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Expropriation, FET, and MFN clause: An Introduction to Investment Arbitration

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ABSTRACT

The objective of this research paper is to acquire an intimate familiarity with the concept of investment arbitration. The paper discusses the reasons why investment arbitration is significant, provides a concise introduction, comprehends the difficulties associated with investment arbitration, discusses the subject of expropriation, provides examples of situations in which we can initiate arbitration, and offers some suggestions. In addition, the paper provides some suggestions.

Keywords*: MFN, FET, Expropriation.*

I. INTRODUCTION

The system for addressing clashes between worldwide financial backers and host state run administrations is alluded to as Investment arbitration. The capacity of an unfamiliar financial backer to sue a host country guarantees that, in case of a question, equity is served. The unfamiliar financial backer will approach autonomous arbitrators who will settle the issue and convey an enforceable decision.

This allows the unfamiliar financial backer to stay away from public locales that might be viewed as biased or ailing in autonomy, and to determine the issue in consistence with a few worldwide settlement securities. Unfamiliar financial backers' considerable privileges are dictated by the global speculation arrangement under which they record their cases. They vary from the assurances allowed by the homegrown law of the host country, and occasionally, they might give more security.[2]

Be that as it may, in the present situation, both the unfamiliar financial backers and the host states have been confronting different difficulties and backfires against their usual methodology.

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[2] International Arbitration Information by Aceris Law, Introduction to Investment Arbitration, Aceris Law LLC, (Sept. 14, 2021, 1:05 PM), https://www.international-arbitration-attorney.com/investment-arbitration/.

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II. EMERGING CHALLENGES IN INVESTMENT ARBITRATION

(A) FET Clause

In worldwide speculation discretion, reasonable and even-handed treatment has become quite possibly the most fundamental and oftentimes referenced principle. FET is certifiably not a clever idea. Early global monetary arrangements, for example, the Havana Charter for an International Trade Organization (1948), the Bogota Economic Agreement (1948), and the Freedom of Navigation (FCN) Treaties, can be followed back to its starting points.[3].

The commitment of fair and equitable treatment rests with the host country, obliging it to treat foreign investors "fairly." The model clause can be found in the Draft OECD MAI,1988, which specifies out the model clause, which has been adopted in various multilateral accords. Foreign investments in a contractual party's territory must be treated fairly and equally, with full and continual protection and security.

They discussed the examination of the realm of FET in UNCTAD's FET series on International Investment Agreements in a concise manner:

- Prohibition of outright assertion in dynamic estimates taken exclusively dependent on bias or predisposition, with no legitimate reason or normal clarification, refusal of equity and disdain for key fair treatment standards.
- Prohibition of victimization financial backers on obviously mistaken grounds, like sex, race, or strict convictions.
- Prohibition of oppressive treatment of financial backers, like pressure, coercion, and badgering.
- Protection of real financial backer assumptions emerging from an administration's particular portrayals or speculation initiating measures, while adjusting the right of the host state.

The "International minimum standard" has been widely acknowledged as the ideal for determining FET. Unlike National Treatment or Most Favoured Nation (MNF) safeguards, FET is an absolute necessity because it is not determined in contrast to any other criteria.[4].

While establishing guidelines for the FET test, the Mondev panel stated that a state action need

[3] United Nations Conference on Trade and Development, Transparency UNCTAD Series on Issues in International Investment Agreements II, United Nations, (Sep. 14, 2021, 1:05 PM), https://unctad.org/system/files/official-document/unctaddiaeia2011d6_en.pdf.
[4] Marcela Klein Bronfman, Fair and Equitable Treatment: An evolving standard, Max Planck Yearbook of United Nations, Volume 10, 2006, p.622.

not be conducted in bad faith to be considered unjust under the FET criterion. *"To the modern eye, what is unfair or inequitable need not correlate with the outrageous or flagrant," the tribunal ruled. Without necessarily acting in bad faith, a state can treat a foreign investment unfairly or inequitably."*[5]

