

Fair and Equitable Treatment and the Fabric of General Principles

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*To my mentor and friend
Massimo Iovane*

Foreword

With the slow proliferation of disputes referring to arbitration pursuant to international investment agreements (IIAs), we have also witnessed a significant increase of reliance on the guarantee of ‘fair and equitable treatment’ (FET). Less than half a century ago, in 1970, the International Court of Justice, in delivering its judgment in *Barcelona Traction*, noted the surprisingly slow evolution of investment law.¹ Despite the increased use of FET by disputing parties, the very content of the protection remains unclear. The language used in IIAs is laconic and as a result Delphic.² Some excellent books have already been published on the topic.³ IIAs refer to an—allegedly non-contingent—minimum standard of protection in accordance with international law and often refer expressly to FET in relation to full protection and security.

Arbitral tribunals under different IIAs have tried to identify the significance of FET and several categories have been created including denial of justice, as well as regulatory and administrative actions that may trigger FET protection (and that covers, *inter alia*, legitimate expectations and review of due process in administrative decision-making). In addition, tribunals have also looked at factors that may justify actions of the State.

It seems that in the early stages of investment arbitration FET has become a very elastic term, perhaps with the view to being able to ‘accommodate’ all cases of breach of IIAs that would not qualify as expropriation; yet the pendulum has swung the other way so that now it appears that in new multilateral agreements, such as CETA or indeed the drafts of TTIP, FET has become narrower. The UNCTAD Investment Policy Hub records that FET was invoked in 384 cases but it was found to exist in only 98 cases, i.e. only in one in four cases.⁴

¹ *Barcelona Traction (Belgium v. Spain)*, Judgment of 5 February 1970, para 89.

² McLachlan, Shore and Weiniger 2017, para 7.02.

³ See, for example, Paporinskis 2012; Kläger 2011.

⁴ See <http://investmentpolicyhub.unctad.org/ISDS/FilterByBreaches>.

This new monograph by Prof. Fulvio Maria Palombino addresses FET from the perspective of the fabric of general principles of international law and as such it is insightful and highly original. In Chap. 1, he explores the origins of the obligation of States to accord FET and characterizes FET as an expression of ‘normative equity’. Against this background, in Chap. 2 Palombino discusses FET as an autonomous and non-contingent custom or a self-standing treaty clause; he argues that FET has penetrated into the fabric of general international law by means of general principles of law. In Chap. 3, he addresses denial of justice and due process (procedural fairness in administrative proceedings) and how they have shaped FET. In Chap. 4, the focus is on the nature and scope of legitimate expectations as an embodiment of a general principle of international law and as an element of FET. Chapter 5 is dedicated to the contours of proportionality as an element of FET; it is powerfully argued that proportionality is a general principle of international law with its own foundation in the international legal order and at the same time it is a balancing process (as an FET element) which allows us to look into the circumstances and related business risks before a full assessment regarding FET can be made. In Chap. 6, the steering role of case law is appraised as undoubtedly case law has shaped the notion and content of FET. In the concluding chapter, the author draws the conclusions together to highlight the normative basis and minimum reach of FET and places the topic and the findings in the context of the broader debate about fragmentation of international law. The positive note is that FET as a non-contingent and autonomous standard may have a unique unifying effect.

I have very much enjoyed reading the book. Most certainly it has not been an easy task. The research is extensive and multi-faceted, but the writing is accessible and the structure and overall approach is innovative. Palombino takes a complex academic topic, presents it in its full academic dimension but also frames it in useful practical terms: the discussion and findings are useful for both the scholar and practitioner of international law. Palombino succeeds in his endeavour and has produced a concise but rich monograph. I would expect the book to become a classic on the important topic of FET.

London, UK
March 2017

Prof. Loukas Mistelis

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Abbreviations

BIT	Bilateral Investment Treaty
BRA	Boston Redevelopment Authority
CARICOM	Caribbean Community
CCJ	Caribbean Court of Justice
CETA	Comprehensive Economic and Trade Agreement between Canada and the European Union
CJEU	Court of Justice of the European Union
DSU	Dispute Settlement Understanding
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EIB	Estonian Innovation Bank
EU	European Union
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FPS	Full Protection and Security
GATT	General Agreement on Tariffs and Trade
ICC	International Criminal Court
ICJ	International Court of Justice
ICSID	International Centre for the Settlement of Investment Disputes
ICTY	International Criminal Tribunal for the Former Yugoslavia
IIL	Institute of International Law
ILC	International Law Commission
ILO	International Labour Organization
ITO	International Trade Organization
LPA	Lafayette Place Associates
MAI	Multilateral Agreement on Investment
MFN	Most-Favoured-Nation
NAFTA	North America Free Trade Agreement
NDT	Non-Discrimination Treatment
NT	National Treatment

OECD	Organization for Economic Cooperation and Development
PCIJ	Permanent Court of International Justice
RTC	Revised Treaty of Chaguaramas
SJC	Supreme Judicial Court
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization