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Limiting the Fair and Equitable Treatment standard in favor of the host state

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Contents

Summary

This paper focuses on FET standard from the perspective of the host state. Assuming that the FET standard is problematic and too investor friendly, the question is how the FET standard may be limited in favor of the host state without the investor losing an unreasonable amount of protection. In search of the answers to this question, the paper focuses on the content and components of the FET standard as well as the issue that the many different formulations of the FET standard prevents a coherent system. After a review of the content and the substantive difference between different FET formulations the conclusion found in this paper is that the most problematic aspect of the FET standard is the doctrine of legitimate expectations. A solution to this might lay in the different FET formulations, as the different formulations provides different interpretations of the doctrine of legitimate expectations. The formulation of the FET standard in the recently negotiated CETA is briefly mentioned and discussed as a possible solution to the problem, but not entirely without flaws.

Sammanfattning

Denna uppsats är fokuserad på FET-standarden från värdlandets perspektiv. Uppsatsen förutsätter att FET-standarden är problematisk på så vis att den gynnar utländska investerare för mycket på värdlandets bekostnad. Frågan är hur FET-standarden kan begränsas till förmån för värdlandet utan att investeraren förlorar sitt skydd. För att besvara denna fråga undersöker uppsatsen FET-standardens innehåll och olika komponenter. Den tittar även på hur olika formuleringar av standarden skiljer sig åt och om detta försvårar en konsekvent tillämpning av standarden. Efter en genomgång av FET-standardens innehåll och avgörande skillnader mellan olika FET formuleringar, kommer uppsatsen fram till att en av de mest problematiska aspekterna med standarden är doktrinen om ”legitimate expectations”. En lösning på detta problem kan finnas i de olika FET formuleringarna som finns, eftersom doktrinen i vissa av dessa tolkas på ett sätt som är mer gynnsamt för värdlandet. Formuleringen av FET-standarden i det nyligen framförhandlade investeringsavtalet CETA nämns och diskuteras som en möjlig lösning på problemet men inte helt utan brister.

Abbreviations

BIT	Bilateral Investment Treaty
CAFTA-DR	Dominican Republic - Central American Free Trade Agreement
CETA	EU-Canada Comprehensive Economic and Trade Agreement
FET	Fair and Equitable Treatment
FCN Treaties	Friendship, Commerce and Navigation Treaties
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICSID Convention	International Centre of Settlement of Investment Disputes Convention
IIA	International Investment Agreement
MST	Minimum Standard of Treatment / International Minimum Standard
NAFTA	North American Free Trade Agreement
OECD	The Organization for Economic Co-operation and Development
SICJ	Statue of the International Court of Justice
UNCTAD	United Nations Conference on Trade and Development
VCLT	Vienna Convention on the Law of Treaties

1 Introduction

1.1 Background

International Investment Agreements (IIAs) and Bilateral Investment Treaties (BITs) can be a source of controversy, as there has been some debate as whether it is reasonable for a state to sign them at all. Some authors argue that there is nothing for the host state to be gained from signing them, yet at the same time they risk being sued through investor-state arbitration for millions of dollars.[1] This paper will not engage in this debate, instead I have assumed that there is something to be gained from signing IIAs and BITs for the state, and that promoting foreign investment can be a way to create jobs and favorable conditions for the host state.

But even if we assume that IIAs and BITs in general are beneficial for the state that sign them, there is still a fear that the treaties are too investor friendly at the cost of the host state. One of the most common investor claims is that the host state has breached the fair and equitable treatment (FET) standard, a general treatment clause commonly found in IIAs and BITs which also is the claim with the best success rate. There is a fear that fair and equitable treatment is too generous for the investor and that it hinders the host state actions too much. Whether this is the case or not is to a certain degree a matter of politics, as it depends on whether one would prefer a power balance in favor of the state or private corporations.

In 2012 the United Nations Conference on Trade and Development (UNCTAD) published a study with the name *Fair and Equitable Treatment - Series on Issues in International Investment Agreements II*, in which several cases from tribunals all over the world were discussed and analyzed in regards to the fair and equitable treatment standard. This treatment standard entails that the host state must behave in a certain way towards investors from another contracting state. Thus the investor is guaranteed a certain

[1] Van Harten, Guz. Five Justifications For Investment Treaties: A Critical Discussion. *Trade, Law and Development,* Vol II:19 (Spring 2010). pp. 28-35.

level of treatment, which encourages the investor to invest in the host country.

The problem with the FET standard, which also was one of the reasons to conclude the above mentioned study, is that it is vague and imprecise. This results in that the arbitrators in an investor-state dispute may interpret the clause differently from case to case, and in the worst case scenario the application of the standard may appear arbitrary. As it stands today, critics against the international investment law regime claim that the FET standard has evolved into a treatment standard which favors the investors and impedes the contracting states legislative powers in a way not initially intended and, in a democratic state, not wanted.[2]

1.2 Purpose and research questions

In this paper I have assumed that the FET standard, as it stands today, imposes too much constraint on the host state's actions. I believe that too investor friendly treaties may hinder the development of the host state, affecting its possibilities of introducing, among others, new environmental regulations, changes in its fiscal regulations and other policies which may affect the investor negatively. This means that I think that the rights of the investors should be limited in favor of the host country. There are major problems with the FET standard. Its content is not clear, and this makes the application of the standard unpredictable, and in the worst case scenario it is applied arbitrarily. This issue is further enhanced by the fact that there exist several different formulations of the FET, which creates uncertainties on whether there exist different kinds of FET standards and how they differ in relation to each other.

The FET standard is an umbrella type of clause, which includes prohibition on different types of host state conduct. The FET regulates the relationship between the investor and the host state, focusing on the host state's actions

[2] United Nations Conference on Trade and Development. *Fair and Equitable Treatment - UNCTAD Series on Issues in International Investment Agreements II*. 2012. p. 2.

against the investor. As such, there are several components to the FET, several different kinds of prohibitions. In this paper I will examine each of these different components, and in the final chapter analyze if they impose unreasonable restrictions on the host state actions.

Further, I will discuss the different types of FET and how they differ. There are signs that the different types of FET are converging, which will also be a subject of this paper. If the different types of FET are converging, this could very well be a good thing as this would promote a coherent system. But if they are converging, one needs to understand towards which direction. One FET formulation seems intended to be more narrow (limits the rights of the investor in relation to the host state) than other formulations, so one question of interest is if this means that this formulation is becoming wider, or if the others are becoming more narrow?

The FET formulation I have in mind is the one which links the FET to the minimum standard of treatment in accordance with the customary international law (MST). This FET formulation, which appears in this paper due to its existence in the North American Free Trade Agreement (NAFTA) and the Dominican Republic - Central American Free Trade Agreement (CAFTA-DR), has been interpreted to equal the MST standard. But despite that it is clear from the IIA that this is the way the FET formulation in the treaty is to be applied, scholars agree on that it is unsure whether the FET linked to the MST has the same content and application as the MST in accordance with international customary law. This paper will focus on the relation between the different FET formulations, and not on the relationship between FET and the MST outside of the context of international investment agreements.

The questions I aim to answer in this paper are the following:

1. Which are the problematic aspects or components of the FET standard, and what can be done to limit their scope in favor of the host state but

still provide good enough protection for investors as to promote foreign investment?

2. How do the different FET formulations relate to each other and are they converging? If they are converging, in which direction?

1.3 Method

In this paper I will utilize the method of legal dogmatics, a method one can describe as interpreting the defined sources of law as a means to analyze and solve issues relating to the applicable legal framework.[3] In domestic law, the sources of law are usually the written laws, any relevant governmental documents in regards of those laws (such as the preparatory works) and the practice of the courts in the country. In regards to international law, it is usually considered that the Article 38 in the Statue of the International Court of Justice (SICJ) itself is considered a rule of international law and thus applicable even outside of the International Court of Justice (ICJ).[4] The articles reads as follows:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

This means that we have three main sources of law, which are all relevant for this paper. The main focus will be on rules originating from treaties (a) since the focus on this paper will be on the interpretation of treaties and on

[3] Korling, Fredric and Zamboni, Mauro (eds.). *Juridisk metodlära.* Lund: Studentlitteratur AB, 2013. pp. 21.

[4] Linderfalk, Ulf (eds.). *Folkrätten i ett nötskal.* Lund*:* Studentlitteratur, 2012. pp. 26-27.

awards from investor-state arbitration (which is not possible without a treaty). But when interpreting treaty provisions, rules originating from other sources of international law will become relevant.

To prove the establishment of an international customary rule one must prove that states follow this rule because of a sense of legal obligation, a so called *opinio juris.* Within the international investment regime investor-state arbitration has played an important role in developing the FET standard, even though awards have no binding precedent. But since past awards have a great influence on the FET standard they are here treated as a source of law within the international investment law regime, a regime in which international treaty constitute the main body of law.[5]

This study is to some extent depending on the above mentioned UNCTAD study. In this study most, if not all, awards up until 2013 were examined to give a detailed view of the issues and problems with the FET standard. As to not simply re-state or control all of the findings in this study, I will base my examination of awards not included in this study. As such, I will look at awards which were published between 2013-2015 and examine:

1. which components the arbitrators believe to be part of the FET standard and if there are any issues with the components which become apparent through the Tribunal's interpretation,
2. how the wording of the standard affect which components it entails and which level of treatment the host state needs to uphold, and
3. if there is any evidence in the recent cases of the different FET standards converging.

As a basis for this paper I have used the database available at italaw.com, the same databased used in the UNCTAD study. A search of all available awards for respective year yielded the following results:

[5] Linderfalk, 2012, pp. 28-30.

Year	2013	2014	2015
Number of cases	39	32	25

This amounts to a total of 96 awards between the years 2013 and 2015. From this number the following awards have been excluded:

1. All awards which only concern jurisdiction or in which the Tribunal found that they lacked jurisdiction.
2. All awards which only regard the quantum.
3. All awards in which the Tribunal does not try the FET-claim. (For example if the Claimant been successful in another claim which makes it unnecessary for the Tribunal to try the FET-claim.)
4. All awards in another language than English.
5. All awards based on an IIA or BIT which have not been translated to English.

This leaves us with a number of fourteen awards where the FET standard has been analyzed by the Tribunals, whereas five are from 2013, six from 2014 and three from 2015.

1.4 Material and Literature

The main material of this paper is the cases examined. To find investor-state arbitration awards I have used the database available at italaw.com. Investor-state arbitration awards have historically been rather hard to find, since many of the awards are not made public. In the last years it seems as there has been a trend of making the investor-state arbitration process more transparent, and as a part of that goal more and more awards are made freely available. A search for all awards published between the years 2013-2015 yielded 96 cases, and these have been the basis for my examination. After the elimination process described above, only fourteen relevant cases remained.

Other than cases this paper also relies on the portrayal of the FET done by Salacuse in his book *The Law of Investment Treaties*. Another prominent book is Rudolf Dolzer's and Christoph Schreuer's *Principles of international investment law*. This paper includes an overview of the international investment regime with the main content of these chapters originating from established literature. But the main focus of this paper is on the examination of the cases and what one can learn from them regarding the content and evolution of the FET standard.

1.5 Disposition

This paper begins with presenting an overview of important and basic concepts relevant for this paper in Chapter 2. The focus of this part of the paper is on the interpretation of treaties as well as the role of past awards from investor-state arbitration in the international investment regime. In Chapter 3 the analysis of the FET standard begins with a presentation of different FET formulations, followed by the different components of the FET. In this chapter there will be references to the cases examined when these are relevant for the component, and an understanding of the different components are important to have when we in the final chapter of the paper discuss the problems with the FET standard. Chapter 4 is focused on the differences and similarities of the different FET formulations. This is an important aspect of the criticism that the FET standard is vague, since seemingly similar treaty terms may be applied differently and also vice versa; namely that seemingly different treaty terms may be applied in the same way. Chapter 5 is the final chapter, in which I will discuss what I found to be the main problems with the standard as well as a summary of the evidence found among the cases examined on whether they are converging or not.

2 Basic concepts within the international investment law regime

2.1 Introduction

In this chapter I will present some of the basic concepts one needs to know and consider when examining investor-state arbitration awards. Firstly I will present the rules for the interpretation of treaties, since what this paper will focus on is how the arbitrators have interpreted the FET standard. Secondly, I will shortly discuss the role of past awards within international investment regime. As this paper uses past awards to define the content of the FET standard one needs to address the lack of binding precedent in the regime. Lastly, this chapter will present an overview of the FET standard and the MST standard, before we go into the substantive content of the FET standard in the next chapter.

2.2 The interpretation of treaties

A major part of the body of law within the international investment regime originates from treaties, either in the form of IIAs or BITs. The Vienna Convention on the Law of Treaties (VCLT) is applicable when interpreting treaties, and in article 31, article 32 and article 33 the basic rules of interpretation is set out.[6] The general rules of interpretation are explained in article 31, which states that a treaty shall be interpreted "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". As such the article present us with three elements one must consider: (1) the ordinary meaning of the terms, (2) the context of the treaty terms and (3) the treaty's objective and purpose.

[6] The interpretations rules in VCLT are generally considered to be international customary law and thus binding even if the host state has not signed the convention. See Evans, Malcom (eds.) *International Law*. Oxford: Oxford University Press, 2014. pp. 193-197.

If one finds that a treaty text is still ambiguous or unclear after one has considered the three elements mentioned above one can turn to article 32 of the VCLT.

In regards to the FET standard, some of these rules in the VCLT provide little to no guidance. If one is to begin with looking at the ordinary meanings of the words "fair" and "equitable", one would simply find other terms which are equally vague. One can hardly provide a comprehensive definition of the FET using this method, which has been noted by the Tribunal in *Saluka Investments v. The Czech Republic*.[7] In regards to the FET standard one is more likely to find guidance when one goes to the next steps mentioned above: (2) the context of the treaty terms and (3) the treaty's objective and purpose.

According to article 31 (2) of VCLT the context for the purpose of the interpretation consists of the following: (1) the treaty text, (2) preambles and annexes, (3) "any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty" and (4) "any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty". This makes it possible to use, for example, diplomatic correspondence relating to the treaty between contracting states when interpreting the treaty.[8]

When interpreting the FET standard it is not uncommon for the Tribunal to look at the context of the term as well as the treaty's objective and purpose.[9] In most investment treaties, whether they are IIAs or BITs, the objective and purpose can be discerned early on in the document, often in the preamble. The purpose with investment treaties is usually to promote investment, and

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[7] *Saluka Investments B.V. versus The Czech Republic*, UNCITRAL Rules, Award, 17 March 2006, para. 297.

