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Exploring the Fair and Equitable Treatment (FET) Principle and Balancing Investor-State Rights

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ABSTRACT

In the recent times, the proliferation of international trade and the rise in foreign investments has led to the initiation of numerous bilateral and multilateral investment treaties. Today, almost every country is a party to atleast one Bilateral Investment Treaty. This article primarily explores the various nuances of the Fair and Equitable Treatment principle including a closer look at its meaning and interpretations, its nexus with minimum standards of protection and with the principle of legitimate expectations and its uncertain nature as viewed by developing countries. Lastly, this short article focuses on the emerging trend of increasing investor responsibilities and duties, which turn leads to the discussion on the need for balance between the investor's rights and the public interest of the host state.

Keywords: FET principle, Host, Investor, FET Standard, Legitimate Expectation.

I. INTRODUCTION

A Bilateral Investment Treaty (hereinafter BIT) is a legally binding agreement between two countries that provides for reciprocal rights and obligations w.r.t investments in each other's jurisdictions. The party investing is known as the 'Investor' state and the country that hosts the investment is referred to as the 'Host' state. Traditionally, all BITs comprise of 'Standards of Protection' clauses including Expropriation, Fair and Equitable Treatment (FET), Full Protection and Security (FPS), Most Favored Nation Treatment (MFN) and National Treatment (NT). Amongst these, the FET principle is the most frequently invoked clause between the state parties as the same is subject to a wider interpretation, is constantly evolving and has an increasingly pervasive character.

II. WHAT IS THE FET CLAUSE?

The FET principle is built on the four strong pillars of transparency and stability, protection of legitimate expectations of investors, non-denial of justice and prohibition of coercion and harassment. Transparency in the form of a stable, predictable and secure climate for foreign

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investment is the first legitimate expectation of the investor under the FET standard. Secondly, the FET principle must accord to the investor due process in relation to criminal, civil and administrative adjudicatory proceedings.² Lastly, prohibition against arbitrary and discriminatory treatment is an integral principle embedded in the FET standard. In essence, the FET clause guarantees a “lawful”, “unbiased” and an “impartial” treatment to the investor.

“Indeed, the standard can be aptly described as the grund norm of modern foreign direct investment agreements, effectively embodying the cardinal principle of the rule of law.”³

However, the FET standard is often subjected to certain exceptions in the form of the host state acting in “public interest or to develop its legal, business and administrative frameworks.”⁴

The three general schools of thought that emerged in interpreting the FET standard are as follows:

- *“FET is an independent treaty standard with an autonomous meaning and provides treatment protections above and beyond the minimum standard of treatment;*
- *FET reflects the minimum standard of treatment, thus an element of the ever-evolving minimum standard of treatment; or*
- *Assuming FET is an independent treaty standard exceeding the traditional requirements of the minimum standard of treatment, FET has emerged as customary international law.”⁵*

Arbitral tribunals have also incorporated the general obligation to act in good faith under the FET standard. This includes protection against the use of legal instruments for uses other than their intended purpose and any conspiracy by government authorities to destroy the investment.⁶ At the same time, it is important to keep in mind that any action in bad faith is not a prerequisite for a finding that the fair and equitable treatment standard has been breached.⁷

“Often arbitral tribunals have recognized abusive conducts in the form of coercion, duress and harassment involving unwarranted and improper pressure, abuse of power, persecution,

² Jason Haynes, *The Evolving Nature of the Fair and Equitable Treatment (FET) Standard: Challenging Its Increasing Pervasiveness in Light of Developing Countries' Concerns - The Case for Regulatory Rebalancing*, 14 J. WORLD INVESTMENT & TRADE 114 (2013).

³ *Id.* at 117.

⁴ Josefa Sicard-Mirabal and Yves Derains, Chapter 6: Standards of Protection Introduction to Investor-State Arbitration (© Kluwer Law International; Kluwer Law International 2018) 133.

⁵ Kendra Leite, *The Fair and Equitable Treatment Standard: A Search for a Better Balance in International Investment Agreements*, 32 AM. U. INT'L L. REV. 363 (2016).

⁶ Christoph Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 J.W.I.T. 3 357, 384 (2005).

⁷ *Id.* at 386.

threats, intimidation and use of force as FET violations."⁸ *Wena Hotels Limited v. Arab Republic of Egypt*⁹ is a classic example of the same. The host state was unsuccessful in protecting the investments of the investor by failing to prevent acts of vandalism against the latter's property and investment. Furthermore, evidence supporting threats and intimidation towards the investor company from officials directly under the control of the host state, was *prima facie* a breach of the FET clause. The host state had an obligation to accord vigilance and protection to investments within its territory, exercise due-diligence, not only in response to conduct on the part of its officials which might adversely affect the investment, but also in its exercise of any preventative measure aimed at protecting the investment from damage.¹⁰

III. UNCERTAIN NATURE OF THE FET STANDARD VIS-À-VIS DEVELOPING COUNTRIES

*"The FET standard, having its foundation in rule of law, not only refers to the formal quality of law as a means of providing guidance for the affairs of foreign investors but also to the institutional aspiration that governments in developing countries have to use law as a means of exercising power. In short, procedural requirements must necessarily be complied with, and where investors' interests are affected by the decisions of the host state, certain rights and remedies must also be afforded."*¹¹

Developing countries are particularly concerned about the "overly intrusive formal legal underpinnings of the standard and have raised concerns about the uncertain nature of the standard countries."¹² There has been a constant debate around balancing the investor's rights and developing countries' public interest. The developing countries have strong views against the traditional interpretations of the FET standard as they believe that the standard disproportionately applies to them as against developed countries.¹³ Further, the developing countries are particularly concerned about their limited resources that can affect their ability to provide an effective evaluation of the proposed investment and, subsequently, to ensure that the expected benefits are realized.¹⁴ Moreover, it is argued that transparency on the part of host state is undoubtedly integral to the adequate protection of investments, however, it must also

⁸ Sicard and Derains, *supra* note 4.

⁹ *Wena Hotels Limited v. Arab Republic of Egypt*, 41 ILM 896 (2002)

¹⁰ Jason (n-1), at pg- 140, See also Alfred Verdross, "'Les Rgles Internationales concernant le Traitement des Strangers' (1931) 37 R.C.A.D.I. 325, 388

¹¹ Jason, *supra* note 2, at 118.

¹² *Id* at 115.

¹³ *Id* at 119.

¹⁴ Peter Muchlinski, *Caveat Investor - The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard*, 55 ICLQ 527, 528 (2006).

be borne in mind that not many developing countries have the regulatory or institutional framework in place to allow for full transparency and investor participation.¹⁵ While the developing countries do accept the interpretation of the FET standard to include “unbiased”, “just”, “even-handed” or “legitimate”, they continue to argue their stand that there is “no uniform methodology” in existence to determine which actions constitute violation of FET standards.¹⁶

IV. EMERGING CONCEPT OF INVESTOR RESPONSIBILITIES

While it is reasonable for the investor to expect the stability of the legal and business environment in the host state, it is also expected that the investor makes a thorough assessment of the circumstances, including not only the fact surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host state.¹⁷ Therefore, we can see that there has been a drifting away from the traditional concept of the host state ensuring unconditional protection to the investor and an upcoming trend of increasing investor responsibilities in customary international law.¹⁸ These investor responsibilities include the cognizance of domestic law of the host state and its requirements; risks and proactive behaviour in abiding by human rights; and promoting sustainable development.¹⁹ Further, investors are expected to be good corporate citizens and respect the international principles of corporate social responsibilities.²⁰ Investment agreements are increasingly refining and perfecting these evolving investor commitments.²¹ For example, Article 12 of the Brazil-India BIT provides that “*Investors and their investments shall strive to achieve the highest possible level of contribution to the sustainable development of the Host State and the local community, through the adoption of a high degree of socially responsible practices, based on the voluntary principles and standards set out in this Article.*”²²

According to Peter Muchlinski, Professor in International Commercial Law, FET standard is all about the host state acting in accordance with the legitimate expectations created for the investor at the time the investment was entered into, thereby allowing the investor a reasonable

¹⁵ Jason, *supra* note 2, at 130.

¹⁶ *Id* at 120.

¹⁷ Tomas Mach, Legitimate Expectations as Part of the FET Standard: An Overview of a Doctrine Shaped by Arbitral Awards in Investor-State Claims, 2018 ELTE L.J. 105, 119-120 (2018).

¹⁸ Laurence Boisson de Chazournes, Changes in the Balance of Rights and Obligations, 111 Proceedings of the Annual Meeting (American Society of International Law), 53 (2017), <https://www.jstor.org/stable/10.2307/26628015>.

¹⁹ *Id* at 54.

²⁰ Muchlinski, *supra* note 14, at 545.

²¹ Laurence, *supra* note 18, at 54.

