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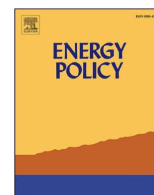

The Energy Charter Treaty reform: Why and how to reach a consensus on fair and equitable treatment?

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ABSTRACT

A sharp rise in the number of energy disputes under the fair and equitable treatment standard (FET) has caused concerns and confusion for the Contracting Parties to the Energy Charter Treaty (ECT). The indeterminate FET wording of Article 10 (1) of the ECT has opened the door for disputes and a lack of coherence in the application of the FET has led to a blurring of boundaries between the legitimate right to regulate and a breach of the FET. The current FET scope has failed to address the emerging political and economic challenges of the new era. In the light of the modernisation process of the ECT, this paper examines the present FET wording and makes a contribution to the ongoing modernisation process by outlining the framework, as well as the procedural and institutional proposals. The paper proposes a revision of the FET scope rather than exclusion. The aim of the proposals is to revise the wording to establish a fairer balance between the right to regulate and investment protection.

1. Introduction

Application of the FET has caused controversy in the investment state dispute settlement (ISDS) system. The topic itself has resulted in endless discussions in the ISDS community. Primarily, the main discussion is around a creative expansion of the FET scope to restrict regulatory rights of States and a perceived lack of balance between regulatory rights and investment protection.

This paper looks at the discussion of the revision of the ECT and particularly the FET scope under Article 10 (1). Current FET wording is a result of political and economic factors at the time of negotiation of the ECT. The incorporation of investment protection standards *inter alia* the FET was mainly due to the regulatory instability in the former Soviet Union States. It seemed important to provide for the high-level protection for European Union investors who were investing in the fossil fuel sector of Russia, Kazakhstan, Azerbaijan, Uzbekistan and Kyrgyzstan. Therefore, drafters initially gave a priority to investment protection.

Further shifts in global energy policy have led to the revision of internal policy goals by Contracting Parties towards sustainable development. The transition from traditional fossil fuel to low carbon sources has carried the implementation of compound regulatory measures by Contracting Parties, for example, different financing schemes on the incentivization of renewable energy. In turn, these factors have impacted on the character of FET disputes, which have shifted from the simple refusal of a mining license right to complex FET disputes related to renewable financing and tariffs. The broad FET scope has led to challenge the legitimate public policy goals and the right to regulate of Contracting Parties.

The paper argues that the ECT drafters incorporated broad and ambiguous FET wording that led to segmental interpretation and uncertainty in application. It led to every submitted claim under the ECT containing an alleged violation of the FET.[1] In practice, there are cases when claimants could not explain how the FET has been violated, while Contracting Parties could not explain how the FET has not been violated. The FET is now the most invoked and breach finding standard under the ECT.[2] These factors culminated in being a disadvantage for Contracting Parties, for example, the boom of energy disputes against the EU Contracting Parties under the ECT is a subject of severe criticism (Chaisse, 2016; Bellantuono, 2017; Selivanova, 2018; López-Rodríguez, 2019). Indeed, the criticism was directed towards the balance issue between the right of the Contracting Parties to regulate and the investment protection under the FET. It is a matter of fact that for states any investment

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[1] The Energy Charter Secretariat statistics on www.energychartertreaty.org.

[2] According to the Energy Charter Secretariat's statistics FET breach amounts to about 61% of 37 awards. Statistics as of 9 October 2020 accessed 3 August 2021 www.energychartertreaty.org.

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dispute in arbitration involves financial stakes large enough despite the win or lose outcomes of the dispute, since even a single award can place "onerous" demands on the budgetary resources of states (Brower, II, 2009). These facts demonstrate that Contracting Parties need more balanced FET under the ECT. The current FET scope has failed to address the emerging political and economic challenges of the new era. In this respect, the central aim of the paper to outline proposals to reconcile the right to regulate and investment protection under the revised FET scope of the ECT.

2. Suggested revisions

2.1. FET wording

This paper believes that it is nonsensical to recommend excluding the FET totally from the ECT framework. In this case, investors lose their rights to obtain protection under the FET. Absence of the FET could be compensated through the Minimum standard treatment (MST) in any event, but there would be procedural issues for investors to invoke MST to the ECT disputes as Article 26 (1) of the ECT limits the scope to an alleged breach of an obligation under Part III. Therefore, there is a need for updating the FET wording taking into account theoretical basis of FET and recent treaty practice.

