In love and war anything is fair – and in arbitration?
An overview of ICSID awards on the fair and equitable treatment standard

Smaranda Miron*

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I. Introduction

"Fair is foul, and foul is fair/Hover through the fog and filthy air" (*Shakespeare*).

Fairness and equity are broad and vague concepts. Although they have been the topic of many studies over the years, no fixed definitions have been agreed upon so far; instead, these two concepts differ according to the evolutionary phases of the society. Nonetheless, it has been broadly agreed that fairness and equity may derive from concepts like justice, reasonableness, impartiality, transparency or proportionality.

In a world full of misunderstood and twisted values, in which the border between fair and foul is often hard to see, giving content to the fair and equitable treatment standard (FET) is no easy task. Just before putting my pen on paper, the word "fair"

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reminded me of the famous Shakespearean quote – "fair is foul and foul is fair" –, the prophecy of a world with values turned upside down. Surprisingly or not, the phrase describes perfectly the fair and equitable standard in modern investment arbitration. As the next pages will show, the interpretation of this clause has led to contradictory decisions in arbitral practice; cases with similar grounds were decided differently on the merits, and the winners in the former case turned into losers in the latter. One can only wonder if this clause is truly meant to protect investors against abuses, or whether it is just a tool in the hands of the powerful ones, an instrument with the help of which they can decide a case in one way or another, enjoying total discretion of interpretation.

The aim of this article, far from approaching the concepts of fairness and equity in a philosophical manner, is to provide a brief examination of the standard of FET in ICSID arbitration (arbitration conducted under the auspices of the International Centre for Settlement of Investment Disputes) and with the normative content of the standard as identified by arbitral tribunals. Without even aiming at making an exhaustive presentation, what will follow is a list of definitions and characteristics that have been given so far to the FET standard, as well as the presentation of the shortcomings with which practitioners confront themselves nowadays. A separate section presents case-law on FET in Argentina in the outcome of the financial crisis from 2001.

II. The definition of FET

There is no overall accepted and recognized legal definition of the FET standard. Arbitrators, government officials, counsels and scholars have tried to provide a worldwide accepted definition – without any success so far. The FET standard was mainly established as a principle because of the numerous bilateral investment treaties (BITs) that incorporate the obligation of the host state to accord fair and equitable treatment to investors at all times. The standard is also to be found in some multilateral and regional investment agreements – such as the Energy Charter Treaty[1] and the North American Free Trade Agreement.[2] What is nevertheless

1 The Energy Charter Treaty (ECT), signed in 1994 and entered into force in 1998. At present, it has 52 signatories. Art. 10(1) reads as follows: "Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favorable and transparent conditions for Investors of other Contracting Parties to make Investments in its area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment."

2 The North American Free Trade Agreement (NAFTA) – between Canada, the United Mexican States and the United States of America – signed in 1992 and entered into force in 1994. Art. 1105(1) reads as follows: "Each Party shall accord to investments of investors of another Party

certain is the fact that this standard of protection has given rise to many successful claims so far: it is currently the most important and successful basis for claims in Investor-State arbitrations.[3]

However, FET is also known in various legal systems in the same or analogous form as it is viewed in investment-related arbitration. In the United States, aspects of FET are clearly encompassed with the so-called takings clause in the Fifth Amendment to the Constitution. In France the standard is called *traitement juste et equitable*, while the Germans have two different names for this concept: *Grundsatz gerechter und billiger Behandlung* and *Anspruch auf umfassenden Vertrauensschutz*.

This phrase was regarded as being vague and open to too many interpretations and its content has caused much anxiety.[4] That is why arbitral practice and scholars have gradually developed and explained this notion. Still, none of their attempts to clarify this continuously-evolving concept has proven successful in the end.

1. Legal basis

The examination of the FET standard in the context of foreign investment has to begin with Art. 42 of the ICSID Convention.[5] This provision strikes a fine balance between the contrasting interests of the investors and of the host states, as it mixes flexibility with certainty. The tribunal is empowered to select the appropriate rules of law on a case-by-case basis. In *Amco v. Indonesia*,[6] the arbitral tribunal underlined the fact that Art. 42(1) of the ICSID Convention "authorises the tribunal to apply the principles of international law only in order to fill the lacunae of the applicable law and to establish the precedence of the international law norms when they are in conflict with the applicable national law".[7] Article 42 of the ICSID Convention is the provision which allows the application of the FET standard in cases before

treatment in accordance with international law, including fair and equitable treatment and full protection and security."

