The 'Minimum Standard of Treatment' in International Investment Law

The Fascinating Story of the Emergence, Decline and Recent Resurrection of a Concept

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1 Introduction

This chapter examines the story of how the concept of the 'Minimum Standard of Treatment' (MST) first emerged, its subsequent decline and also its recent 'resurrection'.

The concept of MST crystallised as a rule of custom in the mid-twentieth century,[1] but in the 1960s and 1970s, Newly Independent States (NIS) began to challenge its existence. While the Standard ultimately survived these events, this opposition had another more subtle consequence: both developing and developed States now perceived the MST as ineffective in providing basic legal protection to foreign investors.[2] It is in this historical context that these States began frenetically signing bilateral investment treaties (BITs) for the promotion and protection of investments, which provided clearer rules on investment protection. I will argue in this chapter that States started to use the expression 'fair and equitable treatment' (FET) in their BITs because of the ambiguities surrounding the concept of the MST and the fact that many States had contested its legitimacy in the past. By the end of the 1990s, only a very small minority of BITs actually referred to the MST. By then, the concept had clearly lost its once prevailing importance as a source of investment protection for foreign investors. The MST's glory days were long gone.

[1] This is indeed the position taken by writers in the 1950s: RR Wilson, *The International Law Standard in Treaties of the United States* (HUP 1953) 103–4; G Schwarzenberger, *International Law*, Vol 1 (3rd edn, Stevens and Sons 1957) 206–7. See also M Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (OUP 2013) 64–7, 83 ff; JE Alvarez, 'Bit on Custom' (2009) 42 NYUJIntlL&Pol 39.

[2] JW Salacuse, *The Law of Investment Treaties* (OUP 2010) 45–6.

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The dynamics suddenly changed, however, when arbitral tribunals started to give a broader interpretation to FET clauses, thereby providing foreign investors with treatment protections *above and beyond* the traditional MST.[3] It was only then that States started to explicitly mention in their new BITs that the treatment offered to investors under the FET clause was, in fact, the same that was extended to all foreign investors under the MST under custom. The concept of the MST, which had almost been forgotten by States in the 1990s, was now centre stage in their quest to limit investors' rights under investment treaties. States' objectives were now to prevent future tribunals from developing their own idiosyncratic interpretations of the FET standard. In this respect, the most interesting and innovative FET clause is certainly Article 8.10 of the Canada–European Union Comprehensive Economic and Trade Agreement (CETA), which contains a closed list of elements that are considered by the parties to embody the standard.[4] States have thus somewhat 'rediscovered' the usefulness of the MST. The concept has now regained the prevalence that it had lost in the past decades as an important source of investment protection.

[3] A good illustration is *Pope & Talbot Inc v Canada* (Award on the Merits of Phase II, 10 April 2001) UNCITRAL [105–18].

[4] The final text of the agreement was released, following legal review, on 29 February 2016: Canada–European Union Comprehensive Economic and Trade Agreement (CETA) (Canada & EU) (adopted 30 October 2016, provisionally entered into force 21 September 2017) Article 8.10. The provision (entitled 'Treatment of Investors and of Covered Investments') reads as follows:

1. Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 through 6.
2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes:
   (a) denial of justice in criminal, civil or administrative proceedings;
   (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;
   (c) Manifest arbitrariness;
   (d) Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
   (e) Abusive treatment of investors, such as coercion, duress and harassment; or
   (f) A breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.
3. The Parties shall regularly, or upon request of a Party, review the content of the obligation to provide fair and equitable treatment. The Committee on Services and Investment, established under Article 26.2.1(b) (Specialized Committee), may develop recommendations in this regard and submit them to the CETA Joint Committee for decision.

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2 The Emergence of MST as a Rule of Customary International Law

Section 2.1 will define the concept of MST and examine its historical foundation. Section 2.2 will analyse the subsequent challenges to the MST's customary status, which was led by developing States in the 1960s and 1970s and eventually resulted, in the 1990s, in the new phenomenon of 'treatification'.

2.1 The Historical Foundation of the Minimum Standard of Treatment

Despite some disagreement between States on the existence of the MST in the last few decades (a point further examined below), the concept is now well recognised by States, tribunals and scholars as a rule of customary international law.[5] What is more controversial is determining the actual *content* of the standard. The MST is an *umbrella concept* that in *itself* incorporates different elements.[6] Based on an analysis of case law and reports by the Organisation for Economic Co-operation and Development (OECD) and United Nations Conference on Trade and Development

4. 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.
5. For greater certainty, 'full protection and security' refers to the Party's obligations relating to physical security of investors and covered investments.
6. For greater certainty, a breach of another provision of this Agreement, or of a separate international agreement does not establish a breach of this Article.
7. For greater certainty, the fact that a measure breaches domestic law does not, in and of itself, establish a breach of this Article. In order to ascertain whether the measure breaches this Article, the Tribunal must consider whether a Party has acted inconsistently with the obligations in paragraph 1.

[5] See, numerous States' pleadings, awards and work of scholars mentioned in P Dumberry, 'Fair and Equitable Treatment: Its Interaction with the Minimum Standard and its Customary Status' (2017) 1(2) BRP Int ILA 1, 5–7.

[6] A number of NAFTA tribunals have also endorsed this description: *Glamis Gold, Ltd v United States* (Award of 8 June 2009) UNCITRAL, *Ad Hoc* Tribunal [618]; *Cargill, Inc v Mexico* (Award of 18 September 2009) ICSID Case No ARB(AF)/05/02 [268]; *Mobil Investments Canada Inc & Murphy Oil Corporation v Canada* (Decision on Liability and on Principles of Quantum of 22 May 2012) ICSID Case No ARB(AF)/07/4 [135]. See also, A Newcombe & L Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer 2009) 236.

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(UNCTAD),[7] it may be observed that the MST encompasses (at the very least) an obligation for host States to prevent denial of justice and arbitrary conduct and also to provide investors with due process and 'full protection and security'.[8]

The historical aspects surrounding the emergence of the MST have already been the subject of substantial scholarship.[9] Suffice it to note that its origin is grounded in the international law doctrine of State responsibility for injuries to aliens.[10] It is rooted in a due diligence obligation for States to respect the rights of foreigners within their country. Before the twentieth century, there was a prevailing view that individuals conducting business in another State should be subject to the law of that State.[11] Several States, especially in Latin America, adopted this position to counter the so-called gunboat diplomacy and other types of interferences by Western States in their internal affairs that were often made under the pretext of protecting the interests of their nationals abroad.[12] It is in this context that many States rejected the idea of the existence of any obligation under international law to accord a 'minimum' level of protection to foreigners.