2.1.1. Identification of theory

Uncertainty and controversy around the nature of the FET have generated various hypotheses in terms of international law theories. In this regard, the nature of FET has been considered from the perspective of customary international law, general principles of international law, the rule of law and autonomous treaty standard.

2.1.1.1. Customary international law. Whether FET forms a part of Customary international law (CIL) derives from the increasing reliance of investors on FET in their claims and the result of interpretation by arbitral tribunals. There are two approaches in relation to the relationship between FET and CIL. First is a consideration of FET as part of the MST. Second is a consideration of FET as an independent standard which may become part of CIL.

In terms of the former, an increasing number of IIAs linked the FET to the MST in the treaty text. Free Trade Commission of NAFTA (FTA) linked them through an Interpretative Note and other links were found in the decisions of tribunals. The approach has found strong support from the developed countries such as United States and Canada and best illustrated and discussed in the framework of NAFTA (Mondev's award, 2002, Methanex's award, 2005, Pope & Talbot Inc, 2002). NAFTA was replaced by United States-Mexico-Canada Agreement (USMCA) went into effect on July 1, 2020. USMCA applies the same approach as in NAFTA. To a certain extent, the two terms became interchangeable and generally reconfirmed the evolutionary character of the FET as part of the MST (Tudor, 2008). It is argued that an explicit link to the MST prevents the expansive interpretation of the FET and assists in preserving the right to regulate (UNCTAD, 2012).

However, the elusive contours and a relatively outdated nature of the MST hinder limiting the FET to the MST. Particularly, the MST itself is indeterminate and lacks a clearly defined content (UNCTAD, 2012). In defining the MST element, decisions of the *Neer, Robert* and *Hopkins* cases played a pivotal role. In particular, the *Neer* tribunal defines the MST as outrage, bad faith, willful neglect of duty and insufficiency of governmental action (Neer's award, 1926, para 61f). These early arbitral cases concerning the MST breach were related to the physical maltreatment of aliens and their property. Reliance on the MST is justified in the period when there were no other provisions for protection of aliens' property (Tudor, 2008). In this context, Judge Stephen M. Schwebel in his observation deduced that *Neer* award had nothing to do with the treatment of foreign investors and investment and did not address FET (Schwebel, 2014). Therefore, *Neer* award is far from the FET standard (Schwebel, 2014).

Since the *Neer* decision, commonly identified elements to date are denial of justice, lack of due process, lack of due diligence, and instances of arbitrariness and discrimination (Newcombe and Paradell, 2009). Each of these elements requires a determination of content. In order to concretize the MST, tribunals revert to the previous decisions of other tribunals without discerning whether these decisions relied on the customary international law or autonomous treaty standard (Schill, 2010). Moreover, the assertion of the MST for foreign nationals under customary international law has a long and contentious history (Shaw, 2003; Brownlie, 2003).

One group of scholars confirmed that elements of the MST and the FET are interconnected and overlapped (Newcombe and Paradell, 2009). Use of precedent by arbitral tribunals implies that there is no categoric difference between the MST and the FET (Schill, 2010). Another group of scholars strongly relies on separation of these two standards (Tudor, 2008). The MST is reflected in the FET framework without clear discussion (Vasciannie, 1999). In this way, limiting the FET to the MST is itself controversial. Moreover, this option does not solve the expansive interpretation of FET.

In terms of the latter, the author is sceptical about the CIL character of the FET. Traditionally it is accepted that a conventional norm codifies an existing customary rule (Tudor, 2008). However, in certain circumstances, rules in treaties could become the corpus of CIL and obtain a binding effect on states which have not expressly accepted it (Vasciannie, 1999). FET itself was initially developed as a conventional norm exactly to avoid the difficulties surrounding MST (Klager, 2016). Supporters of this view consider that theoretical requirements in relation to a uniformity of State practice are met mostly based on the BIT (Tudor, 2008; Schwebel, 2004). According to this view *opinio juris* is an immaterial element in the formation of CIL based on three main theories (Tudor, 2008). It has been supported by some tribunals which consider that BIT has transformed the FET into CIL (Pope & Talbot's award, Mondev's award).

In my opinion, a contemplation of FET as a corpus of the CIL is still an immature view and it is less likely that developing countries will accept it as a CIL (Sornarajah, 2015; Vasciannie, 1999; Dumberry, 2017). Rather in recent years, scholars have tended to confirm that CIL norms in relation to FET are evolving. This view strongly confirms the nature of FET. Arbitral tribunals were reluctant to discuss the CIL nature of FET outside the discussion of MST. Hence, there is still no explicit consensus in arbitration practice in relation to the CIL nature of FET.

