

FAIR AND EQUITABLE TREATMENT

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Fair and equitable treatment (FET) has replaced expropriation as the most important standard in the protection of foreign investment. It is invoked in almost every international investment arbitration. Nowadays most successful claims by investors are based on FET.

FET is not new. It has been around for quite some time in the form of treaty provisions, especially in bilateral investment treaties (BITs). Important regional and multilateral treaties such as the NAFTA (Article 1105) and the Energy Charter Treaty (Article 10(1)) also refer to it. But it was not before the year 2000 that investment tribunals have started to apply it and to give content to the meaning of the standard.¹

1. THE MEANING OF FAIR AND EQUITABLE TREATMENT

FET is a legal standard. Despite its seeming reference to equity and its apparent lack of precision, it is a legal concept and not a reference to decision *ex aequo et bono*.² The Tribunal in *ADF v. United States* pointed out that the requirement to accord fair and equitable treatment does not allow a tribunal to adopt its own idiosyncratic standard but “must be disciplined by being based upon State practice and judicial or arbitral case law or other sources of customary or general international law.”³

The lack of precision is not an obstacle to its practical application. Like other broad principles of law FET is susceptible of specification through judicial practice. As *Prosper Weil* wrote in the year 2000:

“The standard of ‘fair and equitable treatment’ is certainly no less operative than was the standard of ‘due process of law’, and it will be for future practice, jurisprudence and commentary to impart specific content to it.”⁴

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¹ *Maffezini v. Spain*, Award, 13 November 2000, 16 ICSID Review – FILJ (2001) 248.

² See C. Schreuer, *Decisions Ex Aequo et Bono Under the ICSID Convention*, 11 ICSID Review – FILJ 37 (1996).

³ *ADF Group Inc. v. United States of America*, Award, 9 January 2003, 6 ICSID Reports 470, para. 184. See also *Mondev Intl. Ltd. v. United States of America*, Award, 11 October 2002, 6 ICSID Reports 192, para. 119.

⁴ *P. Weil*, *The State, the Foreign Investor, and International Law: The No Longer Stormy Relationship of a Ménage À Trois*, 15 ICSID Review – FILJ 401, 415 (2000).

History has since proven him right. A considerable number of arbitral awards have gone a long way towards clarifying the concept of fair and equitable treatment through judicial practice.

In a number of cases Tribunals have attempted to develop broad and generally acceptable definitions of the term.⁵ In doing so tribunals have relied on concepts such as the investor's basic expectations, reliance, consistency, transparency, even-handedness, non-discrimination, justice, arbitrariness, fairness, judicial propriety and natural justice. The problem with this approach is that it either tends to lead to definitions that are overly general and hence of little value in practice or are too narrow to serve as a useful standard for every conceivable case.

A more promising method to explore the meaning of FET is to identify typical situations to which this concept may be applied. This leads to more concrete principles that are covered by the fair and equitable treatment standard. The most important principles derived from the FET standard are transparency, stability and the investor's legitimate expectations, compliance with contractual obligations, procedural propriety and due process, action in good faith and freedom from coercion and harassment.

Transparency, stability and the protection of the investor's legitimate expectations are closely interrelated. Transparency means that the legal framework for the investor's operations is readily apparent and that any decisions affecting the investor can be traced to that legal framework. Stability means that the investor's legitimate expectations based on this legal framework and on any undertakings and representations made explicitly or implicitly by the host State will be protected. The legitimate expectations of the investor will rest primarily on the legal order of the host state as it stood at the time when the investor acquired the investment. The investor may rely on that legal framework as well as on representations and undertakings made by the host State in legislation, treaties, decrees licenses and contracts. An arbitrary reversal of such undertakings will constitute a violation of FET. While the host State is entitled to determine its legal and economic order, the investor has a legitimate expectation in the system's stability to facilitate rational planning and decision making.

