Guarantees of Legal Stability in the Strict Sense

Introduction

Stability, whether legal, political, economic, financial or monetary, seems to represent one of the core values of today’s society. Unsurprisingly, stability in all the above-mentioned meanings also represents one of the key desiderata of economic operators, particularly when they invest in a foreign market. For example, stability with regard to the host State’s political environment (political stability) or with regard to the rate of inflation in the foreign market (economic stability) will ensure predictability and reduce the risks that may ultimately undermine the viability of the investor’s business venture. With regard to legal stability, foreign investors’ focus is on the stability of both the underlying investment contract (contractual

---

1 Political stability is one of the six Worldwide Governance Indicators (WGI) according to the World Bank Group (WBG) (https://info.worldbank.org/governance/wgi/#home); ensuring monetary and financial stability is the main goal of the International Monetary Fund (IMF) (https://www.imf.org/external/about/howwedo.htm). For the argument that trade agreements address uncertainty, see Nuno Limão and Giovanni Maggi, ‘Uncertainty and Trade Agreements’ (2015) 7 AEJ: Microeconomics I.

DOI: 10.1093/oso/9780198842637.001.0002
stability) and the applicable regulatory framework in the host country (regulatory stability). A recent World Bank Group survey confirms that, among the so-called political risks facing foreign investors, ‘breach of contract’ and ‘adverse regulatory change’ by the host State represent the most pressing ones.²

The concept of stability may, however, be somewhat controversial. Stability as a general value, or even as an aspiration, is more likely to be a ‘relative’ (or soft) rather than an ‘absolute’ (strict) concept. According to its dictionary definition, stability in fact highlights the ‘state of something that is not easily changed’ rather than something that cannot (or should not) be modified. In other words, stability is not understood as a total standstill but more as gradual movement. This definition is also reflected in the notion of stability as one of the formal elements of the rule of law, which is often seen as implying a system of norms that is ‘sufficiently resistant to change’³ or as requiring that the ‘demands [that] laws make on citizens should remain relatively constant’.⁴ The reference to stability at times expressly included in the preamble of international investment treaties should be understood in this softer sense.⁵

When it comes to investment treaty obligations, there can, however, be two alternative understandings of the concept of legal stability, which highlight two conceptually distinct obligations. According to one view, legal stability may be understood to include an obligation of legal stability in the strict sense (akin to so-called ‘freezing clauses’ in investment contracts). According to this understanding, the mere failure to preserve the more advantageous regulatory framework applicable to the investment will lead to a violation of the investment treaty (regulatory stability in the strict sense). Similarly, failure to observe a contractual undertaking vis-à-vis the foreign investment will lead to a treaty violation (contractual stability in the strict sense).

According to a second view, the obligation of legal stability may be understood in a softer sense, according to which violation of the investment treaty can only be found if the non-observance of the investment contract or the change in the regulatory framework (detrimental to the foreign investment) cannot be justified by the legitimate exercise of public policy powers.

Early investment tribunals were divided on the question of whether or not investment treaties provided strict legal stability obligations. For example, investment tribunals interpreting the fair and equitable treatment provision in order to address adverse regulatory change contain statements supporting either the ‘strict’ or ‘soft’ understanding of a stability obligation. One of the paradigmatic examples of a strict obligation of regulatory stability under the fair and equitable treatment

⁵ See eg the 1991 United States-Argentina bilateral investment treaty (BIT).
(FET) standard is the 2004 decision in *Occidental v Ecuador I*. Having stated that ‘[t]he stability of the legal and business framework is [ . . . ] an essential element of fair and equitable treatment’, the *Occidental v Ecuador I* tribunal found a breach of the FET provision, as the tax framework under which the investment had been made and had been operating ‘has been changed in an important manner by the actions adopted by the [Ecuadorian tax authorities]’. The tribunal also noted that a determination of whether there is a breach of the FET standard is premised on whether or not the host State has ‘alter[ed] the legal and business environment in which the investment has been made’.

On the other hand, one example adopting a softer, more deferential, interpretation of regulatory stability as part of FET is the 2006 decision in *Saluka v Czech Republic*. In the view of the *Saluka* tribunal, in order to be protected, the investor’s expectations ‘must rise to the level of legitimacy and reasonableness in light of the circumstances’ and a determination of a breach of the FET standard ‘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’.

Similarly, early investment tribunals were divided on the protection provided by the so-called ‘umbrella clause’. In particular, tribunals disagreed on whether or not ‘a simple breach of contract, or of municipal statute or regulation, by itself, would suffice to constitute a treaty violation on the part of a Contracting Party and engage the international responsibility of the Party’.

It is clear that from the perspective of the foreign investor, a strict stability obligation would afford a very high level of protection vis-à-vis the risk of contractual or regulatory change (as the investor will be compensated for the existence of the contract breach or adverse regulatory change). On the other hand, a soft stability obligation would afford a greater degree of discretion to the host State as, at a minimum, the existence of a treaty violation (and the duty to compensate the investor)

---

6 The *Occidental v Ecuador I* tribunal relied on the clear statement found in the preamble of the underlying treaty (the 1993 Ecuador–United States BIT) that FET ‘is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources. *Occidental Exploration and Production Company v The Republic of Ecuador (Occidental v Ecuador I)*, Final Award, 1 July 2004, para 183.
8 Saluka Investments BV v The Czech Republic, UNCITRAL, Partial Award, 17 March 2006.
9 ibid, para 304.
10 ibid, para 306.
11 ibid, para 306.
12 SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan, ICSID Case No ARB/01/13, Decision on Jurisdiction, 6 August 2003, para 168. But see SGS Société Générale de Surveillance SA v Republic of the Philippines, ICSID Case No ARB/02/6, Decision on Jurisdiction, 29 January 2004, para 128. ‘To summarize the Tribunal’s conclusions on this point, Article X(2) makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments.’
would depend in relevant part on an assessment of the public policy justification underlying the contractual breach or regulatory change at issue.

The aim of this chapter is to inquire whether—and if so, the extent to which—investment treaties contain guarantees of strict legal stability. More specifically, this chapter asks whether investment treaties contain provisions (a) guaranteeing that contractual undertakings vis-à-vis the foreign investment are respected (contractual stability in the strict sense); and/or (b) ensuring that adverse regulatory changes will not be applied to foreign investments (regulatory stability in the strict sense).

Three main arguments are advanced in this chapter. First, legal stability in the strict sense does represent one of the guarantees in international investment treaties, provided specifically through investment treaties’ umbrella clauses (section A) and stabilization clauses (section B). Second, despite an attempt by a few early tribunals to read the FET provision as imposing a strict stability obligation on host States, most investment treaty tribunals faced with the task of interpreting FET, seem to have recognized the need to balance the protection vis-à-vis adverse contractual and regulatory changes and host States’ right to regulate in the public interest. However, one can still find recent arbitral decisions where the role of legal stability within the FET standard remains at best ambiguous, and which thus fail to assuage the fears that the FET standard may indeed function as imposing an obligation of stability in the strict sense (section C). Third, investment treaties signed in the past ten years clearly show a retreat of provisions guaranteeing legal stability in the strict sense (section D).

A. Respect of Host State’s Undertakings with Regard to Foreign Investments and the Umbrella Clause

While contracts are principally used to define parties’ respective rights and obligations, they are drafted in order to bring a level of stability and thus predictability in the parties’ contractual relationship. Subject to the usual clauses addressing exceptional events (such as force majeure, or changed circumstances), contracts are legally binding on the parties, they are enforceable before courts and tribunals and remedies are available in case of contractual breaches.

Investment contracts, negotiated by the investor and the host State, are no different: ‘[i]n principle, it will be the intention of both sides to create a legal framework that will last from the beginning to the end of their common project.’

---

13 Some early tribunals have also interpreted the ‘full protection and security’ as requiring a strict stability obligation. See eg CME Czech Republic BV v Czech Republic, UNCITRAL, Partial Award, 13 September 2001, para 613.

14 Dolzer and Schreuer, Principles of International Investment Law (n 8) 82.
However, in the international investment context, contractual mechanisms face particular challenges in providing a high level of stability, as the State party to the contract has the ability to affect unilaterally the terms of the investment contract as well as the likely law applicable to such contract (ie the law of the host State).  

International investment treaties have for a long time provided for a clause specifically designed to promote and ensure stability in the strict sense with regard to the contractual relations between foreign investors and host States. The so-called ‘umbrella clause’ (or ‘observance of undertakings clause’) requires the host State to observe any obligation it may have entered into with regard to foreign investments. While language varies across the various investment treaties, roughly 40–50% of existing treaties contain an umbrella clause.

The last sentence of Article 7 of the 1959 Germany and Pakistan BIT, the first modern investment treaty, reads as follows: ‘Either Party shall observe any other obligation it may have entered into with regard to investments by nationals or companies of the other Party.’ While some variations exist, the text of most umbrella clauses in modern investment treaties look similar to the one contained in the very first modern BIT.

As evidenced by Dr Sinclair, the origin of umbrella clauses is to be found in a movement during the 1950s in Western Europe pressing for the sanctity of long-term investment contracts (particularly, concessions) and epitomized in Article II

---

15 ibid, 82–6 (pointing to stabilization clauses as a mechanism used in state contracts to preserve the sanctity and stability of the contract; as well as to renegotiation clauses focusing on guaranteeing the economic equilibrium of the contract, rather than its legal stability). See Peter Cameron, International Energy Investment Law: The Pursuit of Stability (OUP 2010) 27 noting the in-built vulnerability of the contractual relationship following from the fact that a state has the power under its municipal law to alter the terms of a contract, and indeed to terminate it entirely.  


17 Katia Yannaca-Small, ‘Interpretation of the Umbrella Clause in Investment Agreements’ (2006) OECD Working Papers on International Investment, 5–6: It is estimated that, of the 2500 or more BITs currently in existence approximately forty percent contain an umbrella clause. Treaty practice of States does not point to a uniform approach to the treatment of these clauses. While Switzerland, the Netherlands, the United Kingdom and Germany, often include umbrella clauses in their BITs, France, Australia and Japan include umbrella clauses in only a minority of their BITs. Of 35 French BITs examined, only 4 contain an umbrella clause while only 5 out of 20 Australian BITs and 2 of the 9 Japanese BITs examined. Canada is the only OECD member state examined in this study which has never included an umbrella clause in its BITs. [ … ] 34 of the 41 US BITs examined, based on the former Model, contained an umbrella clause [ … ] [footnotes omitted].

18 See Article 7 of the 1959 Germany–Pakistan BIT.  


of the 1959 Abs-Shawcross Draft Convention on Investments Abroad\(^{21}\) and Article 2 of the 1967 Organisation for Economic Co-operation and Development (OECD) Draft Convention on the Protection of Private Property.\(^{22}\) The purpose was two-fold: (a) to internationalize the investment contract, thus preventing its exclusive subjection to the law of the host State and the risk of unilateral variation by the government; and (b) to provide a remedy in international law for breaches of the contract.\(^{23}\) In other words, ‘[f]rom an investor’s point of view, the umbrella clause was a natural progression in the law of investment protection beyond negotiated contractual techniques to internationalize and stabilize investment agreements.’\(^{24}\)

The Notes and Comments to Article 2 of the 1967 OECD Draft Convention explain that the umbrella clause represents an application of the general principle of *pacta sunt servanda*, which also applies to agreements between States and foreign nationals.\(^{25}\) Accordingly, ‘any right originating under such an undertaking [given by the host State in relation to property] gives rise to an international right that the Party of the national concerned or of his successor in title is entitled to protect.’\(^{26}\)

As noted by FA Mann in 1981, umbrella clauses are of particular importance because they protect ‘the investor’s contractual rights against any interference which might be caused by either a simple breach of contract or by administrative or legislative acts, and independently of the question whether or no [sic] such interference amounts to expropriation.’\(^{27}\) According to Mann, the variation of the terms of a contract or license by legislative measures, the termination of the contract or the failure to perform any of its terms are acts that the umbrella clause would render wrongful in international law.\(^{28}\)

In terms of guaranteeing contractual stability in the strict sense, the umbrella clause has certain peculiar features. First, it only covers the (contractual) undertakings of the host State vis-à-vis the protected investment and thus it does not

---

\(^{21}\) Article II reads as follows: ‘Each Party shall at all times ensure the observance of any undertakings which it may have given in relation to investments made by nationals of any other Party.’

\(^{22}\) Article 2, titled ‘Observance of Undertakings’, reads as follows: ‘Each Party shall at all times ensure the observance of undertakings given by it in relation to property of nationals of any other Party.’ Incidentally, the OECD Draft Convention, based heavily on the Abs-Shawcross text, greatly influenced the many investment treaties that were signed in the last thirty years of the twentieth century.


\(^{24}\) Sinclair, ‘The Origin of the Umbrella Clause’ (n 20) 425.


\(^{26}\) ibid, 336. Interestingly, the above explanation refers implicitly to the State-to-State arbitration mechanism only, rather than to the investor-to-State one (Article 7(a)), which is also included in the Draft Convention (Article 7(b)).


\(^{28}\) Mann, ‘British Treaties’ (n 27) 246.
include the corresponding undertakings of the foreign investor. Accordingly, the umbrella clause appears to be premised on the assumption that the foreign investor is in need of special protection rather than on the underlying investment contract as a whole.

