Univerzita Karlova v Praze

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Současné trendy standardu spravedlivého a rovného zacházení v investiční arbitráži

Diplomová práce

Vedoucí diplomové práce: doc. JUDr. Vladimír Balaš, CSc.

Katedra mezinárodního práva

Datum vypracování práce: 20.6.2015

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Daniel Hrčka

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Introduction

Noble ideals of justice and fairness always lay in the centre of attention of jurisprudence. It has therefore only been a matter of time before rapidly evolving law of international investment will contribute to these vague notions by its own concept. This contribution happened to become a standard of protection which causes controversies even more than fifty years after its implementation into everyday life of international investment.

No substantive standard of protection dealt within investment treaty arbitration has lead to such controversy as standard of fair and equitable treatment (FET). Present in almost every bilateral investment treaty (BIT), claims are regularly raised regarding violation of FET standard, thereby putting more traditional standards (such as expropriation) into shade.[1] However, although being applied by number of tribunals and frequently evaluated by scholars, there are several issues discussed within FET causing this controversy: possible relation of the standard to minimum standard under customary international law, its actual content and evolution of sub-elements of FET, as well as relation to other standards of protection available in BITs.

These issues stem from the indeterminate wording of FET clauses, debatable ideological background of the standard and conflicting interests of investors and host states. Inconsistent decisions of arbitral tribunals also do not contribute to legal certainty. Finally, the function of FET standard within BIT itself raises doubts on its effective functioning. At least according to some awards, FET should be filling gaps left by other standards so that no improper conduct of the host state violating the performance of the investment will remain unpunished.[2] FET therefore often has to defend a number of interests which stand in conflict with each other. In combination with factors mentioned above it becomes clear that finding an uniform approach on what is fair and equitable as well as on actual application of FET in individual cases is an intricate goal almost impossible to achieve.

[1] According to Schreuer "*Fair and equitable treatment is currently the most important standard in investment disputes*." FET in arb. practice, p. 357. See Also Blackaby, p. 489.

[2] UNCTAD FET 2012, p. 6; Principles of IIL, p. 122.

Aim of this treatise is to review the current approaches to issues causing immanent instability in application of FET clauses and try to find a solution which would at least partly satisfy both investors seeking for the highest level of protection, as well as host states willing to preserve their sovereign right to regulate domestic matters (bearing in mind large scope and diversity of FET clauses and therefore danger of any generalizations).[3]

The first part will be dedicated to prevailing differences in form and wording of FET clauses and resulting consequences, which lead to uncertainty regarding actual content of the standard. Aim is to show that few can be done in lifting the veil of this uncertainty by drafters of the clauses – even uniform, universally accepted clause will not explain intricacies bound to the standard.

The second part will be devoted to everlasting dispute whether FET equals to minimum standard under customary international law or if it is an autonomous standard additional to general international law.[4] Although much has already been written on this topic, here the issue will be addressed from the point of legal methods of interpretation generally used in theory of law. Given the theoretical background of FET, formulations in BITs, case law applying it and also various methods of interpretation, it will be argued that FET stands as an autonomous standard. This however means extending the inherent conflict between certainty in application of the standard and high level of protection.

The third part will approach this conflict and look at FET from perspective principles of rule of law and legality requirements described by recognized legal philosopher Lon Fuller. Subsequently the core of both substantive and procedural requirements will be extracted into group of principles to assist with easier application of the standard in real cases.

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[3] Principles of IIL, p. 121.
[4] Sornarajah, p. 349.

Findings from the previous parts and possible solutions will be tested in the last part which is concerned with a topical particular example of alleged FET violation: sovereign debt restructuring in Argentina.

1. Current Shape of the FET Standard

1.1. Development of FET clauses

In order to be able to critically assess the recent developments of FET without any prejudice and reach trustworthy conclusions, it is necessary first to look into past. Although FET obligation did not appear in the first ever BIT between Germany and Pakistan,[5] it became (among others) part of Havana Charter for an International Trade Organization of 1948[6] or Draft Convention on Investments Abroad of 1959.[7] Already in these documents FET took its traditional form which now causes so much distress between practitioners – indeterminate wording "fair and equitable" with no indication of actual meaning, no connection to other standards of protection or even sources of international law.

This may be the reason why FET clause in OECD Draft Convention on the Protection of Foreign Property of 1967[8] was interpreted as falling within the scope of minimum standard which forms part of customary international law. Other example of the need to solve the issue of vagueness of FET by means of subsequent clarification was North American Free Trade Agreement of 1992. The Free Trade Commission issued a Note of Interpretation[9] linking FET customary international law to prevent extensive reading of the standard.

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[5] Treaty for the Promotion and Protection of Investments (with Protocol and exchange of notes), Germany and Pakistan, 25 November 1959.

[6] Havana Charter, Art. 11(2): "*The Organization may, in such collaboration with other inter-governmental organizations as may be appropriate: [...] make recommendations for and promote bilateral or multilateral agreements on measures designed [...] to assure just and equitable treatment for the enterprise, skills, capital, arts and technology brought from one Member country to another*".

[7] Proposed by Hermann Abs and Lord Shawcross, Art. 1: "*Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties[...]*".

[8] Art. 1 a): "*Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties. It shall accord within its territory the most constant protection and security to such property and shall not in any way impair the management, maintenance, use, enjoyment or disposal thereof by unreasonable or discriminatory measures[...]*".

[9] Note is available at: http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp [accessed on 20. June 2015].

However, this route was not followed by creators of bilateral investment treaties. Even after year 2000, when arbitral tribunals started to cope massively with alleged violations of FET (and often reaching different conclusions), no uniform approach was taken by states regarding the wording of FET clauses to achieve stability and legal certainty in relations between investors and host states. Tribunals have nowadays to take decisions regarding various clauses with different content. United Nations Conference on Trade and Development (UNCTAD) mentions 5 possible approaches to formulation of FET clauses:[10]

[10] UNCTAD FET 2012, p. 17 – 37.

1.1.1. BIT with no FET obligation

This approach is not very widespread since FET clauses are present in the high majority of BITs. However, exclusions to the rule exist and that concerns even some treaties concluded in the new millennium when FET started to gain its current importance.[11]

Omitting the FET clause is however unlikely to be considered as a correct way to approach deficiencies of FET itself. Firstly, complexity of international investment law as well as artifice of host states (giving rise to various types of disruption of an investment) justify inclusion of FET clauses into BITs. Impairment of an investment can be caused not only by breach of expropriation, full protection or security or other standards less vague than FET. Only few states will thus take the risk of not protecting their investors from violations FET as described today by tribunals. Moreover, given the large number of academic writings dedicated to FET and its importance in case law, inclusion of FET may have become a custom (though of course still not an obligation because of autonomy of contracting parties) relied on by states concluding BIT. Also, domestic law of host states and administrative regulation affecting investors is being shaped by rights of investors stemming from FET (stability, predictability, publicity and non-discrimination rules).

Secondly, non-inclusion of FET clause into BIT does not necessarily mean investor cannot rely on its protection. If FET equals to international minimum standard, a broad dispute settlement clause can still allow investors‘ claims regarding breaches of FET.[12] Furthermore, FET standard absent in a BIT can be incorporated from another BIT through most favoured nation clause. This happened in *Bayindir*[13] where FET was mentioned only in the preamble of Pakistan-Turkey BIT. Nevertheless, the tribunal stated that "*It is true that the reference to FET in the preamble together with the*

[11] See Australia-Singapore FTA (2003), New Zealand-Singapore FTA (2000), Turkey-Pakistan BIT (1995), Turkey-Kazakhstan BIT (1992), Turkey-Jordan BIT (1993).

[12] The dispute settlement clause must allow claims with respect to the investment itself without linking them to the violations of particular provisions of BIT. Customary international law (and thus international minimum standard) will be afterwards applied automatically. UNCTAD FET 2012, p. 18.

[13] Bayindir v. Pakistan, Award, para 153.

absence of a FET clause in the Treaty might suggest that Turkey and Pakistan intended not to include an FET obligation in the Treaty. The Tribunal is, however, not persuaded that this suggestion rules out the possibility of importing an FET obligation through the MFN clause expressly included in the Treaty. The fact that the States parties to the Treaty clearly contemplated the importance of the FET rather suggests the contrary [...]"[14] This view was supported by the fact, that FET was mentioned in the preamble and exclusions to the use of MFN clause did not mention FET. Since apparently every country that has ever concluded a BIT without FET clause must have also entered into BIT including it, this approach is of high significance. However, it has to be still used with caution bearing in mind actual intention of contracting parties and nature of the original BIT.[15]

[14] Bayindir v. Pakistan, Award, para 155 – 157.

[15] UNCTAD MFN, p. 102*: Assuming MFN treatment in investment agreements, the exercise should not entail an automatic importation but the undertaking of an assessment of whether the absence of the provision at stake actually causes a damage to the investor, for which the measure that gave rise to the dispute would have to be characterized as breaching said provision in the first place. Moreover, if the importing of a regime into the basic treaty notably disrupts the structure and nature of the latter, the outcome should be disregarded.*

1.1.2. FET without any reference to international law or any further criteria

This traditional[16] and widespread wording of FET clauses does not integrate it with international law or minimum standard. It only imposes obligation of the state to accord fair and equitable treatment to investments creating autonomous standard (as will be shown below). This vague formulation however causes biggest uncertainty regarding its content.

On the other hand, its breadth provides with possibility to encompass under FET protection actions of state that would not fall within its scope if one of the options below would be used.

[16] This method was laso used in Abs Shawcross Agreement or OECD Draft Convention (see notes 6 and 7).

1.1.3. FET linked to international law

A link to international law is one of the possibilities to ensure more predictable conclusions regarding contents of FET standard. "*Tribunal faced with such language may not go beyond what the sources of law dicate the scope and meaning of FET to be*."[17] However, difficulties arise with the need to define all relevant principles of international law as well as customary international law (as a part of international law). Moreover, some clauses can be worded in a way where international law is only the bottom floor, which does not prohibit from granting a greater protection.[18] According to some authorities, FET standard itself is a part of international law without need to mention it in FET clause.[19]

[17] UNCTAD FET 2012, p. 22.
[18] USA-Jordan BIT, Art. II.3.a): "*Each Contracting Party shall at all times accord to covered investments fair and equitable treatment and full protection and security, and shall in no case accord treatment less favorable than that required by international law*." (emphasis added)
[19] OECD Working papers, p. 20-22; Metalclad, para 101.

1.1.4. FET linked to minimum standard of treatment under customary international law (CIL)

Another way to limit extensive intepretations of FET is connection of the standard to CIL. Relation between FET and CIL, its actual significance and influence on host states‘ obligations towards investor has been widely analysed[20] in last decades and is more discussed below. So far it can be said that the biggest advantage of this approach is (like with clauses linked to international law) an attempt to clarify the content of the standard by linking it to a particular source of law. However, this legal certainty is disputed by the fact that no consensus exists regarding content of minimum standard under CIL and achieved certainty is thereby lost.

Moreover, some tribunals claimed that actual difference between autonomous FET and FET based on minimum standard is rather apparent than real.[21]

[20] Principles of IIL, p. 124; Porterfield; Choudhury, p. 298-302.
[21] Saluka, para 291; Occidental v. Ecuador para 189, CMS v. Argentina para 282.

1.1.5. FET with additional substantive content

By specifying particular obligations of host states within FET clause (and not relying on links to international law or CIL which are often difficult to define), freedom of interpretation for tribunals is restricted and contracting parties get a better awareness of their obligations (thus being able to adapt their conduct). This additional content depends on contracting parties and their willingness to restrict the scope of FET protection.[22]

However, these rules embedded into general FET clause shed light only on those aspects they are concerned with. FET clause is usually not restricted to that additional content (unless directly stated[23]), it only specifies these particular elements of FET standard. This means that uncertainty prevails for the rest of the content of FET obligation (elements not mentioned in additional sub-articles) and we are speaking of another half-way measure.

[22] UNCTAD FET 2012, p. 29, mentions BITs with special requirements dedicated to denial of justice, arbitrariness and non-discrimination, irrelevance of a breach of a different treaty norm, accounting for the level of development .

[23] In ASEAN-China Investment Agreement of 2009, FET is explicitly restricted to denial of justice.

1.2. Czech Republic BITs in the New Millennium

Before moving to actual description and critical evaluation of contents of the standard, recent trends in creation of FET clauses can be shown in the chart below. It shows all BITs entered into by the Czech Republic[24] since 2000, that is after emergence of case law concerned with FET and also after issuance of Note of Interpretation of Free Trade Commission regarding Article 1105 of NAFTA (linking FET to CIL).

BIT with	Type of FET clause	Comments
Azerbaijan (2011)	Art. 2(2), unqualified obligation	Mentioned together with full protection and security (FPS), Art. 2(3) assures good faith in assessment of applications for necessary permits in connection with investment
Bahrain (2009)	Art. 2(2), unqualified obligation	Mentioned together with FPS
Bosnia and Herzegovina (2002)	Art. 2(2), FET with additional substantive content	Prohibition of unreasonable and discriminatory measures
Cambodia (2008)	Art. 2(2), unqualified obligation	Mentioned together with FPS
Canada (2009)	Art. 3(1), FET linked to minimum standard of treatment under CIL	Additional content: A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish breach of FET
Cyprus (2001)	Art. 2(2), unqualified obligation	Mentioned together with FPS
Georgia (2009)	Art. 2(2), unqualified obligation	Mentioned together with FPS
Guatemala (2003)	Art. 2(2), FET linked to international law as a	Mentioned together with FPS, prohibition of unreasonable and discriminatory measures

[24] All BITs are available at: http://investmentpolicyhub.unctad.org/IIA/CountryBits/55 [accessed on 20.6.2015].

	floor of protection	
China (2005)	Art. 2(2), unqualified obligation	Mentioned together with FPS
Malta (2002) – terminated	Art. 2(2), unqualified obligation	Mentioned together with FPS, obligation to accord fair, *non-discriminatory* and equitable treatment (emphasis added)
Mexico (2002)	Art. 2(3), unqualified obligation	Mentioned together with FPS
Morocco (2001)	Art. 2(2), unqualified obligation	Mentioned together with FPS, extension,change or conversion of an ivestment should be considered as a new investment
Nicaragua (2002)	Art. 2(2), unqualified obligation	Mentioned together with FPS
Saudi Arabia (2009)	Art. 2, FET with additional substantive content	prohibition of unreasonable and discriminatory measures
Sri Lanka (2011) – not in force	Art. 2(2), unqualified obligation	Mentioned together with FPS
Syria (2008)	Art. 2(2), unqualified obligation	Mentioned together with FPS
Turkey (2009)	Art. 2, FET with additional substantive content	Mentioned together with FPS, prohibition of unreasonable and discriminatory measures
Yemen (2009)	Art. 2(2), unqualified obligation	Mentioned together with FPS

As can be seen, high majority of Czech BITs opts for unqualified obligation[25] which is sometimes (Turkey, Saudi Arabia, Bosnia) supplemented by prohibition of arbitrary and discriminatory measures. Link to minimum standard under CIL is used just once, same goes with link to international law. Czech Republic has not adopted any model BIT

[25] E.g. Art. 2(2) Czech-China BIT: *Investments of investors 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.*

which also contributes to discrepancies. It should be noted that these differences within FET obligations are unwanted. As will be shown below various wordings of FET clauses indeed result in various obligations of host states. This can lead to a situation when a particular measure adopted by state will not violate one BIT while causing a breach of another. This will of course negatively influence the right of state to regulate its domestic matters because uncertainty arises whether ostensibly innocent measure potentially affecting investment is in accord with some of its international obligations (BITs with lower liability threshold).

