

Fair and Equitable Treatment Standards and Its Challenges For Developing and Least Developed Countries with Special Reference to Afghanistan

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Abstract

Much of the regulation of foreign investments are done through the domestic laws of host countries. As foreign investors search for laws and regulations that affect their potential and actual investments, they would also look to the provisions of domestic law of that host state. The backbone of international foreign investment law is to provide complimentary and supplementary protection, outline international standards of protection, and give assurance to foreign investors of accessibility to an independent international tribunal in the event of a dispute arising between the host state and a foreign investor. In this area of international economic law, the special risks involved make predictability and stability as well as the nature and duration of investments become predominantly important. Changes in the position of the host state causes vulnerability to the foreign investor once he has sunk his investment in that state. Meanwhile, protecting the host state's interest is highly important. It is true that foreign investments are subject to the law and administrative control of the host States.

* This paper is partially part of the author's Master's thesis submitted to the International Islamic University Malaysia on "Fair and Equitable Treatment of Investors under International Investment Law and from the Islamic Perspective".

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However, legitimate regulation of the states must not be jeopardized by the guarantees afforded to the foreign investors. From time to time, some important interests of the local population are at stake in some areas of investment. However, developing and least developed countries are more vulnerable to this phenomenon as they desperately look for foreign investments to save and boost their volatile economies leading them to compromise their sovereign rights. Foreign investors are penetrating in very far territories and countries with different degrees of development in their laws despite problems caused by expansive and creative interpretations of FET. Therefore, a striking balance between these potentially conflicting interests is needed as one of the tasks of international investment law. Afghanistan's economy is booming and desperately looks for foreign investment. Therefore, the abovementioned challenges are more tangible than ever.

Keywords: Treatment Standards, FET, Afghanistan

Introduction

International investment law cope with foreign direct, and to a smaller degree, indirect and portfolio investment of international property globally. Its main players are the capital exporting countries (investors' country of origin), capital importing countries (i.e. investor's host state) along with the private international investors.²

By and large, there are serious concerns as to how foreign investors are treated in developing and least developed countries becoming the main concern of the international community (this could be attributed to the lack of suitable laws and their enforcement). However, aside from the level of development, the concerns for foreign investor's treatment has general application encompassing developed countries too.³

The latent idea behind the conduct of international business is the principle of non-discrimination. This principle is utilized to assure that host countries provide a certain level of treatment for foreign investors. For example, foreign investors doing business in host countries must be given the same favourable treatment as provided by national treatment principles as well as the MFN principle. In addition, the principle of fair and equitable treatment incorporates the elements of equity and fairness drawn from international law (especially the principle of minimum standards and practice), as well as domestic law principles concerning the overall treatment of foreign investment in a host country.⁴

Much of the regulation of foreign investments are done through the domestic laws of host countries. As foreign investors search for laws and regulations that affect their potential and actual investments, they would also look to the provisions of domestic law of that host state. For

² Asif Hasan Qureshi and Andreas R. Ziegler, *International Economic Law* (Sweet & Maxwell UK, 2011).

³ Qureshi and Ziegler.

⁴ Surya P. Subedi, *International Investment Law Reconciling Policy and Principle* (Hart Publishing, 2008), 57.

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instance, a foreign investor who plans to invest in China would be suggested to consult the Law on Chinese law on Foreign Equity Joint Ventures and Wholly Foreign-Owned Enterprises. The backbone of international foreign investment law is to provide complimentary and supplementary protection, outline international standards of protection, and give assurance to foreign investors of accessibility to an independent international tribunal in the event of a dispute arising between the host state and a foreign investor.⁵

In this area of international economic law, the special risks involved make predictability and stability as well as the nature and duration of investments become predominantly important. Changes in the position of the host state causes vulnerability to the foreign investor once he has sunk his investment in that state. Due to this reason, the purpose, structure, nature of foreign investment law are different when compared to trade law.⁶