3 *Schreuer*, Fair and Equitable Treatment (FET): Interactions with Other Standards, Transnational Dispute Management 2007, p. 2.

4 *Sornarajah*, The International Law on Foreign Investment, 2nd ed. 2004, p. 235 et seq.

5 The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Washington Convention) was drafted in 1965 and entered into force in 1966. Art. 42(1) reads as follows: "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In absence of such agreement, the tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."

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7 Ibid., para. 20.

the ICSID tribunals. Even if this standard is not specifically mentioned in the relevant BIT, since the FET standard is part of international law, the parties will have to comply with it.

Some scholars even consider that this very freedom and flexibility with which Art. 42 of the ICSID Convention empowers the tribunals is the reason for the reluctance of some countries to join the ICSID. The case of Mexico cannot be ignored. Though party in many ICSID arbitration proceedings, Mexico has been regularly failing to become a party to the ICSID Convention. Investors can only get a second-best from the host state: the Additional Facility. Surprisingly, no official Mexican position exists, but it goes without saying that Mexico is now the "black sheep" of NAFTA.[8] Although Mexico may postpone its adhering to the Convention because of its fear that international law can be interpreted as corrective of domestic law in investment matters (under Art. 42 ICSID Convention), Mexico is indeed a part of NAFTA,[9] and Art. 1105 of the Agreement also provides that domestic rules can be overruled by international law. It seems that Mexico must more or less obey the same rules on FET as any other ICSID member as if it had already joined the Convention. In addition, it has to face the disadvantages of not adhering to the ICSID Convention: investors are taken aback by a system with high political risks, no certainty, an unknown legal system, no guarantee of fair challenge of awards mechanism and no proof of impartiality.

The standard of fair and equitable treatment appears prominently in almost all of the approximately 2.400 bilateral investment treaties that have been concluded so far between ICSID signatories. Prior to that it figured in the Friendship, Commerce and Navigation Treaties in the United States concluded with various countries and it played an important role in all multilateral projects relating to the protection of foreign investment.[10]

2. Case-law

Over the years, arbitral tribunals have attempted to interpret and apply the standard of fair and equitable treatment. They identified elements which, either alone or taken together, have been regarded as being part of the standard. Such elements would include due process, consistency, non-arbitrariness, non-discrimination, transparency and good faith.

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8 *De Cossio*, Mexico before ICSID, Rebel without a cause?, Journal of World Investment and Trade 9 (2008), pp. 3-5.

9 See above fn. 2.

10 *Yannacca-Small*, Fair and Equitable Treatment Standard in International Investment Law, OECD Working Papers on International Investment No. 2004/3, p. 3 et seq.

Paragraph 154 of the case *Tecmed v. Mexico*[11] is the most often-cited provision which defines the fair and equitable treatment standard. In this comprehensive and – as alleged – almost exhaustive definition, the arbitral tribunal stated that the FET standard requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The host state must act in a consistent manner, free from ambiguity and totally transparent in its relations with the foreign investor. For the *Tecmed* tribunal, transparency is a very broad concept. Investors should know beforehand any and all rules and regulations that would govern their investments, as well as the goals of the relevant policies and administrative practices or directives. The host state bears the obligation, in the view of the *Tecmed* tribunal, to provide the investors with all the data needed in order to plan their investments wisely. Surprisingly enough, the tribunal understands that the meaning of the standard stems both from treaty law as well as from international law.[12] Paragraph 155 of the same award makes reference to the basis for the tribunal's findings: in its interpretation, the tribunal took into account the text of the Agreement between the parties (interpreted in accordance with Art. 31(1) of the Vienna Convention), as well as international law and the good faith principle.

Schill sees the decision in *Tecmed*[13] as introducing a "*Leitmotiv*" in arbitration for structuring administrative proceedings. In his opinion, FET would play an essential role in shaping administrative proceedings that involve foreign investors, in particular, but not exclusively, concerning the grant of administrative licenses. From *Tecmed* onwards, national administrations should carefully plan each and every change of direction. It comes with no surprise that *Tecmed* is one of the strongest backups of foreign investors seeking an award of damages against a state which changed the legal framework in a more or less unexpected way.[14]

In *Genin v. Estonia*,[15] the Tribunal opined that acts violating the FET standards would include acts showing a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith. Furthermore, state authorities must refrain themselves from impairing investment by acting in an arbitrary or discriminatory way.

