
Fair and Equitable Treatment (FET)



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- Example of a simple FET clause:

All investments made by investors of one Contracting Party shall enjoy a fair and equitable treatment in the territory of the other Contracting Party.

(Belgium-Luxembourg Economic Union-Tajikistan BIT (2009), Article 3)



Fair and Equitable Treatment (FET): Introduction

- FET is a common investor protection provision in IIAs.
- FET is intended to protect investors against serious instances of arbitrary, discriminatory or abusive conduct by host States.
- FET is the most relied upon and successful basis for IIA claims by investors.
- Vague and broad wording of the FET obligation carries a risk of overreach in its application.



The meaning of FET

- FET is an *absolute* standard of protection
- Basic definition of terms:
 - «fair» = just, unbiased, equitable, in accordance with rules.
 - «equity» = requires a balancing process, weighing up what is right in all circumstances.
- Interpretations of the FET standard by arbitral tribunals:
 - Denial of justice and due process.
 - Manifest arbitrariness in decision-making.
 - Discrimination.
 - Outright abusive treatment.
 - Defeating investors' *legitimate expectations* (in balance with host State right to regulate in the public interest).



The meaning of FET (cont.)

- FET has its origins in the customary international law minimum standard of treatment (MST) of foreigners and their property
 - Includes investors / investments
 - Only violated if an act is sufficiently egregious and shocking – e.g. a blatant injustice or complete lack of due process
- Some IIAs clarify that FET does not go beyond this MST (narrows the scope of the obligation)
- If there is no reference to the MST in an IIA, arbitral tribunals have often held that FET is a separate and independent standard (broadens the scope of the obligation)



Key development and sovereignty-related issues

1. Expansive interpretation and lack of predictability.
2. Indeterminacy of the threshold of liability.
3. Need for effective balancing between legitimate public welfare objectives and investor rights.



Formulations of the FET standard

IPFSD Policy Options:

- 4.3.0: FET without any reference to international law or any other criteria
- 4.3.1: FET standard linked to obligations under:
 - International law; or
 - The customary MST of foreign nationals.
- 4.3.2 & 4.3.3: FET clause with additional substantive content.
- 4.3.4: No FET obligation.



4.3.0: FET without any reference to international law or any other criteria

Implications

- Heightens the exposure of the host State to international responsibility.
- It is vague, subjective and uncertain and may thus generate diverging expectations as to the actual level of treatment that must be afforded.



4.3.1: FET linked to international law

Implications:

- Does not specify an applicable source or area of international law which has to be looked at.
- Relatively high level of protection to investments and rests on an objective body of law (international law), from which the content of the standard is to be derived.



4.3.1: FET linked to the MST of aliens under customary international law

Implications:

- High threshold of violation (the breach must be serious or egregious), thus diminishing exposure to international responsibility.
- Higher degree of predictability and legal certainty, as there is a broader consensus on the content of customary international law (CIL) in this sphere.



4.3.2 & 4.3.3: FET with additional substantive content

Two options:

- List the obligations under the FET clause (e.g. prohibition on denial on justice or violation of due process); OR
- Clarify the scope of the FET obligation (e.g. that a country's level of development is relevant to determining breach)

Implications:

- Specific obligations narrow down the discretion that arbitrators enjoy.
- The disputing parties and arbitrators do not face the difficult problem of establishing the relevant content of international law or customary international law.



4.3.4: No FET obligation

Implications:

- Exposure to international responsibility and hence financial costs of the host State may be greatly diminished.
- May signal to investors that the Contracting States are not willing to subject themselves to an internationally enforceable minimum absolute standard of treatment of foreign investors.



IPFSD policy option – Fair and equitable treatment

4.3 Fair and equitable treatment (FET)

... protects foreign investors/ investments against, e.g. denial of justice, arbitrary and abusive treatment

- 4.3.0 Give an unqualified commitment to treat foreign investors/investments “fairly and equitably”.
- 4.3.1 Qualify the FET standard by reference to:
 - minimum standard of treatment of aliens under customary international law (MST/CIL)
 - international law or principles of international law.
- 4.3.2 Include an exhaustive list of State obligations under FET, e.g. obligation not to
 - deny justice in judicial or administrative proceedings
 - treat investors in a manifestly arbitrary manner
 - flagrantly violate due process
 - engage in manifestly abusive treatment involving continuous, unjustified coercion or harassment
 - infringe investors’ legitimate expectations based on investment-inducing representations or measures.
- 4.3.3 Clarify (with a view to giving interpretative guidance to arbitral tribunals) that:
 - the FET clause does not preclude States from adopting good faith regulatory or other measures that pursue legitimate policy objectives
 - the investor’s conduct (including the observance of universally recognized standards, see section 7) is relevant in determining whether the FET standard has been breached
 - the country’s level of development is relevant in determining whether the FET standard has been breached
 - a breach of another provision of the IIA or of another international agreement cannot establish a claim for breach of the clause.
- 4.3.4 Omit FET clause.