[8] Salacuse, Jeswald. *The Law of Investment Treaties*. Oxford: Oxford University Press, 2010. p. 147.

[9] Salacuse, 2010, p. 147.

this purpose could be used as an argument to interpret the FET standard extensively, in favor of the investors. That a balance between the opposing interests of the investor and the host state must be considered when interpreting the FET has been noted by, among others, the Tribunal in *Saluka Investments v. The Czech Republic*.[10]

It is required by article 31 (3) of the VCLT that any "subsequent practice" or "subsequent agreement" is to be taken into account when interpreting the treaty.[11] An example of this are the interpretations notes regarding certain provisions in NAFTA. In NAFTA there is a clear link between the FET standard and the minimal treatment standard in accordance with customary international law. This link were interpreted by arbitrators in a way not intended by the signatory states, and as such NAFTA Free Trade Commission issued the Notes of Interpretation of Certain Chapter 11 provisions, explaining how to interpret this link between the two standards. In the interpretations notes it is made clear that the FET standard is restricted by the MST.[12]

In accordance with article 31 (3) (c) of the VCLT, treaty interpretation must also take into account ”[a]ny relevant rules of international law applicable to the relation between the parties". This means that the arbitrators may turn to international law for the definition of a certain term. For example, if the case revolves around the term "expropriation" but the treaty lacks a definition of this, the arbitrator may turn to international law for guidance. Note that VCLT makes it clear in article 31 (4) that if a special meaning of a certain term were intended, this one gains primacy over of the one established through international law. Further, one must beware of interpreting a treaty in accordance with international law as the parties might have intended to

[10] *Saluka Investments v. The Czech Republic,* para. 300.

[11] Salacuse, 2010, p. 148.

[12] See NAFTA Article 1105 and the Notes of Interpretation of Certain Chapter 11 Provisions issued on July 31, 2001 by the NAFTA Free Trade Commission.

exclude certain elements of international law from the relationship between the parties.[13]

NAFTA has linked the FET standard to the MST standard, which is a standard developed through the means of international customary law. As such, one must turn to international law to gain insight of what the MST standard entails, something one must consider if one is to interpret the FET standard as it is formulated in NAFTA.

The two other articles in the VCLT regarding interpretation are article 32 and article 33. Article 32 permits that if one finds the meaning vague or ambiguous even after applying the rules in article 31, one may turn to supplementary sources for guidance, for example any preparatory works of the treaty. But when it comes to investment treaties in general, negotiating history and preparatory works are very scant and hard to come by.[14] As such, this means of interpretation is not very useful when discerning the scope and components of the FET standard.

Lastly, article 33 is applicable when dealing with treaties in more than one official language. It states that all official or authenticated texts are equally authoritative unless the parties agreed otherwise and that if there is a difference between the versions they shall be reconciled in such a way that is best suited to accommodate the treaty's object and purpose.

2.3 The role of past awards within the international investment regime

This paper will rely on past awards during its examination of the FET standard, and as such it is very important to consider that international investment law has no doctrine of binding precedent, which means that

[13] Salacuse, 2010, pp. 150-151.

[14] Salacuse, 2010, p. 154.

future awards are not bound by past awards.[15] This has even been made clear in international treaties such as the Statue of the International Court of Justice (SICJ) and the international investment agreement NAFTA.[16] The International Centre for Settlement of Investment Disputes Convention (ICSID Convention) includes neither a prohibition of this kind nor any explicit evidence that investment awards constitute binding precedent.[17]

But from this one must not draw the conclusion that past awards lack relevance for future awards. Article 38 (d) of the SICJ recognizes "judicial decisions [...] as subsidiary means for the determination of rules of law", meaning that arbitrators may refer to past awards in their argumentation regarding the interpretation of the treaty. In the investment law regime, this has become rather common practice, most likely due to vague and general terms often used in investment treaties and the fact that many of these vague terms (as the FET standard) are commonly used in different treaties. Since one of the recognized goals of international investment law is to provide a stabile and predictable framework for investors, arbitrators strive to achieve some continuity within the regime.[18]

2.4 Fair and equitable treatment

The fair and equitable treatment standard has been around for quite some time and it is a very popular element of modern day BITs and IIAs. The first mention of the standard was in the Havana Charter of 1948, a legal document which never came into force. Several attempts followed in which different parties tried to include the standard in different conventions, and the first country to successfully incorporate the standard in its treaty practice was the United States which included the standard in its Friendship, Commerce and Navigation (FCN) treaties. It did not take long until

[15] Salacuse, 2010, p. 155.

[16] See SICJ Article 59 and NAFTA Article 1136 (1).

[17] Salacuse, 2010, p. 155.

[18] Salacuse, 2010, pp. 155-156.

European countries started incorporating the standard into their BITs, and between the 1960s and the 1990s the standard was incorporated into over 300 BITs.[19] Today, the standard can be found in "virtually all"[20] investment agreements, and in the year 2012 there existed over 3000 investment agreements (including both BITs and IIAs).[21] As such, the standard is undoubtedly very important for the international investment regime.

The FET standard is an absolute standard, in contrast to a relative standard. In this context, that means that the FET standard prescribes an absolute and objective minimum standard of treatment that the host state must uphold in relation to the foreign investor. This differs from the relative standards, which compare the treatment of the investor with another subject, such as national investors or foreign investors from other countries. Examples of relative standards is the most favored nation treatment and the national treatment standard, which means that the foreign investor is to be treated equally with other foreign investors and domestic investors respectably. If we use the national treatment standard as an example, this might not provide adequate protection in the eyes of the investor if the domestic investors themselves are treated poorly. This is one of the advantages of the FET standard from the perspective of the foreign investor: according to the FET standard the host state has an obligation to grant the foreign investor a minimum level of protection, which means that in some cases the host state might have an obligation to treat foreign investors more favorably than their domestic counterparts.[22] This was an idea which at its inception met quite the resistance from states as well as academics. [23] But determining what this minimum level of protection in fact entails is not an easy task.

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[19] Salacuse, 2010, pp. 218-220.

[20] Salacuse, 2010, p. 218.

[21] Paparinskis, Martins. *The International Minimum Standard and Fair and Equitable Treatment.* Oxford: Oxford Scholarship Online, 2013. p. 3.

[22] Salacuse, 2010, pp. 220-221.

[23] Evans, 2014, pp. 312-313.

As mentioned earlier, when interpreting the standard one often begins with looking at the ordinary meaning of the words. At this point in the interpretation process, one may ask if one is in fact dealing with two standards, namely (i) ”fair” and (ii) ”equitable”. But Tribunals and legal doctrine are clear on this subject, namely that the two terms are to be interpreted as one common standard. One reason for this interpretation is that the two terms are so similar to each other that they could not have different substantive content. It has also been argued that in treaties where the term ”fair” has been omitted, one might be able to interpret just ”equitable” in the same way as the FET standard.[24]

The FET standard has been interpreted in two ways; either it is (i) autonomous and standalone from the MST or (ii) it is equal to the MST. The MST itself has an unclear meaning. In terms of international investment law, the MST has been interpreted frequently by Tribunals settling disputes under NAFTA. In NAFTA, the FET is linked to the MST and the parties have made it clear by adding an annex to NAFTA which explicitly states that FET in the treaty equals MST, and that FET adds no substantive content to MST. As such, when tribunals decide a case based on the FET standard in NAFTA, they are deciding a case based on the MST. But the problem with this is that it is not sure that the practice developed within NAFTA can be applied outside of that context. This means that even though we have access to awards regarding the MST within the investment regime, it is unsure whether it is possible to draw any conclusion from them when defining the content of the MST.

As the definition of the MST is relevant for the definition of the FET, especially concerning certain formulations of the FET, the next section presents an overview of the content of the international minimum standard of treatment.

[24] Dolzer, 2008, p. 123.

2.5 International minimum standard of treatment

The MST is a set of norms in international customary law which governs the state's relation towards foreigners. It is a broad concept and it is unclear exactly what it entails, but it is certain that one of its key elements is the doctrine of denial of justice.[25] An OECD report of 2004 further concluded that the standard also covers the treatment of aliens under detention and the doctrine of full protection and security.[26]

When interpreting the international minimum standard of treatment the process is fairly different from that of the FET standard. In the case of FET, one begins in the treaty and the applicable rules from VCLT. In regards to the MST one must apply the conventional way of establishing international customary rules. As such one needs to find that States follow a rule or norm because of a sense of legal obligation, an *oponio juris.* The burden of proof is on the Claimant, and proving an *oponio juris* can be a daunting task.[27]

One of the most cited cases in regards to the MST is the *Neer*[28] case from 1926. In this case, the U.S. brought a claim against Mexico alleging that Mexico, due to failing in finding and prosecuting a murderer of a U.S. national, had failed to exercise due diligence and committed a denial of justice. The Mexico-United States General Claims Commission which tried the case set a high threshold, stating that the treatment had to "amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every

[25] United Nations Conference on Trade and Development. *Fair and Equitable Treatment - UNCTAD Series on Issues in International Investment Agreements II.* 2012. p. 45.

[26] OECD. *Fair and Equitable Treatment Standard in International Investment Law.* OECD Working Papers on International Investment, 2004/03, OECD Publishing, 2004. p. 9, para 34.

[27] United Nations Conference on Trade and Development. *Fair and Equitable Treatment - UNCTAD Series on Issues in International Investment Agreements II.* 2012. pp. 44-45.

[28] *LFH Neer and Pauline Neer (United States v. Mexico),* General Claims Commission, Opinion, 15 October 1926.

reasonable and impartial man would readily recognize its insufficiency."[29] Mexico had not failed to uphold the MST.

But despite being one of the most cited cases, its influence today is debatable. Especially within the international investment regime the *Neer* case seems to have lost some of its relevance, with Tribunals arguing that the MST has evolved since 1926. In regards to the argument that the MST has changed there are two different views of its evolution: either (i) the MST in itself has changed and the threshold is no longer as high so as to constitute an "outrage", or (ii) that what is to be consider an "outrage" today is something different from what would be considered an "outrage" in 1926. Among my cases, only the first (i) viewpoint is supported, and it seems as though the second (ii) viewpoint is losing, or have already lost, most of its support.[30]

[29] *LFH Neer and Pauline Neer (United States v. Mexico),* General Claims Commission, Opinion, 15 October 1926. para. 4.

[30] The Tribunals reasoning in *Gold Reserve Inc. versus Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, seems to support the first (i) viewpoint, see para. 567. The Tribunal in *Glamis Gold Ltd v. United States*, UNCITRAL Rules, Award, 8 June 2009, para. 22 supports the second viewpoint. The Tribunal in *Clayton v. Canada* supports the first (i) viewpoint and claims that the viewpoint articulated in *Glamis Gold v. United States* is losing support, para. 434.

3 The substantive content of the fair and equitable treatment

3.1 Introduction

The main focus of this chapter is the substantive content of the fair and equitable treatment which will be defined through a list of prohibitions of host state conduct. But before we delve into that subject we need to discuss the different FET formulations found among the IIAs and BITs examined in this paper. The existence of these different formulations of FET is something one must consider, as the components of the FET might differ depending on the FET formulations. Therefore this chapter begins with a discussion regarding different formulations on the FET standard, followed by a discussion of the substantive content of the FET. In the next chapter, we will have a closer look at how the different formulations differ and whether some of the formulations are converging.

3.2 The different FET formulations

The FET standard is found in many IIAs and BITs throughout the world, and as such it is not strange that the exact formulation of FET differs from treaty to treaty. The question that arises from this fact is whether this means that the interpretation and application of the standard also differs from treaty to treaty. In this section I will present the different categories of the FET used in the UNCTAD study and the corresponding categories used in this paper.

The UNCTAD study differs between the following different FET formulations:

1. FET without any references to international law or any further criteria (unqualified FET)
2. FET linked to international law
3. FET linked to the minimum standard of treatment of aliens under international customary law

4. FET with additional substantive content (denial of justice, unreasonable/ discriminatory measures, breach of other treaty obligations, accounting for the level of development).[31]

Of the cases examined all of these different formulations have been accounted for, see Supplement B for a list of all cases and applicable FETs.

In the cases examined I have found no apparent difference in how the Tribunals treat formulation 1 and 4. At times, the Tribunal has made an extra comment regarding certain claims, for example in *Minnotte and Lewis v. Poland*[32] the Tribunal concluded that there had not been any breach of the FET nor the prohibition of discriminatory measures, a prohibition which traditionally is thought to be a part of the FET claim.[33] But besides this the additional substantive content does not add anything of interest to the FET claim since the additional content in all of the examined cases were part of the FET anyway. The Tribunal in *British Caribbean Bank v. Belize*[34] also made their opinion on this matter clear when they chose to only reveal the very beginning of the relevant FET article when they were citing relevant articles from the BIT. The parts in the BIT regarding the additional substantive content were left out, cutting the article in mid-sentence.[35] For these reasons, I have excluded this category in its entirety and included these cases in the same category as the unqualified FETs.

In regards to the formulation number 2 used in the UNCTAD study, this includes two different ways of linking the FET to international law. First, we

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[31] United Nations Conference on Trade and Development. *Fair and Equitable Treatment - UNCTAD Series on Issues in International Investment Agreements II.* 2012. pp. 17-38.

[32] *David Minnotte and Robert Lewis versus Republic of Poland*, ICSID Case No. ARB(AF)/10/1, Award, 16 May 2014. As one can see in the Supplement C, I have not categorized the applicable FET as a FET with additional content because it has a link to international law and the additional content is not in the same sentence as the FET. The additional content can be found in the same article.

[33] *Minnotte and Lewis v. Poland,* para. 202.

[34] *British Caribbean Bank Limited (Turks & Caicos) versus The Government of Belize*, PCA CASE No 2010-18, Award, 19 December 2014.

[35] *British Caribbean Bank v. Belize,* para. 268.

have the formulation that states that the FET shall provide protection which shall be no less than required by international law. Among my cases this has been interpreted in the same way as an unqualified FET, and the UNCTAD study mentions the similarity between the two formulations.[36] Therefore I have decided to put these cases in the same category as the unqualified FET.

