IRSTI 10.87.79

B. Kuzhatov

M. Narikbaev KAZGUU University, Nur-Sultan, Kazakhstan
(E-mail: k_bagdat@kazguu.kz; bkuzhatov@gmail.com)

The standard of fair and equitable treatment in the new environment

Abstract. Fair and equitable treatment (FET) is one of the controversial standards in international investment law. It is a subject of intense academic discussion. Recent shifts in international investment treaty regime such as the raise of concern on the right to regulate for public purposes and legitimacy crisis in investor-state dispute settlement system have contributed to the revision of the long-standing FET formulations. This research article aims to address the recent developments in the international investment treaty practice in relation to the FET. For this purpose, the article analyses stages of historical development of the FET and recent approaches on the FET formulation. The article also discusses advantages and disadvantages of these approaches. In conclusion, the article also notes the FET formulation from the Kazakhstan's perspective and expresses its view. The scientific novelty of the article is determined by the fact that this research devotes critical analysis to the recent approaches and identifies flaws and advantages of them. The subject of the research is international investment law, particularly treaty regime.

Keywords: fair and equitable treatment, international investment law, the right to regulate, minimum standard treatment, investor, host state, arbitration tribunal, BIT, MIT.

DOI: https://doi.org/10.32523/2616-6844-2021-134-1-28-34
Received: 24.02.21 / **Accepted:** 26.03.21

Introduction. The FET is regarded as one of the core investment protection standard in the international investment law. Literally, this standard refers to treat foreign investors fairly and equitably. The normative guidelines contain several elements, the purpose of which is to protect investors against arbitrary, discriminatory, or abusive conduct by host states. It appears almost in all bilateral investment treaties (BIT) and multilateral investment treaties (MIT), the amount of which around 3000.

The relevance of the FET has become very high when regulatory expropriation has been recognised as a non-compensable taking. The nascence of the regulatory expropriation concept in the international investment law has led to decrease of expropriation claims but has opened an arbitration door for investors under the FET standard.

Currently the FET is an integral part of every submitted claim to arbitration. The broad application of the FET has demonstrated it as a protective shield for investors from regulatory measures of host states. At the same time it has exposed uncertainties and risks to treaty parties. In particular, uncertainties are related with the indeterminate content and the lack of coherence in application of the FET. The vague wording and the indeterminate scope of the FET gives rise to speculation and to challenge of the legitimate regulatory rights of host states. It became difficult for arbitral tribunals to identify the borderline between the FET breach and legitimate right to regulate of the host states.

These uncertainties have been taken into account in the recent formulations of the FET under the BITs and MITs. Recent treaties have revised their approach on the FET formulation. There are currently two widespread approaches: the EU and the US.

In this respect, this article aims to provide analysis on the approaches recently incorporated in BITs and MITs. The article consists of two parts. First part devotes the analysis on the historical development of the FET. This part elucidates the main stages of the FET development and issues on each stage. Second part examines the recent formulations of the FET. The article discusses two widespread approaches in recent treaty practice: the EU and the US approaches. In this way, the article provides for advantages and disadvantages of two approaches.

Methodology. The article employs doctrinal methodology to legal research from the perspective of historical, comparative, and empirical analysis. The research under this article is text-based and if applicable supported by the results of empirical studies.

Discussion *I. Analysis of historical development.* The historical development of the FET is full of controversy and a subject of academic debate. This analysis divides the historical development into three following stages and provides explanation for each of them.

First stage is an early emergence of the FET as an investment protection standard. It has been incorporated into practically every concluded international investment agreement (IIA). Historically, the purpose of incorporation of the FET in IIAs was related to filling of the gaps that may be left by the investment protection standards [1]. The FET has been incorporated in a vague formulation and parties to IIAs have not paid close attention to content. However, at this stage the FET has been less raised investment protection standard and mostly equated to minimum standard treatment (MST) under customary international law. Moreover, it was time when investors mostly raised the expropriation claim.

