

Ioana Tudor. *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment*. Oxford: Oxford University Press, 2008, Pp. xxxii, 315. £60.00. ISBN: 9780199235063.

Fair and equitable treatment (FET) has advanced from a rather neglected and only subordinately applied standard of treatment in international investment law to what is probably the investor's most powerful right. Today it plays a central role in virtually any investment treaty arbitration and has been applied by investment tribunals to a wide range of conduct of every branch of government. Notwithstanding, tribunals and commentators often deplore the vagueness and openness of FET and cast doubts on the predictability, coherence, and consistency of the jurisprudence on this standard of treatment and, above all, on its normative content. The guiding question informing any scholarly discussion and arbitral practice then is what FET, as a legal standard, requires of states when engaging with foreign investors.

The answers given by commentators and tribunals to this question are as varied as the terminology of fair and equitable treatment is vague. Some try to dock FET to the customary international law minimum standard of treatment that has developed in the arbitral practice of various claims commissions in

the inter-war period.¹ Others understand FET as an independent standard that embodies the concept of the rule of law and has to be enriched by a comparative methodology that aims at identifying general principles of public law that states have to adhere to when acting *vis-à-vis* private economic actors.² Again others consider FET to be a deliberate delegation of authority to investment tribunals to develop actively, and rather autonomously, standards of fairness and equitableness for international investment relations.³ Consensus on the function, scope, and content of FET, and the proper methodological approach in determining them, is therefore far from being achieved.

For this reason, one welcomes the publication of the first monographic study on FET in international investment law by Ioana Tudor, which is based on her doctoral thesis at the European University Institute and promises to elucidate many of the topical issues in this context. Indeed, the table of contents mentions almost every one of the many practically relevant questions concerning the interpretation and application of FET, starting with its sources, its content, the elements of a successful claim based on FET, followed by discussions of the relevant arbitral practice, of the relationship of FET to other treaty standards, and of the consequences of a breach of the standard. Furthermore, Tudor takes a refreshingly different approach by choosing

¹ See above all, in the NAFTA context NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions*, 31 July 2001, available at: www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp.

² S.W. Schill, *Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law*, IILJ Working Paper 2006/6 (Global Administrative Law Series), available at: www.iilj.org/publications/2006-6Schill.asp.

³ Brower, 'Investor-State Disputes under NAFTA: The Empire Strikes Back', 40 *Columbia J Transnat'l L.* (2003) 43, at 56; Dolzer, 'Fair and Equitable Treatment: A Key Standard in Investment Treaties', 39 *Int'l Lawyer* (2005) 87, at 89; cf. also Porterfield, 'An International Common Law of Investor Rights?', 27 *U Pennsylvania J Int'l Econ L* (2006) 79.

as her point of departure, unlike most existing contributions which focus primarily on the application of FET in arbitral jurisprudence, an analysis of the treaty practice of states with respect to FET.

The book remains, however, largely a promise. Above all, it does not draw a clear picture of the concept, scope, and content of FET. Instead, Tudor's book often remains opaque and ambiguous and, apart from its often cumbersome presentation and some technical weaknesses, such as occasional missing references, contains plenty of unresolved contradictions and tensions that invalidate rather than support her own thesis that FET is a legal concept which governs the relations between host states and foreign investors.

These tensions already surface in Tudor's discussion of the sources of FET. After presenting a review of approximately 400 investment treaties and the way they refer to some variation of FET (Chapter 1), she discusses the relationship of this treaty standard to the customary international law minimum standard and to general principles of law (Chapter 2). Showing that there are different drafting variations of FET, above all in bilateral investment treaties, Tudor concludes that 'there are different levels of treatment embodied in the FET standard, not a single, uniform one' (at 33). Despite the disparity Tudor suggests, she nevertheless proceeds to argue that the treaty-based FET standard is not only different from the customary international law minimum standard, but has itself, as an autonomous treaty-based standard, become part of customary international law (at 54–85). She resolves the tension between disparate treaty drafting and the uniformity in state practice that is necessary for a treaty norm to become custom with the contorted argument that '[t]he differences encountered [in the drafting of FET clauses] refer to the level of the treatment to be accorded to the Investors, not to the standard within its content' (at 77).

