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WHAT IS THE SCOPE OF FAIR AND EQUITABLE TREATMENT (FET) STANDARD, AND CAN IT BE AGREED THAT FET IS OVERLY BROAD STANDARD? CAN FAIR AND EQUITABLE TREATMENT (FET) STANDARD BE DISTINGUISHED FROM THE FULL-PROTECTION AND SECURITY (FPS) STANDARD?

Аннотация. В данной статье рассматриваются принципы справедливого и равноправного обращения (FET) и полной защиты и безопасности (FPS) в контексте международного инвестиционного права. Анализ структурирован на три отдельных раздела. В первом разделе рассматривается объем стандарта справедливого и равноправного обращения, его значение и применение в международных инвестиционных соглашениях. Во втором разделе представлен всесторонний обзор концепции полной защиты и безопасности, ее исторической эволюции и ее роли в защите инвесторов. Заключительный раздел исследует взаимосвязь между справедливым и справедливым обращением и полной защитой и безопасностью, подчеркивая их взаимосвязь и то, как они коллективно способствуют защите иностранных инвестиций.

Ключевые слова: справедливое и справедливое обращение (FET) и полная защита и безопасность (FPS)

Abstract. This paper explores the principles of fair and equitable treatment (FET) and full protection and security (FPS) within the context of international investment law. The analysis is structured into three distinct sections. The first section delves into the scope of the fair and equitable treatment standard, examining its significance and application in international investment agreements. The second section provides a comprehensive overview of the concept of full protection and security, its historical evolution, and its role in protecting investors. The final section investigates the relationship between fair and equitable treatment and full protection and security, highlighting their interconnectedness and how they collectively contribute to the protection of foreign investments.

Keywords fair and equitable treatment (FET) and full protection and security (FPS).

Аннотация. Ушбу мақола халқаро инвестиция ҳуқуқи доирасида адолатли ва тенг муносабат (FET) ҳамда тўлиқ ҳимоя ва хавфсизлик (FPS) тамойилларини ўрганган. Таҳлил учта алоҳида бўлимга бўлинган. Биринчи бўлимда адолатли ва тенг ҳуқуқли муомала стандартининг кўлами, унинг аҳамияти ва халқаро инвестиция шартномаларида

қўлланилиши кўриб чиқилади. Иккинчи бўлимда тўлиқ ҳимоя ва хавфсизлик тушунчаси, унинг тарихий эволюцияси ва инвесторларни ҳимоя қилишдаги роли ҳақида тўлиқ маълумот берилган. Сўнги бўлимда адолатли ва тенг муносабат ҳамда тўлиқ ҳимоя ва хавфсизлик ўртасидаги боғлиқлик ўрганилиб, уларнинг ўзаро алоқадорлиги ва биргаликда хорижий инвестицияларни ҳимоя қилишга қандай ҳисса қўшиши ёритилган.

Калит сўзлар: адолатли ва тенг муносабат (FET) ва тўлиқ ҳимоя ва хавфсизлик (FPS).

I. Introduction

This article discusses the fair and equitable treatment and full-protection and security. The paper is divided into three parts. The first section examines the scope of the fair and equitable treatment standard and its role in international investment law. The second section describes the concept of the full-protection and security. Finally, the last part provides the relationship between the fair and equitable treatment and the full-protection and security.

Fair and equitable treatment

Heterogeneity in treaty language

Broad generalizations about the requirement for fair and equal treatment should be avoided. This standard clause does not have a single frozen version, as other standard clauses in investment treaties do. In this regard, there are significant differences. Every type of clause must be interpreted in accordance with Article 31 of the Vienna Convention on the Law of Treaties (1969), taking into account its context and, where applicable, its history. The discussion of the various types of linkage to customary law is an excellent example of these variations. In some treaties, the phrase 'equitable and reasonable' is used instead of 'fair and equitable.' This difference does not appear to be the result of a semantic difference.

Nature and function

The purpose of the provisions used in BIT practices is to fill the gaps that more specific standards may leave in order to achieve the level of investor protection specified in the treaties. The operation of the Full-Protection and Security (FET) clause in an investment contract is similar to that of a civil law state code, which establishes a number of specific rules, fills gaps, and supplements them with general good faith clauses as comprehensive principles that aid in the understanding of specific clauses. Indeed, the content of fair and equitable treatment standards overlaps with a broader sense of integrity, including the *venire contra factum proprium* and related concepts of infringement. In fact, if the facts do not support the expropriation claim, the FET standard can provide a remedy.

