

Study on Fair and Equitable Treatment Clauses in International Investment Agreements

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Abstract: As the most core and widely applicable investment protection standard in international investment agreements (IIAs), Fair and Equitable Treatment (FET) clauses have played an important role in regulating the behavior of host countries and safeguarding the legitimate foreign investors' rights and interests. Based on the development of the FET clause, this paper systematically analyzes its connotation and arbitration practice, and reveals its interpretation path in terms of “legitimate expectation”, “non-discriminatory treatment” and “procedural justice” through typical case analysis. “The article further points out that in the application of FET clauses, it is not easy to find out the path of interpretation of FET clauses. The article further points out that the FET Clause faces the main problems of ambiguous connotation, inconsistent arbitration standards and inhibition of host country's policy space in the process of application. To overcome these issues, this article proposes that the scope of the Fair and Equitable Treatment (FET) clause's applicability be modified. through measures such as narrowing the scope of provisions, establishing mechanisms to protect regulatory authority, applying proportionality assessments, and formalizing the dispute resolution process. The goal is to achieve a balanced equilibrium between safeguarding investments and preserving national sovereignty.

Keywords: International investment law, fair and equitable treatment, legitimate expectations, arbitration practice, right to regulate

1. Introduction

In a rapidly developing economy, international trade and investment have grown rapidly, but so have disputes. International investment is characterized by its long-term and risky nature, which is safeguarded by FET clauses, which have become key and commonly used provisions in agreements for international investment (IIAs). [1] Embedded within the framework of bilateral investment agreements (BITs), Fair and Equitable Treatment (FET) operates as a key regulatory mechanism governing foreign investor rights. It establishes binding obligations for host states to ensure non-discriminatory treatment and procedural due process in investment-related administrative proceedings. [2]. As a core protection mechanism in IIAs, the FET clause, despite the lack of a uniform and clear definition in the specific provisions, has gradually developed a clearer legal connotation and application standard through the development of international arbitration practice and multilateral jurisprudence. This provision is usually understood as requiring the host country to reflect the legitimacy and reasonableness in accordance with the basic norms of international law when dealing with foreign investors and their investment behavior. Specifically, it emphasizes

safeguarding investors' reasonable expectations, meaning the nation that is hosting should honor the reasonable reliance investors place on existing legal and policy frameworks when making investment decisions. It also requires the avoidance of discriminatory practices, ensuring foreign investors are treated on a same basis with domestic and third-country investors, without bias based on nationality. The host country must observe the principle of due process, guaranteeing procedural fairness in both administrative and judicial proceedings. Moreover, it prohibits arbitrary or unjustified state interference in investments, preventing the misuse of governmental authority. Transparency in legal and policy environments is also essential, enabling investors to make informed decisions based on clear and foreseeable information. Lastly, the framework protects investors from coercion, harassment, or other improper actions by public authorities.

As a key component of international investment agreements (IIAs), fair and equitable treatment (FET) clauses seek to guarantee that foreign investors are legally shielded against unfair, capricious, or discriminatory host country practices. For instance, the arbitral panel in *Metalclad v. Mexico* [3] made it clear that the host state's inability to provide all relevant information on environmental limits amounted to a breach of transparency, which resulted in liability under the FET clause. This provision significantly enhances the efficiency of cross-border capital flows by stabilizing the legal environment for investment and restraining the abuse of government power [4].

However, the vague and broadly framed language of the FET clause has given rise to considerable debate in practice. Its ambiguity has made it one of the most debated standards in international investment law, with some even referring to it as a "mystifying" or elusive legal concept. [5].

First, semantic ambiguities have led to divergent interpretations, such as *Parkerings v. Lithuania* [6], where the standard for reasonable expectation was found to be very different. Second, as demonstrated by the disparate handling of the state of emergency argument in *CMS v. Argentina* [7] and *LG&E v. Argentina* [8], arbitral tribunals' over-reliance on case-by-case discretion has made precedent inconsistencies worse. The arbitral panel in *Vivendi v. Argentina* [9] viewed the enlargement of the FET requirement as the international minimum standard of treatment, which highlighted the matter of excessive sovereignty cession. This is concerning since some of the rulings have a propensity to become judicial law-making.

