

FAIR AND EQUITABLE TREATMENT (FET) STANDARD IN ARBITRAL PRACTICE: SUSTAINABLE DEVELOPMENT IN CONTEXT

Rumana Islam*

ABSTRACT

The Fair and Equitable Treatment (FET) standard in international investment law has become an indispensable tool for the foreign investors to bring claims against host countries. These claims largely relates to sectors which are directly linked with the sustainable development of these host countries. Considering the importance of the concept and the commitment of the global community to enhance sustainable development objectives the aim of this article is to examine the aspects of sustainable development as one of the principle to interpret the FET standard. Accordingly it will analyse how the principle of FET and sustainable development relate to each other on conceptual founding. It will analyse some arbitral awards to examine how the current investment tribunals have interpreted the FET clause as an expression of sustainable development objective and how far the FET standard contained in the treaties are compatible with the ideas of sustainable development. The article concludes with a view that the integrative flexibility of FET provides the arbitrators with an ample opportunity to take a comprehensive approach in balancing the interests of foreign investors and host countries with regard to their wider implications on sustainable development.

I. INTRODUCTION

It is fascinating to notice the rapid growth of the fair and equitable treatment¹ (FET) standard during last decade in international investment law and in arbitral practice.²This has now become an indispensable element for

* **Rumana Islam**, Ph.D. (University of Warwick, UK), LL.M (Specialization in Commercial Law) (University of Cambridge, UK), LL.B. (Hons.) and LL.M. (University of Dhaka), is an Associate Professor, Department of Law, University of Dhaka.

¹ For a brief explanation of the etymology of the terms ‘fair’ and ‘equitable’ see Muchlinski, P., *Multinational Enterprises and the Law*, Oxford, 2007, at pp. 635-636.

² On FET standard generally see, e.g. UNCTAD Fair and Equitable Treatment Series on issues in International Investment Agreements(1999); Vasciannie, S., “The Fair and Equitable Standard In International Investment Law And Practice”, 70 (1999) *The British Year Book Of International Law*, at p. 99; OECD *Fair and Equitable Standard in International Investment Law* (Working Papers on International Investment Law No. 2004/3, OECD September 2004); Schreur, C., “Fair And Equitable Treatment In Arbitral Practice”, 6 (2005) *Journal of World Investment And Trade*, at p. 357; Dolzer, R., “Fair And Equitable Treatment: A Key Standard In Investment Treaties”, 39 (2005)

international investment treaties and consequently in investment arbitration.³The standard has developed from an almost empty expression into an obligation of such potential breadth within a short span of time.⁴At the same time it is also indeed the most controversial issue in international investment law due to its indeterminacy of the language. For some far reaching arbitral decisions it has become a major cause of action brought by the foreign investors against the host country. Due to its prominence in international investment agreements (IIAs) and bilateral investment treaties (BITs) it has thus been coined to represent the ‘golden rule’ of investment treaties⁵ and labelled as ‘an almost ubiquitous presence’ in investment litigation.⁶Some scholars even have termed it to be a ‘mystifying’ legal term.⁷ In comparison to other protections accorded (i.e. national treatment or most favoured national clauses) in the IIAs and the BITs the FET standard has a special appeal to the investors seeking redress against actions done by the host country. The FET standard often appears as an all-purpose tool⁸ in order to cover the gaps left by

International Lawyer, at p.87; Foy, PG., and Deane, RJC., “Foreign Investment Protection Under Investment Treaties: Recent Developments Under Chapter 11 Of North American Free Trade Agreement”, 16 (2001)*ICSID Review- FILJ*, at p. 299; Thomas, J.C., “Reflections on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators”, 17 (2002) *ICSID Review-FILJ*, at p. 21; Dumberry, P., “The Quest To Define “Fair And Equitable Treatment” For Investors Under International Law-The Case Of The Nafta Chapter 11 Pope And Talbot Awards”, 3 (2002) *Journal of World Investment*, at p. 657.