It has been suggested that the FET standard is simply a broad principle that encompasses other standard treatments commonly found in investment contracts. There are undeniable interactions and overlaps with other standards, but FETs are widely accepted as stand-alone

standards. In the majority of cases, courts distinguished FETs from other standards and investigated whether there were any violations of each standard individually. There is no doubt that the FET standard is intended to be a principle of international law and is not determined by the host country's law. Courts have repeatedly stated that the FET standard is distinct from national standard treatment. Even if a foreign investor is treated the same as an investor of the host country's nationality, the FET standards may be violated. For the same reason, investors may have been treated unfairly and unjustly because they cannot demonstrate that investors of other nationalities have been treated better, even if they do not benefit from Most Favored Nation status (MFN).

The ambiguity and lack of definition of the FET standard have been noted by some courts, and the European Parliament has expressed regret over the use of ambiguous language in this context. In fact, inaccuracy can be used to your advantage rather than your disadvantage. In practice, it is impossible to predict the scope of the types that may violate an investor's legal status in an abstract manner. Based on flexible standards, the FET principle allows an independent, objective third party to define this type of behavior. As a result, it contains independent legal content. It can be made clear in judicial practice, just like any other general principle of law.

Fair and equitable treatment and customary international law

There has been considerable debate around the question of whether the FET standard reflects only the minimal international standards found in customary international law, or whether it proposes a standalone standard that complements general international law. In the interpretation of the text, it seems almost impossible for a treaty to use the expression 'fair and equitable treatment' to refer to well-known concepts such as 'minimum standards of treatment under customary international law'. When a party to a treaty wishes to refer to customary international law, it may be assumed that reference is made to it without the use of other language.

This argument depends to some extent on the exact representation of the contractual terms provided by the FET. Upon closer inspection, they provide links to customary international law to varying degrees. Some treaties simply provide 'fair and impartial treatment' regardless of customary international law. German, Dutch, Swedish, and Swiss BITs usually follow this pattern.

The most intense discussion on the relationship between FET standards and customary international law has occurred within the framework of Article 1105(1) of NAFTA. This provision, including its title, reads as follows:

Article 1105: Minimum Standard of Treatment

1. Each Party shall accord to investments of investors of another Party treatment appropriate accordance with international law, including fair and equal treatment as well as comprehensive protection and protection.

Attempts to define fair and equitable treatment

In a number of cases, tribunals attempted to give the FET standard a more specific meaning by developing general definitions or descriptions. (MTD v Chile)

Foreigner discrimination has long been considered a key indicator of a failure to provide fair and equitable treatment. Awards have also included the standard of 'improper and discreditable conduct' or 'unreasonable conduct,' as well as references to international or comparative standards.

Specific applications of the fair and equitable treatment standard

Broad definitions or descriptions are not the only way to establish an enigmatic concept like FET. Another strategy is to look for examples of real-life situations in which this theory has been applied. A review of tribunal practice reveals that the requirement for fair and equitable treatment supports a number of principles.

Stability and the protection of the investor's legitimate expectations

The legitimate expectations of investors are based not only on the host country's legal framework, but also on all promises and statements made directly or indirectly by the host country. The legal framework on which an investor can rely is made up of laws, warranties, and contractual obligations contained in contracts, statutes, licenses, and other implementing documents. It is critical to be specific in order to create legitimate expectations. The strongest basis for legitimate expectations is the host country's promises and statements, whether made directly or indirectly. The receiving State's refusal to guarantee that it leads to legitimate expectations violates the principle of fair and equitable treatment.

Some courts weighed the legitimate expectations of investors against the state's obligation to act in the public interest when deciding between investors' right to stability and the state's right to regulate. Specific guarantees to encourage investors to invest, as well as guarantees from the host country, are critical for building trust. However, as previously stated, some referees have determined that mere political statements cannot raise reasonable expectations.

The arbitral tribunal emphasized that an investor's legitimate expectations are based on the host country's legal order at the time the investor acquired the investment. (GAMI vs Mexico)

Transparency

Transparency is correlated to the preservation of legitimate investor expectations. Transparency implies that the legal framework that governs the investor's operations is easily visible, and that any decisions affecting the investor can be traced back to that legal framework. In a few recent judgment, arbitral tribunals defined 'fair and equitable treatment,' relying on a relatively new idea that isn't widely recognized as a criterion of international law: transparency.

In *Metalclad Corporation v United Mexican States*, the Tribunal concluded that the absence of a clear rule in Mexico regarding construction permit requirements had

'failed to ensure a transparent and predictable framework for Metalclad's planning and investment.' It determined that Mexico's failure to ensure the transparency required by NAFTA in Article 1802 on transparency violated Article 1105, which requires fair and equitable treatment.

The Tribunal defined the concept of 'transparency' specified in Article 1802 as the idea that 'all relevant legal requirements for the purpose of investing shall be capable of being readily known to all investors.'

