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Review Scientific Paper
UDC: 341.6(497.16)
doi: https://doi.org/10.56461/SPZ_24406KJ
Received: 13. 9. 2024.
Accepted: 13. 1. 2025.

MONTENEGRO RECAP: THE STANDARD OF FAIR AND EQUITABLE TREATMENT (FET) AS A CATALYST FOR INVESTMENT DISPUTES

Summary

The fair and equitable treatment (FET) standard stands for one of the most significant yet debated principles in safeguarding foreign investments. While its wording is often broad and vague, its definition often emerges through arbitral awards based on the particulars of each case. This paper analyses the FET clauses in Montenegro's Bilateral Investment Treaties (BITs) within the context of its EU accession and modern approaches to FET regulation. By examining Montenegrin BITs and reviewing past disputes, the paper explores key aspects of FET application in Montenegro's Investor State Dispute Settlement (ISDS) practice so far. Given that the FET standard has been a central issue in nearly all disputes against Montenegro, the analysis underscores the need to review and refine FET regulation in Montenegrin BITs, in order to ensure better protection for foreign investments and clarify which state actions violate FET. Furthermore, the paper compares Montenegro's FET clauses with those in EU practice, offering recommendations for aligning it with more robust frameworks.

Keywords: fair and equitable treatment, investments, EU, FET standard, Montenegro.

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CRNA GORA: STANDARD FER I PRAVIČNOG POSTUPANJA KAO INICIJATOR INVESTICIONIH SPOROVA

Sažetak

Standard fer i pravičnog tretmana (FET) je jedan od najznačajnijih, ali i najviše diskutovanih standarda u oblasti zaštite stranih investicija. Iako je njegova formulacija često široka i nejasna, definicija ovog standarda se uglavnom nalazi u arbitražnim odlukama koje su zasnovane na činjenicama svakog pojedinog slučaja. Ovaj rad analizira odredbe fer i pravičnog tretmana u bilateralnim investicionim sporazumima Crne Gore, a u kontekstu njenog pristupanja Evropskoj uniji i savremenih pristupa regulisanju standarda fer i pravičnog tretmana stranih investicija. Analizom crnogorskih bilateralnih investicionih sporazuma i pregledom dosadašnjih sporova Crne Gore, ovaj rad istražuje ključne aspekte primjene standarda fer i pravičnog tretmana u dosadašnjoj praksi rješavanja sporova između Crne Gore i stranih investitora. S obzirom na to da se ovaj standard javlja kao jedno od glavnih pitanja u skoro svim sporovima pokrenutim protiv Crne Gore, analiza podvlači potrebu da se preispita i precizira njegovo regulisanje u crnogorskim bilateralnim investicionim sporazumima, kako bi se osigurala bolja zaštita stranih investicija i razjasnilo koje radnje države podrazumijevaju kršenje ovog standarda. U radu se dalje porede crnogorske odredbe o fer i pravičnom tretmanu stranih investicija sa takvim odredbama usvojenim na nivou EU, uz preporuke za usklađivanje regulisanja ovog standarda po ugledu na snažnije regulatorne okvire.

Ključne riječi: fer i pravičan tretman, investicije, EU, FET standard, Crna Gora.

1. Introduction

Arbitration regulation in Montenegro has its roots in the period when the country was part of the Socialist Federal Republic of Yugoslavia. Yugoslavia established the Foreign Trade Arbitration in Belgrade in 1947 (Jovanović, 2022, p. 161), mostly dealing with disputes regarding foreign trade and foreign partner relations. Yugoslavia also established Main State Arbitration in 1954, focused on regulating domestic commercial disputes. After it became an independent state, Montenegro

turned to finding its own way to include arbitration as a dispute resolution mechanism by adopting the Law on Arbitration (Montenegrin Law on Arbitration, Official Gazette of Montenegro, No. 047/15, 2015).[1] Montenegrin Law on Arbitration is based primarily on the United Nations Commission on International Trade Law (UNCITRAL) Model Law, including its provisions on establishing the arbitral tribunal, conduct of arbitration proceedings, recognition and enforcement of foreign arbitral awards, etc. The principal arbitration body is the Arbitration Court established within the Chamber of Commerce of Montenegro. Proceedings before the Court are conducted according to the Arbitration Rules before the Arbitration Court at the Chamber of Commerce of Montenegro, which were recently updated in 2023 to ensure they reflect current practices and standards in international and domestic arbitration. However, the parties may also agree to apply the UNCITRAL Arbitration Rules to proceedings before the Arbitration Court of the Chamber of Commerce of Montenegro. Although Montenegro's legal framework for arbitration aligns well with the standards of leading arbitration centres, arbitration itself has yet to gain significant popularity. It is primarily utilized by foreign-owned companies or those based outside of Montenegro (MINA BUSINESS, 2024). While Montenegro's legislation is on par with other prominent arbitration institutions, the challenge remains to raise awareness among domestic businesses and highlight the advantages arbitration offers for resolving disputes efficiently. Promoting its benefits to local entities could help make arbitration a more common choice in the business environment.

