CONCEPTUALIZING THE INTERPRETATION AND APPLICATION OF THE PRINCIPLE OF FAIR AND EQUITABLE TREATMENT UNDER BILATERAL INVESTMENT TREATIES

BY

MISS NUTTIYA WIBOONCHOKSEIT

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS IN BUSINESS LAWS (ENGLISH PROGRAM) FACULTY OF LAW THAMMASAT UNIVERSITY ACADEMIC YEAR 2015

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Chairman _____
(Professor Jayavadh Bunnag)

Member and Advisor _____
(Professor Jumphot Saisoonthorn, Ph.D.)

Member _____
(Professor Prasit Aekaputra, Docteur en droit)

Member _____
(Assistant Professor Nartnirun Junngam, J.S.D.)

Dean _____
(Professor Udom Rathamarit, Docteur en droit)

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Author	Miss Nuttiya Wiboonchokseit
Degree	Master of Laws
Major Field/Faculty/University	Business Laws (English Program) Faculty of Law Thammasat University
Thesis Advisor	Professor Jumphot Saisoonthorn, Ph.D.
Academic Years	2015

ABSTRACT

The objective of this research was to study Fair and Equitable Treatment (hereinafter “FET”) as one of an investment protection standards contained in most Bilateral Investment Treaties (hereinafter “BITs”) nowadays.

Due to the absence of its definition provided in such BITs, this research thus continue examining Investor-State Dispute Settlement (ISDS) in relation to FET based claims under BITs: the International Centre for Settlement of Investment Disputes (ICSID) and Ad-hoc arbitration including FET based claims brought before the International Court of Justice (ICJ) in order to determine how arbiters in particular cases applied and interpreted the FET standard under BITs.

Furthermore, this research was also try to identify the differences (if any) of the interpretation of FET under BITs among international dispute settlement organizations in practice.

In addition, each elements as well as the criteria that arbiters take into account for rendered their decisions and/or awards were pointed out in order to give a more certain view of the interpretation and application as well as the current legal

status of FET standard to assist both investors and host States to handle with the upcoming FET based claims in this age.

Keywords: International Law, International Investment Law, Investment Protection, Standard of Investment Protection, Transnational Investment

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Thammasat University
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LIST OF ABBREVIATIONS

Symbols/Abbreviations	Terms
BITs	Bilateral Investment Agreements
FET	Fair and Equitable Treatment
IIAs	International Investment Agreements
IMS	International Minimum Standard of Treatment
MFN	Most Favored Nation
MST	Minimum Standard of Treatment
NT	National Treatment

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CHAPTER 1
INTRODUCTION

1.1 Background and Problems

The origin of the concept of Fair and Equitable Treatment (hereinafter "FET") can be traced back to the Havana Charter for an International Trade Organization (1948). The concept was intended to protect foreign investments and ensure fair and equitable treatment from the host country.

FET, in recent years, has become a key feature of investment protection standard which is contained mostly in bilateral investment treaties (hereinafter "BITs"), the main source of law in the field of investment, and many multilateral trade agreements. As a result of a growing number of international investments, the use of Investor-State Dispute Settlement (hereinafter "ISDS") has rapidly developed. Meanwhile investors tend to bring FET based claims against host countries with a considerable rate of success. However, the scope of application of the FET standard in dispute settlement system has remained contentious and, in most cases, the definition of FET has to be sought from arbitral decisions or judgments case by case depending on the discretion of the tribunal(s) or judicator(s). Consequently, host countries may carry a heavy burden of the obligation to accord FET to foreign investments.

To promote foreign investment in the country, Thailand also provides foreign investors with fair and equitable treatment through the Agreements for the Promotion and Protection of Investment or BITs. However, Thailand has very little experience in this field and had just recently lost a claim relating to the breach of FET obligation under BITs[1] which caused a severe impact on the Thai economy.

This thesis therefore aims to study Investor-State Dispute Settlement pertaining to FET based claims under BITs, particularly International Centre for Settlement of Investment Disputes (hereinafter "ICSID") and Ad-hoc Arbitration.

[1] Walter Bau AG (in Liquidation) v The Kingdom of Thailand, *infra note* 68.

