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## Fair and Equitable Treatment (FET): Interactions with other Standards by C.H. Schreuer

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# Fair and Equitable Treatment (FET): Interactions with other Standards

By Christoph Schreuer

## 1. Introduction

The Energy Charter Treaty (ECT), like most bilateral investment treaties (BITs), guarantees fair and equitable treatment (FET). In Article 10 of the ECT the standard of FET is embedded in a complex provision that also refers to constant protection and security, to a prohibition of unreasonable or discriminatory measures to treatment required by international law and to the observance of obligations entered into (an umbrella clause).<sup>1</sup>

Practice on the FET provision in Article 10 of the ECT is scant.<sup>2</sup> But there is an interesting remark in the Award in *Petrobart v. The Kyrgyz Republic*.<sup>3</sup> The Tribunal said:

The Arbitral Tribunal does not find it necessary to analyse the Kyrgyz Republic's action in relation to the various specific elements in Article 10(1) of the Treaty but notes that this paragraph in its entirety is intended to ensure a fair and equitable treatment of investments.<sup>4</sup>

From that passage it would appear that the Tribunal regarded FET as an overarching principle that embraces all the other standards mentioned in that Article. The *Petrobart* Tribunal was not alone in this assessment. The Tribunal in *Noble Ventures v. Romania*<sup>5</sup>, a case decided on the basis of the Romania-United States BIT, also seemed to think that the fair and equitable treatment standard was just a more general label for a number of standards:

Considering the place of the fair and equitable treatment standard at the very beginning of Art. II(2), one can consider this to be a more general standard which finds its specific application in *inter alia* the duty to provide full protection and security, the prohibition of arbitrary and discriminatory

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<sup>1</sup> The text of Article 10(1) ECT is as follows: "Each 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 to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties **fair and equitable treatment**. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party." [Emphasis added]

<sup>2</sup> See *Nykomb Synergetics Technology Holding AB v. Republic of Latvia*, Award, 16 December 2003, 11 ICSID Reports 153; *Petrobart v. The Kyrgyz Republic*, Award, 29 March 2005, 2005:3 Stockholm Intl Arbitration Rev p. 45 at p. 82.

<sup>3</sup> *Petrobart v. The Kyrgyz Republic*, Award, 29 March 2005, *loc. cit.*

<sup>4</sup> At p. 82.

<sup>5</sup> *Noble Ventures. Inc. v. Romania*, Award, 12 October 2005, <http://ita.law.uvic.ca/documents/Noble.pdf>

measures and the obligation to observe contractual obligations towards the investor.<sup>6</sup>

But is it true that FET is no more than a broad general standard that finds concrete manifestation in a number of more concrete standards? Practice shows that FET has been applied effectively in a considerable number of cases. In fact, it is currently the most important and successful basis for claims in investor-State arbitrations. There is no doubt that it is an autonomous standard of protection that has given rise to numerous successful claims. Tribunals have held that the FET standard requires a transparent and consistent legal framework that protects the investors' legitimate expectations, freedom from coercion and harassment, procedural propriety and due process and generally action in good faith.<sup>7</sup>

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. Some of these standards are listed in Article 10(1) of the ECT: constant protection and security, protection against unreasonable or discriminatory measures, treatment required by (customary) international law and observance of obligations entered into with an investor (the umbrella clause). Additional standards are afforded by the host State's domestic law and by protection against uncompensated expropriation. Sometimes this interaction is so close that the different standards become indistinguishable. At other times a violation of another standard may lead to a violation of FET or, conversely, a violation of FET triggers a violation of the other standard.

## **2. FET and Constant Protection and Security**

Article 10(1) of the ECT, like most BITs, lists FET and constant protection and security side by side, suggesting that two distinct standards are involved. But some tribunals have equated the standards of full or constant protection and security with fair and equitable treatment. In *Wena Hotels v. Egypt*<sup>8</sup> the Tribunal dealt with the two standards jointly without drawing any distinction between them.<sup>9</sup> Similarly, the Tribunal in *Occidental v. Ecuador*<sup>10</sup> seemed to

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<sup>6</sup> At para. 182.

<sup>7</sup> For discussions of practice see *C. Yannaca-Small*, Fair and Equitable Treatment Standard in International Investment Law, in *International Investment Law: A Changing Landscape*, OECD ed. (2005) p. 73; *C. Schreuer*, Fair and Equitable Treatment in Arbitral Practice, 6 *The Journal of World Investment & Trade* 357 (2005); *R. Dolzer*, Fair and Equitable Treatment: A Key Standard in Investment Treaties, 39 *The International Lawyer*, 87 (2005).

<sup>8</sup> *Wena Hotels Ltd. v. Arab Republic of Egypt*, Award, 8 December 2000, 6 ICSID Reports 89.

<sup>9</sup> At paras. 84-95.

regard the two standards as largely equivalent. After finding that the Respondent had violated the standard of fair and equitable treatment, it said:

In the context of this finding the question of whether in addition there has been a breach of full protection and security under this Article becomes moot as a treatment that is not fair and equitable automatically entails an absence of full protection and security of the investment.<sup>11</sup>

By contrast, in *Azurix v. Argentina*<sup>12</sup> the Tribunal, interpreting the Argentina-US BIT, found that the two standards were separate:

407. In some bilateral investment treaties, fair and equitable treatment and full protection and security appear as a single standard, in others as separate protections. The BIT falls in the last category; the two phrases describing the protection of investments appear sequentially as different obligations in Article II.2(a): “Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and...”<sup>13</sup>

The Tribunal added that the protection and security standard went beyond protection against physical violence and extended to the obligation to provide a secure investment environment. This meant that the Respondent had breached both standards - FET and protection and security - simultaneously.<sup>14</sup>

The Tribunal in *PSEG v. Turkey*,<sup>15</sup> interpreting the Turkey-United States BIT, came to a different result. It found that the full protection and security standard was developed in the context of physical safety and only exceptionally to legal security. In the latter situation the connection with FET became very close.<sup>16</sup> Since the situation at hand did not involve questions of physical safety and security, the case was covered by the FET standard and the additional claim based on protection and security had to be dismissed.<sup>17</sup>

The view that the two standards, FET and protection and security, are to be seen as different obligations is clearly the better one. As a matter of interpretation, it appears unconvincing to assume that two standards, listed separately in the same document, have the same meaning.

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<sup>10</sup> *Occidental Exploration and Production Co. v. Ecuador*, Award, 1 July 2004, [http://ita.law.uvic.ca/documents/Oxy-EcuadorFinalAward\\_001.pdf](http://ita.law.uvic.ca/documents/Oxy-EcuadorFinalAward_001.pdf).

<sup>11</sup> At para. 187. In a similar sense see *PSEG v. Turkey*, Award, 19 January 2007, at paras. 257-259, <http://ita.law.uvic.ca/documents/PSEGGlobal-Turkey-Award.pdf>.

<sup>12</sup> *Azurix Corp. v. The Argentine Republic*, Award, 14 July 2006, <http://ita.law.uvic.ca/documents/AzurixAwardJuly2006.pdf>.

<sup>13</sup> At para. 407.

<sup>14</sup> At para. 408.

<sup>15</sup> *PSEG v. Turkey*, Award, 19 January 2007.

<sup>16</sup> At para. 258.

<sup>17</sup> At para. 259.

An interpretation that deprives a treaty provision of its independent meaning is implausible to say the least.