Meanwhile, protecting the host state's interest is highly important. It is true that foreign investments are bound by the law and administrative control of the host States. However, legitimate regulation of the states must not be jeopardized by the guarantees afforded to the foreign investors. Some important interests of the local population are at stake in some areas of investment from time to time. Therefore, a striking balance between these potentially conflicting interests is needed as one of the tasks of international investment law.⁷

In this paper, we will look at how FET standards has to some extent adversely affect the sovereignty of the poorer countries. With their broken economy, they desperately look for foreign investments and as a result they have to agree to the terms that are detrimental to their sovereignty.

I. Foreign Investment Protection: The Fundamental Principles

⁵ Ibid.

⁶ Christoph Schreuer, "Investments, International Protection,".

⁷ Ibid, para. 2.

It is still unclear whether fair and equitable treatment is part of customary law. However, barely any lawsuit on an international investment treaty is filed without invoking the applicable treaty clause that requires fair and equitable treatment.⁸

However, the ultimate principle of modern foreign investment law is derived from customary international law, and provides protections to foreign investors together with the international law of state responsibility. When the act of a state weakens the guaranteed rights to foreign investors under customary international law or under a treaty, the act may give rise to state responsibility. Therefore, the principle of fair and equitable treatment has evolved to provide protections to foreign investors which has an international minimum standard of treatment. The status of international minimum standard was explained in the arbitral⁹ tribunal case of *Saluka Investments BV (the Netherlands) v the Czech Republic* by stating that:

It should be kept in mind that the customary minimum standard is in any case binding upon a state and provides a minimum guarantee to foreign investors, even where the state follows a policy that is in principle opposed to foreign investment; in that context, the minimum standard of ‘fair and equitable treatment’ may in fact provide no more than ‘minimal’ protection. Consequently, in order to violate that standard, States’ conduct may have to display a relatively higher degree of inappropriateness.¹⁰

Few tribunals have acknowledged that FET is a customary international law rule. NAFTA tribunals are the sole tribunals that have raised this issue in their award i.e. Pope and Talbot Tribunal in its 2002

⁸ Rudolf Dolzer, “Fair and Equitable Treatment: A Key Standard in Investment Treaties,” *The International Lawyer*, 2005, 81.

⁹ Stephen Vasciannie, “The Fair and Equitable Treatment Standard in International Investment Law and Practice,” *The British Year Book of International Law* 70, no. 1 (1999): 99.

¹⁰ *Saluka Investments BV (the Netherlands) v the Czech Republic*, para 292.

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second award.¹¹ The tribunal stressed that FET is present in many BITs establishing State practice essential to substantiate the presence of a rule of customary international law:

Canada's views on the appropriate standard of customary international law for today were perhaps shaped by its erroneous belief that only some 70 bilateral investment treaties have been negotiated, however, the true number, now acknowledged by Canada, is in excess of 1800. Therefore, applying the ordinary rules for determining the content of custom in international law, one must conclude that the practice of states is now represented by those treaties [62].¹²

Even though it is considered that these basic standards are settled, the meaning and scope of certain principles are subject to intense debate in both jurisprudence and in the literature on foreign investment. For instance, what constitutes 'fair and equitable treatment'? What is included in the 'international minimum standard' of treatment? Who is entitled to 'fair and equitable treatment'? What is included in the definition of 'investment'? Questions like these surround much of foreign investment law.¹³

Furthermore, framework clauses, which are generally typical substantive standards expressed in treaties, are included in bilateral treaties for the promotion and protection of foreign investments. These framework clauses cover objective and relative standards which are as follow:

- i. Most-favoured-nation treatment,
- ii. National treatment,
- iii. Fair and equitable treatment,
- iv. Protection and security standard,

¹¹ Patrick Dumberry, "Has the Fair and Equitable Treatment Standard Become a Rule of Customary International Law?," *Journal of International Dispute Settlement* 8, no. 1 (2016): 155–78.