2.1.1.2. The rule of law, the general principles of international law and treaty standard. Some scholars have developed their views to link the FET elements to the principle of the rule of law (Vandevelde, 2010; Schill, 2010). In this way, there was an attempt to facilitate the interpretation of the FET and conceptualize the FET theory. Under this approach FET elements are divided into substantive and procedural dimensions as it seems under the concept of the rule of law. Particularly, reasonableness, consistency, non-discrimination and transparency are elements of the substantive dimension, while due process is an element of the procedural dimension (Vandevelde, 2010). In this way, FET can be understood as a public law concept with a quasi-constitutional function that restricts the conducts of host states in relation to the foreign investor (Schill, 2010).

In this regard, I note that there is no single approach in the understanding of the rule of law and what the rule of law requires. The rule of law is itself a heavily contested topic in international law. Generally, not only at international level, but also a difference in the understanding of the rule of law at national level. Anglo-American and Continental Europe, as well as other jurisdictions have elaborated their own understanding of the rule of law (Chesterman, 2008). At the international level, a common understanding of the rule of law is divided into 'thin'

and 'thick' theories. The former implies instrumental limitations on the exercise of State authority. The latter encompasses a broad set of areas, including human rights. Several scholars provided a general understanding of the rule of law by considering the rule of law as a particular set of values and principles related to the idea of legality (Waldron, 2006; Fuller, 1969). Cumulatively, the term compromises non-arbitrariness, predictability and consistency of laws of States (Chesterman, 2008). At the same time, often jurists treat the rule of law as a political ideal rather than the law (Waldron, 2004; 2011, 2012). In this regard, there is doubt that in relation to the assertion of the rule of law as a normative reality of international law. Moreover, if we conceptualize the FET as part of the rule of law, we will may encounter a balance issue between sovereignty rights and investment protection. Therefore, in my opinion, linking the FET to the rule of law appears to have not yet found a solid basis and it is still at an immature stage. At the same time there was an attempt to recognize the FET as a general principle of law (Diehl, 2012).

Therefore, in my opinion, it is reasonable to treat the FET in terms of treaty standard theory. There are currently two widespread approaches in the recent treaty practice. First is the EU approach that involves a provision of exhaustive list of elements and an explicit the right to regulate. Second is the US approach that provides the limitation of the FET to MST with the closed list.

2.1.2. Incorporation of the right to regulate

The suggestion refers to the preservation of the right to regulate in the preamble and objectives of the ECT. It facilitates the interpretation of the FET in the light of the right to regulate as Article 31.1 of the VCLT refers to the interpretation in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Article 2 of the ECT incorporates a diversified purpose that is directed to establish a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the European Energy Charter (EEC).

Title I of the EEC contains a long list of objectives. In sum, they group development of trade in energy, cooperation in the energy field, including the formulation of stable and transparent legal frameworks creating conditions for the development of energy resources, energy efficiency and environmental protection.

Title II of the EEC, in turn, contains implementation actions to attain the objectives. The goal of formulation of stable and transparent legal frameworks is enshrined within the implementation scope. It served as a basis to address uncertainties of the FET scope in a number of cases. At the same time, the cumulative objectives of the EEC are regarded as implicitly referring to the economic development of Contracting Parties (Plama's award, 2003, para 166).

Surprisingly, however, the economic development objective was not given an explicit form in the EEC and the ECT objective, but rather it was enshrined in the preamble of the EEC. In my opinion, it is one of the reasons for the shift in balance towards the investor when tribunals have sought to resolve interpretative uncertainties of the FET scope.

In contrast, the International Energy Charter (IEC) recognized in the preamble the global challenge posed by the trilemma between energy security, economic development and environmental protection, and efforts by all countries to achieve sustainable development. In this way, the IEC has paved the way for balancing the rights under the revised ECT framework.

In this respect, CETA could serve as an example of this approach. The preamble of CETA sets out that '*provisions of this Agreement preserve the right of the Parties to regulate within their territories and the Parties' flexibility to achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity*'.

The same formulation is reiterated in the substantive part in Article 8.9 of CETA. Therefore, CETA incorporates general exceptions within the context of investment protection provisions. However, a practical value of general exceptions is missing, and they were not taken into account within the context of FET.

FET under Article 10 (1) does not contain express exceptions to regulatory rights of Contracting Parties for the public interest. The ECT itself does include exceptions in Article 21 and Article 24 and both are implicitly linked to Article 10 (1).