There are numerous decisions to illustrate this point. In *Metalclad v. Mexico*⁶ the issue of transparency played a central role. The Federal Government of Mexico and the

⁵ For attempts at general definition see: *S D Myers v. Canada*, First Partial Award, 13 November 2000, 40 ILM (2001) 1408, para. 263; *Genin v. Estonia*, Award, 25 June 2001, 17 ICSID Review – FILJ (2002) 395, para. 367; *TECMED v. Mexico*, Award, 29 May 2003, 43 ILM (2004) 133, para. 154; *Waste Management v. Mexico*, Final Award, 30 April 2004, 43 ILM (2004) 967, para. 98; *MTD v. Chile*, Award, 25 May 2004, 12 ICSID Reports 6, para. 113; *Saluka v. Czech Republic*, Partial Award, 17 March 2006, para. 309.

⁶ *Metalclad Corp. v. Mexico*, Award, 30 August 2000, 5 ICSID Reports 209.

State government had issued construction and operating permits for the investor's landfill project. The investor was assured that it had all the permits it needed. But the municipality refused to grant a construction permit. The Tribunal held that the investor was entitled to rely on the representations of the federal officials.⁷ It concluded that the acts of the State and the municipality were in violation of the fair and equitable treatment standard under Article 1105 of NAFTA.

In *MTD v. Chile*⁸ the Respondent had signed an investment contract for the construction of a large planned community with the country's Foreign Investment Commission. The project failed because it turned out to be inconsistent with zoning regulations. The Tribunal found that the FET standard had been violated by what it described as "the inconsistency of action between two arms of the same Government *vis-à-vis* the same investor".⁹

In *Occidental v. Ecuador*¹⁰ the claim was directed at the inconsistent practice of the Respondent's authorities in reimbursing value added tax. The Tribunal noted that the framework under which the investor had been operating had been changed in an important manner and that the tax law was changed without providing any clarity about its meaning and extent.¹¹

In *CMS Gas Transmission Company v. Argentina*¹² the Respondent had given guarantees for price adjustments for the transportation of natural gas in legislation, regulations and under a license. Subsequently, an emergency law and other laws and regulations first suspended and then terminated these guarantees. The Tribunal pointed out that a stable legal and business environment is an essential element of fair and equitable treatment. It found that Argentina's actions had breached that standard.¹³

The observance of contractual obligations is closely related to the protection of legitimate expectations. *Pacta sunt servanda* is an obvious application of the stability requirement which is central to the FET standard. Nevertheless, practice on this point is not uniform. Tribunals seem to be agreed that a failure to perform a contract may amount to a violation of the FET standard. But it is far from clear whether any violation of a contractual obligation by a host State amounts to a violation of the FET standard.

⁷ At para. 89.

⁸ *MTD v. Chile*, Award, 25 May 2004, 12 ICSID Reports 6.

⁹ At para. 163.

¹⁰ *Occidental v. Ecuador*, Award, 1 July 2004, 12 ICSID Reports 59.

¹¹ At para. 184.

¹² *CMS v. Argentina*, Award, 12 May 2005, 44 ILM (2005) 1205.

¹³ At paras. 274-276.

A number of tribunals have found that a violation of FET may occur as a consequence of a breach of obligations arising from contracts.¹⁴ But other tribunals have found that a simple breach of contract by a State would not trigger a violation of the FET standard. Only an outright repudiation of the contract brought about by the use of sovereign prerogative would have this effect.¹⁵

Procedural propriety and due process are essential elements of the rule of law and indispensable for FET. The United States Model BIT of 2004 specifically clarifies that the FET standard covers protection from denial of justice and guarantees of due process on the basis of the world's principal legal systems.¹⁶ In a number of cases tribunals have held procedural shortcomings to be violations of FET. This included violations of the right to be heard,¹⁷ lack of notification of important legal steps,¹⁸ improper and discreditable court proceedings¹⁹ and executive intervention in court proceedings.²⁰

Good faith is another application of FET. Although hardly more specific than FET, good faith has been put to use in several cases.²¹ Examples for violations of good faith in the investment context would be a deliberate conspiracy to defeat the investment²² or the termination of the investment for reasons other than the one put forth by the government.²³ This is not to say that every violation of the standard of FET requires bad faith. The FET standard may be violated, even if no *mala fides* is involved.²⁴

¹⁴ *Mondev v. USA*, Award, 11 October 2002, 42 ILM (2003) 85, para. 134; *SGS v. Philippines*, Decision on Jurisdiction, 29 January 2004, 8 ICSID Reports 518, para. 162; *Noble Ventures v. Romania*, Award, 12 October 2005, para. 182.