Despite this opposition, the MST gradually emerged in the early twentieth century.[13] The development of this standard of treatment stemmed from capital-exporting States' concern that many host States receiving investments lacked the most basic measures of protection for aliens and

[7] OECD, *International Investment Law: A Changing Landscape: A Companion Volume to International Investment Perspectives* (OECD Publishing 2005) 82; UNCTAD, 'Fair and Equitable Treatment' (*UNCTAD Series on Issues in International Investment Agreements II*, 2012) UN Doc UNCTAD/DIAE/IA/2011/5, 44 (referring to OECD, 'Fair and Equitable Treatment Standard in International Investment Law' (2004) *OECD Working Papers on International Investment 2004/03*, <http://dx.doi.org/10.1787/675702255435> accessed 10 May 2021).

[8] P Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (Kluwer 2013) 25–8.

[9] Paparinskis (n 1) 39–83; T Weiler, *The Interpretation of International Investment Law: Equality, Discrimination and Minimum Standards of Treatment in Historical Context* (Martinus Nijhoff 2013). See also, more recently, M Pinchis-Paulsen, 'The Life and Death (and Re-Birth) of "Fair and" "Equitable Treatment": A Historical Examination of Twentieth Century International Trade and Investment Law Treaty-Making and Political Decision-Making' (PhD Thesis, King's College London 2017).

[10] H Dickerson, 'Minimum Standards' [2013] MPEPIL 845 [2].

[11] This period is examined in detail in Weiler (n 9) 337 ff.

[12] Weiler (n 9) 345, providing a number of examples of such interventions and referring to 'no fewer than one hundred instances of "protection by force" between 1813 and 1927 by the United States alone, including two dozen in the Twentieth century'.

[13] Weiler (n 9) 351; Paparinskis (n 1) 64, noting that at the time it focused almost exclusively on the non-discriminatory aspects of the treatment and on preventing denial of justice.

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their property.[14] They argued that all governments were bound under international law to treat foreigners with at least a minimum standard of protection,[15] because the existing standard in many countries was considered too low.[16] The reasons for establishing such a standard were explained by the US Secretary of State, Mr Elihu Root, in an article published in 1910[17] and were reiterated some ninety years later by the North American Free Trade Agreement (NAFTA) *SD Myers* Tribunal.[18] International jurisprudence slowly developed the concept of a minimum standard of protection. While a number of cases have had a significant impact on the emergence of this standard, the best known is certainly the *Neer* case of 1926.[19]

The question of whether or not any customary rule in the field of investment arbitration had firmly crystallised after the Second World War is controversial.[20] However, it is safe to say that the MST was an established rule of custom at the time.[21] Section 2.2 examines a number of dramatic developments that occurred in the decades following the Second World War.

[14] MA Orellana, 'International Law on Investment: The Minimum Standard of Treatment (MST)' (2004) 3 TDM 1.

[15] C Schreuer & R Dolzer, *Principles of International Investment Law* (OUP 2008) 12–13.

[16] Salacuse (n 2) 47; JC Thomas, 'Reflections on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators' (2002) 17(1) ICSID Rev 26.

[17] E Root, 'The Basis of Protection to Citizens Residing Abroad' (1910) 4 AJIL 521.

[18] *SD Myers Inc v Canada* (Partial Award of 13 November 2000) UNCITRAL [259]: 'The inclusion of a "minimum standard" provision is necessary to avoid what might otherwise be a gap. A government might treat an investor in a harsh, injurious and unjust manner, but do so in a way that is no different than the treatment inflicted on its own nationals. The "minimum standard" is a floor below which treatment of foreign investors must not fall, even if a government were not acting in a discriminatory manner'.

[19] *USA (LFH Neer) v Mexico* (Award of 15 October 1926) 4 RIAA 60. The Commission held that the 'propriety of governmental acts should be put to the test of international standards' and that 'the treatment of an alien, in order to constitute an international delinquency, should amounts 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 reasonable and impartial man would readily recognize its insufficiency' (ibid 61–2). For a critical assessment of the influence of this case, see *Railroad Development Corporation (RDC) v Guatemala* (Award of 29 June 2012) ICSID Case No ARB/07/23 [216]; *Mondev International Ltd v United States* (Award of 11 October 2002) ICSID Case No ARB(AF)/99/2 [115]; SM Schwebel, 'Is Neer Far from Fair and Equitable?' (2011) 27(4) Arb Intl 555, 555–61; J Paulsson & G Petrochilos, 'Neer-ly Misled?' (2007) 22(2) ICSID Rev 242–57.

[20] P Juillard, 'L'évolution des sources du droit des investissements' (1994) 250 RdC 76.

[21] Paparinskis (n 1) 64–7, 83 ff. On the contrary, AC Blandford in 'The History of Fair and Equitable Treatment Before the Second World War' (2017) 32(2) ICSID Rev 294 ff argues that in the period before the Second World War the MST that emerged was originally based on the concept of 'general principles recognised by civilized nations' (which are found in the *domestic laws* of States), and therefore, *not* based on customary international law.

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2.2 Newly Independent States Challenging the MST

In the 1960s and 1970s, NIS revived opposition towards the existence of any customary rules in the field of investment law. They openly contested the *legitimacy* of the existing CIL and demanded a revision of these 'outdated' rules that did not take into account the fundamental changes that had occurred in the international community since the end of the colonisation period.[22] According to Abi-Saab, these States '[did] not easily forget that the same body of international law that they [were] now asked to abide by, sanctioned their previous subjugation and exploitation and stood as a bar to their emancipation'.[23]

Specifically, these States rejected having the obligation to provide any minimum standard of protection to foreign investors under CIL.[24] They insisted that they were bound to provide foreign investors only with the level of treatment existing under their domestic law.[25] They also contested the existence of any international law norms requiring compensation for expropriated foreign properties and supported a less stringent compensation requirement than the Hull formula.[26] At the time, developing States took the debate to the United Nations General Assembly where they represented the majority of States.[27] They used their status within the international body to advance their interests by way of resolutions and declarations,[28] which included Resolution 3171 adopted in 1973[29] and the 1974 *Charter of Economic Rights and Duties*

[22] AT Guzman, 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1998) 38(4) VaJIntlL 64; Juillard (n 20) 76.

[23] G Abi-Saab, 'The Newly Independent States and the Rules of International Law: An Outline' (1962) 8 HowLJ 100. See also SN Guha-Roy, 'Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?' (1961) 55 AJIL 866.

[24] M Sornarajah, *The International Law on Foreign Investment* (2nd edn, CUP 2004). See, for instance, ILC, 'Report on the Fourth Session of the Asian-African Legal Consultative Committee (Tokyo, February 1961), by FV Garcia Amador, Observer for the Commission' (30 May 1961) UN Doc A/CN4/139, 78, 82–4.