Certainly, it can be argued that FET is different from the customary international law minimum standard of treatment and has itself evolved into a norm of customary international law. Yet, Tudor's argument sits

squarely with the accepted doctrine on the generation of customary law: it is contradictory to observe, on the one hand, the diversity of bilateral treaty norms and argue, on the other, for the existence of custom, which is by definition multilateral. Instead, it would have been more convincing, and also more helpful to Tudor's argument, to conclude that, despite differences in drafting, states referred to the very same and uniform legal principle of international investment law when including formulations relating to FET in their investment treaties. Thus, one could argue that differences in wording would not translate into differences in legal meaning.

Subsequently in Chapter 3, Tudor tackles the quest to identify the content of FET and describes it as a 'standard' rather than a 'rule' of international investment law that requires the judge or arbitrator 'to evaluate and to balance the circumstances of the case in front of him before applying the standard and its sanction ... us[ing] intuition and expertise' (at 120). As a consequence, Tudor views the main characteristic of FET in its flexibility which 'allows a continuous adaptation of the law to the changing social and economic circumstances' (at 121). Consequently, the primary role in implementing such changes and in filling FET with meaning is accorded to the arbitrators who hear and decide investment treaty disputes (at 121–123). This flexibility, in Tudor's opinion, is also responsible for the fact that 'FET has no stable or fixed content' (at 133). Certainly, Tudor is right in stressing the central role of arbitrators in bringing FET to life. Yet, her conclusion on the lack of a fixed content reinforces the contradiction addressed earlier, namely how a norm without fixed content can become a norm of customary international law.

The contradictions and unresolved tensions continue in Chapter 4, which discusses questions of attribution and causality that have to link the state's conduct to the damages caused to the investor, and describes the methods of treaty interpretation used in the application of FET in an actual investment treaty case. Here, Tudor argues that in applying FET clauses attention has to be paid to the wording of the

specific clause (at 145 and 146). This creates yet another tension with her earlier identification of FET as a standard that has no fixed content and depends, as the book posits, on the rather subjective determination of arbitrators. How should methods of treaty interpretation, one wonders, help to concretize a legal norm that has no definition, no fixed content, and not even a *Leitmotiv*, but which depends primarily on the discretion of arbitrators? And again, Tudor contradicts herself when she concludes that, in applying FET, ‘there is not one threshold ... but there are as many thresholds as there are cases’ (at 152). How does this not break with her earlier argument that there is some uniform content that can serve as a basis for the customary nature of FET, and her later assumption that ‘FET has only one content which is operating at different thresholds, depending on the context’ (at 154)?

Quite useful, however, is Tudor’s discussion of the arbitral practice relating to fair and equitable treatment. In Chapter 5, she describes in a reasonably comprehensive and practically usable manner the case-sensitive approaches that arbitral tribunals have taken, and thereby offers an accurate illustration of the variety of circumstances that FET has been applied to. From a theoretical point of view, however, Tudor’s largely descriptive approach in this regard has difficulties in developing a more conceptual understanding of FET and navigates primarily within the framework established by prior arbitral jurisprudence. Yet she identifies ‘the requirements of predictability and stability [as] a central element of the FET obligation’ (at 181) and lists a number of sub-categories which constitute violations of FET, namely government conduct that entirely transforms the legal or business environment, arbitrary or discriminatory treatment, failures to respect engagements *vis-à-vis* foreign investors, and conduct that impairs the investors’ personal and procedural rights (*ibid.*).

