

AN EMPIRICAL STUDY OF THE FAIR AND EQUITABLE TREATMENT STANDARD CLAUSE: HOW TRIBUNALS HAVE EXAMINED THE RELATIONSHIP WITH THE MINIMUM STANDARD

BY PATRICK DUMBERRY

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Over the last decade, Patrick Dumberry has produced an impressive body of empirical work exploring how arbitral tribunals have interpreted the Fair and Equitable Treatment (“FET”) standard, especially in relation to the minimum standard of treatment (“MST”) in international investment law. In *An Empirical Study of the Fair and Equitable Treatment Standard Clause: How Tribunals Have Examined the Relationship with the Minimum Standard*, Dumberry continues that important and timely work, looking to how tribunals have engaged in treaty interpretation. The monograph is directed both to academics in the field and to practitioners of international investment law who may have to engage with the interpretation of FET clauses.

Both the scope of FET and its relationship to MST are highly contested.¹ Roughly speaking, there are two groups of commentators, those who argue that FET is identical to the minimum standard of treatment under customary international

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¹ Patrick Dumberry, *An Empirical Study of the Fair and Equitable Treatment Standard Clause: How Tribunals Have Examined the Relationship with the Minimum Standard* (Alphen aan den Rijn: Kluwer Law International 2024) at 1 [Dumberry].

law, as initially enunciated in *Neer* (and developed since then), and those who argue that FET is an independent, higher standard. On the latter view, FET must have a distinct meaning from MST.² Some scholars and tribunals have even argued that the FET standard in those treaties has now crystalized as a new norm of customary international law.³

In this book, Dumberry proposes to engage in two tasks. First, he asks “how investment tribunals have asessed FET clauses in the last 25 years regard the complex question of the relationship between [FET] and [MST].” Second, he assesses “whether the answer given by the tribunals to [the] first question has had any impact on how they have examined the content of the standard and how they have address matters of liability and compensation.”⁴

It is well known that tribunals have frequently adopted a higher standard of protection than that accepted by states when considering the meaning of FET clauses in international investment law. In *Pope & Talbot*, a NAFTA arbitration against Canada, the arbitral tribunal initially found that the meaning of FET, both under NATFA and in international investment law, “must be ascertained free of any threshold that might be applicable to the evaluation of measures under the minimum standard of international law.”⁵ In response, the state parties to

² Ioana Tudor, *The Fair and Equitable Treatment Standard in International Foreign Investment Law* (Oxford: OUP 2008) at 22.

³ Stephen M 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 (2004); Patrick Dumberry, “Are BITs Representing the ‘New’ Customary International Law in International Investment Law?” (2010) 28:4 Penn State Int’l L R 674.

⁴ Dumberry, *supra* note 1 at 2.

⁵ *Pope & Talbot v Canada*, Award, 10 April 2001 at para 111 [Pope & Talbot]; see also *S.D. Myers, Inc. v Government of Canada*, UNCITRAL, Partial Award of 13 November 2000 at para 266. Although modern commentators might consider Dr Mann’s statement to be an over-generalisation, and the Tribunal does not rule out the possibility that there could be circumstances in which a denial of the national treatment provisions of the NAFTA would not

NAFTA issued a note under the auspices of the NAFTA Free Trade Commission, clarifying that the FET standard in NAFTA did not depart from that of customary international law and should not be read as an independent standard.⁶ Reluctantly, the arbitral tribunal accepted the states' agreed interpretation, and found that the FET standard, at least as applied in NAFTA, was identical to MST.

There are two, not necessarily exclusive, explanations for how the divergence between states and tribunals has arisen. For formalists, tribunals have undertaken a largely textualist reading of treaty clauses to determine whether the FET standard is different from MST. On this view, the drafting of treaty clauses explains how tribunal practice has developed. For realists, who begin from the work of sociologists such as Dezalay and Garth, arbitrators and tribunals must be understood as acting within a specific professional milieu.⁷ As Smit has noted, they are incentivized to adopt broad readings of both jurisdictional and FET clauses, which advance their personal interests.⁸

necessarily offend the minimum standard provisions, a majority of the Tribunal determines that on the facts of this particular case the breach of Article 1102 essentially establishes a breach of Article 1105 as well. See also Patrick Dumberry, "The Quest to Define 'Fair and Equitable Treatment' for Investors under International Law - The Case of the NAFTA Chapter 11 Pope & Talbot Awards" (2002) 3:4 J World Investment 657; PG Foy and RJC Deane, "Foreign Investment Protection under Investment Treaties: Recent Developments Under Chapter 11 of the North American Free Trade Agreement" (2001) 16 ICSD Rev 299; JC Thomas, "Reflections on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators" (2002) 17 ICSID Rev 21.