It also stated that if a Party becomes aware of 'confusion or misunderstanding' among investors regarding the legal requirements to be met, the Party has a 'duty to ensure that the right position is promptly determined and clearly stated so that the investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all relevant laws.'

One of the complaints in *Maffezini v Spain* concerned a 'loan' transferred from the investor's personal account by a government institution without his consent. The Tribunal determined that the lack of transparency in the loan transaction was incompatible with fair and equitable treatment.

Compliance with contractual obligations

Closely related to the issue of protecting investor trust is the extent to which this protection extends to compliance with contractual obligations. In most, if not all, legal systems, contractual agreements are a classic means of creating legal stability and predictability. Therefore, *pacta sunt servanda* appears to be an application with very prominent stability requirements in the FET standard. The relationship between this aspect of FET and the inclusion clause is clear. (*Impregilo v Pakistan*)

Procedural propriety and due process

Fair trials are a fundamental requirement of the rule of law and an essential element of FETs. It contains the traditional concept of international law, the denial of justice. In contrast to other aspects of investment protection, it is generally accepted that the right to deny justice depends on the prior depletion of local remedies. (*Metalclad v Mexico*)

Many commentators have expressed the view that the FET is an independent treaty standard that goes beyond simply repeating customary international law.

Good faith

Good faith is a fundamental premise in international investment law. If the host state fails to operate in good faith and its conduct is significant, the violation is most likely a breach of faith and equitable treatment. In numerous cases, tribunals have discussed the principle of good faith, but no case has been decided solely based on the principle.

The Tribunal determined that the obligation to treat people fairly and equitably is an expression and component of the 'bona fide principle recognized in international law.'

The Tribunal stated in *El Paso v Argentina* that 'a

violation can be determined even if there is a mere objective disregard of the investor's rights under the FET test, and such a violation does not require subjective bad faith on the part of the State.' Other tribunals have used a similar procedure.

Freedom from coercion and harassment

The FET standard also applies to situations of coercion and harassment of investors. In the *Pope & Talbot v Canada* proceedings, state regulator SLD has launched a confrontational and aggressive 'verification review' of investors. The referee found the investigation to be 'more like a struggle than a cooperative regulation.' Regulatory actions have been found to be 'threat and misrepresentation' and 'difficult and confrontational' in violation of the FET standard.

In many cases, courts have determined that investors' claims were unsubstantiated. Allegations have surfaced of a campaign to punish the investor for exposing critical information about the regime, aggressive tax inspections, and general intimidation and harassment.

Full protection and security

Concept

At first glance, the traditional concept of 'complete protection and security' appears amorphous and incapable of being easily applied in practice. However, arbitral precedent, like other standards included in the BIT, has gradually improved our understanding of the term. This is true both for the specific expressions of the various treaty provisions that provide protection and for the specific issues that fall under this concept.

In treaty practice, various formulations and patterns have been used. The traditional version (found in a series of US FCN treaties dating back to the nineteenth century) is based on the classical version of a guarantee that provides for 'full protection and security,' but other treaties have removed the word 'full.' Another option guarantees 'fair and equitable treatment.' The straightforward approach is limited to providing 'protection' (rather than 'security'), whereas other formulations rely on the promise of 'legal security.'

Standard of liability

According to most experts, the standard does not provide absolute security against physical or legal infringement. Under the law of state responsibility, the host state is not subject to a strict liability requirement to prevent such violations. Rather, it is widely accepted that the host state will be required to conduct 'due diligence' and take reasonable precautions to protect foreign investment in the circumstances.

At the same time, if the standard does not provide more protection than national or most-favored-nation provisions, as in the case of *LESI v Algeria*, the standard becomes a pointless and pointless requirement. The host country's lack of resources to take appropriate action is not an excuse. There is no issue with theft or due diligence because the state is directly liable when it violates the standards or makes a significant contribution to such behavior.

Protection against violence and harassment

Obligations to provide physical protection and security may be related to state interventions or private actions. Violence was investigated by state agencies in the case of *AAPL vs. Sri Lanka*, where security forces destroyed investment as part of a counterinsurgency operation. The referee assessed all of the situations and determined that the actions were unjust and excessive.

Private violence was also a factor in some of the other cases. An ICJ Chamber applied a provision in an FCN treaty that guaranteed 'constant protection and security' in the *ELSI* case. One of the plaintiffs' claims was that the factory was allowed to be occupied by Italian authorities. The court determined that the Italian authorities' reaction was proportional to the situation. The court determined that references to certain protection and security provisions in Article 5 'cannot be construed as guaranteeing that property will not be occupied or interfered with under any circumstances.'

Legal protection

Beyond physical violence, the Principle of Full Protection and Security has the effect of requiring legal protection from investors. Some contracts expressly state that they provide 'complete protection and legal certainty.' Case law, on the other hand, supports the view that the standard formula of 'full protection and security' also protects the investor's rights.

