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TEMPLARS ThoughtLab – ISDS Series | Part III

Fair and Equitable Treatment

Introduction

This is the third instalment of the TEMPLARS ISDS Series, exploring recent trends in the Investor-State Dispute Settlement (ISDS) system. In the opening contribution, we introduced the ISDS system, its historical development, operational mechanics and the types of disputes it addresses. In the second instalment, we examined the Full Protection and Security (FPS) standard. This third instalment considers the Fair and Equitable Treatment (FET) standard, the most frequently invoked and contested standard of protection in international investment law.

The Fair and Equitable Treatment Standard – Definition and Scope

The FET standard is a substantive protection found, in one form or another, in virtually all bilateral investment treaties (BITs) and other international investment agreements (IIAs). It requires host states to accord foreign investments a quality of treatment, assessed by reference to the principles of good governance, due process and fairness that underpin the international legal order.

The typical treaty formulation, particularly for old generation BITs, is illustrated by the UK-Nigeria BIT which provides in Article 2(2) that “investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment ... in the territory of the other Contracting Party.” Similarly, Article 3(1) of the China-Nigeria BIT provides that “investments of investors of each Contracting Party shall all the time be accorded fair and equitable treatment in the territory of the other Contracting Party.”

The FET standard is often described as the workhorse of investment treaty arbitration: it captures a broader range of state misconduct than any other single standard and has been the basis of more successful claims than any of the other treaty protections.

The Relationship Between FET and the Minimum Standard of Treatment

The relationship between FET and the customary international law minimum standard of treatment has been the subject of sustained debate and has led to the emergence of two broad positions. The "equivalence" view holds that FET is simply a codification of the customary international law minimum standard of treatment enunciated in the seminal **Neer v. Mexico** decision.¹ In that case, the US-Mexico General Claims Commission was asked to determine whether Mexico's failure to investigate and prosecute the killing of an American national amounted to an international delinquency. In dismissing the claim and setting the threshold for breach, the Commission held that:

"the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."

Under the "equivalence" interpretation, the threshold for breach is high, and the content of FET does not exceed the protections available under customary international law. This position was adopted by the NAFTA Free Trade Commission in its 2001 Notes of Interpretation and has been applied by tribunals such as **Glamis Gold v. United States**,² which held that a breach requires conduct that is "sufficiently egregious and shocking."³

The "autonomous standard" view, on the other hand, treats FET as an independent treaty obligation whose content is determined by the ordinary meaning of the words "fair and equitable" in their treaty context, and which goes beyond the minimum standard of customary international law. Tribunals under this view have articulated a more expansive set of obligations encompassing transparency, consistency, due process and proportionality and often hold that FET requires less extreme conduct to found a violation. For this reason, developing countries have, in more recent IIAs, abandoned the autonomous FET standard in favour of the minimum standard of treatment. For instance, the Nigeria-Singapore BIT 2016 which entered into force on 22 August 2025, representing the latest Nigeria BIT to enter into force, provides in Article 3(1) that, "Each Party shall accord to investors of the other Party treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment."⁴

Regardless of which interpretation is adopted, arbitral jurisprudence has identified a number of core elements of the FET standard. These elements correspond broadly to the conduct of the three arms of government, and it is through this lens that we examine the standard below.

The Three Arms of Government and the FET Standard

The International Law Commission (ILC) Articles on Responsibility of States for Internationally Wrongful Acts confirm that the conduct of any state organ – legislative, executive or judicial – is attributable to the state. Each arm of government interacts with foreign investments in a distinct manner, and the FET standard applies to each in a way that reflects its particular function.

The Executive Arm: Protection of Legitimate Expectation

As the arm of government responsible for the daily management of the country, the executive branch issues the specific permits, licenses, contracts and assurances that attract foreign investment. Because

¹ L. F. H. Neer and Pauline E. Neer (U.S.A.) v. United Mexican States, (1926) 4 Rep. Int. Arb. Awards 60.

² Glamis Gold Ltd v. United States of America, UNCITRAL Award of 8 June 2009.

³ See also Pope & Talbot v. The Government of Canada, UNCITRAL Interim Award of 26 June 2000.

⁴ See also Article 6 of the Canada-Nigeria BIT 2014 and Article 7 of the Morocco-Nigeria BIT 2016, both of which categorically provide that the FET standard under the BIT shall not exceed the minimum standard of customary international law.

investors rely on these concrete representations when committing capital, the core FET obligation applied to the executive is the protection of legitimate expectation.