Furthermore, it will focus on how the International Court of Justice (hereinafter "ICJ") and other decision-making bodies have interpreted the FET standard to understand the current scope of the application of the FET standard in disputes involving BITs in order to minimize the risk of loss and protect host countries against FET based claims.

1.2 Hypothesis

FET is widely accepted as a prominent standard of investment protection although the scope of its application to disputes is controversial. A scholarly look at the recent arbitral awards shows that the scope applied to the FET standard is ambiguous depending upon the discretion of the arbiter of each case.

This thesis discusses how the tribunals and other decision-making bodies especially ICSID, Ad-hoc Arbitration and ICJ have defined the scope of the FET standard under BITs. It then attempts to identify the differences (if any) between the interpretation and application of FET by these institutes. This emphasis on multi-institutes differs from other academic studies that focus merely on one decision-making body.

As mentioned above, the FET standard nowadays is contained in most of BITs though its exact definition is not always specified, which causes problems in interpreting the FET standard in BITs. Consequently, arbiters apply their discretions to each case differently. To study and analyze the current legal status of the FET principle, whether it is applied to disputes as international custom or general principle of law, thus helps clarifying this unclear standard.

1.3 Objectives of Study

(a) To study FET as one of the investment protection standards contained in most Bilateral Investment Treaties (BITs);

(b) To examine Investor-State Dispute Settlement (ISDS) in relation to FET based claims under BITs: ICSID and Ad-hoc arbitration;

(c) To determine the resolution for application and interpretation of FET by the International Court of Justice (ICJ);

(d) To identify the differences (if any) of the interpretation of FET under BITs among international dispute settlement organizations;

(e) To analyze the current legal status of FET principle specified in BITs and

(f) To propose practical guideline for the scope of application of FET applied to FET based claims in investment dispute settlement system.

1.4 Scope of Study

This thesis firstly focuses on the origin and development of the concept of 'fair and equitable treatment'. The next chapter will examine how ICSID and Ad-hoc Arbitration defined the scope of FET and applied it to disputes; how they are similar or different. After that, a resolution for application and interpretation of FET under BITs by the ICJ will be addressed with a comparison to the interpretation of ICSID and Ad-hoc Arbitration concerning FET provision under BITs in order to provide guideline for host countries and foreign investors. And lastly, it will end with summarization and suggestion for host countries and foreign investors.

1.5 Methodology

This thesis is a documentary research of both primary and secondary sources relating to Fair and Equitable Treatment in international investment law.

1.6 Expected Results

By examining how ICSID, Ad-hoc arbitration and ICJ interpreted the FET standard contained in BITs and applied it to disputes, I suggest that FET is nowadays being applied by international dispute settlement organizations as a general principle of law. In addition, studying such arbitral awards and international judgments will help create a clearer understanding on how the FET is currently applied and which elements of

the standard are applied to solve disputes. This understanding will ensure both host states and foreign investors are able to handle with any future FET violation claims including making FET claims against other parties more effectively.

CHAPTER 2
HISTORICAL BACKGROUND AND DEVELOPMENT OF THE FAIR AND EQUITABLE TREATMENT STANDARD

Today, it is undeniable that Fair and Equitable Treatment is a significant standard of protection granted to foreign investors although its exact scope and meaning have been hotly debated. This chapter will begin with the origin of the concept of Fair and Equitable Treatment and its development. This will be followed by a discussion of the current use of the Fair and Equitable Treatment Standard in international investment laws and state practice. Lastly, it will delve into the formulations found in the investment instrument, particularly bilateral investment treaties, all of which share a common substantial vagueness. The problems of applying the Fair and Equitable Treatment Standard in Bilateral Investment Treaties will also be addressed.