This paper focuses on the FET clause in IIAs, discusses its legal connotation, arbitration practice and controversy, reveals the tension between the clause in protecting investors and safeguarding state sovereignty, and proposes a reform path to realize the balance between normative application and institutional balance through the limitation of the provisions and the restructuring of the system.

2. Definition and content of the fair and equitable treatment clause

2.1. Connotation and history of the fair and equitable treatment clause

2.1.1. Connotation

The FET standard is nearly omnipresent in investment disputes [10]. It comprises both elements: on the one hand, it serves to protect the legitimate rights and interests of investors, requiring the host state to maintain transparency, consistency, and non-discrimination in its legislative, administrative, and judicial actions; on the other hand, it implicitly restricts the host state's regulatory space within its sovereign prerogatives.

In the realm of international investment law, Fair and Equitable Treatment (FET) lacks a universally accepted definition among scholars and legal practitioners, but its meaning can be understood through some representative views. Some scholars believe that the view that FET is difficult to interpret through a concise definition, but should be understood from its constituent elements. Specifically, key components of the FET standard encompass transparency, legal and

regulatory consistency, safeguarding investors' legitimate expectations, acting in good faith, avoiding coercive or intrusive measures, and honoring contractual commitments. The source of these elements can be traced back to *EDF v. Romania*, in which the arbitral tribunal's interpretation of FET provided an important reference for subsequent practice [11].

Furthermore, according to some academics, arbitral courts have broadly construed the host state's duty to treat foreign investors fairly and equally as a norm of treatment for foreign investors that is not dependent on the conventional framework of international law. This expansive interpretation has even viewed FET as a principle-based provision that can compensate or correct other international investment rules.

2.1.2. Historic evolution of FET

The 1948 Havana Charter is when the idea of "fair and equitable treatment" first appeared. The obligation of "fair and equitable treatment" was originally incorporated in Article 11(2) of the Charter, and it served as the model for similar clauses in later IIAs. However, the Havana Charter ultimately failed to enter into force, and its Article 11 (2) only authorized the ITO to make relevant recommendations, rather than making them binding and mandatory. The article clearly advocates for the incorporation of fair and equitable treatment provisions in bilateral or multilateral agreements, aiming to guarantee that enterprises, technology, capital, procedures, and scientific advancements are treated fairly and equitably among member states of the International Trade Organization.

Although the Havana Charter did not enter into force for reasons related to investment protection and lack of ratification by major developed countries, the concept of FET has gradually emerged regarding international investment law. That same year, Article 22 of the Bogotá Economic Agreement, adopted during the Ninth Conference of the Americas, also addressed the principle of FET. Rather than simply requiring FET, the Agreement further clarified its content by prohibiting unjust, unreasonable or discriminatory measures. Despite the lack of support, the agreement constituted a significant endeavor to make the "fair and equitable treatment" provision a reality.

The 1959 Arbus-Shawcross Draft Convention on Overseas Investments called on host states to refrain from taking irrational or discriminatory actions against foreign property and to treat it fairly. Although the draft was not adopted, such efforts contributed to the continued evolution of FET clauses in IIAs.

Furthermore, the 1954 German-American Treaty of Friendship, Commerce, and Navigation stipulates that both sides shall always treat each other's citizens, companies, and related assets and interests fairly and equally. As mentioned above, IIAs have begun to experiment with the inclusion of fair and equitable treatment clauses, and although these clauses are mostly of an encouraging nature and vary in their specific content, they show that such treatment clauses have entered the realm of investment protection and have been taken seriously by the contracting parties. FET clauses have progressively developed from early commercial agreements and multilateral drafts to become essential components of BITs since the 1954 German-American Treaty of Amity, Commerce, and Navigation. FET was made a significant component of the treaty's requirements when Germany and Pakistan signed the first modern BIT in 1959.

