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Legitimate Expectations as Part of the Fair and Equitable Treatment Standard in Investment Arbitration

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Abbreviations

BIT	bilateral investment treaty
FET	Fair and Equitable Treatment
FCN	Treaties of Friendship, Commerce and Navigation
ICSID	International Centre for Settlement of Investment Disputes
OECD	Organisation for Economic Co-operation and Development
ECT	Energy Charter Treaty
NAFTA	North American Free Trade Agreement
USMCA	United States of America, Mexico, and Canada
VCLT	Vienna Convention on the Law of Treaties
UNCTAD	United Nations Conference on Trade and Development
MFN	most-favoured-nation
ICJ	International Court of Justice

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Introduction

Globalization has in the recent decades affected a multitude of aspects in our lives. Law is no different. One of the consequences of globalization in the legal realm is the need to resolve disputes on the international level. And not only the usual disputes between legal and natural persons that can be solved through conflict of laws or the disputes between states as sovereign entities, but also a particular kind of disputes between investors and states. This is the essence of foreign direct investment arbitration, which primarily concerns the resolution of disputes between foreign investors, whether they are corporations or individuals, and the host states in which they have made their investments.

Before investment arbitration, there was virtually no way for an individual to uphold a claim against a foreign state. The only way to do so was through the individual's own government or the local courts of the foreign state. Until the Hague Conventions from the beginning of 20th century it was common for states to solve such disputes through presentations of warpower. The Hague Conventions ended the era of gunboat diplomacy in which a government would dispatch a number of warships to anchor near the coast of the offending state, with the aim of obtaining reparations.[1] Instead, these conventions paved the way for peaceful methods of dispute resolution.

However, the most significant reform for investment disputes as they exist today happened in 1965 with the establishment ICSID Convention. This convention allows individuals from signatory states the direct right to pose a claim against a state without being subject to political considerations of his own government. The ICSID Convention started the era of Bilateral Investment Treaties (BITs). BITs are diagonal clauses among states, which provide a general agreement to arbitration of the states towards each other's investors. One of the first signed BITs was between Pakistan and Germany in 1959[2] and the number of investment treaties has been growing ever since. It has quintupled during 1990s[3] and in 2020 there were 3360 international investment agreements in effect in total.[4]

The BIT typically takes comprehensive approach to international investments, regulating the admission of investment, the standard of treatment of the investment, rules for expropriation and for compensation. This thesis will focus on the regime of treatment in these treaties and the

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[1] Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (Oxford University Press 2015) 441. [2] *Treaty for the Promotion and Protection of Investments, Germany and Pakistan, 25 November 1959, 457 U.N.T.S. 24 (dated 28 November 1962).*

[3] UNCTAD, 'UNCTAD Press Release, TAD/INF/PR/077' <https://unctad.org/press-material/bilateral-investment-treaties-quintupled-during-1990s> accessed 30 March 2023.

[4] UNCTAD, 'World Investment Report 2021 – Investing in Sustainable Recovery' 12 <https://unctad.org/system/files/official-document/wir2021_en.pdf>.

different standards of protection they offer. These standards establish the framework in which foreign investors operate and rely on when making the investment. They can be differentiated into two types based on their nature: absolute standards and relative standards. Relative standards depend on a treatment given to another person or entity in the same position. These are for example the most-favoured-nation (MFN) treatment, national treatment, or protection from discrimination. Such standards directly stem from a comparison with another investor in similar or identical conditions. On the other hand, absolute standards are those that have a set threshold which applies to all cases in the same manner and does not require any comparison. Those are for instance the right to full protection and security, protection from arbitrary measures or the cornerstone of this thesis, the fair and equitable treatment (FET) standard. The FET standard is the topic of the first part of this thesis. The second part deals with one of the crucial contents of the FET standard, the protection of investor's legitimate expectations, which safeguard the stability of investment environment.

To comment on sources of this thesis, it is based on academic writings as well as legal doctrine, documents from international organisations and relevant treaties. However, the fundamental role is played by decisions of arbitral tribunals. Since the international legal regime is by majority fragmented into BITs, there are not coherent and straightforward rules to apply and base the theory on. Consequently, the field of investment arbitration is highly impacted by precedent and less by academic theory. The tribunals in arbitral decisions typically dedicate dozens of pages to the analysis of previous case law, looking for similar circumstances and trends. It is usual to cite multiple other tribunals and their sources before applying all of these findings onto the facts of the dispute and then drawing their own conclusions, agreeing more or less with the preceding decisions.

After analysing these sources, this thesis aims to provide a conceptual overview of the FET standard and legitimate expectations as it evolved and manifested in arbitral practice. The objective is to examine this standard, its interpretation, application and implications onto investment disputes and investment treaties nowadays. While this thesis aspires to provide a comprehensive analysis, it is important to acknowledge certain limitations. The scope of the study is confined to a select number of investment treaties and arbitral decisions, recognizing that the field is vast and requires targeted analysis.

This thesis is divided into two major parts. The first part will focus on the FET standard and the second is dedicated to the concept of legitimate expectations under the FET standard in investment law. The first part on FET standard consists of five chapters. The first chapter introduces the history and evolution of the standard. The second focuses onto the relationship of

FET and the minimum standard of treatment under customary international law. The third introduces the different formulations of FET provisions in investment agreements. The fourth chapter dissects the substantive contents of the FET standard, introducing especially the protection of stability and constancy, transparency and due process. At last, this part will describe the interplay between FET standard and other standards of treatment stemming from international investment law.

The second part consists of three chapters. Firstly, it introduces the concept of legitimate expectations and portrays its relationship with the FET standard. Secondly, it differs between types of legitimate expectations based on their origin. Thirdly, it examines the delicate balance between the interests of the investor and the host states right to regulate, especially in public interest.

1. Fair and equitable treatment standard of treatment

Standards of treatment are the backbone of international investment protection. They create the framework for investors to invest in a more predictable and safer environment through international agreements between sovereign states.

There are two typical characteristics associated with rules governing the treatment of investments. The first is lack of multilateral contractual agreements and the second are disagreements concerning the existence and substance of universally accepted rules of international law. These two aspects directly lead to the biggest problem of the treatment of investments which is the fragmentation of its rules and the wideness of different definitions, wordings and interpretations. Consequentially, no dispute is like the other, because every bilateral treaty uses different standards, or uses different wording for the same standards. Furthermore, most standards are linked to the facts of the investment at hand, be it actual promises of the state officials, the political situation in the state or the motivations of the specific investor, creating a wide palette of facts, rules and provisions for every individual tribunal to consider. Among these rules and standards of treatment lies the fair and equitable standard of treatment.

Fair and equitable standard of treatment is one of the fundamental principles in international investment law. It can be found in majority of investment treaties.[5] The purpose of the standard is, as the name suggests, to protect investors from treatment that would be considered unfair or inequitable. The key requirements under FET standard are stability and consistency, legitimate expectations, transparency, non-discrimination and reasonableness of state measures towards the investor.

FET standard generally comes into play when a state action does not directly constitute a violation of other specific provisions of the treaty, such as the prohibition of expropriation or the protection of due process. In a way, the standard *"fills gaps that may be left by the more specific standards"*.[6]

By definition from Max Planck Encyclopedia of International Law *"FET is a standard of international investment law which sets a quality requirement for the interference of host State*

[5] Rudolf Dolzer, Christoph Schreuer and Ursula Kriebaum, *Principles of International Investment Law* (Third Edition, Oxford University Press 2022) 186; Pavel Šturma and Vladimír Balaš, *Mezinárodní Ekonomické Právo* (C H Beck 2013) 387; OECD, 'Fair and Equitable Treatment Standard in International Investment Law' 5 <https://www.oecd.org/daf/inv/investment-policy/WP-2004_3.pdf>.

[6] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2008) 122.

regulatory and adjudicatory systems with foreign investments".[7] As such, the FET standard provision is more concerned with the decision-making process of the state and its consistency and practice than substantive rights themselves. It offers protection to the investor from a wide variety of state actions which could be harmful towards the investment.

The standard of treatment of investments sits at the core of most disputes. The rules of treatment are derived from international norms as well as national. And they create a framework in which the investment exists from its foundation to its liquidation. The conflict arises from the fact that, outside of international investment law, the treatment is mostly governed by the national laws of a foreign state which is under no influence of the state of the investor be it on its content or its stability. That is why the standard of treatment is in most cases regulated in the BIT. Simply put, it assures the state certain level of guarantees for its investors through the norms of international law, even if national laws of the host state change in the future.

The FET standard is often considered vague.[8] This nature could be regarded as a benefit as well as a complication. On the positive side, this general nature of fairness gives tribunals the room to consider all the individual circumstances of the case at hand. On the other hand, the standard gives the tribunal extensive space for interpretation which has led to inconsistency and fragmentation of the arbitral practice as will be illustrated later in this thesis.

FET standard is a factual standard as its implementation relies on the specific facts of the specific case.[9] Consequently, it is essentially impossible to describe its specific contents.[10] The contents will differ depending on the facts of the case and acts taken by the host state and the investor as well as the wording if the treaty in question. This allows the tribunals to properly consider all the facts of the dispute no matter how unpredictable or particular they could be and rule accordingly.

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[7] Nicolas Angelet, 'Fair and Equitable Treatment', *Max Planck Encyclopedias of International Law* <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e2055?rskey=tKQufr&result=1&prd=MPIL> accessed 22 March 2023.

[8] *CMS Gas Transmission Company v The Republic of Argentina, ICSID Case No ARB/01/8, Award, 12 May 2005* [273]; *Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales del Agua SA v The Argentine Republic, ICSID Case No ARB/03/17, Decision on Liability, 30 July 2010* [196]; *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic, ICSID Case No ARB/07/26, Award, 8 Deember 2016* [611]; Dolzer, Schreuer and Kriebaum (n 5) 186–188.

[9] *Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt, ICSID Case No ARB/05/15, Award, 1 June 2009* [450]; *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay, ICSID Case No ARB/10/7, Award, 8 July 2016* [320]; *Waste Management, Inc v United Mexican States, ICSID Case No ARB(AF)/00/3, Award, 30 April 2004* [99]; *Mondev International Ltd v United States of America, ICSID Case No ARB(AF)/99/2, Award, 11 October 2002* [118]; *Saluka v Czech Republic, UNCITRAL, Partial Award, 17 March 2006* [285].

[10] *Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004* (n 9) paras 98–99; *Ronald S Lauder v Czech Republic, UNCITRAL, Award, 3 September 2001* [292].

The FET standard is one of the most used and most controversial standards of modern investment arbitration. It is included in almost 95% of investment treaties.[11] The standard is also the most frequently invoked standard in investment arbitration,[12] accounting to more than 80% of investment disputes.[13] There is a valid reason for this circumstance, as FET serves as the base for most successful claims, due to its broad definition which leaves plenty of room for interpretation along with legal and factual argumentation.

Protection standard this wide and unspecific also brings its disadvantages. In the current times we can find widely differing interpretations of arbitral tribunals and other dispute settlement bodies. Some tribunals interpret the standard more broadly than others, some take into account the context of the treaty and its preamble while others focus more on the pure concept of fairness. These different approaches and their subsequent reasoning will be the subject of following chapters.

To derive from practice, tribunals commonly concur that FET standard eludes a precise definition and encompasses a broad spectrum of situations and measures.[14] Nonetheless, some tribunals have made attempts to articulate the standard in their own terms. These definitions have gained frequent citations in legal briefs and subsequently influenced arbitral practice.[15]

One of the most cited definitions is from the decision in *Tecmed v Mexico* from 2003.[16] This dispute revolved around the revocation of a license for a hazardous waste landfill. The Tribunal determined that it had the responsibility to interpret the FET standard autonomously, considering its textual provisions and their ordinary meaning, principles of international law, and the principle of good faith. The tribunal highlighted the requirements of consistency, transparency, and legitimate expectations of the investor as the important requirements under this standard of treatment. This was one of the first broad definitions of FET by states and became highly influential in investment jurisprudence.[17]

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[11] Florencia Sarmiento and Suzy Nikièma, 'Fair and Equitable Treatment: Why It Matters and What Can Be Done' <https://www.iisd.org/system/files/2022-11/fair-equitable-treatment-en.pdf> accessed 22 March 2023.
[12] Dolzer, Schreuer and Kriebaum (n 5) 186.
[13] Florencia Sarmiento and Suzy Nikièma (n 11).
[14] *Thomas Gosling and others v Republic of Mauritius, ICSID Case No ARB/16/32, Award, 18 February 2020* [244].
[15] *Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004* (n 9) para 98; *El Paso Energy International Company v The Argentine Republic, ICSID Case No ARB/03/15, Award, 31 October 2011* [341–347]; *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania, ICSID Case No ARB/05/22, Award, 24 July 2008* [596–600]; *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, 8 July 2016* (n 9) paras 316–324.
[16] *Técnicas Medioambientales Tecmed, SA v The United Mexican States, ICSID Case No ARB (AF)/00/2, Award, 29 April 2003*.
[17] Damien Charlotin, 'Looking Back: Tecmed v. Mexico Breaks Ground in Adopting Expansive Reading of the Fair and Equitable Treatment and Upholding Protection of Investors' "Legitimate Expectations"' (*Investment Arbitration Reporter*) <https://www-iareporter-com.ezproxy.is.cuni.cz/articles/looking-back-tecmed-v-mexico-breaks-ground-

Another widely cited definition, which puts more obligation onto the state to actively act favourably towards the investors, can be found in *MTD v Chile*[18]. In this case, concerning the refusal of Chile to rezone a land for building a satellite city by MTD in contrary to its previous assurances, the tribunal ruled:

> *"fair and equitable treatment should be understood to be treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment. Its terms are framed as a pro-active statement - "to promote", "to create", "to stimulate"- rather than prescriptions for a passive behavior of the State or avoidance of prejudicial conduct to the investors."*[19]

In *Genin v Estonia*[20] the tribunal, when ruling onto a withdrawal of banking licence by Estonia, defined the acts in breach of FET standard as:

> *"Acts that would violate this minimum standard would include acts showing a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith."*[21]

In *Waste Management v Mexico*[22], where the tribunal dealt with the failure on the side of Mexican municipality to fulfil its contractual and other obligations towards the investor, the tribunal described that breach of FET standard is present:

> *"if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety."*[23]

When considering these definitions made by tribunals, we can see the wideness of consideration, when it comes to the FET standard and its contents. As will be demonstrated in the following sections, some tribunals use broad or vague sentences and argue with general

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in-adopting-expansive-reading-of-the-fair-and-equitable-treatment-and-upholding-protection-of-investors-legitimate-expectations/> accessed 30 November 2023.

[18] *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile, ICSID Case No ARB/01/7, Award, 25 May 2004.*

[19] *ibid 113.*

[20] *Alex Genin, Eastern Credit Limited, Inc and AS Baltoil v The Republic of Estonia, ICSID Case No ARB/99/2, Award, 25 January 2001.*

[21] ibid 367.

[22] *Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004* (n 9).

[23] ibid 98.

meaning of the words "fair and equitable" while others rather list the types of actions which in their opinion constitute a breach. We can draw a tentative conclusion that tribunals usually agree on the fact, that state is required to actively protect the investments and to support it through concrete actions, especially if they were previously agreed upon. The simple fact of not creating hindrances or staying passive towards the investment and its approval process is typically not enough to satisfy the threshold of FET standard protection.

Other tribunals have taken to the approach of listing the contents of the FET standard[24], for instance, here is the interpretation from *Philip Morris v Uruguay*[25]:

> *"Based on investment tribunals' decisions, typical fact situations have led a leading commentator to identify the following principles as covered by the FET standard: transparency and the protection of the investor's legitimate expectations; freedom from coercion and harassment; procedural propriety and due process, and good faith. In a number of investment cases tribunals have tried to give a more definite meaning to the FET standard by identifying forms of State conduct that are contrary to fairness and equity."*[26]

The tribunal lists important substantive aspects of the FET standard, which are legitimate expectations, due process, good faith and freedom from coercion. Other tribunals have highlighted also the importance of transparency, protection from arbitrary or discriminatory measures and judicial propriety.[27]

The main defining aspects of the FET standard can be drawn from these examples. Most of the tribunals agree on the requirement of good faith principle, on the guarantee of certain level of stability and predictability. However, the scope of these protections widely differs, depending on the treaty language, the facts of the case and the interpretations of the tribunal.

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[24] *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania [I], ICSID Case No ARB/05/20, Final Award, 11 December 2013* [519]; *Glencore International AG and CI Prodeco SA v Republic of Colombia, ICSID Case No ARB/16/6, Award, 27 August 2019* [1310]; *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Republic of Kazakhstan, ICSID Case No ARB/05/16, Award, 29 July 2008* [609]; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, 24 July 2008* (n 15) para 602.

[25] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, 8 July 2016* (n 9).

[26] ibid 320.

[27] e.g. *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan, ICSID Case No ARB/03/29, Award, 27 August 2009* [178]; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, 24 July 2008* (n 15) 602; *Total SA v The Argentine Republic, ICSID Case No ARB/04/01, Decision on Liability, 27 December 2010* 109.

All of the above is to be decided by the tribunals while considering the delicate balance between the interests of the investors and the right to regulate of the states. The tribunal in *El Paso v Argentina*[28] highlighted the balance between the rightful interest of the state and of the investor as the crucial element of interpreting the FET standard.

> *"This Tribunal considers that a balanced interpretation is needed, taking into account both State sovereignty and the State's responsibility to create an adapted and evolutionary framework for the development of economic activities, and the necessity to protect foreign investment and its continuing flow."*[29]

This widening interpretation of the tribunals regarding the rights of the investors stemming from the standards of treatment in general, but especially the FET standard, has in the recent years motivated states to revaluate their approach to BITs. It in a way appears as the pendulum has shifted. While in the past everyone was worried about the sovereign and untouchable states abusing and wronging private actors, who seemed to be in the weaker position, in the recent years tribunals with their interpretations of FET have put large amount of obligations and restrictions onto states to an extend in which they are revaluating their approach to investments, their incentives and whether attracting investors under the current circumstances continues to be beneficial.

As with any legal concept, even the FET standard is subject to criticism. The most frequently criticised aspect of the FET standard is its vague nature. This has been confirmed by several tribunals.[30] For instance in *CMS v Argentina*[31] the tribunal admitted that *"The Treaty, like most bilateral investment treaties, does not define the standard of fair and equitable treatment and to this extent Argentina's concern about it being somewhat vague is not entirely without merit."*[32]

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[28] *El Paso Energy International Company v The Argentine Republic, ICSID Case No ARB/03/15, Decision on Jurisdiction, 27 April 2006.*
[29] ibid 70.
[30] *Total S.A. v. The Argentine Republic, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010* (n 27) paras 106–109; *Sempra Energy International v The Argentine Republic, ICSID Case No ARB/02/16, Award, 28 September 2007* [610]; *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Award, 8 Deember 2016* (n 8) para 611; *Flemingo DutyFree Shop Private Limited v the Republic of Poland, UNCITRAL, Award, 12 August 2016* [530]; *Mamidoil Jetoil Greek Petroleum Products Societe SA v Republic of Albania, ICSID Case No ARB/11/24, Award, 30 March 2015* [599].
[31] *CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award, 12 May 2005* (n 8).
[32] *ibid 273.*

However, others see this vagueness as a *"virtue rather than a shortcoming"*.[33] Since FET is a factual standard, it will always adapt to the particular circumstances, no matter what they may be. Given the rapid evolution and ongoing changes in the world, the flexibility of this standard is turning into a necessary asset. The FET standard allows an independent third-party, the arbitral tribunal, to specify it through application on a particular dispute. Like other overarching principles of law, the fair and equitable treatment standard can be refined and clarified through judicial practice.[34]

According to an unconventional opinion of Pedro Nikken in his separate opinion to *AWG v Argentina*[35] the interpretation of the standard should be significantly narrowed. Arbitrator Nikken claims for FET to be a standard of factual treatment, meaning the specific conduct of the State towards the investment, not a source of substantive rights for the investors. In his opinion *"fair and equitable treatment represents the degree of due diligence that the States Parties to the BIT mutually pledged to observe with respect to the investments from nationals of both States."*[36] He also argues that it is unlikely for states to deliberately commit themselves above the good governance treatment. Additionally, he highlights that the formulation speaks about protection of investments, rather than individual investors.

