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Arbitral Lawmaking and State Power: An Empirical Analysis of Investor–State Arbitration

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ABSTRACT

The article focuses on arbitral lawmaking (the development of precedent-based frameworks of argumentation and justification), and state responses to that lawmaking (as registered in subsequent treaty-making). The article reports three main findings. First, in most disputes, investors do not challenge general state measures; and they are far more likely to prevail when they contest acts specifically targeting their investments. Secondly, the evidence does not show that arbitral doctrine produces outcomes that are biased against states. In the vast majority of awards, tribunals take seriously the respondent state's 'right to regulate'. Thirdly, the regime has not generated strong 'backlash' in any systemic sense. States continue to sign investment treaties; the mix of protections on offer has remained remarkably stable; and new treaties have largely consolidated the case law that the most influential tribunals had already developed.

Over the past two decades, investor–state arbitration (ISA) has developed at a spectacular rate, while generating controversy among state officials, and within the arbitral profession and scholarly community. This article focuses a major source of disagreement: the arbitral construction of international investment law and its effects on determinations of state liability. Arbitral tribunals have been the authors of much of that law since the field's take-off in the late-1990s. In the past decade, states— as contracting principals and primary lawmakers—have rematerialized, placing reform of the regime on the top of the agenda. The article examines (i) the development of arbitral lawmaking (conceived in terms of the development of doctrinal frameworks that govern the arbitration of specific investment treaty provisions), and (ii) state responses to that lawmaking (as registered in subsequent treaty-making).

The article addresses four overlapping empirical questions. First, to what extent have tribunals reviewed 'general measures' of respondent states, such as statutes? Secondly, when states plead the public interest in defence, how have tribunals responded? Thirdly, as a doctrinal matter, how do tribunals resolve conflicts between investors' entitlements and the regulatory prerogatives of states? Fourthly, to what extent have states

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sought to use their treaty-making authority to override arbitral lawmaking, or to constrain tribunals, going forward? The article presents findings on these matters, and assesses them in light of the debates on the evolution and reform of the regime.

We proceed as follows. Section 1 discusses the research design. Two data sets organized the presentation of outcomes in the aggregate, as well as the qualitative analysis. The first contains information on all publicly available awards on liability rendered through 2016; $n = 159$,¹ the largest number of final decisions on the merits compiled to date. The second consists of all Bilateral Investment Treaties (BITs) signed between 2002 and 2015, available on the UNCTAD website, and written or translated into English; $n = 398$.² We also examined multi-lateral, draft and model investment treaties. Section 2 shows that, in most disputes, investors do not challenge general state measures. When they do, claimants are far less likely to prevail than when they attack measures specifically targeting investments. Section 3 reports the outcomes of decision-making in the two most pleaded domains of investment law: the prohibition of 'Indirect Expropriation' (InEx); and investors' entitlement to 'Fair and Equitable Treatment' (FET). Although investors routinely plead identical facts under both headings, tribunals strongly prefer finding liability in FET, rather than in InEx. Moreover, arbitrators have generated a relatively stable doctrinal framework for enforcing the FET standard, which treaty-makers had left textually open-ended and incomplete. Section 4 reports the findings of our analysis of new treaties signed since 2002. States have become more aware of the costs of incomplete contracting and delegation to arbitrators which has led to a clarification of state preferences. But, perhaps surprisingly, the data do not support the view that the regime has generated strong 'backlash' from states-as-treaty-makers. On the contrary, the analysis shows that: (i) the mix of treaty protections on offer has remained remarkably stable; and (ii) new treaties, including those that contain carve outs and interpretive guidelines, largely serve to consolidate the case law that the most influential tribunals had already developed.

1. THEORY, DATA AND DESIGN

Here, we outline the basic theoretical materials that guided the research, define key concepts and provide an overview of the data collected and analysed.

A. Theoretical Considerations

The purpose of the article is to respond, empirically, to the questions listed above, not to develop new theory, or test hypotheses derived from existing theory. Instead, a simple 'Principal-Agent' [P-A] framework organized the research.³ In this

1 The complete data set contains information on 177 available awards, not all of which contain complete information on pleadings and arbitral decisions on the topics of our inquiry.

2 UNCTAD Division on Investment and Enterprise, 'Investment Policy Hub' <<http://investmentpolicyhub.unctad.org>> accessed 17 June 2017. The data set includes the 2012 Japan-China-South Korea trilateral agreement.

3 While we assume basic familiarity with the basics of delegation theory, there is no need to develop a more complex model for present purposes. For an introduction, see Mark Thatcher and Alec Stone Sweet, 'Theory and Practice of Delegation to Non-Majoritarian Institutions' (2002) 25 *West European Politics* 1. For an application to international arbitration, see Alec Stone Sweet and Florian Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (OUP 2017).

perspective, states are the contracting Principals (as treaty-makers), tribunals are their Agents (charged with the task of resolving disputes between foreign investors and host states) and public international law mediates the relationship (eg arbitrators are bound by the 1969 Vienna Convention on the Law of Treaties).

States confer authority on arbitral tribunals through treaties. At the close of 2015, there were 3304 such agreements: 2946 BITs, ratified by some 150 different states; and 358 other arrangements, including multilateral and multi-purpose economic agreements that provide for arbitration of investment disputes. Through 2015, the number of known ISA cases reached 696. The majority of cases did not result in a final award on liability, having been withdrawn, dismissed or settled at an earlier stage.⁴ Most cases fall under jurisdiction conferred on arbitrators by BITs, and most BITs provide for ISA under the auspices of the World Bank's International Centre for the Settlement of Investment Disputes (ICSID).⁵

Despite these vertiginous numbers, ISA provisions share common features, though important provisions may vary. Agreements were meant to encourage foreign direct investment, by reducing its risk, including though the removal of disputes from diplomacy and domestic courts and channeling them into arbitration.⁶ In the archetypal case, the investor initiates ISA to obtain compensation for an alleged breach of a BIT's protections by the host state. If the tribunal concludes that the state did violate the treaty so as to incur liability, then it assesses and awards damages to the claimant.

States delegate lawmaking powers, indirectly, insofar as the treaties being arbitrated comprise incomplete contracts. Tribunals are under a duty to resolve disputes according to the terms of these treaties, notwithstanding the fact that the contracting states may have given little or no interpretive guidance to many important protections, the FET being a paradigmatic example. Virtually every investment agreement provides for FET; investors systematically raise FET claims; and ISA tribunals have found more violations of the FET standard than of any other substantive provision of investment law. For their part, arbitrators have generated an expansive, self-sustaining jurisprudence on the scope and application of the FET, eventually deploying it as an integrative norm of investment law. Important streams of arbitral case law also 'complete' and network other important provisions, through similar processes.

States are the contracting principals when they make investment treaties. When it comes to disputes with an investor under an investment treaty, they are not Principals; rather, they are subject to the authority of the tribunal. States themselves gave a number of advantages to arbitrators (self-binding to enhance the credibility of commitments made). First, tribunals exercise compulsory jurisdiction over investment disputes, once initiated by the claimant. Secondly, after a tribunal is constituted, respondent states possess no formal capacity to block the process or to unilaterally control the tribunal's activities. Thirdly, there is no appeal on errors-in-law. At ICSID, either party may initiate the so-called 'annulment procedure', but formally, at least,

4 For an overview of the ISA regime and relevant statistics, see Sweet and Grisel (n 3).

5 In addition, two multilateral agreements—the 1965 ICSID Convention, and the 1958 New York Convention—are important for enforcement purposes, among others.

6 Joost Pauwelyn, 'At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed' (2014) 29 ICSID Review 372.

Annulment Committees are not empowered to quash an award on such errors.⁷ Fourthly, most tribunals (typically comprises three arbitrators) are constituted through one of three procedures, either: the parties (i) select the arbitrators; or (ii) each party nominates one member, called a ‘co-arbitrator’, and the two co-arbitrators then select the presiding member; or (iii) ICSID can directly participate in the selection process. Party-based selection presumptively legitimates the tribunal, although the losing party will sometimes claim bias. In contrast, states appoint the judges of those international courts that exercise compulsory jurisdiction over disputes involving treaty compliance.

We also designed our research with reference to other general approaches to explaining the evolution of ISA. Pauwelyn, in his account of the dynamics of regime construction, rightly stresses that the system ‘was not rationally designed’ but, instead, ‘gradually emerged from a series of small, historically contingent and at times accidental steps, not just by treaty or BIT negotiators but also by contract drafters, international institutions, arbitrators and litigators’. The article provides strong support for Pauwelyn’s major claim to the effect that ISA, as it currently exists, developed as a ‘self-organizing’ system along path-dependent lines.⁸ The article is also an application of the theory of judicialization,⁹ which has been applied to other new systems of dispute resolution, including to the EU¹⁰ and WTO.¹¹ Judicialization theory directs empirical attention on the path-dependent development of the capacity of dispute resolvers to govern through precedent-based lawmaking.

B. Concepts: Precedent and Lawmaking

We define *precedent* as those accreted legal materials, issuing from prior awards, that counsel and arbitrators use as building blocks to construct frameworks for argumentation and justification. Legum conceptualizes arbitral precedent in a congruent way: (i) for counsel—‘a precedent is any decisional authority that is likely to affect the decision in the case at hand’; and (ii) for arbitrators—‘a precedent is any decisional authority that is likely to justify the award to the principal audience for that award’.¹² Not everyone will agree with our approach to precedent; and there is no consensus of how to conceptualize judicial or arbitral *lawmaking*, which we define the term in connection with precedent. A tribunal makes law to the extent that its award supplements the corpus of normative materials that counsel and tribunals will take into

7 International Centre for the Settlement of Investment Disputes, ‘Background Paper on Annulment for the Administrative Council of ICSID’ <https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Background%20Report%20on%20Annulment_English.pdf> accessed 5 April 2015.

8 Pauwelyn (n 6) 3–4.

9 Alec Stone Sweet, ‘Judicialization and the Construction of Governance’ (1999) 32 *Comparative Political Studies* 147, 147–84, applied to international arbitration in Sweet and Grisel (n 3).

10 Alec Stone Sweet, *The Judicial Construction of Europe* (OUP 2004); Alec Stone Sweet, ‘The European Court of Justice and the Judicialization of EU Governance’ (2010) 5(2) *Living Reviews in European Union Governance* <<http://www.europeangovernance-livingreviews.org/Articles/lreg-2010-2/>> accessed 17 June 2017.

11 Alec Stone Sweet and Thomas L Brunell, ‘Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the European Convention on Human Rights, the European Union, and the World Trade Organization’ (2013) 1 *Journal of Law and Courts* 61.

12 Barton Legum, ‘The Definitions of “Precedent” in International Arbitration’ in Emmanuel Gaillard and Yas Banifatemi (eds), *Precedent in International Arbitration* (Juris Publishing 2008) 7–8; See (n 4).

account in future proceedings. Thus, when tribunals clarify existing, or create new, understandings of investment law, they make law that an observer can track empirically, as usable precedent.

It is today indisputable¹³ that ‘a *de facto* doctrine of precedent’¹⁴ is basic to arbitrating investment disputes (see Section 1C below further). The parties intensively plead and dispute the relevance and application of prior awards, which most arbitrators treat as a wellspring of legal reasons to justify decisions. Absent the formal mechanisms of coordination associated with hierarchy and appeal, the outcome was in no way pre-ordained. Indeed, there are good reasons to think that precedent-based lawmaking would not readily emerge in ISA.

Tribunals are obligated to apply the substantive law laid down by a treaty, each of which comprises a discrete inter-state contract, with its own particular ‘object and purpose’,¹⁵ negotiating history, and so on. But there is no obvious reason why thousands of specific treaties should be bundled together and interpreted in the aggregate unless systemic coherence is a goal of an increasing number of counsel, tribunals and state officials.