As a matter of substance, the content of the two standards is distinguishable. The fair and equitable treatment standard consists mainly of an obligation on the host State's part to desist from a certain course of action. By contrast, by promising full protection and security the host State assumes an obligation to actively create a framework that grants security. The necessary measures must be capable of protecting the investment against adverse action by private persons as well as by State organs.<sup>18</sup> In addition to physical protection, this requires the provision of legal remedies against adverse action affecting the investment and the creation of mechanisms for the effective vindication of investors' rights.<sup>19</sup>

### 3. FET and Unreasonable or Discriminatory Measures

Clauses protecting investors from arbitrary or discriminatory treatment are common in investment treaties. The precise wording varies between "arbitrary or discriminatory", "unjustified or discriminatory" and "unreasonable or discriminatory". There does not appear to be a relevant distinction between the terms "arbitrary", "unjustified" and "unreasonable" in this context. Rather, the terms seem to be used synonymously.

Article 10(1) of the ECT also lists unreasonable or discriminatory measures in addition to FET. Again, this suggests that two separate standards are offered. But a clear distinction between the two may be even more difficult here.

It is undeniable that the prohibition of unreasonable or discriminatory measures is related to

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<sup>18</sup> *Elettronica Sicula SpA (ELSI) (United States of America v. Italy)*, ICJ Reports 1989, p.15 at paras. 105-108; *Wena Hotels v. Egypt*, Award, 8 December 2000, 41 ILM 896 (2002), paras. 84-95; *Tecnicas Medioambientales Tecmed S. A. v. The United Mexican States*, Award, 29 May 2003, 43 ILM 133 (2004), paras. 175-177; *Noble Ventures Inc. v. Romania*, Award, 12 October 2005, paras. 164-166, <http://www.investmentclaims.com/decisions/Noble-Ventures-Final-Award.pdf>; *AAPL v. Sri Lanka*, Award, 21 June 1990, 4 ICSID Reports 246, paras. 45-53, 78-86; *AMT v. Zaire*, Award, 21 February 1997, 5 ICSID Reports 11, paras. 6.02-6.11; *Eureko B.V. v. Poland*, Partial Award, 19 August 2005, paras. 236, 237, <http://ita.law.uvic.ca/documents/Eureko-PartialAwardandDissentingOpinion.pdf>; *PSEG v. Turkey*, Award, 19 January 2007, paras. 257-259, <http://ita.law.uvic.ca/documents/PSEGlobal-Turkey-Award.pdf>.

<sup>19</sup> *Saluka Investments BV (The Netherlands) v. The Czech Republic*, Partial Award, 17 March 2006, paras. 483, 484, <http://ita.law.uvic.ca/documents/Saluka-PartialAwardFinal.pdf>; *CME v. The Czech Republic*, Partial Award, 13 September 2001, 9 ICSID Reports 121, para. 613; *Ronald S. Lauder v. The Czech Republic*, Award, 3 September 2001, 9 ICSID Reports 66, para. 314; *Ceskoslovenská Obchodní Banka A.S. v. The Slovak Republic*, Award, 29 December 2004, para. 170, <http://ita.law.uvic.ca/documents/Cesk-Slovakia-AwardDec2004.pdf>; *Azurix Corp. v. The Argentine Republic*, Award, 14 July 2006, paras. 406, 408, <http://ita.law.uvic.ca/documents/AzurixAwardJuly2006.pdf>; *Siemens v. Argentina*, Award, 6 February 2007, para. 303, <http://ita.law.uvic.ca/documents/Siemens-Argentina-Award.pdf>.

the fair and equitable treatment standard. *Vasciannie* explains the interrelationship of the two standards in the following terms:

... if there is discrimination on arbitrary grounds, or if the investment has been subject to arbitrary or capricious treatment by the host State, then the fair and equitable standard has been violated. This follows from the idea that fair and equitable treatment inherently precludes arbitrary and capricious actions against investors.<sup>20</sup>

In a number of cases the Tribunals dealt with the 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.<sup>21</sup>

In *S.D. Myers v. Canada*<sup>22</sup> the Tribunal used the concept of “arbitrary” as a definitional element of the fair and equitable treatment standard. The Tribunal said:

263. The Tribunal considers that a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective.<sup>23</sup>

In *Mondev v. United States*<sup>24</sup> the Tribunal also discussed the concept of arbitrariness as part of the standard of fair and equitable treatment enshrined in Article 1105(1) of the NAFTA in the context of its investigation into a possible denial of justice. In doing so, it relied on the ICJ's definition of arbitrariness in *ELSI*.<sup>25</sup> The Tribunal said:

127. In the *ELSI* case, a Chamber of the Court described as arbitrary conduct that which displays “a wilful disregard of due process of law, ... which shocks, or at least surprises, a sense of judicial propriety”. It is true that the question there was whether certain administrative conduct was “arbitrary”, contrary to the provisions of an FCN treaty. Nonetheless (and without

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<sup>20</sup> *S. Vasciannie*, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, 70 *The British Year Book of International Law* 133 (1999).

<sup>21</sup> For the use of the concept of arbitrariness in the context of interpreting the fair and equitable treatment standard under Article 1105(1) NAFTA see also *Pope & Talbot v. Canada*, Award in Respect of Damages, 31 May 2002, 7 ICSID Reports 148, paras. 63, 64; *ADF Group Inc. v. United States of America*, Award, 9 January 2003, 6 ICSID Reports 470, paras. 188, 191; *Loewen Group Inc. and Raymond L. Loewen v. United States of America*, Award, 26 June 2003, 7 ICSID Reports 442, paras. 131-133.

<sup>22</sup> *S.D. Myers v. Canada*, Award on Liability, 13 Nov. 2000, 8 ICSID Reports 18

<sup>23</sup> At para. 263.

<sup>24</sup> *Mondev Intl. Ltd. v. United States of America*, Award, 11 October 2002, 6 ICSID Reports 192.

<sup>25</sup> *Elettronica Sicula SpA (ELSI) (United States of America v. Italy)*, ICJ Reports 1989, p.15, at para. 128: “Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. ... It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.”

otherwise commenting on the soundness of the decision itself) the Tribunal regards the Chamber's criterion as useful also in the context of denial of justice, and it has been applied in that context, as the Claimant pointed out.<sup>26</sup>

The Award in *Waste Management*<sup>27</sup> also dealt with the obligation not to take arbitrary action as an element of FET. In its examination of the standard under Article 1105 of the NAFTA it stated that the case authority suggests that

... the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic ...<sup>28</sup>

A number of cases concerned BITs that contained specific references to a prohibition of arbitrary or discriminatory treatment in addition to the FET standard. Nevertheless, the tribunals applied these two standards in close conjunction.

In *CMS v. Argentina*,<sup>29</sup> the Claimant invoked Article II(2) of the Argentina-US BIT which protects the investor from "arbitrary or discriminatory measures" in addition to the FET standard. The Tribunal said:

The standard of protection against arbitrariness and discrimination is related to that of fair and equitable treatment. Any measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment.<sup>30</sup>

Similarly, in *Impregilo v. Pakistan*<sup>31</sup> the Tribunal applied a provision in the BIT between Italy and Pakistan which provides for the standards of FET and protection from unjustified and discriminatory measures in the same paragraph. The Tribunal dealt with these two standards jointly without articulating any distinction between them.<sup>32</sup>

In *MTD v. Chile*<sup>33</sup> a foreign investment contract signed on behalf of Chile had been frustrated by an inconsistent zoning regulation. The Tribunal held that the host State's behaviour had violated the FET standard. Additionally, the Claimant invoked a provision in the Chile-

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<sup>26</sup> At para. 127. Footnotes omitted.

<sup>27</sup> *Waste Management, Inc. v. United Mexican States*, Award, 30 April 2004.

<sup>28</sup> At para. 98. The Tribunal found that in the particular case the city had not violated this standard. See para. 115.

<sup>29</sup> *CMS Gas Transmission Co. v. Argentina*, Award, 12 May 2005.

<sup>30</sup> At para. 290.

