note 357, Art. 5.4; Argentina-Qatar, *supra note* 357, Art. 10.
[362] Argentina-Japan, *supra* note 73, Art. 3.5; Argentina-UAE, *supra note* 357, Art 4.
[363] Argentina-UAE, ibid, Art. 4.3-4.4.
[364] Argentina-UAE, ibid, Art. 4.7.

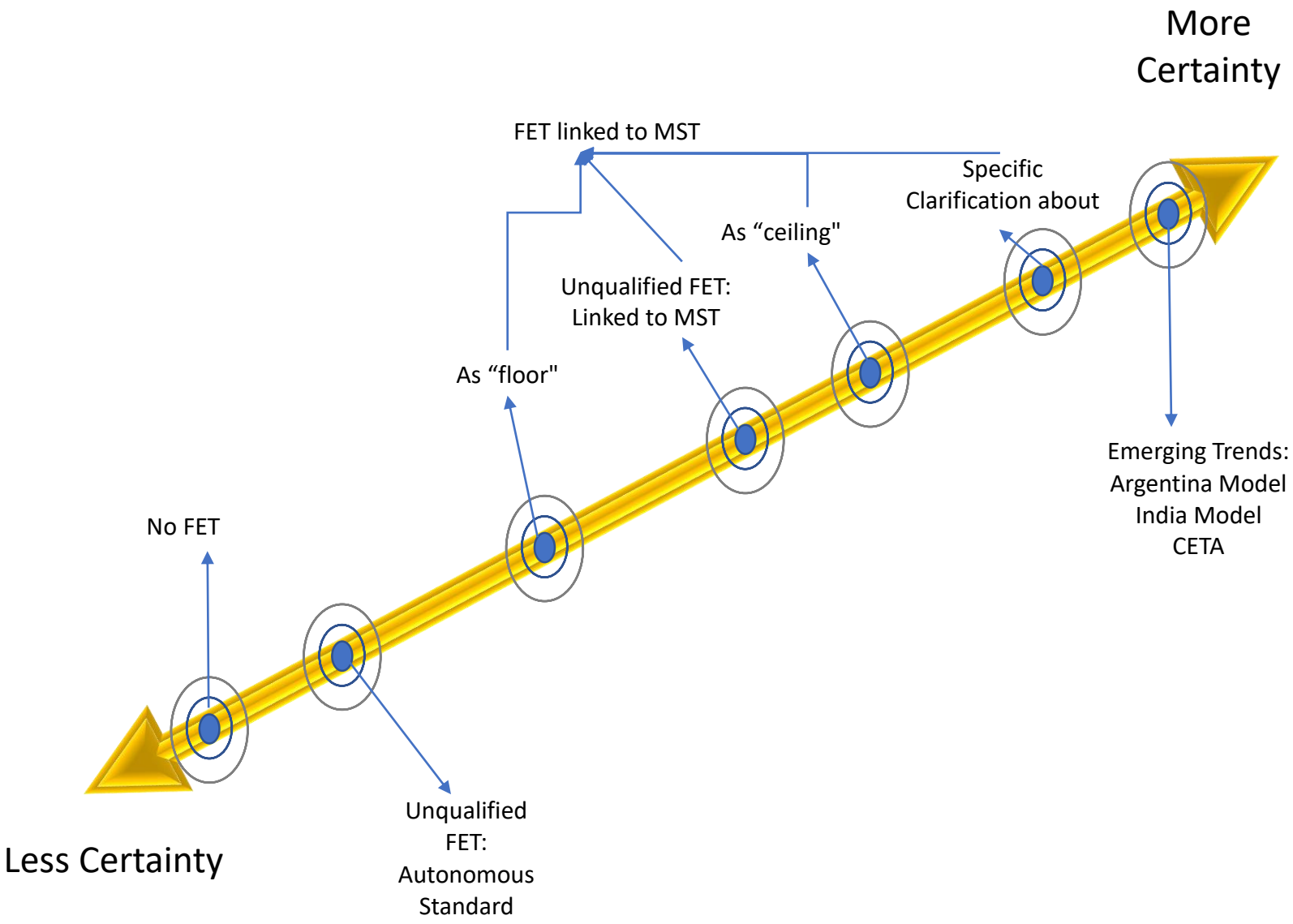
Furthermore, the BITs with Japan and the UAE add clarification that FET includes the obligation to protect due process, but it is limited to be; "in accordance with the principle of due process embodied in the principal legal systems of the world."[365]

The Argentinian model aims to design a more limited FET that will likely better protect the host state's regulatory space. This is done by modeling the FET as linked to MST, as this link narrows the discretion that tribunals have in defining what are the components of the FET. Secondly, the Argentinian model explicitly emphasizes the expansion of the state's regulatory space and the possibility that the state will make regulatory changes. The model contains a term that exempts from violating the FET in cases that the regulatory changes were made for the protection of the public, such as maintaining public order and public health.