Since regaining independence in 2006, Montenegro has turned to attracting foreign direct investments, most of which today are in the tourism, real estate, energy, telecommunications, banking and construction sectors. According to the Central Bank of Montenegro data, the total amount of foreign direct investment flowing into Montenegro from the time of independence in 2006 until the end of 2023 amounted to 13.8 billion euros, while for the period 2019 to 2023, that number was 4.38 billion euros (Central Bank of Montenegro, 2024). As an official candidate to become the next member state of the European Union, Montenegro is continuously taking significant reform steps towards harmonizing its legal framework with EU standards, including the one related to investment climate and foreign investment protection. However, the implementation often lags far behind the legal structure, and Montenegro faces various challenges in dealing with foreign investors, through the unfinished investment projects or handling the previously undertaken obligations as the host state.

[1] There has been discussion about drafting a new arbitration law in Montenegro, however, at the time of writing, it is unclear what stage the drafting process has reached or what specific changes the new law will introduce.

Truth be told, Montenegro has mostly been successful in solving investment disputes so far, however, there is a number of significant disputes yet to come, as some of them are only in the initial phase, and some have only been announced. As a leading common catalyst of earlier investment disputes against Montenegro, we can identify the well-known and well-argued fair and equitable treatment standard (hereinafter: FET), which has appeared in almost all disputes. It is therefore reasonable to anticipate that the FET will also find its way into future disputes, along with its expansiveness and blurry meaning. This empowers us to examine and discuss the role of the FET standard in Montenegrin investment practices, including its Bilateral Investments Treaties (hereinafter: BITs) and investment dispute experience, which will further lead us to other possible dilemmas on Montenegro's path to the European Union and its approach to reforms in the world of investments. The following sections of the paper will provide a concise summary of the FET standard and the key dilemmas associated with its interpretation. The discussion will then shift to the investment policy challenges Montenegro is likely to encounter during its EU accession process. The central focus of the paper will analyse Montenegro's past investment disputes, particularly the contentious issues where the FET was a critical factor. Additionally, the paper will explore potential improvements to the regulation of the FET standards, drawing on practices adopted within the EU.

2. A Brief Insight Into the FET Standard and its Dilemmas

The fair and equitable treatment (FET) standard is without a doubt the most significant standard of treatment in Bilateral Investments Treaties (BITs), and it forms part of the majority of modern BITs. Besides, it is also the most commonly cited standard in investment disputes,[2] and its interpretation and applicability are at the centre of the fiercest debates and discussions in contemporary foreign investments law. As frequently occurs in the dynamic legal environment, these debates mostly arise from various ambiguities and the insufficiently specified content of the FET, as well as the threshold standards for its interpretation. Vague language and the absence of strict terms defining what is meant by "fair" and "equitable" in terms of a specific "investor" or "investment" are the very reasons why the FET standard invites interpretations, seeking its closer definition in investment tribunal awards reasoning.

[2] Nearly 83% of all the treaty-based investment arbitration cases (based on the available data) have involved claims based on the application of the FET standard clause (Sarmiento & Nikièma, 2022, p. 1; Shan, 2012, p. 23).

Most of the BITs simply refer to the FET standard without any further explanation of its content and actions that constitute possible violations.[3] This leaves room for investment tribunals to engage in a "quasi-legislative" activity (Živković, 2023, p. 20), setting the FET its much-needed contours. However, its broadness has led to it becoming a so-called *catch-all clause* used by investors (Mann, 1981, pp. 241-254; Sarmiento & Nikièma, 2022, p. 5; Reinisch & Schreuer, 2020, p. 252), allowing them to succeed in disputes where their other claims were more likely to fail. This consequently caused various efforts to limit the scope of the FET clause, some of which indicated that the treatment under the FET standard is nothing more than the treatment of aliens under the customary international law minimum standard of treatment for aliens (hereinafter: MST), below which the host state may not go.[4] However, the authors suggest that the modern concept of the FET standard should be understood in light of the legitimate expectations of investors,[5] which means that it has expanded beyond what is known as the minimum standard of treatment under customary international law (Rubins, Papanastasiou & Kinsella, 2020, p. 244).

Some authors, and even tribunals, have further argued and adopted the view that the FET itself has become a rule of custom because it is found in so many BITs (Tudor, 2008, p. 43; Kirkman, 2002, p. 343). Conversely, other researchers believe that it is premature to consider the FET as a rule of custom, and it is still primarily a treaty-based standard of protection, which foreign investors cannot claim in cases where the FET is not expressly guaranteed by the treaty text (Dumberry, 2020, p. 318). Although most FET clauses sound alike, there is much more to it than meets the eye. Despite the fact that a number of BITs combine different wording to include "fair and equitable", "just and equitable", or just "equitable" treatment, such differences do not alter the content of what constitutes the FET standard of treatment (Rubins, Papanastasiou & Kinsella, 2020, p. 240). However, when coupled with other possible standards of treatment or criteria established under reference to international law, customary international law, minimum standard of treatment under customary international law and the like, the FET clause can become something

[3] New generation Model BITs feature a novel type of the FET clause that includes a comprehensive list of measures deemed to breach the FET standard, e.g. the CETA agreement between the EU and Canada, or the EU-Singapore Investment Protection Agreement.

[4] This approach was taken by NAFTA parties in the binding interpretation issued through the NAFTA Free Trade Commission.