Where a host state, through its executive organs, makes specific representations or commitments to an investor, on which the investor relies, in making or maintaining its investment, a legitimate expectation arises. A subsequent repudiation of these representations without justification will result in a breach of FET.

In **Tecmed v. Mexico**,⁵ the tribunal held that FET requires the host state to "act in a consistent manner, free from ambiguity, and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations."

Other important manifestations of the executive's FET obligation include: (i) procedural fairness and due process which requires the executive to afford investors a fair opportunity to be heard before adverse administrative decisions like revocation of permits are taken; (ii) good faith dealing which requires the executive to avoid conduct designed to frustrate an investor's rights, or using regulatory power for purposes extraneous to the public interest; and (iii) ensuring that regulatory decisions are grounded in reason and fact, rather than taken arbitrarily or on discriminatory grounds. As stated in **Lauder v. Czech Republic**,⁶ measures that are "founded on prejudice or preference rather than on reason or fact" are arbitrary and breach FET.

The Legislative Arm: Protection of Regulatory Stability

The legislative branch enacts the laws of the land. Because foreign investors commit capital on the basis of the legal framework in force at the time of their investment, and because investments are typically long-term ventures requiring predictability, the core FET obligation applied to the legislature is the protection of regulatory stability and transparency.

The right of a sovereign state to regulate in the public interest or to amend its legislative framework in response to evolving public policy needs is firmly recognised in international law and has been reaffirmed in numerous arbitral awards.⁷ In **Saluka v. Czech Republic**, the tribunal observed that:

*"No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor's expectations was justified and reasonable, the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well."*⁸

The requirement for regulatory stability does not mean that the state is forbidden from changing its laws and does not create a "stabilisation" obligation. What the FET standard prohibits is radical, arbitrary or discriminatory alteration of the legal framework in a manner that fundamentally destroys the basis upon which the investment was made, without adequate justification or transitional measures. In **CME Czech Republic BV v Czech Republic**,⁹ the tribunal found that the state breached its FET obligation by eviscerating the arrangements in reliance upon which the foreign investor was induced to invest. The tribunal in **CMS v. Argentina**¹⁰ also found that Argentina breached its FET obligation by dismantling its gas regulatory framework during its economic crisis, which was the very basis on which the investor decided to invest.

⁵ *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award of 29 May 2003. See also *Waste Management, Inc. v. United Mexican States* ("No 2"), ICSID Case No. ARB(AF)/00/3, Award of 30 April 2004.

⁶ *Ronald S. Lauder v. The Czech Republic*, UNCITRAL Final Award of 3 September 2001.

⁷ See *Impregilo v. The Argentine Republic*, ICSID Case No ARB/07/17, Award of 21 June 2011; *Philip Morris Brands SARL v Oriental Republic of Uruguay* ICSID Case No ARB/10/7, Award of 8 July 2016.

⁸ *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL Partial Award on Jurisdiction of 17 March 2006 paragraph 305.

⁹ *CME Czech Republic BV v The Czech Republic*, UNCITRAL Partial Award of 13 September 2001.

¹⁰ *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award of 12 May 2005

Key principles relevant to the legislature include: (i) Proportionality, which requires legislative change that adversely affects an investment, to be proportionate to a legitimate public policy objective; (ii) Non-discrimination i.e., the legislative changes should not single out foreign investors or benefit a particular domestic constituency at the expense of foreign-owned enterprises; and (iii) Transparency: the legislative process must afford investors adequate notice of impending changes and, where practicable, an opportunity to comment or adapt.

The Judicial Arm: Protection Against Denial of Justice

The judicial branch is responsible for resolving legal disputes. Because investors must be treated fairly when they resort to the national courts of the host state, the core FET obligation applied to the judiciary is the prohibition of a denial of justice.

Denial of justice, one of the oldest principles governing the treatment of aliens, addresses the failure of the host state's judicial system to provide an adequate standard of justice. The threshold for establishing denial of justice is deliberately high, reflecting the principle that international tribunals should not act as appellate courts reviewing the merits of domestic judicial decisions.

In **Loewen Group Inc v. United States**,¹¹ the tribunal held that a denial of justice requires evidence of conduct that is "clearly improper and discreditable" and amounts to "a manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety."