The other FET formulation in this category states that the FET should be in accordance with principles of international law. This type is highly relevant as according to the UNCTAD study this could be interpreted as linking the FET to the MST, since customary international law is a part of the principles of international law.[37]

In the UNCTAD study different categories have been used based mainly on the wording of the FET. This approach will to some extent be abandoned here and instead I categorizes the FETs after their different substantive content. For more on how cases has been categorized, see Supplement C which includes a table of how my categories are different from the ones used in the UNCTAD study and how the cases examined in this paper have been categorized. To compare this list with the wording of the FET in the treaties, see Supplement B. This paper will use and discuss the following three FET formulations:

1. Unqualified FET
2. FET in accordance with principles of international law
3. FET linked to the minimum standard of treatment

This distinction between the different FET formulations is important to consider and one ought to have this in mind as we begin our discussion of

[36] United Nations Conference on Trade and Development. *Fair and Equitable Treatment - UNCTAD Series on Issues in International Investment Agreements II.* 2012. p. 23 and see *Minnotte and Lewis v. Poland.*

[37] United Nations Conference on Trade and Development. *Fair and Equitable Treatment - UNCTAD Series on Issues in International Investment Agreements II.* 2012. pp. 22-23.

the substantive content of the FET, since the content of the FET differ depending on its formulation.

As already mentioned in the above section on interpretation, interpreting the FET standard usually begins with discerning the ordinary meaning of the words "fair" and "equitable", in line with the rules of interpretations laid out in the VCLT. But since it is so hard to determine the content of the FET through the use of the rules in the VCLT, arbitral awards have become exceedingly important in determining the content of the standard. By examining past awards one has been able to ascertain host state conduct which are in breach of the FET standard, namely:

1. conduct which fail to protect the investor's legitimate expectations,
2. conduct which is inconsistent or lacks transparency,
3. arbitrary or discriminatory conduct,
4. harassment,
5. denial of justice or due process and
6. host state actions committed in bad faith.[38]

All of the above are what I in this paper call the different elements or components of the FET standard. One problem with these different components is that at times it can be hard to separate them from each other, for example the host states requirement to act transparently is closely tied to the doctrine of legitimate expectations.

Note that it is not necessary for one action in itself to breach the standard, as in the concept of "treatment" tribunals have found that this includes many actions taken over a period of time. This means that even if one action in itself was not enough to breach the standard, all of the actions taken as a

[38] Salacuse, 2010, p. 230. United Nations Conference on Trade and Development. *Fair and Equitable Treatment - UNCTAD Series on Issues in International Investment Agreements II.* 2012, pp. 61-88 and Dumberry, 2014, p. 50.

whole can together amount to a breach.[39] This also means that it can be hard to determine exactly which component of the FET the Tribunals finds most important in the current case. For example in *Clayton v. Canada* the Tribunals discusses a breach of the FET both in terms of lack of transparency and failure to uphold the investors legitimate expectations.[40]

In the following we will have a look at the different components of the FET standard, with each sub-heading corresponding to one of the six components listed above.

3.3 Legitimate expectations

This component of the FET standard was applied in a majority of the cases examined in this essay, and I would say it is one of the most central but also one of the most problematic aspects of the standard.[41] The concept, or doctrine, of the investors legitimate expectations evolves around changes which occur after the investor has made their investments which effects the investment in a negative way. Changes in general can be of very different nature; the price of oil may change drastically which may make an investment no longer profitable, or the host state may change its legislation or deny a renewal of a permit which will have negative consequences for the investment. Changes not attributable to the host state, such as price changes due to supply and demand or natural disasters, are outside the scope of the legitimate expectations doctrine. Instead, the doctrine of legitimate expectations focuses on changes attributable to the host state actions.[42]

The reason behind this principle is that making an investment in a foreign country often involves a big commitment for the investor. The investment

[39] This has been made clear by many awards, see for example *The Rompetrol Group N.V. versus Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013. para. 198.

[40] *Clayton v. Canada*, para. 594.

[41] In twelve of the fourteen cases the legitimate expectations doctrine were discussed by the Tribunal as a part of the FET standard.

[42] United Nations Conference on Trade and Development. *Fair and Equitable Treatment - UNCTAD Series on Issues in International Investment Agreements II.* 2012. pp. 63-64.

might be planned to continue for a long time or maybe even indefinitely, as such one does not want the host state to lure foreign investor with, for example, lucrative tax exemptions only to remove these exemptions once the investment has been made. Many arbitral tribunals have found that it is unfair if a host state create certain expectations through their laws and actions if the state later on takes subsequent actions which fundamentally deny these expectations.[43]

The doctrine includes several limitations, so as not to have the unwanted consequence that the host state is required to freeze its legal state. If the host state alters its environmental law or labour regulations in a way which is disadvantageous for the investor this should in most cases not constitute a breach of the doctrine. Rather, it is applicable in cases were the host state has been clear that certain investor friendly laws will be in force for a certain amount of time but then revoked them too early (as in *Micula and others v. Romania*[44]).[45]

It is also important to note that the role of the legitimate expectations doctrine might be different depending on the FET formulation. The difference is that among the unqualified FETs, the doctrine is a standalone component of the FET and as such a Claimant may claim a breach of the investors legitimate expectations and thus establish a breach of the FET. But this might not be the case if the FET is linked to the international minimum standard as it is in the NAFTA treaty. Instead, the doctrine of the investors legitimate expectations is considered when establishing a breach of another standalone component of the FET, such as the prohibition against discriminatory or arbitrary actions.[46]

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[43] Salacuse, 2010, p. 231.

[44] *Oan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. versus Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013.

[45] Salacuse, 2010, pp. 233.

[46] Dumberry, 2014. pp. 58-62.

In determining whether there has been a breach of the doctrine, tribunals focus on whether the expectations created were reasonable and justifiable. As such not every statement from a government official will amount to create legitimate exceptions for the investor. If an investor receives a positive statement from a governmental institution this might not be enough to create legitimate expectations if the statement is unclear or if it is contradictory to other facts or statements. Many of the cases regarding the legitimate expectations doctrine concerns permissions, licenses and regulatory framework which changed after the investment was made.[47]

It is very important for the investor to establish that their expectations were reasonable and justified, and how the Tribunals determine if the expectations are reasonable is also something which might differ depending on the FET formulation. For the expectations to be considered reasonable and justified when dealing with a FET linked to the international minimum standard, the investor must be able to point to specific representations from a governmental agency with the correct authority as a basis for its expectations. This is to be distinguished from Tribunals deciding cases based on an unqualified FET, where the current legislation in the country might be enough to create legitimate expectations for the investor.[48]

In *Gold Reserve v. Venezuela*[49] the Tribunal made a statement regarding the doctrines standing within international law. The FET formulations in the award was a FET in accordance with principles of international law. International law includes but is not limited to the international minimum standard.[50] This case is unique among the cases examined here since it regards a FET formulation only used in two of the cases, and unfortunately

[47] Salacuse, 2010, pp. 233.

[48] Dumberry, 2014, pp. 66-69.

[49] *Gold Reserve Inc. versus Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014.

[50] United Nations Conference on Trade and Development. *Fair and Equitable Treatment - UNCTAD Series on Issues in International Investment Agreements II.* 2012. p. 22.

in the other case with the same formulation the Tribunal did not elaborate much on the content of the FET.

Due to the FET formulation applicable in *Gold Reserve v. Venezuela* it is not strange that the Tribunal turned to international law in its discussion of the content of the FET. But even though the FET used in this case has a more unusual formulation, this does not mean that the conclusion reached in this award is not applicable in regards to other formulations of the FET standard. In its reasoning to apply international law on the present case the Tribunal made a reference to Article 54 of the ICSID Arbitration (Additional Facility) Rules which states that the Tribunal is to apply rules of international law as long as the parties have not agreed differently. They also make a reference to Article 38 of the Statute of the International Court of Justice which states that an element of international law is ”the general principles of law recognized by civilized nations”.[51] This means that the reasoning applied by the Tribunal in this case is not bound to apply only on cases which concerns the same FET formulation, since the same line of argument could have been used to apply rules of international law in most other investor-state arbitrations.

By examining the legal framework in different countries the Tribunal conclude that the doctrine of legitimate expectations is a rule of international law. Countries mentioned to include the legitimate expectations doctrine in the award are Germany, France, England, Argentina and Venezuela.[52] Author Monebhurrun points out that this list might as well include the countries South Africa, Colombia, India, Kenya, Australia, Canada, Scotland and Japan as well.[53]

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[51] *Gold Reserve v. Venezuela,* para. 575.

[52] *Gold Reserve v. Venezuela,* para. 574. The Tribunal also mentions that the principle can be found within European Union Law.

[53] Monebhurrun, Nitish. *Gold Reserve Inc. v. Bolivarian Republic of Venezuela - Enshrining Legitimate Expectations as a General Principle of International Law?* Journal of International Arbitration 32, no. 5, p. 551-562. Netherlands: Kluwer Law International, 2015. p. 556.

In *Gold Reserve v. Venezuela* the doctrine was used in an instrumental way, as the doctrine of legitimate expectations was used to establish a breach of another component of the FET standard, namely the requirement for the host state actions to be transparent, consistent and in good faith.[54]

This case points towards an even more general acceptance of the doctrine of legitimate expectations, which makes its content even more important to define. By defining the doctrine of legitimate expectations as a rule of international law, one might use this classification to learn more about the principle. If one is to argue that the doctrine of legitimate expectations originated from general principles of law found in different societies around the world, this also means that through the use of a comparative analysis of the different legal frameworks one might be able to get a better understanding of the doctrine of legitimate expectations.[55]

3.4 Inconsistency and lack of transparency

The obligation of the host state to act transparently is closely linked to the doctrine of legitimate expectations and one has found that in many arbitral awards the host states have failed both to act transparently and to protect the investors legitimate expectations. This is to prevent the host state from hiding behind unclear and confusing legislation when determining whether there has been a breach of the investors legitimate expectations.[56] The obligation to provide transparency includes that the host state's legal framework is made available to the investor and that any authoritative decision affecting the investor can be traced back to the legal framework.[57]

The concept of consistency and transparency means that the host state needs to supply a stable legal framework. But providing a stable framework is not

[54] *Gold Reserve v. Venezuela,* para. 591.

[55] Monebhurrun, 2015, pp. 559-561.

[56] Salacuse, 2010, pp. 237-238.

[57] Dolzer, 2008, pp. 133-134.

without its controversy, since interpreting this in the most investor friendly way possible could mean that the host state should in principle not change their legislation. In this regard there is a famous description of the host state's obligations provided by the Tribunal in *Tecmed*:

> The Arbitral Tribunal considers that this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a *consistent manner, free from ambiguity* and *totally transparently* in its relations with the foreign investor, so that *it may know beforehand any and all rules and regulations that will govern its investments*, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. [58][Emphasis added.]

This passage is included by Dolzer (2008) as providing ”the most comprehensive definition”[59] of the FET standard, and this passage is sure to have had some impact on the interpretation and development of the FET standard. The list demands much of the host state, and it has been called ”impossible to achieve”[60] as well as ”a description of perfect public regulation in a perfect world”[61] and in fact not a standard at all.

In five of the cases examined in this paper the Tribunal discussed the obligation to provide a transparent and consistent legal framework. In *Clayton v. Canada* the Tribunal used the doctrine of the investors legitimate expectations to conclude that the host state had not been transparent enough in their dealings with the investor. The investors had been encouraged by governmental representatives to invest in a certain region, and the investors

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[58] *Tecnicas Medioambientales Tecmed S.A. versus The United Mexican States*, ICISID Case No. Arb (AF)/ 00/2, Award, 29 May 2003, para. 154.

[59] Dolzer, 2008, p. 130.

[60] United Nations Conference on Trade and Development. *Fair and Equitable Treatment - UNCTAD Series on Issues in International Investment Agreements II.* 2012. p. 65.

[61] Douglas, Zachary. *Nothing if not critical for investment treaty arbitration: Occidental, Eureko and Methanex*. Arbitration International, Vol. 22, No. 1 pp 27-52. LCIA, 1 March 2006. p. 28.

got the reasonable expectations that they were allowed to invest in the area as long as they fulfilled the requirements imposed by local and federative environmental law. But once they had begun making their investment, a special screening process begun (which in itself was unusual but not in breach of the FET standard) which was to evaluate the project and recommend whether to continue or discontinue the project. In their evaluation, they were to follow certain guidelines in accordance with national law. These guidelines were seemingly not followed, and instead of evaluating the project based on environmental concerns the committee in charge of the process chose not the recommend the project due to ”community core values”, a term not apparent in national law. By evaluating on values not mentioned in the guidelines, the investor did not know on what basis their project was being evaluated and thus could not prepare a proper defense or argument for their investment. This conduct was according to the Tribunal a breach of the FET standard due to lack of transparency.

In *Micula and others v. Romania* the Tribunal discussed the application of the obligation for the host state to act consistent and transparent. They cited the *Saluka Investment* award which emphasized a balanced approach, and concluded that the question is not if the host state has acted inconsistent or with a lack of transparency. Rather the question is if the host state acted inconsistent, or with a lack transparency, if they in doing so acted unfairly or inequitably in their relation towards the investors.[62] This interpretation of the requirements to act transparent and consistent is problematic, as they in turn refer to the concept of fair and equitable treatment, terms we are trying to define by referring to transparency and consistency. Nevertheless, the addition by the Tribunal should avoid placing unrealistic restrictions on the host state’s actions.

[62] *Micula and others v. Romania,* para. 533.

3.5 Arbitrary or discriminatory actions

The prohibition against arbitrary and discriminatory actions are implied in the plain meaning of the words “fair and equitable”. Arbitrary actions stand out due to the motivation behind them, more specifically if an action damages an investors interest without having a legitimate purpose the actions could be considered arbitrary. Especially so if one is able to determine that the host state is biased or have acted with prejudice.[63]

Actions which influence the investor in a negative way are not in themselves arbitrary, even if the decision at hand might not have been the best of the options available. This has been made clear by the Tribunal in *Enron v. Argentina*[64] where it was stated that it is not for the Tribunal to decide whether the host state actions were ”good or bad”, and instead they focused on the fact that the government had the best of intentions in mind and they thought what they did was the best course of action available to them in light of the crisis at hand.[65] A similar approach is found in *Micula and others v. Romania*, where the host state actions were not found to be arbitrary due to the fact that the government’s actions were motivated by a rational policy and their actions were not unreasonable in trying to uphold this policy.[66]

The prohibition against discriminatory actions are sometimes regarded as a component of its own, separate from the prohibition against arbitrary actions.[67] Among the cases examined in this essay, all of the cases regarding the prohibition against arbitrary actions have included the prohibition against discriminatory action and vice versa. Discriminatory actions and

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[63] United Nations Conference on Trade and Development. *Fair and Equitable Treatment - UNCTAD Series on Issues in International Investment Agreements II.* 2012, p. 78.

[64] *Enron Corporation Ponderosa Assets, L.P versus Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007.

[65] *Enron v. Argentina,* para. 281.

[66] *Micula and others v. Romania,* paras. 756 and forward, particularly 802.

