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The Faith of the Fair and Equitable Treatment Clause in Africa

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Countries have taken different strategies in framing the concept of fair and equitable treatment ("FET"). This post first highlights the evolution of the FET standard at a global level and then discusses the recent approaches taken by African states at an individual, regional, and continental level in framing this standard of treatment to better examine its faith in Africa.

Existing Landscape of FET

In most investment treaties, states pledge to ensure FET for foreign investors or investments operating in their jurisdiction. This standard of treatment is one of the most commonly invoked standards in investor-state arbitration. According to UNCTAD, in 2020, a violation of FET was alleged in "over 80 percent of known ISDS cases", and "in cases decided in favor of the investor, breaches of the FET provision were the most commonly found violation". The framing of this standard has evolved over time. Earlier investment agreements include an unqualified/ autonomous FET clause or FET clause linked with international law. In the absence of a definition in the investment agreements, tribunals have interpreted these clauses as including various obligations, including the obligation to protect investor's legitimate expectations, ensure transparency, provide a stable, and predictable legal environment, and refrain from acting arbitrarily and taking discriminatory measure. *See e.g.*, *PSEG v Turkey*, ICSID Case No. ARB/02/5, Award, ¶ 240; *Infinito Gold Ltd. v. Costa Rica*, ICSID Case No. ARB/14/5, Award, ¶ 355.

States have taken three approaches to prevent what they consider to be an expansive interpretation of the FET. The first approach is to limit FET to the minimum standard of treatment under customary international law. In July 2001, state parties to the North Atlantic Free Trade Agreement ("NAFTA") issued a joint interpretation, limiting the FET under NAFTA to the minimum standard of treatment under customary international law. Such framing sets a higher threshold for establishing a violation of FET. For instance, an investor that brings a FET violation claim because the state allegedly failed to provide a stable and predictable legal environment must first establish that the state has an obligation to provide such an environment under the minimum standard of treatment of customary international law by presenting evidence of state practice and *opinio juris*. *See Cargill v. Mexico*, ICSID Case No. ARB(AF)/05/2, Award, ¶ 290. As of March 2023, 155 treaties limit FET to the minimum standard of treatment under customary international law.

The second approach is to provide an exhaustive list of conducts that amount to a breach of the FET and identify measures that do not qualify as FET violations. Recent treaties concluded by the

European Union, Turkey, Canada, and Slovakia fall under this category. For instance, the Slovakia-Iran BIT (2016) outlines conducts that could "only" result in a breach of the FET, and the EU-Singapore Investment Protection Agreement notes, that "the frustration of legitimate expectations […] does not, by itself, amount to a breach" of the FET.

The third and less common approach followed by some countries such as Brazil is to exclude FET from investment treaties. (*See, e.g.,* Brazil-India BIT (2020); Brazil-Ethiopia BIT (2018); Brazil-Malawi BIT (2015).) Despite these changes, most of the treaties that are currently in force include the traditional FET standards.

FET Clauses in Inter-Africa and Intra-Africa Investment Agreements

A similar movement away from traditional FET clauses is also visible in investment treaties concluded by African states. Most of the BITs and MITs entered into by African states until 2016 contained an autonomous FET standard or FET standard linked with principles of international law. From 2016 onwards, however, African states have only concluded a few investment treaties that include such FET standards. (*See* Ghana-Turkey BIT (2016), Art. 4(1) and Nigeria-UAE BIT (2016), Art. 4(3).)

Since then, African states and regional economic communities have either modified or replaced FET with a similar but different standard of treatment. South Africa was at the forefront of these changes. In 2009, European mining investors brought investment claims against South Africa under the Belgium-Luxembourg-South Africa BIT and the Italy-South Africa BIT after South Africa passed the Mineral and Petroleum Resources Development Act, which required investors to relinquish a percentage of their investments to historically disadvantaged South Africans. (*See* Victoria Sahani, *Africa's New Economic Partnerships and Dispute Settlement* in 110 American Society of International Law Proceedings 85 (2016), p. 89.) The investors argued that the measures breached the FET clauses in the BIT. While the tribunal never reached the merits because the investors discontinued the proceedings and the matter was eventually settled, the case propelled South Africa to take stock of its BITs and revise its investment law. *Ibid*. In 2014, South Africa terminated its BITs with six European countries and in 2015 passed the Protection of Investment Act ("PIA"), which will eventually replace all BITs. The PIA, which came into effect in 2018, introduced several changes. It preserves the state's right to regulate, excludes investor-State arbitration, and replaces FET with fair administrative treatment (Art. 6, 12-13). In stark contrast to the autonomous FET standard included in South Africa's BITs (both terminated and currently in force), the PIA only guarantees foreign investors that:

> "administrative, legislative and judicial processes do not operate in a manner that is arbitrary or that denies administrative and procedural justice to investors in respect of their investments as provided for in the Constitution and applicable legislation."
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> (*Compare* South Africa-Denmark BIT (1996), Art.3(1) *with* PIA, Art. 6).