2.1 The Origin of the Concept of Fair and Equitable Treatment

In post-war decolonization period, the newly independent states wanted to protect their independence by way of nationalization through a direct expropriation. This was accompanied by the refusals of the host countries to compensate foreign investors. This attitude obviously contradicts the generally recognized conception of economic benefits brought about by foreign investments and caused inconsistent national policies.[2]

At that time, the only instrument that granted foreign investors the right to claim damages due to an unjust action of the host countries was the diplomatic protection of their home states. However, this kind of protection is considered an indirect protection because the investors had to rely on the will of their own states to

[2] IOANA TUDOR, **The Fair and Equitable Treatment Standard in the International Law of Foreign Investment** 1 (Oxford University Press, 2008).

engage in such procedures against the host countries.[3] Private foreign investors thus craved for the more direct mechanism to enforce their rights against host countries.

Fair and equitable treatment (hereinafter "FET") is one of the prominent standards included in international investment agreements (hereinafter "IIAs") to solve such problem. The FET obligation is often stated, together with other standards, as part of the protection due to foreign direct investment by host countries.[4] Due to its significant feature that allows an investor to directly bring a case against a host country without any references to other investments, the FET standard is also known as an "absolute", "non-contingent" standard of treatment[5], as opposed to the "relative" standards embodied in "national treatment" (hereinafter "NT") and "most favored nation" (hereinafter "MFN") principles which define the required treatment by reference to an initial treatment or situation established by the host countries.

The phrase "equitable treatment" first appeared in the Article 23 (e) of the League of Nations Covenant which stated that ". . . the Member of the League . . . to secure and maintain freedom of communications and of transit and *equitable treatment* for the commerce of all Members of the League . . ."[6]. The league convened an International Conference on the Treatment of Foreigners to develop an applicable

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[3] *Ibid*.

[4] OECD, "**Fair and Equitable Treatment Standard in International Investment Law 2**" (OECD Working papers on International Investment, 2004/3, OECD Publishing, 2004), http://dx.doi.org/10.1787/675702255435 (accessed on December 8, 2015).

[5] A standard that states the treatment to be accorded in terms whose exact meaning has to be determined, by reference to specific circumstances of application. Please See, Stephan W. Schill, **The Multilateralization of International Investment Law** 78 (Cambridge University Press 2009); Rudolf Dolzer & Margrete Stevens, **Bilateral Investment Treaties** 58 (Martinus Nijhoff Publishers 1995); Katia Yannaca-Small, **Fair and Equitable Treatment Standard: Recent Developments**, in **Standards of Investment Protection** 111 (August Reinisch ed., Oxford University Press 2008); also cited in OECD *supra* note 4.

[6] *Please see* the analysis of the Theodore Kill, **Don't Cross the Streams: Past and Present Overstatement of Customary International Law in Connection with Conventional Fair and Equitable Treatment Obligations** 869 (Michigan Law Review 2008).

standard of treatment under Article 23 (e) and later adopted a Draft Convention on the matter, which did not, however refer to FET obligation.[7]

Subsequently in 1948, the Havana Charter for the International Trade Organization (hereinafter "Havana Charter") had adopted the principle that foreign investments should be guaranteed a "just and equitable treatment" in its Article 11 (2). Even though the Havana Charter dealt with trade issues, it also contained many provisions pertaining to investments including the envisagement that the future trade organization would make recommendations for bilateral or multilateral agreements to assure just and equitable treatment for investments to another Member.[8]

Due to several controversial issues, the Havana Charter never came into force. Nevertheless, the Havana Charter is generally considered as the first legal instrument that made a reference to the FET standard.[9]

In addition, the Ninth International Conference of American States that took place in 1948 the Economic Agreement of Bogota (hereinafter "Bogota Agreement"). Its Article 22 provided that "foreign capital shall receive equitable treatment".[10] Yet, it was never ratified.

In 1959, Mr. Hermann Abs and Lord Shawcross together with a group of European businesspersons and lawyers drafted the Abs-Shawcross Draft Convention on Investments Abroad, which granted a protection to property of foreign investors in

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[7] *Ibid.*, p. 870-871. *Please also see*, Patrick Dumberry, **The Fair and Equitable Treatment Standard A Guide to NAFTA Case Law on Article 1105** 29 (Kluwer Law International 2013).

[8] Havana Charter for an International Trade Organization, 24 March 1948, Article 11(2), in: U.N. Conference on Trade & Employment, Final Act and Related Documents 8-9, U.N. Doc. E/Conf. 2/78, U.N. Sales No. 1948.II.D.4 (1948).