On the issue of the financial backer's "real assumptions" as a part of FET, the Saluka board held that the FET measure was inseparably connected to the idea of genuine assumptions. It did, nonetheless, recognize the SD Myers court's translation that "the assurance of a break of the host state's commitment of "reasonable and fair treatment" should be made considering global law's significant degree of reverence concurred to homegrown specialists' more right than wrong to control matters inside their boundaries." The Saluka tribunal established the FET standard as follows: "The host state's legitimate right to regulate domestic affairs in the public interest must also be considered when determining whether the host state's legitimate right to regulate domestic matters in the public interest was justified and reasonable."

Despite various arbitral rulings interpreting FET, the exact criterion remains ambiguous and evolving, and it is dependent on the facts and circumstances of the case.

(B) Most- Favoured nation clause

The most-favoured nation clause is "a treaty provision in which a state ensures a commitment to award most-favoured nation (MFN) treatment to another state in an agreed-upon sphere of relations." The investor is guaranteed MFN treatment by the host state. It ensures that an investor from one country is treated in the same way that an investor from another country is treated. MFN, on the other hand, can only be used if the underlying BIT provides MFN protection.

According to the ILC draught articles on MFN clauses, 'Most-favoured nation treatment is a treatment accorded by the granting state to the beneficiary state, or to persons or things in a determined relationship with that state, that is not less favourable than treatment extended by the granting state or to a third state, or to persons or things in the same relationship with the third state,'.[6]

In addition, there is a growing global pushback against multinational firms' alleged abuse of BITS, with national regulations being harassed in the name of protecting foreign investors and

[5] Tecnicas Medioambientales Tecmed, S.A. v The United Mexican States, (2003) ICSID Case Number ARB (AF)/00 Para 153.
[6] Draft articles on most-favoured-nation clauses (Yearbook of the International Law Commission, 1978, Vol. II, Part Two) 21.

their interests.

The threat seen by sovereign states of private courts interfering with policy and regulatory actions adopted by governments in the public interest is a primary driver of the reaction. For example, the Australian government announced in April 2011 that it would no longer include investor-state dispute resolution clauses in future trade agreements with poor countries in the Gillard Government Trade Policy Statement.[7]

The proposed investment chapter in the Transatlantic Trade and Investment Partnership (TTIP) with the United States has also sparked concerns among European citizens. Around 3.5 million Europeans protested the TTIP, essentially halting the talks. Massive protests and demonstrations across Europe led governments, including the French government, to say that they will not approve TTIP "at this time." One of the main arguments advanced by supporters of Brexit is the possibility of avoiding the hazards of the Transatlantic Trade and Investment Partnership (TTIP).

Indonesia has terminated almost 60 bilateral investment treaties, beginning with the one it signed with the Netherlands, while expressing dissatisfaction with the "new modus operandi" of foreign investors using these agreements to threaten weak governments. Indonesia terminated 11 treaties between January 1, 2016, and April 1, 2017, whereas India terminated seven accords in the same time period.[8]

III. EXPROPRIATION

The Bilateral Investment Treaties provides a shield to foreign investors against expropriation. So, what is expropriation? It is a set of rights that balances the interests of both the investor and the host country. Under international law, the host government has the sovereign right to seize property from foreign and domestic investors for a variety of reasons, including social, economic, and political ones. Expropriations can be divided into-

Direct Expropriations: It can be described as the host state's physical seizure of the property. The foreign investor loses his property and must be compensated.

Indirect Expropriations: the foreign investor right to his physical property is protected, i.e., he keeps the right over it, but we transfer the economic gains arising from it to the domestic government.

[7] Gillard Government Trade Policy Statement, Trading our way to more jobs and prosperity, Pg. 14, April 2011.
[8] UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, World Investment Report, 2017, Investment and Digital Economy United Nations Publications, (Sept. 14, 2021, 2:00 PM), https://unctad.org/system/files/official-document/wir2017_en.pdf.

