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Unearthing FET: What Did States Intend, and Does It Matter?

Simon Batifort, Belén Ibañez (Curtis, Mallet-Prevost, Colt & Mosle LLP) and Remy Gerbay (Hughes Hubbard LLP) · Monday, May 2nd, 2022

FET is often described as the core standard of international investment law. Recently, there has been renewed discussion on its intended meaning, by reference to a range of source materials that arguably reflect States' intentions at the time of concluding investment treaties. On December 10, 2021, the Dispute Resolution Interest Group of the American Society of International Law hosted the webinar "Unearthing FET: What Did States Intend, and Does It Matter?". The event featured Jaroslav Kudrna, Ana María Ordóñez Puentes, Martins Paparinskis and Jennifer Thornton, all speaking in their individual capacities, and was moderated by DRIG co-chairs Simon Batifort and Rémy Gerbay. This post summarizes the key takeaways.

States' Different Negotiating Approaches on the Scope of FET

Quoting the tribunal in *Pawlowski v. Czech Republic*, which described FET as "a rule of laconic brevity and delphic obscurity", Jaroslav Kudrna noted that tribunals' interpretations of FET are sometimes unanticipated due to a lack of universal agreement on the standard's scope. Thus, one of the cross-cutting themes of the event was the different negotiating approaches by different States towards FET provisions.

Martins Paparinskis explained how British and German treaty drafters approached FET, drawing on research contained in an article "Investment Law Before Arbitration" he co-authored with Hepburn, Poulsen, and Waibel. Recalling the provisions of Articles 31(1) and 31(4) of the VCLT, he suggested that FET can have two special meanings and one ordinary meaning. One special meaning is found in pleadings before the ICJ and PCIJ, according to which FET is thought of as a technically equivalent reference to customary international law, analogous to denial of justice. The second special meaning comes from the League of Nations' treaty practice on international trade, given that Article 23(e) of the Treaty of Versailles referred to "equitable treatment." Later on, States concluded bilateral treaties in which FET was applied in the context of non-discriminatory competition. The third – the ordinary meaning – is that FET is a vague term, similar to other vague terms used in fields such as the law of the sea, State succession, human rights, and environmental law. Paparinskis explained that in applying these alternatives, it is difficult to maintain that British and German treaty negotiators considered that FET had a certain special meaning in the sense of VCLT Article 31(4). FET was not treated with a great deal of interest, not due to treaty negotiators' lack of knowledge – they were leading international lawyers – but because it was not something treaty negotiators focused on, unlike the national treatment and expropriation standards.

In turn, Kudrna explained that the negotiating history of investment treaties concluded by the Czech Republic provides scarce evidence of FET's intended role. Negotiations focused mostly on provisions regarding national treatment, free transfers of profits, and dispute settlement. The only treaty negotiations in which the FET standard was touched upon were those conducted with France, as the *travaux préparatoires* indicate that France suggested a clause in which FET would be afforded in accordance with international law. Czech representatives conveyed to their French counterparts that this provision should be concretized, but no specification was made in the final text of the treaty, in which the FET standard is linked to principles of international law.

Jennifer Thornton explained that the United States' consistent position is that FET refers to a developed body of customary international law that evolved in the era of diplomatic protection and requires that States provide certain minimum standards of protection to the property interests of foreign nationals. The U.S. has always maintained that no single standard applies to all FET claims or to all MST claims. Rather, the U.S. maintains that it is an umbrella concept, and a floor beneath which no State can fall, but that ultimately it is akin to a set of common law tort claims with unique elements that claimants must prove. The U.S. has acknowledged that the obligation prohibits States from denying justice to foreign nationals in their courts, as well as unlawfully expropriating foreign property interests and repudiating their contractual commitments to foreign nationals in certain circumstances, in addition to requiring States to offer full protection and security to foreign property interests. Notwithstanding its best efforts to use conventional mechanisms to clarify the obligation's scope, such as NAFTA's Free Trade Commission's Note of Interpretation and non-disputing party ("NDP") submissions, the U.S. has never been able to persuade tribunals to completely embrace its approach on FET. The consequence of this lingering ambiguity is that U.S. treaty negotiators have been unable to persuade Congress that the obligation is sufficiently well-defined so it can be fully embraced in future agreements.