<sup>31</sup> *Impregilo v. Pakistan*, Decision on Jurisdiction, 22 April 2005, <http://ita.law.uvic.ca/documents/impregilo-decision.pdf>.

<sup>32</sup> At paras. 264-270.

<sup>33</sup> *MTD Equity Sdn. Bhd. and MTD Chile S. A. v. Republic of Chile*, Award, 25 May 2004.

Malaysia BIT protecting it against “unreasonable or discriminatory measures”. The Tribunal said:

196. To a certain extent, this claim has been considered by the Tribunal as part of the fair and equitable treatment. The approval of an investment against the Government urban policy can be equally considered unreasonable.<sup>34</sup>

The Tribunal in *Saluka v. Czech Republic*<sup>35</sup> also declined to distinguish the two standards. It had to apply a provision in the Netherlands-Czech BIT which provided that the host State “shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal” of investments. The Tribunal said:

460. The standard of “reasonableness” has no different meaning in this context than in the context of the “fair and equitable treatment” standard with which it is associated; and the same is true with regard to the standard of “non-discrimination”. The standard of “reasonableness” therefore requires, in this context as well, a showing that the State’s conduct bears a reasonable relationship to some rational policy, whereas the standard of “non-discrimination” requires a rational justification of any differential treatment of a foreign investor.<sup>36</sup>

In a similar way, the Tribunal in *PSEG v. Turkey*,<sup>37</sup> having examined the applicability of FET, did not think that there was any merit in examining the facts before it separately under the heading of arbitrariness. It held that

... the anomalies that took place in connection with the conduct just referred to are included in the breach of fair and equitable treatment and that there is no ground for a separate heading on liability on account of arbitrariness.<sup>38</sup>

Despite this tendency of some tribunals to amalgamate the prohibition of arbitrary or discriminatory measures with FET, there are weighty arguments in favour of treating the two standards as conceptually different. There is no good reason why treaty drafters should use two different terms when they mean one and the same thing. Equally it is difficult to see why one standard should be part of the other when the text of the treaties lists them side by side as two standards without indicating that one is merely an emanation of the other. Of course this does not deny that there may be considerable overlap and that one particular set of facts may

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<sup>34</sup> At para. 196.

<sup>35</sup> *Saluka Investments BV (The Netherlands) v. The Czech Republic*, Partial Award, 17 March 2006, <http://ita.law.uvic.ca/documents/Saluka-PartialawardFinal.pdf>.

<sup>36</sup> At para. 460. See also paras. 461, 465, 503. Interestingly, the Tribunal discussed the issue of discrimination primarily under the heading of fair and equitable treatment rather than under the heading of unreasonable or discriminatory measures. See paras. 312-347.

<sup>37</sup> *PSEG v. Turkey*, Award, 19 January 2007, <http://ita.law.uvic.ca/documents/PSEGGlobal-Turkey-Award.pdf>.

<sup>38</sup> At para. 261.



violate both the fair and equitable treatment standard and the rule against arbitrary or discriminatory treatment.

A number of tribunals have, in fact, examined compliance with the standards of FET and unreasonable or discriminatory treatment separately.<sup>39</sup> Although there is often no explicit discussion of the relationship of the two concepts, their sequential and separate treatment in awards indicates that the tribunals regarded them as distinct standards.

The Tribunal in *LG&E v. Argentina*<sup>40</sup> not only examined compliance with the two standards separately but also considered their relationship. It found that it was possible to violate one standard without violating the other:

... characterizing the measures as not arbitrary does not mean that such measures are characterized as fair and equitable ...<sup>41</sup> it was not arbitrary, though unfair and inequitable, not to restore the Gas Law or the other guarantees related to the gas distribution sector and to implement the contract renegotiation policy.<sup>42</sup>

The tendency to fuse the prohibition of arbitrariness with FET is probably more a consequence of the insecurity of tribunals confronted with two relatively novel and unspecific standards. As the case law evolves, it may be expected that tribunals develop a clearer perception of the precise implications of each of these principles. In fact, in a number of cases tribunals have already given a more concrete meaning to these standards. The decisions dealing with arbitrary conduct<sup>43</sup> indicate that measures are arbitrary if they inflict damage on

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<sup>39</sup> See *Occidental Exploration and Production Co. v. Ecuador*, Award, 1 July 2004, at paras. 159-166, [http://ita.law.uvic.ca/documents/Oxy-EcuadorFinalAward\\_001.pdf](http://ita.law.uvic.ca/documents/Oxy-EcuadorFinalAward_001.pdf); *Ronald S. Lauder v. The Czech Republic*, Award, 3 September 2001, at paras. 214-288, 9 ICSID Reports 66; *Genin, Eastern Credit Ltd. Inc. and AS Baltoil v. Republic of Estonia*, Award, 25 June 2001, at paras. 368-371, 6 ICSID Reports 241; *Noble Ventures v. Romania*, Award, 11 October 2005, at paras. 175-180, <http://www.investmentclaims.com/decisions/Noble-Ventures-Final-Award.pdf>; *Azurix Corp. v. The Argentine Republic*, Award, 14 July 2006, at paras. 385-393, <http://ita.law.uvic.ca/documents/AzurixAwardJuly2006.pdf>; *Siemens v. Argentina*, Award, 6 February 2007, at paras. 310-321, <http://ita.law.uvic.ca/documents/Siemens-Argentina-Award.pdf>.

<sup>40</sup> *LG&E v. Argentina*, Decision on Liability, 3 October 2006, <http://ita.law.uvic.ca/documents/LGEArgentinaLiability.pdf>.

<sup>41</sup> At para. 162.

<sup>42</sup> At para. 163.

<sup>43</sup> *Elettronica Sicula SpA (ELSI) (United States of America v. Italy)*, International Court of Justice, Judgment, 20 July 1989 ICJ 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, <http://ita.law.uvic.ca/documents/AzurixAwardJuly2006.pdf>; *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 in Respect of Damages, 31 May 2002, para. 64, 41 ILM 1347 (2002); *Occidental Exploration and Production Co. v. Ecuador*, Award, 1 July 2004, para. 163, [http://ita.law.uvic.ca/documents/Oxy-EcuadorFinalAward\\_001.pdf](http://ita.law.uvic.ca/documents/Oxy-EcuadorFinalAward_001.pdf); *Noble Ventures, Inc. v. Romania*, Award, 12 October 2005, paras. 176-178, <http://ita.law.uvic.ca/documents/Noble.pdf>; *Azurix Corp. v. The Argentine Republic*, Award, 14 July 2006, para.

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 pretence for a different motive. In cases dealing with discriminatory treatment tribunals have dealt with the issues of the basis for comparison<sup>44</sup> and with the question of whether discriminatory intent is required for a violation of the standard.<sup>45</sup>

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

#### 4. FET and Customary International Law

Article 10(1) of the ECT lists FET as well as treatment not less favourable than that required by international law, including treaty obligations as applicable standards. The question 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, has been the subject of some debate. This debate has reached particular prominence in the context of the interpretation of Article 1105(1) of the NAFTA. Principles of treaty interpretation, academic writings, State practice and judicial decision have all contributed to this debate.

As a matter of textual interpretation it is inherently implausible that a treaty would use an expression such as “fair and equitable treatment” to denote a well known concept like the “minimum standard of treatment in customary international law”. If the parties to a treaty

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393, <http://ita.law.uvic.ca/documents/AzurixAwardJuly2006.pdf>; *LG&E v. Argentina*, Decision on Liability, 3 October 2006, para. 158, <http://ita.law.uvic.ca/documents/LGEArgentinaLiability.pdf>; *Siemens v. Argentina*, Award, 6 February 2007, para. 318, <http://ita.law.uvic.ca/documents/Siemens-Argentina-Award.pdf>.

