MYKOLAS ROMERIS UNIVERSITY
FACULTY OF LAW
INSTITUTE OF PRIVATE LAW

OLENA HALAHAN
EUROPEAN AND INTERNATIONAL BUSINESS LAW

CHANGES IN THE REGULATORY FRAMEWORK AS A BREACH OF FAIR AND EQUITABLE TREATMENT IN INVESTMENT LAW

Master thesis

Supervisor –
Prof. dr. Solveiga Palevičienė

Vilnius, 2020

TABLE OF CONTENTS

ABBREVIATIONS

IIA – International investment agreement

BIT – Bilateral investment treaty

ECT – Energy Charter Treaty

FDI – Foreign direct investment

FET – Fair and equitable treatment

FCN treaties – Friendship, commerce and navigation treaties

FTA – Free Trade Agreement

ICJ – International Court of Justice

ICSID – the International Centre for Settlement of Investment

ISDS – Investor-State dispute settlement

MFN – Most-favoured-nation treatment

MST– Minimum standard of treatment of aliens under

NAFTA - North American Free Trade Agreement

OECD – the Organization for Economic Cooperation and Development

PCIJ – Permanent Court of International Justice

UNCITRAL – United Nations Commission on International Trade Law

INTRODUCTION

The relevance of the master thesis. Fair and equitable treatment (FET) is one of the most important standards in investment law. Most international investment agreements (IIAs), including approximately 2000 bilateral investment agreements (BITs)[1], contain this standard, and it is frequently used by claimants in investor-state dispute settlement (ISDS) proceedings with a big success. FET plays a role of protection for foreign investors and covers a number of requirements to the state's conduct in relation to the investment, that has become a great incentive for investors. However, such requirements arise a lot of worries that FET limits the power of a state to respond to changed circumstances adopting appropriate modifications to the regulatory framework and to be a guarantor of protection of public interests. According to the UNCTAD Investment Dispute Settlement Navigator, the breach of FET was the most alleged and proved among the violations of IIA provisions. Out of 1023 treaty-based ISDS proceedings, the breach of FET was invoked 499 times and was found in 139 cases, while the total amount of all proved breaches is 219. In comparison, violation of indirect expropriation was established in 60 cases.[2] Consequently, the above statistics show that investors claim for breach of FET extremely often. However, sometimes it is done in an abusive manner, as a claim under more specific standards may be denied, which could lead to frustration of the position of a state.

Even though this standard has currently become one of the most invoked treaty standards in investment arbitration and is contained in most IIAs, there is no uniform version of it. The diversity emanates from the problem of establishing the legal nature of the FET standard, which has a significant impact on the interpretation of FET and understanding what components it contains and what requirements raised to a host state. Some scholars state that: "The standard of fair and equitable treatment is relatively imprecise. Its meaning will often depend on the specific circumstances of the case at issue."[3] This mostly leads to its broad interpretation and contains a variety of specific requirements to a state to act transparently and reasonably, with the duties of stability and predictability, but without arbitrariness or discrimination; to follow the principle of good faith and proportionality, to respect of legitimate expectation of the investors.

---

[1] International Investment Agreements Navigator, Accessed 9 May 2020, https://investmentpolicy.unctad.org/international-investment-agreements.

[2] Investment Dispute Settlement Navigator, Accessed 9 May 2020, https://investmentpolicy.unctad.org/investment-dispute-settlement

[3] Schreuer Christoph, "Fair and Equitable Treatnlent in Arbitral Practice," *The Journal of World Investment & Trade*, Vol. 6 No.3 (June 2005): 364.

So, what is FET? Is it a reflection of the minimum standard of treatment of aliens and should be interpreted according to international customary law? Or maybe it is an autonomous treaty standard and, as a result, should be interpreted under VLCT and provisions of the IIA? What should be the fundament of its interpretation and determining its elements? As we see, there is a number of uncertainties and risks connected with the FET standard, which create some difficulties in concluding and interpreting IIAs and leads to investment disputes. These questions are still opened.

A lot of arbitral tribunals concluded that the FET standard requires some stability and predictability of the state's regulatory framework in order to assure investment, which is highly connected with the principle of legitimate expectations of investors as an essential part of the FET concept. However, there is a lack of a precise approach in this regard. That is why some tribunals consider a modification of the regulatory framework after the time when the investment was made as a breach of FET standard, because of the frustration of the investors' legitimate expectations.[4] Others held that without special commitment made by a state, an investor is not supposed to have legitimate and reasonable expectations that the legal environment will not change.[5]

On the one hand, the FET standard requires the host states to act in a predictable for an investor manner in relation to the investment and to provide a stable legal framework. But on the other hand, considering the constant evolution of circumstances in the country, the states should legally respond to the changes and nothing can oblige the state to refrain from its undeniable right to exercise its sovereign legislative power for the sake of public interest. As it is entitled by its nature to act in the best interest of its country. That is why is it of extreme importance to find a solution to this problem.

Legal research problem. Analysis of the relevant literature, legal acts and case law indicates that there is no precise and mandatory meaning of FET, each court and arbitration interpret it differently, on a case by case basis, especially when it concerns changes of regulatory framework and investor's legitimate expectations. From the one side, FET protects foreign investors from the state's unpredictable and inconsistent action. But from the other side, each state has a right to exercise its power in the way it considers is the best for public interest, including the power to change its legislation.

That is why it is crucial to answer to such questions: what test or approach is better to use in order to determine whether certain state's changes of regulatory framework could be accounted as a

[4] "Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1," Award, para. 99; "Técnicas Medioambientales Tecmed S.A. vs. The United Mexican States, ICSID Case No. ARB (AF)/00/2," Award, para.154.
[5] "AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary, ICSID Case No. ARB/07/22," para. 9.3.31.

breach of FET? Whether all investor's expectations are legitimate and reasonable, how to establish it? And how to solve the problem of inconsistent interpretation of the FET and its elements?

Level of the analysis of a researched problem of the final thesis. The research of this topic demands analysis of literature concerning FET standards and legitimate expectations, their stipulations in the IIAs and BITs, interpretation in case law. As there is no legal document that would clearly set up the elements of FET standards and their characterization, the most proper would be the analysis of arbitral practice concerning breach of FET and legitimate expectations by changing regulatory framework and the works of scholars. Rumana Islam[6], Christoph Schreuer[7], Abhijit P.G. Pandya[8] have done a significant research in establishing the FET standard and its components. Gamze Öztürk[9] in 2017 has written a master thesis about the role of legitimate expectations in balancing the investment protection and state's regulations. David Gaukrodger[10] devoted one of his papers to establishing the balance between investor protection and the right to regulate in investment treaties.

Scientific novelty of the master thesis. Even though that breach of FET standard, especially breach of legitimate expectations of investor, in the matter of changing of a state's regulatory framework has been highly invoked in the investment disputes settlement, a lot of tribunals fail to clearly set out the role of regulatory stability within the FET standard, thus failing to assuage the fears that IIAs may indeed impose excessive restraints on host states' right to regulate. Despite the fact that a lot of scholars and practical lawyers researched the question of breach of FET standard and breach of legitimate expectations investor, in the matter of changing of a state's regulatory framework, it is yet quite vague to what extend state could exercise its power to regulate its legislation and to act in the best interest of its country, in order not to violate FET standard. That is why the master thesis is concentrated on establishing an algorithm on how a tribunal should act when some adopted measures by a state contradict legitimate expectations of investor, on which the later relied when undertook the investment.

---

[6] Rumana Islam, "*The Fair and Equitable Treatment (FET) Standard in International Investment Arbitration*", Springer Nature Singapore Pte Ltd. 2018.

[7] Schreuer Christoph, "Fair and Equitable Treatnlent in Arbitral Practice," *The Journal Of World Investment & Trade*, Vol. 6 No.3 (June 2005): 357-386.

[8] Abhijit P.G. Pandya, "Interpretations and Coherence of the Fair and Equitable Treatment Standard in Investment Treaty Arbitration", (Ph.D. thesis, London School of Economics, 2011).

[9] Gamze Öztürk, "The Role of Legitimate Expectations Balancing the Investment Protection and State's Regulations", (Uppsala Universitet, 2017).

[10] Gaukrodger D., "The balance between investor protection and the right to regulate in investment treaties: A scoping paper", *OECD Working Papers on International Investment*, No. 2017/02.

The aim of the master thesis. To find out the most appropriate approach for determining what changes in the regulatory framework of a host state and under what circumstances would defeat investor's legitimate expectations and therefore, would be considered as a breach of FET.

The objectives of the master thesis. In order to achieve the established aim of this master thesis the following tasks have to be carried out:

1. To reveal the concept of FET standard and to find out its nature, origins and the most appropriate elements.
2. To analyse the legitimate expectations of investors in relation to the predictable and stable framework of a state.
3. To find out the most appropriate approach in determining whether particular changes in the state's legal regulation could be declared as inconsistent with FET.

The practical significance of the master thesis. The current research will be useful for scholars and practitioners in the field of investment law and investment disputes settlement proceedings. It will help investors and their lawyers to protect their rights; host state - to provide such legislation that will not lead to a lawsuit from the investor's side; and of course, it will be useful for judges and arbitrators that are admitted to resolve cases connected with such matter. It will also help states in concluding new BITs. Undoubtedly, this master thesis could also be useful for the students studying investment law and investment disputes settlement proceedings who wants to deepen their knowledge in such complicated issues.

Methods used in the master thesis. In the current research such methods will be used:

First of all, the methods of data collection and data analysis. As it is necessary to find out information, which is connected with the topic, to analyse and structure it, and to make appropriate deduction. So, the logical method, that allows us to make the complete vision of a problematic that is subject to the current analysis and to elaborate some reasonable solutions to it, will be used as well. It will be reflected in studying and analysing the significant amount of legal texts, case law and scholar's articles and some conclusions will be deduced. Then, method of the synthesis will be used in order to combine all relevant deductions. The teleological method will be used to discuss the ordinary meaning, purpose, and intention of the treaties and arbitral awards.

Also, a method of comparative analysis, as in order to establish that some changes of legal framework are breach of FET, it is needed to establish whether the adopted measure was relevant in that circumstances and whether another measure, less adverse, was possible. Also, it will be useful in order to compare the position of investor before and after regulatory changes.

The structure of the master thesis. It consists of several parts:

The first part of the master thesis is dedicated to the definition of FET standard, its nature, origins and elements.

During the second part of the research, the attention will be paid to one of the essential elements of FET standard – legitimate expectations of investors with its relation to changes in legal environment.

Third part deals with the establishing the approach of determining which analysis and tests should be used in order to resolve a case of a breach of the FET standard by the host state because of adoption of a particular measure in regulatory framework. The comparative analysis of case law will be shown and the required approach will be found out.

Defence statements. 1. Fair and equitable provisions in international investment agreements should be stipulated by parties as precise as possible, in addition with the determination and explanation of each element and requirements of the FET standard.

2. The investor's expectations should be determined by using balancing approach that contains a number of qualifying requirements regarding legitimacy and reasonableness of the expectations and state's representations, which have to be assessed considering all the circumstances in which the investment was made, including the prevailing situation in the state and taking into account the rights of the state.

3. Arbitrariness (or unreasonableness) and proportionality tests would help tribunal to determine what is prevailed in a particular case – the right of the host state to act in the public interest with regard to respond to changed circumstances or legitimate expectations of the investor, on which it relied when undertook the investments.

1. THE STANDARD OF FAIR AND EQUITABLE TREATMENT IN INVESTMENT LAW

In this chapter, the concept of fair and equitable treatment will be analysed. Will be researched the origins of this standard and its appearance in international investment agreements since the first time to the modern times. The primary attention will be paid to the legal nature of the standard and its interpretation.

1.1. GENERAL CHARACTERISTICS OF THE STANDARD FAIR AND EQUITABLE TREATMENT

Ensuring fair and equitable treatment (FET) of investments has always been one of the key concerns for foreign investors. In the modern investment treaty practice, the obligation to provide fair and equal treatment on a reciprocal basis is enshrined in the overwhelming majority of international investment agreements (IIAs).

In modern bilateral treaties on the promotion and reciprocal protection of investments, the definition of their general legal regime plays an essential part, as it's quite crucial in order to ensure a favourable investment climate in any country. The theory and practice of international investment law divide foreign investment regimes into absolute and relative ones. Fair and equitable treatment is an absolute standard of protection. In the case with relative standards, which are national treatment and most favoured nation (MNF) principles, the required treatment could be defined by reference to the treatment accorded to other investment. In contrast, the FET standard applies to investments in a situation without reference to how other investments or entities are treated by the host state and provides complete and unconditional protection of investments. Accordingly, the treatment must conform in terms whose exact meaning should be determined, by reference to the particular circumstances of the application.[11]

Fair and equitable treatment is a crucial element of current international investment agreements. For many years it has become the most established and successful foundation for investor demands. Notwithstanding that FET is one of the most important standards and clauses of this regime can be found in most modern bilateral investment treaties (BITs), it is still an ambiguous standard, with an extensible concept, the interpretation of which varies from case to case. Due to the breadth

[11] Schreuer Christoph, "Fair and Equitable Treatnlent in Arbitral Practice," *The Journal of World Investment & Trade*, Vol. 6 No.3 (June 2005): 367, https://files.pca-cpa.org/pcadocs/bi-c/2.%20Canada/4.%20Legal%20Authorities/RA-90%20%20C.%20Schreuer,%20Fair%20and%20Equitable%20Treatment%20%20(June%202005).pdf.

and flexibility of this concept, it can interact or even relate to other standards and fill their gaps. As a result of the wide scope of the standard, a claim for violation of a fair and equitable treatment may be satisfied, while a claim under more specific standards may be denied.

In this context, it is appropriate to underline that in the absence of an official interpretation of the standard by the contracting states, investors will tend to interpret the relevant provisions of the agreement broadly, while the respondent states themselves, on the contrary, are interested in narrowing the scope of guarantees provided to investors.

There is an opinion that fair and equitable treatment can be considered either as an independent (autonomous) standard or as a reflection of the international minimum standard under customary international law (MST) or international law in general. This has become possible due to significant differences in the draft of the clauses of fair and equal treatment in bilateral international treaties. As, some BITs have established that FET is the minimum standard of customary international law, while in others this regime is being declared without any indication to customary or international law.

The international minimum standard was formed as a custom in the first quarter of the 20th century. Thus, at the beginning of the century, the UN International Court of Justice (ICJ) considered it to be a generally binding norm in a number of cases on violation of the rights to security, personal integrity, honour and dignity of citizens of certain states on the territory of foreign states. A. H. Roth in monograph "The minimum standard of international law in relation to foreigners", expressed opinion that the attitude towards foreign citizens in the territory of any state should be regulated on the basis of its international law.[12]

It is not known precisely when fair and equitable treatment was first equated to the minimum standard, or rather, since when the international minimum standard for aliens began to be called the fair and equitable treatment of foreign investment. However, already in 1963, in the comments to the OECD Draft Convention on the Protection of Foreign Property[13], the drafters indicated that the fair and equitable treatment inherently complies with "the minimum standard, which forms part of customary international law."[14]

Nevertheless, according to F.A. Mann, a fair and equitable regime is an independent treaty standard, FET bypasses the minimum standard and provides protection to a large extent and is the

[12] Roth A. H. "*The International Minimum Standard Applied to Aliens*", (Leidan: Sijthoff, 1949): 26-27.
[13] OECD, "*Draft Convention for the Protection of Foreign Property*", O.E.C.D. Publications, (Paris, 1967): 9.
[14] Newcombe A., Paradell L., "*Law and Practice of Investment Treaties: Standards of Treatment*", (Kluwer Law International, 2009), 237.

most objective in contrast to previously applicable standards. No other standards will certainly be so significant. That is why, due to its importance, this term should be understood and used independently and autonomously.[15]

The content (specific elements) of the FET standard is constantly developing and has been specified by tribunals on a case-by-case basis.

> Although each tribunal interprets a FET provision from the investment treaty applicable in that specific case, there has been considerable convergence in terms of the elements that the FET standard incorporates, regardless of how it is expressed in the treaty. The following five main concepts have emerged as relevant in the context of fair and equitable treatment: (a) Prohibition of manifest arbitrariness in decision-making, that is, measures taken purely on the basis of prejudice or bias without a legitimate purpose or rational explanation; (b) Prohibition of the denial of justice and disregard of the fundamental principles of due process; (c) Prohibition of discrimination on manifestly wrongful grounds, such as gender, race or religious belief; (d) Prohibition of abusive treatment of investors, including coercion, duress and harassment; (e) Protection of the legitimate expectations of investors arising from a government's specific representations or investment inducing measures, although balanced with the host State's right to regulate in the public interest.[16]

It is also worth mentioning that the investor's own behaviour is an important factor in evaluating FET claims too. In particular, fraud or misrepresentation by an investor may justify government intervention. The investor is also required to conduct full due diligence in order to rationally assess the risks associated with making an investment in a particular state, as well as properly manage its investment.

Next subchapter will highlight the history of the appearance of FET in IIAs and treaties, from the first time to the modern BITs. Furthermore, the third subchapter will cover the question of legal origins of the FET standard, and connected with the ongoing dispute regarding the legal nature of the FET standard. By taking into consideration all the given facts it becomes clear why there are so many discussions over this question, as it has a huge influence on the understanding of the scope of the standard and on the dimension of imposed on host states obligations. There are few main theories on whether the FET standard is: 1) a minimum standard of treatment under customary international law; 2) a minimum standard of treatment under international law, including all sources such as treaties and general principles; 3) a separate institution of customary international law; 4) a free-standing,

---

[15] Mann F. A., "British Treaties for the Promotion and Protection of Foreign Investment", *British Yearbook of International Law* (1981), 241, https://academic.oup.com/bybil/article-abstract/52/1/241/581585?redirectedFrom=fulltext.

[16] UNCTAD, "Fair and Equitable Treatment UNCTAD Series on Issues in International Investment Agreements II", (United Nations Conference on Trade and Development, New York – Geneva, 2012), 15-16.

autonomous requirement that should be interpreted according to the plain meaning of fair and equitable treatment.[17] The entire arbitral decision on the same case could be different because of the interpretation that the arbitration will use by taking one of the approaches.

Finally, the last subchapter will describe the content of the FET standard and which obligations host state is supposed to carry out.

1.2. THE ORIGIN OF THE STANDARD OF FAIR AND EQUITABLE TREATMENT. ITS APPLICATION IN MODERN BILATERAL INVESTMENT AGREEMENTS

In most works and researches that concern FET, the history of the origin of this standard has been traced after the Second World War. The reason – is because exactly in post-war treaties we can find the precise expression of four words "fair and equitable treatment", or its equivalent – "just and equitable treatment".

The term "just and equitable treatment" first appeared in Article 11(2) of the Havana Charter for an International Trade Organization of 1948, which however never entered into force. It was stated that Organization may "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."[18]

The 1948 Economic Agreement of Bogota stated: "Foreign capital shall receive equitable treatment. The States, therefore, agree not to take unjustified, unreasonable or discriminatory measures that would impair the legally acquired rights or interests of nationals of other countries in the enterprises, capital, skills, arts or technology they have supplied."[19]

One of the striking results of the scientific (unofficial) codification of international investment law was the Draft Convention on Investments Abroad, developed in 1959 by Hermann Abs and Lord Shawcross. The first article of the Draft states: "Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties. Such property shall be accorded the most constant protection and security within the territories of the other Parties and the

[17] OECD, "Fair and Equitable Treatment Standard in International Law", *OECD Working Papers on International Investment*, (OECD Publishing, September 2004), 8.
[18] "Final Act and Related Documents", United Nations Conference on Trade and Employment (Havana, Cuba, April 1948), 11.
[19] "Economic Agreement of Bogotá", (Ninth International Conference of American States, 2 May 1948), 22, http://www.oas.org/juridico/english/treaties/a-43.html.

management, use and enjoyment thereof shall not in any way be impaired by unreasonable or discriminatory measures."[20] It seems that the Abs-Shawcross Draft used fair and equitable treatment as an umbrella clause, including protection and security and excluding unreasonable or discriminatory measures, and was based on the US treaty practice and principles of international law.[21] This wording was subsequently literally reproduced in paragraph (a) of Article 1 of the Draft Convention on the Protection of Foreign Property developed in the framework of the Organization for Economic Cooperation and Development (hereinafter - OECD) in 1963 and 1967[22], though identifying it as the international minimum standard under international customary law.

However, none of these attempts was successful. They all failed to come into force due to a lack of support; notwithstanding, they stated a practice that was included in other agreements, especially in BITs. As underlined by Martins Paparinskis: "The post-Second World War treaty-making regarding fair and equitable treatment proceeded in two ways. First, from the 1940s to the 1960s States engaged in consistently unsuccessful attempts at multilateral treaty-making. While failing on their own terms, the attempts at multilateral treaty-making were important in disseminating the concept of fair and equitable treatment that could be taken up in bilateral treaty-making."[23] The discussion on the FET standard that developed in the framework of the OECD in the 1960s inspired many states to start using this standard in their own contractual practice. Thus, the provision of granting investments fair and equal treatment became one of the characteristic features of many BITs concluded during that period.