[9] *See* Kill, *supra* note 6, p. 871-873.

[10] Organisation of American States, Economic Agreement of Bogota, Article 22, May 1948, L. Treaty Ser. No. 25, OAS Doc. No. OEA/Ser.A/4 (SEPF). The full provision reads as follows: '[f]oreign capital shall receive equitable treatment. The States therefore agree not to take unjustified, unreasonable or discriminatory measures that would impair the legally acquired rights or interests of nationals of other countries in the enterprises, capital, skills, arts or technology they have supplied'.

accordance with the "fair and equitable treatment"[11] and included "full protection and security" and "discrimination".

In 1967, the Organisation for Economic Co-operation and Development (hereinafter "OECD") had developed the Draft Convention on the Protection of Foreign Property (hereinafter "Draft Convention") in order to protect private property by requiring that "each party shall at all times ensure fair and equitable treatment to the property of the nationals of the other parties". Since then, the developed countries had adopted the 1967 OECD Draft Convention, even though was never opened for signature, as a model for drafting their own bilateral investment treaties (hereinafter "BITs"). The Draft Convention was subsequently incorporated into BITs between developed and developing countries with FET clause therein. Therefore, it can be said that the 1967 OECD Draft Convention was a prominence threshold of FET clause contained in BITs nowadays.

2.2 The Current Usage of the Fair and Equitable Treatment Standard in International Investment Agreements and State Practice

As aforementioned, the OECD had profoundly influenced both developed and developing countries to incorporate the FET clause in their respective IIAs since the late 60s. In recent years, the FET clause has commonly been included in the majority of BITs as well as multilateral instruments. It has even appeared in the treaties concluded by countries traditionally favor national control over foreign investments and generally use national treatment rather than the FET standard[12]. This topic will be discussed below.

2.2.1 Fair and Equitable Treatment in Bilateral Investment Treaties

Due to the belief held by developing countries that the term "fair and equitable treatment" is applied by developed countries to replace the term "minimum

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[11] Article 1. Hermann Abs & Hartley Shawcross, *The Proposed Convention to Protect Private Foreign Investment: A Round Table: Comment on the Draft Convention by its Authors*, 9 J.P.L., October 1967, 7 ILM 117 (1967).

[12] ICSID, *Investment Laws of the World: Bilateral Investment Treaties* (1972).

standard of treatment", which is one of the most controversial protection standards in international law because of its uncertainties and ambiguities, the negotiation of multilateral instruments between developed and developing countries hardly achieves its goal, which ultimately leads both parties to enter into BITs instead[13]. The use of BITs had begun from the 1990s onwards.

There are presently over 2,900 bilateral treaties listed in UNCTAD database, 2,276 of which have come into force.[14] The majority of those BITs were concluded with the FET clause. The first group that endorsed the FET clause in their BITs was the European States (including Germany and Switzerland).[15] The latest BITs that granted the FET protection to foreign direct investments was concluded between Canada and the Republic of Serbia in April, 2015.[16] As for the Kingdom of Thailand, it has currently signed 41 bilateral treaties.[17]

From my examination, it can be summarized that BITs that exclude a reference to the FET standard are presently the exception rather than the rule. The FET clause hence has become a common feature found in BITs.

2.2.2 Fair and Equitable Treatment in Regional and Multilateral Instruments

As aforesaid, the FET clause is principally found in the majority of BITs. Furthermore, it is also discovered in many multilateral and regional instruments pertaining to foreign investments. These regional and multilateral instruments

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[13] Salacuse, Jeswald W., **The Treatification of International Investment Law: a Victory of Form Over Life? A Crossroads Crossed?**, 3(3) Transnational Dispute management 219 (2006); Paparinskis, **The International Minimum Standard and Fair and Equitable Treatment** 90-92 (Oxford University Press, 2013).

[14] UNCTAD, **International Investment Agreements Navigator**, UNCTAD, *available at* http://investmentpolicyhub.unctad.org/IIA (accessed on November 30, 2015).

[15] The first BITs that endorsed a FET clause, in the early 1960s, were Germany and Switzerland. *See* Tudor, *supra note* 2.