The principal forms of denial of justice recognised in arbitral jurisprudence include: (i) Denial of access to courts which arises where the host state's judicial system refuses to hear the investor's claim or erects procedural barriers that effectively prevent the investor from obtaining a judicial determination of its rights; (ii) Undue delay where the judicial process is subject to prolonged, egregious and unjustified delays that effectively deny the investor a timely resolution of its dispute; (iii) Procedural unfairness, where the judicial proceedings are conducted in a manner that deprives the investor of basic due process guarantees, such as the right to be heard, the right to present evidence, and the right to an independent and impartial tribunal; and (iv) Manifestly unjust judgments, which is where the outcome of judicial proceedings is not merely an incorrect decision but one so fundamentally flawed that no competent and honest court could have reached the same conclusion.¹²

An important procedural prerequisite for a denial of justice claim is the exhaustion of local remedies. The investor must have given the host state's judicial system as a whole the opportunity to correct any deficiency before bringing an international claim. As stated in **Loewen**, denial of justice can only be established once the judicial system as a whole has been provided with the opportunity to correct any deficiencies but has failed to do so.

FET in the Nigerian Context

Virtually all of Nigeria's 31 bilateral investment treaties contain FET provisions in one form or another. As noted above, while the older generation BITs like the UK-Nigeria BIT and the China-Nigeria BIT contain FET as an autonomous standard, the more modern BITs like the Canada-Nigeria BIT 2014, the Nigeria-Singapore BIT 2016, and the Morocco-Nigeria BIT 2016 have abandoned FET as an autonomous standard and benchmarked it to the minimum standard of treatment.

¹¹ *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award of 26 June 2003.

¹² *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award of 1 November 1999.

ISDS Cases Involving Nigeria

Just like the Full Protection and Security standard, the two ISDS cases against Nigeria which ended up with an award i.e., ***Interocean Oil Development Company & Anor v. Federal Republic of Nigeria and***

Zhongshan Fucheng Industrial Investment Co. Ltd. v. Federal Republic of Nigeria each engaged the FET standard, with strikingly different outcomes.

In ***Interocean Oil v. Nigeria***, brought under the Nigerian Investment Promotion Commission (NIPC) Act, the Claimants alleged that Nigeria had violated the FET standard by failing to protect their 40% participating interest in Nigerian oil assets OML 98 and OPL 275. The Claimants contended that various acts and omissions attributable to Nigeria constituted violations of the standards of transparency, good faith, fairness, procedural propriety and due process owed to a foreign investor.

Nigeria countered that the FET standard was not a standalone protection under customary international law and that its obligations were limited to the customary international law minimum standard. Nigeria further argued that none of its acts or omissions reached the "egregious and shocking" threshold required for a breach. On the specific allegation of denial of justice, Nigeria contended that the Claimants failed to exhaust available domestic remedies.

The Tribunal found no breach of the FET standard. It concluded that the actions of the individual who orchestrated the alleged deprivation of the Claimants' investment, were not attributable to Nigeria. Overall, the Tribunal held that the Claimants did not meet their burden of establishing the elements of a FET claim and found no violation of the FET standard.

In ***Zhongshan Fucheng v Nigeria***, the Tribunal reached the opposite conclusion. The Tribunal found that the coordinated actions of Ogun State, NEPZA and the Nigerian police between April and August 2016 breached Nigeria's FET obligation under Article 3(1) of the China-Nigeria BIT. Applying the test from *Waste Management v. Mexico (No. 2)*, the Tribunal held that there was a wholesale "lack of due process leading to an outcome which offends judicial propriety." The Tribunal also found that the threats, intimidation, the arrest and physical mistreatment of Zhongfu's representative, Mr Zhao, were inconsistent with the fair and equitable treatment to be given to international investment, and that the actions of these entities were arbitrary within the meaning of *Lauder v. Czech Republic*, having been "founded on prejudice or preference rather than on reason or fact" and without any legal basis.

Zhongshan Fucheng remains the only case in which Nigeria has been held liable in investment treaty arbitration. It provides a powerful illustration of how executive misconduct – specifically, the coordinated and coercive use of state machinery by a sub-national government, a federal agency and the police to dispossess a foreign investor of lawfully acquired rights, without due process and without any basis in domestic law – can engage FET liability and result in substantial financial consequences for the state.¹³

Practical Guidance for Investors

The foregoing analysis of the three arms of government carries practical implications for how foreign investors should structure, document and protect their investments.

