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THE FAIR AND EQUITABLE TREATMENT STANDARD - CUSTOMARY RULE OF INTERNATIONAL INVESTMENT LAW?

Abstract:

Article examines whether or not the Fair and Equitable Treatment (FET) standard has become a rule of customary international law. It analyses the question based on the two conditions under which a treaty-based norm could transform into a customary rule. Author argues that FET standard has not become a rule of custom. Practice of states to include FET clauses in their BITs can be considered as general, widespread and representative, however it is not uniform and consistent. There is no indication that state parties to BITs believe that they have an obligation under international law to provide fair and equitable treatment protection to investors.

Keywords:

FET standard, Investment Arbitration, International Investment Law, BITs, International Custom

JEL Classification: K33

1 Introduction

The fair and equitable treatment *(FET)* standard is a key element in contemporary international investment agreements (*IIAs*). FET standard has emerged as the most relied upon and successful basis for IIAs claims by investors. The obligation to accord fair and equitable treatment to foreign investments appears in the great majority of international investment agreements. Among the IIA protection elements, the FET standard has gained particular prominence, as it has been regularly invoked by claimants in investor-State dispute settlement proceedings. The standard protects investors against serious instances of arbitrary, discriminatory or abusive conduct by host states. As such, it constitutes an important investment protection element of IIAs. At the same time, the vague and broad wording of the obligation carries a risk of an overreach in its application[1]. The fair and equitable treatment standard is an absolute standard of protection. It applies to investments in a given situation without reference to how other investments or entities are treated by the host state. Host governments are unable to resist a claim under this standard by saying that the treatment is no different from that experienced by their own nationals or other foreign investors. In relation to usage in bilateral investment treaties (*BITs*), the original purpose and intent behind FET clauses was to protect against the many types of situations of how unfairness may manifest itself, for instance, an arbitrary cancellation of licenses, harassment of an investor through unjustified fines and penalties or creating other hurdles with a view to disrupting a business.

One of the sources of international law listed in Article 38 (1) of the Statute of the International Court of Justice (*ICJ*) is international custom, as evidence of a general practice accepted as law. Rules of customary international law are binding on all states. They gradually develop over time based on the uniform and consistent practice of a large number of representative states. For any customary rule to emerge, states must also have the conviction (or the belief) that the law requires such a practice (*opinio juris*).[2] Decisions of international courts and arbitral tribunals have consistently adopted this so-called double requirement. This article addresses important question: whether or not the FET standard should be considered as a rule of customary international law. The basic argument of this proposition is the fact that the standard is found in the overwhelming majority of bilateral investment treaties. That does not necessarily mean that the standard should be considered as a customary rule. Actually, the opposite conclusion could be drawn as well. The fact that states are still consistently signing bilateral investment

[1] UNCTAD, Fair and Equitable Treatment, UNCTAD Series on Issues in International Investment Agreements II, United Nations, UNCTAD. 2012. p. 10-17.

[2] KLUČKA, Ján. *Medzinárodné právo verejné: (všeobecná a osobitná časť)*. 2., dopln. a prepr. vyd. Bratislava: Iura edition, 2011, p. 113.

treaties containing FET clauses can be also interpreted as evidence that no such standard of protection exist under custom.[3] However, if the standard truly existed under custom, it could be argued that states would not need to include such protection in their BITs. As noted by the International Court of Justice: „*the frequency or even habitual character of the acts is not in itself enough, States must feel that they are conforming to what amounts to a legal obligation."*[4]

Aim of the presented article is therefore to evaluate the controversial proposal for the customary status of the FET standard and author is of the opinion that this standard has not become a customary rule. Whilst the transformation of the content of the provisions contained in the treaties into the customary rule has long been recognized under international law, it can be said that this phenomenon is in practice rarer, given the stringent conditions under which such a transformation may take place. A treaty rule can be transformed to customary under two conditions. It is important to show that a significantly big number of states have entered into numerous BITs containing the same provision (or very similar). So, the practice of states who are parties to BITs must be uniform, representative and consistent. This article will show that the practice of States to include FET standard in their BITs could be considered as general, widespread and representative. Practice is, however, not uniform and consistent enough for the standard to have crystallized into custom. There exist many different types of FET clauses. Indeed, tribunals have concluded that differently worded FET clauses impose different levels of investment protection. States also lack the necessary *opinio juris* for any rule of customary law to have emerged. There is no indication that states believe that they have an obligation under international law to provide FET protection to each other's investors.

