Available Online: 19 February 2025 DOI: 10.54254/2977-5701/2025.21078

Balancing the Investor-country Interests: Reforming FET Standards and Indirect Expropriation

Qiushi Xu

Department of Law, Sun Yat-sen University, Guangzhou, 510006, China

1546852311@qq.com

Abstract. Foreign Direct Investment (FDI) plays a key role in the global economy, and its protection is often ensured through provisions in Bilateral Investment Treaties (BITs), particularly the Fair and Equitable Treatment (FET) standard. However, when the host country's actions lead to substantive devaluation of an investor's assets, often referred to as indirect expropriation, investors frequently invoke FET clauses to seek redress. Both FET and indirect expropriation are vaguely defined in international law, resulting in considerable space for interpretation by arbitral tribunals. Due to the protective nature of these provisions, tribunals often interpret these standards in favor of investors, which may lead to an imbalanced protection of investor rights. This imbalance can, in turn, encroach upon the sovereignty of host states and their ability to regulate in the public interest. Although Tribunals recently have taken some measures to restrict the interpretation of FET and indirect expropriation in dispute, these two treatments still face the risk of being abused by investors and becoming a “pocket clause”. This paper uses case studies and legal analysis to explore the ways in which such unbalanced interpretations undermine the interests of host states, particularly with respect to their regulatory and sovereign powers. This paper further proposes potential reforms of FET and indirect expropriation aimed at restricting the interpretation space of Tribunals while sustaining the flexibility of these two treatments, rebalancing the interests of both foreign investors and host countries.

Keywords: FET, indirect expropriation, unbalancing, reforming

1. Introduction

FDI plays a crucial role in promoting the economic development of the host country, and it also benefits foreign investors by cutting their costs and taking advantage of the local resources [1,2]. Driven by mutual benefits, more and more countries sign BITs with other countries to attract foreign capital, with the purpose of safeguarding the investment benefits of investors. Due to the strong power of the host country, foreign investors are worried about losing their investment benefits or ownership of properties. To eliminate those concerns, some treatments for foreign investors are recognized by the host country. Among those treatments, FET and indirect expropriation are often combined and cross-used to provide overall benefits of investors [3]. Indirect expropriation refers to measures taken by the host country to enforce property rights, causing investors to lose their substantive utility [4]. To be specific, the FET aims to ensure investors are treated fairly without discrimination, while the indirect expropriation is designed to prevent the properties of investors from being deprived without compensation.

However, there are limits to the protection extent of these two treatments. Investors should not abuse the FET and indirect expropriation to infringe on the justified interests of the host country. Because of the ambiguity of these two treatments, when investors claiming for compensation from the host country, the Tribunal is prone to interpret them in favor of investors and does not pay equal attention to the interests of the host country [5]. Thus, many scholars query that the FET and indirect expropriation are now going too far to protect investors, arguing to make some reforms about them to alter the unbalancing Status quo. The major reason for such reforms is the necessity to maintain the balance of interests between investors and the host country. If the two treatments lead to the interests of investors outweighing the host country too much, more regulatory rules towards investors will be introduced [6]. Moreover, it has an impact on the enthusiasm of countries to sign BITs, which is harmful to both investors and the country. In order to make the two treatments play the due role, this paper will find how the FET and indirect expropriation skew the balance and what we should do about it.

Copyright: © 2024 by the authors. Submitted for possible open access publication under the terms and conditions of the Creative Commons Attribution (CC BY) license (https://creativecommons.org/licenses/by/4.0/).