2. Relation of FET to Customary International Law

Extensive debate has emerged regarding the question, whether FET only mirrors international minimum standard under CIL or should be considered as an autonomous standard, an overrirding obligation comprising of much more than gross arbitrary or discriminatory conduct. Answering this question is crucial since it has implications on content of FET standard itself. Before actual assessment of both positions and reaching a justified conclusion, it is important first to look at foundations of CIL and international minimum standard paying attention to specifics of international investment law.

Pursuant article 38(1)b of the Statute of the International Court of Justice "*The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply [...] international custom, as evidence of a general practice accepted as law[...]*"[26] There are 2 obligatory elements forming an international custom[27]. Material element embodied in consistent and general practice which is widespread (*usus generalis*) and repeated, homogenous, continuous and long-term (*usus longaevus*). Psychological element is represented by general awareness of necessity of that practice by which they consider the practice as binding (*opinio iuris sive necesitatis*).[28] Moreover, international law, and this twice as big concerns international investment, is affected by inequality between states (given by their economic potential). This inequality influences the consistent practice as an element of international custom.

Furthermore, international economic law emerged only after the Second World War, international investment law (IIL) in the last 50 years, case law being formed mainly last 2 decades.[29] In order to consider settled practice as legally binding, this is mostly proven by precedents originating in the case law. But do arbitral tribunals

[26] The Statute is available at http://www.icj-cij.org/documents/?p1=4&p2=2 [accessed on 20.6.2015].
[27] Čepelka, Šturma p. 99.
[28] Shaw, p. 72-89.
[29] Blackaby, p. 468.

actually reflect the will of states in their awards?[30] Moreover, short existence of international investment often denies sufficient development of the material element, *usus longaevus*. This signifies that in the sphere of IIL international custom is more likely to develop as a "modern custom"[31] derived mainly from opinio iuris without existence of previous consistent practice. However, is there an opinio iuris on contents of IIL and namely FET? Methodological problem arises as it is difficult to ascertain the content of norm binding respective subjects. Practice of states is not uniform and awareness of obligation is contentious[32] especially between developed and developing countries.

Another issue is the continuous development of CIL.[33] This is topical especially in IIL where evolving economic conditions and globalisation of economy result in changes in understanding of international minimum standard under CIL. Paradoxically arbitrators or disputing parties supporting CIL-linked standard define it the same ways as autonomous standard – by enumeration of previous arbitral decisions without either proving consistent practice or opino iuris which are the very elements distinguishing it from autonomous standard.[34]

International minimum standard under CIL "*governs the treatment of aliens, by providing for a minimum set of principles which States, regardless of their domestic legislation and practices, must respect when dealing with foreign nationals and their*

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[30] Example outside the scope of FET is too restrictive reading of umbrella clause by tribunal in SGS v. Pakistan which was criticised by Swiss Government as one of the contracting parties of the BIT. Reinisch, p. 22.

[31] Čepelka, Šturma p. 104

[32] Türk, p. 45.

[33] This has also been acknowledged by a number of tribunals, see Mondev, para 125 (content of CIL today is shaped by more than 2 thousand concluded BITs) or ADF v. USA, para 86: "*[...]what customary international law projects is not a static photograph of the minimum standard of treatment of aliens as it stood in 1927 when the Award in the Neer case was rendered. For both customary international law and the minimum standard of treatment of aliens it incorporates, are constantly in a process development.*"

[34] See Porterfield. Author suggests that FET clauses linked to CIL should include obligation of investor to prove the host state's duty by actual state practice and opinio iuris, not by mere citation of arbitral awards. See also RDC v. Guatemala, para 159-160.

property".[35] This minimum is valid regardless of treatment accorded to own citizens, it encompasses basic rights stemming from international law.[36]

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[35] OECD Working Papers, p. 8; another definition is provided by The American Law Insitute's Restatement (Second) of Foreign Relations Law of the United States, 1965, para 165.2: "*The international standard of justice [...] is the standard required for the treatment of aliens by (a) the applicable principles of international law as established by international custom, judicial and arbitral decisions, and other recognized sources or, in the absence of such applicable principles, (b) analogous principles of justice generally recognized by States that have reasonably developed legal systems.*"

[36] International minimum standard applies to areas of denial of justice, treatment of aliens under detention or full protection and security. See OECD Working Papers, p. 9, note 34.

2.1. Assessment of the relation by methods of interpretation

In order to independently evaluate whether FET really is tantamount to minimum standard as defined above, we will firstly assess this issue by looking on it from the point of various ways of legal intepretation. Review of the case law concerning link of FET to CIL (including context of Article 1105(1) of the NAFTA) will follow afterwards.

Methods of interpretation are procedures enabling to clarify the meaning of interpreted text (legal norm). We can separate standard (developed through centuries and necessarily used in every interpretation: linguistic, logical and systematic method) and above-standard methods (which have only supplementary role and do not have to be used in every occasion: historical, teleological, comparative).[37] Above-standard methods overcome interpretation of the text itself and look closely at purpose of a law.

Historical interpretation focuses on documents issued with creation of respective legal norm such as explanatory reports or various notes of interpretation.[38] They provide a better guidance of what was the intention of legislator or contracting parties. As noted above, FET clause in OECD Draft Convention on the Protection of Foreign Property features no explicit link to minimum standard under CIL. However, notes and comments to this article explicitly alleged that "*the standard required conforms to the "minimum standard" which forms part of customary international law* ".[39] Since this draft convention was afterwards used by some OECD members as a basis for negotiation of their own BITs, it might be tempting to support the opinion of Montt who states that "*[...]if the historical background is to be taken seriously, then the FET standard when first used, could not have meant anything higher than the international minimum standard of treatment."*[40] However, this conclusion should be treated with caution.

[37] Boguszak, p. 182.
[38] Gerloch, p. 40-46.
[39] OECD Draft Convention: Text with Notes and Comments, p.9.
[40] Montt, p. 69.

Firstly, the Draft Convention "*remained a text without legal effect*".[41] Secondly, it does not say anything about explanatory reports and intentions lying behind particular BITs. OECD Draft Convention was only an inspiration for some states, which afterwards concluded some BITs (but definitely not all of today's more than two thousand BITs can trace their origin back to that convention). To conclude, it is the BIT itself which should be the subject of historical analysis. This can be however problematic, since BITs are sometimes signed during negotiations between political authorities as some kind of declaration proving good relation between states[42] without due attention being paid to negotiation process. Documents explaining aims of the contracting parties are either non-existent or difficult to find.

Finally, limitations exist also regarding historical method of interpretation itself. Aims and intentions of contracting parties can change during time and thus documents from negotiation process will not reflect them (the older the legal norm is, the more likely this is going to happpen). Moreover, it cannot stay in conflict with standard methods of interpretation, otherwise it is not an intepretation, but creation of law.[43] These conflicts are outlined below.

Other above-standard methods provide only with little assistance. Comparative intepretation takes into consideration reasoning used in similar legal regulations.[44] Regarding FET, its use is only limited because of different wording of FET clauses in BITs and multilateral international treaties. Comparative analysis would fall short if one confronts BIT with unqualified FET obligation, BIT with FET clause linked to CIL and NAFTA whose article 1105(1) should reflect CIL[45]. Teleological method is focused on purpose of legal regulation with respect to social and political context at time of

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[41] UNCTAD FET 2012, p. 21, 22 ("*These factors may have influenced many arbitral tribunals that interpreted the unqualified FET standard as delinked from customary international law and focused on the plain meaning of "fair" and "equitable".*").

[42] Montt, p. 305.

[43] Boguszak, p. 186.

[44] Ibid., p. 182.

[45] See e.g. Choudhury, p. 299. This interpretation of article 1105(1) by Free Trade Commission (FTC) was influenced by its wording – heading contains reference to minimum standard of treatment and clause itself is worded "*in accordance with international law including fair and equitable treatment*" (FET in Arb. Practice, p. 364). Moreover, NAFTA awards emerging after FTC's interpretation have relativized it as CIL is an evolving concept lowering the liability threshold (Mondev, para 114; ADF, para 179; Thunderbird, para 194; Glamis, para 613, 616). For non-NAFTA cases connecting FET to minimum standard under CIL see Teco v. Guatemala, para 454; Vannessa v. Venezuela, para 227.

application. Here results of interpretation are disputable because of conflicting purposes at stake. On one hand it is the legal certainty[46] which gives investor an idea on what to expect during performance of its investment (legitimate expectations) and also it gives limits to host state regarding its right to regulate. On the other we face the gap-filling function of FET introduced to overcome limited protection by other substantive standards.[47] Link of FET to CIL was introduced in favour of the former function. However, given preference of FET clauses with unqualified obligation and with support of standard methods of interpretation, one may assume that latter function prevails (thus arguments supporting FET as an image of minimum standard under CIL are weakened).

Moving to standard methods of interpretation, linguistic approach presupposes 3 possible situations of legal notion used in a rule. Into *core of the notion* falls everything what any member of respective linguistic environment would consider to fall within its scope. On the contrary, sphere outside the scope of the notion is everything what nobody would regard to fall within that scope. Inbetween is an *indefinite sphere of the notion* where only part of society would regard respective circumstances to be covered by the notion. German legal scholar Philip Heck speaks of "*A nucleus of certain meaning is surrounded by a gradually fading halo of meaning*."[48] H. L. A Hart uses concept of term's "core of certainty" and its "penumbra of doubt".[49]

If we apply this theory on FET standard, we will face a question at what point may one begin to reasonably doubt the notion's applicability and at what point is such application impermissible. Limits of application are set first by minimum standard under CIL as the highest liability threshold possible, which must be applied at all circumstances since it forms part of general international law.[50] Secondly, the opposite limit is represented by other substantive standards of protection in the BIT

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[46] But if FET is to be interpreted in accordance with minimum standard of treatment shaped through time by conclusion of BITs, the concept still continues to be demystified. See Klager, p. 439

[47] Schreuer PIL, p. 122

[48] Sartor, p. 6.

[49] Hart, p. 129.

[50] Lad-Ojomo, p. 8: "*Even where there is a link to international law tribunals usually asopt two views in interpretation namely (i) that the FET standard does not require any addition to the customary international law [minimum standard of treatment] or (ii) the FET standard is an expansion of the customary international law minimum standard.*".

(expropriation, umbrella clause...). If these other standards would be also considered as FET violations, they would practically lose reason for their existence in BIT (since any violation of BIT could be subsumed under FET clause).[51]

Linguistic interpretation causes no trouble with FET clauses directly linked to minimum standard where connection to CIL is clear. Problems arise with unqualified FET obligation. One can approach the issue by more ways. *Grammatical* reading[52] is focused on meaning of the words in connection with other. This provides little assistance since from phrase "*to accord fair and equitable treatment*" only few conclusions can be draw regarding relation to CIL. By contrast, *semantic* reading puts emphasis on meaning of individual words. Here we can at least state that concepts of "fairness" and "equity" are not linked to CIL as understood from normal language.[53] Schreuer notes that "*it seems implausible that a treaty would refer to a well-known concept like the 'minimum standard of treatment in customary international law' by using the expression 'fair and equitable treatment'.*"[54] It is apparent however that this deduction is neither sufficient for defining contents of FET nor for deciding the true relationship to CIL.

Logical interpretation is based on logical structure of the text. One[55] particular argument can be used in support of autonomous FET standard: *argumentum a contrario*.[56] Since 2000, when tribunals started address the issue of FET and CIL, states concluding BITs surely must have noticed this controversy. They could therefore opt for

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[51] It is therefore necessary to reject any opinions that FET clause encompasses other standards in BIT (such as F. A. Mann: it "*may well be that other provisions of the Agreements affording substantive protection are no more than examples or specific instances of this overriding duty.*"), in OECD Working Papers, p. 23.

[52] Boguszak, p. 183.

[53] See definition in MTD v. Chile, para 113: "*In their ordinary meaning, the terms "fair" and "equitable" used in Article 3(1)62 of the BIT mean "just", "even-handed", "unbiased", "legitimate". These terms are also used in Article 2(2) of the BIT entitled "Promotion and Protection of Investments [...]Hence, in terms of the BIT, 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*.".

[54] Principles of IIL, p. 124.

[55] *Argumentum per analogiam* in support of relation to CIL cannot be used because of different wording of FET clauses. Conclusion drawn from clauses stating link to CIL are applicable to unqualified FET obligations.

[56] Boguszak, p. 183.

wording of FET clause which would establish relation to CIL explicitly. However, in many cases (as shows our table with example of the Czech Republic) countries continue to use unqualified FET obligations inspite of the danger that obligations of host states will equal to more than minimum standard of treatment. This was also confirmed by UNCTAD. Opposite conclusion would contravene the debate about minimum standard and its non-acceptance in international economic law by some (developing) countries.[57] Returning to the origins of international custom, perhaps we can even claim that non-inclusion of link to CIL in FET clauses has become a consistent general practice, *opinio iuris* being the autonomous FET standard.