[67] United Nations Conference on Trade and Development. *Fair and Equitable Treatment - UNCTAD Series on Issues in International Investment Agreements II.* 2012. p. 81.

arbitrary actions thus seem linked and are closely related to each other, but the same could be said of the components legitimated expectations and transparency which I have presented as two different components. The two prohibitions are not cumulative, if one finds that the actions are either discriminatory or arbitrary this is sufficient for a breach of the FET standard.

The prohibition against discriminatory actions affects both actions which have discriminatory intent as well as those actions which have a discriminatory effect. The *ELSI*[68] ruling in the International Court of Justice offers some guidance and is often referred to by tribunals.[69] Salacuse concluded through a reading of the judgement that there are four elements to the concept of discrimination: "(i) an intentional intent, (ii) in favour of a national, (iii) against a foreign investor and (iv) that is not taken under similar circumstances against another national"[70].

Yet the main focus of the prohibition against discriminatory actions within the application of the FET standard is not that of nationality since this is covered by the common "most favored nation" and "national treatment" clauses. Rather the prohibition of discriminatory actions within the FET standard is focused on other grounds, such as discrimination based on sex, gender or religion.[71]

3.6 Denial of justice

That denial of justice is part of the FET standard is made clear by past awards as well as the treaties themselves.[72] For example, in the US model BIT of 2012 the FET standard includes "the obligation not to deny justice in

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[68] *Case Concerning Elettronica Sicula S.p.A* (United States v. Italy), International Court of Justice, Reports 1989, p. 15, 20 Juli 1989.

[69] Salacuse, 2010, pp. 240-241.

[70] Salacuse, 2010, p. 241.

[71] United Nations Conference on Trade and Development. *Fair and Equitable Treatment - UNCTAD Series on Issues in International Investment Agreements II.* 2012. p. 82.

[72] Salacuse, 2010, p. 242.

criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world"[73].

Salacuse finds that in investor-state arbitration the tribunals have found a breach of the FET standard due to denial of justice most often due to the following three types of neglect: (i) failing to give proper notification of a hearing or process which affects the investors interest, (ii) failing to invite or not allowing the investor to appear at the hearing or process or (iii) when the decision was influenced by bias or prejudice.[74] This list can be complemented by the following of what is likely to constitute a denial of justice according to the UNCTAD study:

> (a) Denial of access to justice and the refusal of courts to decide;
> (b) Unreasonable delay in proceedings;
> (c) Lack of a court's independence from the legislative and the executive branches of the State;
> (d) Failure to execute final judgments or arbitral awards;
> (e) Corruption of a judge;
> (f) Discrimination against the foreign litigant;
> (g) Breach of fundamental due process guarantees, such as a failure to give notice of the proceedings and failure to provide an opportunity to be heard.[75]

To provide a definition of what is to be considered a denial of justice is not a simple task and the authors of the study themselves say that trying to provide a comprehensive list is "bound to fail"[76].

As one can see from the above, central to the concept of denial of justice is the conduct of governmental organs and particularly those dealing with administrative justice. But there is a certain vagueness to its application and

[73] US model BIT of 2012, Article 5, 2 (a).

[74] Salacuse, 2010, pp. 242-243.

[75] United Nations Conference on Trade and Development. *Fair and Equitable Treatment - UNCTAD Series on Issues in International Investment Agreements II.* 2012. pp. 80-81.

[76] United Nations Conference on Trade and Development. *Fair and Equitable Treatment - UNCTAD Series on Issues in International Investment Agreements II.* 2012. p. 80.

the concept has been interpreted in different ways. Interpreted in its broadest sense, some scholars mean that the concept covers all kinds of wrongful acts done by a host state against foreigners.[77]

Among the cases examined in this paper, the concept has been interpreted narrowly compared to the interpretation mentioned above. In *Vanessa v. Venezuela, Hassan v. Romania*[78]*, Mamidoil v. Albania* and *Hesham v. Indonesia* the claimants were all unsatisfied with dealings of the national courts and claimed that there had been a denial of justice. In *Vanessa v. Venezuela* the applications to the courts regarding interim relief were dealt with poorly (among other things the courts responses were slow), while in *Hassan v. Romania* and *Mamidoil v. Albania* the claimants were dissatisfied with national court rulings. In none of these cases did the Tribunal find that there had been a denial of justice, emphasizing that the threshold for there to be a breach of the FET in this regard is high. In the awards where claimants were dissatisfied with national court rulings, the Tribunal has emphasized that investor-state arbitration is not a *supra-court* and it is not their role to act as an appeal instance regarding decisions from national courts.[79]

Hesham v. Indonesia[80] is the only case of the cases in the scope of this study in which the Tribunal found there to be a denial of justice. The Tribunal turned to the principles evolved within international human rights doctrine to define when there had been a denial of justice. The Tribunal discussed, *inter alia*, the provisions found in International Covenant on Civil and Political Rights (ICCPR), and case law from the European Court of Human Rights.[81] In the award Indonesia had tried the claimant in his absence,

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[77] Salacuse, 2010, pp. 241-242.

[78] *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation versus Romania*, ICSID Case No. ARB/10/13, Award, 2 March 2015.

[79] *Hassan v. Romania,* para. 764 and *Mamidoil v. Albania* para. 436.

[80] *Hesham Talaat M. Al-Warraq versus The Republic of Indonesia*, UNCITRAL Rules, Award, 15 December 2014.

[81] *Hesham v. Indonesia,* paras. 556-569 and para 575 and forward.

without proper notification of his trial and found him guilty. Since none of the exceptions in ICCPR which allowed trials in absentia were applicable, the Tribunal found that Indonesia's actions constituted a breach of the ICCPR and thus also a breach of the FET standard in the applicable BIT.

Of note is also the tendency among the cases examined to emphasize the high threshold needed for the states conduct to breach the FET standard in regards to denial of justice claims. This indicates that the threshold is higher when concerning denial of justice claims than if it concerns other components of the FET standard. That the threshold level is different depending on which component the claim is based on is also indicated by the often cited paragraph from *Waste Management II*[82] which states that host state's actions are in breach of the FET standard if:

> the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.[83]

The use of intensifying adjectives in connection to some terms but not others indicates that the threshold for the host state's actions to be in breach of the FET is higher in regards to some types of breaches. The wording used by the Tribunal in regards to denial of justice, "a manifest failure of natural justice", indicates a high liability threshold.

Among the cases examined in this paper, the awards that show that the liability threshold is set high in regards to a denial of justice claim are *Hesham v. Indonesia, Vannessa v. Venezuela*[84], and *Mamidoil v. Albania.* In

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[82] *Waste Management, Inc. versus United Mexican States*, ICSID Case No ARB(AF)/00/3, Award, 30 April 2004.

[83] *Waste Management II,* para. 98.

[84] *Vannessa Ventures Ltd. versus The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Award, 16 January 2013.

Hesham v. Indonesia the Tribunal emphasized that ”the threshold to establish a claim of denial of justice is high”[85], and a similar statement can be found in *Vannessa v. Venezuela*[86]. When examining whether a court decision is in breach of the FET standard in *Mamidoil v. Albania* the Tribunal uses intensifying adjectives in describing the necessary conduct required for there to be a breach. The relevant paragraph reads as follows: ”the Supreme Court’s decision […] is not *clearly improper*, *discreditable* or in *shocking* disregard of Albanian law [emphasis added]”[87].

3.7 Harassment

The prohibition against harassment entails, *inter alia,* prohibition against coercion, threats, intimidation and abuse of power. The arrest of executives may amount to harassment, but only if it is done on unlawful grounds. When finding a breach of the standard on this ground the Tribunal has focused on whether the harassment has been repeated and if the actions where motivated by trying to unlawfully seize the investors assets.[88]

This component can be hard to separate from denial of justice claims and claims based on a breach of the investors legitimate expectations. In a past award the Tribunal found that the harassment in that particular case amounted to a denial of justice, which constituted a breach of the FET standard.[89] One of the cases examined this paper, *Rompetrol Group v. Romania*[90], finds that the state harassment through the use of, *inter alia,*

[85] *Hesham v. Indonesia,* para. 620.

[86] *Vannessa v. Venezuela*, para 227: ”Tribunals in other cases have pointed to the high threshold in this regard. [..] The Tribunal considers that to be the correct approach.”

[87] *Mamidoil v. Albania,* para. 769.

[88] United Nations Conference on Trade and Development. *Fair and Equitable Treatment - UNCTAD Series on Issues in International Investment Agreements II.* 2012. p. 83.

[89] Dolzer, 2008, p. 147.

[90] *The Rompetrol Group N.V. versus Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013.

strong fiscal controls is in breach of the investors legitimate expectations and constitute a breach of the FET standard.[91]

The *Rompetrol Group v. Romania* case illustrates well the application of this component but also highlights the problems with applying it. In this case the investor was subjected to an ongoing criminal investigation regarding tax fraud by the Romanian authorities. The Tribunal found that investigation in itself is legal and the motivation is sound. But the investigation included several procedural irregularities which the Tribunal found amounted to a breach of the FET to a limited extent, but which did not award the Claimant any damages. The question this case highlights is how to deal with a situation in which there is a legally motivated investigation towards an investor but these actions against the investor might be very harmful to the investment. Regarding this scenario, the Tribunal has the following to say:

> In the Tribunal's considered view, it is part of the legitimate expectations of a protected investor – without in any way trenching upon the sovereign right of the host State to prescribe and enforce its criminal law – that, if its interests find themselves caught up in the criminal process either directly or indirectly, means will be sought by the authorities of the host State to avoid any unnecessarily adverse effect on those interests or at least to minimise or mitigate the adverse effects.[92]

It is due to lack of effort from the Romanian authorities to minimize or mitigate the negative impact on the investment that the Tribunal finds that there has been to a limited extend a breach of the FET. But, as the Tribunal did not award any damages to the investor and the legal fees of the proceedings were shared between the claimant and the respondent, if this case has a winner it is the host state.

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[91] *Rompetrol Group v. Romania,* para. 278.

[92] *Rompetrol Group v. Romania,* para. 278.

3.8 The host state acts in bad faith

If a host state acts in bad faith in relation towards the investor, these actions would constitute a breach against the FET standard. But according to Salacuse, no modern arbitral decisions have included a breach of the FET standard due to actions in bad faith. Salacuse offers three reasons for this: (i) it is not necessary for there to be a breach, (ii) it can be extremely difficult to establish that the host state actions where done in bad faith and (iii) even though the state has acted in bad faith, most tribunals would be inclined to avoid making such accusations against a state, especially if they can give redress to the investor without doing so.[93]

Actions in bad faith relate to the host state motivations, and a conspiracy to unlawfully overtake the investors assets is an example of the concept. Usually this component is incorporated into another component of the FET. This has given rise to two questions: (i) is bad faith in itself enough to breach the FET standard and (ii) is bad faith required for there to be a breach of the FET standard?

In regards to question (i), the answer is most likely affirmative. Through an analysis of past awards it becomes clear that Tribunals are of the view that actions in good faith is a basic obligation of the FET standard, and failing to uphold this requirement (by actions in bad faith) is a breach of the FET standard. The answer to question (ii) is negative. Bad faith is not required for there to be breach of the FET standard. This is seen in, among others, *Micula and others v. Romania*, were not only was Romania acting in good faith, they were even acting reasonably.[94]

[93] Salacuse, 2010, p. 243.

[94] Dolzer, 2008, pp. 144-147.

4 The convergence of different FET formulations

4.1 Introduction

In this chapter I will present my examination of the attitudes the Tribunals have towards the different FET formulations. As mentioned above, in this paper I discuss three different types of FET:

1. Unqualified FET
2. FET in accordance with principles of international law
3. FET linked to the minimum standard of treatment

In the next section I will examine what can be said of the Tribunals attitude in regards to the differences in application or the convergence of the different unqualified FET and the FET linked to the minimum standard. The section after that will discuss the differences and the convergence of the unqualified FET and FET in accordance with principles of international law. It will also become apparent that the FET linked to the minimum standard of treatment and FET in accordance with principles of international law can be very similar in their applications but at the same time the cases examined in this papers presents us with conflicting attitudes in regards to the interpretation process of the FET standard.

4.2 Are the unqualified FET and the FET linked to the minimum standard of treatment converging?

Some authors argue that the unqualified FET should be interpreted as an independent treaty terms which are separate from the international minimum standard.[95] There have been instances where Tribunals acknowledged and supported this way of interpreting the FET standard by referring to the terms

[95] Dumberry, Patrick. *The Protection of Investors Legitimate Expectations and the Fair and Equitable Treatment Standard under NAFTA Article 1105*. Journal of International Arbitration 31, no. 1 pp. 47–74. Netherlands: Kluwer Law International, 2014, p. 50.

as an ”autonomous FET”, for example in *Biwater Gauff v. Tanzania*[96] and *Saluka Investment v. Czech Republic*[97]. The very idea of the ”autonomous FET” is that it is standalone and a term which has originated and developed through treaties and treaty practice. This means that it is separate from MST, which originated from international customary law, in contrast to the autonomous FET which originated from treaties.

Thus, I looked at how many cases of the ones examined in which the discussion of whether FET was autonomous or not was brought up. Including the awards concerning a FET linked to the MST, I found five cases in which the term autonomous was brought up in conjunction with FET. But in not one did the Tribunal provide a clear view of their opinion as the *Biwater Gauff v. Tanzania* Tribunal did. The Tribunal in *Micula and others v. Romania* highlighted the fact that the Claimant is of the view that the standard is autonomous and this view was not contested by the Respondent, thus implying that they are dealing with an autonomous FET.

One the most interesting comments from a Tribunal in regards to the debate, is the one made by the Tribunal in *Rompetrol Group v. Romania*. In this case, the Claimant interpreted the FET as an autonomous one, and when it was up to the Tribunal to provide a definition of the FET standard, they came with the following statement:

> It sees no benefit in engaging in an abstract debate as to whether Article 3(1), and in particular its reference to ‘fair and equitable treatment,’ was or was not intended by the Parties simply to incorporate the ‘minimum standard’ under customary international law, still less to engage in any debate as to what that ‘minimum standard’ should now be understood to be. It prefers instead (in keeping with the approach adopted by other arbitral tribunals) to follow the ordinary meaning of the words used, in their context, and in the light of the object and purpose of the BIT.[98]

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[96] *Biwater Gauff Ltd versus United Republic of Tanzania*, ICISD Case No. ARB/05/22, Award, 24 July 2008. para. 591.

[97] *Saluka Investment v. Czech Republic,* para. 294.