2. Thesis and Road Map

The thesis of the paper is that FET and indirect expropriation have gone too far to protect the interests of investors. The major problems are the vague meaning of FET and the inconsistent analysis doctrine in indirect expropriation. Due to the large discretion, the Tribunal does not consider the rights of the host country as equally as those of the investor, resulting in the imbalance of interests between them. To support this thesis, this paper will continue as follows: The introduction illustrates the phenomenon of unbalancing interests' protection between investors and the host country and then describes the negative impact. The literature review then examines existing research, identifying different opinions about how the FET and indirect expropriation intrigue the balance of interests and relevant suggestions. The statement of hypotheses follows, putting forward the reasons for current issues of FET and indirect expropriation. Next, this paper will examine several case studies to test the hypotheses, focusing on the Tribunal's interpretation of FET and indirect expropriation. The first two cases illustrate an earlier phase in which the Tribunal tended to interpret these provisions in a manner that heavily favored investors. Subsequent cases highlight the evolution of the Tribunal's approach and the adjustments made over time. Finally, the paper concludes with a discussion of the findings and proposes recommendations for achieving a more equitable balance between the rights of investors and the regulatory authority of the host country.

3. Literature Review

Scholars now have noticed that the uncertainty of FET and indirect expropriation cause the unbalancing between the interests of investors and those of host countries. They argue that we need to improve these two treatments to re-balance the interests.

3.1. Existing Research on the Issues with FET and Indirect Expropriation

The inconsistent requirements under the FET standard are sometimes associated with the developing stage of the country. Karun, Niknil, and Nandhana argue that when assessing violations of FET, the developmental stage of the host country should be considered, which decides that the same requirements cannot be achieved simultaneously [7]. Emmanuel proposes the phenomenon that developing countries often face unforeseen demands that go beyond what they anticipated [8].

The legitimate expectation contained in FET has gone too far to protect investors, while the country's legitimate expectation is ignored. Rumana believes that in investment disputes, due to the broad scope of FET, it has become almost unavoidable for investors to cite violations of FET alongside other investment protection criteria in their claims [9]. Emmanuel points out that legitimate expectations are not established for host countries under international law as they are for investors. The inconsistent application of FET complicates the ability of host countries to address these issues, as no such expectations are recognized for them under international law. He further illustrates the lack of consideration regarding the host country's legitimate expectation is partly caused by the content of IIAs [8]. K Chovancova notes that the protection of investors from the destruction of their investments, along with paying a lot of attention to investors' legitimate expectations, has become a prominent topic [10].

The meaning of indirect expropriation lacks a consistent and clear definition. Pulkeria argues that the expansion of the definition of expropriation has made it challenging to ascertain if a country's actions amount to expropriation and trigger the duty to provide compensation [11]. Maryam proposes that the absence of a clear statutory conception of indirect expropriation has led to negative consequences for the application of IIAs in protecting and promoting public welfare [12,13]. Ramil proposes that the inherent ambiguity of the FET standard, coupled with its potential to constrain the regulatory capacity of states, raises concerns about their ability to pursue societal goals [14].

Due to the vague meaning, Tribunals have different doctrines in identifying indirect expropriation. Peter D suggests that although tribunals generally assess the impact of country actions on investors and their purposes, the specific standards they apply can vary significantly from case to case [4]. Ying Zhu concludes that there are three doctrines in identifying indirect expropriation: the sole effect, police powers and proportionality. The "sole effect" doctrine dictates that a tribunal considers solely the impact of a country's measure in the evaluation of indirect expropriation, whereas the "police powers" doctrine involves assessing the public interest served by the measure, which might justify actions that would otherwise be deemed indirect expropriation [15]. Caroline points out that despite some tribunals having tried to use proportionality analysis, they should be mindful of the greater democratic legitimacy and closer connection of host country authorities to their communities [16]. Charvi notes that there remains a degree of unpredictability in the current rulings of arbitral tribunals concerning the interpretation of provisions related to FET [17].

3.2. Existing Research Suggestion for Solving the above Issues

Some scholars propose to apply the good faith principle to clarify the FET. Sanja believes that the intrinsically harmonizing function of good faith implies that expectations should not be judged exclusively on investors' subjective perceptions, which could impose extensive obligations on host countries [18]. Jack argues that investors' expectations should be treated in a manner akin to the estoppel principle [19]. Rumana analyzes that good faith is a fundamental component of the FET standard. Since the good faith principle is associated with concepts including equity and justice, its application is inherently as indeterminate as the FET standard itself [9].

