



## ความไม่ชัดเจนในความหมาย ทำให้คุณค่าของหลักปฏิบัติที่เป็นธรรมและเท่าเทียม ที่ใช้เพื่อคุ้มครองนักลงทุนต่างชาติลดลงหรือไม่

**Whether the usefulness of the fair and equitable  
treatment standard for investors is undermined  
by uncertainty about its meaning**

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### บทคัดย่อ

หลักปฏิบัติที่เป็นธรรมและเท่าเทียมเป็นหลักมาตรฐานที่ได้รับการยอมรับว่าเป็นหลักที่ใช้เพื่อคุ้มครองนักลงทุนต่างชาติจากการปฏิบัติที่ไม่เป็นธรรม อย่างไรก็ตาม แม้ว่าส่วนใหญ่หลักปฏิบัติที่เป็นธรรมและเท่าเทียมจะถูกกำหนดอยู่ในข้อตกลงที่เกี่ยวกับการลงทุน แต่ไม่ได้มีการให้คำนิยามหรือคำจำกัดความของหลักปฏิบัติที่เป็นธรรมและเท่าเทียมไว้แต่อย่างใด ทำให้มีการให้ความหมายหรือตีความหลักดังกล่าวในความหมายที่แตกต่างกัน ผลจากการที่ความหมายของหลักดังกล่าวซึ่งไม่มีการให้นิยามที่แนชัดอาจมองได้ 2 มุมมอง กล่าวคือ มุมมองแรก คือ การที่ไม่ได้มีการให้คำนิยามของหลักปฏิบัติที่เป็นธรรมและเท่าเทียมไว้อย่างชัดเจน อาจส่งผลเสียทำให้การนำหลักดังกล่าวมาใช้เพื่อคุ้มครองนักลงทุนต่างชาติจากการปฏิบัติที่ไม่เป็นธรรมไม่มีประสิทธิภาพ ส่วนมุมมองที่สอง คือ การที่ไม่ได้มีการให้คำนิยามของหลักปฏิบัติที่เป็นธรรมและเท่าเทียมไว้อย่างชัดเจน จะส่งผลดีทำให้เป็นการเปิดช่องให้สามารถตีความหรือนิยามความหมายของหลักดังกล่าวให้สอดคล้องกับแต่ละสถานการณ์ของการลงทุนหรือการทำความตกลงที่มีความแตกต่างกัน ดังนั้น ในบทความนี้จะวิเคราะห์ว่าความคลุมเคลือหรือความไม่ชัดเจนในความหมายของคำว่าหลักปฏิบัติที่เป็นธรรมและเท่าเทียมทำให้คุณค่าของหลักดังกล่าวลดลงหรือไม่ ซึ่งผู้เขียนเห็นว่าความไม่แน่นอนในความหมายของหลักปฏิบัติที่เป็นธรรมและเท่าเทียมไม่ได้ทำให้คุณค่าของหลักปฏิบัติที่เป็นธรรมและเท่าเทียมลดลงเนื่องจากเหตุผลหลายประการ

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กล่าวคือ ศาลสามารถตีความหลักดังกล่าวโดยนำหลักต่าง ๆ เช่น หลักสุจริต หลักความคาดหวังที่เป็นธรรม หลักความชอบด้วยกระบวนการทางกฎหมาย มาปรับใช้ให้สอดคล้องกับสถานการณ์หรือเงื่อนไขของแต่ละกรณีเพื่อให้นักลงทุนได้รับความยุติธรรมที่เหมาะสมมากยิ่งขึ้น นอกจากนั้น ในการพิทีนักลงทุนได้รับการคุ้มครองที่ต่ำกว่ามาตรฐานหรือไม่ได้รับการคุ้มครอง การที่ยังไม่ได้มีการให้กำกับด้วยความของหลักดังกล่าว ส่งผลทำให้ศาลสามารถตีความหลักปฏิบัติที่เป็นธรรมและเท่าเทียมเพื่อนำอุดช่องว่างที่ไม่เป็นธรรมที่เกิดขึ้นกับนักลงทุนต่างชาติได้