[25] SM Schwebel, 'Investor-State Disputes and the Development of International Law: The Influence of Bilateral Investment Treaties on Customary International Law' (2004) 98 ASIL Proc 27.

[26] Guzman (n 22) 647; UNCTAD, 'Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking' (*UNCTAD*, 2007) UN Doc UNCTAD/ITE/IIA/2006/5, 48.

[27] Juillard (n 20) 84ff.

[28] M Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (CUP 1999) 41.

[29] UNGA, 'Permanent Sovereignty Over Natural Resources' (17 December 1973) UN Doc A/RES/3171(XXVIII).

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of States.[30] Given the division between the developed and the developing States, the *Charter of Economic Rights and Duties of States* could hardly be considered a reflection of existing international law at the time.[31] Another question is whether or not the effect of the attack by new States was to *destroy* the few rules of custom that existed after the Second World War. A number of writers believe this was the case.[32] Without specifically taking a position on the impact that the contestation may have had on custom, the International Court of Justice (ICJ) in the famous *Barcelona Traction* case of 1970 simply noted that *no rule* of customary international law existed in the field of international investment law.[33]

The more established position is that some customary rules (including the MST) *already existed* at the time the developing States started opposing them.[34] In the 1990 *Elettronica Sicula S.p.A.* (*ELSI*) case, the ICJ indeed referred explicitly to the existence of a 'minimum international standard'.[35] In fact, while it seems that the MST survived the assault by the developing States, it did not do so without some casualties. Thus, as noted by one writer, the strong contestation of a large segment of States has 'served to undermine the solidity of the traditional international legal framework for foreign investment'.[36] Thus, while the developed States held the view that

[30] UNGA, 'Charter of Economic Rights and Duties of States' (12 December 1974) UN Doc A/RES/3281(XXIX).

[31] Schwebel (n 25) 28; C Brower & J Tepe, 'The Charter of Economic Rights and Duties of States: A Reflection or Rejection of International Law?' (1975) 9(2) IntlLaw 295; D Carreau & P Juillard, *Droit international économique* (LGDJ 1998) 464; Salacuse (n 2) 75.

[32] Carreau & Juillard (n 31) 464–5; Sornarajah (n 24) 19–20, 89–93, 213; A Akinsanya, 'International Protection of Direct Foreign Investments in the Third World' (1987) 36 ICLQ 58; A Al Faruque, 'Creating Customary International Law Through Bilateral Investment Treaties: A Critical Appraisal' (2004) 44 IJIL 312, 312–13; J d'Aspremont, 'International Customary Investment Law: Story of a Paradox' in T Gazzini & E de Brabandere (eds), *International Investment Law: The Sources of Rights and Obligations* (Martinus Nijhoff 2012) 14.

[33] *Barcelona Traction, Light and Power Co, Ltd (Belgium v Spain)* (Judgment) [1970] 3 ICJRep 46–7, noting that 'it may at first sight appear surprising that the evolution of the law [on foreign investments] has not gone further and that no generally accepted rules in the matter have crystallized on the international plane'.

[34] See, Paparinskis (n 1) 83 ff; Alvarez (n 1) 39; JE Alvarez, 'The Public International Law Regime Governing International Investment' (2009) 344 RdC 292.

[35] *Elettronica Sicula SpA (ELSI) (USA v Italy)* (Judgment) [1989] 15 ICJRep 111 ('The primary standard laid down by Article V is "the full protection and security required by international law", in short, the "protection and security" must conform to the minimum international standard').

[36] Salacuse (n 2) 45–6, 75; Al Faruque (n 32) 294–5.

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customary rules existed, they also acknowledged that their effectiveness was limited as a result of the vehement opposition of a large number of States.[37] In fact, both the developed and the developing States perceived these rules as ineffective in providing basic legal protection to foreign investors.

It is in this historical context that, in the 1990s, States began signing numerous BITs providing clearer rules on investment protection (a new phenomenon referred to as 'treatification'). At the time, a new consensus emerged regarding the necessity to offer better legal protections to foreign investments in order to accelerate economic development. Yet, there was still great uncertainty surrounding the types of legal protections that existed for foreign investors under custom. As explained by two scholars, Dolzer and von Walter, it is due to the fact that 'customary law was deemed be too amorphous and not be able to provide sufficient guidance and protection' to foreign investors that capital-exporting and developing States started frenetically concluding *ad hoc* BITs.[38] According to both Schreuer and Dolzer, as a result of the new climate of international economic relations of the 1990s, 'the fight of previous decades against customary rules protecting foreign investment had abruptly become anachronistic and obsolete'.[39] Consequently, by the 1990s, 'the tide had turned', and developing States were no longer opposed to the application of a minimum standard of protection under custom. Instead, they granted 'more protection to foreign investment than traditional customary law did, now on the basis of treaties negotiated to attract additional foreign investment'.[40]

Section 3 examines how this new phenomenon of 'treatification' was marked by the emergence of the FET standard and the decline of the MST as a source of investment protection for foreign investors.

3 The Emergence of the FET Standard in Investment Treaties

From the 1990s and onwards, States have included the FET standard in an overwhelming majority of BITs. I have explained elsewhere that less than 5%

[37] The member States of the OECD certainly believed at the time that these customary rules existed. See OECD, 'Draft Convention on the Protection of Foreign Property' (1967) 7 ILM 117, Notes and Comments to Article 1 (further discussed in Section 3).

[38] R Dolzer & A von Walter, 'Fair and Equitable Treatment – Lines of Jurisprudence on Customary Law' in F Ortino, L Liberti, A Sheppard & ors (eds), *Investment Treaty Law: Current Issues II* (BIICL 2007) 99. The same conclusion is reached by many writers, see long list in Dumberry (n 5) 18.

[39] Schreuer & Dolzer (n 15) 16.

[40] ibid.

