THE IMPACT OF THE FAIR AND EQUITABLE TREATMENT STANDARD ON STATE SOVEREIGNTY

— — FROM THE PERSPECTIVE OF INTERNATIONAL INVESTMENT PRACTICE

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The Impact of the Fair and Equitable Treatment Standard on State Sovereignty
公平與公正待遇標準對國家主權的影響

― From the Perspective of International Investment Practice
― 以國際投資實踐為視角

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Abstract

As a result of globalization, States have realized that the attraction of foreign investments into their territories is a decisive element in their economic growth. However, there is a concern among States as to the method of stimulating foreign investments flow into their countries. On the other hand, foreign investor’s decision to make an investment depends on a stable environment in the host State. On this basis, States have agreed upon a set of basic standards for the purpose of granting foreign investors the security and assuring its continuance over time.

Some classic standards such as national treatment or most-favored-nation treatment (MFN) have become insufficient. The reason for this is based on the concern of foreign investors that because those standards are contingent in nature, the protection granted to them may not reach their basic expectations since the treatment provided by the State to its own nationals is deficient. Thus, as a non-contingent standard, the fair and equitable treatment standard (FET), constitutes an independent and reliable system for the protection of foreign investors, because it provides them with a certain treatment that host States must grant regardless of the treatment given to their own nationals.

The FET standard first appeared in Havana Charter of 1948 as a desirable basis for the treatment of investment in foreign countries and the broad usage of the standard for the protection of foreign investors was following the BIT (Bilateral Investment Treaty) network from 1960s. However, the FET standard had become one of the most controversial issues in the international investment law since 1997 when the AMT tribunal discussed the violation by a State of its FET obligation for the first time.

In recent decades, we identified that there are more than seventy cases in which the FET standard was discussed by international arbitral tribunals. The FET standard has
become one of the most important standards which grant protection in international investment instruments and is regularly invoked by the foreign investors as a basis for requiring compensation from host States. Its characteristics, that of being non-contingent upon other standards, that of being so broad and vague, but also that it is a unilateral obligation of host States, had two direct consequences: first, the foreign investors relied on the FET standard extensively, seeing it as a sort of divine gift given to them by host States and second, a lot of commentators and host States started to violently criticize this standard because of the unbalanced relationship it allegedly created between the foreign investor and the host State. In practice, the arbitral jurisprudence of the interpretation on the FET standard developed a series of standards to cover restrictions of domestic administrative bodies, domestic courts and even national legislators. Therefore, this thesis will study on the impact of the FET standard on State sovereignty from the perspective of international investment practice.

The task of this thesis is to study the international investment practice on the FET standard and contribute to the general reflection and to the better function of the FET standard with new proposals and ideas. Being concerned with the treatment standard of investor in international investment law, this thesis is hence about a controversial concept and its normative underpinnings. It is primarily a practical analysis to the extent that international arbitral tribunals, through an evolving case law, structured the FET standard and gave it the scope and content it has today. By analyzing the ways in which host States accept to be bound by this obligation and the ways in which international tribunals carry out their tasks, this thesis aims to explain the impact of the FET standard on the State sovereignty and the interaction between protection of foreign investors and function of host governments.

Chapter I begins with the origins of the FET standard and the international investment practice on this standard. With the emergence of international investment regime, the FET standard has shown up on the stage of foreign investment protection.
The FET standard first appeared in draft multilateral instruments and treaties from the 1950s and became commonplace in BITs from the early 1960s. It is now included as a matter of course in almost all the international investment instruments. However, the formulations of the FET standard in different investment treaties are not consistent. On the basis of relevant practices, four main approaches to draft the FET standard have been used. In addition, this Chapter also examines the relationship between the FET standard and other treatment standards.

Chapter II considers the attempts to define the FET standard by governmental officials, arbitrators and scholars. There are three main approaches to the interpretation of the “fair and equitable treatment” obligation: first, the fair and equitable treatment can be viewed as reflecting the minimum standard of treatment. Second, the fair and equitable treatment can be viewed as an independent treaty standard that has an autonomous meaning. Third, the fair and equitable treatment can be assumed as an independent rule of customary international law. From analyzing the different approaches, none of them obtained the exact scope of the FET standard; thus the content of this standard should be illustrated by specific circumstances.

Chapter III examines the content of the FET standard. The standard is a legal concept composed of an objective and a subjective requirement. Some elements or concrete examples of what acts or omissions amount to a failure to accord the FET standard are now well established, whilst others are emerging from recent cases. International arbitral tribunals have found that lack of due diligence, discrimination against foreigners, State acts or omissions that deny investors justice, failure to accord due process or procedural fairness all violating, in certain circumstances, principles of fairness and equity. Transparency on the part of host States and their authorities is also required. More recently, a number of decisions have laid emphasis on the closely related question of frustration of foreign investors’ legitimate expectations and the stable and predictable legal and business environment of host States.
Expropriation was traditionally the most important standard of investment protection, and there was a time when foreign investor protection was virtually synonymous with protection against uncompensated expropriation. However, the vital position has been taken by the FET standard in recent arbitral practices. Chapter IV will focus on the recent arbitral case law to clarify an apparent tendency for recent tribunals to move away from findings of indirect expropriation in circumstances where there has been no substantive deprivation of investment, in favor of reliance upon the more flexible fair and equitable treatment standard as a source of State responsibility. The FET standard has evolved into an alternative for indirect expropriation in international arbitral practice with the application of “legitimate expectations”. Nevertheless, the broad interpretation of “legitimate expectations” in FET claims may create risks where the host States should bear State responsibility for necessary regulatory measures.

The frequency with which it is invoked by foreign investors and applied as a basis for State responsibility by investor-State arbitral tribunals, the FET interpretive jurisprudence has elaborated an important set of criteria for State actions which in some way affects foreign investors. Furthermore, the investor-State arbitral tribunals are seen as the agencies to define standards of good administration by State when they are interpreting the FET standard. Therefore, in Chapter VI, combined with the analysis on the status of investor-State arbitration, the impact of the FET standard on function of host government would be examined in detail. In the second half of this Chapter, three significant requirements of the FET standard for the exercise of public power would also be briefly addressed.

Although the FET standard is an obligation of the host State towards the foreign investors present on its territory, the overemphasis on the protection of foreign investors would injure the sovereignty of host State. Therefore, in a FET claim, it may allow the tribunals to assess the investors’ conducts when they determine whether the investors’ complaint of unfair and inequitable treatment was properly made out.
Chapter VI examines the three main types of investors’ conduct to be considered in a FET claim to determine the liability and compensation, such as the unconscionable conducts of investor, the error in risk assessment, and the lack of awareness of or compliance with the regulatory environment. At the end of this Chapter, the author points out that the application of proportionality analysis in FET jurisprudence would help to realize the genuine fair and equitable between foreign investors and host States.
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