So far, the earliest examples of the application of such regime relate to a series of the US friendship, commerce and navigation (FCN) treaties. Accordingly, the US FCN treaties with France, Belgium, Luxembourg, Greece, Ireland, Israel and Pakistan, concluded in the middle of the 20th century, guaranteed "that foreign persons, properties, enterprises and other interests would receive "equitable treatment"; while the US FCN treaties with Ethiopia, the Federal Republic of Germany, Oman and the Netherlands— "fair and equitable treatment" for a similar set of rights and obligations involved in the foreign investment process."[24] Thus, paragraph 1 of Article I of the FCN Treaty

[20] Abs, Herman and Hartley Shawcross "Draft Convention on Investments Abroad", *Journal of Public Law*, (9, 1960): 1.
[21] Paparinskis M., "*The International Minimum Standard and Fair and Equitable Treatment*", Oxford University Press, (Oxford, 2013), 91-92.
[22]OECD "Draft Convention for the Protection of Foreign Property", O.E.C.D. Publications, (Paris, 1967), 9.
[23] Paparinskis M., "*The International Minimum Standard and Fair and Equitable Treatment*", Oxford University Press, (Oxford, 2013), 90; and Vasciannie S., "Fair and Equitable Treatment Standard," *British Yearbook of International Law* (Vol. 70, 1999), 107–119.
[24] UNCTAD "Fair and equitable treatment: a sequel", *Series on International Investment Agreements II* (UNITED NATIONS, New York and Geneva, 2012),7–8.

between the United States and Germany of 1954 stipulated the contracting party's obligation to permanently provide "fair and equitable treatment to the nationals and companies of the other Party, and to their property, enterprises and other interests."[25]

Further attempts to establish IIA on the regional or international levels were much more successful. The Seoul Convention on the Establishment of the Multilateral Investment Guarantee Agency in 1985 mentions the standard of "fair and equitable treatment", however without any specification of its scope, establishing only that "in guaranteeing an investment, the Agency shall satisfy itself as to the investment conditions in the host country, including the availability of fair and equitable treatment and legal protection for the investment."[26]

Among the regional agreements that have come into force, NAFTA is a major player in the definition of the standard. Art. 1105 declares: "Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."[27] NAFTA has made a decisive contribution to the determination of the standard's meaning, especially through the Free Trade Commission's (FTC) work.

Besides NAFTA, another regional agreement making reference to the standard that is worth mentioning, is the Protocol of Colonia for the Promotion and Reciprocal Protection of Investments within MERCOSUR signed in 1994, which also grants investors from each Mercosur country fair and equitable treatment. [28]

Finally, an instrument that reflects capital-exporting views is the Energy Charter Treaty (ECT) on the subject of investment. It provides a more complex wording of the standard, which allows to detail its content: "Each Contracting Party, in accordance with the provisions of this Treaty, encourages and creates stable, equal, favourable and transparent conditions for Investors of other Contracting Parties to make Investments on its territory. Such conditions include an obligation to provide, without exception, to Investments of Investors of other Contracting Parties a fair and equal treatment."[29] The Energy Charter Treaty is considered to be one of the most advanced in terms of protection of the investor. "The ECT's investment regime has been largely adopted from NAFTA Chapter XI and UK bilateral investment treaties […] Given the time of its drafting and the influences

[25] "Treaty of Friendship, Commerce and Navigation between the United States of America and the Federal Republic of Germany", Office of Trade Agreements Negotiation and Compliance, US Department of Commerce (1954), Art. 1.
[26] "Convention Establishing the Multilateral Investment Guarantee Agency", MIGA (1985), 12.
[27] "North American Free Trade Agreement," (1992), Art. 1105.
[28] "Protocol of Colonia for the Promotion and Reciprocal Protection of Investments within MERCOSUR" (1994), Art. 3.
[29] "Energy Charter Treaty," (1994).

on it (the NAFTA, the World Trade Organization, the EU's then draft Energy Directives, BIT practice), it is possibly the most advanced text in terms of extensive investor protection."[30]

The subsequent increase in the total number of IIAs concluded in the world, which on a regular basis secure the guarantee of fair and equal treatment, has led to the fact that this standard has now become regarded as an integral element of modern treaty practice on foreign investment.[31] Thus, according to a study conducted by the former Secretary General of ICSID Ibrahim Shihata, by 1993 92% out of 335 BITs negotiated by most of the Western industrialized countries studied by him contained the provision of "fair and equitable treatment"[32].

On today's date, according to the UNCTAD database, there are 2901 BITs and 2341 of them are in force and approximately 2000 contain the fair and equitable standard.[33]

However, the results of the interpretation of the standard in different cases are not the same, and depend, in particular, on the wording of the relevant provisions of the contract, which may include additional clarifications of the content of the standard, as well as definitions of terms used in the contract.

For illustrating, a comparison can be made between the investment agreement between Great Britain and Argentina in 1990, on the one hand, and the agreement between the Russian Federation and Germany in 1989, on the other. While the treaty between Great Britain and Argentina establishes the obligation to ensure a "fair and equal treatment", without limiting it in any way, which corresponds to the approach of the aforementioned agreement on FCN between the US and Germany of 1954. The agreement between the Russian Federation and Germany contains an important clarification of the scope of the guarantee provided, limiting it to the legislation of the state receiving the investment: "Each Contracting Party, in accordance with its legislation, shall promote and permit investments made in its territory by investors of the other Contracting Party and shall accord fully equitable treatment to them in each case."[34]

---

[30] Walde T.W., "Energy Charter Treaty-Based Investment Arbitration. Controversial Issues", *The Journal of World Investment & Trade* 5, 3 (2004):376.
[31] Rachkov I.V., "The concept of "legitimate expectations of a foreign investor" in the practice of international investment arbitration", *Moscow Journal of International Law*, No. 1, (2014):196-220.
[32] Shihata Ibrahim, *Legal Treatment of Foreign Investments: The World Bank Guidelines* (Martinus Nijhoff Publishers, 1993), 233-237.
[33] International Investment Agreements Navigator, Accessed 9 May 2020, https://investmentpolicy.unctad.org/international-investment-agreements.
[34] "Agreement concerning the promotion and reciprocal protection of investments (with protocol)", Federal Republic of Germany and Union of Soviet Socialist Republics, (1989), Art. 2.

Another way to clarify the scope of the guarantee (with reference to general international law) is found in a bilateral investment treaty between the US and Turkey in 1985, which provides that FET should be interpreted in a "manner consistent with international law"[35].

The official approach of the state on the formulation of the standard can be manifested in its model bilateral investment agreement. The standard form of the BIT can be developed and approved by the authorized body of the corresponding state in order to indicate the terms of the contract that are desirable from the point of view of the interests of this state, and also serve as a starting point in the negotiation process regarding its conclusion. Thus, the Italian model BIT of 2003 is limited to a mere reference to the "just and fair treatment to investments" and that investments "shall in no way be the object of unjustified or discriminatory measures"[36], without suggesting any conditions that clarify the content of FET. The 2012 United States Model Bilateral Investment Treaty, on the contrary, provides a detailed description of the standard, thereby providing a more predictable result of its interpretation. Article 5 of this document proposes to consider the fair and equitable treatment as an integral element of the international minimum standard.[37] Clause 2 of Article 5 further establishes that the guarantee of fair and equitable treatment (together with the guarantee of full protection and security) does not imply such treatment of foreign investment that would go beyond customary international law minimum standard of treatment of aliens. It is stated that "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world."[38]

Hence, the above examples indicate that the content of the standard may be different in each case. It should be noted that the US restrictive approach to formulating a standard (i.e. its maximum specification) is an exception; in most cases, the standard is formulated broadly with minimal clarification regarding its content or without it. The laconicism of the wording is generally characteristic of investment agreements, but it cannot serve as a measure of the significance of certain provisions.

Reflecting on the reasons that encourage states to stipulate the standard of fair and equal treatment in the agreements by general phrases without any detail, K. Yannaka-Small suggests that "the vague wording is used in the agreements intentionally in order to give arbitrators the opportunity

[35] "Treaty between The United States of America and the Republic of Turkey concerning the reciprocal encouragement and protection of investments", (1985), Art.2.
[36] "Agreement between the Government of the Italian Republic and the Government of … on the promotion and protection of investments", Art. 2.
[37] "U.S. Model Bilateral Investment Treaty" (2012), Art. 5.
[38] Ibid, Art. 9.

to independently to formulate a list of principles necessary to achieve the purpose of the contract in resolving specific disputes."[39] She also notes that a number of states take the position according to which the lack of guidance (instructions) for arbitrators regarding the content of the standard makes it possible to bring the results of its interpretation closer to the implementation of the principle ex aequo et bono ("from equity and conscience"). Following this logic, P. Weil notes that "the standard of a "fair and equal treatment" is definitely no less effective than the standard of "due process", and future practice of its interpretation, including arbitration practice, will fill it with specific content."[40]

However lately, states preferer to be more precise in stipulating the definition of the FET standard. For instance, the Netherlands Model Investment Agreement on 22 March 2019 adopts and broader the US model and declare in Art. 9:

> 1. Each Contracting Party shall ensure fair and equitable treatment of the investments of investors of the other Contracting Party. […]
> 2. A Contracting Party breaches the aforementioned obligation of fair and equitable treatment where a measure or series of measures constitutes:
> a) Denial of justice in criminal, civil or administrative proceedings;
> b) Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;
> c) Manifest arbitrariness;
> d) Direct or targeted indirect discrimination on wrongful grounds, such as gender, race, nationality, sexual orientation or religious belief;
> e) Abusive treatment of investors such as harassment, coercion, abuse of power, corrupt practices or similar bad faith conduct; or
> f) A breach of any further elements of the fair and equitable treatment obligation adopted by the Contracting Parties in accordance with paragraph 3 of this Article.
> 3. The Contracting Parties shall, upon request of a Contracting Party, review the content of the obligation to provide fair and equitable treatment and may complement this list through a joint interpretative declaration within the meaning of Article 31, paragraph 3, sub a, of the VCLT.
> 4. When applying paragraph 2 of this Article, a Tribunal may take into account whether a Contracting Party made a specific representation to an investor to induce an investment that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain that investment, but that the Contracting Party subsequently frustrated.[41]

The aforesaid shows that treaty law is the primary source for provisions concerning the FET standard. Despite the fact that there were many multilateral investment efforts to establish a provision regarding the standard, BITs continue to be the major source of information about the standard. States

[39] Yannaca-Small C., "Fair and Equitable Treatment Standard in International Investment Law," *Journal of International Economic Law (China)*, Vol.13, No.3 (2006): 2-3.
[40] Weil P., "The State, The Foreign Investor, and International Law: The No Longer Stormy Relationship of a Ménage à Trois", ICISD Review, *Foreign Investment Law Journal*, Vol. 15 (2000): 415.
[41] "Netherlands Model Investment Agreement" (2019), Art. 9.

have adopted a wide variety of approaches of defining FET: either recognizing fair and equitable treatment as customary law[42]; or limiting it to customary international law minimum standard of treatment of aliens[43]; providing examples of what fair and equitable treatment means[44], or combining a number of those elements[45]. The multilateral experience is equally varied: "the NAFTA suggests some relationship between treaty and custom, and the early arbitral attempts to separate them have been authoritatively interpreted away by the NAFTA FTC; the ECT provides for fair and equitable treatment in parallel to other customary and treaty rules, and the recent ASEAN Comprehensive Investment Agreement limits fair and equitable treatment to denial of justice without invoking customary law at all[46]".[47]

1.3. LEGAL ORIGIN OF THE FAIR AND EQUITABLE TREATMENT STANDARD

The independence of the legal regime provided within the framework of the FET standard, as well as the nature of the issues it regulates, provoke a long discussion among theorists and practitioners regarding the legal nature of the standard and its relationship with the MST and customary international law or international law in general. On this issue, there are few concepts:

1) the standard is the treaty expression of the MST, and, accordingly, is limited by its content;

2) the standard is a separate institution of customary international law, and, accordingly, may imply a higher standard for the protection of foreign investment than the MST;

3) the standard is an expression of the minimum standard but should be interpreted within international law; and

---

[42] "Norway Draft Model BIT" (2007), Art. 5: "Each Party shall accord to investors of the other Party, and their investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security".

[43] "Canada Model Foreign Investment Protection Agreement (FIPA)" (2014), Art. 6: "1. Each Party shall accord to a covered investment treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security. 2. The concepts of "fair and equitable treatment" and "full protection and security" in paragraph 1 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens".

[44] "Colombia - United Kingdom BIT" (2010), Art. 2: "3. Each Contracting Party shall accord fair and equitable treatment and full protection and security in its territory to investments of investors of the other Contracting Party. 4. For greater certainty: (a) The concepts of "fair and equitable treatment" and "full protection and security" do not require additional treatment to that required in accordance with international law; (b) "Fair and equitable treatment" includes the prohibition against the denial of justice in criminal, civil, or administrative proceedings in accordance with the principle of due process embodied in the main legal systems of the world".

[45] " U.S. Model Bilateral Investment Treaty" (2012), Art. 5.

[46] "ASEAN Comprehensive Investment Agreement", Art 11(2)(a).

[47] Paparinskis M., *The International Minimum Standard and Fair and Equitable Treatment*, Oxford University Press, (Oxford, 2013), 93-94.

4) the standard is an independent treaty provision, the content of which must be identified separately in each case, applying the rules of the VCLT.[48]

1.3.1. THE FAIR AND EQUITABLE TREATMENT STANDARD AS A MINIMUM STANDARD OF TREATMENT

As constantly underlined by UNCTAD, the FET standard, no matter how expressed, emerged as an expression of the international minimum standard of treatment of aliens (MST).[49] On this point, as stated above, there are two different opinions: whether it is the standard under international customary law or under international law in general, including general principles and all the treaties, that significantly broaden the scope for interpretation.

The MST is the norm of customary international law that governs the treatment of foreigners, providing them with a minimum set of rights and guarantees which states must respect and provide, regardless of their domestic legislation and or treatment of their nationals. Violation of this norm may cause international responsibility on the part of the state.

Edwin M. Borchard in his work "Basic Elements of Diplomatic Protection of Citizens Abroad" wrote:

> The alien derives his rights, - fundamental or human rights and others, - by grant from the territorial legislature, international law fixing a minimum which cannot be transcended and authorizing certain agencies, usually the national state, to remedy and punish a breach… This minimum standard below which a state cannot fall without incurring responsibility to the other members of the international community has been shaped and established by the advance of civilization and the necessities of modem international intercourse on the part of individuals. [50]

1.3.1.1. FAIR AND EQUITABLE TREATMENT AS A MINIMUM STANDARD UNDER INTERNATIONAL LAW

The emergence of the term "minimum standard" is often connected with the Elihu Root's speech to the American Society of international law in 1910. During the speech he set out the standard's legal basis, that was based on "the universally accepted principles of justice" that were

[48] "Vienna Convention on the Law of Treaties 1969", Art. 31.
[49] UNCTAD "Fair and equitable treatment: a sequel", *Series on International Investment Agreements II*, (UNITED NATIONS, New York and Geneva, 2012), XIV (15).
[50] Borchard E., "Basic Elements of Diplomatic Protection of Citizens Abroad," *American Journal of International Law 7*, no. 3 (1913): 507, 516.

recognized in the laws of "all civilized countries". However, Root didn't use the term "minimum standard", but the term "international standard of justice":

> There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own citizens is that its system of law and administration shall conform to this general standard. If any country's system of law and administration does not conform to that standard, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens. [51]

Next prominent step was the adoption of the Statute of the Permanent Court of International Justice. During the work of drafting committee, Root underlined that "it had been impossible to establish this Court because Great Britain wished to know the scope of the principles of justice and equity which the Court was to apply."[52] "The President agreed with Mr. Root that it would be dangerous to allow the judges to apply the law of right and wrong exclusively according to their own personal understanding of it. [He] wished to indicate the lines which the judges must follow and compel them to conform to the dictates of the legal conscience of civilised nations."[53] According to the President's opinion "the various sources of law should be examined successively. The first rule was that if there were a text, a conventional rule, it must be applied. Failing a rule of this kind, international custom must be applied. If neither law nor custom existed, could the judge pronounce a non-liquet? The President was convinced that he could not; the judge must then apply general principles of law." Root generally agreed, but he stated that it might be misinterpreted as allowing the PCIJ to apply "what it deems to be the conscience of civilised peoples". Therefore, Root proposed the text that became Article 38 (3) of the PCIJ Statute, which required the PCIJ to apply "the general principles of law recognised by civilised nations." Root explained that the PCIJ could apply any "principle of law [that] was universally recognised." [54]

Therefore, what is extremely important on this stage of my research, the Committee confirmed that the drafters equated the "general principles of law recognized by civilized nations"

---

[51] Root Elihu, "Basis of Protection to Citizens Residing Abroad," *American Journal of International Law 4*, no. 3 (1910): 521-522.
[52] "14th Meeting (Private), Held at the Peace Palace, the Hague, on July 2nd, 1920," *Proces-Verbaux of the Proceedings of the Committee June 16th - July 24th 1920 with Annexes 1* (1920): 308-309.
[53] Ibid, 318.
[54] Ibid.

with the "general principles of justice and equity", which leads to the thought that FET is more connected with international law in general, rather than just with customary law.

Andrew Blandford in his work about history of FET stated that

> early twentieth-century scholars frequently explained that 'the international minimum standard is compounded of general principles recognized by the domestic law of practically every civilized country'. Today, these principles are known as 'the general principles of law recognized by civilized nations', but, when the minimum standard first emerged, they were often called 'the general principles of justice and equity'. The term 'just and equitable treatment' referred to treatment in accordance with the general principles of justice and equity - and, thus, treatment in accordance with the minimum standard.[55]

In the work of Edwin Borchard published in 1939 were indicated such words: "when aliens are admitted into a country the country is obligated to accord them that degree of protection of life and property consistent with the standards of justice recognized by the law of nations."[56]

Even in the eighteenth century we can find examples of using principles of justice and equity as a limitation of sovereign power in order to protect foreigners. As Emer de Vattel stated: "justice and equity did not permit a sovereign to take without compensation or to inflict 'terrible punishments' on prisoners."[57] Treaties of this period often appealed to justice and equity when prohibiting the arbitrary seizure of persons or property. For instance, in 1794 the Treaty of Amity, Commerce and Navigation between Great Britain and the United States was signed. It has become one of the first modern arbitration treaty, the so-called Jay Treaty. Article VII of the Treaty stated that if US nationals could not obtain compensation for expropriations by the British "in the ordinary course of Justice" in British courts, then a joint Commission would award them compensation "according to justice, equity and the laws of nations"[58]. And in two years, in 1796 the Commission supported a so-called "fair and equitable claim" in the Betsey case, which was the first opportunity to interpret the justice and equity provision of the Jay Treaty. The US Claimant declared that the British had taken his ship and cargo without compensation.[59] The Commission concluded that domestic decision had settled the title of the property, however, there might exist a fair and equitable claim for full compensation for the losses

---

[55] Blandford A., "The History of Fair and Equitable Treatment before the Second World War", *ICSID Review*, Vol. 32, No. 2 (2017), 287–303.
[56] Borchard E., "The "Minimum Standard" Of The Treatment Of Aliens," *Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969) 33 (1939)*: 51-74.
[57] Emer de Vattel, "Les Droits des Gens" (1758), qouted in Stapelbroek K., Trampus A., *The Legacy of Vattel's Droit des gens* (Palgrave Macmillan, 2019),3.
[58] "Treaty of Amity, Commerce and Navigation between Great Britain and the United States" (signed 19 November 1794, entered into force 28 October 1795), Art. VII.
[59] "Betsey Case" (1796), reprinted in Moore J.*,1 International Arbitration* (1796): 326.

incurred by such condemnation. Thus, the Commission adjudicated the claimant compensation for the taken property based on the Treaty's justice and equity provision.[60]

In the Neptune case of 1797, another US Claimant received compensation for the expropriation of a vessel by the British. According to a majority of the Commission, full and complete compensation "was the standard of compensation for expropriation that was conformable to justice, equity, and the law of nations."[61] In other words, this was the standard required by the law of nations as derived from the general principles of justice and equity.[62]

Taking into account aforesaid, it seems to me that the FET standard, if to be treated as MST, then at least should be interpreted under international law in general.

1.3.1.2. FAIR AND EQUITABLE TREATMENT AS A MINIMUM STANDARD UNDER INTERNATIONAL CUSTOMARY LAW

However, an official commentary on article 1 of the Draft Convention on the Protection of Foreign Property states that fair and equitable treatment is customary in the relevant bilateral agreements and means a "minimum standard which forms part of customary international law. Each Party must not only grant but "ensure", the fair and equitable treatment of the property of nationals of the other Parties. It will, of course, incur responsibility for any acts or omissions which may be properly attributed to it under customary international law."[63]

Indeed, some scholars as Pamela Gann, Robert Paterson and others consider fair and equitable to be one of the elements of the minimum standard of treatment of foreigners and their property under international customary law.[64] "Recently, the question has been raised whether the content of the minimum standard is limited to the interpretation given to it in the early 20th century in the context of the Neer and Roberts' cases or refers to an evolving customary law which has been influenced by the extensive network of BITs."[65]

---

[60] Ibid, 326-328.
[61] "Neptune Case," reprinted in Moore J., *4 History and Digest of International Arbitrations to which the US has been a party* (1898): 421.
[62] Ibid.
[63] OECD, "Draft Convention for the Protection of Foreign Property", O.E.C.D. Publications, (Paris, 1967), Art.1.
[64] Gann Pamela, "The US Bilateral Investment Treaty Program", *Stanford Journal of International Law*, Volume 21 (1985): 373, 389; Robert K. Paterson "Canadian Investment Promotion and Protection Treaties", *Canadian Yearbook of International Law*, Volume 29 (1992): 373-390.
[65] OECD, "Fair and Equitable Treatment Standard in International Law", *OECD Working Papers on International Investment*, (OECD Publishing, September 2004), 9.

In the Neer case 1926, the Mexican - American Claims Commission examined the US lawsuit against Mexico for inappropriate investigation and punishment of those responsible for the murder of US citizen Paul Neer. The Commission acknowledged that Mexico did not violate the minimum standard for the treatment of foreigners and that its authorities showed due diligence in the investigation of the murder. This case went down in history thanks to the first written (although not official) formulation of the international custom of the minimum standard for foreigners, which was given in the decision of the case by an international tribunal and was called the "Neer standard"[66]. According to the "Neer standard", "the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful 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."[67] Thus, the "Neer standard" is a recognized formulation of the international custom of the minimum standard for foreigners in its classical sense.

The most successive supporter of identifying FET with MST is the United States of America. This is confirmed by the practice of concluding investment treaties and FTAs in which FET does not establish any other rights besides those provided for in the framework of the international custom of the minimum standard for treatment of aliens.[68]

The United States came to this conclusion not by accident: this was facilitated by the extensive practice of resolving of investment disputes within the framework of NAFTA, a significant part of which were disputes about the violation of fair and equitable treatment of investors. It is important to note that the US does not perceive the "Neer standard" as a threshold for violating the minimum standard and considers FET as an evolving international minimum standard for foreigners, without, however, defining its exact content or specific differences from the classical minimum standard.[69] Under Article 1105(1) of the NAFTA "Minimum Standard of Treatment", each Party committed to "accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."[70] Such wording has caused concerns among the Contracting Parties after the NAFTA arbitration tribunal in Pope and Talbot v. Canada ruled that the FET standard was "additive" to the international minimum standard. Following that arbitral award, the NAFTA FTC, composed of representatives of the three

[66] "Neer L. F. H. & Pauline Neer (U.S.A.) v. United Mexican States," 4 UNRIAA 60 (1926).
[67] Ibid.
[68] "Notes of Interpretation of Certain Chapter 11 Provisions," *NAFTA Free Trade Commission* (July 31, 2001).
[69] Velyaminov G.M., *International Economic Law and Process (Academic Course),* Volters Kluver (2004), 360.
[70] "North American Free Trade Agreement", Art. 1105.