There is a need to know not in all circumstances regulatory measures sum to expropriation. Certain activities by the state for public interest can upset the businesses, but this would not mean it is expropriation. The key difficulty here is how to distinguish between a regulatory/normal governmental act and an expropriation measure. For instance, the ***Colombia-India BIT (2009)*** states: "*Non-discriminatory regulatory actions by a Contracting Party that are designed and applied to protect legitimate public welfare objectives including the protection of health, safety and environment do not constitute expropriation or nationalization; except in rare circumstances, where those actions are so severe that they cannot be reasonably viewed as having been adopted and applied in good faith for achieving their objectives*[9]." Even arbitral tribunals have come to the same conclusion about the host state's non-discriminatory activities. In the case of ***Saluka Investments v. Czech Republic***[10], the tribunal held that, under international law, the state is not required to compensate a foreign investor when regulatory measures are non-discriminatory and directed at the public good.

On the other hand, what actions are we allowed to criticise? Expropriatory measures claimed by investors include confiscatory tax measures, prohibitions on dividend distribution to shareholders, labour rules limiting employee dismissal, judicial judgements, banking laws, and constraints on compelled licences.

Lawful Expropriation and its requirement:

Public Purpose–International Law recognizes that expropriation for public purpose is valid and, if done for general welfare. It posed the Arbitral Tribunals with the duty to recognize the underlying aim of public purpose. The Egyptian government expropriated the plaintiffs' land in ***Siag and Vecchi v. Egypt*** due to delays in the construction of a tourist project. According to the government, they did not define it as a public policy goal, therefore the property was given to a gas corporation for pipeline construction. The fact that they afterwards utilised the land for public purposes was deemed immaterial by the tribunal.

It was held that *"The Tribunal does not accept that just because an investment was finally placed to public use means that the expropriation of that investment was 'for' a public purpose."*[11] Compensation must be given to the investor and under international law the states may do so.

[9] United Nations Conference on Trade and Development, Expropriation UNCTAD Series on Issues in International Investment Agreements II, United Nations,(Sep. 5, 2021, 10:05 AM), https://unctad.org/system/files/official-document/unctaddiaeia2011d7_en.pdf.
[10] IIC 210 (2006).
[11] (ICSID Case No. ARB/05/15).

Non-Discrimination: The expropriation should be non-discriminatory towards the investor.

Due process of Law: Due regard must be given to international rules recognized and the domestic legislation of the country and the investor shall have a fair opportunity to get his case heard before an impartial body.

Compensation: Compensation must be paid to the investor in order for it to be legal. The money should be paid as soon as possible, and the market worth of the investment should be considered. "*Amount that a willing buyer would normally pay to a willing seller after considering the nature of the investment, the circumstances in which it would operate in the future, and its specific characteristics, such as the length of time it has been in operation, the proportion of tangible assets in the total investment, and other relevant factors pertinent to the investment.," according to the World Bank Guidelines on the Treatment of Foreign Direct Investment."*[12]

We must follow these requirements for a lawful expropriation.

IV. INVESTMENT ARBITRATION ITS INITIATION AND FORUMS

Mostly cooling-off periods are mentioned in investment arbitration agreements, which provides an opportunity to host state and investor to start negotiations. In case we do not resolve the issue during the cooling period, then arbitration is pursued. To begin arbitration proceedings against the host state, you must first file a notice of intent. Requesting that the other party participate in the arbitration. The process is governed by the host state's and the investor's arbitration agreement. For example, an investor might be under an obligation to use the domestic remedies before going to arbitration. Similarly, the parties might have an option to choose to sue either in domestic or an international arbitral tribunal. It becomes very important to assess the document prescribing the details for initiation of arbitration proceedings, i.e., if courts are to be approached prior to arbitration, etc.