**คำสำคัญ** : นักลงทุนต่างชาติ หลักปฏิบัติที่เป็นธรรมและเท่าเทียม การตีความ

## Abstract

Fair and equitable treatment standards are recognized as the principles used to protect foreign investors from unfair practices. However, although fair and equitable practices are often denied in terms of investments, it does not provide meanings or definitions of fair and equitable practices resulting in different and ambiguous meanings of such principles. Unclearness of such principles may be viewed in two perspectives. The first view is that there is a lack of efficiency when such principles are applied. The second point of view is that there is room for interpretation or giving meanings to such principles in accordance with each situation of investment or different agreements. Thus, in this article, we will analyze whether ambiguous meanings of fair and equitable practices reduce their value. The author finds that uncertain meanings of fair and equitable practices do not reduce their value due to many reasons. Firstly, tribunals can interpret fair and equitable treatment standards using various factors such as good faith and legitimate expectation, compliance with contractual obligation and due process to adjust fair and equitable treatment standards in accordance with the different facts of each case; therefore, foreign investors receive justice in proper protection. Secondly, uncertainty of fair and equitable treatment standard's meaning fills gaps when foreign investors receive low levels of protection or do not receive protection from other standards. Lastly, tribunals can continually comprise new elements to provide more advantages derived from fair and equitable treatment standards to investors.

**Keyword** : foreign investor, fair and equitable treatment standard, interpretation

## 2 วารสารวิชาการ

## 1. Introduction

Almost all investment agreements or treaties include promises by the contracting parties to provide fair and equitable treatment standard (FET) to investors of the other contracting parties.<sup>1</sup> Violation of FET standard by host countries is the commonest allegation made by foreign investors, whose claims are usually successful in such cases.<sup>2</sup> FET is, thus, an important element for foreign investors to claim protection from host states. Although FET has become an indispensable element of investor protection, it is a standard that varies from case to case; as its terms are difficult to define, it can be open to different interpretations.<sup>3</sup> The precise meaning of FET is therefore still uncertain.<sup>4</sup> Some scholars argue that FET's lack of fixed meaning may make it inefficient to protect investors<sup>5</sup> whilst others believe that this lack of fixed meaning is a

strength for FET to protect investors.<sup>6</sup> Some scholars even suggest that FET's flexibility, rather than detracting from its usefulness, is actually a vital element and not a shortcoming<sup>7</sup> because FET is open to interpretation and thus capable of extending to include new elements in each case to appropriately protect investors.<sup>8</sup> The main purpose of the present essay is to analyze that whether the usefulness of the fair and equitable treatment standard for investors is undermined by uncertainty about its meaning. This essay is divided into four sections. The first section gives an overview of FET and its usefulness for investors. The second section outlines and analyses uncertainty about the meaning of FET. The third section argues that the usefulness of the FET standard for investors is not undermined by uncertainty about its meaning. The last section contains conclusions and suggestions.

<sup>1</sup> Jeswald W Salacuse, *The Law of Investment Treaties* (Oxford: Oxford University Press, 2010) 218.

<sup>2</sup> Surya P Subedi, *International Investment Law: Reconciling Policy and Principle* (Oxford: Hart Publishing, 2008) 63.

<sup>3</sup> I Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (Oxford: Oxford University Press, 2008) 15.

<sup>4</sup> Ibid, 155.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> C Schreuer, "Fair and Equitable Treatment in Arbitral Practice" (2005) 6:3 *The Journal of World Investment & Trade* 357, 365.

<sup>8</sup> K Yannaca-Small, "Fair and Equitable Treatment Standard: Recent Developments" in A Reinisch (ed), *Standards of Investment Protection* (Oxford: Oxford University Press, 2008) 100, 111.



## 2. Fair and Equitable Treatment Standard (FET) and its usefulness for investors

The broad aim of a fair and equitable treatment standard (FET) clause is to provide a fundamental and general standard of protection for investors investing in a host state in order to promote and stimulate investment.<sup>9</sup>

FET is clearly useful for investors and may even constitute investors' most powerful right<sup>10</sup> for many reasons. Firstly, FET is the standard that host states must provide for investors in order to ensure that foreign investors and their investments are fairly and equally treated by host countries.<sup>11</sup> Therefore, FET is useful for investors because it makes sure that investors are protected under FET standard when investing in any host country. For example, in the *Eureko* case,<sup>12</sup> consent to foreign investors' contracts was withdrawn from the host countries, but under the FET

standard, the court ruled that foreign investors' contracts were not withdrawn, on the grounds that the host country was violating the FET standard.