Apart from the good faith principle, the due diligence obligation of investors should be considered in the legitimate expectation. Yulia concludes that tribunals have emphasized the investor's due diligence obligation in determining if expectations are legitimate according to FET. This due diligence requires more than a commercial risk evaluation. It is also associated with responsible business practices [20]. FET should include the country's legitimate expectation of regulatory rights and changing their laws. Emmanuel believes that the host country anticipates that investors will operate in a manner that genuinely benefits them and supports their development goals [8]. Jack argues that tribunals set a stringent standard for what counts as a violation of regulatory stability, requiring that a country's behaviour must significantly alter the regulatory framework. By linking legitimate expectations to regulatory stability, it is easier for investors to meet the criteria for what constitutes legitimate expectations [19]. Karun, Niknil, and Nandhana propose that we need to balance investor expectations with the host country's legitimate regulatory interests. They criticized the unjustified approach of the Tribunal, as it might obstruct the host country from making legitimate regulatory adjustments, thereby undermining its sovereign authority [7].

The Minimum Standard of Treatment (MST) is also used to interpret FET in practice. The FET clause in some BITs links the standard of treatment to explicitly linked to MST, which can greatly reduce the likelihood of a tribunal adopting a broad interpretation of the FET standard and granting excessive compensation [21].

To conclude, existing research has explored and discussed the problems with FET and indirect expropriation, and suggestions proposed are mostly using other principles and standards to restrict the interpretation of FET and indirect expropriation.

4. Statement of Hypotheses

Based on the current research, this paper proposes 3 hypotheses to further explore how and why the pro-investor nature of FET and indirect expropriation emerged and whether that might inform ways to address the problem.

4.1. Hypothesis 1: FET Establishes A Low Threshold for the Investors' Legitimate Expectation

Legitimate expectation is a fundamental component of FET, yet its precise scope remains debatable. When investors choose to make investments in foreign countries, they expect the host state to adhere to its commitments, maintain a stable legal framework, and refrain from depriving them of their investments without justified reasons and full compensation. However, legitimate expectations can be overly expansive, turning into a "pocket clause" that includes any benefit favorable to investors while overlooking the legitimate expectations of the host state. It is within the country's legitimate expectation to amend laws in response to the public interest and societal needs, and it cannot be expected to freeze its legal system. If FET protects the legitimate expectations of investors solely on the basis of damages incurred from the change of laws, this treatment is likely to skew the balance of interests.

In addition, investors should not depend on every statement made by the country. The host country's obligations encompass both explicit and implicit commitments, which form the basis for investors' legitimate expectations. For instance, the China-Japan-Korea Investment Agreement stipulates that only written commitments, such as agreements or contracts, are binding. Statements made by the host state, unless legally binding, should not be treated as implicit commitments. Tribunals sometimes erroneously treat informal statements as guarantees to investors, which can lead to unreasonable outcomes. It is essential that tribunals consider the form, context, and identity of the individual making the statement before interpreting it as a binding commitment.

4.2. Hypothesis 2: Improper Use of Proportionality Principle When Determining Indirect Expropriation

Realizing the one-sidedness of the doctrine of sole effect and police powers, the Tribunal has increasingly turned to the proportionality principle to identify indirect expropriation. Although the Tribunal attempts to achieve balance of interests through proportionality analysis, the interpretation is still more favourable to investors. The unbalancing is no longer caused by the exclusion of the country's motivation for a measure but rather by the inappropriate reasoning in the use of proportionality. The inherent uncertainty of the proportionality doctrine leaves tribunals with large discrepancies in evaluating the interests, lacking guidance for arbitrators in the determination of claims. Although the proportionality doctrine is aimed to pay equal attention to the benefits of investors and the host country, it remains unclear which specific interests tribunals should prioritize in their analysis. As a result, there is a risk that the fundamental rights of the host state are excluded from the reasoning process, leading to disproportionately favorable outcomes for investors and, ultimately, an unequal application of proportionality.