In constructing a system of dynamic, precedent-based lawmaking, actors had to overcome a set of significant structural obstacles. The judges of investment treaties do not sit as a permanent college, analogous to a judiciary, but rather combine in kaleidoscopic, *ad hoc* arrangements. Arbitrators are of varying backgrounds, competence and reputation and preferences and prospects for appointments to future tribunals. In three-member tribunals, they engage in strategic interactions with one another and, as a collective body, with the parties. There are several necessary conditions for precedent to emerge in such a context. Some tribunals must see it in their interest to develop the law, in ways that will serve to coordinate across treaty instruments, tribunals and time; and counsel and arbitrators in future cases must credit legal interpretation and reasons given in past awards with at least some persuasive authority. These actors must invest in a sustainable, collective process that works to permit ‘the survival of good awards’, while filtering out poorly reasoned ones.¹⁶

Formal law also constrains the evolution of certain notions of precedent. While ICSID arbitrators are under an express duty to give reasons,¹⁷ they are not obligated to give good reasons, or to take into account the past reason giving of their peers. Further, Article 53 of the ICSID Convention states: ‘The award shall be binding on the parties.’ The phrasing echoes, in part, Article 59 of the Statute of the International

13 ‘That a special jurisprudence is developing from the leading awards in the domain of investment arbitration can only be denied by those determined to close their eyes’. Jan Paullsen, ‘International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law’ (2006) 3 *Transnational Dispute Management* 13.

14 Domenico Di Pietro, ‘The Use of Precedents in ICSID Arbitration: Regularity or Certainty?’ (2007) 10 *International Arbitration Law Review* 92, 96. For empirical analyses of precedent in ISA, see Jeffrey P Commission, ‘Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence’ (2007) 24 *Journal of International Arbitration* 129; Ole Kristian Fauchald, ‘The Legal Reasoning of ICSID Tribunals – An Empirical Analysis’ (2008) 19 *European Journal of International Law* 301.

15 A tenet of interpretation imposed by art 31(1) of the Vienna Convention on the Law of Treaties (1969).

16 Commission (n 14) 156.

17 art 48(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), done at Washington, 18 March 1965, 575 UNTS 159.

Court of Justice: ‘The decision of the Court has no binding force except between the parties and in respect of that particular case.’ These provisions are typically understood to occlude precedent conceived in *stare decisis* terms. Nonetheless, it is today widely recognized that international courts—including arbitral tribunals—produce case law, the persuasive authority of which will depend on its longevity, coherence and relevance to stakeholders beyond the parties to any discreet dispute.¹⁸

The regime has surmounted these obstacles. It is precisely due to: (i) the fragmentation of the sources; (ii) the indeterminacy of key provisions shared by the treaties; (iii) the one-shot nature of arbitration; (iv) the transient composition of tribunals; and (v) the absence of formal mechanisms of horizontal coordination between arbitrators, that the system begs for precedent, as we have defined it. The empirical record¹⁹ strongly supports a functional argument of this type. As the number of high-stakes cases flowing into the system mounted, so did the demand for precedent—and for skilled, repeat arbitrators—which the system supplied. As a result, ICSID officials, tribunals, arbitrators, counsel and scholars intensified efforts to legitimize arbitral lawmaking, using the same types of arguments long deployed to legitimize the lawmaking of courts. Arbitral jurisprudence, the claim goes, serves the overlapping values of legal certainty and systemic coherence, of transparency and legitimacy and of rule-of-law and justice.²⁰ Noting the emergence and consolidation of precedent-based practices in the regime, however, tells us nothing about how precedent will evolve or operate.

The community has, in fact, generated differing notions of precedent. A decidedly minimalist—now virtually moribund—version scripts arbitrators as faithful agents of the contracting parties, rendering them strictly bound by state preferences. A tribunal applying treaty X has no business looking into how another tribunal has interpreted treaty Y, even in a ‘like’ case. It could, however, consider how past tribunals have interpreted treaty X to settle similar disputes arising under treaty X.²¹ A far more prevalent view holds that tribunals should consider well reasoned, prior decisions to be sources of persuasive authority. It emerged in an explicit form in the early 2000s,²² in response to heavy reliance on past awards by parties in their submissions.²³ An even more robust perspective asserts a positive arbitral duty to directly

18 Gilbert Guillaume, ‘The Use of Precedent by International Judges and Arbitrators’ (2011) 2 *Journal of International Dispute Settlement* 5.

19 Sweet and Grisel (n 3) ch 4.

20 For a strong counter-argument, see Irene M Ten Cate, ‘The Costs of Consistency: Precedent in Investment Treaty Arbitration’ (2013) 51 *Columbia Journal of Transnational Law* 418.

21 A view expressed, for example, by the tribunal in *Glamis Gold Ltd. v United States of America* (NAFTA/UNCITRAL Rules) Award of 8 June 2009, paras 3–9.

22 As Commission (n 14) 156, puts it, tribunals had, by this time, ceased ‘to disguise their outright reliance’ on important ‘cases’ and ‘precedents’.

23 By 2005, the *AES v Argentine Republic* tribunal could articulate it as follows: ‘Each tribunal remains sovereign and may retain, as it is confirmed by ICSID practice, a different solution for resolving the same problem; but decisions . . . dealing with the same or very similar issues may at least indicate some lines of reasoning of real interest; this Tribunal may consider them in order to compare its own position with those already adopted by its predecessors and, if it shares the views already expressed by one or more of these tribunals on a specific point of law, it is free to adopt the same solution.’ *AES Corporation v Argentine Republic* (ICSID Case No ARB/02/17) Decision on Jurisdiction of 26 April 2005, para 30. Dicta of this type is today so commonplace that one can say that it comprises a basic, first-order understanding of precedent in ISA.

engage *la jurisprudence constante*—settled case law—when on point.²⁴ Under this advanced notion of precedent, the duty to pursue doctrinal coherence is owed to the regime itself, not just to the contracting states and the disputing parties. In the absence of ‘compelling grounds’, the tribunal is constrained to decide in light of a dominant approach. These obligations flow from an unwritten, but increasingly irresistible, command to the effect that arbitrators are to maximize the stability and coherence of their jurisprudence in the name of the ‘community’.

C. Data

To help assess the evolution of precedent, we compiled information on citation to prior ISA awards, and to judicial decisions, in all publicly available final arbitral awards on the merits (liability). With regard to this article’s priorities, there are no relevant selection bias issues, insofar as awards that are not publically available cannot serve as the basis for precedent-based lawmaking. We did not count every citation as an indicator of precedent; instead we counted only instances in which a tribunal cited to prior decisions on which it either: (i) positively relied; (ii) on which it expressly disagreed; or (iii) on which it engaged to distinguish the present from a prior case.²⁵ Tribunals have injected precedent-based reasons into the ISA regime at a rising rate, with the average number of citations per decision more than doubling since 2000.²⁶ As awards have accumulated, the number of precedents in the system has grown exponentially (Figure 1). Indeed, 97% ($n = 2108$) of all citations added to the system between 1977 and 2014 have been produced since 2000, 84% ($n = 1827$) since 2005 and 45% ($n = 971$) in the 2010–14 period. The upshot is that, today, one can expect counsel to support every important pleading, and tribunals to defend virtually every important decision, with reference to case law.

The ISA regime has strengthened its relative autonomy, as a legal system in its own right, through precedent-based decision-making. Tribunals routinely cite across treaty instruments. ICSID tribunals freely cite to NAFTA tribunals operating under UNCITRAL rules, for example, and vice-versa. Coupled with the findings of the case

24 Consider the influential statement by the tribunal in *Saipem v Bangladesh*: ‘The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.’ *Saipem S.p.A. v People’s Republic of Bangladesh* (ICSID Case No ARB/05/07) Decision on Jurisdiction and Recommendations on Provisional Measures of 21 March 2007, para 67.

25 We counted citations contained in summaries of counsels’ pleadings only if the tribunal later addressed the relevant arguments in its own assessment. If the tribunal did not make it clear that a cited case informed its interpretation of the law, we did not count it. Finally, within any single award, we counted multiple citations to the same case, on the same proposition, only once; multiple citations to the same award would be counted more than once only where a tribunal had invoked the award with regard to two or more independent propositions. Thus, the data analysed represent only those materials actually used by tribunals in the interpretation and application of the law in final awards on the merits. They are therefore a robust, relatively direct, indicator of the influence of precedent on decision-making.

26 Since 2000, 10 awards have contained no counted citations, four of which have been rendered since 2004.

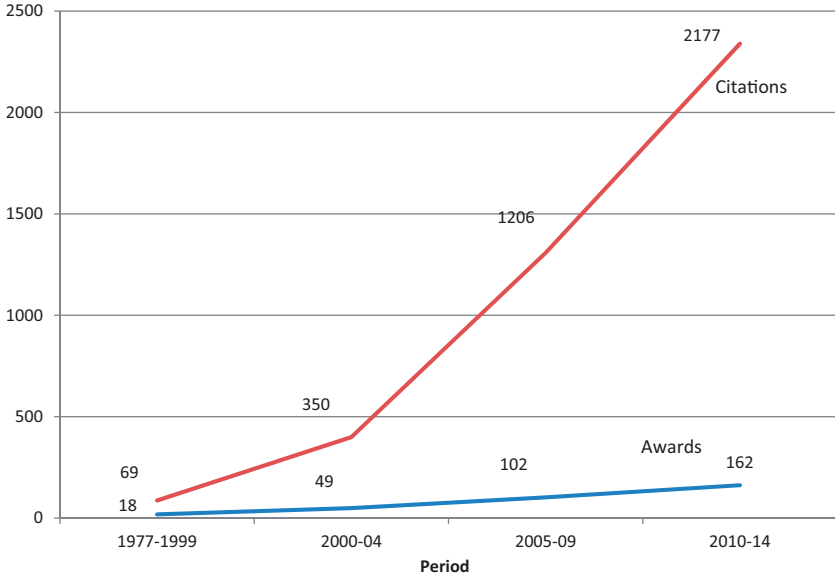


Figure 1. Cumulative Number of Awards and Cases Cited, by Period

Source: *Yale Law School Data Sets on Investor–State Arbitration*, compiled by Alec Stone Sweet, Sheng Li, Meng-Jia Yang, Michael Chung, Moeun Cha and Tara Zivkovich.

studies below, the evidence strongly supports the claim that treaties are networked through arbitral case law, a result that is causally dependent upon the development of precedent.²⁷

The drive towards jurisprudential coherence is facilitated by the fact that at least one member of a relatively small group of elite arbitrators is usually present on any tribunal, and repeat arbitrators that specialize in chairing tribunals dominate the production of awards. Our data set on appointments contains information on 166 final awards on liability (the merits). The top 10 co-arbitrators²⁸—those appointed by parties at least four times—were found on 76 (46%) of the tribunals. With respect to the presiding arbitrator, individuals on our top-10 list (those presiding over at least four tribunals) comprise 38% ($n = 63$) of all presidents. Twenty arbitrators have chaired at least three tribunals, meaning that experienced, repeat players drafted the majority of all final awards on the merits (54%, $n = 90$). Thus, a relatively small college of elite, repeat arbitrators play an outsized role in the system, giving the field more coherence than it might otherwise have. The fact that fewer than 20 presiding

27 We also compiled data at the domain level, coding pleadings and interpretations in specific substantive areas of treaty law. In many important cases, questions falling under categories such as Arbitrary or Discriminatory Treatment, Protection and Security, Denial of Justice and Umbrella Clause will overlap with, or be subsumed by, FET claims. What is clear is that formally autonomous legal domains have been steadily brought into closer relationship to one another as the case law has evolved, creating a system of interdependent norms.

28 The number is actually 11, as there was a three-way tie for the 10th spot.

arbitrators have produced a majority of final awards has favoured the development of a more consistent arbitral case law.