Secondly, since FET is a standard protecting investors independent of the host country's domestic law or treatment of host states, foreign investors can be sure that they are always protected and will receive justice from the host country irrespective of any changes in the host country's domestic law.<sup>13</sup> Finally, in Bilateral Investment Treaties (BITs), FET standard fill the gaps in cases where investors are insufficiently protected or do not receive protection from other standards such as Most-Favoured National (MFN) or National Treatment (NT).<sup>14</sup> This will be elaborated in the fourth section.

## 3. Uncertainty of Fair and Equitable Treatment Standard

Although FET provides benefits to investors as mentioned in Section 2, there is a debate

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<sup>9</sup> R Doak Bishop and others, *Foreign Investment Disputes: Cases, Materials and Commentary* (London: Kluwer Law International, 2005) 1013.

<sup>10</sup> A Newcombe and L Paradell, *Law and Practice of Investment Treaties: Standard of Treatment* (Netherlands: Wolters Kluwer, 2011) 296.

<sup>11</sup> Jeswald W Salacuse, "BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries" (1990) 24:1 *International Law* 655, 667.

<sup>12</sup> *Eureko v Poland*, Partial Award, 19 August 2005, 12 ICSID Report 335.

<sup>13</sup> R Doak Bishop and others, above n9, 1013.

<sup>14</sup> R Dolzer and C Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press) 122.



among scholars concerning the vagueness of meaning of FET.<sup>15</sup> In this section uncertainty of FET's meaning will be analyzed.

### **3.1. Approach to defining Fair and Equitable Treatment Standard (FET)'s meaning in relation to customary international law**

It could be seen that there are a number of approaches to defining and interpreting FET resulting in a lack of precise meaning of FET.<sup>16</sup>

The first approach is to interpret FET as part of a minimum standard in customary international law.<sup>17</sup> The clearest and most explicit interpretation of the FET standard as a international minimum standard (IMS) is found in the context of North American Free Trade

Agreement (NAFTA).<sup>18</sup> In the context of NAFTA, it is explicitly determined in Article 1105(1) that FET is a subheading of 'minimum standard of treatment'.<sup>19</sup> Moreover, NAFTA Free Trade Agreement (FTA) also provides an official interpretation of FET stating that 'Article 1105(1) reflects customary international law and does not provide more cover than is provided by customary international law'.<sup>20</sup> The FTC interpretation has been applied in many cases such as the *Occidental*<sup>21</sup> and *AAPL*<sup>22</sup> cases. However, in this approach, FET's definition has not been exactly denied.<sup>23</sup>

Moreover, considering the level of FET interpretation of tribunals in each state within this approach, the interpretation standards of those tribunals are various.<sup>24</sup>

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<sup>15</sup> A Wythes, "Investor-State Arbitrations: Can the "Fair and Equitable Treatment" Clause Consider International Human Rights Obligations?" (2010) 23:1 *Leiden Journal of International Law* 241, 245.

<sup>16</sup> I Tudor, above n3, 15.

<sup>17</sup> A Newcombe and L Paradell, *Law and Practice of Investment treaties: Standard of Treatment* (Netherland: Kluwer Law International, 2009) 264.

<sup>18</sup> R Dolzer and C Schreuer, above n4, 125.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> *Occidental Exploration and Production Co v Ecuador*, LCIA Case No UN3467 (Award) (1July 2004).

<sup>22</sup> *Asain Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka* (1990) International Centre for Settlement of Investment Disputes, Case no. ARB/87/3 Award) (13June 2000).

<sup>23</sup> Tai-Heng Cheng, *Is Fair and Equitable Treatment Standard Fair and Equitable?* (15April 2019) Heinonline <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1259941](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1259941)>

<sup>24</sup> R Dolzer and C Schreuer, above n4, 128-129.



Tribunals in some states still use the *Neer* case<sup>25</sup> to underline requirements and set a high standard for the violation of the FET.<sup>26</sup> In contrast, the tribunal in the *ELSI*<sup>27</sup> and *ADF*<sup>28</sup> cases set less rigorous standards for violation of FET than the *Neers* case, to align them with evolving customary international law.<sup>29</sup>

Thus, it seems that within the same approach, interpretation of FET's meaning as part of a minimum standard in customary international law in each tribunal is uncertain, further confirming the uncertain meaning in FET.