¹⁵ *RFCC v. Morocco*, Award, 22 December 2003, 20 ICSID Review – FILJ (2005) 391, paras. 33/34; *Waste Management v. Mexico*, Final Award, 30 April 2004, 43 ILM (2004) 967, para. 115; *Impregilo v. Pakistan*, Decision on Jurisdiction, 22 April 2005, 12 ICSID Reports 245, paras. 266-270. But see: *Noble Ventures, Inc. v. Romania*, Award, 12 October 2005, at para. 82.

¹⁶ United States Model BIT (2004), Article 5(2)(a).

¹⁷ *Metalclad Corp. v. Mexico*, Award, 30 August 2000, 5 ICSID Reports 209, para. 91; *TECMED v. Mexico*, Award, 29 May 2003, 43 ILM (2004) 133, para. 162.

¹⁸ *Middle East Cement v. Egypt*, Award, 12 April 2002, 18 ICSID Review – FILJ (2003) 602, para. 143.

¹⁹ *Loewen v. USA*, Award, 26 June 2003, 42 ILM (2003) 811, paras. 54, 132, 137; *Waste Management v. Mexico*, Final Award, 30 April 2004, 43 ILM (2004) 967, para. 98.

²⁰ *Petrobart v. Kyrgyz Republic*, Award, 29 March 2005, para. 82.

²¹ *TECMED v. Mexico*, Award, 29 May 2003, 43 ILM (2004) 133, para. 153; *Saluka v. Czech Republic*, Partial Award, 17 March 2006, para. 307.

²² *Waste Management v. Mexico*, Final Award, 30 April 2004, 43 ILM (2004) 967, para. 138.

²³ *Bayindir Insaat Turizm Ticaret Ve Sanayi A. S. v. Pakistan*, Decision on Jurisdiction, 14 November 2005, para. 250.

²⁴ *Mondev v. USA*, Award, 11 October 2002, 42 ILM (2003) 85, para. 116; *TECMED v. Mexico*, Award, 29 May 2003, 43 ILM (2004) 133, para. 153; *Loewen v. USA*, Award, 26 June 2003, 42 ILM (2003) 811, para. 132; *Occidental v. Ecuador*, ILM (2004) 133, para. 153; *Loewen v. USA*, Award, 26 June 2003, 42 ILM (2003) 811, para. 132; *Occidental v. Ecuador*, Award, 1 July 2004, 12 ICSID Reports 59, para. 186; *CMS v. Argentina*, Award, 12 May 2005, 44 ILM (2005) 1205, para. 280; *Azurix Corp. v. The Argentine Republic*, Award, 14 July 2006, para. 372; *LG&E v. Argentina*, Decision on Liability, 3 October 2006, 21 ICSID Review – FILJ 203 (2006), para. 129; *PSEG v. Turkey*, Award, 19 January 2007, paras. 245/246; *Siemens v. Argentina*, Award, 6 February 2007, para. 299; *Enron v. Argentina*, Award, 22 May 2007, para. 263.

