

ROLE OF GOOD FAITH IN INTERPRETING FAIR AND EQUITABLE TREATMENT (FET) STANDARD IN ARBITRAL PRACTICE

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ABSTRACT

Despite the lack of a precise meaning of the term, the investment tribunals have developed some broad principles for the application of the Fair and Equitable Treatment (FET) standard. These broad principles include good faith along with other principles. This article focuses on role of good faith as a means to interpret the FET standard. It discusses how the notion of good faith as referred by the arbitral tribunals has at least two distinct functions. Firstly, a more subjective function of good faith requires the parties to a treaty to comply with their obligations in a candid and loyal manner. Secondly a more objective function of good faith rather concerns the process of decision making being committed-while not distinguishable from the concept of equity to general considerations of justice. In the context of FET standard, the later function is especially connected with the approach of balancing the interests between host states and foreign investors. The article concludes with an analysis of the arbitral awards that shows that in interpreting and applying the FET standard they have identified among many other elements, the principle of good faith which singly or in combination have been encompassed in the standard. Finally it is stated that, the arbitral tribunals have found that FET standard encompasses the general obligation to act in good faith. This would include protection against the use of legal instruments for uses other than their intended purpose and any conspiracy by government authorities to destroy the investment. At the same time, it is clear that, action in bad faith is not a prerequisite for finding that the FET standard has been breached.

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INTRODUCTION

In the last decade there have been a considerable number of cases before the international arbitral bodies to resolve investment disputes. In a majority of these cases the arbitrators were entrusted the task of addressing violation of a *Fair and Equitable Treatment* (FET)¹ clause in the investment treaty between the parties.² 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 interpreting it systematically.³ Despite the lack of a precise meaning of the term, the arbitral tribunals have developed some broad principles where the FET can be applied. These broad principles includes good

¹ For a brief explanation of the etymology of the terms ‘fair’ and ‘equitable’ see, Muchlinski, P.T., *Multinational Enterprises and the Law* (Second Edition), Oxford, Oxford University Press, 2007, at pp. 635-636; On FET standard generally see, UNCTAD *Fair and Equitable Treatment Series on issues in International Investment Agreements*, UNCTAD, 1999; Vasciannie, S., “The Fair and Equitable Standard in International Investment Law and Practice” 70 (1999) *British Year Book of International Law*, No. 99; OECD *Fair and Equitable Standard in International Investment Law Working Papers on International Investment Law No. 2004/3* (OECD Paris September 2004); Schreur, C., “Fair and Equitable Treatment in Arbitral Practice”, 6 (2005) *Journal of World Investment and Trade*, No. 357; Dolzer, R., “Fair and Equitable Treatment: A Key Standard in Investment Treaties”, 39 (2005) *International Lawyer*, No. 87; Foy, P.G., and Deane, J.R., “Foreign Investment Protection under Investment Treaties: Recent Developments under Chapter 11 of North American Free Trade Agreement” 16 (2001) *ICSID Review- Foreign Investment Law Journal*, No. 299; Thomas, J.C., “Reflections on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators”, 17 (2002) *ICSID Review-Foreign Investment Law Journal*, No. 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*, No. 657.

² Dolzer argues that the invocation of this standard is deemed necessary by claimant’s lawyers ‘*colorandicausa*’ to present certain flair of an offense to basic notions of justice to its cause. See, supra note 1, at p. 87. For a brief discussion on the dominance of FET standard in Bilateral Investment Treaties see, Jeswald, W. S., *The Law of Investment Treaties*, Oxford, Oxford University Press, 2010, at pp. 218-219; Brower, C., “Fair and Equitable Treatment Under NAFTA’s Investment Chapter”, 96 (2002) *American Society of International Law Proceedings*, No. 9.

³ Supra note 1, at p. 385.

faith, obligation of full protection and security,⁴ freedom from coercion and harassment,⁵ denial of justice and due process,⁶ lack of arbitrariness and non-discrimination,⁷ transparency and stability,⁸ legitimate expectations of the investor,⁹ principle of proportionality¹⁰ etc.

Most of these principles are indeed derived from customary international law or accepted as a general principle of law. However, they have also penetrated the system of international treaty law and are

⁴ See, Occidental Exploration and Production Company vs. Republic of Ecuador, LCIA No. UN 3467, Award 1 July 2004 at Paras 180-192 [hereinafter *Occidental*]; Azurix vs. Argentine Republic, ICSID Case No. ARB/01/12, Award 14 July 2006 at Para 408 [hereinafter *Azurix*]. For a comprehensive discussion on the standard of full protection and security see, Moss, G.C., “Full Protection and Security”, in August Reinisch (ed), *Standards of Investment Protection*, Oxford, 2008, at pp. 131-150.

⁵ *Pope & Talbot vs. Canada*, Award 10 April 2001, 7 ICSID Reports 102 [hereinafter *Pope & Talbot*]. For a detailed discussion on *Pope & Talbot* also see supra note 1.

⁶ See, *Metaclad Corporation vs. Mexico*, ICSID Case No. ARB (AF)/97/1, Award 30 August 2000, 5 ICSID Reports 212 at Para 91 [hereinafter *Metaclad*]; *Middle East Cement Shipping and Handling Co. S.A. vs. Arab Republic of Egypt*, Award 12 April 2002, 7 ICSID Reports 178 at Para 143; *Tecnicas Medioambientales Tecmed, S.A. vs. United Mexican States*, ICSID Case No. ARB(AF)/00/02, Award 29 May 2003 at Para 162 [hereinafter *Tecmed*]; *Mondev International Ltd vs. United States of America*, ICSID Case No. ARB (AF)/99/2, Award 11 October 2002 at Para 96 [hereinafter *Mondev*].

⁷ *CMS Gas Transmission Company vs. The Argentine Republic*, ICSID Case No. ARB/01/8, Award 12 May 2005 at Para 290 [hereinafter *CMS*]; *MTD Equity Sdn. Bhd. And MTD Chile S.A. vs. Republic of Chile*, ICSID Case No. ARB/01/7, Award 25 May 2004; *PSEG Global et al. vs. Republic of Turkey*, ICSID Case No. ARB/02/5, Award 19 January 2007.

⁸ Supra note 6 at Paras 167, 172 and 173; *Emilio Agustin Maffezini vs. The Kingdom of Spain*, Award 13 November 2000, 5 ICSID Report 419 at Para 83

⁹ Supra note 7 at Para 284; *Saluka vs. Czech Republic*, Partial Award, 17 March 2006 [hereinafter *Saluka*] at Para 302; *LG & E Energy Corp, LG & E Capital Corp and LG & E International Inc. vs. Argentina Republic*, ICSID Case No. ARB/02/1, Decision on Liability Award 3 October 2006 [hereinafter *LG & E*]

¹⁰ *S.D Myers vs. Government of Canada*, Partial Award, 12 November 2000, 40 I.L.M 1408 at Paras 263-264 [hereinafter *SD Myers*]; *Duke Energy Electroquil Partners and Electroquil SA vs. Republic of Ecuador* (ICSID Case No. ARB/04/19) (US-Ecuador BIT) Award 18 August, 2008 at Para 320