Introduction to the Book: ‘The Fair and Equitable Treatment (FET) Standard in International Investment Arbitration: Developing Countries in Context’ (Springer, 2018)

By:

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This book ‘The Fair and Equitable Treatment (FET) Standard in International Investment Arbitration: Developing Countries in Context’ (Springer, 2018) is a revised version of my doctoral thesis that I completed at the University of Warwick in 2015. Before introducing the contents of the book in brief, it requires an anecdote what inspired me to research this particular topic.

With the rise of discourse on Third World Approaches to International Law (TWAIL), there has also been more engagement among researchers to look

into different aspects of international law, both on doctrinal and practical levels from developing countries' perspectives. International law on foreign investment and particularly the foreign direct investment (FDI) has a direct impact on host developing countries economically, socially and politically. Therefore, the intricacies of FDI and their impact on developing countries deserved to be scrutinized with the rise of more investor-state disputes against these countries. There has been a considerable amount of scholarship written looking into developing countries' perspectives in international investment law, but very little research has been done particularly on the very controversial fair and equitable treatment (FET) standard. The standard has become a key feature of most bilateral investment treaties (BITs) and its flexible nature has made it a favorite tool for the foreign investors to invoke in their claims against developing countries. The Awards made by arbitral tribunal based on interpretations of this standard do not take into account the socio- economic and political circumstances of developing countries. These expansive interpretations inclined me to look into this ever expanding and 'catch all' investment protection standard from the critical lens of developing countries' perspectives.

This book aimed to take a different approach to the topic, particularly focusing on the arbitral jurisprudence that has created inequities and imbalance against developing countries. In the book, I did so by examining this standard against the contextual background of the inequalities that existed in the drafting process of the majority of the BITs concluded between the capital exporting developed countries and capital importing developing countries. The overarching argument made in the book is that there is a pressing need to reconceptualize the interpretation of the FET standard, taking into account the particular developmental circumstances of the developing countries in investor-State disputes. The book explores these challenges and issues that the developing countries face arising from overly broad interpretations of the FET standard.

The book consists of eight chapters. The first chapter provides a review of literature on the topic and sets out the contextual background of the study. The second chapter discusses the political and economic context under which the FET standard has been developed and constructed in different BITs and multilateral treaties to give the readers a flavor of the asymmetries of powers

under which developing countries signed those treaties. In particular, I emphasize how these interpretations primarily favor the foreign investors. As a result, a provision that may very well have been designed to do justice later became a tool for the astute arbitrators to advance the global system of the law on foreign investment which aimed to protect solely the foreign investors. The third chapter of the book discusses the different approaches that have been adopted by different scholars to classify the different articulations of the FET standard that appear in a variety of investment treaties and adopts a unique classification to describe those textual constructions, namely FET plus, FET simple and FET minus. In the fourth chapter of the book, I discuss different classifications of developing countries devised by a variety of international organizations based on different economic and social parameters and argue that all these criteria are not helpful for the investment tribunals to understand and grasp the realities and challenges that the host developing countries face. Therefore, this chapter, contests the dominant views on economic development and argues that the particular conditions and circumstances prevailing in each host developing country should be taken into consideration by the arbitral tribunal since these factors provide a relevant contextual factors for the proper application of the FET standard in any investment disputes against those countries.

The next two chapters of the book engage in three strands of arbitral awards rendered against host developing countries in the interpretation of FET standard. Chapter five discusses arbitral awards against host developing countries which were facing challenges due to their socio-political circumstances and their transitory nature. Some arbitral tribunals expressed their concern for these countries due to the plight that they were experiencing arising from socio-political and transitory elements, but nevertheless did not in most cases consider these factors as a basis to exempt the host developing country from their obligation of FET standard towards the foreign investors. Chapter six discusses the disputes that arose out of Argentine financial crisis. The impact of these awards against Argentina was considerable and the conflicting awards rendered by the tribunals addressing a financial crisis raised legitimacy concerns for the whole system. This chapter addresses all these issues in considerable depth and emphasizes that flexible standards like the FET cannot be interpreted in favor of the foreign investors when they are in

turmoil on the basis of a universal standard.

Chapter seven, based on the findings discussed in the previous two chapters on arbitral awards, highlights the key problems in the interpretation of the FET standard rendered by the current arbitral tribunal against host developing countries- inconsistency and inadequacy. The final chapter of the book summarizes the overarching argument of the book, that the application of the FET standard needs to be reconceptualized in order to take into account the socio-economic and political circumstances prevailing in the host developing countries rather than applying a global standard which appears to be unjustly applied against these developing countries.

There are three reviewers of this book. The first review is by Nitish Monebhurrun. The second is by Rizwanul Islam, and the third is by Ferdous Rahman.

Contributors

Rumana Islam: Introduction to the Book: 'The Fair and Equitable Treatment (FET) Standard in International Investment Arbitration: Developing Countries in Context' (Springer, 2018)

Nitish Monebhurrun: Book Review: Rumana Islam, The Fair and Equitable Treatment (FET) Standard in International Investment Arbitration - Developing Countries in Context, Springer, 2018

Rizwanul Islam: Review of the Fair and Equitable Treatment (FET) Standard in International Investment Arbitration: Developing Countries in Context

Ferdous Rahman: The Fate of the Developing States in International Arbitration and the Fair and Equitable Treatment Standard

View online: Introduction to the Book: ‘The Fair and Equitable Treatment (FET) Standard in International Investment Arbitration: Developing Countries in Context’ (Springer, 2018)

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