The FET standard may also apply in situations of coercion and harassment directed at the investor. Examples would be an aggressive investigation directed at the investor,²⁵ personal threats, or the threat of non-renewal of a licence in order to force the investor to relocate.²⁶

2. RELATIONSHIP TO CUSTOMARY INTERNATIONAL LAW

There has been considerable debate on whether the FET standard merely reflects the international minimum standard, as contained in customary international law, or offers an autonomous standard that is additional to general international law. In terms of the ordinary meaning of the term, it is hard to see why the drafters of a treaty would use “fair and equitable treatment” where they mean the “minimum standard under customary international law”. A number of authors have argued in favour of an autonomous concept of FET that is independent of and additional to customary international law.²⁷

This question has gained particular prominence in the interpretation of Article 1105(1) of the NAFTA dealing with FET and full protection and security.²⁸ This provision has certain peculiarities that are absent from most other treaty provisions dealing with FET: the provision refers to the “Minimum Standard of Treatment” in the heading – an evident reference to general international law. In addition the provision refers to FET as part of international law: “international law, including fair and equitable treatment”. Both features suggest that under this provision fair and equitable treatment is indeed part of international law.

In addition, Article 1105(1) of the NAFTA has been the subject of an official interpretation by the NAFTA Free Trade Commission. The interpretation states that Article 1105(1) reflects the customary international law minimum standard and does not require

²⁵ *Pope & Talbot v. Canada*, Award on Merits, 10 April 2001, 122 ILR (2002) 352, paras 156-181.

²⁶ *TECMED v. Mexico*, Award, 29 May 2003, 43 ILM (2004) 133, para. 169.

²⁷ F. A. Mann, *British Treaties for the Promotion and Protection of Investments*, 52 The British Year Book of International Law 241, 244 (1981); R. Dolzer/M. Stevens, *Bilateral Investment Treaties*, p. 60 (1995); P. T. Muchlinski, *Multinational Enterprises and the Law*, p. 626 (1999); UNCTAD Series on issues in international investment agreements, *Fair and Equitable Treatment* (1999), pp. 13, 17, 23, 37-40, 53, 61; S. Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, 70 The British Year Book of International Law 104/105, 139-144 (1999); C. Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 The Journal of World Investment & Trade 357, 359-364 (2005).

²⁸ Article 1105: Minimum Standard of Treatment

“1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.”

treatment beyond what is required by customary international law.²⁹ NAFTA tribunals have accepted the official interpretation.³⁰ The subsequent BIT practice of the United States³¹ and of Canada³² has also followed this interpretation.

Tribunals operating outside the NAFTA have interpreted the relevant provisions in BITs autonomously on the basis of their respective wording.³³ For instance, the Tribunal in *Azurix v. Argentina*³⁴ had to interpret Article II(2)(a) of the Argentina-United States BIT which provides for FET, full protection and security and for treatment no less than that required by international law. It confirmed that the wording of this provision made it necessary to regard fair and equitable treatment as a standard that is separate and higher than the one under international law. The Tribunal said:

*"The clause, as drafted, permits to interpret fair and equitable treatment and full protection and security as higher standards than required by international law. The purpose of the third sentence is to set a floor, not a ceiling, in order to avoid a possible interpretation of these standards below what is required by international law."*³⁵

But tribunals have also indicated that the difference between fair and equitable treatment and the customary minimum standard "when applied to the specific facts of a case, may well be more apparent than real."³⁶ Therefore, in a particular case, FET may well overlap with or even be identical with the minimum standard required by international law.

²⁹ FTC Note of Interpretation of 31 July 2001: <http://www.international.gc.ca/tna-nac/NAFTA-Interpr-en.asp>

³⁰ *Pope & Talbot v. Canada*, Award in Respect of Damages, 31 May 2002, 41 ILM 1347 (2002), paras. 17-69; *Mondev Intl. Ltd. v. United States of America*, Award, 11 October 2002, 6 ICSID Reports 192, paras. 100 et seq.; *United Parcel Service of America Inc. v. Canada*, Award, 22 November 2002, 7 ICSID Reports 288, para. 97; *ADF Group Inc. v. United States of America*, Award, 9 January 2003, 6 ICSID Reports 470, paras. 175-178; *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, Award, 26 June 2003, 7 ICSID Reports 442, paras. 124-128; *Waste Management, Inc. v. United Mexican States*, Award, 30 April 2004, 43 ILM 967 (2004), paras. 90-91; *Methanex v. United States*, Award, 3 August 2005, Part IV, Chapter C, paras. 17-24; *Thunderbird v. Mexico*, Award, 26 January 2006, paras. 192, 193. See also *United Mexican States v. Metalclad Corp.*, Judgment, Supreme Court of British Columbia, 2 May 2001, 5 ICSID Reports 236, paras. 61-65.