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12 *Dolzer/Schreuer*, Principles of International Investment Law, 2008, p. 127.

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14 *Schill*, Revisiting a Landmark: Indirect Expropriation and Fair and Equitable Treatment in the ICSID Case TECMED, Transnational Dispute Management 2006.

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The *Mondev*[16] tribunal ruled the opposite. A state may treat foreign investment unfairly and inequitably without necessarily acting in bad faith. The arbitral tribunal explained that what is unfair and inequitable need not equate with outrageous and egregious.

In *MTD v. Chile*,[17] the arbitrators agreed that 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.

In *Waste Management v. Mexico*,[18] the tribunal described the possible conduct of the state which might infringe FET. According to paragraph 98 of the award, the state is in breach of the FET standard when the conduct attributable to the state is harmful to the claimant, if that conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory or exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety. The tribunal acknowledged that the standard is flexible and must be adapted to the circumstances in each case. What should be taken into account are the representations made by the host state at the moment when investment commenced, and which representations were relied upon by reasonable businessmen.

In the case of *RFCC v. Morocco*,[19] the tribunal agreed that the obligation of according FET to foreign investors does not have a predetermined content, but simply refers to the notions of justice and equity, understood objectively, and takes into account the circumstances of the case.

Non-discrimination is also part of the FET, added the arbitral tribunal in *CMS v. Argentina*.[20] Paragraph 290 of this landmark award says that "any measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment."

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16 ICSID Case No. ARB (AF) 99/2, *Mondev International Ltd v. United States of America*, award of 11/11/2002, para. 116.

17 ICSID Case No. ARB/01/7, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, award of 25/5/2004, para. 113.

18 ICSID Case No. ARB (AF)/00/3, *Waste Management, Inc. v. United Mexican States*, award of 30/4/2004.

19 ICSID Case No. ARB/00/6, *Consortium RFCC v. Kingdom of Morocco*, award of 22/12/2003, para. 51.

20 ICSID Case No. ARB/01/8, *CMS Gas Transmission Company v. The Argentine Republic*, award of 12/5/2005.

The Tribunal in *LG&E v. Argentina*[21] further developed the issue: it found that it was possible for the host state to have an arbitrary and discriminatory conduct without breaching the standard of FET and the vice-versa. Paragraphs 162 and 163 of the Decision on Liability state as follows: "characterizing the measures as not arbitrary does not mean that such measures are characterized as fair and equitable […] it was not arbitrary, though unfair and inequitable, not to restore the Gas Law or the other guarantees related to the gas distribution sector and to implement the contract renegotiation policy."

The Arbitral Tribunal in *Noble Ventures v. Romania*[22] was generous when it equated the fair and equitable treatment standard with the duty to provide full protection and security, the prohibition of arbitrary and discriminatory measures and the obligation to observe contractual obligations towards the investor.

Also, in the Decision on Jurisdiction in the case of *SGS v. Philippines*,[23] the Tribunal admitted that a violation of obligations under a contract may give rise to a claim for a violation of the FET standard. It ruled that "an unjustified refusal to pay sums admittedly payable under an award or a contract at least raises arguable issues under Article IV" (containing the FET standard).

The case *Impreglio v. Pakistan*[24] concerned a contract for the construction of hydroelectric power facilities. Basing its decision on the reasoning in *RFCC v. Morocco*,[25] the Tribunal did not interpret the standard of fair and equitable treatment as protecting investors from each and every breach of contract by the host state. In order for a breach of FET under the relevant BIT to occur, the state should have adopted a behaviour which goes beyond the one of an ordinary contracting party. Only then would the tribunal have jurisdiction and the Claimant's claim may ultimately be successful.

The relationship between the breach of contractual obligations and a breach of the FET standard is particularly problematic, as the FET standard may intrude the so-called *domaine réservée* of the states more than any other principle. It is hard to accept that each and every breach of a contract would trigger a violation of FET. If any

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21 ICSID Case No. ARB/02/1, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, decision on liability of 3/10/2006.

22 ICSID Case No. ARB/01/11, *Noble Ventures, Inc. v. Romania*, award of 12/10/2005, para. 181 et seq.

23 ICSID Case No. ARB/02/6, *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines,* decision of the Tribunal on the objections to jurisdiction of 29/1/2004, para. 162. See also the Settlement Agreement of 11/4/2008.