Second, at least part of the content of the umbrella clause is determined through what appears to be a ‘dynamic reference’ to any undertakings entered by the host State vis-à-vis the foreign investment (akin to the legislative technique of incorporation by reference often used in domestic or international legal systems). Thus, the content of the undertakings protected by the umbrella clause will need to be determined on the basis of the undertaking’s legal system of reference at the time the claim under the umbrella clause is made.

Despite a few initial decisions that were sceptical vis-à-vis the very function of umbrella clauses, investment treaty tribunals have since recognized that umbrella clauses are (at a minimum) more than ‘aspirational statements’. While there has been disagreement, particularly with regard to the ‘effect’ and ‘scope’ of umbrella clauses, more recently there appears to be a consensus among investment tribunals favouring an interpretation according to which (a) the function of umbrella clauses is ‘essentially jurisdictional in that it provides a claimant with access to an arbitral tribunal but does not alter their actual rights’; and (b) ‘the scope of the umbrella clause extends at least to contractual obligations and potentially beyond, provided that a specific undertaking is entered into with regard to an investment’.


30 In principle, a protected ‘undertaking’ for purposes of the umbrella clause may stem from both domestic law and international law. Umbrella clauses use different terms, including ‘undertaking’, ‘obligation’, or ‘commitment’. Dolzer and Stevens have noted that the ‘term “obligation” tends not to be defined in the treaties but is generally assumed to include both obligations arising from investment contracts i.e. contracts between a Party and investors from the other Contracting Party, as well as obligations stemming from direct undertakings between the two Contracting Parties’: Dolzer and Stevens, *Bilateral Investment Treaties* (n 27) 82. See Newcombe and Paradell, *Law and Practice of Investment Treaties* (n 23) 448–9.

31 See in particular, *SGS v Pakistan*, Decision on Jurisdiction, 6 August 2003 (n 12).

32 Jude Antony, ‘Umbrella Clauses since *SGS v Pakistan* and *SGS v Philippines*—A Developing Consensus’ (2013) 29 Arb Int’l 607, 614.

33 ibid.

34 ibid, 638. Interestingly, the Notes and Comments to Article 2 of the OECD Draft Convention seem to include a general undertaking giving rise to legitimate expectations. The Notes specify, first, that the ‘undertaking may represent a consensual or a unilateral engagement on the part of the Party concerned’ and, second, that ‘it must relate to the property concerned; it is not sufficient if the link is incidental’. Moreover, in order to establish the link between the undertaking and the property, the Notes and Comments include the case where, though the undertaking was originally couched in general terms, the national concerned acted in reliance on it. ‘In such cases, in accordance with the principles of international law, a situation must be protected in which a Party by its conduct had given rise to a legitimate expectation of the continuance of a particular state of affairs.’ See further, Christoph Schreuer, ‘Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road’ (2004) 5 JWIT 231, 250–1; Mann, ‘British Treaties’ (n 27) 246.
On the basis of this growing consensus, and leaving to one side the still controversial question of privity, the umbrella clause represents a clear example of an investment treaty obligation guaranteeing the stability in the strict sense of the host State’s (contractual) undertakings, as it requires the host State to respect, and conform to, any undertakings assumed with regard to the foreign investment. As noted above, whether the undertaking exists and whether it has been breached crucially depend on the content of the undertaking itself. In the paradigmatic case of a contract between the host State and the foreign investor, the existence and non-observance of the contractual undertaking for purposes of an umbrella clause claim is determined on the basis of the contract and its applicable law. For example, in CEF Energia BV v Italy the tribunal rejected the investor’s umbrella claim on the basis of the finding that the contractual breaches alleged by the investor were in fact unilateral modifications permitted by Italian law, as the applicable law to the contracts at issue.

Nevertheless, having determined the existence of an undertaking, failure by the host State to observe such undertaking represents a breach of the investment treaty’s umbrella clause. Excluding general exception clauses in the underlying treaties (or circumstances precluding wrongfulness under customary law), the umbrella clause does not require an investment tribunal to take into account the possible reasons that may have justified the host State’s conduct. In this sense, an umbrella clause represents a treaty obligation directly guaranteeing the stability in the strict sense of the host State’s undertakings.

However, while umbrella clauses guarantee the stability in the strict sense of the host State’s undertakings (principally of a contractual nature) entered into with regard to the investment, they do not guarantee regulatory stability in the strict sense. In other words, umbrella clauses may not be able to freeze the regulatory framework governing the foreign investment at the time the investment is made. This is

---

35 The issue of privity refers to whether or not the respondent State and the claimant are (either or both) required to be parties to the contract establishing the obligation relied on in the umbrella clause claim. See Antony, ‘Umbrella Clauses’ (n 32) 639.

36 The role of an investment treaty tribunal is to determine whether the host State has complied with the relevant undertaking (or obligation). The existence of an exclusive forum selection clause in the underlying source of the obligation may create a potential jurisdictional conflict (say, eg, between the treaty tribunal and the contractual forum). However, such conflict can and should be resolved using the traditional tools, such as lis alibi pendens. See Campbell McLachlan, Lis Pendens in International Litigation in Collected Courses of the Hague Academy of International Law (Hague Academy of International Law 2009).

37 CEF Energia BV v Italy, SCC Case No 158/2015, Award, 16 January 2019, para 254.

38 Some tribunals have limited a finding of breach of the umbrella clause to ‘governmental’ breaches of the underlying obligation (or undertaking), thus excluding ‘pure commercial’ breaches (see eg Sempra Energy International v The Argentine Republic, ICSID Case No ARB/02/16, Award, 28 September 2007, para 310). However, even under this reading, the umbrella clause’s fundamental nature and operation does not change: it is still for the host State to respect its undertakings (even if such obligation only applies when the host State exercises ‘sovereign’ powers, rather than merely acting in its ‘commercial’ capacity). See Mihir C Naniwadekar, ‘The Scope and Effect of Umbrella Clauses: The Need for a Theory of Deference?’ (2010) 2 Trade, L Dev 169.
for at least two sets of reasons. First, the host State’s wider regulatory framework applicable to the foreign investment does not usually take the form of an ‘undertaking’ ‘entered into by the host State’ ‘with regard to the investment’. Accordingly, the wider regulatory framework does not come under the protection offered by the umbrella clause. It is true that specific undertakings vis-à-vis foreign investors may be included in domestic law (eg in investment codes of host States) and thus may come under the scope and protection of an umbrella clause (subject to the required link between the undertaking and the specific investment at issue). However, the wider regulatory framework is not protected by an umbrella clause, as it is usually comprised of a complex set of disciplines (rather than undertakings), which may not relate to foreign investments specifically. For example, domestic laws may set a mandatory minimum wage for employees or a corporate tax rate without committing one way or the other whether those laws will be modified in the future.39

Second, even in the presence of stabilization commitments (whether in the investment contract or in the host State legislation) made specifically to the foreign investment, these commitments are incorporated in the treaty’s umbrella clause only to the extent that they actually exist in, and are valid and enforceable under, the relevant legal system of reference at the time the umbrella clause claim is made. This is again based on the understanding that the content of the umbrella clause is at least in part determined through a dynamic reference to any undertakings entered into by the host State vis-à-vis the foreign investment. Let us assume a stabilization commitment with regard to the mandatory minimum wage is found in the authorization granted to the foreign investment at the time of admission to the host State (ie increases of the minimum wage will not apply to the specific investment). Let us assume further that a later act of Parliament or judgment by the Constitutional Court of the host State declares such commitments void because they are in violation of the constitutional protection of employees or the constitutional principle of parliamentary sovereignty. A claim brought by a foreign investor based on the observance of undertakings clause in an investment treaty (after such act of Parliament or judgment of the Constitutional Court) would likely fail, as the stabilization ‘undertaking’ itself does not exist any longer at the time the claim is brought. One can imagine a similar effect in the case of a stabilization commitment contained in a domestic investment code at the time the investment was admitted, and which is then abrogated before the treaty claim is brought.40

39 See Mann, ‘British Treaties’ (n 27) 242, 246:
Thus if the law of the land provides that the State is liable for the torts of its servants this is not an ‘obligation arising from a particular commitment’ the State may have entered into and may be changed, though in certain circumstances this may become subject to the provisions about expropriation.

B. Regulatory Stability in the Strict Sense and (the Little Known Case of) Investment Treaties’ Stabilization Clauses

Under traditional investment treaties, investments are admitted in accordance with the host State’s legislation and regulation. As noted in the Introduction, next to breach of contract, one of the most pressing concerns for foreign investors is an adverse change in the host State’s regulatory framework applicable to the investment once the investment has been admitted. In order to ensure the stability in the strict sense of such regulatory framework, international investment treaties have, albeit rarely, featured so-called ‘stabilization clauses’ purporting to freeze the regulatory framework applicable to the covered foreign investments at the time of its admission to the host State. Following the known categorization of contractual stabilization clause, Professor Gazzini has recently referred to such treaty clauses as ‘freezing clauses’.

There appears to be very little awareness (let alone examination) of investment treaties’ stabilization clauses. In addition to Gazzini’s recent note, the only references were found in a 1988 publication by the United Nations Centre on Transnational Corporations (UNCTC) on Bilateral Investment Treaties and in the 1998 sequel prepared by UNCTAD. The latter one states as follows:

the stabilization clause […] requires that, if there is a change in the law after the admission of an investor protected under the BIT, and the new law is less favourable to the investor, the pre-existing, more favourable norms remain applicable to

41 While the present author has not carried out a systematic review of investment treaties, the cursory examination of a few western European treaties (mainly, Italian, Dutch and French treaties) shows that stabilization clauses are relatively rare in such treaties (or are found in older treaties that have since been terminated following the renegotiation between the same contracting parties of a new treaty that does not include such clauses). However, through the operation of the Most Favoured Nation (MFN) clause, their relevance may not be so negligible.

42 There exist two basic types of contractual stabilization clauses: (a) ‘freezing clauses’, which freeze the law at the time the contract is executed for the specific investor and any future changes do not apply to the contract at issue; and (b) ‘economic equilibrium clauses’, which provide that, while future regulatory changes in the host State will apply to the specific investor, the host State agrees to provide compensation to the investor for its compliance with the new law. On contractual stabilization clauses, see further Nagla Nassar, Sanctity of Contracts Revisited: A Study in the Theory and Practice of Long-Term International Commercial Transactions (Martinus Nijhoff 1995); Thomas Wälde and George N’Di, Stabilising International Investment Commitments’ (1996) 31 Tex Int’l L J 215; Piero Bernardini, ‘The Renegotiation of the Investment Contract’ (1998) 13 ICSID Rev/FILJ 411; Lorenzo Cotula, ‘Regulatory Takings, Stabilization Clauses and Sustainable Development’ (2008) OECD Investment Policy Perspectives 69; Andrea Shemberg, ‘Stabilization Clauses and Human Rights’ (2009) International Finance Corporation (IFC) Report.


44 ibid.

45 UNCTC, Bilateral Investment Treaties (Graham & Trotman in cooperation with the United Nations 1988) 57-8.

that investor. Such a clause is intended to protect investors from changes in legislation after their admission.

This lack of awareness is also evident in some of the decisions by investment treaty tribunals that have criticized an interpretation of the FET standard that imposes on States a regulatory stability obligation. For example, the tribunal in *El Paso v Argentina* noted that ‘it is inconceivable that any State would accept that, because it has entered into BITs, it can 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.’

Unsurprisingly, and in line with the better-known case of stabilization clauses in investment contracts, there are variations in the drafting of investment treaties’ stabilization clauses. An example of a general stabilization clause is Article 11.3 of the 1996 Italy–Jordan BIT, which reads as follows:

> Whenever, after the date when the investment has been made, a modification should take place in laws, regulations, acts or measures of economic policies governing directly or indirectly the investment, the same treatment will apply upon request of the investor that was applicable to it at the moment when the investment had been carried out.

Article 11.3 grants to the foreign investor the right to avoid being subjected to any (prejudicial) change in the applicable regulatory framework after the investment has been made. In the words of Gazzini, such a clause ‘provides all investors of the other contracting party a total exemption from unfavourable laws, regulations, acts, or measures of economic policies adopted by host countries [. . .], it neutralizes the exercise of subsequent regulatory powers to the extent that such exercise is directly or indirectly detrimental to covered investors.’

---

47 See section C, ‘Strict Stability through the Fair and Equitable Treatment (FET) Standard’, below.
48 *El Paso Energy International Company v The Argentine Republic*, ICSID Case No ARB/03/15, Award, 31 October 2011, para 367. Obviously, one should read this statement as referring to a BIT that does not expressly contain a stabilization clause.
50 See also Article 12(3) of the 1998 Italy–Mozambique BIT, which reads as follows:

> Whenever, after the date when the investment has been made, a modification should take place in laws, regulations, acts or measures of economic policies governing directly or indirectly the investment, the same treatment shall apply upon request of the investor that was applicable to it at the moment when the investment was agreed upon to be carried out.