To evaluate state responses to arbitral lawmaking, we analysed 398 BITs signed during the 2002–15 period; $n = 398$. The UNCTAD database makes available a further 137 BITs which are not available in English; thus our data base contains 74.4% of all available BITs signed during this period. While the absence of non-English language materials raises issues of selection bias, only 27% ($n = 106$) of the treaties analysed were signed by at least one State Party that has English as an official language; that is, 73% ($n = 292$) of the treaties analysed were signed by all State Parties whose national language was not English. The vast majority of investment treaties are drafted in, or translated into, English; these treaties include those signed by China, EU states, Japan, South Korea, Thailand, Turkey and other important states. Thus, there is no reason to believe that the content of the treaties we analysed is not representative of treaties not available in English. In any event, we chose 2002 as the earliest year in which one might find states responding, in a new treaty to arbitral lawmaking, at least in the domains of FET and expropriation. One finding deserves to be highlighted up-front. Of the awards contained in our data set, only four involved the arbitration of any treaty signed after 1999, the latest being a BIT signed in 2003. Thus, no one will be able to assess the direct impact of these new treaties on final awards until such awards appear.

2. THE REVIEW OF STATE MEASURES

We gathered information on the types of measures challenged by investors as violations of a host state's treaty obligations, as recorded in the cases contained in our data set on final awards on the merits. It was possible to do so in 159 awards. We paid particular attention to the distinction between (i) general measures—a state act that regulates activity, and/or applies to all persons acting, within a particular policy domain—and (ii) individual acts, those that target or apply to a specific investment. Statutes are presumptively general measures, while some administrative decisions would also meet the criteria.²⁹ The distinction will blur (as in domestic administrative judicial review) insofar as an individual measure is indelibly linked to a general act.

A. General Measures

Investors claimed that at least one general measure was a source of a treaty violation in 40 awards (29%). Some rulings concern the same set of measures. The 'Argentina cases', disputes based on the effects of the emergency measures adopted to meet that state's economic crisis of 1999–2002, comprise the largest such cluster. In each of these cases, claimants attacked pesification and bank controls, among other measures, prevailing in 12 of 14 cases. A second cluster, of four awards, involves Ecuador's Law 42 (2006) and its implementation. In 2006, Ecuador adopted a statute imposing a 50% windfall profits tax on foreign oil companies which, 18 months later, it raised to 99%. Tribunals found state liability in all four cases. In three NAFTA awards—*ADM*, *Cargill* and *Corn Products*—a Mexican tax on corn

29 We counted a revision of the tax code through ministerial decree, for example, as a general measure.

sweeteners used in soda drinks, a measure favouring domestic producers, generated three violations.³⁰ Tribunals found general measures to be the source of a violation in seven more discrete cases; and they rejected such claims in the remaining 16. Table 1 summarizes these data.

The Argentina cases are the most significant group of awards involving general measures, giving a series of tribunals the opportunity to take positions on similar pleadings.³¹ Tribunals dealt with public interest arguments, including the so-called ‘necessity’ defence,³² in diverse ways, but none failed to take into account public interests at the liability or damages stage. In the Mexican sweetener cases, tribunals engaged WTO rulings, which had already declared the same domestic measures to be in violation of WTO law. All three tribunals found that Mexico had intentionally adopted the law to harm foreign interests based on facts left virtually unchallenged. In the disputes raised under Ecuador’s Law No 42, three tribunals—in *Occidental* (2012), *Perenco* (2014) and *Murphy* (2016)—found that the law’s provisions violated the FET.³³ While arbitrators acknowledged that ‘there cannot be any doubt that a sovereign State has the undisputable sovereign authority to enact laws in order to raise revenue for the public welfare’, such a ‘right’ is also subject to ‘rule of law’.³⁴ All three tribunals also found, and Ecuador did not dispute,³⁵ that officials had taken these measures (announcing as much in public fora) to coerce oil companies in like situations to renegotiate their participation contracts with the state.³⁶ A fourth, in the *Burlington* award (2012),³⁷ rejected the tax claim but found a violation for the physical seizure of the investor’s oil field (which we coded as an individual measure found by the tribunal to be expropriatory).

There are 31 non-Argentina cases in which a pleading against a general measure is registered, most contesting changes in taxation and subsidies. The remaining claims concern acts allegedly tailored to harass the investor, or to unravel express commitments on which investors had relied. Of the non-Argentina cases challenging general measures, tribunals rejected investors’ claims in 18 (58%). They did so, most

30 *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v United Mexican States* (ICSID Case No ARB(AF)/04/5) Award of 21 November 2007; *Cargill, Incorporated v United Mexican States* (ICSID Case No ARB(AF)/05/2) Award of 19 September 2009; *Corn Products International, Inc. v United Mexican States* (ICSID Case No ARB(AF)/04/1) Award of 18 August 2009.

31 For an overview of the Argentina cases from the perspective of public interests, see Giorgio Sacerdoti, ‘General Interests of Host States in the Application of the Fair and Equitable Treatment Standard’ in Giorgio Sacerdoti (ed), *General Interests of Host States in International Investment Law* (CUP 2014) 3–25.

32 Sweet and Grisel (n 3) ch 5.

33 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador* (ICSID Case No ARB/06/11) Award of 5 October 2012; *Perenco Ecuador Ltd. v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)* (ICSID Case No ARB/08/6) Decision on the Remaining Issues of Jurisdiction and on Liability of 12 September 2014; *Murphy Exploration & Production Company – International v Republic of Ecuador* (UNCITRAL) Partial Final Award of 6 May 2016.

34 *Occidental*, *ibid*, para 529.

35 *Perenco* (n 33) para 409.

36 As the *Perenco* tribunal put it: ‘Law 42 at 99% unilaterally converted the Participation Contracts into *de facto* service contracts while the State developed a new model of such contracts which it demanded the contractor to sign.’ *ibid*, para 409.

37 *Burlington Resources Inc. v Republic of Ecuador* (ICSID Case No ARB/08/5), Decision on Liability of 14 December 2012.

Table 1. Review of State Measures: Pleadings and Outcomes

	Claims	Violations	No Violation
General measures	45	25	20
Argentina Cases	14	12	2
Non-Argentina Cases	31	13	18
Individual measures*	126	67	59
No of awards Analysed: 159			

*This count excludes the 14 Argentina awards, and those 12 awards in which a tribunal found a violation of a general measure. The number of claims ($n = 171$) that contain either (i) a claim concerning at least one general measure, or (ii) one targeting at least one individual measure, is higher than the total number of awards ($n = 155$), because tribunals may reject a pleading against a general measure, while accepting a claim targeting an individual measure. Source: *Yale Law School Data Sets on Investor–State Arbitration*, compiled by Alec Stone Sweet, Sheng Li, Meng-Jia Yang, Michael Chung, Moeun Cha and Tara Zivkovich.

commonly, after recognizing a ‘regulatory [or ‘police’]power exception’,³⁸ or the state’s ‘right to regulate’,³⁹ and then deferring to the state’s discretion to change the law in light of the changing circumstances.⁴⁰

B. Individual Measures

In more than 72% of the awards in our data set ($n = 114$), investors do not attack general measures. Investors challenge specific acts designed to harass,⁴¹ to interfere with operations,⁴² or to alter unilaterally contracts or agreements,⁴³ on the grounds of due process (requirements of transparency, notice, the right to be consulted and

38 *Saluka Investments B.V. v Czech Republic* (UNCITRAL) Partial Award of 17 March 2006, para 471.

39 *Total S.A. v Argentine Republic* (ICSID Case No ARB/04/01) Award of 8 December 2010, para 123; *El Paso Energy International Company v Argentine Republic* (ICSID Case No ARB/03/15) Award of 31 October 2011, paras 72–76.

40 In *Chemtura Corporation v Government of Canada* (UNCITRAL) Award of 2 August 2010, paras 123, 134–38, the claimant challenged measures that would phase out use of a certain pesticide it produced. The tribunal, composed of three elite arbitrators (Gabrielle Kaufman-Kohler, Charles Brower and James Crawford), deferred to the scientific expertise of Canadian regulators and noted Canada’s ‘margin of appreciation’. It then engaged in comparative analysis of the environmental regulation in other states, and of relevant international instruments, in the style of the WTO and ECHR courts (para 135).

41 Recent awards in which violations were found for harassment include: *Joseph Charles Lemire v Ukraine* (ICSID Case No ARB/06/18) Award of 28 March 2011; *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v United Mexican States* (ICSID Case No ARB(AF)/04/3) Award of 16 June 2010; *Mr. Franck Charles Arif v Republic of Moldova* (ICSID Case No ARB/11/23) Award of 8 April 2013.

42 Recent awards in which violations were found for interference include: *Alpha Projektholding GmbH v Ukraine* (ICSID Case No ARB/07/16) Award of 8 November 2010; *Hulley Enterprises Limited (Cyprus) v Russian Federation* (UNCITRAL, PCA Case No AA 226) Award of 18 July 2014; *Mobil Corporation, 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. v Bolivarian Republic of Venezuela* (ICSID Case No ARB/07/27) Award of 9 October 2014.

43 Recent awards in which violations were found with regard to contractual obligations undertaken include: *AES Summit Generation Limited and AES-Tisza Erőmű Kft v Republic of Hungary* (ICSID Case No ARB/07/22) Award of 23 September 2010; *Railroad Development Corporation v Republic of Guatemala* (ICSID Case No ARB/07/23) Award of 29 June 2012; *Gold Reserve Inc. v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/09/1) Award of 2 September 2014.

heard and reason giving), often in breach of that state's own public law requirements when it comes to domestic governance.⁴⁴ Arbitrators developed FET, in part, to cover these types of pleadings. As Table 1 reports, claimants prevailed against an individual measure 53% of the time ($n = 67$).

We found no influential award post-*Saluka* (2006, discussed below further) that we would classify as a failure on the part of the tribunal (i) to deliberate the scope of the state's sovereign prerogatives, or (ii) to consider carefully the public interest. In virtually all cases in which tribunals reviewed general measures and found against states ($n = 25$), they gave defensible reasons. Most tribunals insist that they are *not* sitting in judgment of statutes or other general measures but, rather, are engaging in the review of their application to the investor in context (hence the importance of FET and due process). The Argentina awards ($n = 14$) involved general measures upon which the investor had relied, and which the host state had explicitly promised would be maintained.⁴⁵ We found that, in the vast majority of awards, tribunals made explicit, good faith efforts to consider carefully the respondent state's 'right to regulate'. Readers should consider this conclusion in light of the evolution of the FET standard, and associated outcomes, to which we now turn.

3. ARBITRAL LAWMAKING

A stunning example of expansive arbitral lawmaking, ICSID tribunals have developed FET as a type of 'master norm', an overarching, quasi-'constitutional' principle.⁴⁶ It is today settled case law that FET comprises of a wealth of relatively elastic sub-principles,⁴⁷ including: good faith; due process, the reason-giving requirement, and access to justice; regulatory consistency and transparency; reasonableness, non-arbitrariness and non-discrimination; and the proportionality principle. A long succession of tribunals gradually assembled these and other norms the banner of the 'legitimate expectations' (LE) of the investor. The move enabled the assessment of virtually every aspect of the relationship between the investor and the host state within what is, today, a relatively stable doctrinal structure.⁴⁸

44 Recent awards finding violations for failures to provide due process, as provided for by domestic law, include: *Rompotrol Group N.V. v Romania* (ICSID Case No ARB/06/3) Award of 6 May 2013; *Hassan Awadi, Enterprise Business Consultants, Inc. and Alfa El Corporation v Romania* (ICSID Case No ARB/10/13) Award of 2 March 2015; *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v Canada* (UNCITRAL, PCA Case No 2009-04) Award of 17 March 2015.