[16] It was signed by both parties on September 1, 2014 and came into force on April 27, 2015. It is also incorporated FET clause in its Article 6 Clause 1. **See Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments** (2014) **available at** http://investmentpolicyhub.unctad.org/Download/TreatyFile/3152

[17] Please see Table 2.1

commonly recommend that the FET clause should be endorsed on every instrument in order to accord foreign investments with fair and equitable treatment.

The regional category of conventional instruments is established by agreements that normally create a customs union or a free trade area that cope with foreign investments. The following section examines these regional instruments:

The Bogota Agreement[18], as earlier mentioned, is one of the regional instruments containing the FET clause. Later on, the Unified Agreement for the Investment of Arab Capital in the Arab[19] States was published in 1980 and also accorded fairness and equity to its member States.

In addition, in 1989, the African, Caribbean and Pacific Group of States[20] (hereinafter "ACP") and the European Union had signed the Fourth Convention of the African, Caribbean and Pacific Group of States and the European Economic Community of so-called "Lomé IV".[21] The FET obligation can be found in its Article 258 (b)[22] in the investment promotion section.

The investment promotion and protection section of the Common Market for Eastern and Southern Africa (hereinafter "COMESA")[23], established in 1994, accorded private investors the FET clause in its Article 159 (1). Article 1105 (1) of the North American Free Trade Agreement (hereinafter "NAFTA"), likewise, required the

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[18] Bogota Agreement, *supra note* 10.

[19] All member States of the League but Algeria and the Comoros had ratified the agreement and it came into force on September 7, 1988. Eleventh Arab Summit Conference, *Unified Agreement for the Investment of Arab Capital in the Arab States* (signed on November 26, 1980) *available at* http://investmentpolicyhub.unctad.org/Download/TreatyFile/2394.

[20] An organisation generated by Georgetown Agreement (officially called "ACP-EC Partnership Agreement" or "Cotonou Agreement") in 1975 of which purpose is for coordinating cooperation between its members and European Union pertaining to negotiation and implementation of agreements concluded by them; ACP website *available at* http://www.acp.int/node/7 (accessed on December 2, 2015).

[21] The effective period of this agreement was 10 years; came into force on March 1, 1990.

[22] ACP-EC, *the Fourth Convention of the African, Caribbean and Pacific Group of States and the European Economic Community* (1989) Art. 258 (b). *Also see* UNCTAD, *International Investment Instruments: A Compendium*, vol. II at 419 (New York and Geneva: United Nations, 1996).

[23] Africa, *Common Market for Eastern and Southern Africa* (signed on June 3, 1991) *available at* http://www.comesa.int/attachments/article/28/COMESA_Treaty.pdf (accessed on December 2, 2015).

NAFTA members to "accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."[24]

Simultaneously, on 17 January 1994, the MERCOSUR [25] parties had signed the Colonia Protocol and Reciprocal Promotion and Protection of Investments, which aimed to promote investments of the MERCOSUR parties and granted the FET clause to the MERCOSUR countries. To promote and protect their investments, the MERCOSUR parties, likewise, accorded the NON-MERCOSUR parties fair and equitable treatment in Article (2)(C)(2) of the Protocol on Promotion and Protection of Investments.[26] Nevertheless, neither of these protocols had come into force.[27]

The Energy Charter Treaty (hereinafter "ECT"), whose purpose was to promote energy security as well as to cooperate in the fields of energy transit, trade, investments, environmental protection and energy efficiency[28], also provides the FET clause in its promotion, protection and treatment of investments provision i.e. Article 10 (1).[29]

The Agreement for the Promotion and Protection of Investments among the Association of South East Asian Nations (hereinafter "ASEAN"), originated

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[24] NAFTA, "*North American Free Trade Agreement"*, (entered into force on January 1, 1994) *available at* http://www.italaw.com/sites/default/files/laws/italaw6187(23).pdf (accessed on December 2, 2015).