Securing and preserving legitimate expectations: Investors should, wherever possible, obtain specific written assurances from executive organs of the host state – whether in the form of licence conditions, contractual commitments, ministerial undertakings, or regulatory approvals – before committing capital. General promotional statements, investment climate reports and policy speeches are unlikely

¹³ The two pending cases against Nigeria – *Korea National Oil Corporation & Ors v. Federal Republic of Nigeria* (ICSID Case No. ARB/23/19) and *Jupiter Lithium Ltd & Ors v. Federal Republic of Nigeria* (ICSID Case No. ARB/26/27, registered 11 June 2026) – may yield further jurisprudence on the application of FET and other standards to Nigeria's treatment of foreign investors.

to ground legitimate expectations. The more specific and targeted the representation, the stronger the foundation for an FET claim should the state subsequently renege from its commitment.

Documenting the regulatory framework: Investors should maintain a contemporaneous record of the legal and regulatory framework in force at the time of their investment. Where the legislature subsequently alters that framework in a manner that materially affects the investment, a documented baseline will be critical to establishing that the change was radical, unpredictable and destructive of the investor's reasonable expectations.

Exhausting local remedies: The lessons of both *Interocean* and *Zhongshan Fucheng* underscore the importance of engaging with the host state's judicial system. In *Interocean*, the Claimants' repeated abandonment of domestic proceedings fatally undermined their denial of justice claim. In *Zhongshan Fucheng*, although the Tribunal did not find that there was denial of justice, it noted that the Nigerian courts' failure to grant prompt relief compounded the wrongfulness of the executive's actions. Investors who find themselves before the courts of the host state should prosecute their claims diligently and exhaust available appellate remedies before invoking international protections.

FET as a Shield for Nigerian Investors Abroad

The FET standard is not only a constraint upon Nigeria as a host state. It is equally available to Nigerian investors operating abroad under the BITs to which Nigeria is a party. As Nigeria's outward investment footprint continues to expand, awareness of FET as a tool for protecting Nigerian investments abroad becomes increasingly important. Nigerian investors operating in other jurisdictions may encounter state misconduct such as arbitrary revocation of permits or licenses by executive agencies, discriminatory legislative changes targeting foreign-owned enterprises, or judicial proceedings that fall below the minimum standards of due process. In such circumstances, the FET provisions of the applicable BIT may provide a basis for a claim against the host state.

By way of illustration, a Nigerian oil and gas company operating in an East African jurisdiction could invoke FET where the host state arbitrarily revokes its exploration licence in favour of a domestic competitor. Similarly, a Nigerian bank operating in South America could rely on the FET standard where the host state introduces retrospective legislation that materially alters the terms of its licence. A Nigerian infrastructure developer operating in the Middle East could invoke FET where the host state's courts refuse to hear its contractual claim or subject it to unjustified delays.

The practical lesson is that Nigerian investors operating abroad should familiarise themselves with the BIT network applicable to their investments, structure their investments so as to fall within the scope of the relevant treaty, and be prepared to invoke the FET standard where the host state's conduct falls below the required threshold.

Conclusion

The FET standard is the most versatile and frequently invoked protection in international investment law. Its content has been developed through extensive arbitral jurisprudence and encompasses a range of obligations that correspond to the functions of the three arms of government: the protection of legitimate expectations in respect of executive conduct, the preservation of regulatory stability and transparency in respect of legislative action, and the prohibition of denial of justice in respect of judicial proceedings.

For Nigeria, the FET standard presents both risks and opportunities. As a host state, *Zhongshan Fucheng* demonstrates the severe consequences of using state machinery to dispossess foreign investors without due process, while *Interocean* illustrates the limits of the standard where the conduct is not attributable to the state and where the investor has failed to exhaust available domestic remedies. For foreign investors in Nigeria, the standard demands that they document their expectations, engage

with the domestic legal system and discharge a substantial evidentiary burden. For Nigerian investors operating abroad, the FET standard is a valuable shield, under Nigeria's BIT network. With two further ISDS cases pending against Nigeria, and the country's outward investment footprint expanding, the importance of understanding the FET standard cannot be overstated.

The next instalment in the TEMPLARS ISDS Series will examine the standard of protection against Expropriation, covering both direct and indirect forms of taking.

If you require any further information, do not hesitate to contact us.