¹² Ibid.

¹³ Subedi, *International Investment Law Reconciling Policy and Principle*.

- v. Guarantees of free transfers of funds,
- vi. Compensation in the event of expropriation or damage to the investment,
- vii. Dispute settlement mechanisms, both state-state and investor-state.¹⁴

This shows a wide scope of protections are given to foreign investors and risk that both parties may face.

II. Fet Standards and Host States: Challenges

From an international law point of view, countries have the general freedom to regulate the entry of international investment as well as the liberty to deal with those investments.¹⁵ Arbitral tribunals have often raised the question as to what is the meaning of the ‘fair’ and ‘equitable’ and law dictionaries were referred to. A close look unveils that ‘equitable’ means ‘just; consistent with principles of justice and right’ and that ‘fair’ means ‘impartial; just; equitable’ and ‘free from bias or prejudice’. This definition does not help much in applying the principle of fair and equitable treatment in a certain case. Therefore, the legal essence of fair equitable treatment remains as it is and there is no wonder that the term has been identified as being a pleonasm, which continuously reiterates that investors must be treated justly.¹⁶

Even though, ‘fair’, ‘equitable’, ‘just’ and ‘reasonable’ have been used interchangeably in the treaty practices, it only creates one obligation of ‘fair and equitable treatment’ on states rather than two separate obligations of ‘fair’ and ‘equitable’. Therefore, the above-mentioned synonymous textual references for the interpretation of a particular fair and equitable treatment clause and the probable

¹⁴ The division adopted from United Nations Conference on Trade and Development. See also (Jeżewski, M. (2011). *Międzynarodowe Prawo Inwestycyjne*. Warszawa: C. H. Beck 2011.

¹⁵ Ibrahim F. I. Shihata, *The World Bank in a Changing World: Selected Essays and Lectures*, vol. 2 (Martinus Nijhoff Publishers, 1995).

¹⁶ Roland Kläger, *‘Fair and Equitable Treatment’ in International Investment Law*, vol. 83 (Cambridge University Press, 2011).

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differences between the two notions in arbitral jurisprudence are considered ‘insignificant’.¹⁷

The search for the literal meaning of a term is challenging due to the fact that ‘fair and equitable treatment’ standards represent a general clause with broad terms. Thus, it has resulted in shorthanded definitions such as: ‘fair and equitable treatment should be understood to be treatment in an even-handed and just manner’. These types of definitions are of no help and add to the complexity of the situation with their imprecision and lack of clarity. Therefore, it is wrong to focus on the literal meaning of FET as it is impossible to apply it in a specific factual situation in any arbitral decisions.¹⁸

In addition to the abovementioned definitional problems of FET, there is an absence of proper guidelines on the standard of compensation. An admittance made by the Customary International law which are (i) the ‘police power’ of the states and (ii) “regulatory expropriations” that either gives lesser or no compensation at all for direct or indirect expropriation foreign properties by the states.¹⁹

However, efforts have been made by arbitral tribunals in their recent decisions and the scope of “regulatory expropriation” has been narrowed down and awarded. These are outstanding sums that have breached BITs and the standards of full compensation. The *Canada–Peru BIT* of 2006 can be referred to on how “indirect expropriation” was defined narrowly as a model of a provision that indicates a recent trend in BIT practice. Yet, a clear guideline has not been provided by foreign investment law as to the balance between regulatory expropriations.²⁰

The main contention in international investment law is the conflict of law between the private investor’s rights and state sovereignty. Both parties in international agreements will argue that their law prevail. In this section, we will discuss what defines state

¹⁷ Ibid.

¹⁸ Ibid, 83:42.

¹⁹ Subedi, *International Investment Law Reconciling Policy and Principle*.

²⁰ Ibid, 155.

sovereignty and how it affects and limits the sovereignty of the host state.

