

# The lack of an FET-standard in CETA

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## Where are we coming from?

- The FET-standard is one of the most important protection elements in BITs;
- In almost all EU Member States BITs, the FET-standard is an autonomous, open, flexible, Rule of Law-based standard.
- Indeed, the FET-standard is a general clause that has been filled with life for over 60 years now;
- It is for this reason that it has been dubbed “the FET-gold standard”;
- As examples, let me refer to:
- NL-VEN BIT: Each Contracting Party shall ensure fair and equitable treatment of the investments of nationals of the other Contracting Party and shall not impair, by arbitrary or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals.
- NAFTA:  
Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

## What is the nature of the FET-standard?

- Can the FET-standard be defined?
- In the Oxford dictionary you find the following descriptions:

### **fair:**

[just](#), [equitable](#), [fair-minded](#), [open-minded](#), [honest](#), upright, honourable, trustworthy; [impartial](#), [unbiased](#), [unprejudiced](#), [non-partisan](#), [non-discriminatory](#), [objective](#), [neutral](#), [even-handed](#), [dispassionate](#), [disinterested](#), [detached](#); [above board](#), [lawful](#), [legal](#), legitimate, proper, good;

### **equitable:**

[fair](#), [just](#); [impartial](#), [even-handed](#), [fair-minded](#), [unbiased](#), [unprejudiced](#), [non-discriminatory](#), unbigoted, [egalitarian](#), with no axe to grind, [without fear or favour](#); [honest](#), [right](#), rightful, proper, decent, good, honourable, upright, scrupulous, conscientious, above board; reasonable, sensible; [disinterested](#), [objective](#), [neutral](#), [uncoloured](#), [dispassionate](#), [non-partisan](#), [balanced](#), [open-minded](#);

- These descriptions prove that defining the FET-standard is illusive.
- That is the same as with pornography. Or to put in the words of Supreme Court Judge Potter Stewart:  
**“I know it when I see it”** [the famous quote attributed to Supreme Court justice Potter Stewart or his law clerk Alan Novak ([Jacobellis v. Ohio](#), 1964)].
- In my opinion, this equally applies to the FET-standard.
- We instinctively know when the FET-standard has been breached when we see the facts!
- So, by its very nature, the FET-standard must be broad, open-textured, fact- and case- specific.
- In short, by its very nature, the FET-standard must be dynamic, flexible, adaptable in order to be able to capture the unlimited creativity of governmental measures that affect foreign investors in one way or another.

## What happened to the open FET-standard?

- But what has happened to the openly-structured FET-standard?
- Well, the NAFTA-parties decided to “clarify” the FET-standard after the first NAFTA awards came out, which they apparently did not like.
- The first step was taken by the NAFTA Free Trade Commission’s Notes of Interpretation of Certain Chapter 11 Provisions of July 31, 2001:
- Minimum Standard of Treatment in accordance with International Law:  
Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.  
The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
- What was the result of this Note of Interpretation?
- It adds “customary international law” as a new element of vagueness by requiring the arbitral tribunal to examine what is the FET-treatment under customary international law.
- And the NAFTA-parties explicitly limited their own obligation by not having to grant a treatment that goes beyond the absolute minimum.
- So, this is no “clarification”, but obviously a significant limitation of the FET-standard.

## Freezing the FET-standard to the 1929 *Neer*-standard

- So, the NAFTA arbitral tribunals had to define the minimum standard and went back to the *Neer* case of 1929, when there were no BITs or ISDS;
  - According to the *Glamis Gold* arbitral tribunal the fundamentals of the *Neer*-standard still apply today;
  - According to this Tribunal:  
To violate the customary international law minimum standard of treatment codified in Article 1105 of the NAFTA, an act must be:
    - ☐ sufficiently egregious and shocking
    - ☐ a gross denial of justice,
    - ☐ manifest arbitrariness,
    - ☐ blatant unfairness,
    - ☐ a complete lack of due process,
    - ☐ evident discrimination, or
    - ☐ a manifest lack of reasons
- so as to fall below accepted international standards and constitute a breach of Article 1105(1).
- Consequently, the “minimum” standard releases the NAFTA-parties from affording a treatment, which goes beyond a treatment that is “egregious and shocking”.

