INTERPLAY BETWEEN FAIR AND EQUITABLE TREATMENT (FET) STANDARD AND OTHER INVESTMENT PROTECTION STANDARDS

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ABSTRACT

There are various constructions of the 'Fair and Equitable Treatment' (FET) clauses in investment treaties. Many of them have combined the FET standard with other investment protection standards in the same clause. A simplistic interpretation of these clauses might lead to an understanding that the FET standard are synonymous with other standards prescribed by the particular investment treaties largely due to the flexibility and generality of the standard. This article will closely scrutinize this interrelation between the FET standard with some other investment protection standards. The demarcation line between and among these interaction is so thin that it becomes difficult to distinguish one standard from another. This article will discuss that the FET is indeed an overarching principle and despite some conceptual similarities with other investment protection standards the FET standard is unique and distinct in its own free standing in the international investment law regime and combining the standard with other investment protection standards is simply a stylistic matter and not a matter of substance to its content.

I. INTRODUCTION

The upsurge of investment arbitration during the last decade has made a strong impact on the substantive standards stipulated in the investment treaties. Traditionally most important and invoked standard was protection against expropriation. Over the years dominance of invoking expropriation has waned while other standards have gained significant importance. Among these investment protections standard the *fair and equitable treatment* (FET) standard have gained most significant prominence in investment disputes. Many investment treaties have mingled the FET standard in bilateral investment treaties (BITs) with other standards in the same clause, while some others stipulate it in distinct clause. However looking plainly at the texts and giving a most simplistic interpretation might at times lead to the conclusion that FET standards are synonymous with other standards prescribed by the particular investment treaties. This is due to the fact that the generality and flexibility of the FET standard easily lends itself to an expansive view of its reach extending to all corners and aspects of an investment setting. This article will closely scrutinize these different other investment protection standards in conjunction with the FET standard. However at times there is evidence that the FET standard does not operate in isolation,[1] but also in interaction

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1 Schreuer, C., 'Fair and Equitable Treatment (FET): Interactions with other Standards' 4 (5) (2007) Transnational Dispute Management Vol. 4 Issue 5 at p.2.

with other standards of protection, and at times it becomes obvious that the clause is not meant to supplant or replace all other segments of the treaty. Sometimes the margin line between and among these interaction is so thin that it becomes difficult to distinguish one standard from another. At times a violation of another standard may lead to a violation of FET or conversely a violation of FET may trigger a violation of other standard.[2] With this view this article reviews the interplay between FET standard and some selected other investment protection standards and in the end reveals that the FET standard remains to be inimitably distinct from other standards in different corners and aspects of an investment treaties.

II. FET AND FULL PROTECTION AND SECURITY

Some BITs[3] refer FET and constant protection and security side by side suggesting that two standards are involved.[4]There are various constructions of the FET clauses and in some the standard of full protection and security emerge as an appendix to FET standard. Mann argues that, the proposition that investments shall have fair and equitable treatment and full protection constituted the 'overriding obligation.'[5] He further argues that, this overriding obligation is wider than simply a prohibition on arbitrary, discriminatory or abusive treatment; and it also encompasses the most favoured nation and national treatment standards and goes even further. Therefore in Mann's view,

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2 Ibid.

3 See e.g. The United Kingdom Model BIT, 2005, Article II (2) which states, " Investments of nationals or companies of either Contracting Party shall at all times be accord fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measure the management, maintenance, use enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments or the other Contracting party."; See also Article II (3) (a) of United States Model BIT, 1994 which stipulates the fair and equitable standard is combined with full protection and security and this combined standard is reinforced by the rule that each party to the agreement 'shall in no case accord treatment less favourable than that required by international law.' Article I of 1964 Investment Agreement between the Economic Union of Belgium and Luxembourg and Tunisia, ICSID, *Investment Laws of the World: Bilateral Investment Treaties (1972a--)* vol I

4 The World Bank Guidelines on Treatment of Foreign Direct Investment, 1992 also suggest that, fair and equitable treatment is the general standard and other standards must be applied as part of this general standard. World Bank, 'Legal Framework for the Treatment of Foreign Investment' 31 (1992) International Legal Materials at p. 1366. Also available at http://ita.law.uvic.ca/documents/WorldBank.pdf.

5 Mann, F.A., 'British Treaties for the Promotion and Protection of Investments' 52 (1999) The British Year Book of International Law 241 at p. 243.

'it may well be that other provisions of the Agreements affording substantive protection are no more than examples or specific instances of this overriding duty.'[6] The tribunals are at odds as to whether full protection and security is an autonomous standard or subspecies of FET[7]. Some Tribunals have equated the two standards on the same balance. In *Wena Hotels vs. Egypt*[8] the Tribunals dealt with the two standards jointly.[9] This expression is flawed since the Tribunal did not provide any convincible reasons for doing so or did not draw any distinction between them. The Tribunal in *Occidental vs. Ecuador*[10] regarded the two standards largely equivalent.[11]

By contrast the Tribunal in *Azurix vs. Argentina*[12]interpreting the Argentine-US BIT found that the two standards were separate.[13]The Tribunal added that the protection and security standard went beyond protection against physical violence and extended to the obligation to provide a secure investment environment. This meant that the respondent had breached both standards—FET and protection and security simultaneously.[14] Thereby the norm was accordingly constructed to embrace not only limited to physical security, but also to legal security.[15]

Here it is interesting to note the findings of *PSEG vs. Turkey*[16] which came with a different result. The Tribunal found that, the full protection and security standard was developed in the context of physical safety and only exceptionally to legal security. In the latter situation the connection with FET became very

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6 Ibid.

7 On general discussion on the issue see Moss, G.C., 'Full Protection and Security' ' in Reinisch A., (ed) *Standards of Investment Protection*, Oxford University Press, 2008 at pp131-150.

8 Wena Hotels Ltd. vs. Arab Republic of Egypt, Award, 8 December 2000. In this case the Tribunal held that the seizure of the claimant's two hotels, by the Egyptian partner in the investment was in violation of full protection and security standard as Egypt had failed to discharge its duty of vigilance and due diligence in protecting the hotels, despite the knowledge of the intention to seize them and also by subsequently failing to restore them to their owners with suitable reparations.

9 Ibid at Paras 84-95.

10 Occidental Exploration and Production Co. vs. Ecuador, Award, 1 July 2004.

11 See e.g., Ibid. at Para 187. In a similar sense see PSEG vs. Turkey, Award, 19 January 2007, at Paras 257-259.

12 Azurix Corp vs. The Argentina Republic, Award, 14 July 2006.

13 Ibid at Para 407.

14 Supra note 1, at p.3

15 Supra note 12, at Para 408.

16 Supra note 11.