

**CONCEPTUALIZING THE INTERPRETATION
AND APPLICATION OF THE PRINCIPLE OF
FAIR AND EQUITABLE TREATMENT
UNDR BILATERAL INVESTMENT
TREATIES***

*Nuttiya Wiboonchokseit***

Abstract

The objective of this research was to study Fair and Equitable Treatment (hereinafter “FET”) as one of an investment protection standards contained in most Bilateral Investment Treaties (hereinafter “BITs”) nowadays.

Due to the absence of its definition provided in such BITs, this research thus continue examining Investor-State Dispute Settlement (ISDS) in relation to FET based claims under BITs: the International Centre for Settlement of Investment Disputes (ICSID) and Ad-hoc arbitration including FET based claims brought before the International Court of Justice (ICJ) in order to determine how arbiters in particular cases applied and interpreted the FET standard under BITs.

Furthermore, this research was also try to identify the differences (if any) of the interpretation of FET under BITs among international dispute settlement organizations in practice.

In addition, each elements as well as the criteria that arbiters take into account for rendered their decisions and/or awards were pointed out in order to give a more certain view of the interpretation and application as well as the current legal status of FET standard to assist both investors and host States to handle with the upcoming FET based claims in this age.

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** Graduate Student of Master of Laws in Business Laws (English Program), Faculty of Law, Thammasat University.

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บทคัดย่อ

วิทยานิพนธ์เรื่องนี้มีวัตถุประสงค์เพื่อศึกษาหลักประติบัติที่เป็นธรรมและเท่าเทียมกัน (Fair and Equitable Treatment) ในฐานะที่เป็นมาตรฐานที่ให้ความคุ้มครองแก่การลงทุนของคนต่างชาตินที่มีความสำคัญมากในขณะนี้ นอกจากนี้ สนธิสัญญาว่าด้วยการส่งเสริมและคุ้มครองการลงทุน (Bilateral Investment Treaties) แทบทุกฉบับในปัจจุบันนี้นิยมกำหนดหลักประติบัติที่เป็นธรรมและเท่าเทียมกันไว้ในข้อบทของสนธิสัญญาด้วย

อย่างไรก็ตาม แม้ว่าสนธิสัญญาว่าด้วยการส่งเสริมและคุ้มครองการลงทุนจะมีการกล่าวถึงหลักประติบัติที่เป็นธรรมและเท่าเทียมกันไว้ในข้อบทของสนธิสัญญานั้นๆ แต่ก็ไม่ปรากฏว่าได้มีการให้คำจำกัดความหรือคำนิยามของหลักประติบัติที่เป็นธรรมและเท่าเทียมกันไว้แต่อย่างใด ผู้เขียนจึงมุ่งเน้นที่จะศึกษาค้นคว้าเกี่ยวกับการระงับข้อพิพาทระหว่างรัฐกับเอกชนในกรณีพิพาทเรื่องหลักประติบัติที่เป็นธรรมและเท่าเทียมกันภายใต้ภายใต้สนธิสัญญาว่าด้วยการส่งเสริมและคุ้มครองการลงทุน ทั้งคดีที่มีการนำขึ้นสู่ศูนย์ระหว่งประเทศสำหรับการระงับข้อพิพาทการลงทุน (International Centre for Settlement of Investment Disputes หรือ ICSID) รวมถึงคดีที่ขึ้นสู่อนุญาโตตุลาการแบบเฉพาะกิจ (Ad-hoc Arbitration) และคดีที่ขึ้นสู่ศาลยุติธรรมระหว่างประเทศ (International Court of Justice) เพื่อพิจารณาและวิเคราะห์ถึงหลักปฏิบัติของอนุญาโตตุลาการในการตีความและปรับใช้หลักประติบัติที่เป็นธรรมและเท่าเทียมกันภายใต้สนธิสัญญาว่าด้วยการส่งเสริมและคุ้มครองการลงทุน

นอกจากนี้ วิทยานิพนธ์ฉบับนี้ยังมุ่งเน้นที่จะจำแนกความแตกต่างในทางปฏิบัติ (หากมี) ในการตีความหลักประติบัติที่เป็นธรรมและเท่าเทียมกันขององค์กรระงับข้อพิพาทระหว่างประเทศทั้งหลาย รวมถึงมุ่งเน้นที่จะศึกษาถึงหลักเกณฑ์ที่อนุญาโตตุลาการนำมาใช้พิจารณาในการตัดสินข้อพิพาทว่าด้วยเรื่องหลักประติบัติที่เป็นธรรมและเท่าเทียมกัน ด้วยความมุ่งหวังว่าการศึกษานี้จะช่วยให้ผู้อ่านทราบถึงสถานะทางกฎหมาย รวมถึงการตีความและปรับใช้หลักประติบัติที่เป็นธรรมและเท่าเทียมกันได้อย่างแน่นอนชัดเจนยิ่งขึ้น ทั้งนี้ เพื่อประโยชน์แก่ทั้งนักลงทุนและรัฐผู้รับการลงทุน โดยในฝ่ายของนักลงทุนนั้นสามารถนำหลักการที่อนุญาโตตุลาการใช้ในการตัดสินคดีมาเป็นข้อเตือนใจว่าในกรณีใดที่ถือว่ารัฐผู้รับการลงทุนละเมิดข้อบทของหลักประติบัติที่เป็นธรรมและเท่าเทียมกัน และสำหรับฝ่ายรัฐผู้รับการลงทุนนั้นสามารถนำหลักการที่อนุญาโตตุลาการใช้ในการตัดสินคดีมาเป็นกรณีศึกษาเพื่อเตรียมรับมือและป้องกันข้อพิพาทเกี่ยวกับหลักประติบัติที่เป็นธรรมและเท่าเทียมกันที่อาจเกิดขึ้นในอนาคตได้