24 ICSID Case No. ARB/03/3, *Impregilo S.p.A. v. Islamic Republic of Pakistan,* decision on jurisdiction of 22/4/2005, para. 255 et seq.

25 ICSID Case No. ARB/00/6, *Consortium RFCC v. Kingdom of Morocco*, award of 22/12/2003.

breach of the *pacta sunt servanda* principle would lead to a breach of the FET, then the FET standard would be nothing less than a broadly interpreted umbrella clause. This is probably much more than any government had pictured the FET to be when they signed a BIT. Nowadays it is widely accepted that only when the violation of the contract affects the investor's legitimate expectations on a secure and legal framework it is possible to speak of a breach of the FET standard.[26]

3. Literature

"Fair" and "equitable" are two slightly different concepts: fairness refers to the contemporary concepts of good governance expressed by authoritative legal instruments relevant to the country implicated in the dispute. On the other hand, equitable is not a synonym of fair, but rather a reference to the abuse of the formality of law; international and civil law concepts and principles such as good faith, *Treu und Glauben*, *abus de droit* and *venire contra factum proprium* are to be taken into account when determining the notion of equity.[27]

There are voices[28] which argue that, though it would not be impossible to state that the two concepts are slightly different, no evidence of state practice seems to point in this direction. The general assumption appears to be that "fair and equitable" must be considered to represent a single, unified standard, and that one could easily equal "equitable" with "fair and equitable". It is also possible to regard the requirement of fair and equitable treatment as a short-hand formula for the combined legal effects of all other standards of treatment. Anyway, in a simplistic interpretation of the concept, one can replace the terms fair and equitable with similar concepts such as just, even-handed, unbiased or legitimate.

Muchlinski opines that there is no general agreement on the precise meaning of this principle and everything is open to interpretation. He states that the standard "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 be said that the concept connotes the principle of non-discrimination and proportionality in the treatment of foreign investors."[29]

Juillard agrees that the inclusion of the fair and equitable standard in investment agreements provides an auxiliary element for the interpretation of other provisions

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26 *Schreuer*, (fn. 3), p. 26.

27 *Wälde*, Investment Arbitration under the Energy Charter Treaty: An Overview of Selected Key Issues Based on Recent Litigation Experience, in: Horn/Kröll (ed.), Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects, 2004, pp. 193-235.

28 *Dolzer/Schreuer*, (fn. 12), p. 123.

29 *Muchlinski*, Multinational Enterprises and the Law, 1995, p. 625.

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1. Legal basis

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17 ICSID Case No. ARB/01/7, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, award of 25/5/2004, para. 113.

18 ICSID Case No. ARB (AF)/00/3, *Waste Management, Inc. v. United Mexican States*, award of 30/4/2004.

19 ICSID Case No. ARB/00/6, *Consortium RFCC v. Kingdom of Morocco*, award of 22/12/2003, para. 51.

20 ICSID Case No. ARB/01/8, *CMS Gas Transmission Company v. The Argentine Republic*, award of 12/5/2005.

The Tribunal in *LG&E v. Argentina*[21] further developed the issue: it found that it was possible for the host state to have an arbitrary and discriminatory conduct without breaching the standard of FET and the vice-versa. Paragraphs 162 and 163 of the Decision on Liability state as follows: "characterizing the measures as not arbitrary does not mean that such measures are characterized as fair and equitable […] it was not arbitrary, though unfair and inequitable, not to restore the Gas Law or the other guarantees related to the gas distribution sector and to implement the contract renegotiation policy."

The Arbitral Tribunal in *Noble Ventures v. Romania*[22] was generous when it equated the fair and equitable treatment standard with the duty to provide full protection and security, the prohibition of arbitrary and discriminatory measures and the obligation to observe contractual obligations towards the investor.

Also, in the Decision on Jurisdiction in the case of *SGS v. Philippines*,[23] the Tribunal admitted that a violation of obligations under a contract may give rise to a claim for a violation of the FET standard. It ruled that "an unjustified refusal to pay sums admittedly payable under an award or a contract at least raises arguable issues under Article IV" (containing the FET standard).

The case *Impreglio v. Pakistan*[24] concerned a contract for the construction of hydroelectric power facilities. Basing its decision on the reasoning in *RFCC v. Morocco*,[25] the Tribunal did not interpret the standard of fair and equitable treatment as protecting investors from each and every breach of contract by the host state. In order for a breach of FET under the relevant BIT to occur, the state should have adopted a behaviour which goes beyond the one of an ordinary contracting party. Only then would the tribunal have jurisdiction and the Claimant's claim may ultimately be successful.