NAFTA countries, published in 2001 the Notes of Interpretation, which rejected any notion that NAFTA Article 1105 contained any elements that were "additive" to the international minimum standard. Namely, it was said: "Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."[71] Exactly the language of the Notes has been used in numerous IIAs and BITs.[72] Further, in ADF Group Inc. v. the US case, the United States declared that "the customary international law referred to in NAFTA Article 1105 (1) is not "frozen in time" and that the minimum standard of treatment does evolve. The FTC interpretation "in the view of the United States refers to customary international law "as it exists today."[73]

In 2002 in Mondev International LTD v. United States of America case tribunal stated:

> the term 'customary international law' refers to customary international law as it stood no earlier than the time at which NAFTA came into force. It is not limited to the international law of the 19th century or even of the first half of the 20th century, although decisions from that period remain relevant. In holding that Article 1105(1) refers to customary international law, the FTC interpretations incorporate current international law, whose content is shaped by the conclusion of more than two thousand BITs and many treaties of friendship and commerce.[74]

The WTO Secretariat for the Working Group on the Relationship between Trade and Investment in 2002 published a document stating that the principle of FET has originated from customary international law and is generally considered "to cover the principle of non-discrimination, along with other legal principles related to the treatment of foreign investors, but in a more abstract sense than the standards of MFN and national treatment."[75]

Some of the BITs, as Rwanda-United States BIT (2008), even contain a separate annex that explains that the term "customary international law" in the FET clause refers to all principles of

---

[71] "Notes of Interpretation of Certain Chapter 11 Provisions," *NAFTA Free Trade Commission* (July 31, 2001).
[72] "Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area" (2009), "the Japan-Philippines FTA" (2006), "the China-Peru FTA" (2009), "the Malaysia-New Zealand FTA" (2009), "the India-Republic of Korea Comprehensive Economic Partnership Agreement" (2009).
[73] "ADF Group Inc. v. United States of America, ICSID Case No ARB(AF)/00/1," Award, para. 179, Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0009.pdf.
[74] "Mondev International LTD v. United States of America, ICSID Case No. ARB(AF)/99/2," Award, para. 125, Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita1076.pdf.
[75] "Non-discrimination most-favoured-nation treatment and national treatment," *WTO, Note by the Secretariat* (4 June 2002), Accessed 9 May 2020, http://www.jmcti.org/2000round/com/doha/wg/WT_WGTI_W_118.pdf.

customary international law for the protection of the economic rights and interests of aliens[76]. As it is underlined by UNCTAD:

> An explicit link between the FET obligation and the MST is used in these treaties to prevent over expansive interpretations of the FET standard by arbitral tribunals and to further guide them by referring to an example of gross misconduct that would violate the MST – denial of justice. By limiting the source of FET to customary international law, these treaties seek to rein in the discretion of tribunals when considering its content. In other words, treaties incorporating a reference to the minimum standard of treatment of aliens under customary law send out a message to arbitrators that the latter cannot go beyond what customary international law declares to be the content of the minimum standard of treatment.[77]

NAFTA cases have also exposed certain problems of applying FET as part of the minimum standard of treatment of aliens, in particular, that the latter was largely developed in the context of claims regarding treatment of individuals (not businesses), outside the context of economic policymaking. Furthermore, given that the MST forms part of customary international law, a claimant would carry a heavy burden of demonstrating general and consistent state practice and opinio juris in order to show that the minimum standard incorporates a certain substantive requirement. For these reasons, a link between FET and the MST has been mostly useful, not from the point of view of the substantive content of the obligation, but as an expression of the gravity of the conduct required for that conduct to be held in violation of the standard.

However, commenting on the standard of FET in investment agreement with the participation of the United Kingdom, F. A. Mann concludes that "the concept of fair and equitable treatment implies behaviour that goes far beyond the minimum standard."[78] G. M. Velyaminov also does not agree to link the FET treatment regime as a category of international investment law with the international custom of the minimum standard for foreigners: "the minimum is something else: for example, the right of a foreigner to make routine necessary transactions, rent a house, receive protection against illegal actions, etc."[79] Indeed, the identification of FET with MST, firstly, significantly expands the latter, and, secondly, undeservedly narrows the scope of rights and guarantees and reduces the threshold of violation of the former. It seems that such an interpretation of the concept is beneficial

---

[76] "Rwanda-United States BIT" (2008), Accessed 9 May 2020, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2241/download.

[77] UNCTAD "Fair and equitable treatment: a sequel", *Series on International Investment Agreements II*, (UNITED NATIONS, New York and Geneva, 2012), 28.

[78] Mann F. A., "British Treaties for the Promotion and Protection of Foreign Investment", *British Yearbook of International Law* (1981), 241.

[79] Velyaminov G.M., *"International Economic Law and Process (Academic Course)",* Volters Kluver (2004), 360.

for the countries that accept investments, since it facilitates the burden of obligations and guarantees that states must fulfil in relation to foreign investors under the FET regime.

1.3.2. THE FAIR AND EQUITABLE TREATMENT STANDARD AS INDEPENDENT STANDARD

1.3.2.1. THE FAIR AND EQUITABLE TREATMENT STANDARD AS SEPARATE CUSTOMARY RULE IN INTERNATIONAL LAW

To my mind, the statement that the standard is an independent institution of customary international law that exists separately from the international minimum standard is not correct. Such opinion is connected with the assumption that their extreme prevalence in the contractual practice of states could lead to the formation of a customary legal norm. The UN International Law Commission described this process as follows: "it is generally recognized that an international treaty creates rules that oblige only contracting parties on the basis of reciprocity; however, it must be remembered that these rules become "generalized" through the conclusion of other similar agreements containing identical or similar provisions". It should be noted, however, that the described mechanism is not absolute. Despite the fact that the practice of guaranteeing a FET has indeed become widespread, it in itself "does not create a presumption in favour of the existence of a customary rule of international law."[80]

As noted by the ICJ in the North Sea Continental Shelf cases in 1969, the practice of states becomes an international legal custom only if the actions constituting the practice were carried out "in such a way as to testify about the belief that this practice is considered mandatory by virtue of the existence of a rule of law [...] States must, therefore, feel that they will reconcile their actions with what is consistent with a legal obligation" (opinio juris).[81] In the words of the former Secretary General of the ICSID, Professor I. Shikhat, "opinio juris" is a way to complete the "perfect" state practice.[82]

---

[80] "Documents of the twelfth session including the report of the Commission to the General Assembly," *Yearbook of the International Law Commission 1960* (United Nations, New York, 196), vol. II., p. 145.
[81] "North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)," (Judgment of February 20, 1969), *ICJ Reports* (1969), para 77, Accessed 9 May 2020, https://www.icj-cij.org/files/case-related/51/051-19690220-JUD-01-00-EN.pdf
[82] Shihata F.I., "The Treaty as a Law-Declaring and Custom Making Instrument," *Revue Egyptienne de Droit International Vol. 22* (1966):73.

Thus, the assertion that states recognize the practice of applying FET to foreign investment as mandatory in all cases (outside of specific contractual relations) is likely to be premature. Recognizing this practice as a rule of law would mean that states are obliged to provide foreign investors with the appropriate treatment, regardless of whether there is an IIA obliging them to do so. Such a conclusion, however, does not currently have any supporting evidence.

1.3.2.2. FAIR AND EQUITABLE TREATMENT AS INDEPENDENT TREATY PROVISION

Even in cases under Article 1105 (1) of the NAFTA, the question of whether FET is an independent standard for contracts or not remains controversial. In SD Myers v. Canada case, the tribunal held that fair and equitable treatment was the minimum standard.[83] While in the Pope & Talbot Inc. v. The Government of Canada, almost in the same period of time and under the same UNCITRAL rules, the tribunal ruled that a FET was a standard that was higher than the minimum standard. It was found that FET is an addictive one, which does not contain threshold restrictions that may be applicable in the process of developing measures under the minimum standard of international law.[84]

Despite the obvious similarities between the standards, the statement of their equivalence, at least, raises doubts. On this point, I would like to underline, that despite the fact that NAFTA in its article 1105 clearly treats FET as a part of the requirements of international law, in the abovementioned Notes of NAFTA, FTC outrageously denied this wording and limited the FET standard to the MST. Moreover, the question arises: if we already had MST, why the FET standard emerged? I think that the protection covered by the FET standard can go beyond MST, which will attract more investors, which in turn will definitely be favourable for host countries.

Indeed, the recognition of such a statement as accurate would deprive the FET standard of any originality and would actually mean that its mere mention in international investment agreements is unnecessary and meaningless since the international minimum standard is applied regardless of whether there is an agreement obliging states to apply it. According to Dolzer R. and Stevens M. "the fact that parties to BITs have considered it necessary to stipulate this standard as an express obligation

[83] "S.D. Myers, Inc. v. Government of Canada," UNCITRAL, Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0754.pdf
[84] "Pope & Talbot Inc. v. The Government of Canada," UNCITRAL, Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0683.pdf

rather than rely on a reference to international law and thereby invoke a relatively vague concept such as the minimum standard is probably evidence of a self-contained standard. Further, some treaties refer to international law in addition to FET, thus appearing to reaffirm that international law standards are consistent with, but complementary to, the provision of the BIT."[85]

Commenting on this issue, the tribunal in the case of Saluka v. Czech Republic did not support the position of the Czech Republic and noted that in order to recognize a violation of the FET standard under the investment agreement, the inappropriateness of the state's actions should be established to a lesser extent than that required to violate the MST. In other words, FET implies a higher level of investment protection than the international minimum standard.[86] As a logical justification for such a position, the arbitration noted that the MST applies in all situations, even if the state does not openly encourage foreign investment, while investment agreements aim to encourage investment, which in itself implies a higher level ensuring them.[87]

Opponents of identifying an international minimum standard with the FET standard argue that if the drafters of IIAs understood the term "fair and equal treatment" as the MST, they would not have created a new term and included it into the treaty. In response to this, proponents of the approach object that the new term is more politically neutral, does not have an ambiguously assessed historical past and appears only as a more acceptable modification of the international minimum standard for foreigners.

What is more, the opponents often adduce the opinion of F. A. Mann: "Fair and equitable treatment goes far beyond the minimum standard for foreigners, provides a more significant level of investment protection and on a more objective basis. A tribunal would not be concerned with a minimum, maximum or average standard. It will have to decide whether in all circumstances the conduct in issue is fair and equitable or unfair and inequitable. No standard defined by other words is likely to be material. The terms are to be understood and applied independently and autonomously."[88]

In MTD v Chile, in 2004 the tribunal interpreted FET by referring to the VCLT and the Oxford Dictionary of Current English. The arbitration also relied on the opinion of experts, on the basis of which it follows that FET is a widely used standard that encompasses fundamental standards such as integrity, due process, non-discrimination and proportionality. Further, referring to the subject

---

[85] Dolzer R., Stevens M., *Bilateral Investment Treaties, ICSID* (Martinus Nijhoff Publishers, 1995), 60.
[86] "Saluka Investments B.V. (The Netherlands) v. The Czech Republic," UNCITRAL, Partial Award, paras. 292–293, Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0740.pdf.
[87] Ibid.
[88] Mann F. A., "British Treaties for the Promotion and Protection of Foreign Investment", *British Yearbook of International Law* (1981), 241.

and purpose of the BIT, the tribunal ruled: "[...] in terms of the BIT, FET 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 behaviour of the State or avoidance of prejudicial conduct to the investors." [89]

Deciding on the case of Sempra v. Argentina in 2007, the arbitration cited a fragment from the article of R. Dolzer[90]: "the purpose of the standard in the practice of BITs is to fill in the gaps that remain after the application of more specific standards in order to achieve the level of investor protection that was expected when concluding the agreement."[91] The tribunal in PSEG v. Turkey in its findings stated that "the concept of FET acquiring a standing on its own, separate and distinct from that of other standards."[92]

In the case of Azurix Corp. v. Argentina in 2009, the arbitration analysed the FET standard contained in the BIT between the United States and Argentina of 1991. The relevant provisions of the agreement required that the investment shall be ensured with FET and shall in no case be accorded treatment less than required by international law. The arbitral tribunal concluded that "the clause, as drafted, permits to interpret FET […] as higher standard 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." [93] This conclusion was made with reference to Article 31 of the VCLT, according to which, when interpreting the treaty, a tribunal should be guided by the usual meaning given to terms in their context, as well as in the light of the object and purpose of the treaty.

In Cervin and Rhone v. Costa Rica case in 2017 the Tribunal started from the differentiation of the Article 1105 of NAFTA and Article 4.1 of the BIT. It was defined that the former makes an explicit reference to the "minimum standard" and to "international law". As long as Article 4.1 of the BIT did not include a "minimum standard", there was no need to investigate the BIT's provision of FET as the MST. Following that, the Tribunal investigated the meaning of the term "fair and equitable

[89] "MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7," para. 113, Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0544.pdf
[90] Dolzer R., "Fair and equitable treatment: a key standard in investment treaties," *The International Lawyer*, Vol. 39, No.1 (2005): 90, https://scholar.smu.edu/cgi/viewcontent.cgi?article=2319&context=til.
[91] "Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16," ICSID, Award, para. 297.
[92] "PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey, ICSID Case No. ARB/02/5," para. 239, Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0695.pdf.
[93] "Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12," Award, para. 361, Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0061.pdf.

treatment" in light of the phrasing of the Article 4.1 of the BIT, and entrusting MTD v. Chile, summarized that FET entails that the Contracting States treat foreign investments with justice and reason, along with equity, and constantly bearing in mind the specific facts of each case. [94]

In conclusion, I would like to underline that the analysis of existing IIAs and arbitration practice, as well as the works of investment law theorists, shows that the question of the legal nature of the FET standard has not been adequately addressed at both the theoretical and practical levels, in order to explicitly state which one of these concepts is accurate. The best approach is to interpret its meaning on a \ case by case basis, depending on precise wording of the standard in the IIA. Nevertheless, in my opinion, equating MST and FET is not correct. On this point, a reasonable question arises: is there a need to provide a special standard for the protection of foreign investments in IIA, if they are already protected by the well-known international minimum standard which is the part of international customary law and will be applied to the international relationship regardless if it was mentioned in the agreement or not? Thus, the FET standard supposed to create better legal protection for investments in order to produce a positive incentive for foreign investors. Exactly for this purpose bilateral investment treaties are designed – to promote foreign direct investments.

1.4 INTERPRETATION OF A CONTENT OF THE FAIR AND EQUITABLE TREATMENT STANDARD

It should be taken into account that FET, like any legal doctrine, consists of elements determined in practice. However, the vagueness of this concept has contributed to significant problems in its interpretation and determining its elements. As already been stated, interpretation of the FET standard depends on the wording of the FET provision in the BIT and, of course, on consideration of the arbitrators. That is why investment tribunals have played a significant role in developing the substance of the standard.

Professor Muchlinski has asserted that the concept of FET "is not precisely defined. It offers a general point of departure in formulating an argument that the foreign investor has not been well treated by reason of discriminatory or other unfair measures being taken against its interests. It is, therefore, a concept that depends on the interpretation of specific facts for its content. At most, it can

[94] "Cervin Investissements S.A. y Rhone Investissements S.A. v Costa Rica, ICSID case No. ARB/13/2," Award, paras. 451–454, 460-462, Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/italaw9215.pdf.

be said that the concept connotes the principle of non-discrimination and proportionality in the treatment of foreign investors."[95]

It is assumed that the FET standard encumbers the host state with a number of obligations, each of them has separate legal content and requirements. Such obligations, in particular, include obligations to ensure the stability and transparency of the investment regime, to justify the investor's reasonable legitimate expectations regarding the guaranteed investment regime, in good faith comply with contractual obligations to the investor ("pacta sunt servanda"), avoid illegal treatment of foreign investments ("arbitrary and abusive treatment"), including such forms of ill-treatment as discrimination, coercion, duress, harassment and denial of justice, as well as ensuring due process in the resolution of disputes.

The practice of resolving international investment disputes shows that at present, the arbitrators and parties to the disputes have gained considerable experience in interpreting the standard of fair and equal treatment, which allows us to determine the main positions on the issues of its content and scope.

As underlined by UNCTAD in its report, "The significant number of decided cases has generated some salient trends clarifying the content of the FET standard. […] these include the limited protection of investors' legitimate expectations, a prohibition of arbitrary and discriminatory treatment, denial of justice and abusive conduct towards investors. Other elements, such as transparency, consistency, legality and stability of regulatory framework, have featured in a number of arbitral awards, but it appears premature to speak about a consensus in relation to those, given the concern and criticism they have raised and the fact that some of those them were drawn from the preamble of the applicable treaty and not from the FET obligation itself."[96]

The OECD stated that in interpreting the content of FET, tribunals "have gone beyond the specific discussion on the relationship between" the FET standard and MST and "attempted to identify the elements encompassed in this standard. These elements can be analysed in five categories: a) Obligation of vigilance and protection, b) Due process including non-denial of justice and lack of arbitrariness, c) Transparency, d) Good faith – which could include transparency and lack of arbitrariness and e) Autonomous fairness elements."[97]

---

[95]Muchlinski Peter, "Multinational Enterprises and the Law," (Oxford University Press; 2 edition, 2007), 625.
[96] UNCTAD "Fair and equitable treatment: a sequel", *Series on International Investment Agreements II*, (UNITED NATIONS, New York and Geneva, 2012), 90.
[97] OECD, "Fair and Equitable Treatment Standard in International Law", *OECD Working Papers on International Investment*, (OECD Publishing, September 2004), 26.

Five groups of principles recur in the more detailed specification by arbitral tribunals as elements of FET: the requirement of 1) stability, predictability and consistency of the legal framework; 2) the protection of legitimate expectations; 3) the requirement to grant procedural and administrative due process and the prohibition of denial of justice; 4) the requirement of transparency; and 5) the requirement of reasonableness and proportionality.

However, despite the prevalence of some elements of the standard, absolute generalizations regarding its content seem premature. The results of the interpretation of the standard in different cases are not the same, and depend, in particular, on the wording of the relevant provisions of the contract, which may include additional clarifications of the content of the standard, as well as definitions of terms used in the contract.

Considering the topic of my research, I will not concentrate on each of these elements. However, some of them, protection of investor's legitimate expectations, stability of regulatory framework and requirement of reasonableness and proportionality will be discussed in further chapters.

2. LEGITIMATE EXPECTATIONS AS AN ELEMENT OF FAIR AND EQUITABLE TREATMENT

One of the requirements to host state that FET standard hold is ensuring a stable legal framework that is connected with legitimate expectations of investors. That is why, when we are saying that a host state violated the FET standard by making some changes in the regulatory framework, we mean that the legitimate expectations of the investor were frustrated by such an action of the host state. That is why in this chapter, the research of the notion of legitimate expectations of the investor will be made, with defining several approaches to identifying the violation of such expectations.

2.1. THE PRINCIPLE OF THE PROTECTION OF LEGITIMATE EXPECTATIONS

The principle of legitimate expectations originated from English administrative law, which was first used by Lord Denning in 1969, and from that time onwards, it has become a significant doctrine of public law in almost all states. Initially, the English law provided only procedural protection of expectations that relates to license, benefits and other privileges. In such cases, it produced a limited form of protection that relates to hearing and participation, the right to make representation during the decision-making process in the administrative decision.[98] For example, a "procedural legitimate expectation arises where a public authority has induced in someone affected by a decision a reasonable expectation that he will be granted a hearing or that some other procedure will be followed before a decision depriving him of some benefit or advantage is taken."[99] On the other hand, the "substantive legitimate expectation is an expectation induced by a public authority that an individual will be granted or retain some substantive benefit."[100] A failure on the part of the public authority to act in accordance with the expectation is considered to be a breach of the rule of law that requires predictability and certainty and is therefore not lawful.[101] In such case, the expectation must

[98] Abhijit P.G. Pandya, "Interpretations and Coherence of the Fair and Equitable Treatment Standard in Investment Treaty Arbitration", (Ph.D. thesis, London School of Economics, 2011), 49.
[99] Oxford Reference, Accessed 9 May 2020, https://www.oxfordreference.com/view/10.1093/oi/authority.20110810105248783
[100] Ibid.
[101] "Regina v North and East Devon Health Authority, ex p Coughlan, QB 213 (CA)" (2001), Accessed 9 May 2020, "https://swarb.co.uk/regina-v-north-and-east-devon-health-authority-ex-parte-coughlan-and-secretary-of-state-for-health-intervenor-and-royal-college-of-nursing-intervenor-ca-16-jul-1999/

be based on either an express undertaking or arise from past conduct on the part of the public authority in order for it to be recognized as legitimate or reasonable.[102]

As Soren Schonberg argues: "The legal protection of expectations by administrative law principles is a way of giving expression to the requirements of predictability, formal equality, and constancy inherent in the Rule of Law."[103] Nevertheless, in most countries, legitimate expectation provides only procedural protection that relates to expectations created by administrative conduct. Due to practical difficulties, substantive aspects of legitimate expectations were rarely protected by most domestic legal systems.