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of the BITs which I have examined do not include any formal and binding FET obligation for the host State of investments.[41] One of the most controversial questions discussed in scholarship is why States first began including the term FET in their BITs throughout the 1960s and 1970s, and why they have continued to do so (almost) uniformly thereafter in the 1990s.[42]

According to one view, Western States incorporated the concept of FET in their BITs to simply reflect the MST that existed under international law.[43] This approach has been endorsed by a number of writers.[44] These writers typically refer to the 1967 OECD Draft Convention[45] as representative of the position of developed States at the time on matters of protection of foreign investments.[46] This is because the OECD's Commentary to the 1967 Draft Convention indicated that the concept of FET flowed from the 'well established general principle of international law that a State is bound to respect and protect the property of nationals of other States'.[47] The Drafting Committee also added that the phrase FET refers to 'the standard set by international law for the treatment due by each State with regard to the property of foreign nationals' and that 'the standard required conforms in effect to the minimum standard which forms part of customary international law'.[48] The same position was also taken by OECD member States in 1984[49] and is confirmed by the practice of some

[41] P Dumberry, 'Has the Fair and Equitable Treatment Standard become a Rule of Customary International Law?' (2016) 8(1) JIDS 155, 155–78, examining 1,964 BITs that were available on the UNCTAD website at the time (February 2014). Yet, it should be added that even when a BIT does not contain an FET clause, it may be that an investor will be able to invoke the MFN clause contained in that treaty to rely on provisions found in *another* treaty entered into by the host State that provide for a 'better' treatment. This is because a BIT containing an FET clause arguably provides (at least in theory) foreign investors with a 'better' treatment than a treaty without such a provision. See, P Dumberry, 'The Importation of the Fair and Equitable Treatment Standard Through MFN Clauses: An Empirical Study of BITs' (2016) 17 ICSID Rev 229, 229–59.

[42] See, discussion in Dumberry (n 8) 31–5.

[43] See, analysis in Newcombe & Paradell (n 6) 268; Thomas (n 16) 44, 47; Carreau & Julliard (n 31) 454.

[44] See, for instance, JR Picherack, 'The Expanding Scope of the Fair and Equitable Treatment Standard: Have Recent Tribunals Gone Too Far?' (2008) 9(4) JWIT 264; Paparinskis (n 1) 160–3; S Montt, *State Liability in Investment Treaty Arbitration* (Hart 2009) 69; Blandford (n 21) 302.

[45] OECD (n 37) Notes and Comments to art 1.

[46] S Vasciannie, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice' (1999) 70(1) BYBIL 99, 112–13; UNCTAD (n 7) 8; OECD (n 7) 4.

[47] OECD (n 37) 119.

[48] ibid.

[49] Thomas (n 16) 48 referring to: OECD, 'Intergovernmental Agreements Relating to Investment in Developing Countries' (*OECD*, 27 May 1984) OECD Doc No 84/14, 12 [36] ('[a]ccording to all Member countries which have commented on this point, fair and

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Western States.[50] This narrative has, however, been subject to dissent by many scholars.[51] While it is possible that the OECD commentary reflected what their member States (all developed States) *themselves* viewed to be the CIL at the time, they were certainly not representative of what the developing States believed were their legal obligations in the 1960s.[52] In any event, as explained by two scholars, Newcombe and Paradell, the use of a 'different and more politically neutral term [FET] might be explained by the historical political sensitivities regarding the minimum standard of treatment', which was 'historically viewed with suspicion because of the legacy of gun-boat diplomacy and imperialism'.[53] This is also the position endorsed by Judge Nikken in his separate opinion in the *AWG Group v Argentina* case.[54] In sum, for these writers the concept of the FET 'may simply have been viewed as a convenient, neutral and acceptable reference' to the MST.[55]

A more convincing approach has been adopted by a number of other writers who suggest that the growing use of the term FET by Western States in their BITs was intended to counter the assertion made by developing States about the inexistence of any MST under international law.[56] Thus, Western States started including references to the FET standard *because* of the ambiguities surrounding the concept of the MST.[57] They started using this term as a result of the challenge mounted by developing States against the MST. Weiler provides a detailed account explaining how the United States started using the expression FET after the War and concluded that US negotiators embraced the term in the 1960s because the MST 'controversy had otherwise poisoned the well for treaty drafters'.[58]

equitable treatment introduced a substantive legal standard referring to general principles of international law even if this is not explicitly stated').

[50] See, examples examined by Newcombe & Paradell (n 6).

[51] T Kill, 'Don't Cross the Streams: Past and Present Overstatement of Customary International Law in Connection with Conventional Fair and Equitable Treatment Obligations' (2008) 106 MichLRev 853, 876–7; M Klein Bronfman, 'Fair and Equitable Treatment: An Evolving Standard' (2006) 10 Max Planck YrbkUNL 615.

[52] Kill (n 51) 879.

[53] Newcombe & Paradell (n 6) 263–4.

[54] *AWG Group v Argentina* (Decision on Liability of 30 July 2010) UNCITRAL, Separate Opinion of Arbitrator Pedro Nikken [14–15].

[55] Newcombe & Paradell (n 6) 263–4. See also, Montt (n 44) 69–70.

[56] See analysis in Thomas (n 16) 48. *Contra*: Paparinskis (n 1) 163.

[57] Weiler (n 9) 199, 211–12, 216, 227, 239–40; Vasciannie (n 47) 157–8.

[58] Weiler (n 9) 199 ff, 215. See also: K Vandevelde, *United States International Investment Agreements* (Kluwer 2002) 263.

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The actual drafting language used by States in their BITs supports this approach. As pointed out by two authors, 'if the parties to a treaty want to refer to customary international law, one would assume that they will refer to it as such rather than using a different expression'.[59] For the vast majority of BITs that contain an FET clause that does *not* make any reference to international law, the standard should *not* be considered as an implicit reference to the MST.[60] As pointed out by Schreuer and Dolzer, '[a]s a matter of textual interpretation, it seems implausible that a treaty would refer to a well-known concept like the "minimum standard of treatment in customary international law" by using the expression "fair and equitable treatment"'.[61] This is especially the case considering the (abovementioned) contentious debates between the developed and the developing States as to the very existence of an MST.[62] The FET standard should therefore *generally* be considered as an *independent* treaty standard with an autonomous meaning from the MST. This is the position adopted by a majority of writers.[63] It should be noted, however, that a number of

[59] Schreuer & Dolzer (n 15) 124. See also, Bronfman (n 51) 621; JP Laviec, *Protection et promotion des investissements, étude de droit international économique* (PUF 1985) 94; Salacuse (n 2) 226; Vasciannie (n 46) 105; UNCTAD (n 7) 13.

[60] UNCTAD (n 7) 13.

[61] Schreuer & Dolzer (n 15) 124. See also, Bronfman (n 52) 621; Laviec (n 59) 94; Salacuse (n 2) 226; Vasciannie (n 46) 105; UNCTAD (n 7) 13. This position is adopted in *Vivendi (II) v Argentina* (Decision on Liability of 30 July 2010) ICSID No ARB/03/19 [184], but rejected in the Separate Opinion of Arbitrator Pedro Nikken [10 ff].

[62] A Diehl, *The Core Standard of International Investment Protection: Fair and Equitable Treatment* (Kluwer 2012) 151; Vasciannie (n 46) 131; UNCTAD (n 7) 13; Salacuse (n 2) 226–7.