The question of the customary status of the FET standard is relevant in two situations. The question has a great importance whenever there is no BIT that governs the relationship between a foreign investor and the host country. In that case, customary rule is the applicable legal regime in the absence of BIT. Therefore, it matters to determine whether or not States are bound to provide an FET protection under custom. Secondly, the question of the customary nature of the standard is also relevant in cases where a BIT does govern the relationship between a foreign investor and the host country, but where this BIT does not contain any FET clause. It should be added that in practice the question of the customary status of the FET standard under this scenario rarely matters (only a small minority, about 5% of BITs, do not contain an FET clause).[5]

[3] WEILER, Todd. *The Interpretation of International Investment Law: Equality, Discrimination and Minimum Standards of Treatment in Historical Context*. Leiden: Martinus Nijhoff Publishers, 2013. p. 236.

[4] North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), I.C.J. Reports 1969, para. 77.

[5] DUMBERRY, Patrick. Has the Fair and Equitable Treatment Standard Become a Rule of Customary International Law? *Journal of International Dispute Settlement*, 2016. p. 28.

2 Tribunals' position in the question of customary status of the FET standard

Only a few tribunals have taken the position that the FET standard has become a rule of customary international law. The first tribunal that adopted this view was the NAFTA tribunal in *Pope and Talbot*. For the Tribunal, the fact that the FET standard was found in that many BITs basically established the element of State practice necessary to prove the existence of a rule of customary international law.[6] Tribunal's reasoning is controversial and questionable on some grounds. Tribunal disregarded the requirement to show states' *opinio juris* to establish the existence of a custom. Tribunal also did not discuss at all the actual content of these BITs. The *Mondev* Tribunal mentioned that it is often difficult in international practice to establish at what point obligations accepted in treaties, multilateral or bilateral, come to condition the content of a rule of customary international law binding on states not party to those treaties. For the Tribunal, the answer was quite simple - the respondent had contended that when adopting provisions for FET and full protection and security in NAFTA, the intention was to incorporate principles of customary international law.[7]

ADF Tribunal stated that while the *Mondev* Tribunal was implying that the process of constituting customary rule was in motion, it had not endorsed the position that the FET obligation was a customary rule.[8] Tribunal expressly rejected the contention that the FET standard had become part of international custom.

The Merrill and Ring Tribunal took another view. It held that against the context of the evolution of the minimum standard of treatment it was satisfied that FET standard has become a part of customary law.[9] The *Cargill* Tribunal has adopted a much more

[6] *„Canada's views on the appropriate standard of customary international law for today were perhaps shaped by its erroneous belief that only some 70 bilateral investment treaties have been negotiated, however, the true number, now acknowledged by Canada, is in excess of 1800. Therefore, applying the ordinary rules for determining the content of custom in international law, one must conclude that the practice of states is now represented by those treaties."* Pope & Talbot Inc. v. The Government of Canada, UNCITRAL, Award in Respect of Damages, 31 May 2002. para. 62.

[7] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2. Award, 2 October 2002. para. 113.

[8] *„We are not convinced that the Investor has shown the existence, in current customary international law, of a general and autonomous requirement (autonomous, that is, from specific rules addressing particular, limited, contexts) to accord fair and equitable treatment and full protection and security to foreign investments. The Investor, for instance, has not shown that such a requirement has been brought into the corpus of present day customary international law by the many hundreds of bilateral investment treaties now extant. It may be that, in their current state, neither concordant state practice nor judicial or arbitral case law provides convincing substantiation (or, for that matter, refutation) of the Investor's position. " ADF Group Inc v United States*, ICSID Case No ARB(AF)/00/1, Award, 9 January 2003. para. 183.