In the investment law, the concept of legitimate expectations has become extremely relevant in the context of the standard of fair and equitable treatment, when a foreign investor expects the host state to act in a certain manner in relation to investment. The obligation to respect the investor's legitimate expectations is closely related to such concepts as "host state's legal or regulatory framework", as well as "host state's undertakings and representations". It is the understanding of the legal regime of the state that accepts the investment, together with the obligations assumed by the state directly to the foreign investor, and assurances provided by the state that form the investor's expectations. It is assumed that government actions that violate the investor's reasonable expectations may be considered a violation of the FET standard.[104] Such expectations arise from the specific conducts, promises, commitments or representations made implicitly or explicitly by the host states. For instance, "the assurances of the host state to not to change the law or alter the legal system that gives the possibility for a productive investment constitute legitimate expectations. Changes in the regulations, revocations of the licenses can be a foundation for alleging breach of legitimate expectations."[105]

Protection of legitimate expectations of the foreign investor as one component of FET is envisaged in IIAs to encourage foreign investors to make adequate business decisions based on the legal regime and representations made by the host state. The main problem at this stage relates to the

[102] "Attorney General of Hong Kong v Ng Yuen Shiu 2 AC 629 (PC)" (1983), Accessed 9 May 2020, https://swarb.co.uk/attorney-general-of-hong-kong-v-ng-yuen-shiu-pc-21-feb-1983/.
[103] Soren Schonberg, *Legitimate Expectations in Administrative Law* (Oxford 2000), 25.
[104] Borgoyakov A.S., "Standards of a "fair regime" and "security" of foreign investment in international law: the dissertation" (Candidate of Jurisprudence: 12.00.10) (2018), http://www.dslib.net/pravo-evropy/standarty-spravedlivogo-rezhima-i-bezopasnosti-inostrannyh-investicij-v.html
[105] Gamze Öztürk, "The Role of Legitimate Expectations Balancing the Investment Protection and State's Regulations", (Uppsala Universitet, 2017), 4, http://www.diva-portal.org/smash/get/diva2:1105461/FULLTEXT01.pdf.

implementation of the protection of legitimate expectations of foreign investors, consistency of the practice with the law and behaviours of officials.[106]

While in public law, due process considerations justify giving some subset of "legitimate expectations with respect to governmental conduct, such as ensuring consistent, non-discriminatory application of law or enforcing representations that are made with sufficient specificity to justify reliance." In investment law, "the doctrine has now been understood to create protections for foreign investors' substantive expectations (the right to a particular legal framework's stability) as well as their procedural expectations (the right to a particular kind of state's conduct in regulation)."[107]

It is considered, that the principle of protection of legitimate expectations leads to an obligation of a state not to defeat the expectations upon which an investor reasonably relied at the time of making its investment. However, as a ground of state liability, legitimate expectations were recognized relatively recently in Tecmed v. Mexico award, which was rendered in 2003. In this case, tribunal opined that "the Claimant was entitled to expect that the government's actions would be free from any ambiguity that might affect the early assessment made by the foreign investor of its real legal situation or the situation affecting its investment and the actions the investor should take to act accordingly"[108]. Such decisions set the trend for subsequent tribunals to include protection of an investor's legitimate expectations as one of the main components of the FET standard. And since then, there were a number of arbitral awards discussing legitimate expectations of investors and many of them have treated legitimate expectations as a self-standing subcategory and independent basis for a claim under the FET standard. In fact, it would be very hard to find an award rendered lately, that does not recognize that FET includes such notion. Even more, arbitral tribunals have considered that the basic benchmark of the FET standard is to be found "in the legitimate and reasonable expectations of the parties, which derive from the obligation of good faith."[109] For instance, the tribunal in Saluka v. the Czech Republic described legitimate expectations as the "dominant element" of the FET standard,[110] while in Electrabel v Hungary the tribunal highlighted protection of investor's legitimate

[106] Haftu Tekleab Alema, "Reflections on Legitimate Expectations of Foreign Investors in Ethiopia," *Jimma University Journal of Law 9* (2017): 29.
[107] Srinath Reddy Kethireddy, "Still the Law of Nations: Legitimate Expectations and the Sovereigntist Turn in International Investment Law," *Yale Journal of International Law 44*, no. 2 (Summer 2019): 323.
[108] "Técnicas Medioambientales Tecmed, S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2," Award, para. 154.
[109]"El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15," Award, para. 339. Accessed 9 May 2020, https://www.acerislaw.com/wp-content/uploads/2018/11/El-Paso-Energy-International-Company-v.-The-Argentine-Republic.pdf.
[110] "Saluka Investments B.V. (The Netherlands) v. The Czech Republic," UNCITRAL, Partial Award, para. 255.

and reasonable expectations as the standard's "most important function"[111]. Rudolf Dolzer and Christoph Schreuer have declared that the principle is by now "firmly rooted in arbitral practice."[112]

An analysis of legitimate investor's expectations during international arbitration proceedings is often carried out in an appropriate evaluation of the government actions regarding the application of the FET standard. In the framework of such an analysis, the main attention is usually paid to the question of whether the position of the state with respect to its initial actions (for example, obligations assumed, assurances given) has changed "in such a way that the investor's resulting expectations were not feasible"[113].

It is also important to underline, that the ICJ in the judgment in the Bolivia v. Chile case, distinguished between public international law and investment arbitration in relation to the concept of legitimate expectations. The ICJ ruled that, unlike BITs, where the principle of the investors' legitimate expectations is often included in the FET standard, this principle does not exist in general international law: "The Court notes that references to legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment. It does not follow from such references that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation. Bolivia's argument based on legitimate expectations thus cannot be sustained."[114]

In spite of the clear consent that provisions of IIAs on FET are definitely assuring the legitimate expectations of foreign investors, tribunals in their practice had few positions on the scope of expectations that are likely to be considered as legitimate. The research on arbitration investment practice gives me a possibility to determine the following approaches to identifying the doctrine of legitimate expectations under the FET standard:

The first approach – pro-investor approach – is based exclusively on the principle of providing a stable legal and business framework under the FET standard;

---

[111] "Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19," Part VII, para. 7.75, Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/italaw4495.pdf.
[112] Dolzer R., Schreuer C., *Principles of International Investment Law* (Oxford University Press 2012), 134;
[113] Dugan C. F., Wallace Jr. D., Rubins N. D., Sabahi B., *Investor-State Arbitration*, (Oxford University Press, 2008), 510.
[114] "Bolivia v. Chile" (Obligation to Negotiate Access to the Pacific Ocean), ICJ, Judgment (1 October 2018), para. 162, Accessed 9 May 2020, https://www.acerislaw.com/wp-content/uploads/2018/11/Bolivia-v.-Chile-case.pdf

The second approach – pro-state approach – is more confining as it needs a specific representation made by the host state, including contractual obligations that are displayed in an IIA or the existence of a specific commitment between the state and the investor;

The third approach - balancing approach - requires the legitimate expectation claim to be subject to a number of qualifying requirements (firstly highlighted in the UNCTAD work[115]).

2.2. INVERTOR'S LEGITIMATE EXPECTATIONS: APPROACHES

According to the **first approach**, the FET standard encompasses an element of stability of the regulatory framework. It is considered to be a low-threshold manner of application of legitimate expectations.

The ICSID arbitration in the case "Tecmed S.A. v. Mexico", as was stated above, for the first time introduced an explanation of legitimate expectations principle and its breach under the FET standard. The case concerned the replacement of an indefinite license for the operation of a landfill for the disposal of hazardous waste with a limited-period license. The arbitration found that the provision that guaranteed FET for the investments of the Spanish-Mexican BIT

> 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 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. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any pre-existing decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.[116]

[115] UNCTAD "Fair and equitable treatment: a sequel", *Series on International Investment Agreements II*, (UNITED NATIONS, New York and Geneva, 2012), 67.

[116]"Técnicas Medioambientales Tecmed S.A. vs. The United Mexican States, ICSID Case No. ARB (AF)/00/2," Award, para. 154.

Although some subsequent arbitral tribunals relied on this definition, it has been criticized for being extremely broad by several other arbitrations[117], as well as by prominent legal scholars. For instance, Zachary Douglas pointed out that "the Tecmed 'standard' is actually not a standard at all; it is rather a description of perfect public regulation in a perfect world, to which all states should aspire but very few (if any) will ever attain. But in the aftermath of the tribunal's correct finding of liability in Teemed, the quoted obiter dictum in that award, unsupported by any authority, is now frequently cited by tribunals as the only and therefore definitive authority for the requirements of fair and equitable treatment."[118] Nevertheless, this did not prevent it from being the basis of many arbitration practices regarding the protection of legitimate expectations of investors. As in CME v. Czech Republic case, the tribunal also recognized that the Czech authority "breached its obligation of fair and equitable treatment by the evisceration of the arrangements in reliance upon which the foreign investor was induced to invest."[119] Also, in the case of Bau v. Thailand, the arbitration acknowledged that the investor had an expectation of a "reasonable rate of return", and this expectation was based solely on the investor's business plans at the time of the investment.[120]

In Enron v Argentina case, the claimant was a US investor with indirect equity participation in the Argentinian gas company, TGN. Argentina amended its regulatory framework promulgating the "Emergency Law" which eliminated the calculation of tariffs in US dollars. The tariff was set to pesos at the rate of one dollar to one peso and followed by a devaluation of pesos which decreased the value of the company immensely. The Claimants have argued that the Respondent has breached the standard of fair and equitable treatment by failure to provide a stable and predictable legal environment. The Respondent's argument in this regard is based on the statement that FET is a standard not different from the MST and that "it is not for tribunals to set out its meaning or even less to legislate on the matter." The Respondent argues that this view is confirmed by the NAFTA FTC and the Chile-US FTA, as well as by a number of NAFTA and ICSID decisions and the opinions of

[117]"White Industries Australia Limited v. The Republic of India," UNCITRAL, Award, para.10.3.6, Accessed 9 May 2020, https://www.acerislaw.com/wp-content/uploads/2018/11/White-Industries-Australia-Limited-v.-The-Republic-of-India.pdf.

[118]Zachary Douglas, "Nothing if Not Critical for Investment Treaty Arbitration: Occidental, Eureko and Methanex," *Arbitration International*, Volume 22, Issue 1, (1 March 2006): 28, https://doi-org.skaitykla.mruni.eu/10.1093/arbitration/22.1.27.

[119] "CME (Netherlands) vs. Czech Republic", UNCITRAL, Award, para. 155.

[120] "Walter Bau Ag (In Liquidation) v. Kingdom of Thailand," UNCITRAL, para 12.3, Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0067.pdf

learned writers, explaining that FET does not provide any treatment additional to or beyond that required by customary law. [121]

However, the Tribunal stated that,

> the evolution that has taken place is […] the outcome of a case by case determination by courts and tribunals, as evidenced among many other investment treaty and NAFTA decisions by the Tecmed, the OEPC and the Pope & Talbot cases. This explains that, like with the international minimum standard, there is a fragmentary and gradual development. Such development however partly hinges on the gradual formulation – both in cases and legal writings – of 'general principles of law' (as understood under Article 38(1)(c) of the ICJ Statute) able to guide and 'discipline' the evaluation of state conduct under investment treaty standards[122].

So, the tribunal recognized stable framework for the investment as a key element of FET along with the requirement to protect legitimate expectations of the investor. "However, the stabilization requirement does not mean the freezing of the legal system or the disappearance of the regulatory power of the State. […] What seems to be essential, however, is that these expectations derived from the conditions that were offered by the State to the investor at the time of the investment and that such conditions were relied upon by the investor when deciding to invest."[123] Consequently, the tribunal concluded that "it was in reliance upon the conditions established by the Respondent in the regulatory framework for the gas sector that Enron embarked on its investment in TGS. Given the scope of Argentina's privatization process, its international marketing, and the statutory enshrinement of the tariff regime, Enron had reasonable grounds to rely on such conditions."[124]

Another tribunal that followed the strict way of protection of the legitimate expectations of the investor is Occidental v. Ecuador. The Claimant, Occidental was a US company had a contract with an Ecuadorian state corporation to explore and produce oil. The dispute was about the VAT reimbursements that the state refused to pay according to a new amended decree. The tribunal said that the stability of the legal and business framework is an essential part of the FET standards. Furthermore, the states have a duty to prevent the alteration to the legal and business environment that the investment was made.[125]

---

[121] "Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3," para. 253, Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0293.pdf
[122] Ibid, para. 257
[123] Ibid, paras. 261-262.
[124] Ibid, para. 265.
[125] "Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11," paras 183-184, 191, Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/italaw1094.pdf.

Consequently, if the legal framework governing the investment changes in a way that was not foreseen by the investor while making the investment, then the investor should be reimbursed for the costs for complying with these changes. This means that, if a new law is adopted, or existing legislation revised or re-enforced, these changes could lead to state liability. And following the decisions of the above-mentioned cases, change of regulatory framework would be a solid ground for recognition a breach of the FET standard and much less attention was paid to whether expectations were reasonable in the particular circumstances of the case.

Obviously, such a divergence in understanding the volume of legitimate expectations to be protected leads to the unpredictability of the legal and business environment, while at the same time the concept of legitimate expectations is directed against such uncertainty. It is also clear that the broader the scope of this concept is, the more damaging it can be to the public interests of the receiving state.[126]

To my mind, the standards applied by the previous tribunals were unreasonably high. That is why today, arbitral tribunals consider almost unanimously that legitimate expectations should be interpreted within its limits. More particularly "a simple general "expectation" of the state's compliance with its laws may not always and as such form the basis of a successful FET claim. It would form such a basis if the evidence is given that a specific representation as to a substantive benefit has been frustrated, or there is proof of arbitrary, or non-transparent conduct in the application of the laws in question or some form of abuse of power."[127]

Accordingly, not every expectation upon which a business decision is taken will be protected by international investment law. At the very least, a certain degree of "active participation" in the raising of the expectation on the part of the state is required, as well as a certain level of specificity, precision and individualization. An investor's legitimate expectations may also be shaped by "the burden of performing its own due diligence in vetting the investment within the context of the operative legal regime."[128] What is also essential, is to understand what type of representation by a state will be sufficient to give rise to legitimate expectations on the part of an investor.

---

[126]Rachkov I.V., "Concept of "Legitimate Expectations" of Foreign Investors in the International Investment Arbitration Practice," *Moscow Journal of International Law* (2014;(1):196-220.

[127]"Crystallex International Corporation v. Venezuela, ICSID Case No. ARB(AF)/11/2," Award, para. 552, Accessed 9 May 2020, https://www.acerislaw.com/wp-content/uploads/2018/11/Crystallex-International-Corporation-v.-Venezuela.pdf.

[128] "Invesmart v. Czech Republic," UNCITRAL, para. 254, Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/italaw4162_0.pdf.

That leads us to the **second approach**. Considering the importance of such state's power as to change its legal framework in order to adapt to new circumstances and protect public interests, a lot of arbitral tribunals found that such changes would be considered as a frustration of legitimate expectations only if special commitment would be taken by the state. What is reflected in the following statement of the tribunal in Parkerings v. Lithuania: "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."[129]

Analysing Saluka v. Czech Republic decision, we can see that the tribunal declared that the protection provided under the treaty could not be based exclusively on the investor's "subjective motivations and considerations." The case concerned ownership of a controlling block of shares from the Czech state-owned bank, that was sold to Nomura Group (subsidiary Saluka). After the Czech Republic had a banking system had financial difficulties and the government imposed a forced administration upon the investor's banking enterprise. The tribunal stated that:

> No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. […] It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare.[…] In order to determine whether frustration of the foreign investor's expectations was justified and reasonable, the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well.[130]

The S.D. Myers tribunal underlined, that the determination of a breach of the obligation of FET by the host State "must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders."[131]

In Methanex v. the United States dispute under NAFTA, the tribunal didn't find a breach of FET in the amendment of the law. In this case, the Canadian methanol producer questioned legislation which prohibited the manufacturing of gasoline containing methanol-based supplements on

---

[129] "Parkerings-Compagniet AS v. Republic of Lithuania (ICSID Case No. ARB/05/8)," Award, para. 332, Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0619.pdf.
[130] "Saluka Investments B.V. (The Netherlands) v. The Czech Republic," UNCITRAL, Partial Award, paras. 255, 305, 351.
[131] "S.D. Myers, Inc. v. Government of Canada," UNCITRAL, Partial Award, para. 263, Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0747.pdf.

environmental purposes. The claimant declared about the breach of NAFTA's FET obligation, claiming that the ban wasn't justified, ruined its market and discriminated in favour of the US domestic ethanol industry. During the analysis, it was concluded that investor can derive legitimate expectations both from the special obligations addressed to it individually (for instance, as a stabilization clause), or the rules that are not specially directed to a definite investor, however, they been put in place with a specific goal to encourage foreign investments and on which investor banked on during his investment.[132] Nevertheless, the tribunal dismissed the demand by stressing on a specific value to the idea that Methanex had not provided any statement by the US that those regulatory modifications would not happen.[133]

One more case to analyse is Total v. Argentina. The dispute was regarding the laws changes right after the Argentinian economic crisis. Opposite to the previous Argentinian tribunals, the case adopted a special nuance that provided certain balance in favour of the regulatory rights of the state, except the cases where the state makes specific commitments. The tribunal basically stated that the parties by signing the IIA do not renounce their regulatory powers or the possibility to adapt its legislation to changing conditions. Also, it was claimed that if the following limitations concern government then they should not be taken into account when the treaty does not clearly state them, neither they should be presumed.[134] However, in this case, the tribunal didn't expel the chance of a stability claim for the regulations created to produce a legal framework for the investment. Such demand might be rooted in the inherently prospective nature of the regulation, which has a goal to define a framework for future operations. Same regarding the regimes that cover the lasting operations and investments, plus offering "fallbacks", in other words, the contingent rights in case the appropriate framework would be changed in case of surprising circumstances or some listed events.[135]

Also, in AES v. Hungary, the tribunal found that "no specific commitments were made by Hungary that could limit its sovereign right to change its law (such as a stability clause) or that could legitimately have made the investor believe that no change in the law would occur."[136] A more recent example of the same point of view was expressed in Eiser and Energía Solar v. Spain case: "Absent

---

[132] "Methanex Corporation v. United States of America," UNCITRAL (NAFTA), Final Award, Part IV, Chapter D, para 7, Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0529.pdf.
[133] Ibid., at Part IV, Chapter D, paras 7-10.
[134] "Total S.A. v. The Argentine Republic, ICSID Case No. ARB/04/01," (Decision on Liability, 27 December 2010), para. 115, Accessed 9 May 2020, https://www.italaw.com/cases/1105.
[135] Ibid, para. 122.
[136] "AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary, ICSID Case No. ARB/07/22," para. 9.3.31, Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0014_0.pdf.

explicit undertakings directly extended to investors and guaranteeing that States will not change their laws or regulations, investment treaties do not eliminate States' right to modify their regulatory regimes to meet evolving circumstances and public needs."[137]

In order to understand what constitutes a specific representation, the arbitral tribunal must analyse all relevant circumstances. Following the application of the case-by-case analysis, the El Paso v. Argentina tribunal concluded that two types of specific commitments could be presented to foreign investors: "those specific as to their addressee and those specific regarding their object and purpose."[138] What in principle reflects tribunals opinion in above-mentioned Methanex case. The tribunal in Continental Casualty v. Argentina case[139] attempted to clarify this issue by outlining the previous categorisation of sources of expectations, distinguishing between: "(a) political statements, which "have the least legal value"; (b) contractual undertakings, which, "as a rule", create legal rights and therefore expectations of compliance; and (c) general legislative statement, which "engender reduced expectations".[140] The tribunal highlighted that

> political statements have the least legal value[...]; general legislative statements engender reduced expectations, especially with competent major international investors in a context where the political risk is high. Their enactment is by nature subject to subsequent modification, and possibly to withdrawal and cancellation, within the limits of respect of fundamental human rights and jus cogens; unilateral modification of contractual undertakings by governments [...] 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.[141]

To my mind, this is the main point of the second approach. Consequently, I should constitute that arbitral tribunals have held that the foreign investor's expectations need to be directly linked to a specific representation, be it a promise or assurance made by a host state. In other terms, in order to find the violation of legitimate expectations, as stated by the Antaris tribunal, a foreign investor "must establish that (a) clear and explicit (or implicit) representations were made by or attributable to the state in order to induce the investment, (b) such representations were reasonably relied upon by the Claimants, and (c) these representations were subsequently repudiated by the state."[142] In Santiago

---

[137] "Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36," Final Award, para. 362, Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/italaw9050.pdf.

[138] "El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15," Award, para. 375.

[139] "Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/9," para. 261.

[140] Simon Maynard, "Legitimate Expectations and the Interpretation of the Legal Stability Obligation," *European Investment Law and Arbitration Review*, no. 1 (2016): 100-104.

[141] "Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/9," para. 261.

[142] "Antaris v. The Czech Republic, PCA Case No. 2014-1," (Award, 2 May 2018), para. 360(3), Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/italaw9809.pdf.

Montt's opinion, the following requirements should be adhered: "first, representations must be legal, or at least, not contra legem, and also must have been provided by a competent official acting within his or her jurisdiction; secondly, they must be specific, precise, unambiguous, and unqualified; thirdly, they must not have been adopted on the basis of false or incomplete information provided by the beneficiary; and, fourthly, they must outweigh the public interest."[143]

In conclusion to this both approaches, I would like to say that, undoubtedly a state has a right to adopt, modify or cancel a law at its own prudence. We can divide all the aforesaid cases into the dispute which were based on specific representation (but I would even highlight that on stabilisation clause) and the ones without in. The first approach that where described concerned the situation without any specific representation and commitment. In such situations any reasonable investor would never expect that over the time of his investment no regulatory changes would occur. In the absence of specific commitments and assurances, there is minimal basis for the protection of investors' expectations. In Stephan Schill's words, "where a foreign investor merely relies on the general legal framework without any specific commitments or intention on behalf of the host state to attract foreign investors, the concept of legitimate expectations may only have a more marginal scope of application."[144] However, with regard to stabilization clauses, I would like to accentuate that the nature of such clause is quite controversial and its application in IIAs should be taken with caution, as in practice, they could be used to prevent the promotion of socially important laws, such as environmental and human rights law.