45 It is worth noting that the preamble to the USA–Argentina BIT states that 'fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment'. The early approach taken to the necessity defence, in *CMS* (2005), *Enron* (2007) and *Sempra* (2007) tribunals (chaired by the same presiding arbitrator), clearly favoured investors, but was 'eviscerated' by the annulment process and the relatively consistent positions taken by subsequent tribunals. Alec Stone Sweet and Giacinto della Cananea, 'Proportionality, General Principles of Law, and Investor-State Arbitration: A Response to José Alvarez' (2014) 46 *NYU Journal of International Law and Politics* 911, 926–32.

46 Roland Kräger, *Fair and Equitable Treatment in International Investment Law* (CUP 2011) 308–16.

47 Giacinto della Cananea, *Due Process of Law Beyond the State: Requirements of Administrative Procedure* (OUP 2016) chs 3, 4.

48 Kenneth J Vandeveld, 'A Unified Theory of Fair and Equitable Treatment' (2010) 43 *NYU Journal of International Law and Politics* 43; Rudolph Dolzer, 'Fair and Equitable Treatment: Today's Contours' (2013) 12 *Santa Clara Journal of International Law* 7.

Three general points deserve emphasis up-front. First, FET is a paradigmatic example of an incomplete norm, combining expansive functional logics, indeterminacy and breadth.⁴⁹ In the great wave of agreements signed in the 1990s, states provided virtually no guidance on how FET was to be interpreted, leaving it to arbitral process. Secondly, tribunals embraced FET for its flexibility, enabling them to tailor their rulings to the facts under the rubric of general principles. Thirdly, different formulations of the standard could have led to widely varying outcomes.

Most treaties present FET as a standalone, ‘autonomous’ provision, and some link it to general principles of law (GPL).⁵⁰ States have, in effect, delegated strong implied lawmaking powers to arbitrators. GPL are unwritten, judge-made norms on which courts have long relied upon to build their own legal systems, ostensibly to ‘fill’ important ‘gaps’.⁵¹ They are also an autonomous source of international law,⁵² fully applicable in arbitrations at least at ICSID.⁵³ Far fewer treaties qualify FET with reference to international law,⁵⁴ or to customary international law (CIL). These qualifications would not necessarily restrict lawmaking, and could well provoke it. There is no consensus, after all, on the content and scope of the ‘minimal standard of treatment’ of CIL owed to aliens. In deciding whether and how to apply CIL, judges assess the consistency of state practice in the light of *opinio juris*, which typically leads them to survey relevant decisions by other courts and officials, as well as doctrinal commentary. It would be defensible for an arbitrator to find that CIL has evolved through (i) the consent of states, as evidenced by the explosion of investment treaties, and (ii) arbitral interpretation and enforcement of FET. Looking forward, influential tribunals have done just that.

A. Overview

The FET has evolved in relation to other important substantive protections in investment agreements. Treaties typically prohibit expropriations that fail to meet certain legal standards,⁵⁵ the most common of which are non-discrimination, due process, the showing of an important public purpose, and the payment of prompt, adequate and effective compensation. Virtually all agreements also prohibit InEx. Regulatory takings, ‘creeping’ incursions on property rights, and state failures to regulate in ways that make it possible to do business, have all been found to be interferences that might trigger a finding of liability. Fewer treaties contain an ‘umbrella clause’, which

49 In the important awards interpreting the FET, the tribunals themselves acknowledge the challenges posed by FET’s incompleteness. eg *Saluka* (n 38) paras 263–65.

50 eg France–Mexico BIT (1998): ‘Each Contracting Party shall extend and ensure fair and equitable treatment in accordance with the principles of International Law to investments made by investors of the other Contracting Party . . . and ensure that the exercise of the right thus recognized shall not be hindered by law or in practice.’

51 Sweet and della Cananea (n 45).

52 art 38 of the 1945 Statute of the International Court of Justice, done at San Francisco, 26 June 1945, 59 Stat 1031.

53 art 42 of the ICSID Convention.

54 Including the NAFTA provision, reproduced below.

55 If an expropriation meets these standards, then it is lawful under the treaty. Typically, the investor will then be compensated for the value of the investment at the date of the taking. If the expropriation violates the treaty, the state may be liable for lost profits as well.

covers breaches of specific promises to an investor, most obviously, of contractual commitments entered into by a state entity.⁵⁶ Arbitrators have developed FET in ways that can supplement these norms, or even supplant them altogether, a development that has recast the law and politics of ISA in important ways.

We can expect⁵⁷ a tribunal to rely on expropriation norms, blunt and stigmatizing instruments, in egregious cases.⁵⁸ Artifacts of incomplete treaty-making, virtually no BIT adopted before 2002 established guidelines for arbitrating InEx claims. Approaches to InEx vary, but all express anxiety towards aggressive enforcement.⁵⁹ There is, for example, consensus on the ‘substantial deprivation’ doctrine: the ‘effects’ of state acts on the investment must be comparable to the effects of an express expropriation. Most important, by 2007, a series of important awards had held that the regulatory power exception⁶⁰ effectively insulated general measures from censure if they met standards of due process and non-discrimination, and were taken for some *bona fide* public purpose.⁶¹

Arbitrators have developed FET as a flexible instrument that enables them to assess all important facts that bear on the dispute, as they accumulated episodically, and then to fashion decisions and remedies that are appropriate to the overall situation. Over the last 15 years, claimants have routinely pleaded both InEx and FET on what are essentially the same facts.⁶² In the absence of an umbrella clause, tribunals may deploy FET to fill the gap. Tribunals now rely heavily on the covering principle

56 A standard formulation would read: ‘Each Contracting Party shall observe any obligation it may have entered into with regard to the treatment of investments of nationals of the other Contracting Party.’ Claims made pursuant to an umbrella clause have concerned licensing agreements, contract-based concessions for the provision of public services and tax exemptions and other inducements. Arbitral case law on umbrella clauses is inconsistent. See Jarrod Wong, ‘Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes’ (2006) 14 *George Mason Law Review* 137.

57 State officials inclined to expropriate or encroach on an investment in other ways will have an interest in disguising its intentions, which the indirect expropriation heading means to smoke out and capture. In this cat and mouse game, a state may turn to ever more subtle forms of encroachment.

58 In an influential dissent, Thomas Wälde expressed the view openly: ‘the legitimate expectation principle . . . provides a more supple way of providing a remedy appropriate to the particular situation as compared to the more drastic determination and remedy inherent in concept of regulatory expropriation. It is probably partly for these reasons that “legitimate expectation” has become for tribunals a preferred way of providing protection to claimants in situations where the tests for a “regulatory taking” appear too difficult, complex and too easily assailable’. *International Thunderbird Gaming Corporation v United Mexican States* (NAFTA/UNCITRAL Rules), Separate Opinion of Thomas Wälde of December 2005, para 37.

59 Prabhash Ranjan and Pushkar Anand, ‘Determination of Indirect Expropriation and Doctrine of Police Power in International Investment Law: A Critical Appraisal’ in Leila Choukroune (ed), *Judging the State in International Trade and Investment Law* (Springer 2016).

60 ‘[I]t is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a nondiscriminatory manner *bona fide* regulations that are aimed at the general welfare.’ *Saluka* (n 38) para 252

61 *ibid.* See also *Marvin Roy Feldman Karpa v United Mexican States* (ICSID Case No ARB(AF)/99/1) Award of 16 December 2002; *Methanex Corporation v United States of America* (UNCITRAL) Award of 3 August 2005.

62 The proposed Trans-Pacific Partnership agreement places the principle of legitimate expectations not within FET provisions—phrased as ‘distinct, reasonable, investor-backed expectations’—but within indirect expropriation. These appear in Annex 9-B—Expropriation; and art 9.7.1, n 36, which concerns Expropriation and Compensation.

Table 2. Cases, Claims and Violations Found in Investor–State Arbitration: Expropriation, Umbrella Clauses and FET

	Total	ICSID*		NAFTA		Other**	
Cases	159	93		23		43	
Claims:	384	236		40		108	
Direct expropriation	63	39		2		22	
InEx	130	77		18		35	
Umbrella Clause	50	38		NA		12	
FET	141	82		20		39	

Violations found	Success Rate		Success Rate		Success Rate		Success Rate	
Cases***	100	63%	60	68%	9	39%	31	72%
Claims	129	34%	85	36%	6	15%	38	35%
Direct expropriation	15	24%	11	28%	0	0%	4	18%
InEx	34	26%	21	27%	1	1%	12	34%
Umbrella Clause	9	18%	8	21%	NA	NA	1	8%
FET	71	50%	45	55%	5	25%	21	54%

*We include both ICSID Convention and ICSID Additional Facility cases here, excluding NAFTA from the latter category.

**The highest percentage of ‘other’ awards fall under UNCITRAL jurisdiction, with the exception of NAFTA cases arbitrated under UNCITRAL Rules, which we include under the NAFTA heading.

***No. of awards in which at least one violation was found.

Source: Yale Law School Data sets on Investor–State Arbitration, compiled by Alec Stone Sweet, Sheng Li, Meng-Jia Yang, Michael Chung, Moeun Cha and Tara Zivkovich.

of LE to manage situations wherein an investor has relied on express commitments made by the state to induce the investment in the first place.

Table 2 reports data on outcomes across these domains in all final, publicly available awards on the merits. In awards rendered on 159 disputes, investors brought 384 separate claims under expropriation, InEx, umbrella clauses and FET. In 118 cases (74%), investors pleaded both InEx and FET. Of these 118 cases, tribunals found a violation of both in 21 (18%); a violation of InEx but not of FET in 8 cases (7%); and a violation of FET but not of InEx in 43 (36%). In disputes in which investors plead both provisions, tribunals commonly assess each claim in turn, generating a great deal of redundant assessment of identical materials.⁶³ FET claims have a far higher success rate (50%) compared to InEx claims (26%). Indeed, the number

63 Some tribunals go directly to FET analysis and, having found a violation, forego assessment of the InEx claims altogether. *Ioan Micula and others v Romania* (ICSID Case No ARB/05/20) Award of 11 December 2013.

of FET violations ($n = 71$) exceeds those found under the other three headings put together ($n = 58$).

B. FET: LE and the Right to Regulate

In the domain of FET, arbitrators overcame obstacles to building precedent. Indeed, a powerful feedback loop has been forged. A steady stream of FET claims has given tribunals the opportunity to develop an increasingly dense and articulated case law, which has, in turn, organized new rounds of pleadings.⁶⁴

Beginning in 2006, certain arbitrators began to devote themselves to the dogmatic construction of the FET. They carefully traced its evolution from a handful of important BIT and NAFTA awards,⁶⁵ as well as from GPL recognized by domestic and international courts, in a clear effort to standardize its content and scope. Within 5 years, a series of prominent opinions were on the books. Written by renowned jurists and former judges of major international courts, they featured sophisticated commentary on the LE, and labourious FET analysis. Four notable examples—*Saluka* (2006), the dissent in *Thunderbird* (2006), *Total* (2010) and *El Paso* (2011)—share common traits. Each is an effort to rationalize FET doctrine in the face of indeterminacy and inconsistent application.⁶⁶ Read together,⁶⁷ one finds consensus on the basic materials that subsequent parties and arbitrators could easily assemble into a general framework for FET analysis. This same period saw a stream of scholarly articles designed to synthesize the case law, including Vandeveldé's treatise-like reconstruction, portentously entitled, 'A Unified Theory of Fair and Equitable Treatment'.⁶⁸

For present purposes, the most important outcome concerns the development of a balancing framework,⁶⁹ wherein the tribunal assesses (i) the LE of investors in light of (ii) the state's policy prerogatives. LE may include an entitlement to some minimal level of regulatory stability, and more if expressly promised by the state to induce the investment in the first place. As tribunals from *Saluka* forward have made clear, investors cannot expect regulatory arrangements to be frozen. In effect, the state possesses a 'right to regulate', which the *Saluka* tribunal labelled the state's 'legitimate

64 As Schill puts it, 'arbitral jurisprudence' in this domain is itself a 'source of expectations' for investors and states. Stephan Schill, 'Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law' in Stephan Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 156–57.