คำสำคัญ: กฎหมายระหว่างประเทศ, กฎหมายการลงทุนระหว่างประเทศ, การคุ้มครองการลงทุน, มาตรฐานคุ้มครองการลงทุน, การลงทุนข้ามชาติ, การลงทุนโดยตรงจากต่างประเทศ

Introduction

The origin of the concept of Fair and Equitable Treatment (hereinafter “FET”) can be traced back to the Havana Charter for an International Trade Organization (1948). The concept was intended to protect foreign investments and ensure fair and equitable treatment from the host country.

FET, in recent years, has become a key feature of investment protection standard which is contained mostly in bilateral investment treaties (hereinafter “BITs”), the main source of law in the field of investment, and many multilateral trade agreements. As a result of a growing number of international investments, the use of Investor-State Dispute Settlement (hereinafter “ISDS”) has rapidly developed. Meanwhile investors tend to bring FET based claims against host countries with a considerable rate of success. However, the scope of application of the FET standard in dispute settlement system has remained contentious and, in most cases, the definition of FET has to be sought from arbitral decisions or judgments case by case depending on the discretion of the tribunal(s) or judicator(s). Consequently, host countries may carry a heavy burden of the obligation to accord FET to foreign investments.

To promote foreign investment in the country, Thailand also provides foreign investors with fair and equitable treatment through the Agreements for the Promotion and Protection of Investment or BITs. However, Thailand has very little experience in this field and had just recently lost a claim relating to the breach of FET obligation under BITs¹ which caused a severe impact on the Thai economy.

This thesis therefore aims to study Investor-State Dispute Settlement pertaining to FET based claims under BITs, particularly International Centre for Settlement of Investment Disputes (hereinafter “ICSID”) and Ad-hoc Arbitration. Furthermore, it will

¹ Walter Bau AG (in Liquidation) v The Kingdom of Thailand.

focus on how the International Court of Justice (hereinafter “ICJ”) and other decision-making bodies have interpreted the FET standard to understand the current scope of the application of the FET standard in disputes involving BITs in order to minimize the risk of loss and protect host countries against FET based claims.

I. Historical Background and Development of the Fair and Equitable Treatment Standard

Today, it is undeniable that Fair and Equitable Treatment is a significant standard of protection granted to foreign investors although its exact scope and meaning have been hotly debated. This chapter will begin with the origin of the concept of Fair and Equitable Treatment and its development. This will be followed by a discussion of the current use of the Fair and Equitable Treatment Standard in international investment laws and state practice. Lastly, it will delve into the formulations found in the investment instrument, particularly bilateral investment treaties, all of which share a common substantial vagueness. The problems of applying the Fair and Equitable Treatment Standard in Bilateral Investment Treaties will also be addressed.

The concept of Fair and Equitable Treatment firstly originated in post-war decolonization period, the newly independent states wanted to protect their independence by way of nationalization through a direct expropriation. This was accompanied by the refusals of the host countries to compensate foreign investors. This attitude obviously contradicts the generally recognized conception of economic benefits brought about by foreign investments and caused inconsistent national policies.²

At that time, the only instrument that granted foreign investors the right to claim damages due to an unjust action of the host countries was the diplomatic protection of their home states. However, this kind of protection is considered an indirect protection because the investors had to rely on the will of their own states to

² IOANA TUDOR, **The Fair and Equitable Treatment Standard in the International Law of Foreign Investment** 1 (Oxford University Press, 2008).

engage in such procedures against the host countries.³ Private foreign investors thus craved for the more direct mechanism to enforce their rights against host countries.

Fair and equitable treatment (hereinafter “FET”) is one of the prominent standards included in international investment agreements (hereinafter “IIAs”) to solve such problem. The FET obligation is often stated, together with other standards, as part of the protection due to foreign direct investment by host countries.⁴ Due to its significant feature that allows an investor to directly bring a case against a host country without any references to other investments, the FET standard is also known as an “absolute”, “non-contingent” standard of treatment⁵, as opposed to the “relative” standards embodied in “national treatment” (hereinafter “NT”) and “most favored nation” (hereinafter “MFN”) principles which define the required treatment by reference to an initial treatment or situation established by the host countries.