Nevertheless, even if there was no stabilization clause or other specific representation, it does not mean that a state can arbitrarily change the regulatory framework and that the investor can never claim legitimate expectations based on the legal system. The tribunal in CMS v. Argentina decision noted: "It is not a question of whether the legal framework might need to be frozen as it can always evolve and be adapted to changing circumstances, but neither is it a question of whether the framework can be dispensed with altogether when specific commitments to the contrary have been made. The law of foreign investment and its protection has been developed with the specific objective of avoiding such adverse legal effects."[145] And inclining on the abovementioned Metalclad and Tecmed cases, the tribunal concluded that the general guarantees represented by Argentina under the domestic legal

[143] Santiago Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation (Studies in International Law),* (Oxford and Portland, Oregon, US: Hart Publishing, 2009), 364.
[144] Schill S.W., "Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law", *IILJ Working Paper,* Global Administrative Law Series (2006/6): 28.
[145] "CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8," (Award, 12 May 2005), para. 277, Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0184.pdf.

framework were "crucial for the investment decision"[146]. The situation that the PSEG Group Tribunal refers to as the "roller-coaster" effect of the continuing legislative changes" may certainly constitute an improper frustration of the investor's legitimate expectations, even in the absence of assurances.[147] So, as a matter of fact, an investor does have a right to certain stability and predictability of the legal environment of the investment, that mostly reproduced in expecting a state to act fairly, reasonably and equitably in the exercising of its legislative power.

Though, without specific representation or commitment the claim of the breach of legitimate expectation would be really hard to prove, especially considering later tribunal practice of banking on the previous decisions with conclusion stating that in order even to put a question about legitimate expectation on a table, there definitely should be individualized assurances or specific undertakings. That is why I think that tribunals should always analyse arbitrariness of taken by a state decision and proportionality, what will be described in Chapter 3 and concerned the third approach.

To my mind, exactly the **third approach** is some kind of compromise between the first two. As the first approach is very broad and almost any changes of regulatory framework could be declared as a violation of the FET clause. And the second one is very strict regarding specific representation, as sometimes it could be not explicit and even more in some cases, stabilization clauses could be contrary public interest of the state. That is why I believe that is a good idea to establish the third approach, that would balance investor's and state's interests.

For this reason, I would like to continue my research with Duke Energy v. Ecuador case, where the tribunal pointed out the necessity to take into consideration all the circumstances:

> The stability of the legal and business environment is directly linked to the investor's justified expectations. The Tribunal acknowledges that such expectations are an important element of fair and equitable treatment. At the same time, it is mindful of their limitations. 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, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State. In addition, such expectations must arise from the conditions that the State offered the investor and the latter must have relied upon them when deciding to invest.[148]

[146] Ibid, para 275.
[147] "PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey, ICSID Case No. ARB/02/5," para. 250.
[148]"Duke Energy v. Ecuador, ICSID Case No. ARB/04/19," Award, para. 340, Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0256.pdf.

From the above-mentioned case it is possible to identify a number of key qualifying elements of legitimate expectations which could be protected:

(a) They should arise from a state's specific representations or commitments made to the investor, on which the latter has relied;

(b) The investor must be aware of the general regulatory environment in the host country and expectations must be reasonable be based on such an environment;

(c) Investors' expectations must be balanced against the legitimate regulatory power of host countries.

Further research will concern the analysis of each of these points.

Regarding the requirement of specific representations, I have already analysed it in the context of the second approach. But if in case of the second approach the tribunal preferably gave an advantage to an express contractual commitment (ideally in the form of stabilization clause) or a specific unilateral declaration by the state not to proceed with legal changes. In light of this approach, the tribunal considered explicit as well as implicit representations, taking into account legal, business and political framework of the country. Accordingly, in Thunderbird v. Mexico decision was explained that the expectations have to be "reasonable" through looking at the state's conduct, and the investor has to have relied on them, so the investment may be motivated by the host-state's policies, representations or law[149]. Moreover, in the already mentioned case of Saluka v. Czech Republic tribunal declared: "The determination of a breach of [FET provision] requires a weighing of the Claimant's legitimate and reasonable expectations on the one hand and the Respondent's legitimate regulatory interests on the other"[150]. Furthermore, in Antaris v. Czech Republic, the tribunal asserted that: "A specific representation may make a difference to the assessment of the investor's knowledge and of the reasonableness and legitimacy of its expectation, but is not indispensable to establish a claim based on legitimate expectation which is advanced under the FET standard."[151] Additionally, it is necessary to investigate the basic link amid the investment and a special promise that is made by the authority to the investor. That is why the notion of legitimate expectations while its application in investment arbitration requires a thorough comparative legal analysis and a complex methodology.

[149] "International Thunderbird Gaming Corporation v. The United Mexican States," UNCITRAL, Award, para. 147, Accessed 9 May 2020, https://www.italaw.com/cases/571.
[150] "Saluka Investments B.V. (The Netherlands) v. The Czech Republic," UNCITRAL, Partial Award, para. 306.
[151] "Antaris v. The Czech Republic, PCA Case No. 2014-1," Award, para. 360 (3).

The next requirement is laid in the awareness of the investor of the general regulatory environment including, political, socioeconomic, cultural and historical conditions prevailing in the state. And also, in exercising due diligence in order to make such expectations reasonable.

In Methanex v. the United States case, mentioned during analysing the second approach, the tribunal underlined the need for the investor to have a general awareness of the legal environment in which he was going to invest as a condition for recognition of his legitimate expectations. It was stated: "it was widely known, if not notorious, that governmental environmental and health protection institutions at the federal and state level [...] continuously monitored the use and impact of chemical compounds and commonly prohibited or restricted the use of some of those compounds for environmental and/or health reasons."[152]

Further awards will illustrate which other conditions could be taken into account in assessing of breach of legitimate expectations. For example, in the decision in Bayindir v. Pakistan case, we can find such wording: "in the light of the political changes of the preceding years, the Claimant could not reasonably expect that no further political changes would occur."[153] Moreover, "the conclusion of Addendum No. 9 is another illustration of the fact that the Claimant elected to pursue its activities in Pakistan despite a degree of political volatility of which it was fully aware."[154]

In another case of Toto v. Lebanon "the post-civil war situation in Lebanon, with substantial economic challenges and colossal reconstruction efforts, did not justify legal expectations that custom duties would remain unchanged."[155]

Consequently, I can conclude that considering political instability or "post-civil war situation" with its significant economic alteration, the investor's expectations will not be found reasonable, as in such situations investor cannot legitimately expect that legislative changes would not happen. Another point that investors should also examine is the level of development of the host country. As tribunals understood investors attraction by developing countries because of possibility to earn a higher rate of return, but in the same time, it is well-known that such countries have greater legal instability, so they should be aware of taking bigger risks.

---

[152] "Methanex Corporation v. United States of America," UNCITRAL (NAFTA), Final Award, Part IV, Chapter D, para. 9.
[153] "Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29," para. 197, Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0075.pdf.
[154] Ibid, para. 195.
[155] "Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon, ICSID Case No. ARB/07/12," para. 245, Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita1013.pdf.

The corresponding opinion was in Generation Ukraine v. Ukraine case: "The Claimant was attracted to Ukraine because of the possibility of earning a rate of return on its capital in significant excess to the other investment opportunities in more developed economies. The Claimant thus invested in Ukraine on notice of both the prospects and the potential pitfalls. Its investment was speculative."[156] That is why the tribunal rejected claimant's submission. Also, if to take Gevin v. Estonia case, we can see that the tribunal didn't establish a breach of FET, considering that the claimants deliberately decided to invest in: "a renascent independent state, coming rapidly to grips with the reality of modern financial, commercial and banking practices and the emergence of state institutions responsible for overseeing and regulating areas of activity perhaps previously unknown."[157]

Kind of a similar situation was in Parkerings v. Lithuania case, where the Claimant was a Norwegian company involved in construction and then operation car parks in the Vilnius Municipality via its Lithuanian subsidiary BP. The arrangement between the parties included carrying out the parking laws of the city with the possibility to collect the fee on clamping and parking. Once the contract was signed, the authority made changes to the Law on Local Fees, and Charges and the amendment of the Decree on Clamping prevented the Claimant from getting a vital part of its income. The Claimant purported that the state thwarted investor's expectations. The arbitration found that it is each state's undeniable right and privilege to exercise its sovereign legislative power. The state has the right to adopt, amend or cancel the law at its own discretion. Due diligence is required from the investor, who "must anticipate that the circumstances could change, and thus structure its investment in order to adapt it to the potential changes of the legal environment"[158]. Consequently, as Lithuania was going through a political transition from USSR to EU country, the tribunal stressed that in this situation, no prospects regarding the laws to stay unmodified would be legitimate and the investor was supposed to take the possible legislative changes into account.[159]

I think another important aspect which should be considered within this question, is the due diligence. As the conduct of the investor is also has been evaluating while deciding the breach of legitimate expectations, especially in valuing their reasonableness. For instance, the necessity of investors to exercise prudence and due diligence in making a business decision and to take all

---

[156] "Generation Ukraine, Inc. v. Ukraine," Award, para. 20.37, Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0358.pdf.
[157] "Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia, ICSID Case No. ARB/99/2," Award, para. 348.
[158] "Parkerings-Compagniet AS v. Republic of Lithuania (ICSID Case No. ARB/05/8)," Award, para. 333.
[159] Ibid, paras. 335–336.

necessary measures to find out what is the legal situation in the country in which they are going to invest was underlined in previous cases and also in ADF Group v. United States award, where the claimant based the submission and accordingly expectations on the case law to the wrong statute.[160] Moreover, it is well illustrated in Eudoro v Paraguay decision, where the tribunal came to the conclusion that it "is evident is that Mr. Olguín, an accomplished businessman, with a track record as an entrepreneur going back many years and experience acquired in the business world in various countries, was not unaware of the situation in Paraguay. He had his reasons [...] for investing in that country, but it is not reasonable for him to seek compensation for the losses he suffered on making a speculative, or at best, a not very prudent, investment."[161] Investors should also take into account specific circumstances of the host state, such as war, economic crisis or entering to international or regional organizations or unions, as in abovementioned Parkerings v. Lithuania case or in Metalpar v. Argentina, where the tribunal considered "that it is unlikely that Claimants legitimately expected that their investments would not be subject to the ups and downs of the country in which they were made or that the crisis that could already be foreseen would not make it necessary to issue legal measures to cope with it."[162]

As underlined by Peter Muchlinski, there are three basic responsibilities that investor should look out for, if he desires to get benefits from the treaty protection: refraining from unconscionable conduct, rationally evaluating the investment risk, plus carrying out the investment in a well-reasoned manner.[163]

The next element of balancing investor's legitimate expectations against the regulatory power of a state will be analysed in the next chapter.

To sum up, the concept of legitimate expectations imposes on the state an obligation not to interfere with the expectations that the investor relies on at the time of making his investments. Claims related to violations of legitimate expectations arise in situations where the investor suffers losses due to changes caused by certain state measures. But in order to recognize such violation, the tribunal has to conclude if the expectations presented were legitimate. I have defined three approaches which the

[160] "ADF Group Inc. v. United States of America, ICSID Case No. ARB (AF)/00/1," Award, 9, para. 189.
[161] "Eudoro Armando Olguín v. Republic of Paraguay, ICSID Case No. ARB/98/5," Award, para. 65(b), Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0587.pdf.
[162] "Metalpar S.A and Buen Aire S.A v The Argentine Republic, ICSID Case No. ARB/03/5," para. 187, Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0516.pdf.
[163] Muchlinski P., "Caveat Investor?" The Relevance of the Conduct of the Investor Under the Fair and Equitable Treatment Standard, *International and Comparative Law Quarterly 55 (3),* (2006): 527, 530.

tribunal can choose in identifying legitimate expectations: “pro-investor”, “pro-state” and “balancing” approach.

Some tribunal choose to adopt the “pro-investor” approach, banking on the FET standard requirement to maintain a stable legal and business framework. According to the “pro-state” approach - all attention should be paid to identifying whether the special commitments were made by a state. And “balancing” approach is a combination and, at the same, a compromise between two previous, and contains in itself a number of qualifying requirements regarding legitimacy and reasonableness of the expectations and state’s representations, which have to be assessed considering all the circumstances in which the investment was made, including the prevailing situation in the state and taking into account the rights of the state.

3. BALANCING STATE'S RIGHT TO REGULATE AGAINST INVESTOR'S LEGITIMATE EXPECTATIONS

This Chapter will be focused on balancing approach in order to establish whether a particular change of regulatory framework could frustrate legitimate expectations of the investor. Arbitrariness and proportionality analyses will be explained and their use in arbitral practice will be shown.

3.1. STATE'S POWER TO REGULATE

Undoubtedly, the power of a state to regulate in the public interest is a fundamental and inalienable feature of a sovereign state. Its capacity to regulate within own borders is being accomplished via its legislative, administrative, and judicial bodies and the state is generally free to adopt, maintain, and enforce the measures crucial to promote aims of public policy. Such power is otherwise understood as the police power of the receiving state. According to the Black's Law Dictionary (2009, 9th edition) this notion constitutes: "The inherent and plenary power of a sovereign to make all laws necessary and proper to preserve the public security, order, health, morality, and justice. It is a fundamental power essential to government, and it cannot be surrendered by the legislature or irrevocably transferred away from the government. [...] Loosely, the power of the government to intervene in the use of privately owned property, as by subjecting it to eminent domain."[164] Also regarding such definition, I would like to quote Ernst Freund: "It is possible to evolve at least two main attributes or characteristics which differentiate the police power: it aims directly to secure and promote the public welfare, and it does so by restraint or compulsion."[165]

Accordingly, the state's regulatory power envisages its right and duty to govern public interest through the three branches of government (executive, legislative and judiciary) together with their subdivisions, with a view to promoting national development by pursuing public policy goals and legal responsibilities like human rights, health and safety, environmental protection, national security and more. Aforesaid regulation might be solely public and mirrored in constitutions, statutes, decrees and laws. They may still have an international dimension due to international declarations, resolutions and treaties. As follows, it is in an utterance of such power that a state may enter into IIAs and thus, being engaged in investor protection obligations. It is of crucial importance, considering the evolving nature of environmental standards and endless endeavours of states to constantly enhance

[164] Black H. C., Garner B. A., *Black's Law Dictionary* (West Group, 1999), p. 1178.
[165] Ernst Freund, *The Police Power, Public Policy and Constitutional Rights,* (University of Chicago Press,1904), 3.

human rights advocacy, that states have a right to exercise their regulatory power in a manner deemed appropriate at any given time when the protection of public interest is in question. It is therefore not surprising that the modern states more and more manifest regulatory activism, frequently by interfering with economic affairs for the general welfare, security, environmental and health protection. This mainly happens in the case of the use of natural resources, likewise for energy and infrastructure projects that have crucial environmental, social, and economic impacts in the host country. For instance, the state can adopt appropriate measures to fulfil its obligations in order to prevent violations of human rights or ecological safety by introducing or amending domestic legislation, along with constant monitoring and judicial litigation that forbid investors or other companies from breaching the rules and demand reimbursement inflicted harm.

That is why, no obligation, including the FET obligation, will preclude host states to act in the public interest, even though it could cause impairment to a foreign investor. Nevertheless, according to the standard FET, even without specific representation or commitment (including a stabilization clause), consistency and predictability of the legal framework of the host country abide protected. Mostly it reflects in the obligation of the host countries to adhere to certain substantive and procedural principles, including fairness, non-discrimination, proportionality, transparency, due process in their governance. In view of this, such principles make a positive impact on foreign investor's expectations with an assurance that the host state respects and obeys the rule of law, with or without the stabilization clause. However, at the same time investor is supposed to accept all the realities of the actual investment environment in the host country when undertaking the investment, including its level of development and its particular circumstances. And this kind of subjective behaviour, which mainly creates his expectations, does not work in his favour.[166]

Let us take a case with representation or commitment. Tribunals have repeatedly stressed on the role of stability commitments as an exclusion to ordinary host country's power to impede foreign investor's projects. Mostly they have referred to the stabilization clauses as a classic example of those specific obligations of the host countries, which are an exception to their normal regulation. For instance, in CMS v. Argentina the arbitral tribunal made the point that the thing is not that the freezing of the legal basis is needed as it can all the time be developing and get used to the up-to-date circumstances. However, the framework cannot "be dispensed with altogether" if there have been

[166] Santiago Montt, *State Liability in Investment Treaty Arbitration Global Constitutional and Administrative Law in the BIT Generation (Studies in International Law),* (Oxford and Portland, Oregon, US: Hart Publishing, 2009), p. 368.

made some special commitments to the contrary, as it could create unfavourable legal effects, against which law of foreign investment has been developed.

The tribunal found that Argentina had breached the FET provision by taking measures contrary to its contractual stability obligations and that such measures were not justified. Even an occurrence of economic or other crises will not justify the derogation of an international treaty or obligations under stabilization clauses. However, such extreme situations would affect the issue of determining compensation.[167] The UNCTAD has also underlined that state's power to regulate without compensation is "limited where it makes specific assurances to the investor about keeping in place certain aspects of the business or legal regime."[168]

However, when the stabilization clause covers certain regulatory areas, that can adversely affect the right of the receiving State to exercise its regulatory powers. And then "it is reasonable to expect that this deterrent effect of stabilization clauses compels governments not to regulate for the public welfare when they fear to breach stability commitments and thereby bearing a financial and reputational burden."[169] This may lead to "regulatory chill", according to which regulators are afraid to raise standards or rules in the fields of human rights, environmental safety, labour and employment, etc., as it may impede foreign investment, cause industrial flight, and increase the financial burden for the state, especially in situations where stability commitments were undertaken.[170] So, it could turn out that, even though that host countries use such commitments as an instrument for attracting foreign direct investment (FDI) and thus for promoting economic development, these clauses can prevent states from constantly regulating important issues of public interest, such as the areas of environmental protection and social welfare. Nobel-prize winning economist Joseph Stiglitz stated that taking into account that there were very few expropriations in recent decades, the real intent of such provisions is to impede health, environmental, safety, and even financial regulations. They are like a weapon to fight regulation.[171]

Considering aforestated, the question arises whether the stability obligation (mainly stabilization clause) should serve as an absolute exception to the state's sovereign right to regulate?

---

[167] "CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8," Award, paras. 277, 281, 254–255.
[168] UNCTAD "Fair and equitable treatment: a sequel", *Series on International Investment Agreements II*, (UNITED NATIONS, New York and Geneva, 2012), 77.
[169] Jola Gjuzi, *Stabilization Clauses in International Investment Law: A sustainable development approach*, (Springer, 2018), 96.
[170] Gehne Katja and Romulo Brillo, *Stabilization Clauses in International Investment Law: Beyond Balancing and Fair and Equitable Treatment*, (Martin Luther University Halle-Wittenberg, 2014), p. 15.
[171] Joseph Stiglitz, "The Secret Corporate Takeover," *Project Syndicate* (13 May 2015), https://www.theguardian.com/business/2015/may/13/the-secret-corporate-takeover-of-trade-agreements

Or is it better to use a balanced approach that aimed at the relative assessment, using other factors affecting the legitimacy and reasonableness of expectations? The analysis of arbitral awards does not give an unambiguous answer regarding the precise approach. On the one hand, the tribunal can use the existence of the stabilization clause (or its absence) as a reason to circumvent the difficult task of balancing the need of foreign investors of stability and states' necessity to the flexibility of the regulatory framework. For example, in Toto Costruzioni v. Lebanon: "in the absence of a stabilization 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"[172] or in case of or "unreasonable modifications"[173]; or Parkerings v. Lithuania: "Save for the existence of an agreement, in the form of a stabilization clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment."[174]

On the other hand, a lot of tribunals used a balanced approach with attempts to establish equilibrium between the investors' interests and the rights of the host state. Indeed, if to take into consideration the third approach, described in the previous chapter, just the mere presence of the stabilization clause would be not enough to recognize the presence of legitimate expectations. The legitimacy and reasonableness of the expectations of an investor have to be evaluated objectively in light of all the circumstances in which the investment was undertaken, including the prevailing situation in the state and with due regard to the rights of the state. Consequently, it is necessary and important to leave a place for balancing approach and leave a space for a state to make some regulatory changes in case of emergency or unforeseen situations, as the main purpose of each and every state is to protect the interest of its citizens.

As highlighted by Gamze Öztürk - the unqualified application of the concept of protection of investor's legitimate expectations "may prevent the governments to regulate the legal framework of their countries in order to adopt the new developments or more enhanced standards of protection of public interests. Therefore, it is clear that a balance between the regulatory rights of the state and the legitimate expectations of the investment should be redressed."[175]

---

[172] "Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon, ICSID Case No. ARB/07/12," para. 244.
[173] "Impregilo v. The Argentine Republic, ICSID Case No. ARB/07/17," Award, para. 68, Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0418.pdf.
[174] "Parkerings-Compagniet AS v. Republic of Lithuania (ICSID Case No. ARB/05/8)," Award, para. 332.
[175] Gamze Öztürk, "The Role of Legitimate Expectations Balancing the Investment Protection and State's Regulations", (Uppsala Universitet, 2017), 25.

Respectively, what we need is to reach a balance between the interests of the host states on regulatory flexibility and the interests of foreign investors for regulatory stability. How? By using proportionality analysis and by subjecting the state's conduct or measures to certain fundamental principles of law, such, for instance, as established in Saluka v. Czech Republic the case. Where, the tribunal found that in order to determine whether the Czech Republic violated the provisions of the FET, it required weighing the legitimate and reasonable expectations of the Claimant and the legitimate regulatory interests of the Respondent. Anyway, foreign investor protected by the Treaty may always expect the Czech Republic will carry out its policy in good faith and with respect to the investment, reasonably justifiable by public policy, and that such conduct will not violate the requirements of consistency, transparency and non-discrimination.[176] Moreover, in Total v. Argentina the arbitral tribunal stated:

> an evaluation of the fairness of the conduct of the host country towards an investor cannot be made in isolation, considering only their bilateral relations. The context of the evolution of the host economy, the reasonableness of the normative changes challenged and their appropriateness in the light of a criterion of proportionality also have to be taken into account. Additional criteria for the evaluation of the fairness of national measures of general application as to services are those found in the WTO General Agreement on Trade of Services (GATS). The Tribunal recalls that Article VI of the GATS of 1994 on "Domestic regulation" provides that "In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner. [...] The balancing test recalled above, requires an assessment of the existence of a breach of the FET standard taking into account the purposes, nature and objectives of the measures challenged, and an evaluation of whether they are proportional, reasonable and not discriminatory.[177]

3.2. ANALYSIS OF ARBITRARINESS AS UNREASONABILITY

Starting this subchapter, I would like to quote already mentioned case, Parkerings v. Lithuania: "As a matter of fact, any businessman or investor knows that laws will evolve over time. What is prohibited however is for a State to act unfairly, unreasonably or inequitably in the exercise of its legislative power."[178] Also in Micula v. Romania case, the tribunal stated that

> the state may always change its legislation, being aware and thus taking into consideration that: (i) an investor's legitimate expectations must be protected; (ii) the state's conduct must be substantively proper (e.g., not arbitrary or discriminatory); and (iii) the state's conduct must be procedurally proper (e.g., in compliance with due

[176] "Saluka Investments B.V. (The Netherlands) v. The Czech Republic," UNCITRAL, Partial Award, paras. 305-306.
[177] "Total S.A. v. The Argentine Republic, ICSID Case No. ARB/04/01," (Decision on Liability), paras. 123,162.
[178] "Parkerings-Compagniet AS v. Republic of Lithuania (ICSID Case No. ARB/05/8)," Award, para. 332.