The second approach is quite different from the first. Here, FET is interpreted as part of international law including all sources.<sup>30</sup> In other words, the interpretation of FET should not be limited to IMS, as contained in

international customary law, but should include a full range of international sources such as contemporary treaties, general principles and other conventional obligations.<sup>31</sup> The interpretation of FET according to this approach can be seen in *S.D. Mayers* case.<sup>32</sup> In this case, tribunal finds that FET should be interpreted together with other standards in international law such as good faith.<sup>33</sup>

Finally, apart from interpreting FET's meaning in accordance with the above approach, UNCTAD and Vasciannie expressed a totally different idea about the interpretation of FET: they argued that FET should be interpreted as an independent self-contained treaty standard (autonomous standard).<sup>34</sup> Several other commentators have suggested that FET's scope of interpretation should not be limited to IMS but should go beyond IMS

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<sup>25</sup> *Neer v Mexico*, Opin, US-Mexico General Claims Commission, 15 October 1926, 21 AJIL (1927) 555.

<sup>26</sup> I Tudor, above n3, 142.

<sup>27</sup> *Electronic Sicula Spa (ELSI) (United States of American v Italy)*, ICJ Reports 1989, 15.

<sup>28</sup> *ADF Group Inc. v USA*, Award, 9 January 2003, 18 ICSID Review-FILJ (2003) 195, 6 ICSID Reports 470.

<sup>29</sup> R Dolzer and C Schreuer, above n4, 128-129.

<sup>30</sup> I A Laird, Betrayal, "Shock and Outrage-Recent Developments in Nafta Article 1105" (2003) 3:1 *Asper Review. International Trade & Business Law* 185, 214.

<sup>31</sup> F Marshall "Issues in International Investment Law: Fair and Equitable Treatment in International Investment Agreements" (Background Papers for the Developing Country Investment Negotiators' Forum, Singapore, October 2007) 6-7.

<sup>32</sup> *S.D. Mayers, Inc. v Canada*, (November 13,2000), Partial Award. International Legal Material 408.

<sup>33</sup> F Marshall, above n31, 22.

<sup>34</sup> A Wythes, "Investor-State Arbitrations: Can the "Fair and Equitable Treatment" Clause Consider International Human Rights Obligations?" (2010) 23:1 *Leiden Journal of International Law* 241, 247.



because this will widen the scope of protection for investors.<sup>35</sup> The use of this approach is evident in the *PSEG*<sup>36</sup> and *Azurix* cases.<sup>37</sup> The tribunal in *Azurix* case held that FET should be interpreted by regarding its ordinary meaning.<sup>38</sup>

From the above analysis, it can be concluded that various approaches to dening the meaning of FET can cause the uncertainty of FET's meaning. Moreover, considering interpreting levels of FET, there is different level of interpretation and consequently inconsistent meaning of FET.

### **3.2. The formulation of Fair and Equitable Treatment Standard (FET)**

There are diverse ways of formulating FET in investment treaties, some of which do

not explicitly mention FET at all, whilst others mention it in a prominent position at the beginning of the treatment clauses,<sup>39</sup> combining FET with other standards of treatment<sup>40</sup> and including more elements in FET to make it more explicit and comprehensive.<sup>41</sup>

However, some treaties such as Cambodia-Cuba BIT formulate FET without reference to international law or further criteria.<sup>42</sup> This kind of formulation may leave room for a high level of vagueness with respect to the interpretation of FET.<sup>43</sup> Moreover, since there are different kinds of FET formulations, a proper interpretation of FET depends on the particular wording of the specic treaty, the purpose of the treaty and its context including the genuine intentions of the

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<sup>35</sup> FA Mann, “British Treaties for the Promotion and Protection of Investments” (1981) 52:1 *British Year Book of International Law* 241, 244 .

<sup>36</sup> *PSEG Global Inc. v Republic of Turkey* (19 January 2007), ICSID Case No. ARB/02/4.

<sup>37</sup> *Azurix Corp. v. The Argentine Republic* (2006) International Centre for Settlement of Investment Disputes (Additional Facility), Case no. ARB/01/12

<sup>38</sup> Ibid.

<sup>39</sup> R Doak Bishop and others, above n9, 1013.

<sup>40</sup> Jeswald W Salacuse, above n1, 220.

<sup>41</sup> I Tudor, above n3, 123.