[9] *Merrill & Ring Forestry LP v Canada*, UNCITRAL, Award, 31 March 2010, para. 211.

cautious approach. It stated that it is widely accepted that the extensive adoption of identical treaty language by many states may in and of itself serve as evidence of customary international law. The Court noted that FET clauses are widespread in BITs, but their language formulations differ. [10] For this reason, tribunal concluded that significant evidentiary weight should not be afforded to autonomous clauses inasmuch as it could be assumed that such clauses were adopted precisely because they set a standard other than that required by custom. Finally, the Tribunal did not believe that it was prudent to give significant weight to the extensive adoption of the FET clauses. [11] Only two awards (*Pope and Talbot, Merrill and Ring*) have clearly adopted the position that the FET standard has become a rule of custom. The reasoning of another (*Mondev*) could also be interpreted as such an endorsement.

3 FET standard and fulfillment of state practice requirement

As mentioned previously, under Article 38 (1) b of the Statute of the International Court of Justice the formation of a rule of international custom requires a general practice by states which is accepted as law. The first condition for transformation of a treaty rule, such as the FET standard, to the customary rule is related to the practice of the BITs contracting parties (which contain such a clause). In order for a customary rule to emerge, state practice must be general, widespread and sufficiently extensive and convincing. This is a relative requirement; no precise number or percentage of states is required to demonstrate general practice. Also, whether or not a practice is widespread and extensive enough will always depend on the circumstances. It cannot be determined in the abstract. What matters is the degree of representativeness of the states actively engaged in that practice. Inclusion of FET standard clauses in modern BITs is general and widespread. For example, Dumberry examined about 2,000 BITs, of which only 50 contained no FET clause, and another 25 referred to the standard only under the preamble. [12] Thus, less than 5% of all of these BITs did not contain any formal and binding FET provision for the host state. Therefore, we can say that the practice of states to include FET clauses in their BITs is indeed general and widespread.

The representativeness of the practice of states is another important aspect when assessing the customary nature of a provision contained in bilateral investment treaties. It's necessary to mention that it is not simply a question of how many states participate in the practice, but also which states. Different (but not necessarily conflicting)

[10] *Cargill, Inc v Mexico*, ICSID Case No ARB(AF)/05/02, Award, 18 September 2009. para. 276.

[11] *Cargill, Inc v Mexico*, ICSID Case No ARB(AF)/05/02, Award, 18 September 2009. para. 276.

[12] DUMBERRY, Patrick. Has the Fair and Equitable Treatment Standard Become a Rule of Customary International Law? *Journal of International Dispute Settlement,* 2016. p. 15.

interpretations as to what representativeness means have been put forward. Representative practice means that it includes those states from all major political and social economic systems. In ICJ opinion, it is the practice of those specially affected states.[13] While the FET standard was first developed by western states to provide protection to their companies when investing in developing countries, it remains that today it has also been embraced by developing states.[14] FET standard is not only contained in BITs, but it is also included in regional multilateral instruments related to the investment protection such as the Energy Charter Treaty or NAFTA. Given the large number of BITs involving states from all regions of the world and the absence of a group of states that would systematically reject the FET clause, we can say that the practice of states on this standard can be considered as representative.

For the constitution of a customary rule, the practice of states must also be uniform and consistent. Therefore, if there is too much inconsistency between states in their practice, there exist no general custom and hence no general customary rule. Is the practice of states to include FET standard in their BITs uniform and consistent? Problematic is the fact that BITs do not refer to the FET standard in a uniform manner. Criticism put forward by scholars is whether is it possible to truly speak of uniformity when there exist 5 or 6 different FET models.[15] The most important drafting distinction lies between two groups of provisions: clauses explicitly linking the FET to the standard existing under international law and clauses containing an unqualified formulation of the FET obligation without any reference to international law.[16] Arbitral tribunals gave different interpretations to the scope of FET standard clauses depending on their actual drafting. UNCTAD report form 2012 indicated that the drafting variations in FET standard clauses have been interpreted as meaning different content as well as different thresholds of liability.[17] The majority of tribunals have interpreted a stand-alone FET clause as having an autonomous character, which provides a level of FET protection higher than under the minimum standard of treatment (*MST*).[18] Only a limited number of tribunals have interpreted a stand-alone FET