This standard, which appears to provide protection only against fundamental due process violations, has been endorsed by some of the regional economic communities ("RECs"), such as the Southern African Development Community ("SADC") and Common Market for Eastern and

Southern Africa ("COMESA"). In the 2012 SADC Model BIT, the Drafting Committee of SADC advised its member states to replace the FET standard in their BITs with the fair administrative treatment adopted by South Africa. (Art. 5, p. 24). The Committee noted that this standard "seeks to avoid the most controversial elements of FET, while still addressing levels and types of actions by States toward an investor that should create a liability." *Ibid*. In 2017, SADC issued a revised model BIT, which, like the PIA, provides fair administrative treatment in the place of FET. On the other hand, SADC decided against including the FET or fair administrative treatment in the SADC Finance and Investment Protocol.

In the same year, COMESA adopted a slight variation of fair administrative treatment in its 2017 investment agreement. Termed as "fair judicial and administrative treatment," this standard under Article 14(1) of the 2017 COMESA Investment Agreement protects investments from measures that not only constitute "denial of justice in criminal, civil, or administrative proceedings" but also amount to "un-remedied and egregious violations of due process;" "targeted discrimination on manifestly unjustified grounds, such as gender, race or religious belief;" and "manifestly abusive treatment, such as coercion, duress and harassment." But unlike the fair administrative treatment in the PIA, the standard under Article 14 does not, at least explicitly, protect investors from arbitrary or manifestly arbitrary measures.

More recently, the African Union ("AU") has also been playing an active role in shaping the investment law regime at the continental level. In December 2016, the AU passed the Pan African Investment Code ("PAIC")—the first continent-wide model investment treaty—to promote sustainable development and "achieve overall balance of the rights and obligations between Member States and the investors under the Code." (Preamble). With this objective in mind, the PAIC, lists a range of investor obligations related to corporate social responsibility, use of natural resources, corporate governance, business, ethics and human rights. (Art. 20-24). But missing among the standards of investment protection is the obligation to provide FET or fair administrative and judicial treatment. This changed seven years later with the adoption of the Protocol on Investment to the African Continental Free Trade Area Agreement.

In 2019, the African Continental Free Trade Area Agreement ("AfCFTA"), negotiated under the auspice of the AU, entered into force. After years of negotiations, the Assembly of Heads of State and Government of the African Union subsequently adopted the Protocol on Investment ("Protocol") to the AfCFTA Agreement in February 2023.[1)] As discussed in a previous post, the Protocol strives to promote and protect intra-African investment by replacing the existing intra-Africa investment treaties with a single instrument that aims to "achieve an overall balance of the rights and obligations between State Parties and investors under" the Protocol. But an agreement regarding investor-state dispute settlement, a topic also discussed in a previous post, is yet to be reached.

Like its predecessor, the Protocol does not include FET, but it does provide for an "administrative and judicial treatment". Under this standard, a state party agrees to ensure:

> "in administrative and judicial matters, that investors and investors of another State party are not subject to treatment which constitutes a fundamental denial of justice in criminal, civil and administrative adjudicative proceedings, an evident denial of due process, a manifest arbitrariness, a discrimination based on gender, race or religious beliefs, or an abusive treatment in administrative and judicial proceedings." (Art. 17)

To avoid any future debate, the Protocol stresses that the administrative and judicial treatment should not be interpreted as FET and notes that the above is an exhaustive list of the elements of the administrative and judicial treatment (Art.17(2)). The Protocol will enter into force after its ratification by 22 members of the AfCFTA (Art. 48(2)). Five years after the Protocol enters into force, state parties must terminate their intra-Africa investment treaties and refrain from concluding investment treaties among themselves (Art. 49(1)). REC investment agreements are not subject to such treatment nor are inter-Africa investment agreements. Contrary to BITs, the Protocol merely encourages state parties to "make best endeavors" to align regional investment agreements with the rules under the Protocol (Art. 49(3)). Similarly, the Protocol notes that state parties "may" consider the rules under the Protocol when negotiating inter-Africa investment agreements (Art. 49 (4)).

According to the African Arbitration Academy Model BIT, which was discussed in a previous post, despite the omission of FET under PAIC, states in the majority of the investment treaties concluded by African states since 2016 commit to providing FET "in accordance with customary international law" (Art. 5(a), p. 20). It remains to be seen whether African states would ratify the Protocol or align their regional and inter-Africa investment agreements with requirements under the Protocol.

Conclusion

Citing the prevailing uncertainties and the broad interpretation associated with traditional FET standards, African states, consistent with global trends, have been gradually shifting away from conventional FET standards. Since 2016, states have adopted a FET limited to customary international law, replaced the FET with fair administrative treatment/ fair judicial and administrative treatment, or included neither FET nor fair administrative treatment/ fair judicial and administrative treatment. The Protocol on Investment represents yet another attempt to balance the interest of investors and state parties by adding a narrowly defined standard of treatment—the administrative and judicial treatment—in lieu of an FET clause. 2024 and the subsequent years will reveal whether the Protocol will secure the required ratification and if it will have an impact beyond intra-Africa investment treaties.

References

?1 The Protocol's text as adopted in February 2023 is currently not available to the public. The cited document is the January 2023 draft version of the Protocol.

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