<sup>42</sup> Cambodia-Cuba BIT (2001) states: ‘Investments of investors of either Contracting Parties shall at all times be accorded fair and equitable treatment and shall enjoy adequate protection and security in the territory of the other Contracting Party’. From: M Malik, ‘Foreign Investment for Sustainable Development Program: Fair and Equitable Treatment (Best Practice Bulletin 3, Canada, September 2009) 4.

<sup>43</sup> M Malik, “Foreign Investment for Sustainable Development Program: Fair and Equitable Treatment” (Best Practice Bulletin 3, Canada, September 2009) 4.

<sup>44</sup> K Yannaca-Small, above n8, 129.



contracting parties.<sup>44</sup> This criterion may impact on the meaning of FET<sup>45</sup> leading to diverse interpretations of FET and uncertainty over its meaning. Thus, it seems that different formulations of FET lead to different interpretations of FET.<sup>46</sup>

### **3.3. Interpretation of Fair and Equitable Treatment Standard (FET) in relation to other treaty standards**

In addition to different ways of formulating FET, some tribunals interpret FET equate with other treaty standards such as the full protection and security standard.<sup>47</sup> This can be seen in the *Occidental* case.<sup>48</sup> However, some tribunals such as the *Azurix*<sup>49</sup> do not agree with interpretation of the tribunal in the *Occidental* case. Thus, interpretation of FET's denition is still arguable and uncertain.

Overall, as shown in Section 3.1 - 3.3, there are many approaches to defining the meaning of FET and even in the same approach there are different levels of FET interpretation. Tribunals employ high standards

of FET interpretation in some cases whilst in others they utilize lower standards of FET interpretation. In each approach, the denition of FET remains imprecise. All these factors contribute to different and uncertain meanings of FET. Moreover, different formulations of FET may give rise to different interpretations of its meaning. Furthermore, in terms of interpretation of FET in relation to other treaty standards, some tribunals agree and others do not with equalizing FET with the full protection and security standard. Additionally, since the role of FET changes from case to case, its meaning sometimes not as certain as would be desirable.<sup>50</sup> Thus, it can be concluded that there is no precise interpretation of FET's meaning.

### **4. The argument that the usefulness of the Fair and Equitable Treatment Standard (FET) for investors is not undermined by uncertainty about its meaning.**

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<sup>45</sup> I Tudor, above n3, 113.

<sup>46</sup> M Malik, above n43, 8.

<sup>47</sup> R Dolzer and C Schreuer, above n4, 149.

<sup>48</sup> *Occidental Exploration and Production Co v Ecuador*, LCIA Case No UN3467 (Award) (1July 2004).

<sup>49</sup> *Azurix Corp. v. The Argentine Republic* (2006) International Centre for Settlement of Investment Disputes (Additional Facility), Case no. ARB/01/12.

<sup>50</sup> K Yannaca-Small, above n8, 129.



Although some scholars deplore the uncertain of FET's meaning,<sup>51</sup> other scholars and commentators find that this lack of certainty may be a merit rather than a shortcoming.<sup>52</sup> Moreover, it seems that uncertainty of FET's meaning does not impair the usefulness of FET for investors. The arguments for this are outlined below.

### **Argument 1**

Although FET's meaning is uncertain, this uncertainty, in practice, does not impair or cancel the benefits that investors receive from the FET standard because tribunals define FET's meaning. Moreover, the uncertain meaning of FET may provide an opportunity for tribunal in order to interpret FET's meaning to cover a wide variety of the host states' conducts which may cause damage to investors.<sup>53</sup>

Furthermore, due to FET's uncertainty and flexibility as demonstrated by courts, FET can be interpreted or adapted to make it

congruent with the particular facts of each case and continually expanded to include new elements so that investors receive more benefits from FET standard.<sup>54</sup> There are many basic elements courts employ, as can be seen from the following analysis.

Legitimate expectation is one element that courts use to interpret FET in specific cases. The principle of legitimate expectation helps to refine the unclear concept of FET.<sup>55</sup> This is evident *Tecmed* cases.<sup>56</sup> In the *Tecmed* case, a dispute arose because of interference with an investor's contract by the regulatory authority of the Mexican government, who replaced the unlimited license of the investor with a limited license.<sup>57</sup> In this case, the court applied the provision from Mexico-Spain BIT guaranteeing the FET standard and judged that the replacement of the license by the host country contravening legitimate expectation was a violation of FET standards.<sup>58</sup> Thus, it can be seen from this case that although the contract states that the host states must provide

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<sup>51</sup> I Tudor, above n3, 236.