[5] According to some arbitral tribunals, investor's legitimate expectations are the dominant element of the FET standard (*Saluka Investments*, 2006, para. 302). The reasoning behind the investor's legitimate expectations is that it is commonly viewed as unjust for the host state to implement actions and changes that alter the expectations that the state made in its laws and regulations before the investment, specifically the circumstances that led the investor to invest (Dumberry, 2020, p. 324).

of a headache for investment tribunals. Over the years, states have adopted various approaches to the formulation of the FET standard in their concluded BITs. Existing practice lists the following approaches as the most common:

1) BITs with no reference to the FET standard or with reference to the FET solely in a BIT preamble, therefore, not imposing any binding obligations to the host State; 2) BITs that include the FET standard, but without any reference to international law or any other criteria, the so-called "stand-alone", autonomous or unqualified clauses; 3) BITs that include the FET standard linked to international law; 4) BITs that include the FET standard linked to the minimum standard of treatment (MST) of aliens under customary international law, or combined with the most-favoured-nation clause (MFN); and 5) BITs that include the FET standard with further guidance on how to apply the standard, or a list of possible violation actions, etc. (UNCTAD, 2012, p. 18; Dumberry, 2020, p. 316).

Once established, the standard by which we will determine whether a violation of the FET has occurred will serve to examine the elements of the FET standard and their alleged violation in a given case. The FET standard is unequivocally recognized to cover and protect the following principles:

1) principle of legality; 2) administrative due process and the denial of justice; 3) the protection of legitimate expectations; 4) the requirement of stability, predictability and consistency regarding the legal framework; 5) non-discrimination; 6) transparency; and 7) the principles of reasonableness and proportionality (Jacob & Schill, 2015, pp. 749-812).

These principles can be recognised as inseparable elements of the application of the rule of law in many legal systems, and therefore serve to protect foreign investors from such state's conducts that violate basic rule of law principles (Živković, 2023). A wide spectrum of measures can give rise to a potential breach of the FET principle, usually defined under a denial of justice, breach of due process, frustration of investor's reasonable and legitimate expectations, instability in the host state's legal framework, lack of transparency, arbitrary decision - making, acting in bad faith, coercion and harassment of the investor (Sarmiento & Nikièma, 2022, p. 4). On the other hand, the state's right to regulate is a significant element of the FET standard interpretation, and needs to be taken into account when approaching its possible violations by the host states.[6]

[6] The right to regulate can be perceived as the legal right of the host state to enact laws or other measures contrary to the substantive obligations it has undertaken in its international investment treaties, without having to compensate injured investors (Titi, 2022, p. 17). The state's right to regulate is in the opposite direction of the application of the FET standard, meaning that it is in the hands of arbitral tribunals to balance the public interests of the host state and the interests of investors when interpreting and applying the FET standard (Levashova, 2019, p. 54).

It is evident that a deeper interpretation of the FET raises questions both on the very nature of this standard and its application in individual cases. However, as its text became universally adopted over time, tribunals tended to look to the facts of the case rather than the FET wording in the BIT when approaching the standard. Usually, the interpretation involves two stages. Tribunals first determine the legal standard against which they will judge the violation of the FET, followed by an analysis of the specificity and scope of the FET clause and the facts of the current case.

3. Montenegro on its Icy Road to the (New) EU Investment Policy

When discussing the origin of foreign investments in Montenegro, the Central Bank of Montenegro statistics reveals that in 2023, the largest share of investments came from Serbia, followed by Russia and Turkey, with Germany and Switzerland trailing behind. Among others are investments from the USA, United Arab Emirates, Cyprus, Austria and Ukraine.[7] It catches the eye that investments from non-EU countries are leading the way, as the countries with the highest representation of investments. At least for now, until Montenegro becomes a full EU member. Recently, Montenegro has received a positive Interim Benchmark Assessment Report (hereinafter: IBAR),[8] directly signalling that Montenegro has made significant steps in important areas and can continue to align with EU laws and standards in order to prepare for full membership. It is now clear that Montenegro is on a safe track to become the 28th EU member state, opening the door for new insights into investment policy and possible challenges. It is no secret that the world of investments in the EU has been shaken by major changes after the *Achmea* award (Case C-284/16; see: Ankersmit, 2018; Fouchard & Krestin, 2018) in the practice of Court of Justice of the European Union (hereinafter: CJEU). In the *Achmea* case, the CJEU established the incompatibility of arbitration clauses contained in the so-called intra-EU BITs with EU law, opening a discussion

[7] According to these data, investments from Serbia amounted to 125.2 million euros, investments from Russia 112.5 million, investments from Turkey 85.2 million, investments from Germany 72.8 million, and investments Switzerland 64.8 million (Forbes SRB, 2024).

[8] The Montenegro EU accession negotiations have been going on for over 12 years, and at the present moment, Montenegro has opened 33 and closed 3 chapters. In February 2020, Montenegro accepted a new negotiation methodology, according to which no chapter can be temporarily closed until the IBAR (Interim Benchmark Assessment Report) is received. Positive IBAR is an indicator that the country has progressed in the area of the rule of law and the judiciary, and that it is ready for the next phase of alignment with EU standards. After a positive IBAR, the country receives the European Commission's final benchmarks, whereby chapters 23 and 24 close last, also with the fulfilment of the final benchmarks (CDM, 2024).

on the future of the investor-state dispute settlement mechanism (hereinafter: ISDS) in Europe, and particularly, in the EU (Beaumont *et al*., 2024). It not only opened discussions, but also resulted in a Termination Agreement[9] signed by 23 EU member states,[10] used to repeal some 196 intra-EU BITs (Spaić, 2023, p. 65), meaning that the ISDS mechanism through international arbitration, as we knew it, will no longer be possible in the EU.[11]