The relationship between the breach of contractual obligations and a breach of the FET standard is particularly problematic, as the FET standard may intrude the so-called *domaine réservée* of the states more than any other principle. It is hard to accept that each and every breach of a contract would trigger a violation of FET. If any

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21 ICSID Case No. ARB/02/1, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, decision on liability of 3/10/2006.

22 ICSID Case No. ARB/01/11, *Noble Ventures, Inc. v. Romania*, award of 12/10/2005, para. 181 et seq.

23 ICSID Case No. ARB/02/6, *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines,* decision of the Tribunal on the objections to jurisdiction of 29/1/2004, para. 162. See also the Settlement Agreement of 11/4/2008.

24 ICSID Case No. ARB/03/3, *Impregilo S.p.A. v. Islamic Republic of Pakistan,* decision on jurisdiction of 22/4/2005, para. 255 et seq.

25 ICSID Case No. ARB/00/6, *Consortium RFCC v. Kingdom of Morocco*, award of 22/12/2003.

breach of the *pacta sunt servanda* principle would lead to a breach of the FET, then the FET standard would be nothing less than a broadly interpreted umbrella clause. This is probably much more than any government had pictured the FET to be when they signed a BIT. Nowadays it is widely accepted that only when the violation of the contract affects the investor's legitimate expectations on a secure and legal framework it is possible to speak of a breach of the FET standard.[26]

3. Literature

"Fair" and "equitable" are two slightly different concepts: fairness refers to the contemporary concepts of good governance expressed by authoritative legal instruments relevant to the country implicated in the dispute. On the other hand, equitable is not a synonym of fair, but rather a reference to the abuse of the formality of law; international and civil law concepts and principles such as good faith, *Treu und Glauben*, *abus de droit* and *venire contra factum proprium* are to be taken into account when determining the notion of equity.[27]

There are voices[28] which argue that, though it would not be impossible to state that the two concepts are slightly different, no evidence of state practice seems to point in this direction. The general assumption appears to be that "fair and equitable" must be considered to represent a single, unified standard, and that one could easily equal "equitable" with "fair and equitable". It is also possible to regard the requirement of fair and equitable treatment as a short-hand formula for the combined legal effects of all other standards of treatment. Anyway, in a simplistic interpretation of the concept, one can replace the terms fair and equitable with similar concepts such as just, even-handed, unbiased or legitimate.

Muchlinski opines that there is no general agreement on the precise meaning of this principle and everything is open to interpretation. He states that the standard "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 be said that the concept connotes the principle of non-discrimination and proportionality in the treatment of foreign investors."[29]

Juillard agrees that the inclusion of the fair and equitable standard in investment agreements provides an auxiliary element for the interpretation of other provisions

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26 *Schreuer*, (fn. 3), p. 26.

27 *Wälde*, Investment Arbitration under the Energy Charter Treaty: An Overview of Selected Key Issues Based on Recent Litigation Experience, in: Horn/Kröll (ed.), Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects, 2004, pp. 193-235.

28 *Dolzer/Schreuer*, (fn. 12), p. 123.

29 *Muchlinski*, Multinational Enterprises and the Law, 1995, p. 625.

of the agreement and, generally, for filling the gaps that may appear. He also opines that the imprecise notion of fair and equitable treatment (*notion aux contours imprécis*) will be ultimately developed by the "praetorian" work of the tribunals.[30]

As the FET standard is a principle that is open to interpretation and application by a tribunal, tribunals are empowered to enrich this admittedly vague standard with concrete normative content in order to apply it to factual circumstances. Nevertheless, no matter how wide and permissive this principle may seem, it is not an authorization to go outside the borders of the law and apply equitable principles.[31] It remains a legal standard, not an empowerment of arbitral tribunals to render decisions *ex aequo et bono*.

III. Shortcomings in arbitral practice

No attempt to unite the vast jurisprudence on FET under a comprehensive concept has been successful until now. There are voices who say that the FET is an intentionally vague term,[32] designed to give arbitral tribunals a quasi-legislative authority to articulate various rules in different cases. The inexistence of a well-shaped definition leads to disadvantages for both host states and investors: governments cannot evaluate accurately the way they exercise the public authority without having to pay for the violation of investment treaties. On the other hand, each and every investor wants a stable and predictable climate; but under the present legal framework, investors do not know against which risks, be they political or economical, they are protected. A clear delineation between investor's rights and state sovereignty is needed.