⁶ NAFTA Free Trade Commission, North American Free Trade Agreement, Notes of Interpretation of Certain Chapter 11 Provisions, July 31, 2001.

⁷ Yves Dezalay & Bryant G Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago: U Chicago P 1998).

⁸ Hans Smit, "The Pernicious Institution of the Party-Appointed Arbitrator" (2010) Columbia FDI Perspectives No 33, Columbia University Vale Columbia Center on Sustainable International Investment.

There is broad support for this view. Scholars have argued that tribunals have played a significant role in the development of the FET standard, as they appear to have done with respect to other terms of art in international investment arbitration. In a related study, Van Harten coded all publicly available awards in English, which amounted to approximately 140 cases as of 2010, and argued that tribunals have adopted expansive readings of treaty terms in order to expand their own jurisdiction.⁹

The formalist approach has been embraced by many practitioners and international organizations. For example, a 2004 OECD working paper concluded:

Because of the differences in its formulation, the proper interpretation of the “fair and equitable treatment” standard depends on the specific wording of the particular treaty, its context, the object and purpose of the treaty, as well as on negotiating history or other indications of the parties’ intent.¹⁰

A similar conclusion was reached by UNCTAD, which argued in a 2012 report that variations in drafting introduced different thresholds for the violation of the standard.¹¹

⁹ Gus Van Harten, “Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration” (2012) 50:1 *Osgoode Hall LJ* 211 at 238.

¹⁰ Organization for Economic Cooperation and Development, “Fair and Equitable Treatment Standard in International Investment Law” (2004), 2004/3 OECD Working Papers on International Investment Law 40.

¹¹ United Nations Commission on Trade and Development, “Fair and Equitable Treatment” (2012), 8 UNCTAD Series on Issues in International Investment Agreements, II (“[I]dentification of the correct source of the FET standard—whether it is grounded in customary international law or is a self-standing obligation—can have important consequences in terms of the standard’s content and, more precisely, of the types of State measures that can be challenged as well as the required threshold for finding a violation, that is, the required degree of seriousness of the breach.”).

Ultimately, Dumberry embraces the same formalist approach. In Part I, he surveys the history of FET and identifies several different types of references to FET in treaty clauses. These include references to FET solely in a treaty preamble (which do not in themselves impose any binding obligations on the host state), stand-alone FET clauses (including autonomous and unqualified references to the FET), FET clauses by which treatment is required to be “in accordance with international law”, references to the FET in combination with other standards of protection (such as national treatment and Most-Favored-Nation clauses), references to FET with an additional specification that this treatment prohibits arbitrary and discretionary measures, FET clauses whereby treatment must be no less than that required by international law, and FET clauses linking FET to MST or custom international law.¹²

Next, in Part II, Dumberry considers how tribunals have interpreted different FET clauses. He identifies three main types of cases. First, he considers cases involving stand-alone FET clauses, which are those where the FET standard is not qualified by reference to international law or the customary standard. The majority of tribunals in those cases appear to have embraced the view that FET is an independent standard.

Thus, for example, the tribunal in *Saluka* found that the text of the treaty precluded a reference to customary international law.¹³ It noted, “[w]hichever the difference between the

¹² Dumberry, *supra* note 1 at 55. See also Patrick Dumberry, “Has the Fair and Equitable Treatment Standard Become a Rule of Customary International Law?” (2017) 8:1 J Int’l Disp Settlement 155; Patrick Dumberry, “The Practice of States as Evidence of Custom: An Analysis of Fair and Equitable Treatment Standard Clauses in States’ Foreign Investment Laws” (2015) 2:1 McGill J Disp Resol 66.

¹³ *Saluka v Czech Republic*, Partial Award of 17 March 2006 at para 294. (“[Article 3.1 of the Treaty] 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 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

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.”¹⁴ Similar reasoning was employed by the tribunal in *Addiko*, which found that the omission of any reference to MST meant that the tribunal should rely on an autonomous standard.¹⁵ Ultimately, Dumberry finds that in 23 out of 29 awards that considered the relationship between FET and MST, tribunals concluded that the clause should be interpreted as having an autonomous character.¹⁶ Unfortunately, he does not adequately explain or identify the outliers, a lacuna to which we will return.

The next class of awards Dumberry considers are those which hold that the meaning of an FET clause should be determined according to international law generally (including clauses which set international law as a floor rather than a ceiling).¹⁷ In these cases, most tribunals (14 out of 19) found that the reference to FET in the treaty was not to MST. Thus, for example, the tribunal in *Vivendi* noted that:

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.”).