Finally, systematic interpretation considers the respective provision in context of the whole legal system. Here another argument stands for autonomous character of FET: international investment is a rapidly developing concept and so is FET standard. *Neer* case which served as a basis for introduction of high liability threshold for vioaltions of FET obligations is almost 100 years old and it also dealt only with denial of justice regarding treatment of natural persons[58]. Its formulations cannot be recklessly used on the contemporary context of treatment of foreign investors and their investments by host states.

To conclude, basically only historical approach, a subsidiary method of intepretation provides with an argument linking FET obligations to CIL which can be however rejected by other arguments drawn from other methods. Even tribunals which accepted FET to be measured by CIL (mostly NAFTA tribunals due to specific wording of article 1105(1)) have stated that "*both customary international law and the minimum standard of treatment of aliens it incorporates, are constantly in process of*

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[57] UNCTAD FET 1999, p. 13: "*If States and investors believe that the fair and equitable standard is entirely interchangeable with the international minimum standard, they could indicate this clearly in their investment instruments[...]*".

[58] In *Neer* (1926), murder of an U.S. citizen was not properly investigated and prosecuted by Mexican authorities and thus denial of justice was claimed. However, The United States-Mexico General Claims Commission did not find a breach and stated that "*...the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to 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 insufficiency*." Neer Report, p. 65.

development."[59] Situations, when violation of FET might occur, became much more varied through conclusion of thousands of BITs. That is why some tribunals noted that the difference autonomous FET and standard linked to CIL "*may well be more apparent than real*".[60] Schreuer therefore correctly states that "*in the absence of a clear indication to the contrary, the fair and equitable treatment standard contained in BITs is an autonomous concept*."[61]

Before moving to actual content of FET standard, I would like to address criticism of Montt who argues that autonomous approach is inconsistent with Vienna Convention on the Law of Treaties (VCLT) since it ignores Art. 31(3)c), 31(4) and Art. 32: "*There is generally no language in BITs by which the parties had indicated their intention to be exempted from the background rules of general international law*."[62] Firstly, non-exemption from rules of general international law is not equal to limitation of FET to CIL.[63] Secondly, giving protection additional to general international does not preclude interpretation in accordance with VCLT. Reference to Art. 32 of VCLT is wrong, historical background of BITs does not prove or justify FET linked to CIL, it only proves that this intention existed with regard OECD Draft Convention. Also Art. 31(4) support autonomous interpretation – Montt considers autonomous FET as a "special meaning" and parties concluding BIT usually lack any intention to give the standard this particular meaning.[64] However, if FET clause is worded in its usual way (unqualified obligation) logic would lead to the conclusion that "special meaning" is CIL-linked FET clause. And as was stated above, there is usually no evidence that contracting parties wanted to interpret unqualified FET clause so restrictively.

These conclusions in favour of autonomous FET were also supported by tribunal in Azurix: "*The last sentence ensures that, whichever content is attributed to the other two standards, the treatment accorded to investment will be no less than required by international law. The clause, as drafted, permits to interpret fair and equitable*

[59] ADF, para. 179, see also Mondev, para 114-116; Glamis, para 616.
[60] Saluka, para 291, CMS v. Argentina, para 284.
[61] FET in Arb. Practice, p. 364.
[62] Montt, p. 304.
[63] Vivendi, Award 2007, para 7.4.7.
[64] Montt, p. 305.

treatment and full protection and security as higher standards than required by international law. The purpose of the third sentence is to set a floor, not a ceiling, in order to avoid a possible interpretation of these standards below what is required by international law.“[65]

[65] Azurix, para 361.

2.2. Sub-elements of FET

As shown above, FET clauses (namely unqualified) themselves provide no guidance regarding actual content of the standard. Tribunals therefore attempted to provide definitions of FET creating more extensive formulations which include particular characteristics of desired conduct of the host state. Often no theoretical background of FET is dicussed and tribunals only enumerate individual sub-elements and consider their violation.

In *Tecmed*, tribunal considered FET as an autonomous obligation based on the wording of obligation interpreted accroding to Vienna Convention on the Law of Treaties, on international law and principle of good faith. "*The Arbitral Tribunal considers that this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting 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*."[66] (emphasis added). This definition mentioned some elements desired conduct of host state: legitimate expectations, stability and transparency. This

[66] Tecmed, para 154–157.

enumeration is of course only demonstrative, optimized for the facts of the case.[67] Several tribunals gave different definitions mentioning other elements such as good faith, due process, non-discrimination[68] or wilful neglect of duty.[69] Other sub-elements of FET also emerged from case of law tribunals – Schreuer[70] adds to the list freedom from coercion and harrassment and compliance with contractual obligations, UNCTAD pays also attention to manifest arbitrariness and role of investor conduct, OECD lists among others obligation of vigilance and protection and autonomous fairness elements.[71]

It is apparent that this substantive content of FET standard is a product of arbitral tribunals created to facilitate their job by applying indeterminate FET clauses. It also confers legitimacy on their awards by meeting the requirement of justification of tribunals' findings (in a just society, result of any legal proceedings must be accordingly reasoned so that parties to the dispute will know what lead the court or tribunal to that particular conclusion). Moreover, sub-elements of FET help not only tribunals, but also disputing parties to get an idea of standard's content. Parties in their submissions now refer directly to violation of FET sub-elements[72]. Question may therefore arise, whether inclusion of list of sub-elements into FET clauses will help to achieve consistency in arbitral awards. Although this step might at first glance contribute to more stability and certainty, actual implications are disputable.

Firstly, there may be controversies between contracting parties as to which sub-elements should be included in the clause. While obligations such as due process or good faith are generally considered by all civilized states as a necessary treatment of

[67] Case concerned a replacement by public authority of an open licence for operation of a landfill by a licence of limited duration.
[68] Waste Management, para 98; Saluka, para 309; MTD v. Chile, para 113
[69] Genin, para 367.
[70] Principles of IIL, p. 140, 147.
[71] OECD Working Papers, p. 26, 39.
[72] See e.g. following memorials: http://www.italaw.com/sites/default/files/case-documents/italaw4046.pdf, http://www.italaw.com/sites/default/files/case-documents/italaw4259.pdf.

foreign investment, the exact content of legitimate expectations[73] or duty of compliance with contractual obligations[74] is ambiguous.

Secondly, with this high level of uncertainty attached to the contents of certain FET sub-elements, parties to the dispute can take advantage of it and easily argue for either host state-friendly or investor-friendly interpretation. The main benefit of adding sub-elements into FET clauses, shedding more light on actual content of FET standard, will be thus negated.

Finally, differences in standard's content will arise from wording of the clause, examples will be shown on a model clause:

1. Investments of the investors 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.
For greater certainty, fair and equitable treatment <u>includes</u> *treatment in accordance with good faith, legitimate expectations of investor and principle of due process.*[75](emphasis added)

Word "includes" in the second sentence suggests that 3 sub-elements mentioned are only a part of obligation falling within the scope of this FET clause. It makes the standard more specific comparing to unqualified FET obligation, still leaves large space open for tribunal's discretion which can fill FET standard with any remaining substantive content it considers appropriate.

2. Investments of the investors of either Contracting Party shall at all times be treated in accordance with good faith, legitimate expectations of investor and principle of due process.

[73] Especially its immanent conflict with the right of state to regulate its domestic matters.
[74] Does violation of contract by host state require use of puissance publique? Consortium RFCC v. Morocco, para 33; Impregilo v Pakistan, para 266.
[75] For other inspiration see Art. 5 of RWANDA-USA BIT.

Aim of this clause is clear comparing to the first one – restrict the meaning of FET standard only to 3 stated sub-elements: good faith, legitimate expectations and due process. This wording even does not mention phrase "fair and equitable. However, same effect can be achieved by using the first clause and replacing word "includes" with "requires". Obviously discretion of tribunals is considerably limited.

To sum up, enumeration of FET sub-elements can in some extent help to clear the content of clauses included in BITs. It would merely confirm what has already been alleged by tribunals and doctrine which is helpful since there is no precedentialy system in international investment law. Tribunal may therefore potentially reject (based on trustworthy justification) that sub-elements form part of FET standard, though this is today highly unlikely. This rejection would be impossible if one of the model clauses mentioned above was used. However, given the constant case law of tribunals, it is doubtful whether there are any reasons for these concerns. Moreover, its use does not take into consideration potential issues arising from relation of FET to customary international law, influence of MFN clause on contents of the standard and most importantly it denies the role of FET as a gap filling device[76] in BITs and its adaptability to facts of the case.

[76] See UNCTAD FET 2012, p. 7. This function is the biggest advantage yet also a drawback of FET. High level of discretion of arbitral tribunals and adaptability of FET to facts of the case stands in conflict with legal certainty. Practice of states shows however, that FET clauses formed as unqualified obligations prevail over clauses filled with substantive content (see table with example of the Czech Republic).

3. In Search of Certainty – Theoretical Basis of Fair and Equitable Treatment and its Content

The first part of this treatise shed light on current differences in FET clauses present in BITs. Miscellaneous variants of their wording result in impossibility to adopt an uniform approach regarding intepretation of their content. These differences are a consequence of an imanent dispute about role of CIL in FET protection. It has been confirmed by many authorities in the field of international investment law that unqualified FET obligation, the most widespread type of clause, should be considered as an autonomous standard demanding more protection than mere minimum standard of treatment under CIL. This conclusion was confirmed by our analysis of the clause by various methods of interpretation. However, answering one question rises another one, much more serious: what conduct falls within the scope of FET?

If FET is an autonomous concept, its actual content cannot be determined by making reference to CIL (and even that would not help because CIL is evolving and it is questionable what is customary in the sphere of international investment). Second approach, sub-elements of FET created by practice of arbitral tribunals, is also of no assistance since content of some of them is not clear (typically legitimate expectations) and most importantly their list is non-exhaustive, any tribunal can in future find a new "type" of FET violation if it considers appropriate (regardless ofhow improbable that is). Therefore there is a desperate need for a generally accepted test or set of rules which would confer legitimacy on the standard and also put the need for legal certainty and its autonomous gap-filling function into harmony no matter it may seem we strive for squaring the circle.

FET is based on noble-minded ideals of fairness and equity. Thus it "*requires an attitude to governance based on an unbaised set of rules that should be applied with a view to doing justice to all interested parties that may be affected by a State's decision in question [...]*".[77] But this requirement is too vague, as well as any efforts to define

[77] UNCTAD FET 2012, p. 7.

notions of fairness, equity or justice. Reason for this is the fact that justice is inherently connected to morality. Morality is a subjective cathegory which is differently understood in every legal culture or environment, differences occur even between individual persons. One must therefore look for a concept of morality which fulfill following conditions:

1. It is applicable within realm of international law.
2. It is adaptable to specific conditions of international economic law, international investment in particular.
3. It is generally accepted so that desired conduct will be endorsed by all states irrespective of their position in international economy.

In the analysis I will proceed from theories of distinguished American legal scholar Lon Fuller. Fuller as an opponent of legal positivism attempted to explain concept of morality and introduce it into legal regulation. This is crucial also for FET, since it is impossible to approach this standard only through mechanical application due to its complexity and emphasis on fairness and justice.

In his major treatise *Morality of Law*, Fuller distinguishes between morality of duty and morality of aspiration.[78] Morality of duty is a set of rules where sanction is a consequence of their violation. It starts at the bottom and prescribes basic rules which must be honoured in every just society.[79] "*In short, the morality of duty somehow defines the 'basic requirements of social living,' and the substantial core of these requirements flows from elementary – and therefore hardly controversial – human experience. Safeguarding these requirements is the (non-controversial) basic function of the legal order, at least in modern, secular, pluralistic societies...*"[80] On the other hand, morality of aspiration is an ideal to which our behaviour should be directed, it is a

[78] Fuller, p. 12-17.
[79] *"It does not condemn men for failing to embrace opportunities for the fullest realization of their powers. Instead, it condemns them for failing to respect the basic requirements of social living."*, Ibid., p. 13.
[80] Veraart, W. The Experience of Legal Injustice. Netherlands Journal of Legal Philosophy, Aflevering 3 2014. Available at: http://www.bjutijdschriften.nl/tijdschrift/rechtsfilosofieentheorie/2014/3/NJLP_2213-0713_2014_043_003_006/fullscreen [accessed on 20. June 2015].

morality of excellence. The problem is the difficulty to grasp this perfect justice (comparing to mere stating of standard of necessary behaviour as does morality of duty). Violation in this case does not occur, one may be only criticised for not achieving the highest standard set by morality of aspiration. Fuller ilustrates the difference on a morality scale where imaginary line must be drawn to separate both moralities. This line is crucial for recipients since it distinguishes the duty and mere encouragement for excellency.

This means that for FET, and this applies to every standard used in any BIT, morality of duty must be used (it is unacceptable to demand from host states to treat a foreign investment by standards of excellency, especially if this excellency is not defined). The problem with FET is its indeterminate nature which makes difficult to draw the line on morality scale, that is to identify these "basic requirements of social living".

3.1. Rule of law and FET

According to Lautenbach, Fuller's concept of morality in legal system is closely connected to rule of law.[81] Like with FET, there is no generally accepted definition of rule of law or this definitions is too vague ("government by law, not by men“) and its links to justice and fairness mean that it cannot be abbreviated to some mechanical concept. Its application depends on historical, social and ideological background in which it has developed[82] (FET requires same individual approach, see for instance investor's obligation to adjust its legitimate expectations to general regulatory environment in the host country).

Rule of law consists of two elements. The first relates to control of power ("rule“) – any legal system is created by some sovereign power which must be controlled to prevent abuse of this power. This is however of lower importance in our search for FET application test. The second element, legality ("of law“), prescribes limits to the sovereign power "*by demanding that government keeps to the law and governs through law*“.[83] It should also assure laws are general, stable or public, that is the law will contain some quality requirements. Moreover, functions of the rule of law concept correspond to the aims of FET:[84] provision of stable rules to society (investors), protection of individual (investor) from arbitrary power, promotion of a just legal system in which individual (investor's) rights are adequately protected.[85]

To conclude, rule of law is ensured not by mere adherence to law, justice will be achieved only if the law meets certain conditions. Similarly, only if the host state respects them, treatment of investor will be considered as fair and equitable. And now we return back to Fuller, since these conditions representing the minimum of morality of duty are drawn from his example of King Rex.

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[81] Lautenbach, p. 38-42.
[82] Note differences between German Rechtsstaat based in constitution and British rule of law concept developed in case law. Ibid., p. 24-30.
[83] Ibid. p. 20.
[84] Vandevelde notes that that tribunals "have intepreted the fair and equitable treatment standard as requrinq treatment in accordance with the concept of the rule of law.“ Vandevelde, p. 49.
[85] Lautenbach, p. 21-22.