The award rendered in *Noble Ventures*[33] speaks volumes. It perfectly illustrates the fact that it is difficult to foresee and estimate whether a specific interpretation of FET will actually encourage investment flows or whether, on the contrary, an interpretation that will be too onerous for the host state will have the effect of chilling the investment climate. Paragraph 52 of the above-mentioned award reads as following: "While it is not permissible, as it is too often done regarding BITs, to interpret clauses exclusively in favor of investors, here such an interpretation is justified". In conclusion, the FET clause is not necessarily always interpreted *in dubio pro investorem*. The tribunal acknowledged that regulating the contractual relationships

30 *Rousseau*, Droit International Public, 1970, p. 47.

31 *Schreuer*, Fair and Equitable Treatment, Transnational Dispute Management 2005, p. 1.

32 *Schill*, (fn. 14), p. 37 et seq.

33 See above fn. 22.

between states and investors falls beyond the scope of the BITs. But in the very case at hand, the arbitrators unanimously stated that a narrower interpretation would have deprived the FET clause of its practical content. However, arbitral practice remains silent concerning when the FET clause can be interpreted in one way or the other.

FET is constantly used by tribunals as a basis for ordering host states to pay damages to foreign investors; true, but no right can be unlimited. An investor should be protected against arbitrariness, but how far should this protection extend to concepts as alerting and advising investors of their administrative rights?[34] It is true, the FET standard narrows down the discretionary space available to the host state; it also true that this sort of limitation is a must in order to attract foreign investment and to ensure its viability.[35]

Obviously FET is not an absolute standard, and it is obviously evolving; but there is no text of law or legal decision which clearly states how far it can go. Predictability is extremely important in the international investment environment. Therefore, in the future, scholars will have to deal with the fact that FET jurisprudence does not produce foreseeable results that are accepted free-willingly by the host states. All in all, as *Mann*[36] put it, "a tribunal should not be concerned with a minimum, maximum or average standard. It will have to decide if 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".

Since the protection of the investor's rights is of outmost importance, and the arbitral tribunal should take into consideration the circumstances of each case, one can only agree with the interpretation of FET in the *Azurix v. Argentina*[37] case: "The clause, as drafted, permits to interpret FET and full protection of security as higher standards than required by international law. The purpose 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."

Literature also deals with the opinion that the lack of precision may be a virtue rather than a shortcoming.[38] The constantly changing economic conditions nowadays make it impossible to anticipate in the abstract all the possible types of infringements upon an investor's legal position.

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34 *Kreindler*, Fair and Equitable Treatment – A Comparative International Law Approach, Transnational Dispute Management 2006, p. 12.

35 *Dolzer/Schreuer*, (fn. 12), p. 122.

36 *Mann*, British Treaties for the Protection and Promotion of Investment, BYIL 52 (1981), p. 241.

37 ICSID Case No. ARB/01/12, *Azurix Corporation v. Argentine Republic*, award of 14/7/2006, para. 361.

38 *Dolzer/Schreuer*, (fn. 12), p. 122 et seq.

It goes without saying that the efforts made in international practice for the harmonization and codification of FET will eventually bring about, if not total success, but at least some sort of progress. Even so, there are voices[39] which speak up against too much harmonization: certain consensus elements will emerge, but too much harmonization and consensus is neither feasible nor desirable. Since there are different levels of host state development, some level of flexibility should be saved. But where this flexibility should end in order to make room for the much-needed certainty, it is hard to tell.

IV. FET in the outcome of the Financial Crisis in Argentina

Argentina has been facing numberless claims under various BITs which brought about the question of the relationship between international investment protection (especially fair and equitable treatment) and the power of the state to handle economic crises. In the present section, we will discuss two landmark cases – *CMS*[40] and *LG&E*[41] – and the new interpretations they gave to the clause of fair and equitable treatment. Based on similar facts, the two decisions resulted in different findings. This is even more surprising as one tribunal member (H.E. Judge *Rezek*) sat in both investment treaty disputes.[42]

Both companies participated in the privatization program of Argentina's gas transportation and distribution sector and purchased shareholding interests in local gas distribution companies following a public bidding process. At the moment of their entering on the Argentinean market, the national investment legislation was an investor's dream, as the government's goal was to create economic stability and prosperity[43]: they were granted long-term licenses and the right to calculate gas tariffs in US dollars and to convert them into pesos at the current exchange rate; twice a year, they had the right to adjust their tariffs based on the US PPI (United States Producer Price Index). Furthermore, the country also pegged its local currency to the US dollar with an exchange rate of 1:1.