The CJEU later reaffirmed and expanded its stance on investor-state disputes arising under the Energy Charter Treaty (hereinafter: ECT), by ruling in the *Republic of Moldova v. Komstroy*[12] *case. In this case, the CJEU ruled that intra-EU arbitration based on the ECT is contrary to EU law, sparking an even more intense debate, as it seemed that the CJEU had snuck this decision in through the backdoor tactic.*[13] *Nevertheless, the CJEU stepped in and defended its position as the sole supreme supervisor and interpreter of EU law, ruling that investment arbitration tribunals were not adequately subject to judicial review, which would ensure the complete effectiveness of EU law. In this regard, the EU has proposed to launch a Multilateral Investment Court (hereinafter: MIC) that will serve to replace ad hoc* arbitration tribunals and judge claims initiated under investment treaties that member states have decided to transfer to its jurisdiction (Spaić, 2023, p. 65; Brodlija, 2024, p. 4; Croisant, 2024).

Resuming the discussion on Montenegro, the establishment of the MIC will significantly impact its future investor-state relations. Not only will Montenegro

[9] Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, OJ L 169/1, 29 May 2020.

[10] Austria, Sweden, Finland and the Republic of Ireland did not sign this Agreement.

[11] However, the authors are vocal in that *Achmea* does not mean the complete abolition of investment arbitration in the EU area. Moreover, they note that some arbitral tribunals seated outside the EU, such as those in London, do not consider themselves bound by the *Achmea* decision, which allows them to continue accepting and processing intra-EU investment arbitration cases. In addition, many BITs include sunset clauses that allow existing protections and arbitration mechanisms to remain in effect for a certain period even after the treaties are terminated (Reuter, 2021, pp. 33-45; Hindelang, 2018).

[12] In the Komstroy case, the dispute was between a Ukrainian investor and Moldova, so it was not an intra-EU dispute. However, the seat of the arbitration was in Paris, France, whose Court of Appeal decided to stay the annulment proceedings and ask the CJEU for a preliminary ruling on several issues, mainly concerned with the definition of investment under the ECT. However, the CJEU relied on the EU's interest in having the ECT provisions uniformly interpreted and on the fact that the seat of arbitration in the present case was in an EU country, justifying the jurisdiction of the CJEU (Brodlija, 2024, p. 6).

[13] Authors share the opinion that this case was not the best opportunity to extend the *Achmea* findings to ECT arbitration, mainly because this particular issue was not submitted to the CJEU, the case itself was not an intra-EU dispute and EU law was not directly enforceable (Fouchard & Thieffry, 2021).

have to align its investment policy with the restrictive EU standards,[14] but its current experience in the ISDS world will also be subordinated to a completely new practice that would be established under the MIC. Once it becomes an EU member state, Montenegro will be unable to rely on its previous (although modest) experience in the ISDS mechanism, mostly acquired within the context of the International Centre for Settlement of Investment Disputes (further: ICSID). This is especially in disputes that will arise with investors from EU member states. Conversely, as a country primarily dealing with investors from outside the EU, it will remain possible for it to maintain various forums for investor-state dispute settlement through extra-EU BITs (between EU member states and non-member countries), at least for the time being.[15] In any case, Montenegro may still be capable of meeting its obligations under BITs established prior to its EU membership, in accordance with the conditions prescribed by Article 351 of the Treaty on the Functioning of the EU (Ankersmit, 2018).

3.1. A Closer Look at FET Clauses in Montenegrin BITs in the Light of New EU Models

Considering its upcoming EU membership, it is reasonable that Montenegro should follow the EU practice and regulations when it comes to defining and contracting the FET clause in its BITs. However, it is not difficult to see the discrepancy between the FET clauses in the current Montenegrin BITs and those present, for example, in the CETA Agreement [16] or in the model BIT provisions between EU member states and third countries.[17] While the FET clauses contained

[14] With the Lisbon Treaty, the EU gained exclusive competence over direct foreign investments, as part of its common commercial policy under Article 207 of the Treaty on the Functioning of the EU. This essentially limits member states' independent treaty-making powers regarding direct foreign investments after joining the EU, as member states are not allowed to negotiate and conclude new BITs or other international agreements independently. Instead, the EU must negotiate such agreements on behalf of all its member states.

[15] Nonetheless, the future of extra-EU BITs remains open, as tribunals established under such treaties can potentially exclude disputes related to EU law from the jurisdiction of EU member state courts. This leads to each EU member state being required to terminate such extra-EU BITs, opening the door to a new field of legal uncertainty – the enforceability of decisions in such cases before EU member state courts (Ankersmit, 2018).

[16] The Comprehensive and Economic Trade Agreement - CETA (OJ L 11/24, 14.1.2017. pp. 23-1079.) is the trade agreement between the EU and Canada designed to enhance trade and stimulate economic growth and job creation.

[17] The European Commission released a Non-Paper containing annotation to model clauses for the negotiation or renegotiation of bilateral investment treaties (BITs) between member states and third countries. Although it is an informal document, the Non-Paper reflects the Commission's approach to investment protections, as well as best practices to be adopted among EU

in the current Montenegrin BITs are mostly those of the old generation, meaning that they are broadly worded and open for interpretation, those contained in the CETA include list of specific actions deemed violations of the FET standard, as well as further instructions on how to implement the FET standard. The following analysis will examine the FET clauses in Montenegro's existing BITs, highlighting particular features that have generated challenges and ambiguities in their application, as evidenced by arbitral practice. Emphasis will be placed on the differences between the current approaches and those applied in EU practice, with suggestions for improving the regulation of the FET standards in future BITs.