The concept of state sovereignty is a very sensitive area in the domain of international law and international relations. In *Encyclopedia of Public International Law*, Steinberger refers to it as “the most glittering and controversial notion in the history, doctrine and practice of international law.”²¹ Lauterpacht on the other hand, calls it a “word which has an emotive quality lacking meaningful specific content.”²²

Sovereignty, according to Kleffens in “Sovereignty in International Law originates from an old French word *sooerainete*, and from Medieval Latin: *superanitas*, *supremitas* or *suprema potestas*.”²³ Sovereignty is often associated with absolute authority and supremacy. The qualifications of the concept of sovereignty incorporate rich variations the most important of which are 'territorial', 'internal', 'external', 'absolute', 'relative' and 'functional'.²⁴ Each of these qualifications differ by subject and historical period and are usually referred to in parts. Sovereignty is a dynamic concept making it prone to being given different meanings throughout different historical periods despite having certain essential characteristics.²⁵

The question is, what is then the essence of the term 'sovereignty' of states? Nico Schrijver inserted that internally it means that “the government of a state is considered the ultimate authority within its borders and jurisdiction.”²⁶ It was concisely stated in the arbitral

²¹ Helmut Steinberger, *Encyclopaedia of Public International Law*, ed. Rudolf Bernhardt (North-Holland Publishing Company, 1987), 397.

²² Eli Lauterpacht, “Sovereignty-Myth or Reality?,” *International Affairs (Royal Institute of International Affairs 1944-)*, 1997, 141.

²³ E.N. van Kleffens, 'Sovereignty in International Law', *Recueil des cours*, 82(1953-1), p. 9.

²⁴ Georg Schwarzenberger, “14 The Forms of Sovereignty An Essay in Comparative Jurisprudence,” *Current Legal Problems* 10, no. 1 (1957): 264–95.

²⁵ Nico Schrijver, “The Changing Nature of State Sovereignty,” *British Yearbook of International Law* 70 (2000): 70.

²⁶ *Ibid*, 70.

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decision in the *Island of Palmas* case (1928)²⁷ between the Netherlands and the United States that:

“Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State ... Territorial sovereignty involves the exclusive right to display the activities of a State.”

The vast majority of BITs, FTAs and MITs presently in force encompass obliges the host state to offer fair and equitable treatment for foreign investors and their investments. In the practice of international arbitral tribunals, little attention has been given to the FET standard even supposing that its principles were presented in numerous international investment instruments for over 60 years. This scenario drastically changed during the 1990s where foreign investors pursued FET claims in an aggressive manner as a result of the actions of the host states. In the last 15 years, the FET standards have appeared as a vital element, as host states are progressively ordered to compensate the damages inflicted before investor-state arbitration on foreign investors in disputes. This is inclusive of circumstances where the investor-state arbitral tribunals found no state liability for indirect expropriation, the FET standards were found to be an independent source for assessing liabilities. Historically, it was claimed that foreign investors were being pursued as the lynchpin of their compensatory demands.²⁸

Many have concluded, in recent cases, that the host states breached their obligations under the standards, where the claims or FET was made directly by investor-state arbitral tribunals. Even though in the domestic administration, the “fair and equitable treatment” standard is not itself a legal standard of direct application, however, it may have

²⁷ *Island of Palmas* case, in *Reports of International Arbitral Awards*, vol. 2 (1949), p. 829.