Another division from the usual interpretation can be seen in *Noble Ventures v Romania* where the tribunal interpreted FET as only an overarching interpretative tool when applying the other substantive standards of treatment and not an autonomous substantive standard.[37] Similar view was also adopted in *Impregilo v Argentina*.[38]

Nonetheless, the jurisprudence in support of the existence and wider interpretation of FET standard prevails. As will be explained in detail in this thesis, it is a pivotal standard with an established place in investment arbitration. In the following sections, this thesis will introduce the history of the standard, its relationship to customary international law as well as its possible formulation in investment treaties. Then it will continue to explain the substantive contents of the standard and the interplay of FET standard with other standards of treatment in international investment law.

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[33] Dolzer, Schreuer and Kriebaum (n 5) 187.
[34] ibid.
[35] *AWG Group Ltd v The Argentine Republic, UNCITRAL, Decision on Liability - Separate Opinion of Arbitrator Pedro Nikken, 30 July 2010.*
[36] *ibid 19.*
[37] *Noble Ventures, Inc v Romania, ICSID Case No ARB/01/11, Award, 12 October 2005* [182].
[38] *Impregilo S.pA v Argentine Republic, ICSID Case No ARB/07/17 , Award, 21 June 2001* [333].

1.1. History of the standard

The FET standard originated even before investment arbitration. At one point the usual concepts of non-discrimination or national treatment under public international law were not sufficient and states started to look for new ways to protect investors and consequentially promote investments. Possibly the first instance where the standard was explicitly used was the Havana Charter of 1948, under the International Trade Organization. Its Article 11 promotes *assurance of just and equitable treatment*.[39] The Havana Charter never came into force but it is one of the documents that set standard for future investment agreements.

Where multilateral solutions failed to find support, the bilateral options succeeded. The important step taken before the creation of first BITs were the U. S. Treaties of Friendship, Commerce and Navigation (FCN), from the middle of 20th century[40], for example the FCN treaty with Germany.[41] These treaties assured "equitable treatment" or "fair and equitable treatment" in its texts. FCN treaties included rules on international commerce, on sailing and on the conduct of foreigners entering other countries. However, if a dispute occurred, the only subject of law was still the state of the impaired national and not the person or legal entity in question.

The standard has appeared in different treaties and draft conventions over the time[42] among which was for instance the Draft Convention on the Protection of Foreign Property[43] under OECD in 1967. This convention was never opened for signature but reflected the trend of OECD countries at the time.[44]

Important illustration can also be drawn from the progress of drafting the United Nations Code of Conduct on Transnational Corporations in the 1980s. This process highlighted the main conflict of interests in the world regarding investment protection. The clash of interests took place between developed countries and developing countries. The developing countries were at the time essentially pure recipients of capital, while developed countries were the ones with big investors. Consequentially the developed countries of the "modern west" pushed for regulation to protect their investors in developing countries that often offered important natural resources and cheap labour, while the developing countries would prefer no international regulations that

[39] Article 11(2), Havana Charter, dated 1948.
[40] Vladimír Balaš and Pavel Šturma, *Nové Mezinárodní Dohody Na Ochranu Investic* (Wolters Kluwer 2018) 4–5. [41] Article 1(1), Treaty on Friendship, Commerce and Navigation, dated 29 October 1954, US-FRG, 273 UNTS 4. 1. [42] UNCTAD, 'UNCTAD Series on Issues in International Investment Agreements, Fair and Equitable Treatment, UNCTAD/ITE/IIT/11 (Vol. III)' 7–10 <https://unctad.org/system/files/official-document/psiteiitd11v3.en.pdf> accessed 10 June 2023.
[43] OECD, Draft Convention on the Protection of Foreign Property, dated 16 October 1967.
[44] OECD (n 5) 4.

would tie their hands in relation to the investments on their land. This drafting process inevitable failed after more than ten years of negotiations and this multilateral solution ended up replaced by individual BITs, settled between individual states.[45]

Developed countries were likelier to find agreement among themselves and still failed at a broader multilateral solution. Some attempts at multilateral solutions took place under the OECD, such as the Draft Negotiating Text for a Multilateral Agreement on Investment of 1998 which directly sets up the FET standard of protection as it requires the parties to *"accord to investments in its territory of investors of another Contracting Party fair and equitable treatment and full and constant protection and security."*[46] However, these negotiations were discontinued after being unable to agree within few years' time. Nonetheless, this trend of including the FET standard in plenty of multilateral drafts shows, that it had its place and relevance at the time and most states agreed to include it in some of its forms.[47]

The standard has been used in BITs since 1960s and the number of treaties including it is still rising. Most treaties since then include FET standard in some form, be it only in preamble or directly in a concrete treaty provision. It also has its place in modern multilateral investment treaties, amid which are Energy Charter Treaty[48] (ECT) or North American Free Trade Agreement[49] (NAFTA), recently replaced by The Agreement between the United States of America, Mexico, and Canada[50] (USMCA). The ECT is one of the most advanced multilateral solutions of its time. While only concerning a certain field of investments and only binding European states, it contains plenty specific standards for protection of investments.[51]

It should also be noted, that while FET standard is one of the most significant and most often invoked standards nowadays, the first significant decisions of arbitral tribunals come from relatively recent times in the 2000s.[52] One of the first and often cited cases on FET standard is *Metalclad v Mexico*[53].

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[45] Karl P. Sauvant, 'The Negotiations of the United Nations Code of Conduct on Transnational Corporations: Experience and Lessons Learned' (2015) 16 11.
[46] UNCTAD, 'International Investment Instruments: A Compedium' 148 <https://unctad.org/system/files/official-document/dite4volxii_en.pdf> accessed 5 April 2023.
[47] UNCTAD, 'Lessons from The MAI' <https://unctad.org/system/files/official-document/psiteiitm22.en.pdf> accessed 3 December 2023.
[48] Energy Charter Treaty, signed 17 December 1994, entered into force 16 April 1998, 2080 UNTS 95.
[49] The North American Free Trade Agreement, signed 17 December 1992, entered into force 1 January 1994.
[50] The Agreement between the United States of America, Mexico, and Canada, signed 30 November 2018, entered into force 1 July 2020.
[51] Andrei Konoplyanik and Thomas Walde, 'Energy Charter Treaty and Its Role in International Energy' (2006) 24 Journal of Energy & Natural Resources Law 523, 532–541.
[52] *Emilio Agustín Maffezini v The Kingdom of Spain, ICSID Case No ARB/97/7, Award, 13 November 2000*; *SD Myers, Inc v Government of Canada, UNCITRAL, Partial Award, 13 November 2000.*
[53] *Metalclad Corporation v The United Mexican States, ICSID Case No ARB(AF)/97/1, Award, 30 August 2000.*

This case concerned hazardous waste landfill in central Mexico. The investor, Metalclad Corporation, started building the landfill after numerous meetings with authorities who encouraged the investment. However, the building process was hindered by local authorities who demanded special permits. The investor continued to negotiate with the local officials for months before being ultimately denied the permit and forced out of ever starting operation by ecological decree issued on the area. The investor then filed a claim under NAFTA for expropriation and violation of FET standard which were both confirmed by the tribunal. If we focus on the reasoning behind the FET, the tribunal decided that *"Mexico failed to ensure a transparent and predictable framework for Metalclad's business planning and investment"*[54] and ruled, that the rules governing local permits in Mexico were unclear and lacked established practice. The tribunal also highlighted the consequences of representations made by Mexican federal government, which assured the investor that no further permits were needed. This case illustrates the trend of tribunals from 2000s where the major concern was legal stability and predictable environment when ruling onto the FET standard. This approach has broadened since.

As the standard found more support through different treaties and arbitral decisions one question was raised – what is the relationship between the FET standard and customary international law? Does the standard follow the minimum standard set by custom, does it offer further protection, or has it by this time established itself as a customary law on its own? These questions will be answered in the following chapter.

1.2. FET as international minimum standard of treatment

The question of interpretation of FET as an autonomous standard or as a minimum standard of treatment set in the boundaries of a customary law has been repeatedly raised.[55] This debate also mirrors the conflicting views on international investment law - whether it is an international system consisting of different customary standards or whether it is just a system of different BITs stating their own separate rules.[56]

The existence of international minimum standard of treatment of foreigners has been convincingly established, particularly through decisions in disputes regarding diplomatic

[54] ibid 99.
[55] Šturma and Balaš (n 5) 386; Dolzer and Schreuer (n 6) 124; Zachary Douglas, Joost Pauwelyn and Jorge E Viñuales, *The Foundations of International Investment Law* (Oxford University Press 2014) 221; Katia Yannaca-Small, *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press 2010) 391–393.
[56] Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011) 114.

protection.[57] The crucial question is how much is this minimum standard of treatment connected to investment claims, especially to the FET standard and its content.

There are two sides to this dispute. Some tribunals and scholars claim that FET standard is a standalone standard with specific substantive protection guaranteed by it's the treaty.[58] The other side claims, that the guarantee of fair and equitable treatment in treaties simply refers to the standard of treatment in customary international law and there is no extra protection provided by the clause.[59] This dispute can also be illustrated through geography, as the developed modern states, the capital-exporting states, support the existence of international minimum standard while the developing countries of the third world, the capital-receiving states, generally oppose it. This has also been manifested in the formerly used Calvo Doctrine in Latin America, which is essentially a national treatment clause with set jurisdiction for the local courts of the host state.[60] The contracts between states of different views have created a certain level of synthesis between these two approaches.[61]

Expectably, these two lines of argumentation are present in most investment disputes that include the FET standard, with the investor claiming the broadest interpretation of standalone FET standard and the host state claiming only the existence of minimum standard under international law, if the relevant treaty allows it.

International minimum standard as a rule of customary international law is in investment decisions often based on the 1926 *Neer v Mexico*[62] decision. Neer did not stem from an investment dispute, it regarded a murder of American citizen in Mexico and denial of justice, but its ruling is considered the lowest possible standard set in customary international law for the treatment of aliens. It states that *"the treatment of an alien… should amount to an outrage, of bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its*

[57] Dolzer, Schreuer and Kriebaum (n 5) 334–337.
[58] ibid 199; Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (Oxford University Press 2008) 53–60; UNCTAD, 'Fair and Equitable Treatment: A Sequel' 44 <https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf> accessed 27 May 2023; Alexander Frederick Mann, 'British Treaties for the Promotion and Protection of Investments' (1981) 52 British Yearbook of International Law 241, 244; Jan Paulsson and Georgios Petrochilos, 'Neer-Ly Misled?' (2007) 22 Foreign Investment Law Journal 242.
[59] European Parliament, 'European Parliament Resolution on the Future European International Investment Policy' para 19; *Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002* (n 9); *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia, ICSID Case No. ARB/99/2, Award, 25 January 2001* (n 20); *CME Czech Republic BV v The Czech Republic, UNCITRAL, Partial Award, 13 September 2001*.
[60] Brown and Miles (n 56) 634.
[61] Šturma and Balaš (n 5) 386.
[62] *L F H Neer and Pauline Neer (USA) v United Mexican States, US-Mexico General Claims Comission, 15 October 1926*.

insufficiency."[63] Neer set out the important notion, that even if legal requirements of the state where the damage or harm happens are met, the action can still be in breach of international standards.

However, Neer was unexpectedly connected to the standard of treatment in investment claims much later in the 2000s.[64] The reference to this definition of minimum standard was used for instance by the tribunal in *Genin v Estonia*.[65] Others accepted Neer as customary law of 1920, however not the contemporary standard.[66] To the contrary, some tribunals rejected the Neer definition as too restrictive and too static to be applied as basic FET standard in investment disputes.[67]

When the tribunals consider the minimum standard of treatment, they rely on the treaty language before analysing the theoretical concepts behind it. As will be explained in detail in the following section, some BITs directly refer to international law in its FET definition which makes it easier for tribunals to draw the line between the minimum standard of treatment and broader protection under autonomous FET standard.

The unclear nature of the relationship between the standard and international law can be illustrated through Article 1105 of NAFTA which guarantees *"treatment in accordance with international law, including fair and equitable treatment"*. Due to the inconsistencies in interpretation, this provision has been interpreted by the NAFTA Free Trade Commission in a binding manner. According to the official interpretation, this provision only allows for protection on the level of customary international law minimum standard and does not give rise to any further protections.[68] NAFTA tribunals have widely accepted this view.[69] This approach was also

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[63] *ibid 61.*
[64] Paulsson and Petrochilos (n 58) 247–249.
[65] *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia, ICSID Case No. ARB/99/2, Award, 25 January 2001* (n 20) para 367.
[66] *Saluka v. Czech Republic, UNCITRAL, Partial Award, 17 March 2006* (n 9) para 295; *LG&E Energy Corporation and ors v Argentine Republic, ICSID Case No ARB/02/1, Decision on Liability, 3 October 2006* [123]; *Azurix Corp v The Argentine Republic, ICSID Case No ARB/01/12, Award, 14 June 2006* [345]; *Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002* (n 9) para 116.
[67] y*Pope & Talbot Inc v The Government of Canada, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001* [58–66]; *United Parcel Service of America Inc v Government of Canada, ICSID Case No UNCT/02/1, Award on Jurisdiction, 22 November 2002* [84]; *International Thunderbird Gaming Corporation v The United Mexican States, UNCITRAL, Award, 26 January 2006* [194].
[68] NAFTA Free Trade Commission, 'Notes of Interpretation of Certain Chapter 11 Provisions' <https://files.pca-cpa.org/pcadocs/bi-c/2.%20Canada/4.%20Legal%20Authorities/RA-49%20-%20NAFTA%20FTC,%20Notes%20of%20Interpretation%20(July%2031,%202001).pdf>.
[69] *Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002* (n 9) para 100; *United Parcel Service of America Inc. v. Government of Canada, ICSID Case No. UNCT/02/1, Award on Jurisdiction, 22 November 2002* (n 67) para 97; *Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004* (n 9) para 90; *ADF Group Inc v United States of America, ICSID Case No ARB (AF)/00/1, Award, 9 January 2003* [175–178].

continued within the USMCA which provides for *"treatment in accordance with customary international law, including fair and equitable treatment and full protection and security"*[70].

Over the course of time, tribunals have been moving away from the consideration of FET and minimum standard of treatment and moved towards considering the substantive contents of the standard, unless stated otherwise in the binding treaty.[71] Majority of tribunals now interpret FET as a standalone standard, that is broader than the minimum standard and is directly derived from the relevant treaties.[72] The interpretation regularly stems from the context of the Treaty, its preamble and also depends on the exact wording of the FET standard treaty provision, which will be explained in one of the following chapters. Nonetheless, even some tribunal rulings on treaties mentioning the link to customary international law decided, that the standard is autonomous and broader than customary international law,[73] for instance in *Tecmed v Mexico*[74] with emphasis on transparency and legitimate expectations. In *Vivendi v. Argentina*[75] the tribunal summarized the main three arguments used by tribunals when deciding in such manner:

> *The Tribunal sees no basis for equating principles of international law with the minimum standard of treatment. First, the reference to principles of international law supports a broader reading that invites consideration of a wider range of international law principles than the minimum standard alone. Second, the wording of Article 3 requires that the fair and equitable treatment conform to the principles of international law, but the requirement for conformity can just as readily set a floor as a ceiling on the Treaty's fair and equitable treatment standard. Third, the language of the provision suggests that one should also look*

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[70] The Agreement between the United States of America, Mexico, and Canada, signed 30 November 2018, entered into force 1 July 2020 (n 50) art 14.6 (1).
[71] UNCTAD, 'Fair and Equitable Treatment: A Sequel' (n 58) 61.
[72] *Enron Corporation and Ponderosa Assets, LP v Argentine Republic, ICSID Case No ARB/01/3, Award, 22 May 2007* [258]; *Compañiá de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic, ICSID Case No ARB/97/3, Award, 20 August 2007* [745]; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award, 25 May 2004* (n 18) paras 110–112; *National Grid plc v The Argentine Republic, UNCITRAL , Award, 3 November 2008* [167–173]; *Oko Pankki Oyj, VTB Bank (Deutschland) AG and Sampo Bank Plc v The Republic of Estonia, ICSID Case No ARB/04/6, Award, 19 November 2007* [217–230]; *Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16, Award, 28 September 2007* (n 30) para 320.
[73] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, 22 May 2007* (n 72) para 258; *Joseph Charles Lemire v Ukraine, Joseph Charles Lemire v Ukraine, ICSID Case No ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010* [247–255]; *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, 29 April 2003* (n 16) para 155; *Total S.A. v. The Argentine Republic, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010* (n 27) paras 125–127.
[74] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, 29 April 2003* (n 16).
[75] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Award, 20 August 2007* (n 72).

to contemporary principles of international law, not only to principles from almost a century ago.[76]

The most frequent argument revolves around the treaty language, concerning the parties' intentions when agreeing onto its contents, in accordance with the Vienna Convention on the Law of Treaties (VCLT)[77]. It appears unlikely that a treaty would use the term 'fair and equitable treatment' to refer to the well-established concept of the 'minimum standard of treatment in customary international law', If parties intend to invoke customary international law, they should do so explicitly.[78] As said by Rudolf Dolzer the progressive nature of FET may affect the minimum standard of treatment under international law and widen it over the course of time.[79] The fact that the minimum standard does evolve and is not frozen in time was also stated by the tribunal in *ADF Group v USA*[80] where the tribunal referenced *"customary international law as it exists today"*.[81]

There have also been some controversial assessments of the relationship between FET standard and the minimum standard of treatment. In Pablo Nikkens separate opinion to *AWG v Argentina*[82] he argues that the standard of treatment should not be treated by the frequently used definition from the Neer case but should be accorded as the current minimum standard at the time of signature of the BIT in question. In his opinion, that would better reflect the true intention of the parties when entering into the treaty as stated in Article 31 of the VCLT.

There are also times when this distinction is not as important as it might seem.[83] As the protection under international law is lower, if the host state breached even the minimum standard, there is no reason for the tribunal to dwell on discerning the differences.[84] The breach of a customary norm may as well be one of the forms of breach of the FET standard. As was said by the tribunal in *Saluka v Czech Republic: "it appears that the difference between the Treaty*

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[76] ibid 7.4.7.
[77] United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.
[78] Dolzer, Schreuer and Kriebaum (n 5) 199.
[79] Dolzer and Schreuer (n 6) 128.
[80] *ADF Group Inc. v. United States of America, ICSID Case No. ARB (AF)/00/1, Award, 9 January 2003* (n 69).
[81] ibid 179.
[82] *AWG Group Ltd. v. The Argentine Republic, UNCITRAL, Decision on Liability - Separate Opinion of Arbitrator Pedro Nikken, 30 July 2010* (n 35).
[83] *Occidental Exploration and Production Company v The Republic of Ecuador, LCIA Case No UN3467, Final Award, 1 July 2004* [189]; *CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award, 12 May 2005* (n 8) para 282.
[84] *BG Group Plc v The Republic of Argentina, UNCITRAL, Award, 24 December 2007* [291]; *S.D. Myers, Inc. v. Government of Canada, UNCITRAL, Partial Award, 13 November 2000* (n 52) para 264.

standard and the customary minimum standard, when applied to the specific facts of a case, may well be more apparent than real.".[85]

In conclusion, the prevailing opinion in doctrine and in arbitral decisions is the autonomy of the FET standard.[86] It is unlikely, that states would actively refer to a customary rule by using a different expression of "fair and equitable treatment" without directly referring to customary international law in exact words.[87]

1.3. The formulations of FET provisions

It has been established that provisions providing for fair and equitable treatment are a standard part of investment treaties. As there are thousands of different investment treaties among states, there is no single version of wording for FET standard. The principle of fair and equitable treatment can take on various forms, and it may apply to different government actions negatively impacting investments. In situations with no other specific rules in place to address these actions, the principle of fair and equitable treatment will be invoked.