[25] Mercado Común del Sur or "Common Market of the South" was created by Argentina, Brazil, Paraguay and Uruguay in 1991. UNCTAD, *"Investment Policy Hub: International Investment Agreements Navigator/ Membership of MERCOSUR"*, available at http://investmentpolicyhub.unctad.org/IIA/CountryGroupingDetails/40#iiaInnerMenu (accessed on December 2, 2015).

[26] MERCOSUR, *Protocol on Promotion and Protection of Investments coming from Non-MERCOSUR State Parties* (signed on August 8, 1994) *available at* http://www.sice.oas.org/trade/mrcsrs/decisions/dec1194e.asp (accessed on December 2, 2015).

[27] Andrew Newcombe & Lluís Paradell, "*Law and Practice of Investment Treaties: Standards of Treatment* 51" (The Netherlands: Kluwer Law International, 2009). *Also available at* http://www.italaw.com/documents/NewcombeandParadellLawandPracticeofInvestmentTreaties-Chapter1.pdf (accessed on December 2, 2015).

[28] *Ibid.* p. 53.

[29] ECT, *the Energy Charter Treaty* (concluded in 1994) Art. 10 (1) stated that ". . . shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment . . ." *available at* http://www.energycharter.org/fileadmin/DocumentsMedia/Legal/1994_ECT.pdf (accessed on December 2, 2015).

in 1987, also contained the FET clause.[30] Moreover, the ASEAN member countries subsequently concluded the Framework Agreement on the ASEAN Investment Area[31], in 1998, within which the FET clause is incorporated into ASEAN investments.

By focusing on the FET clause in multilateral context, the following instruments were examined. The Havana Charter[32], the 1967 OECD Draft Convention and the Abs-Shawcross Draft Convention on Investments Abroad [33] are some of the multilateral instruments within which the FET clause can be found as aforementioned in Chapter 2.1.

Moreover, the 1983 Draft United Nations Code of Conduct on Transnational Corporations [34] suggested in its Article 48 that transnational corporations should be accorded "fair and equitable" and "non-discriminatory" treatment in compliance with international laws.

The Article 12 (d) of the Convention Establishing the Multilateral Investment Guarantee Agency[35] (MIGA) requires the investments to be assured by FET before guaranteeing such investments. This requirement is not only for lowering the

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[30] ASEAN, *The Agreement for the promotion and Protection of Investments among the Association of South East Asian Nations* (Manila, 15 December 1987) Article 3 (2) as well as Article 4 (2) *available at* http://www.asean.org/communities/asean-economic-community/item/the-1987-asean-agreement-for-the-promotion-and-protection-of-investments (accessed on December 2, 2015).

[31] Its purpose is to magnetize the flows of foreign direct investment to ASEAN region. ASEAN, *The Framework Agreement on the ASEAN Investment Area* (signed on October 8, 1998) *available at* http://www.asean.org/images/2012/Economic/AIA/other_document/Framework%20Agreement%20on%20the%20ASEAN%20Investment%20Area.pdf (accessed on December 2, 2015).

[32] International Trade Organisation, *The Havana Charter* Art. 11(2) (1948), *supra note* 8.

[33] Abs & Shawcross, *supra note* 11.

[34] UNCTC, *The Draft United Nations Code of Conduct on Transnational Corporations* Art. 48 (1983) UN Doc. *Also available at* http://investmentpolicyhub.unctad.org/Download/TreatyFile/2891 (accessed on December 2, 2015).

[35] MIGA came into force on April 12, 1988 and later amended by the Council of Governors of MIGA and went into effect on November 14, 2010. Multilateral Investment Guarantee Agency, *the Convention establishing the Multilateral Investment Guarantee Agency* Art. 12 (d) (Washington, D.C., World Bank, 2010) *available at* http://www.miga.org/documents/miga_convention_november_2010.pdf (accessed on December 2, 2015).

risk of the agency but also aim to promote investment flows among developing countries.

Subsequently, the World Bank published the Guidelines on Treatment of Foreign Direct Investment[36] in 1992. It recommended in Article III (2) that each State should grant FET to nationals of any other State whose investments are established in its territory.