Joint Interpretations, NDP Submissions, Amendments

The event also addressed the role of joint interpretations, NDP submissions and amendments calibrating the scope of FET. Ana María Ordóñez explained that joint interpretations and NDP submissions are valid international law instruments that States rely on to define the scope of concepts such as FET. These do not constitute a supplementary source of interpretation but a keystone of treaty interpretation, which in the context of ISDS exist precisely because States are aware of current arbitral practice that sees standards such as FET as empty clauses needing interpretation. As to whether these instruments are taken into consideration in practice, Ordóñez opined that arbitral practice was inconsistent. She held that whenever NDP submissions were taken into account, tribunals' level of engagement with them seemed more concerned with the need to avoid allegations of failure to state reasons than with engaging with the arguments raised. Ordóñez also noted that in 2020, UNCITRAL Working Group III ("WGIII") issued a note in which it made specific reference to NDP submissions as authoritative interpretation mechanisms under VCLT Article 31(3)(b). She pointed out that WGIII meetings show that States share a concern about tribunals adopting questionable interpretative approaches, and that WGIII's work could indicate a general understanding between States that tools such as joint interpretations or NDP submissions can ensure that vague treaty provisions are not interpreted in a manner inconsistent with States' intentions.

As to the proposition that States should amend their treaties if they are unsatisfied with tribunals'

interpretations of FET, Thornton opined that amending treaties is easier said than done, as the process can be complicated. She concluded that States need to be more precise in their treaties when identifying FET's scope, while recognizing that even their best efforts to clarify the obligation may not be fully embraced by a tribunal interpreting the treaty. She stressed that this is the sort of bargain that States make when entering into these agreements to protect the offensive interests of their investors.

New-generation FET Clauses and the Uncertain Impact of Current Reform Efforts

Speakers also considered the possibility for new-generation FET clauses to clarify the meaning of FET provisions into the future. In recent treaties, some States have opted for a more elaborate concept of FET, in order to set a higher threshold for the application of this standard for tribunals, which in turn results in more predictability.

Kudrna referred to the European Union's practice and explained that the scope of FET was an issue in the negotiations of CETA, in which Canada wanted to link the FET standard to the MST under customary international law, a proposal which was strongly opposed by the EU. The EU instead proposed to set out elements of the FET standard, codifying existing elements appearing in case law. New agreements concluded by the EU containing its revised FET standard provide for an exhaustive list of conduct that can result in an FET standard violation. This new approach is also being used by EU Member States individually when negotiating new investment treaties with third States or renegotiating existing treaties. Regarding future treaty negotiations, Thornton opined that States should be clear about FET's scope because conventional control mechanisms can be ignored. She considered that the U.S. needs to move towards the CETA approach if the FET obligation is to remain in U.S. agreements. Still, the devil is in the details: every time an attempt was made to enumerate the norms that had sufficient State practice and *opinio juris* to have crystallized into custom, there was fierce debate within the U.S. government about what those norms actually were.

Paparinskis contended that European and American approaches to FET are not similar but rather address very different points. He explained that in examining FET, one intellectual exercise goes to the determination of the content of the rule, *i.e.* interpretation, and another goes to the application of that rule. We have sophisticated machinery for determining whether interpretation of a treaty provision or the determination of the content of custom is correct or persuasive: the VCLT for one, and rules of determination of customary law for the other. Application of FET on the other hand is something about which international law says little. We must be clear about these different exercises. He referred to the above-mentioned quote by the *Pawlowski v. Czech Republic* tribunal, and explained that the tribunal conflated two meanings of vagueness. One is vagueness as opposed to concreteness. The other is vagueness as something similar to what VCLT Article 32 refers to, namely a meaning that is obscure. He explained that there was nothing wrong with a rule being vague in the sense of not being concrete. That is a plausible conclusion – after all, international law is full of vague but applicable and routinely applied rules. The problem appears at the application level, where we can identify good and bad examples of the rule's application. Thus, U.S.is addressing the first point, namely clarifying and concretizing the content of the rule. Europe is addressing the second point, namely identifying examples of application that fit within the rule.

However, these new approaches to FET do not come without difficulties. Kudrna noted that it is not always easy in practice when States attempt to negotiate reforms to unqualified FET clauses with third States, as some prefer to link the FET standard to the MST under customary international law. As he concluded, we still remain far from a uniform understanding of the scope of the FET standard.

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