The Argentinian model is unique in its clear language which results in a wider regulatory space for the state. This is a result of the clear wording of the FET and the direct exclusion of certain protective standards from the BIT, which both function to limit the protection provided by the FET and grant greater certainty to both parties.

[365] Argentina-UAE, *supra* note 357, Art. 5.2(a).

The Certainty Spectrum: a ranking of the FET models based on the level of legal certainty they provide.



6. Conclusions

The aim of this memorandum was to find the formulation of FET clauses in investment treaties that adequately reflects the state's desired balance between the protection of investors, on the one hand, and the state's right to regulate, on the other hand. This was done by creating a practical description and analysis of the FET standard as it is found in treaties, jurisprudence and scholarly works.

In the memorandum we first described in Section two the two basic concepts of FET and MST and framed the legal discussion. In the third section we mapped the different FET components, using a wide range of tribunal awards, BITs and scholarly works. The components discussed were: 1) legality 2) procedural due process 3) legitimate expectations 4) stability, predictability, and consistency 5) transparency 6) good faith 7) arbitrariness 8) non-discrimination 9) proportionality and reasonableness. This description of the different FET components was designed to further analyze each component and to enable a greater understanding of the different FET formulations and their differences later in the memorandum.

In Section four, after analyzing existing scholarly works and arbitral awards, we mapped three main FET formulations as they appear in IIAs: 1) FET Linked to MST; 2) Unqualified FET; 3) No FET. Each type of FET was then divided into sub-categories which described their main differences and similarities according to the FET components discussed earlier in Section 3.

In Section five we described recent trends in IIAs, focusing our analysis on: CETA; the 2016 Indian model BIT and recent Argentinian treaties. These recent trends show an attempt by states to deal with the shortcomings of the classic FET formulations previously discussed. The two main characteristics common in all three models that were described are an attempt to create greater certainty and to balance protection of foreign investors and the states' regulatory space.

After examining the different FET models, it is clear that there are limitations to each model, which vary in their impact on the state's regulatory space, as described extensively in Section 4. Furthermore, in regard to the specific components of the FET, as seen in Section 3, each set of components may lead to a different balance between the state and the foreign investor. As such, considering that each IIA includes a unique set of interests, our aim is to maximize the legal certainty to both parties of the agreement and therefore this memorandum does not specify any

desired components or balances between the parties. This is a required deviation from our original aim to establish a desired balance between the party's interests, since we assume that only the parties would be able to find the desired balance suitable to them.

Following this rationale, our claim is that the model which would maximize certainty, and therefore is the desired model, is **FET linked to MST with specific clarification**. First, as seen for example in CETA, adding specific clarifications has received major scholarly support as an attempt to clarify the components of the FET in the IIA. This means that regardless of the components chosen by the parties, specific clarifications would enhance the legal certainty of the FET. Second, adding a link to MST limits interpretation of the IIA to customary international law. It is important to note that, as extensively described above, the MST standard is uncertain but is covered by a large pool of arbitral awards and scholarly writings which adds to its degree of certainty. In other words, the link to the MST creates necessary boundaries to the FET, even if they are somewhat unclear. A strong reflection of this recommendation is seen in the Morocco-Nigeria BIT (2016).[366]

Lastly, it is important to note that in drafting a BIT, the parties need to find the right balance between the two conflicting interests; on one hand the states' regulatory freedom and on the other, the protection of foreign investors in the state. Understanding that each investment treaty reflects a unique assortment of interests, there cannot be one formula that would fit all treaties. The interests of the states which are parties to an IIA are not purely legal, but include many practical constraints, such as inequality in negotiating power between the states. These constraints were not addressed in this memorandum.

On a side note, as explained above in Sections 4 and 5, parties to an agreement who seek legal certainty, should consider the effect of the MFN clause on their investor protection standards, as the MFN clause could be used to import standards of treatment previously given to investors in present treaties. It is recommended to bear in mind the possibility of limiting or completely erasing the clause as seen in the recent Indian and Argentinian treaties.[367] However, as this is not the main subject of this memorandum, the discussion on this topic is limited.

[366] Morocco-Nigeria BIT, *supra* note 269.
[367] See further analysis in Section 5 and under the No-FET model in Section 4.

Considering all of the above, our aim in this memorandum has changed from offering a "fit all" FET model, to providing parties with a wide variety of tools and indication in drafting new FET clause, in order to maximize their legal certainty, under the different possible negotiation constraints.