[13] MALENOVSKÝ, Jiří. *Mezinárodní právo veřejné: obecná část a poměr k jiným právním systémům*. 6., upr. a dopl. vyd. Brno: Doplněk, 2014. p. 190.

[14] OECD, International Investment Law: A Changing Landscape: A Companion Volume to International Investment Perspectives, 2005. p. 78.

[15] UNCTAD, Fair and Equitable Treatment, UNCTAD Series on Issues in International Investment Agreements II, United Nations, 2012. xiii (Executive Summary).

[16] DUMBERRY, Patrick. Has the Fair and Equitable Treatment Standard Become a Rule of Customary International Law? *Journal of International Dispute Settlement,* 2016. s. 19.

[17] UNCTAD, Fair and Equitable Treatment, UNCTAD Series on Issues in International Investment Agreements II, United Nations, 2012. p. 8.

[18] UNCTAD, Fair and Equitable Treatment, UNCTAD Series on Issues in International Investment Agreements II, United Nations, 2012. p. 22.

clause as an implicit reference to international law. Some tribunals have held that the term international law found in an FET standard clause was a reference to the minimum standard under custom and some tribunals have interpreted such an express reference in the same way as a stand-alone FET clause. [19] We could conclude that while tribunals' interpretations to FET clauses containing an explicit reference to international law are inconsistent, overall picture suggests that drafting differences between the two main types of FET clauses matters a great deal. Therefore, the practice of states to include FET clauses in their BITs is clearly general and widespread and also representative, it remains that, such practice is not uniform enough for the standard to be considered as a customary rule.

While the first condition for the transformation of a treaty-based provision into a customary rule concerns the practice of states that are parties to BITs containing FET clauses, the second condition deals with the practice of states outside the treaty framework. It must be demonstrated that states are actually consistently and uniformly providing the fair and equitable treatment protection to foreign investors in their own practice (outside bilateral investment treaties). For example, the fact that states that are not party to any bilateral investment treaty (or states which are parties to BITs not containing any fair and equitable treatment standard clause) are doing so would be particularly convincing to evidence the customary nature of the FET standard obligation. This kind of practice could be found, for example, in the domestic legislation of host states. In fact, just because the FET standard is not mentioned expressly in a state's foreign investment legislation per se, one cannot automatically conclude that such standard is absent from its domestic legal order. The standard may also exist under that state's constitution. Some authors have mentioned that the FET standard can be found in the national legislation of developed and developing countries. [20] One detailed study of the national legislation of several states shows that most of these states do not provide FET standard to a foreign investors.[21] Another similar analysis of national law on the protection of foreign investments (160 countries) was carried out by Dumberry and he came to a similar conclusion (only 10 of them explicitly referred to the FET standard in their laws). [22] In sum, there exist no sign in foreign investment laws supporting in any way the conclusion that states are uniformly and consistently providing FET protection to

[19] *Compañiá de Aguas del Aconquija SA and Vivendi Universal SA v Argentina*, ICSID Case No ARB/97/3, Award, 20 August 2007. para. 5.2.2.

[20] DUMBERRY, Patrick. Has the Fair and Equitable Treatment Standard Become a Rule of Customary International Law? *Journal of International Dispute Settlement,* 2016. p. 21.

[21] VASCIANNIE, Stephen. The Fair and Equitable Treatment Standard in International Investment Law and Practice. *British Yearbook of International Law*, Volume 70, Issue 1, 1 January 2000, p. 160.