²⁸ Deng Ting Ting, “The Impact of the Fair and Equitable Treatment Standard on State Sovereignty: From the Perspective of International Investment Practice” (City University of Hong Kong, 2012), 162.

an impact on the specific law and the practice of administration within the host states through its influence and diffusion. Once arbitral cases are lost by the host governments, in order to conform to the FET standards, they are required to regularize their conduct and even reform their rules and regulations. A crucial set of criteria of state actions is outlined by the FET interpretative jurisprudence when exercising public powers in ways that affect foreign investors; this is noted by the regularity with which it is raised by foreign investors and applied as a basis for state responsibility by tribunals. Furthermore, FET standards are being interpreted by the states, the investor-state arbitral tribunals are perceived as the agencies to outline standards of good administration.²⁹

Moreover, only after the investor had exhausted local remedies could a claim of diplomatic protection by the home state be made, thereby, giving the host state the opportunity to address the investor's complaint before resorting to international law. In the investor-state arbitration, foreign investors could raise international claims against the host state in disputes arising from the state's exercise of public power without any requirements for claims to be filtered by the investor's home state. In addition, the customary rule that a foreign investor must exhaust local remedies before an international claim can be brought before an international arbitral tribunal has been limited or removed by many international investment treaties.³⁰

An investment treaty reduces the scope of sovereignty for all parties to the treaty, as with every international agreement. An investment treaty will limit, in particular, the sovereign right of a state to subject foreign investors to its domestic administrative legal system.³¹ The host state's domestic administrative law would inevitably be affected, based on investment treaties which settle the regulatory

²⁹ Ibid, 163.

³⁰ Gus Van Harten and Martin Loughlin, "Investment Treaty Arbitration as a Species of Global Administrative Law," *European Journal of International Law* 17, no. 1 (2006): 121–50.

³¹ Rudolf Dolzer, "Impact of International Investment Treaties on Domestic Administrative Law, The," *NYUJ Int'l. L. & Pol.* 37 (2004): 953.

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disputes between foreign investor and host state, by the investor-state arbitrations.³²

FET standards limit the exercise of public power and sovereignty of states specifically that of developing and least developed countries. This is mainly due to the fact that that these countries look for foreign investment to save and boost their volatile economies. Foreign investors are penetrating in very far territories and countries with different degrees of development in their laws despite problems caused by expansive and creative interpretations of FET. Further problems arise when least developed or sometimes developing countries plunge into internal conflicts, poor system of governance, high levels of corruption, and politicized judiciary. Thus, foreign investors through BITs and FTAs are demanding maximum protection under international law and individual investment contracts with broad and easy access to mechanisms of international dispute settlements and substantive standards in case anything goes awry by the actions of the host state.³³

III. Foreign Investment In Afghanistan: The Problems of Fet Standards

Afghanistan being one of the poorest countries in the world applied to WTO membership in 2004. Afghanistan has ample mineral resources such as copper, iron, and chromium along with precious stones (lapis lazuli). However, due to the continuing security threats, investors are discouraged to invest in Afghanistan. It is widely believed that WTO membership helps economic growth in Afghanistan.³⁴

In addition, Afghanistan has a plentiful precious metals, coal, copper, lithium, marble, iron, gemstones and particularly hydrocarbons resources, which are unexposed due to the conflicts. Afghan and

³² Ting, "The Impact of the Fair and Equitable Treatment Standard on State Sovereignty: From the Perspective of International Investment Practice," 168.

³³ Subedi, *International Investment Law Reconciling Policy and Principle*.

³⁴ Shamil Shams, "Will WTO Membership Help Improve Afghanistan's Economy?," DW, 2016, <https://www.dw.com/en/will-wto-membership-help-improve-afghanistans-economy/a-19437115>.

American Geological Surveys was conducted between 2007 to 2009 which indicated that mercury, copper, asbestos, rare-earth elements, sulfur, graphite, chromites, potash, and shingle and shingle are located in 20 mineralized areas. It is estimated that the total copper resources in Afghanistan is 60 million metric.³⁵

On July 2016, Afghanistan finally joined WTO as its 164th member, after a long negotiation regarding its accession terms. Afghanistan has formally agreed as well on the new WTO Trade Facilitation Agreement (TFA). Since WTO's establishment in 1995, Afghanistan is the ninth least-developed country (LDC) to comply with WTO.³⁶