3.2. Requirements to host state

Fuller in his famous example of king Rex aiming at adopting a new legal order discusses elements necessary in legal regulation to achieve morality. Rex makes 8 mistakes during his attempt: inability to create any rules at all (so that all cases would then be decided ad hoc), inability to make them public, retroactive legislation, created laws were incomprehensible, laws were contradictory, they require conduct impossible for its recipients, frequent changes in legislation which result in deteriorated orientation of recipients and finally inability to achieve conformity between promulgated laws and their application in practice.[86] These 8 mistakes result in 8 requirements legal system must respect in order to secure legality in legal system[87]:

1. *Generality* of rules is a basis of every legal system otherwise rights and obligations would be accorded only ad hoc through political and administrative decisions. However, though rules should be general, they must also allow some discretion when deciding particular cases. Regarding FET, if we take as an example case *Tecmed,* conditions to obtain a permit to operate a landfill must be stated in a statute or other general form of law depending on legal system of the host state.

2. Promulgation of rules enables to achieve *publicity*. This requirement is firmly connected with requirement of transparency which is considred as one of FET sub-elements. Any demanded behaviour must be known beforehand to investor so that it can adjust its actions.[88] "*If laws, administrative decisions and other binding decisions are to be imposed upon a foreign investor by a host State, then fairness requires that the*

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[86] Fuller, p. 41-42

[87] Lautenbach, p. 38-39

[88] See *Metalclad*, where investor was assured it had all permits to operate its investment. Nevertheless, public authorities refused to grant necessary construction permit. Tribunal stated 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.*"; Metalclad, para 76.

investor is informed about such decisions before they are imposed.“[89] Although sub-element of transparency has caused controversies and it is contested that it falls within the scope of FET,[90] this does not diminish the role of publicity in achieving goals of FET protection.

3. *Retroactive laws* are unacceptable since they cannot serve as a guideline for investor to act in accordance with law. Any retroactivity would breach the sub-element of legitimate expectations, because any law or statute should be regarded as an undertaking or representation made explicitly by the host state.[91]

4. *Clarity* of rules is necessary for the same purpose as prohibition of retroactivity. Investor must be able to deduce its actual rights and obligations from a respective rule, this is possible only if it is sufficiently clear. Concerning FET, clarity does not refer only to statutes but also to decisions, representations and host-state's policy connected to operation of investment. It is linked to the sub-element of transparency. The rules are not clear if host state does not disclose the rules to be applied or it fails to disclose reasons for measures it adopted.[92]

5. Requirement not to adopt *contradictory laws* fulfils the principle of consistency. Conglicting norms should not appear within single law as well as within

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[89] UNCTAD FET 1999, p. 51. Publicity is also crucial for assessment of actions of host state whether it satisfies conditions of fairness and equity: “*[...]where a foreign investor wishes to establish whether or not a particular State action is fair and equitable, as a practical matter, the investor will need to ascertain the pertinent rules concerning the State action;*“ ibid., p. 51.

[90] UNCTAD FET 2012, p. 63: “*A number of possible elements, such as transparency or consistency, have generated concern and criticism. So far, they may not be said to have materialized into the content of fair and equitable treatment with a sufficient degree of support.*“ This conclusion is particularly interesting with regard to the first issue of UNCTAD Series from 1999 (see note above) which considered transparency firmly to be a part of FET. See also p. 72 which discusses transparency with regard to level of host state's development.

[91] Investor should of course anticipate regulatory changes by host state as a legitimate means of domestic regulation. “*To be protected, the investor's expectations must be legitimate and reasonable at the time when the investor makes the investment. The assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment[...]*“; Duke Energy, para 340. It is apparent however, that in majority of retroactivity cases this reasonobleness will be accomplished.

[92] See e.g. Saluka, para 407, where the Czech government did not communicate with the claimant reasons for its discriminatory treamtment and thus violation of FET.

legal system as a whole.[93] As with clarity, prohibition of contradictory legal regulation in sphere of FET applies not only to statutes, but also to contracts or representations made by the host state.[94] This is often connected to violation of sub-element of legitimate expectations, that state failed act in accord with its promise.

6. *Laws requiring impossible* are prohibited since they cannot regulate behaviour of its recipient. In economic sphere, some impossible requirements exist such as absolute liability in contract. This liability is adherent to business risk and its existence in legal system definitely should not trigger FET violation. Any investor operating for instance a factory which causes damages to environment must be ready to bear consequences.

7. *Stability* is another crucial function of legal system. Frequent changes in law make it difficult for recipients to adjust their conduct to required behaviour. It makes foreseeability of the law difficult and thus host state acts arbitrarily. This requirement plays a special role in FET standard because it is projected into sub-element of legitimate expectations. As with clarity, prohibition of contradictory legal regulation in sphere of FET applies not only to statutes, but also to contracts or representations made by the host state. This however brings a number of issues. Firstly, investor must take into account the level of development of host state to prove its claim reasonable. This was confirmed in a number of awards: "*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.*"[95] It should be noted that stability requirement does not equal to legitimate expectations. The latter refers mainly to

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[93] In *MTD v. Chile* host state violated FET by issuing a construction permit which was however against government's urban policy. This "*inconsistency of action between two arms of the same Government vis-à-vis the same investor*" violates FET even though investor is obliged to perform due diligence and get knowledge of host state's legal system. MTD v. Chile, para 163-166.

[94] in *SGS v. Philippines*, host state adopted inconsistent position by acknowledging debt but at the same time refusing to pay it. SGS v. Philippines, para 162.

[95] Duke Energy, para 340. In Parkerings v. Lithuania, tribunal allowed legislative changes since Lithuania was in the process of transition "*from its past being part of the Soviet Union to candidate for the European Union membership*", changes therefore could have been anticipated. Moreover, investor was not given any assurances. Parkerings, para 333-337.

situations where investor was given specific promises or assurances on which it relied.[96] Secondly, specific requirements were found by some tribunals to activate FET through breach of stability such as exercise of sovereign power by host state when violating contract with investor[97] or non-existence of remedy before domestic courts.[98] Finally, especially where no assurances to investor were made, it becomes complex to balance legitimate expectations and principle of stability with right of host state to regulate: "*It is each State's undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a stabilisation clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment. As a matter of fact, any businessman or investor knows that laws will evolve over time.*"[99] Stability requirement is therefore not an absolute one. A line must be drawn on an imaginary scale which would set up what is still a legitimate regulatory measure and what already makes it excessively difficult for recipients to adapt themselves to the change.

8. *Congruence between the rule and official acts* is in FET generally embodied in sub-principle of due process. It is generally the judiciary which aim it is to prevent conflict between declared and applied law.[100] If this condition is not met, we can speak of violation of sub-principles of legitimate expectations (investor expects state will act on the base of rules it issued) or due process. "*A denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way...There is a fourth type of denial of justice, namely the clear and malicious misapplication of the law.*"[101] (emphasis added).

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[96] E.g. Metalclad, para 89; CME, para 624; CMS v. Argentina para 277.
[97] Duke Energy, para 354, 358.
[98] Biwater v. Tanzania, para 635; Waste Management, para 115.
[99] Parkerings, para 332. "*[T]he object and purpose of the Treaty is not to protect foreign investments per se, but as an aid to the development of the domestic economy. And local development requires that the preferential treatment of foreigners be balanced against the legitimate right of Ukraine to pass legislation and adopt measures for the protection of what as a sovereign it perceives to be its public interest.*" Lemire v. Ukraine Decision on Jurisdiction, para 273. See also EDF v. Romania, para 219; Continental Casualty, para 258; Saluka, para 305-306.
[100] Fuller, p. 79.
[101] Azinian, para 102-103.

Ignorance of own legal regulation in the process of creation of individual legal acts indeed amounts to malicious missaplication.

The last quotation confirms that Fuller's requirements are however concentrated only on legislative power or executive power. But FET also contains requirements to judicial power, as is shown in broadly recognized sub-element of due process. Just treatment must therefore also encompass principles of possibility of judicial review as well as well as the right to a fair trial.[102] This will provide with judicial aspect of equality before the law.

To sum up, "*[w]hen law fails to meet the requirements of legality, its authority can merely be based on enforcement. Only the ability of law to ensure order in society would remain as a reason to respect law.*"[103] If host state manages to fulfil above mentioned 8 requirements[104] it is very likely to achieve just treatment of investment claims based on violation of FET will be rejected[105]. These requirements are actually accepted in every civilised state which accepts foreign investment as a means of developing its own economy. No investor would take the risk and invest in a country with non-public, incomprehensible, contradictory or frequently changed laws. It has also been argued that they can apply to specific conditions international investment law and FET standard. Of course, full achievement of these goals is often impossible (absolute stability would prevent any changes in legal system), they should be therefore balanced against each other.[106]

[102] Right to fair trial should encompass any possible violations of equality during judicial or administrative proceedings such as refusal of courts to decide, undue delay in proceedings, intrusion of executive or legislative power into decision-making process of the courts, discrimination on grounds of nationality, failure to give notice or opportunity to be heard.
[103] Lautenbach, p. 42.
[104] Lautenbach argues that requirement of non-contradictory laws and laws not demanding impsossible conduct should be incorporated under the condition of clarity. Ibid., p. 40.
[105] For use of legality requirements in the context of human rights, namely Articles 5 and 7 of European Convention of Human Rights, see ibid., p. 71-73.
[106] Ibid., p. 39.

3.3. Legality and Morality

What is questionable is the relationship between requirements of legality and morality. Can their use really lead to just content of laws? Criticism came from both sides. Ronald Dworkin, advocate of moral principles as being the nature of law,[107] states that requirements *“[...] are not concerned with the material content of the law and are, therefore, not concerend with morality*.“[108] On the other side of theoretical spectrum, Hart, proponent of legal positivism, argues that quality requirements do not prevent law from pursuing aims which are not in accord with justice or morality. Functioning legal system by itself does not amount to justice.[109] However, Fuller himself did not dispute the fact that his theory is not concerned with substantive content of the law. The underlying principles of morality or justice can be either stated in constitution or can stay as unwritten rules respected by the society. Though legality is only a formal basis of rule of law, it still contributes to achieving goals of fairness. Firstly, both substantive and procedural elements of legality are a prerequisite for enforcement of just substantive content of the law. Secondly, form is likely to have a positive impact on the content of the law. Thirdly, legality requirements ensure equality of recipients of the norm (clear, stable, non-contradictory rules which are equally applied).[110]

Finally, with regard to content of FET, criticism of Fuller plays no role. Although the standard is referring to fairness and equity, tribunals have not employed themselves into assessment of morality from the point of substantive content of host state’s law in question. This approach would never be successful because of diverse understandings of that substantive content in different countries, thus condition of universal acceptance would not be fulfiled. On the other hand, Arbitrators therefore rather evaluated morality from its formal side, side of legality requirements (due process, transparency, consistency or non-discrimination).

[107] See more in Dworkin, *Taking Rights Seriously*, 1999, Harvard University Press.
[108] Lautenbach, p. 46.
[109] See also criticism of Hayek claiming there is no universal criterion safeguarding equality before the law. Ibid., p. 47.
[110] Ibid., p. 47.

3.4. Legality requirements – guidance for tribunals?

After proving the importance of indicators of formal quality of the law as described by Fuller, their strong influence on actual substantive content of the law and relevance in the sphere of FET, we can proceed to implications drawn from these findings which can be used by tribunals in practice. Due to complexity of FET standard it is necessary to distinguish procedural and substantive law violations.

Procedural aspect is concerned with fair and equitable application of the law to an investor. This however does not mean that international tribunals serve as appelate bodies to decisions of national courts.[111] Returning back to procedural legality requirements established above, the first question tribunal should be concerned with is whether investor has access to judicial review of acts of the host state. This is a prerequisite to fulfil the goal of due process.

If investor is given the chance to pursue its claim, second part of analysis takes place. Tribunal in *Mondev* observed: "*The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome [...] In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment. This is admittedly a somewhat open-ended standard, but it may be that in practice no more precise formula can be offered to cover the range of possibilities.*"[112] (emphasis added). Judicial propriety is embodied in the concept of fair trial, which is reflection of principle of (procedural) equality. Any possible violations of that principle found or considered by tribunals such as violation of domestic law by court's decision[113], not receiving notice of ongoing proceedings[114], discrimination

[111] Azinian, para 99.
[112] Mondev, para 127.
[113] Loewen, para 135.
[114] LLC AMTO, para 86.

against investor based on nationality, influence of legislative or executive power on decision-making process[115], right to be heard, right to judicial review of administrative decision[116] or undue delay all secure equality (not just with domestic litigants in similar situations, but also with the opposing party to the dispute – the host state).

Finally, tribunal must check whether investor exhausted all local remedies provided to him by host state. This has been confirmed by a number of tribunals.[117]

To conclude, alleged violations of FET in the sphere of procedural requirements of legality can be judged based on following steps:

1. Does investor get an opportunity for judicial review of host state's regulatory measure?
2. Is the measure in accordance with principle of equality?
3. Did investor exhaust all local remedies?

Substantive aspect is more complicated since host state's violations can take various forms depending on what Fuller‘s legality requirements were breached. The aim is to extract universally accepted conclusions from these requirements. Vandevelde introduces 4 principles of rule of law that should be applied on any alleged violations of FET: reasonableness (influences content of laws), consistency, non-dicrimination (both influence structure of laws) and transparency (concerns operation of laws).[118]

Reasonableness ensures that acts of the host state are not arbitrary, this means that they must be "*reasonably related to a legitimate public policy objective*".[119] This is not the case where acts are politically motivated.[120] This principle is the most difficult one to apply because of its assessment of content of the law and balancing of legitimate regulatory measures with interests of investor, it will always demand on circumstances of the case. It encompasses also the requirement that law does not demand any

[115] Bayindir, para 252.
[116] Thunderbird, para 200.
[117] Chevron, para. 235; Bayindir Decision on Jurisdiction, para. 252; Saipem, para 151; Loewen, para 137.
[118] Vandevelde, p. 52.
[119] Ibid., p. 54.
[120] Eureko, para 233; Pope & Talbot, para 181.

impossible conduct. Also non-discrimination principle falls within the scope of reasonableness,[121] since it is also concerned with law's content and discrimination is allowed only on reasonable grounds (not on basis of nationality e.g.).[122]

Consistency is closely connected to sub-element of legitimate expectations.[123] This sub-element usually refers to situations where host state has given prior assurances or promises regarding operation of investment which were not afterwards respected. However, consistency is not exhausted by that. Apart from requirement of stability, it also embodies requirements of prohibition of retroactivity, consistency between rules and official acts and prohibition of contradictory rules. Consistency is related to foreseeability[124] as a prerequisite of legal certainty – it demands laws which are sufficiently clear and precise (so it enables recipients to draw consequences from it), foreseeability also excludes retroactivity and mutually contradictory positions. Tribunals should therefore inquire, whether there are any limits (e.g. time) regarding use of discretionary power by host state, whether law enumerates reasons for which they can be exercised and if use of this power can be reviewed by independent authority.