Treaties use similar language to declare fair and equitable treatment, but the devil is in the details. Besides the standard wording of "fair and equitable", it can be "equitable and reasonable" as in Lithuania-Norway BIT[88], "just and equitable" as in Estonia-Germany BIT[89] or "just and fair" as in Lithuania-Italy BIT[90]. Nonetheless tribunals agreed that these variations still point to the established standard of FET and should not affect the interpretation.[91] As said in *MTD v Chile*: *"In their ordinary meaning, the terms "fair" and "equitable" mean "just", "even-handed", "unbiased", "legitimate"."*[92]

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[85] *Saluka v. Czech Republic, UNCITRAL, Partial Award, 17 March 2006* (n 9) para 291.
[86] Mann (n 58) 243–244; Dolzer, Schreuer and Kriebaum (n 5) 199; Blackaby and others (n 1) 476–482; *Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Award, 14 June 2006* (n 66) para 361; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, 22 May 2007* (n 72) 258; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award, 25 May 2004* (n 18) paras 110–112.
[87] Dolzer, Schreuer and Kriebaum (n 5) 199.
[88] Article III, Agreement between the Government of the Kingdom of Norway and the Government of the Republic of Lithuania on the Promotion and Mutual Protection of Investments, dated 16 June 1992.
[89] Article II, Agreement between The Government of the Republic of Estonia and the Federal Republic of Germany for the promotion and protection of investments, dated 12 November 1992.
[90] Article 2, Agreement Between the Government of the Republic of Lithuania and the Government of the Italian Republic on the Promotion and Protection of Investments, dated 1 December 1994.
[91] *Parkerings-Compagniet AS v Republic of Lithuania, ICSID Case No ARB/05/8, Award, 11 September 2007* [271–275]; *Luigiterzo Bosca v Lithuania, UNCITRAL, Award, 17 May 2013* [196]; *Oko Pankki Oyj, VTB Bank (Deutschland) AG and Sampo Bank Plc v. The Republic of Estonia, ICSID Case No. ARB/04/6, Award, 19 November 2007* (n 72) para 214.
[92] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award, 25 May 2004* (n 18) para 113.

While these alternatives in naming do not affect the interpretation[93], the phrasing of the whole FET clause does. The differences in the phrasing of the FET standard provision are significant, as they can lead the tribunal to a apply a different scope of protections. The importance of treaty wording has been highlighted in arbitral decisions[94] as well as in doctrine.[95] Some BIT's opt for simple guarantee of fair and equitable treatment to all investments[96], some only amount the protection to the standards of customary international law, and some offer more precise definitions. All of these different wordings are then subject to interpretation in accordance with Article 31 of the VCLT, considering its context, purpose and history.

Fair and equitable treatment clauses can be divided into different types. The clause can be formed as Unqualified FET, FET linked to international law, FET linked to minimum standard of treatment under customary international law, or as an FET definition with further specifications.

Unqualified FET is the simplest formulation which was frequently used in the older BITs. This clause simply states that *"the contracting party shall ensure fair and equitable treatment"* without further explanation. This leaves tribunals almost free hand for interpretation. Some reach for argumentation through ordinary meaning of the words "fair and equitable" while others reach for possible minimum standard of treatment or established contents of FET through previous arbitral decisions. The unclarity created by this definition led the states to adopt other, more descriptive, definitions.

The FET clause linked to international law usually denotes *"fair and equitable treatment in accordance with principles of international law"* or similarly worded clause. This clause gives more guidance and leads the tribunals more towards the principles of international law as such and away from pure meaning of the words.

Sometimes the drafters decided to directly link FET clause to minimum standard of treatment under customary international law. This can be denoted through such formulation as *"treatment in accordance with customary international law"* or directly state that *"the concept of FET does not require treatment in addition to or beyond that which is required under*

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[93] *Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, 11 September 2007* (n 91) paras 271–278; *Oko Pankki Oyj, VTB Bank (Deutschland) AG and Sampo Bank Plc v. The Republic of Estonia, ICSID Case No. ARB/04/6, Award, 19 November 2007* (n 72) para 214.

[94] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, 24 July 2008* (n 15) para 590; *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Award, 20 August 2007* (n 72) para 746; *ADF Group Inc. v. United States of America, ICSID Case No. ARB (AF)/00/1, Award, 9 January 2003* (n 69) para 179.

[95] Dolzer and Schreuer (n 6) 121; Blackaby and others (n 1) 280–282.

[96] e.g. Article 2(2), Treaty between the Federal Republic of Germany and the Islamic Republic of Afghanistan concerning the Encouragement and Reciprocal Protection of Investments, dated 20 April 2005.

customary international law". However, as was explained in the previous chapter, tribunals have not agreed on what the baseline for treatment under customary international law is. Consequently, even such direct statement does not always limit the tribunal from ruling in a manner that FET clause creates additional substantive rights for the investor than the contracting parties may have intended.

The last type emerged in reaction to the problems with interpreting previous definitions. With this type the contracting parties attempt to further clarify the definition by either listing the situations that may give rise to a violation of FET or provide further guidance on the application of FET clause. This provides the states and the investors with more transparency and certainty on their substantive rights stemming from the standard.

Many disputes stem from inaccurate and imprecise definitions in old-generation BITs, which has motivated states to redraft and clarify old treaties. While many of the older treaties with simpler wording are still in effect, the new trend is turning towards more exact and precise definitions which are easier for tribunals to interpret and apply in disputes and lead to more transparency in the field. The rising number of disputes in last decades has pointed to two important lessons. First is the one mentioned above, highlighting the importance of the exact wording used, especially when it comes to the crucial points of conflict like the definition of investment or the standards of treatment. The second lesson is that it is just as important to pay attention to the arbitration conventions and forums referred to in the agreement as they differ in its application.[97] To illustrate, in 2019 virtually all cases have been filed pursuant to treaties concluded before 2012. [98]

United Nations Conference on Trade and Development (UNCTAD) has in the recent years highlighted the importance of modernising the FET standard definitions in investment treaties. They have released multiple documents informing and motivating the States to revaluate and amend its investment treaties to adapt to modern global challenges.[99] Nowadays we face obstacles which were not considered when most of today's investment treaties were concluded. According to UNCTAD's Investment Policy Hub majority of BITs were concluded in the 90s[100] and consequently do not sufficiently reflect modern view on topics such as public health, environment, or economic stability. As explained above, older treaties usually have a short but

[97] UNCTAD, 'UNCTAD Press Release, UNCTAD/PRESS/PR/2008/002' <https://unctad.org/press-material/report-says-wave-arbitration-cases-impacted-international-investment-rulemaking> accessed 30 March 2023.
[98] UNCTAD, 'International Investment Agreements Reform Accelerator (UNCTAD/DIAE/PCB/INF/2020/8)' <https://unctad.org/system/files/official-document/diaepcbinf2020d8_en.pdf> accessed 31 March 2023.
[99] ibid.
[100] UNCTAD, 'International Investment Agreements Navigator' <https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping> accessed 10 May 2023.

broad definition of standard of protection which leads to uncertainty when faced with a regulation in public interest that might damage the investor. This often leads to host states not being able to regulate in public interest due to the threat of large payments in compensation towards the investors.

To give an example of an old-generation treaty definition, this is the wording of the standard of treatment in *Philippines - United Kingdom BIT* from 1980:

> *Investments of nationals or companies of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.*[101]

This definition leaves the states and the investors fully at the hands of arbitral tribunal when a dispute arises. There is no certainty in what is and what is not considered fair or equitable unless there is a clear disproportionate breach of one's obligation. This uncertainty can be illustrated by wide differences in arbitral adjudications on similarly worded treaty provisions.

To the contrary, the modern and qualified definition of FET standard should ideally contain an exhaustive list of specific obligations or attempt to clarify its implication in another way.[102] Some treaties even opted for omitting the term of fair and equitable treatment altogether[103] or only list concrete obligations of parties.[104] These listed obligations can surely be difficult to agree on, but ultimately secure legal certainty for both sites in the future. In the context of this thesis, it is notable that recent treaties tend to omit legitimate expectations from this list of obligations. Instead, they put legitimate expectations in separate provision and specify, that it does not create a standalone substantive obligation.

To show an example of modern wording, these are the first paragraphs of Article 2.5.2 of *EU – Vietnam Investment Protection Agreement* from 2019:

> *1. Each Party shall accord fair and equitable treatment and full protection and security to investors of the other Party and covered investments in accordance with paragraphs 2 to 7 and Annex 3 (Understanding on the Treatment of Investments).*

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[101] Article III., Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Republic of the Philippines for the Promotion and Protection of Investments, dated 3 December 1980.
[102] UNCTAD, 'International Investment Agreements Reform Accelerator (UNCTAD/DIAE/PCB/INF/2020/8)' (n 98).
[103] e.g. Article 4.3, Protocolo de cooperación y facilitación de inversiones intra-MERCOSUR, dated 7 April 2017.
[104] For example Article 4.1 of Brazil-India BIT (2020)

2. A Party breaches the obligation of fair and equitable treatment referred to in paragraph 1 where a measure or series of measures constitutes:

(a) a denial of justice in criminal, civil or administrative proceedings;

(b) a fundamental breach of due process in judicial and administrative proceedings;

(c) manifest arbitrariness;

(d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;

(e) abusive treatment such as coercion, abuse of power or similar bad faith conduct; or

(f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3.[105]

The difference between these two approaches is obvious. The modern definition provides the general idea of what protections are to be expected by both parties and lists the exact instances in which this provision is to be invoked. It does not leave excessive space for clarification by the tribunal if the dispute arises and should lead to more exact and predictable interpretation of the substantive rights of both parties. The current trend in BITs is to restrict the impact of FET standard.[106]

However, recent research shows, that this might not be the case. According to data of Professor Wolfgang Alschner tribunals still tend to apply the old arguments and definitions even onto these new formulations.[107] Therefore, this change has not been as effective in practice. This is in his opinion firstly due to the fact, that old treaties and arbitral practice provide precedent and arbitral tribunals still use the interpretative space left even by the new and more thorough definitions to reach for old approaches, and secondly because most disputes still stem from old

[105] Article 2.5.2, Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam of the other part, dated 30 June 2019.
[106] Dolzer, Schreuer and Kriebaum (n 5) 230.
[107] Wolfgang Alschner, *Investment Arbitration and State-Driven Reform: New Treaties, Old Outcomes* (Oxford University Press 2022).

BITs. Consequently, more systematic approach to redefining BITs and unifying the new approaches and rules could be the way towards a more predictable investment arbitration.[108]

To conclude, balanced reform of investment treaties leads to more predictability on both sides. It benefits the host state's ability to regulate as well as create a secure position for investors. States would benefit from continuing the process of renegotiations and redefinitions of old FET clauses. This would also influence the number of arbitrations, as clear definition, accepted by the tribunals, gives less ground for possible disputes, and consequently saves time and money to both investors and host states.

1.4. The contents of the FET standard

While the name of the standard suggest adjudication ex aqueo et bono, the standard represents specific substantive protections and cannot be individually defined by tribunals without other legal context.[109] Based on these substantive protections we can divide the FET arbitral cases into types with similar contents and analysis.[110] An example of this list of substantive protections can be drawn from tribunals that attempted to define FET standard through such enumeration of factual situations when the standard has been applied[111], for instance in *Lemire v Ukraine*[112] they ruled:

> *"The threshold must be defined … bearing in mind a number of factors, including among others the following:*

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[108] Wolfgang Alschner and Florencia Sarmiento, 'An Interview with Wolfgang Alschner on Investment Arbitration and State-Driven Reform: New Treaties, Old Outcomes' <https://www.iisd.org/itn/en/2022/07/04/an-interview-with-wolfgang-alschner-on-investment-arbitration-and-state-driven-reform-new-treaties-old-outcomes-wolfgang-alschner-florencia-sarmiento/> accessed 15 December 2023.

[109] Dolzer, Schreuer and Kriebaum (n 5) 187; *MCI Power Group LC and New Turbine, Inc v Republic of Ecuador, ICSID Case No ARB/03/6, Award, 31 July 2007* [302]; *Saluka v. Czech Republic, UNCITRAL, Partial Award, 17 March 2006* (n 9) para 284; *ADF Group Inc. v. United States of America, ICSID Case No. ARB (AF)/00/1, Award, 9 January 2003* (n 69) para 184.

[110] Christoph Schreuer, 'Fair and Equitable Treatment in Arbitral Practice' (2005) 6 Journal of World Investment & Trade 6 357, 373.

[111] *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I], ICSID Case No. ARB/05/20, Final Award, 11 December 2013* (n 24) para 519; *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia, ICSID Case No. ARB/16/6, Award, 27 August 2019* (n 24) para 1310; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award, 29 July 2008* (n 24) para 609; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, 24 July 2008* (n 15) para 602; *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, 8 July 2016* (n 9) para 320.

[112] *Joseph Charles Lemire v Ukraine, Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010* (n 73).

- whether the State has failed to offer a stable and predictable legal framework;
- whether the State made specific representations to the investor;
- whether due process has been denied to the investor;
- whether there is an absence of transparency in the legal procedure or in the actions of the State;
- whether there has been harassment, coercion, abuse of power or other bad faith conduct by the host State;
- whether any of the actions of the State can be labeled as arbitrary, discriminatory, or inconsistent."[113]

The tribunal offers a non-exhaustive list of different rights and conditions to be considered when ruling on an FET standard clause, giving it more detailed shape. It further added that the standard requires *"an action or omission by the State which violates a certain threshold of propriety, causing harm to the investor, and with a causal link between action or omission and harm"*.[114]

Furthermore, the tribunal in *Mamidoil v Albania*[115] introduced four classes of cases, made up of the duty to establish a stable and transparent legal framework and administrative process, legitimate expectations, undue pressure, and the denial of justice. *"The classes of cases have developed in reaction to the fact that the terms "fair" and "equitable" are generic and vague. They offer no straightforward guidance to their application and must be interpreted to fit the circumstances of each particular dispute."*[116] The tribunal also notes that while we can create these classes, it is not bound by this limited list when considering whether the treatment was unfair or inequitable, it is simply a guiding line.

In the end, it is generally accepted, that the form of measures or their motive is irrelevant if their effects amount to an unfair treatment of the investment.[117] Accordingly, it does not matter whether the state withdraws a permit, denies due process in front of local authorities or lowers revenue from solar power plants, as long as it amounts to sufficient and unfair harm to the investor. It also does not matter whether the harm was accounted for in the host states intentions.

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[113] ibid 284.
[114] *ibid.*
[115] Im L*Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania, ICSID Case No. ARB/11/24, Award, 30 March 2015* (n 30).
[116] *ibid 599.*
[117] Blackaby and others (n 1) 474; *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, 29 April 2003* (n 16) para 116; *Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000* (n 53) para 111; *Phillips Petroleum Company Iran v The Islamic Republic of Iran, the National Iranian Oil Company, IUSCT Case No 39, Award, 29 June 1989* [97–99].

"There is extensive authority for the proposition that the state's intent, or its subjective motives are at most a secondary consideration… the effect of the measure on the investor, not the state's intent, is the critical factor."[118]

It is also important to mention, that breach of FET standard can be a composite act. The investor can complain about a series of actions in combination and their overall effects, and that is usually the case. The responsibility of states for composite acts has been recognized in general international law in ILCs Articles on State Responsibility.[119] The tribunal in *El Paso v Argentina*[120] aptly titled this phenomenon as *"creeping violation of the FET standard"* and described it as *"a process extending over time and comprising a succession or an accumulation of measures which, taken separately, would not breach that standard but, when taken together, do lead to such a result."*[121] Hence, it is usual for the investor to file a claim against multiple state actions in combination and often claim a violation of multiple substantive protections under the FET standard.

While there is no uniform list of contents of the FET standard, we can identify the usual aspects and circumstances in which tribunals ruled on the breach of the standard provision. These contents are 1) stability and consistency, 2) legitimate expectations, 3) transparency 4) due process, 5) acting in good faith and more.[122] These protections will be covered in this section.

1.4.1. Stability, consistency and legitimate expectations

The first aspect of FET standard to consider is the requirement of stability and consistency in state regulations and actions. These protect predictability of the investment, which is the fundamental objective of creating a framework for investment arbitration. Stability is required primarily in state legislation. The State should not drastically and unpredictably change its laws regarding the investor or the investment. Consistency is linked to state actions. The regulatory authorities of the host state must consistently and coherently apply stable rules to ensure that the investor's capacity for effective planning remains intact. When ruling on this issue, the tribunal in *Total v. Argentina*[123] adjudicated that:

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[118] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Award, 20 August 2007* (n 72) para 7.5.20.
[119] International Law Comission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' art 15.
[120] *El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15, Award, 31 October 2011* (n 15).
[121] ibid 518.
[122] Dolzer, Schreuer and Kriebaum (n 5) 205–225.
[123] *Total S.A. v. The Argentine Republic, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010* (n 27).

> *stability, predictability and consistency of legislation and regulation are important for investors in order to plan their investments, especially if their business plans extend over a number of years. Competent authorities of States entering into BITs in order to promote foreign investment in their economy should be aware of the importance for the investors that a legal environment favourable to the carrying out of their business activities be maintained.*[124]

The requirement of stability as well as consistency of state actions have been established in arbitral practice.[125] Nonetheless, the requirement of regulatory stability inherently opposes states right to regulate. This conflict is and was the subject of numerous investment disputes and the tribunals have widely agreed that the right to stability is not absolute.[126] The change in laws needs to be unpredictable and radical to substitute a breach of FET standard.[127] The tribunal in *CMS v Argentina*[128] ruled as follows:

> *It is not a question of whether the legal framework might need to be frozen as it can always evolve and be adapted to changing circumstances, but neither is it a question of whether the framework can be dispensed with altogether when specific commitments to the contrary have been made.*[129]

The requirement of stability and consistency is closely linked to the cornerstone of this thesis, the protection of investor's legitimate expectations. Legitimate expectations of the

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[124] ibid 114.
[125] *Eiser Infrastructure Limited and Energía Solar Luxembourg Sà r.l v Kingdom of Spain, ICSID Case No ARB/13/36, Final Award, 4 May 2017* [363]; *BG Group Plc. v. The Republic of Argentina, UNCITRAL, Award, 24 December 2007* (n 84) para 307; *Plama Consortium Limited v Republic of Bulgaria, ICSID Case No ARB/03/24, Award, 27 August 2008* [173]; *Total S.A. v. The Argentine Republic, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010* (n 27) para 114; *LG&E Energy Corporation and ors v Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006* (n 66) para 124; *Ronald S. Lauder v. Czech Republic, UNCITRAL, Award, 3 September 2001* (n 10) para 290.
[126] *EDF (Services) Limited v Romania, ICSID Case No ARB/05/13, Award, 8 October 2009* [217]; *Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, 11 September 2007* (n 91) paras 332–338; *Continental Casualty Company v The Argentine Republic, ICSID Case No ARB/03/9, Award, 5 September 3008* [258]; *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v The Government of Mongolia, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011* [302].
[127] *RREEF Infrastructure (GP) Limited and RREEF Pan-European Infrastructure Two Lux Sà r.l v Kingdom of Spain, ICSID Case No ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018* [315]; *El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006* (n 28) para 402; *Charanne and Construction Investments v Spain, SCC Case No V 062/2012, Award, 21 January 2016* [517]; *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, 8 July 2016* (n 9) para 423; *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v The Kingdom of Spain, SCC Case No 2015/063, Final Award, 15 February 2018* [656].
[128] *CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award, 12 May 2005* (n 8).
[129] ibid 227.

investor play a major role as a part of the protection under FET standard.[130] These expectations can be connected to the legal regime as well as other behaviour of the state towards the investor. Such behaviour is in breach of the FET standard if is utterly unexpected or in contrary to prior representations of the state authorities or legislation. In *Thunderbird v. Mexico*[131] this protection has been described as *"a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the Party to honour those expectations could cause the investor (or investment) to suffer damages."*[132]

Legitimate expectations will be analysed in detail in the second half of this thesis including its position within the FET standard, its sources, and the balance between the legitimate regulatory goals of the country and the protection of investments.

