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

By:

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I am delighted to write this review on the book titled "The Fair and Equitable Treatment (FET) Standard in International Investment Arbitration: Developing Countries Context". The book was published in 2018. The author, Professor Dr. Rumana Islam's book focuses on the application of the FET treatment by centering the perspectives of developing countries. She also contributes to the literature on human rights, corporate finance, and banking laws.

International investment law has been an emerging arena of international law. The perspective of developing countries on the interpretation of the foreign investors' treatment has received increasing global attention. The home States ensure the protection of their investors through protections such as non-discriminatory treatment as well as full protection and security as incorporated

in the International Investment Agreements (IIAs). Among them, the Fair and Equitable Treatment (FET) is the most discussed, given that it provides expansive protection for the foreign investors. The FET is an absolute standard of protection (UNCTAD, 2012 p. 6) but with no concrete definition. It has no strictly defined ambit, rather it is determined as BITs are negotiated between the States and interpretations provided by arbitral tribunals when disputes arise. Two common views are available on FET principles. First, that the FET standard does not add anything more to customary international law but affirms it. Second that it expands the scope of customary international law by allowing future tribunals to create new standards when situations demand (IISD, 2013). For example, after the second award of the *Pope & Talbot case (2000)*, the NAFTA commission delivered an interpretive note on FET and full protection and security where the interpretation was limited to customary international law. Such fluid nature of this treatment has made it one of the most common claims in the Investors-State investment dispute. In the book, Dr. Islam analyzed the four-corners of the FET standard in light of the IIAs and the arbitral awards.

Data from the UNCTAD published in May 2019, shows that the majority of ISDS cases were against the developing states and the transition economies (UNCTAD, 2019). There has also been a sharp increase of ISDS against African States since 2013 (Muller & Olivet, 2019). The FET clause has been the most common ground in ISDS cases as well as the most likely basis for finding developing states liable. Hence, these facts make the book contemporary and relevant to the current trend in international investment law. Another feature that makes this book contemporary is the consideration of the multiple contexts of the host State while interpreting the FET standard. The host States no longer provide unfettered protection to the investors. Rather, they argue that the standard of treatment should be subjected to the existing context of the host State which should provide guidance in understanding the regulatory behavior of the host State.

In this book, the author took the interdisciplinary approach to explore the application of the FET clause in the IIAs between the developed and the developing countries and the subsequent effects on the socio-economic context of the developing countries. The main aim of this book as stated in p. 171 is to reconceptualize the FET clause from the perspective of developing States so

that a comprehensive consideration of their social, political, and economic conditions is taken into account. The book is built on the three existing types of FET clauses available in various IITs, i.e. the FET minus, the simple FET, and the FET plus. The FET minus is drafted with the narrowest scope; the simple FET gets a comparatively broader ambit and finally, the FET plus is intended with the highest elastic definition.

The book divided the discussion into six major chapters in addition to the introduction and conclusion. It started with the historical development of the FET clause in the IIAs, followed by its different constructions provided by the arbitral tribunals acting for the investor-state dispute settlement (ISDS). Subsequently, the author diligently scrutinized the interpretation of the FET clause in the context of socio-political and the economic crisis of the developing host States. Before the conclusion, the book focused on key issues in the construction of the FET clause given by the ISDS arbitral tribunal. The author significantly relied on primary sources such as the FET clauses in the IIAs and the decisions from the Permanent Court of Justice, the International Court of Justice as well as the arbitral tribunals constituted under the NAFTA, ICSID, UNCITRAL to formulate the arguments. The author also consulted the opinions of leading scholars in international investment law to portray an inclusive overview vis-a-vis the secondary literature from prominent writers in this area of study.

The book justified its focus on the developing states and their challenges from the current FET clause with data showing that despite the lower amount of FDI received, developing States face a higher number of ISDS claims. The elastic drafting of the FET clause in the IIAs and its subsequent interpretation is responsible for the miseries of developing States in the ISDS cases. In many cases, the arbitral tribunal ignored the socio-political and the development status of the developing State. The author argues that the context of the defendant host State should receive the necessary consideration from the tribunal instead of solely emphasizing the investors' protection (at page 187). Notwithstanding differences in how FET clauses are drafted, the FET clause adopted widely in the IIAs has some significant features analyzed in the book. The book focuses on both the social and political contexts as well as the economic context. The prevailing context of the host State provides the context for understanding regulatory behavior of developing countries. The author

identified the tribunals' lack of acknowledgement of the development status of developing countries while privileging the protections of foreign investors as a major concern. Due to the limited resources and unstable social and political situation, developing States cannot maintain the FET standard of protection as the foreign investors expect and the arbitral tribunal contemplates.

The challenge is not only limited by the reluctance of the arbitral tribunal to consider the developing status of the host State but also by the inconsistent exercise of vast discretionary power while interpreting the FET standard. The author provided several case studies in support of the inconsistent use of this discretionary power by arbitral tribunals. For instance, in the fifth chapter, the unstable political circumstances of the developing States was analyzed. In the case of *Bayindir Insaat Turizm (2005)*, the ICSID tribunal considered the political turmoil in Pakistan in defining the investor's legitimate expectation of stability in the host State under the FET standard. A similar approach was taken in the case of *Toto Construzioni Generali S. p. A. v. the Republic of Lebanon (2009).* However, in *American Manufacturing & Trading v. Republic of Zaire (1997)* the tribunal did not consider the political crisis of the host State as a defense but only took into account the calculation of the compensation amount. Another related issue in the literature of the FET standard is the application of the doctrine of necessity, discussed in the sixth chapter with reference to the Argentine economic crisis. In the case of *CMS v. Argentina (2003)* the ICSID tribunal rejected the defense of necessity despite the compelling context of the economic crisis in Argentina.

The book argues in favor of integrating the challenges of development developing countries face in interpreting the FET standard. Dr. Islam argues that when an arbitral award takes into account the interests of the host State particularly where there is a crisis, the award has more legitimacy from the parties and becomes easier for enforcement. Moreover, this inclusive approach, Dr. Islam argues, would bring coherence to the arbitral jurisprudence. Such certainty of 'fair and equitable' consideration of the existing crisis of the host developing States would motivate them to welcome foreign investment with better protection mechanisms subject to their availability of resources and supportive environment. In the final chapter of this book, the author emphasized that the development issues of the host States are not limited to some economic parameters of GNI, HAI, and/or EVI (The UN LDC Graduation

Threshold, 2021) but the country-specific contextual background such as social unrest, political instability, unforeseeable disasters, limitation of resources, lack of infrastructure, inefficient administration. Dr. Islam argues these factors should be a primary concern of the ISDS tribunals. Finally, the book negates the idea of incorporating the development issues and/or challenges into the IIAs as exceptions to the standard of treatment, because of the impossibility to foresee every possible context at the negotiation stage. (p. 193) Instead, it advocates ISDS Awards to accommodate the developmental context of developing countries into the jurisprudence of the FET.

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