Finally, transparency concerns not only the requirement of publicity, but also clarity and generality of the law in question. Most violations of FET are found if host

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[121] This applies only if we consider non-discrimination as a part of FET standard. Schreuer rejects that by stating that "*[t]here is no good reason why treaty drafters should use two different terms when they mean one and the same thing. Equally it is difficult to see why one standard should be part of the other when the text of the treaties lists them side by side as two standards without indicating that one is merely an emanation of the other.*" Principles of IIL, p. 175.

[122] Eureko, para 233.

[123] For a more detailed discussion see part dedicated to requirement of stability.

[124] Foreseeability is not absolute, it should only be reasonable (as well as expectations of investor have to be legitimate). This does not apply only to investor-host state relations, but was also confirmed by European Court of Human Rights: "[...] *a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances.*" Sunday Times, para 49.

state fails to disclose rules to be applied[125] which brings uncertainty on operation of investment.

To summarise, alleged violations of FET in the sphere of substantive requirements of legality can be judged based on following steps:

1. Is host state’s measure reasonable (mostly search for legitimate public purpose)?

2. Is it consistent and foreseeable (what are the limits for use of discretionary powers)

3. Is the measure transparent (investor knows in advance all regulations necessary for operation of its investment)?

[125] MTD v. Chile, para 163; Metalclad, para 176. Note that neither this principle (nor reasonableness or consistency) is absolute and exemptions may arise to the benefit of host state (see e.g. Parkerings, para 342).

4. Recent Trends – Argentine Debt Restructuring

Landmark case *Abaclat*[126] issued in August 4, 2011 confirmed jurisdiction over the dispute between the Argentine Republic and over 60 000 Italian bondholders regarding process of sovereign debt restructuring (SDR). One of allegedly violated provisions of Argentina-Italy BIT[127] is also FET "*by ignoring any concept of proportionality in responding to its temporary financial crisis and continuing to impose through arbitrary legislative and other regulatory actions an unjust excessive burden on Claimants long after the abatement of any issues*".[128]

Relevant provision which includes FET clause is in Art. 2(2) of the BIT:
Investments made by investors of each Contracting Party shall at all times be accorded fair
and equitable treatment. Neither Party shall impair by arbitrary or discriminatory measures the management, maintenance, enjoyment, transformation, cessation or disposal of investments made in its territory by the other Contracting Party's investors.

FET is therefore mentioned with additional substantive content (prohibition of arbitrary or discriminatory measures), but otherwise its wording is traditional without any specific reference to international law or CIL, it is an unqualified obligation, as in majority of other BITs.

Abaclat is still a pending case, 8 years after commencement of proceedings and almost 4 years after date of dispatch of decision on jurisdiction, parties only start to consolidate their positions in the merits phase. Aim of this part is to evaluate arguments

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[126] ICSID case. no... Decision is groundbreaking because it accepted mass claims although Argentina-Italy BIT did not mention collective proceedings. It also considered bonds as a qualifying investment notwithstanding the Salini criteria and lack of territorial link (bonds were purchased on secondary market and did not realte to a specific economic enterprise in the host state). Se also Strong, p. 266-271; De Luca, p. 6-19.
[127] BIT is available at: http://investmentpolicyhub.unctad.org/IIA/country/8/treaty/135 [accessed on 20 June 2015], English excerpts: http://www.investorstatelawguide.com/documents/documents/BIT-0254%20-%20Argentina-Italy%20BIT%20(1990)%20[English%20translation]%20(excerpt).pdf.
[128] Abaclat, para 264.

of both parties from the point of findings reached in previous parts and to apply the test of legality requirements in the light of circumstances of Argentine debt restructuring.

4.1. Background: Argentine Great Depression and SDR

In years 1991 – 2001, Argentina issued $186.7 billion[129] in sovereign bonds which were purchased both on domestic and international markets. This was a result of positive economic development in the country, resulting from opening of the economy to the outside world. This also lead to conclusion of more than 50 BITs with other states (including Italy) to encourage foreign investment.

For number of reasons such as highly irresponsible fiscal policy, high level of corruption, overvalued currency and convertibility plan (guaranteed convertibility of pesos to dolar in a fixed rate) and drop in global commodity prices, Argentina eventually sunk into economic crisis.[130]

As a result of its inability to pay off its debts, Argentina decided to default its public debt at the end of 2001 for not being able to pay it. This resulted in two waves of debt restructuring[131]. The first wave came in 2005 and was described by a large haircut[132] and generally low participation regarding previous experience with SDR.[133] The second wave followed in 2010 with aim to reduce the number of holdouts (creditors so far not participating in SDR). Around two thirds of the remaining holdouts accepted the new offer, total participation in SDR therefore exceeded 90% of defaulted debt. Part of the creditors which did not participate in either wave, holding $1 billion in Argentine bonds, started above mentioned ICSID claim.

However, Argentina was not the only subject to blame for economic depression. A number of external factors contributed to the current situation, including policy of International Monetary Fund (IMF). Hornbeck notes: "In *retrospect, it is also*

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[129] Wiessner, p. 58.

[130] Details on Argentine crisis in Hornbeck, p. 1-8.

[131] SDR can be described as "*formal and legal change in the contractual arrangements of the debt, such as reducing the face value of the obligations, issuing new bonds with lower interest rates and longer maturities, and capitalizing overdue interest, usually at a sizable loss to bondholders.*" Ibid., p.4

[132] Haircut is a percentage reduction of the amount that will be repaid to creditors (http://lexicon.ft.com/Term?term=haircut). Participating creditors received only 25-30% of the nominal value of original bonds. Wiesner, p. 58.

[133] Around 76% of defaulted bonds were exchanged. Abaclat, para 80. A typical participation rate exceeds 90%, also haircut reduction usually does not exceed 50%. Sahay, p. 8,11.

clear that in addition to Argentina's policy choices and an increasingly hostile global economy, actions by the international community were complicit in deepening the severity of Argentina's financial crisis. Global credit markets lent generously to Argentina, compounding the problem by chasing high yield even after risk factors began to rise to worrisome levels. Investment bank and credit agency reports overstated Argentina's strengths. Also, the IMF agreed to numerous lending arrangements made between 1991 and 2001 based on promised changes in Argentine policies, and economic assumptions and projections that ranged from being overly optimistic to wildly unrealistic. U.S. policies for much of the time could not be divorced from those of the IMF. Without the IMF, the convertibility plan would have collapsed much sooner. By its own admission, the IMF made repeated mistakes in surveillance, conditionality, and economic analysis that resulted in lending too much for too long into an untenable situation."[134] As will be shown below, this aspect might have crucial importance for exempting Argentina from liability.

[134] Hornbeck, p. 3.

4.2. Argentina's position

Moving to actual violation of FET clause in Argentina-Italy BIT, Argentina can take various positions of defence.

Firstly, it may try to argue for restricitive interpretation of FET that it does not demand more than minimum standard under CIL. Proving a wilful neglect of duty, manifest arbitrariness or bad faith in the field of SDR, so far unexplored by investment arbitration, is likely to become an insurmountable burden (especially with regard to frequent occurence of SDR in last decades and its support by IMF).[135] Ideological basis of this argument was explained above, according to its advocates it provides with predictability and boundaries regarding content of the standard. This is likely to be rejected for following reasons: Respective BIT contains unqualified FET obligation and actual content of the standard depends on the specific wording of applicable clause.[136] Moreover, alleged predictability is relativized by disputes concerning formation and existence of international custom in the sphere of international economic law, foreign investment and debt restructuring.

Another argument is the need to balance justice and interests of investor and host state in the process of application of the standard.[137] Aim of SDR is improvement of economic situation in the country by reducing the public debt, thus serving public at large by preserving health care and other necessary public services secured by state. On the other hand, does this apply to mere inability of host state to pay off its debts? If the answer is affirmative, it will become a negative motivation for host states since they would lose any incentive to sound administration of public finances. In case of default, debtor would only use economic crisis and "public interest" as an excuse for SDR or non-payment of its debts.

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[135] Sahay, p. 8, Sovereign Debt restructurings – Recent Developments, p. 6.

[136] FET in Arb. Practice, p. 364. Note however that according to some ICSID cases, conclusions drawn by NAFTA tribunals as equation of FET to CIL are universally applicable notwithstanding wording of the FET clause (see Genin, para 367 or American manufacturing, para 6.07). Yet this opinion is against methods of interpretation as well as prevailing case law elaborated in the second part of this treatise.

[137] UNCTAD FET 2012, p. 7.

Since tribunal is much more likely to consider FET as an autonomous standard (or at least find that contents of the standard are the same either it autonomous or CIL-based), Argentina is likely to argue that it managed to preserve a stable legal environment.

It has already been affirmed that every state has a sovereign power to regulate its domestic matters and react by these measures on newly arising circumstances.[138] Argentina will claim that consistency principle outlined above which embodies sub-element of legitimate expectations was violated only if certain assurances were given to bondholders regarding non-performance of SDR[139]. There were no such promises and domestic legislation or investment contracts (bonds) did not include any stabilization clauses[140] prohibiting reaction of the state to economic crisis.[141] Representations expressed in the preamble of the BIT such as commitment to a more stable economy are too broad to be considered as a specific assurance. Accomplished changes of bond's terms did not amount to a roller coaster effect (continuous and endless changes)[142] and relative stability (regarding circumstances of the crisis) was achieved.

Issues may however arise with regard to transparency. In SDR, it can be achieved by regular consultations with creditor committees which encourage early and active participation of creditors in the whole process. Because of dispersed creditor structures, it is often difficult to identify and communicate with them. The ideal scenario is a joint development of the exchange offer between host state and committees which was the case in a high number of restructurings.[143] This can be fulfiled by asking for feedback to governmental proposals of SDR or notices in media.

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[138] Vandevelde, p. 66.

[139] "*Unlike [...] conclusion regarding contractual and semi-contractual arrangements as well as unilateral statements, the host state's regulatory measures alone are generally in sufficient in forming legitimate expectations protected by FET clauses*." Hirsch, p. 18.

[140] *Stabilization clauses are designed to make new laws or regulatory changes inapplicable to the particular investment project; or providing that although new regulatory measures are applicable to the investment, the investor shall be compensated for the cost of compliance with them*. Ibid, p. 5.

[141] "*In the absence of a stabilisation clause or similar commitment, which were not granted in the present case, changes in the regulatory framework would be considered as breaches of the duty to grant full protection and fair and equitable treatment only in case of a drastic or discriminatory change in the essential features of the transaction.*" Toto v. Lebanon, para 244.

[142] PSEG, para 254.

[143] Examples are SDR in Uruguay (2003), Ukraine (2000), Grenada (2005) or Jamaica (2010). Sahay, p. 22.

In Argentina, Global Committee of Argentinian Bondholders (GCAB) was formed to represent creditors holding more than 50% of all bonds. However, GCAB was never formally recognized by government[144] and according to IMF "*no constructive dialogue was observed and the authorities presented a non-negotiated offer, which eventually led to a restructuring of eligible debt and past due interest of about two-fifths of total debt, more than three years after the default.*"[145] Conclusions regarding foreseeability of SDR are therefore difficult to predict.

Defence by public interest has already been mentioned being connected to principle of reasonableness.[146] Rational policy in the form of protection of its population against economic crisis can be accepted because of "*the general welfare of the public that warrants recognition and protection*".[147] In *National Grid*, another case arisen after Argentine great depression, economic crisis was considered to be an important element when assessing the fairness of measures taken by host state: "*The Tribunal's conclusion that the Respondent has been in breach of the Treaty cannot ignore the context in which the Measures were taken. The determination of the Tribunal must take into account all the circumstances and in so doing cannot be oblivious to the crisis that the Argentine Republic endured at that time. What is fair and equitable is not an absolute parameter. What would be unfair and inequitable in normal circumstances may not be so in a situation of an economic and social crisis. The investor may not be totally insulated from situations such as the ones the Argentine Republic underwent in December 2001 and the months that followed. For these reasons, the Tribunal concludes that the breach of the fair and equitable treatment standard did not occur at the time the Measures were taken on January 6, 2002 but on June 25, 2002 when the Respondent required that companies such as the Claimant renounce to the legal remedies they may have recourse as a condition to re-negotiate the Concession*."[148] (emphasis added). Vandevelde states, that this distinction on the timeline of events points (breach of FET occured because of

[144] Ibid, p. 22.
[145] Sovereign Debt restructurings – Recent Developments, p. 36.
[146] Saluka, para 460.
[147] Black's Law Dicitionary, p. 1266.
[148] National Grid, para 180.

requirement to renounce legal remedies) to the fact that tribunal allowed modification of its commitments because of aggravated economic situation.[149]

However, this defence falls short for various reasons. Firstly, the same tribunal rejected Argentina's argument that the measures were taken within a state of necessity which exempts it from any responsibility for losses of investor. Argentina did not fulfil conditions of article 25 of Draft Articles on State Responsibility[150] since it contributed to that situation of necessity. As was shown above and also confirmed by the tribunal, the crisis was not caused only by external but also internal factors.[151] Contribution of the host state was "*sufficiently substantial and not merely incidental or peripheral*"[152] and thus state of necessity cannot be invoked.[153] It should be noted that this defence does not preclude tribunal from finding a violation of FET standard, it is however crucial from liability perspective.

Secondly, tribunal in *Continental Casualty* solving another dispute emerged under Argentine economic crisis, rejected state of necessity with regard to restructuring of certain treasury bills (where FET violation was found)[154] since Argentina's financial

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[149] Vandevelde, p. 76. See also National Grid – case commentary, p. 2.