51 Gazzini, ‘Beware of Freezing Clauses’ (n 43) 1.
Thus, such a general stabilization clause operates with regard to a wide set of host State’s measures as it refers to ‘laws, regulations, acts or measures of economic policies governing directly or indirectly the investment’. Interestingly, Article XII.3 of the 2003 Italy model BIT is equally broad as it only refers to ‘legislation [ . . . ] regulating directly or indirectly the investment’.52

On the other hand, there exist more limited stabilization clauses in investment treaties that only purport to freeze the host State legislation with regard to certain specific rules. One example of such limited clauses is in connection with the rules on transfer of capital, profits and other payment related to the investment. In these cases, the specific stabilization clause purports to ensure that less favourable laws regulating the repatriation of capital that may be introduced after the investment is made do not apply to the covered investments. For example, Article 2 of the (now terminated) 1965 Belgium–Morocco BIT required each contracting party to authorize the transfer of net profits, interests, dividends and royalties ‘in conformity with the regulations promulgated in pursuance of the legislation in force in its territory at the time each investment is made or of any more favourable legislation that may be enacted in the future or of rules agreed upon between the two Parties’.53

The stabilization clause may be even narrower, as applying only to the balance of payments exception to the free transfer of capital obligation. For example, Article 6 of the 1982 UK–Paraguay BIT provides as follows:

Each Contracting Party shall in respect of investments guarantee to nationals or companies of the other Contracting Party the unrestricted transfer to the country where they reside of their investments and returns, subject to the right of each Contracting Party in exceptional balance of payments difficulties and for a limited period to exercise equitable and in good faith powers conferred by its laws existing when this Agreement enters into force.

In these cases, the relevant legislation (being frozen) is the one at the time of the entry into force of the treaty rather than at the time the specific investment is made.54

52 XII.3 of the 2003 Italy model BIT reads as follows: ‘After the date when the investment has been made, any substantial modification in the legislation of the Contracting party regulating directly or indirectly the investment shall not be applied retroactively and the investments made under this Agreement shall therefore be protected.’ This is the exact language used in the 2004 Italy–Nicaragua BIT (Article XII.3). See further Federico Ortino, ‘Italy’ in Chester Brown (ed) Commentaries on Selected Model Investment Treaties (OUP 2013) 321.

53 Similarly, Article 6.5 of the 1975 France–Morocco BIT (now terminated) read as follows:

Le régime juridique régissant ce transfert est celui qui est en vigueur au moment de l’agrément pour les transferts effectués pendant une période de dix ans à partir de la date de l’agrément de l’investissement. Toutefois l’investisseur pourra, sur sa demande, bénéficier du régime en vigueur au moment de la réalisation du transfert.

54 See similarly Article 6 of both the 1982 UK–Cameroon BIT and the 1981 UK–Lesotho BIT.
Investment treaties’ stabilization clauses may be bilateral or unilateral in the sense that they may apply reciprocally to both contracting parties, or with regard to the legislation of one contracting party only. For example, Article 4 of the 1974 France–Jugoslavia BIT provides that if new, less favourable legislation should be introduced, investments will continue to be governed by the law in force when they were admitted. However, the reference appears to have been made only to the ‘législation yougoslave’. Similarly, the Protocol to the 1996 Netherlands–Zimbabwe BIT specifies that with respect to the Republic of Zimbabwe, the payments falling under the obligation to guarantee the free transfer under Article 5 of the treaty ‘shall be subject to such conditions as to remittability […] as may have been agreed with the national and fixed in terms of the laws of the Republic of Zimbabwe at the time of admission of the investment’.

A few investment treaties qualify the scope of the stabilization obligation by specifying that the clause is triggered only in the case of ‘substantial’ modification. This appears to happen in the case of general stabilization clauses. For example, Article XII.3 of the 2004 Italy–Nicaragua BIT prohibits the retroactive application of ‘any substantial modification in the legislation of the Contracting party regulating directly or indirectly the investment’. In other words, the requirement that future modification be ‘substantial’ appears to limit an otherwise broad stabilization obligation (because applicable to a wide set of host States’ measures).

Whether the stabilization clause is general or limited, reciprocal or unilateral in scope, it should be noted that the stabilization clause’s main objective is to exclude the application of ‘prejudicial’ changes in the relevant regulatory framework of the host State to any protected investment. Stabilization clauses often provide this expressly, or condition the application of the clause to a request by the foreign investor. In the context of investment contracts, Professor Cameron has referred to this typical feature as the asymmetrical character of stabilization clauses: ‘[t]he investor is protected against adverse changes but if there are any changes made to the laws or regulations that may have beneficial effects, these are passed on to the investor’. This is in line with so-called ‘preservation of rights clauses’ often included

55 Article 4:

Les ressortissants français, personnes physiques ou morales, bénéficieront pour les investissements visés à l’article 1er de la présente Convention ainsi que pour l’exercice des activités professionnelles et économiques liées à ces investissements, du traitement le plus favorable accordé en la matière à des ressortissants de tout autre pays tiers par la législation yougoslave. Au cas où celle-ci serait modifiée dans un sens moins favorable, lesdits investissements resteront régis par les dispositions en vigueur à la date au ils ont été agréées.

For a similar provision, see 1975 Egypt–Greece BIT.


57 See eg Article 4 of the 1974 France–Jugoslavia BIT.

58 See eg Article 11.3 of the 1996 Italy–Jordan BIT or Article 6.5 of the 1975 France–Morocco BIT (now terminated).

in investment treaties, according to which protected investment will benefit from more favourable laws and regulation, that already exist or are introduced in the future.\(^{60}\)

Based on the various formulations shown above, one can easily imagine a few key interpretative questions that remain open with regard to the content and scope of investment treaties’ stabilization clauses. For example, what is the level of change in the regulatory framework necessary in order for the relevant ‘modification’ to take place? Does a change in the established practice with regard to the interpretation and application of a specific legislation (without any formal amendment) qualify as a ‘modification of the legislation regulating the investment’? When does a modification become ‘substantial’ for purposes of the investment treaty? Given the apparent absence of any decision examining an investment treaty’s stabilization clause, it may be difficult to tackle these questions in the abstract (although an examination of the decisions interpreting parallel clauses in investment contracts\(^{61}\) and in national legislation\(^{62}\) may constitute a good starting point). For purposes of the present study, it is important to emphasize that such clauses can be categorized as provisions guaranteeing regulatory stability in the strict sense, since their key function is to impose on the host State an obligation to avoid subjecting the protected investment to a prejudicial change in the regulatory framework of the host State. And crucially, as noted with regard to umbrella clauses, excluding general exception clauses in the underlying treaties (or circumstances precluding wrongfulness under customary law), investment treaties’ stabilization clauses do not require an investment tribunal to take into account the possible reasons that may have justified the host State’s conduct under review.

Brief mention should be made here to those treaty clauses that, while they may at first blush appear as stabilization clauses, upon closer examination are not (at least in a strict sense). The clearest example is Article 10(1) of the Energy Charter Treaty, which provides in relevant part, that ‘each contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable [. . .] conditions for investors of other Contracting Parties’. As stated by the tribunal in *AES v Hungary*, while the stable conditions in Article 10(1) relate to the framework within which the investment takes place, Article 10(1) ‘is not a stability clause’.\(^{63}\)

\(^{60}\) See Article 11.2 of the 1996 Italy–Jordan BIT, providing as follows: ‘Whenever the treatment accorded by one Contracting Party to the investors of the other Contracting Party according to its laws and regulations or other provisions or specific contract or investment authorizations or agreements, is more favourable than that provided under this Agreement, the most favourable treatment shall apply.’


\(^{63}\) *AES Summit Generation Limited and AES Tisza Erőmű Kft v The Republic of Hungary*, ICSID Case No ARB/07/22, Award, 23 September 2010, para 9.3.29 (‘A legal framework is by definition subject to change as it adapts to new circumstances day by day and a state has the sovereign right to exercise its powers which include legislative acts’). See section C.
C. Strict Stability through the Fair and Equitable Treatment (FET) Standard

The debate about legal stability in international investment treaties has principally focused on the FET standard.\(^{64}\) While investment treaties’ stabilization clauses are indeed a very rare breed, FET clauses are a common feature of modern international investment treaties. As noted in section A, UNCTAD recent mapping of more than 2500 investment treaties has shown that FET clauses are found in approximately 95% of such treaties.\(^{65}\) In the paradigmatic case of *Occidental v Ecuador I*, having stated that ‘[t]he stability of the legal and business framework is […] an essential element of fair and equitable treatment’, the tribunal found a breach of the FET as the tax framework under which the investment had been made and had been operating ‘has been changed in an important manner by the actions adopted by the [Ecuadorian tax authorities]’.\(^{66}\)

Legal stability has often been linked to the FET standard through the concept of the protection of the investor’s expectations. In one of the leading textbooks on international investment law, the authors identify the ‘stability and the protection of the investor’s legitimate expectations’ as one of the central principles of the FET standard emerging from the practice of investment tribunals.\(^{67}\) In this context, legal stability has been linked to a broad set of legal sources, including promises, representations, contractual undertakings, administrative decisions and legislative acts. Terms used have included legal framework, legal regime and legal environment.

This section’s primary aim is to inquire whether, and the extent to which, investment treaty tribunals have interpreted the FET standard as a guarantee of legal stability in the strict sense. The section puts forward two main arguments. First, despite a limited attempt by a few early investment tribunals to read a strict stability obligation as part of the FET provision (section 1), the majority of investment tribunals appear to have adopted a more nuanced approach by increasingly recognizing the need to safeguard the host State’s right to regulate in the public interest.

---

\(^{64}\) It should be noted that the full protection and security (FPS) provision appears to have also at times been interpreted as imposing a legal stability obligation in the strict sense by those tribunals that have extended the scope of FPS to include ‘legal’ security and protection. See eg *CME Czech Republic BV v Czech Republic*, Partial Award, 13 September 2001 (n 13) para 613:

> The host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor’s investment withdrawn or devalued. This is not the case. The Respondent therefore is in breach of this obligation.

See also *National Grid plc v Argentina*, UNCITRAL, Award, 3 November 2008, paras 187–89.

\(^{65}\) As of 20 May 2019, out of 2571 treaties mapped, the FET clause is not found in at least 131 treaties. See UNCTAD database, ‘IIA Mapping Project’ http://investmentpolicyhub.unctad.org accessed 20 May 2019.

\(^{66}\) *Occidental v Ecuador*, Final Award, 1 July 2004 (n 6) paras 183–84.

\(^{67}\) Dolzer and Schreuer, *Principles of International Investment Law* (n 8) 145.
(section 2). Second, despite investment tribunals’ apparently more deferential approach, one can still find (recent) arbitral decisions where the role of regulatory stability within the FET standard remains at best ambiguous, and which thus fail to assuage the fears that the FET standard may indeed function as imposing an obligation of regulatory stability in the strict sense (section 3).68

1. Linking FET and legal stability in the strict sense: the early attempt

There exists a line of arbitral decisions that in the early years of the twenty-first century (particularly between 2003 and 2006) appeared to read the FET standard to include a guarantee of legal stability in the strict sense. These tribunals relied principally on (a) statements in treaty preambles linking stability and FET; (ii) the need to protect investors’ expectations; and/or (iii) previous arbitral decisions. For example, the tribunal in Tecmed v Mexico notoriously stated in a 2003 decision that the FET provision requires the contracting parties to provide to international investments ‘treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment’, including the expectation that the host State acts ‘in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor’.69

In 2004, as noted above, the tribunal in Occidental v Ecuador I expressly stated that the stability of the legal and business framework is an essential element of fair and equitable treatment. The tribunal relied on the clear statement found in the preamble of the underlying treaty (the 1993 Ecuador–United States BIT) that FET ‘is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources’.70 One of the key questions at issue in Occidental I was whether the host State had breached the FET provision by modifying the right of certain exporters to claim a VAT refund. The tribunal explained its finding in the following terms:

The relevant question for international law in this discussion is not whether there is an obligation to refund VAT, which is the point on which the parties have argued most intensely, but rather whether the legal and business framework meets the

68 This section draws on and expands upon Federico Ortino, “The Obligation of Regulatory Stability in the Fair and Equitable Treatment Standard: How Far Have We Come?” (2018) 21 JIEL 845.
69 Técnicas Medioambientales Tecmed SA v The United Mexican States, ICSID Case No ARB (AFA)/00/2, Award, 29 May 2003, para 154. An even earlier tribunal in the context of finding a violation of FET in the context of Article 1105 of the North American Free Trade Agreement (NAFTA), referred to the host State’s failure ‘to ensure a transparent and predictable framework, as well as to the investor’s expectation that it would be treated fairly and justly’. Metalclad Corporation v The United Mexican States, ICSID Case No ARB(AF)/97/1, Award, 30 August 2000, para 99.
70 Occidental v Ecuador I, Final Award, 1 July 2004 (n 6) para 183.
requirements of stability and predictability under international law. It was earlier concluded that there is not a VAT refund obligation under international law, except in the specific case of the Andean Community law, which provides for the option of either compensation or refund, but there is certainly an obligation not to alter the legal and business environment in which the investment has been made. In this case it is the latter question that triggers a treatment that is not fair and equitable [emphasis added].

In 2005, the tribunal in CMS v Argentina similarly affirmed that 'a stable legal and business environment is an essential element of fair and equitable treatment'. The CMS tribunal also specifically relied for its interpretation of the FET provision on the preamble of the applicable investment treaty (the 1991 United States–Argentina BIT), where the contracting parties had expressed their agreement 'that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective use of economic resources'.