Examining the BIT with the country from which Montenegro receives the highest investments, Serbia, we can find a somewhat simple and regular FET standard clause. Under Art. 2 titled "Encouraging and protecting investments", it has been established in paragraph 2 that:

> "[Investments of investors of each Contracting Party shall, at all times, in the territory of the other Contracting Party, enjoy fair and equitable treatment and full protection and security. None of the Contracting Parties shall use unreasonable or discriminatory measures to hinder the investor of the other Contracting Party in managing, maintaining, using, enjoying or disposing of their investments in its territory.]"[18]

It can be noted that this clause encompasses not only the FET standard, but also the full protection and security principle. However, this formulation does not change the interpretation of the FET, it rather merely enumerates both standards of treatment within the same clause (UNCTAD, 2012, p. 21). While the FET standard addresses mostly the administrative and judicial decision-making processes, it is worth noting that full protection and security principle is interpreted primarily as the obligation of the host state to take all reasonable measures to physically safeguard assets and property from threats and attacks by public officials or third parties (UNCTAD, 2012, p. 36).[19] However, some tribunals have questioned whether the clause on full protection and security principle encompasses also the legal protection of investments, and not only physical protection (*Siemens A.G. v. Republic of Argentina*, 2007, para. 303; Rubins, Papanastasiou & Kinsella, 2020, p. 247). In any

member states (Nacimiento, Scharaw & Lui, 2024).

[18] Agreement between Montenegro and the Republic of Serbia on Mutual Encouragement and Protection of Investments (2009).

[19] As noted in the *Saluka Investments BV v. The Czech Republic* (2006, para. 483), "the 'full protection and security' standard applies essentially when the foreign investment has been affected by civil strife and physical violence." However, some cases raised the issue of whether full protection and security standard covers legal security of investments as well, i.e., *Siemens A.G. v. Republic of Argentina* (2007, para. 303).

case, only a few BITs contain special wordings that provide "full *legal* protection and security," strangely enough, one of them is the BIT concluded between Montenegro and Poland.[20] Meanwhile, some EU legal texts contain clarifications that "full protection and security" pertains to the obligations concerning the physical security of investors and protected investments.[21] Be that as it may, the state's duty to provide full protection and security is enshrined in almost all BITs, making it a very common standard in investment protection practice, and when combined with the FET principle, it should be interpreted as a complement standard (Rubins, Papanastasiou & Kinsella, 2020, p. 245-246).

This regular, or unqualified, FET clause from Serbia-Montenegro BIT is common in other BITs concluded by Montenegro with other countries, i.e., with Germany, Cyprus, Moldova, Qatar, Slovakia, Lithuania, Czech Republic, etc.[22] The clause usually provides that investments [shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other contracting party]. As is the case with the BIT concluded with Serbia, some other BITs also further impose that [neither Contracting Party shall, in any way, impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, disposal and, eventually, liquidation of such investments in its territory of nationals or companies of the other Contracting Party...].[23] However, such an additional provision does not constrain the scope of the FET to unreasonable or discriminatory measures only, but merely seeks to enhance the substance of the FET clause (UNCTAD, 2012, p. 31).

A more questionable issue is a reference point to international law, such as the one made in Montenegro-Spain BIT,[24] providing that a party [shall in no case

[20] Agreement Between the Federal Government of the Federal Republic of Yugoslavia and the Government of the Republic of Poland on Reciprocal Promotion and Protection of Investments (1997); e.g. This particular phrase is included in Croatia-San Marino BIT as well; A similar provision establishing continuous protection and security is included in the Montenegro's BIT with the Belgium-Luxembourg Economic Union, explaining that this standard excludes an unjustified or discriminatory action that could impede, *whether legally or practically*, the management, maintenance, use, possession, or liquidation of the investment.

[21] E.g. the CETA agreement between the EU and Canada, as well as the EU-Singapore Investment Protection Agreement.

[22] Germany-Montenegro BIT (1989), Cyprus-Montenegro BIT (2005), The Republic of Moldova-Montenegro BIT (2014), Montenegro-Qatar BIT (2009), Montenegro-Slovakia BIT (1996), Lithuania-Montenegro BIT (2005), Czech Republic-Montenegro BIT (1997).

[23] For example, Malta-Montenegro BIT (2010), Montenegro-Netherlands BIT (2002), Montenegro-Turkey BIT (2012), Montenegro-Switzerland BIT (2005), Greece-Montenegro BIT (1997), Bosnia and Herzegovina-Montenegro BIT (2001);

[24] Agreement between the Federal Republic of Yugoslavia and the Kingdom of Spain on

accord to such investments treatment less favourable than that provided for by international law]. Despite the obvious connection with international law, the above wording is viewed as granting arbitrators greater flexibility in interpretation than the wording that provides that investments will receive fair and equitable treatment [in accordance with international law] (UNCTAD, 2012, p. 22).[25] A tribunal that is explicitly mandated to interpret the FET in line with international law cannot exceed the boundaries set by the sources of international law regarding the scope and meaning of the FET. On the other hand, a tribunal dealing with treatment *no less favourable than that provided for under international law* may interpret the FET more freely as an additional requirement to those established under international law. Therefore, the "no less favourable" wording is generally considered essentially closer to an unqualified FET clause, setting only a threshold for treatment below which the state may not go and leaving arbitrators with greater autonomy to determine the content of the FET in the specific case (UNCTAD, 2012, p. 23).