65 *S.D. Myers Inc. v Canada* (NAFTA/UNCITRAL Rules) First Partial Award of 13 November 2000; *Pope & Talbot v Canada* (NAFTA/UNCITRAL Rules) Award on the Merits of Phase 2 of 10 April 2001; *Mondev International Ltd v United States of America* (ICSID Case No ARB(AF)/99/2) Award of 11 October 2002; *Técnicas Medioambientales Tecmed, S.A. v United Mexican States* (ICSID Case No ARB(AF)/00/2) Award of 29 May 2003.

66 The *El Paso* tribunal worried that 'ICSID case-law has developed in a way that generates some confusion and overlap between these different standards of protection found in most BITs'. *El Paso* (n 39) para 226. The tribunal then goes on to lay out its views on the distinction between (a) FET and (b) other substantive protections more generally, including indirect expropriation (paras 226–31) before applying these views to the facts (paras 380–519).

67 See also *Parkerings-Compagniet AS v Republic of Lithuania* (ICSID Case No ARB/05/8) Award of 11 September 2007.

68 Vandeveldé (n 48).

69 The process has not been a linear one, and not all leading arbitrators have invested in it.

regulatory interests,⁷⁰ to pursue important public purposes, even if such changes would harm the investor.

Tribunals read into the FET both the doctrine of ‘legitimate expectations’, and the state’s ‘right to regulate’. They did not camouflage their lawmaking but, instead, adopted the mantle of a judge of general principles. Where tribunals have interpreted the FET–LE in light of CIL, they typically arrive at the same conclusions as tribunals that rely more explicitly on a jurisprudence of principles.⁷¹ This common disposition networks treaties and tribunals, while creating a dynamic through which the FET, GPL and CIL evolve synergistically.

The award in *Tecmed v Mexico* (2003) is the most cited award in our data set, notably for the proposition that LE constitutes a ‘*bona fide* principle recognized in international law’,⁷² derivable from an even broader principle: good faith.⁷³ Explicit recognition of a ‘right to regulate’, conceived as a necessary corollary to LE, emerged in Thomas Wälde’s dissent in *Thunderbird v Mexico* (2006), a NAFTA case. Wälde considered the development of LE—as a GPL⁷⁴—in light of the case law of the EU, the ECHR, the WTO Appellate Body and national administrative law courts, in addition to the relevant scholarship of comparative public law. For present purposes, two aspects of the dissent are important. First, the opinion emphasizes that LE analysis inevitably drives the arbitrator into a balancing posture.⁷⁵ Secondly, Wälde defends an approach to FET that highlights the role of judges in progressively building the law as a set of ‘objective’, ‘authoritative’ and ‘universal’ principles capable of binding together ‘modern national and international economic law’.⁷⁶

Two months after *Thunderbird* was decided, the tribunal in *Saluka*, citing to *Tecmed* and other awards,⁷⁷ asserted that LE was the ‘dominant element’ of FET.⁷⁸ Yet, it pointedly denied the view that investors possessed a right to regulatory ‘stability’ which, if ‘taken too literally . . . would impose upon host States’ obligations [that] would be inappropriate and unrealistic’.⁷⁹ Instead, arbitrators should balance:

The determination of a breach of [the FET] therefore requires a weighing of the Claimant’s legitimate and reasonable expectations on the one hand and the Respondent’s legitimate regulatory interests on the other . . . having due regard [for] all relevant circumstances.⁸⁰

70 *Saluka* (n 38) para 306.

71 As the *El Paso* tribunal affirmed, seeking to determine if the FET-as-principle constrains states more than the FET within CIL would be a ‘somewhat futile’ exercise since ‘the scope and content of the minimum standard of international law is as little defined as the BITs’ FET standard. The issue is not one of comparing two undefined or weakly defined standards; it is to ascertain the content and define the BIT standard of fair and equitable treatment’. *El Paso* (n 39) para 335.

72 *Tecmed* (n 65) para 153.

73 *ibid*, para 154.

74 *Thunderbird*, Separate Opinion of Thomas Wälde (n 58) para 25.

75 *ibid*, para 30.

76 *ibid*, para 16. Tribunals are not only under an obligation to apply such general principles; they ought to generate a precedent-based jurisprudence on general principles ought to knit together the various sources of international law into a coherent whole.

77 *Saluka* (n 38) paras 302–03.

78 *ibid*, para 302; paras 307–08.

79 *ibid*, para 304.

Saluka concerned the recent privatization of an important Czech bank that had experienced severe debt problems when the global financial crisis hit in 1998. As the crisis progressed, the government intervened ever more intrusively into the bank's affairs, eventually placing it under forced administration, after dispatching armed police to remove managers. Not only were other large Czech banks in comparable situations spared this treatment, but state officials placed 'the Forced Administrator' under instruction, who was then paid to carry out those instructions. The tribunal found that Czech authorities had engaged in discriminatory treatment, while breaching due process and transparency norms.⁸¹ It pointedly rejected the claim that the host state had failed 'to ensure a predictable and transparent framework for Saluka's investment'.⁸²

In 2010–11, two awards—*Total v Argentina* and *El Paso v Argentina*—consolidated what is now the standard approach to FET–LE. Presiding arbitrators, who were perfectly at home with balancing, produced the awards.⁸³ Both invoked *Saluka*,⁸⁴ noting the importance of an investors' LE,⁸⁵ while firmly rejecting any view to the effect that FET guarantees 'the stability of the legal and business framework'.⁸⁶ As the *El Paso* tribunal put it: 'Economic and legal life is by nature evolutionary.' The *Total* tribunal began an extensive doctrinal construction of the LE by addressing states directly:⁸⁷

Competent authorities of States entering into BITs in order to promote foreign investment in their economy should be aware of the importance for the investors that a legal environment favourable to the carrying out of their business activities be maintained. On the other hand, [States] do not thereby relinquish their regulatory powers nor limit their responsibility to amend their

80 *ibid*, paras 305–06, 309.

81 The *Saluka* tribunal declared that it was not 'second-guess[ing]' the 'Government's privatization policies', which it characterized as 'perfectly legitimate'. *ibid*, para 337. Nonetheless, '[o]nce it had decided to bind itself by the Treaty to accord "fair and equitable treatment" to investors of the other Contracting Party, [the Czech Republic] was bound to implement its policies, including its privatisation strategies, in a way that did not lead to unjustified differential treatment unlawful under the Treaty.' *ibid*.

82 *ibid*, paras 498–502.

83 Drafting the awards were Giorgio Sacerdoti (*Total*), a former WTO Appellate Body judge, and Lucius Caflisch (*El Paso*), a former justice on the European Court of Human Rights.

84 'The standard of "FET" is . . . closely tied to the notion of legitimate expectations which is the dominant element of that standard'. *Saluka* (n 38) para 302.

85 'There is an overwhelming trend to consider the touchstone of FET to be found in the legitimate and reasonable expectations of the Parties, which derive from the obligation of good faith'. *El Paso* (n 39) para 348.

86 *ibid*, para 352. Further, '[I]t is inconceivable that any State would accept that, because it has entered into BITs, it [could] no longer modify pieces of legislation which might have a negative impact on foreign investors, in order to deal with modified economic conditions and must guarantee absolute legal stability. In the Tribunal's understanding, [the] FET cannot be designed to ensure the immutability of the legal order, the economic world and the social universe and [to] play the role assumed by stabilisation clauses specifically granted to foreign investors with whom the State has signed investment agreements.' *ibid*, paras 367–68.

87 This award also puts investors on alert, stating that BITs 'are not insurance policies against bad business judgments' and that the investor has its own duty to investigate the host State's applicable law'. *Total* (n 39) para 124.

legislation in order to adapt it to change and the emerging needs and requests of their people in the normal exercise of their prerogatives and duties. Such limitations upon a government should not lightly be read into a treaty which does not spell them out clearly nor should they be presumed.⁸⁸

Positioned as balancers, the crucial questions concerned what and how to balance.

Both the *El Paso* and the *Total* tribunals emphasized the importance of context—the political and economic circumstances surrounding the investment—to the various ways that LE and the right to regulate reciprocally limit one another. The investor can never expect economic stability,⁸⁹ and FET is not a general stabilization clause.⁹⁰ Nonetheless, FET–LE protects investors in at least three, sometimes overlapping, situations. First, a state triggers liability by re-regulating, or implementing existing law, in ways that breach core FET norms (due process, non-discrimination, and so on). Secondly, liability ensues when a state reneges on a ‘specific commitment directly made to the investor, on which the latter has relied.’⁹¹ Such commitments ‘limit the right of the host State to adapt the legal framework to changing circumstances’,⁹² at least without paying compensation. Thirdly, states must exercise their policy prerogatives in conformity with the principle of proportionality. The *Total* tribunal, borrowing an approach to balancing from WTO jurisprudence, put it this way:

The determination of a breach of the standard requires, therefore, ‘a weighing of the Claimant’s reasonable and legitimate expectations on the one hand and the Respondent’s legitimate’ [citing to *Saluka*]... The context of the evolution of the host economy, the reasonableness of the normative changes challenged and their appropriateness in the light of a criterion of proportionality also have to be taken into account.⁹³

And the *El Paso* tribunal: FET is ‘a standard entailing reasonableness and proportionality’.⁹⁴

88 *ibid*, paras 114–15. The *Continental Casualty* tribunal opined that ‘it would be unconscionable for a country to promise not to change its legislation as time and needs change, or even more to tie its hands by such a kind of stipulation in case a crisis of any type or origin arose. Such an implication as to stability in the BIT’s Preamble would be contrary to an effective interpretation of the Treaty; reliance on such an implication by a foreign investor would be misplaced and, indeed, unreasonable.’ *Continental Casualty Company v Argentine Republic* (ICSID Case No ARB/03/9) Award of 5 September 2008, para 258.

89 *El Paso* (n 39) para 366.

90 ‘A general stabilization requirement would go beyond what the investor can legitimately expect.’ *Total* (n 39) para 120. See also *ibid*, para 117; *El Paso* (n 39) para 368 (‘In the Tribunal’s understanding, FET cannot be designed to ensure the immutability of the legal order, the economic world and the social universe and play the role assumed by stabilisation clauses specifically granted to foreign investors with whom the State has signed investment agreements’); *Parkerings* (n 67) para 332.

91 *El Paso* (n 39) para 375. See also *Continental Casualty* (n 88) para 261 (‘Representations made by the host State are enforceable and justify the investor’s reliance only when they are specifically addressed to a particular investor’); *Total* (n 39) paras 119, 309.

92 *Total*, *ibid*, paras 119, 309.

93 *ibid*, para 123.

94 *El Paso* (n 39) para 373.

The claims in *Total* and *El Paso* issued from Argentina's response to its economic meltdown of the early 2000s. The *Total* tribunal dismissed most of the oil companies' arguments, judging the measures to be proportional. In the tribunal's view, the enormity of the crisis justified, even required, the taking of radical reforms, even though they could not but harm investors. The *Total* tribunal found a breach of FET–LE with regard to the government's abandonment of certain agreed-upon procedures to adjust rates ('tariffs') on a regular basis with the company's participation. For its part, the *El Paso* tribunal stressed that the measures under examination, considered individually in light of the public interests pursued, would not violate the energy company's LE. It, nonetheless, held that 'the cumulative effect of the measures was a total alteration of the entire legal [framework] for foreign investments', thus comprising a type of 'creeping violation of FET'.⁹⁵

Although there remain important disagreements concerning the scope of FET–LE and its application to the facts, as the outcomes in *Total* and *El Paso* demonstrate, tribunals have generated a dominant doctrinal frame. In an examination of every award on liability dated after *Total* and *El Paso* ($n = 66$), and in which investors pleaded FET, we found no important instance of a tribunal departing from the basic approach, produced between *Saluka* and *El Paso*.

C. NAFTA: The Struggle for Authority

The most important BIT awards treat the FET–LE as a general principle, or as a manifestation of an underlying principle. In BITs that tie FET to CIL, arbitrators have held that the customary standard—nominally a 'minimum standard of treatment' owed to foreigners—includes the principles covered by LE doctrine. As awards routinely point out,⁹⁶ doctrinal convergence has rendered differences between formulations more superficial than real.⁹⁷ Moreover, tribunals typically consider the ubiquity of FET provisions as evidence that CIL has evolved in light of state practice; and they assess state practice in synergy with the arbitral case law on FET, the latter being a repository of general principles. Tribunals that interpret FET in terms of CIL routinely invoke the jurisprudence of principles; and tribunals that begin in the realm of GPL commonly consult the case law rooted in CIL analysis.

In NAFTA, these dynamics have generated an ongoing war of authority between State Parties and tribunals. Article 1105 of NAFTA states:

95 *ibid*, paras 517–18.

96 *Azurix Corp. v Argentine Republic* (ICSID Case No ARB/01/12) Award of 14 July 2006, para 361: The relevant standard 'has evolved and the Tribunal considers that its content is *substantially similar* whether the terms are interpreted in their ordinary meaning, as required by the Vienna Convention, or in accordance with customary international law'.

97 The *El Paso* tribunal addressing the question as to whether FET imposes a higher standard when conceived (a) as a general principle or an autonomous provision of investment treaties or (b) in terms of CIL, stated that it 'consider[ed] this discussion to be somewhat futile, as the scope and content of the minimum standard of international law is as little defined as the BITs' FET standard, and as the true question is to decide what substantive protection is granted to foreign investors through the FET.' *El Paso* (n 39) para 335.

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 . . .

In 2001, in the most important early example of a state response to an arbitral decision-making, Canada, Mexico and the USA jointly issued an interpretive statement to the effect that CIL's minimal standard of treatment subsumes FET in this provision. They did so to block the development of FET–LE doctrine.

State Parties acted in response to three NAFTA awards rendered in 2000 and 2001 (before *Tecmed* in the BIT context).⁹⁸ In *Pope & Talbot v Canada*,⁹⁹ the investor had claimed that FET should be established under 'all the sources of international law found in Article 38 of Statute of the ICJ', which would include GPL and ISA awards (as a subsidiary source). Canada, joined by the USA, insisted that CIL covered only 'egregious misconduct' of the state resulting in a 'shocking denial of fairness', implying that the standard had not evolved beyond the so-called *Neer* test (1926). To violate *Neer*, the state's treatment of an alien must 'amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial [person] would readily recognize its insufficiency'.¹⁰⁰ The *Pope & Talbot* tribunal rejected these arguments, holding that the 'fairness' elements in Article 1105 were 'additive to the requirements of CIL', the network of existing treaties being their source.¹⁰¹ 'There are', insisted the tribunal, 'very strong reasons for interpreting the language of Article 1105 consistently with the language in . . . BITs'. In an interim award on liability of April 2001, the tribunal dismissed four of the investor's claims, accepted two, and scheduled hearings on damages.

In response, State Parties, acting as the NAFTA Free Trade Commission (FTC), issued a Note of Interpretation:

1. Article 1105 prescribes the CIL minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments . . .
2. The concepts of 'FET' and 'full protection and security' do not require treatment in addition to . . . that which is required by the CIL minimum standard of treatment of aliens.
3. A determination that there has been a breach of . . . a separate international agreement, does not establish that there has been a breach of Article 1105.¹⁰²

98 *Metalclad Corporation v United Mexican States* (ICSID Case No ARB(AF)/97/1) Award of 30 August 2000; *S.D. Myers Inc.* (n 65); *Pope & Talbot* (n 65).

99 *Pope & Talbot* (n 65) paras 107–15.

100 *LFH Neer and Pauline Neer v United Mexican States (United States v Mexico)* (1926) 4 RIAA 60. The case concerned the killing of an American citizen (Paul Neer) in Mexico.

101 *Pope & Talbot* (n 65) paras 57–60: 'Canada considers that the principles of customary international law were frozen in amber at the time of the *Neer* decision. It was on this basis that it urged the Tribunal to award damages only if its conduct was found to be an "egregious" act or failure to meet internationally required standards.'

102 NAFTA Free Trade Commission, 'FTC Notes of Interpretation of Certain Chapter 11 Provisions' <http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp> accessed 10 May 2016.

They could presume their interpretive authority: Article 2000 NAFTA confers on the FTC authority ‘to supervise the implementation’ of the treaty, ‘oversee its further elaboration’ and to ‘resolve disputes that may arise regarding its interpretation or application’; and Article 1131 declares that ‘an interpretation by the Commission . . . shall be binding’ on tribunals.

In response, the *Pope & Talbot* tribunal obtained disclosure of the *travaux préparatoires* of NAFTA, to help it determine whether the FTC had sought to ‘amend’, rather than merely ‘interpret’, Article 1105. In yet another interim award (of May 2002), the tribunal held that the FTC had indeed tried to revise the treaty, but through the wrong procedure.¹⁰³ ‘Canada’s views’, it suggested, ‘were perhaps shaped by its erroneous belief that only some 70 bilateral investment treaties [had] been negotiated; however, the true number, now acknowledged by Canada, is in excess of 1800. Therefore, applying the ordinary rules for determining the content of custom in international law, one must conclude that the practice of states is now represented by those treaties.’¹⁰⁴ Nevertheless, the tribunal also indicated that its interpretation of Article 1105 was not incompatible with the FTC Note.

The FTC Note failed to constrain subsequent doctrinal development of FET–LE. To be sure, subsequent to the Note, every NAFTA tribunal has undertaken analysis of CIL while delineating the scope of the FET. One tribunal adopted a restrictive approach, holding that the *Neer* test remained relevant, if adapted to new circumstances.¹⁰⁵ The rest have held that the minimum standard of treatment has evolved a good deal beyond *Neer*, in favour of investors.¹⁰⁶

In *Mondev v U.S.A.*, a case decided immediately after *Pope & Talbot*, the pleadings focused heavily on the FTC Note. Canada claimed that *Neer* remained the controlling law. The tribunal included Ninian Steven (former justice of the High Court of Australia), James Crawford (then an influential member of the International Law Commission, and now a justice on the ICJ) and Stephen Schwebel (former justice of

103 ‘[The documents] show that no reference was ever made to CIL . . . Canada has argued to this Tribunal that CIL is limited to what was required by the cases of the *Neer* era of the 1920s’, whereas international law in its entirety would bring into play a large variety of subsequent developments. For these reasons, were the Tribunal required to make a determination whether the Commission’s action is an interpretation or an amendment, it would choose the latter.’ *Pope & Talbot* (n 65) paras 46–47.

104 *ibid*, para 62.

105 *Cargill* (n 30) para 284: ‘The Tribunal observes a trend in previous NAFTA awards, not so much to make the holding of the *Neer* arbitration more exacting, but rather to adapt the principle underlying the holding of the *Neer* arbitration to the more complicated and varied economic positions held by foreign nationals today. Key to this adaptation is that, even as more situations are addressed, the required severity of the conduct as held in *Neer* is maintained.’

106 *Glamis Gold* (n 21) para 627: The *Glamis Gold* tribunal appears to have taken a hybrid position. That tribunal found that the ‘claimant has not met its burden of proving that something other than the fundamentals of the *Neer* standard apply.’ However, it also held that: ‘[s]uch a breach may be exhibited by a “gross denial of justice or manifest arbitrariness falling below acceptable international standards,” or the creation by the State of objective expectations *in order to induce* investment and the subsequent repudiation of those expectations [emphasis in original]’. The LE principles, of course, cover the latter situation, which would render the *Neer* standard obsolete. The tribunal addressed this tension as follows: ‘although the standard for finding a breach of the CIL minimum standard of treatment therefore remains as stringent as it was under *Neer*; it is entirely possible that, as an international community, we may be shocked by State actions now that did not offend us previously.’ *ibid*, para 27. In any event, the tribunal engaged in LE analysis (*ibid*, paras 812–30), explicitly using the language of ‘legitimate expectations’ (*ibid*, para 813) and ‘reasonable expectations’ (*ibid*, para 812).

the ICJ), unanimously disagreed, siding with *Pope & Talbot* in terms that have been widely cited by subsequent tribunals.¹⁰⁷ The *Mondev* tribunal then engaged in full-fledged FET analysis, only to dismiss the investor's claims.

Most NAFTA tribunals have followed the path cleared by *Pope & Talbot* and *Mondev*. They have held, or strongly implied, that CIL protects investors beyond *Neer*, citing to one another, drawing evidence from BITs, and invoking FET jurisprudence beyond NAFTA.¹⁰⁸ Pushing further, the tribunal in *Waste Management v Mexico* (2004) engaged in LE analysis in all but name: 'In applying [the FET] it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.'¹⁰⁹ The *Waste Management* tribunal, too, dismissed all of the investor's claims. Along with *Tecmed* and *Saluka*, the NAFTA awards in *Mondev* and *Waste Management* are among the five most cited cases in the FET domain, and tribunals in non-NAFTA proceedings regularly refer to both.

A case decided in 2010, *Merrill & Ring v Canada*, brought the LE issue to a head. The investor, invoking *Saluka*, argued that the tribunal should interpret Article 1105 in light of all sources of international law, not just CIL.¹¹⁰ In its view, given the absence of a substantive difference between the FET standard as expressed in (i) stand-alone BIT provisions, and (ii) CIL,¹¹¹ the NAFTA version must also contain the principle of LE.¹¹² Canada reiterated the terms of the FTC Note which, it insisted, would exclude LE altogether.¹¹³ The tribunal rejected the argument, holding that the BIT and CIL standard had converged, while invoking GPL:

[G]eneral principles of law . . . have a role to play . . . Even if the Tribunal were to accept Canada's argument to the effect that good faith, the prohibition of arbitrariness, discrimination and other questions raised in this case . . . might not be a part of customary law . . . these concepts are to a large extent the expression of general principles of law and hence also a part of international law.¹¹⁴

107 '[I]t is unconvincing to confine the meaning of "FET" . . . to what [this term] . . . might have meant in the 1920s . . . To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith. [Moreover,] the vast number of bilateral and regional investment treaties . . . almost uniformly provide for [the FET] . . . Investment treaties run between North and South, and East and West, and between States in these spheres *inter se*. On a remarkably widespread basis, States have repeatedly obliged themselves to accord foreign investment such treatment. In the Tribunal's view, such a body of concordant practice will necessarily have influenced the content of rules governing the treatment of foreign investment in current international law. *Mondev* (n 65) paras 116–17.

108 *ADF Group Inc. v United States of America* (ICSID Case No ARB(AF)/00/1) Award of 9 January 2003; *Waste Management v Mexico* (ICSID Case No ARB(AF)/00/3) Award of 30 April 2004; *Merrill & Ring Forestry L.P. v Canada* (NAFTA/UNCITRAL Rules) Award of 31 March 2010; *Clayton-Bilcon* (n 44).

109 *Waste Management*, *ibid*, para 98.

110 *Merrill & Ring* (n 108) para 160.

111 *ibid*, para 161.

112 *ibid*, para 167.

113 *ibid*, paras 168–70.

114 *ibid*, para 187.

While the tribunal acknowledged the ‘binding’ nature of the FTC Note, it declared that CIL could not be considered ‘frozen in amber’ or incapable of evolution.¹¹⁵ The CIL standard was ‘now broader than that defined [by] *Neer* and its progeny’, providing ‘for the FET of . . . investors within the confines of reasonableness’.¹¹⁶ Turning to the dispute, the *Merrill & Ring* tribunal found no violation.