A few other decisions in 2006–07, relying on these precedents, followed this line of cases, affirming that the requirement of legal stability is a key element of fair and equitable treatment. In PSEG v Turkey, for example, the Tribunal found that the host State conduct had seriously breached the FET obligation in light of 'the “roller-coaster” effect of the continuing legislative changes'. In Sempra v

71 ibid, para 191.
72 CMS Gas Transmission Company v The Republic of Argentina, ICSID Case No ARB/01/8, Award, 12 May 2005, para 274. There is a very similar approach and language in LG&E Energy Corporation, LG&E Capital Corporation and LG&E International, Inc v Argentine Republic, ICSID Case No ARB/02/1, Decision on Liability, 3 October 2006, paras 124 and 131 ('Tribunal must conclude that stability of the legal and business framework is an essential element of fair and equitable treatment in this case'); Enron Corporation and Ponderosa Assets, LP v Argentine Republic, ICSID Case No ARB/01/3, Award, 22 May 2007, paras 259–60 ('the Tribunal concludes that a key element of fair and equitable treatment is the requirement of a “stable framework for the investment,” which has been prescribed by a number of decisions') and Sempra v The Argentine Republic, Award, 28 September 2007 (n 38) para 300 ('What counts is that in the end the stability of the law and the observance of legal obligations are assured, thereby safeguarding the very object and purpose of the protection sought by the treaty').
73 CMS v Argentina, Award, 12 May 2005 (n 72) para 274. This is true also for the LG&E v Argentina (n 72) and Enron v Argentina (n 72) decisions.
74 Enron v Argentina, Award, 22 May 2007 (n 72) paras 259–60 ('the Tribunal concludes that a key element of fair and equitable treatment is the requirement of a “stable framework for the investment,” which has been prescribed by a number of decisions'). There is very similar language in LG&E v Argentina, Decision on Liability, 3 October 2006 (n 72) paras 124 and 131 ('Tribunal must conclude that stability of the legal and business framework is an essential element of fair and equitable treatment in this case').
75 PSEG Global, Inc, The North American Coal Corporation, and Konya İngin Elektrik Üretim ve Ticaret Limited Şirketi v Republic of Turkey, ICSID Case No ARB/02/5, Award, 19 January 2007, para 250. The PSEG tribunal also emphasized the inconsistency of the host State's behaviour (ibid, paras 248–49):

Inconsistent administrative acts are also evident in this case in respect of some matters. On occasion the administration would ignore rights granted by law as a matter of policy or practice. [...] Similar was the situation in respect of the Constitutional Court decision upholding the rights acquired under a contract, which was simply ignored by MENR in its dealings with
Argentina, the tribunal captured the key issue as follows: ‘What counts is that in the end the stability of the law and the observance of legal obligations are assured, thereby safeguarding the very object and purpose of the protection sought by the treaty.’ The Sempra tribunal also discarded the relevance of any justifications for introducing such changes in the legal and business framework. Having found that the emergency legislation implemented by Argentina had, beyond any doubt, substantially changed the legal and business framework under which the investment was decided and implemented, the Sempra tribunal concluded that there had been an ‘objective breach’ of the FET provision, ‘even assuming that the Respondent was guided by the best intentions.’

These early decisions’ reasoning underlying a requirement of stability in the strict sense stemming from the FET provision appears at best underdeveloped. First of all, while the Tecmed decision appears to represent one of the first leading precedents underlying these early decisions establishing a stability obligation, that decision never mentions the concept of ‘stability’ or ‘stable legal framework’; rather, its emphasis is on ‘consistency’. In other words, the Tecmed tribunal does not appear to prohibit changes in the legal framework in force at the time the investment was made (akin to a stabilization or freezing clause), but rather it seems to impose a laxer requirement of harmonious, predictable or transparent behaviour on the part of the various components of the host State. Furthermore, the Tecmed tribunal defines a ‘consistent act’ as one ‘without arbitrarily revoking any pre-existing decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities.’

One may still criticize the Tecmed consistency standard as being excessive or aspirational, but the point worth making here is that it does not appear to impose a legal stability requirement in the strict sense, as several of the subsequent decisions relying on Tecmed actually did.

Second, despite the reference to the relatively well-known legal concept of ‘legitimate expectations’ in the arguments of the disputing parties, these early tribunals refrained from expressly referring to such concept and instead limited their reference to a broader notion of investors’ ‘expectations’. Also, these early tribunals adopted differing views with regard to the relationship between the investor’s expectations and the Claimants. Such inconsistent acts might be unlawful under Turkish law, but in light of the provisions of the Treaty they are also in breach of the standard of fair and equitable treatment.

76 Sempra v Argentina, Award, 28 September 2007 (n 38) para 300.
77 ibid, paras 303–04. See also Enron v Argentina, Award, 22 May 2007 (n 72) para 268.
78 Tecmed v Mexico (n 69) para 154.
79 ibid.
81 See eg Occidental v Ecuador I (n 6) para 181.
82 The tribunal in LG&E v Argentina does refer to the investor’s ‘fair expectations’ in one instance. See LG&E v Argentina, Decision on Liability, 3 October 2006 (n 72) para 130.
expectations and the stability requirement. Some tribunals appeared to include predictability, consistency or stability as some of the investor’s expectations that the treaty provision on FET was aimed to protect. As noted above, the Tecmed tribunal stated that FET requires ‘to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment’, including the expectation that the host State act ‘in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor’.83 Other tribunals seemed, instead, to distinguish the ‘legal stability’ component from the ‘protection of the investor’s expectations’ component of FET. The LG&E tribunal, for example, expressly noted that ‘in addition to the State’s obligation to provide a stable legal and business environment, the fair and equitable treatment analysis involves consideration of the investor’s expectations when making its investment in reliance on the protections to be granted by the host State’.84

Third, some of these early tribunals were not clear whether they conditioned the stability obligation to a certain high level of change and, even more fundamentally, whether they subjected the stability obligation to the existence of a specific commitment by the host State that such change would not occur. The decision in CMS v Argentina is the perfect example of this. Having determined that the emergency legislation ‘did in fact entirely transform and alter the legal and business environment under which the investment was decided and made’,85 the CMS tribunal stated as follows:

It is not a question of whether the legal framework might need to be frozen as it can always evolve and be adapted to changing circumstances, but neither is it a question of whether the framework can be dispensed with altogether when specific commitments to the contrary have been made.86

The italicized sentence is particularly important in terms of understanding what kind of obligation the CMS tribunal read in to the FET provision. On the one hand,

83 Tecmed v Mexico, Award, 29 May 2003 (n 69) para 154.
84 LG&E v Argentina, Decision on Liability, 3 October 2006 (n 72) para 127. The LG&E tribunal seems to contradict itself on this point (ibid, para 131):

Thus, this Tribunal, having considered, as previously stated, the sources of international law, understands that the fair and equitable standard consists of the host State’s consistent and transparent behavior, free of ambiguity that involves the obligation to grant and maintain a stable and predictable legal framework necessary to fulfill the justified expectations of the foreign investor.

85 CMS v Argentina (n 72) para 275.
86 ibid, para 277. The tribunal in Sempra v Argentina (n 38) also appeared to emphasize the magnitude of the change (‘The measures in question in this case have beyond any doubt substantially changed the legal and business framework under which the investment was decided and implemented’: ibid, para 303). See also the PSEG v Turkey tribunal, who did not merely referred to ‘legislative changes’ but a ‘roller-coaster’ behaviour on the part of the host State public authorities, specifically noting the ‘continuous change in the conditions governing the corporate status of the project’ and the ‘constant
Guarantees of Legal Stability in the Strict Sense

A reading of FET as imposing a strict stability obligation will entail a treaty violation if the host State introduces any (prejudicial and possibly substantial) changes to the legal framework applicable to the investment. On the other hand, conditioning a violation of the FET provision to a change in the legal framework that goes against a specific stabilization commitment (as hinted by the CMS tribunal in the above quoted sentence) would greatly narrow the scope of the strict stability obligation under the FET provision: in this latter sense, a breach of the FET provision would only occur when the host State violates a stabilization commitment given to the investor. In other words, in this narrower sense, the FET provision would have a function similar to that of an umbrella clause. However, aside from the ambiguity, the nature of the norm stemming from either of the two possible interpretations remains the same, as in both cases the FET provision would require the host State either to conform to the (broad) legal framework or only to the (specific) stabilization commitment.

Aside from the lack of clarity and elaboration with regard to its precise origin and scope, it is submitted that there was enough in these early decisions to justify the argument (or fear) that the FET provision can actually embody an obligation of legal stability in the strict sense. Crucially, such an obligation would be principally aimed at protecting foreign investors from (substantial) changes in the legal framework of the host State applicable at the time the investment was made and notwithstanding any possible valid justification that the host State may have had to introduce such changes. In a study published in 2012, UNCTAD concluded that some investment tribunals ‘have gone so far as to suggest that any adverse change in the business or legal framework of the host country may give rise to a breach of the FET standard in that the investors’ legitimate expectations of predictability and stability are thereby undermined’.

Unsurprisingly, this line of decisions interpreting the FET provision as including a legal stability obligation has not gone without notice. Sornarajah noted that ‘[t]he breadth of the rule in some awards is staggering and could not have been agreed to by the states concluding the treaties’. Even more broadly, this line of decisions has contributed to some of the criticism vis-à-vis the very concept of the protection of legitimate expectations. Particularly in regard to the first few awards interpreting the FET provision, Potestà noted ‘an almost complete lack of analysis as to the reasons for including the protection of legitimate expectations as a sub-element, or indeed the “dominant” sub-element, of fair and equitable treatment’.

Another commentator has more strongly argued that the investment tribunals’ interpretation of FET to include the protection of investors’ legitimate expectations is ‘an invention’, as it requires far too high a standard of State conduct ‘so far beyond what simple good governance would require’.\(^90\)

2. The majority of investment tribunals have rejected the link between FET and stability in the strict sense

The handful of decisions that, in the infancy of investment treaty arbitration, appeared to read the FET provision to include an obligation of regulatory stability in the strict sense remain limited in number\(^91\) and have been overtaken by a subsequent, large arbitral practice denying the existence of such strict regulatory stability obligation as part of the FET provision.

The initial blow to such an attempt hinged on the rejection of the view that the FET standard protects the investor’s general expectation of stability. The tribunal in *Saluka v Czech Republic* was one of the first investment tribunals to politely but firmly reject reading the FET provision as imposing a legal stability obligation.\(^92\) In the view of the *Saluka* tribunal, an interpretation of the FET provision requiring the protection of too large a set of investor’s expectations (including the expectation of legal stability) would be ‘inappropriate and unrealistic’. In the view of the *Saluka* tribunal, in order to be protected, the investor’s expectations ‘must rise to the level of legitimacy and reasonableness in light of the circumstances’.\(^93\) Noting that no investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged, the *Saluka* tribunal specified that, ‘the host State’s legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well’.\(^94\)

In 2007, the Annulment committee in *MTD v Chile* referred to the *Tecmed* tribunal’s apparent reliance on the foreign investor’s unqualified expectations as the source of the host State’s obligations as ‘questionable’.\(^95\) In other words, investors’


\(^91\) In one sense, this group of decisions was possibly also limited in authorship, as most of them were rendered by tribunals chaired by Professor Orrego Vicuna (*Occidental v Ecuador I* (n 6), CMS v Argentina (n 72), *Enron v Argentina* (n 72) and *Sempra v Argentina* (n 38)).

\(^92\) *Saluka v Czech Republic*, Partial Award, 2006 (n 9) para 302.

\(^93\) ibid, para 304.

\(^94\) ibid, para 305.

\(^95\) *MTD v Chile*, Decision on Annulment, 21 March 2007, at 67: The obligations of the host State towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have. A tribunal which sought to generate from such expectations a set of rights different from those contained in or enforceable under the BIT might well exceed its powers, and if the difference were material might do so manifestly.
expectations *sic et simpliciter* cannot create legal obligations (including strict stability obligations) unless the protection stems from a treaty provision or general international law.

Furthermore, in 2008, the *Continental* tribunal was the first to oppose reading the FET provision as imposing an obligation of stability in the strict sense in the context of the same US–Argentina treaty that links, in its preamble, FET with the stability of the legal framework. The *Continental* tribunal noted that such reference in the preamble does not constitute a legal obligation in itself, nor can it be properly defined as an object of the treaty. In the view of the tribunal, while stability of the legal framework is undoubtedly conducive to attracting foreign investments, ‘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’.

There are plenty of statements in subsequent arbitral decisions rejecting an interpretation of the FET provision that includes a broad legal stability obligation and affirming the host State’s prerogative to modify its laws and regulations. For example, in the context of determining a claim based on the FET provision, the tribunal in *Parkerings v Lithuania* stated as follows:

> It is each State’s undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a stabilisation clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its

---

96 *Continental Casualty Company v The Argentine Republic*, ICSID Case No ARB/03/9, Award, 5 September 2008, para 258 (‘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.’) See more recently, *RREEF Infrastructure (GP) Limited and RREEF Pan-European Infrastructure Two Lux Sàrl v Kingdom of Spain*, ICSID Case No ARB/13/30, Decision on Responsibility and Principles of Quantum, 30 November 2018, para 244:

> Moreover, as firmly established in the case-law, an international obligation imposing on the State to waive or decline to exercise its regulatory power cannot be presumed […]. The regulatory power is essential to the achievement of the goals of the State, so to renounce to exercise it is an extraordinary act that must emerge from an unequivocal commitment; more so when it faces a serious crisis.