One would, however, have welcomed a more critical look at this jurisprudence, namely one that addresses the questions whether this jurisprudence is in itself consistent, whether it is in conformity with the accepted methodol-

ogy of treaty interpretation, and whether it makes sense from a normative standpoint. Yet, Tudor hides behind her earlier characterization of FET as a ‘standard’ that prevents her not only from ‘aiming at giving a definition to FET’ (at 181) but from elucidating and narrowing down the normative content of FET itself. This deficit is also not remedied by the rather inconclusive discussion of the relationship between FET and other investment treaty standards in Chapter 6.

Finally, Chapter 7 addresses the question of which consequences flow from a breach of FET. Tudor argues that this phase in an arbitral proceeding should be used as a ‘balancing operation ... between the rights and obligations of the Investors and those of the States’ (at 205). The justification she forwards for such balancing is a literal one: such balancing, she argues, is ‘justified ... by the very meaning of the terms fairness and equity, which form the FET standard’ (*ibid.*). Elements of this ‘re-balancing process ... between the interests of the two parties’ (at 208) which have to be taken into account in favour of the state, Tudor continues, are the behaviour of the investor and the situation of the host state. Thus, corrupt practices, the absence of due diligence, errors in assessing the risk presented by the host state, and bad faith militate for a reduction of damages (at 217–222). Likewise, special circumstances of the host state, such as *force majeure* or a state of necessity, should cut down damages claims of investors under FET (at 223–227). While Tudor’s proposition for balancing in this context may sound appealing in the ideological debate between pro-state and pro-investor advocates, it is presented in an utterly non-legal way and lacks precise guidance on how it should operate in a predictable and justiciable way. Ultimately, it generates just another tension with Tudor’s earlier conclusion that the central element of FET is the requirement of predictability and stability.

Certainly, Tudor correctly identifies the importance and the power of arbitrators in the operation and application of FET. Yet, her thesis falls short of developing this crucial point further. What is missing in this context

is a discussion of the impact that the creation of dispute settlement bodies and the individuals appointed to these positions have on the application and operation of a specific field of international law and on the outcome of disputes. If, as Tudor posits, arbitral tribunals are the essential rule-makers, the question of which rules are made as part of FET, and how they are made, would have been essential. Instead, Tudor's suggestion that '[t]he role of the judge in the application of FET is crucial, as he is the one identifying the various situations in which the FET has to be applied' (at 155), that 'the flexible character of FET gives an important discretion task to the arbitrator' (at 207), and that 'it is the work of arbitrators to mould the FET standard into a balancing concept that accounts for the mutual expectations of the parties' (at 233), ultimately begs the question whether FET, in her view, is at all a legal standard or not merely an instrument which allows tribunals to make decisions *ex bono et aequo* without being bound by any real normative corset established by the text and the fabric of investment treaties. This view also echoes in her closing paragraph, in which she 'point[s] to an element of *non-dit* which is inherent in the standard of FET and which constitutes both its paradox and its fortune; a paradox because it is impossible to tie it to a

definition; its fortune because only such a flexible concept can be adapted to such diversity of factual situations arising in the context of the international law of foreign investment' (at 237).

Overall, Tudor's book sounds more like a challenge to one of the core assumptions made regarding FET: that it is a legal standard which contains prescriptive and normative content for the conduct of states *vis-à-vis* foreign investors and does not allow tribunals to reach equitable or Solomonian results.⁴ Yet, this is not what Tudor purports to argue. Her argument is that FET is a legal norm which originates from sources of international law and is applied as a legal concept in investment treaty arbitrations. This argument is certainly correct, but the book falls short of its promise to 'use the legal characteristics of FET in order to propose new methods and ideas for its application' (at p. xiii). Above all, it does not elucidate the normative content of FET, nor does it suggest a methodology to make its application more predictable.

Dr. Stephan W. Schill

*International Arbitration Law Clerk to
The Hon. Charles N. Brower, Arbitrator,
20 Essex Street Chambers, London
Email: schill@nyu.edu*

doi: 10.1093/ejil/chp009

⁴ See Schill, *supra* note 2, at 2 (with further references).