The phrase “equitable treatment” first appeared in the Article 23 (e) of the League of Nations Covenant which stated that “. . . the Member of the League . . . to secure and maintain freedom of communications and of transit and *equitable treatment* for the commerce of all Members of the League . . .”⁶. The league convened an International Conference on the Treatment of Foreigners to

³ *Ibid.*

⁴ OECD, “**Fair and Equitable Treatment Standard in International Investment Law 2**” (OECD Working papers on International Investment, 2004/3, OECD Publishing, 2004), <http://dx.doi.org/10.1787/675702255435> (accessed on December 8, 2015).

⁵ A standard that states the treatment to be accorded in terms whose exact meaning has to be determined, by reference to specific circumstances of application. Please See, Stephan W. Schill, **The Multilateralization of International Investment Law** 78 (Cambridge University Press 2009); Rudolf Dolzer & Margrete Stevens, **Bilateral Investment Treaties** 58 (Martinus Nijhoff Publishers 1995); Katia Yannaca-Small, **Fair and Equitable Treatment Standard: Recent Developments, in Standards of Investment Protection** 111 (August Reinisch ed., Oxford University Press 2008); also cited in OECD *supra* note 4.

⁶ *Please see* the analysis of the Theodore Kill, **Don’t Cross the Streams: Past and Present Overstatement of Customary International Law in Connection with Conventional Fair and Equitable Treatment Obligations** 869 (Michigan Law Review 2008).

develop an applicable standard of treatment under Article 23 (e) and later adopted a Draft Convention on the matter, which did not, however refer to FET obligation.⁷

Subsequently in 1948, the Havana Charter for the International Trade Organization (hereinafter “Havana Charter”) had adopted the principle that foreign investments should be guaranteed a “just and equitable treatment” in its Article 11 (2). Even though the Havana Charter dealt with trade issues, it also contained many provisions pertaining to investments including the envisagement that the future trade organization would make recommendations for bilateral or multilateral agreements to assure just and equitable treatment for investments to another Member.⁸

Due to several controversial issues, the Havana Charter never came into force. Nevertheless, the Havana Charter is generally considered as the first legal instrument that made a reference to the FET standard.⁹

In addition, the Ninth International Conference of American States that took place in 1948 the Economic Agreement of Bogota (hereinafter “Bogota Agreement”). Its Article 22 provided that “foreign capital shall receive equitable treatment”.¹⁰ Yet, it was never ratified.

In 1959, Mr. Hermann Abs and Lord Shawcross together with a group of European businesspersons and lawyers drafted the Abs-Shawcross Draft Convention on Investments Abroad, which granted

⁷ *Ibid.*, p. 870-871. Please also see, Patrick Dumberry, **The Fair and Equitable Treatment Standard A Guide to NAFTA Case Law on Article 1105** 29 (Kluwer Law International 2013).

⁸ Havana Charter for an International Trade Organization, 24 March 1948, Article 11(2), in: U.N. Conference on Trade & Employment, Final Act and Related Documents 8-9, U.N. Doc. E/Conf. 2/78, U.N. Sales No. 1948.II.D.4 (1948).

⁹ See Kill, *supra* note 6, p. 871-873.

¹⁰ Organisation of American States, Economic Agreement of Bogota, Article 22, May 1948, L. Treaty Ser. No. 25, OAS Doc. No. OEA/Ser.A/4 (SEPF). The full provision reads as follows: ‘[f]oreign capital shall receive equitable treatment. The States therefore agree not to take unjustified, unreasonable or discriminatory measures that would impair the legally acquired rights or interests of nationals of other countries in the enterprises, capital, skills, arts or technology they have supplied’.

a protection to property of foreign investors in accordance with the “fair and equitable treatment”¹¹ and included “full protection and security” and “discrimination”.

In 1967, the Organisation for Economic Co-operation and Development (hereinafter “OECD”) had developed the Draft Convention on the Protection of Foreign Property (hereinafter “Draft Convention”) in order to protect private property by requiring that “each party shall at all times ensure fair and equitable treatment to the property of the nationals of the other parties”. Since then, the developed countries had adopted the 1967 OECD Draft Convention, even though was never opened for signature, as a model for drafting their own bilateral investment treaties (hereinafter “BITs”). The Draft Convention was subsequently incorporated into BITs between developed and developing countries with FET clause therein. Therefore, it can be said that the 1967 OECD Draft Convention was a prominence threshold of FET clause contained in BITs nowadays.