97 Several scholars agree: Moshe Hirsch, ‘Between Fair and Equitable Treatment and Stabilization Clause: Stable Legal Environment and Regulatory Change in International Investment Law’ (2011) 12 JWIT 783, 806 (‘In the absence of stabilization clauses, investment tribunals are not inclined to interpret FET clauses as effectively equivalent to stabilization clauses, and regulatory changes alone are insufficient in binding the host states to compensate foreign investors harmed by such changes’); Ursula Kriebaum, ‘FET and Expropriation in the (Invisible) EU Model BIT’ (2014) 15 JWIT 173:

> In recent years, tribunals have moved towards a more reserved approach concerning the stability limb of fair and equitable treatment and have moved to a more cautious approach concerning the FET standard and the right to regulate. In other words, they have stressed the need for States to maintain a regulatory space.

As a matter of fact, any businessman or investor knows that laws will evolve over time.\textsuperscript{98}

In a similar vein, the tribunal in \textit{EDF v Romania} stated that the investor ‘may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State’s legal and economic framework’.\textsuperscript{99} Similarly, the tribunal in \textit{Total v Argentina} stated that the parties to an investment treaty:

\begin{quote}
do not thereby relinquish their regulatory powers nor limit their responsibility to amend their 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.\textsuperscript{100}
\end{quote}

Even in the context of Article 10(1) of the Energy Charter Treaty (ECT), which links the FET provision with the obligation to ‘encourage and create stable, equitable, favourable and transparent conditions’ for foreign investors, the tribunal in \textit{AES v Hungary} excluded the existence of a legal stability obligation.\textsuperscript{101}

It is true that many of the tribunals that have expressly excluded a general legal stability obligation stemming out of the FET provision have also expressly recognized the possibility that a legal stability obligation may exist based on a specific stabilization commitment undertaken by the host State. To cite one example, the tribunal in \textit{Total v Argentina} stated as follows:

\begin{quote}
In the absence of some ‘promise’ by the host State or a specific provision in the bilateral investment treaty itself, the legal regime in force in the host country at the time of making the investment is not automatically subject to a “guarantee”
\end{quote}

\textsuperscript{98} \textit{Parkerings-Compagniet AS v Republic of Lithuania}, ICSID Case No ARB/05/8, Award, 11 September 2007, para 332 [emphasis original]. The tribunal crucially added that the FET provision did, however, prohibit ‘for a State to act unfairly, unreasonably or inequitably in the exercise of its legislative power’.

\textsuperscript{99} \textit{EDF (Services) Limited v Romania}, ICSID Case No ARB/05/13, Award, 8 October 2009, para 217.

\textsuperscript{100} \textit{Total SA v The Argentine Republic}, ICSID Case No ARB/04/01, Decision on Liability, 27 December 2010, para 115. See further Hirsch, ‘Between Fair and Equitable Treatment and Stabilization Clause’ (n 98) 793–9.

\textsuperscript{101} \textit{AES v Hungary}, Award, 23 September 2010 (n 63) para 9.3.29:

\begin{quote}
The stable conditions that the ECT mentions relate to the framework within which the investment takes place. Nevertheless, it is not a stability clause. A legal framework is by definition subject to change as it adapts to new circumstances day by day and a state has the sovereign right to exercise its powers which include legislative acts.
\end{quote}
of stability merely because the host country entered into a bilateral investment
treaty with the country of the foreign investor.\textsuperscript{102}

This statement reminds us of the statement made by the tribunal in CMS \textit{v}
Argentina, quoted in section 1, apparently conditioning the legal stability obli-
gation under FET to the existence of a specific stabilization commitment. Could one
argue that both decisions similarly stand for an interpretation of the FET provision
that merely requires a host State to comply with its specific stabilization commit-
ments? ‘Not necessarily’ is the answer. There is a crucial difference between the
ey early decisions such as CMS \textit{v} Argentina analysed in section 1 and the decisions
such as the one in Total \textit{v} Argentina examined above. Even assuming the narrower
reading of the CMS decision (according to which a breach of the FET provision
will only occur when the host State violates a stabilization commitment given to
the investor), such a decision appears to be premised fundamentally on the CMS
tribunal’s express recognition that a stable legal and business environment is an
essential requirement of FET. On the other hand, the decision in Total (similarly
allowing the FET provision to guarantee a specific stabilization commitment
undertaken by the host State) rejects the premise based on the stability of the legal
regime in force at the time of making the investment. The Total decision is instead
grounded on the legitimacy or reasonableness of the investor’s expectation that
such stabilization commitment would be respected. After the sentence quoted
above, the Total tribunal continues as follows:

The expectation of the investor is undoubtedly ‘legitimate,’ and hence subject
to protection under the fair and equitable treatment clause, if the host State has
explicitly assumed a specific legal obligation for the future, such as by contracts,
concessions or stabilisation clauses on which the investor is therefore entitled to
rely as a matter of law.\textsuperscript{103}

The bulk of the arbitral practice (following from the Saluka decision) shows that
the starting point of the analysis with regard to the investor’s \textit{claim} of (strict)
legal stability under the FET provision is the doctrine of legitimate expectations
rather than a broad legal stability obligation vaguely linked to investors’ expect-
ations.\textsuperscript{104} Accordingly, while there is little doubt that, according to arbitral practice,

\textsuperscript{102} Total \textit{v} Argentina, Decision on Liability, 27 December 2010 (n 101) para 117. See also Parkerings \textit{v}
Lithuania (n 99) para 332 and Paushok \textit{v} Mongolia, Award on Jurisdiction and Liability, 28 April 2011, para 305.

\textsuperscript{103} Total \textit{v} Argentina, Decision on Liability, 27 December 2010 (n 101), para 117. See also Parkerings \textit{v}
Lithuania (n 99), para 332 (‘As a matter of fact, any business or investor knows that laws will evolve over
time. What is prohibited however is for a State to act unfairly, unreasonably or inequitably in the exercise
of its legislative power.’).

\textsuperscript{104} See Simon Maynard, ‘Legitimate Expectations and the Interpretation of the “Legal Stability
the protection of investors’ legitimate expectations constitutes a key requirement under FET, this requirement does not in itself entail a guarantee of stability in the strict sense, as investors’ expectations are protected only if legitimate and reasonable under the circumstances. Specifically, one of the factors often referred to by investment tribunals in order to determine the legitimacy of the investor’s expectation (of legal stability) is the existence of a specific promise or representation of stability given by the host State and relied upon by the investor. For example, as stated by the tribunal in *EDF v Romania*:

> except where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State’s legal and economic framework. Such expectation would be neither legitimate nor reasonable.

Similarly, the tribunal in *Total v Argentina* stated as follows:

> In the absence of some ‘promise’ by the host State or a specific provision in the bilateral investment treaty itself, the legal regime in force in the host country at the time of making the investment is not automatically subject to a ‘guarantee’ of stability merely because the host country entered into a bilateral investment treaty with the country of the foreign investor. The expectation of the investor is undoubtedly ‘legitimate’, and hence subject to protection under the fair and equitable treatment clause, if the host State has explicitly assumed a specific legal obligation for the future, such as by contracts, concessions or stabilisation clauses on which the investor is therefore entitled to rely as a matter of law.

In other words, according to this arbitral practice, the investor’s expectation that the general legal framework at the time the investment is made will not be subject to change (detrimental to its investment) does not deserve treaty protection under the FET provision *at least unless* specific promises or representations of stability have been made by the host State.

---


106 *EDF v Romania*, Award, 8 October 2009 (n 100) para 217.

107 *Total v Argentina*, Decision on Liability, 27 December 2010 (n 101) para 117.

108 See also *Parkerings v Lithuania* (n 99) para 332 (‘Save for the existence of an agreement, in the form of a stabilization clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment’); *Paushok v Mongolia*, Award on Jurisdiction and Liability, 28 April 2011 (n 103) para 305 (‘An investor, without an agreement which limits or prohibits the possibility of tax increases, should not be surprised to be hit with tax increases in subsequent years and such an event could not be considered as “unpredictable”’).
A second factor often referred to by investment tribunals in evaluating the legitimacy of investors’ expectations worthy of protection under FET is whether the adverse regulatory change under review is in itself ‘reasonable’ or reasonably related to a legitimate public policy. For example, the tribunal in Impregilo v Argentina, whose eminent members disagreed on several key issues, agreed on the following:

The term ‘fair and equitable treatment’, as it appears in the present BIT and in other similar BITs, is intended to give adequate protection to the investor’s legitimate expectations. [...] The legitimate expectations of the investors [...] have to be evaluated considering all circumstances. In the Tribunal’s understanding, fair and equitable treatment cannot be designed to ensure the immutability of the legal order, the economic world and the social universe and play the role assumed by stabilization clauses specifically granted to foreign investors with whom the State has signed investment agreements. [...] The legitimate expectations of foreign investors cannot be that the State will never modify the legal framework, especially in times of crisis, but certainly investors must be protected from unreasonable modifications of that legal framework.109

The legal issue identified by the Impregilo tribunal was not whether the host State had (substantially) modified the legal framework to the detriment of the foreign investment (as a strict stability obligation would have required); rather, the tribunal focused on whether that modification was indeed reasonable in light of the various circumstances and interests at issue.110 Similar position was expressed by the tribunal in Parkerings v Lithuania as follows:

It is each State’s undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a stabilisation clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment. As a matter of fact, any businessman or investor knows that laws will evolve over time. What is prohibited however is for a State to act unfairly, unreasonably or inequitably in the exercise of its legislative power.111

110 See Maynard, ‘Legitimate Expectations’ (n 105) 99, 113–14 for the suggestion to apply a reasonableness test to the legal stability obligation.
111 Parkerings v Lithuania (n 99) para 332. See Ioan Micula, Viorel Micula, S European Food SA, S Starmill SRL and SC Multipack SRL v Romania, ICSID Case No ARB/05/20, Final Award, 11 December 2013, para 529: The BIT’s protection of the stability of the legal and business environment cannot be interpreted as the equivalent of a stabilization clause. In the Tribunal’s view, the correct position is that the state may always change its legislation, being aware and thus taking into
Lastly, other tribunals have subjected the protection of the investor’s legitimate expectations to a balancing act that takes into account, next to investors’ legitimate or reasonable expectations, the host State’s right to regulate, too. For example, the tribunal in *Perenco v Ecuador* noted the following:

Many cases hold that a central aspect of the analysis of an alleged breach of the fair and equitable treatment standard is the investor’s reasonable expectations as to the future treatment of its investment by the host State. [...] The search is for a balanced approach between the investor’s reasonable expectations and the exercise of the host State’s regulatory and other powers.112

Based on these various pronouncements, it can be argued that, despite those few early decisions that appeared to easily embrace a strict stability obligation, subsequent arbitral practice has shown more deference vis-à-vis the host State’s right to regulate, and supported a softer understanding of a stability obligation under FET. In particular, the focus on (a) the existence of a stabilization commitment or promise; (b) the reasonableness of the host State measure; and/or (c) the need to balance the investor’s expectations and the host State’s right to regulate represents strong evidence of this softer notion of stability. Under this softer notion, a treaty consideration that: (i) an investor’s legitimate expectations must be protected; (ii) the state’s conduct must be substantively proper (e.g., not arbitrary or discriminatory); and (iii) the state’s conduct must be procedurally proper (e.g., in compliance with due process and fair administration).

More recently, see *Charanne and Construction Investments v Spain*, SCC Case No V 062/2012, Award, 21 January 2016, paras 510 and 513:

[... ] under international law [... ] in the absence of a specific commitment toward stability, an investor cannot have a legitimate expectation that a regulatory framework such as that at issue in this arbitration is to not be modified at any time to adapt to the needs of the market and to the public interest. [... ] an investor has a legitimate expectation that, when modifying the existing regulation based on which the investment was made, the State will not act unreasonably, disproportionately or contrary to the public interest.112

112 *Perenco Ecuador Limited v The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No ARB/08/6, Decision on Remaining Issues of Jurisdiction and Liability, 12 September 2014, para 560. See *Joseph Charles Lemire v Ukraine*, ICSID Case No ARB/06/18, Decision on Jurisdiction and Liability, 10 January 2010, paras 284–85:

The evaluation of the State’s action cannot be performed in the abstract and only with a view of protecting the investor’s rights. The Tribunal must also balance other legally relevant interests, and take into consideration a number of countervailing factors, before it can establish that a violation of the FET standard, which merits compensation, has actually occurred: (a) the State’s sovereign right to pass legislation and to adopt decisions for the protection of its public interests, especially if they do not provoke a disproportionate impact on foreign investors; (b) the legitimate expectations of the investor, at the time he made his investment [... ].

See also *El Paso v Argentina*, Award, 31 October 2011 (n 48) para 358 (‘In other words, a balance should be established between the legitimate expectation of the foreign investor to make a fair return on its investment and the right of the host State to regulate its economy in the public interest.’). See further Jonathan Bonnitcha, *Substantive Protection under Investment Treaties* (CUP 2014) 175–90.
violation would be established not because of a (substantial) detrimental change in the host State’s legal framework applicable to the foreign investment, but because the legal change was judged ‘unreasonable’. While such a reasonableness test may take different forms (including procedural fairness, substantive rationality or proportionality balancing), the distinctive feature of this softer understanding of FET and the obligation of stability is that the analysis will include an examination of the merit of the regulatory change.