<sup>44</sup> *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, <http://ita.law.uvic.ca/documents/Saluka-PartialawardFinal.pdf>; *Occidental Exploration and Production Co. v. Ecuador*, Award, 1 July 2004, paras. 167-176, [http://ita.law.uvic.ca/documents/Oxy-EcuadorFinalAward\\_001.pdf](http://ita.law.uvic.ca/documents/Oxy-EcuadorFinalAward_001.pdf).

<sup>45</sup> *S.D. Myers v. Canada*, Award on Liability, 13 November 2000, paras. 252-254, 8 ICSID Reports 18; *Marvin Feldman v. Mexico*, Award, 16 December 2002, para. 184, 18 ICSID Review – FILJ 488 (2003); *Siemens v. Argentina*, Award, 6 February 2007, para. 321, <http://ita.law.uvic.ca/documents/Siemens-Argentina-Award.pdf>; *Ronald S. Lauder v. The Czech Republic*, Award, 3 September 2001, para. 231, 9 ICSID Reports 66; *LG&E v. Argentina*, Decision on Liability, 3 October 2006, paras. 146, 148, <http://ita.law.uvic.ca/documents/LGEArgentinaLiability.pdf>.

want to refer to customary international law it must be presumed that they will refer to it as such rather than using a different expression.

Prominent among the supporters of an independent concept of FET is *F.A. Mann*. Writing about British BITs in 1981 he said:

It is submitted that nothing is gained by introducing the conception of a minimum standard and, more than this, it is positively misleading to introduce it. The terms 'fair and equitable treatment' envisage conduct which goes far beyond the minimum standard and afford protection to a greater extent and according to a much more objective standard than any previously employed form of words. A tribunal would not be concerned with a minimum, maximum or average standard. It will have to decide whether in all circumstances the conduct in issue is fair and equitable or unfair and inequitable. No standard defined by other words is likely to be material. The terms are to be understood and applied independently and autonomously.<sup>46</sup>

*Dolzer* and *Stevens* in their leading treatise on BITs reach the same result:

It is submitted here that the fact that the parties to BITs have considered it necessary to stipulate this standard as an express obligation rather than relied on a reference to international law and thereby invoked a relatively vague concept such as the minimum standard, is probably evidence of a self-contained standard. Further, some treaties refer to international law in addition to the fair and equitable treatment, thus appearing to reaffirm that international law standards are consistent with, but complementary to, the provisions of the BIT.<sup>47</sup>

*Muchlinski* also reaches the result that the standard of fair and equitable treatment is autonomous and should be read independently of the minimum standard under general international law. He writes:

It has been suggested that fair and equitable treatment represents a classical international law standard which embodies international minimum standards of treatment. ... According to *Lavieć*,<sup>48</sup> a reference to fair and equitable treatment should not be read as a reference to international minimum standards. If the intention is to assimilate the two concepts, this should be made explicit in the text. Otherwise, the fair and equitable treatment standard should stand on its own.<sup>49</sup>

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<sup>46</sup> *F. A. Mann*, *British Treaties for the Promotion and Protection of Investments*, 52 *The British Year Book of International Law* 241, 244 (1981).

<sup>47</sup> *R. Dolzer/M. Stevens*, *Bilateral Investment Treaties*, p. 60 (1995). Footnote omitted.

<sup>48</sup> The reference is to *J. P. Lavieć*, *Protection et promotion des investissements: étude de droit international économique* p. 94 (1984).

<sup>49</sup> *P. T. Muchlinski*, *Multinational Enterprises and the Law* p. 626 (1999). Footnotes omitted.

The UNCTAD study on fair and equitable treatment<sup>50</sup> devotes considerable attention to the question of the autonomous or declaratory nature of the fair and equitable treatment standard. It also finds that “[i]f States and investors believe that the fair and equitable standard is entirely interchangeable with the international minimum standard, they could indicate this clearly in their investment instruments;”<sup>51</sup> After looking at the evidence in some detail,<sup>52</sup> the study concludes:

These considerations point ultimately towards fair and equitable treatment not being synonymous with the international minimum standard. Both standards may overlap significantly with respect to issues such as arbitrary treatment, discrimination and unreasonableness, but the presence of a provision assuring fair and equitable treatment in an investment instrument does not automatically incorporate the international minimum standard for foreign investors. Where the fair and equitable standard is invoked, the central issue remains simply whether the actions in question are in all the circumstances fair and equitable or unfair and inequitable.<sup>53</sup>

Similarly, *Vasciannie* in the most exhaustive study of the concept of fair and equitable treatment undertaken to date, supports the view that this standard is autonomous.<sup>54</sup> After a detailed examination of the evidence he concludes:

... given the substantial volume of State practice incorporating the fair and equitable standard, it is noteworthy that the instances in which States have indicated or implied an equivalence between this standard and the international minimum standard are relatively sparse. Moreover, bearing in mind that the international minimum standard has itself been an issue of controversy between developed and developing States for a considerable period, it is unlikely that a majority of States would have accepted the idea that this standard is fully reflected in the fair and equitable standard without clear discussion. These considerations point ultimately towards the conclusion that the two standards in question are not identical: both standards may overlap significantly with respect to issues such as arbitrary treatment, discrimination and unreasonableness, but the presence of a provision assuring fair and equitable treatment in an investment instrument does not automatically incorporate the international minimum standard for foreign investors. Following Mann, where the fair and equitable standard is invoked, the central issue remains simply whether the actions in question are in all the circumstances fair and equitable or unfair and inequitable.<sup>55</sup>

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<sup>50</sup> UNCTAD Series on issues in international investment agreements, *Fair and Equitable Treatment* (1999).

<sup>51</sup> At p. 13.

<sup>52</sup> At pp. 17, 23, 37-40, 53, 61.

<sup>53</sup> At p. 40.

<sup>54</sup> *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).

<sup>55</sup> At p. 144. Footnotes omitted.

But there is also authority pointing in the opposite direction. Outside the NAFTA context, the case for regarding the fair and equitable treatment standard as equivalent to the international minimum standard of customary international law is limited and seems to rest primarily on the following evidence:

Article 1(a) of the OECD Draft Convention on the Protection of Foreign Property of 1967 refers to fair and equitable treatment. The Notes and Comments to this provision state that, in the drafting committee's view, this indicated the standard set by international law:

4. (a) The phrase "fair and equitable treatment", customary in relevant bilateral agreements, indicates the standard set by international law for the treatment due by each State with regard to the property of foreign nationals. The standard requires that ... protection afforded under the Convention shall be that generally accorded by the Party concerned to its own nationals, but, being set by international law, the standard may be more exacting where rules of national law or national administrative practices fall short of the requirements of international law. The standard required conforms in effect to the "minimum standard" which forms part of customary international law.<sup>56</sup>

A comment by the Swiss Foreign Office of 1979, in the context of a discussion of the fair and equitable treatment standard, is sometimes put forward as supporting the view that the standard is equivalent to the international minimum standard:

On se réfère ainsi au principe classique du droit des gens selon lequel les Etats doivent mettre les étrangers se trouvant sur leur territoire et leurs biens au bénéfice du «standard minimum» international, c'est-à-dire leur accorder un minimum de droits personnels, procéduraux et économiques.<sup>57</sup>

Additional authority is sought in the dissenting opinion in *AAPL v. Sri Lanka*.<sup>58</sup>

By far the most intensive discussion on the relationship of the fair and equitable treatment standard to customary international law has taken place in the context of Article 1105(1) of the NAFTA.<sup>59</sup> That provision, including its heading, reads as follows:

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<sup>56</sup> 7 International Legal Materials 120 (1968).

<sup>57</sup> 36 *Annuaire suisse de droit international* 178 (1980). "Thus, it refers to the classical principle of international public law according to which States must give foreigners found within their territories, and their properties, the benefit of the international 'minimum standard', that is to say to accord them a minimum of personal, procedural and economic rights."