II. The Current Usage of the Fair and Equitable Treatment Standard in International Investment Agreements and State Practice

As aforementioned, the OECD had profoundly influenced both developed and developing countries to incorporate the FET clause in their respective IIAs since the late 60s. In recent years, the FET clause has commonly been included in the majority of BITs as well as multilateral instruments. It has even appeared in the treaties concluded by countries traditionally favor national control over foreign investments and generally use national treatment rather than the FET standard¹².

Due to the belief held by developing countries that the term “fair and equitable treatment” is applied by developed countries to replace the term “minimum standard of treatment”, which is one of the most controversial protection standards in international law because of its uncertainties and ambiguities, the negotiation of

¹¹ Article 1. Hermann Abs & Hartley Shawcross, *The Proposed Convention to Protect Private Foreign Investment: A Round Table: Comment on the Draft Convention by its Authors*, 9 J.P.L., October 1967, 7 ILM 117 (1967).

¹² ICSID, *Investment Laws of the World: Bilateral Investment Treaties* (1972).

multilateral instruments between developed and developing countries hardly achieves its goal, which ultimately leads both parties to enter into BITs instead¹³. The use of BITs had begun from the 1990s onwards.

There are presently over 2,900 bilateral treaties listed in UNCTAD database, 2,276 of which have come into force.¹⁴ The majority of those BITs were concluded with the FET clause. The first group that endorsed the FET clause in their BITs was the European States (including Germany and Switzerland).¹⁵ The latest BITs that granted the FET protection to foreign direct investments was concluded between Canada and the Republic of Serbia in April, 2015.¹⁶ As for the Kingdom of Thailand, it has currently signed 41 bilateral treaties.¹⁷

From my examination, it can be summarized that BITs that exclude a reference to the FET standard are presently the exception rather than the rule. The FET clause hence has become a common feature found in BITs.

As aforesaid, the FET clause is principally found in the majority of BITs. Furthermore, it is also discovered in many multilateral and regional instruments pertaining to foreign investments. These regional and multilateral instruments commonly recommend that the FET clause should be endorsed on every

¹³ Salacuse, Jeswald W., **The Treatification of International Investment Law: a Victory of Form Over Life? A Crossroads Crossed?**, 3(3) *Transnational Dispute management* 219 (2006); Paparinskis, **The International Minimum Standard and Fair and Equitable Treatment** 90-92 (Oxford University Press, 2013).

¹⁴ UNCTAD, **International Investment Agreements Navigator**, UNCTAD, available at <http://investmentpolicyhub.unctad.org/IIA> (accessed on November 30, 2015).

¹⁵ The first BITs that endorsed a FET clause, in the early 1960s, were Germany and Switzerland. See Tudor, *supra note 2*.

¹⁶ It was signed by both parties on September 1, 2014 and came into force on April 27, 2015. It is also incorporated FET clause in its Article 6 Clause 1. **See Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments** (2014) available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3152>

¹⁷ Please see Table 2.1

instrument in order to accord foreign investments with fair and equitable treatment.

The regional category of conventional instruments is established by agreements that normally create a customs union or a free trade area that cope with foreign investments such as the Bogota Agreement¹⁸, the Investment of Arab Capital in the Arab States¹⁹, the African, Caribbean and Pacific Group of States²⁰ (hereinafter “ACP”), the European Union had signed the Fourth Convention of the African, Caribbean and Pacific Group of States and the European Economic Community of so-called “Lomé IV”²¹, the Common Market for Eastern and Southern Africa (hereinafter “COMESA”)²², the North American Free Trade Agreement (hereinafter “NAFTA”), the MERCOSUR²³, The Energy Charter Treaty (hereinafter “ECT”)²⁴, the Agreement for the Promotion and Protection of Investments among the Association of South East Asian Nations (hereinafter “ASEAN”), the 1967 OECD Draft Convention, the Abs-Shawcross

¹⁸ Bogota Agreement, *supra note* 10.

¹⁹ All member States of the League but Algeria and the Comoros had ratified the agreement and it came into force on September 7, 1988. Eleventh Arab Summit Conference, *Unified Agreement for the Investment of Arab Capital in the Arab States* (signed on November 26, 1980) available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2394>.

²⁰ An organisation generated by Georgetown Agreement (officially called “ACP-EC Partnership Agreement” or “Cotonou Agreement”) in 1975 of which purpose is for coordinating cooperation between its members and European Union pertaining to negotiation and implementation of agreements concluded by them; ACP website available at <http://www.acp.int/node/7> (accessed on December 2, 2015).

²¹ The effective period of this agreement was 10 years; came into force on March 1, 1990.

²² Africa, *Common Market for Eastern and Southern Africa* (signed on June 3, 1991) available at http://www.comesa.int/attachments/article/28/COMESA_Treaty.pdf (accessed on December 2, 2015).

²³ Mercado Común del Sur or “Common Market of the South” was created by Argentina, Brazil, Paraguay and Uruguay in 1991. UNCTAD, “*Investment Policy Hub: International Investment Agreements Navigator/ Membership of MERCOSUR*”, available at <http://investmentpolicyhub.unctad.org/IIA/CountryGroupingDetails/40#iiaInnerMenu> (accessed on December 2, 2015).