I will reserve a more detailed examination of the features of this reasonableness-based requirement for chapter III. It suffices here to emphasize that, while the legal environment (including contractual obligations, informal representations or regulatory frameworks) at the time the investment is made will be a relevant factor to be considered by the tribunal in order to establish the host State’s liability based on FET, such legal environment will only represent one of the relevant factors in the broader balancing exercise to be carried out by the arbitral tribunal. Crucially, among the various other considerations within such balancing, one also finds ‘the State’s sovereign right to pass legislation and to adopt decisions for the protection of its public interests, especially if they do not provoke a disproportionate impact on foreign investors’.

Finally, it may be useful to highlight the difference between an umbrella clause and a softer understanding of stability under FET. As noted in section 1, a stabilization commitment undertaken by the host State vis-à-vis a specific investment

---

113 See RREEF Infrastructure (GP) Limited and RREEF Pan-European Infrastructure Two Lux Sàrl v Kingdom of Spain, Decision on Responsibility and Principles of Quantum, 30 November 2018 (n 97) para 263 (‘the Tribunal considers that [ … ] the main criterion to be applied for the interpretation of the FET standard is that of reasonableness’).

114 See Valentina Vadi, Proportionality, Reasonableness and Standards of Review in International Investment Law and Arbitration (Edward Elgar 2018).

115 See chapter III showing how investment tribunals have interpreted several treaty provisions, like the FET standard, as reasonableness-based provisions.


117 Lemire v Ukraine, Decision on Jurisdiction and Liability, 10 January 2010 (n 113) paras 284–85. Similarly, Perenco Ecuador Limited v The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador), Decision on Remaining Issues of Jurisdiction and Liability, 12 September 2014 (n 113) para 560:

Many cases hold that a central aspect of the analysis of an alleged breach of the fair and equitable treatment standard is the investor’s reasonable expectations as to the future treatment of its investment by the host State. [ … ] The search is for a balanced approach between the investor’s reasonable expectations and the exercise of the host State’s regulatory and other powers.

See also Micula v Romania, Final Award, 11 December 2013 (n 112) para 529:

The BIT’s protection of the stability of the legal and business environment cannot be interpreted as the equivalent of a stabilization clause. In the Tribunal’s view, the correct position is that the state may always change its legislation, being aware and thus taking into consideration that: (i) an investor’s legitimate expectations must be protected; (ii) the state’s conduct must be substantively proper (e.g., not arbitrary or discriminatory); and (iii) the state’s conduct must be procedurally proper (e.g., in compliance with due process and fair administration).

See further Bonnitcha, Substantive Protection (n 113) 175–90.
in a contract is likely to find protection as such through the guarantee of contractual stability in the strict sense embedded in the umbrella clause. However, that same stabilization commitment will be protected by the FET provision (understood to include a soft stability obligation) only within the strictures of the doctrine of legitimate expectations, which would include the need to take into account the host State’s legitimate exercise of regulatory authority. Accordingly, based on the circumstances of the case at issue, the same stabilization commitment may be protected by the umbrella clause but not by the FET provision (if the latter is understood to include a soft stability obligation).

Similarly, the difference between an investment treaty’s stabilization clause and a softer understanding of a stability obligation under FET is that, in determining a breach of the FET standard following a (substantial) regulatory change in the host State, only the latter will involve consideration of the host State’s right to regulate in the public interest.

3. FET, regulatory change and recent arbitral practice: still in muddy waters

Having reached the conclusion that, despite the few early outliers, most subsequent investment tribunals seem to have embraced a softer, more deferential reading of the FET provision that would exclude a strict stability obligation, this section zooms in on a few recent decisions to determine whether such softer reading has indeed consolidated. Unfortunately, such an examination reveals how several investment tribunals still fail to clearly set out the role of regulatory stability within the FET standard. In particular, they fail (a) to take a clear position on whether or not FET includes a requirement of regulatory stability in the strict sense; (b) to address the precise ambit of, and relationship between, the obligation to provide a stable legal framework and the obligation to protect the investor’s legitimate expectations; and (c) to clarify the kind of regulatory change that would qualify for a breach of the FET provision.

(a) Some tribunals’ failure to take a clear position on whether or not FET includes a strict stability obligation

In their claims brought against host States, investors still regularly argue for a broad reading of the FET provision that includes an obligation of regulatory stability in the strict sense. More recently, however, investors often put forward two separate grounds in order to claim a breach of the FET provision because of a regulatory change: (a) the host State has violated the obligation to protect investors’ legitimate expectations; and (b) the host State has violated the obligation to provide a stable legal framework.
expectations (including the expectation that the regulatory framework would not change during the life of the investment); and (b) the host State has violated the obligation to provide a stable regulatory framework.

For example, in *Philip Morris v Uruguay*, a case involving various legislative measures aimed at restricting the use of brands on cigarette packages, claimants argued, first, that investors’ legitimate expectations may rise inter alia from ‘general statements, the legal framework, legislation’ and that ‘specific, explicit promises to an investor [. . .] are not necessary’.119 Second, while they accepted that ‘it is a State’s prerogative to exercise its regulatory and legislative powers’, claimants argued that those powers ‘must not be “outside of the acceptable margin of change”’.120

In their pleadings, investors usually refer to any of the early decisions that, as examined in section 1, contained language that appeared to support a broad reading of the FET provision.121 For example, in *Antaris v The Czech Republic*, a case involving a policy change in the level of government incentive regime in the photovoltaic industry, claimants referred inter alia to *Tecmed, CMS, Occidental I*, and *Enron* to support the proposition that ‘the requirements of protection of the investors’ basic expectations as to stability are essential elements of the FET standard [and] a host State’s policy change may lead to a violation of the FET standard’.122

While it is unsurprising that claimants argue for a broad reading of FET and base their arguments on the most supportive precedents, it is nonetheless disappointing that some arbitral tribunals do not take a clearer stance (one way or the other) with regard to the extent to which the FET provision disciplines regulatory change. The tribunals’ decisions in *Philip Morris v Uruguay* and *Antaris v The Czech Republic* are good examples of this.

As noted above, the *Philip Morris v Uruguay* tribunal was confronted with the investor’s claim that various legislative measures introduced by Uruguay restricting the use of brands on cigarette packages violated the FET provision in the Switzerland–Uruguay BIT principally because (a) the measures were arbitrary; (b) they frustrated the investor’s legitimate expectations; and (c) they failed to provide a stable and predictable legal system. Having decided to consider the latter two grounds ‘in the same context due to their interrelation’,123 the *Philip Morris v Uruguay* tribunal stated as follows:

422. It is common ground in the decisions of more recent investment tribunals that the requirements of legitimate expectations and legal stability as manifestations

---

119 *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7, Award, 8 July 2016, para 342.
120 Ibid, para 346 referring to *El Paso v Argentina*, Award, 31 October 2011 (n 48).
121 Claimants in *Philip Morris v Uruguay* refer to *Tecmed v The United Mexican States* (n 69) and *Occidental v Ecuador I* (n 6), see Award, 8 July 2016 (n 120) paras 340 and 346.
122 *Antaris Solar GmbH and Dr Michael Göde v Czech Republic*, PCA Case No 2014-01, Award, 2 May 2018, para 266.
123 *Philip Morris v Uruguay*, Award, 8 July 2016 (n 120) para 421.
of the FET standard do not affect the State's rights to exercise its sovereign authority to legislate and to adapt its legal system to changing circumstances.

423. On this basis, changes to general legislation (at least in the absence of a stabilization clause) are not prevented by the fair and equitable treatment standard if they do not exceed the exercise of the host State's normal regulatory power in the pursuance of a public interest and do not modify the regulatory framework relied upon by the investor at the time of its investment 'outside of the acceptable margin of change.'

While these statements do reflect the greater sensitivity shown by investment tribunals vis-à-vis the host State's right to regulate, one can still find language there that may be perceived as supporting a rather strict obligation of regulatory stability. Particularly, both the tribunal's express reference to a 'requirement of legal stability' (which is in addition to the requirement of legitimate expectations and non-arbitrariness) and its express recognition that a modification of the regulatory framework 'outside of the acceptable margin of change' is indeed prohibited by the FET provision fail to completely clarify whether or not FET includes an obligation of regulatory stability in the strict sense.

The uncertainty in reading the Philip Morris v Uruguay award remains, and in fact it is carried over to the tribunal's ultimate findings with regard to the investor's actual claims. In rejecting Philip Morris's FET claim, a majority of the Philip Morris v Uruguay tribunal concluded as follows:

by adopting the Challenged Measures the Respondent has not breached Article 3(2) of the BIT regarding 'legitimate expectations' and the 'stability of the legal framework,' considering that the Claimants had no legitimate expectations that such or similar measures would not be adopted and further considering that their effect had not been such as to modify the stability of the Uruguayan legal framework.

By distinguishing between the legitimate expectation claim and the legal stability claim, and basing its rejection of the latter claim on the finding that the effect of the measures under review had not been to modify the stability of the host State's legal framework, one can still advance the argument that the majority of the tribunal appears to accept a reading of the FET provision as a guarantee of regulatory stability in the strict sense.

124 ibid, paras 422–23.
125 ibid, para 434; in the tribunal’s view, ‘the new regulations [have not] modified the legal framework for foreign investments beyond an “acceptable margin of change,” as also alleged by the Claimants, considering the limited impact on Abal’s business, as found by the analysis of the alleged expropriation of their investment;’ ibid, para 433.
126 Another recent example of such (possible) implicit recognition may be found in Eli Lilly and Company v The Government of Canada, UNCITRAL, ICSID Case No UNCT/14/2, Final Award, 16
In the second example, the tribunal in *Antaris v The Czech Republic* was confronted with the claim that the host State's modification of its incentive regime in the photovoltaic sector had violated the FET provision in the ECT and the Germany–Czech Republic BIT because the policy change violated the obligation (a) to provide a stable and predictable legal framework; (b) to protect an investor's legitimate expectations; and (c) not to impair the investment through arbitrary and unreasonable behaviour.\(^{127}\)

The *Antaris* tribunal's analysis begins with the recognition of the existence of a vast arbitral practice (which the disputing parties had referred to) interpreting and applying the FET standard. The tribunal then puts forward thirteen 'general propositions' stemming from such practice, which include the following:

1. There will be a breach of the FET standard where legal and business stability or the legal framework has been altered in such a way as to frustrate legitimate and reasonable expectations or guarantees of stability.

2. A claimant must establish that (a) clear and explicit (or implicit) representations were made by or attributable to the state in order to induce the investment [...]

3. An expectation may arise from what are construed as specific guarantees in legislation.

4. A specific representation may make a difference to the assessment of the investor's knowledge and of the reasonableness and legitimacy of its expectation, but is not indispensable to establish a claim based on legitimate expectation which is advanced under the FET standard.

5. Provisions of general legislation applicable to a plurality of persons or a category of persons, do not create legitimate expectations that there will be no change in the law; and given the State's regulatory powers, in order to rely on legitimate expectations the investor should inquire in advance regarding the prospects of a change in the regulatory framework in light of the then prevailing or reasonably to be expected changes in the economic and social conditions of the host State.

6. An expectation may be engendered by changes to general legislation, but, at least in the absence of a stabilization clause, they are not prevented by the fair and equitable treatment standard if they do not exceed the exercise of the

---

\(^{127}\) *Antaris v Czech Republic*, Award, 2 May 2018 (n 123) paras 262–64.
host State's normal regulatory power in the pursuance of a public interest and do not modify the regulatory framework relied upon by the investor at the time of its investment outside the acceptable margin of change. (8) The requirements of legitimate expectations and legal stability as manifestations of the FET standard do not affect the State's rights to exercise its sovereign authority to legislate and to adapt its legal system to changing circumstances. […]

While the Antaris tribunal does acknowledge that several of these propositions ‘overlap with each other’ and that its decision to ultimately reject the investors’ FET claims ‘is not based on all of those propositions’, the tribunal fails to recognize the (at least potential) inconsistency of several of those propositions. Apparently more anxious to show a high level of harmony or consistency in the way investment tribunals have so far interpreted the FET provision,128 the Antaris tribunal fails to clarify the extent to which the FET provision disciplines regulatory change. In particular, the tribunal fails to take a clear position on whether, and the extent to which, FET includes an obligation of regulatory stability in the strict sense.