Determination of the applicable standard in the FET clause aims to answer a crucial threshold question - what is the criterion by which a state's conduct should be evaluated? Seen through the eyes of practice, it is easier to prove a breach of the FET as an "autonomous" standard, than under a provision referencing the international law or the MST. It was generally agreed that under the *Neer* standard (*United States v. Mexico,* 1926), when in conjunction with the MST, the FET provision gives rise to a higher threshold of liability to be applied, covering only very serious acts as violations of the BIT.[26] However, this threshold has been changed by later cases, which highlight the evolution of international investment protection from *Neer* to the present. Modern tribunals often recognize that the MST has evolved beyond the "egregious" or "outrageous" conduct standard established by *Neer*, to be aligned more closely with the contemporary FET expectations (*Mondev International Ltd. v. United States of America*, 2002, para. 116; Bi*lcon of Delaware Inc. and others v. Government of Canada,* 2015, para. 440; *Lone Pine Resources Inc. v. Government of Canada*, 2022, para. 602-604).

Alternatively, the autonomous or unqualified FET clause leaves that specific extent of the standard to be determined at the tribunals' discretion (Dumberry,

Promotion and Reciprocal Protection of Investments (2002); A similar reference is made in Finland-Montenegro BIT (2008) as well.

[25] For example, such wording is present in Croatia-Oman BIT (2004).

[26] State's conduct in such a case needs to be "egregious" or "outrageous" to determine a FET clause violation. This standard is specified in the *Neer* case (*United States v. Mexico, 1926*), where the tribunal stated that [the treatment of alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency] (UNCTAD, 2012, p. 45-46).

2023, p. 6), allowing tribunals to determine the range of principles required to fulfil the objectives of each BIT in a particular dispute (*Biwater Gauff v. Tanzania* case, 2008, para. 593-59), which presumably leaves investors with a better level of protection (Dumberry, 2023, p. 10). This holds particular importance given that the FET standard is highly fact-dependent and its potential violation must be established based on all circumstances in the specific case (*Biwater Gauff v. Tanzania*, 2008, para. 593-595; *Mondev v. USA*, 2002, para. 118).

None of the BITs concluded by Montenegro to date contains any guidelines for the implementation of the standard regarding its content and the actions that may constitute a potential FET standard violation. The use of such simple and unqualified FET clauses has almost ceased in the new practice of BITs concluded after 2018 (OECD, 2023, p. 9). Recently concluded BITs generally limit the scope of FET-related obligations or provide an exhaustive list of actions that represent a FET violation, while some of them contain no obligation to provide FET standard of treatment at all.[27]

Taking the EU practice as an example, e.g. the CETA Agreement, which shows a significantly detailed approach to the FET standard and its regulation, not only does CETA establish the requirement to provide fair and equitable treatment and full protection and security for investment, but it also gives a closed and comprehensive list of the FET standard violations. It is stipulated that a party violates the FET obligation if a measure or set of measures constitutes [denial of justice in criminal, civil or administrative proceedings; fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; manifest arbitrariness; targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; abusive treatment of investors, such as coercion, duress and harassment; or some other element of the FET that is established between the parties to the agreement] (Art. 8.10, CETA Agreement.)[28] It was further established that the signatories will regularly, or at the party's request, examine the elements of the FET obligation, which may lead to new recommendations in this regard. Some other guidance o the FET standard relate to the approach to the frustration of legitimate investor expectations,[29] as well as the question of

[27] E.g., India-Singapore Comprehensive Economic Cooperation Agreement.

[28] A somewhat similar provision is contained in Art. 2.4 of the EU-Singapore Investment Protection Agreement (2018), OJ L 294/3, 14.11.2019.

[29] Frustration of investor's legitimate expectations generally implies some "change" in the regulations affecting the investment. Claims derived from the frustration of legitimate expectations of investors are generally considered to develop in situations where the investor suffers losses due to changes made by the State (UNCTAD, 2012, p. 64). However, one of the questions is to what degree the FET standard encompasses the protection of these expectations. Arbitral tribunals

what would not constitute a FET standard breach.[30] It can be presumed that this approach grants a more profound way to the application of the FET standard in investor-state dealings. One thing is certain, an unqualified FET clause provides a very limited protection for host states against the possibility that a tribunal adopts a wide-ranging interpretation and concludes that a FET violation has been committed (Dumberry, 2023, p. 21).

3.2. Approach to the FET in Montenegro's ISDS Experience so Far

Several concluded disputes against Montenegro have addressed compliance with the FET standard requirements,[31] while some of them are currently ongoing,[32] and some have been announced, but have yet to be officially launched. Although potential FET clause violations have been a particular focus by tribunals in some cases, in other disputes there was no chance to discuss the FET because the tribunal declined jurisdiction.[33] Nevertheless, it can be noted that the FET clause revealed itself as a potential catalyst for investment disputes against Montenegro.

In some cases, tribunals had to deal with broader issues than determining whether there had been a FET standard violation. For example, in the case *Addiko*

have adopted different approaches to this issue, from establishing the obligation of host states to maintain a stable legal and business framework (*Techmed v. Mexico*, 2003; *CMS Gas Transmission Company v. Argentina*, 2005) to clarifying the specific requirements for a FET claim grounded in frustration of legitimate expectations to succeed (Dumberry, 2020, p. 325).