In the 1990s, along with the development of arbitration mechanisms such as ICSID and UNCITRAL, FET clauses have become increasingly active in dispute settlement, as exemplified by the case of *Tecmed v. Mexico* [12] which established the principle of protection of "legitimate expectations". *Saluka v. Czech Republic* [13] emphasizes the predictability of the legal environment and policy stability. These cases have transformed FET from an abstract moral norm into a legally binding substantive standard covering legitimate expectations, procedural justice, transparency, and the reasonableness of state regulation.

In the 21st century, national attitudes towards FET provisions have diverged. European countries tend to maintain a higher standard of protection, while the United States and Canada have set limits on the application of the FET in new agreements, trying to constrain it within the “minimum standards of international law”, in order to avoid investors from abusing the provision to affect the space for national policies. This transition highlights how varying legal systems approach the balance between investment protection and state sovereignty, while also encouraging more diverse and nuanced formulations of FET provisions.

2.2. The content of FET

2.2.1. Non-discriminatory treatment

Non-discriminatory treatment forms a fundamental aspect of the FET clause, encompassing two key elements: national treatment and most-favored-nation treatment. The national treatment principle obliges the host state to provide foreign investors and their investments with treatment at least equal to that granted to its domestic counterparts.

2.2.2. Procedural due process

Procedural due process is another key aspect of the FET Clause, which requires that the host state's administrative procedures must include prior written notice, an opportunity to be heard, and an obligation to show cause. In *Tecmed v. Mexico* [12], the arbitral tribunal found a violation of the FET on the basis that the waste disposal license renewal process did not provide an opportunity for a hearing.

2.2.3. Reasonable expectation protection

Reasonable expectation protection is the third important component of the FET Clause, which requires that the host state's undertakings need to be clear, specific and relied upon. In *Metalclad v. Mexico* [3], the tribunal found that the local government's verbal promises conflicted with the federal licensing documents, resulting in investor losses, and constituted reasonable expectation destruction. Attention has also been paid to the reasonableness of policy adjustments, such as the “legitimate public policy objective” defense introduced by Article 9.6 of the CPTPP, which requires that policy changes comply with the principles of non-discrimination, proportionality, and least harm. In *Philip Morris v. Uruguay*, the arbitral tribunal upheld the compliance of the host country's implementation of the Tobacco Flatbread Act in the interest of public health.

2.3. Manifestations of FET

2.3.1. Fair and equitable treatment clauses in investment treaties

FET is mainly expressed in specific international investment treaty provisions from the very beginning of its creation and establishment. The formulation of FET in international investment law has been varied. First, a small number of treaties do. Second, there are multilateral treaties that have adopted a persuasive or hortatory approach towards FET. Finally, there are FETs in BITs and FTAs that have adopted specific provisions in international investment treaties. BITs and FTAs that are binding and varied [14].

In BITs or MIAs, some countries have established the FET principle through stand-alone clauses, such as the 2009 agreement between China and Switzerland, which stipulates that investors shall enjoy fair and equitable treatment and adequate protection. There are differences in determining the legal basis for FET, with one approach being based on broad international law, such as the 2004

agreement between Croatia and Oman [15]. Using content-specific treatment provisions, like those included in the 2008 Rwanda-US agreement and the 2009 Netherlands-Oman agreement, which specifically forbid wrongdoing, is an additional strategy. Some countries make it clear that certain behavior does not violate FET through negative enumeration, such as the 2009 agreement between Mexico and Singapore [16].

2.3.2. Embodied in minimum treatment clauses

The United States and other Western nations have made substantial investments in less developed countries to support local economic growth. Many developing nations signed investment agreements with Fair and Equitable Treatment (FET) clauses at the beginning of the twenty-first century. Developed countries often associate FET with minimum standards of treatment, requiring host states to uphold a baseline level of fairness for foreign investors. The U.S., in particular, promotes the idea of a universal standard of justice in international law to assess the treatment of foreign nationals. While efforts have been made to align FET with the international minimum standard, the two serve distinct functions in international law, with FET encompassing a broader scope. Treating them as equivalent would restrict legal claims to only the most severe investor harms. Furthermore, the international minimum norm, which has its roots in customary international law, is still up for discussion and is not widely accepted.