[63] See, FA Mann, 'British Treaties for the Promotion and Protection of Investments' (1981) 52 BYBIL 241, 244; Newcombe & Paradell (n 6) 263; R Dolzer & M Stevens, *Bilateral Investment Treaties* (Martinus Nijhoff 1995) 60; Vasciannie (n 47) 144; P Muchlinski, *Multinational Enterprises and the Law* (2nd edn, OUP 2007) 635–47; C McLachlan, L Shore & M Weiniger, *International Investment Arbitration: Substantive Principles* (OUP 2007) 226–47; Dolzer & Schreuer (n 15) 124–8; I Tudor, *The Fair and Equitable Treatment Standard in International Foreign Investment Law* (OUP 2008) 53–104; Diehl (n 62) 151–2; C Schreuer, 'Fair and Equitable Standard (FET): Interaction with Other Standards' (2007) 4(5) TDM 68; R Dolzer, 'Fair and Equitable Treatment: A Key Standard in Investment Treaties' (2005) 39(1) IntI Law 87; H Haeri, 'A Tale of Two Standards: 'Fair and Equitable Treatment' and the Minimum Standard in International Law' (2011) 27 Arb Intl 34; M Kinnear, A Biorklund & JFG Hannaford, *Investment Disputes Under NAFTA: An Annotated Guide to NAFTA Chapter 11* (Kluwer Law 2006) 7; MC Ryan, 'Glamis Gold, Ltd v The United States and the Fair and Equitable Treatment Standard' (2011) 56(4) McGill LJ 919, 932–4; Salacuse (n 2) 226–7: R Preiswerk, 'New Developments in Bilateral Investment Protection – With Special Reference to Belgian Practice' (1967) 3 RBDI 173, 186; N Blackaby, C Partasides, A Redfern & Ors, *Redfern and Hunter on International Arbitration* (OUP 2009) 494.

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scholars have rejected this interpretation.[64] Yet, as logical and sound as it may be, this interpretation is *not* convincing *in certain particular cases* where a treaty *explicitly* links the FET to the standard existing under 'international law'.[65] The same is true whenever the FET clause is entitled 'MST' (such as NAFTA Article 1105) or when the parties to a treaty have expressly stated that their intention was in fact for the FET standard to make reference to the MST under custom.[66]

4 The 'Return' of the MST

By the year 2000, the concept of the MST had clearly lost its once prevailing importance as a source of investment protection for foreign investors. One could have assumed at the time that the MST's role would become limited to the traditional function played by customary rules under international law in the context of the proliferation of treaty norms.[67] It seemed at the time that the MST's glory days were long gone. That impression did not last very long.

When arbitral tribunals actually started to interpret FET clauses that had systematically been included in BITs for decades, States were considerably surprised by the outcome. The controversy began in the year 2000 when three Tribunals rendered awards that defined different aspects of the scope of the FET clause (Article 1105) contained in the NAFTA.[68] These

[64] Picherack (n 44) 260–2, 265, 291; Thomas (n 16) 50; G Mayeda, 'Playing Fair: The Meaning of Fair and Equitable Treatment in Bilateral Investment Treaties' (2007) 41(2) JWT 273, 273–91; Orellana (n 14) 7; B Choudhury, 'Evolution or Devolution? Defining Fair and Equitable Treatment in International Investment Law' (2005) 6(2) JWIT 297, 317–20; Sornarajah (n 24) 170 ff; C Leben, 'L'évolution du droit international des investissements' in SFDI & IHEI (eds), *Un accord multilatéral sur l'investissement: d'un forum de négociation à l'autre?* (Pedone 1999) 7–28; M Romero Jiménez, 'Considerations of NAFTA Chapter 11' (2001) 2 CJIL 243, 244; Paparinskis (n 1) 163; Montt (n 44) 302–10.

[65] One example is North American Free Trade Agreement (NAFTA) (adopted 17 December 1992, entered into force 1 January 1994) 32 ILM 289, Art 1105; see the analysis in Dumberry (n 8).

[66] The most well-known example is the NAFTA Free Trade Commission, 'Notes of Interpretation of Certain Chapter 11 Provisions' (*NAFTA FTC*, 31 July 2001) <https://2009-2017.state.gov/documents/organization/38790.pdf> accessed 10 May 2021 (further discussed below). See the analysis in Dumberry (n 8) 65–86.

[67] The MST would, for instance, remain the applicable legal regime of protection in the absence of any BIT and could also play a gap-filling role whenever a treaty, a contract or domestic legislation is silent on a given issue. See P Dumberry, *The Formation and Identification of Rules of Customary International Law in International Investment Law* (CUP 2016) 364 ff.

[68] On this debate, see Dumberry (n 8) 65 ff.

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three NAFTA Tribunals interpreted the FET clause as providing investors with treatment protections *above and beyond* the MST.[69] In other words, under this approach, the level of the standard of treatment imposed on the host State would be higher than that existing under custom; foreign investors would be given *more rights*. Most importantly, these three Tribunals adopted this approach notwithstanding the important fact that under Article 1105 (entitled 'MST') the FET is clearly linked to the standard existing under 'international law'.

This NAFTA debate highlights the importance of the actual drafting of the FET clause. Arbitral tribunals (outside the NAFTA context) have given different interpretations to the scope of FET clauses depending on their actual drafting.[70] A 2012 UNCTAD report indicated that the drafting variations in FET clauses have in fact been interpreted as meaning *different content* as well as *different thresholds*.[71] Many arbitral tribunals have thus interpreted an unqualified (or 'stand-alone') FET clause as 'delinked from customary international law' and have, therefore, 'focused on the plain-meaning of the terms "fair" and "equitable,"' which 'may result in a low liability threshold and brings with it a risk for State regulatory action to be found in breach of it'.[72] This phenomenon has been recognised by many scholars.[73] The vast majority of tribunals have, in fact, interpreted an unqualified FET clause as having an autonomous character, which therefore, provides a higher level of protection than the MST.[74] Only a limited number of tribunals have interpreted an unqualified FET standard as an implicit reference to international law.[75] This situation contrasts with the rather confusing approach adopted by tribunals faced with an FET clause containing an explicit reference to 'international law'.[76] Tribunals have overall been divided on the proper interpretation and use of these words. While some tribunals have held that the term 'international law' found in an FET clause was a reference

69 *Metalclad v Mexico* (Award of 30 August 2000) ICSID Case No ARB(AF)/97/1 [70, 76]; *SD Myers* (n 18) [266]; *Pope & Talbot* (n 3).
70 Newcombe & Paradell (n 6) 263–4; Paparinskis (n 1) 94; OECD (n 7) 40.
71 UNCTAD (n 7) 8.
72 ibid 22.
73 See, several writers mentioned in Dumberry (n 5) 33.
74 See Newcombe & Paradell (n 6) 263–4, referring to many cases.
75 See, for instance, *Siemens AG v Argentina* (Award of 17 January 2007) ICSID Case No ARB/02/8 [291].
76 UNCTAD (n 7) 22. See, *El Paso Energy International Company v Argentina* (Award of 31 October 2011) ICSID Case No ARB/03/15 [331–7], for an overview of the different positions adopted by tribunals.