> process and fair administration). If a change in legislation fails to meet these requirements, while the legislation may be validly amended as a matter of domestic law, the state may incur international liability.[179]

Considering such wording and taking into account the third approach from the previous chapter, tribunals should not only decide if there was or not specific representation or commitment, but also consider legitimacy and reasonableness, taking into account all the circumstances in which the investment was made and the legal framework changed. That leads us to the thought that tribunals should test the state's regulatory changes on arbitrariness, including illegality, irrationality and proportionality.

Consequently, the first what tribunals should determine is whether measures harming foreign investors, that have already been deemed legal according to domestic laws, are irrational or unreasonable. Which kind of measures would be considered arbitrary? A legal expert, Professor Christoph Schreuer, has described in his opinion as "arbitrary": a measure that inflicts damage on the investor without serving any apparent legitimate purpose [so is the protection of public interest]; a measure that is not based on legal standards but on discretion, prejudice or personal preference; a measure taken for reasons that are different from those put forward by the decision-maker; a measure taken in wilful disregard of due process and proper procedure."[180]

The arbitral tribunal in Glencore v. Colombia case (will be discussed in the next subchapter) stated that in order to check whether the measure was arbitrary, what is necessary it "to establish whether the state's conduct vis-à-vis protected foreign investors is tainted by prejudice, preference or bias or is so totally incompatible with the reason that it constitutes an international wrong" with taking "the individual circumstances of each decision into consideration and avoid the temptation of using hindsight as the basis for assessing reasonableness."[181]

Santiago Montt suggests that arbitrariness test should contain two requirements "that should be generally seen as falling under the realm of the corrective justice rationale: the regulatory state must act only in pursuit of the public interest – naked transfers from foreign investors to other groups

[179] "Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I], ICSID Case No. ARB/05/20," paras. 520,529.
[180] "EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13," Award, para 303, Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0267.pdf.
[181] "Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia, ICSID Case No. ARB/16/6," Award, paras. 1457,1458, Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/italaw10767_0.pdf.

are not allowed – and policy programs or decisions being implemented must demonstrate a proper means-ends relationship."[182]

First of all, the tribunal should determine whether the presented interests are indeed public, reviewing the public nature of the goals that are considered. And whether the invoked public interests are actually the purpose of the taken measure. Or whether it's a mere cover or "simulation" for another public interest which may not hold sufficient weight. For example, Eastern Sugar v. Czech Republic, in which the tribunal concluded that the adoption of decree changing the regulatory regime of the sugar beet industry, in particular, for the applying a "one-day production basis to allocate quota" was "unfairly and inequitably" with regards to investor's expectations and constituted a breach of the FET standard. Considering that the end-goal of such a measure was "not persuasive. Moving to an entirely new basis just for the sake of doing something different simply makes no sense to the Arbitral Tribunal"[183], it stated that such measure "was discriminatory and unreasonable"[184].

Secondly, after the tribunal recognizes that the aims that state followed are legitimate, then it must evaluate whether the measures taken are rationally related to those goals. This is the case where property rights compete against the public interest, it is not a rare situation including in national law. However, they should yield only if there is a rational connection amid the means and the aims. Such questions are appropriate in this test: whether the situation in question really demanded such a measure, where the possibility to adopt a less harmful measure, was it reasonable to take it considering all the circumstances?

"Given its corrective justice foundation, arbitrariness as irrationality focuses exclusively on the connection between means and ends, and not on the reasonableness and proportionality of the measures and harm suffered by the investor[proportionality test]. Distributive justice considerations, meanwhile, generally are to be dealt with under tests of arbitrariness as a special sacrifice and lack of proportionality stricto sensu."[185] When checking such means-ends, the general attitude of tribunals should be deferential. The tribunal can apply such a test by questioning whether there were less harmful means of achieving the same goals. However, Santiago Montt considers that the tests like this "should be avoided in the BIT generation; intrusiveness on these issues has the effect of blurring the

[182] Santiago Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation (Studies in International Law),* (Hart Publishing, 2009), 351.
[183] "Eastern Sugar B.V. (Netherlands) v. The Czech Republic, SCC Case No. 088/2004," Final Award, para. 313, Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0261_0.pdf.
[184] Ibid, 338.
[185] Santiago Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation (Studies in International Law),* (Hart Publishing, 2009), 354.

distinction between policy judgment and legal adjudication. The weak legitimacy foundation of dispute settlement under investment treaties only permits tribunals to adopt a modest attitude toward government policy decisions."[186]

A significant decision in this question is Methanex, where the tribunal considered that in the circumstances of legal regulation "serious and objective" scientific work is sufficient to justify the questioning the status quo to the detriment of foreign investors: "Having considered all the expert evidence […], the Tribunal accepts the UC Report as reflecting a serious, objective and scientific approach to a complex problem in California. […] In particular, the UC Report was subjected at the time to public hearings, testimony and peer-review; and its emergence as a serious scientific work from such an open and informed debate is the best evidence that it was not the product of a political sham engineered by California, leading subsequently to the two measures impugned by Methanex in these arbitration proceedings."[187]

More particularly we can see the application of the concept of reasonableness into specific interpretations and applications of the FET standard in Pope & Talbot v. Canada. While observing the assessment by the tribunal of the reasonableness of the measure taken by an administrative agency: "The Tribunal considers that Canada's operation of the transitional adjustment to the quota system was a reasonable response to the circumstances described above and did not deny the Investment fair and equitable treatment."[188] "The Tribunal concludes that the adjustments were a reasonable response to perceived errors, omissions and hardships, and cannot be said to violate principles of fairness and equitable treatment. The application of the effects of those adjustments to B.C. producers only was also reasonable, given the view that at least a significant element of the justification was considered to be the B.C. averaging criteria (which were not applicable in other provinces) and that, to confine those effects to B.C. producers, was what the B.C. Committee had recommended."[189] Also in Eureko v. Poland, the tribunal stated that: "the RoP, by the conduct of organs of the State, acted not for cause but for purely arbitrary reasons linked to the interplay of Polish politics and nationalistic reasons of a discriminatory character." and "[...] the conduct of the RoP could even be characterized as "outrageous"[...]".[190]

---

[186] Ibid.
[187] "Methanex Corporation v. United States of America," UNCITRAL, Final Award, Part III, Chapter A, para. 101.
[188] "Pope & Talbot Inc. v. The Government of Canada," UNCITRAL, Award, para. 123.
[189] Ibid, 128.
[190] "Eureko B.V. v. Republic of Poland," Partial Award, paras. 233,234, Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0308_0.pdf.

3.3. ANALYSIS OF PROPORTIONALITY

Speaking of proportionality analysis with regard to investor's legitimate expectations and a taken by the state measure, that could mainly derive investor from his property rights, I find it quite important to mention the following statement of the European Court of Human Rights: "Not only must a measure depriving a person of his property pursue, on the facts as well as in principle, a legitimate aim "in the public interest", but there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised[...]. The requisite balance will not be found if the person concerned has had to bear "an individual and excessive burden" [...]. The Court considers that a measure must be both appropriate for achieving its aim and not disproportionate thereto."[191]

The concept of proportionality analysis envisages special method, applied in various legal techniques for solving different kinds of collisions and conflicts, using balancing and weighting. The particular characteristic of this approach is that it is not concentrated on "everything or nothing" but on "more or less". Rules "contain fixed points in the field of the factually and legally possible", consequently, a rule is a statement that is either "fulfilled or not". Principles, contrariwise, direct that something should be fulfilled as high as factually and legally possible. [192] Proportionality analysis facilitates the application of a fair and equitable standard, especially when limitation of the state's regulatory power in question, by fulfilling the balancing act between the interests of foreign investors, or, mainly property rights and conflicting public interests. Additionally, in some aspects, the principle of proportionality might supply a more rigid framework for resolving investor-country disputes than today's jurisprudence. It requires arbitrators to use the method of assessing the conflicting legal queries, balancing them, taking into consideration the possible alternatives, plus providing rational arguments for the decisions.

In domestic law context, proportionality is used as a method of defining the relationship between citizens and authorities. It assists in finding a decision in conflicts between the rights of individuals and the interest of the state and, also, between conflicting rights of individuals. Furthermore, proportionality establishes significant restrictions on the interference of authorities in the private sphere and offers a tool for setting frames of the regulatory power of governments. That is why proportionality analysis will definitely bring more predictability and determinacy in the

[191] "James and Others v. the United Kingdom," ECHR (1986), 19-20, Accessed 9 May 2020, https://hudoc.echr.coe.int/eng#{"fulltext":["James%20and%20Others%20v.%20the%20United%20Kingdom"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-57507"]}

[192] Robert ALEXY, *A Theory of Constitutional Rights* (1986; reprinted Oxford University Press, 2010), 47-48.

procedural aspect of deciding such a controversial question of balancing a state's right to regulate and investor's legitimate expectations.

Proportionality is a form of cost-benefit analysis, in other words, whether the means are proportionate to the end goal or whether the costs are excessive in relation to the benefits.[193] The LG&E Tribunal has provided a general approach to this test: "With respect to the power of the State to adopt its policies, it can generally be said that the State has the right to adopt measures having a social or general welfare purpose. In such cases, the measure must be accepted without the imposition of liability, except in cases where the State's action is obviously disproportionate to the need being addressed."[194]

The role of tribunals in ISDS is often being challenged, considering that they factually exercise power over states and can question the role of states as sovereigns in regulation and protection of public interest, including environmental protection, human rights, or to meet emergencies in order to protect property rights and economic interests. The crucial point is that conflicts between investment protection and all others public interests may have to be fully and fairly weighed in tribunal proceedings, even though that the state has not subordinated all these public interests by entering into a particular IIA. In the following statement of Martti Koskenniemi we can observe criticism regarding the power of the tribunal to decide in such question: "essentially, it's a transfer of power from public authorities to an arbitration body, where a handful of people would be able to rule whether a country can enact a law or not and how the law must be interpreted."[195] However, Charles Brower and Sadie Blanchard suggested that: "The authority to regulate remains intact, and arbitrators decide only whether an investor is entitled to compensation because a state breached an obligation it undertook – in an exercise of its sovereign capacity – by concluding a treaty. There is no foundation for the characterization that investment tribunals are a back door to dismantling environmental regulations or that they substitute their own policy judgment for that of democratically elected governments."[196]

That is why it is of the utmost importance for arbitral tribunals to apply a proportionality analysis when the BITs provide for states' obligations to investors, without setting clear textual criteria

---

[193] Trachtman J.P., "Trade and...Problems, Cost-Benefit Analysis and Subsidiarity", *European Journal of International Law 9* (1998): 35, http://www.ejil.org/pdfs/9/1/1484.pdf.

[194] "LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic, ICSID Case No. ARB/02/1," Award, para. 195.

[195] Jussi Konttinen & Alexsi Teivainen, "Professor: Finland's legislative power may be in jeopardy," *Helsinki Times* (15 December 2013), https://www.helsinkitimes.fi/finland/finland-news/domestic/8717-professor-finland-s-legislative-power-may-be-in.

[196] Brower C., Blanchard S., "What's in a Meme? The Truth about Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States," *Columbia Journal of Transnational Law*, Vol. 52, 2014.

for permitted deviations or restrictions on those obligations in order to protect important public interests.

Getting back to the test, after arbitral tribunals have found that the public interests invoked by the state are appropriate, and the measures taken for the goal are rational, the next relevant question is whether the harm suffered by the investor, given its nature and extent, is proportionate in the light of the goals pursued by the government. Proportionality needs the measure not to be excessive with regard to the purpose and that each principle bears relative weight. "The greater degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other."[197]

Investment tribunals appeal to proportionality analysis when they are trying to decide whether a regulatory measure remains within the framework of requirements to respect the interests of foreign investors under the FET standard. Arbitrators must consider whether the considerations and policy objectives of the measure taken by the state remain in such limits based on the general recognition of the rights or interests that the state seeks to protect. "Proportionality stricto sensu requires taking into account all available factors such as cost-benefit analysis, the importance of the right affected, the importance of the right or interest protected, the degree of interference (minor v. major interference), the length of interference (permanent v. temporary), the availability of alternative measures that might be less effective, but also proportionally less restrictive for the right affected, and so on."[198]

3.4. TRIBUNAL PRACTICE IN APPLYING BALANCING APPROACH

Such a balancing approach, using arbitrariness and proportionality tests can be found in Saluka v. Czech Republic. The tribunal started its consideration by stressing that in interpreting the Treaty and FET standard a balanced approach should be used, which required taking into account all the objects and purposes of the Treaty, that is not only protection of foreign investments, but also "overall aim of encouraging foreign investment and extending and intensifying the parties' economic relations."[199] "An investor's decision to make an investment is based on an assessment of the state of the law and the totality of the business environment at the time of the investment as well as on the

[197] Alexy R., "On the Structure of Legal Principles," *Ratio Juris*, 13 (2000): 298.
[198] Kingsbury B., Schill S.W., "Investor-State Arbitration As Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law," *NYU School of Law* (2009), 30.
[199] "Saluka Investments B.V. (The Netherlands) v. The Czech Republic," UNCITRAL, Partial Award, para. 300.

investor's expectation that the conduct of the host State subsequent to the investment will be fair and equitable."[200]

However, the tribunal considered that if to take the concept of stability of the legal and business framework "too literally, they would impose upon host States' obligations which would be inappropriate and unrealistic."[201] That is why,

> no investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor's expectations was justified and reasonable, the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well. [...] The determination of a breach of [FET clause] requires a weighing of the Claimant's legitimate and reasonable expectations on the one hand and the Respondent's legitimate regulatory interests on the other. A foreign investor protected by the Treaty may in any case properly expect that the Czech Republic implements its policies bona fide by conduct that is, as far as it affects the investors' investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and non-discrimination. In particular, any differential treatment of a foreign investor must not be based on unreasonable distinctions and demands and must be justified by showing that it bears a reasonable relationship to rational policies not motivated by a preference for other investments over the foreign-owned investment.[202]

And starting from paragraph 310 of the award, we can see the application of the balancing approached, used by the tribunal. The tribunal did find the breach of the FET standard, however, not due to regulatory changes.

Such balancing analysis is also frequently used in cases involving fines, penalties, termination of licences and contracts, and may be manifested in consideration regarding breach of either the expropriation or the FET standard, depending on the extent of the harm suffered by the investor (the expropriation standard requires full or substantial deprivation). In both cases, the analysis should be essentially the same as a matter of reasonableness and proportionality, and, therefore, might be under consideration together. That is why I would like to analyse Tecmed v. Mexico case, considering that in the case the question of expropriation was alleged together with breach of the FET standard. The tribunal considered the State's denial to lengthen the investor's permit to exploit landfill and noted that: "in order to determine if they are to be characterized as expropriatory, whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has

[200] Ibid, para. 301.
[201] Ibid paras. 303-304.
[202] Ibid., para. 305.

a key role upon deciding the proportionality." [203] The tribunal recognised that the "analysis starts at the due deference owing to the State when defining the issues that affect its public policy or the interests of society as a whole as well as the actions that will be implemented to protect such values", however, it does not prevent the tribunal from "questioning such due deference", by examining the actions of the State "to determine whether such measures are reasonable with respect to their goals, the deprivation of economic rights and the legitimate expectations of who suffered such deprivation. There must be a reasonable relationship of proportionality between the charge or weight imposed on the foreign investor and the aim sought to be realized by any expropriatory measure".[204]

Therefore, the Tribunal concluded that the deprivation of the claimant's landfill business, as the outcome of the refusal to renew the needed permits, was not acquitted by the applicant's violations, but rather for "socio-political" reasons, because of the community opposition to the functioning of the landfill. However, in reviewing the proportionality of such deprivation, the tribunal acknowledged that taking into account the relevant facts, the measures taken by the Mexican Government were not proportional, and as a consequence, the investor supposed to be compensated because of expropriation.[205]

In EDF v. Romania case, the tribunal has also adopted the balanced approach use in Saluka v. Czech Republic case. In this case, the claimant entered into a joint-venture agreement with two companies owned by the State to provide duty-free and retail offerings in Romanian airports and on-board flights. Later these companies refused to renew the contracts for commercial reasons. EDF then filed a claim, alleging violations of the expropriation and FET of the BIT by stating that he was unfairly deprived of his business, because, among others, he refused to pay the bribe to officials involved. The tribunal discharged the claim, finding that the stability and predictability of the legal and business framework "may not be correct if stated in an overly-broad and unqualified formulation" and consequently it could lead to "virtual freezing of the legal regulation of economic activities, in contrast with the State's normal regulatory power and the evolutionary character of economic life."[206] The tribunal asserted: "Legitimate expectations cannot be solely the subjective expectations of the investor. They must be examined as the expectations at the time the investment is made, as they may be deduced from all the circumstances of the case, due regard being paid to the host State's power to

[203] "Técnicas Medioambientales Tecmed S.A. vs. The United Mexican States, ICSID Case No. ARB (AF)/00/2," Award, para. 112.
[204] Ibid.
[205] Ibid, 112, 128,139.
[206] "EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13," Award, para. 217.

regulate its economic life in the public interest."[207] Regarding balancing assessment, the arbitral tribunal stated:

"As held by other tribunals, in addition to a legitimate aim in the public interest there must be "a reasonable relationship of proportionality between the means employed and the aim sought to be realized"; that proportionality would be lacking if the person involved "bears an individual and excessive burden." The aim of GEO 104 to combat corruption was certainly legitimate and in the public interest. In addition, the proportionality requirement was met as shown by the fact that the adverse effect of this measure regarding Claimant was limited to the latter's duty-free operation at Constanta Airport."[208]

In the end, the tribunal didn't find any evidence of bribe solicitation by the governmental officials. In addition, the claimant could not prove that he had a legitimate reason to expect continued involvement in the business or that the Romanian authorities' actions to terminate that involvement violated the current rules of Romanian law. A statute adopted for the cancellation of duty-free operations at Romanian airports was considered of being a proportionate response to cases of contraband activities being carried out at such operations and did not disproportionately or discriminately affect the claimant's investments as only one of its duty-free outlets was affected and the statute applied equally to all other duty-free operators at Romanian airports.[209]

Further analysis will concern more recent cases, namely, the awards were held in 2019. Quite interesting to observe the application and development of the tests of arbitrariness (or unreasonableness) and proportionality while considering the issue of a proper balance between a foreign investor's interests and a host state's necessity to change regulatory framework.

In Glencore v. Colombia case, the claimant acquired Prodeco, a Colombian company that had a coal mining exploration and exploitation contract. In 2009 the parties renegotiated the contract and Ingeominas agreed to lower royalties in exchange for Prodeco's further investments in the mining operation. At first, it was stated that the amendment could not be registered with the Colombian Mining Registry because it was opposite to Colombia's interests.[210] However, eventually, after new modifications, the amendment in favour of Colombia was registered in January 2010.[211]

---

[207] Ibid, para. 219.
[208] Ibid, para. 293.
[209] Ibid, paras 306, 330.
[210] "Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia, ICSID Case No. ARB/16/6," Award, paras. 197-198, 314-315.
[211] Sofia de Murard, "Colombia is ordered to pay over USD 19 million for frustrating Glencore's legitimate expectations", *IISD*, Accessed 9 May 2020, https://www.iisd.org/itn/2019/12/17/colombia-is-ordered-to-pay-over-usd-

Here we can see that they concluded the special amendment which would give investor benefit, and exactly this benefit was an incentive for further investment.

Afterwards, the Colombian agency supervising public funds, Contraloria, commence an investigation into Ingeominas. The investigation report stated that the amendment was against the interests of the state and reduced Colombia's revenues. Prodeco, however, claimed that revenue had to be calculated over the contract's entire duration, not just 2010, and then" would, in the long-run, generate much higher revenues to the State, compared to the previous regime."[212]

After a long history of investigations, derogations, reports, court hearing and appeals, in 2016, Prodeco paid the USD 19.1 million fine but challenged it. And in March 2016, Glencore and Prodeco (Glencore) jointly initiated ICSID arbitration. They argued that Colombia violated the FET and non-impairment standards and also the umbrella clause of the BIT, by applying the following measures: the Fiscal Liability Proceeding (and accordingly the fine) and the Procedure for Contractual Annulment. They asked the tribunal to order Colombia to pay the fine, to fulfil its contractual obligations and its amendment, and to suspend the annulment proceedings.[213]

The tribunal stated that:

> The threshold of propriety required by FET must be determined by the tribunal in light of all the relevant circumstances of the case. To this end, the tribunal must carefully analyse and take into consideration all the relevant facts, among them the following factors:
> - whether the host State has engaged in harassment, coercion, abuse of power, or other bad-faith conduct against the investor;
> - whether the State made specific representations to the investor before the investment was made and then acted contrary to such representations;
> - whether the State has respected the principles of due process, consistency, and transparency when adopting the measures at issue;
> - whether the State has failed to offer a stable and predictable legal framework, in breach of the investor's legitimate expectations.[214]
>
> In evaluating the State's conduct, the Tribunal must balance the investor's right to be protected from improper state conduct against other legally relevant interests and countervailing factors. First among these factors is the principle that legislation and regulation are dynamic, and that (absent a treaty obligation to the contrary) States enjoy a sovereign right to amend their laws and regulations and to adopt new ones in furtherance of public interest, the conception of which can change over time. [Another factor is] an investor's legitimate expectations. Such expectations arise when a State

19-million-for-frustrating-glencores-legitimate-expectations-glencore-international-a-g-and-c-i-prodeco-s-a-v-republic-of-colombia-icsid-case-no-arb-16-6/.