2.3.3. Analysis of the difference between judicial practice and treaty formulation of FET clause

Due to the FET Clause's widespread incorporation into IIAs, international investment arbitration institutions' interpretations and applications of the Clause have progressively amassed a wealth of judicial practice, which serves as a crucial resource for comprehending both its normative meaning and purpose. From the viewpoint of existing arbitration cases, the FET clause has not only become one of the main legal bases for investors to defend their rights. It also illustrates the value-oriented approach taken by arbitral courts in resolving the contradiction between the reasonable expectations of investors and the host nation's regulatory authority.

Table 1: application and interpretation of the FET clause in typical arbitration cases

Case Name	Arbitral Institution	Year	Case Summary	Tribunal's Interpretation of FET
Tecmed v. Mexico [12]	ICSID (Additional Facility)	2003	Mexico revoked the landfill permit.	FET protects investors' "legitimate expectations" and mandates that host state behavior be proportionate, predictable, transparent, and fair.
Saluka v. Czech Republic [13]	UNCITRAL	2006	Czech government supported local banks and refused to bail out a foreign investor-controlled bank.	Tribunal held FET requires legal stability, respect for legitimate expectations, and a reliable legal environment.
CMS v. Argentina [7]	ICSID	2005	Argentina adjusted public service contracts during a financial crisis.	Although the tribunal acknowledged the crisis, it found that breaking investors' legitimate expectations violated FET.

Table 1: (continued)

ADF v. USA [17]	ICSID (NAFTA)	2003	Canadian company excluded from U.S. government procurement for using foreign steel.	According to the tribunal, FET should be interpreted in accordance with the minimal level of treatment established by international law; a more expansive reading would unjustly establish an independent standard.
Parkerings v. Lithuania [18]	ICSID	2007	Foreign company's legitimate expectations were not fulfilled.	Tribunal held that legitimate expectations do not equate to a static legal framework.

Table 1 analyses the connotation of FETs in different cases. For the first time, the arbitral tribunal established "Legitimate Expectations" as a fundamental component of the FET Clause in *Tecmed v. Mexico* [12], holding that the host state must preserve the predictability and stability of the legal and policy environment in order to preserve investors' faith in the current system. Subsequent arbitral tribunals have recognized this case as a significant precedent. The tribunal in *Saluka v. Czech Republic* [13] also underlined that in order to prevent unfavorable differential treatment of particular investors, FET requires the host state to maintain fairness and reasonableness in the exercise of its regulatory power, in addition to procedural justice and non-discrimination. Furthermore, in addressing the conflict between investment protection and public policy adjustment, as demonstrated in *CMS v. Argentina* [7], the tribunal did not absolve the host state of responsibility for violating the FET, even though it acknowledged that the state has some degree of policy freedom in emergency situations. Instead, it insisted that the host state's actions must be in line with the fundamental protection of reasonable investor expectations.

Tribunals have, however, adopted a more circumspect approach in NAFTA-based cases like *ADF v. USA* [17], contending that FET clauses ought to be governed by "minimum standards of customary international law," rejecting the notion that they ought to be regarded as a safeguard that is separate from and in addition to traditional international law obligations. This line of interpretation indicates a bias toward conservative wording in the treaty's development and reflects the worry of several industrialized nations that the FET clause may unduly constrain national sovereignty.

Table 2: Comparison of FET clause expressions in BITs across different countries/regions

Country/Agreement	Linked to International Minimum Standard of Treatment?	Characteristics
Germany (Model BIT)	No	An 'open-ended' expression, without defining the scope of FET, leaving broad interpretative space.

