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

By:

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1. Introduction

The fair and equitable treatment standard (FET) has been the object of many studies in international investment law. Its vagueness has predictably mustered an avalanche of academic studies tracing its contours and seeking to construe its content. The standard is entrenched in a majority of international investment agreements. One arbitral tribunal has considered it to be the grundnorm of international investment law. It has been called the “head of

claim” in investment arbitration. As the fair and equitable treatment standard has already been perused under various angles by arbitral tribunals and by a vast scholarly literature, a new book on the subject could seem of parochial importance and could be criticized for relaying what is already known. Yet Rumana Islam’s *The Fair and Equitable Treatment (FET) Standard in International Investment Arbitration — Developing Countries in Context* is not *another* book on the FET. At its core, the book explores the relationship between the FET and its application to the specific context of developing States with the aim of unraveling the extent to which the standard can be construed to treat foreign investors fairly and equitably without putting an unfair and inequitable burden on developing host States. The book proposes a relevant thesis by tackling prevailing problems while recommending how best we should understand it backup by rigorous research.

1. A relevant thesis to tackle a necessary problematic

The author provocatively affirms from the very beginning that the FET standard and its broad interpretation are a risk to developing States in that it extends too much solicitude to investors who are already generously protected by the existing international investment agreements. From this perspective, she urges the need to re-conceptualize the standard, that is, contextualizing the FET by incorporating a ‘development’ parameter to its interpretation. In the author’s words, “the book aims to examine as far as possible the full range of approaches to determine how the tribunals might adequately address the socio-political and economic contextual background of each host developing country”. If the FET is, as claimed, sometimes decontextualized in its application by arbitral tribunals , the arbitral practice has also shown that the standard can be interpreted in light of local realities . In other words, the FET is not barrenly isolated in an untouchable vacuum. It can be calibrated and adapted so as to strike a balance between, on one hand, the expected investors’ treatment and protection and, the development needs and constraints of developing host States, on the other. These States’ confidence in and support of the international investment law system are, to some extent, related to how their own domestic priorities are discussed, integrated or ignored by arbitral tribunals. The book draws a trend line showing that development issues are usually neglected by arbitral tribunals. These conclusions constitute the result of a meticulous research undertaken by the

author.

2. A worthy work of categorization built on rigorous research

The book is reader-friendly for a number of reasons. First, it offers novelty to researchers that are well-versed in international investment law whilst having a didactic approach for any newcomer. More importantly, it is structured on a noteworthy work of categorization. The author matches her categorization of the FET with that of the development conundrums which characterize investment arbitration.

She divides the FET in three categories: the FET minus, the simple FET; and the FET plus. Chapter 3 covers these three categories but in a nutshell, the FET minus is drafted in a way which restricts its scope, the simple FET does not contain any reference to customary international law or to any other factor which would limit its scope and finally, the FET plus is delineated in a way to include other standards which can range from full protection and security to denial of justice or the prohibition of discrimination. The author then organizes a classification of developing States, based on the approaches used by international organizations for this purpose and also synthetizes the possible approaches to enlighten the very concept of development — a challenge in itself. She however critically concludes that despite the relevance of such classification methods to propose a synthetical and comprehensive map of developing countries, the latter's developmental specificities are therein overlooked, as they are in investment arbitration. Developing States do not form a unique, compact and uniform block. They each have their very own characteristics and limitations which can sometimes impact on the legal protection concretely offered to foreign investors. These specificities, as argued by the author, must become a parameter while interpreting the FET. It is however unclear whether the arbitrators are technically prepared to discuss development questions at an advanced level.

Grounded on a solid literature and case law review, the book then identifies and classifies the recurring development-related issues in the arbitral practice. It critically examines how the FET was construed considering a series of backgrounds set in the reality of developing States involved in investment arbitration, these being: (i) political instability; (ii) regulatory changes; (iii) an

economy in transition, namely for Eastern European States; (iv) economic and financial crisis. Chapters 5 and 6 accordingly map the flexibility and adaptability of the FET against these backgrounds with the author concluding later in Chapter 7 that the approach adopted by arbitral tribunals are in fine inadequate to intrinsically make space for and eventually tackle development issues.

The book flees from a Manichean vision of international investment law. It is not written against foreign investors and in favor of developing States. With a scientific caution, the author reflects on how bridges can be built between these two actors with the aim of upholding development priorities without undermining investors' protection — thereby hinting at a fair and equitable treatment for host developing States.

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