4.3. Hypothesis 3: The Pro-investor Nature of FET and Indirect Expropriation Emerged Due to the Subjective Bias of Tribunals

In international investment arbitration, arbitrators have a discrepancy in deciding what constitutes a violation of the FET and whether the measure consists the indirect expropriation. The Investor-State Dispute Settlement (ISDS) system inherently favors investors due to the structure of the proceedings, the choice of arbitrators, and the lack of transparency. Foreign investors are in a relatively weaker position compared to the host country, and both FET and indirect expropriation treatments are designed to protect investors. So when assessing these two treatments, arbitrators may be inclined to favour investors, assuming the state is at fault. This tendency also conforms with the general aim to protect foreign investment in BITs. Another contributing factor is the financial incentives for arbitration institutions, which may influence the way in which legal standards, such as FET, are interpreted. Although tribunals are expected to act impartially, the financial benefits tied to arbitration could influence the outcome of cases, particularly in the absence of clear legal guidelines.

5. Case Study

In different stages, the Tribunal explained and applied FET and indirect expropriation in various ways, but there is a general trend to better balance the interests between investors and the host country.

5.1. Cases in the Early Stage

In some previous cases, the Tribunal adopted extreme ways of interpreting FET and indirect expropriation in favor of investors.

5.1.1. Tecmed, S.A. v. Mexico

Tecmed was a subsidiary of a Spanish firm that acquired a hazardous waste landfill and obtained an annual operating permit. While operating, Tecmed encountered fines for breaching environmental protection regulations at the site and faced problems with its waste transportation activities. Due to the landfill's location being too close to a population center and under local pressure, Tecmed relocated to a more suitable site. However, the Mexican government refused to renew Tecmed’s permit, so Tecmed was not able to operate continually. Tecmed subsequently filed for arbitration against Mexico, alleging that the refusal to renew the permit constituted expropriation and violated FET under the Spain-Mexico BIT. The Tribunal decided in favor of Tecmed, concluding that Mexico had expropriated the investment by canceling the permit and had also breached the FET standard.

5.1.1.1. The Violation of FET

The bona fide principle is adopted in this case. The Tribunal finds that the FET commitment outlined in Article 4(1) of the Agreement reflects the principle of good faith acknowledged in international law. According to this principle, the host country must ensure that international investments receive treatment that upholds their basic expectations. The bona fide principle is a customary law, and this explains why the legitimate expectations of investors should be respected. However, the Tribunal does not explain what “basic expectations” are. According to the Tribunal's view, legitimate expectations of foreign investors in FET do not encompass changes to the country’s legal framework. The Tribunal sets high transparency requirements for the host country. The Tribunal analyzes that foreign investors hope the host country to behave in a consistent manner, free from ambiguity and totally transparently. When the investment was made, Tecmed had no reason to question the legality of the Landfill’s location despite the social and political pressures that emerged later. The tribunal views changes in the legal framework occurring after the investment was made as a breach of the FET standard due to the frustration of investors’ legitimate expectations [20]. This paper argues that it is unreasonable for the Tribunal to narrow the investors’ legitimate expectations. The host country is entitled to change its laws and decide the legal framework.

5.1.1.2. The Constitution of Indirect Expropriation

The tribunal also used the principles of legitimate expectation and transparency to evaluate whether the measures taken by the government amounted to expropriation. Apart from these two principles, the proportionality principle was applied to identify the indirect expropriation. The Tribunal focused primarily on the investor's interests when weighing competing considerations. Specifically, it evaluated three factors in its decision-making process: the extent of the damage incurred, the presence of a public interest, and whether the country's actions were essential to serve that public interest [22]. The tribunal determined that there was no evidence indicating that the Landfill’s operation posed a genuine or potential risk to the environment or public health, and there was also a lack of significant opposition. The tribunal's assessment focused on the impact of the measures on the investment benefits without sufficiently considering the legitimate exercise of regulatory power [23].