<sup>52</sup> R Dolzer and C Schreuer, above n4, 148.

<sup>53</sup> Surya P Subedi, above n2, 173.

<sup>54</sup> K Yannaca-Small, above n8, 111.

<sup>55</sup> Ibid.

<sup>56</sup> *Tecnicas Medioambientales Teemed SA v The United Mexican States*, ICSID Case No ARB (AF)/00/2 (Award) (29 May 2003).

<sup>57</sup> *CME v Czech Republic*, Partial Award, 13 September 2001, 9 ICSID Reports 121.

<sup>58</sup> Ibid.



FET for investors, there is no specific meaning of FET, court can use legitimate expectation as an element of FET and the court decides when a violation of legitimate expectation is also a violation of FET. Therefore, investors still receive benefits from FET.

Furthermore, transparency is also factors used by courts. In the *Metalclad* case,<sup>59</sup> the municipality declined to grant a construction permit without transparency and the tribunal judged that the municipality had violated FET standard. This case tribunal raises stability and transparency by considering with other factors such as preamble of treaty or prominence of the statement of FET principle.<sup>60</sup> This shows that FET's meaning is inconstant giving the opportunity to court to take various factors into account to give protection to investors in the most proper way. Apart from the factors mentioned above, an arbitral tribunal considers good faith an inherent element in FET.<sup>61</sup> This is evident in the *Tecmed* case, in which the tribunal interpreted FET in the BIT provision as 'an

expression and part of the bona fide recognized in international law'<sup>62</sup>. Moreover, in the *Waste Management* case<sup>63</sup>, the tribunal ruled that acting in good faith was a fundamental obligation of the host state under FET standard as included in Article 1105 of NAFTA. From these two cases, it can be seen that although FET's meaning is not clearly dened in the concept of interpreting FET as part of IMS or as part of international law<sup>64</sup>, the lack of precision of FET does not make it less useful for investors because a court can use its discretion to consider such factors as good faith to give proper protection to investors.

In some cases, an arbitral tribunal finds that FET standard could be applied in specific situations such as coercion and harassment applied directly to investors. In the *Pope* case, the government regulatory authority started a 'verication review' against investors that was aggressive and the court held that their action violated FET.<sup>65</sup> Thus, in this case, FET's unclear definition benefited investors

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<sup>59</sup> *Metalclad Corp. v Mexico*, Award, 30 August 2000, 5 ICSID Reports 209.

<sup>60</sup> R Dolzer and C Schreuer, above n14, 135.

<sup>61</sup> *Ibid* 145.

<sup>62</sup> *TECMED v Mexico*, Award, 29 May 2003, 43 ILM (2004) 133.

<sup>63</sup> *Waste Management v Mexico*, Final Award, 30 April 2004, 43 ILM (2004) 967.

<sup>64</sup> Tai-Heng Cheng, above n23, 3.

<sup>65</sup> *Pope & Talbot v Canada*, Award on Damage, 31 May 2002, 41 ILM (2002) 1347, at paras 67-69.



because the tribunal can apply FET standard to protect investors in a specific situation such as in the case of coercion and harassment, which might cause trouble to investors.

Finally, some tribunals consider compliance with contractual obligation and due process an element of FET standard. This can be evident from *SGS* case.<sup>66</sup>

Thus, it can be concluded that, although there is no specific definition of FET and there is no telling which basic element is included in FET, this uncertainty does not obscure or destroy FET's usefulness for investors because tribunal can interpret FET using several elements to give just and proper protection to investors. Moreover, the uncertainty provides flexibility for a court to interpret or adapt FET in accordance with the particular facts of each case so that investors receive justice and protection under FET standard.<sup>67</sup> In addition, the elasticity of FET's definition enables courts to continually include new elements in order to give more benefits of FET standard to investors.<sup>68</sup>

## **Argument2**

Although some scholars find that FET is inadequate because of its uncertain meaning, this shortcoming does not decrease the usefulness of FET for investors, but, on the other hand, it helps fill the gaps in cases where investors do not receive protection from other treaty provisions<sup>69</sup>, as can be seen from the following two cases.

