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FET and Abuse of Rights in Private Law: Unlikely Bedfellows or a Match Made in Heaven?

Pedro Lins · Wednesday, February 5th, 2025

This post is concerned with the potential comparison between the fair and equitable ("FET") standard and the rule against abuse of rights ("AR"), as regulated under municipal private law systems (mainly of continental origin).

A Fresh Take On FET Through the Prism of Comparative Law: A Role for AR?

FET combines a wide array of legal concepts of both private and public law under the same rubric. FET, therefore, seems to lie on the fault lines between commercial and investment arbitration (a peculiar and characteristic trait of a brand of "investomercial" arbitration, as it were). Accordingly, it is at least arguable that FET is comparable to private law concepts arising under municipal legal systems which are similarly protean and also involve fact-driven exercises.

Against this backdrop, abuse of rights immediately springs to mind.

Preliminarily: The Object and Purpose of Comparative Law

Comparative law raises two fundamental questions: *First*, *why* compare? *Second*, *what* should be the object of comparison? More precisely, what legal rules can be meaningfully compared?

As to *why*, it is widely understood that the ultimate goal of comparative law is to enhance knowledge by gaining unique insight into how specific legal rules operate.

As to *what*, the prevalent position in the literature seems to be that the comparative exercise should focus on functionally equivalent rules – namely, rules that seek to achieve the same end-goal, albeit in different ways.

FET and AR as Functional Equivalents

Having established the purpose of comparative law (namely, to glean knowledge) and its object

(namely, functionally equivalent legal rules), the question arises as to whether FET and AR are functionally equivalent. I submit that they are, for the following reasons.

FET is typically associated with the investor's expectations as to the regularity of State conduct.

Crucially, the reference to the investor's legitimate expectations in this context is meant as a separate and distinct concept to the specific cause of action often deemed by investment tribunals to be encompassed by the applicable FET clause. Here, the concept of legitimate expectations is meant as the underpinning justification for FET as a whole.

As reasoned by the tribunal in *Oxus Gold v Uzbekistan*, FET seeks to ensure that the host State, even when exercising its regulatory discretion, shall nevertheless "give due regard to an investor's legitimate expectations by refraining from taking measures which are not justified under the circumstances, i.e. unreasonable, disproportionate or discriminatory" (Final Award at 819). Over and above protection against outright takings and physical harm, the basis of the relief afforded by FET therefore lies in the disappointment of the investor's broader expectations as to the fairness of otherwise legitimate and *prima facie* lawful host State conduct.

Correspondingly, AR seeks to prevent conduct which, albeit *prima facie* lawful, is nevertheless irrational, arbitrary, disproportionate or otherwise perverse. AR limits the right-holder's ability to exercise a given right, which he or she possesses, whenever to do so would be inconsistent with the contract as a whole or, more broadly, with the contract's underlying legal system (UNIDROIT Principles of International Commercial Contracts, Commentary Art. 1.7).

It follows that AR's ultimate purpose, in the same vein as FET, is to protect the innocent party's legitimate expectations that it will not be subject to injustice or unfair treatment.

Hence, from a functional perspective, both AR and FET seek to protect the investor's/innocent party's legitimate expectations against injustice, *writ large*.

Additional Normative Parallels Between FET and AR

Both FET and AR involve context-specific exercises and they both supply a basis of liability of residual application. As such, the application of either AR or FET is, in principle, contingent on the conditions of more specific causes of action not being met and will invariably turn on the specific circumstances of the case at hand (*Mobil v Argentina Decision on Jurisdiction and Liability* at 812).

Additionally, the overarching goal of each principle is to effectuate justice by weighing the merits of competing claims in the light of the specific facts of the case (*Mondev International Ltd v USA*, Award at 118). That said, however dependent on context, the nature of the relevant inquiry under each cause of action is not discretionary, but, instead, is conceptualized as a legal test insofar as it is composed by general elements capable of juridical application (*Urbaser v Argentina*, Award at 612-613).

Indeed, the operative test under both AR and FET is a highly structured one, in which the relevant considerations are rigorously articulated and operate in a consistent and principled way. In this sense, abuse of right comprises quasi-independent causes of actions such as *venire contra factum*

proprium (prohibition of inconsistent behavior in the light of detrimental reliance), *supressio* (the loss of a legal right due to unreasonable delay in asserting a claim over it), *surrectio* (acquisition of a legal right or defence by virtue of detrimental reliance), *tu quoque* (the principle that a party should not benefit from its own wrongdoing). By the same token, FET comprises due process obligations, the prohibition on arbitrary or unreasonable behavior and the duty to, whether to a higher or lesser degree depending on the wording of the operative FET formulation, respect reasonably relied specific representations.