Moreover, the Tribunal ignored the motive of the host country’s measure. The Tribunal argued that country actions, whether regulatory or otherwise, can be considered a form of indirect de facto expropriation if they result in irreversible and permanent changes. The Mexican government's refusal to extend Cytrar's license was based on several factors, including environmental compliance, community opposition, and public interest considerations. Despite the government claiming that its actions served the public interest, the Tribunal determined that these actions might still amount to a deprivation of the investment, potentially leading to liability. While the proportionality approach used by the Tecmed tribunal offers a useful starting point for balancing legitimate expectations with regulatory powers, the protection afforded by investment law lacks a thorough assessment of the motives of both parties [20].

5.1.2. Metalclad v. Mexico

The U.S. company Metalclad specializes in storing and recycling toxic waste. Metalclad had acquired the waste confinement facility, with the commitment to address the contamination issue. However, the country's government opposed the facility's operations upon discovering its location over an aquifer and subsequently designated the site as part of an ecological zone. Metalclad alleged that the government of San Luis Potosi had violated several NAFTA investment provisions. The corporation also argued that this refusal, driven by political conflicts between the country and local governments, amounted to an effective expropriation of its investment. The case was ultimately resolved in favor of Metalclad [24].

5.1.2.1. The Violation of FET

Firstly, NAFTA Article 1105 generally stipulates that FET should be accorded to investors. One issue with Chapter 11 of NAFTA is its lack of specificity in defining terms. Different Tribunals have different interpretations of the Article 1105 of NAFTA. This ambiguity has led to an increasing trend of investors claiming that a broad array of governmental actions constitutes a violation of Chapter 11 [24]. Secondly, the transparency requirement is high for the host country. To determine whether there was a violation of FET under Article 1105(1), the tribunal referred to NAFTA Article 102(1), which emphasizes "transparency" as a key goal of the treaty. The Tribunal interprets "transparency" in NAFTA to mean that all pertinent legal requirements related to starting, completing, and effectively managing investments should be easily accessible to all foreign investors. Thirdly, the representation of the officials is considered as evidence of the investor's expectation. According to the Tribunal, Metalclad had the right to depend on the assurances given by federal officials and reasonably believed it could proceed with constructing the landfill and the permit would be issued. The problem is that the Tribunal did not explain why the "full" expectation is reasonable and why the officials' representations have authority. As Magdalena said, the tribunal placed significant emphasis on the investor's reliance on assurances from country and federal officials that all necessary legal steps for proceeding with the investment had been completed and deemed the expectations of non-interference as legitimate [25].

5.1.2.2. The Constitution of Indirect Expropriation

The Tribunal defined the meaning of expropriation broadly. The Tribunal stated that expropriation encompasses not just open, deliberate, and acknowledged takings of property but also hidden or indirect actions that interfere with property use. This includes situations where the interference deprives the owner of significant use or expected economic benefits from the property, even if it does not clearly benefit the host country. This paper argues that it is inappropriate for the tribunal to only consider the interests of the investors, as this interpretation obviously favors the investors. Additionally, the neutrality of the Tribunal in using the proportionality principle is questionable, which impacted the host country's ability to regulate independently. The Tribunal stated that the local construction permit was refused by the Municipality partly due to concerns about the environmental impact of the hazardous waste landfill. By doing this, the Municipality acted beyond its legal powers. The Tribunal failed to consider that such actions should be challenged through the proper domestic administrative and judicial procedures. It is not within the tribunal's rights to adjudicate domestic legislation. By linking transparency issues with domestic law, the tribunal exceeded its jurisdiction [26].