¹⁴ *Ibid.*

¹⁵ *Addiko Bank AG v Montenengro*, ICSID Case No ARB/17.35, Award of 24 November 2021 at paras 543-544; *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan*, ICSID Case No ARB/12/1, Award of 12 July 2019 at paras 804-805; *Cairn Energy PLC and Cairn UK Holdings Limited v The Republic of India*, PCA Case No 2016-07, Final Award of 21 December 2020 at para 1701; *Gardabani Holdings B.V. and Silk Road Holdings B.V. v Georgia*, ICSID Case No ARB/17/29, Award of 21 November 21 2022 at para 498; *Sociedad Aeroportuaria Kuntur Wasi S.A. and Corporación América S.A. v Republic of Peru*, ICSID Case No ARB/18/27, Decision on Jurisdiction, Liability, and Quantum of 11 August 11 2023 at para 668.

¹⁶ Dumberry, *supra* note 1 at para 90.

¹⁷ *Ibid* at para 91.

The Tribunal sees no basis for equating principles of international law with the minimum standard of treatment. First, the reference to principles of international law supports a broader reading that invites consideration of a wider range of international law principles than the minimum standard alone. Second, the wording of Article 3 requires that the fair and equitable treatment *conform* to the principles of international law, but the requirement for conformity can just as readily set a floor as a ceiling on the Treaty's fair and equitable treatment standard. Third, the language of the provision suggests that one should also look to contemporary principles of international law, not only to principles from almost a century ago.¹⁸

¹⁸ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic*, ICSID Case No ARB/97/3, Award of 20 August 2007 at 7.4.7 (citing, for the proposition that MST could be a floor, not a ceiling, *American Manufacturing & Trading, Inc. (AMT) v Democratic Republic of Congo*, ICSID Case No ARB/93/1, Award of 21 February 1997; *Eastern Credit Limited, Inc. and A.S. Baltoil v The Republic of Estonia*, ICSID Case No ARB/99/2, Award of 25 June 2001 at para 367).

The floor-not-a-ceiling principle was also accepted by the *Azurix* tribunal: *Azurix Corp. v The Argentine Republic*, ICSID Case No ARB/01/12, Award of 14 July 2006 at para 361. The tribunal, in a footnote, rejected any reference to the statements of the NAFTA state parties: "Any suggestion that the minimum standard remains effectively unchanged since the 1926 Neer Claim is not supportable. Indeed, NAFTA cases that preceded the Free Trade Commission's interpretation of the Chapter Eleven F&ET provision ... affirm that the minimum standard has evolved significantly beyond Neer. Also, the *ADF Group* tribunal held that the minimum standard is not a static photograph dated 1927 ... and the Tribunal in *Mondev* held that the content of the minimum standard today cannot be limited to the content of customary international law as recognised in arbitral decisions in the 1920's. It added that, to the modern eye, what is unfair or inequitable need not equate with outrageous or egregious." (internal citations omitted).

A similar approach was taken by the tribunals in *Global Telecom* and *Suez*.¹⁹ These cases are controversial—not least, as Stern has noted, because the tribunals in question appear not to have conducted any analysis of the principles of international law underlying the autonomous interpretation of FET.²⁰

Next, Dumberry turns to the question of how tribunals have interpreted clauses which state that the FET standard requires treatment no less favourable than that required by international law. The tribunals in Dumberry’s data set were evenly split in these cases. Eleven out of twenty-two tribunals found that the standard contained in such clauses is a reference to the customary international law standard, while the other eleven found that such clauses require a heightened standard of protection.²¹ Thus, the tribunal in *Lemire* found that the FET standard exceeds MST, by protecting against inequitable treatment even if such treatment did not rise to the level of an outrage.²² Conversely, the *AMT* tribunal found that the reference in the treaty text to FET as “no less than” the standard

¹⁹ *Global Telecom Holding S.A.E. v Canada*, ICSID Case No ARB/16/16, Award of 27 March 2020 at para 484 (“Dealing first with Canada’s argument that the fair and equitable treatment standard set out in the BIT is limited to the minimum standard of treatment under customary international law, the Tribunal concludes that there is no basis for such an interpretation. Any such limitation runs counter to the explicit terms used in Article II(2)(a) and to the ordinary meaning to be given to those terms in their context and in the light of the BIT’s object and purpose.”); *Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentine Republic*, ICSID Case No ARB/03/19, Decision on Liability of 20 July 2010 at para 179 (“the Tribunal rejects the Respondent’s argument that the fair and equitable treatment standard as embodied in the Argentina-Spain BIT is implicitly limited by minimum international standard.”).

²⁰ *Infinito Gold Ltd. v Costa Rica*, ICSID Case No ARB/14/5, Separate Opinion of Professor Brigitte Stern on Jurisdiction and on the Merits of 3 June 2021 at para 84. See also Dumberry, *supra* note 1 at 101 et seq.

²¹ *Ibid* at 116.