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to the minimum standard under custom,[77] others have interpreted such an express reference in much the same way as an unqualified FET standard.[78] Others have simply decided not to take position on the issue.[79]

The broad interpretations of FET clauses adopted by some tribunals led many States to take concrete measures to effectively reduce tribunals' margin of appreciation when assessing the conformity of States' conduct with the FET standard. The most virulent and comprehensive reaction came from NAFTA parties. Under the aegis of the Free Trade Commission ('FTC'), they responded by issuing a 'Note of Interpretation', which interpreted the FET standard *restrictively* by expressly limiting the level of protection to be accorded to foreign investors to that existing under the MST under custom.[80] The Note itself rapidly became the centre of an important controversy amongst parties to NAFTA arbitration proceedings, arbitrators and scholars.[81]

Around the same time, States also started *explicitly* mentioning in their BITs that the FET standard was not only linked to 'international law', but that it was in fact a reference to the MST under customary international law.[82] Again, two of the NAFTA Parties (United States and Canada) started this trend when they adopted their respective Model BITs in 2004. For instance, Article 5(1) of the US Model BIT provides that '[e]ach Party shall accord to covered investments treatment in accordance with *customary* international law, including FET and full protection and security'.[83] Clearly, Canada and the United States decided to adopt such

[77] See, in particular, *MCI Power Group LC and New Turbine, Inc v Ecuador* (Award of 31 July 2007) ICSID Case No ARB/03/6 [369]; *Gold Reserve Inc v Venezuela* (Award of 22 September 2014) ICSID Case No ARB(AF)/09/1 [567].

[78] *See*, for instance, *Vivendi (I) v Argentina* (Final Award of 20 August 2007) ICSID Case No ARB/97/3 [7.4.5 ff]; *Técnicas Medioambientales Tecmed, SA v Mexico* (Award of 29 May 2003) ICSID No ARB(AF)/00/2 [155]; *Crystallex International Corporation v Venezuela* (Award of 4 April 2016) ICSID Case No ARB(AF)/11/2 [530]; *Mr Franck Charles Arif v Moldova* (Award of 8 April 2013) ICSID Case No ARB/11/23 [529]; *Total SA v Argentina* (Decision on Liability of 27 December 2010) ICSID Case No ARB/04/1 [125]; *Oko Pankki Oyj, VTB Bank (Deutschland) AG and Sampo Bank Plc v Estonia* (Award of 19 November 2007) ICSID Case No ARB/04/6 [216 & 231–7].

[79] One recent example is *PA Allard v Barbados* (Award of 27 June 2017) PCA Case No 2012–06 [193].

[80] NAFTA FTC (n 66).

[81] The controversy is examined in Dumberry (n 8) 65–80.

[82] UNCTAD (n 7) 29.

[83] USTR, '2004 Model Bilateral Investment Treaty' (USTR, 2004) <https://ustr.gov/sites/default/files/U.S.%20model%20BIT.pdf> accessed 10 May 2021 (hereinafter 'US Model BIT'). US Model BIT, Art 5(2) further states that '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

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language to refute the expanding interpretation applied by some NAFTA tribunals and to incorporate the clarification made in the NAFTA FTC Note of 2001.[84] The two BITs that the United States entered into after 2004 with Uruguay and Rwanda also contain the same clause referring specifically to the MST under custom.[85] Recent investment treaties of the United States, Canada and Mexico also contain the same FET clause.[86] While such specific language is clearly the result of the NAFTA experience, the phenomenon is not limited to the North American context as many States elsewhere have recently adopted the same types of FET clauses referring to the MST.[87]

'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…' (emphasis added).

[84] C Lévesque, 'Influences on the Canadian Model FIPA and US Model BIT: NAFTA Chapter 11 and Beyond' (2006) 44 CanYBIL 255; K Vandevelde, 'A Comparison of the 2004 and 1994 US Model BITs' (2008–2009) 1 YB Intl Invest L&Pol 291; C Lévesque & A Newcombe, 'Commentary on the Canadian Model Foreign Promotion and Protection Agreement' in C Brown (ed), *Commentaries on Selected Model Investment Treaties* (OUP 2013) 78–80.

[85] Treaty Between the United States of America and The Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment (US & Uruguay) (adopted 4 November 2005, entered into force 31 October 2006) Art 5(1)(2); Treaty Between the United States of America and The Government of The Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment (US & Rwanda) (adopted 19 February 2012, entered into force 1 January 2012) Art 5(1)(2).

[86] See many examples mentioned in Dumberry (n 5) 39–40. See also, *Adel A Hamadi Al Tamimi v Oman* (Award of 27 October 2015) ICSID Case No ARB/11/33 [382, 384 & 386], where the Tribunal interpreted the US–Oman FTA, which contains the same restrictive language as the US Model BIT.

[87] UNCTAD (n 7) 25, referring to the Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area (adopted 27 February 2009, entered into force 10 January 2010) 2672 UNTS 3; the Agreement Between Japan and the Republic of the Philippines for an Economic Partnership (Japan & Philippines) (adopted 9 September 2006, entered into force 11 December 2008); Free Trade Agreement Between The Government of the People's Republic of China & The Government of The Republic of Peru (China & Peru) (adopted 28 April 2009, entered into force 1 March 2010); New Zealand–Malaysia Free Trade Agreement (NZ & Malaysia) (adopted 26 October 2009, entered into force 1 August 2010); Comprehensive Economic Partnership Agreement Between India and The Republic of Korea (India & Korea) (adopted 7 August 2009; entered into force 1 January 2010). See also, Free Trade Agreement Between The Republic of Korea and Singapore (Korea & Singapore) (adopted 4 August 2005, entered into force 2 March 2006) Art 10.5; Agreement Between Japan and The Lao People's Democratic Republic for the Liberalisation, Promotion and Protection of Investment (Japan & Laos) (adopted 16 January 2008, entered into force 3 August 2008) Art 5; Agreement Between Japan & Brunei Darussalam for an Economic Partnership (Japan & Brunei) (adopted 18 June 2007, entered into force 31 July 2008) Art 59 (see 'Note'). See also, The Agreement Between the Belgian–Luxembourg Economic Union and the Republic of Peru on Mutual Encouragement and Protection of Investments (BLEU

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Another recent and closely related phenomenon is States becoming 'more precise about the content of the FET obligation and more predictable in its implementation and subsequent interpretation'.[88] One example is the 2004 US Model BIT that clarifies that the obligation to provide FET under Article 5(1) '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'. This addition is also featured in the United States' most recent BITs and FTAs as well as some of Canada's investment treaties.[89] The same approach was adopted in the recently signed Canada–United States–Mexico Agreement (CUSMA, which has replaced NAFTA)[90] as well as by other States in the context of ASEAN,[91] COMESA,[92] CAFTA-DR[93] and the new Transpacific Partnership agreement (without the United States).[94]

The efforts by many States to clarify the content of the FET standard in the last two decades have also had an impact on the solidification of the meaning of the MST. The next section further examines this phenomenon.