In addition, Afghanistan became the 10th LDC member and 90th WTO member that have submitted its instrument of acceptance for TFA. For that, Afghanistan is privileged with exceptional flexibilities in the TFA where developing countries and LDCs can determine the implementation time of individual agreement provision by themselves. It can also indicate which provisions to be applied when technical support and assistance is received for capacity building. The TFA will be fully implemented when two-third of the WTO membership has formally agreed with the Agreement.³⁷

The WTO membership assist economic growth in Afghanistan in two ways, higher export capacity and greater Foreign Direct Investment (FDI). All Afghanistan's trading partners at Central Asia, West Asia, and SAARC are members of WTO or in the process of accession. It is believed that through dispute settlement mechanism of WTO, the country will obtain better chance of fair trade. However, the WTO membership comes with responsibilities, which obliges

³⁵ Thomas J. Mack Stephen G. Peters, Trude V.V. King and Michael P. Chornack, "Summaries of Important Areas for Mineral Investment and Production Opportunities of Nonfuel Minerals in Afghanistan," U.S. Geological Survey Afghanistan Mineral Assessment Team, 2011, <https://pubs.usgs.gov/of/2011/1204/> and on DVD.

³⁶ "DG Azevêdo Welcomes Afghanistan as 164th WTO Member," World Trade Organization, 2016, https://www.wto.org/english/news_e/news16_e/acc_afg_29jul16_e.htm.

³⁷ Ibid.

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Afghanistan to do extensive reforms in complying with its WTO obligations. Afghanistan tariff revenues are expected to reduce and this will in return have an impact on Afghanistan in short term.³⁸

In order to fully benefit from the WTO membership, there is a need for specialized experts and professionals in a number of areas of law for instance international trade, WTO, economics, WTO negotiations, and dispute settlement. This should be coupled with a focus on Human Capital development which encompasses advancements in the field of science and technology together with entrepreneurial capabilities.³⁹

There has been limited statistics on Afghanistan's foreign direct investment (FDI), and some of them are not reliable as well. In 2013, it is observed that there is an increase in FDI flow as the result of government's effort through more land allocation given to organisation and industries of numerous trade exhibits. However, the investment in the country drops ominously when NATO troops left at the end of 2014. A major share of FDI inflows was undoubtedly associated to the NATO intervention troops and its related development programs.⁴⁰

Under the Afghan law, it is guaranteed to foreign companies to receive the same investment opportunities just like local companies. Unfortunately, several factors restrain the country's ability to attract foreign investors including insufficient facilities and infrastructures, political violence, a high number of unskilled labourers, weak regulations on property protection, as well as under-developed financial markets. In addition, corruption is rooted and widespread throughout the country, even the country is ranked 177 out of 189 by World Bank

³⁸ Ahmad Shah Mobariz, "Afghanistan's WTO Accession: Costs, Benefits and Post-Accession Challenges" (United Nations Economic and Social Commission for Asia and the Pacific (ESCAP), 2015).

³⁹ "Islamic Republic of Afghanistan Afghanistan National Development Strategy 1387 – 1391 (2008 – 2013)," *Afghanistan National Development Strategy (ANDS)*, 2007,

http://www.af.undp.org/content/dam/afghanistan/docs/ANDS_Full_Eng.pdf.

⁴⁰ "Afghanistan: Foreign Investment," Santander Trade Portal, 2016, <https://en.portal.santandertrade.com/establish-overseas/afghanistan/investing-3>.

in its Doing Business 2016 category. On the other hand, a railway project was signed in 2013 with the aim of connecting Tajikistan, Turkmenistan, and Afghanistan. In 2015, the Chinese government showed interest and decided to support the railway development as well as hydroelectric plant construction. Afghanistan also strengthened its bond with Turkmenistan in August 2015, and as the result a number of development projects were announced such as the building of pipeline to connect the Afghanistan and Turkmenistan to India and China. It was hoped that the project is able to invite FDIs noting that security condition gets better.⁴¹