Controversy exploded in 2015, with the appearance of the *Bilcon v Canada* award. The tribunal, citing at length to *Merrill & Ring* with regard to CIL,¹¹⁷ and relying heavily on *Waste Management* with respect to LE,¹¹⁸ found that an environmental assessment, as subsequently undertaken by a provincial government, had made it all but impossible for *Bilcon* to be awarded a concession to undertake coastal mining. Provincial officials, having given strong, ‘very clear’, and ‘repeated encouragements’ to *Bilcon*, not only reversed their position, but altered procedures and standards governing the assessment in midstream, in apparent violation of a federal statute. In *Bilcon*, for the first time in a NAFTA proceeding, LE analysis had real bite. All three NAFTA parties objected to the ruling, and Canada has requested annulment of the award in a federal court, ‘on the grounds that the Tribunal exceeded its jurisdiction and that the award is in conflict with the public policy of Canada’ (suit currently pending).¹¹⁹

4. STATE RESPONSES

Not long ago, ISA operated in relative obscurity. Today, state officials, arbitrators, scholars and public interest groups are intensively debating regime reform.¹²⁰ One standard argument holds that traditional capital-exporting states will seek to curtail arbitral power insofar as they become recipients of investment emanating from traditional capital-importing states, thereby exposing their own regulatory arrangements to scrutiny. A second argument suggests that to the extent that states in the developing world learn, or come to believe, that the current regime is biased against them, the more they will pursue treaties that are tailored to insulate them from liability, while reasserting state autonomy and regulatory prerogatives. To the extent that these hypotheses hold, states of both types will find it in their interest to design new treaties that would effectively insulate regulatory arrangements from arbitral review. For heuristic purposes, we accept the premises of these propositions.

We now turn to how states-as-treaty-makers have responded to the arbitral law-making. States possess the power to reform, exit or even destroy the system. They may select an exit option, and denounce BITs and the ICSID Convention, as a small

115 *ibid*, para 192.

116 *ibid*, para 213.

117 *Clayton–Bilcon* (n 44) para 435.

118 *ibid*, paras 442–44, citing to *Waste Management* for the proposition that the FET covers ‘reasonably relied-on representations by a host state, and a recognition that injustice in either procedures or outcomes can constitute a breach.’

119 Global Affairs Canada, ‘Cases Filed Against the Government of Canada: Clayton/Bilcon v. Government of Canada’ <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/clayton.aspx?lang=eng>> accessed 27 December 2016.

120 Jürgen Kurtz, ‘The Shifting Landscape of International Investment Law and its Commentary’ (2012) 106 *American Journal of International Law* 694.

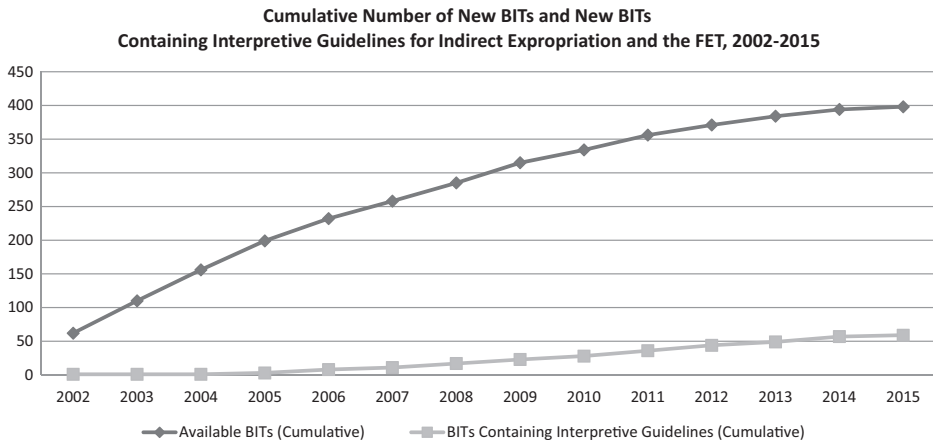


Figure 2. Cumulative Number of New BITs and New BITs Containing Interpretive Guidelines for InEx and the FET, 2002–15

Source: Data Set of New BITs Signed since 2002, *Yale Law School Data Sets on Investor–State Arbitration*, compiled by Michael Chung and Alec Stone Sweet.

handful of states have done.¹²¹ They may drop protections for InEx and FET; they may draft and sign new treaties that include carve-outs; they may design provisions to limit arbitral discretion, or to guide the tribunals’ decision-making in other ways; and they may replace ad hoc tribunals with a court.

To address the question, we analysed 398 BITs signed during the 2002–15 period. We also examined other important treaties and model BITs. Figure 2 charts the cumulative number of (i) new BITs signed in our data set, and (ii) those new BITs that contain substantive guidelines for interpreting either InEx ($n = 46$) or FET ($n = 40$).

A. InEx

Only 2 of the 398 (0.5%) new treaties leave out InEx provisions.¹²² A small subset of new treaties ($n = 46$; 12%) include substantive criteria for defining InEx, all of which embrace tenets of settled case law.¹²³

The most common interpretive guidelines, variations of which are included in 33 new BITs, comfort both (i) the dominant arbitral approach to InEx, in place since 2003 at the latest; and (ii) the formulation announced in the US Model BIT of 2004. An example is Article 7 of the Colombia–Turkey BIT (2014), which stipulates

121 Ecuador terminated 9 BITs in 2008; Venezuela terminated 1 BIT in 2009; and, since 2014, Indonesia has terminated 14 BITs. Bolivia (2007), Ecuador (2009) and Venezuela (2012), denounced the ICSID Convention. South Africa has initiated withdrawal from certain BITs. See ‘South Africa begins withdrawing from EU-member BITs’ *Investment Treaty News* (30 October 2012) <<https://www.iisd.org/ita/2012/10/30/news-in-brief-9/>> accessed 10 February 2016; Ben Bland and Shown Donnan, ‘Indonesia to Terminate More than 60 Bilateral Investment Treaties’ *Financial Times* (26 March 2014).

122 BLEU–Qatar BIT (2007); BLEU–Montenegro BIT (2010) <<http://investmentpolicyhub.unctad.org/IIA>,> accessed 17 June 2017.

123 A standard formula: ‘It is understood that indirect expropriation results from a measure or series of measures of a Contacting Party having an equivalent effect to direct expropriation without formal transfer of title or outright seizure.’

that review requires ‘fact-based inquiry’ that takes account of: ‘the scope of the [measures]; [their] economic impact; the level of interference on the reasonable . . . expectations concerning the investment; [and their] character in accordance with the legitimate public objectives searched’. The same treaty, joined with minor variation by 42 other BITs in this subset,¹²⁴ goes on to state that:

It is understood that non-discriminatory measures of a Contracting Party that are designed and applied for public purposes or social interest or with objectives such as public health, safety and environment protection, do not constitute indirect expropriation.

Such provisions neatly overlap the positions taken by the most cited awards on exactly this issue.¹²⁵ It is unlikely that experienced arbitrators would consider such guidelines to be a ‘reining-in’ of their powers.

B. FET

Arbitral lawmaking has expanded the scope of the FET standard, making review more intrusive, to the benefit of investors. In response, states could excise the provision, attempt to revive the *Neer* standard, or prohibit coverage of LE, among other things. Of the 398 BITs in our data set, only 7 (1.8%) do not contain the FET.¹²⁶ Two of these mandate the ‘minimal standard of treatment’, respectively, of international law¹²⁷ or CIL.¹²⁸ Only five BITs, negotiated among only six states, fail to provide for fair treatment of investors, and one dated after 2005.¹²⁹

Of the BITs that contain an express FET provision ($n = 393$), signatory states added interpretive guidelines in 40 (about 10%). Within this subset, the most important trend (albeit marginal, when compared to dominant tendencies) is the diffusion of the terms of the FTC Note, through new treaties signed by Canada ($n = 17$), Mexico ($n = 9$), Japan ($n = 5$), China ($n = 5$), and the USA ($n = 2$). Perhaps the migration of the FTC guidelines into new BITs will lead tribunals to revise the basics of the FET doctrine, but we are sceptical. Given that the FTC Note utterly failed to constrain NAFTA tribunals, non-NAFTA tribunals, arbitrating these same

124 Only 5 of the 42 BITs containing the ‘health, safety and environmental protection’ clarification predate the *Saluka* ($n = 38$) award, four of which involved India: India–Trinidad and Tobago BIT (2007); India–Jordan BIT (2006); China–India BIT (2006); and India–Saudi Arabia BIT (2006).

125 As the *El Paso* tribunal put it: A ‘general regulation’, such as a statute or regulation that applies to all within a domain of activity, ‘is a lawful act rather than an expropriation if it is non-discriminatory, made for a public purpose and taken in conformity with due process.’ However, when the state enacts ‘unreasonable, *i.e.* arbitrary, discriminatory, disproportionate or otherwise unfair’ measures, they may be ‘considered as amounting to indirect expropriation if they result in a neutralisation of the foreign investor’s property rights.’ *El Paso* ($n = 39$) paras 240–41.

126 Five BITs whose formulations depart slightly from the standard FET provision are included in the FET count: two (Dominican Republic–Italy BIT (2006) and Italy–Yemen BIT (2004)) announce a ‘just and fair treatment’ standard; two (Albania–Moldova BIT (2004) and Botswana–Ghana BIT (2003)) call for ‘equitable treatment’; and one (Italy–Nicaragua BIT (2004)) provides for ‘fair treatment’.

127 Azerbaijan–Estonia BIT (2010).

128 Guatemala–Trinidad and Tobago BIT (2013).

129 Morocco–Serbia BIT (2013); Turkey–UAE BIT (2005); Libya–Malta BIT (2003); Malta–Turkey BIT (2003); Italy–Malta BIT (2002).

provisions, are unlikely to depart from strong FET precedents. No new BIT, including those signed by NAFTA parties, removed the LE of investors from FET provisions. This outcome counts against backlash claims, dispositively in our view. Meanwhile, some of the 40 new BITs added substantive criteria that, in effect, codify established FET doctrine. Some stipulate that FET covers explicit promises made by host states.¹³⁰ Further, new treaties signed by a long list of important states—including Belgium and Luxembourg, Canada, Colombia, India, Japan, Mexico and the USA—prohibited the denial of justice, while laying down duties of due process, transparency, notice and comment and so on.¹³¹ In sum, we observe states working to consolidate FET as a framework for the development of general principles, while doing virtually nothing to dismantle it.

C. General Exceptions

States may also generate derogation clauses (non-precluded measures provisions), whether applicable to specific domains,¹³² or to all regulation, in the style of Article XX of the GATT (1947) and Article XIV of the GATS (1994).

The most prevalent general exception clause is found, with slight variation, in every new BIT to which Canada is a party ($n = 17$). Modelled on the WTO clauses just mentioned, it creates a carve-out for measures that are ‘necessary to protect human, animal or plant life or health’, as well as ‘for the conservation of living or non-living exhaustible natural resources’. It also adapts the ‘chapeau’ of Article XX of the GATT, specifying that the derogation is only available for measures that are not ‘applied in a manner that constitutes arbitrary or unjustifiable discrimination between investments or between investors’, or that constitute ‘a disguised restriction on international trade or investment’. It states that the BIT does not ‘prevent a Contracting Party from adopting or maintaining reasonable measures for prudential reasons’, in the banking and finance sector. And it does the same for measures ‘necessary to protect . . . essential security interests’, and to ‘fulfill obligations’ when it comes to international security arrangements.¹³³ Canada’s boilerplate exception clauses are likely to push tribunals into a style of balancing that some arbitrators have already adopted, eg in *Total*.¹³⁴

130 Japan–Laos BIT (2012); Colombia–Japan BIT (2011). art 5(2) of the trilateral agreement between China, Japan, and South Korea (2012), for example, announces the FET and then immediately states that: ‘Each Contracting Party shall observe any written commitments in the form of an agreement or contract it may have entered into with regard to investments of investors of another Contracting Party.’