[150] *In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) the international obligation in question excludes the possibility of invoking necessity; or (b) the State has contributed to the situation of necessity*. Draft articles on Responsibility of States for Internationally Wrongful Acts, p. 80.

[151] "*As noted in the evaluation of the crisis by the IMF, both types of factors played a role and their importance varied over time but they all had a significant part in contributing to its seriousness.*" National Grid, para 260.

[152] Draft articles on Responsibility of States for Internationally Wrongful Acts, p. 85.

[153] In LG&E, state of necessity was accepted due to existence special provision in Argentina-USA BIT, Article XI: "*This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the 62 fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests*." Host state was exempted from liability since this article established state of necessity (LG&E, para 261). However, no such provision exists in Argentina-Italy BIT.

[154] When evaluating legitimate expectations, attention must be paid to "*unilateral modification of contractual undertakings by governments, notably when issued in conformity with a legislative framework and aimed at obtaining financial resources from investors deserve clearly more scrutiny, in the light of the context, reasons, effects, since they generate as a rule legal rights and therefore expectations of compliance*;", Continental Casualty, para 261. In Abaclat, process of SDR is not an unilateral modification since it is based on the consent of bondholders. However, given the low chance of holdouts to succeed (claims before domestic courts are almost surely rejected, foreign judgements will not be enforced in Argentina and abroad host state has only a small number of seizable assets), the reality is that creditors are often implicitly forced to participate in SDR.

conditions were improving, percentage of the original value of the debt that Argentina unilaterally offered to recognize was too low (U.S.$0.30 per dollar) and offer was based on condition that any other rights would be waived including protection of the BIT.[155] At minimum 2 of these conditions to reject necessity[156] defence apply in *Abaclat* – large haircut around 70% and (concerning the second wave of SDR) also improved economic situation of the country.

Finally, case law concerned with FET and Argentine crisis is far from unified. Tribunals in *CMS v. Argentina*[157] or *Enron*[158] found violation of FET clauses nothwithstanding economic circumstances.

[155] Continental Casualty, para 220-222.
[156] More on necessity defence and cases concerning Argentina in Alvarez, Brink: *Revisiting the Necessity Defense*.
[157] CMS v. Argentina, para 277-281.
[158] Enron, para 268.

4.3. SDR and sub-elements of FET

Before moving to application of the test of legality requirements to SDR, Argentine defence will be considered by current traditional method of addressing the content of FET standard: enumeration of particular sub-elements. This method is used also because of wiping off the differences between autonomous and CIL-linked FET. Some useful arguments for both sides have already been addressed in the paragraphs above on stable legal framework, transparency and public interest.

As for legitimate expectations, host state may argue that losses incurred by SDR on the value of investment are a result of ordinary business risk. Otherwise claimant would not have to meet any burden of proof, it would only label respective actions of host state as breaches of its expectations. Pursuant to Argentina, risk of default is an inherent part of investment (see case law drawing attention at specific circumstances in the host state)[159] including occurence of SDR.[160] "*Otherwise, both parties would not be sharing some of the costs of the crisis in a reasonable manner and the decision could eventually amount to an insurance policy against business risk, an outcome that, as the Respondent has rightly argued, would not be justified.*"[161] SDR became a common tool in international economic relations and thus expectation of full repayment may not be legitimate. But though it is true that so far no tribunal held host state liable for performance of SDR but that should not be a burden (in fast evolving field of investment arbitration concepts of new possible violations emerge every year). Furthermore, claim may not demand full repayment but instead argue that haircut pushed through by Argentina was too high and thus unreasonable.

Question is whether investor got the opportunity to evaluate the risk of potential restructuring. As was already stated no assurances were given (but what if tribunal finds that conditions stipulated in the bonds as contacts between host state and investor represent this assurance) regarding future SDR. IMF *"[...]did not set any fiscal*

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[159] Parkerings, para 333; MTD v. Chile, para 171.

[160] In years 1950-2010, sovereign debt restructuring episodes have become widespread around the world, with more than 600 individual cases in 95 countries during the past 60 years alone. Of these, 186 were debt restructurings with private creditors (foreign banks and bondholders). Sahay, p. 9

[161] CMS v. Argentina, para 248.

targets for Argentina beyond 2004 and ventured no opinion on Argentina's capacity to repay its debts."[162] Moreover, specific nature of bonds should be taken into account. Investor here is not an international corporation but an individual with restricted knowledge of Argentine economy (especially if all factors at the time of purchase of bonds, including policy of the IMF, did not point to any issues) with limited capability to accomplish a proper due diligence. On the other hand, factor in favour of the host state is a development of rating of the bonds. According to Moody's, rating of Argentine bonds in the 1990s (when they were purchased by current holdouts in Abaclat) was always oscillating between grades "highly speculative" and "non-investment grade speculative".[163] Ignorance of these ratings would result in a fact that they are meaningless. Investors would not be motivated to perform a due diligence since BIT protection would serve as a means of insurance of their investment.[164]

Argentina will also claim that its actions were performed in good faith (measure to cope with economic crisis).[165] Indeed investor will not prove any conspiracy by state organs to inflict damage upon their investment. However, number of tribunals confirmed that bad faith is not a prerequisite for finding a violation of FET standard.[166] Moreover, good faith may be lacking because of mentioned implicit threat by host state that non-participants in debt restructuring will lose any hope to receive their money back whatsoever.[167]

Another circumstance which may lead to conclusion of bad faith on the side of Argentina is so called "Rights upon future offers" (RUFO) clause in its bonds and its

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[162] *Argentina's debt restructuring: A victory by default?*, 2005, The Economist. Available at: http://www.economist.com/node/3715779 [accessed on 20 June 2015].
[163] See http://www.tradingeconomics.com/argentina/rating and Moody's, p. 20.
[164] Schreuer claims that "*A simple breach of contract is part of normal business risk, [...] a breach of contract resulting from serious difficulties on the part of the government to comply with its financial obligations cannot be equated with unfair and unequitable treatment.*" FET in Arb. Practice, p. 380.
[165] Importance of this sub-element is disputed between authorities. Schreuer considers it as "*inherent in FET*" citing e.g. Saluka, para 307. However, Vandevelde argues that godd faith adds nothing to already established principles of reasonableness, consitency or transparency and has no importance for interpretation of FET clauses. Principles of IIL, p. 145; Vandevelde, p. 97-98.
[166] "*Neither State practice, the decisions of international tribunals nor the opinion of commentators support the view that bad faith or malicious intention is an essential element of unfair and inequitable treatment or denial of justice amounting to a breach of international justice*." Loewen, para 132. See also Enron, para 263; Azurix, para 372.
[167] Wiessner, p.58.

expiry in 31 December 2014. According to RUFO if Argentina makes a better offer to some creditors before date of expiry of the clause, other bondholders have a right to the same treatment. This was also an "excuse" for Argentina not to pay to holdouts who recently won their suits before US courts, since otherwise same amount would have to be paid to creditors participating in restructuring.[168] After expiry of RUFO clause nothing prevents Argentina to settle with all creditors (without ruining its financial reserves as the case would be if clause was triggered). Any other delaying tactics would contribute to suspicion of bad faith.

Argentina's actions will probably not be found discriminatory – there was no intention to discriminate and there was no distinguishing between bondholders based on nationality or other characteristics. Prohibition of arbitrary acts may however be triggered given low percentage of consenting bondholders (in comparison with other countries experiencing default) and no discussion with creditor committees regarding final offer. All this may contribute to finding Argentina at least partly liable, though goals it pursued and policy it adopted were generally reasonable in light of its situation at that time.

Finally, lack of cooperation with bondholders in creation terms of SDR mentioned in the last paragraph may amount to violation of last main FET sub-element – due process. It has already been confirmed that due process applies not only to judicial but also administrative proceedings.[169] If we look at the case law and extract examples of violation of due process,[170] only denial of access to justice can be considered as breached in the case at hand. However, it is improbable that national law of Argentina provides with obligation to actively collaborate with bondhodlers in case of debt restructuring. Moreover, although it is a prefered practice no such obligation was stipulated by international organizations including IMF.[171] On the other hand,

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[168] *Rufo expiry will test Argentina's willingness to settle debt*, 2014, Financial Times. Available at: http://www.ft.com/intl/cms/s/0/e554502e-8fa4-11e4-9ea4-00144feabdc0.html#axzz3dhCNs1Qn [accessed on 20 June 2015].
[169] Thunderbird, para 200.
[170] UNCTAD FET 2012, p. 80.
[171] Sovereign Debt Restrucutring – Recent Developments, p. 36, note 39.

these “take it or leave it” options as presented by Argentina lack legitimacy and are likely to contribute to violation of other principles, namely transparency.

4.4. Sovereign Debt Restructuring and Legality Requirements Test

Before concluding I will apply the test based on principles of rule of law and Fuller's legality requirements (developed in Part 3) to SDR process in cirumstances of Argentine economic crisis, taking arguments outlined above into consideration.

4.4.1. Procedural requirements

1. Does investor get an opportunity for judicial review of host state's regulatory measure?

This question may be answered from two points of view. Firstly, bondholders indeed did not get any opportunity to review or participate in formation of exchange offer of the bonds. However, since probably no obligation exists to "provide justice", denial of justice in this case cannot be argued.

Secondly, bondholders not participating in restructuring were not precluded to pursue their claims before courts, including proceedings abroad (based on forum choices of various bonds – USA, Italy, Germany).[172]

2. Is the measure in accordance with principle of equality?

Equality was not achieved in formation of exchange offer since it was rather an unilateral step of Argentina. However as stated above, this is not prohibited by any legal rule. There was therefore no clear or malicious missaplication of own law.

What raises concerns is measure from February 2005 when Argentina passed Ley 26017 which prohibited any new wave of restructuring and any settlement with nonparticipating bondholders.[173] Obviously, this law, designed to prevent creditors from holding out, raises concerns about equal treatment between Argentina's bondholders. The law was subsequently set aside and second wave of SDR was enabled.

[172] Wiessner, p. 59.
[173] Waibel, p. 18.

Confirmation of equality in proccedings between holdouts and Argentina would depend on each circumstances of each proceeding. Violation of due process and liability of Argentina would however exist only if proceedings took place before Argentine courts (e.g. because of forum choice in the bonds) and these courts did not provide with procedural legality requirements.

3. Did investor exhaust all local remedies?

Because of specific nature of possible due process violation in Abaclat, investors cannot be asked to exhaust local remedies since there are not any available.

4.4.2. Substantive requirements

1. Is host state's measure reasonable (mostly search for legitimate public purpose)?

The public policy objective (economic crisis) is existent but this is not sufficient. Assessment of reasonableness in this case will be a complex issue because of intricate circumstances surrounding the case. Tribunal will have to consider both internal and external reasons of the crisis, admissibility of the necessity defence and other factors.

What might serve as a guideline is the different ideological base between first and second wave of restructuring (protection of public welfare versus attempt at additional reduction of its commitments stemming from public debt in spite of better economic situation), harsh conditions of the exchange (e.g. large haircut)[174] and bad faith of Argentina in unwillingness to settle with its creditors at all (after expiration of RUFO clause). Tribunal will have to answer what does prevent host state (arguing with public policy objective) from continuing restructuring to the point where value of original investment will reach zero and, most importantly, whether the measures taken were proportional.[175]

2. Is it consistent and foreseeable (what are the limits for use of discretionary powers)?

Given the widespread use of SDR in last decades (and possibility of loss of investment value), the obligation of every investor[176] to bear negative consequences of business risk (connected to performance of due diligence), not very promising rating of Argentine bonds at time of their purchase and large discretionary powers of host states in this sphere, it is going to be difficult for claimants to prove that they could not foresee host state's actvities. No specific assurances were given regarding exclusion of

[174] This argument is disputed by Kiguel in *Argentina's Debt: the Good, the Bad and The Ugly*.
[175] Apart from rational policy it must fulfil that "*investment is not put under strain by a State measure any more than is necessary.*" Kläger, FET and Sustainable Development, p. 248.
[176] Muchlinski considers adequate knowledge of risk together with duty to refrain from unconscionable conduct and conduct business in a reasonable manner as three main obligations of every foreign investor. Muchlinski, p. 536-556.

future SDR. However, what if tribunal considers the change of bonds‘ terms as a retroactive measure?

3. Is the measure transparent (investor knows in advance all regulations necessary for operation of its investment)?

Host state will claim that no violation of transparency exist since the whole SDR process was clear and public. However, disputes may arise concering treatment of creditor committees by Argentine government and their insignificant role. Moreover, in view of strong economic growth of Argentina following after the default in 2001, creditors are likely to claim bad faith of host state in its negotiation tactics.[177]

[177] Waibel, p. 17.

Summary and Conclusion

Current functioning of FET is far from being perfect. Evaluation of each case, each regulatory measure taken by the host state from the perspective of FET is dependent upon circumstances of the case, wording of the FET clause, preferences and ideological background of arbitrators. Too many factors to be considered all at once and impossibility of an uniform approach. Therefore it will always be "*difficult to reduce the words 'fair and equitable treatment' to a precise statement of a legal obligation*."[178]

It has been argued to the benefit of prevalent opinion that FET is rather an autonomous standard. Finding an international custom in the sphere of international investment is a challenge and tribunals fail to provide evidence of its existence. Still considerable number of BITs include FET obligation linked to CIL. Out of 18 international investment agreements concluded in 2013, 8 opted for this approach.[179] Ambiguous attitude is also proven by stance of the European Union: while European Parliament is in favour of CIL-linked standard, Commision supports the opposite approach.[180] However, it has been stated that differences in wording are only a minor issue which could be solved only by renegotiation of all FET clauses in thousands of BITs in force into a single wording with uniform intepretation. This is, of course, an utopian version.

The main difficulty has always been drawing a clear line between host state's right to sustainable development through rational (economic, environmental) policies or regulatory measures and maximum protection of investor. Equity and fairness strive for both and principles such as reasonableness, transparency or consistency deduced from rule of law and Fuller's theory help to shed light on that line. However, still high level of uncertainty remains which was shown on the pending case of Argentine debt

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[178] Blackaby, p. 489.

[179] World Investment Report, p. 117.