One argument for such an expansion of the standard could be that modern investment treaties, on the whole, protect intellectual property rights, which, logically, cannot be infringed by physical injuries and thus would not be protected under the Fair and Equitable Treatment (FET) standard's strict interpretation.

In general, and based on the Tribunal's definition of investment, which includes both tangible and intangible assets, the Tribunal believes that the obligation to provide full protection and security extends beyond 'physical' protection and security. It's difficult to imagine how physical security for an intangible asset could be achieved.

Arbitration courts have interpreted the FET standard broadly in some cases. (*Occidental Exploration v. Ecuador*) (*Rumeli v Kazakhstan*).

Relationship to customary international law

Several treaty provisions on protection and security connect this standard to general international law ('full protection and security under international law') and the practice of fair and equitable treatment. Other treaties treat protection, safety, and treatment under international law as distinct standards, implying that they are not synonymous. It is unclear whether the unconditional reference to 'full protection and security' provides an independent treaty basis or merely serves to unify common law.

To clarify this issue for the purposes of NAFTA, the three parties stated in their comments that Article 1105(1)'s full protection and security provisions embody common law as well as fair and equal treatment. In other

words, NAFTA participants believe that the standards reflect requirements embodied in the concept of minimum standards at the level of general international law on foreigners.

Distinguishing the FET from the FETs

The relationship between the FET and FET standards is unclear. In arbitral awards, tribunals disagree on whether the FET standard is autonomous or related to the FET standard. Some argue that the two standards are distinct, while others contend that they are linked. Treaties' standards are either linked or separated. Although the standards are treated separately in BITs, it appears that arbitral practice has not followed the provisions' wording and context.

These two standards are distinct, but they overlap in numerous ways. The fact that these two standards derive from the same norm of international customary law could explain their overlap, but different practices in their implementation have evolved over time. As a result, the FET requires governments receiving investments to exercise reasonable diligence in order to protect foreign assets and investors, while also providing them with an effective legal structure to do so. The FET, on the other hand, is a standard whose goal is to 'fill any gaps that may have been left by other, more concrete standards, such as the FET, in order to achieve the investor protection contemplated by the treaties.'

The FET primarily represents the receiving country's obligation to avoid any action that could be detrimental to the investor or the investment, whereas the FET represents the host country's obligation to be actively working to create a safe environment for investors and investment security. As Schreuer pointed out, it appears unconvincing that two separate treaty standards should have the same meaning, so it makes more sense to treat them as separate standards.

The arbitral tribunal in Egypt's *Jan de Nul* proceedings agreed with this viewpoint. 'The concept of continuous protection and security is used in two different provisions and must be distinguished here from fair and equitable standards, which are fixed in bilateral agreements.' In arbitration, the general consensus is that these are two independent standards that do not overlap, and that the 'fact that the Tribunal dismissed the FET claim does not imply that the claim for a violation of protection and security was also rejected.'

According to the Arbitration Tribunal's decision in the case of *Oxus v Uzbekistan*, the distinguishing factor between these two criteria is whether protection is provided against the actions of the state and its bodies or against the actions of third parties. 'The FET standard supplements the FET standard by providing protection against acts of third parties, i.e. non-state parties, that the FET standard does not cover. Thus, when a State organ commits an incriminating act, the applicable standard is the FET standard, whereas when a non-state organization commits an incriminating act, the applicable standard is the FET standard.' As a result, the investor cannot expect

the state to ensure his fair and equitable treatment by third parties under the FPS standard, but he does have the right to expect the state to take all reasonable steps to prevent any injuries caused by third parties, and to punish the perpetrators if injuries do occur.

Conclusion

In conclusion, under international investment law, the full protection and security (FPS) requirement and the fair and equitable treatment (FET) criterion are both essential for defending the rights of foreign investors. Despite their connections, these standards have different purposes. By filling up the gaps left by more detailed treaty provisions, the FET standard makes sure that investors are protected from capricious or unfair host state actions. It includes values that are essential to establishing an atmosphere in which investors may act with confidence, including the preservation of reasonable expectations, openness, due process, and good faith.

The FPS norm, on the other hand, places a strong emphasis on the host state's obligation to offer both legal and physical protection from harassment, assault, and other types of damage, whether brought on by the state or by outside parties. It mandates that states take reasonable steps to guarantee the legal and physical protection of foreign assets.

These two standards serve different purposes even though they could occasionally overlap. The FPS standard places a higher priority on safeguarding investments from outside risks, whereas the FET principally concentrates on how investors are treated and how equitable the regulatory system is. In order to foster stability and predictability in international investment relations, both criteria are crucial and work well together.

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