Second stage is a rise of the FET as an autonomous standard. At this stage there is no doubt that the FET has become one of the pillars of the investment protection and shelter for investors over the world. At this stage expropriation claims have become a rare occurrence. It was due to two factors. On the one hand, a rise of host states' discretion in relation to outright expropriation of investment of aliens. On the other hand, an establishment of stringent criteria for finding a breach of expropriation under IIAs. Regulatory expropriation has been recognised as a non-compensable taking. It led to a sharp increase of the FET claims by investors. Currently the FET is most invoked investment protection standard in investor state dispute settlement (ISDS) [2]. Particularly, at this stage the FET has accumulated abundant arbitration practice. The scope of the FET has been expanded largely through interpretations [3]. Therefore, the contours of the FET scope have been blurred. It became difficult to determine content and precise elements of the FET. Arbitration practice was split into two schools. First school has equated the FET to MST based on the arbitration cases of Neer, *Robert and Hopkins.* Second school has recognized the FET as an autonomous standard and has provided own content. In this way, the FET scope has become too flexible and as a result it has led to confine legitimate regulatory rights of host states.

Third stage is a current development of the FET under new conditions. At third stage the FET has been a subject of severe criticism. Currently in IIA's practice the FET is found in different formulations. In accordance with UNCTAD report, there are four common formulations of FET: 1) unqualified FET; 2) the FET linked to international law; 3) the FET linked to the minimum standard under customary international law; 4) the FET with additional substantial content [4]. These different formulations, indeterminate content and the lack of coherence in application have led to revision of the FET under a number IIAs. New generation of IIAs have reviewed traditional formulations and have incorporated more balanced forms of the FET.

II. Analysis of recent approaches on the FET formulation. Analysing recent treaty practice, the author notes two widespread approaches on the

FET formulation. First is the EU approach that involves a provision of closed list of elements and explicit the right to regulate in the FET. The US approach that maintains the limitation of the FET to the MST.

In terms of the first, the EU has started to negotiate comprehensive economic and trade agreements that *inter alia* include investment protection clauses. For example, Comprehensive Economic and Trade Agreement with Canada (CETA), an Investment Protection Agreement with Vietnam. This article finds the following peculiarities of this approach:

• provision of exhaustive list of breaches of the FET;

• formulation of breaches was supplemented with wording 'manifest', 'targeted', 'abusive' and 'fundamental breach';

• provision of parties with the right to amend the list by agreement;

• explicit incorporation of the right to regulate of treaty parties for the public purposes.

• balanced treaty preamble.

The EU approach demonstrates the complex package of the revision. In particular, the EU approach focuses on the determination of the FET content and the borderline between investment protection and the right to regulate. Analysing recent the EU treaties, there is clear that drafters have attempted to achieve a balance between investment protection and the right to regulate. Drafters have made clear by incorporating the right to regulate of states for public purposes in investment protection provisions of the treaties that include the FET. For example, in CETA *'For the purpose of this Chapter, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity'* [5]. It is included in preamble of the CETA. The term of the right to regulate does not have an entrenched meaning in international investment law. But it is used interchangeably with the concepts of sovereignty, national space, regulatory rights, police power, regulatory autonomy, regulatory measures and regulatory freedom of states to regulate. The term of the right to regulate is widely mentioned in recent scholars' contributions. In particular, it is understood as the right of the host state to regulate foreign investment in order to promote domestic priorities and to protect the public welfare from possible negative impacts of foreign and domestic investment. More narrowly the term is discussed in recent scholar contributions, where the term is defined as the legal right of the host state that permits it exceptionally to regulate in derogation of international commitments it has undertaken in the framework of investment agreements without incurring a duty to compensate [6]. Moreover, the author notes that the EU approach provides more limitation on the scope of FET elements through formulations 'fundamental breach', 'manifest arbitrariness', 'targeted discrimination' and 'abusive treatment'. Furthermore, the EU approach gives an explanation on elements of the FET.