In 2005-2013, Afghanistan's economy was observed to have stable economic growth with average of 10 percent. This was mainly the result of major funding by international aid agencies and security forces. Economic growth is predicted to slow down due to decrease in international aid by one or two percent per year in short term or three to four percent per year in longer term. The Afghan government must improve their local revenue generation as such growth would not be able to support the expected government budget deficits. Development led by private sector may be successful if the government succeed in persuading hesitant investors of business opportunities and that it is possible to control the security risk present.⁴²

The legal and regulatory structures and implementation mechanisms in Afghanistan is currently underdeveloped and unevenly applied. Majority of the system required that encourage and protect private investment is not widely implemented. At the same time, legal professionals and investors may be confused due to the coexistence of three overlapping legal laws namely Shura (traditional law and practice), Sharia (Islamic Law), and the formal statutory system under the 2004 Constitution. The laws application is also heavily affected by corruption. The attempts to complement new laws were unsuccessful at

⁴¹ Ibid.

⁴² U.S. Department of State, "Afghanistan Investment Climate Statement," 2015.

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times through application of rules and regulations that transform into reformed administrative practices.⁴³

The Private Investment Law of Afghanistan allows government to seize assets or investments on a non-discriminatory basis and for the sake of public only. It is stated by the law that the government shall provide sufficient, prompt, and effective compensation that conformed to the international law principles and comparable to fair market value. In addition, the government is able to seize private property in order to resolve commercial debts. When more than 25 percent ownership is owned by the investors, according to PIL he is allowed to challenge the confiscation. So far, there have been no complaints made regarding foreign assets confiscation, “creeping”, or others by government.⁴⁴

Afghanistan faces several challenges. Afghanistan’s image is tainted internationally after long-lasting civil wars and destructions. In order to fix this image, several steps need to be taken, such as rebuilding the infrastructure, improving the security situation and establishment of rule of law.⁴⁵

As Afghanistan economy is boosting, Afghanistan must be ready to face the challenges that FET standard imposes. FET affects the sovereignty of states specifically that of developing and least developed countries. Host governments that have lost arbitral cases may regularize their conduct and even reform their rules and regulations in order to conform to the requirements under the FET standards. The FET interpretative jurisprudence elaborated an important set of criteria of state actions when exercising public powers in ways that affect foreign investors; This is noted by the frequency with which it is invoked by foreign investors and applied as a basis for state responsibility by tribunals. Furthermore, when states interpret the FET standards, the

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ World Bank Group: Multilateral Investment Guarantee Agency, “Investment Horizons: Afghanistan,” 2005, <https://www.miga.org/sites/default/files/archive/Documents/horizon.pdf>.

investor-state arbitral tribunals are seen as the agencies to define standards of good administration.

Problems posed by the expansive or creative trend in interpretation: through opportunities arising out of globalization and multinational enterprises, foreign investors are penetrating in very far territories and countries with different degrees of development in their laws. These least developed or sometimes developing countries are plunged into internal conflicts, poor system of governance, high level of corruption and politicized judiciary. Thus, these foreign investors through BITs and FTAs are demanding maximum protection under international law and individual investment contracts with broad and easy access to mechanisms of international dispute settlements and substantive standards in case anything goes awry by the actions of the host state.⁴⁶

The host states are victimised through FET standard protection provided to the foreign investors. When the foreign are unhappy with the legitimate exercise of public power of the host state or if their demands are not met, they invoke FET violation against the host state. Hence, a friction is created between the parties as foreign investors have a tough pitching for FET standard protection that undermine regulatory power of every sovereign host state action. The situation is exacerbated as “foreign investors demand absolute protection of foreign investment”.⁴⁷

For the purposes of public interest, host state as a sovereign retain the regulatory power. Hence, the host state has the power in introducing, monitoring and enforcing measures that regulate private conducts. However, foreign investors perceive this a negative phenomenon that could affect their investments. Moreover, the tribunal's awards currently override domestic and public interests for

⁴⁶ Subedi, *International Investment Law Reconciling Policy and Principle*, 160.