Table 2: (continued)

United States (2012 Model BIT)	Yes	Clearly equates FET with 'minimum standard under customary international law,' limiting arbitral expansion.
China (New-generation BIT, e.g., China-Canada Agreement)	Yes	Adopts a broadly worded clause to both protect investment and avoid overly broad interpretation.
Canada (CETA Draft)	Yes	Tends to constrain arbitral tribunals' discretion.
France (BIT)	No	As a traditional civil law country, tends to use open-ended language.

Different approaches to striking a balance between regulatory autonomy and investor protection are also reflected in the ways that FET provisions have been formulated differently between treaties (Table 2). For instance, Germany and other European civil law countries typically use broad and open-ended language in their BITs, allowing arbitral tribunals greater interpretive discretion. Common law nations like the US and Canada, on the other hand, frequently use more exacting and prescriptive language to limit arbitral discretion and expressly limit FET to the "minimum standard of international law." In the BITs it has signed recently, China has also progressively taken a compromise stance. This means that, while acknowledging the need to provide "fair and equitable treatment," it has stressed that this treatment must not go beyond what is permitted by international law in order to strike a balance between luring in foreign investment and preserving policy space.

As a result, while the FET Clause is highly universal in form, there are significant differences in its substance, applicable interpretation and judicial path. These differences are not only limited by differences in national legal traditions and treaty discourse, but also reflect the gradual evolution of global investment law from investor rights-centrism to rights-obligations-balancing.

3. Problems with the fair and equitable treatment clause and the way forward for reform

3.1. Problems

Although "fair and equitable treatment" (FET) clauses are widely used in IIAs and have become an important criterion for measuring the legitimacy of host countries' behavior, they still face a series of theoretical and practical problems in their practical application.

Firstly, there is a high degree of uncertainty about the meaning of the clause; FET clauses are usually expressed in general terms such as "fair", "reasonable", "just", etc. In the absence of a clear definition, the specific meaning of FET clauses often relies on the arbitral tribunal to interpret them in a particular case. This interpretation's "jurisprudence-driven" character results in conflicting standards of application, which hinders the host State's capacity to precisely anticipate the legal bounds of its actions and lowers the law's predictability and certainty [19]. The inconsistency of

applicability is further exacerbated by the disparities in the linguistic expression and structure of the provisions in the treaty text. The US BIT template from 2012, for instance, expressly restricts FET to "the minimum standard of treatment recognized by customary international law." [20] Conversely, nations with civil law, like France and Germany, employ more free-flowing language without any particular limitations [21]. The development of a cohesive and stable international investment legal system is hampered by this normative fragmentation, which also increases the subjectivity of interpretation.

Secondly, the lack of consistency and transparency in the application of FET clauses in arbitration practice has led to instability in the standard of legal application. Although FET clauses have been widely invoked in investment arbitration cases, there are significant differences in the selection and interpretation of its application standards by different arbitral tribunals, and even in similar cases, completely different conclusions may be reached. Some tribunals have interpreted FET as protecting the "reasonable expectations" of investors, while others have emphasized procedural due process or non-discrimination in the conduct of the state, and this freedom of choice of standard has led to a high degree of uncertainty as to the outcome of the arbitration. In *Tecmed v. Mexico* [12], for instance, the panel saw FET as mandating that the state respect the investor's reasonable expectations resulting from its actions. The panel in *Saluka v. Czech Republic* [13], on the other hand, stressed the necessity of striking a balance between safeguarding investor interests and maintaining the regulatory authority of the host state. This interpretational discrepancy undermines the authority and consistency of the international investment law system in addition to raising ambiguity in case outcomes [22].

Thirdly, there is an institutional conflict between the FET provisions and the host country's policy autonomy, making it difficult for host countries to supervise. In recent years, in cases involving environmental policy, public health and labor standards and other public interest matters, investors frequently invoke the FET clause against the sovereignty of the state, limiting the host country's ability to adjust its policies in accordance with domestic development needs. This "regulatory chill" is particularly evident in the environmental field, leading some countries to abandon or delay public policy reforms in the face of potential arbitration risks [23].