The intent and purpose of the country's rule were also omitted in this case. The Tribunal believed that it is not required to determine or assess the motivation or intent behind the adoption of the Ecological Decree. However, the Tribunal decided that the implementation of the Decree itself constitutes an act amounting to expropriation. Finally, the agreement or contract between investors and the country was decisive in evaluating the interests of the country. In this case, the Tribunal was persuaded to find that Mexico had adequately addressed the environmental issues concerning the landfill's operation solely based on the existence of an agreement between Metalclad and Mexican federal agencies. It is obvious that the environmental assessment was superficial in comparison to the focus given to the rights related to foreign investment property [27]. That is to say, the Tribunal ignored the host country's changeable environmental interest but relied solely on the agreement.

5.1.3. The Comparison of Two Cases

By analyzing the two cases, we can find that in the early stage, the tribunal is prone to favor investors' interests, placing the host country at a disadvantage. The common reasons for the imbalance are the unreasonable interpretation of FET and the identification of the indirect expropriation. In detail, the problems of FET are the expansion of the investor's legitimate expectation and the high requirement of transparency. As for indirect expropriation, except for the same problems as FET, the broad interpretation of country commitments and the exclusion of the purpose of the country's measure are also problems.

Compared to the Metalclad, the Tecmed Tribunal makes some changes to apply the FET and indirect expropriation. Firstly, the Tribunal in the Tecmed elaborates on the good faith principle (bona fide) more. The Tribunal in the Metalclad applies the good faith as a rule of NAFTA rather than a principle or the customary law. Secondly, The Tribunal in the Tecmed considers the host country's interests by using the proportionality method. The Tribunal evaluates whether the community pressure and its effects were severe enough to create a serious emergency, social crisis, or public unrest. This assessment should also encompass the economic impact of the government action, which can result in the foreign investor losing its investment without any compensation. However, the Tribunal thinks the country should the community crisis was intensive and sustained.

We can conclude that although Tribunals evaluated the interests of the host country, public interest should reach a high standard to constitute the exception for expropriation. So, the Tribunal does not apply the proportionality analysis in a neutral way. Although the Tribunal in the Tecmed was trying to balance the interests through the application of proportionality, it still focused on the interests of the investor.

5.2. Cases in the Recent Stage

It is noticeable that in recent cases, the Tribunal has made some changes to alter the unbalancing phenomenon.

In the case of Duke Energy v. Ecuador, the legitimate expectation was analyzed from both sides of investors and the state in detail. The Tribunal recognized that while legitimate expectations are crucial for ensuring fair and equitable treatment, they have boundaries and must be both legitimate and reasonable at the time the investment is made. The Tribunal considered the political and economic context, such as Ecuador's energy crisis, and noted that the investor, Duke Energy, was aware of the risks and potential penalties for non-performance. Thus, Energy's expectations were not reasonable. Moreover, the Tribunal emphasized the importance of the state's commitments in determining the reasonableness of the investor's expectations, asserting that only explicit written commitments could form the basis of legitimate expectations. Due to contradictions in the state's declarations and the lack of written records, the Tribunal found that assurances were not demonstrated, underscoring the high standard required for state commitments to be considered valid.

In the case of Foresight v. Spain, the Tribunal emphasized that investors cannot reasonably expect the legal or regulatory environment to remain static unless there is a specific commitment from the host state. In the absence of such a commitment, the state has the right to make reasonable adjustments to its legal framework without infringing on the investor's expectations of stability. On the matter of indirect expropriation, while the investors' losses were significant, it did not constitute expropriation. The Tribunal held that for indirect expropriation to occur, the state's measures must substantially deprive the investors of the value, use, or enjoyment of their investments. A mere decline in investment value is not sufficient to amount to expropriation unless the loss is so severe that it is equivalent to the loss of property.