[212] "Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia, ICSID Case No. ARB/16/6," Award, paras. 388, 418.

[213] Ibid, paras. 525, 536-537, 547.

[214] Ibid, para. 1310.

> (or its agencies) makes representations or commitments or gives assurances, upon which the foreign investor (in the exercise of an objectively reasonable business judgement) relies, and the frustration occurs when the State thereafter changes its position as against those expectations in a way that causes injury to the investor.[215]

The tribunal asserted that claimants failed to prove that the fiscal control regime itself was a frustration of legitimate expectations. It declared that "different kinds of acts and measures, including contracts between the investor and the State, can give rise to an investor's legitimate expectations. But a mere contractual breach by the State will not per se result in a violation of the international law FET standard. An additional element (be it the special significance of the breach, an act of puissance publique, loss of a secure and stable legal framework, and so on) is required to trigger international responsibility."[216] Especially, "Colombia never made any representation or gave any assurance to Claimants that Mining Agency would abstain from enforcing such rights as it might have under the Contract or under Colombian law."[217]

Then the tribunal used the test of reasonability in order to decide whether the measures taken by Colombia were arbitrary and unreasonable. To do so, the tribunal checked whether the measures were adopted with prejudice, preference, or bias and whether they were adopted with a reasoned judgement or a rational decision-making process, taking all the circumstances into consideration.[218] Therefore, the tribunal agreed with the claimants that "The determination of the existence and quantum of damages made by the Contraloria […] is biased, contrary to basic principles of legal reasoning and financial logic, and incompatible with" non-impairment and FET clauses.[219] "The level of arbitrariness and unreasonability is high and cannot be protected by the deference accorded to state agencies when performing supervisory tasks entrusted by law." [220]

The tribunal came to the conclusion that the legitimate expectations of the investor were violated by breach of the non-impairment and FET clauses, and Colombia by way of restitution should compensate the Fiscal Liability Amount and interest, half of its legal costs and full arbitration costs. Regarding the request to order to continue performing the contract, immediate and unconditional cessation proceedings and promise to refrain initiating similar proceedings, the tribunal stated that the question remains open whether "tribunal constituted under the Treaty and the ICSID Convention is authorized to issue an order of this type to a sovereign State like Colombia". Nevertheless, it held that

[215] Ibid, paras. 1311,1367.
[216] Ibid, para. 1378.
[217] Ibid, para. 1550.
[218] Ibid, paras. 1447-1458.
[219] Ibid, para. 1475.
[220] Ibid, para. 1504.

the "reparation of the international wrong committed by Colombia requires full reparation […] achieved by restitution […] not by ordering Colombia to perform the Eighth Amendment."[221]

Another case is CEF v. Italy, where the claimant, a Netherlands company CEF, acquired shares in three Italian companies: Megasol, Phenix and Enersol. The latter had already been granted the incentives through a specific contract with the relevant Italian administrative entity. As for Megasol and Phenix, they applied for the incentive tariffs established under Conto Energia decrees, and later they also obtained the incentives. In few years, Italy has adopted measures that directly or indirectly altered the incentive tariffs scheme, including "the Spalmaincentivi decree, which reduced the incentives' amount; the administrative fees associated with the payment of the incentives; the imbalance costs scheme; and fiscal measures such as the "Robin Hood" tax and other immovable property taxes." [222] CEF argued that such measures violated the FET standard, the umbrella clause, the obligation to provide a transparent legal framework and not to unreasonably impair the investment under ECT. The tribunal based its consideration on the summary of Antaris v. case, quoting it with regards to definitions of legitimate expectations, specific representations, a requirement of stability of the legal framework. And taking into account such information and all the existing circumstances in the time of the investments were made, the tribunal held that when the investment was made, Megasol and Phenix still had several conditions to satisfy before being granted the incentives and that CEF may not have any expectations on the success of their applications. However, with regard to Enersol, it had already been granted with the incentive tariffs at the time of investment, so the tribunal indicated in such case it may give rise to legitimate expectations.[223]

In analysing aforestated legitimate expectations, the tribunal used a two-stage process: "first, what is the origin and scope, precisely, of the legitimate expectation; secondly, how exactly has such legitimate expectation (if first established as a matter of international law) have been transgressed, if at all, in a manner prohibited by international law."[224] So the tribunal analysed the nature of the expectations, and concluded: "Claimant's expectation was both specific as to what it was to receive by way of incentives and their exact duration, and precise in its origin (namely, from explicit acts of

[221] Ibid, paras 1587, 1166-1167.
[222] Alessandra Mistura, "In yet another solar energy incentives case against Italy, ECT tribunal applying proportionality test finds breach of legitimate expectations," *IISD*, Accessed 9 May 2020, https://www.iisd.org/itn/2019/09/19/in-yet-another-solar-energy-incentives-case-against-italy-ect-tribunal-applying-proportionality-test-finds-breach-of-legitimate-expectations-alessandra-mistura/.
[223] "CEF Energia BV v. Italian Republic, SCC Case No. 158/2015," paras 189 -190, Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/italaw10557_0.pdf
[224] Ibid, para 191.

Respondent)"[225], the tribunal confirmed the due diligence performed by the Claimant and relied on the circumstances of Enersol when deciding whether to invest. Therefore, the Claimant did have legitimate and reasonable expectations "and the precise scope of that legitimate expectation is that Enersol was to receive incentives, in constant currency for a twenty-year period."[226]

After applying the test of arbitrariness, the tribunal concluded that Italy's changes to the regulatory framework were reasonable and pursued a public interest goal. It also stated that sovereigns should be granted a high level of deference, which is not absolute. Changes to the regulatory framework must be balanced by the respondent's specific obligations and freely assumed international obligations in relation to the investor. In the case of a higher "level of engagement", less deference should be attributed to acts that, even if reasonable, end up disrupting investors' expectations. So, it leads us to the next step – proportionality test. The tribunal cited the established in El Paso v. Argentina and stated that there is an "acceptable margin of change" when the state can exercise its regulatory power and change its regulatory framework for the sake of public interest without breaching investors' legitimate expectations even with specific representations. Therefore, the tribunal should have exercised "balancing and weighing" the expectations of the Claimant as a foreign investor [...] with the right of Respondent as host State to adapt its regulatory framework to changing circumstances" in order to establish whether such an acceptable margin of change has been transcended.[227]

Thus, after applying the proportionality test, the majority concluded that there was a breach in respect of CEF's legitimate expectations on its investment in Enersol. However, Arbitrator Giorgio Sacerdoti had another point of view. He stated that considering the reasonableness of Italy's regulatory changes, the due diligence report on the possibility of a unilateral amendment, the transparent way in which they were adopted and the existence of legitimate public interest, together with the balancing and weighing exercise should have led the tribunal to reach the opposite conclusion.

However, in quite a similar case Blusun v. Italy, the tribunal criticized the decision in Charanne v. Spain[228] for adoption arbitrariness and proportionality tests. The tribunal declared that criteria of "public interest" and "unreasonableness," were largely indeterminate:

> Except perhaps in very clear cases, it is not for an investment tribunal to decide, contrary to the considered view of those authorities, the content of the public interest of their state, nor to weigh against it the largely incommensurable public interest of the capital-exporting state. The criterion of 'unreasonableness' can be criticized on similar

[225] Ibid, para. 222.
[226] Ibid, paras. 224 - 225, 234.
[227] Ibid, para. 237.
[228] "Charanne B.V. Constructio Investments S.A.R.L,v. Kingdom of Spain", Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/italaw7162.pdf.

> grounds, as an open-ended mandate to second-guess the host state's policies. By contrast, disproportionality carries in-built limitations and is more determinate. It is a criterion which administrative law courts, and human rights courts, have become accustomed to apply to governmental action.[229]

To sum up, the confrontation of such important concepts as the sovereign right of the state to regulate within its borders and respect for the legitimate expectations of the investor raises many questions and problems. The most important thing is to strike a balance and harmony between these two concepts. As they both form an important and integral part of the FET standard, which is nowadays considered to be a key element of ensuring a favourable investment regime. That is why it is of extreme necessity to establish definite criteria for identifying when a host country's regulation may constitute a FET violation.

The analyses of arbitrariness and proportionality facilitate the application of the concept of respect of investor's legitimate with regard to changes or measures adopted by the state. They accommodate to establish a balance between investor's expectations and sovereign rights of a state to respond on changes of circumstances that require applying appropriate measures in order to protect the public interest. In other words, it is balancing between investor's property rights and conflicting public interests.

The foregoing analysis has shown there is no clear approach to resolving such a question. Currently, tribunals are the only ones who determine and establish such an approach. However, more and more tribunals recently have applied tests of arbitrariness (or unreasonableness) and proportionality in trying to balance the regulatory rights of a state against the rights of investors, taking into account all the circumstances and respecting the state's own determination. Nevertheless, such practice is not consistent and a clear rule would definitely contribute to the predictability of the ISDS proceedings and would certainly reduce the cases claims of a FET violation, as it seems that for now, investors invoke it in almost every case connected with the adoption by a state of regulatory measure. My way of resolving this problem will be described in "Conclusions" and "Recommendations".

[229] "Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic, ICSID Case No. ARB/14/3," para, 317, Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/italaw8967.pdf.

CONCLUSIONS

1. Being the key element in international investment agreements, fair and equitable treatment's main aim is to create a favourable investment environment and to provoke an incentive of investors to undertake investments. As long as the interpretation of the nature and the content of the FET standard depends on its stipulation in the IIA, there is a tendency to specify the FET clause as precise as possible, indicating every element and requirement. Nevertheless, nowadays there are approximately 2000 BITs that contain FET provisions, which mostly are vague and unclear.

It is not correct to state that FET is an independent institution of customary international law as well as to blindly equate FET to MST. The later attitude unfairly narrows the scope of rights and guarantees, and reduces the threshold of its violation. Such an interpretation is only beneficial for the host countries, since it facilitates the burden of obligations and guarantees that states must fulfil in relation to foreign investors under the FET regime. I consider that there would be no need to provide a special standard for the protection of foreign investments in IIAs, if they are already protected by the well-known MST, which is the part of international customary law and will be applied to the international relationship regardless if it was mentioned in the agreement or not. Thus, the FET standard is supposed to create better legal protection for investments in order to produce a positive incentive for foreign investors. That is why, I think that the best approach is to consider it as independent treaty standard, then its interpretation would be defined on a case by case basis using VCLT and provisions of an IIA.

Elements of the FET standard also depends on IIA's stipulation, but due to established tribunal practice the following concepts, in most cases, were considered as the elements of the FET standard: predictability and stability of legal framework together with transparency, requirement of due process, reasonableness and proportionality, denial of justice, protection of qualified legitimate expectations.

2. The concept of protection of legitimate expectations of the foreign investor is recognized by numbers of tribunals as one of the most crucial elements of FET. It encourages foreign investors to make adequate business decisions based on the legal regime and representations made by the host state. Violating the FET standard by making some certain changes in the regulatory framework, means that a host state frustrated legitimate expectations of an investor, on which it reasonably relied at the time of undertaking the investment, by such an action.

Legitimate expectations cannot be solely based on the subjective assumptions, but rather on the objective conduct of the host state. That is why from the three approaches highlighted, I find the third one the most suitable, as it contains a number of qualifying requirements regarding legitimacy and reasonableness of the expectations and state's representations, which have to be assessed by the tribunal considering all the circumstances, including the rights of the state and the prevailing situation in it. Exactly according to this approach, a balancing test should be applied.

3. The confrontation of such important concepts as the sovereign right of the state to regulate within its borders and respect for the legitimate expectations of the investor requires to strike balance and harmony between them. On the one hand, no obligation, including the FET, can preclude host states from acting in the public interest, even though it could cause impairment to a foreign investor. On the other hand, according to the FET standard, even without specific representation or commitment (including a stabilization clause), consistency and predictability of the legal framework of the host state should be protected. That is why it is vital to establish definite criteria for identifying when a host country's regulation may constitute a FET violation. In my opinion, arbitrariness (or unreasonableness) and proportionality tests are indispensable to determine which of the principles is prevailing in each case. More and more tribunals recently have applied such tests, however, the practice is not consistent and a clear rule would definitely contribute to the predictability of the ISDS proceedings and would certainly reduce the cases claiming FET violation, as it seems that for now, investors invoke it in almost every case connected with the adoption by a state of regulatory measure.

What I propose is, when tribunals are considering a case concerning invoking FET standard by breaching legitimate expectations as a result of adopted changes to the regulatory framework by the host state, the further analysis should be used: 1) First, the tribunal must establish whether the investor's expectations are legitimate and reasonable, taking into account all the circumstances of the case. 2) The tribunal then should determine whether the measure applied by the state and violated the investor's legitimate expectations was indeed adopted with the aim of the protection of the public interest. 3) Next, it should be found out if a different measure, less adverse was possible in this case. 4) After, a proportionality test should be performed. Therefore once it was determined that the measure was implemented to protect the public interest and there was no other option than to adopt it, tribunals must exercise weighting or balancing on the one hand of the interests of the investor and on the other, the state's interest, particularly public interests. In other words, a tribunal must find out which of them weighted more in this case – legitimate expectations of investor or state's right to regulate in order to protect public interests. The question of compensation should also be determined by using such a test.

RECOMMENDATIONS

In order to resolve the problem revealed in this research, I would propose further suggestions:

1. It is almost impossible to create a binding treaty in the investment field to which most countries would join, as the essence of BIT is to create a favourable and profitable climate for investors so that they have the desire to invest in a particular country. Moreover, the nature of such treaty is very special, since on the one hand, it concerns the private sphere and private subjects – investors, but on the other hand, it is concluded at the international level between the states. Despite that, I still believe there are couple of options. Let us take for example the international sale of goods. Subjects are the same, private entities. At first, everything was problematic too: the interpretation of the contacts was inconsistent; arbitrators did not know which law to apply to settle disputes, as it was difficult for the parties to conclude the contract with choosing applicable the law of the other party. The CISG appeared to resolve many of the problems connected with the international sale of goods – contracts negotiation and conclusion, its performance and interpretation, and dispute resolution. Why not take such step for BITs?

That is why, I consider that adoption of some kind of Convention on bilateral investment agreements, which, among others, would include an exhausting list of possible stipulations of the FET clause, which should be sufficiently detailed. In addition, there also should be determined and explained each possible element and requirements of the FET standard. In this case, is more likely that parties would choose one of the established clauses for indicating of FET in their BIT.

2. Another necessary point is to develop effective techniques of comparative and principled analyses, therefore methodology for decision making. That possibly could be fulfilled by adding to the above-stated Convention provisions on interpretation and methodological analysis.

3. After the adoption of previous suggestions, harmonization of the tribunal practice in the cases of legitimate expectations and regulatory power will be possible. In this regard, it would be quite good if UNCTAD would publish a report concerning only this question, arbitral practice on its solving and the methodology used.

LIST OF BIBLIOGRAPHY

ARBITRAL AWARDS AND LEGAL CASES:

1. "ADF Group Inc. v. United States of America, ICSID Case No. ARB (AF)/00/1." Award, Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0009.pdf.

2. "AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary, ICSID Case No. ARB/07/22." Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0014_0.pdf.

3. "Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia, ICSID Case No. ARB/99/2." Award. Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0359.pdf.

4. "Antaris v. The Czech Republic, PCA Case No. 2014-1," (Award, 2 May 2018). Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/italaw9809.pdf.

5. "Attorney General of Hong Kong v Ng Yuen Shiu 2 AC 629 (PC)." (1983). Accessed 9 May 2020, https://swarb.co.uk/attorney-general-of-hong-kong-v-ng-yuen-shiu-pc-21-feb-1983/.

6. "Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12," Award. Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0061.pdf.

7. "Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29." Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0075.pdf.

8. "Betsey Case" (1796), reprinted in Moore J.*,1 International Arbitration* (1796).

9. "Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic, ICSID Case No. ARB/14/3." Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/italaw8967.pdf.

10. "Bolivia v. Chile" (Obligation to Negotiate Access to the Pacific Ocean), ICJ, Judgment (1 October 2018). Accessed 9 May 2020, https://www.acerislaw.com/wp-content/uploads/2018/11/Bolivia-v.-Chile-case.pdf

11. "CEF Energia BV v. Italian Republic, SCC Case No. 158/2015." Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/italaw10557_0.pdf

12. "Cervin Investissements S.A. y Rhone Investissements S.A. v Costa Rica, ICSID case No. ARB/13/2," Award. Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/italaw9215.pdf

13. "Charanne B.V. Constructio Investments S.A.R.L,v. Kingdom of Spain", Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/italaw7162.pdf

14. "CME (Netherlands) vs. Czech Republic", UNCITRAL, (Award, March 14, 2003), Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0180.pdf

15. "CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8," (Award, 12 May 2005, Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0184.pdf.

16. "Crystallex International Corporation v. Venezuela, ICSID Case No. ARB(AF)/11/2," (Award, 4 April 2016). Accessed 9 May 2020, https://www.acerislaw.com/wp-content/uploads/2018/11/Crystallex-International-Corporation-v.-Venezuela.pdf.

17. "Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/9." Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0228.pdf.

18. "Duke Energy v. Ecuador, ICSID Case No. ARB/04/19," (Award, August 18, 2008). Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0256.pdf.

19. "Eastern Sugar B.V. (Netherlands) v. The Czech Republic, SCC Case No. 088/2004," Final Award. Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0261_0.pdf.

20. "EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13," Award, Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0267.pdf.

21. "Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36," (Final Award, 4 May 2017). Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/italaw9050.pdf.

22. "Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19." Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/italaw4495.pdf

23. "El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15." (Award, 31 October 2011). Accessed 9 May 2020, https://www.acerislaw.com/wp-content/uploads/2018/11/El-Paso-Energy-International-Company-v.-The-Argentine-Republic.pdf.

24. "Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3." Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0293.pdf

25. "Eudoro Armando Olguín v. Republic of Paraguay, ICSID Case No. ARB/98/5," Award. 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0587.pdf.

26. "Eureko B.V. v. Republic of Poland," Partial Award. Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0308_0.pdf.

27. "Generation Ukraine, Inc. v. Ukraine," Award. Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0358.pdf.

28. "Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia, ICSID Case No. ARB/16/6," Award. Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/italaw10767_0.pdf.

29. "Impregilo v. The Argentine Republic, ICSID Case No. ARB/07/17," Award. Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0418.pdf.

30. "International Thunderbird Gaming Corporation v. The United Mexican States," UNCITRAL/NAFTA (Award of 26 Jan. 2006). Accessed 9 May 2020, https://www.italaw.com/cases/571.

31. "Invesmart v. Czech Republic," UNCITRAL. Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/italaw4162_0.pdf.

32. "Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I], ICSID Case No. ARB/05/20." Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/italaw3036.pdf.

33. "James and Others v. the United Kingdom," ECHR (1986). Accessed 9 May 2020, https://hudoc.echr.coe.int/eng#{"fulltext":["James%20and%20Others%20v.%20the%20United%20Kingdom"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-57507"]}

34. "LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic, ICSID Case No. ARB/02/1," Award. Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0462.pdf

35. Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1." Award. Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0510.pdf.

36. "Metalpar S.A and Buen Aire S.A v The Argentine Republic, ICSID Case No. ARB/03/5." Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0516.pdf.

37. "Methanex Corporation v. United States of America," UNCITRAL (NAFTA), (Final Award, 3 August 2005), Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0529.pdf.

38. "Mondev International LTD v. United States of America, ICSID Case No. ARB(AF)/99/2," Award. Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita1076.pdf.

39. "MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7." Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0544.pdf

40. "Neer L. F. H. & Pauline Neer (U.S.A.) v. United Mexican States," 4 UNRIAA 60 (1926), Accessed 9 May 2020, http://www.investmentclaims.com

41. "Neptune Case," reprinted in Moore J., *4 History and Digest of International Arbitrations to which the US has been a party* (1898).

42. "North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)," (Judgment of February 20, 1969), *ICJ Reports* (1969). Accessed 9 May 2020, https://www.icj-cij.org/files/case-related/51/051-19690220-JUD-01-00-EN.pdf

43. "Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11." Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/italaw1094.pdf

44. "Parkerings-Compagniet AS v. Republic of Lithuania (ICSID Case No. ARB/05/8)," (Award, 11 September 2007). Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0619.pdf

45. "Pope & Talbot Inc. v. The Government of Canada," UNCITRAL, Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0683.pdf

46. "PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey, ICSID Case No. ARB/02/5," Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0695.pdf

47. "Regina v North and East Devon Health Authority, ex p Coughlan, QB 213 (CA)" (2001), Accessed 9 May 2020, "https://swarb.co.uk/regina-v-north-and-east-devon-health-authority-

ex-parte-coughlan-and-secretary-of-state-for-health-intervenor-and-royal-college-of-nursing-intervenor-ca-16-jul-1999/

48. "Saluka Investments B.V. (The Netherlands) v. The Czech Republic," UNCITRAL (Partial Award of March 17, 2006). Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0740.pdf.

49. "S.D. Myers, Inc. v. Government of Canada," UNCITRAL (Final Award). Accessed 9 May 2020. https://www.italaw.com/sites/default/files/case-documents/ita0754.pdf

50. "S.D. Myers, Inc. v. Government of Canada," UNCITRAL (Partial Award). Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0747.pdf.

51. "Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16," ICSID, Award. Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0770.pdf.

52. "Técnicas Medioambientales Tecmed S.A. vs. The United Mexican States, ICSID Case No. ARB (AF)/00/2" (Award, May 29, 2003). Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0854.pdf

53. "Total S.A. v. The Argentine Republic, ICSID Case No. ARB/04/01," (Decision on Liability, 27 December 2010). Accessed 9 May 2020, https://www.italaw.com/cases/1105.

54. "Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon, ICSID Case No. ARB/07/12." Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita1013.pdf.

55. "Walter Bau Ag (In Liquidation) v. Kingdom of Thailand," UNCITRAL. Accessed 9 May 2020, https://www.italaw.com/sites/default/files/case-documents/ita0067.pdf

56. "White Industries Australia Limited v. The Republic of India," UNCITRAL (Award, 30 November 2011). Accessed 9 May 2020, https://www.acerislaw.com/wp-content/uploads/2018/11/White-Industries-Australia-Limited-v.-The-Republic-of-India.pdf

BOOKS:

1. Alexy Robert, *A Theory of Constitutional Rights (*1986), reprinted in Oxford University Press, 2010. https://books.google.com.ua/books/about/A_Theory_of_Constitutional_Rights.html?id=ZbWxWYhhe8UC&redir_esc=y.