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39 *Schill*, (fn. 14), p. 37 et seq.

40 ICSID Case No. ARB/01/8, *CMS Gas Transmission Company v. Argentine Republic*, award of 12/5/2005.

41 ICSID Case No. ARB/02/1, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, award of 25/7/2007.

42 *Schill*, International Investment Law and the Host State's Power to Handle Economic Crises, Comment on the ICSID Decision in LG&E v. Argentina, Journal of International Arbitration 24 (2007), p. 266.

43 Ibid., p. 267.

But as the Argentinean economic crisis began to unfold, things changed almost overnight. In 2001, Argentina's economy collapsed. In a single day, the country's central bank reserves fell by 2 billion amidst massive capital flight. In a single month, 30 people died in street protests. Five presidents were forced from the office within two weeks only. No sooner than a year after the breakout of the crisis, the government was distributing emergency food aid.

In response to this crisis without precedent, Argentina implemented emergency legislation. The government met with the gas companies, and they agreed that the adjustment of tariffs would be temporarily suspended. But this temporary agreement soon turned into a permanent one as the economic situation continued to worsen. Emergency Law No. 25 561 eliminated the practice of pegging the value of peso to the dollar and allowed the devaluation of the Argentinean national currency.[44]

CMS[45] was the first in a series of ICSID cases against Argentina resulting from the severe economic crisis in 2001-2002. CMS brought a claim before ICSID, alleging that it had violated its obligation under the United States-Argentina-BIT and under international customary law. Article II(2)(a) of the US-Argentina-BIT reads: "Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law." In its defense, Argentina claimed that its actions were the result of a state of necessity. The case raised the following issues: Can a country's social unrest and severe economic crises release it from its liability concerning its contractual obligations under international law? And even more, is there any difference between the obligations under the fair and equitable treatment standard in the situation of a state in emergency and the same obligations in a state in a normal economic situation? To put it in other words, can the FET standard be a guarantee against financial losses during financial crises?

The ICSID tribunal ordered Argentina to pay CMS Gas compensation of 133.2 million US dollars plus interest. The tribunal in *CMS* considered that Argentina breached its obligations under the BIT and had a behavior "contrary to the stability and predictability of the law". The tribunal acknowledged the danger that, should the otherwise demanding standards of FET be loosely applied, "any state could invoke the necessity to elude its international obligations."[46] Also, according to the tribunal, the principle of fair and equitable treatment was identical to the interna-

44 *Mayeda*, Playing fair: The Meaning of Fair and Equitable Treatment in Bilateral Investment Treaties, Journal of World Trade 41 (2007), p. 276.

45 ICSID Case No. ARB/01/8, *CMS Gas Transmission Company v. Argentine Republic*, award of 12/5/2005.

46 Ibid., para. 317.

tional minimum standard, as they both preserve the required stability and predictability of the business environment.[47] So once it accords fair and equitable treatment to foreign investors, the host state must preserve the bargain between the parties and ensure a stable and predictable investment environment.[48] Of course, the legal framework must not be frozen in time; the tribunal accepted Argentina's argument: "stability does not mean immobilization, and the measures adopted, particularly the 'pesification', were the solution necessary to prevent greater social damage and poverty".[49] The decision in *CMS* was regarded as a highly controversial one, as the tribunal based its findings on two previous decisions: *Tecmed*[50] and *CME v. Czech Republic*[51] (UNICTRAL arbitration). But *CMS* is different from the abovementioned ones, since in none of them were the circumstances of a severe economic downturn requiring emergency legislation as they did in Argentina. If any critics were to be made regarding the tribunal's reasoning, then the tribunal should have noticed that the obligation to provide investment stability could not trump the government's obligation to prevent severe economic damage.[52] While accepting that a severe crisis could give rise to circumstances exempting a state from observing its international obligations, the *CMS* tribunal ruled on the grounds that Argentina contributed to the crisis while disposing of other ways of reacting to it.[53]