1.4.2. Transparency

Transparency is another requirement that is closely linked to legitimate expectations. It entails the obligation for the legal framework of the host state to be clear and evident to the investor and the obligation for any state actions of the administrative or judicial bodies to be directly identifiable with the rules and processes established in law.[133] There have been numerous, especially recent, cases establishing transparency as a part of the FET standard.[134]

One of the first and pivotal cases ruling on transparency was *Metalclad v Mexico*[135], regarding a denial of construction permission by local authorities in contrary to previous

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[130] *El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15, Award, 31 October 2011* (n 15) para 348; *Saluka v. Czech Republic, UNCITRAL, Partial Award, 17 March 2006* (n 9) para 302; *Electrabel SA v Republic of Hungary, ICSID Case No ARB/07/19, Award, 25 November 2015* [7.75]; *EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13, Award, 8 October 2009* (n 126) para 216; *Invesmart v Czech Republic, UNCITRAL, Award, 26 June 2009* [202].

[131] *International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL, Award, 26 January 2006* (n 67).

[132] ibid 147.

[133] Dolzer, Schreuer and Kriebaum (n 5) 212; *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I], ICSID Case No. ARB/05/20, Final Award, 11 December 2013* (n 24) para 530; *Frontier Petroleum Services Ltd v The Czech Republic, Final Award, Final Award, 12 November 2010* [285].

[134] *LG&E Energy Corporation and ors v Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006* (n 66) para 131; *Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Award, 13 November 2000* (n 52) para 83; *Joseph Charles Lemire v Ukraine, Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010* (n 73) para 418; *CMC Muratori Cementisti CMC Di Ravenna SOC Coop, CMC MuratoriCementisti CMC Di Ravenna SOC Coop ARL Maputo Branch and CMC Africa, and CMC Africa Austral, LDA v Republic of Mozambique, ICSID Case No ARB/17/23, Award, 24 October 2019* [424]; *Crystallex International Corporation v Bolivarian Republic of Venezuela, ICSID Case No ARB(AF)/11/2, Award, 4 April 2014* [579].

[135] *Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000* (n 53).

representations of the state. The Claimant criticized the lack of transparency in the process for the final denial of permits. The tribunal in regards to transparency stated:

> *The Tribunal understands this to include the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party. There should be no room for doubt or uncertainty on such matters. Once the authorities of the central government of any Party … become aware of any scope for misunderstanding or confusion in this connection, it is their duty to ensure that the correct position is promptly determined and clearly stated so that investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all relevant laws.*

We can see that the tribunal required not only passive transparency through legality and regulatory certainty, but also proactive approach if a mistake or misunderstanding arises, so the investor does not waste its resources on futile negotiations and processes.

In *MTD v. Chile*[136] the tribunal ruled, that non-transparency stemming from the inconsistency between two parts of the same Government can also lead to the breach of FET, if one minister makes direct representations and other withdraws it without actively communicating the problems to the investor, a breach of FET can be manifested.[137] It also went on to stipulate, that while it is the obligation of the investor to practice due diligence to learn about the host states laws, their lack of diligence does not free the host state from its responsibility to communicate transparently:

> *Chile claims that it had no obligation to inform the Claimants and that the Claimants should have found out by themselves what the regulations and policies of the country were. The Tribunal agrees with this statement as a matter of principle, but Chile also has an obligation to act coherently and apply its policies consistently, independently of how diligent an investor is.*[138]

[136] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award, 25 May 2004* (n 18).
[137] ibid 175.
[138] ibid 166.

Nonetheless, other tribunals have expressed less broad approach to the protection of transparency. In *Micula v Romania*[139] the tribunal made clear that *"it would be unrealistic to require Romania to be totally transparent with the general public in the context of diplomatic negotiations"*[140] and that the crucial problem to consider is not how transparent Romania has been, but whether this level of non-transparency led to an insufficiently fair and equitable treatment of the investor. Furthermore, in *Al Tamimi v Oman*[141], where the claimant alleged persistent harassment and unjust environmental sanctions by Omani agencies and officials towards his limestone quarry, along with the improper termination of two quarry leasing agreements, the tribunal ruled that:

> *The standard of consistency and transparency provided to the Claimant by the Respondent as to the permitted scope and location of the quarry project thus certainly left something to be desired. But the Tribunal is not persuaded that this conduct reaches the level of "manifest arbitrariness" or "complete lack of transparency and candour" required for a breach of the minimum standard of treatment.*[142]

In conclusion, transparency is a standard balancing on proportionality of the measures, considering the factual circumstances, the concrete representations and communications between the state and the investor and public security and interest. Nonetheless, it certainly has earned its place as a protection granted by the FET standard.

1.4.3. Due process and denial of justice

Another undisputable requirement under the FET standard is the obligation to provide due process in order to avoid denial of justice towards the investor. Denial of justice is typically characterized as a significant misconduct of justice by domestic courts due to the malfunctioning of the state's judicial system. It is widely acknowledged that only blatant or manifest instances of injustice qualify as a denial of justice, while simple errors, misinterpretations, or misapplications of domestic law are not inherently classified as such.

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[139] *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I], ICSID Case No. ARB/05/20, Final Award, 11 December 2013* (n 24).
[140] ibid 533.
[141] *Adel A Hamadi Al Tamimi v Sultanate of Oman, ICSID Case No ARB/11/33, Award, 3 November 2015*.
[142] ibid 399.

The requirement of judicial propriety is one of the crucial aspects of FET. It is also based on customary international law and international human rights instruments.[143] This obligation is also sometimes directly listed under the FET provision as we can see in e.g. USA Model BIT of 2004.[144]

The protection from denial of justice differs from other protections under FET in the fact, that it is required to firstly exhaust local remedies before filing for dispute before investment tribunal. As long as local remedies are available, the mistreatment can potentially be amended by higher courts.[145] Furthermore, it is important to note, that the threshold for denial of justice under FET is a high one and *only a serious deficiency and failure to accord due process will reach the threshold of such a fair and equitable treatment violation*.[146]

Denial of justice can be for instance invoked in cases of denial of access to justice, undue delay, lack of independence of the judiciary, failure to execute judgements, corruption or breach of fundamental due process guarantees or if law is maliciously applied.[147]

Lack of fair procedure can have many forms. Important right is the right to be heard and informed. Investors have the right to be notified of important proceedings or actions taken by the state in order to be able to react accordingly. For example, in *Metalclad v Mexico*[148] the tribunal decided on lack of procedural fairness, because the investor has not been invited to a hearing regarding its construction permit which has been subsequently denied.

Denial of access to justice has also been ruled as an important factor.[149] In *Siemens v Argentina*[150] the tribunal decided that the refusal to allow access to administrative documentation in order to file an appeal can amount to a breach.

On the other hand, claims of undue delays often fail. If the state has a legitimate reason for prolonged proceedings, be it a current political situation or intricacy of the case, they as such

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[143] Šturma and Balaš (n 5) 391; Dolzer, Schreuer and Kriebaum (n 5) 317; *The Rompetrol Group NV v Romania, ICSID Case No ARB/06/3, Award, 6 May 2013* [168–172].
[144] Article 5(2)(a) US Model BIT, 2004 5.
[145] Dolzer, Schreuer and Kriebaum (n 5) 217–218; James Crawford, 'Second Report on State Responsibility, UN Document A/CN.4/498' para 75 <https://legal.un.org/ilc/documentation/english/a_cn4_498.pdf>; *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt, ICSID Case No ARB/04/13, Award, 6 November 2008* [255–259]; *Pantechniki SA Contractors & Engineers (Greece) v The Republic of Albania, ICSID Case No ARB/07/21, Award, 30 July 2009* [96].
[146] *Krederi Ltd v Ukraine, ICSID Case No ARB/14/17, Award, 2 June 2018* [442].
[147] UNCTAD, 'Fair and Equitable Treatment: A Sequel' (n 58) 80; *Robert Azinian, Kenneth Davitian, & Ellen Baca v The United Mexican States, ICSID Case No ARB (AF)/97/2, Award, 1 November 1999* [101–103]; *Iberdrola Energía SA v Republic of Guatemala, ICSID Case No ARB/09/5, Award, 17 August 2012* [432].
[148] *Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000* (n 53).
[149] *Limited Liability Company Amto v Ukraine, SCC Case No 080/2005, Final Award, 26 March 2008* [75]; *Iberdrola Energía S.A. v. Republic of Guatemala, ICSID Case No. ARB/09/5, Award, 17 August 2012* (n 147) para 432.
[150] *Siemens AG v The Argentine Republic, ICSID Case No ARB/02/8, Award, 17 January 2007*.

are not in breach of the FET standard.[151] Even 10 years long proceedings before the first instance court did not manifest a breach as long as the court is progressing and taking action, be it slowly.[152]

Other grave mistakes can be found in the adjudicative process, be it through corruption or prejudice towards the investor, if it renders the decision clearly improper or discreditable.[153] It is also important to note, that due process does not only apply to courts, but also to proceedings before administrative bodies of the state, if the treaty language allows it.[154] The same rules apply even onto these state actors and their actions towards the investor. Notwithstanding, procedural shortcomings that are neither fundamental nor abusive may contribute to identifying a violation of FET standard but are still insufficient to establish a breach if the measure in question is inherently legitimate, so that states right to regulate is sufficiently protected. As noted in *Gami v Mexico*[155]:

> *Proof of a good faith effort by the Government to achieve the objectives of its laws and regulations may counterbalance instances of disregard of legal or regulatory requirements.*[156]

In the end it is important to mention that arbitral tribunals are in place purely for the protection of investors from unfair and inequitable treatment and must never serve as a court of appeal in these matters. They will protect the investor from fundamental procedural ill-treatment but will not correct a simply unjust decision if it is recognisable how did an impartial judge reach the result in question.[157]

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[151] *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v The Republic of Ecuador, UNCITRAL, PCA Case No 34877, Partial Award on the Merits, 30 March 2010* [250]; *Jan Oostergetel and Theodora Laurentius v The Slovak Republic, UNCITRAL , Final Award, 23 April 2012* [290].
[152] *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Award, 6 November 2008* (n 145).
[153] *Loewen Group, Inc and Raymond L Loewen v United States of America, ICSID Case No ARB(AF)/98/3, Award, 26 June 2003* [137].
[154] *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award, 29 July 2008* (n 24) paras 615–618; *Frontier Petroleum Services Ltd. v. The Czech Republic, Final Award, Final Award, 12 November 2010* (n 133) para 292; *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia, ICSID Case No. ARB/99/2, Award, 25 January 2001* (n 20) para 364. [155] *Gami Investments Inc v Mexico, UNCITRAL, Final Award, 15 November 2014.*
[156] ibid 97.
[157] Dolzer, Schreuer and Kriebaum (n 5) 221; *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania, ICSID Case No. ARB/07/21, Award, 30 July 2009* (n 145) para 94.

1.4.4. Other relevant contents

FET includes more relevant protections, that should be mentioned in this section. Among those are freedom from abusive treatment, acting in good faith and compliance with contractual obligations.

Under the FET standard the investor has the right to exist free of coercion, duress and harassment from the host state.[158] Such actions have been described as "burdensome and confrontational"[159], "conspiracy to take away legitimately acquired rights"[160] or "inadmissible pressure"[161]. Coercion was found for instance in cases of intimidating the investor into making unfavourable decisions, threatening with criminal proceedings, obstructing daily business operations, launching aggressive reviews of licences, or even armed threats or arrest of the investor's personnel.[162] States of course have under their sovereignty the right to take such actions under legal conditions, however the FET standard protection comes into play, when such behaviour has no lawful ground or when it has improper reasons, such as discrimination.

Another important aspect is good faith. It is a principle of general international as well as investment law.[163] There is a widespread acknowledgment that the principle of good faith serves as the foundation for the fair and equitable treatment standard.[164] In *Tecmed v Mexico*[165] the tribunal found that *"the commitment of fair and equitable treatment is an expression and part of the bona fide principle recognized in international law"*. Right after the tribunal also importantly adds that *"bad faith from the State is not required for its violation"*. [166]

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[158] *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia, ICSID Case No. ARB/16/6, Award, 27 August 2019* (n 24) para 1310; *Total S.A. v. The Argentine Republic, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010* (n 27) para 129; *Olin Holdings Ltd v Libya, ICC Case No 20355/MCP, Award, 25 May 2018* [326–337]; *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v Kazakhstan, SCC Case No V 116/2010, Award, 19 December 2013* [1095].

[159] *Pope & Talbot Inc. v. The Government of Canada, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001* (n 67) paras 67–69.

[160] *PSEG Global, Inc, The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v Republic of Turkey, ICSID Case No ARB/02/5, Award, 19 January 2007* [245].

[161] *Desert Line Projects LLC v The Republic of Yemen, Award, 6 February 2008* [193].

[162] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, 29 April 2003* (n 16); *Pope & Talbot Inc. v. The Government of Canada, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001* (n 67); *Desert Line Projects LLC v. The Republic of Yemen, Award, 6 February 2008* (n 161).

[163] *Merrill and Ring Forestry LP v Canada, ICSID Case No UNCT/07/1, Award, 31 March 2010* [187]; *CC/Devas (Mauritius) Ltd, Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v India, PCA Case No 2013-09 , Award on Jurisdiction and Merits, 25 July 2016* [467].

[164] *Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Award, 14 June 2006* (n 66); *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt, ICSID Case No. ARB/05/15, Award, 1 June 2009* (n 9) para 450; *Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16, Award, 28 September 2007* (n 30) paras 297–299.

[165] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, 29 April 2003* (n 16).

[166] ibid 153.

No state shall intentionally cause harm to the investment.[167] Therefore bad faith will generally lead to the breach of FET if it manifests enough damage. Nonetheless, bad faith is not a requirement of a breach. FET standard can still be violated even through measures which have not been manifested through malicious intentions.[168] The interplay of good faith principle with FET standard and its other contents can be illustrated through the following citation from *Saluka v Czech Republic*[169]:

> *A foreign investor protected by the Treaty may in any case properly expect that the Czech Republic implements its policies bona fide by conduct that is, as far as it affects the investors' investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and non-discrimination.*[170]

The final standard to mention is the obligation to comply with contractual obligations. It is based on the essential pacta sunt servanda principle. Tribunals have established, that failure to fulfil contractual obligations are to be considered under the FET and can lead to its breach.[171] Representations of states made by contract also strengthen investor's legitimate expectations.[172] However, it is important to note that not all breaches of contracts directly mean the breach of the FET standard.[173] The tribunals often draw the line between acts of commercial manner and

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[167] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Award, 20 August 2007* (n 72) para 7.4.39; *Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004* (n 9) para 138.
[168] *Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002* (n 9) para 116; *Crystallex International Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2014* (n 134) para 543; *Mobil Exploration and Development Inc Suc Argentina and Mobil Argentina SA v Argentine Republic, ICSID Case No ARB/04/16, Decision on Jurisdiction and Liability, 10 April 2013* [934].
[169] *Saluka v. Czech Republic, UNCITRAL, Partial Award, 17 March 2006* (n 9).
[170] ibid 307.
[171] *Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002* (n 9) para 134; *Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award, 12 October 2005* (n 37) para 182; *Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v The Argentine Republic, ICSID Case No ARB/09/1, Award of the Tribunal, 21 July 2017* [849–851]; *SGS Société Générale de Surveillance SA v The Republic of Paraguay, ICSID Case No ARB/07/29, Decision on Jurisdiction, 12 February 2010* [146].
[172] *Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/9, Award, 5 September 3008* (n 126) para 261; *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010* (n 8) para 231.
[173] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award, 27 August 2009* (n 27) para 180; *Toto Costruzioni Generali S.pA v The Republic of Lebanon, ICSID Case No ARB/07/12, Award, 7 June 2012* [162]; *Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, 11 September 2007* (n 91) paras 344–345; *Glamis Gold, Ltd v The United States of America, UNCITRAL, Award, 8 June 2009* [620].

sovereign governmental manner.[174] Simple inability to pay in a contractual manner, is not in breach of FET standard.[175]

All these substantive rights together with those from previous subchapters provide the protection of the investor from unfair and inequitable conduct. This list is in no way exhaustive, as arbitral practice changes and evolves every year and states enter into new BITs but illustrates the current practice. The protection of legitimate expectations will be further analysed in the second half of this thesis.

1.5. Relationship with other treaty standards

Fair and equitable treatment commonly stands next to other standards of protection and arbitral tribunals differentiate among them. The standards may differ in its origin, be it customary or contractual. We can also differentiate between relative standards, like national treatment, or absolute ones, such as FET. But altogether, they create the framework of protections for foreign investors.

These standards, with the exception of expropriation, are commonly named alongside FET standard in one paragraph of the BIT providing protection and promotion of investments. Expropriation typically has its own separate provision. For instance, according to the Article 10 of ECT all parties shall accord to investors and investments "fair and equitable treatment", "the most constant protection and security", and no party shall impair the investment by "unreasonable or discriminatory measures" or allow "treatment less favourable than that which it accords to Investments of its own Investors or of the Investors of any other Contracting Party or any third state".

This leads to consideration of the interplay of these standards. Besides a few exceptions[176], majority of tribunals agree that FET is an autonomous standard and stands next to these other provisions.[177] It would be unreasonable of treaty drafters to use different terms and definitions for the same standard and the separate listing would seem obsolete. While the

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[174] Dolzer, Schreuer and Kriebaum (n 5) 216.
[175] *Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004* (n 9) para 115.
[176] *Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award, 12 October 2005* (n 37) para 182; *Petrobart Limited v The Kyrgyz Republic, Arbitral Award, Award, 29 March 2005* 76.
[177] *LG&E Energy Corporation and ors v Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006* (n 66) para 162; *El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006* (n 28) para 230; *Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Award, 14 June 2006* (n 66) paras 407–408; *Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award, 27 August 2008* (n 125) paras 183–184.

standards overlap and the particular factual background could fall under more than one standard, it seems rational to consider and apply them separately.[178]

According to Blackaby the essential protections are (1) protection against expropriation without due compensation, (2) right to be treated fairly and equitably, (3) right to full protection and security, (4) protection against arbitrary or discriminatory treatment, (5) right to national or MFN treatment, (6) right to free transfer of funds and assets and lastly (7) the protection against a state's breaches of its investment obligations and undertakings.[179] Other scholars name a similar list in their work.[180]

The definitions in treaties can differ. Some include more of the standards, while others only mention FET and nothing else. Sometimes discrimination is listed as one of the ways to breach FET and not a standalone standard. I will focus on the four most frequently used and commented standards – protection from expropriation, full protection and security, discriminatory and arbitrary treatment, and national and MFN treatment. These essential protections besides the FET will be introduced and put in context with the right to be treated fairly and equitably.