[30] For example, a violation of some other CETA clause, or an independent international treaty clause, does not constitute a FET clause violation, nor does a measure in breach of domestic law.

[31] For example: *Addiko Bank AG v. Montenegro*, (ICSID Case No. ARB/17/35); *Oleg Vladimirovich Deripaska v. the State of Montenegro* (PCA Case No. 2017-07); *CEAC Holdings Limited v. Montenegro* (ICSID Case No. ARB/14/8); *MNSS B.V. and Recupero Credito Acciaio N.V v. Montenegro* (ICSID Case No. ARB(AF)/12/8); *Medusa (Montenegro) Limited v. Montenegro* (PCA Case No. 2015-39).

[32] For example, *Atlas Group and Duško Knežević v. Montenegro* (Further details still not available) (Global Arbitration Review, 2020).

[33] In *Medusa (Montenegro) Limited v. Montenegro* (2015), the tribunal raised the issue of whether or not Medusa was a protected investor under the relevant BIT. In this case, Medusa relied on three different BITs, in particular on Austria-Montenegro BIT (2001), Finland-Montenegro BIT (2008) and Serbia-United Kingdom BIT (2002), in order to enhance its position against Montenegro. However, the tribunal stated that Medusa had been unable to prove that it qualified as an investor protected by any of the BITs and declined its jurisdiction. On the contrary, in the case of *CEAC Holdings Limited v. Montenegro* (2016), the tribunal faced doubts about qualifying CEAC as an investor under Cyprus-Montenegro BIT (2005). The tribunal decided that the CEAC did not hold a seat in Cyprus as required by the relevant BIT and, therefore, that the tribunal was unable to exercise jurisdiction over the matter.

Bank AG v. Montenegro (2021),[34] the tribunal examined whether the Article 2(2) of the relevant Austria-Montenegro BIT,[35] stipulating the FET standard, referred to the MST under customary international law (MST) or whether it referred to a separate autonomous standard. Tribunal was specifically concerned with the interpretation of the phrase:

> "[investments admitted … shall at all times be accorded fair and equitable treatment…]" in Article 2(2) of the Austria-Montenegro BIT.

Tribunal concluded that the clause set in Austria-Montenegro BIT created an autonomous standard, and not the MST under the customary international law. Tribunal interpreted the BITs text in accordance with the treaty interpretation standards set out in the Vienna Convention on the Law of Treaties (VCLT, 1969),[36] finding that the reference "fair and equitable treatment" in Art. 2(2) of the Austria - Montenegro BIT was not a reference to the MST under customary international law. Tribunal explained that the MST was a "well-established concept in international law" and that "the parties to the treaty could have specifically referred to it, if they wished the customary international law standard to apply" (*Addiko* award, 2021, p. 152). This view is supported by recognized scholars, who argue for the FET standard to be commonly viewed as an independent standard in treaties, seeking also an autonomous interpretation from the MST, especially in cases where BIT includes only a simple, unqualified FET clause, without any reference to international law (Dumberry, 2020, p. 314).

Tribunal relied on the reasoning from *Biwater Gauff v. Tanzania*, which established that "actual content of the FET standard is not materially different from the content of the MST in customary international law." However, tribunal noticed that

[34] The dispute involved Montenegro's enactment of the "Law on Conversion of Swiss Franc Denominated Loans into Euro Denominated Loans," following the Swiss central bank's decision from the previous year to eliminate an exchange rate control mechanism. This move caused the Swiss franc to surge in value against the euro, resulting in borrowers having to repay their loans at significantly higher rates. Addiko was obligated to refund the borrowers without applying interest on the converted loans and reportedly incurred costs of 10 million euros for converting loans that had already been repaid. Addiko argued that this Law violated Austria-Montenegro BIT by causing significant financial harm to its investment in Montenegro, as well as that the Law constituted unfair and inequitable treatment and amounted to an indirect expropriation of its assets.

[35] Dispute was submitted to arbitration under ICSID on the basis of Austria-Montenegro BIT (2002).

[36] Vienna Convention on the Law of Treaties (VCLT, 1969), known as the "treaty on treaties," serves as an international agreement that regulates treaties among states, establishing rules, guidelines and procedures on how the treaties are to be drafted, defined, amended and interpreted.

FET was not precisely defined in the BIT, but seemed to grant each arbitral tribunal "much latitude", therefore leaving tribunal to determine its content based on the interpretation of specific facts.[37]

In defining the relevant threshold, the tribunal followed the reasoning from *David Minnotte v. Poland* (2014, para. 198), that it is insufficient that a claimant finds itself in an unfortunate position as a result of all of its interactions with a respondent. Instead, the claimant must demonstrate that the state's conduct involved some level of impropriety (*Addiko* award, 2021, p. 155). *Addiko* claimed that there had been several breaches of Austria-Montenegro BIT and that the tribunal had to decide whether there had been a violation of due process and good faith, whether the investor's legitimate expectations had been frustrated, whether the measures taken by Montenegro had been discriminatory and proportionate, and whether these measures were unreasonable or arbitrary. However, the Tribunal rejected all claims and determined that Montenegro had not violated the FET standard under the Austria-Montenegro BIT, therefore it had not violated the BIT itself.