Unlike the *CMS* award, the tribunal in *LG&E*[54] accepted that Argentina was excused from observing its BIT obligations during the financial crisis. The investor was due to bear the financial consequences of the state's measures; the host state is not liable to pay the US investor. The tribunal considered that the principle of fair and equitable treatment should be interpreted in an evolutionary manner, with respect to the specific circumstances of the case and the course of time, since "it becomes difficult to establish an unequivocal and static concept of these notions".[55] The existence of an emergency is therefore relevant to the content of what is fair and equitable in a given situation; what is fair and equitable in the situation of a state of emergency might then differ from what is fair and equitable in

47 Ibid., para. 284.

48 *Mayeda*, (fn. 44), p. 278.

49 ICSID Case No. ARB/01/8, *CMS Gas Transmission Company v. Argentine Republic*, award of 12/5/2005, para. 272.

50 ICSID, Case No. ARB(AF)/00/2, *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, award of 29/5/2003.

51 UNCITRAL, *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, final award of 13/9/2003.

52 *Mayeda*, (fn. 44), p. 279

53 ICSID Case No. ARB/01/8, *CMS Gas Transmission Company v. Argentine Republic*, award of 12/5/2005, para. 329.

54 ICSID Case No. ARB/02/1, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, award of 25/7/2007.

55 Ibid., decision on liability of 3/10/2006, para. 123.

the normal course of things. As we have seen, the tribunal in *CMS* considered the economic crisis severe, but not to the extent that a preclusion of the wrongfulness of the actions of Argentina would be justified.[56] In contrast, the *LG&E* tribunal regarded the economic crisis in Argentina as comparable to a military invasion.[57]

The decision in *LG&E* is yet another step in the evaluation of the economic breakdown in Argentina and its impact on the international investment. The plea of necessity of the host state was accepted by the tribunal and so no damages had to be paid to the investor. The *LG&E* decision opens a new chapter regarding the distribution of the risks of economic crises between host states and investors; far from being a more balanced approach, it simply makes the investors unable to rely on specific promises made by host states, since any commitment might be left aside when economic difficulties are encountered. One should also keep in mind that usually financial crises in developing countries are preceded by credible political and economic reforms.[58]

The two decisions mentioned above are a proof that the ICSID tribunals have the exquisite freedom of interpreting the fair and equitable standard – in favor of the investor or of the host state; this raises a big question mark about the predictability and certainty that the FET standard should ensure.

V. Conclusion

"Such a fair and foul day I have not seen […]" (*Shakespeare*).

Describing the fair and equitable treatment standard both in an understandable and thorough way is not an easy of a challenge. This is only to be added to the fact that the FET standard is connected to other different standards of protection in a variety of ways. Some tribunals found these standards to be overlapping, others that distinction between them should be drawn. Practice has shown that this overarching principle finds its expression in a number of ways in different concepts of modern investment law.

The purpose of this article was to show that no universally accepted definition and features of the FET clause have been put into words so far; this led to an inconsistent arbitral practice, as arbitrators are left the freedom of interpreting the clause.

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56 *Rosell*, The CMS Case: A Lesson for the Future?, Journal of Investment Arbitration 25 (2008), p. 496.

57 ICSID Case No. ARB/02/1, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, award of 25/7/2007, para. 238.

58 *Schill*, (fn. 42), p. 286.

The advantage of this lies in the fact that, since there is no institution of precedent in investment arbitration, tribunals do not have to follow previous decisions; the errors of the past do not have to make it into the future and so the investors may enjoy the protection they have been granted. The other side of the coin is the lack of certainty for the foreign investors in developing countries, and also the unequal bargaining powers between poor nations and the developed ones. Less guidance for the tribunals means more discretion, and more discretion means that interpreting the FET would seem similar to rendering a decision *ex aequo et bono*.

As the Argentinean cases have shown, it is not always easy to make the difference between "fair" and "unfair", as well as it is also not easy to balance contrasting interests and strong arguments and to render a decision that can at least partially satisfy both parties. Nevertheless, it is not comforting for an investor to know that all the agreements he had entered can become void as soon as the host state encounters a so-called "emergency situation". Arbitration can be a tough game of losers and winners, and their parts can switch quickly; the FET clause is living proof of that. In order to prevent uncertainty in the future, investment arbitration bodies and arbiters should be provided with a clear definition of the concept. Legal scholars should sharpen their pencils and let us know what "fairness" means in arbitration.