3.2. Reform paths

In response to the above issues, academics and practitioners have proposed several reform paths in an attempt to establish a more balanced institutional framework between the protection of investor rights and the maintenance of host country's right to regulate.

First, the connotation of FET provisions should be qualified and clarified at the level of treaty norms. Newer investment agreements show a propensity to align FET with the "minimum standard of international law." For example, investor claims are expressly restricted to treatment that satisfies but does not above this minimal bar established by international law in Article 14.6 of the United States-Mexico-Canada Agreement (USMCA) [24]. Furthermore, a violation may only be shown in certain circumstances, such as discriminatory behavior, denial of justice, or absence of due process, according to the EU-Canada Comprehensive Economic and Trade Agreement (CETA), which defines FET through a lengthy list of components [25]. This approach improves the clarity and predictability of the provisions for host states, enhancing their practical enforceability. At the same time, at the level of arbitration procedures, the establishment of a uniform interpretation mechanism or the establishment of an appeal mechanism is also considered to be an important institutional guarantee to enhance the consistency of the application of the FET provisions. Currently, arbitral awards are not binding on each other, and it is easy to form a contradictory precedent system [26]. It will help to limit the arbitrariness of arbitral tribunal interpretations and encourage the methodical development of international investment law regulations if jurisprudence can be unified through the Multilateral Investment Court or the International Appellate Body.

Second, the development of the "safeguard clause of the right to regulate" and the coordinated implementation of the FET clause can reinforce the methodical acknowledgement of state sovereignty. For instance, Article 8.9 of CETA clearly states that the FET clause will not restrict the parties' non-transferable authority to regulate in order to preserve the environment, public health, safety, and other significant public interests. This dual structure design helps to guard against the phenomenon of arbitration institutions favoring one-sidedly the interests of investors and weakening the space for national public policy.

Thirdly, it is proposed to introduce the principle of proportionality and the necessity review mechanism as internal limitations on the application of the FET clause. That is, when the arbitral tribunal judges whether the host country's behavior violates the FET, it should consider whether there is an appropriate proportion and reasonable correlation between the goals, means and effects of the state's behavior.[27] This principle of "structural balance" guides the arbitral tribunal to make substantive trade-offs between the protection of investments and the protection of national public interests.

4. Conclusion

Since its development in the mid-20th century, the fair and equitable treatment clause has become one of the most controversial and influential protection clauses in IIAs. In the course of its institutional evolution, it has realized the transformation from a political declaration to a legal obligation, and through arbitration practice, it has gradually formed a system based on the principles of "legitimate expectations", "due process", "non-discrimination" and "state sovereignty". Through the practice of arbitration, it has gradually formed an interpretative framework centered on "legitimate expectation", "due process", "non-discrimination" and "reasonable conduct of the state". By analyzing the development trajectory of the FET Clause, jurisprudential practice and treaty differences, this article reveals that while strengthening investor protection, the FET Clause has also brought about challenges such as normative uncertainty, Arbitration inconsistency, and limited space for national policies.

This essay makes the case that the institutional guarantee of the state's authority to regulate based on the investment protection function and the clarity of the standards should be the main focus of any future revisions to the FET clause. The FET Clause is anticipated to transform from a highly elastic arbitration tool into an international law norm with distinct boundaries, consistent application, and consideration of multiple interests through the qualification of the treaty text, the construction of the right to regulate clause, the introduction of the proportionality review mechanism, and the encouragement of the construction of the multilateral dispute settlement mechanism.

In light of the growing emphasis on "sustainable development" and "investment responsibility" around the world, it is anticipated that the institutional restructuring of the FET Clause will support the development of a more coordinated, equitable, and multilateralized international investment law system in addition to fostering the balance of norms between investors and states. Additionally, it is anticipated to encourage the growth of the international investment legal framework toward increased multilateralization, fairness, and harmonization.

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