³¹ See Chile-United States FTA of 2003, Article 10.4; United States-Uruguay BIT of 2004, Article 5. US Model BIT of 2004 Article 5(2).

³² Canada Model BIT, Article 5.

³³ *Técnicas Medioambientales Tecmed S. A. v. The United Mexican States*, Award, 29 May 2003, 43 ILM 133 (2004), paras. 155, 156; *MTD v. Republic of Chile*, Award, 25 May 2004, 44 ILM 91 (2005), paras. 110-112; *Occidental Exploration and Production Co. v. Ecuador*, Award, 1 July 2004, paras. 188-190; *CMS Gas Transmission Company v. Argentina*, Award, 12 May 2005, 44 ILM 1205 (2005), paras. 282-284; *Saluka v. Czech Republic*, Partial Award, 17 March 2006, paras. 286-295; *PSEG v. Turkey*, Award, 19 January 2007, para. 239; *Siemens v. Argentina*, Award, 6 February 2007, paras. 291 et seq.

³⁴ *Azurix Corp. v. The Argentine Republic*, Award, 14 July 2006.

³⁵ At para. 361.

³⁶ *Saluka v. Czech Republic*, Partial Award, 17 March 2006, para. 291. See also *Azurix v. Argentina*, Award, 14 July 2006, para. 361, 364; *Occidental Exploration and Production Co. v. Ecuador*, Award, 1 July 2004, para. 190; *CMS Gas Transmission Company v. Argentina*, Award, 12 May 2005, 44 ILM 1205 (2005), paras. 282-284.

The motive behind the insistence that FET is identical with the minimum standard under customary international law is evidently to minimize its practical impact. But the effect of this insistence may well be the opposite of what is intended by those who advocate it. *Dolzer* has pointed out that the more likely consequence will be to accelerate the development of customary law through the practice on FET clauses in treaties.³⁷

3. RELATIONSHIP WITH OTHER TREATY STANDARDS

Some tribunals have suggested that FET is no more than an overarching principle that embraces the other standards granted to foreign investors in treaties.³⁸ This would be at odds with the autonomous role played by FET in the practice of tribunals. At the same time there is evidence that the FET standard does not operate in isolation. It is also in interaction with other standards of protection.³⁹ The most important of such standards are constant (or full) protection and security, protection against unreasonable or discriminatory measures, as well as protection against uncompensated expropriation.

Some tribunals have equated the standards of full or constant protection and security with fair and equitable treatment. They have dealt with the two standards jointly without drawing any distinction between them.⁴⁰ Other tribunals have emphasised the separateness of the two standards.⁴¹

The view that the two standards are to be regarded as different obligations appears more convincing. It is implausible to assume that two standards, listed separately in one document, have the same meaning. In addition, the content of the two standards is distinguishable. The fair and equitable treatment standard consists mainly of obligations on the host State to desist from a certain course of action. By contrast, by promising full protection and security the host State assumes the obligation to actively create a framework for investments that grants factual and legal security also against third persons.

Many treaties for the protection of investments refer to arbitrary (unjustified, unreasonable) or discriminatory treatment. In a number of cases the Tribunals dealt with the

³⁷ R. Dolzer/A. von Walter, 'Fair and Equitable Treatment and Customary Law – Lines of Jurisprudence' in F. Ortino, L. Liberti, A. Sheppard and H. Warner (eds.) *Investment Treaty Law: Current Issues II* (2007) 99.

³⁸ *Petrobart v. The Kyrgyz Republic*, Award, 29 March 2005, 2005:3 Stockholm Intl Arbitration Rev p. 45 at p. 82; *Noble Ventures, Inc. v. Romania*, Award, 12 October 2005, para. 182.

³⁹ See A. Reinisch (ed), *Standards of Investment Protection* (2008).

⁴⁰ *Wena Hotels Ltd. v. Arab Republic of Egypt*, Award, 8 December 2000, 6 ICSID Reports 89, paras. 84-95; *Occidental Exploration and Production Co. v. Ecuador*, Award, 1 July 2004, para. 187.

⁴¹ *Azurix Corp. v. The Argentine Republic*, Award, 14 July 2006, paras. 407, 408; *PSEG v. Turkey*, Award, 19 January 2007, paras. 258, 259.

prohibition of unreasonable or arbitrary measures in close conjunction with the fair and equitable treatment standard. This tendency is particularly pronounced with tribunals applying the NAFTA. It may be explained, at least in part, by the fact that the NAFTA does not contain a separate provision on arbitrary or discriminatory treatment.⁴² Even in cases that concerned the application of treaties that contained separate references to a prohibition of arbitrary or discriminatory treatment in addition to the FET standard, some tribunals applied these two standards in close conjunction without distinguishing between them.⁴³ By contrast, other tribunals examined compliance with the standards of FET and unreasonable or discriminatory treatment separately.⁴⁴

On balance, treating the two standards separately appears more convincing. There is no good reason why treaty drafters should use two different terms when they mean one and the same thing. The cases dealing with arbitrary conduct⁴⁵ suggest that measures are arbitrary if they inflict damage on the investor without serving any apparent legitimate purpose. In addition, a measure would be arbitrary if it is not based on legal standards but on discretion, prejudice or personal preference. Also, a measure would be arbitrary if it is taken for reasons that are different from those put forward by the decision maker, especially if a public purpose is merely a pretext for a different motive. In cases dealing with discriminatory treatment tribunals have dealt with the issues of the basis for comparison⁴⁶ and with the question of whether discriminatory intent is required for a violation

⁴² *S.D. Myers v. Canada*, Award on Liability, 13 Nov. 2000, 8 ICSID Reports 18, para. 263; *Mondev Intl. Ltd. v. United States of America*, Award, 11 October 2002, 6 ICSID Reports 192, para. 127; *Waste Management, Inc. v. United Mexican States*, Award, 30 April 2004, 43 ILM 967 (2004), para. 98;

⁴³ *CMS Gas Transmission Co. v. Argentina*, Award, 12 May 2005, 44 ILM 1205 (2005), para. 290; *Impregilo v. Pakistan*, Decision on Jurisdiction, 22 April 2005, 12 ICSID Reports 245, paras. 264-270; *MTD Equity Sdn. Bhd. and MTD Chile S. A. v. Republic of Chile*, Award, 25 May 2004, 44 ILM 91 (2005), para. 196; *Saluka Investments BV (The Netherlands) v. The Czech Republic*, Partial Award, 17 March 2006, paras. 460-461, 465, 503; *PSEG v. Turkey*, Award, 19 January 2007, para. 261.

⁴⁴ *Occidental Exploration and Production Co. v. Ecuador*, Award, 1 July 2004, at paras. 159-166; *Ronald S. Lauder v. The Czech Republic*, Award, 3 September 2001, 9 ICSID Reports 66, paras. 214-288; *Genin, Eastern Credit Ltd. Inc. and AS Baltoil v. Republic of Estonia*, Award, 25 June 2001, 6 ICSID Reports 241, paras. 368-371; *Noble Ventures v. Romania*, Award, 11 October 2005, paras. 175-180; *Azurix Corp. v. The Argentine Republic*, Award, 14 July 2006, paras. 385-393; *LG&E v. Argentina*, Decision on Liability, 3 October 2006, 21 ICSID Review – FILJ 203 (2006), paras. 162, 163; *Siemens v. Argentina*, Award, 6 February 2007, at paras. 310-321.