In the case of Mamidoil v. Albania, the Tribunal highlighted that economic, social, environmental, and legal conditions are inherently dynamic, and thus, regulatory changes did not necessarily breach the obligation to maintain a stable legal framework. It also stressed that explicit representations from the host state play a crucial role in shaping an investor's legitimate expectations. On the issue of indirect expropriation, the Tribunal adopted a similar approach to that in Foresight, focusing on the impact of the regulatory changes on the investor. Expropriation occurs when the investor is effectively deprived of all ownership rights, not merely when there is a decline in the investment's value.

Overall, through the three cases in the recent stage, we can conclude that the Tribunal has set some limitations on the legitimate expectation of investors and indirect expropriation, with the aim to prevent the FET from being abused by the investors. Tribunals also recognize the sovereignty right of the host country to change its legal framework, which should be predicted by foreign investors when they decide to invest. However, witnessing the reform of interpretation towards FET and indirect expropriation, the meaning of FET and indirect expropriation was still vague, and there is no mandatory binding force on Tribunals' reasonable interpretation of these two treatments. How to prevent FET and indirect expropriation from becoming an all-covering "pocket clause" needs to be further considered.

6. Conclusion

The rebalance of interest between investors and states cannot realized only through the efforts of Tribunals' interpretation of FET and indirect expropriation after the dispute. Instead, attention should shift to the stage of negotiating and signing BITs, where clearer terms and definitions can be established to reduce the interpretative discretion available to tribunals.

Firstly, the concept of FET should encompass the legitimate expectations of host countries. As the above analysis demonstrates, legitimate expectations primarily address what investors can reasonably expect from the host state, as well as the scope of those expectations. To achieve a more balanced approach, Tribunals need to consider the host country's legitimate expectations rather than focusing solely on the investor's perspective. In detail, the legitimate expectations of the host state include its sovereign authority to amend or revise laws in response to evolving social concerns and public issues, such as environmental protection. This balance can be achieved by incorporating clear FET provisions into BITs.

Secondly, the clarification of FET and indirect expropriation should not rely on other principles. While the good faith principle, minimum standard, and proportionality principle are now invoked by tribunals to explain FET, the relationship among these principles remains ambiguous. Given that these principles themselves are inherently ambiguous, it is impractical to use vague terms to define another imprecise principle. Hence, we cannot expect to clarify the FET standard by using other vague principles.

Instead, the focus should be on the meaning of the FET itself, with other principles serving merely to assist the reasoning process. For instance, in the arbitral awarding, Tribunals can outline the elements of the FET and define specific circumstances that would constitute expropriation, thereby making the interpretation of these two treatments more predictable and transparent.

Thirdly, it is essential to explore whether developing countries should be subject to different FET standards compared to developed countries. In the past, most investment disputes have arisen between developing countries and investors, with tribunals often interpreting the FET standard in a way that places more obligations on host states—especially developing ones. However, as developed countries are now increasingly facing claims from foreign investors, the tribunal adopts different FET and indirect expropriation standards, potentially imposing a heavier burden on developing countries in certain cases. This raises the question of whether a one-size-fits-all approach to FET is appropriate or if a differentiated standard should be applied, considering the varying economic, political, and social circumstances of developing and developed countries. It is important to assess whether the regulatory capacity and development priorities of developing countries should be taken into account when applying FET and whether this could help achieve a more balanced and equitable approach in investment arbitration.

References

[1] Aitken, B. J., & Harrison, A. E. (1999). Do domestic firms benefit from direct foreign investment? Evidence from Venezuela. *American Economic Review, 89*(3), 605-618.

[2] Bubb, R. J., & Rose-Ackerman, S. (2007). BITs and bargains: Strategic aspects of bilateral and multilateral regulation of foreign investment. *International Review of Law and Economics, 27*(3), 291-311.

[3] Charvi Devprakash. (2024). Demystifying tech-related investor-state arbitration: Understanding the role of the FET Clause. In *Opportunities and Risks in AI for Business Development* (pp. 455-461).