Further, in the *MNSS v. Montenegro* (2018)[38] case established under Montenegro-Netherlands BIT (2002), the parties argued whether a breach of contract may have been a breach of the FET standard or not. Yet, the tribunal only briefly addressed this matter, citing the *Noble Ventures* (2005, para. 53) and the stance that, under normal circumstances, a breach of a contract *per se* did not automatically result in direct international responsibility for the state. While FET is not usually used as a tool to assess the adequacy of a contractual arrangement between foreign investors and host states (*Bivac BV v. Paraguay*, 2012, para. 211-213), there are diverse perspectives on this issue. Some tribunals have found violations of the FET clause when there has been a breach of contract in situations where the host state's actions were arbitrary, discriminatory or conducted in bad faith (*CMS Gas*

[37] Further accessing the relevant threshold in the *Addiko* case, tribunal stated that the simple integration of the FET standard in the treaty language did not shield an investor from any state conduct or intervention, but that it was upon investor to show that there was "some degree of impropriety in the state's conduct". Tribunal referred to *David Minnotte v. Poland* award, which stated that it was insufficient for an investor to be in an unfortunate situation due to its interactions with the host state, and that it had to demonstrate also that the host state had acted improperly in some manner to be found in violation of the standard (*Addiko* Award, 2021, p. 155).

[38] Dutch companies MNSS B.V. and Recupero Credito Acciaio N.V. invested in the steel plant Željezara Nikšić in Montenegro through the privatization process. However, the investor claimed that Montenegro had misinterpreted the financial health and operational status of the plant, and that the plant was in a far worse condition than had been shown. Later financial difficulties led to bankruptcy proceedings and the investor claimed that Montenegro's misrepresentation, improper interference and mismanagement of bankruptcy proceedings were actions that were detrimental to its investment and led to an infringement of the FET established under Montenegro-Netherlands BIT.

Transmission Company v. Argentina, 2005; *AES Summit v. Hungary*, 2010; Schreuer, 2005, pp. 357-386). Therefore, it is widely accepted that a mere breach of contract is not by default a breach of the FET standard, but that there must be additional elements such as serious acts of mistreatment, rather than simply a matter of compliance with the contract.[39] BITs generally do not explicitly state whether a breach of contract constitutes a breach of the FET clause, but the phrasing of the clause itself may provide arbitrators with broader or narrower interpretations to include/exclude a particular breach of contract as an act violating the FET.

4. Is There a Preferred Conclusion for Montenegro?

Given all that has been discussed, one should not be surprised with an overhead question that remains - what should Montenegro do to prevent future disputes arising from the FET clause? Furthermore, what should Montenegro do to prepare its investment policy regime for the upcoming challenge of harmonizing its investment policy with the EU policy, especially the one dealing with the ISDS mechanism? Both these questions are quite difficult to address, as disputes will arise as long as there is investment, while the EU appears to be continuing its search for its best response to foreign investment regulation. Regardless of that, Montenegro should aim to enhance its position as an attractive host state for foreign investments, known for its good reputation in dealing with foreign investors, and recognized as a country where the law prevails. To achieve this, Montenegro should review its already concluded BITs, many of which it inherited as the successor state from its time as part of the Socialist Federal Republic of Yugoslavia and later the Federal Republic of Yugoslavia. The predominant form of the FET clauses in the current Montenegrin BITs is a simple, unqualified FET clause, without any

[39] Similar discussion follows the umbrella clauses incorporated in many BITs, in particular whether the umbrella clause applies to obligations arising under the investment contract between the host state and investor, and not only to obligations arising under the specific BIT. Umbrella clauses indicate that the host state "shall observe obligations," "shall respect any obligation," "shall constantly guarantee the observance of the commitments," or "shall comply with obligations" entered into with investors from the other contracting state. However, arbitral practice soon questioned the exact scope of the umbrella clause, and whether the arbitral tribunal established under the BIT holds jurisdiction over claims for breach of investment contract (Wong, 2006, p. 139). While in some cases like *SGS v. Pakistan* (2003) the conclusion was that the BIT tribunal lacked jurisdiction regarding contractual claims, tribunals in cases such as *SGS v. Philippines* decided otherwise (2004). Some tribunals attempted to find a middle ground, evaluating the unique circumstances of each case, e.g. in *El Paso v. Argentina* (2011) where the tribunal argued that only contractual obligations related to the state's sovereign authority could be raised under the umbrella clause, but not purely commercial breach of contract.

guidance on what constitutes coverage under the FET standard or what the possible violations thereof are. As noted in the earlier discussion, the FET is considered the embodiment of the rule of law in investment protection, and therefore, it ought to be regulated and implemented with care. For this reason, competent Montenegrin authorities should prepare an analysis of what should be revised in the Montenegrin BITs, with an emphasis on the FET standard and its formulation. Considering Montenegro's upcoming membership in the European Union, it would be most logical for Montenegro to align actions with the viewpoints of the EU and its member states, thus facilitating the future harmonization and adaptation process. Additionally, it is important to protect its relations with the non-EU countries, as a significant number of them are among the largest Montenegrin investors, and matters of interpretation of EU law can become quite sensitive when dealing with the non-EU forums. Fortunately, Montenegro still has a fair amount of time to refine its investment policy to guarantee a smooth shift to the new EU ISDS system and catch up on best practices in regulating foreign investment protection.

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