⁴⁵ *Elettronica Sicula SpA (ELSI) (United States of America v. Italy)*, International Court of Justice, Judgment, 20 July 1989 IJ Reports 1989, p. 15, para. 128; *Genin, Eastern Credit Ltd. Inc. and AS Baltoil v. Republic of Estonia*, Award, 25 June 2001, 6 ICSID Reports 241, para. 371; *Azurix Corp. v. The Argentine Republic*, Award, 14 July 2006, para. 392; *CME v. The Czech Republic*, Partial Award, 13 September 2001, 9 ICSID Reports 121, para. 612; *Ronald S. Lauder v. The Czech Republic*, Award, 3 September 2001, 9 ICSID Reports 66, paras. 221, 222, 230, 232, 270; *Pope & Talbot v. Canada*, Award, 3 September 2001, 9 ICSID Reports 66, paras. 221, 222, 230, 232, 270; *Pope & Talbot v. Canada*, Award in Respect of Damages, 31 May 2002, 41 ILM 1347 (2002), para. 64; *Occidental Exploration and Production Co. v. Ecuador*, Award, 1 July 2004, para. 163; *Noble Ventures, Inc. v. Romania*, Award, 12 October 2005, paras. 176-178; *Azurix Corp. v. The Argentine Republic*, Award, 14 July 2006, para. 393; *LG&E v. Argentina*, Decision on Liability, 3 October 2006, 21 ICSID Review – FILJ 203 (2006), para. 158; *Siemens v. Argentina*, Award, 6 February 2007, para. 318.

⁴⁶ *Nycomb v. Latvia*, Award, 16 December 2003, Stockholm Intl. Arb. Rev. 2005:1, p. 53 at p. 99; *Saluka Investments BV (The Netherlands) v. The Czech Republic*, Partial Award, 17 March 2006, paras. 313-347, 466; *Occidental Exploration and Production Co. v. Ecuador*, Award, 1 July 2004, paras. 167-176.

of the standard.⁴⁷ These criteria will overlap with those that have been developed for FET. But they are sufficiently distinct to form the basis of a separate standard of treatment.

Protection against uncompensated expropriation was once the most important issue in international investment law. The FET standard has to some extent replaced the central role of protection against expropriation. Two reasons are responsible for this development. One is the requirement that the investor must be deprived of the economic benefits of its investment entirely or in substantial part, otherwise there will not be a finding of expropriation. The other reason is a growing tendency of tribunals to respect the host State's power to take regulatory measures in the public interest. Some tribunals have found that if only the public interest is clear and due process is followed there is no expropriation.⁴⁸ The consequence of these tendencies is that the investor loses his protection against expropriation.⁴⁹

The Tribunal in *PSEG v. Turkey*⁵⁰ has described the relationship between FET and expropriation in the following terms:

*“238. The standard of fair and equitable treatment has acquired prominence in investment arbitration as a consequence of the fact that other standards traditionally provided by international law might not in the circumstances of each case be entirely appropriate. This is particularly the case when the facts of the dispute do not clearly support the claim for direct expropriation, but when there are notwithstanding events that need to be assessed under a different standard to provide redress in the event that the rights of the investor have been breached.”*⁵¹

A look at recent practice demonstrates that tribunals will frequently find a violation of FET but will decline a claim of expropriation. On the other hand, it is difficult to envisage an uncompensated expropriation that would not also violate of the FET standard. But protection against expropriation has by no means become superfluous through the introduction of FET. Not all treaties provide protection against unfair and inequitable

⁴⁷ *S.D. Myers v. Canada*, Award on Liability, 13 November 2000, 8 ICSID Reports 18, paras. 252-254; *Marvin Feldman v. Mexico*, Award, 16 December 2002, 18 ICSID Review – FILJ 488 (2003), para. 184; *Siemens v. Argentina*, Award, 6 February 2007, para. 321; *Ronald S. Lauder v. The Czech Republic*, Award, 3 September 2001, 9 ICSID Reports 66, para. 231; *LG&E v. Argentina*, Decision on Liability, 3 October 2006, 21 ICSID Review – FILJ 203 (2006), paras. 146, 148.