## The flexible, open-textured EU Member States “gold standard”

- Compare this with the flexible, EU Member States FET-“gold standard”;
- For example, regarding the FET-standard in the Spain-Mexico BIT, the arbitral tribunal in *Tecmed* mentioned the following examples:
  - ☐ The protection of the investor’s legitimate expectations
  - ☐ Due process and denial of justice
  - ☐ Obligation of vigilance and protection
  - ☐ Transparency and Stability
  - ☐ Lack of arbitrariness and non discrimination
  - ☐ Proportionality
  - ☐ Abuse of Authority.
- If one compares these elements with the *Neer-standard* it becomes clear that they go far beyond the level of “egregious and shocking”.
- Indeed, in the recent Mobil v. Venezuela award, the arbitral tribunal in particular emphasized the importance of legitimate expectations, when it stated:
- 256. [...] In the Tribunal’s opinion, this [FET]-standard may be breached by frustrating the expectations that the investor may have legitimately taken into account when making the investment. Legitimate expectations may result from specific formal assurances given by the host state in order to induce investment. The Tribunal will thus consider whether in the present case legitimate expectations could reasonably have been the result of such assurances.
- In short, the examples mentioned in *Tecmed* and *Mobil* are the generally accepted Rule of Law-principles, which are recognized in the EU and its Member States.

## The EU's Rule of Law approach

- Indeed, they correspond closely with the **new EU Framework to strengthen the Rule of Law** (19.3.2014 COM(2014) 158 final/2)

The precise content of the principles and standards stemming from the Rule of law may vary at national level, depending on each Member State's constitutional system. Nevertheless, case law of the Court of Justice of the European Union ("the Court of Justice") and of the European Court of Human Rights, as well as documents drawn up by the Council of Europe, building notably on the expertise of the Venice Commission, provide **a non-exhaustive list of these principles** and hence **define the core meaning of the rule of law as a common value of the EU** in accordance with Article 2 TEU.

- Those principles include:

- ☐ **legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws;**
- ☐ **legal certainty;**
- ☐ **prohibition of arbitrariness of the executive powers;**
- ☐ **independent and impartial courts;**
- ☐ **effective judicial review including**
- ☐ **Respect for fundamental rights;**
- ☐ **equality before the law**

- **Within the EU, the Rule of law is of particular importance.** Compliance with the Rule of law is not only a prerequisite for the **protection of all fundamental values listed in Article 2 TEU.**
- It is also a **prerequisite for upholding all rights and obligations** deriving from the Treaties and from international law.

## Why did not the EU follow its own Rule of Law-principles?

- So, what happened in CETA?
- Why did not the EU follow its own Rule of Law-principles?
- In CETA we find a surprisingly similar list of examples as mentioned in *Glamis Gold*:

### Article X.9: Treatment of Investors and of Covered Investments

- Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments **fair and equitable treatment** and full protection and security **in accordance with paragraphs 2 to 6**.
- A Party **breaches the obligation of fair and equitable treatment** referenced in paragraph 1 where a measure or series of measures constitutes:
  - ☐ Denial of justice in criminal, civil or administrative proceedings;
  - ☐ Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings.
  - ☐ Manifest arbitrariness;
  - ☐ Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
  - ☐ Abusive treatment of investors, such as coercion, duress and harassment; or
  - ☐ A breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.
- The Parties shall regularly, or upon request of a Party, review the content of the obligation to provide fair and equitable treatment. The Committee on Services and Investment may develop recommendations in this regard and submit them to the Trade Committee for decision.
- When applying the above fair and equitable treatment obligation, a tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, **and** upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.
- For greater certainty, ‘full protection and security’ refers to the Party’s obligations relating to physical security of investors and covered investments.
- For greater certainty, a breach of another provision of this Agreement, or of a separate international Agreement, does not establish that there has been a breach of this Article.

## Controlling the FET-standard by binding interpretations

Moreover, the CETA-parties included two mechanisms for controlling the FET-standard:

### Article X.42: Committee

- The Committee may, on agreement of the Parties, and after completion of the respective legal requirements and procedures of the Parties:
  - ❑ 1) recommend to the Trade Committee the adoption of **interpretations of the agreement** pursuant to Article X.27(2) (Applicable Law and Interpretation);
    - ❑ **Article X.27: Applicable Law and Interpretation**  
(2) Where serious concerns arise as regards matters of interpretation that may affect investment, the Committee on Services and Investment may, pursuant to Article X.42(3)(a), recommend to the Trade Committee the adoption of interpretations of the Agreement. **An interpretation adopted by the Trade Committee shall be binding on a Tribunal** established under this Chapter. The Trade Committee may decide that **an interpretation shall have binding effect from a specific date.**
  - ❑ 2) recommend to the Trade Committee the adoption of any further elements of the **fair and equitable treatment obligation** pursuant to Section 5, Article X.9(4) (Treatment of Investors and of Covered Investments).

