

## **Proposal for reforming the fair and equitable treatment (FET) standard in International Investment Agreements (IIAs)<sup>1</sup>**

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### **Introduction**

One of the most important pillars of investment protection under international law is the understanding that a foreign investor investing in a host state should be treated ‘fairly and equitably’. The importance of this notion is supported by the inclusion of the fair and equitable treatment (FET) standard in most of the International Investment Agreements (IIAs), as well as its invocation in the vast majority of investment disputes. However, the concern has been expressed frequently that a broad interpretation of this usually openly formulated provision has an adverse impact on the host state’s ‘right to regulate’ in a public interest. These concerns have been voiced particularly as a result of FET claims in which investors have challenged a variety of state decisions in publicly sensitive areas, e.g. renewable energy, waste management, public health issues, and access to water. In this regard, tribunals have often been criticised for attaching insufficient weight in their assessment of the FET standard to a host state’s right to regulate and its duty to fulfil its obligations under other international treaties, such as human rights and environmental treaties.

Yulia Levashova has analysed in her dissertation 66 FET cases and 89 IIAs. One of the results indicates that in the last 5 years, the balance has gradually shifted from an approach of a (very) broad interpretation of investor protection under the FET standard towards an approach in which also the state’s right to regulate is recognised, and in particular when this right is exercised to benefit the public interest and/or to fulfil obligations in the field of human rights, health, and environmental protection, derived from international treaties.

However, Levashova’s research shows that there are still gaps in clarifying the scope of the FET standard in the IIAs, including the new generation of treaties. The following proposals have the aim to harmonise the treaty practice – both the treaty drafting and the treaty interpretation practice. In the proposals, a host state is allowed to maintain adequate policy space to exercise its right to regulate in a public interest and, on the other hand, obliged to observe its obligations under FET standards in IIAs:

- **Exhaustive list of state’s obligations complimented with a provision on the state’s right to regulate**

For example, in the IIAs concluded between the EU and Canada (CETA),<sup>4</sup> the EU and Vietnam,<sup>5</sup> and the EU and Singapore,<sup>6</sup> the obligation to provide fair and equitable treatment has been clarified

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<sup>1</sup> These recommendations are based on the doctoral study ‘The Right of States to Regulate in the Public Interest and the Right of Investors to Receive Fair and Equitable Treatment’, conducted by Yulia Levashova under the supervision of Professor Ige Dekker and Professor Tineke Lambooy. This study will be published *Kluwer International Arbitration Law Library*, forthcoming in 2019. These recommendations are also based on the research conducted by Yulia Levashova on CSR and international investment law. The results of this research have been published in the following article: Y. Levashova, The Accountability and Corporate Social Responsibility of Multinational Corporations for Transgressions in Host States through International Investment Law, *Utrecht Law Review*, Vol. 14 No 2, 2018 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3204456](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3204456)>.

<sup>2</sup> PhD defence on 5 December 2018.

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<sup>4</sup> Comprehensive Economic and Trade Agreement between the EU and Canada (CETA), (signed 30 October 2016) <<http://ec.europa.eu/trade/policy/in-focus/ceta/>>.

through an exhaustive, but expandable list of state obligations towards foreign investors. Furthermore, these agreements include provisions on the state's right to regulate in the public interest. What is important in reforming the FET standard in future treaties is to continue to include such a list. The exhaustive list of obligations provides some certainty and predictability to host states and investors about those types of state conduct that might lead to a breach of the FET standard.

Also important is the explicit codification of the host state's right to regulate in some recent IIAs. See examples hereof in CETA, the EU-Singapore FTA and the Dutch Model BIT.<sup>7</sup> Explicating the right to regulate in the body of an IIA constitutes a strong sign that, in the opinion of the contracting states, the role of tribunals is to balance the state's public interests and the interests of the investor when interpreting and applying the FET standard.

- **Direct obligations towards investors**

Further, the retaining of adequate domestic policy space, while providing the FET standard to investors, can be attained by including a provision on Corporate Social Responsibility (CSR) in the IIA. Such a provision should be addressed directly to the foreign investors rather than addressed to the contracting states. Examples hereof are the 2016 Morocco-Nigeria Bilateral Investment Agreement (BIT),<sup>8</sup> the 2016 Argentina-Qatar BIT,<sup>9</sup> the 2016 Pan-African Investment Code,<sup>10</sup> and the 2012 South African Development Community (SADC) Model Bilateral Investment Treaty Template.<sup>11</sup>

Also, it is essential to specify in the CSR provisions to which CSR norms an investor should adhere while operating in a host state. It is not sufficiently to merely refer to the 'internationally recognized standards of corporate social responsibility' that often can be traced in CSR provisions.<sup>12</sup> In the absence of a definition of CSR norms, tribunals may face difficulty in interpreting these norms as it will remain unclear what investor obligations follow from such CSR provisions. A concrete specification of the CSR norms that foreign investors are expected to comply with when investing in the host state provides more concrete guidance to such investors, as well as to arbitrators. For example, the Dutch Model BIT refers to the OECD Guidelines for Multinational Enterprises, the United Nations Guiding Principles on Business and Human Rights, and the Recommendation CM/REC(2016) of the Committee of Ministers to Member States on human rights and business. The Morocco-Nigeria BIT refers to the ILO Tripartite Declaration.