²² *Joseph Charles Lemire v Ukraine*, ICSID Case No ARB/06/18, Decision on Jurisdiction and Liability of 14 January 2010 at paras 253-254.

under international law must be a reference to MST.²³ In all cases examined to this point, Dumberry finds that a holding of heightened protection is positively correlated with success for the claimants and higher awards.

Finally, Dumberry examines cases turning on treaty clauses that expressly refer to MST, as in NAFTA cases. Tribunals in these cases have generally found, at least in the post-*Talbot & Pope* era, that the FET standard is equivalent to MST.²⁴ However, even where clauses clearly specify that the standard is one of customary international law or MST, not all tribunals have hewed closely to the text. In *Eco Oro*, the tribunal expanded MST to include legitimate expectations, despite that no international court appears to have found that the doctrine of legitimate expectations forms part of customary international law.²⁵ Additionally, at least one tribunal has found that anti-discrimination forms a part of MST.²⁶ Unfortunately, Dumberry does not provide total numbers of awards in this section, so the reader cannot determine how frequently tribunals adopted

²³ *American Manufacturing & Trading v Zaire*, ICSID Case No Arb/93/1, Award of 21 Feb 1997 at para 6.60.

²⁴ This approach has been adopted elsewhere, including in cases under the Canada-EU Free Trade Agreement (CETA), such as *Railroad Development Corporation v Republic of Guatemala*, ICSID Case No ARB/07/23; *Elliot v Korea*, PCA Case No 2018-451, Award of 20 January 2023; *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v Republic of Peru*, ICSID Case No UNCT/18/2, Award of 6 December 2022 at 823; *IC Power Ltd and Kenon Holdings Ltd v Republic of Peru*, ICSID Case No ARB/19/19, Award of 3 October 2023 at para 287 et seq; *Adel A Hamadi Al Tamimi v Sultanate of Oman*, ICSID Case No ARB/11/33, Award of 3 November 2015 at para 382 et seq.

²⁵ *Eco Oro Minerals Corp. v Republic of Colombia*, ICSID Case No ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum of 9 December 2021 at para 745; see also *OI European Group B.V. (OIEG) v Bolivarian Republic of Venezuela*, ICSID Case No ARB/11/25, Award of 10 March 2015 at para 491, where the tribunal found that a state may violate both FET and MFN “by means of general legislative actions, enacted by the State, if the new regulation contracts the investor’s legitimate expectations”.

²⁶ Dumberry, *supra* note 1 at 133. Others have expanded MST by including an expensive protection against arbitrary treatment. *Ibid* at 133-35.

expansive interpretations of clauses linking FET to MST. Dumberry concludes, however, that because of the narrow interpretations advanced by these tribunals, claimants are less likely to be successful and, when they are, awards are likely to be smaller.²⁷

In Part III, Dumberry turns to the so-called convergence thesis in ISDS. The convergence thesis argues that the FET and MST standards have converged in international investment law such that the level of protection offered by each is now essentially the same.²⁸ Dumberry rejects this thesis: “My analysis of case law shows that this ‘dichotomy’ is far from being simply a ‘misconception’. Tribunals do analyze stand alone FET clauses and provisions linked to the MST differently”.²⁹ This is a key and important finding that appears to be supported by Dumberry’s analysis.

However, it is also incomplete, and it is precisely here that Dumberry’s book would have benefited from greater analysis of outlier cases, as well as more precise references to allow for the verification of his findings. Thus, while he has clearly identified patterns in the interpretative practices of tribunals, he has not been able to explain why some tribunals deviated from the majority practice. For example, even where tribunals have examined stand-alone FET clauses, some have found that the FET clauses refer to MST and not to an independent standard. Similarly, where interpreting FET clauses referring to international law as a floor, some tribunals have declined to follow the approach adopted in *Vivendi* and found that reference to FET in those clauses must be references to MST. It is precisely this deviation that gives credence to the sociological challenge to internal investment arbitration. The outlying arbitrators, it would appear (although we lack the ability to completely verify

²⁷ *Ibid* at 154.

²⁸ *Ibid* at 156-57.

²⁹ *Ibid* at 156.

this claim) are still engaged in the practice of international investment law, even if their conclusions are outside the norm.

Additionally, although Dumberry flags the existence of these outliers,³⁰ he does not provide complete citations, making it impossible to identify the cases or verify his analysis. This is unfortunate, and sadly too common in legal writing (where norms about providing complete data sets, which are more common in other social scientific disciplines, do not prevail), and takes away from the strength of his argument.

Hopefully, in future work, Dumberry will provide an account of the tribunals which depart from the practices he identifies here. However, none of this is to take away from what is otherwise a pathbreaking work.

³⁰ See *supra*, fns 16 and 17.