& Peru) (adopted 12 October 2005, entered into force 12 September 2008) Art 3; Australia–Chile Free Trade Agreement (Australia & Chile) (adopted 30 July 2008, entered into force 6 March 2009) Art 10.5.

[88] UNCTAD (n 7) 13, 29, 30.

[89] DA Gantz, 'The Evolution of FTA Investment Provisions: From NAFTA to the United States – Chile Free Trade Agreement' (2003) 19(4) AmUIntl LRev 679, 724 ff. See, for instance, Canada–Colombia Free Trade Agreement (Canada & Colombia) (adopted 21 November 2008, entered into force 15 August 2011) Art 805; Agreement Between The Government of Romania and The Government of Canada for the Promotion and Reciprocal Protection of Investments (Canada & Romania) (adopted 8 May 2009, entered into force 23 November 2011) Art II(2).

[90] Agreement Between the United States of America, the United Mexican States and Canada (CUSMA) (adopted 10 December 2019, entered into force 1 July 2020), see, Art 14.6(1). The provision only finds application in disputes involving a US or a Mexican investor against either Mexico or the United States. The chapter on investor-State dispute settlement does not apply to Canada and Canadian investors. The provision can only be invoked in disputes relating to 'covered government contracts' (mentioned at Annex 14-E), which includes oil and gas production, power generation, transportation, telecoms and certain other infrastructure investments.

[91] ASEAN Comprehensive Investment Agreement (adopted 26 February 2009, entered into force 24 February 2012) Art 11.

[92] Investment Agreement for the COMESA Common Investment Area (adopted 23 May 2007, not yet in force) Art 14.

[93] Free Trade Agreement Between Central America, the Dominican Republic and the United States of America (CAFTA) (adopted 5 August 2004, entered into force 1 January 2009) Art 10.5. On this clause, see, P Dumberry, '"Cross Treaty Interpretation" en Bloc or How CAFTA Tribunals Are Systematically Interpreting the FET Standard Based NAFTA Case Law' The Law and Practice of International Courts and Tribunals (forthcoming 2023).

[94] Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (adopted 8 March 2018, entered into force 30 December 2018) Art 9.6.

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5 CETA: The Ultimate Detailed FET Clause

The most interesting and innovative recent FET clause is Article 8.10 of the CETA entered into by Canada and the member States of the European Union.[95] That provision is the first FET clause contained in an IIA that specifically enumerates a *closed list* of the different situations resulting in a breach of the obligation.[96] The content of Article 8.10 is to a very large extent based on how NAFTA tribunals have interpreted Article 1105 over the last 25 years. Thus, NAFTA tribunals have recognised that the FET standard contains only a *limited number* of specific elements of protection and that it requires proof of a high threshold of severity and gravity in order to conclude that the host State has committed a breach.[97] Article 8.10 CETA seems to be the natural and logical outcome of States' willingness to ever increase the degree of specificity of the content of the FET clause in order to narrow its scope and to circumscribe its interpretation by tribunals.[98]

One of the most notable features of Article 8.10 CETA is the fact that it does *not* refer to 'international law', the MST or to custom. The parties certainly believed that there was no need to expressly link the FET to the standard existing under the MST precisely because the clause contains a comprehensive enumeration of the elements they considered to be comprised in the FET 'box'. In any event, the elements listed at Article 8.10 CETA are those which are generally considered to be existing under the concept of the MST. As such, the omission of a reference to the MST should not be interpreted as a possible setback to the contemporary

[95] CETA (n 4) Art 8.10. This clause is examined in P Dumberry, 'Fair and Equitable Treatment' in M Bungenberg & A Reinisch (eds), *Canada-European Union Comprehensive Economic and Trade Agreement (CETA): Article-by-Article Commentary* (Nomos/Hart 2021); P Dumberry, 'Fair and Equitable Treatment' in S Schacherer & MM Mbengue (eds), *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)* (Springer 2018) 95–126.

[96] The elements listed are mentioned above, see footnote 4. It should be added that under para 4 the concept of legitimate expectation is mentioned as a 'factor', which can be taken into account by a tribunal.

[97] My analysis of NAFTA case law, Dumberry (n 8) 125–275, suggests that only the prohibition of manifest arbitrary conduct, denial of justice and the obligation of due process are unambiguously stand-alone elements of the FET obligation under Article 1105.

[98] F Jadeau & F Gélinas, 'CETA's Definition of the Fair and Equitable Treatment Standard: Toward a Guided and Constrained Interpretation' (2016) 13(1) TDM 1, 2 ff; G Ünüvar, 'The Vague Meaning of Fair and Equitable Treatment Principle in Investment Arbitration and New Generation Clarifications' in AL Kjær & J Lam (eds), *Language and Legal Interpretation in International Law* (OUP 2022) 288–9, article available: (2016) 55(2) *iCourts Working Paper Series*, 22.

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importance of that standard. One writer has recently correctly referred to Article 8.10 CETA as an MST clause with another name.[99]

6 Conclusion

This chapter has argued that States have started to use the expression FET in their investment treaties because of the ambiguities surrounding the concept of the MST and because of the fact that many States had heavily contested it in the past. By the end of the 1990s, the importance of the MST as a source of investment protection for foreign investors seems to be in sharp decline. Yet, soon after, States began to refer explicitly to the MST in FET clauses contained in their investment treaties. Their clear aim was to limit the scope of investors' rights under said clauses. The clearest illustration of this willingness is the CETA FET clause.