In contrast, the US has maintained the MST approach as is in their Free Trade Agreements rather than the autonomous FET. The author notes the continuance of this approach on the following grounding. The approach originally had found strong support from the developed countries such as United States and Canada. Then, the MST has become a matter of intense debate between developed and developing states. It is well illustrated and discussed in the framework of the North American Free Trade Agreement (NAFTA) between Canada, the US and Mexico. Despite the text of Article 1105 (1) of NAFTA that refers to international law, NAFTA Free Trade Commission concluded that Article 1105(1) prescribes the MST under customary international law to be afforded to investments of investors of another Party. As compared with the NAFTA, the US Model BIT 2005 incorporated the explicit formulation on the equation of the FET and the MST.

There is a view that the advantage of the MST is that the MST prevents the expansive interpretation of the FET and assists in preserving the right to regulate [7]. It derives from the point that the MST as a rule requires a high liability threshold and could be applicable to very serious breaches. As Glamis tribunal asserted 'it is meant

to serve a floor, an absolute bottom, below which conduct is not accepted by the international community' [8]. As long as the MST is an old standard rather than the relatively recent the FET, there is a more coherence in its application based on the abundant arbitration practice. Arbitration practice on the MST derives since 1926 *Neer* decision and NAFTA arbitration awards have contributed to the evolution of the MST.

Irrespective of this, the elements of the MST remain indeterminate. It may represent a weakness of this approach. Particularly, the MST lacks a clearly defined content. In determination of the MST content, tribunals usually refer to decisions of the *Neer, Robert* and *Hopkins* cases. In particular, Neer decision defined the MST as outrage, bad faith, willful neglect of duty and insufficiency of governmental action [9]. In determination of the MST breach, tribunals refer to the previous decisions of other tribunals. In this line, common defined elements of the MST are asserted denial of justice, lack of due process, lack of due diligence, arbitrariness and discrimination. These elements are in some way overlapped and interconnected [10].

In this respect, an outdated character of the MST hinders its broad application. However, tribunals confirmed that the MST is constantly in the process of evolution [11]. This evolution includes hundreds of concluded international investment treaties and awards since 1926 *Neer* decision. In this line, the MST is going to be flexible under new conditions. However, this flexibility could present difficulty in balancing investment protection and the right to regulate of states for public purposes.

Given the indetermined nature of the MST, both the US (2004 and 2012) and Canada (2004 and 2014) model treaties have provided a specificity to the FET and the MST wording [12]. In particular, the US model treaty defines the exhaustive elements of the FET limiting to the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world. In this way, drafters may have intended to limit the scope of the FET.

In relation to a nexus between these two approaches, the author notes the varying views. As *Enron* tribunal noted that MST is sufficiently elaborate and clear, FET might be equated with it. But in other more vague circumstances, the FET may be more precise than the MST. Therefore, in the context of the US and Argentina treaty applicable to the case can also require a treatment additional to, or beyond the customary international law [13].

Moreover, it is generally claimed that the FET could be broader than the MST. Irrespective of that there is an arbitration practice where the implicit FET formulation was equated to the MST. For example, the discussion has been held in the interpretation of the FET under the Energy Charter Treaty. Despite that the majority of the tribunals have concluded that the FET under the ECT as an autonomous standard, *Blusun* tribunal came to the conclusion that Article 10 (1) incorporates the FET under the MST [14]. Taking into account the equation issue, the recent treaties have incorporated more clear FET content.