In 1998, the OECD also established the Draft of Multilateral Agreement on Investment which endorsed the FET clause. For example, in the general treatment of investment protection provision, it is stated that "fair and equitable" treatment and full and constant protection and security will be covered to all contracting parties whose investments incurred in OECD territories.[37]

2.3 Formulations and Problems of the Application of Fair and Equitable Treatment Standard

After thoroughly examined IIAs in the previous section, this section will deal with the formulations commonly found in IIAs. After that, the problems of applying the FET standard, which will be limited to bilateral level only, will be addressed

2.3.1 Formulations of the Fair and Equitable Treatment Standard in International Investment Agreements

UNCTAD, after finishing its decennary survey of BITs, concluded that FET language found in the surveyed BITs varied under different circumstances.

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[36] World Bank, *Legal Framework for the Treatment of Foreign Investment: Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment*, volume II at 20 (Washington, D.C., the World Bank Group, 1992) *available at* http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1999/11/10/000094946_99090805303082/Rendered/PDF/multi_page.pdf. *Also available at* http://www.italaw.com/documents/WorldBank.pdf (accessed on December 2, 2015).

[37] OECD, *the Draft Multilateral Agreement on Investment* (1998) Article 4 (1) (1.1) *available at* http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf (accessed on December 2, 2015).

UNCTAD hence categorized those different formulations of the FET standard contained in BITs into seven categories in 2007[38] as follows:

The first group includes the BITs that accord covered investments "fair and equitable treatment" without a reference to international law or other standards. Article II (2) of Cambodia-Cuba BIT (2001)[39], for example, provides that:

"Investments of investors of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy adequate protection and security in the territory of the other Contracting Party."

The second group is a group of the BITs that distinctly express that treatment granted to both relative investors and investments shall not be less favorable than national treatment (hereinafter "NT") or Most Favored Nation treatment (hereinafter "MFN"). For instance, the BIT concluded between Bangladesh and the Islamic Republic of Iran in 2001 specifies in Article 4[40] that:

"Investments of natural and legal persons of either Contracting Party effected within the territory of the other Contracting Party, shall receive the host Contracting Party's full legal protection and fair treatment **no less than that accorded to its own investors or to investors of any third State**, whichever is more favorable"

The third group comprises the BITs that endorse supplementary obligation to the FET clause. This additional obligation stipulates the obligation of host countries to refrain from diminishing the investment through irrational or

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[38] UNCTAD (2007), *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking* 30-33 *available at* http://unctad.org/en/docs/iteiia20065_en.pdf (accessed on December 2, 2015).

[39] Cambodia-Cuba, *Agreement between the Government of the Kingdom of Cambodia and the Government of the Republic of Cuba concerning the Promotion and Protection of Investments* (signed at Phnom Penh on May 28, 2001) *available at* http://investmentpolicyhub.unctad.org/Download/TreatyFile/573 (accessed on December 2, 2015).

[40] Bangladesh-Iran, Islamic Republic, *Agreement on Reciprocal Promotion and Protection of Investment between the Government of the Peoples Republic of Bangladesh and the Government of the Islamic Republic of Iran* (signed in Dhaka on April 29, 2001) *available at* http://investmentpolicyhub.unctad.org/Download/TreatyFile/ 267 (accessed on December 2, 2015).

discriminatory criteria. One of the BITs that contain this kind of the FET clause is the Hungary-Lebanon BIT (2001)[41] which states in its Article 2 (2) that:

"Investments and returns of investors of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Each Contracting Party **shall refrain from impairing by unreasonable of discriminatory measures** the management, maintenance, use, enjoyment, extension, sale or liquidation of such investments."

Next, the fourth group includes the BITs that link the FET clause to international laws. The Article 4 (1) of the France-Mexico BIT[42] signed on 1998 is one of the BITs that contain the FET clause with a reference to international law as follows:

"Either Contracting Party shall extend and ensure fair and equitable treatment in accordance with the principles of International Law to investments made by investors of the other Contracting Party in its territory or in its maritime area, and ensure that the exercise of the right thus recognized shall not be hindered by law or in practice."

This rhetorical phrase limits the interpretation of the FET clause to international law which also takes into account customary international law. In the other word, the FET clause under this category cannot be interpreted independently.