[4] De Brabandere, E. (2016). States' reassertion of control over international investment law-(Re) defining 'Fair and Equitable Treatment' and 'Indirect Expropriation'. *Cambridge University Press*, 1-17.

[5] Djajić, S. (2021). Good faith in international investment law and policy. In *Handbook of International Investment Law and Policy* (pp. 1-34).

[6] Emmanuel T. Laryea. (2020). Legitimate expectations in investment treaty law: Concept and scope of application. In *Handbook of International Investment Law and Policy* (pp. 1-24).

[7] Gamze Öztürk. (2017). The role of legitimate expectations balancing the investment protection and country's regulations—Can countries have legitimate expectations?. *Master Programme in Investment Treaty Arbitration*.

[8] Guajardo, D. F. (2000). Redefining the expropriation of a foreign direct investment in Mexico. *S. Tex. L. Rev.*, *42*, 1309-1329.

[9] Holmer, M. P. (2006). Regulatory expropriation under international investment law. *Master thesis, University of Lund*.

[10] Isakoff, P. D. (2013). Defining the scope of indirect expropriation for international. *The Global Business Law Review, 3*(2), 189-209.

[11] Jack, Biggs. (2021). The scope of investors' legitimate expectations under the FET standard in the European renewable energy cases. *ICSID Review-Foreign Investment Law Journal, 36*(1), 1–30.

[12] Karun Roy, N. Viswam, & N. Madhu. (2023). Balancing investors rights and regulatory action: A study of fair and equitable treatment standard in investment law. *International Journal of Law Management & Humanities, 6*(2), 43–57.

[13] K Chovancova. (2023). The fair and equitable treatment standard and its current status in international investment law. *Pravny Obzor, 106*, 433.

[14] Kurtishi-Kastrati, S. (2013). The effects of foreign direct investments for host country's economy. *European Journal of Interdisciplinary Studies, 5*(1), 26-38.

[15] Legesse Tigabu Mengie. (2016). Host countrys' police power and the proportionality test in international investment law. *Jimma UJL, 8*, 81.

[16] Levashova, Y. (2020). Fair and equitable treatment and investor's due diligence under international investment law. *Netherlands International Law Review, 67*(2), 233–255.

[17] Malakotipour, M. (2020). The chilling effect of indirect expropriation clauses on host countrys' public policies: A call for a legislative response. *International Community Law Review, 22*, 235–270.

[18] Maximo Romero Jimenez. (2001). Considerations of NAFTA Chapter 11. *Chicago Journal of International Law, 2*(1), 243-251.

[19] Patrick Dumberry. (2024). The cost of inaction: Arbitral practice in respect of earlier generation FET clauses and current approaches to FET clauses. *Report, OECD*.

[20] Pulkeria, R. (2014). The progressive expansion of the expropriation concept and its impact on country responsibility. *International Investment Law Journal, 10*(4), 45-67.

[21] Ramil Gachay. (2023). Collisions between international intellectual property law and international investment law caused by the FET principle. *SSRN Electronic Journal*. https://doi.org/10.2139/ssrn.4611578

[22] Rumana, Islam. (2013). Proportionality as a tool for balancing competing interest in investment disputes: Fair and equitable treatment (FET) standard in context. *Jahangirnagar University Journal of Law, 1*(2023), 119-139.

[23] Shrestha, O. K. (2016). A host state regulatory right in fair and equitable treatment (FET) in bilateral investment treaties (BITs). *Master thesis, University of Lapland*.

[24] Winters, K. (2015). Indirect and regulatory expropriation in international investment law: A critical review. *LL.M(R) thesis, University of Glasgow*.

[25] Ying Zhu. (2019). Do clarified indirect expropriation clauses in international investment treaties preserve environmental regulatory space? *Harvard International Law Journal, 66*(2), 377-416.

[26] Carlos Glave Mávila. (2015). The role of international environmental law in the application of foreign investment law. *Anuario de investigación del CICAJ, 2015*, 187-221.