We can conduct investment arbitrations on an ad hoc (non-administered) basis, in which the parties determine the procedure and number of arbitrators to be appointed before the arbitration begins. Arbitration conducted by arbitral institutions such as the International Centre for Dispute Settlement is referred to as institutional arbitration (ICSID). The Convention on the Settlement of Investment Disputes between States and Foreign Nationals gave birth to it. It provides opportunities for investment disputes between contractual states and nationals of other

[12] United Nations Conference on Trade and Development, Expropriation UNCTAD Series on Issues in International Investment Agreements II, United Nations,(Sep. 5, 2021, 10:10 AM), https://unctad.org/system/files/official-document/unctaddiaeia2011d7_en.pdf.

contracting nations to be arbitrated and settled.[13] Similarly, there are various arbitration institutions which offer their services, example–Stockholm Chamber of Commerce, International Chamber of Commerce, London Court of International Arbitration, Permanent Court of Arbitration, Cairo Regional Centre for International Commercial Arbitration, etc. These organisations have their own set of guidelines for how arbitration proceedings should be conducted. The parties are at the free will to choose the forum they like to resolve their disputes. Arbitration as an out of court settlement has strengthened over the period and under international investment law regime, we have effectively used it to solve the issues. The award passed by the arbitrator being binding has helped the parties win over their rights without going through the exhaustive process of courts.

V. SUGGESTIONS

Intervention administrations: both host state and the financial backer can select mediation prior to going for arbitration. It will be less casual, and the disputants can attempt to genially resolve the questions, as arbitration is costly and tedious when contrasted with mediation. Before they heighten the issues, we can intervene them between the gatherings. The host government can take drives and foster intercession administrations for financial backers. This will assist with working with correspondence before the matter becomes complicated and at last goes to the court.

Data sharing as an anticipation measure: In a great deal of cases, we have seen that choices taken by government at nearby level impacts the financial backers and their organizations. This happens on the grounds that the financial backer isn't made mindful of such turns of events. Global speculation settlements are endorsed by the high-ranking representatives of the public authority and some of the time the data isn't circulated among specialists who are in touch with unfamiliar financial backers. This can be stayed away from by imparting all pertinent data to nearby state-run administrations and guaranteeing that financial backers' privileges are completely secured.

Improving State–State joint effort on applicable issues is one more procedure to keep questions from emerging and arriving at the global discretion stage. Before, correspondence and collaboration among legislatures on issues like venture arrangements and financial backer state clashes were normal somewhat, giving fundamental examples to ways of formalizing such practice. Not simply capital-bringing in nations want to keep away from conflicts growing into

[13] ICSID Convention, Regulation and Rules, Convention on the settlement of Investment Disputes between states and nationals of other states, World Bank, (Sep. 5, 2021, 10:10 AM), https://icsid.worldbank.org/sites/default/files/documents/ICSID%20Convention%20English.pdf.

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worldwide discretion. To abstain from expanding strains, capital-sending out nations go to lengths for the benefit of their financial backers. The job of State–State joint commissions or comparative foundations set up to deal with financial backer objections and directing them to the public authority bodies for additional thought is maybe really encouraging. We can even set up the point and obligations of joint commissions in IIAs, as recently referenced. Financial backers can contact a joint commission agent in their nation of origin, who will talk with its partner in the host nation to determine the heightening clash as fast as could really be expected.

VI. CONCLUSION

Global speculation arrangements accommodate specific securities to unfamiliar financial backers. These shields are vital to guarantee that the financial backers feel ensured. Insurances from confiscation, impartial treatment, public treatment to pay each perspective should be focused on and the host state and financial backer should give due respect to it while concurring with one another. Worldwide law has given these expressions a more extensive significance, and arbitral tribunals have additionally shielded financial backer interests. In any case, we often cast question on these protections. The United Nations Conference on Trade and Development characterizes worldwide venture arrangements, the securities that are accessible, and the lawful prerequisites that states should follow when consenting to a global speculation arrangement.

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