[22] DUMBERRY, Patrick. The Practice of States as Evidence of Custom: An Analysis of Fair and Equitable Treatment Standard Clauses in States' Foreign Investment Laws. *McGill Journal of Dispute Resolution,* VOL 2 (2015-2016), p. 67.

foreign investors outside BITs framework. We can also conclude that the second condition for the transformation of treaty-based provision into customary rule has not been met.

4 FET standard and *opinio juris* of states

The definition, the function and the nature of the *opinio juris* requirement raise some of the most controversial questions in international law. The International Law Association has noted that in the real world of diplomacy, these questions regarding the subjective element in customary international law may be less problematic than in the groves of Academe.[23] Although the *opinio juris* requirement is widely recognized, it is nonetheless problematic in many respects. This is because states rarely explain their intention and the reasons for acting in one way or another. They seldom expressly clarify whether or not they believe that they are acting out of a sense of obligation. Both state practice and *opinio juris* must be demonstrated in all cases. The reason why both elements can be seen to be necessary is that without *usus* it would not be customary and without *opinio* it would not be law.[24] There are two basic reasons why it is necessary to demonstrate the subjective element of custom. Demonstrating the *opinio juris* of a state is essential to distinguish between, on the one hand, real international law obligations and, on the other hand, conduct that is merely based on other non-legal motivations. Thus, a clear distinction needs to be made between a state's conduct regarding the recognition or acceptance of, or belief in, the existence of a legal rule and other considerations such as for example courtesy, political expediency, precautionary measures, will or compromise, expressions of intent and aspirations or preferences. Second, demonstrating *opinio juris* is also necessary in explaining how the accumulation of uniform and consistent state practice can transform into a legal rule binding on all states. International Court of Justice noted in the North Sea Continental Shelf cases that acting, or agreeing to act in a certain way, does not itself demonstrate anything of a juridical nature.[25] It is indeed fundamental to be able to explain how something that states often and typically do becomes something that they feel they have to do under international law. In consideration of the current decentralized international legal order, characterized by the lack of a supranational entity above states, one can only conclude that a given conduct is

[23] International Law Association, Statement of Principles Applicable to the Formation of General Customary International Law, Final Report of the Committee on the Formation of Customary Law, Conference Report London (2000), p. 33.

[24] DUMBERRY, Patrick. *The Formation and Identification of Rules of Customary International Law in International Investment Law*. Cambridge: Cambridge University Press, 2016. p. 305.

[25] North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands) , I.C.J. Reports 1969, para. 76.

obligatory for states when they actually believe themselves that this is the case. In any event, the *opinio juris* requirement is necessary to distinguish between different kinds of omissions, those that count as relevant state practice in the formation of customary rules and those that do not count. The fact that a state does nothing for no particular reason cannot be compared to the situation where a state abstains from acting based on its belief that it has an obligation to do so under the law. Only the latter kind of omission or abstention can count as evidence of state practice that is relevant in the formation of customary rule.

And how does a state's *opinio juris* manifest itself? There are two straight- forward situations. On the one hand, when a state makes an express statement to the effect that it believes that a given rule is obligatory under customary international law, this is undeniable and first-hand proof of the existence of that state's *opinio juris*. On the other hand, when a state clearly indicates that a certain conduct is not obligatory and should not be considered as a rule of customary international law, this is evidence of the absence of any *opinio juris* for that state. Since a state's belief in the obligatory nature of a given conduct is rarely measurable, its *opinio juris* often have to be discovered by examining some form of state practice. Therefore, the behavior of states is often characterized as the sole guide in determining what they believe to be the law. The only way to determine what a State thinks about the existence of any given norm is often to look at what that state actually does in practice.

Therefore, the existence of a rule of customary law does not only require that the practice of states is uniform, representative and consistent, it must also be shown that states believe that they have an obligation under international law to provide fair and equitable treatment protection to each other's investors notwithstanding the fact that such protection is set out in the BIT. Because when the parties to a treaty act in fulfilment of their conventional obligations, this does not generally demonstrate the existence of an *opinio juris.* When states simply fulfill their treaty obligations it has nothing to do with custom.