<sup>58</sup> See Dissenting Opinion of arbitrator Asante to *AAPL v. Sri Lanka*, Award, 21 June 1990, 30 International Legal Materials 628, 639 (1991). See also the discussion in *S. Vasciannie*, The Fair and Equitable Treatment Standard in International Investment Law and Practice, 70 *The British Year Book of International Law* 141/42 (1999).

<sup>59</sup> See especially *C. N. Brower, C. H. Brower, J. K. Sharpe*, The Coming Crisis in the Global Adjudication System, 19 *Arbitration International* 415, 428 (2003); *P. Dumberry*, The Quest to Define "Fair and Equitable Treatment" for Investors under International Law, The Case of the NAFTA Chapter 11 Pope & Talbot Awards, 3 *The Journal of World Investment* 657 (2002); *P. G. Foy, R. J. C. Deane*, Foreign Investment Protection under

### **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.<sup>60</sup>

Two features of this text are conspicuous. One is the reference to the “Minimum Standard of Treatment” in the heading – an evident reference to general international law. The second is the inclusion of the fair and equitable treatment standard in the reference to international law: “international law, including fair and equitable treatment”. Both features suggest that under this provision fair and equitable treatment is part of international law, specifically, its rules on the minimum standard of treatment. Both these features are absent from Article 10(1) of the ECT and from most BITs.

Article 1105(1) of the NAFTA has been the subject of an official interpretation by the NAFTA Free Trade Commission (FTC), a body composed of representatives of the three States Parties with the power to adopt binding interpretations.<sup>61</sup> The FTC interpretation states that Article 1105(1) reflects the customary international law minimum standard and does not require treatment beyond what is required by customary international law.<sup>62</sup> NAFTA tribunals have accepted the FTC interpretation.<sup>63</sup> The subsequent BIT practice of the United States<sup>64</sup> and of Canada<sup>65</sup> has also followed the FTC interpretation. The United States Model BIT of 2004 in its Article 5(2) states that fair and equitable treatment prescribes the customary international law minimum standard of treatment and that it does not require treatment in addition to or beyond that which is required by that standard.

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Investment Treaties: Recent Developments under Chapter 11 of the North American Free Trade Agreement, 16 ICSID Review – Foreign Investment Law Journal 299 (2001); *J. C. Thomas*, Reflections on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators, 17 ICSID Review – Foreign Investment Law Journal 21 (2002).

<sup>60</sup> 32 International Legal Materials [ILM] 639 (1993).

<sup>61</sup> Article 1131 (2) NAFTA.

<sup>62</sup> FTC Note of Interpretation of 31 July 2001: <http://www.international.gc.ca/tna-nac/NAFTA-Interpr-en.asp>

<sup>63</sup> *Pope & Talbot v. Canada*, Award in Respect of Damages, 31 May 2002, 41 ILM 1347 (2002) at 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, para. 97, 7 ICSID Reports 288; *ADF Group Inc. v. United States of America*, Award, 9 January 2003, paras. 175-178, 6 ICSID Reports 470; *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, Award, 26 June 2003, paras. 124-128, 7 ICSID Reports 442; *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.

<sup>64</sup> See Chile-United States FTA of 2003, Article 10.4; United States-Uruguay BIT of 2004, Article 5.

<sup>65</sup> Canada Model BIT, Article 5.

The authority of this practice, developed in the NAFTA context, is of limited relevance for the interpretation of other treaties, notably BITs. This is so because of three special features of Article 1105(1) of the NAFTA which are absent from other treaties:

- Article 1105 of the NAFTA refers to the “Minimum Standard of Treatment” in its heading.
- Article 1105(1) of the NAFTA refers to “international law, *including* fair and equitable treatment” suggesting that the fair and equitable treatment standard is part of general international law.
- Article 1105(1) was the object of a binding interpretation by an authorized treaty body.

Arbitral tribunals operating outside the NAFTA context have not adopted a dogmatic position on whether the fair and equitable treatment standard contained in BITs is an autonomous standard or merely reflects customary international law. Rather, they have interpreted the relevant provisions in BITs autonomously on the basis of their respective wording.<sup>66</sup> For instance, the Tribunal in *Tecmed v. Mexico*,<sup>67</sup> interpreting the BIT between Mexico and Spain, said:

The Arbitral Tribunal understands that the scope of the undertaking of fair and equitable treatment under Article 4(1) of the Agreement described above is that resulting from an autonomous interpretation, ...

If the above were not its intended scope, Article 4(1) of the Agreement would be deprived of any semantic content or practical utility of its own...<sup>68</sup>

The view that fair and equitable treatment is a treaty standard that is independent of other standards under customary international law has been expressed also by the Tribunal in *PSEG v. Turkey*.<sup>69</sup> The Tribunal, interpreting the BIT between Turkey and the United States, said of the fair and equitable treatment standard:

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<sup>66</sup> *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, [http://ita.law.uvic.ca/documents/Oxy-EcuadorFinalAward\\_001.pdf](http://ita.law.uvic.ca/documents/Oxy-EcuadorFinalAward_001.pdf), paras 188-190; *CMS Gas Transmission Company v. Argentina*, Award, 12 May 2005 at paras. 282-284, [http://ita.law.uvic.ca/documents/CMS\\_FinalAward.pdf](http://ita.law.uvic.ca/documents/CMS_FinalAward.pdf).; *Saluka v. Czech Republic*, Partial Award, 17 March 2006, paras. 286-295, <http://ita.law.uvic.ca/documents/Saluka-PartialawardFinal.pdf>; *LG&E v. Argentina*, Decision on Liability, 3 October 2006, <http://ita.law.uvic.ca/documents/LGEArgentinaLiability.pdf>; *PSEG v. Turkey*, Award, 19 January 2007, para. 239, <http://ita.law.uvic.ca/documents/PSEGGlobal-Turkey-Award.pdf>; *Siemens v. Argentina*, Award, 6 February 2007, at paras. 291 *et seq.*, <http://ita.law.uvic.ca/documents/Siemens-Argentina-Award.pdf>.

<sup>67</sup> *Tecnicas Medioambientales Tecmed S. A. v. The United Mexican States*, Award, 29 May 2003, 43 ILM 133 (2004).

<sup>68</sup> At paras. 155, 156.

<sup>69</sup> *PSEG v. Turkey*, Award, 19 January 2007, <http://ita.law.uvic.ca/documents/PSEGGlobal-Turkey-Award.pdf>.

... it clearly does allow for justice to be done in the absence of the more traditional breaches of international law standards. This role has resulted in the concept of fair and equitable treatment acquiring a standing on its own, separate and distinct from that of other standards, albeit many times closely related to them, and thus ensuring that the protection granted to the investment is fully safeguarded.<sup>70</sup>

Other tribunals have similarly held that the fair and equitable treatment standard had to be interpreted independently of the standards of customary international law.<sup>71</sup>

*Genin v. Estonia*<sup>72</sup> is sometimes cited as authority to the contrary. In that case the Tribunal had referred to fair and equitable treatment as

... an “international minimum standard” that is separate from domestic law, but that is, indeed a *minimum* standard.<sup>73</sup>

The Tribunal in *Genin* was not referring to “the” international minimum standard under customary international law. It merely pointed out that the treaty provision containing the obligation to offer fair and equitable treatment constituted a minimum below which domestic law may not fall.