III. From Kazakhstan's perspective. In the context of this topic, the article notes that recent trends on the FET is important also for Kazakhstan. To date, Kazakhstan has concluded over 40 (forty) bilateral investment treaties on the encouragement and reciprocal protection of investment (Ministry of Foreign Affairs of the Republic of Kazakhstan 2020). There are also multilateral treaties that contain investment protection provisions such as the Energy Charter Treaty and the Eurasian Economic Union Treaty. The majority of them were concluded between 1992 and 2005, which based on the old investment treaty regime. The FET provisions in those treaties incorporate indeterminate content. In the framework of these investment treaties, Kazakhstan is Respondent in 19 (nineteen) international investment arbitrations [15]. 5 (five) of them were initiated under the Energy Charter Treaty and 7 (seven) of them under the bilateral investment treaty between Kazakhstan and the United States. In majority of them the FET standard is a subject of claims of investors.

The recent Kazakhstan and Singapore BIT (2018) incorporates the US approach. While

BIT between Kazakhstan and the United Arab Emirates (2018) has no FET standard. BIT between Kazakhstan and Japan BIT (2014) has followed old indeterminate approach. Therefore, it is noted a neutral position of Kazakhstan on the FET approach.

Results and Conclusion. The article has sought to elucidate the review of recent developments in the FET formulation and their peculiar features. Currently, states seek to develop new types of investment treaties that strike a balance between regulatory space and investor protection.

The number of new model treaties has been elaborated. In this respect, the article has discussed the recent treaty practice and identified two widespread approaches: the EU and the US. The article has critically discussed peculiarities of both approaches and describes their advantages and disadvantages. The article also notes the FET formulation from the Kazakhstan's perspective and expresses its view. There is no doubt that a new wave of treaties will also touch upon Kazakhstan since most of the treaties have been concluded in the late 1990s and 2000s.

References

1. Dolzer R., Schreuer C. Principles of International Investment Law. -Oxford: Oxford University Press, 2008. - 122 p.

2. United Nations Conference on Trade and Development 'Fair and Equitable Treatment UNCTAD Series on Issues in International Investment Agreements'. – New York: UNCTAD, 2012. - 10 p.

3. Sornarajah M. Resistance and change in the international law on foreign investment. (Cambridge: Cambridge University Press, 2015, 247p).

4. United Nations Conference on Trade and Development 'Fair and Equitable Treatment UNCTAD Series on Issues in International Investment Agreements' (New York:2012, UNCTAD, 17-18 p.)

5. Comprehensive Economic and Trade Agreement between the EU and Canada, Article 8.9. [Electronic resource] – URL: https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/ (Accessed: 29.01.2021).

6. Aikaterini T. The right to regulate in International Investment law, (Hart Publishing, Oxford, 2013, 33 p).

7. Vasciannie S. (1999) The Fair and Equitable Treatment Standard in International Investment Law and Practice, British Yearbook of International Law, Vol. 70. Issue 1. P.144 -164.

8. Glamis Gold v United States, UNCITRAL, Award, 8 June 2009 at para. 615. [Electronic resource] – URL: https://www.italaw.com/cases/487 (Accessed: 11.02.2021).

9. L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States, 61f. [Electronic resource] – URL: https://legal.un.org/riaa/cases/vol_IV/60-66.pdf (Accessed: 13.02.2021).

10. United Nations Conference on Trade and Development 'Fair and Equitable Treatment UNCTAD Series on Issues in International Investment Agreements' (New York:2012, UNCTAD, 28 p.).

11. Newcombe A. and Paradell L. Law and Practice of Investment Treaties: Standards of Treatment (The Netherlands: Kluwer Law International, 2009, 238 p).

12. The US (Article 5) and Canada (Article 6) model treaties. [Electronic resource] –URL: https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf and https://www.italaw.com/sites/default/files/files/italaw8236.pdf (Accessed: 25.01.2021).

13. Enron Corporation, Ponderosa Assets, L.P. v. Argentina at para. 258. [Electr. resource] – URL: https://www.italaw.com/cases/401 (Accessed: 25.01.2021).

14. Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic, ICSID Case No. ARB/14/3 at para. 319 (3). [Electronic resource] – URL: https://www.italaw.com/cases/5739 (Accessed: 27.01.2021).