(b) Some tribunals’ failure to clearly address the precise ambit of, and relationship between, the obligation to provide a stable legal framework and the obligation to protect the investor’s legitimate expectations

It is common (and again unsurprisingly so) that in claiming violation of the FET provision, investors separate between the stability requirement and the obligation to protect investors’ legitimate expectations. As noted in section (a), the investors in both the Philip Morris and Antaris disputes claimed a violation of the FET provision arguing, inter alia, that the regulatory change violated (a) the obligation to provide a stable legal framework; and (b) the obligation to protect the investor’s legitimate expectations.129

Despite the investors’ separate claims, the tribunals in Philip Morris and Antaris completely failed to elaborate the relationship, if any, between the two allegedly distinct grounds. As noted in section (a), the Philip Morris tribunal decided to consider the two arguments in the same context due to their interrelation.130 Having laid out several propositions with regard to the FET standard, the Antaris tribunal believed it unnecessary to decide ‘the precise ambit of, and the relationship

128 The dissenting arbitrator seems to highlight the inconsistency of the tribunal’s decision. Antaris v Czech Republic, PCA Case No 2014-01, Dissenting Opinion, 2 May 2018.
129 This happens often independently of whether or not the applicable treaty provides a different textual basis for the two grounds. In Antaris v Czech Republic, Dissenting Opinion, 2 May 2018 (ibid), for example, while both the ECT and Germany–Czech Republic BIT were applicable, the existence of distinct language in the former referring to the obligation to ‘create stable conditions for investors’ does not seem to have justified a different approach with regard to the issue of how FET disciplines regulatory change.
130 Philip Morris v Uruguay (n 120) para 421.
between, [those] propositions. One can legitimately argue that neither tribunal really believed that there is substantially any difference between the two allegedly distinct grounds.

A similar situation may be found in Blusun et al v Italy, another recent dispute involving the photovoltaic sector, where the investor put forward two distinct grounds of violation, one based on legal stability and one on the doctrine of legitimate expectations. Interestingly, the claims in Blusun et al v Italy were based exclusively on the ECT. Article 10(1) ECT is quite unique as, in addition to providing the various traditional investment protection standards (including FET and the umbrella clause), it has an introductory reference to ‘stable conditions’. Accordingly, Article 10(1) provides that ‘[e]ach Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties’ (first sentence) and ‘[s]uch conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment’ (second sentence). The claimants thus relied separately on Article 10(1), first sentence, with regard to the ‘legal stability’ claim and on Article 10(1), second sentence, with regard to the ‘fair and equitable treatment’ claim, with particular emphasis on the doctrine of legitimate expectations.

While the Blusun tribunal does appear to have at least attempted to elaborate the relationship between stability and investors’ legitimate expectations, the result is nonetheless unsatisfactorily unclear. The Blusun tribunal notes, first of all, that (a) all sentences in Article 10(1) embody commitments and neither is merely preambular or hortatory; and (b) the core commitment in Article 10(1) is the FET standard under customary international law and as applied by tribunals.

Second, and before examining in turn ‘the legal instability claim’ and the ‘breach of the FET standard under Article 10(1) ECT (legitimate expectations)’, the tribunal puts forward the following key conclusion:

In the absence of a specific commitment, the state has no obligation to grant subsidies such as feed-in tariffs, or to maintain them unchanged once granted. But if they are lawfully granted, and if it becomes necessary to modify them, this should be done in a manner which is not disproportionate to the aim of the legislative amendment, and should have due regard to the reasonable reliance interests of recipients who may have committed substantial resources on the basis of the earlier regime.

---

131 Antaris v Czech Republic (n 123) para 363.
132 Interestingly, the claimant in Philip Morris v Uruguay (n 120) had equally advanced the two-prong claim (stability and legitimate expectations) but as part of the ‘traditional’ FET standard found in the Switzerland–Uruguay BIT.
133 Blusun SA, Jean-Pierre Lecorcier and Michael Stein v Italian Republic, ICSID Case No ARB/14/3, Award, 27 December 2016, para 319.
134 ibid.
Do the two conditions (proportionality of the measure and having due regard to any reasonable reliance interests) refer to the substance of the stability obligation and to the protection the investors’ legitimate expectations, respectively? Or does the tribunal consider that those two conditions are in fact part of the same underlying obligation and that there is little point in distinguishing between the two allegedly separate grounds? And in any event, what is the tribunal’s view regarding the relation, if any, between ‘specific commitment’ and investor’s ‘reasonable reliance’?

These questions remain unanswered as the tribunal’s subsequent analysis seems ultimately to rely on the same key conclusion quoted above. In its analysis of the ‘legal instability claim’, the tribunal examines, for example, the claimants’ argument that the Romani Decree (adopted to implement the EU Directive aimed at achieving a share of at least 20% of energy from renewable sources in the EU) was in effect ‘a paradigm of the legal instability’ addressed by Article 10(1) ECT. The tribunal, however, does not clarify the relationship, if any, between legal stability and legitimate expectations, as the tribunal rejects the investors’ legal stability claim by concluding that the Italian measure was ‘not disproportionate, did not violate specific commitments [...]’, and did not breach Article 10(1), first sentence, of the ECT.

In its analysis of the ‘legitimate expectations’ claim, the Blusun tribunal expressly emphasizes both the ‘alternative’ nature of the claim at issue and the existence of the issue of the relationship between stability and legitimate expectations. However, first it reiterates (almost verbatim) the key conclusion quoted above (‘in the absence of a specific commitment . . . ’). Second, it rejects the (apparently alternative) claim based on the protection of investors’ legitimate expectations principally because ‘the Respondent made no special commitment to the Claimant with respect to the extension and operation of the FITs, nor did it specifically undertake that relevant Italian laws would remain unchanged’.

Based on the decisions in Philip Morris, Blusun and Antaris, one remains none the wiser with regard to the precise ambit of, and the relationship between, the obligation to provide a stable legal framework and the obligation to protect the investor’s legitimate expectations.

(c) Some tribunals’ failure to clarify the kind of regulatory change that qualifies for a breach of the FET provision

A last controversial issue revolves around the kind of regulatory change that is required in order to determine a violation of the FET provision. I noted in the

---

135 ibid, para 338.
136 ibid, para 343.
137 ibid, paras 365–66.
138 ibid, para 372.
139 ibid, para 374.
introduction above the conceptual distinction between a strict and soft notion of
legal stability obligation, where the former focuses on the existence of a regulatory
change and the latter entails (at least in part) an analysis of the merit (ie fairness or
reasonableness) of the measure under review. Crudely put, the two key questions
are, respectively, whether a change in regulation has occurred or whether the regu-
larly change was on its merit unreasonable.

The complication is that, in their FET claims, investors often highlight the mag-
nitude of the regulatory change put in place by the host State by arguing that the
host State has ‘profoundly altered the stability and predictability of the investment
environment’\(^{140}\) by referring to the legal framework as ‘exceptionally unstable’\(^{141}\) or
by describing the regulatory change as ‘radical’.\(^{142}\) Similarly, the claimants in \textit{Blusun v Italy} emphasized the relentlessness of the regulatory changes by describing their
claim as follows:

Our claim is not that Italy’s legislation had to remain immutable, unchanged,
written in stone. This case is not about regulatory change; it’s about regulatory
turbulence. It concerns the fact that during the two years between permissible
and legally impossible, the legal framework for the project constantly changed,
leaving no period of stability in which the requisite capital investment for a pro-
ject of this size could be realised.\(^{143}\)

One question here is thus whether these investors are relying on a strict notion of
regulatory stability (albeit more limited as only ‘substantial’ changes will constitute
a breach of the FET) or whether they are instead relying on a soft notion of regu-
larly stability, where those qualifiers (‘profound’, ‘exceptional’, ‘radical’, ‘constant’)
represent (at least implicitly) the evidence of an arbitrary or disproportionate
behaviour by the host State.

\(^{140}\) CMS \textit{v} Argentina, Award, 12 May 2005 (n 72) para 267. See also \textit{El Paso v Argentina}, Award, 31
October 2011 (n 48) para 351, where the tribunal refers to the following quote by the investor:

Claimant does not call into question Argentina’s right to change its laws or regulations. It has
never been Claimant’s position that the BIT imposes an absolute obligation not to alter the
regulatory framework. [ … ] But the complete alteration of the regulatory framework in a
manner that does not reasonably protect existing capital investments promoted by the gov-

\(^{141}\) Mamidoil Jetoil Greek Petroleum Products Societe SA \textit{v} Republic of Albania, ICSID Case No ARB/
11/24, Award, 30 March 2015, para 590.

\(^{142}\) Eli Lilly and Company \textit{v} Canada, Final Award, 16 March 2017 (n 127), para 227 (‘Claimant argues
that the promise utility doctrine is a radical departure from Canada’s traditional utility standard [ … ]’).
See also \textit{El Paso v Argentina}, Award, 31 October 2011 (n 48) para 390 (‘in [the claimant’s] view, the deci-
sions and regulations in issue [ … ] that brought a radical alteration of key rules, effectively eviscerated
the existing regulatory frameworks, and therefore exceeded normal regulatory powers’). See also Eiser
Infrastructure Limited and Energía Solar Luxembourg Sàrl \textit{v} Kingdom of Spain, ICSID Case No ARB/13/
36, Award, 4 May 2017, para 358 (‘The drastic changes adopted by Respondent defeated Claimants’
legitimate expectations of stability [ … ]’).

\(^{143}\) Blusun \textit{v Italy}, Award, 27 December 2016 (n 134) para 320.
Accordingly, one would expect the competent tribunal to address and clarify this issue. However, an examination of a few recent awards confirms, unfortunately, that the kind of stability obligation being applied by the tribunals remains, at best, far from clear. For example, as noted in section (a) above, while it ultimately rejected the investor’s claim, the *Philip Morris v Uruguay* tribunal seems to accept in principle that changes to the regulatory framework are in violation of the FET provision if they are ‘outside of the acceptable margin of change’. The tribunal, however, does not clarify what it means by ‘acceptable’ margin of change: does the regulatory change become ‘unacceptable’ because it is ‘substantial’ (or even ‘total’) or is it unacceptable because the change is ‘unreasonable’ (or disproportionate)? The tribunal’s succinct reasoning for rejecting the investor’s FET claim regarding the ‘stability of the legal framework’, only adds to the uncertainty. The *Philip Morris v Uruguay* tribunal concluded that the regulations under review did not modify the legal framework for foreign investments beyond an acceptable margin of change ‘considering the limited impact on [the investor’s] business’ and ‘that their effect had not been such as to modify the stability of the Uruguayan legal framework’. Accordingly, it remains unclear whether the reliance on limited ‘impact’ and ‘effect’ indicate that the tribunal was focusing on whether the regulatory change was substantial or unreasonable.

Similarly, the tribunal in *Eli Lilly v Canada* was confronted with a claim that the Canadian court’s interpretation of the utility requirement under Canadian patent law, and in particular their adoption of the promise utility doctrine in the mid-2000s, allegedly departing dramatically from prior Canadian patent law, violated, inter alia, the FET standard in Article 1105 NAFTA. While the *Eli Lilly* tribunal ultimately rejected the investor’s claim as the investor failed to demonstrate a ‘fundamental or dramatic change’ in Canadian patent law, it remains unclear what the tribunal meant for a ‘dramatic’ change. Looking at the various factors examined by the tribunal (including the utility requirement in Canadian jurisprudence, relevant

---

144 Philip Morris v Uruguay, Award, 8 July 2016 (n 120) para 423:

changes to general legislation (at least in the absence of a stabilization clause) are not prevented by the FET standard if they do not exceed the exercise of the host State’s normal regulatory power in pursuance of a public interest and do not modify the regulatory framework relied upon by the investor at the time of its investment ‘outside of the acceptable margin of change’.

It should be noted that the phrase ‘outside of the acceptable margin of change’ comes from the *El Paso v Argentina* tribunal (n 48), in the context of a long and (perhaps over-) elaborated decision, which contains some apparently conflicting statements: compare ‘the legitimate expectations of a foreign investor can only be examined by having due regard to the general proposition that the State should not unreasonably modify the legal framework or modify it in contradiction with a specific commitment not to do so’ (para 364) with ‘[t]here can be no legitimate expectation for anyone that the legal framework will remain unchanged in the face of an extremely severe economic crisis. No reasonable investor can have such an expectation unless very specific commitments have been made towards it or unless the alteration of the legal framework is total’ (para 374).

145 Philip Morris v Uruguay, Award, 8 July 2016 (n 120) paras 433–34.

146 Eli Lilly and Company v Canada (n 127).
Canadian regulatory practice and statistical evidence), one can argue that the *Eli Lilly* tribunal was indeed focusing on whether there had been a substantial change in law, rather than whether the change in law was arbitrary or disproportionate. However, some of the tribunal’s conclusions (stressing the ‘incremental and evolutionary’ nature of the change and suggesting some of the reasons that may have led to such change) seem to imply instead a focus on the reasons for (ie reasonableness of) the change.

The tribunal in *Eiser v Spain* was confronted with the claim, brought exclusively under the ECT, where the investors alleged a violation of the FET provision because the drastic changes in the subsidies provided to solar energy producers by the host State defeated the investors’ legitimate expectations of stability. The *Eiser* tribunal recognized that ‘absent explicit undertakings […] investment treaties do not eliminate States’ right to modify their regulatory regimes to meet evolving circumstances and public needs’ and that ‘the FET standard does not give a right to regulatory stability per se’.

The tribunal, however, added that the FET provision ‘does protect from a fundamental change to the regulatory regime in a manner that does not take account of the circumstances of existing investments made in reliance on the prior regime’. While the ECT did not bar Spain from making appropriate changes, the *Eiser* tribunal continued, ‘the ECT did protect Claimants against the total and unreasonable change that they experienced here’.