1.5.1. Expropriation without due compensation

Possibly the most crucial protection stipulated in investment treaties is the protection from expropriation without an adequate compensation. Such provision can be found in practically every treaty and, unlike the FET standard, the provisions are fairly similar. For instance, in Czech Republic – Mexico BIT:

> *Neither Contracting Party shall expropriate or nationalise an investment either directly or indirectly through measures tantamount to expropriation or nationalisation except: for a public purpose; on a non-discriminatory basis; in accordance with due process of law, and accompanied by payment of compensation.*
>
> *Compensation shall: be paid without delay and be equivalent to the market value of the expropriated investment immediately before the expropriation occurred.*

[178] Dolzer, Schreuer and Kriebaum (n 5) 198.
[179] Blackaby and others (n 1) para 8.78.
[180] Marcela Klein Bronfman, 'Fair and Equitable Treatment: An Evolving Standard' (2005) 38 Estudios Internacionales 89, 90; Dolzer, Schreuer and Kriebaum (n 5); Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties* (Kluwer Law International 2009); Šturma and Balaš (n 5).

The market value shall not reflect any change in value occurring because the expropriation had become publicly known earlier…[181]

On this example we can see the regular building blocks of a provision on the protection from expropriation which generally requires public purpose, treatment without discrimination, due process in the actions of the state and timely adequate and effective compensation.

Expropriation generally takes one of two forms, which are also demonstrable on the cited provision. First is direct expropriation which pertains to the complete physical confiscation of property belonging to a foreign investor or the transfer of title to such property by the host state or a state-mandated third party. *There is an open, deliberate and unequivocal intent, as reflected in a formal law or decree or physical act, to deprive the owner of his or her property through the transfer of title or outright seizure.*[182] For example in *Funnekotter v Zimbabwe*[183] direct expropriation was found when Zimbabwean government forcibly evicted Dutch farmers from their land by violent invasions of locals and orders taken by the government without due compensation.

The second form of expropriation is indirect expropriation which is much more common in the recent times. Indirect expropriation entails the complete or nearly complete deprivation of an investment, without the occurrence of a formal transfer of title or outright seizure. It is a well-known principle, used in different decisions by different judicial bodies even before investment arbitration.[184] The purpose of indirect expropriation is to safeguard the investor from actions taken by the host state that render the investment effectively inoperable, without involving a direct transfer of property rights to the state. As explained in *Total v Argentina*[185]*: "under international law a measure which does not have all the features of a formal expropriation could be equivalent to an expropriation if an effective deprivation of the investment is thereby caused. An effective deprivation requires, however, a total loss of value of the property such as when the property affected is rendered worthless by the measure, as in case of direct expropriation, even if*

[181] Article 4, Agreement between the Czech Republic and the United Mexican States on the Promotion and Reciprocal Protection of Investments, dated 4 April 2002.
[182] UNCTAD, 'Expropriation: A Sequel' 7 <https://unctad.org/system/files/official-document/unctaddiaeia2011d7_en.pdf> accessed 2 June 2023.
[183] *Bernardus Henricus Funnekotter and others v Republic of Zimbabwe, ICSID Case No ARB/05/6, Award, 22 April 2009*.
[184] *Case Concerning the Factory at Chorozow (Poland v Germany), Merits, PCIJ, 13 September 1928*; *Starrett Housing Corporation, Starrett Systems, Inc and others v The Government of the Islamic Republic of Iran, Bank Markazi Iran and others, IUSCT Case No 24, Final Award, 14 August 1987*.
[185] *Total S.A. v. The Argentine Republic, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010* (n 27).

formal title continues to be held.[186] The determining factors often revolve around the extent of value destruction, loss of control or interference with management, as well as the duration of the implemented measures.

The difference between expropriation and the FET standard has been analysed in *Continental Casualty v Argentina*[187] as follows: *While the requirements of a lawful expropriation focuses on the preservation of the value of the investment when the host State precludes its further operation for some public reasons, the fair and equitable standard is aimed at assuring that the normal law-abiding conduct of the business activity by the foreign investor is not hampered without good reasons by the host government and other authorities.*[188]

Upon examining the interplay between the FET standard and the protection against expropriation, it becomes apparent that investors regularly claim breach of both protections.[189] Typically, their initial claim is focused on allegations of indirect expropriation, and in case of failing to prove such severity of interference with the investment, they turn to the claimed breach of the FET standard. The difference can be found in detail. For example, in *Suez v. Argentina* the tribunal held, that in the face of economic crisis, the implementation of regulatory measures and set tariffs fell within the realm of the Argentina's inherent police powers and these measures did not result in a lasting and significant deprivation of the Claimants' investments and consequently did not amount to indirect expropriation. However, the tribunal held these measures to still be in breach of the FET standard for treating the investor in an unfair manner.[190]

1.5.2. Full protection and Security

This standard, unlike others, imposes a positive obligation onto the host state to protect and ensure security of the investments on their soil. In practice it mainly creates an obligation for the state to protect the investment from physical impairment from non-state actors, for instance, in cases of strikes or armed unrest. However, this obligation is not unlimited as full protection and security *"is not a strict standard, but one requiring due diligence to be exercised by the*

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[186] *ibid 195.*
[187] *Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/9, Award, 5 September 3008* (n 126).
[188] ibid 254.
[189] *Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16, Award, 28 September 2007* (n 30) paras 300–301; *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey, ICSID Case No. ARB/02/5, Award, 19 January 2007* (n 160) para 238.
[190] *Suez, Sociedad General de Aguas de Barcelona, SA.and Vivendi Universal, SA v Argentine Republic, ICSID Case No ARB/03/19, Decission on Liability, 30 July 2010.*

State".[191] The tribunals in these cases consider the political and economic circumstances or the risk of armed conflict and lower the expectations on security in the face of these factual circumstances.[192]

Development of a state has been taken into account for example, in *Generation Ukraine v Ukraine*[193]. There the tribunal dismissed the claim, with the argument that the investor chose a country with lower guarantee of security, along with the possible benefits of such country, and cannot suddenly expect otherwise. The situation in the country is to be considered by the investor in the name of due diligence.

Full protection and security standard is linked to the physical safety of persons and installations, and only exceptionally will it be broader and include protection to legal certainty.[194] The physical protection arises in cases when a state is not capable of preventing a damage to the investment or additionally in cases when they neglect to impose punishment onto the wrongdoers.[195]

The damage can be caused by private violence or state related violence. Private violence can take on different forms from seizure of the investment by its employees without reaction of any authorities, violent illegal strikes without reaction of the host state or even failure to protect the investment from a terrorist attack.[196] State related violence was ruled on in cases of harassment of senior representatives occurred, but also when security forces of the state directly destroyed the investment during a counterinsurgency operation..[197] These examples illustrate that this standard, as well as the FET, can take on numerous different forms and is impossible to define exactly.

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[191] *Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award, 12 October 2005* (n 37) para 164; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, 24 July 2008* (n 15) para 725; *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010* (n 8) para 158.
[192] *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania, ICSID Case No. ARB/07/21, Award, 30 July 2009* (n 145) paras 71–84; *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania, ICSID Case No. ARB/11/24, Award, 30 March 2015* (n 30) para 824.
[193] *Generation Ukraine, Inc v Ukraine, ICSID Case No ARB/00/9, Award, 6 September 2003*.
[194] *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey, ICSID Case No. ARB/02/5, Award, 19 January 2007* (n 160) paras 257–259.
[195] *Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, 11 September 2007* (n 91) para 355.
[196] *Elettronica Sicula SPA (ELSI) (United States of America v Italy), Judgment, ICJ Reports 1989, p 15*; *Wena Hotels Ltd v Arab Republic of Egypt, ICSID Case No ARB/98/4, Award, 8 December 2000*; *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, 29 April 2003* (n 16); *Ampal-American Israel Corporation and others v Arab Republic of Egypt, ICSID Case No ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017*.
[197] *Asian Agricultural Products Ltd v Republic of Sri Lanka, ICSID Case No ARB/87/3, Award, 27 June 1990*; *Eureko BV v Republic of Poland, Partial Award, 19 August 2005*.

Some tribunals have ruled, that the full protection and security standard also includes legal protection of the investor, but especially in cases when legal security is directly mentioned by the treaty.[198] In those cases state is obliged to not only provide physical secure environment, but also commercial and legal.[199] This standard has been invoked in cases of withdrawal of necessary authorisations or when a legal change took place, preventing the investor from continuing its investment process.[200] Notwithstanding these decisions, there is also a substantial authority stating, that full protection and security extends only onto physical protection of investments.[201]

The standard of full protection and security is the closest standard to FET and their coexistence is the most questioned. Some tribunals view it is a subpart of FET and do not see the need to consider them separately.[202] Others ruled on them as separate standards of protection.[203]

The tribunal in *Frontier Petroleum v Czech Republic*[204] summed up the difference as follows: *"full protection and security obliges the host state to provide a legal framework that grants security and protects the investment against adverse action by private persons as well as state organs, whereas fair and equitable treatment consists mainly of an obligation on the host state's part to desist from behaviour that is unfair and inequitable."*[205]

The main difference can be seen between the goals of these two standards. While full protection and security aims to provide safety to the physical existence and functionality of the investment, FET standard includes broader protection from any acts of the state that would be

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[198] *Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, Award, 17 January 2007* (n 150) para 303; *Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Award, 25 November 2015* (n 130) para 7.146; *Krederi Ltd. v. Ukraine, ICSID Case No. ARB/14/17, Award, 2 June 2018* (n 146) para 652.
[199] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, 24 July 2008* (n 15) para 729.
[200] *Antoine Goetz and ors v République du Burundi, Award, ICSID Case No ARB/95/3, Award, 10 February 1999* [125–130]; *CME Czech Republic B.V. v. The Czech Republic, UNCITRAL, Partial Award, 13 September 2001* (n 59) para 613; *Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Award, 14 June 2006* (n 66) para 408.
[201] *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010* (n 8) para 170; *Saluka v. Czech Republic, UNCITRAL, Partial Award, 17 March 2006* (n 9) para 484; *Olin Holdings Ltd v. Libya, ICC Case No. 20355/MCP, Award, 25 May 2018* (n 158) para 365; *Crystallex International Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2014* (n 134) para 632.
[202] *Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Award, 14 June 2006* (n 66) para 408; *Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17 , Award, 21 June 2001* (n 38) para 334; *OAO Tatneft v Ukraine, PCA Case No 2008-8, Award on the Merits, 29 July 2014* [427]; *Asian Agricultural Products Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Award, 27 June 1990* (n 197) para 43.
[203] *El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15, Award, 31 October 2011* (n 15) paras 228–230; *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania, ICSID Case No. ARB/11/24, Award, 30 March 2015* (n 30) paras 819–820; *Ulysseas, Inc v The Republic of Ecuador, UNCITRAL, Final Award, 12 June 2012* [272].
[204] *Frontier Petroleum Services Ltd. v. The Czech Republic, Final Award, Final Award, 12 November 2010* (n 133).
[205] ibid 296.

unacceptably unfair or inequitable. It can be understood why some tribunals accepted the view, that these two standards are not worth distinguishing, however their differences can be seen and have been relevant in arbitral decisions. The differentiation makes case law more precise and allows for more detailed analysis of the disputes at hand.

1.5.3. Discriminatory and arbitrary measures

As stated at the beginning of this chapter, the protection from discriminatory and arbitrary measures is usually mentioned as a separate protection in the BIT and that is why the standard is included in this section of the thesis. Some treaties, however, do not include this protection at all, like USMCA. Others name it as one of the possible breaches of FET and not a separate standard at all.[206]

It is not completely clear, whether the protection from discriminatory or arbitrary treatment is a part of FET standard[207] or a standard standing next to it.[208] However, it is quite non-controversial that such treatment leads to the violation of the FET.[209] As stated in *CMS v Argentina*[210]: *"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."*[211] Tribunals have also repeatedly highlighted, that it is not necessary for the state to be acting in bad faith in order to breach this substantive standard.[212]

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[206] Belgium-Luxembourg Economic Union Model BIT 2019, dated 28 March 2019.
[207] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award, 25 May 2004* (n 18) para 196; *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey, ICSID Case No. ARB/02/5, Award, 19 January 2007* (n 160) para 261; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award, 29 July 2008* (n 24) paras 679–681; *Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17 , Award, 21 June 2001* (n 38) para 264.
[208] *Occidental Exploration and Production Company v. The Republic of Ecuador, LCIA Case No. UN3467, Final Award, 1 July 2004* (n 83) paras 159–166; *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia, ICSID Case No. ARB/99/2, Award, 25 January 2001* (n 20) paras 368–371; *Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Award, 14 June 2006* (n 66) paras 385–393; *BG Group Plc. v. The Republic of Argentina, UNCITRAL, Award, 24 December 2007* (n 84) para 342.
[209] *El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006* (n 28) para 230; *CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award, 12 May 2005* (n 8) para 290; *Joseph Charles Lemire v Ukraine, Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010* (n 73) para 259; *S.D. Myers, Inc. v. Government of Canada, UNCITRAL, Partial Award, 13 November 2000* (n 52) para 263.
[210] *CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award, 12 May 2005* (n 8).
[211] ibid 290.
[212] *Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002* (n 9) para 116; *Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003* (n 153) para 206.

The standard consists of two separate protections. Protection from discrimination is quite straightforward. To claim discrimination, the claimant must *"demonstrate that it has been subjected to unequal treatment in circumstances where there appears to be no reasonable basis for such differentiation".*[213] A measure is considered discriminatory if the intent of the measure is to discriminate or if the measure has a discriminatory effect.[214]

The protection from arbitrariness is somewhat more intricate. If we were to look for definition of arbitrariness outside of investment adjudications, ICJ offers its definition in *ELSI case*[215] as *"a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety"*.[216] Some arbitral tribunals based arbitrariness on dictionary definitions while others relied on its ordinary meaning in accordance with the VCLT.[217] In *Lauder v Czech Republic*[218] it has been described as an action "*founded on prejudice or preference rather than on reason or fact"*.[219] The important aspect is that, *"finding of arbitrariness requires that some important measure of impropriety be manifest."*[220] The tribunal is not there to consider whether the treatment by the host state was good or bad nor whether it was correct, but only whether it is not utterly random and baseless.

The decision in *Lemire v Ukraine*[221] offers a summary of situations in which arbitrariness usually arises. These situations are measures inflicting damage on the investor without any other legitimate purpose, measures lacking legal standards that are based on prejudice or preference, measures with disguised intentions and measures taken in wilful disregard to due process.

These protections are more unequivocal than the FET standard as they stem from customary international law as well as general principles of law. No State with rule of law should knowingly allow arbitrary conduct nor consider it fair and equitable. Non-arbitrariness is also considered as a part of the minimum standard of treatment under customary international law. Consequently, if the treaty does not have a separate provision against discrimination or

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[213] *Marion Unglaube v Republic of Costa Rica, ICSID Case No ARB/08/1, Award 16 May 2012* [262].
[214] *LG&E Energy Corporation and ors v Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006* (n 66) para 147.
[215] *Elettronica Sicula S.P.A. (ELSI) (United States of America v Italy), Judgment, ICJ Reports 1989, p. 15.* (n 196).
[216] ibid 128.
[217] *Occidental Exploration and Production Company v. The Republic of Ecuador, LCIA Case No. UN3467, Final Award, 1 July 2004* (n 83) para 162; *Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Award, 14 June 2006* (n 66) para 392; *CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award, 12 May 2005* (n 8) para 291.
[218] *Ronald S. Lauder v. Czech Republic, UNCITRAL, Award, 3 September 2001* (n 10).
[219] ibid 221.
[220] *Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16, Award, 28 September 2007* (n 30) para 318.
[221] *Joseph Charles Lemire v Ukraine, Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010* (n 73).

arbitrariness, but contains the FET clause, the tribunal will typically rule on the breach of FET standard. The prohibition of discriminatory and arbitrary treatment are in line with the FET standard, the standard itself goes beyond this prohibition.[222]

1.5.4. National and MFN treatment

Other standards autonomous from FET are the standards of national treatment and MFN treatment.[223] These clauses exist, because customary international law does not provide obligation for states to treat nationals and foreigners alike.[224] The fact that almost every BIT contains a MFN clause alleviates inequalities.

These standards are comparative, as their breach directly relies on a comparison with treatment of someone else, be it a national or a third party. They are factual standards, like the FET, and cannot be substantively defined on their own and will be based on a factual analysis of circumstances of the individual case. To prevail in a claim based on the national treatment or MFN provisions, the claimant must demonstrate that another foreign investor or national in comparable circumstances has received more favourable treatment.

The national standard of treatment is assessed by tribunals in the following three steps. [225] Firstly, the tribunal considers whether the two actors are in comparable circumstances. These circumstances can be defined as the same business or the same field, but some tribunals even ruled on local producers in general, depending on the case at hand and the regulation in question.[226] Secondly, the tribunal must evaluate whether one treatment was more favourable than the other. This treatment can take the form of action or an omission which impairs the foreign investor. The discrimination does not need to stem from the difference in nationality, it is enough if the measure results in differential treatment.[227]At last, if there were like circumstances and different level of treatment, the tribunal must determine whether the difference was justified. This evaluation typically requires factual assessment of balance between national public interest and the interests of the investor. Tribunals have found some forms of subsidies or exclusive

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[222] UNCTAD, 'Fair and Equitable Treatment: A Sequel' (n 58) 31.
[223] *Flemingo DutyFree Shop Private Limited v the Republic of Poland, UNCITRAL, Award, 12 August 2016* (n 30) para 531.
[224] *Methanex Corporation v United States of America, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005* [IV. C 25].
[225] Dolzer, Schreuer and Kriebaum (n 5) 254.
[226] *Marvin Roy Feldman Karpa v United Mexican States, ICSID Case No ARB(AF)/99/1, Award, 16 December 2002* [171]; *Occidental Exploration and Production Company v. The Republic of Ecuador, LCIA Case No. UN3467, Final Award, 1 July 2004* (n 83) para 173; *Merrill and Ring Forestry L.P. v. Canada, ICSID Case No. UNCT/07/1, Award, 31 March 2010* (n 163) para 88.
[227] *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v The United Mexican States, ICSID Case No ARB (AF)/04/5, Award, 21 November 2007* [193]; *International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL, Award, 26 January 2006* (n 67) para 177.

contracts in favour of national suppliers reasonable and in line with national treatment.[228] However, the case law is not uniform on this issue.

The MFN clause works in a similar manner. It prevents unequal treatment not only in comparison to nationals, but in comparison to any other actor in a comparable position. This creates an equal environment for all foreign investors[229] and promotes the liberalization of international trade. The rights under MFN can stem from other investment treaties as well as mere practice. Therefore, these clauses have the power to bring in rights and obligations from other treaties signed between the host state and a third state, which leads to multilateralization of the whole framework of investment arbitration. Typically, MFN clause is used to import substantive rights from another treaty. Through such provision any of the standards mentioned in this section, including the FET standard, can be imported if the base treaty does not include it.[230]

In regard to the FET standard, it can be violated even in cases where the host state accorded national treatment.[231] The fact that the host state treats its own nationals unfairly does not in any way invalidate its international obligation stated in a treaty with another state to accord such standard of treatment to foreign investors. Identical autonomy manifests when the FET standard stands next to a MFN clause. Again, the accordance with MFN standard does not directly mean, that the best accorded treatment is fair and equitable.

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[228] *S.D. Myers, Inc. v. Government of Canada, UNCITRAL, Partial Award, 13 November 2000* (n 52) para 255; *ADF Group Inc. v. United States of America, ICSID Case No. ARB (AF)/00/1, Award, 9 January 2003* (n 69) paras 156–158.

[229] *National Grid plc v. The Argentine Republic, UNCITRAL , Award, 3 November 2008* (n 72) para 92.

[230] *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011* (n 126) paras 242–354; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award, 27 August 2009* (n 27) paras 155–157; *ATA Construction, Industrial and Trading Company v The Hashemite Kingdom of Jordan, ICSID Case No ARB/08/2, Award, 18 May 2010* [125]; *OAO Tatneft v. Ukraine, PCA Case No. 2008-8, Award on the Merits, 29 July 2014* (n 202) para 365.