[180] European Parliament resolution of 6 April 2011 on the future European international investment policy, para 19, availbale at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0141+0+DOC+XML+V0//EN [accessed 18 June 2015]; EC Communication Towards a comprehensive European international investment policy, p. 11, available at: http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146307.pdf [accessed 18 June 2015].

restructuring. Current approaches of FET interpretation refer to a certain area within which the liability line of the host state is drawn thus judging the liability from circumstances of the case.[181]

Fair and equitable treatment is based on “broadly conceived equity“ which refers to equity as the governing applicable standard for the accomplishment of resource allocation.[182] This gives an enormous opportunity to apply noble ideals of justice and fairness in the field of foreign investment. It leads to one complication: there is no common understanding of justice and every individual will treat it differently. This however does not mean that we should surrender in trying to achieve it.

[181] Perenco, para 627.
[182] Kläger, *Fair and Equitable Treatment: A Look at the Theoretical Underpinnings of Legitimacy and Fairness*, p. 445.

Resumé

Standard spravedlivého a rovnoprávného zacházení (FET) je v současné době přítomen takřka ve všech dvoustranných smlouvách o vzájemné ochraně a podpoře investic (BITs) a především je v posledních letech jeho porušením argumentováno ve většině případů, jež rozhodují arbitrážní tribunály.[183] Tato oblíbenost standardu mezi žalujícími investory je dána především vágní formulací ustanovení ve většině BIT, ve kterých je FET obsažen, což žalujícímu investorovi umožňuje pod standard zařadit rozličné formy tvrzeného špatného zacházení s jeho investicí. Výsledkem je ale právní nejistota a nejednotná rozhodovací činnost tribunálů.

Cílem práce je jednak rozbor jednotlivých forem ustanovení v BITs, v nichž je standard uveden, ale také nový pohled na spor, zda FET je autonomním smluvním standardem či jeho obsah má být vykládán podle minimálního standardu daného mezinárodním obyčejovým právem. Následně, ve snaze snížit nejistotu ohledně obsahu standardu FET, je za pomoci principů rule of law a základů spravedlivého právního řádu dle uznávaného právního teoretika Lona Fullera vytvořen určitý test funkčnosti FET. Ten je posléze aplikován na dosud nerozhodnutý případ týkající se tvrzeného porušení FET v rámci Argentinské ekonomické krize.

Současná podoba standardu

Vzhledem k více než 2500 sjednaných BIT neexistuje v současnosti žádné jednotné znění ustanovení v BIT, které FET zakotvují. Rozlišit lze několik forem:

1. BIT neobsahující FET standard[184]

Tato varianta je spíše výjimečná. Složitost mezinárodního investičního práva ukazuje, že investice můžebýt zhoršena nejenom na základě tradičních standardů ochrany jako je vyvlastnění nebo standard plné ochrany a bezpečnosti. Zároveň díky velkému množství případů týkajících se FET a značné pozornosti věnované standardu

[183] Např. FET in Arb. Practice, str. 357.

[184] Např. dvoustranné dohody o ochraně a podpoře investic mezi Tureckem a Pakistánem (1995), Tureckem a Kazachstánem (1992), nebo Tureckem a Jordánskem (1993).

ze strany akademiků lze uvažovat, že se stalo určitým konsenzem vkládat do BITs klauzule s FET. Opak by samozřejmě výrazně snížil manévrovací prostor pro investora, jenž by se nemohl spoléhat na tak výraznou ochranu ze strany BIT.

2. FET bez odkazu na mezinárodní právo či jiná kritéria

Toto nekvalifikované znění FET klauzule[185] je v praxi nejrozšířenější a poskytuje tribunálům nejvyšší míru uvážení ohledně obsahu standardu.

3. FET navázaný na mezinárodní právo

Úzký vztah k mezinárodnímu právu[186] o něco zvyšuje právní jistotu ohledně obsahu standardu a omezuje arbitry v jejich rozhodovací činnosti. Avšak problémy působí nutnost identifikovat všechny principy mezinárodního práva, které by se na FET podle tohoto znění klauzule měly vztahovat.

4. FET navázaný na minimální standard zacházení podle mezinárodního obyčejového práva

Tyto klauzule představují další pokus o vyjasnění skutečného obsahu FET a povinností investora a státu. Stejně jako výše i zde však je problém v určení mezinárodního obyčeje, ohledně čehož obzvláště v oblasti mezinárodních investic je složité najít shodu. Krom toho mnohé tribunály judikovaly, že rozdíl mezi automomním FET standardem (spojovaným především s klauzulemi typu č. 2) a obyčejovým minimálním standardem může být více zdánlivý než skutečný.

5. FET s doplňkovým obsahem

Toto znění standardu poskytuje adresátům jistotu, že obsahuje prvky vyjmenované v rámci klauzule.[187] Jedná se však pouze o polovičaté řešení. Jelikož se takřka nikdy nejedná o výčet taxativní, nejistota přetrvává ohledně zbytkového obsahu standardu

Na příkladu České Republiky je následně ukázáno, že velká většina BITs sjednaných po roce 2000,[188] kdy došlo k rozmachu rozhodovací činnosti tribunálů

[185] Viz. znění standardu v čl. 1. Abs Shawcross Agreement nebo čl 1. a) OECD Draft Convention.
[186] OECD Working papers, str. 20-22; Metalclad, para 101.
[187] Např. UNCTAD FET 2012, str. 29.

týkající se FET (a v plné síle se ukázal problém v podobě nejistoty ohledně obsahu standardu) i nadále obsahuje FET ve formě nekvalifikované klauzule.

FET a mezinárodní obyčejové právo (CIL)

Spojování standardu FET s mezinárodním obyčejem je problematické už s ohledem na *usus longaevus* a *opinio iuris* jakožto konstitutivní prvky mezinárodního obyčeje. Ačkoliv FET je obsažen v BITs již více než 50 let, reálná diskuze o jeho obsahu vyvstala až v posledních dvou dekádách a tudíž je těžké uvažovat o nějaké konzistentní praxi států. V úvahu je třeba brát zároveň složitost mezinárodního investičního práva a rozdílné postoje rozvojových a rozvinutých zemí, což mnohdy zpochybňuje existenci *opinio iuris*.[189] Tribunály argumentující ve prospěch tohoto restriktivního pojetí FET navíc místo důkazu, že určitou formu zacházení s investorem je nutno kvalifikovat jako mezinárodní obyčej, často pouze odkáží na dřívějších rozhodnutí jiných tribunálů.[190]

Na problém je nově nazíráno z hlediska standardních i doplňkových metod právního výkladu, jak je definuje právní teorie.[191]

Pouze historický výklad umožňuje dojít k závěru, že i nekvalifikovaná FET ustanovení je nutno vykládat pouze v rozsahu minimálního standardu podle CIL. Úmluva o ochraně cizího majetku z dílny OECD z roku 1967 (která byla předlohou mnoha BITs uzavřených členy OECD) ve svém komentáři tvrdí, že FET odpovídá právě tomuto minimálnímu standardu.[192] Avšak tato úmluva se jednak nikdy nestala závaznou a především nelze vyvodit závěr, že komentář k této úmluvě je závazným výkladem BITs (zkoumat je především třeba podklady vedoucí ke sjednání jednotlivých BITs, ty však často nejsou k dispozici). Navíc se úmysly autorů ohledně standardu FEt mohou s časem vyvíjet (ve prospěch autonomního standardu) a historický výklad je pouze metodou doplňkovou, jež nesmí být v rozporu s metodami standardními.

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[188] BITs uzavřené Českou republikou jsou k dispozici zde: http://investmentpolicyhub.unctad.org/IIA/CountryBits/55#iiaInnerMenu (platné 20.6.2015).
[189] Shaw, str. 72 a n.
[190] RDC v. Guatemala, para 159-160.
[191] Boguszak, str. 182 a n.
[192] Montt, str. 69.

Komparativní metoda je nepoužitelná z důvodu odlišného znění FET klauzují v jednotlivých BITs. Teleologický výklad (zaměřený na účel právní úpravy) poskytuje argumenty oběma stranám – na jedné straně tu je požadavek maximální ochrany investora a funkce „zaplňování mezer“ zanechaných ostatními standardy ochrany v BIT, kterou FET plní. Na straně druhé stojí právní jistota a právo státu spravovat své záležitosti a měnit svůj právní řád. Lze říci, že vzhledem k preferenci nekvalifikovaných FET ustanovení a s pomocí standardních metod výkladu převažují prvně zmíněné funkce.

Co se týče standardních metod právní interpretace, jazykový výklad poskytuje jen málo vodítek ohledně obsahu FET (pokud ustanovení není přímo navázáno na CIL). Je třeba však souhalsit se Schreuerem, který zdůrazňuje, že je nepřijatelné, aby mezinárodní smlouva odkazovala na známý koncept jako minimální standard ochrany použitím obecné fráze „spravedlivé a rovné zacházení“.

Ze stejného důvodu se ve prospěch autonomního FET standardu kloní i výklad logický. Pokud si strany přejí FET navázat na CIL, mají možnost to ve smlouvě stanovit, a contrario se jedná o autonomní standard, jestliže toto ve smlouvě chybí. Systematický výklad by měl brát v potaz rychle se vyvíjecí mezinárodní investiční právo a s ním i FET, tento vývoj svědčí ve prospěch extenzivního přístupu. Případy obhajující restriktivní pojetí FET (např. známý *Neer* z roku 1926) ztrácí na své aktuálnosti.

Dále se zmiňuje kritika Montta,[193] který tvrdí, že autonomní pojetí FET je v rozporu s Vídeňskou úmluvou o smluvním právu, jmenovitě s čl. 31 odst. 3 c), čl. 31 odst. 4 a čl. 32. Nic podle něj v BITs nesvědčí tomu, že má být výklad FET prováděn mimo oblast obecného mezinárodního práva. Avšak vynětí z úzkého spektra CIL neznamená automaticky ignorování mezinárodního práva jako takového. Požadovaný soulad soulad standardu s principy mezinárodního práva stanoví pouze podlahu a ne strop tomuto standardu.

[193] Montt, str. 304 a n.

Na závěr této části se poukazuje na to, že tribunály ve snaze objasnit obsah standardu vytvořily určité elementy (legitimní očekávání, spravedlivý proces, transparentnost jednání s investorem aj.).[194] Avšak uvedení těchto elementů do BIT bohužel nepovede k dosažení kýžené právní jistoty. Jednak mohou panovat spory ohledně toho, jaké konkrétní elementy FET obsahuje, především však většina těchto elementů sama postrádá jednoznačný obsah a lze je výkladat způsobem příznivým pro investora i žalovaný stát.

Teoretický základ standardu FET

Jak bylo uvedeno výše, přijatelné rovnováhy mezi ochranou investora a právní jistotou ohledně obsahu standardu nelze dosáhnout ani výkladem FET klauzulí v jednotlivých BITs, ani určením, zda se jedná o nezávislý standard ochrany či je navázán na mezinárodní obyčej. Cílem je proto najít určité obecně přijatelné principy (přizpůsobené povaze mezinárodního investičního práva), jež bude možné univerzálně aplikovat tribunály v jedotlivých případech při posuzování porušení FET.

Americký právní filosof Lon Fuller, zastánce přirozenoprávní doktríny, prosazoval úzkou korelaci mezi pojmy „právo“ a „morálka“. Stejné pojetí v sobě ztelesňuje i standard FET. Fuller rozlišuje 2 druhy morálek:[195] „morálku povinnosti“ jakožto souhrn pravidel stanovící minimum nutné pro fungování společnosti, jehož porušení je trestáno sankcí. Naopak „morálka aspirace“ je morálkou dokonalosti, je ideálem, k němuž by se mělo směřovat. Cílem je vytyčit jasnou hranici mezi oběma typy morálek. Chování požadované standardem FET je vytyčeno právě morálkou povinnosti, protože nelze trestat za to, že s investorem nezachází podle měřítek ideálu a dokonalosti (která je navíc subjektivní kategorií a nelze ji autoritativně určit).

[194] Principles of IIL, str. 133 a n.
[195] Fuller, str. 12 až 17.

Následně (na známém příkladu vladaře Rexe marně usilujícího o vytvoření spravedlivého práva) se zmiňuje 8 požadavků legality,[196] které Fuller klade na každý právní řád, aby nebyl pouze souhrnem právních norem, nýbrž v sobě také ztělesňoval i principy morálky. Jedná se o:

1. Obecnost práva: je základem každého právního systému, jinak by práva a povinnsoti vznikaly nepředvídatelně pouze skrze ad hoc politická a adminsitrativní rozhodnutí

2. Publicita a vyhlašování: je spojena s elementem FET transparentnosti, umožňuje investorovi přizpůsobit své jednání na základě uvedených pravidel.

3. Zákaz retroaktivních norem: retroaktivita také znemožňuje jednat v souladu s předem stanovenými pravidly a je v rozporu s elementem legitimních očekávání.

4. Jasnost pravidel: v oblasti FET se jasnost nevztahuje pouze na zákony, nýbrž i na rozhodnutí, ujištění či politiky státu, které mají vliv na provádění investice. Je spojena s elementem transparentnosti. K porušení v investičních spotrech může dojít nejen při nezveřejnění pravidel, ale i při zatajování důvodů k přijetí určitých opatření státem.

5. Zákaz rozporů v právních normách: souvisí s požadavkem konzistentnosti právního řádu.

6. Zákaz právních norem požadujících nemožné: tyto normy nemohou regulovat chování svých adresátů, avšak jsou přípustné výjimky, např. případy absolutní smluvní odpovědnosti.

7. Stálost práva v čase: stálost ovlivňuje předvídatelnost práva, je vtělena do elementu legitimních očekávání. Avšak tento požadavek je předmětem mnoha sporů. Jednak investor musí prokázat, že jeho nárok je důvodný, což se posuzuje s ohledem na konkrétní okolností případu (sociální, ekonomické, kulturní či historické podmínky).

[196] Ibid., str. 38-39.

Dále některé tribunály stanovily speciální podmínky pro užití tohoto standardu jako např. vyčerpání opravných prostředků investorem nebo že stát při porušení očekávání investora musel jednat v rámci své suverénní moci.

8. Shoda mezi úředním postupem a deklarovaným pravidlem: ignorování vlastního právního řádu při aplikaci práva je v rozporu s legitimními očekáváními i požadavky spravedlivého procesu a aktivuje standard FET.