²⁴ *Ibid.* p. 53.

Draft Convention on Investments Abroad²⁵, the 1983 Draft United Nations Code of Conduct on Transnational Corporations²⁶, the Convention Establishing the Multilateral Investment Guarantee Agency²⁷ (MIGA), etc.

Lastly, in 1998, the OECD also established the Draft of Multilateral Agreement on Investment which endorsed the FET clause. For example, in the general treatment of investment protection provision, it is stated that “fair and equitable” treatment and full and constant protection and security will be covered to all contracting parties whose investments incurred in OECD territories.²⁸

III. Formulations and Problems of the Application of Fair and Equitable Treatment Standard

1. Formulations of the Fair and Equitable Treatment Standard in International Investment Agreements

UNCTAD, after finishing its decennary survey of BITs, concluded that FET language found in the surveyed BITs varied under different circumstances. UNCTAD hence categorized those different formulations of the FET standard contained in BITs into seven categories in 2007²⁹ as follows:

²⁵ Abs & Shawcross, *supra note* 11.

²⁶ UNCTC, *The Draft United Nations Code of Conduct on Transnational Corporations* Art. 48 (1983) UN Doc. Also available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2891> (accessed on December 2, 2015).

²⁷ MIGA came into force on April 12, 1988 and later amended by the Council of Governors of MIGA and went into effect on November 14, 2010. Multilateral Investment Guarantee Agency, *the Convention establishing the Multilateral Investment Guarantee Agency* Art. 12 (d) (Washington, D.C., World Bank, 2010) available at http://www.miga.org/documents/miga_convention_november_2010.pdf (accessed on December 2, 2015).

²⁸ OECD, *the Draft Multilateral Agreement on Investment* (1998) Article 4 (1) (1.1) available at <http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf> (accessed on December 2, 2015).

²⁹ UNCTAD (2007), *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking* 30-33 available at http://unctad.org/en/docs/iteiia20065_en.pdf (accessed on December 2, 2015).

1.1 BITs that accord covered investments “fair and equitable treatment” without a reference to international law or other standards;

1.2 BITs that distinctly express that treatment granted to both relative investors and investments shall not be less favorable than national treatment (hereinafter “NT”) or Most Favored Nation treatment (hereinafter “MFN”);

1.3 BITs that endorse supplementary obligation to the FET clause. This additional obligation stipulates the obligation of host countries to refrain from diminishing the investment through irrational or discriminatory criteria;

1.4 BITs that link the FET clause to international laws.

1.5 BITs with a reference to international law. Nevertheless, this category provides a wider coverage by incorporating additional language of the FET obligation which goes beyond the international minimum standard of treatment. Moreover, its wording leaves very little discretion to a potential arbitral tribunal;

1.6 BITs whose FET language relying on the domestic legislation of the host country; and

1.7 BITs that takes into account the issues debating in NAFTA arbitrations. The appearance of this kind of BITs therefore provides the FET clause as well as full protection and security by making a reference to customary international law minimum standard of treatment. Moreover, they also contain a further explanation of “fair and equitable treatment” and “full protection and security” within the same article.

2. The Problems of the Application of Fair and Equitable Treatment Standard under Bilateral Investment Treaties

Nevertheless the seventh approach had been established by UNTACD, as explained in the previous section, the scope of application and the exact meaning of the FET clause under BITs are still ones of the most controversial issues in the field of international law due to the proliferation of claims brought before tribunal in relation to FET violation. Because of the absence of the precise meaning of FET endorsed in the majority of BITs and the intrinsic

language used in BITs to give arbitrators and judges the possibility to determine the scope and meaning of the FET clause by taking into account the objective of particular disputed treaty, the scope of application and definition of the FET standard contained in BITs can be traced to awards or judgments rendered in particular cases. However, since there is very little guidance given to adjudicators, the discretion of tribunals thus plays a significant role in this part. In the other way, it can be concluded that the concept of “fairness” and “equity” depends on tribunals’ discretion which can be varied case by case.

I hence opine that examining the awards and judgments rendered in relation to the interpretation of FET under BITs, which will be discussed later, can generate an abstract of the FET standard under BITs in order to provide tribunals a guidance on how FET should be translated and applied to particular claim which can help solve one of the most contentious issues in international law. In addition, it can provide guidance for host countries to minimize the risk of breaching the FET obligation and for foreign investors to protect their investments in such territory.

IV. Analysis of Viewpoints Endorsed by International Decision Making Bodies

In recent years, the sleeping standard “fair and equitable treatment” has been invoked by investors due to an increase in success rate for FET based claims. This leads the principle of FET in international investment law to be much in vogue. The FET standard has become one of the most controversial investment protection standards due to its lack of precise meaning. Many institutions (which will be selected and addressed below) have, therefore, attempted to seek the accurate interpretation of FET.