The few investor-State arbitration tribunals that have defined the concept of customary international law have all referred to the necessity of demonstrating the double requirement of state practice and *opinio juris*. Some of tribunals have used expressions other than *opinio juris* (or accepted as law mentioned at Article 38 (1) b of the ICJ Statute) such as the requirement that states have a sense of legal obligation, that they be aware that it is obligatory, or that they have an understanding that the practice is required by law.[26] While tribunals do mention *opinio juris*, it remains that they almost never examine such requirement in detail. This is certainly because, as pointed out by the *Glamis* Tribunal, although one can readily identify the practice of States, it is usually very

[26] *Camuzzi International S.A. v. Argentina*, ICSID Case No. ARB/03/2, Decision on Jurisdiction, 11 May 2005, para. 144.

difficult to determine the intent behind those actions.[27] Exceptions include the *Mondev* Tribunal that acknowledged that the so-called letters of submittal by which the US government introduces draft legislation in Congress should be considered as a manifestation of that State's *opinio juris*.[28] Next example is also the *Camuzzi* Tribunal, which recognized the phenomenon of double counting insofar as a treaty can be a manifestation of both State practice and *opinio juris*.[29]

Considering the fact that western states started including FET clauses in their BITs because of the ambiguities surrounding the concept of the MST, which was rejected by developing States, it would be quite difficult to posit that there was consensus between developed and developing countries that the fair and equitable standard had passed into customary law. To identify supportive *opinio juris*, particularly on the part of developing States would be very difficult.[30] There is no indication in treaty text (or in the *travaux preparatoires* or anywhere else) showing that states include fair and equitable standard clauses in their bilateral investment treaties out of a sense of conviction that this is the type of protection they have to provide to foreign investors under international law. [31] States sign BITs to protect their own interests, not out of any sense of obligation. States perceive FET standard clauses in their BITs as one of the means to support investment in their countries.

5 Conclusion

Presented article has argued that the FET standard should not be considered as a rule of customary international law. At the end of the day, the fair and equitable treatment obligation is a treaty-based standard of protection. There is therefore no legal basis for an investor to claim the general benefit of FET standard protection before an arbitral tribunal whenever the FET standard is not expressly mentioned in a treaty, the domestic law of the host state or in a state contract. It's important to mention the practical consequences regarding the level of investment protection which host States must offer to foreign investors. The fact that FET standard has not (yet) customary rule nature will have limited practical impact for investors under the few BITs which contain no FET standard clause

[27] *Glamis Gold Ltd v. United States*, Award, 14 May 2009, para. 603.

[28] *Mondev International Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award, 2 October 2002, para. 111.

[29] *Camuzzi International S.A. v. Argentina*, ICSID Case No. ARB/03/2, Decision on Jurisdiction, 11 May 2005, para. 144.

[30] VASCIANNIE, Stephen. The Fair and Equitable Treatment Standard in International Investment Law and Practice. *British Yearbook of International Law*, Volume 70, Issue 1, 1 January 2000, p. 157–158.

[31] DUMBERRY, Patrick. Has the Fair and Equitable Treatment Standard Become a Rule of Customary International Law? *Journal of International Dispute Settlement,* 2016. p. 23.

at all. Most of these BITs contain a wide-scope most favorable nation clause that would allow an investor to benefit from the FET protection contained in other treaties signed by the host state. On the other side, the absence of customary status of the FET standard will have a very real and concrete impact in the different context where no BIT exists. Investor should not be allowed to claim the benefit of an FET standard protection under general international law. It should be added that all investors (wherever they invest) can still claim the benefit of the minimal standard treatment under custom. The minimal standard treatment encompasses an obligation for host states to prevent the denial of justice in the administration of justice, to provide due process, to prevent arbitrary conduct and to provide investors with full protection and security. Foreign investors are therefore allowed to benefit from important basic legal protections even if the FET standard is not considered as a rule of custom.

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