²² <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5912/download> (last visited accessed March 20, 2021)

opportunity to profit, and the investor delivering to the best standard of care and due diligence, the reasonably anticipated economic and other benefits of the investment.²³

V. CREATING A BALANCE BETWEEN FET STANDARD AND PUBLIC INTEREST OF THE STATE

The FET standard is precisely about balancing the rights and obligations of host states and investors.²⁴ As per the state and the international law perspective, the state is generally free to pursue any action that it chooses to as it has a right over its territorial sovereignty. However, it is also a recognised fact that, if the measure taken by the state is questioned on the basis of other principles which affect the degree of legitimacy of the pursued objective or the means applied, then it arguably disqualifies the measures or the ends.²⁵ The host state views the FET standard as a medium of attracting foreign investments by providing legal remedies; whereas for the investor, it is a promise of the host state's stable and consistent conduct in order to carry out long-term investor-relations.²⁶ The following four elements have been identified as valid and legitimate expectations of investors which limit the host state's right to regulate in public interest:

- *“the specific representations made by the host state to an investor;*
- *the investor's expectations based on the stability of a general regulatory framework;*
- *the economic and socio-political circumstances in the host state; and*
- *the investor's conduct.”²⁷*

Similarly, the following standards are considered by the arbitral tribunals in deciding the validity of state's measures acting in public interest:

- *“the legitimacy of the objective of the state's measure;*
- *the compliance of the state's measure with the principles of reasonableness, proportionality, the prohibition of arbitrariness, non-discrimination and transparency; and*

²³ Muchlinski, *supra* note 14, at 556.

²⁴ Yulia Levashova, Chapter 8: Towards a More Balanced Approach, *The Right of States to Regulate in International Investment Law: The Search for Balance Between Public Interest and Fair and Equitable Treatment*, International Arbitration Law Library, 50 (© Kluwer Law International; Kluwer Law International 2019) 237, 238 (2019).

²⁵ Rumana Islam, Proportionality as a Tool for Balancing Competing Interest in Investment Disputes: Fair and Equitable Treatment (FET) Standard in Context, 1 Jahangirnagar University Journal of Law 119, 124 (2013).

²⁶ Levashova, *supra* note 24, at 239.

²⁷ *Id* at 246.

- *the legality of the state's measure under national law in relation to the breach of the FET standard.*"²⁸

The principles of reasonableness and proportionality decide the rights of states and investors in the assessment of the FET standard by establishing a nexus between the legitimacy of the state's objective and its reasonable relationship with the state's measure.²⁹ While the state promises adequate compensation in case it fails to live upto its promises, it is reasonably expected of the investor that he is aware of the possibilities of changes in regulatory framework and policies of the state over time.

First and foremost, balance between host state and investor concerns can be achieved by reference to international minimum standards of treatment as an integral part of the FET.³⁰ Further, in order to strike a balance between the protection of investors and the inherent right of a state, the economic and financial affairs within its borders should be regulated in a transparent manner.³¹ Another way of resolving the problem of balancing investor-state rights is to clearly enlist specific obligations that fall under the FET clause in the investment treaties and to replace the general FET provision with a number of more unambiguous obligations emanating the same rights that originate from the FET standard.³² Further, the FET clause could be supplemented with interpretative guidance leaving very less room for uncertainty.³³

VI. CONCLUSIONS

The FET standard is indeed one of the most significant principle embedded in every international investment treaty. Over the past decades, there has been a sea change in the jurisprudence of the principle, considering its ambiguity and continuously evolving interpretation. Earlier, any action that substantially affected the investor's investment in the host state was considered a blatant FET violation. However, over time, the arbitral tribunals have taken cognizance of other factors such as investor's pro-activeness and awareness about the host state's internal laws and regulations and reasonable policy changes into consideration while determining and balancing the rights. Therefore, to some extent, the arbitral tribunals have laid down distinct standards in order to balance the investor's legitimate expectations

²⁸ *Id* at 251.

²⁹ *Id* at 271.

³⁰ Swapneshwar Goutam and Rachna Pastore, *The Concept of Fair and Equitable Treatment: Toward Host Country Is Not Only Vague but Also Created Uncertainty as to What to Be Expected of Private Foreign Investors (TNC)*, 6 ILJ 293, 296 (2020), <https://ssrn.com/abstract=3634402> or <http://dx.doi.org/10.2139/ssrn.3634402>

³¹ *Id* at 296.

³² Kendra, *supra* note 5, at 398, See also U.N. Conf. on Trade & Dev., *Fair and Equitable Treatment: A Sequel, UNCTAD Series on Issues in International Investment Agreements II, 10-12*, U.N. Doc. UNCTAD/DIAE/IA/2011/5, U.N. Sales No. E.11.II.D.15 (2012)

³³ *Id* at 399.

under the FET principle vis-à-vis the host state's actions under the larger public interest canopy. The arbitral tribunals are increasingly incorporating principles of reasonableness and proportionality in tackling the problem of competing interests. Nonetheless, even today, principles under FET standard continue to evolve and are open to wider and newer interpretations since the concepts of "fairness" and "equity" remain undefined. The art of treaty negotiations and drafting will certainly play a significant role in development of the FET standard in the coming times, given the incessant proliferation of international investment treaties. And finally, the arbitral tribunals will continue to exercise their discretion and power in analysing the FET standard according to facts and circumstances of each case.