⁴⁷ Om Krishna Shrestha, “A Host State Regulatory Right in Fair and Equitable Treatment (FET) in Bilateral Investment Treaties (BITs)” (fi= Lapin yliopisto| en= University of Lapland|, 2016).

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robust investments protection.⁴⁸ Particularly, FET standard is used by arbitral jurisprudence to limit the host states exercise of sovereign powers.⁴⁹ Hence, through the FET standard, BIT influence the "international standard" content by dictating how states are expected to exercise their sovereign rights.⁵⁰

Afghanistan as a least developed country is desperately looking for foreign investment. Government of Afghanistan has taken positive steps in the past decade to attract foreign investments and has been successful to some extent regardless of the worrying security challenges. Membership of WTO is another great opportunity for Afghanistan to boost its economy if proper policies are set. However, high foreign investor's expectations and FET standards have proven to have grave consequences mainly on poor countries like Afghanistan. As LDC countries' economies are fragile, they are in great need of foreign investments and that allows the investors to impose illegitimate expectations on them. Hence, due to their lack of good bargaining chips, they tend to comply with majority of some investors' illegitimate expectations. This in return affect their economy and their undermine their sovereignty.

Conclusion

Regardless of outstanding growth in the number of BITs and FTAs, there remain significant issues within international investment law that are still unresolved under the trends in jurisprudence of international

⁴⁸ Lise Johnson and Oleksandr Volkov, "Investor-State Contracts, Host-State Commitments' and the Myth of Stability in International Law," *American Review of International Arbitration* 24, no. 3 (2013): 361.

⁴⁹ Denning Jin and King & Wood Mallesons, "China: Fair and Equitable Treatment (FET) – Should the Standard Be Differentiated According to Level of Development, Government Capacity and Resources of Host Countries?," Mondaq, n.d., <http://www.mondaq.com/china/x/221614/international+trade+investment/Fair+and+Equitable+Treatment+FET+Should+the+Standard+be+Differentiated+According+to+Level+of+Development+Government+Capacity+and+Resources+of+Host+Countries>.

⁵⁰ Anuradha Ghosh, Banhisikha Chatterjee, and Arati Das, "Production of Glucoamylase by 2-Deoxy-D-Glucose Resistant Mutant Of *Aspergillus terreus* 4," *Biotechnology Letters* 13, no. 7 (1991): 515–20.

investment courts and tribunals. In the absence of a comprehensive international treaty, different interpretations by tribunals and states are being made due to the lack of codification of the rules of foreign investment law. In jurisprudence too, the ambiguous and various definitions of fair and equitable treatment by different tribunals have added to the existing confusion.

Afghanistan as a least developed country applied to WTO membership and became its 164 member. This is a tremendous achievement for Afghanistan. The WTO membership is expected to modernise Afghanistan's regulatory, institutional and policy frameworks. It will also increase the export capacity of Afghanistan and Afghanistan will have a better access to dispute settlement mechanism under the dispute settlement mechanism of WTO. As a result of this, there are going to be an increase in foreign direct investment in Afghanistan too, as the investors will have better perception about Afghanistan. However, it is also expected that the WTO membership will have negative impacts on Afghanistan's economy too. For instance, Afghanistan's tariff revenues are expected to be reduced as part of Afghanistan WTO obligations to reduce tariffs.

Afghanistan like any other least developed countries desperately look for foreign investment in order to save its broken economy. This situation might result in worrying circumstances in which forces the government to give extra privileges and protection to the foreign investors. This will not only affect the sovereignty of Afghanistan, but also might put the domestic investors at disadvantage with their foreign counterparts.

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