15. (Investment Policy Hub of UNCTAD, 2020). [Electronic resource] – URL: https://investmentpolicy.unctad.org (Accessed: 03.02.2021).

Б. Құжатов

«М.С. Нәрікбаев атындағы КАЗГЮУ Университеті» АҚ, Нұр-Сұлтан, Қазақстан

Жаңа жағдайдағы әділеттілік және тең құқықтық режим стандарты

Аннотация. Әділеттілік және тең құқықтық режим (FET) - халықаралық инвестициялық құқықтағы даулы стандарттардың бірі және қарқынды ғылыми пікірталастардың тақырыбы. Халықаралық инвести-

циялық келісімшарттар режиміндегі жақында болған өзгерістер, мысалы, қоғамдық мақсаттар үшін реттеу құқығына қатысты алаңдаушылықтың күшеюі және инвесторлар мен мемлекет арасындағы дауларды реттеу жүйесіндегі заңдылықтың дағдарысы, FET бұрыннан келе жатқан тұжырымдаманы қайта қаралуына ықпал етті. Бұл ғылыми жұмыс FET-ке қатысты халықаралық инвестициялық шарттар практикасындағы соңғы өзгерістерді қарастыруға бағытталған. Осы мақсатта мақалада FET-тің тарихи даму кезеңдері мен оны тұжырымдаудың соңғы тәсілдері талданады. Мақалада осы тәсілдердің артықшылықтары мен кемшіліктері де талқыланады. Қорытындылай келе, мақалада Қазақстанның көзқарасы бойынша FET тұжырымы көрсетілген және автор өз пікірін білдіреді. Мақаланың ғылыми жаңалығы осы зерттеудің соңғы тәсілдерді сыни талдауға және олардың кемшіліктері мен артықшылықтарын анықтауға арналғандығымен анықталады. Зерттеу тақырыбы халықаралық инвестициялық құқық, атап айтқанда инвестицияларды қорғау туралы келісімдер режимі болып табылады. Мақалада тарихи, салыстырмалы және эмпирикалық талдау тұрғысынан құқықтық зерттеудің доктриналық әдістемесі қолданылады. Осы мақаладағы зерттеулер мәтінге негізделген және қажет болған жағдайда эмпирикалық зерттеулермен қамтамасыз етілген.

Түйін сөздер: әділетті және тең құқылы режим, халықаралық инвестициялар құқығы, реттеу құқығы, төменгі стандартты режим, инвестор, қабылдаушы мемлекет, арбитраждық сот, екіжақты инвестициялық келісім (BIT), көпжақты инвестициялық келісім (MIT).

Б. Кужатов
АО «Университет КАЗГЮУ имени М.С. Нарикбаева»,
Нур-Султан, Казахстан

Стандарт справедливого и равноправного режима в новых условиях

Аннотация. Справедливый и равноправный режим (FET) - один из спорных стандартов в международном инвестиционном праве и предмет интенсивных научных дискуссий. Недавние изменения в режиме международных инвестиционных договоров, такие как рост озабоченности по поводу права на регулирование в общественных целях и кризис легитимности в системе урегулирования споров между инвесторами и государством, способствовали пересмотру давних формулировок FET. Данная исследовательская статья направлена на рассмотрение последних изменений в практике международных инвестиционных договоров в отношении FET. С этой целью в статье анализируются этапы исторического развития FET и недавние подходы к его формулировке. В статье также обсуждаются преимущества и недостатки этих подходов. В заключение в статье также отмечается формулировка FET с точки зрения Казахстана и автор выражает свое мнение. Научная новизна статьи определяется тем, что данное исследование посвящено критическому анализу новейших подходов и выявлению их недостатков и преимуществ. Предметом исследования является международное инвестиционное право, в частности режим соглашений по защите инвестиций. В статье используется доктринальная методология правовых исследований с позиций исторического, сравнительного и эмпирического анализа. Исследования в рамках этой статьи основаны на тексте и, если применимо, поддерживаются результатами эмпирических исследований.