Fullerovy požadavky se věnují pouze oblasti legislativy, avšak možná porušení FET jsou i procedurální. K výše uvedeným prinsipům je tedy třeba přidat právo na (soudní, správní) přezkum a veškeré prvky spravedlivého procesu.[197]

Tyto požadavky se nezabývají samotným obsahem právních norem, nýbrž jejich formální stránkou. Může jejich použití vést ke spravedlivému obsahu norem? Ačkoliv požadavky legality (hmotné i procesní) znázorňují pouze formu, tak jsou podmínkou prosazování spravedlivého obsahu pravidel. Za druhé, forma ovlivňuje obsah. Nakonec výše zmíněné požadavky zajišťují rovnsot subjektů práva (skrze obecno, jasnost či zákaz retroaktivity).[198]

Z pohledu standardu FET je tato kritika navíc bezpředmětná. Tribunály se ve svých nálezech příliš nevěnují rozboru morálky z hlediska obsahu norem (protože jde o subjektivní kategorii), ale především se snaží posoudit chování státu z pohledu požadavků legality (konzistentnost, transparentnost, spravedlivý proces aj.).

Požadavky legality jako vodítko pro tribunály

Při vytváření určitého návodu pro rozhodování jednotlivých případů je třeba vzít v potaz principy rule of law. Tento v civilizovaném světě všeobecně přijímaný koncept sdílí se standardem FET mnohé charakteristiky: je podobně vágní co se týče svého obsahu a zároveň odkazuje na principy spravedlnosti, takže znemožňuje jednoduchou mechanickou aplikaci.[199] Snaží se poskytnout stabilní pravidla společnosti

[197] Více viz. UNCTAD FET 2012, str. 80.
[198] Lautenbach, str. 42.
[199] Ibid., str. 71-73.

(investorům), která umožňují důslednou ochranu jejich práv, chránit jednotlivce (investora) před svévolnou aplikací státní moci apod.

Co se týče procesní části, základní otázkou je zda investor vůbec disponuje právem obrátit se na soudní či jiné podobоné orgány. Jestliže tato podmínka je splněna, posuzuje se samotný průběh procesu – porušení práva rozhodnutím soudu, nepřípustné průtahy, ovlivnění soudu výkonnou či zákonodárnou mocí, diskriminace z důvodu národnosti, chybějící předvolání nebo právo být slyšen. Všechny tyto nároky lze shrnout do pojmu rovnost (procesní), ať už s ostatními investory nebo se státem, kde je investice prováděna. Nakonec podle některých názorů je třeba prověřit, zda investor vyčerpal všech opravné prostředky poskytnuté mu státem, kde investuje.

Tvrzená porušení FET v oblasti procesních požadavků lze tedy shrnout následovně:

1. Má investor možnost soudního či jiného podobného přezkumu opatření provedeného státem, kde investuje?
2. Dodržela forma procesu podmínky procesní rovnosti?
3. Vyčerpal investor možné opravné prostředky.

Ohledně hmotněprávních nároků lze výše zmíněné Fullerovy požadavky shrnout do principů společných rule of law i standardu FET.

Rozumnost zajišťuje, že opatření státu negativně ovlivňující investici je navázáno na určitý cíl ve veřejném zájmu.[200] Posouzení tohoto principu je velmi obtížné, jelikož zde ve značné míře dochází k hodnocení opatření a jeho účelu a vyvažování zájmů státu a investora. Je také spjat se zákazem diskriminace, která je možná pouze pokud je rozumná (důvodná).

Konzistentnost souvisí s klíčovým elementem standardu FET – ochranou legitimních očekávání investora.[201] Zároveň je do ní vtělen zákaz retroaktivity či zákaz rozporů v právních normách. Tento princip souvisí s předvídatelností jakožto podmínkou právní jistoty. Tribunály by v tomto ohledu měly zjiš´tovat, zda existují

[200] Vandevelde, str. 54.
[201] Campbell, str.. 361 a n.

nějaké limity (např. časové) užití diskreční pravomoci státem, případně zda zákon vypočítává případy, kdy může být použita.

Veřejnost, jasnost a obecnost pravidel je vtělena do principu transparentnosti, který umožňuje investorovi s jistotou spravovat jeho investici.

Tvrzená porušení FET v oblasti hmotněprávních požadavků lze tedy shrnout následovně:

1. Bylo opatření státu rozumné (hledání důvodu veřejného zájmu)?
2. Bylo konzistentní s předchozí praxí a předvídatelné?
3. Bylo opatření transparentní (zná investor s předstihem všechna pravidla nutná ke správě jeho investice)?

FET a argentinská restrukturalizace státního dluhu

Argentina se na přelomu tisíciletí dostala do vážných ekonomických potíží způsobených vnitřními i externími faktory jako nezodpovědná fiskální politika, vysoká míra korupce či snížení cen na komoditních trzích. Výsledkem byl státní bankrot vyhlášený v roce 2001.[202]

Argentina přitom v letech 1991-2001 prodala státní dluhopisy ve výši 186,7 miliard amerických dolarů. Po vzniku ekonomických problémů a neschopnosti dostát svým závazkům proto přistoupila k restrukturalizaci nesplaceného státního dluhu a svým věřitelům nabídla v roce 2005 výměnu za nové dluhopisy, které však pro investory znamenaly ztrátu 70% jejich investice. Výměny se zúčastnilo cca 76% všech dluhopisů.[203] V roce 2010, kdy se země již do určité míry z krize vzpamatovala a zažívala ekonomický růst, byla provedena druhá vlna restrukturalizace s cílem co nejvíce snížit procento „holdouts“ (věřitelů dosud nesouhlasících s výměnou svých dluhopisů). Po této druhé vlně došlo k restrukturaliazci více než 90% dluhu.

V roce 2007 (případ Abaclat v. Argentina) byla podána kolektivní žaloba 60 000 italských věřitelů (holdouts), kteří se domáhali toho, že restrukturalizací došlo k porušení standardu FET v BIT mezi Itálií a Argentinou.[204] V roce 2011 tribunál v přelomovém rozhodnutí potvrdil svou jurisdikci, když připustil kolektivní žalobu a

[202] Wiessner, str. 58.
[203] Více viz Hornbeck, str. 4 a n.
[204] Abaclat, para 264.

zároveň potvrdil, že dluhopisy spadají pod definici investice. Ani 8 let od počátku sporu však nebylo vydáno rozhodnutí ve věci. Cílem poslední části je aplikovat test požadavků legality na tento případ a zhodnotit argumenty obou stran z hlediska porušení standardu FET.

Procesní požadavky

1. Má investor možnost soudního či jiného podobného přezkumu opatření provedeného státem, kde investuje?

Mezinárodní měnový fond považuje v případě restrukturaliazce státního dluh za žádoucí praxi, aby stát byl maximálne transparentní a aktivně jednal s výbory věřitelů (tak tomu většinou bývá) případně dokonce přijatá opatření vytvářel ve spolupráci s nimi.[205] Nestanoví ale žádnou explicitní povinnost, stejně tak nic takového nejspíše nepředepisuje ani argentinské právo. Ačkoliv se v době před první restruturalizací (2005) zformoval výbor věřitelů, který sdružoval věřitele cca 50% celého dluhu, nikdy nebyl argentinskou vládou uznán a konečné podmínky restrukturalizace byly jednostranným opatřením státu. Je však možné tvrdit porušení, pokud státu neplyne žádná povinnost?[206]

2. Dodržela forma procesu podmínky procesní rovnosti?

Rovnost z výše uvedených důvodů spíše nebyla dodržena, jednalo se o nabídku „take it or leave it“. Platí však stejný závěr jako výše – neexistence procesních pravidel a tudíž ani povinností při restrukturalizaci.

3. Vyčerpal investor možné opravné prostředky.

Kvůli specifické povaze požadavku spravedlivého procesu v případu Abaclat, nelze po investorech žádat yvčerpání opravných prostředků.

Hmotněprávní požadavky

1. Bylo opatření státu rozumné (hledání důvodu veřejného zájmu)?

[205] Sahay, str. 22.

[206] Sovereign Debt Restructurings: Recent Developments, str. 36.

Pouhá existence veřejného zájmu (zájem vyrovnat se s ekonomickou krizí) není dostatečná ke zproštění odpovědnosti. Tribunál bude muset zvážit vnitřní i vnější příčiny krize, přípustnost obrany z důvodu nezbytnosti[207] (necessity – krize nesmí být zapříčiněna chováním státu). Vodítkem mohou být rozdílné motivace a podmínky vedoucí k první a druhé vlně restrukturalizace, zda opatření byla proporcionální (příliš vysoká ztráta hodnoty u nových dluhopisů vzhledem k následnému ekonomickému růstu Argentiny) a možná absence dobré víry kvůli absenci vůbec dosáhnout narovnání s věřiteli. Dluhopisy totiž obsahují tzv. klauzuli RUFO,[208] která zavazuje případné vyšší plnění nabídnout i ostatním věřitelům. Argentina z toho důvodu odmítala zaplatit holdout věřitelům, kteří v posledních letech vyhráli spory např. v USA (aby nemusela poté platit zbytku věřitelů, kteří participovali na restrukturalizaci). Tato klauzule však 31. prosince 2014 vypršela a neochota dosáhnout konsenzu v posledních měsících svědčí o špatné víře.

2. Bylo konzistentní s předchozí praxí a předvídatelné?

Vzhledem k častému užití institutu restrukturaliazce dluhu v posledních desetiletích, povinnosti každého investora strpět podnikatelské riziko (ztráta hodnoty investice),[209] nízkému ratingu dluhopisů[210] v době jejich pořízení a značné diskrece státu v provádění regulačních opatření za časů krize bude pro investory obtížné prokázat, že opatření nemohly předvídat.

3. Bylo opatření transparentní (zná investor s předstihem všechna pravidla nutná ke správě jeho investice)?

Případné porušení transparentnosti se může vztahovat na nedostatečnou komunikaci s výbory věřitelů při přípravě nabídky výměny dluhopisů.

FET je tudíž třeba chápat jako určité spektrum, na kterém jsou zobrazena jednotlivá opatření státu a tvrzená porušení. Na něm je, v závislosti na okolnostech

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[207] National Grid, para 160; LG&E, para 161. Více v Alvarez, Brink: *Revisiting the Necessity Defense*.

[208] *Rufo expiry will test Argentina's willingness to settle debt*, 2014, Financial Times. Dostupné na: http://www.ft.com/intl/cms/s/0/e554502e-8fa4-11e4-9ea4-00144feabdc0.html#axzz3dhCNs1Qn [20. červen 2015].

[209] Muchlinski, str. 536 a n.

[210] Moody's, str. 20.

případu vyznačena linie znamenající odpovědnost státu za porušení FET. Teoretická i praktická stránka současné podoby standardu ukázala, že je obtížné dosáhnout rovnováhy mezi kýženou právní jistotou a ochranou investora pouze na základě znění ustanovení v BIT. Ani stanovení principů, které by tribunálům měly umožnit snadnější aplikaci standardu na konkrétních případech, často k výsledku nepovede. Častokrát se totiž jedná o pokus o kvadraturu čtverce. To je přímou daní za protiřečící si cíle standardu.

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Abstract (Czech)

V oblasti investiční arbitráže neexistuje v dvoustranných smlouvách o ochraně investic kontroverznější a zároveň investory častěji žalovaný standard ochrany než standard spravedlivého a rovného zacházení (FET). Obě tyto vlastnosti spolu přitom úzce souvisí. Vágní formulace standardu obsahující odkaz na neurčitý pojem spravedlnosti vede ke značné právní nejistotě ohledně obsahu FET. Zároveň však umožňuje díky snadné adaptabilitě na různé skutkové okolnosti zaplňovat mezery zanechané ostatními, rigidnějšími standardy ochrany.

K výše zmíněné nejistotě přispívá i roztříštěná úprava znění standardu v jednotlivých investičních smlouvách, v níž se zrcadlí imanentní spor, zda FET je standardem autonomním, či se jeho obsah pouze rovná minimálnímu standardu zacházení dle mezinárodního obyčejového práva. Na základě standardních i doplňkových metod právní interpretace je třeba se klonit k extenzivnímu výkladu FET.

Ve snaze dosáhnout určité rovnováhy mezi zájmy investora získat maximální ochranu a právem státu upravovat regulačními opatřeními své domácí záležitosti je možné z hodnot koncepce rule of law a z teorie morálky a legality právního filosofa Lona Fullera vyabstrahovat určité principy. Ačkoliv se nezabývají přímo obsahem práva a jedná se spíše o formální požadavky spravedlnosti, jejich důsledné dodržování může významně napomoci spravedlivému obsahu norem. Tyto principy poté tribunálům při aplikaci standardu na konkrétní případ usnadní jeho posouzení. Na základě požadavků rozumnosti, konzistentnosti a transparentnosti zkoumaných opatření lze ve spojení s prvky spravedlivého procesu posoudit, zda jsou nároky investora ospravedlněné.

Nakonec se tyto principy hypoteticky aplikují na otázku porušení standardu FET ve vztahu k restrukturalizaci státního dluhu provedeného v Argentině na počátku tohoto tisíciletí.

Abstract (English)

Often evoked by investors before arbitral tribunals and at the same time causing controversy and uncertainty with regard to its contents. Fair and equitable treatment standard of protection (FET) suffers from its vague formulation in bilateral investment treaties but simultaneously this characteristic enables it to fulfil the function of filling gaps left by other standards of protection. This results in a fact that uniform understanding of the standard seems impossible to achieve.

Inherent dispute on whether FET amounts only to minimum standard of treatment under customary international law or is rather an autonomous standard is also embodied in various wordings of FET clauses present in the treaties. Unless specific link to minimum standard is made, almost all methods of legal interpretation prove that FET is an autonomous concept. Enumeration of sub-elements of FET in clauses will also not achieve certainty mainly because of disputes on contents of some of these sub-elements.

Effort to shed more light on the contents of the standard is achieved by evaluation of values of rule of law as well as requirements of morality and legality (necessary for functioning of every legal system) presented by legal philosopher Lon Fuller. A set of universally accepted principles is extracted from these theories: reasonableness, consistency, foreseeability, transparency and concept of procedural equality. Although they are not concerned directly with contents of host state'sregulatory measure, it is claimed that complying with these principles by host states (influencing "just" form of the law) will influnece just content of legal norms.

Use of these principles in the decision making process is afterwards used on a pending case featuring alleged violation of FET concerning sovereign debt restructuring in Argentina in the new millennium.

Keywords

investtment arbitration, fair and equitable treatment; rule of law

investiční arbitráž, spravedlivé a rovné zacházení; rule of law