Hence, in summary, FET and AR are structurally similar: each cause of action is *residual*, *fact-driven*, and calls for an *evaluative assessment* (as against the exercise of a discretion). In addition, AR and FET also supply *the theoretical structure and unifying principle* for more specific types of claims, each of which with its own constituent elements.

Lessons for Practitioners Arising From the Comparison Between FET and AR

There are at least two areas in which the comparison yields valuable practical insights. *First*, in respect of the applicable substantive standard of review of State conduct under FET. *Second*, in respect of the remedial consequences of a breach of FET.

First, in order to show an abuse of right the innocent party must first displace the presumption that the impugned conduct is *prima facie* lawful. This requires a showing of egregious conduct on cogent evidence; only manifestly abusive conduct supports relief.

Investment tribunals, in contrast, are largely divided in respect of the applicable standard of review to determine a breach of FET. Tribunals now recognize that host States are mostly free to enact detrimental regulation, which is nevertheless non-discriminatory and for a public purpose, provided it is reasonable (*Phillip Morris v Uruguay*, Award at 423). Historically, however, tribunals have applied a much more exacting standard of review, effectively subjecting State conduct to a proportionality test (*Tecmed v Mexico*, Award at 154).

Nevertheless, consistently with the residual nature of FET and its underpinning justification as a tool to correct injustice, any claim of a breach of FET should arguably be subject to a presumption that damages arising out of non-discriminatory regulation enacted for a public purpose are not recoverable. In practice, this means that the investor should bear the burden of any evidentiary deficiency in connection with these issues (as argued by Viñuales, here).

This approach has been reflected in recent investment treaties, which expressly safeguard a space for regulatory action within the confines of which general regulation enacted for a bona fide purpose will not entail a breach of FET, however detrimental it might have been to the foreign investor (e.g., Dutch Model BIT 2019, Art. 2.2).

Second, AR and FET differ drastically as to the remedies available to the alleging party.

AR allows the court to grant any order required to remedy the abuse. In stark contrast, when faced with a breach of FET investment tribunals, as a matter of course, exclusively award full compensation for fair market value.

The measure of compensation in investment arbitration has been widely criticized as being overly

onerous to States while also giving rise to a windfall to foreign investors (e.g., here). This begs the question of whether the remedies available to investment tribunals should evolve to keep up with the distinct causes of action encapsulated by FET and in order to effect a more perfect and fair-minded form of reparation.

Absent limitations set by treaty, as a matter of law investment tribunals already enjoy wide remedial discretion (*Von Pezold v Zimbabwe* Award at 743). Tribunals are nevertheless typically reluctant to award non-pecuniary relief due to concerns that they might be encroaching upon the sovereignty of the host State and giving rise to effects on third parties, not subject to the tribunal's jurisdiction. In certain situations, however, non-pecuniary relief, in the form of restitutionary and discontinuance orders, would provide a more perfect form of corrective justice than monetary compensation which, at the same time, would also be less burdensome on the host State.

While specific restitutionary remedies of the kind suggested here give rise to several complications, not the least reduced enforceability under art. 54(1) ICSID Convention, potential impracticality, unexpected effects on third parties, undue encroachment on host State sovereignty, as well as limitations set by treaty (e.g., art. 26(8) ECT), a rigorous assessment of their pitfalls falls outside the scope of this post. However, given the normative foundation for a claim based on a breach of FET resting on the defeat of the investor's expectation as to the certainty and reasonableness of the host State's legal and regulatory system which was the basis of the investment, arbitrators should be free to award whatever relief is necessary to specifically enforce this defeated expectation, provided said relief (i) is not disproportionate, (ii) falls within the confines of the tribunal's mandate, and (iii) due account is given for potential second-order effects on third parties.

Conclusion

FET and the continental concept of AR should not be seen as total strangers. Rather, there are substantive parallels between these rules. Indeed, the comparison yields unique and hopefully valuable insights that allow us to rethink essential aspects of FET, at least as it is currently interpreted by investment tribunals and treaty drafters.

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