Such CSR obligations of investors - stipulated in an IIA - can be even more effective, if the same treaty also contains a provision that allows a tribunal to reduce the protection under the substantive investment protection clauses, e.g. the FET standard, in the situation in which an investor has

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<sup>5</sup> The EU-Vietnam FTA, draft text (January 2016) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>>.

<sup>6</sup> The EU-Singapore FTA, (April, 2018), Investment Protection Agreement <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>>.

<sup>7</sup> Dutch Model BIT <<https://www.rijksoverheid.nl/ministeries/ministerie-van-buitenlandse-zaken/documenten/publicaties/2018/10/26/modeltekst-voor-bilaterale-investeringsakkoorden>> accessed on 5 November 2018.

<sup>8</sup> Morocco-Nigeria BIT (signed 3 December 2016), <<http://investmentpolicyhub.unctad.org/IIA/treaty/3711>>.

<sup>9</sup> Argentina-Qatar BIT (signed 6 November 2016), <<http://investmentpolicyhub.unctad.org/IIA/treaty/3706>>.

<sup>10</sup> United Nations Economic Commission for Africa, 'Conference of African Ministers of Finance, Planning and Economic Development', UN Doc. E/ECA/CM/50/1 AU/STC/FMEPI/MIN/1(III) (2017).

<sup>11</sup> South African Development Community (SADC) Model BIT Template of 2012 with Commentaries, <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/2875>>.

<sup>12</sup> For example: Art. 12, Argentina-Qatar BIT (2016).

breached one or more of the CSR provisions contained in the IIA.<sup>13</sup>

- **The investor's due diligence efforts**

The inclusion of the investor's duty of conducting due diligence, is another aspect that can help to create a better balance between the rights and obligations of states and investors under the FET standard. For example, in Article 7 of Dutch Model BIT, the contracting parties are encouraged to reaffirm the importance of investor's due diligence 'to identify, prevent, mitigate and account for the environmental and social risks and impacts of its investment.'

The importance of due diligence also can be observed in case law on the FET standard. Some tribunals have underlined that an investor bears the responsibility of appraising the reality and the context of the state, in which the investment is/will be made, by performing a due diligence investigation and conducting risk assessments. The investor has to be aware and to take into account the relevant regulations, policies and decisions concerning its investment in order to anticipate the possible risks.<sup>14</sup> This aspect played particularly a role in cases, in which the investor's claim was based on a claim to protect his 'legitimate expectations' in the context of regulatory changes applied to a general regulatory framework. The extent of an investor's due diligence investigation can operate as a yardstick in judging whether the contested changes could have been predicted by an investor. Only if the changes were not foreseeable by a prudent investor,<sup>15</sup> despite visible efforts to collect the information about the future of the regulatory framework, the legitimate expectations of the investor may rise to the protection under the applicable IIA.

Therefore, it would be advisable to specify in a IIA that an investor has the duty to conduct an adequate due diligence comprising an investigation of the environmental, human rights and social risks, and that this constitutes a condition for receiving a fair and equitable treatment. An explicit reference in IIAs to an investor's duty to conduct due diligence also strengthens the importance of investors' responsibilities under international investment law.<sup>16</sup>

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<sup>13</sup> In Article 23 of the Dutch Model BIT, this idea is reflected in the provision 'Behavior of the investor.' It provides that 'a Tribunal may, in deciding on the amount of compensation, take into account non-compliance by the investor with its commitments under the UN Guiding Principles on Business and Human Rights, and the OECD Guidelines for Multinational Enterprises.'

<sup>14</sup> *Charanne Construction v. Spain*, SCC Case No. 062/2012 Award (21 January 2016) para. 505.

<sup>15</sup> This threshold is indicated in *Isolux Netherlands, BV v. Kingdom of Spain*, SCC Case V2013/153, Award (17 July 2016) para. 781.

<sup>16</sup> UNCTAD, *International Policy Framework for Sustainable Development*, 2015, p. 58. This framework stresses among the options for states in balancing their treaties is to introduce 'Investor obligations and responsibilities' that also can include specific CSR provisions directed at the application of the FET standard. See: <[http://unctad.org/en/PublicationsLibrary/diaepcb2012d5\\_en.pdf](http://unctad.org/en/PublicationsLibrary/diaepcb2012d5_en.pdf)>. See also in this context the *Urbaser v. Argentina* case in which the investor's obligation to respect the human right to access to water was acknowledged. See: *Urbaser v. Argentina*, ICSID Case No. ARB/07/26 Award (8 December 2016).