## From a flexible, open-textured FET-standard to a *de facto* closed, vague FET-standard

EU Member States “gold standard”	NAFTA	<i>Tecmed</i>	<i>Glamis Gold / Neer</i>	CETA
Each CP shall <b><u>ensure fair and equitable treatment</u></b> of the investments of nationals of the other Contracting Party and <b>shall not impair, <input type="checkbox"/>by arbitrary or <input type="checkbox"/>discriminatory measures</b> , the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals.	Each Party shall <b><u>accord</u></b> to investments of investors of another Party treatment in <b><u>accordance with international law</u></b> , <b>including fair and equitable treatment</b> and full protection and security.	<p>The protection of the investor’s <b>legitimate expectations</b></p> <p><input type="checkbox"/> due process and denial of justice,</p> <p><input type="checkbox"/> Lack of arbitrariness and non discrimination,</p> <p><input type="checkbox"/> Transparency and Stability</p> <p><input type="checkbox"/> Obligation of vigilance and protection</p> <p><input type="checkbox"/> Proportionality</p> <p><input type="checkbox"/> Abuse of Authority.</p>	<p>To violate the FET standard in Article 1105 of the NAFTA, an act must be:</p> <p><input type="checkbox"/> sufficiently egregious and shocking</p> <p><input type="checkbox"/> a <u>gross</u> denial of justice,</p> <p><input type="checkbox"/> a <u>complete lack</u> of due process,</p> <p><input type="checkbox"/> <u>manifest</u> arbitrariness,</p> <p><input type="checkbox"/> <u>blatant</u> unfairness,</p> <p><input type="checkbox"/> a <u>manifest</u> lack of reasons</p> <p><input type="checkbox"/> <u>evident</u> discrimination,</p>	<p>Each Party shall <u>accord</u> in [...] <b>fair and equitable treatment</b> and full protection and security <u>in accordance with paragraphs 2 to 6</u>. A Party <b>breaches the obligation of fair and equitable treatment</b> where a measure or series of measures constitutes:</p> <p><input type="checkbox"/> Denial of justice in criminal, civil or administrative proceedings;</p> <p><input type="checkbox"/> <u>Fundamental</u> breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings.</p> <p><input type="checkbox"/> <u>Manifest</u> arbitrariness;</p> <p><input type="checkbox"/> <u>Targeted</u> discrimination on manifestly wrongful grounds, such as gender, race or religious belief;</p> <p><input type="checkbox"/> <u>Abusive</u> treatment of investors, such as coercion, duress and harassment; or</p> <p><input type="checkbox"/> A breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.</p>

**Proliferation of value-based adjectives in CETA and NAFTA, which are absent in the EU Member States “gold FET-standard”**

CETA	NAFTA
Manifest Fundamental Targeted Abusive	Sufficiently Gross complete lack of manifest arbitrariness blatant unfairness manifest lack of reasons evident discrimination

## Conclusions

- So, in conclusion, to me the core question is: Do states still trust arbitral tribunals?
- If they would trust them, they would leave the interpretation and application of the FET-standard to the arbitral tribunals.
- Arbitral tribunals are perfectly able to apply on a fact- and case-specific basis an open-textured FET-standard.
- Indeed, they have done so for several decades now.
- The FET-standard has proven to be effective in protecting foreign investors from unfair treatment for more than 60 years and goes back to the constitutional principles, which are more than 200 years old.
- But, clearly in CETA, the parties have decided to increase their control over arbitral tribunals and directly influence the outcome of arbitral proceedings in two ways:
- 1) by prescribing a *de facto* closed list of vague circumstances, which amount to a breach of the FET-standard. In this way, measures, which do not reach this level but which under the EU Member States “gold standard” would constitute a breach of the FET-standard, are now considered to be OK.
- 2) by adopting binding interpretations – even retroactively, which allows state to “correct” any expansionist interpretation of the FET-standard. Indeed, the CETA-parties can - at any time - agree to add further restricting terminology or even remove circumstances in the current list, thereby lowering the level of protection to the absolute minimum.

## Conclusions (2)

### RESULT:

- So, what's the result of all this?
- In essence, it makes it effectively impossible for an investor to prove that a CETA-party breached the FET-standard as contained in CETA.
- In short, the FET-standard in CETA is practically the same as the minimum standard of customary international law in NAFTA or the US model BIT of 2012.
- From a European Member States' perspective, this is a significant shift from their "gold standard"-protection against unfair and inequitable treatment by host states.
- So, if the aim was to "clarify" the FET-standard, that aim has clearly not been reached.
- If the aim was to effectively remove the FET-standard from CETA, that aim has been fully achieved.
- If that was the true aim of this operation, why not just be honest about it and simply leave any FET-standard out?!
- This would have been more consistent with the general tendency of incrementally reducing the level of investment and investor protection in FTAs and "modern" BITs.
- In fact, with regard to TTIP, it would be less hypocritical to leave the whole ISDS chapter out, rather than pretending that there is still some investor protection left, whereas *de facto* that is not the case.