[98] *Rompetrol Group v. Romania,* para. 197.

As such, it presents us with a solution to the problem by simply ignoring it.

In *Clayton v. Canada,* which concerns a FET linked to the MST, the Claimant tries to argue that the FET standard is autonomous and adds substantial content to the MST, despite the interpretation notes published by the contracting states. This argument the Tribunal, agreeing with the Respondent, does not accept.[99]

My intention with this overview of the Tribunals attitude towards the concept of an ”autonomous FET” was to find arguments against the convergence of the two terms FET and MST. Unfortunately the results yielded were unsatisfactory. The only conclusion to draw from this is that among the cases the concept of an ”autonomous FET” is not very popular, not even among the claims, and it cannot present any evidence *against* the two terms converging. This in itself is of course not any evidence of the two concept converging.

But I did manage to find some signs that the different FET formulations were converging by looking at which past awards were cited among the awards examined.

There is no such thing as binding precedents within investor-state arbitration. As such, there is no obligation for a Tribunal to pay attention to any past awards on the same subject. But, even without obligation they are allowed to and it was common practice among the cases I examined for the Tribunal to make references to past awards to give credibility to their arguments. Without binding precedent there is no guaranteed way to know if an award is going to be influential on future awards, it depends on how well argued the Tribunal analysis is. A well argued award might influence future

[99] *Clayton v. Canada* para. 432.

awards in many years to come, but at the same time a not so well argued award might have no influence at all on future awards.

In eight of fourteen cases I examined, the Tribunal in their arguments made references to the *Waste Management II* case. Of these eight, five was in regards to FET and two in regards to MST. *Waste Management II* is a NAFTA case decided after the interpretation notes which makes it clear that Article 1105 in NAFTA equals the MST, and still other Tribunals cite this case when they are defining the FET. This, I believe, is a clear sign that the two terms are indeed converging.

I will also point out that there are other cases which make similar points, but the *Waste Management II* case was the most popular case to cite that I managed to find within the cases I chose to examine. In *Gold Reserve v. Venezuela,* an award dealing with a FET in accordance with principles of international law, the Tribunal cites the *Neer* case. The *Neer* case provided a definition of the MST and it is still being referred to even though the case is over 80 years old. Of course, the *Neer* case has a very limited influence today on the two standards, as most tribunals will argue either that the *Neer* case no longer offers the correct definition of the content of MST or that what was seen as egregious in 1926 is not the same as what would be seen as egregious today.[100] Nevertheless, that some Tribunals make references to that case when discussing the FET standard today makes it clear to me that there is link between the two terms.

The *Mondev*[101] case is another NAFTA case which concerns the MST which were cited by *Gold Reserve v. Venezuela* and *Micula and others v. Romania*, two cases which concern the FET standard. The examination I have done of this pattern, of FET cases citing MST cases, is far from conclusive. Nonetheless, I believe one can use this as sign that the terms are converging.

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[100] See above, footnote 27.

[101] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002.

From my cases alone one would have to assume that they are converging in the direction towards the MST, due to the fact that I cannot provide examples of the contrary, that is MST cases which cite FET cases. But with my selection only consisting of two cases concerning a FET linked to the MST, one would definitely need to examine this subject further if one would like to be able to make more definite conclusions.

Of course, my use of references alone is hardly convincing by itself since the Tribunal could be referencing the case due to explaining how it is not applicable. For an overview of how the *Waste Management II* and the *Saluka investments* were cited in the awards, see Supplement A.

4.3 Are the unqualified FET and FET in accordance with principles of international law converging?

Only two of the cases examined concerns a FET in accordance with principles of international law, *Vannessa v. Venezuela* and *Gold Reserve v. Venezuela*. What I found interesting, is how the Tribunal in *Gold Reserve v. Venezuela* puts a lot of weight on the wording of the FET, while the Tribunal in *Vannessa v. Venezuela* seems to completely disregard the link to international law. Both cases are based on the same BIT and the FET is formulated as such:

> Each Contracting Party shall, in accordance with the principles of international law, accord investments or returns of investors of the other Contracting Party fair and equitable treatment and full protection and security.[102]

In *Gold Reserve v. Venezuela* the Tribunal does not begin their definition of the FET standard through the use of VCLT and the ordinary meaning of the words, instead they have the following to say about the FET and its wording in the BIT:

[102] Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments, Article 2 (2).

> Article II(2) of the BIT refers to the "principles of international law" in accordance with which fair and equitable treatment is to be bestowed. To determine these principles the Tribunal must consider the present status of development of public international law in the field of investment protection. It is the Tribunal's view that public international law principles have evolved since the *Neer* case and that the standard today is broader than that defined in the *Neer* case on which Respondent relies.[103]

As such they begin their analysis more in line with how one might interpret the MST standard, that is by beginning at its roots, namely the *Neer* case. The Tribunal focuses on past awards when providing its definition of the FET standard, citing among others *Waste Management II* which is a case regarding the MST within the NAFTA context.

Maybe more importantly, they also cite the *Saluka Investment* case which concerns an unqualified FET. A trend among the cases examined seems to be that if the case concerns MST one prefers citing other cases regarding MST, while if the case regards FET one can cite both cases regarding MST and FET. This case is no exception, since it is not explicitly linked to the MST.

Nevertheless it seems to me as if the wording of the FET has influenced the Tribunal which therefore interprets the FET more in line with how one would interpret the MST, yet still not in the same way as if it had been the actual MST. *Ergo,* in this case it seems as though the Tribunal has gone down a middle road. According to the UNCTAD study, by providing the IIA or BIT with this kind of formulation of the FET one prevents the use of a semantic approach and instead imposes on the Tribunal to use principles of international law instead. The principles of international law includes, but are not limited to, international customary law.[104] This means that the interpretation in this case should be the same as if the FET had been linked

[103] *Gold Reserve v. Venezuela,* para. 567.

[104] United Nations Conference on Trade and Development. *Fair and Equitable Treatment - UNCTAD Series on Issues in International Investment Agreements II.* 2012. p. 22.

to the MST, but it is not. One big difference from the other two cases concerning the FET linked to the MST is that this case refers to at least one case which concerns an unqualified FET, namely the *Saluka Investment* case.

As such, this case could be a sign that the two terms are indeed converging and are in fact very similar to each other. But on the other hand, it is very hard to determine whether this case has applied a higher threshold needed for a breach of the treaty, which, if any, is probably the main difference between the unqualified FET and the MST.

In the other case which regards the same BIT, *Vannessa v. Venezuela*, the Tribunal has the following to say about the FET standard:

> The Tribunal recognizes that there are different formulations of the precise content of the FET standard, but observes that they all have in common the requirement that the standard does not guarantee the success or profitability of an investment but requires that the treatment of investments not fall below a minimum standard of fairness and equitableness that all investors have a right to expect.[105]

The Tribunal does not comment on the FETs link to the principles of international law anywhere in the award, so it is hard to tell if the wording of the FET has influenced the award or not. They cite only three cases, and this is in relevance to the high threshold when it comes to claims relating to denial of justice. Two of these cases are NAFTA cases relating to the MST, and the third is a case regarding an unqualified FET in a BIT.[106] The mention of a ”high threshold”[107] may indicate that the interpretation of the FET is leaning towards the MST, but it is more likely due to the fact that

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[105] *Vannessa v. Venezuela,* para. 222.

[106] They cite the following cases: *Waste Management v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, para. 98, *Cf*., *Loewen Group v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, June 26, 2003, para. 132 and *Alex Genin v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, June 25, 2001, para. 371.

[107] *Vannessa v. Venezuela,* para. 227.

Tribunals when regarding claims relating to a breach of denial of justice have applied a higher threshold than when regarding a breach of any of the other elements included in the FET.[108]

4.4 Is there a difference in the threshold depending on the FET formulation?

In this section, I will examine how the Tribunals express their view of the liability threshold in the awards, and compare the findings between the unqualified FETs, the FETs linked to the MST and the FETs linked to the principles of international law.

Beginning with the unqualified FETs, these are in the clear majority of the awards examined, with ten of fourteen awards concerning this type of FET. In only five of these awards did I manage to find any utterance from the Tribunal regarding the level of treatment they were applying. Unfortunately the matter gets further complicated by the fact that depending on what kind of breach the awards focused on this effects the liability threshold. Three of the cases came with what seemed to be general guidelines describing the liability threshold, which I interpret as being relevant mainly regarding breaches due to arbitrary or discriminatory actions.

In *Micula and others v. Romania* the Tribunal simply stated that the host state's treatment of the investor need not be as bad as "egregious", meaning that the threshold is not as high as in the *Neer* case and citing among others the *Waste Management II* award.[109] *Minnotte and Lewis v. Poland* states that for there to be a breach the host state must act "delinquently" or in an "improper manner", citing, among others, *Waste Management II, Saluka Investment* and *Tecmed.*[110] In *Tulip v. Turkey*[111] they said that the host state

[108] See section 4.3.

[109] *Micula and others v. Romania,* para. 524.

[110] *Minnotte and Lewis v. Poland,* para. 198-99.

[111] *Tulip Real Estate Investment and Development Netherlands B.V. versus Republic of Turkey*, ICSID Case No. ARB/11/28, Award, 10 March 2014.

actions must not constitute ”treatment in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable”, citing *Saluka Investment*.[112] The last two awards state that when the actions constituting a breach of the FET due to denial of justice the threshold is set high.[113]

Turning to the cases regarding FET in accordance with international law, this category of cases only holds two awards: *Vannessa v. Venezuela* and *Gold Reserve v. Venezuela*. *Vannessa v. Venezuela* does not comment on the general liability threshold for the applicable FET standard, but states that when it regards claims relating to denial of justices the threshold is high.[114] In *Gold Reserve v. Venezuela* on the other hand, they cite the *Saluka Investment* award which says that host actions will not breach the standard as long as they are ”justifiable by public policies” and ”does not manifestly violate the requirements of consistency, transparency, even- handedness and non-discrimination”.[115]

In both of the two Tribunals applying a FET linked to the MST one could find that the Tribunals had discussed the level of treatment required for a breach of the standard. The Tribunal in *Teco v. Guatemala*[116] says that the standard is ”infringed by conduct attributed to the State and harmful to the investor if the conduct is arbitrary, grossly unfair or idiosyncratic, is discriminatory or involves a lack of due process leading to an outcome which offends judicial propriety”[117] and that ”a complete lack of candor or good faith on the part of the regulator in its dealings with the investor, as

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[112] *Tulip v. Turkey,* para. 401.

[113] *Hesham Talaat M. Al-Warraq versus The Republic of Indonesia,* UNCITRAL Rules, Award, 15 December 2015, para. 620 and *Mamidoil v. Albania*, para. 769.

[114] *Vannessa v. Venezuela,* para. 227.

[115] *Gold Reserve v. Venezuela,* para. 569, citing *Saluka Investments v. The Czech Republic,* paras. 307-308.

[116] *Teco Guatemala Holdings LLC versus The Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, 19 December 2013.

[117] *Teco v. Guatemala,* para. 454.

well as a total lack of reasoning, would constitute a breach"[118] of the standard.

Clayton v. Canada probably provides the most comprehensive material on the liability threshold, stating that "there is a high threshold for the conduct of a host state to rise to the level of a NAFTA Article 1105 breach, but that there is no requirement in all cases that the challenged conduct reaches the level of shocking or outrageous behaviour."[119] The Tribunal further states that tribunals need to "be sensitive to the facts of each case, the potential relevance of reasonably relied-on representations by a host state, and a recognition that injustice in either procedures or outcomes can constitute a breach."[120] The Tribunal in *Clayton v. Canada* relies on the *Waste Management II* award and cites a long passage from the award when discussing which level of treatment the standard requires.[121]

Unfortunately this overview provides us with very little material regarding the level of treatment necessary to constitute a breach of the FET standard. The most important aspect of this is rather how the level of treatment seems to differ depending on which aspect of the FET standard that is in focus. Quite few of the components of the FET standard seem to qualify to the same, vague standard of "improper"[122] and "delinquent"[123] but need not be "egregious"[124] or "outrageous"[125]. Arbitrary, discriminatory and inconsistent actions seem to fall under this level of treatment within the regime of the unqualified FETs, but if the threshold is higher in regards to the two other types of FETs is hard to say. The *Tribunal in Clayton v. Canada* states that

[118] *Teco v. Guatemala,* para. 456.

[119] *Clayton v. Canada,* para. 442.

[120] *Clayton v. Canada,* para. 442.

[121] *Clayton v. Canada,* para. 442.

[122] *Minnotte and Lewis v. Poland,* para. 198-99.

[123] *Minnotte and Lewis v. Poland,* para. 198-99.

[124] *Micula and others v. Romania,* para. 524.

[125] *Micula and others v. Romania,* para. 524.

the threshold for breach of the FET (linked to MST) is ”high”[126], which makes it stand out from the other cases. Similar opinions were not found in the awards which regarded the FET in accordance with principles of international law (which should be at the same threshold level)[127] or the other case concerning a FET linked to MST.

To determine a common ground among the awards, this becomes more apparent when looking at the cases cited by the Tribunals in their reasoning of the content of the standard. *Waste Management II* is a case which has been cited among both awards dealing with the FET as well as the FET linked to MST, and as such seems to provide with one of the more generally accepted definitions of the FET standard and its applicable level. Another interesting case is the *Saluka investment* case which is popular to cite in regards to the unqualified FETs, and was also cited by *Gold Reserve v. Venezuela* which regards a FET in accordance with the principles of international law. These are the two most popular cases to cite among the awards examined, *Waste Management II* being cited eight times and *Saluka Investment being* cited six times.[128] Examples of other popular cases to cite are *S.D Myers*[129] which was cited four times and *Thunderbird*[130] which was cited three times.[131]

Turning our attention to the *Waste Management II* award, there is one key paragraph which is the focus of the Tribunals in the cases examined, being

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[126] *Clayton v. Canada,* para. 444.

[127] United Nations Conference on Trade and Development. *Fair and Equitable Treatment - UNCTAD Series on Issues in International Investment Agreements II.* 2012. p. 22.

[128] See supplement A.

[129] *S.D. Myers Inc. versus Canada*, UNCITRAL Rules, First Partial Award, 13 November 2000.

[130] *International Thunderbird Gaming Corporation versus Mexico,* UNCITRAL Rules, Award, 26 January 2006.