The first case is indirect expropriation. Uncertainty of FET's meaning can be applied as an alternative and flexible way to give protection or provide remedy for investors in cases where the test for indirect expropriation has a high threshold making it hard for investors to obtain.<sup>70</sup> An example can be seen in the *Sempra case*,<sup>71</sup> in which the tribunal stated that the testing for indirect expropriation was difficult to implement, resulting in investors' property being expropriated. FET standard can make sure that where the justification is not clear for making a ruling on expropriation, a tribunal can interpret FET's meaning in the way that serves the aims of

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<sup>66</sup> *SGS v Philippines*, Decision on Jurisdiction, 29 January 2004, 8 ICSID Reports 518.

<sup>67</sup> *Waste Management Inc v United Mexican States* ICSID, ARB (AF)/00/3, Award rendered on 30 April 2004 (Crawford.Civiletti.Gomez) 99.

<sup>68</sup> K Yannaca-Small, above n8, 111.

<sup>69</sup> R Dolzer and C Schreuer, above n14, 122.

<sup>70</sup> K Yannaca-Small, above n8, 111.

<sup>71</sup> *Sempra Energy v The Argentine Republic*, ICSID Case No. ARB/02/16, 28 September 2007, paras 300, 301.



justice or redresses unlawful damage for investors.<sup>72</sup> Thus, in this case it seems that FET's inconstant meaning does not undermine its benefits for investors. On the contrary, FET's exibility allows a tribunal to ll the gap in cases where investors fail to obtain testing for indirect expropriation so that investors are compensated or do not have to face expropriation.

The second case is the BITs practice. Uncertainty of FET's meaning fills gaps in cases where investors receive little or no protection from other standards such as MFN and NT.<sup>73</sup> Although FET's meaning can be dened in different ways, one of them which dene FET as a part of international law gives tribunals the opportunity to underline the independence of FET standard from the NT and MFN<sup>74</sup> and then interpret FET in favor of investors irrespective of whether they have sufficient protection from NT or MFN. For example, although a state promises protection under NT and MFN to investors, in some cases, the level of protection is inadequate

because nationals or investors from the most favoured nation also receive insufficient protection.<sup>75</sup> This means investors also receive low levels of protection under NT or MFN standard.<sup>76</sup> At this point, due to the exibility of FET's meaning, when problems arise between investors and the state, the tribunal may interpret FET in such a way that investors receive sufficient protection even if foreign investors obtain the same treatment as the host state's investors or most favoured nation's investors, which is insufcient treatment.<sup>77</sup>

Moreover, in the event that investors cannot receive benets from an MFN clause because it is not stated in the treaty or investors cannot prove that investors of other nationalities have obtained better treatment, tribunal arbitration may, instead, interpret FET standard in favour of investors.<sup>78</sup> Thus, it seems that FET's benets are not undermined by its uncertainty. Conversely, FET's uncertain meaning gives flexibility to tribunals to interpret FET standard in favour of investors when they receive no or low levels of

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<sup>72</sup> M Sornarajah, *The International Law on Foreign Investment* (Cambridge: Cambridge University Press, 2010) 460-63.

<sup>73</sup> R Dolzer and C Schreuer, above n14, 122-123.

<sup>74</sup> K Yannaca-Small, above n8, 123.

<sup>75</sup> Jeswald W Salacuse, above n1, 221.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid, 367.

<sup>78</sup> Ibid.

protection from other standards such as NT or MFN.

## 5. Conclusion and suggestions

Even though FET provides benefits to investors, some scholars deplore FET's meaning uncertain which results from several approaches and several ways of FET's formulation. Nevertheless, this uncertainty does not obscure or destroy the usefulness of FET for investors, since tribunals can interpret FET using several elements such as good faith, legitimate expectation, coercion and harassment, compliance with contractual obligation and due process to adapt FET in accordance with the particular facts of each case, so that investors receive justice and proper protection. Moreover, thanks to the

elasticity of FET's definition, tribunals can continually include new elements to give more benefits derived from FET standard to investors. Furthermore, uncertainty of FET's meaning fills gaps when investors receive low levels of protection or do not receive protection from other standards such as MFN, NT or expropriation. Therefore, the author suggests that although FET's meaning is still vague, such standard is useful for investors in many ways such as providing protection to investors and preventing foreign investors against lack of protection or justice as a result of changes in the host country's domestic law. Moreover, FET fills gaps when investors receive low levels of protection or do not receive protection from other standards such as MFN or NT.



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