This interpretation is confirmed by the Partial Award in *Saluka v. Czech Republic*.<sup>74</sup> The Tribunal explicitly rejected a suggestion that the provision on fair and equitable treatment in the Netherlands-Czech BIT incorporates the customary minimum standard. The Tribunal said:

The *Genin* tribunal merely held that a BIT standard of “fair and equitable” treatment provides “a basic and general standard which is detached from the host States’ domestic law”. This standard is characterised by the *Genin* tribunal as “an” international minimum standard, not as “the” international minimum standard. Far from equating the BIT’s standard with the customary minimum standard, the *Genin* tribunal merely emphasised that the “fair and equitable treatment” standard requires the Contracting States to accord to foreign investors treatment which does not fall below a certain minimum, this minimum being in any case detached from any lower minimum standard of treatment that may prevail in the domestic laws of the Contracting States.<sup>75</sup>

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<sup>70</sup> At para. 239.

<sup>71</sup> *MTD v. Republic of Chile*, Award, 25 May 2004, 44 ILM 91 (2005), at paras. 110-112; *Siemens v. Argentina*, Award, 6 February 2007, at paras. 291-299. <http://ita.law.uvic.ca/documents/Siemens-Argentina-Award.pdf>.

<sup>72</sup> *Genin, Eastern Credit Ltd. Inc. and AS Baltoil v. Republic of Estonia*, Award, 25 June 2001, 6 ICSID Reports 241.

<sup>73</sup> At para. 367. Italics original.

<sup>74</sup> *Saluka v. Czech Republic*, Partial Award, 17 March 2006, <http://ita.law.uvic.ca/documents/Saluka-PartialawardFinal.pdf>.

<sup>75</sup> At para. 295. Footnote omitted.



In this context it is significant that one of the arbitrators in *Saluka* had been the President of the *Genin* Tribunal.<sup>76</sup>

Much will depend on the wording of the specific treaty to be applied in the particular case.<sup>77</sup> Article 10(1) of the ECT, lists several standards in parallel. These standards include FET and treatment not less favourable than that required by international law. It would be implausible to regard two of the standards thus listed as being identical. Put differently, a provision that separately provides for FET **and** for treatment required by international law cannot reasonably be interpreted as meaning that FET is the same as the treatment required by international law.

In *Azurix v. Argentina*<sup>78</sup> the Tribunal interpreted 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 paragraph consists of three full statements, each listing in sequence a standard of treatment to be accorded to investments: fair and equitable, full protection and security, not less than required by international law. Fair and equitable treatment is listed separately. The last sentence ensures that, whichever content is attributed to the other two standards, the treatment accorded to investment will be no less than required by international law. 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.<sup>79</sup>

The conclusion that fair and equitable treatment is an autonomous treaty standard is somewhat mitigated by the fact that some 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.”<sup>80</sup> For instance, the Tribunal in *CMS v.*

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<sup>76</sup> Maître L. Yves Fortier CC QC.

<sup>77</sup> See also *S. Vasciannie*, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, 70 *The British Year Book of International Law* 122, 127 (1999) who points out that the use of the term fair and equitable treatment does not necessarily convey the same legal result in each case. In the same sense: UNCTAD Series on issues in international investment agreements, *Fair and Equitable Treatment*, p. 22 (1999).

<sup>78</sup> *Azurix Corp. v. The Argentine Republic*, Award, 14 July 2006, <http://ita.law.uvic.ca/documents/AzurixAwardJuly2006.pdf>.

<sup>79</sup> At para. 361.

<sup>80</sup> *Saluka v. Czech Republic*, Partial Award, 17 March 2006, para. 291, <http://ita.law.uvic.ca/documents/Saluka-PartialawardFinal.pdf>. See also *Azurix v. Argentina*, Award, 14 July 2006, para. 361, 364,

*Argentina*<sup>81</sup> found that the question whether the standard of fair and equitable treatment was identical with customary international law was not relevant in the case before it since

the required stability and predictability of the business environment, founded on solemn legal and contractual commitments, is not different from the international law minimum standard and its evolution under customary law.<sup>82</sup>

In a particular case, FET may well overlap with or even be identical with the minimum standard required by international law. The fact that the host State has breached a rule of international law may be evidence of a violation of the FET standard,<sup>83</sup> but it is not the only conceivable form of its breach. Overall, FET describes a higher standard that is additional to the customary law minimum standard. For instance, the demanding standards of transparency and consistency that have been developed for FET in *Tecmed*<sup>84</sup> and in subsequent cases go beyond the traditional international minimum standard for the treatment of foreigners.

The insistence that FET is identical with customary international law may well have an effect that is the opposite of what is intended by those who advocate this identity. It will not restrain the development of the FET standard. More likely, the consequence of that position will be to accelerate the development of customary law through the rapidly expanding practice on FET clauses in treaties.<sup>85</sup>

## 5. FET and the Observance of Contracts

It is widely accepted that the most important function of the FET standard is the protection of the investor's legitimate expectation through the creation of a transparent and stable legal

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<http://ita.law.uvic.ca/documents/AzurixAwardJuly2006.pdf>; *Occidental Exploration and Production Co. v. Ecuador*, Award, 1 July 2004, para. 190, [http://ita.law.uvic.ca/documents/Oxy-EcuadorFinalAward\\_001.pdf](http://ita.law.uvic.ca/documents/Oxy-EcuadorFinalAward_001.pdf).

<sup>81</sup> *CMS Gas Transmission Company v. Argentina*, Award, 12 May 2005 at paras. 282-284, [http://ita.law.uvic.ca/documents/CMS\\_FinalAward.pdf](http://ita.law.uvic.ca/documents/CMS_FinalAward.pdf).

<sup>82</sup> At para. 284.

<sup>83</sup> See *S D Myers v Canada*, First Partial Award, 13 November 2000, 40 ILM (2001) 1408, 1438 at para. 264: "the fact that a host Party has breached a rule of international law that is specifically designed to protect investors will tend to weigh heavily in favour of finding a breach of Article 1105."

<sup>84</sup> *Tecnicas Medioambientales Tecmed S. A. v. The United Mexican States*, Award, 29 May 2003, para. 154, 43 ILM 133 (2004).

<sup>85</sup> *R. Dolzer/A. von Walter*, 'Fair and Equitable Treatment and Customary Law – Lines of Jurisprudence' in BIICL (ed), *Investment Treaty Forum* (forthcoming 2007).

framework. Emblematic of this function is the description of the FET standard in *Tecmed v. Mexico*.<sup>86</sup> In that case the Tribunal said:

The Arbitral Tribunal considers that this provision of the Agreement, in light of the good faith principle established by international law, 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. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.<sup>87</sup>

An important aspect of the protection of the investor's legitimate expectations is the observance of obligations arising from contracts with the host State. Agreements are the classical instrument in most if not all legal systems for the creation of legal stability and predictability. Therefore, *pacta sunt servanda* would seem to be an obvious application of the stability requirement that is so prominent in the fair and equitable treatment standard. Taken to its logical conclusion this argument would put all agreements between the investor and the host State under the protection of the FET standard. If this position were to be accepted, the FET standard would be nothing less than a broadly interpreted umbrella clause.

But Article 10(1) of the ECT contains a typical umbrella clause in addition to the FET standard. It provides that host States are to observe any obligations entered into with an investor.<sup>88</sup> Therefore, an interpretation that gives the FET standard the meaning of an umbrella clause is inherently implausible. It cannot be assumed that the umbrella clause adds nothing to the FET standard.

A look at practice shows that tribunals seem to agree that a failure to perform a contract may amount to a violation of the FET standard. But it is doubtful whether any violation of a contractual obligation by a host State or one of its entities automatically amounts to a violation of the FET standard.

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<sup>86</sup> *Tecnicas Medioambientales Tecmed S. A. v. The United Mexican States*, Award, 29 May 2003, 43 ILM 133 (2004).

<sup>87</sup> At para. 154.

<sup>88</sup> Article 10(1) ECT, last sentence: "Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party."