[231] *S.D. Myers, Inc. v. Government of Canada, UNCITRAL, Partial Award, 13 November 2000* (n 52); *United Parcel Service of America Inc. v. Government of Canada, ICSID Case No. UNCT/02/1, Award on Jurisdiction, 22 November 2002* (n 67) para 80.

2. Legitimate expectations and their protection

FET standard creates broad objective protections for the investor. Those protections include the right to stable and predictable investment environment, allowing the investor to maximalise investments. The maintenance of this stable environment is largely attributed to the safeguarding of investors' legitimate expectations. Given that investments are economic ventures with substantial lifespans and often require enormous funding, expected to yield returns over several years of operation, certain level of stability is crucial for investments to be profitable and, consequently, to sustain investors' motivation to invest. The protection of legitimate expectations is also considered to be the *"dominant element of the FET standard"*[232] by numerous tribunals.[233]

Legitimate expectations are an established legal principle, protecting a legitimate interest of a party in a particular matter. As a concept, legitimate expectations are not limited to investment arbitration, and we can observe such protection of legal certainty in different legal fields.[234]

In investment arbitration the principle recognizes that investors may reasonably rely on certain assurances or actions by a host state or another relevant actor when making an investment or taking other steps in relation to their investment. A withdrawal or fundamental change in these commitments on the side of the host state will violate existing legitimate expectations and subsequently constitute a breach of the FET standard.[235] Therefore, the protection of legitimate expectations sets limits for legislative and administrative discretion.

The exact scope of this principle may vary depending on the individual treaty or legal instrument in question. However, generally, such expectations arise if the host state makes specific representations or guarantees to an investor, or when an investor reasonably relies on the legal framework in place at the time of the investment. The legitimacy of the expectations is measured by sensibility of the investor and his approach to the objective circumstances. If a

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[232] *Saluka v. Czech Republic, UNCITRAL, Partial Award, 17 March 2006* (n 9) para 302.
[233] *EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13, Award, 8 October 2009* (n 126) para 216; *Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Award, 25 November 2015* (n 130) para 7.75; *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain, SCC Case No. 2015/063, Final Award, 15 February 2018* (n 127) para 648; *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, 10 April 2013* (n 168) para 927.
[234] *International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL, Award, 26 January 2006* (n 67) paras 27–30; Michele Potestà, 'Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept' (2013) 28 ICSID Review - Foreign Investment Law Journal 88. [235] *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt, ICSID Case No. ARB/05/15, Award, 1 June 2009* (n 9) para 450; *Charanne and Construction Investments v. Spain, SCC Case No. V 062/2012, Award, 21 January 2016* (n 127) para 486; *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, 29 April 2003* (n 16) para 154.

reasonable investor, who abided due diligence, would act in line with these assurances of the host state, the expectations will be considered legitimate.[236] The tribunal does not evaluate these actions simply from the point of view of the claimant in the dispute at hand but instead from an objective point of view of a reasonable investor in alike circumstances.[237] *"The obligations of the host State towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have. A tribunal which sought to generate from those expectations a set of rights different from those contained in or enforceable under the BIT might well exceed its powers, and if the difference were material might do so manifestly."*[238]

This process of evaluating the legitimacy of expectations was helpfully summed up in *Parkerings v Lithuania*[239]:

> *The expectation is legitimate if the investor received an explicit promise or guaranty from the host state, or if implicitly, the host state made assurances or representation that the investor took into account in making the investment. Finally, in the situation where the host-State made no assurance or representation, the circumstances surrounding the conclusion of the agreement are decisive to determine if the expectation of the investor was legitimate. In order to determine the legitimate expectation of an investor, it is also necessary to analyse the conduct of the State at the time of the investment.*[240]

Even if the investor has legitimate expectations, in accordance with these rules, there are more steps to be fulfilled in order to be awarded compensation for the state misconduct. In *Sun Reserve v Italy*[241] the tribunal construed a three-step test for the protection of legitimate expectations. In their view, the tribunal is to consider:

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[236] *Joseph Charles Lemire v Ukraine, Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010* (n 73) para 285; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award, 25 May 2004* (n 18) paras 244–246; *Alasdair Ross Anderson et al v Republic of Costa Rica, ICSID Case No ARB(AF)/07/3, Award, 19 May 2010* [58]; *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain, SCC Case No. 2015/063, Final Award, 15 February 2018* (n 127) para 679.

[237] *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010* (n 8) para 209; *Perenco Ecuador Ltd v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador), ICSID Case No ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability, 12 September 2014* [560].

[238] *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile, ICSID Case No ARB/01/7, Decision on Annulment, 21 March 2007* [67].

[239] *Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, 11 September 2007* (n 91).

[240] ibid 331.

[241] *Sun Reserve Luxco Holdings SRL v Italy, SCC Case No 132/2016, Award, 25 March 2020.*

(a) whether the investors in the case had any expectations based on any conduct of the host State, and if so, whether these expectations were legitimate;

(b) whether the investors relied on these expectations to make their investments in the host State; and

(c) whether the host State by its subsequent conduct frustrated these expectations.

If any of these three questions is answered in the negative, the investors' claim for breach of the FET obligation fails.[242]

This test can be dismantled into four essential elements that must be present for the emergence of legitimate expectations and to be granted compensation.

Initially, there must be some form of encouraging conduct by the host state towards the investor, which can take various forms such as explicit representations, consistent legal framework, declared policies, decrees, licences or other behaviour conducive to investment support.[243] Secondly, the legitimacy of these expectations must be recognized and upheld. The reliance on the law of the state or the policies or promises must be objectively reasonable and abide due diligence.[244] Thirdly, it is crucial for these expectations to have tangible implications for the investor. The investor must have acted onto these expectations, typically by deciding to commence the investment.[245] Finally, the host state becomes obligated to provide compensation for the resulting damages, if it undermines these expectations through subsequent conduct that adversely affects the investor. The impact can have different forms from hindrances in licencing process, cancelling tariff guarantees, to changes in tax regime and more.[246] The severity of the result of this treatment by the host state can also vary, from causing the investment to be less profitable, to substantive expropriation or liquidation of the investment.

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[242] *ibid 695.*

[243] *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey, ICSID Case No. ARB/02/5, Award, 19 January 2007* (n 160) para 250; *National Grid plc v. The Argentine Republic, UNCITRAL , Award, 3 November 2008* (n 72) paras 177–179; *LG&E Energy Corporation and ors v Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006* (n 66) para 133; *CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award, 12 May 2005* (n 8) para 275.

[244] *Orazul International España Holdings SL v Argentine Republic, ICSID Case No ARB/19/25, Award, 14 December 2023* [810].

[245] *Antaris Solar GmbH and Dr Michael Göde v Czech Republic, PCA Case No 2014-01, Award, 2 May 2018* [360]; *Olin Holdings Ltd v. Libya, ICC Case No. 20355/MCP, Award, 25 May 2018* (n 158) para 307.

[246] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, 22 May 2007* (n 72); *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, 29 April 2003* (n 16); *Occidental Exploration and Production Company v. The Republic of Ecuador, LCIA Case No. UN3467, Final Award, 1 July 2004* (n 83).

Legitimate expectations can also be mentioned in other sections of the treaty in specific provisions regarding for instance subsidies or grants. These provisions usually serve as an exception, specifically stating that withdrawal of subsidies does not constitute a breach of the FET standard.[247]

It is also important to note, that the relevant law or representations and relevant expectations must exist at the time of the investment. Since the tribunal is evaluating what lead the investor to the decision to invest, it is only relevant what was known and said at that point in time. If the investment took multiple steps, the relevant information will again only relate to the point in time when that particular step happened.[248]

One of the most cited cases when interpreting the FET standard and specifically when considering the existence and extend of protection of legitimate expectation is the decision in *Tecmed v Mexico*[249]. The standard it set is also quite controversial.

> *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. … The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any pre-existing decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities.*[250]

[247] Agreement between the Government of Hungary and the Government of the United Arab Emirates for the Promotion and Reciprocal Protection of Investments, dated 15 July 2021; Article 8.9, Comprehensive Trade and Economic Agreement between Canada and the European Union, dated 30 October 2016.
[248] Christoph Schreuer and Ursula Kriebaum, 'At What Time Must Legitimate Expectations Exist?' (2012) 10 Transnational Dispute Management <https://www.transnational-dispute-management.com/article.asp?key=1793> accessed 12 December 2023; *Duke Energy Electroquil Partners & Electroquil SA v Republic of Ecuador, ICSID Case No ARB/04/19, Award, 18 August 2008* [304]; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award, 27 August 2009* (n 27) para 190; *Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16, Award, 28 September 2007* (n 30) paras 24–26.
[249] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, 29 April 2003* (n 16).
[250] ibid 154.

Other tribunals ruled in a similar manner and stated strong necessity of stable framework for the investment.[251] In *Occidental v Ecuador* the tribunal even stated that stable and predictable legal and business framework is required under international law standard.[252]

However, the Tecmed standard is also heavily criticised. For instance, in the Decision on Annulment of *MTD v Chile*[253] the committee called this standard "questionable" for purely relying on legitimate expectations as a base for FET breach under NAFTA. In their words *"The obligations of the host State towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have."*[254] Criticism can also be found in doctrine as Zachary Douglas expressed that the Tecmed standard envisions an idealized form of public regulation that few, if any, states are likely to attain and is not a realistic standard.[255]

These disagreements are well founded as the aforementioned decisions including *Tecmed v Mexico* omit any possible unfavourable change in the legal framework of the state. If states were to abide by these extensive limitations, their laws would have to practically freeze in time and even reasonable reform might be considered a breach of the FET standard. Along with legitimate expectations towards positive circumstances on the side of the host state, the investor should also expect the laws and rules to reasonably change and evolve over time.

Other tribunals have taken more reserved approach. In *Duke Energy v Ecuador*[256], the tribunal highlighted the need for the expectations to actually be *"justified and reasonable"* at the time of the investment. They considered the factual background of the investment and ruled that *"the assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State"*.[257]

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[251] *CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award, 12 May 2005* (n 8) para 274; *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey, ICSID Case No. ARB/02/5, Award, 19 January 2007* (n 160) paras 252–253; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, 22 May 2007* (n 72) para 259.
[252] *Occidental Exploration and Production Company v. The Republic of Ecuador, LCIA Case No. UN3467, Final Award, 1 July 2004* (n 83) para 190.
[253] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Decision on Annulment, 21 March 2007* (n 238).
[254] ibid 67.
[255] Zachary Douglas, 'Nothing If Not Critical for Investment Treaty Arbitration: Occidental, Eureko and Methanex' (2006) 22 Arbitration International 27.
[256] *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award, 18 August 2008* (n 248).
[257] ibid 340.

In *Bayindir v Pakistan*[258] the tribunal also considered the socioeconomic and political situation in the host state. The investor claimed that the termination of its concession to construct a highway was in breach of the FET standard. When deciding the tribunal relied on *"all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State"*[259] and decided in favour of Pakistan as *"the Claimant could not reasonably have ignored the volatility of the political conditions prevailing in Pakistan at the time"*.[260] Similar approach was taken in other cases, highlighting that investors must be aware of the general regulatory and factual environment in the state where they decide to invest.[261] Investors are often drawn to developing countries as their economic situation offers higher rate of return. However, these countries also typically offer less secure investment environment and a decision to invest in such environment should be a result of a business risk assessment on the side of the investor.[262]

These more restrictive interpretations of tribunal assessment commonly centre on three criteria for deeming expectations as legitimate. They necessitate explicit and active representations from the state, assume the investor's awareness of the regulatory environment in the host state, and, finally, demand these expectations to be in balance with justifiable regulatory behaviour on the part of the host state.[263] The same can be applied to states undergoing political transition, where no investor could reasonably expect the legislation to not change.[264]

It is important to emphasize that we are solely discussing expectations rather than explicit commitments. There needs to be a reasonable difference between enforcing someone's expectations and enforcing their contractual or other clearly stated and accepted obligations. As noted by the tribunal in *Blusun v Italy*[265]:

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[258] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award, 27 August 2009* (n 27).
[259] ibid 192.
[260] ibid 193.
[261] *Generation Ukraine, Inc. v. Ukraine, ICSID Case No. ARB/00/9, Award, 6 September 2003* (n 193) para 20.37; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, 24 July 2008* (n 15) para 601.
[262] *Generation Ukraine, Inc. v. Ukraine, ICSID Case No. ARB/00/9, Award, 6 September 2003* (n 193) para 20.37; *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia, ICSID Case No. ARB/99/2, Award, 25 January 2001* (n 20) para 348.
[263] UNCTAD, 'Fair and Equitable Treatment: A Sequel' (n 58) 68; *Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/9, Award, 5 September 3008* (n 126) para 261; *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award, 18 August 2008* (n 248) paras 340–341.
[264] *Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, 11 September 2007* (n 91) paras 335–336.
[265] *Blusun SA, Jean-Pierre Lecorcier and Michael Stein v Italian Republic, ICSID Case No ARB/14/3, Final Award, 27 December 2016*.

There is still a clear distinction between a law, i.e. a norm of greater or lesser generality creating rights and obligations while it remains in force, and a promise or contractual commitment. There is a further distinction between contractual commitments and expectations underlying a given relationship: however legitimate, the latter are more matters to be taken into account in applying other norms than they are norms in their own right. International law does not make binding that which was not binding in the first place.[266]

This statement was also supported by other tribunals, including *Eurus v. Spain*, where the tribunal described legitimate expectations, which were not directly mentioned in the wording of an FET standard in the relevant treaty, as a rule to consider when interpreting and applying the standard of treatment, but not a rule to strictly enforce on its own.[267]

Undoubtedly, criticism of legitimate expectations principle and of its place under the FET standard in investment law also exist. Some academics believe that the tribunal decisions which started applying this substantive standard under FET do not offer sufficient explanation as to how such concrete standard can be derived from the BIT without it being mentioned in the treaty text.[268] If we were to follow this line of critique, it would mean that arbitral tribunals impose new obligations which were not anticipated by the parties when entering into the BIT. That could be stemming from the fact, that tribunals usually focus more on arguments of the parties – the investor and the host state – instead of allowing enough space for evaluation of the commitments set out in the Treaty from which the arbitral jurisdiction arises. Christopher Campbell states that *"It is unlikely that states around the world should have signed up to the proliferation of IIAs in existence today requiring FET, and knowingly committed themselves to a standard so far beyond what simple good governance would require."*[269]

Arbitrator Pedro Nikken in *AWG v Argentina* wrote a separate opinion criticizing the place and scope of legitimate expectation in the FET standard. He fundamentally believes that the modern and relatively wide interpretation of legitimate expectations *"goes beyond the*

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[266] *ibid 371.*

[267] *Eurus Energy Holdings Corporation v Kingdom of Spain (ICSID Case No ARB/16/4), Decision on Jurisdiction and Liability, 17 March 2021* [317]; *Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, 11 September 2007* (n 91) para 344.

[268] Jaroslav Ostřanský, 'An Exercise in Equivocation: A Critique of Legitimate Expectations As a General Principle of Law Under the Fair and Equitable Treatment Standard', *General Principles of Law and International Investment Arbitration* (Brill | Nijhoff 2018).

[269] Christopher Campbell, 'House of Cards: The Relevance of Legitimate Expectations under Fair and Equitable Treatment Provisions in Investment Treaty Law' (2013) 30 Journal of International Arbitration 361.

normal meaning of the terms of the BITs and the intention of the parties".[270] He believes that the rights of the investor which stem from the protection of legitimate expectations in no way correspond with the ordinary meaning of the terms "fair and equitable", therefore such interpretation directly contradicts the customary interpretation rules in Article 31.1 of the VCLT.

The vague nature of the protection of legitimate expectations has also been addressed. The European Parliament's Resolution on the Future European International Investment Policy directly states:

> *a number of problems became clear because of the use of vague language in agreements being left open for interpretation, particularly concerning the possibility of conflict between private interests and the regulatory tasks of public authorities, for example in cases where the adoption of legitimate legislation led to a state being condemned by international arbitrators for a breach of the principle of 'fair and equitable treatment'.*

This criticism is however overshadowed by the numerous tribunal decisions which uphold and apply the legitimate expectations doctrine in investment disputes. Even if it is not perfect from the academic point of view and sometimes the argumentation can be lacking or seem as if construed of thin air, this doctrine undoubtedly has considerable effect on arbitral practice.

Following this introduction, in this part of the thesis I will focus further on the relationship between FET standard and legitimate expectations, on types of these expectations and on the arbitral practice of balancing the interests between the states and the investors.

2.1. FET Standard and Legitimate Expectations

As established in the first chapter of this thesis, FET clause can have different formulations and often does not contain direct reference to the protection of investor's legitimate expectations. The protection of legitimate expectations is therefore derived from the general concept of fairness and from the object and purpose of the treaty in accordance with the VCLT.[271]

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[270] *AWG Group Ltd. v. The Argentine Republic, UNCITRAL, Decision on Liability - Separate Opinion of Arbitrator Pedro Nikken, 30 July 2010* (n 35).
[271] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award, 25 May 2004* (n 18) paras 109–113; *Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Award, 14 June 2006* (n 66) para 139; *LG&E Energy Corporation and ors v Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006* (n 66) para 147.

As the states sign their BITs, including a FET standard provision, they assume an obligation to treat foreign investor predictably. As stated in *Tecmed v Mexico*[272] about FET provision of Mexico-Spain BIT[273]: *"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."*[274] FET standard and the requirement of stability are essentially inseparable.[275] The investor must be provided a certain level of protection, for them to be motivated to take the necessary risk and invest in the host state. Debates can take place about the specific thresholds and circumstances, but tribunals repeatedly upheld this important link.[276]

In the section on the FET standard, the existence and extend of FET under the international minimum standard was debated. In this context, the incorporation of the protection of legitimate expectations within the framework of the international minimum standard is questionable.

The International Court of Justice in case concerning Obligation to *Negotiate Access to the Pacific Ocean*[277] observed that:

> *references to legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment. It does not follow from such references that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation.*[278]

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[272] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, 29 April 2003* (n 16).
[273] Agreement on the Reciprocal Promotion and Protection of Investments signed by the Kingdom of Spain and the United Mexican States, dated 18. December 1996, terminated in 2008.
[274] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, 29 April 2003* (n 16) para 154.
[275] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, 22 May 2007* (n 72) para 260; *LG&E Energy Corporation and ors v Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006* (n 66) para 125; *Occidental Exploration and Production Company v. The Republic of Ecuador, LCIA Case No. UN3467, Final Award, 1 July 2004* (n 83) para 183.
[276] *CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award, 12 May 2005* (n 8) para 276; *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36, Final Award, 4 May 2017* (n 125) para 363; *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, 29 April 2003* (n 16) para 154; *Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000* (n 53) para 99. [277] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile), Judgment, ICJ Reports 2018, p 507.*
[278] *ibid 162.*

Conversely, recent arbitral decisions admit that the minimum standard under international law is evolving and many of them adapt legitimate expectations as a part of the minimum standard of treatment.[279] In *Thunderbird v Canada* the tribunal under NAFTA ruled:

> *Having considered recent investment case law and the good faith principle of international customary law, the concept of "legitimate expectations" relates, within the context of the NAFTA framework, to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor to suffer damages.*[280]

These tribunals supported the idea of the evolution of the minimum standard of treatment towards the existence of legitimate expectations as a modern customary standard.