131 BLEU–Colombia BIT (2009); India–Mexico BIT (2007); Rwanda–USA BIT (2008); Canada–Jordan BIT (2009); China–Japan–South Korea (2012).

132 For the domain of expropriation, see the discussion above. With regards to the FET, we found only two treaties that contained substantive carve-outs. art 2(4) of the Morocco–Vietnam BIT (2012) prohibits the application of the FET for ‘measures that have to be taken by either Contracting Party for reasons public security, order or public health or protection of environment provided that such measures are not applied in a manner which would constitute a means of arbitrary or unjustified discrimination’. Under the Australia–Mexico BIT (2005), investors may attack taxation measures under the expropriation (but not the FET) heading.

133 Expressing a particular Canadian sensitivity, BIT protections do not apply to measures regulating the ‘cultural industry’ and the media.

134 The same point applies to the other BITs that contain GATT-style derogation provisions, including those of Jordan–Singapore BIT (2004), Colombia–India BIT (2009), Colombia–Japan BIT (2012), Colombia–Turkey BIT (2014) and Japan–Peru BIT (2008).

D. Model Treaties

States may also reveal their preferences, and weigh in on the acceptability of current arrangements, by publishing model BITs and floating drafts of new treaties. Yet, in considering departures from the standard template for BITs, the more radical proposals have been removed or diluted. In the USA, the business community, which worried about reducing investment protections, including with regard to FET, prevailed over those who sought to strengthen regulatory prerogatives.¹³⁵ In the end, the 2012 US Model BIT made only marginal adjustments to the 2004 Model it replaced. In 2008, the Norwegian Government issued a draft model that contained several revisionist features, including a requirement that investors exhaust local remedies before filing for arbitration. The Government dropped the provision in the 2015 version, after Norwegian business leaders and investors mounted protests.

The Indian Government has produced the most innovative model, which it submitted for comment in April 2015. Among other things, the draft: required exhaustion of local remedies; insulated from arbitral review ‘any legal issue’ that had been ‘finally settled by any judicial authority of the Host State’; and prohibited a tribunal from reviewing a host state’s determination that a state act under review was taken in the public interest, and thus deserving substantial deference. It also left out FET, preferring a ‘treatment of investment’ provision emphasizing due process. Most intriguing, the draft contained a list of investors’ ‘duties’ (compliance with anti-corruption, environmental and consumer protection laws, human rights, labour regulations, and so on), headings under which a host state could counter-sue the investor. After opposition by business groups and the publication of a critical commentary by its own Law Commission,¹³⁶ which was headed by a Supreme Court justice, the draft was revised. Although officials maintained their position on the ‘treatment of investment’ in the December 2015 version, they chose to limit the exhaustion of remedies requirement to a period of 5 years, while excising the other reform initiatives just noted.¹³⁷

Virtually all of the models and drafts treaties we examined contain derogation clauses, the addition of which reflects states’ concerns for defending regulatory space.¹³⁸ Some also explicitly declare the host state’s ‘right to regulate’.¹³⁹ To the extent that these provisions become law, they will favour further doctrinal integration of the trade and investment regimes,¹⁴⁰ as well as a more structured development of

135 Luke Eric Peterson, ‘Analysis: U.S. Unveils “New” Model BIT that Retains Protective Core, and Makes a Few Tweaks on Periphery’ (22 April 2012) *Investment Arbitration Reporter* <<http://www.iareporter.com/articles/analysis-united-states-unveils-new-model-bilateral-investment-treaty-that-retains-protective-core-and-makes-a-few-tweaks-on-periphery/>> accessed 17 June 2017.

136 Government of India, Law Commission of India, ‘Report No.260: Analysis of the 2015 Draft Model Indian Bilateral Investment Treaty’ (August 2015) <<http://lawcommissionofindia.nic.in/reports/Report260.pdf>> accessed 17 June 2017.

137 Government of India, Law Commission of India, ‘Model Text for the Indian Bilateral Investment Treaty’ <https://mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf>.

138 These include the statements to the effect that ‘it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic labor [or environmental] laws’. art 13(2) of the US Model BIT (2012). Similar statements are also found in dozens of BITs signed since 2002.

139 Including the Draft Model BITs of Norway and India, and the Trans-Pacific Partnership signed in February 2016 by 12 Pacific Rim states, including Australia, Canada, Japan, the USA and Singapore.

140 See Jürgen Kurtz, *The WTO and International Investment Law: Converging Systems* (CUP 2016).

balancing frameworks. We do not consider these developments to be straightforward indicators of ‘backlash’, as others might. On the contrary, experienced arbitrators are likely to welcome these moves, insofar as they (i) comfort approaches to the ‘right to regulate’ developed by the most influential tribunals themselves, and (ii) leave tribunals less exposed as primary lawmakers.

E. The Canada–European Union Comprehensive Economic and Trade Agreement

The Canada–European Union Comprehensive Economic and Trade Agreement (CETA), signed in October 2015, is a potential game changer, given that the contracting states envision the creation of a ‘multilateral investment tribunal and appellate mechanisms’, both within and beyond the confines of the agreement. We do not consider the impact of such moves here.¹⁴¹ Nonetheless, because the CETA is the most important, recent BIT signed by major trading states, we examined its substantive provisions in light of this article’s priorities.

The parties provided no new interpretive guidance on InEx.¹⁴² The treaty also reflects the dominant arbitral approach to FET. Its FET provisions expressly cover ‘denial of justice’, ‘a fundamental breach of due process’, ‘manifest arbitrariness’, ‘targeted discrimination’, as well as ‘coercion’ and ‘harassment’.¹⁴³ Presumably, the use of the terms—‘fundamental’ and ‘manifest’—are meant to narrow coverage to the most egregious of acts. Yet only a small handful (and, arguably, none) of the awards finding violations on these grounds would be excluded under these qualifications. Perhaps surprisingly (given Canada’s oft-stated position), the CETA expressly provides for LE. Thus, arbitrators ‘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’.¹⁴⁴ Although Canada had also been at the forefront of criticizing NAFTA tribunals for raising the standard beyond what it considered to be the minimal standard of CIL, the CETA makes no mention of the latter. Only one provision appears to be a straightforward, critical response to a past award. ‘For greater certainty’, the treaty declares, ‘the fact that a measure breaches domestic law does not, in and of itself, establish a breach of this Article’,¹⁴⁵ a formulation apparently alluding to the finding in *Bilcon*.

Although the agreement leaves out a general derogation clause, it does announce the ‘right to regulate’, in situations in which the state pursues ‘legitimate policy objectives’.¹⁴⁶ The contracting states, however, did not make that right absolute, non-justiciable, or self-judging.

141 See Sweet and Grisel (n 3) chs 5, 6.

142 art 8.12 of the Canada-European Union Comprehensive Economic and Trade Agreement [CETA].

143 art 8.10.2 of CETA.

144 art 8.10.4 of CETA.

145 art 8.10.7 of CETA.

146 art 8.9.1 of CETA: ‘For the purpose of this Chapter, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the

5. CONCLUDING ASSESSMENT

To what extent have tribunals failed to take seriously the public interest when pleaded by the state? Have they, in effect, placed a thumb on the scales in favour of investors? Of course, even the most informed observers may disagree on the proper response to these questions, which we sought to address as systematically as possible.

In the vast majority of awards, tribunals made explicit, good faith efforts to take seriously the respondent state's 'right to regulate'. We found no support for the view that arbitral doctrine biases tribunals against states in any structural sense. Claimants win more often under the FET heading, but the success rate for FET claims is 50%: a coin toss. The outcome conforms to certain well-known theories of adjudication, including Priest–Klein, which predicts a 'tendency toward 50 percent plaintiff victories among litigated cases' under conditions of uncertainty.¹⁴⁷ In FET cases (and balancing situations, more generally), it is the factual matrix, not the law, that varies across cases, a strong condition of uncertainty.

Moreover, the evidence provides no support for the view that the regime has generated 'backlash' in any systemic sense. We fully recognize the importance of state officials, as treaty-makers, who may seek to override arbitral lawmaking, or try to block unwanted future development. To date, they have not done so in any sustained or significant way. We are aware of another empirical study that examines these issues relatively systematically, and it arrived at similar conclusions.¹⁴⁸ We do not wish to be misunderstood on this point. This article directs empirical attention to the question of how states, *as treaty-makers*, have responded to the most important lines of arbitral lawmaking, across time. We do not claim that this focus exhausts other important issues involving the nature of state interests, or the content and intensity of state preferences when it comes to the design of the regime's institutions. Nonetheless, when states make new investment treaties, they act authoritatively, in ways that reveal underlying preferences.

Why have states not pursued a more radical reform agenda? We would highlight four main factors. First, the generic problems of inter-state contracting and coordination are acute in international economic law. Officials have found it difficult to write more complete contracts when it comes to the most highly arbitrated protections, InEx and FET illustrating the point. Most of the relevant provisions of new BITs, revised models and draft treaties in these areas have consolidated, not repudiated, approaches that had already been mapped in major strains of arbitral jurisprudence. The delegation theorist would assume that states (as contracting Principals) are choosing from a menu of options that tribunals (their Agents) produce, on an ongoing basis. In the foreign investment regime, cooperative interactions between states and arbitrators are far more prevalent than conflict. Secondly, and relatedly, the decision-rule governing treaty-revision (consensus) favours

environment or public morals, social or consumer protection or the promotion and protection of cultural diversity'.

147 George Priest and Benjamin Klein, 'The Selection of Disputes for Litigation' (1984) 13 *Journal of Legal Studies* 1.

148 Tomer Broude, Yoram Z Haftel and Alexander Thompson, 'Who Cares about Regulatory Space in BITs? A Comparative International Approach' in A Roberts and others (eds), *Comparative International Law* (OUP forthcoming).

inertia, not radical regime change. Thirdly, even when states have contemplated proposals to restrict treaty protections for foreign investment, domestic investors and the national bar have pushed back. India has become a major capital exporter, and Indian investors want the same protections that their counterparts from other countries enjoy. Fourthly, it has proven difficult, even for the most sceptical and disgruntled states (and critical scholars), to demonstrate that the regime is biased in favour of investors in a systemic sense,¹⁴⁹ or against developing states.¹⁵⁰ While some 27% of all filings are settled,¹⁵¹ states prevail in nearly 60% of the cases at the merits stage.¹⁵²

These points add up to a rather banal conclusion: most states, even those that are reform-minded, find the basics of what tribunals have done to be in their interest.

- 149 Susan D Franck, 'The ICSID Effect? Considering Potential Variations in Arbitration Awards' (2011) 51 *Virginia Journal of International Law* 825. To our knowledge, the only relatively systematic empirical study that purports to have found pro-investor bias concerns decisions on jurisdiction. See Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration' (2012) 50 *Osgoode Hall Law Journal* 211.
- 150 Susan D Franck, 'Conflating Politics and Development? Examining Investment Treaty Arbitration Outcomes' (2014) 55 *Virginia Journal of International Law* 13.
- 151 International Bar Association, 'Investor-State Dispute Settlement: the Importance of an Informed, Fact-Based Debate' (23 April 2015) <<http://www.ibanet.org/Article/Detail.aspx?ArticleUid=1dff6284-e074-40ea-bf0c-f19949340b2f>> accessed 17 June 2017.
- 152 Through 2015, UNCTAD reports, the known number of concluded cases is 444. States 'won' in 38% of these cases: either jurisdiction was denied, or investors' claims for compensation were rejected in final awards. Investors 'won' in 27% of the cases, that is, a tribunal issued a final award ordering the respondent state to compensate the investor. Of the remaining cases, 26% were settled: 9% were 'discontinued'. In 2% of cases, 'liability [was] found but no damages [were] awarded', which we counted here as wins for states. UNCTAD, 'World Investment Report 2016' <http://unctad.org/en/PublicationChapters/wir2016ch3_en.pdf> accessed 17 June 2017. accessed visited 26 December 2016.