The Tribunal in *Mondev*<sup>89</sup> found it clear that the protection of Article 1105(1) NAFTA, containing the FET standard, extended to contract claims. The Tribunal said:

... a governmental prerogative to violate investment contracts would appear to be inconsistent with the principles embodied in Article 1105 and with contemporary standards of national and international law concerning governmental liability for contractual performance.<sup>90</sup>

The Tribunal in *SGS v. Philippines*<sup>91</sup> also admitted the possibility that a violation of obligations under a contract may give rise to a claim for violation of the FET standard. In its Decision on Jurisdiction, it found that “an unjustified refusal to pay sums admittedly payable under an award or a contract at least raises arguable issues under Article IV” [containing the FET standard].<sup>92</sup>

In *Bogdanov v. Moldova*<sup>93</sup> a contract between the investor and the State of Moldova provided that the investor should transfer to the State certain assets in exchange for shares in companies owned by the State. The Claimant’s requests for the Compensation Shares were all rejected since the requested shares were not on a list of eligible shares. The Tribunal found that the Respondent was not entitled to choose the Compensation Shares in such a way that the compensation was deprived of its value. The Tribunal said:

By taking this measure, the Respondent has in practice avoided to pay compensation for the Transferred Assets, thus negatively affecting the Claimant’s legitimate expectations of obtaining compensation ( ...).

The Arbitral Tribunal, therefore, finds that the Respondent, by establishing a system for compensation of the Transferred Assets that permitted an abusive application and by its subsequent application, is in violation of the fair and equitable treatment standard contained in article 3 of the BIT.<sup>94</sup>

The Tribunal in *Noble Ventures v. Romania*<sup>95</sup> also found that the FET standard covers the obligation to abide by contracts. The Tribunal said with respect to this standard:

... one can consider this to be a more general standard which finds its specific application in *inter alia* the duty to provide full protection and security, the prohibition of arbitrary and discriminatory measures and the *obligation to*

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<sup>89</sup> *Mondev Intl. Ltd. v. The United States of America*, Award, 11 October 2002, 42 ILM 85 (2003).

<sup>90</sup> *Ibid.*, at para. 134.

<sup>91</sup> *SGS v. Philippines*, Decision on Jurisdiction, 29 January 2004, 42 I.L.M. 1285.

<sup>92</sup> *Ibid.*, at para. 162.

<sup>93</sup> *Iurii Bogdanov, Agurdino-Invest Ltd. and Agurdino-Chimia JSC v. Republic of Moldova*, Award, 22 September 2005, <http://ita.law.uvic.ca/documents/Bogdanov-Moldova-22September2005.pdf>.

<sup>94</sup> At p. 17.

<sup>95</sup> *Noble Ventures. Inc. v. Romania*, Award, 12 October 2005, <http://ita.law.uvic.ca/documents/Noble.pdf>.

*observe contractual obligations* towards the investor.<sup>96</sup>

Other tribunals have adopted a more differentiated approach. They have found that a simple breach of contract by a State would not trigger a violation of the fair and equitable treatment standard. However, an outright repudiation of the contract, brought about through the employment of sovereign prerogative, would lead to a violation of the fair and equitable treatment standard.

In *Waste Management*,<sup>97</sup> one of the claims based on Article 1105(1) NAFTA concerned the failure of the City of Acapulco to make payments under a concession agreement.<sup>98</sup> The Tribunal did not find that this amounted to a violation of the FET standard. The Tribunal said:

... even the persistent non-payment of debts by a municipality is not to be equated with a violation of Article 1105, provided that it does not amount to an outright and unjustified repudiation of the transaction and provided that some remedy is open to the creditor to address the problem.<sup>99</sup>

*Impregilo v. Pakistan*<sup>100</sup> concerns a contract for the construction of hydroelectric power facilities. The Tribunal, in its Decision on Jurisdiction, found that the success of Claimant's reliance on the FET standard would depend on whether the impugned activity by the host State involved "*puissance publique*" *i.e.* activity beyond that of an ordinary contracting party.<sup>101</sup>

It is unlikely that a view will prevail that sees each and every violation of a contract as a breach of the FET standard. Where the outer limits of FET with regard to contracts will be drawn is another matter. A formal repudiation of the contract by way of a sovereign act may not be the best criterion. In fact, an action that abrogates a contract through an act of *puissance publique* would probably more accurately be described as an expropriation. A more relevant test for the violation of the FET standard with respect to contracts would be whether the investor's legitimate expectations regarding a secure and stable legal framework are affected. Not every violation of a contract would trigger a finding to this effect. The availability of legal remedies would clearly play a role in this context.

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<sup>96</sup> At para. 182. Emphasis added.

<sup>97</sup> *Waste Management, Inc. v. United Mexican States*, Award, 30 April 2004, 43 ILM 967 (2004).

<sup>98</sup> At paras. 108–117.

<sup>99</sup> At para. 115. This part of the decision is cited with approval in *GAMI v. Mexico*, Final Award, 15 November 2004, 44 ILM 545 (2005) at para. 101.

<sup>100</sup> *Impregilo S.p.A. v. Pakistan*, Decision on Jurisdiction, 22 April 2005, <http://ita.law.uvic.ca/documents/impregilo-decision.pdf>.

<sup>101</sup> At paras. 266–270.

## 6. FET and the Observance of Domestic Law

It is accepted that domestic law may not be used as an excuse for the non-compliance with international obligations.<sup>102</sup> It is also accepted that important changes in domestic law that undermine the investor's legitimate expectations or the stability of the investment's legal environment are contrary to the FET standard.<sup>103</sup>

A different question is whether the host State's non-compliance with its own law may amount to a violation of the FET standard. Does the investor have a right under international law that the host State acts at all times in accordance with its own law? Compliance with domestic law would be the primary responsibility of domestic enforcement mechanisms and not a matter for international adjudication. On the other hand, non-observance of important aspects of domestic law may well affect the transparency and stability of the investment's regulatory framework and may therefore be contrary to the FET standard.

The Tribunal in *ADF v. United States*<sup>104</sup> said in this sense:

... something more than simple illegality or lack of authority under the domestic law of a State is necessary to render an act or measure inconsistent with the customary international law requirements of Article 1105(1) ...<sup>105</sup>

In *GAMI v. Mexico*<sup>106</sup> the Claimant demonstrated that relevant domestic regulations had not been carried out in accordance with their terms.<sup>107</sup> Mexico's response was that the Tribunal did not have the mandate to control the application of national law by national authorities.<sup>108</sup> The Tribunal rejected that argument and stated that a government's failure to comply with its own law may violate the FET standard. The Tribunal said:

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<sup>102</sup> See Article 32 of the Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission at its fifty-third session in 2001: "The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part." *J. Crawford*, *The International Law Commission's Draft Articles on State Responsibility* 207 (2002).

<sup>103</sup> See e.g. *PSEG v. Turkey*, Award, 19 January 2007, at para. 250.

<sup>104</sup> *ADF Group Inc. v. United States of America*, Award, 9 January 2003, 6 ICSID Reports 470.

<sup>105</sup> At para. 190.

<sup>106</sup> *GAMI v. Mexico*, Final Award, 15 November 2004, 44 ILM 545 (2005).

<sup>107</sup> At paras. 86, 88, 103, 108.

<sup>108</sup> At para. 90.

