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

By:

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Probably buoyed by its relatively open-ended nature, the fair and equitable standard (FET) of protection of foreign investors has become a much more invoked arsenal than the claim of direct or indirect expropriation. As Professor Sornarajah very appositely notes in his foreword to the book, very few scholars have dealt with the impact the relatively opaque, if not expansive interpretations of the FET standard by arbitrators has had particularly on the economies of the global South. Professor Rumana Islam's work is a notable exception to this.

The author presents her thesis in eight neatly weaved chapters. By drawing on other scholarly works, Chapter One sets the background of the book and explains how FET claims are brought more frequently against economically less well off States and how the value of the claims poses a challenge to their economies. While reasonable, minds can differ as to the cause of this phenomenon, that is, whether this is due to any particular targeting of the developing economies or because investors felt that they were subject to the violation of their treaty or contract rights. This is all the more so because the investments of foreign investors from developed economies is not only concentrated in the global South, but also extends to the investment in other developed economies. However, that does not detract from the author's point that these claims pose particular challenges to developing countries. The chapter tells us that the main thesis of the book is that the interpretation of the FET standard by arbitrators has given primacy to the protection of the interest of the foreign investors over the economic interests of developing states. It also presents a succinct yet comprehensive overview of the major scholarly contributions on the contours of the FET standard.

Chapter Two provides a detailed sketch of the evolution of the FET standard in international investment treaties. It posits that the standard or its semblance in some hortatory forms originated in multilateral treaties which never came into fruition. This then meant that the major net capital exporting countries sought to incorporate this term through the bilateral avenues as a binding legal norm. Developing countries gradually conceded to this demand to signal their willingness to protect foreign investment. This process culminated in the 1980s when Latin American countries, which were hitherto resounding proponents of the preponderance of the national standard of foreign investment over any international standard, also signed bilateral investment treaties (BITs) incorporating the FET standard. The chapter is quite comprehensive in its coverage of the relevant treaties.

Chapter Three takes a rather unique way of categorising the FET standard enshrined in various treaties. It employs the following terminologies: FET minus, simple FET, FET plus. It suggests that FET minus BITs are those which somehow seek to limit the import of the FET standard in that the clause tags the standard to the minimum standard of protection or protection under customary international law. Simple FET standard relates to those treaties which do not

predicate the minimum standard of protection or protection under customary international law. FET plus are those BITs which add some additional obligation to the FET standard such as the most favoured nation treatment or national treatment. However, the author argues that these various categories are nothing but semantic. In practice, their interpretations by arbitral bodies do not really differ following any discernible pattern.

Chapter Four catalogues the different definitions of the notion of the 'developing country' denomination in various inter-governmental organisations and scholarly works. It posits that these various definitions are unhelpful in identifying the capability of host States to offer protection to foreign investors. The chapter does not seek to offer a grand, all-encompassing definition of development. It asserts that development situation of the respective host developing country must serve as a context for interpreting the FET standard in the relevant treaty. In particular, it argues that in assessing the violation of the FET standard, the arbitrators must take into account the context of specific challenges that the host State may have faced in taking the measure at issue, i.e. what economic, social, or political challenges may have influenced the decision of the host State which has adversely impacted the claimant foreign investor. However, assuming one were to think that the arbitrators venture to take up this arduous task, the vexed question of which set of countries should be eligible for this greater latitude would remain a very debatable issue.

Chapter Five focuses on the interpretation of the FET standard in some selected investment disputes involving developing countries as host States. The cases that it covers are classified according to whether or not the measure/s of the host developing countries impinging on foreign investments stemmed from severe political adversities, pressing socio-economic needs, and legal or policy changes in economies in fundamental transition. The chapter shows that even in more or less similar situations, arbitral tribunals took a dissimilar approach in ascertaining the liability of the host developing countries and assessing the quantum of compensation awardable to foreign investors. It concludes that generally, tribunals have tended to give primacy to the interest of foreign investors. Sometimes even when the defence of the host States prevailed, they prevailed on technicalities, not on any reasoned deference to the situation of the host countries; meaning that they afford thin comfort to host developing countries in future cases.

Chapter Six analyses some foreign investment cases in which the host developing country's response to severe economic crises led to the measures which gave rise to the alleged FET violation claim by foreign investors. Various cases involving Argentina feature prominently in the chapter. This chapter shows that more often than not arbitrators paid scant regard to the economic crises which crippled the choices made by host States. While they often recognised the severity of the problems faced by developing countries, they declined to accept the crisis as justification for the measures taken by host States adversely impacting foreign investment.

Chapter Seven summarises the findings of chapters Five and Six. It makes a pressing argument which is the overarching theme of the work is that the protection of the FET standard cannot remain oblivious to the socio-economic context of host developing states. The author laments the inconsistent pattern in the award and also the fact that foreign private interest has tended to prevail over the public interest of host States.

Chapter Eight outlines a need for reconceptualising the FET standard in a manner which would be more responsive to the needs of the developing countries. In particular, it would necessitate that the arbitral tribunals consider constraint in resources – infrastructural, technological, administrative – of host developing countries. The author argues that this would mean that the FET standard would be applied fairly and equitably.

While arguably, the book's tenor is not in consonance with the mainstream view of the scholarly literature, there is nothing rowdy about its tone, making it a more swaying one. That being said, one relatively missing point in the book is the treatment of the FET standard in the South-South BITs. Almost all BITs and the arbitral cases discussed in the book involve at least one developed state. It would have been interesting to notice if the approach of the South-South BITs (or the interpretation of their text by arbitrators) towards the FET standard is any different from the BITs involving North-North parties or North-South BITs. However, possibly the absence is due to the fact that there are fewer BITs involving South-South countries and even fewer of them leading to any investment disputes which went for formal settlement by investment dispute settlement bodies.

What do all these mean for the global South? For sure, that may be left to the future works for a detailed analysis. However, for now, countries of the global South would do well to take a more circumspect view on including FET in their treaties, or they may even more radically seek to renegotiate their investment treaties. With the ever-expanding body of jurisprudence developed by the plethora of arbitral bodies interpreting the FET standard, a new line of jurisprudence which would be more sensitive to the context of the host developing States may perhaps only develop through a new generation of BITs. While the arbitrators do possess some discretion, it would be very difficult to imagine that their discretionary choices would not be significantly influenced by the jurisprudence that has developed in the last few decades. In the current state of jurisprudence, it is difficult to see that arbitral bodies would be able to take the author's envisaged host developing State's context-sensitive approach. Even the formation of a global investment court as envisaged by some may not necessarily lead to a coherent jurisprudence tilting towards a more deferential approach to the constraints of the host developing States and their regulatory autonomy.

It would seem that works like the one by Professor Islam in analysing the perils of the elastic nature of the FET standard and the way arbitral tribunals interpret it, would encourage some soul-searching among many policymakers in the global South. Anyone with interest in international investment law would do well to consult this work of Professor Islam, and this is even more so for those in the global South.

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