Article 24 includes a series of exceptions, contained in the GATT of 1994, that provides Contracting Parties with the possibility of derogating from the ECT rules for various reasons. In practice, however, Article 24 has been raised only once as a basis of defence with respect to the FET violation. In the *Watkins* case, Spain invoked Article 24 as a basis of defence but failed to persuade the tribunal (Watkins' award, 2020, para 496). In general, as ISDS practice demonstrates in contrast to international trade law where trade and non-trade objectives have long been explicitly balanced through general exceptions, in IIAs a practical value of these provisions is largely missing (Alschner and Hui, 2018). Respondents fail to raise them properly and tribunals either overlook them or adopt interpretations that lessen their impact (Alschner and Hui, 2018).

In contrast to Article 24, the application of exceptions under Article 21 has been executable. Article 21 carves out taxation measures of Contracting Parties from the scope of certain provisions of the ECT, including investment protection standards. The application of this Article in the light of FET was discussed in the *Plama*[3] and *Eiser*[4] awards. In both of these, tribunals found no sufficient evidence to sustain the claims and asserted Article 21 reserved a regulatory space of Contracting Parties. In relation to regulatory rights, the *Eiser* tribunal recalled the *Yukos* award stating that a carve-out under Article 21 is applicable only to *bona fide* taxation actions which are motivated by the purpose of raising general revenue for the State (Eiser's award, 2017, para 268).

Regardless of the absence of explicit exceptions for regulatory rights of Contracting Parties in the FET scope, arbitral tribunals followed case practice and conceded a legitimate right of Contracting Parties to regulate when assessing the compliance with FET (Plama, 2003, para 177; Blusun, 2016, para 319 (4)). In this respect, arbitral tribunals used various approaches to balance regulatory rights of Contracting Parties and investment protection under FET.

There is a high chance of balance where the ECT framework itself will contain explicit the right to regulate objectives. It is likely to lead to a more balanced interpretation. Moreover, the ECT is a suitable framework to incorporate a balanced objective compared with BITs where the sole focus is on investment protection.

2.1.3. Specification of the scope

It is proposed to limit the FET scope to an exhaustive list of elements to which Contracting Parties must strictly adhere. The advantage of this step is a limitation of the discretion of tribunals. It allows cutting off new elements in the case of the future expansion of the FET scope in treaty practice. However, the FET elements themselves are indefinite and ambiguous. Each element will require a separate limitation and interpretative explanation in dispute. The list of elements could be narrower or broader depending on the wishes of the Contracting Parties. In any case, however, given the flexible nature of the FET it would be less possible to circumstantially detail the scope and precisely foresee all of

[3] In *Plama* case, Claimant contested that '*Bulgaria lacked appropriate accounting rules and tax legislation, the discount or rescheduling of Nova Plama's debts in its Recovery Plan resulted in artificial profit which became taxable and thus created a new debt for the company, requiring an accounting reserve in its books*' paras 256–273.

[4] In *Eiser* case, Claimant challenged that '*the 7% Levy was intentionally framed as a tax under Spanish law in order to breach Spain's commitments to the Claimants without incurring liability under the ECT*' paras 250–272.

the issues that will arise in an investment dispute.

Since current FET scope under the ECT lacks a clear content, arbitral tribunals have implemented various methods to limit the scope of FET. They are standards of review, correspondence to additional requirements, as well as evaluation of the regulatory measures taken by the Contracting Party *vis-a-vis* the impact on the investment of the claimant based on factual circumstances.

The paper notes that the EU approach contains broader closed list of elements than the US. CETA contains: (a) denial of justice in criminal, civil or administrative proceedings; (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; (c) manifest arbitrariness; (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; (e) abusive treatment of investors, such as coercion, duress and harassment. The US Model BIT (2012) contains obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.

The EU approach provides for a brief explanation and limitations to elements through additional formulations 'fundamental breach', 'manifest arbitrariness', 'targeted discrimination' and 'abusive treatment'. The same approach could be utilized under the ECT. These formulations could be criteria on exclusion of unfounded FET claims.

In this respect, CETA provides for the Committee on Services and Investment with the competency to regularly review the elements of FET and propose recommendations to the CETA Joint Committee for decision. The TTIP draft utilizes the same approach. The same step could be executed under the auspices of the Energy Charter Secretariat (ECS).