Legitimate expectations are also linked to the other protections under FET. This can be seen in decisions of tribunals which use other FET protections and requirements to describe the actions of the state when deciding on states right to regulate in the face of legitimate expectations. In *Saluka v Czech Republic*[281] the tribunal ruled, that the investor may legitimately expect the state to implement *"bona fide policies"* and their conduct to not *"manifestly violate the requirements of consistency, transparency, even-handedness and nondiscrimination".*[282]

They are especially closely linked to the obligation of transparency. While transparency is usually linked to proceedings, be it administrative or judicial, it can also deal with laws and regulations of the host state. Foreign investor must have access to the existing regulations in compliance with the transparency requirement, in order to be able to create basis for legitimate expectations appropriate to the regulations in place. This link can be illustrated for example by the decision in *Electrabel v Hungary*[283] under the ECT: *"transparency can be read to indicate an obligation to be forthcoming with information about intended changes in policy and regulations that may significantly affect investments, so that the investor can adequately plan its investment and, if needed, engage the host State in dialogue about protecting its legitimate expectations."*[284]

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[279] *ADF Group Inc. v. United States of America, ICSID Case No. ARB (AF)/00/1, Award, 9 January 2003* (n 69); *Occidental Exploration and Production Company v. The Republic of Ecuador, LCIA Case No. UN3467, Final Award, 1 July 2004* (n 83); *Merrill and Ring Forestry L.P. v. Canada, ICSID Case No. UNCT/07/1, Award, 31 March 2010* (n 163) paras 201–211.
[280] *International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL, Award, 26 January 2006* (n 67) para 147.
[281] *Saluka v. Czech Republic, UNCITRAL, Partial Award, 17 March 2006* (n 9).
[282] ibid 307.
[283] *Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Award, 25 November 2015* (n 130).
[284] *ibid 7.79.*

This means, that the state is obliged to transparently and fairly inform the investor if it already plans to change its regulatory framework prior to the investment.

However, it is also necessary to acknowledge, that most countries do not have a framework developed well enough to fully abide the requirement of absolute transparency when creating legislation and other regulative acts. *"An inflexible and unrealistic approach to these issues would in effect transfer the risk of operating in a developing country environment from an investor to the host State."*[285]

To note on modern approach of states to legitimate expectations, it is important to look at trends in new BITs. As mentioned previously, most formulations of FET standard do not include legitimate expectations in the explicit list of obligations under fair and equitable treatment. While legitimate expectations were not clearly stated in the old-generation treaties either, the substantive standard was regularly derived from the generic FET clause. For example, in *National Grid v Argentina*, which was based on *Argentina-UK BIT*[286] from 1990, tribunal decided on a breach of fair and equitable treatment primarily through the breach of legitimate expectations of the investor.[287]

Some modern treaties rather create a separate provision which states, that legitimate expectations can be taken into account while considering a breach of one of the listed obligations under FET. However, such provision does not establish a standalone standard of protection for legitimate expectations.[288] Here we can use an example from Article 2.5.2 of the *EU – Vietnam BIT*, which is further explaining the use of paragraphs on FET standard:

> *4. When applying paragraphs 1 to 3, a dispute settlement body under Chapter 3 may take into account whether a Party made a specific representation to an investor of the other Party to induce a covered investment that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain that investment, but that the Party subsequently frustrated.*[289]

The referred paragraphs 1 to 3 state the definition of FET standard through an exhaustive list of obligations. According to the cited paragraph 4, legitimate expectation can only be taken

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[285] UNCTAD, 'Fair and Equitable Treatment: A Sequel' (n 58) 72.
[286] Agreement between the the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments, dated 11 December 1990.
[287] *National Grid plc v. The Argentine Republic, UNCITRAL , Award, 3 November 2008* (n 72) paras 168–180.
[288] UNCTAD, 'International Investment Agreements Reform Accelerator (UNCTAD/DIAE/PCB/INF/2020/8)' (n 98) 20–21.
[289] Article 2.5.2, Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam of the other part, dated 30 June 2019 (n 105).

as a possible factor by the tribunal when dealing with a breach of other FET obligations. It cannot be invoked as a standalone breach of the FET standard which was usual under older broad FET definitions. Such formulation weakens the role of legitimate expectations and create a framework within which a claim solely based on the protection of legitimate expectations will fail.

In this section, it was proved that legitimate expectations are undeniably a significant part of FET standard as such at the moment. However, the attempts at modernisation of BITs suggest that a shift is happening. This shift and its relevance will depend on the number of countries who will renegotiate their treaties to fit the challenges we face in the unpredictable reality of today. It will also depend on whether they decide to take this restrictive approach to the concept of legitimate expectations.

2.2. Types of Legitimate Expectations

Legitimate expectations can be differentiated into two types based on their origin. In *Saluka v Czech Republic*[290] the tribunal explained that: *"An investor's decision to make an investment is based on an assessment of the state of the law and the totality of the business environment at the time of the investment as well as on the investor's expectation that the conduct of the host State subsequent to the investment will be fair and equitable."*[291]

The first type is based on representations made by the state, and the second type is stemming from the host state's legal framework. The sources can differ and overlap, and tribunals always must consider the whole context thoroughly and from the point of view of both parties before ruling on the breach.[292] These factual circumstances serve as a base of legitimate expectations as well as evidence in the subsequent dispute for the tribunal to uphold these expectations and award compensation.

2.2.1. Expectations based on representations made by the host state or its agents

When foreign investors seek to invest in host states, they face uncertainty regarding the presence of stable and secure conditions throughout the investment's duration. To reassure the investor, the state may extend specific assurances to incentivize investment decisions. However,

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[290] *Saluka v. Czech Republic, UNCITRAL, Partial Award, 17 March 2006* (n 9).
[291] *ibid 301.*
[292] *BG Group Plc. v. The Republic of Argentina, UNCITRAL, Award, 24 December 2007* (n 84) para 307; *LG&E Energy Corporation and ors v Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006* (n 66) para 133; *CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award, 12 May 2005* (n 8) paras 275, 281.

if the state unilaterally revokes these assurances within the agreed lifespan in a manner that significantly diminishes the investment's value, it may constitute an instance of unfair and inequitable treatment.

Specific representations of the state create the strongest basis for legitimate expectations claim.[293] The protection of legitimate expectations *"becomes particularly meaningful when the investment has been attracted and induced by means of assurances and representations"*.[294] The tribunal in *Greentech v Italy*[295] explained how direct representations bind the state and limit its right to regulate:

> *Host states certainly retain the sovereign prerogative to amend their laws. However, if the state gives an investor express assurances that no amendment would occur, the investor must be fairly compensated if those assurances are violated.*[296]

In these situations, it is necessary to evaluate the legitimacy of such representations and whether they can be attributable to the host state as binding promises. It has been adjudicated that simple political statements individually do not create legitimate expectations[297], as *"political statements have the least legal value, regrettably but notoriously so"*.[298] However, specific representations of members of the government or local authorities can in some cases lead to the existence of legitimate expectations.[299] The tribunals also consider the purpose of such representations. If there was an intention to induce the investment, they will hold more value in the dispute.[300] The specifity of the representations is also relevant, because *"a legitimate*

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[293] *Eureko B.V. v. Republic of Poland, Partial Award, 19 August 2005* (n 197) paras 231–234; *Oko Pankki Oyj, VTB Bank (Deutschland) AG and Sampo Bank Plc v. The Republic of Estonia, ICSID Case No. ARB/04/6, Award, 19 November 2007* (n 72) para 247; *Total S.A. v. The Argentine Republic, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010* (n 27) paras 117–120; *Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, 11 September 2007* (n 91) para 331.

[294] *Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16, Award, 28 September 2007* (n 30) para 298.

[295] *Greentech Energy Systems A/S, et al v Italian Republic, SCC Case No V 2015/095, Final Award, 23 December 2018*.

[296] ibid 452.

[297] *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania, ICSID Case No. ARB/11/24, Award, 30 March 2015* (n 30) para 643; *El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15, Award, 31 October 2011* (n 15) para 378.

[298] *Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/9, Award, 5 September 3008* (n 126) para 261.

[299] *White Industries Australia Limited v The Republic of India, Final Award, Final Award, 20 November 2011* [10.3.17]; *Frontier Petroleum Services Ltd. v. The Czech Republic, Final Award, Final Award, 12 November 2010* (n 133) para 465; *BG Group Plc. v. The Republic of Argentina, UNCITRAL, Award, 24 December 2007* (n 84) paras 300–310.

[300] *Glamis Gold, Ltd. v. The United States of America, UNCITRAL, Award, 8 June 2009* (n 173) para 766.

expectation is assumed more readily if an individual investor receives specifically formal assurances that display visibly an official character".[301] The representations must convene the specific message and motivate to invest. General statements about support for investments, even if addressed to the specific investor, will not suffice.

To introduce an example of representations from case law, in *MTD v Chile*[302] the tribunal took into account Chilean President's toast speech at a dinner with the President of Malaysia in which he celebrated the investment project.[303] Also, according to the tribunal in *El Paso v Argentina*[304] a declaration made by the President towards the Congress could be taken as a ground for legitimate expectations if it included a specific commitment to not modify the legal framework in order to attract investors.[305]

The tribunal in *Infracapital v Spain*[306] decided, that for specific representations of a state official to suffice as the base of legitimate expectation, the official has to be competent by law to make such a promise:

> *for an assurance or representation giving rise to legitimate expectations, the commitment must be grounded in the law. Given that public authorities can only act in accordance with pre-existing legal norms, political statements or promotional advertising material cannot generate justifiable and reasonable expectations unless they have some normative value under the domestic law of the host State.*[307]

The tribunal then proceeds to name more requirements for such statements. Besides being competent legally, the assurance must be clear and specific, the investor must prove due diligence and it must be in balance with states regulative interests.[308]

Similar thought on competence of representatives of the state when extending assurances to the investor was expressed by the tribunal in *Invesmart v Czech Republic*[309]:

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[301] *International Thunderbird Gaming Corporation v The United Mexican States, UNCITRAL, Separate Opinion of Thomas Wälde, 1 December 2005* [32].
[302] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award, 25 May 2004* (n 18).
[303] ibid 156–158.
[304] *El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15, Award, 31 October 2011* (n 15).
[305] ibid 395–396.
[306] *Infracapital F1 Sà r.l and Infracapital Solar BV v Kingdom of Spain, ICSID Case No ARB/16/18, Award, 13 September 2021*.
[307] ibid 570.
[308] ibid 570–575.
[309] *Invesmart v. Czech Republic, UNCITRAL, Award, 26 June 2009* (n 130).

While the acts of governmental entities are attributable to the state for the purposes of international responsibility, the fact of attribution cannot be used to obscure the allocation of different competencies between different entities of the state when the issue of breach is determined…. One entity of the state not vested with actual decision-making authority cannot be taken to bind the entity which by law possesses the actual authority. [310]

Regarding competent authorities, the breach of FET through protection of legitimate expectation can also take place when there are multiple authorities in arbitrary disagreement when communicating with the investor. In *Eco Oro v Colombia*[311], the authorities created utter confusion regarding mining concessions in an attempt to protect the local ecosystem. The prolongation of the process, confusion of the investor and failure to finally delimit the mining area of the investment amounted to a breach of FET standard.[312]

In the end the result of a dispute will always depend on the particular facts of the case, the form of the representations, the state agent, and further context. Tribunals usually decide onto these representations along with other actions of the state, from legislation to licencing processes to other actions and regarding the political context in the host country as well as investor's due diligence.

Notably, in some instances the acts contrary to undertakings granted by the state to the investor even constituted indirect expropriation.[313] In *CME v Czech Republic*[314] the Czech Media Council withdrew a broadcasting licence, contrary to its previous undertakings. This withdrawal destroyed the legal basis of Claimant's investment which amounted to not just breach of FET standard but to expropriation.

2.2.2. Expectations based on the host state's regulatory or legal framework

When considering legitimate expectations stemming from legal or regulatory framework the question for the tribunal is *"who bore the risk of regulatory change: the state or the investors who benefitted from the existing regulatory regime?"*.[315] Firstly it is undebated, that investor

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[310] ibid 258.
[311] *Eco Oro Minerals Corp v Republic of Colombia, ICSID Case No ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021.*
[312] ibid 791, 805.
[313] Jan Paulsson and Zachary Douglas, 'Indirect Expropriation in Investment Treaty Arrbitrations', *Arbitrating Foreign Investment Disputes* (Kluwer Law International 2004) 157–158; *National Grid plc v. The Argentine Republic, UNCITRAL , Award, 3 November 2008* (n 72) paras 150–155.
[314] *CME Czech Republic B.V. v. The Czech Republic, UNCITRAL, Partial Award, 13 September 2001* (n 59).
[315] *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I], ICSID Case No. ARB/05/20, Final Award, 11 December 2013* (n 24) para 655.

must take the laws of the host state as they are at the time of the investment. Claim will not be upheld if the investor complains about legislation, that was transparently in place at the time of the investment.

While host states cannot be expected to refrain from changing its legislation over time, a certain level of proportionality and predictability must be upheld. The criterion of legal stability does not imply that a state's legal framework must remain unchanged over time. However, certain measures taken by the state, that would be considered arbitrary or unexpectable can lead to the frustration of FET standard towards the investor.[316] Dispute may also arise through retroactive acts, as they interfere with the law present at the time of the investment.[317]

The protection of these legitimate expectations can be positively affected through a mention of stability in the preamble or in the goals of the treaty.[318] In *Argentina-US BIT* the position of legitimate expectations was strengthened when the parties agreed that *"fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment"*.[319] But it can also be weakened by highlighting regulatory autonomy as in *Australia - China FTA* which *"upholds the rights of their governments to regulate in order to meet national policy objectives, and to preserve their flexibility to safeguard public welfare"*.[320]

Tribunals have in majority refused to rule on the fact, that a legal framework itself would allow for a creation of legitimate expectations, meaning that if there was no further representation or no further commitment by the state, the investor cannot expect the regulatory framework to stay unchanged.[321] As stated by the tribunal in *El Paso v. Argentina*[322], where the tribunal ruled in favour of the investor on the actions of Argentina in the face of financial crisis:

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316 *CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award, 12 May 2005* (n 8) para 200; *Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, 11 September 2007* (n 91) para 174.
317 *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/08/2, Award, 18 May 2010* (n 230) para 126.
318 *Occidental Exploration and Production Company v. The Republic of Ecuador, LCIA Case No. UN3467, Final Award, 1 July 2004* (n 83) para 183; *Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/9, Award, 5 September 3008* (n 126) para 258; *CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award, 12 May 2005* (n 8) para 274.
319 Treaty between United States of America and the Argentine Republic concernig the Reciprocal Encouragement and Protection of Investments, dated 14 November 1991.
320 Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China, dated 17 June 2015.
321 *Methanex Corporation v. United States of America, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005* (n 224) para IV, D, 7; *CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award, 12 May 2005* (n 8) para 277; *Charanne and Construction Investments v. Spain, SCC Case No. V 062/2012, Award, 21 January 2016* (n 127) para 510.
322 *El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15, Award, 31 October 2011* (n 15).

Under a FET clause, a foreign investor can expect that the rules will not be changed without justification of an economic, social or other nature. Conversely, it is unthinkable that a State could make a general commitment to all foreign investors never to change its legislation whatever the circumstances, and it would be unreasonable for an investor to rely on such a freeze.[323]

Another illustration can be taken from *AWG v. Argentina*[324] where the tribunal unilaterally decided that the measures Argentina took in the face of economic crisis were in breach of legitimate expectations of the investor. These measures varied from modification of tariffs and price setting to suspension of sanctions for breaches arising from the crisis. While the award itself states, that the breach of legitimate expectations and subsequently the FET standard of treatment, was constituted by enacting the measures, Arbitrator Nikken in his separate opinion states his disagreement with this reasoning. He believes the breach occurred later when the measures became disproportionate and unnecessary. That is because the state should always be able to use its regulatory power in crisis, however they should be used only for the period strictly necessary to address the emergency, which Argentina still failed to comply with.[325]

A tribunal in *Philip Morris v. Uruguay* went a step further on this approach to clarify, that even *"provisions of general legislation applicable to a plurality of persons or of category of persons, do not create legitimate expectations that there will be no change in the law."*[326] Similar requirement was raised by other tribunals.[327] The tribunal in *Metalpar v Spain*[328] directly stated that without *"bid, license, permit or contract of any kind… there were no legitimate expectations."*[329]

On the other hand, tribunal in *ESPF v. Italy*[330] established that under given and strict circumstances, even legislation itself can be sufficient to give rise to legitimate expectation of the investor, especially if it is created with the intention to attract investments. In ESPF's case, Italy offered tariffs through governmental decrees constantly for 20 years and reduced them after the

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[323] *ibid 372.*
[324] *AWG Group Ltd v The Argentine Republic, UNCITRAL, Decision on Liability, 30 July 2010.*
[325] *AWG Group Ltd. v. The Argentine Republic, UNCITRAL, Decision on Liability - Separate Opinion of Arbitrator Pedro Nikken, 30 July 2010* (n 35) paras 39–44.
[326] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, 8 July 2016* (n 9) para 426.
[327] *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey, ICSID Case No. ARB/02/5, Award, 19 January 2007* (n 160) paras 241–243.
[328] *Metalpar SA and Buen Aire SA v The Argentine Republic, ICSID Case No ARB/03/5, Award, 6 June 2008.*
[329] ibid 186.
[330] *ESPF Beteiligungs GmbH, ESPF Nr 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co KG v Italian Republic, ICSID Case No ARB/16/5, Award, 14 September 2020.*

ESPF's investment qualified for said tariffs. The tribunal found that it was legitimate of the investor to expect continuation of those tariffs for the whole period of the investment as the investor has proven that they relied on these expectations when deciding to invest.[331] Similar approach was taken also in other cases.[332]

A reasonable middle ground was offered by the tribunal in *Antin v Spain*, where the tribunal explained that:

> *the obligation … to provide FET to protected investments comprises an obligation to afford fundamental stability in the essential characteristics of the legal regime relied upon by the investors in making long-term investments. This does not mean that the legal framework cannot evolve or that a State Party to the ECT is precluded from exercising its regulatory powers… It rather means that a regulatory regime specifically created to induce investments in the energy sector cannot be radically altered —i.e., stripped of its key features— as applied to existing investments in ways that affect investors who invested in reliance on those regimes.*[333]

Generally, we can derive from case law that an investor may have legitimate expectations based on addressed representation of the state, as was explained in previous subsection, or based on legislation, that is not explicitly tailored to an individual investor but is implemented with the specific goal of encouraging foreign investments, and upon which the foreign investor relied when making their investment.[334]

Tribunals choose multitude of approaches from ruling very strictly onto possible state measures while upholding the motivation of investors, to tribunals which scrutinize the motivation and behaviors of the investors and balance those with the interests of the state. It is always dependent onto the particular facts at hand, ranging from previous legislative, to changes

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[331] ibid 512–546.

[332] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, 22 May 2007* (n 72) paras 264–266; *LG&E Energy Corporation and ors v Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006* (n 66) paras 133–135; *Total S.A. v. The Argentine Republic, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010* (n 27) para 119.

[333] *Antin Infrastructure Services Luxembourg Sà.r.l and Antin Energia Termosolar BV v Kingdom of Spain, ICSID Case No ARB/13/31, Award, 15 June 2018* [532].

[334] *Glamis Gold, Ltd. v. The United States of America, UNCITRAL, Award, 8 June 2009* (n 173) para 627; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, 22 May 2007* (n 72) paras 264–266; *LG&E Energy Corporation and ors v Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006* (n 66) para 133; *Ortiz Construcciones y Proyectos SA v People's Democratic Republic of Algeria, ICSID Case No ARB/17/1, Award, 29 April 2020* [312].

in regime, specific undertakings by the host state as well as the opinion of the arbitrators appointed in that particular case.

2.3. Balancing investor's legitimate expectations and state's right to regulate

The delicate balance between investor's right to maximalise the investment and the right of the state to regulate and adapt to current events is at the core of most disputes regarding FET standard, but especially those regarding legitimate expectations. The prudence of investor's expectation is under tribunal's scrutiny as well as the intentions and behaviour of the host state.