I examined some selected ICJ judgments³⁰ and After examining references to the FET principle in ICJ judgments, I found

³⁰ ICJ, *Case concerning Ahmadou Sadio Diallo, Republic of Guinea v. Democratic Republic of the Congo* [hereinafter “Diallo”], Judgment of November 30, 2010. ICJ, *Case concerning Ahmadou Sadio Diallo, Republic of Guinea v. Democratic Republic of the Congo* [hereinafter “Diallo”], Judgment

that the ICJ has hardly dealt with the FET interpretation issue and we have to seek its definition by looking further in Arbitral awards which will be analyzed in the next Chapter. Examining such arbitral awards may give us a clearer view of current legal status and its interpretation under BITs context.

V. Analysis of Selected Arbitral Awards Regarding FET Obligations

Historically, most of the cases brought before international tribunals involve the protection of foreign investments.³¹ Investment treaty protection and investment arbitration have hence become a cornerstone of international investment law since they, when applied together, provide foreign investors a productive protection.

The earliest investment treaty based claim concerning the violation of the FET obligation under BIT, and not a NAFTA based, was rendered on 21 February 1997.³² Afterwards, FET based claims under BIT had been drastically increased along with the vagueness surrounding its context i.e. a precise meaning of the FET standard.

Consequently, the author, in this chapter, will only focus on FET based claims at the BIT level of which a legal mechanism for bringing investment claims is typically found in Investor-State Dispute Settlement or ISDS provision.³³ Both arbitration under

of June 19, 2012. ICJ, *Case concerning The Barcelona Traction, Light and Power Company, Limited* [hereinafter “*Barcelona Traction*”], Judgment of February 5, 1970. ICJ, *Case concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)* [hereinafter “*ELSI case*”], Judgment of July 20, 1989.

³¹ TUDOR, *supra* note 2, p. 1.

³² *American Manufacturing & Trading, Inc v Democratic Republic of Congo* (AMT case) (ICSID, ARB/93/1, Final Award rendered on 21 February 1997) (Sucharitkul.Golsong.Mbaye).

³³ There, each State sets forth its advance consent to submit investment disputes to international arbitration. Once a covered investor provides its own written consent, the State’s offer becomes legally binding, and the investor can bring proceedings directly against the State without the need for any additional approval. Latham & Watkins, *Investment Treaty Arbitration: A Primer*, Client Alert No. 1563, July 29, 2013: p.3 available at <https://www.lw.com> (accessed on December 8, 2015).

ICSID Convention and an ad-hoc arbitration under the rules of the United Nations Commission for International Trade Law (hereinafter “UNCITRAL”) are ones of the most popular legal mechanism established in such provision. This chapter will thus analyze relative arbitral awards in order to understand the way tribunals have interpreted the FET standard, in particular BIT, and how they have applied the standard to cases. Then the concepts of ICSID and ad-hoc tribunals will be addressed by means of a comparison in order to provide a guideline for foreign investors and also host countries who may encounter this circumstance.

I examined ICSID awards³⁴ including Ad-hoc arbitration awards³⁵ and acknowledged that the tribunal under both arbitrations had endorsed a similar set of key elements of the FET obligations by host States under BITs as follows:

³⁴ ICSID, *American Manufacturing & Trading (AMT), Inc. (US) v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award of February 21, 1997. ICSID, *Robert Azinian and others (US) v. United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award of November 1, 1999. ICSID, *Metalclad Corporation (US) v. United Mexican States*, ICSID Case No. ARB (AF)/97/1, Award of October 31, 2001. ICSID, *Emilio Agustin Maffezini (Argentina) v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award of January 31, 2001. ICSID, *Wena Hotels Ltd. (U.K.) v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award of October 31, 2005. ICSID, *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil (US) v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award of January 1, 2006. ICSID, *Middle East Cement Shipping and Handling Co. S.A. (Greece) v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award of April 12, 2002. ICSID, *8Mondev International Ltd. (Canada) v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award of October 11, 2002. ICSID, *Mondev International Ltd. (Canada) v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award of October 11, 2002. ICSID, *Tecmed S.A. (Spain) v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award of May 29, 2003. ICSID, *11The Loewen Group, Inc. and Raymond L. Loewen (Canada) v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award of October 31, 2005. ICSID, *Waste Management, Inc. (US) v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award of April 30, 2004.

³⁵ *Methanex Corporation v. United States of America*, UNCITRAL, Final Award rendered on August 3, 2005. *Saluka Investments B.V. (The Netherlands) v. the Czech Republic* case issued a Partial Award on March 17, 2006. The Partial Award was made public on 22 March, 2006. *Walter Bau AG v. Kingdom of Thailand*. *CME v. The Czech Republic of Argentina*, UNCITRAL, Award rendered on December, 2007.