The key question put forward at the beginning of this section presents itself, once again. Is the *Eiser* tribunal relying on a strict notion of regulatory stability (albeit more limited, as only ‘fundamental’ or ‘total’ changes will constitute a breach of the FET), or is the tribunal instead relying on a soft notion of regulatory stability where those qualifiers merely represent the evidence of an unreasonable or


On those exceptional but usually very important occasions when high courts reconsider well-established judicial doctrines in the face of social, economic, environmental or other forms of rapid change we experience in the world today, they must now beware that any basic or fundamental reorientation of their jurisprudence could force that state’s government to pay out millions or even billions to foreign corporations in the guise of an ‘expropriation’ having occurred [or a breach of the FET provision].

148 *Eli Lilly v Canada*, Final Award, 16 March 2017 (n 127) para 386:

Taken as a whole, the evidence before the Tribunal shows that Canada’s utility requirement underwent incremental and evolutionary changes […]. Over those years, there was an increase in the number of utility-based challenges of pharmaceutical patents, which appears to have increased the pace of the development of the law most relevant to that sector.

On the other hand, the fact that the tribunal proceeded next to examine whether the utility requirement under Canadian law is ‘arbitrary’ may undermine this second reading of what constitutes a ‘dramatic’ change.

149 *Eiser v Kingdom of Spain*, Award, 4 May 2017 (n 143) para 362.

150 ibid, para 363.

151 ibid.
disproportionate behaviour by the host State? The language used by the tribunal is not helpful in fully understanding the nature of the obligation imposed on the host State through the FET provision.

The ambiguity is somewhat reinforced by the fact that, in its ultimate finding of violation of the FET provision, the *Eiser* tribunal seems to principally stress the regulatory change’s dramatic impact on the value of the investment. The tribunal found that a favourable regulatory regime was replaced with ‘an unprecedented and wholly different regulatory approach’ and that the ‘new system was profoundly unfair and inequitable as applied to Claimants’ existing investment, stripping Claimants of virtually all of the value of their investment’. It is not clear whether the *Eiser* tribunal’s focus on the unprecedented nature of the regulatory change and its impact on the value of the investment shows that the tribunal’s finding of violation was based on the extent of the regulatory change at issue or the disproportionate nature of that change. In other words, it remains unclear whether the tribunal relied on a strict or soft notion of the regulatory stability obligation.

D. Recent Treaty Practice

In recent years, the inclusion of provisions in investment treaties requiring strict legal stability has increasingly dwindle. First, umbrella clauses have very often been omitted in recent investment treaties. An UNCTAD survey of publicly available investment treaties concluded between 2011 and 2015 has found that out of seventy-two treaties only seventeen contain an umbrella clause (and thirteen of those seventeen treaties involved Japan as one of the contracting parties).

This roughly adds up to three in every four new treaties not containing an umbrella clause, and contrasts with the pre-2004 treaties statistic of one in every two treaties. Apparently, in 2016 and 2017, out of fifty-four new investment instruments (fifty-two treaties and two model treaties), only two (3.7%) contain an umbrella clause, namely, the Austria–Kyrgyzstan BIT and the Japan–Iran BIT (both signed in 2016).

---

152 ibid, para 365.
153 See Foresight Luxembourg Solar Sàrl et al v Kingdom of Spain, SCC Arbitration V (2015/150), Final Award, 14 November 2018, para 398 (‘The Majority of the Tribunal concludes that the Respondent’s enactment of the New Regulatory Regime constituted a fundamental change to the legal and regulatory framework that crossed the line from a non-compensable regulatory measure to a compensable breach of the FET standard in the ECT’).
Noteworthy is the change in the United States’ policy with regard to umbrella clauses, as starting from its 2004 model BIT, United States’ treaties omit the umbrella clause. However, it should also be noted that United States’ investment treaties adopt a wide jurisdictional clause, including the investor’s right to submit to arbitration a claim that the respondent has breached an ‘investment authorization’ or an ‘investment agreement’.  

Interestingly, the European Union (EU)’s position on umbrella clauses appears more nuanced. While the agreement with Canada does not contain any umbrella clause (and no broad jurisdictional clause), the 2015 EU draft proposal in the context of the negotiation with the United States for the Transatlantic Trade and Investment Partnership (TTIP) does contain an umbrella clause. The wording is, however, different from the traditional umbrella clauses as it attempts to clarify the various issues that had led to several controversies in arbitral practice. Article 7 of the Chapter on Investment in the EU’s draft proposal made public on 12 November 2015 reads as follows:

Article 7 Observance of written commitments

Where a Party either itself or through any entity mentioned in Article X [Definition of ‘measures adopted or maintained by a Party’] has entered into any contractual written commitment with investors of the other Party or with their covered investments, that Party shall not, either itself or through any such entity breach the said commitment through the exercise of governmental authority.

Second, as noted above, investment treaties’ stabilization clauses are rare, with the exception perhaps of Italian BITs. The most recent stabilization clause that I could

157 See eg Article 24.1 of the 2004 US model BIT. Article 1 defines an ‘investment agreement’ as:

a written agreement between a national authority of a Party and a covered investment or an investor of the other Party, on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor: (a) with respect to natural resources that a national authority controls, such as for their exploration, extraction, refining, transportation, distribution, or sale; (b) to supply services to the public on behalf of the Party, such as power generation or distribution, water treatment or distribution, or telecommunications; or (c) to undertake infrastructure projects, such as the construction of roads, bridges, canals, dams, or pipelines, that are not for the exclusive or predominant use and benefit of the government.

Article 1 also defines ‘investment authorization’ as ‘an authorization that the foreign investment authority of a Party grants to a covered investment or an investor of the other Party’.


159 A footnote clarifies the meaning of ‘contractual written commitment’ as follows:

For the purposes if this paragraph, a ‘contractual written commitment’ means an agreement in writing, entered into by a Party, itself or through any entity mentioned in Article X [Definition of ‘measures adopted or maintained by a Party’], with an investor or a covered investment, whether in a single instrument or multiple instruments, that creates an exchange of rights and obligations, binding on both Parties.
find is that contained in the 2004 Italy–Nicaragua BIT. Furthermore, some of the few examples of stabilization clauses in investment treaties are found in early BITs that have since been terminated following renegotiation. Interestingly, the stabilization clause was omitted in the renegotiated treaty.\(^\text{160}\)

Third, some recent investment treaties have excluded either expressly or implicitly the possibility to interpret any of the traditional investment protection provisions (including the FET standard) as a guarantee of regulatory stability in the strict sense. A general exclusion of regulatory stability *stricto sensu* may be implied by the investment treaty’s recognition, often in the preamble, that the contracting parties retain the right to regulate in the public interest. For example, the preamble of the 2015 Australia–China Free Trade Agreement (FTA) refers to the ‘rights of [the] governments to regulate in order to meet national policy objectives, and to preserve their flexibility to safeguard public welfare’. Arguably, reading an FET provision to include a guarantee of regulatory stability in the strict sense would contrast with an interpretation based on the customary rules of treaty interpretation that, in addition to the ‘text’, rely on the ‘context’ and ‘object and purpose’ of the treaty.\(^\text{161}\)

Some recent treaties contain express exclusions of regulatory stability in the strict sense. For example, the last sentence of Article 4.1 of the 2014 Columbia–France BIT expressly clarifies the limit of the FET standard as follows: ‘Se entiende que la obligacion de otorgar un trato justo y equitativo, no incluye una clausula de estabilizacion juridical ni impide a una Parte Contratante adaptar su legislacion de conformidad con los terminus de este paragrafo.’\(^\text{162}\)

Another example of a broad, express exclusion of legal stability *stricto sensu* is Article 8.9 on Investment and Regulatory measures of the 2016 Canada–EU Comprehensive Economic and Trade Agreement (CETA). While paragraph 1 reaffirms the contracting parties’ ‘right to regulate […] to achieve legitimate policy objectives’, paragraph 2 expressly clarifies that the host State’s regulation negatively affecting an investment or interfering with an investor’s expectations is not per se prohibited by the investment treaty. Paragraph 2 reads as follows:

> For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor’s expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section.\(^\text{163}\)

---

\(^{160}\) See 1965 Belgium–Morocco BIT, 1975 France–Morocco BIT.


\(^{162}\) See similarly Article 4.5 of the 2014 Colombia–Turkey BIT.

\(^{163}\) Article 9.6, para 5 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) provides the same with regard to subsidies or grant (‘For greater certainty, the mere fact that a subsidy or grant has not been issued, renewed or maintained, or has been modified or reduced, by a
Furthermore, the inclusion in recent investment treaties of general exception clauses may also be seen as an implicit rejection of strict stability obligations, as these exception clauses would vest on contracting parties at least a margin of regulatory discretion in order to act in the public interest (and notwithstanding any contractual or regulatory stability obligations). For example, one of the two investment treaties concluded in 2016 that include an umbrella clause, features a general exception provision, styled on the general exception of Article XX of the General Agreement on Tariffs and Trade (GATT).

Preliminary Conclusions

This chapter’s main findings have been the following. First, legal stability in the strict sense, including both contractual and regulatory stability, represents one of the protections afforded to foreign investment in international investment treaties. It is imposed specifically through umbrella and stabilization clauses, respectively.

Second, despite a limited attempt by a few early investment tribunals to read a strict stability obligation as part of the FET provision, the majority of investment tribunals appear to have adopted a more nuanced approach by increasingly recognizing the need to safeguard the host State’s right to regulate in the public interest. However, despite investment tribunals’ apparently more deferential approach in their interpretation of FET, one can still find recent arbitral decisions where the role of regulatory stability within the FET standard remains at best ambiguous, and thus fears that the FET standard may function as imposing an obligation of regulatory stability in the strict sense remain.

Third, investment treaties signed in the past ten years clearly show a move away from provisions guaranteeing legal stability in the strict sense, principally by omitting umbrella and stabilization clauses and by narrowing the scope of the substantive protections included in investment treaties.

Three preliminary reflections are advanced. First, the existence of provisions expressly guaranteeing legal stability in the strict sense confirms the conclusion that traditional investment treaties provided, at least in some instances, a remarkably broad level of protection to foreign investments. Furthermore, the existence of such provisions seems to strengthen the argument that other open-ended

---

164 See the Agreement between Japan and the Islamic Republic of Iran on Reciprocal Promotion and Protection of Investment, signed on 5 February 2016. The second agreement signed in 2016 featuring an umbrella clause but not a general exception clause is the Austria–Kyrgyzstan BIT.

standards such as FET should not be interpreted as imposing a similarly strict legal stability obligation as well. And this argument appears to be valid whether those express strict stability obligations are found in the specific treaty at issue or not.\[166\]

Second, while the attempt of a few tribunals to read the FET provision as including a legal stability obligation may be used as evidence that investment tribunals have been 'out of control', this is somewhat unfair for two sets of reasons. First of all, legal stability in the strict sense was not exclusively a 'creation' of investment tribunals, as at least some investment treaties did expressly envisage such broad guarantees. In this sense, contracting parties have a much greater responsibility for the existence of legal stability as one of the key obligations found in international investment treaties. While there are several controversial issues when it comes to delineating the scope and effect of investment treaties' umbrella and stabilization clauses, their core function is beyond doubt: to guarantee the stability of the host State's contractual undertakings and regulatory framework, respectively. A second reason why the 'out-of-control' criticism vis-à-vis investment tribunals appears (at least in part) unfair is based on the conclusion that the great majority of investment tribunals have rejected a broad interpretation of the FET provision, recognizing instead the need to safeguard host States' right to regulate in the public interest.

The key criticism that is advanced in this chapter vis-à-vis arbitral practice revolves around investment tribunals' failure to clearly draw a line between strict and soft stability obligation. Based on a review of several arbitral decisions rendered in the past five years, it remains for example, frustratingly unclear whether tribunals perceive the FET provision as imposing a strict stability obligation that focuses on the existence of an adverse regulatory change or a soft stability obligation that focuses instead on the regulatory change's fairness, reasonableness or proportionality. The apparent disregard shown by these investment tribunals of the fundamental difference between a strict stability guarantee and soft stability guarantee is indeed puzzling.

Finally, when it comes to the question of the future of strict legal stability guarantees, one may distinguish between contractual and regulatory stability. While it is hard to imagine that any future investment treaty will include a stabilization clause, the future of umbrella clauses may not appear as bleak, as shown for example by its inclusion in the most recent draft proposal put forward by the EU in the context of the TTIP negotiations. This may be in part because investment tribunals have narrowed the scope of traditional umbrella clauses and in part because

\[166\] See Louis-Philippe Coulombe, 'Duplicating the Umbrella Clause? Some Thoughts on Contractual Expectations and the Fair and Equitable Treatment Standard' in Ian Laird et al (eds) Investment Treaty Arbitration and International Law Volume 7 (Juris 2014) 101:

the fair and equitable standard cannot be construed so as to cover contractual expectations. Such claims should be brought under the umbrella clause. However, where the treaty contains no umbrella clause, or where the latter is inapplicable, the fair and equitable treatment should not be interpreted as a means to fill this void.
some recent investment treaties have included broad general exception provisions capable of preserving a margin of regulatory sovereignty.

However, the appropriateness of including a contractual stability mechanism in an investment treaty will depend on each contracting parties’ confidence in the ability (and wisdom) of their public authorities in undertaking commitments with regard to foreign investments. In this regard, one wonders whether future policy makers should consider employing international treaties not simply to strengthen the sanctity of investor–State contracts, but also to introduce some parameters (both procedural and substantive in nature) disciplining the ability of host States to bind themselves through such contracts.