⁴⁸ *Methanex v. United States*, Award, 3 August 2005, Part IV, D paras. 7, 15; *Saluka v. Czech Republic*, Partial Award, 17 March 2006 at para. 255.

⁴⁹ For a suggestion on how to balance the interests of the State and of the investor in situations of this kind see *U. Kriebbaum*, Regulatory Takings, Balancing the Interests of the Investor and the State, 8 *The Journal of World Investment and Trade* 717 (2007).

⁵⁰ *PSEG v. Turkey*, Award, 19 January 2007.

⁵¹ At para. 238.

treatment. Investment insurance typically covers expropriation but not the violation of FET. Under some treaties jurisdiction for investor-State arbitration exists only with respect to expropriation, sometimes only for the amount of compensation due, but not for violations of FET.

Some treaties contain carve-outs for tax matters. This means that the treaty is inapplicable, in principle, to matters of taxation. However, the carve-out does not apply if an expropriation is involved.⁵² Therefore, in order to obtain protection, the claimant would have to prove expropriation by way of a tax measure.

In addition, some treaties, including NAFTA, contain references to FET in their provisions on expropriation.⁵³ Thus, for example, the Argentina-US BIT not only provides that any expropriation must be for a public purpose, non discriminatory and against prompt adequate and effective compensation. It also requires that any expropriation must be in accordance with due process of law and FET as well as other principles of treatment.⁵⁴ In this way the FET standard gets imported into the provision on expropriation.⁵⁵

Therefore, although FET can be clearly distinguished from expropriation, the two are still interrelated. FET may be part of the requirements for a legal expropriation. Even where jurisdiction extends only to claims based on expropriation, the tribunal may have to look at the FET standard to establish whether the expropriation was legal. On the other hand, the calculation of damages in case of a violation of the FET standard is clearly different from compensation for an expropriation.⁵⁶

⁵² See Article XII of the Argentina-US BIT.

⁵³ Article 1110(1) of the NAFTA.

⁵⁴ Article IV(1) of the Argentina-US BIT provides in relevant part: "Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ('expropriation') except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II (2)." The principles of treatment in Article II(2) of the BIT are: fair and equitable treatment, full protection and security, treatment no less than required by international law, no arbitrary or discriminatory measures and observance of obligations entered into with regard to investments.

⁵⁵ See *Link-Trading v. Moldova*, Award, 18 April 2002 at para. 64; *Enron v. Argentina*, Decision on Jurisdiction, 14 January 2004, 11 ICSID Reports 273, para. 66; *Pan American v. Argentina*, Decision on Preliminary Objections, 27 July 2006, para. 136.

⁵⁶ I. Marboe, *Compensation and Damages in International Law, The Limits of "Fair Market Value"*, 7 *The Journal of World Investment & Trade* 723 (2006).

4. CONCLUSION

The fair and equitable treatment (FET) standard has become the centrepiece of most claims by investors against host States. Despite its apparent vagueness, it has been specified and turned into a reasonably clear set of principles through the practice of arbitral tribunals. The most important of these principles are transparency, stability and the investor's legitimate expectations, compliance with contractual obligations, procedural propriety and due process, action in good faith and freedom from coercion and harassment.

Although related to standards under customary international law, it is widely accepted that FET is an autonomous treaty standard. But within the framework of NAFTA and some BITs the view has prevailed that FET corresponds to the customary minimum standard of treatment.

Although FET is related to other typical treaty standards for the protection of foreign investors, such as constant (or full) protection and security as well as protection against unreasonable or discriminatory measures, these standards have an independent legal existence and must be applied separately.

The FET standard has to some extent replaced the central role of protection against expropriation. One reason for this development is a high threshold applied by tribunals for accepting the existence of an expropriation. But FET even plays a role in the context of expropriation. Some treaty provisions list adherence to the FET standard as a requirement for an expropriation's legality.