[131] Awards citing *Myers*: *Micula and others v. Romania, Teco v. Guatemala, British Caribbean Bank v. Belize* and *Clayton v. Canada*. Awards citing *Thunderbird*: *Micula and others v. Romania, Gold Reserve v. Venezuela* and *Clayton v. Canada*.

cited no less than six times. The Tribunal in *Waste Management II* came to the following conclusion regarding the FET:

> The search here is for the Article 1105 standard of review, and it is not necessary to consider the specific results reached in the cases discussed above. But as this survey shows, despite certain differences of emphasis a general standard for Article 1105 is emerging. Taken together, the S.D. Myers, Mondev, ADF and Loewen cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.[132]

Noticeably, their conclusion is one drawn from past awards. Being itself a very popular case to cite, there is no denying the heavy impact of past awards when defining the FET standard even though the international investment law regime lacks binding precedent. Nevertheless, this case's popularity among Tribunals independent of the formulation of the FET in the treaty makes this passage stand out as particularly important when defining the content of the FET.

Saluka Investment has no key paragraph as such, as the different cases have cited somewhat different paragraphs. Nevertheless the focus in undoubtedly on the paragraphs 296-309, which concern the Tribunal's interpretation of the standard. Their approach is similar to that of the Tribunal in *Waste Management II* in that they rely on past awards, but since this award concerns an unqualified FET there are some key differences. First, this is what they have to say about the content of the FET standard:

> The protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of encouraging foreign

[132] *Waste Management II,* para. 98.

> investment and extending and intensifying the parties' economic relations. That in turn calls for a balanced approach to the interpretation of the Treaty's substantive provisions for the protection of investments, since an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties' mutual economic relations. […]
>
> The "fair and equitable treatment" standard in Article 3.1 of the Treaty is an autonomous Treaty standard and must be interpreted, in light of the object and purpose of the Treaty, so as to avoid conduct of the Czech Republic that clearly provides disincentives to foreign investors. The Czech Republic, without undermining its legitimate right to take measures for the protection of the public interest, has therefore assumed an obligation to treat a foreign investor's investment in a way that does not frustrate the investor's underlying legitimate and reasonable expectations. A foreign investor whose interests are protected under the Treaty is entitled to expect that the Czech Republic will not act in a way that is manifestly inconsistent, non-transparent, unreasonable (i.e. unrelated to some rational policy), or discriminatory (i.e. based on unjustifiable distinctions).[133]

In this they have applied a balanced approach, in which one must consider the investor's need for protection as well as the host state's right to legislate. I believe their focus on this aspect of the FET is one of the reasons the awards have been a popular source of reference, as well as the fact that their reasonings in regards to the standard is well developed and thorough. The Tribunal has also a few things to say about the relationship between the FET and MST:

> [I]t appears that the difference between the Treaty standard laid down in Article 3.1 and the customary minimum standard, when applied to the specific facts of a case, may well be more apparent than real. To the extent that the case law reveals different formulations of the relevant thresholds, an in- depth analysis may well demonstrate that they could be explained by the contextual and factual differences of the cases to which the standards have been applied. […] Whichever the difference between the customary and the treaty standards may be, this Tribunal has to limit itself to the interpretation of the "fair and equitable treatment" standard as embodied in Article 3.1 of the Treaty. That Article omits any express reference to the customary minimum standard. The interpretation of Article 3.1 does not therefore share the difficulties that may arise under treaties (such as the NAFTA) which

[133] *Saluka Investments v. The Czech Republic,* paras. 300-309.

> expressly tie the “fair and equitable treatment” standard to the customary minimum standard. Avoidance of these difficulties may even be regarded as the very purpose of the lack of a reference to an international standard in the Treaty. This clearly points to the autonomous character of a “fair and equitable treatment” standard such as the one laid down in Article 3.1 of the Treaty.[134]

Firstly, they regard the FET in their case as an ”autonomous” standard, something no Tribunal did in any of the cases I examined. This means that they at least in theory divide the terms FET and MST. But they also make a comment regarding their content, stating that the difference between the standard may be ”more apparent than real”. To summarize, the Tribunal makes a difference between the terms but at the same time voices their opinion that there might not be any real difference between them when applying them to a particular case.

[134] *Saluka Investments v. The Czech Republic,* paras. 291-294.

5. Concluding remarks - Problems and solutions

5.1 Is the threshold level high enough?

In this subsection, we will be looking at how to apply the liability threshold within the legitimate expectations doctrine. After an analysis of the content of the FETs components, this is what I found to be most problematic.

Some Tribunals when discussing the host state's treatment of the foreign investor and the doctrine of legitimate expectations focus on that the doctrine includes an obligation to provide a stable legal framework. The Tribunal in *Tecmed* provided with a very investor friendly definition of the required conduct by the host state:

> The Arbitral Tribunal considers that this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. *The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.* […] The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. [Emphasis added.][135]

Despite being dismissed by some sources, this has not prevented Tribunals from following this kind of reasoning.[136] In *CMS v. Argentina*[137] the

[135] *Tecmed*, para. 154.

[136] For criticism against the *Tecmed* award, see Douglas, 2006.

[137] *CMS Gas Transmission Company versus The Argentine Republic*, ICSID Case No. Arb/01/08, Award, 12 May 2005.

Tribunal found that even if the reasons behind the host state actions were reasonable, this did not matter as there still had been an objective breach of the investor's legitimate expectations.[138] The Tribunal in *Micula and others v. Romania* also agrees to a certain degree with the Tribunal in *Tecmed,* but adds that one cannot take this statement from *Tecmed* too literal as this would impose unreasonable restrictions on the host state.[139]

Among the cases examined in this essay, this investor friendly view of the legitimate expectations has been upheld by the Tribunal in *Micula and others v. Romania*. In this case foreign investors chose to invest in certain regions in Romania due to tax reductions available in these regions. Romania had under-developed regions with high unemployment and this was part of a strategy for Romania to try and increase the living conditions in these regions. To get the tax reduction the investor had to fulfill certain conditions, for example they had to keep being active in the region for a certain amount of time even after the tax reductions became unavailable, and failing to fulfill the condition could lead to the investor losing the tax reduction privilege and paying retrospectively for the time they paid lesser taxes. The tax reductions were to be available for the investors during a certain amount of time, but Romania chose to revoke the tax reductions earlier than intended.

This case concerned an unqualified FET, and had it concerned a FET linked to the international minimum standard the outcome would most likely have been quite different. In the award the Tribunal focuses on the legitimate expectations doctrine, and concluded that Romania had failed to fulfill the investor's legitimate expectation because they revoked the tax reduction earlier than intended.

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[138] *CMS v. Argentina,* para. 278 and forward.

[139] *Micula and other v. Romania,* para 533: regarding the cited *Tecmed* passage the Tribunal states that they "agrees with the general thrust of these statements".

The Tribunal states that it first needs to conclude three things: (i) that the host state made an assurance or promise, (ii) that the claimants relied on this promise when making their investment and (iii) that the expectations the claimant had were reasonable.[140] They also make clear that the assurance or promise can be either specifically made to the investor or just generally issued, an interpretation which is not generally accepted within the FET regime.[141] By looking at the purpose as well as the form of the legislation granting the tax reductions the Tribunal finds that the current legislation, which specified that it would last until a certain date, constituted a general assurance towards the investors.[142]

In deciding whether the expectations were reasonable, the Tribunal examines this question from two perspectives; (i) under Romanian law and (ii) under the context of Romanian's ascension to EU.[143] This means that the Tribunal turn to the reasons behind Romania's actions, and as we will see they did revoke the tax reductions due to a specific reason and their actions cannot be said to be either arbitrary or discriminatory. During this time, it was Romania's ambition to ascend to EU. The question thus arose whether the tax reductions were compatible with EU-law, and eventually it became clear that they were not. Therefore Romania decided, in order to comply with EU-law, to revoke the tax reductions earlier than intended.[144]

The Tribunal in its analyses of whether Romania acted unreasonably concludes that they did not act unreasonably when they revoked the tax reductions for the investor. But they also conclude that this does not matter when it comes to determining whether there has been a breach of the doctrine of legitimate expectations. Thus the Tribunal concludes that

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[140] *Micula and other versus Romania*, para. 668.

[141] *Micula and other versus Romania,* para. 671.

[142] *Micula and other versus Romania,* para. 677.

[143] *Micula and other versus Romania,* para. 690.

[144] *Micula and other versus Romania,* para. 739.

Romania, even though they did not act unreasonable, breached the FET due to failure to uphold the investor's legitimate expectations.[145]

In its definition of the FET standard, the Tribunal in *Micula and others v. Romania* cites *Waste Management II* as well as *Saluka Investment*. Both of these awards focus on the balancing aspect of the FET, which means that when concluding whether there has been a breach of the standard one must respect the host state's sovereignty and its right to legislate and balance this against the investors interest. Yet I have a hard time seeing how the Tribunal implemented this principle in the award, since they acknowledge that Romania did not act unreasonably and yet they still breached the standard. The Tribunal puts Romania in a position were whatever they do they either breach international law or they breach EU-law. The EU Commission has, since the award was published, asked that Romania do not pay the award (in which the Claimant won no less than 90 million USD[146]) since the award itself would constitute an unlawful state aid according to EU-law. This dispute is now being subject to trial in the Court of Justice.[147]

Using this kind of approach when applying the doctrine of legitimate expectations sets the liability threshold for the host state very low, if one can even talk about a liability threshold in this instance. The state conduct does not need to be outrageous or even faulty in the traditional sense, all that is needed is that the host state's actions do not comply with the expectations of the foreign investors.

The problem with the doctrine of legitimate expectations is that it has a very wide scope and may impose unreasonable restrictions on the host state's actions. Then there is the problem regarding its vague definition and content. Interpreted in the most investor friendly way, the doctrine is

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[145] *Micula and other versus Romania,* para. 827 and para 725.

[146] Actual sum in award: 376,433,229 RON.

[147] *Micula and Others v Commission*, Court of Justice, Case T-646/14, Case in progress.

standalone and it does not require specific representations from the host state. Interpreted in this sense, I believe that the doctrine may allow Tribunals to reach unreasonable conclusions. The main example being *Micula and others v. Romania*, in which the host state has put themselves in a position in which no matter what they do, they will either breach a BIT or EU law. I believe that when a host state acts with the best of intentions and try to limit the damages of a current problem at the best of their ability they, as a general rule, ought not to have breached the fair and equitable treatment.

This leads us to the concept of good faith. Would it then be reasonable to claim that it should be required for the host state to act in bad faith for it to breach the FET? This would of course solve the problem with the FET standard and the doctrine of legitimate expectations being too investor friendly, but it would also render the FET standard almost toothless. To require that the investor prove the host state's motivation and concluding there has been bad faith would most likely lead to very few investors winning in investor-state arbitration, even in cases where the investor has been treated unfairly.

The natural way to limit the scope of the doctrine in favor of the host state is thus to limit it to an instrumental use, meaning that it can only be considered when there has been a breach of another component. Further, it may be required that specific representations are required. This, I believe might help with the issues but I am not sure it will suffice.

In the newly negotiated EU-Canada Comprehensive Economic and Trade Agreement (CETA) one has tried to amend a lot of the issues with the FET standard. One issue is the lack of clarity, and thus the signatory states have tried to define the FET more clearly in the treaty:

> 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 to 6.
>
> A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 where a measure or series of measures constitutes:
>
> Denial of justice in criminal, civil or administrative proceedings;
> Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings.
> Manifest arbitrariness;
> Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
> Abusive treatment of investors, such as coercion, duress and harassment;
>
> […]
>
> When applying the above fair and equitable treatment obligation, a tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.[148]

In this treaty the components of the FET have been explicitly listed. This is a great attempt at clarifying its content, and note also that it does not mention any requirement for there to be a stable or consistent legal environment, a requirement that has been discussed as part of the FET and the legitimate expectations doctrine that potentially may impose very strict restrictions on the host state actions. The omission of this is a good sign.

The article also explicitly mentions the doctrine of the investors legitimate expectations. The wording is not entirely clear, but it would seem as though it is a limited version of the doctrine. First, it is clear that specific representations are needed for there to be any expectations. It seems as if there has only been a breach of the legitimate expectations doctrine, this will not amount to a treaty breach, otherwise it would have been listed among the list of measures earlier in the article.

[148] Article X.9: *Treatment of Investors and of Covered Investments* of CETA.

It is for the future to decide if the compromises made in CETA are enough, or if the FET standard is still up for an extensive interpretation in favor of the investors. I would prefer a treaty which explicitly forbade the use of the doctrine of legitimate expectations, since if one does not forbid it Tribunals might reason that it is part of international law and thus applicable on the present case. This because I fail to see that the benefits of the doctrine outweigh the negative.

If one were to solve FET claims without the doctrine of legitimate expectations, one would need to clearly define the limits of each of the other components, something I would prefer and I believe that in the long run this would be most beneficial to the international investment regime.

5.2 Convergence of FET formulations

In this paper, we have come across two cases in which the Tribunals voice their opinion that there might not be any practical difference between the MST and the FET, namely *Saluka Investment* and *Rompetrol Group v. Romania*. Both of these cases regard the unqualified FET, and the Tribunal have interpreted the FET through the use of VCLT and past awards. In doing so no one can claim that the Tribunals have done anything wrong. It would have been different if the awards were in regards to the MST, and they would have claimed that this has the same content and liability threshold as the FET standard. The closest we come in this regard is *Gold Reserve v. Venezuela*, which cites *Saluka Investments* in a case regarding an FET in accordance with principles of international law. Nevertheless, these two cases are indeed signs that the two terms are converging, or at least that there are forces among arbitrators within the international investment regime that would want them to be. But one can hardly point to these two cases as proof that the terms are converging.

Then we have the *Waste Management II* case, which provides a general definition of the FET linked to the MST. The fact that this one key

paragraph has been cited in eight of the fourteen cases examined surely says something of the general acceptance the definition made by the Tribunal in *Waste Management II* has. But more important is the fact that the paragraph has been cited by Tribunals dealing with different FET formulations. Of the cases examined, *Vannessa v. Venezuela*, *Micula and others v. Romania*, *Teco v. Guatemala*, *Minnotte and Lewis v. Poland*, *Gold Reseve v. Venezuela*, *British Caribbean Bank v. Belize*, *Mamidoil v. Albania* and *Clayton v. Canada* were the ones which cited *Waste Management II,* paragraph 98. These include both of the two cases concerning a FET formulation in accordance with the principles of international law[149], both of the two cases concerning a FET linked to the MST[150] and four of the cases concerning an unqualified FET[151]. I believe that this finding is one of the strongest signs that I have found that point to the terms converging.