1. Denial of Justice

The obligation of host countries not to deny of justice in criminal, civil or administrative in accordance with the principle of due process lays in customary international law. As to a responsibility of host countries for the actions of its court, thus in case that fundamentally unfair manner in justice system is appeared against foreign investors, the tribunal shall considered such action of host countries as a breach of this obligation. However, the preliminary condition required for claiming of denial of justice against host countries is that all available procedural remedies by local courts must be proceeded. Like the statement of Newcombe & Paradell³⁶ which provided that “denial of justice arises where a national legal system fails to provide justice – not where there is a single procedural irregularity or misapplication of the law at some level of the judicial system”.

To be considered denial of justice, Miss Chotamano had concluded that there are two factors that ICSID tribunal take into account: denial of access to justice and the refusal of domestic courts to decide as well as failure to execute final judgments or arbitral awards.

2. Due Process of Law

Host countries were bound by an obligation to respect due process in their administration of justice. Moreover, this element are also closely connected with transparency, good faith and unlawful discretion of administration.³⁷

Due process of law is a fundamental principle in administrative law which requires officials to be bound under rules and regulations enacted by Administration. In addition, it also requires officials to protect the infringing of rights, freedom or any other righteous rights of any individuals or private sectors.

³⁶ Newcombe & Paradell, *supra note* 26, p. 240-241.

³⁷ M. Sornarajah, *The International Law on Foreign Investment* 337, 2nd ed. (Cambridge, United Kingdom: Cambridge University Press, 2004).

In brief, due process of law is an action or omission that deny of justice which shall be considered as a violation of FET obligation.

3. Full Protection and Security

Full protection and security is generally accepted in international law for ages. It evolved by the United States of America and considered as one of investment protection standards in customary international law.

Full protection and security have ordinarily been found together with the FET clause in the majority of BITs. Full protection and security mainly emphasized the protection that States given to aliens whilst FET is focusing on the treatment accord to investors. Moreover, full protection and security are always identified broadly in BITs. This action hence imposes an onerous level of liability on host countries as to its limited resources. This obligation undoubtedly relates to the physical protection of the investors and their assets and prohibits host countries, both State organs and private parties, from violating individuals and properties.

4. Non-Discrimination

States, in international law, are not prohibited to provide in its legislation certain types of distinction of treatment between nationals and aliens.³⁸ Non-discrimination required state to provide nationals and aliens an equal standard of treatment. This can be divided into two points: “Most-Favored Nation or MFN” and “National Treatment or NT”. To prove to a tribunal that non-discrimination has been breached is to thus determine onerous liability as to many factors. Both investors and investments have to also be taken into account.

FET obligation and Non-Discrimination are a delicate issue in international law since there are a number of controversies whether or not FET is equate to NT. Some authors identified the uniformity of FET and NT while others established NT as a minimum standard of treatment under FET.

5. Expropriation, Nationalization and Compensation

³⁸ *Grand River v. United States*, US Counter-Memorial (December 22, 2008), para.472, 473, 475; *Methanex v. United States*, US Amended Statement of Defense (December 5, 2003), para 367.

Robert L. Bledsoe and Bolesaw A. Boczek, in the International Law Dictionary, had defined an expropriation as a seizure of aliens' assets and transfer the ownership to host countries which is allowed under limited conditions and considered as an exceptional acistion under international law. The expropriation can be exercised for the sake of public interests with neither discrimination nor retaliation. In addition the expropriated parties are entitled to be paid with a prompt, adequate and effective compensation. Expropriation, nevertheless, has to be proceeded in accordance with a treaty and under due process of law otherwise it is called "Confiscation".

Nationalization does not equate Expropriation because nationalization can occur to assets of either nationals or aliens. The common feature of both nationalization and expropriation is to be done merely for public interests together with compensation³⁹ or it will be considered as an illegal action.

From the examination I found that a compensation paid to aliens in developed and developing countries were considered on a different basis. Developing and underdeveloped countries believe that compensation accord to aliens from expropriation should be treated equally to their own nationals and depend on the ability to pay of State rather than an appropriate compensation (prompt, adequate and effective) which was adopted by developed countries.

6. Good Faith

The principle of good faith requires parties to a transaction to deal honestly and fairly with each other, to represent their motives and purposes truthfully, and to refrain from taking unfair advantage that might result from a literal and unintended interpretation of the agreement between them."⁴⁰

³⁹ M. Sornarajah, *supra note 57*, at 194.

⁴⁰ Anthony d'Amato, "Good Faith" in *Encyclopedia of Public International Law* (1992) at 599 available at <http://anthonydamato.law.northwestern.edu/encyclopedia/good-faith.pdf> (accessed on December 11, 2015).