Another generally discussed option is linking the FET to international law or principles of international law. It was initially incorporated in the Draft of Basic Agreement for European Energy Charter as of 31 October 1991 (Travaux preparatoires of the ECT, 1991). Later in the Draft of Basic Agreement for European Energy Charter as of 21 January 1992, it was excluded (Travaux preparatoires of the ECT, 1992). The intention behind the exclusion of this approach in the draft is less clear and has not been publicly declared.

Linking the FET to international law or principles of international law means at least reference to the MST and it could also include other sources of law such as treaty obligation and general principles of law (Newcombe and Paradell, 2009). In this respect, the whole body of international law could serve as a relevant source for the FET violation. In the NAFTA context, however, parties through interpretation clarified that reference to international law means the MST. Theoretically, this option resembles linking the FET to the MST. In addition, linking the FET to international law provides tribunals with a wider discretion in interpretation than the MST option (UNCTAD, 2012). The process of discerning such principles can be laborious but it will advance the understanding of the FET content (UNCTAD, 2012).

2.2. *Use of standards of review*

A group of scholars are inclined to the standard of review rather than a treaty drafting to resolve the conflict between investment protection and the right to regulate (Schill and Djanic, 2018; Kingsbury and Schill, 2010; Burke–White and von Staden, 2010a,b (two research papers); Henckels, 2013). It is regarded that the right choice of standard of review that the arbitrator deploys will resolve the questions left open by ambiguity in a treaty text, and thus affect the result in the case (Van Harten, 2007).

The critical point is which standard of review is appropriate in determination of the FET violation. Certainly, there is no single recommended one. Recently in the light of the legitimacy crisis debate, opinions of scholars are varied at this point and mainly divided into two. First, is a balancing exercise through proportionality and second is a margin of discretion. Both are derived from public law and developed to balance the rights in different legal systems. This paper discusses these two standards of review and shares the view on this.

The first time in the ECT framework that the *Electrabel* tribunal employed proportionality refers to the *Saluka* decision (Electrabel's award, 2007, para 165). Then, it was further deployed as a case precedent in other decisions of tribunals. Unfortunately, tribunals did not explain the grounds for application of proportionality in their decisions. It is noted that earlier tribunals under the ECT are timid in the application of these standards and even in some way they are confused. Some of them have applied them in combination. The text of the ECT is silent on the application of proportionality in FET disputes. Hence, the question arises whether it is legitimate to apply proportionality in FET disputes under the ECT and whether it is effective.

Proportionality was derived from German public law and subsequently was extended to other domestic legal orders within and outside the Europe (Bucheler, 2015). Further it was migrated to a large number of public law systems across the globe and it can be considered to represent a true principle of comparative public law (Schill and Djanic, 2018). In domestic legal systems, on the one hand, proportionality is regarded as 'a *meta-constitutional rule'* (Stone Sweet and Mathews, 2008), on the other hand, it is considered as '*a neutral, rational decision-making tool'* of conflict resolution between individual rights and highly sensitive public interests of states (Bomhoff, 2008). In any case, under domestic legal orders, the main function of proportionality is to provide for an appropriate balance between individual rights and public interest (Bucheler, 2015).

In contrast, there is no general rule in the application of proportionality in ISDS. Proportionality in ISDS is being adopted case by case depending on the discretion of tribunals. The *Tecmed* tribunal paved the way to other tribunals in the application of proportionality (Tecmed's award, 2003, paras 139, 145, 147). There is a view that the integration of proportionality into ISDS could be either through the external norms or internal norms. In the case of external norms, it could be either through a general principle within the meaning of Article 38(1)(c) ICJ Statute (Bucheler, 2015) or the principle of systemic integration reflected in Article 31(3)(c) of VCLT (Bucheler, 2015). In the case of internal norms, proportionality can also be integrated with the relevant treaty itself, without a need to resort to external norms (Bucheler, 2015). FET itself is also a flexible standard by nature, which allows for the balancing of the interests of the host state and foreign investors (Schill, 2010). Therefore, in the author's opinion, proportionality may be incorporated either within the FET wording of the ECT or in interpretative guidance to the FET. In this respect, there is no reason to refute the application of proportionality in the framework of the ECT.

There is a general view related to the rise of the judicial law-making role of arbitrators in the application of proportionality (Kingsbury and Schill, 2010; Alvarez, 2016; Vadi, 2015). To be clear, tribunals engage in direct balancing of the rights of investors and the host state in proportionality (Kingsbury and Schill, 2010; Alvarez, 2016; Vadi, 2015). It would make it possible for arbitral tribunals to prioritize the values in a particular situation (Stone Sweet and Mathews, 2008). In this way, proportionality is inescapably an exercise in applied constitutional (or international) law making (Stone Sweet and Mathews, 2008).