2. Black H. C., Garner B. A., *Black's Law Dictionary*, West Group, 1999.

3. Dolzer R., Schreuer C., *Principles of International Investment Law,* Oxford University Press, 2012.

4. Dolzer R., Stevens M., *Bilateral Investment Treaties*, Martinus Nijhoff Publishers, 1995. https://books.google.com.ua/books?id=u2CF6a6yvCoC&printsec=frontcover&hl=uk#v=onepage&q&f=false.

5. Dugan C. F., Wallace Jr. D., Rubins N. D., Sabahi B., *Investor-State Arbitration*, Oxford University Press, 2008. https://books.google.lt/books?id=xfkEAQAAQBAJ&printsec=frontcover&hl=ru#v=onepage&q&f=false.

6. Ernst Freund, *The Police Power, Public Policy and Constitutional Rights,* University of Chicago Press, 1904. https://books.google.com.mt/books?id=zS4OAwAAQBAJ&pg=PP1&dq=Ernst+Freund,+The+Police+Power&hl=uk&sa=X&ved=0ahUKEwifqdy-4obpAhXkwMQBHRJYCQgQ6AEIMTAB#v=onepage&q=Ernst%20Freund%2C%20The%20Police%20Power&f=false

7. Gehne Katja and Romulo Brillo, *Stabilization Clauses in International Investment Law: Beyond Balancing and Fair and Equitable Treatment*, Martin Luther University Halle-Wittenberg, 2014. http://telc.jura.uni-halle.de/sites/default/files/BeitraegeTWR/Heft%20143.pdf.

8. Jola Gjuzi, *Stabilization Clauses in International Investment Law: A sustainable development approach*, Springer, 2018.

9. Muchlinski Peter, *Multinational Enterprises and the Law*, Oxford University Press; 2 edition, 2007. https://global.oup.com/academic/product/multinational-enterprises-and-the-law-9780199227969?cc=ua&lang=en&

10. Newcombe A., Paradell L., *Law and Practice of Investment Treaties: Standards of Treatment*, Kluwer Law International, 2009. https://www.researchgate.net/publication/228191041_Law_and_Practice_of_Investment_Treaties_Standards_of_Treatment_Chapter_1_Historical_Development_of_Investment_Treaty_Law

11. Paparinskis M., *The International Minimum Standard and Fair and Equitable Treatment*, Oxford: Oxford University Press, 2013. https://global.oup.com/academic/product/the-international-minimum-standard-and-fair-and-equitable-treatment-9780199694501?cc=ua&lang=en&

12. Roth A. H., *The International Minimum Standard Applied to Aliens*, Leidan: Sijthoff, 1949.

13. Rumana Islam, *The Fair and Equitable Treatment (FET) Standard in International Investment Arbitration*, Springer, 2018. https://www.researchgate.net/publication/327828804_The_Fair_and_Equitable_Treatment_FET_Standard_in_International_Investment_Arbitration_Developing_Countries_in_Context

14. Santiago Montt, *State Liability in Investment Treaty Arbitration Global Constitutional and Administrative Law in the BIT Generation (Studies in International Law),* Oxford and Portland, Oregon, US: Hart Publishing, 2009.

15. Shihata Ibrahim, *Legal Treatment of Foreign Investments: The World Bank Guidelines*, Martinus Nijhoff Publishers, 1993. https://books.google.lt/books?id=7ENCIjp9WukC&printsec=frontcover&dq=inauthor:%22Ibrahim+F.+I.+Shihata%22&hl=ru&sa=X&ved=0ahUKEwi7hdfO05PpAhVgwMQBHV8ZDPAQ6AEILzAB#v=onepage&q&f=false

16. Soren Schonberg, *Legitimate Expectations in Administrative Law*, Oxford 2000.https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198299479.001.0001/acprof-9780198299479

17. Stapelbroek K., Trampus A., *The Legacy of Vattel's Droit des gens*, Palgrave Macmillan, 2019. https://www-springer-com.skaitykla.mruni.eu/gp/book/9783030238377#aboutAuthors

18. Velyaminov G.M., *International Economic Law and Process (Academic Course),* Volters Kluver, 2004.

DISSERTATIONS AND THESIS:

1. Abhijit P.G. Pandya, "Interpretations and Coherence of the Fair and Equitable Treatment Standard in Investment Treaty Arbitration." Ph.D. thesis, London School of Economics, 2011. http://etheses.lse.ac.uk/338/1/Pandya_Interpretations%20and%20Coherence%20of%20the.pdf

2. Borgoyakov A.S., "Standards of a "fair regime" and "security" of foreign investment in international law." Doctoral dissertation, Moscow State University, 2018. http://www.dslib.net/pravo-evropy/standarty-spravedlivogo-rezhima-i-bezopasnosti-inostrannyh-investicij-v.html

3. Gamze Öztürk, "The Role of Legitimate Expectations Balancing the Investment Protection and State's Regulations." Master's thesis, Uppsala Universitet, 2017. http://www.diva-portal.org/smash/get/diva2:1105461/FULLTEXT01.pdf.

INTERNATIONAL INVESTMENT AGREEMENTS AND TREATIES:

1. "Agreement concerning the promotion and reciprocal protection of investments (with protocol)", Federal Republic of Germany and Union of Soviet Socialist Republics, (1989), Accessed 9 May 2020, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1398/download.

2. "ASEAN Comprehensive Investment Agreement" (adopted 26 February 2009, entered into force 29 March 2012), Accessed 9 May 2020, http://investasean.asean.org/files/upload/Doc%2005%20-%20ACIA.pdf.

3. "Colombia - United Kingdom BIT" (2010), Accessed 9 May 2020, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3253/download.

4. "Convention Establishing the Multilateral Investment Guarantee Agency", MIGA, 1985, 12, Accessed 9 May 2020, https://www.miga.org/sites/default/files/archive/Documents/MIGA%20Convention%20(April%202018).pdf.

5. "Energy Charter Treaty," (1994), Accessed 9 May 2020, https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/1994_ECT.pdf

6. "North American Free Trade Agreement,"(1992), Accessed 9 May 2020, https://www.nafta-sec-alena.org/Home/Texts-of-the-Agreement/North-American-Free-Trade-Agreement?mvid=1&secid=539c50ef-51c1-489b-808b-9e20c9872d25#A1105.

7. "Protocol of Colonia for the Promotion and Reciprocal Protection of Investments within MERCOSUR," (1994), Accessed 9 May 2020,: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3585/download.

8. "Rwanda-United States BIT" (2008), Accessed 9 May 2020, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2241/download.

9. "Treaty between The United States of America and the Republic of Turkey concerning the reciprocal encouragement and protection of investments", (1985), Accessed 9 May 2020, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2356/download.

10. "Treaty of Amity, Commerce and Navigation between Great Britain and the United States" (signed 19 November 1794, entered into force 28 October 1795), Art. VII, Accessed 9 May 2020, https://www.trans-lex.org/801500/_/treaty-of-amity-commerce-and-navigation-between-his-britannic-majesty-and-the-united-states-of-america-by-their-president-with-the-advice-and-consent-of-their-senate-1794/#head_2

11. "Treaty of Friendship, Commerce and Navigation between the United States of America and the Federal Republic of Germany", Office of Trade Agreements Negotiation and Compliance, US Department of Commerce, 29 October 1954, Accessed 9 May 2020, https://treaties.un.org/doc/publication/unts/volume%20273/volume-273-i-3943-english.pdf.

12. "Vienna Convention on the Law of Treaties 1969", Accessed 9 May 2020, https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

JOURNAL ARTICLES:

1. Abs, Herman and Hartley Shawcross "Draft Convention on Investments Abroad", *Journal of Public Law* 1 (1960): 115-118. https://www.international-arbitration-attorney.com/wp-content/uploads/137-volume-5.pdf

2. Alexy R., "On the Structure of Legal Principles," *Ratio Juris*, 13 (2000): 294-304. https://doi.org/10.1111/1467-9337.00157.

3. Alessandra Mistura, "In yet another solar energy incentives case against Italy, ECT tribunal applying proportionality test finds breach of legitimate expectations," *IISD*, https://www.iisd.org/itn/2019/09/19/in-yet-another-solar-energy-incentives-case-against-italy-ect-tribunal-applying-proportionality-test-finds-breach-of-legitimate-expectations-alessandra-mistura/.

4. Blandford A., "The History of Fair and Equitable Treatment before the Second World War", *ICSID Review*, Vol. 32, No. 2 (2017): 287–303. https://academic.oup.com/icsidreview/article-abstract/32/2/287/3748168.

5. Borchard E., "Basic Elements of Diplomatic Protection of Citizens Abroad," *American Journal of International Law 7*, 3 (1913): 497-520. https://heinonline-org.skaitykla.mruni.eu/HOL/Page?public=true&handle=hein.journals/ajil7&div=33&start_page=497&collection=journals&set_as_cursor=0&men_tab=srchresults .

6. Borchard E., "The "Minimum Standard" of The Treatment of Aliens," *Proceedings of the American Society of International Law at Its Annual Meeting* 33 (1939): 51-74. www.jstor.org/stable/25656995.

7. Dolzer R., "Fair and equitable treatment: a key standard in investment treaties," *The International Lawyer* 39, No.1 (2005*):* 87-106. https://scholar.smu.edu/cgi/viewcontent.cgi?article=2319&context=til.

8. Brower Charles and Blanchard Sadie, "What's in a Meme? The Truth about Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States," *Columbia Journal of Transnational Law* 52 (2014): 689-777. https://ssrn.com/abstract=3023409.

9. Gann Pamela, "The US Bilateral Investment Treaty Program", *Stanford Journal of International Law*, Volume 21 (1985): 373-460. https://heinonline-org.skaitykla.mruni.eu/HOL/Page?public=true&handle=hein.journals/stanit21&div=22&start_page=373&collection=journals&set_as_cursor=0&men_tab=srchresults.

10. Gaukrodger D., "The balance between investor protection and the right to regulate in investment treaties: A scoping paper", *OECD Working Papers on International Investment*, No. 2017/02, OECD Publishing, Paris. https://doi.org/10.1787/82786801-en.

11. Haftu Tekleab Alema, "Reflections on Legitimate Expectations of Foreign Investors in Ethiopia," *Jimma University Journal of Law 9* (2017): 28-53. http://ejhs.ju.edu.et/index.php/jlaw/article/download/1004/391

12. Joseph Stiglitz, "The Secret Corporate Takeover," *Project Syndicate*, *The Guardian*, 13 May 2015. https://www.theguardian.com/business/2015/may/13/the-secret-corporate-takeover-of-trade-agreements.

13. Jussi Konttinen & Alexsi Teivainen, "Professor: Finland's legislative power may be in jeopardy," *Helsinki Times*, 15 December 2013. https://www.helsinkitimes.fi/finland/finland-news/domestic/8717-professor-finland-s-legislative-power-may-be-in.

14. Kingsbury B., Schill S.W., "Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law," *NYU School of Law, Public Law Research Paper No. 09-46* (2009): 1-50. https://ssrn.com/abstract=1466980

15. Mann F. A., "British Treaties for the Promotion and Protection of Foreign Investment", *British Yearbook of International Law* (1981): 241-254. https://academic.oup.com/bybil/article-abstract/52/1/241/581585?redirectedFrom=fulltext.

16. Muchlinski P., "Caveat Investor?" The Relevance of the Conduct of the Investor Under the Fair and Equitable Treatment Standard, *International and Comparative Law Quarterly 55, 3,* (2006): 527-557. https://www.jstor.org/stable/4092639?seq=1#metadata_info_tab.

17. Paterson Robert, "Canadian Investment Promotion and Protection Treaties", *Canadian Yearbook of International Law* 29 (1992): 373-390. https://doi.org/10.1017/S0069005800004501

18. Rachkov I.V., "Concept of "Legitimate Expectations" of Foreign Investors in the International Investment Arbitration Practice," *Moscow Journal of International Law* 1 (2014): 196-220.

19. Root Elihu, "Basis of Protection to Citizens Residing Abroad," *American Journal of International Law 4*, no. 3 (1910): 517-528. https://heinonline.org/HOL/P?h=hein.journals/ajil4&i=523 .

20. Schill S.W., "Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law", IILJ Working Paper*, Global Administrative Law Series 6* (2006): 1-37. http://iilj.org/wp-content/uploads/2016/08/Schill-Fair-and-Equitable-Treatment-under-Investment-Treaties-as-an-Embodiment-of-the-Rule-of-Law-2006-2.pdf

21. Schreuer Christoph, "Fair and Equitable Treatment in Arbitral Practice," *The Journal of World Investment & Trade* 6 No.3 (June 2005): 357-386. https://files.pca-cpa.org/pcadocs/bi-c/2.%20Canada/4.%20Legal%20Authorities/RA-90%20%20C.%20Schreuer,%20Fair%20and%20Equitable%20Treatment%20%20(June%202005).pdf.

22. Shihata F.I., "The Treaty as a Law-Declaring and Custom Making Instrument," 22 *Revue Egyptienne de Droit International 51* (1966):56-83.

23. Simon Maynard, "Legitimate Expectations and the Interpretation of the Legal Stability Obligation," *European Investment Law and Arbitration Review*, no. 1 (2016): 99-114.

24. Srinath Reddy Kethireddy, "Still the Law of Nations: Legitimate Expectations and the Sovereigntist Turn in International Investment Law," *Yale Journal of International Law 44*, no. 2 (Summer 2019): 316-353. https://digitalcommons.law.yale.edu/yjil/vol44/iss2/4/

25. Sofia de Murard, "Colombia is ordered to pay over USD 19 million for frustrating Glencore's legitimate expectations", *IISD*, 17 December 2019. https://www.iisd.org/itn/2019/12/17/colombia-is-ordered-to-pay-over-usd-19-million-for-frustrating-glencores-legitimate-expectations-glencore-international-a-g-and-c-i-prodeco-s-a-v-republic-of-colombia-icsid-case-no-arb-16-6/.

26. Trachtman J.P., "Trade and...Problems, Cost-Benefit Analysis and Subsidiarity", European Journal of International Law 9 (1998): 32–85. http://www.ejil.org/pdfs/9/1/1484.pdf.

27. Vasciannie S., "Fair and Equitable Treatment Standard," *British Yearbook of International Law* 70 (1999): 107–119.

28. Weil P., "The State, The Foreign Investor, and International Law: The No Longer Stormy Relationship of a Ménage à Trois", ICISD Review, *Foreign Investment Law Journal*, Vol. 15 (2000): 400 - 417.

29. Walde T.W., "Energy Charter Treaty-Based Investment Arbitration. Controversial Issues", *The Journal of World Investment & Trade 5, 3* (2004): 373-412. https://heinonline-org.skaitykla.mruni.eu/HOL/Page?public=true&handle=hein.journals/jworldit5&div=26&start_page=373&collection=journals&set_as_cursor=2&men_tab=srchresults.

30. Zachary Douglas, "Nothing if Not Critical for Investment Treaty Arbitration: Occidental, Eureko and Methanex," *Arbitration International* 22, Issue 1, (1 March 2006): 27–52. https://doi-org.skaitykla.mruni.eu/10.1093/arbitration/22.1.27.

31. Yannaca-Small C., "Fair and Equitable Treatment Standard in International Investment Law," *Journal of International Economic Law (China)*13, No.3 (2006): 1-24. https://www.oecd.org/investment/internationalinvestmentagreements/37777477.pdf

OFFICIAL PUBLICATIONS:

1. "14th Meeting (Private), Held at the Peace Palace, the Hague, on July 2nd, 1920," *Proces-Verbaux of the Proceedings of the Committee June 16th - July 24th 1920 with Annexes 1* (1920). https://heinonline.org/HOL/P?h=hein.intyb/leagnatc0001&i=326.

2. "Agreement between the Government of the Italian Republic and the Government of … on the promotion and protection of investments". https://www.italaw.com/sites/default/files/archive/ITALY%202003%20Model%20BIT%20.pdf.

3. "Documents of the twelfth session including the report of the Commission to the General Assembly," *Yearbook of the International Law Commission 1960* (United Nations, New York, 196), vol. II., p. 145.

4. "Economic Agreement of Bogotá", (Ninth International Conference of American States, 2 May 1948). http://www.oas.org/juridico/english/treaties/a-43.html

5. "Non-discrimination most-favoured-nation treatment and national treatment," *WTO, Note by the Secretariat* (4 June 2002). http://www.jmcti.org/2000round/com/doha/wg/WT_WGTI_W_118.pdf.

6. "Norway Draft Model BIT" (2007), Accessed 9 May 2020, https://www.italaw.com/sites/default/files/archive/ita1031.pdf.

7. "Canada Model Foreign Investment Protection Agreement (FIPA)" (2014), Accessed 9 May 2020, https://www.italaw.com/sites/default/files/files/italaw8236.pdf.

8. "Final Act and Related Documents", United Nations Conference on Trade and Employment (Havana, Cuba, April 1948), 11, Accessed 9 May 2020, https://www.wto.org/English/docs_e/legal_e/havana_e.pdf

9. "Netherlands Model Investment Agreement" (2019), Art. 9, Accessed 9 May 2020, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download

10. OECD, "Draft Convention for the Protection of Foreign Property", O.E.C.D. Publications, (Paris, 1967): 9, Accessed 9 May 2020, https://www.oecd.org/daf/inv/internationalinvestmentagreements/39286571.pdf.

11. OECD, "Fair and Equitable Treatment Standard in International Law", *OECD Working Papers on International Investment*, (OECD Publishing, September 2004), 8, Accessed 9 May 2020, http://www.oecd.org/daf/inv/investment-policy/WP-2004_3.pdf

12. "Notes of Interpretation of Certain Chapter 11 Provisions," *NAFTA Free Trade Commission* (July 31, 2001), Accessed 9 May 2020, http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp.

13. UNCTAD "Fair and equitable treatment: a sequel", *Series on International Investment Agreements II*, (UNITED NATIONS, New York and Geneva, 2012), Accessed 9 May 2020, https://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf.

14. "U.S. Model Bilateral Investment Treaty" (2012), Accessed 9 May 2020, https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf.

WEBPAGES:

1. Investment Dispute Settlement Navigator, Accessed 9 May 2020, https://investmentpolicy.unctad.org/investment-dispute-settlement.

2. International Investment Agreements Navigator, Accessed 9 May 2020, https://investmentpolicy.unctad.org/international-investment-agreements.

3. Oxford Reference, Accessed 9 May 2020, https://www.oxfordreference.com/view/10.1093/oi/authority.20110810105248783.

ABSTRACT

The Master thesis researched a question of changes in the state's regulatory framework as a basis of the frustration of legitimate expectations of investors, and consequently breach of FET. The research starts with the analysis of the nature of the FET standard, in order to find out its most appropriate interpretation and content. Demand for such a study is argued by lack of harmonized practice of interpretation of the FET standard, and therefore legitimate expectations, and absence of a single legal instrument that clearly defines its structural components and methodology of its interpretation.

Further research of the author is concentrated on analysing the legitimate expectations of investor in relation to the predictable and stable framework of a state. Also, it was discovered that the most appropriate approach in determining whether changes of the state's legal regulation would be declared as inconsistent with FET - balancing approach, including arbitrariness and proportionality analyses. Such an approach considers all relevant circumstances that influenced on the existence of legitimate and reasonable expectations of the investor and on the emergence of the necessity of the state to adopt certain measures.

Keywords: Fair and equitable treatment, investment law, legitimate expectations of investors, tribunal practice, balancing approach, arbitrariness and proportionality tests.

SUMMARY

The main goal of the Master Thesis is to find out the most appropriate approach for determining what changes in the regulatory framework of a host state and under what circumstances would defeat investor's legitimate expectations and therefore, would be considered as a breach of FET.

A feature of the chosen topic is that in practice there is no scientific and theoretical harmonization or a single legal instrument that would establish uniform approaches to the interpretation and composition of the FET standard. According to the author's opinion, such diversity is related to the absence of a unified concept of FET and its nature, and the lack of methodology of its interpretation and algorithm for analysis in case of violations. Therefore, special attention in Chapter 1 is given to the analysis of the nature of FET, its origins and its components. As FET's interpretation depends on the exact wording of FET's provision in the IIA or BIT, the author highlighted its stipulation in the modern IIAs.

Moreover, the author underlined that if the state's violation of FET by changing the regulatory framework is in question it means that investment legitimate expectations were frustrated. Hence, in Chapter 2 the author made a research on the concept of investor's legitimate expectation under the FET standard. The aim of the concept is to provoke an incentive of investors to undertake investments, however not all of the investor's expectations will be legitimate. So, in the result of the analysis of arbitration decisions, three approached were identified: pro-investor, pro-state and balancing approach. The author inclines to balancing approach that contains a number of qualifying requirements regarding legitimacy and reasonableness of the expectations and state's representations, which have to be assessed considering all the circumstances in which the investment was made, including the prevailing situation in the state and taking into account the rights of the state.

Chapter 3 of the thesis is concentrated on the search of the most appropriate approach in determining whether certain changes in the state's legal regulation could be declared as inconsistent with FET. The author concluded that such an analysis should be focused on identifying if the regulatory framework was changed in order to protect the public interest, whether the adopted measure was necessary under the circumstances and if less harmful for the investor actions could have been taken.

HONESTY DECLARATION

12/05/2020

Ukraine

I, Olena Halahan, student of Mykolas Romeris University (hereinafter referred to University), Faculty of Law, European and International Business Law confirm that the Master thesis titled:

"CHANGES IN THE REGULATORY FRAMEWORK AS A BREACH OF FAIR AND EQUITABLE TREATMENT IN INVESTMENT LAW"

Is carried out independently and honestly;

Was not presented and defended in another educational institution in Lithuania or abroad;

Was written in respect of the academic integrity and after becoming acquainted with methodological guidelines for thesis preparation.

I am informed of the fact that student can be expelled from the University for the breach of the fair competition principle, plagiarism, corresponding to the breach of the academic ethics.

_____ Olena Halahan

(signature) *(name, surname)*