Furthermore, a position of good faith is considered a natural law which is a fundamental of public international law. In addition, good faith has a great impact on customary international law which reflected in a great number of BITs and given also a clarification of Article 31 (1) of the Vienna Convention on the Law of Treaties.⁴¹

7. Transparency

Transparency is yet to be defined as a customary international law but in some arbitration awards identified transparency as one of the elements compounded in the FET standard. Therefore, a breach of such element shall be considered as a FET breach.

8. Legitimate Expectations

Lord Scott⁴² however discovered the increasing prominence of legitimate expectations doctrine in English law in 2008 and it has recently become a fashionable doctrine in international investment law. Lately, ICSID tribunals have regularly taken for granted the notion that a breach of investor's expectations may be conducive to a violation of an investment treaty particularly the FET standard. The invocation of legitimate expectations has thus extremely been founded on precedent, that is, ICSID awards citing to previous awards that have referred to the concept.⁴³

In summary, it is likely that, after examining the aforementioned judgments and awards, the interpretation and the application of FET are found to be even more variable depending on

⁴¹ UN, *the Vienna Convention on the Law of Treaties* (Vienna on May 23, 1969), United Nations available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf> (accessed on December 11, 2015).

⁴² *EB (Kosovo) v. Secretary of State for the Home Department* [2008] UKHL 41, para. 31 *per* Lord Scott.

⁴³ ICSID Review (Spring 2013) 28 (1): 88-122, Michele Potestà, *Legitimate expectations in investment treaty law: Understanding the roots and the limits of a controversial concept* (first published online on February 27, 2013) at <http://icsidreview.oxfordjournals.org/content/28/1/88.full.pdf+html> available at (accessed on December 11, 2015).

surrounding circumstances, yet the manner in which they have been interpreted and applied are considerably similar. However, it can be argued that the FET standard has been defined broadly in ICJ trials while in the arbitration proceedings, the FET standard was defined more thoroughly; for instance, its elements have been addressed as to the development and drastically increasing of investment disputes nowadays.

The subjective elements of the FET standard in present day can be traced to the precedent awards or judgments as follows:

- (1) Non-Denial of Justice;
- (2) Due Process of Law
- (3) Full Protection and Security
- (4) Non-Discrimination;
- (5) Expropriation, Nationalization and Compensation;
- (6) Good Faith;
- (7) Transparency; and
- (8) Legitimate Expectations.

Conclusions and Recommendations

Fair and Equitable Treatment (FET) has been recognized as a general principle abided by civilized nations to provide protection to foreign direct investment. The influx of FET based claims in recent years has been accompanied by various interpretations of FET and a lack of its precise meaning, I thus decided to examine relevant arbitral awards as well as legal cases in order to extract some of the elements taken into account, at least subjectively, by the tribunals to interpret the meaning of FET when considering a breach of FET obligations at BIT level.

The initial appearance of FET language was found in 1948 and it has been used frequently in international investment treaties particularly in BITs since the 1960s onwards. FET is a standard that seeks to protect both international investors and investments fairly and equally. However, the FET language has been used differently in different treaties. UNCTAD in 2007 thus categorized the formulations of FET language generally found in the majority of IIAs. Such variation further led the tribunals to face the problems of

interpretation and application of FET which have been examined in this thesis.

Precedents of relevant arbitral awards and judicial judgments reveal that even the FET standard has been interpreted and applied in the same manner, yet it is slightly different in each trial depending on surrounding circumstances. I assumed that the principle of the FET standard had been created intentionally as a flexible approach to let the tribunal exercise its appropriate discretion depending on the circumstances encompassing the disputes.

In summary, the conceptualization of interpretation and application of the FET standard under BIT can be traced primarily to judicial judgments which defined FET widely. Subsequently, such precedent had been adopted in international arbitration proceedings and had been given more details as explained earlier which led to the application of the FET standard to disputes as a general principle of law.

2. Recommendations

Thailand is one of the significant developing countries in South-East Asian Area with expanding volume of foreign direct investments (FDIs). In addition, Thailand has concluded more than 40 BITs in order to promote its investments as well as to attract the investments into its territory. As discussed earlier, the majority of BITs nowadays accord investors and investments a fair and equitable treatment, including BITs signed by Thailand.

Concerning FET based claims which have been drastically increased, Thailand has very little experience in dealing with these type of claims. Moreover, it has recently lost the case in *Walter Bau v. Thailand* which rendered the final award in favor of the claimant. Thailand is bound by such award and obliged to pay compensation in the amount of 29.21 million Euros plus interests to the claimant causing a severe impact to Thailand's financial status.

The following recommendations, concerning the present flow of international investments, are that Thailand, in order to minimize the risks from the upcoming FET based claims, should: first, modify its current Model BIT by providing a clearer clarification of the FET

obligations as well as adding the provisions of Policy Space; second, keep the relevant authorities up to date on the information pertaining to the FET obligations including providing a guideline on the ISDS proceeding and also illustrations of what actions or omissions can be determined as a breach of the FET obligations.

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