Ключевые слова: справедливый и равноправный режим, международное инвестиционное право, право на регулирование, минимальный стандартный режим, инвестор, принимающее государство, арбитражный суд, двухстороннее инвестиционное соглашение (BIT), многостороннее инвестиционное соглашение (MIT).

References

1. Dolzer R., Schreuer C. Principles of International Investment Law (Oxford University Press, Oxford, 2008, 122 p.).

2. United Nations Conference on Trade and Development 'Fair and Equitable Treatment UNCTAD Series on Issues in International Investment Agreements' (UNCTAD, New York, 2012, 10 p.)

3. Sornarajah M. Resistance and change in the international law on foreign investment. (Cambridge University Press, Cambridge, 2015, 247p).

4. United Nations Conference on Trade and Development 'Fair and Equitable Treatment UNCTAD Series on Issues in International Investment Agreements' (UNCTAD, New York, 2012, 17-18 p.)

5. Comprehensive Economic and Trade Agreement between the EU and Canada, Article 8.9. [Electronic resource]. Available at: https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/ (Accessed: 29.01.2021).

6. Aikaterini T. The right to regulate in International Investment law, (Hart Publishing, Oxford, 2013, 33 p).

7. Vasciannie S. The Fair and Equitable Treatment Standard in International Investment Law and Practice, British Yearbook of International Law, 70(1), 144 -164(1999).

8. Glamis Gold v United States, UNCITRAL, Award, 8 June 2009 at para. 615. [Electronic resource]. Available at: https://www.italaw.com/cases/487 (Accessed: 11.02.2021).

9. L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States, 61f. [Electronic resource]. Available at: https://legal.un.org/riaa/cases/vol_IV/60-66.pdf (Accessed: 13.02.2021).

10. United Nations Conference on Trade and Development 'Fair and Equitable Treatment UNCTAD Series on Issues in International Investment Agreements' (UNCTAD, New York, 2012, 28 p.).

11. Newcombe A. and Paradell L. Law and Practice of Investment Treaties: Standards of Treatment (The Netherlands: Kluwer Law International, 2009, 238 p).

12. The US (Article 5) and Canada (Article 6) model treaties. [Electronic resource]. Available at: https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf and https://www.italaw.com/sites/default/files/files/italaw8236.pdf (Accessed: 25.01.2021).

13. Enron Corporation, Ponderosa Assets, L.P. v. Argentina at para. 258. [Electronic resource]. Available at: https://www.italaw.com/cases/401 (Accessed: 25.01.2021).

14. Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic, ICSID Case No. ARB/14/3 at para. 319 (3). [Electronic resource]. Available at: https://www.italaw.com/cases/5739 (Accessed: 27.01.2021).

15. Investment Policy Hub of UNCTAD, 2020. [Electronic resources]. Available at: https://investmentpolicy.unctad.org (Accessed: 03.02.2021).

Сведение об авторе:

Құжатов Б. - Заң ғылымдарының магистрі (LLM, Queen Mary University of London), «M.C. Нәрікбаев атындағы КАЗГЮУ Университеті» АҚ Құқық жоғары мектебінің докторанты, Қазақстан Республикасы Үкіметінің Қашаған және Қарашығанақ мұнай-кен орындарындағы арнайы тағайындалған PSA Өкілетті органында даулы мәселелерді шешу жөніндегі бас заң менеджері, Нұр-Сұлтан, Қазақстан.

Kuzhatov B. - Master of Law (LLM, Queen Mary University of London), Ph.D. student at the Higher School of Law M. Narikbaev KAZGUU University, Chief Legal Manager on dispute resolution in a specially appointed Authorized body of the Government of the Republic of Kazakhstan on PSA at Kashagan and Karachaganak, Nur-Sultan, Kazakhstan,.