- ³ This trend of frequent use of the term FET in investment treaties indicates the investors desire to have an additional safety net of ‘fairness’ in addition to the assurances of national treatment and most-favoured nation treatment.
- ⁴ Kläger, R., “Fair and Equitable Treatment: A Look at the Theoretical Underpinnings of Legitimacy and Fairness”, 11 (2010) *Journal of World Investment & Trade*, at p.443.
- ⁵ Salacuse, J.W., *The Law of Investment Treaties*, Oxford, 2010, at p. 218.
- ⁶ Dolzer, *supra* note 2. It has also been referred as the ‘alpha and omega’ of investor state arbitration under Chapter 11 of NAFTA, see Brower, C., “Fair and Equitable Treatment under NAFTA’s Investment Chapter”, 96 (2002) *American Society of International Law Proceedings*, at p. 9. Salacuse describes the concept as, “Indeed, one would say that fair and equitable treatment is to employ Hans Kelsen’s concept from his *Pure Theory of Law (1934)*, the *grundnorm* or basic norm of the investment treaty system, see e.g. Salacuse, *supra* note 5 at p. 219.
- ⁷ Yannaca-Small, K., “Fair and Equitable Treatment Standard: Recent Development” in Reinisch, A., (ed.), *Standards of Investment Protection*, Oxford, 2008 at p. 211.
- ⁸ The FET standard was intended to supersede the uncertain grounds of customary international law on the treatment of aliens and especially to overcome the tenacious debate on the existence of customary international minimum standard. On minimum standard, see e.g. Roth, AH. *The Minimum Standards of International Law Applied To Aliens*, Leiden, 1949.

more specific standards of investment protection or to buttress the claimant's argumentation related to any of the other standards.⁹ Though the concept of FET has appeared in documents for over half a century, yet its meaning has remained elusive until recent time when the tribunals started to interpret the term systematically.¹⁰

On the other hand, the principle of sustainable development is a well-established concept in international law and particularly in context of international environmental law. The most often quoted definition of sustainable development was first coined by the 1987 Brundtland Report which stated that, it is a development that "meets the needs of the present without compromising the ability of future generations to meet their own needs."¹¹ In simple words it refers to a pattern of economic development in which the resources are used in a way that human needs are satisfied and in the same time the environment is preserved so that the resources can meet the needs not only of present generation but also the future as well. Although emerged as a buzz word to grasp the policy objective of environmental protection, in the last decade it has rather increasingly displayed other developmental perspectives. The sphere of sustainable development has expanded to address the environmental, economic and social problems at the same time and also seeks to establish a process of development that is mutually reinforced by all these three pillars.¹² Therefore, now the notion has been evolved and employed as a collective term in its broadest sense to make a balance between ideas of economic and social development¹³ and also to identify the three integrated and mutually reinforcing and independent pillars of the concept, i.e. environmental protection, economic development and social development.¹⁴ With its on-going evolution today it has become a widely accepted global commitment of the nations.

⁹ Kläger, *supra* note 4.

¹⁰ Schreur, *supra* note 2 at p. 385.

¹¹ UN Report of the World Commission on Environment and Development, Paragraph 2, UN DOC.A/RES/42/187 (1987).

¹² For a recognition of these three pillars sustainable development, see UN Johannesburg Declaration on Sustainable Development, Paragraph 5, UN DOC A/CONF.199/20 (2002).

¹³ For a comprehensive description of the development of sustainable development movement, see e.g. Segger, M.C.C., and Khalfan, A., *Sustainable Development Law: Principle, Practices & Prospect*, Oxford, 2004, at pp. 15 *et seq.*

¹⁴ For a recognition of these three pillars sustainable development, see UN Johannesburg Declaration on Sustainable Development, *supra* note 12; Segger, M.C.C., and Khalfan, A., *ibid* at p. 26.