In my view, the degree of specificity of the CETA FET clause is a welcome development. The reference to the MST in IIAs has not been entirely successful at harmonising the interpretation of the standard and limiting its scope.[100] Thus, faced with the binding FTC Note that links the FET to the MST, several NAFTA tribunals (*Pope & Talbot*, *Mondev*, *ADF, Merrill & Ring* and *Bilcon*) have simply 'moved the goal post'.[101] They have thus interpreted CIL broadly by emphasising its evolutionary character. Under the CETA FET clause, a tribunal would no longer have the freedom to do that. In the CETA, the 'evolution' has effectively been *stopped* with the specific enumeration of elements contained in the FET clause.[102] In theory, one could argue that it is still possible for a tribunal to give a wide interpretation to any of the specific elements contained in the enumeration set out in Article 8.10 CETA. As such, even a closed list of what constitutes a FET breach would not prevent a Tribunal like *Merrill & Ring* to interpret the concept of arbitrariness or due process in a very broad manner.[103] The likelihood of such a possibility is somewhat diminished by the use of qualifiers in Article 8.10 CETA ('manifest' arbitrariness, 'fundamental'

[99] B Barrera, 'The Case for Removing the Fair and Equitable Treatment Standard from NAFTA' (2017) 128 CIGI Papers 10.

[100] Jadeau & Gélinas (n 98) 11 ff.

[101] P Dumberry, 'Moving the Goal Post! How Some NAFTA Tribunals Have Challenged the FTC Note of Interpretation on the Fair and Equitable Treatment Standard Under NAFTA Article 1105' (2014) 8(2) WAMR 251.

[102] There remains, of course, the possibility under CETA, Art 8.10(3) for the parties to review and update the content of the standard.

[103] See, C Henckels, 'Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA and TTIP' (2016) 19(1) JIEL 27.

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breach of due process') and, most importantly, the establishment of a permanent tribunal of first instance and an appellate tribunal.[104] This will ensure that the same adjudicators decide on every case, thereby allowing for a more consistent and coherent jurisprudence with regards to the FET standard.[105] This is ultimately the best safeguard against any future attempts by arbitral tribunals to adopt a broad interpretation of the FET standard.[106]

Ultimately, the CETA FET clause is emblematic of the fact that in this new century the pendulum is clearly swinging in the direction of States increasingly trying to regain control of investor-State arbitration.[107] For Stephan Schill, changes that have occurred in the last decade are 'aimed at shifting power back from arbitral tribunals to the contracting parties in order to regain control over the interpretation of the obligations' under investment treaties.[108] José Alvarez calls this recent phenomenon the 'Return of the State'.[109] The approach adopted by Canada and the EU in CETA is arguably the most vivid demonstration of States narrowly defining the FET clause in their treaties and leaving arbitrators with a limited margin of appreciation. The same closed list approach has been adopted by the EU in agreements subsequently concluded with three other States[110] and has also been followed by Belgium–Luxembourg and the Netherlands

[104] CETA, Arts 8.27–8. See, S Schacherer, 'TPP, CETA and TTIP Between Innovation and Consolidation – Resolving Investor–State Disputes Under Mega-Regionals' (2016) 7(3) JIDS 631; G Van Harten, 'ISDS in the Revised CETA: Positive Steps, But Is It a "Gold Standard"?' (*CIGI Investor-State Arbitration Commentary Series*, 20 May 2016) <www.cigionline.org/publications/isds-revised-ceta-positive-steps-it-gold-standard> accessed 10 May 2021; JA VanDuzer, 'Investor-State Dispute Settlement in CETA: Is It the Gold Standard?' (*CD Howe Institute Commentary No 459*, 4 October 2016) <www.cdhowe.org/sites/default/files/attachments/research_papers/mixed/Commentary%20459.pdf> accessed 10 May 2021.

[105] See Schacherer (n 104) 631.

[106] See also, CETA, Art 8.31(3) providing the possibility for the CETA Joint Committee to adopt a binding interpretation 'where serious concerns arise as regards matters of interpretation that may affect investment'.

[107] See, G Aguilar Alvarez & WW Park, 'The New Face of Investment Arbitration: NAFTA Chapter 11' (2003) 28 YJIL 365.

[108] S Schill, *The Multilateralization of International Investment Law* (CUP 2009) 271.

[109] JE Alvarez, 'The Return of the State' (2011) 20(2) Minn JIntlL 223, 223.

[110] See, Investment Protection Agreement Between the European Union and its Member States, of the One Part, and The Republic of Singapore, of the Other Part (EU & Singapore) (adopted 18 October 2018, not yet in force); Investment Protection Agreement Between the European Union and its Member States, of the One Part, and the Socialist Republic of Viet Nam of the Other Part (EU & Vietnam) (adopted 30 June 2019, not yet in force); European Commission, 'New EU-Mexico Agreement: The Agreement in Principle' (*European Commission*, 23 April 2018) (text agreed upon 21 April 2018, not yet in force)

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in their respective Model BITs.[111] The latest Indian Model BIT (which, notably, does not use the terms FET or MST, but instead refers to the expression 'violation of customary international law') also contains a similar explicit list of FET elements.[112] There are good reasons to believe that the CETA FET clause will increasingly be used by other States in the future. The most interesting feature of such clauses is that they reflect the content of the MST as defined by tribunals in the last 25 years. The concept of the MST, which had almost been forgotten by States in the 1990s, is now centre stage in their quest to limit investors' rights under investment treaties. Its 'resurrection' is one of the most interesting developments of the last two decades.

<https://trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156791.pdf> accessed 10 May 2021. It should be added that the proposed text of the (now doomed) Transatlantic Trade and Investment Partnership (TTIP) between the EU and the United States also contained an FET clause with similar language to that provided by Article 8.10. European Commission, 'Commission Draft Text TTIP – Investment: Transatlantic Trade and Investment Partnership' (*European Commission*, 2015) Art 3 <http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf> accessed 10 May 2021.

[111] Belgium–Luxembourg Economic Union Model BIT 2019 (Belgium & Luxembourg) (adopted 28 March 2019) Art 4; Netherlands, 'Netherlands Model Investment Agreement' (*Netherlands Ministry of Foreign Affairs*, 22 March 2019) Art 9 <www.rijksoverheid.nl/binaries/rijksoverheid/documenten/publicaties/2019/03/22/nieuwe-modeltekst-investeringsakkoorden/nieuwe+modeltekst+investeringsakkoorden.pdf> accessed 10 May 2021.

[112] India, 'Model Text for the Indian Bilateral Investment Treaty' (*Indian Ministry of Finance*, 14 January 2016) Art 3.1 <www.dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf> accessed 10 May 2021: 'No Party shall subject investments made by investors of the other Party to measures which constitute a violation of customary international law through: (i) Denial of justice in any judicial or administrative proceedings; or (ii) fundamental breach of due process; or (iii) targeted discrimination on manifestly unjustified grounds, such as gender, race or religious belief; or (iv) manifestly abusive treatment, such as coercion, duress and harassment (…)'. This type of clause is found in the Treaty Between The Republic of Belarus and The Republic of India on Investments (Belarus & India) (adopted 24 September 2018, not yet in force).

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