Analysing the arbitral practice of the ECT, this paper disagrees that tribunals engage in the direct balancing of the rights of investors and States. In ISDS, proportionality analysis is different from the three-tier test as applied in ECtHR and WTO. Under the ECT, dispute proportionality is involved in defining a proportionality of effects of the measure with regard to the affected rights and interests of the investor. In the light of broad FET formulation under the ECT, proportionality to a certain extent has succeeded in striking a balance between regulatory rights and investor rights. Proportionality is generally regarded as a preferable option for resolving rights conflicts in international public law adjudication. To some extent it allowed not overly confining the regulatory rights of the Contracting Parties. This paper argues that proportionality would not be regarded as a hurdle, but rather a tool in complex disputes to determine the FET violation.

The margin of appreciation is a relatively less known approach in FET disputes, but a number of scholars recently proposed it as a feasible solution (Kingsbury and Schill, 2010; Burke–White and von Staden, 2010a,b (two research papers); Henckels, 2013). Tribunals under the ECT referred to a margin of appreciation in the scope of FET (Hydro Energy's award, 2020, para 589; Blusun, 2016, para 319 (4)), but tribunals have been reluctant to implement it extensively in ISDS so far.

By recognizing the right to regulate within the ECT framework Contracting Parties provide for the margin of discretion for their regulatory rights. It helps to subject legitimate regulatory rights to the margin of discretion of the Contracting Parties. In complex disputes tribunals could recourse to proportionality. Not every FET element requires proportionality analysis since determination of the FET violation is mostly fact-based analysis.

In addition, this paper highlights that interpretative guidance to the FET would be an advantage. UNCTAD itself also recommends supplementing the FET with interpretative guidance (UNCTAD, 2012).

UNCTAD recommended the following statements in this respect: (a) FET does not preclude the Contracting Party from adopting regulatory or other measures that pursue legitimate policy objectives, including measures to meet other international obligations; (b) The investor's conduct and the country's level of development and level of business risk are relevant in determining whether the clause has been breached; (c) A breach of another provision of an IIA or of another international agreement cannot establish a claim for breach of this FET; (d) In the event that a breach is found, the amount of compensation awarded should compensate for direct losses of the claimant, taking into account equitable considerations and other relevant circumstances of the case.

This paper notes that revision of the FET wording under the ECT in conjunction with appropriate interpretation guidance would increase the chance of balancing rights.

2.3. Institutional suggestion

The complementary proposal concerns achieving full coherence for the long-term under FET through reforming institutions of the ECT.

In my opinion, the functional role of ECS is underestimated and overlooked in terms of application of the ECT provisions. Supra, the author proposes incorporation of the institution in the periodical review of the FET elements and transfer of this function to ECS similar to the CETA Joint Committee. The analogue is the FTC of NAFTA that has binding interpretation power over NAFTA provisions. By enhancing functions, ECS has a high chance of designing a coherent system that could address the new future challenges related to FET disputes.

To build a better coherent ISDS system and to achieve the balance of rights under the ECT, the I believe probably it is time to think also about forming a separate dispute resolution body. The formation of an Energy Charter Treaty Court as a separate institution which would have an exclusive and comprehensive jurisdiction over the ECT was raised before by the late Thomas Walde (Andrews-Speed and Walde, 1996; Walde, 1996). The advantage of its own dispute resolution body is a consistency of decisions and the development of expertise in application of the ECT provisions (Andrews-Speed and Walde, 1996; Walde, 1996).

3. Conclusion and policy implications

This paper has conducted an analysis of one of the critical investment protection standards of the ECT - the FET. The paper has noted a lack of coherence in application and particular ambiguity of FET in Article 10 (1). It is argued that a lack of coherence led to every submitted claim under the ECT containing an alleged violation of the FET. The paper has proposed a revision of the FET scope in the light of modernisation of the ECT. In this way, it put forward theoretical and practical suggestions to address the status quo and to establish a fairer balance between the right to regulate and investment protection.

CRediT authorship contribution statement

Bagdat G. Kuzhatov: Writing – original draft, preparation, Conceptualization, Methodology, done by a sole author.

Declaration of competing interest

The authors declare that they have no known competing financial interests or personal relationships that could have appeared to influence the work reported in this paper.

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