... a government's failure to implement or abide by its own law in a manner adversely affecting a foreign investor may but will not necessarily lead to a violation of Article 1105. Much depends on context.<sup>109</sup>

The Tribunal added that whether a breach of international law had occurred would not depend on dramatic incidents in isolation but on the record as a whole.<sup>110</sup> In the particular case there was no evidence that Mexico set its face against implementation of the regulations. The failures were not attributable to the government since the necessary cooperation of the private sector and the unions had been lacking.<sup>111</sup>

The Tribunal in *PSEG v. Turkey*<sup>112</sup> was more explicit. It found that the administration had on occasion ignored rights granted by law as a matter of policy or practice. The Tribunal added:

Similar was the situation in respect of the Constitutional Court decision upholding the rights acquired under a contract, which was simply ignored by MENR [Ministry of Energy and Natural Resources] in its dealings with 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.<sup>113</sup>

Ultimately this and other shortcomings led the Tribunal to the conclusion that a stable and predictable business environment for investors had been lacking and that this constituted a violation of the FET standard.

It follows that a violation by the host State of its own law will not automatically amount to a breach of the FET standard. This would be the case only if the violations were systemic and were to affect the stability and transparency of the investment's legal environment. Again, the availability of legal remedies to enforce the domestic law would be important.

## **7. FET and Expropriation**

Article 13 of the ECT contains a detailed provision on expropriation. That provision is distinct and separate from Article 10(1) which contains the FET standard.

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<sup>109</sup> At para. 91. See also paras. 94, 97.

<sup>110</sup> At para. 103.

<sup>111</sup> At paras. 104, 108, 110.

<sup>112</sup> *PSEG v. Turkey*, Award, 19 January 2007

<sup>113</sup> At para. 249.

Protection against uncompensated expropriation was once the most important issue in international investment law. The role of protection against expropriation has to some extent been replaced by the FET standard. In an investment dispute the burden of proof for an investor to demonstrate a violation of FET is usually lighter than to establish an expropriation.

The Tribunal in *PSEG v. Turkey*<sup>114</sup> described this relationship 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.<sup>115</sup>

A look at decisions rendered over the last couple of years shows clearly that Tribunals frequently find a violation of the FET standard but at the same time deny that there has been an expropriation. Therefore claims based on violations of the FET standard have become the most promising and most popular way to vindicate investors' rights. In fact, it is difficult to envisage an uncompensated expropriation that would not also involve a violation of the FET standard.

But protection against expropriation has by no means become superfluous through the introduction of the FET standard. At times reliance on the FET standard may not be available. 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. In that situation reliance on the FET standard would not suffice. In order to establish the tribunal's jurisdiction the claimant will have to base its claim on expropriation.

The two standards, FET and protection against expropriation, are not always kept completely separate. Sometimes a treaty, in its provision on expropriation, contains a reference to FET. For instance 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

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<sup>114</sup> *PSEG v. Turkey*, Award, 19 January 2007.

<sup>115</sup> At para. 238.



as well as other principles of treatment.<sup>116</sup> In this way the FET standard gets imported into the provision on expropriation.

This sort of provision becomes highly relevant where the treaty concerned provides for jurisdiction for expropriation but not for other matters. The same Argentina-US BIT contains a carve out for tax matters. This means that the treaty is inapplicable, in principle, in matters of taxation. However, the carve out does not apply if an expropriation is involved.<sup>117</sup> Tribunals have held that the reference to FET in the provision on expropriation preserved its applicability even where taxation was involved.

The Tribunal in *Enron v. Argentina*<sup>118</sup> found that the fact that it remained competent for matters of expropriation, despite the exception for tax matters, also had some important implications for the standards of treatment in Article II(2) of the BIT, notably FET. Therefore, the standards of treatment, including FET, remained operational notwithstanding the exception for tax matters. The Tribunal said:

66. It is also important to note that once expropriation is invoked, as indeed it has been, then the connection between Article IV and the standards of treatment under Article II (2) of the Treaty becomes operational, including fair and equitable treatment, full protection and security and treatment not less than that required by international law.<sup>119</sup>

The Tribunal in *Pan American v. Argentina*<sup>120</sup> reached the same result:

... an expropriation claim linked to a tax matter brings in, *via* Article IV, the standards of treatment of Article II, including that of fair and equitable treatment, provided that there is direct or indirect expropriation, which comprises measures tantamount to expropriation.<sup>121</sup>

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<sup>116</sup> 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.

<sup>117</sup> Article XII of the Argentina-US BIT provides in relevant part: “1. With respect to its tax policies, each Party should strive to accord fairness and equity in the treatment of investments of nationals and companies of the other Party. 2. Nevertheless, the provisions of this Treaty, and in particular Article VII and VIII, shall apply to matters of taxation only with respect to the following: (a) expropriation, pursuant to Article IV; (b) transfers, pursuant to Article V; (c) the observance and enforcement of terms of an investment agreement or authorization as referred to in Article VII(1)(a) or (b), ...

<sup>118</sup> *Enron v. Argentina*, Decision on Jurisdiction, 14 January 2004, 11 ICSID Reports 273.

<sup>119</sup> At para. 66.

<sup>120</sup> *Pan American v. Argentina*, Decision on Preliminary Objections, 27 July 2006.

<sup>121</sup> At para. 136.

An example for the operation of the standards of treatment, such as FET, in the context of a decision concerning expropriation by way of taxation, is offered by *Link-Trading v. Moldova*.<sup>122</sup> The applicable treaty was the Moldova-US BIT which is similar to the Argentina-US BIT in all material respects. In that case, the Government had withdrawn customs and tax exemptions granted to the investor's retail customers. The Tribunal used the standards of FET and of arbitrary and discriminatory in order to ascertain the existence of an expropriation:

As a general matter, fiscal measures only become expropriatory when they are found to be an abusive taking. Abuse arises where it is demonstrated that the State has acted unfairly or inequitably towards the investment, where it has adopted measures that are arbitrary or discriminatory in character or in their manner of implementation, or where the measures taken violate an obligation undertaken by the State in regard to the investment.<sup>123</sup>

In other word, the existence of the expropriation depended *inter alia* on whether there had been a violation of the FET standard.

As the examples above demonstrate, FET and protection against expropriation, while clearly separate standards are still connected. 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 there was indeed an expropriation or whether the expropriation was legal.

## **8. Conclusion**

If any specific conclusion is to be drawn from the above it is the central role of FET in the protection of foreign investments. Despite its generality and abstraction, FET is a free standing standard that may be the basis for an independent claim. There are numerous cases that prove this assertion.

At the same time FET is connected to other standards of protection in a variety of ways. It has points of contact to the standards of 'constant protection and security' and protection against 'unreasonable or discriminatory measures'. Some tribunals have even found it unnecessary to distinguish these two standards from FET. The better view is that these standards, though

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<sup>122</sup> *Link-Trading v. Moldova*, Award, 18 April 2002.

<sup>123</sup> At para. 64. The claim of expropriation failed primarily as a matter of causality. At para. 91.

related, are separate and autonomous. In fact, some tribunals have given them their own specific meaning.

The question of whether the FET standard is identical with or additional to the international minimum standard under customary international law has led to intensive debate. The answer ultimately depends on the wording of the respective treaties. Under the NAFTA and under some BITs it is established that they are the same. Under the ECT and under most BITs the better view is that FET is an additional and higher standard.

The violation of contractual commitments by a host State may amount to a violation of the FET standard. But this does not mean that a treaty provision on FET will render an umbrella clause superfluous. Only where a violation of the contract affects the investor's legitimate expectations on a secure and stable legal framework is it possible to speak of a breach of the FET standard.

Not every violation by the host State of its own domestic law is at odds with FET. But violations of host State law that affect the stability and transparency of the legal framework under which the investor operates may encroach upon the treaty standard of FET.

Protection against expropriation is clearly distinguishable from FET. But under certain circumstances FET may be a prerequisite for a legal expropriation. This link between expropriation and FET is particularly important where a tribunal's jurisdiction is limited to matters arising from an expropriation.

These various instances of interactions with other standards of protection demonstrate that FET is indeed an overarching principle that finds its expression in a number of ways in different standards and concepts of modern investment law.