5.3 End summary

In this paper I have identified the legitimate expectations doctrine, together with a requirement to provide a consistent, stable legal framework to be the most problematic component of the FET. This component can be limited in several ways, and it has been in the newly negotiated CETA. This is a step in the right direction, but I would prefer to see it removed it in its entirety from the international investment regime. This because I fail to see the benefits of the doctrine, and I do not believe that removing the doctrine from the FET standard would leave the investors without protections.

In regards to the other question I set out to answer in this paper regarding the different FET formulations and whether these are converging or not, my answer is not as clear. The many Tribunals citing the *Waste Management II* award point to a will among the arbitrations to try and commit to a *jurisprudence constante*, but as pointed out by the tribunal in *Mamidoil v.*

[149] *Vannessa v. Venezuela* and *Gold Reseve v. Venezuela*

[150] *Teco v. Guatemala* and *Clayton v. Canada*

[151] *Micula and others v. Romania, Minnotte and Lewis v. Poland, British Caribbean Bank v. Belize* and *Mamidoil v. Albania*

Albania the international investment regime lacks coherent past awards.[152] But despite many tribunals citing the *Waste Management II* award, some did not. Even if the *Waste Management II* may be singled out as an exceptionally influential award, it does not include an accepted and complete definition of the FET standard. And with new treaties using new formulations of the FET, as CETA does, the divergence will continue. But at the same time this will make sure that the FET evolves, and due to treaties like CETA it might begin to evolve into a provision with a more balanced application.

[152] *Mamidoil v. Albania,* para. 603.

Supplement A

Overview of instances where the Tribunal cited or made reference to *Waste Management 2* or *Saluka Investment* in their discussion regarding the definition of the fair and equitable treatment standard

Vannessa Ventures Ltd. versus The Bolivarian Republic of Venezuela,

ICSID Case No. ARB(AF)/04/6, Award, 16 January 2013

Para 227	Tribunals in other cases have pointed to the high threshold in this regard. In Waste Management, the award referred to "a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice."227 The Tribunal considers that to be the correct approach. The question is not whether the host State legal system is performing as efficiently as it ideally could: it is whether it is performing so badly as to violate treaty obligations to accord fair and equitable treatment and full protection and security. The Tribunal does not consider that the delays in this case are of an order that constitute conduct that falls below the minimum standard demanded by the Treaty.	227 = Waste Management v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, ¶ 98. Cf., Loewen Group v. United States of America, ICSID Case No. ARB(AF)/ 98/3, Award, June 26, 2003, ¶ 132; Alex Genin v. The Republic of Estonia, ICSID Case No. ARB/99/2, Award, June 25, 2001, ¶ 371.

Para 504	This Tribunal agrees with the Saluka tribunal in that "[t]his is probably as far as one can get by looking at the 'ordinary meaning' of the terms of Article 3.1 of the Treaty."81	81 = Saluka v. Czech Republic, ¶ 297.
Para 506	Similarly, the tribunal in Waste Management II said that "the standard is to some extent a flexible one which must be adapted to the circumstances of each case."83 This has been echoed by several tribunals, including in Lauder v. Czech Republic84, CMS v. Argentina, Noble Ventures v. Romania85, Saluka v. Czech Republic.	83 = Waste Management v. Mexico II, ¶ 99 84 = Ronald S. Lauder v. The Czech Republic, UNCITRAL, Final Award, 3 September 2001 (hereinafter, "Lauder v. Czech Republic"). 85 = Noble Ventures, Inc. v. Romania (ICSID Case No. ARB/01/11), Award, 12 October 2005.
Para 507	The tribunal in *Saluka* held: This does not imply, however, that such standards as laid down in Article 3 of the Treaty would invite the Tribunal to decide the dispute in a way that resembles a decision ex aequo et bono. This Tribunal is bound by Article 6 of the Treaty to decide the dispute on the basis of the law, including the provisions of the Treaty. Even though Article 3 obviously leaves room for judgment and appreciation by the Tribunal, it does not set out totally subjective standards which would allow the Tribunal to substitute, with regard to the Czech Republic's conduct to be assessed in the present case, its judgment on the choice of solutions for the Czech Republic's. As the tribunal in S.D. Myers has said, the "fair and equitable treatment" standard does not create an "open-ended mandate to second-guess government decision-making". The standards formulated in Article 3 of the Treaty, vague as they may be, are susceptible of specification through judicial practice and do in fact have sufficient legal content to allow the case to be decided on the basis of law. Over the last few years, a number of awards have dealt with such standards yielding a fair amount of practice that sheds light on their legal meaning.86	86 = Saluka v. Czech Republic, ¶ 284.

Para 512	In view of these considerations, the Tribunal favors a balanced view of the goals of the BIT similar to that adopted by the Saluka tribunal: ”This is a more subtle and balanced statement of the Treaty’s aims than is sometimes appreciated. The protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties’ economic relations. That in turn calls for a balanced approach to the interpretation of the Treaty’s substantive provisions for the protection of investments, since an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties’ mutual economic relations. Seen in this light, the “fair and equitable treatment” standard prescribed in the Treaty should therefore be understood to be treatment which, if not proactively stimulating the inflow of foreign investment capital, does at least not deter foreign capital by providing disincentives to foreign investors. An investor’s decision to make an investment is based on an assessment of the state of the law and the totality of the business environment at the time of the investment as well as on the investor’s expectation that the conduct of the host State subsequent to the investment will be fair and equitable.”88	88 = Saluka v. Czech Republic, ¶¶ 304-309.
Para 522	There is no dispute that conduct that is substantively improper, whether because it is arbitrary, manifestly unreasonable, discriminatory or in bad faith, will violate the fair and equitable treatment standard. As stated by the Waste Management II tribunal: “[T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.”96	96 = Waste Management v. Mexico II, ¶ 98. The Tribunal notes that, strictly speaking, this case refers to the minimum standard of treatment contained in NAFTA Article 1105. However, both Parties have relied on this definition in their submissions in this case, so the Tribunal understands that they accept that it is relevant for the fair and equitable treatment standard under the BIT.
Para 523	On this subject, the Saluka tribunal stated: ”A foreign investor protected by the Treaty may in any case properly expect that the Czech Republic implements its policies bona fide by conduct that is, as far as it affects the investors’ investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and nondiscrimination. In particular, any differential treatment of a foreign investor must not be based on unreasonable distinctions and demands, and must 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.”97	97 = Saluka v. Czech Republic, ¶ 307.

Para 524	This finding was echoed by the tribunal in Waste Management v. Mexico II: ”Both the Mondev and ADF tribunals rejected any suggestion that the standard of treatment of a foreign investment set by NAFTA is confined to the kind of outrageous treatment referred to in the Neer case, i.e. to treatment amounting to an “outrage, to bad faith, to wilful neglect of duty, or to an in insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.””99	99 = Waste Management v. Mexico II, ¶ 93. This paragraph has been cited by many different tribunals, including Chemtura Corporation v. Government of Canada, UNCITRAL, Award, 2 August 2010 (hereinafter, “Chemtura v. Canada”), ¶ 215. See Dolzer & Schreuer p. 129.
Para 533	However, as noted by the Saluka tribunal, such propositions must be considered in the proper context; “taken too literally, they would impose upon host States obligations which would be inappropriate and unrealistic.”106	106 = Saluka v. Czech Republic, ¶ 304.

Para 667	Although the question of whether these legitimate expectations were breached is a factual one, an overwhelming majority of cases supports the contention that, where the investor has acquired rights, or where the state has acted in such a way so as to generate a legitimate expectation in the investor and that investor has relied on that expectation to make its investment, action by the state that reverses or destroys those legitimate expectations will be in breach of the fair and equitable treatment standard and thus give rise to compensation.133	133 = See, e.g., Saluka v. Czech Republic, ¶¶ 302 (The standard of "fair and equitable treatment" is therefore closely tied to the notion of legitimate expectations which is the dominant element of that standard. By virtue of the "fair and equitable treatment" standard included in Article 3.1 the Czech Republic must therefore be regarded as having assumed an obligation to treat foreign investors so as to avoid the frustration of investors' legitimate and reasonable expectations"); Tecmed v. Mexico, ¶ 154 (where the tribunal found that the obligation to provide "fair and equitable treatment" meant "to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment"); CME v. Czech Republic, ¶ 611 (where the tribunal concluded that the Czech authority "breached its obligation of fair and equitable treatment by evisceration of the arrangements in reliance upon with the foreign investor was induced to invest"); Waste Management v. Mexico II, ¶ 98 ("In applying [the 'fair and equitable treatment'] standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant."); International Thunderbird v. Mexico, ¶ 147 ("[t]he concept of 'legitimate expectations' relates, within the context of the NAFTA framework, to a situation where a Contracting Party's 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 NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages")
Para 671	This promise, assurance or representation may have been issued generally or specifically, but it must have created a specific and reasonable expectation in the investor. That is not to say that a subjective expectation will suffice; that subjective expectation must also have been objectively reasonable. As stated by the Saluka tribunal, "the scope of the Treaty's protection of foreign investment against unfair and inequitable treatment cannot exclusively be determined by foreign investors' subjective motivations and considerations. Their expectations, in order for them to be protected, must rise to the level of legitimacy and reasonableness in light of the circumstances."138	138 = Saluka v. Czech Republic, ¶ 304.

Para 673	When the alleged legitimate expectation is one of regulatory stability, the reasonableness of the expectation must take into account the underlying presumption that, absent an assurance to the contrary, a state cannot be expected to freeze its laws and regulations. As noted by the Saluka tribunal, "[n]o investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor's expectations was justified and reasonable, the host state's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well."139	139 = Saluka v. Czech Republic, ¶ 305.
Para 834	Similarly, the Waste Management II tribunal held that "[a] basic obligation of the State under Article 1105(1) [which sets out NAFTA's minimum standard of treatment] is to act in good faith and form, and not deliberately to set out to destroy or frustrate the investment by improper means."151	151 = Waste Management v. Mexico II, ¶ 138.

Para 454-455	The Arbitral Tribunal considers that the minimum standard of FET under Article 10.5 of CAFTA-DR is infringed by conduct attributed to the State and harmful to the investor if the conduct is arbitrary, grossly unfair or idiosyncratic, is discriminatory or involves a lack of due process leading to an outcome which offends judicial propriety. The Arbitral Tribunal agrees with the many arbitral tribunals433 and authorities434 that have confirmed that such is the content of the minimum standard of treatment in customary international law.	433 = Waste Management Award, supra footnote 214, § 98; Glamis Gold Award, supra footnote 290, § 627. 214 = Counter-Memorial, §§ 79-83 and Rejoinder, §§ 62 et seq. citing ADF Group Inc. v. United States of America, ICSID Case No. ARB (AF)/001, Award, January 9, 2003 (CL-4), § 190 (hereinafter "ADF Award"), Robert Azinian et al. v. United Mexican States, ICSID Case No. ARB (AF)/97/2), Award, November 1, 1999 (RL-2), § 99; Waste Management Inc. v. United Mexican States, ICSID Case No. ARB (AF)/00/3, Award, April 30, 2004 (CL-46), § 12 (hereinafter "Waste Management Award"); Saluka Investments BV v. Czech Republic, UNCITRAL Case, Partial Award, March 17, 2006 (CL-42) (hereinafter "Saluka Award"), Generation Ukraine v. Ukraine, ICSID Case No. ARB/00/9, Award, September 16, 2003 (RL- 6) (hereinafter "Generation Ukraine Award"); EnCana Corporation v. Republic of Ecuador, LCIA Case No. UN3481, (hereinafter "EnCana v. Ecuador", Award, February 3, 2006 (RL-9), § 194; Marvin Feldman v. United Mexican States, ICSID Case No. ARB (AF)/99/1, Final Award, December 16, 2002 (RL-5), §§ 134, 140; GAMI Investments Inc. v. United Mexican States, UNCITRAL, Final Award, November 15, 2004 (RL-7), § 100; Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/ 05/8, Award, September 11, 2007 (RL-10) (hereinafter "Parkerings-Compagniet Award"), §§ 315-317; Iberdrola Energía SA v. Republic of Guatemala, ICSID Case No. ARB/09/5, Award, August 17, 2012 (RL-34) (hereinafter "Iberdrola Award"), §§ 369-372 and 418-421.

David Minnotte and Robert Lewis versus Republic of Poland, ICSID Case No. ARB(AF)/10/1, Award, 16 May 2014

Para 198	The Claimants refer to the approach to the interpretation of the duty of fair and equitable treatment adopted by tribunals in cases such as Waste Management, Myers, Lauder, Saluka and TecMed.244 While the precise formulations of the fair and equitable treatment standard in these, and other, awards differ, they all have in common the notion that the State must be shown to have acted delinquently in some way or other if it is to be held to have violated that standard. It is not enough that a claimant should find itself in an unfortunate position as a result of all of its dealings with a respondent.	244 = Waste Management, Inc. v. Mexico (ICSID Case No. ARB(AF)/ 00/3), Award, 30 April 2004, ¶ 98 ("Waste Management"); S.D. Myers v. Canada, Partial Award, 13 November 2000, ¶¶ 134 et seq.. ("Myers"); Lauder (US) v. Czech Republic, Final Award, 3 September 2001 ("Lauder"); Saluka Investments BV (The Netherlands) v. The Czech Republic, Partial Award, 17 March 2006, ¶¶ 298 & 309 ("Saluka"); Técnicas Medioambientales Tecmed, S.A. v. United Mexican States (ICSID Case No. ARB (AF)/00/2), Award, 29 May 2003, ¶ 154 ("Tecmed"); see also Claimants' Memorial, ¶¶ 45-46, 56, 58, 71; Claimants' Reply Memorial, ¶ 155.

Gold Reserve Inc. versus Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014

Para 569	As held by the tribunal in Saluka, a foreign investor protected by the particular treaty providing for, among others, the FET standard, "may in any case properly expect that the [State will] implement[] its policies bona fide by conduct that is, as far as it affects the investors' investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even- handedness and non-discrimination". In particular, any differential treatment of a foreign investor must not be based on unreasonable distinctions and demands, and must be justified by showing that it bears a reasonable relationship to the foreign-owned investment."461	461 = Saluka, cit., paras. 307-308.
Para 569	The tribunal held that the State had failed to accord the investor fair and equitable treatment because it failed to consider in an "unbiased, even-handed, transparent and consistent way" the investor's good faith proposals to resolve the bank crisis, and by "unreasonably refus[ing] to communicate with IPB and Saluka/Nomura in an adequate manner."462	462 = Saluka, cit., para. 407.

Para 573	In Waste Management v. Mexico the tribunal summarized its position on the FET standard in the following terms: "the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to Claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes Claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by Claimant."470	470 = Waste Management v. Mexico, cit., para. 98.

Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana De Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd and Mobil Venezolana De Petróleos, Inc. versus The Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Award, 9 October 2014

Para 256	The Tribunal will first consider the alleged breach of the FET standard. In the Tribunal's opinion, this standard may be breached by frustrating the expectations that the investor may have legitimately taken into account when making the investment. Legitimate expectations may result from specific formal assurances given by the host state in order to induce investment[330].	330 = Glamis Gold Ltd. v. United States (NAFTA Ch. 11, 8 June 2009), (Ex. CL-189); Parkerings-Compagniet AS v. Republic of Lithuania (ICSID Case No. ARB/05/8), (Ex. R-303); Continental Casualty Company v. Argentine Republic (ICSID Case No. ARB/03/9), (Ex. CL-167); Saluka Investments BV v. Czech Republic (PCA- UNCITRAL, IIC 210 (2006)), (Ex. CL-123).

Tulip Real Estate Investment and Development Netherlands B.V. versus Republic of Turkey, ICSID Case No. ARB/11/28, Award, 10 March 2014

Para 401	The Tribunal concludes that Art 3(1) of the BIT is to be construed according to the ordinary meaning of the term "fair and equitable," *i.e.*, "'just,' 'even-handed', 'unbiased', 'legitimate'" and infringement of that standard requires "treatment in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable".[436]	436 = See Saluka Investments B.V. v. The Czech Republic, UNCITRAL (Partial Award dated 17 March 2006), para. 297 (Exhibit CLA-38).

British Caribbean Bank Limited (Turks & Caicos) versus The Government of Belize, PCA CASE No 2010-18, Award, 19 December 2014

Para 279	First, fair and equitable treatment is frequently noted to include a prohibition on conduct that is "arbitrary," "idiosyncratic," or "discriminatory".321 There is an inherent logic to this association.	See, e.g., SD Myers Inc v Government of Canada, UNCITRAL, Award of 13 November 2000 at para. 263; Waste Management, Inc v United Mexican States (No 2), ICSID Case No ARB(AF)/00/3, Award of 30 April 2004 at para. 98.

Mamidoil Jetoil Greek Petroleum Products Societe S.A. versus Republic of Albania, ICSID Case No. ARB/11/24, Award, 30 March 2015

Para 604	Tribunals have tried to give meaning to the terms by circumscribing them with other terms such as 'just', 'even-handed', 'unbiased', 'legitimate', 'idiosyncratic', 'a manifest failure of natural justice in judicial proceedings' and a disregard of 'procedural propriety'.468	468 = MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award, 25 May 2004, para. 113; Saluka Investments B.V. v. Czech Republic, UNCITRAL, Partial Award, 17 March 2006, paras. 303-308; Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, para. 98.

Para 609-610	In Saluka v. Czech Republic, the tribunal found as follows: ”The protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties’ economic relations. That in turn calls for a balanced approach to the interpretation of the Treaty’s substantive provisions for the protection of investments, since an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties’ mutual economic relations. Seen in this light, the “fair and equitable treatment” standard prescribed in the Treaty should therefore be understood to be treatment which, if not proactively stimulating the inflow of foreign investment capital, does at least not deter foreign capital by providing disincentives to foreign investors.”473 In a first step to its assessment of the fair and equitable standard, and in light of the controversial debate among tribunals, the Tribunal affirms that the vagueness of the terms does not entitle tribunals to create a new standard of international law in disregard of the terms of the applicable treaties, generic as they may be.	473 = Saluka Investments B.V. v. Czech Republic, UNCITRAL, Partial Award, 17 March 2006, paras. 300-301.
Para 619	In Saluka v. Czech Republic, the tribunal affirmed: ”No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor’s expectations was justified and reasonable, the host State’s legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well.”476	476 = Saluka Investments, B.V. v. Czech Republic, UNCITRAL, Partial Award, 17 March 2006, para. 305.
Para 629	The Tribunal concurs with Saluka v. Czech Republic, where the Tribunal held that “expectations, in order to be protected, must rise to the level and reasonableness in light of the circumstances”.482	482 = Saluka Investments B.V. v. Czech Republic, UNCITRAL, Partial Award, 17 March 2006, para. 304 (emphasis in original); also Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 99, and Pantechniki S.A. Contractors & Engineers v. Republic of Albania, ICSID Case No. ARB/07/21, Award, 30 July 2009, paras. 81-82.

Para 442-443	The formulation of the "general standard for Article 1105" by the Waste Management Tribunal is particularly influential, and a number of other tribunals have applied its formulation of the international minimum standard based on its reading of NAFTA authorities: "Taken together, the S.D. Myers, Mondev, ADF and Loewen cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety - as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant. Evidently the standard is to some extent a flexible one which must be adapted to the circumstances of each case."635 While no single arbitral formulation can definitively and exhaustively capture the meaning of Article 1105, the Tribunal finds this quote from Waste Management to be a particularly apt one. Acts or omissions constituting a breach must be of a serious nature. The Waste Management formulation applies intensifying adjectives to certain items—but by no means all of them—in its list of categories of potentially nonconforming conduct. The formulation includes "grossly" unfair, "manifest" failure of natural justice and "complete" lack of transparency.	635 = Waste Management Inc. v. Mexico, ICSID Case No. ARB(AF)00/3, 30 April 2004, paras. 98 and 99, quoted in Mobil Investments Canada Inc. & Murphy Oil Corporation v. Canada, ICSID Case No. ARB(AF)/07/04, Decision on Liability and on Principles of Quantum, 22 May 2012, para. 141, and in Cargill Incorporated v. United Mexican States, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, para. 282.

Supplement B

Table of cases with corresponding treaties and FET formulations

Case	Name of Treaty	Formulation of FET
Vannessa Ventures Ltd. versus The Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/04/6, Award, 16 January 2013.	Agreement between the Government of Canada and the Government of The Republic of Venezuela for the Promotion and Protection of Investments	Each Contracting Party shall, in accordance with the principles of international law, accord investments or returns of investors of the other Contracting Party fair and equitable treatment and full protection and security.
Oan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. versus Romania, ICSID Case No. ARB/05/20, Award, 11 December 2013.	Agreement between the Government of Sweden and the Government of Romania on the Promotion and Reciprocal Protection of Investment	Each Contracting party shall at all times ensure fair and equitable treatment of the investments by investors of the other Contracting Party and shall not impair the management, maintenance, use, enjoyment or disposal thereof, as well as the acquisition of goods and services or the sale of their production, through unreasonable or discriminatory measures.
The Rompetrol Group N.V. versus Romania, ICSID Case No. ARB/06/3, Award, 6 May 2013.	Agreement on encouragement and reciprocal protection of investments between the Government of the Kingdom of the Netherlands and the Government of Romania	Each Contracting Party shall ensure fair and equitable treatment of the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors. Each Contracting Party shall accord to such investments full physical security and protection.
Teco Guatemala Holdings LLC versus The Republic of Guatemala , ICSID Case No. ARB/10/17, Award, 19 December 2013.	The Dominican Republic-Central America Free Trade Agreement (CAFTA-DR)	**Article 10.5: Minimum Standard of Treatment** 1. Each Party shall accord to covered investments treatment in accordance with customary international law, including **fair and equitable treatment** and full protection and security. 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. 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 the world; and (b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.

Case	Name of Treaty	Formulation of FET
Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Traiding Ltd. versus The Republic of Kazakhstan, SCC Arbitration V (116/2010), Award, 19 December 2013.	Energy Charter Treaty	Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties **fair and equitable treatment**. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.
David Minnotte and Robert Lewis versus Republic of Poland, ICSID Case No. ARB(AF)/10/1, Award, 16 May 2014.	Treaty Between The United States Of America And The Republic Of Poland Concerning Business And Economic Relations	Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law. Neither Party shall in any way impair by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal of investments. Each Party shall observe any obligation it may have entered into with regard to investments.
Gold Reserve Inc. versus Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014.	Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments	Each Contracting Party shall encourage the creation of favourable conditions for investors of the other Contracting Party to make investments in its territory. Each Contracting Party shall, in accordance with the principles of international law, accord investments or returns of investors of the other Contracting Party fair and equitable treatment and full protection and security.
Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana De Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd and Mobil Venezolana De Petróleos, Inc. versus The Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Award, 9 October 2014.	Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Republic of Venezuela	Each Contracting Party shall ensure fair and equitable treatment of the investments of nationals of the other Contracting Party and shall not impair, by arbitrary or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals. More particularly, each Contracting Party shall accord to such investments full physical security and protection which in any case shall not be less than that accorded either to investments of its own nationals or to investments of nationals of any third State, whichever is more favourable to the national concerned.

Case	Name of Treaty	Formulation of FET
Tulip Real Estate Investment and Development Netherlands B.V. versus Republic of Turkey, ICSID Case No. ARB/ 11/28, Award, 10 March 2014.	Agreement on Reciprocal Encouragement and Protection of Investments between the Kingdom of the Netherlands and the Republic of Turkey	Each Contracting Party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment sale or liquidation thereof by those investors.
British Caribbean Bank Limited (Turks & Caicos) versus The Government of Belize, PCA CASE No 2010-18, Award, 19 December 2014.	Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Belize for the Promotion and Protection of Investments of 30 April 1982	Each Contracting Party shall encourage and create favourable conditions for nationals or companies of the other Contracting Party to invest capital in its territory, and, subject to its right to exercise powers conferred by its laws, and consistently with its national objectives, shall admit such capital. Investments of nationals or companies of either Contracting Party shall at all times be accorded **fair and equitable treatment** and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable, or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into. with regard to investments of nationals or companies of the other Contracting Party.
Hesham Talaat M. Al-Warraq versus The Republic of Indonesia, UNCITRAL Rules, Award, 15 December 2014.	Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference and Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Indonesia for the Promotion and Protection of Investments	Investments of nationals or companies of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Each Contracting Party shall ensure that the management. maintenance use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party is not in any way impaired by unreasonable or discriminatory measures.
Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation versus Romania, ICSID Case No. ARB/10/13, Award, 2 March 2015	Treaty between The Government of The United States Of America and The Government Of Romania Concerning the Reciprocal Encouragement and Protection of Investment	2. (a) Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law. (b) Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. For purposes of dispute resolution under Articles VI and VII, a measure may be arbitrary or discriminatory notwithstanding the fact that a party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a Party.

Case	Name of Treaty	Formulation of FET
Mamidoil Jetoil Greek Petroleum Products Societe S.A. versus Republic of Albania, ICSID Case No. ARB/ 11/24, Award, 30 March 2015.	Between the Government of the Hellenic Republic and the Government of the Republic of Albania for the Encouragement and Reciprocal Protection of Investments	The BIT lacks a FET clause. Imported the ECT FET by the use of an MFN clause: Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party
William Ralph Clayton, William Richard Clayton, Douglas Clayton, Danial Clayton and Bilcon of Delaware, Inc. versus Government of Canada, UNCITRAL Rules, Award on Jurisdiction and Liability, 17 March 2015.	North American Free Trade Agreement	**Article 1105: Minimum Standard of Treatment** 1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security. 2. Without prejudice to paragraph 1 and notwithstanding Article 1108(7)(b), each Party shall accord to investors of another Party, and to investments of investors of another Party, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife. 3. Paragraph 2 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 1102 but for Article 1108(7)(b).

Supplement C

Table of cases and corresponding UNCTAD study FET type and FET type used in this paper.

UNCTAD study FET categories	Corresponding FET category used in paper
Unqualified FET	Unqualified FET
FET linked to international law	FET in accordance with principles of international law/ Unqualified FET*
FET linked to the international minimum standard under international customary law	FET linked to the international minimum standard under international customary law
FET with additional substantive content	Unqualified FET

* In the UNCTAD study, FET linked to international included the FET formulations ”FET in accordance with principles of international law” and ”FET NO LESS than required by international law or something”. Since there is no relevant different between ”no less than” and the unqualified FET I have chosen to put these in the same category, namely the category ”unqualified FET”.

Case name	UNCTAD study FET	FET category used in paper
Vannessa Ventures Ltd. versus The Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/ 04/6, Award, 16 January 2013.	FET linked to international law	FET in accordance with principles of international law
Oan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. versus Romania, ICSID Case No. ARB/ 05/20, Award, 11 December 2013.	FET with additional substantive content	Unqualified FET
The Rompetrol Group N.V. versus Romania, ICSID Case No. ARB/06/3, Award, 6 May 2013.	FET with additional substantive content	Unqualified FET
Teco Guatemala Holdings LLC versus The Republic of Guatemala, ICSID Case No. ARB/ 10/17, Award, 19 December 2013.	FET linked to the international minimum standard under international customary law	FET linked to the international minimum standard under international customary law
Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Traiding Ltd. versus The Republic of Kazakhstan, SCC Arbitration V (116/2010), Award, 19 December 2013.	Unqualified FET	Unqualified FET
David Minnotte and Robert Lewis versus Republic of Poland, ICSID Case No. ARB(AF)/10/1, Award, 16 May 2014.	FET linked to international law	Unqualified FET
Gold Reserve Inc. versus Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014.	FET linked to international law	FET in accordance with principles of international law
Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana De Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd and Mobil Venezolana De Petróleos, Inc. versus The Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Award, 9 October 2014.	FET with additional substantive content	Unqualified FET

Case name	UNCTAD study FET	FET category used in paper
Tulip Real Estate Investment and Development Netherlands B.V. versus Republic of Turkey, ICSID Case No. ARB/11/28, Award, 10 March 2014.	FET with additional substantive content	Unqualified FET
British Caribbean Bank Limited (Turks & Caicos) versus The Government of Belize, PCA CASE No 2010-18, Award, 19 December 2014.	Unqualified FET	Unqualified FET
Hesham Talaat M. Al-Warraq versus The Republic of Indonesia, UNCITRAL Rules, Award, 15 December 2014.	Unqualified FET	Unqualified FET
Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation versus Romania, ICSID Case No. ARB/10/13, Award, 2 March 2015.	FET linked to international law	Unqualified FET
Mamidoil Jetoil Greek Petroleum Products Societe S.A. versus Republic of Albania, ICSID Case No. ARB/11/24, Award, 30 March 2015.	FET linked to international law	Unqualified FET
William Ralph Clayton, William Richard Clayton, Douglas Clayton, Danial Clayton and Bilcon of Delaware, Inc. versus Government of Canada, UNCITRAL Rules, Award on Jurisdiction and Liability, 17 March 2015.	FET linked to the international minimum standard under international customary law	FET linked to the international minimum standard under international customary law

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Teco Guatemala Holdings LLC versus The Republic of Guatemala, ICSID Case No. ARB/10/17, Award, 19 December 2013.

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