Majority of case law agrees that *"no investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged."*.[335] Consequently, nearly every dispute on legitimate expectations will have to tackle the question of whether the states right to regulate domestic matters in public interest is balanced with the expectations of the investor, taking into account all the factual circumstances of the particular case. It is important, that states have the right to regulate even if it negatively affects the investor, however such measures must be proportionate and ultimately provided with compensation, where compensation is due.

The tribunal in *LG&E v Argentina*[336] described fair expectations as follows:

> *"The investor's fair expectations have the following characteristics: they are based on the conditions offered by the host State at the time of the investment; they may not be established unilaterally by one of the parties; they must exist and be enforce- able by law; … however, the investor's fair expectations cannot fail to consider parameters such as business risk or industry's regular patterns."*[337]

This sums up the necessary assessment of the investor. They can never rely purely on a simple political statement or a promise, that is not given by an actual relevant authority. A responsible investor was described in *Invesmart v Czech Republic*:

> *The due diligence performed when the investor made its investment plays an important role in evaluating its expectation. A putative investor, especially one making an investment in a highly regulated sector…, has the burden of*

[335] *Saluka v. Czech Republic, UNCITRAL, Partial Award, 17 March 2006* (n 9) para 305.
[336] *LG&E Energy Corporation and ors v Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006* (n 66).
[337] ibid 130?; *Saluka v. Czech Republic, UNCITRAL, Partial Award, 17 March 2006* (n 9) para 304?

> *performing its own due diligence in vetting the investment within the context of the operative legal regime.*[338]

Sometimes even if the investor assesses the legal and factual situation correctly, changes to legal framework can still happen and be legitimate. In *Vivendi v Argentina* the tribunal ruled that it *"would have been entirely proper for a new government with a different policy perspective on privatisation to seek to renegotiate a concession agreement in a transparent non-coercive manner"*.[339] However, in *Vivendi* the authorities forced the investor into renegotiation through threats and accusations and, consequently, acted unfairly.

The relevance of investors' due diligence process prior to investment varies. Most tribunals view it as an extra positive factor to be taken into account.[340] However, some tribunals strictly require it as a necessary predisposition for a successful claim.[341] For example in *Stadtwerke München v Spain*[342] the tribunal stated that *"for such an expectation to be reasonable, it must also arise from a rigorous due diligence process carried out by the investor"*.[343]

Public interest is at large the main argument of host states when a dispute arises. Multiple tribunals highlighted, that such intentions should be taken into account. In *Saluka v Czech Republic,* a dispute regarding the investment into Czech banking system during privatisation, they stipulated that:

> *In order to determine whether frustration of the foreign investor's expectations was justified and reasonable, the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well.*[344]

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[338] *Invesmart v. Czech Republic, UNCITRAL, Award, 26 June 2009* (n 130) para 254.
[339] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Award, 20 August 2007* (n 72) para 7.4.31.
[340] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, 24 July 2008* (n 15) para 601; *Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic, PCA Case No. 2014-01, Award, 2 May 2018* (n 245) paras 73–77.
[341] *OperaFund Eco-Invest SICAV PLC and Schwarb Holding AG v Spain, ICSID Case No ARB/15/36, Award, 6 September 2019* [486]; *Charanne and Construction Investments v. Spain, SCC Case No. V 062/2012, Award, 21 January 2016* (n 127) para 505; Shaun Matos, 'Investor Due Diligence and Legitimate Expectations' (2022) 23 The Journal of World Investment & Trade 313.
[342] *Stadtwerke München GmbH, RWE Innogy GmbH, and others v Kingdom of Spain, ICSID Case No ARB/15/1, Award, 2 December 2019*.
[343] ibid 264.
[344] *Saluka v. Czech Republic, UNCITRAL, Partial Award, 17 March 2006* (n 9) para 305.

When ruling on public interest and right to access to drinkable water *Urbaser v Argentina* the tribunal stipulated that:

> *the investor's interests are not to be identified as separate and distinct from the legal framework into which they have been placed upon entering into the investment. This includes, firstly, the respect for the rights and powers exercised by the competent authorities... Moreover, other obligations of the host State must prevail over the Contract and are therefore also part of the law applicable to the investment…. In the instant case, this obligation relates to the Government's responsibilities under the Federal Constitution to ensure the population's health and access to water and to take all measures required to that effect…When measures had been taken that have as their purpose and effect to implement such fundamental rights protected under the Constitution, they cannot hurt the fair and equitable treatment standard because their occurrence must have been deemed to be accepted by the investor when entering into the investment and the Concession Contract.*[345]

The tribunal follows up with an important clarification, that this does not mean the actions of the state in the name of public health are not subject to the FET standard. It simply means, that such measures if proportionate, rational, and transparent, are not in breach.

The intention or motivation behind state measures is not primary point of consideration when it comes to FET standard and other treaty protections. Consequently, host states may be unable to regulate without providing sufficient compensation even with laudable reasons in mind. This has been confirmed by the tribunal in *Santa Elena v Costa Rica*[346] concerning the expropriation of land bordering Santa Rosa National Park in order to meet biodiversity preservation objectives. The tribunal stipulated that *"where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains"*.[347] The fact, that the measure is commendable or legal[348] in the host

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[345] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Award, 8 Deember 2016* (n 8) para 622.
[346] *Compañia del Desarrollo de Santa Elena SA v Republic of Costa Rica, ICSID Case No ARB/96/1, Award, 17 February 2000*.
[347] *ibid 72.*
[348] *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia, ICSID Case No. ARB/99/2, Award, 25 January 2001* (n 20) para 367; *El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15, Award, 31 October 2011* (n 15) para 337.

state does not directly mean it can be taken without awarding the investor adequate compensation.

Bad faith conduct on the side of the state can have negative effect onto its position when a claim has been raised. Even if the behaviour itself could be considered legitimate, if it is accompanied by bad faith actions, investor might still be awarded compensation.[349]

It is also important to note, that investor conduct in bad faith can have diminishing outcomes, onto seeking compensation. Commercial law acknowledges that specific types of behaviour are incompatible with sound commercial practices. Consequently, actions such as fraud, misrepresentation or undue influence by an investor can serve as valid grounds for justifiable intervention. In such instances, even the complete termination of the investment may be deemed justified, as long as it represents a proportionate response to the alleged misconduct.[350] In such cases, the tribunals have to balance the misconduct of the state against the misconduct of the investor and find a just solution.[351]

In *Thunderbird v Mexico*[352] the investor relied on a legal opinion given by Mexican Secretariat of the Interior regarding the legality of their investment in their gambling machines. However, after the new legislative went into effect, the facilities of the investor were shut down, contrarily to the previously given information. In the end the tribunal found out, that it was at least in part due to the fact, that the investor did not disclose all the relevant information and mislead the authorities on the true nature of its gaming machines. Consequently, the tribunal decided, that legitimate expectations could have not been generated by a falsely grounded document.

The balance between the host state and investor can be clarified through establishing a stabilization clause. These commitments make the relationship more coherent and understandable. Stabilization clauses exist within private agreements between investors and host states that prevent alterations in host state laws throughout the project's duration. These clauses can have different forms from completely freezing the applicable law of the state in relation to the investment to assuring the coverage of financial loss in relation to changes in law. Because these agreements create even more commitments for the state, they usually take place in capital-

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[349] *EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13, Award, 8 October 2009* (n 126) paras 221, 237.
[350] *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt, ICSID Case No ARB/84/3, Award, 20 May 1992* [113–125]; *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States, ICSID Case No. ARB (AF)/97/2, Award, 1 November 1999* (n 147) paras 106–115.
[351] Peter Muchlinski, '"Caveat Investor"? The Relevance of the Conduct of the Investor Under the Fair and Equitable Treatment Standard' (2006) 55 International & Comparative Law Quarterly 527.
[352] *International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL, Award, 26 January 2006* (n 67).

intensive projects which in some way benefit the local economy or provide infrastructure or other relevant services such as telecommunications or transport.[353]

As illustrated on the caselaw in this subsection, the balance of interests regarding legitimate expectations is still quite ambiguous and always depends on the specific facts and on the opinion of the tribunal in question. The rulings use different definitions and consequently reach different solutions, extending from requiring compensation for virtually any change in regulation towards heavily damaging regulations being considered fair based on factual circumstances of the dispute.

[353] Katia Gehne and Romulo Brillo, 'Stabilization Clauses in International Investment Law: Beyond Balancing and Fair and Equitable Treatment' <https://icsid.worldbank.org/sites/default/files/parties_publications/C6106/2021.01.08%20Parties%27%20Post%20Hearing%20Briefs/Claimants%27%20Post%20Hearing%20Submission/Legal%20Authorities/CL-0281.pdf> accessed 21 December 2023.

Conclusion

This thesis aimed to offer a conceptual overview of the FET standard of treatment and its protection of legitimate expectations. The goal was to scrutinize their interpretation, application, and contemporary implications in investment disputes and treaties. Despite aspiring to provide a comprehensive analysis, it focused on a specific set of investment treaties and arbitral decisions, given the expansive nature of the field.

Standards of treatment stand at the core of a significant number of investment disputes and FET is the most invoked standard in general. In the first major part of the thesis, the FET standard was introduced, including its history. The FET standard provides protection to investors and their investments when they are mistreated by the host states through any form of damaging and unfair behaviour, that does not breach other specific treaty obligations. This part explained the benefits of FET standard, such as the encouragement of investment environment and additional security for the investors, as well as its downsides and criticism. It has also established that while there are voices claiming that FET standard is not a standard of its own or that it should only represent the minimum standard of treatment under international law, majority of arbitral practice proves otherwise. At this point in time, if the treaty does not directly state differently, FET standard is considered to be an autonomous source of substantive rights to the investor. Furthermore, this part introduced the different formulations FET standard may have in BITs, from simple unqualified FET definition with no further specifications to definitions consisting of lists of specific obligations under the standard in attempt to further clarify the obligation to both parties of the BIT.

The main trends in approach to the standard have been illustrated on examples from doctrine as well as caselaw. Those lead to the conclusion, that the standard does not have clearly defined definition and can differ based on the text of relevant treaties and factual circumstances of the particular dispute. That can be considered a downside as well as a benefit.

The vagueness is considered to be the most significant downside of the FET standard. It creates uncertainty of both sides of the diagonal clauses of BITs, the states and the investors. This is due to the fragmentation of international investment law in different BITs and due to reliance on precedent, while caselaw vastly differs in its conclusions and definitions. The states as well as the investors cannot rely on specific and crystal-clear contents of the standard when taking actions in regard to the investment. The decision of the tribunal, if a dispute arises, will depend on the specific circumstances of the case, the language of relevant investment treaty, the caselaw used in submissions of the parties as well as opinions of the appointed arbitrators.

On the contrary, this dependence on factual circumstances constitutes the spirit of the FET standard. The point of evaluation of the FET standard is to apply this general principle onto the facts of the case and draw out concrete boundaries of fairness in the current case, no matter how unpredictable or unconventional these surrounding facts might be. This allows the standard to be flexible and really fill the gaps left by other more specific standards of protection. It also creates space for factual argumentation of the parties as well as evaluation of the importance of public interest or the socioeconomic situation in the host state if the tribunal deems it relevant.

The last two chapters of the first part of this thesis introduce the contents of the FET standard and the relationship of FET with other treaty standards. Among the key introduced contents of FET standard are stability and consistency, legitimate expectations, transparency, due process, and protection from denial of justice. Other protections, such as freedom from abusive treatment, good faith as well as compliance with contractual obligations are also noted and introduced briefly. These factual contents amount to what we understand as the FET standard in practice. They safeguard a fair and equitable framework of investors from the sovereign powers of the states. At last, the first part explained the relationship between FET and other treaty standards. FET stands next to protection from expropriation without due compensation, full protection and security, protection from discriminatory or arbitrary measures, and national or MFN treatment. Altogether, these standards amount to the framework of protection of investors and their investments.

At the end of this part, we can draw a tentative conclusion, that although there is a consensus among most tribunals regarding the necessity of the good faith principle and the assurance of a certain level of stability and predictability, the extent of these protections varies significantly based on treaty language, case-specific facts, and tribunal interpretation.

The second part of this thesis focused on one of the key substantive contents of the FET standard, the protection of legitimate expectations of foreign investors. Closely linked to the standards of consistency and stability, this protection assures predictable environment for investments and legal certainty for investors and host states. This concept is crucial in modern investment law, as investors require a certain level of stability and assurances of a returnable investment before deciding to invest significant resources in a foreign country. The assurance of stability is also beneficial for the host states, who manifest their interests when drafting and agreeing to particular BITs and their individual definitions of FET standard. In this part, the thesis introduced the relationship between legitimate expectations and the FET standard, the types of legitimate expectations based on their different sources and debated the balancing of the expectations of investors with the state's right to regulate.

The legitimate expectations of an investor typically stem from reliance on legal framework at the time of the investment, or from specific representations of the state or its agents. These circumstances are then evaluated from the point of view of an objectively reasonable investor, not the subjective point of view of the investor in question, before the tribunal decides whether such expectations were indeed legitimate in the sense of the FET standard. While the tribunals often rely on previous caselaw, the FET standard and consequently the protection of legitimate expectations is absolute and does not require comparison to another similar situation.

Every case, where the compensation for the breach of investor's legitimate expectation is awarded, requires certain conditions to be fulfilled. There must be a real source for the expectations, be it legislation or promises of the state. Other requirement is a reasonable investor who abided due diligence regarding these promises. The investor must also factually rely onto these promises or onto the legislation and lastly, the state must negatively impact the investor through a breach of these established expectations. Only after fulfilling all these conditions is an investor entitled to compensation under the FET standard's protection of legitimate expectations.

The vagueness of the FET standard also manifests in the arbitral practice regarding legitimate expectations. Similarly, the tribunals do not agree on the specific contours of the protection, some opting for wider interpretations, while others take more restrictive and realistic approach, respecting reasonable regulatory change and considering the socioeconomic situation in the host state at the time of the investment. This creates an ironic situation in which a standard built up on legal certainty does not provide such certainty in its application on arising disputes. The tribunals typically attempt to strike balance between freezing the legal framework of states and providing stable environment for investors to function in. While the states shall not intentionally or accidentally impair the investor, the investor is supposed to make reasonable assessment of the state, the situation therein and the possible evolution of its legal framework or political situation.

In the end, this thesis gives rise to the question of whether the FET standard and its protection of legitimate expectations actually provide more "fairness" as stated by its title? That depends on the viewpoint. The tribunals shall never serve as an appeal court to the courts of the host state, so they shall not review the exact fairness of the case at hand. The FET standard is an absolute standard stemming from international law instruments and while flexible, it is still limited only to certain level of protection and does not allow the tribunals to decide however they would deem philosophically fair. However, investment arbitration provides a system of

boundaries in between which the outcomes of disputes are relatively fair and shall not be outrageously unfair towards the investor nor the host states.

Additionally, to comment on possible future of the standard, recent trends in international investment arbitration were affected by topics that we did not give as much importance to before. The challenges we face today relating to public health, the protection of environment or sustainable development need to be reflected in our laws and regulations, including investment agreements. Recently legitimate expectations were the legal base for disputes arising from the difficulties encountered by several states due to reduction of incentives for renewable energy or the implementation of measures in response to profound economic crises.

These facts emphasize the need to accelerate the reform of old-generation investment agreements. As shown thorough this thesis, the shift in approach to BITs and the formulations of the FET standard and legitimate expectations is happening, be it slowly. Some states are moving towards modern and more precise definitions. Regarding FET, new treaties tend to limit and clarify its existence and contents. The modern definitions also often omit the protection of legitimate expectations, or only mention it as a circumstance to be considered, not a standalone right of the investor. The modernisation of these treaties has the potential to help avoid a substantial number of investment dispute cases and protect states doing legitimate public policy objectives.

This thesis provided an overview of the FET standard up until today. Its future depends on the modern approach and choices taken by the states in the following years. Either the current fragmented regime will continue, or the states will accelerate the reform of the standard and its definitions towards more unified and precise formulations. That would create an environment in which the practices of arbitral tribunals could, to some extent, harmonize, and allow for more secure and predictable framework for investments.

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Legitimate Expectations as Part of the Fair and Equitable Treatment Standard in Investment Arbitration

Abstract

This thesis introduces the conceptual overview of the fair and equitable treatment standard in international investment arbitration with focus on its protection of legitimate expectations. The first part of the thesis is divided into five chapters. Firstly, the standard is introduced and set into historical context. In the second chapter the author explains the relationship between the FET standard of treatment and the minimum standard of treatment of foreigners under international customary law. The third chapter showcases the different formulations of FET provisions and the effects of the wording on the application of the norm. The fourth chapter deals with the substantive contents of the standard, introducing them in separate subchapters. These contents are stability and consistency, legitimate expectations, transparency, judicial propriety, and other contents are also briefly introduced. The last chapter introduces the other standards of treatment, existing next to the FET and the relationship among them. These standards are protection from expropriation without due compensation, full protection and security, protection from discriminatory and arbitrary measures and the national or MFN treatment.

The second part focuses further on the protection of legitimate expectations of the investor under the FET standard. This part consists of three chapters and offers the overview of legitimate expectations and its contents, explains the relationship with the FET standard and introduces the different sources of legitimate expectations. It showcases the two main sources of legitimate expectations, the regulatory framework of the state and the possible representations of the state or its agents. The final chapter deals with the delicate balance of interests between the investor's right to maximalise the investment and the state's sovereign right to regulate. The conclusion offers a summary of the main findings of the thesis.

Keywords: Investment arbitration, Investor-state dispute settlement, FET, Standards of Treatment, Legitimate Expectations

Zásada legitimního očekávání jako součást standardu spravedlivého zacházení v investiční arbitráži

Abstrakt

Tato práce nabízí přehled standardu spravedlivého zacházení v mezinárodní investiční arbitráži s důrazem na ochranu legitimního očekávání investorů. První část práce je rozdělena do pěti kapitol. V první je standard představen a zasazen do historického kontextu. Ve druhé kapitole autorka vysvětluje vztah mezi standardem spravedlivého zacházení a minimálním standardem zacházení s cizinci podle mezinárodního obyčejového práva. Třetí kapitola představuje různé formulace ustanovení o spravedlivém zacházení v mezinárodních smlouvách a jejich dopady praktickou aplikaci normy. Čtvrtá kapitola se zabývá obsahem standardu, představuje jeho jednotlivé náležitosti v samostatných podkapitolách. Těmito náležitostmi jsou zejména stabilita, legitimní očekávání, transparentnost, právo na spravedlivý proces, ale jsou zmíněny i další. Poslední kapitola představuje další standardy zacházení, které existují vedle standardu spravedlivého zacházení, a vztah mezi nimi. Tyto standardy jsou ochrana před vyvlastněním bez náležité kompenzace, plná ochrana a bezpečnost, ochrana před diskriminačními a svévolnými opatřeními a jako poslední je představeno národní zacházení a zacházení dle doložky nejvyšších výhod.

Druhá část se dále zaměřuje na ochranu legitimních očekávání investora v rámci standardu spravedlivého zacházení. Tato část se skládá ze tří kapitol a představuje zásadu ochrany legitimních očekávání a její obsah, dále vysvětluje vztah k standardu spravedlivého zacházení a představuje různé zdroje legitimního očekávání. Zaměřuje se na dva hlavní zdroje legitimních očekávání, a to právní řád hostitelského státu a možné nabídky či sliby ze strany státu nebo jeho zástupců. Poslední kapitola se zabývá křehkou rovnováhou zájmů mezi právem investora rozvíjet svou investici a suverénním právem státu na regulaci svých vnitřních záležitostí. Závěr nabízí shrnutí hlavních zjištění práce.

Klíčová slova: Investiční arbitráž, Řešení sporů mezi investory a státy, Standard spravedlivého a rovnoprávného zacházení, Zásady zacházení, Zásada legitimního očekávání