The fifth classification is also a group of BITs with a reference to international law. Nevertheless, this category provides a wider coverage by incorporating additional language of the FET obligation which goes beyond the international minimum standard of treatment. Moreover, its wording leaves very little discretion to

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[41] Hungary-Lebanon, *Agreement between the Republic of Lebanon and the Republic of Hungary for the Promotion and Reciprocal Protection of Investments* (signed in Beirut on June 22, 2001) *available at* http://investmentpolicyhub.unctad.org/Download/TreatyFile/1531 (accessed on December 2, 2015).

[42] France-Mexico, *Agreement between the Government of the Republic of France and the Government of the United Mexican States on the Reciprocal Promotion and Protection of Investments* (signed on November 12, 1998) *available at* http://investmentpolicyhub.unctad.org/Download/TreatyFile/1253 (accessed on December 2, 2015).

a potential arbitral tribunal. Among the BITs adopting this model is the BIT between France and Uganda (2003)[43] which states in Article 3 that:

"Either Contracting Party shall extend **fair and equitable treatment in accordance with the principles of International Law** to investments made by nationals and companies of the other Contracting Party on its territory or in its maritime area, and shall ensure that the exercise of the right thus recognized shall not be hindered by law or in practice. **In particular through not exclusively, shall be considered as de jure or de facto impediments to fair and equitable treatment any restriction to free movement, purchase and sale of goods and services, as well as any other measures that have a similar effect**."

The sixth group comprises the BITs whose FET language relying on the domestic legislation of the host country. An illustration for this kind of approach is the BIT concluded by and between the countries of the Caribbean Common Market[44] (hereinafter "CARICOM") and Cuba in 1997. Its Article IV[45] stated that:

"Each Party shall ensure fair and equitable treatment of Investments of Investors of the other Party **under and subject to national laws and regulations**."

The last approach identified by UNCTAD (2007) is a group of the BITs that takes into account the issues debating in NAFTA arbitrations. The appearance of this kind of BITs therefore provides the FET clause as well as full protection and

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[43] France-Uganda, *Agreement between the Government of the Republic of France and the Government of the Republic of Uganda on the Reciprocal Promotion and Protection of Investments* (signed on January 3, 2003) *available at* http://investmentpolicyhub.unctad.org/Download/TreatyFile/1289 (accessed on December 2, 2015).

[44] The Caribbean Community and Common Market or so-called "CARICOM" was established by the Treaty of Chaguaramas which was signed by Barbados, Jamaica, Guyana and Trinidad & Tobago. It came into force on August 1, 1973. Antigua & Barbuda, Bahamas, Belize, Dominica, Grenada, Haiti, Montserrat, Saint Kitts & Nevis, Saint Lucia, Saint Vincent and Grenadines and Suriname were subsequently joint the group. CARICAOM, *History of the Caribbean Community, available at* http://www.caricom.org/jsp/community/history.jsp?menu=community. (accessed on December 6, 2015).

[45] CARICOM-Cuba, *Trade and Economic Co-Operation Agreement between the Caribbean Community (CARICOM) and the Government of the Republic of Cuba* (signed on July 5, 2000) *available at* http://investmentpolicyhub.unctad.org/Download/TreatyFile/2498. (accessed on December 6, 2015).

security by making a reference to customary international law minimum standard of treatment. Moreover, they also contain a further explanation of "fair and equitable treatment" and "full protection and security" within the same article. An illustration of this approach is Article 5 of the United States-Uruguay BIT (2005)[46]:

"Article 5

Minimum Standard of Treatment[1]

1. Each Party, shall accord to covered investments treatment **in accordance with customary international law**, including fair and equitable treatment and full protection and security

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

(a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and

(b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.

3. A determination that there has been a breach of another provision of this Treaty, or of a separate international agreement, does not establish that there has been a breach of this Article.

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[1] Article 5 shall be interpreted in accordance with Annex A.

Annex A

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[46] The United States of America-Uruguay, *Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment* (signed on November 4, 2005) *available at* http://investmentpolicyhub.unctad.org/Download/TreatyFile/2380 (accessed on December 6, 2015).

Customary International Law

The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Article 5 and Annex B results from general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens."

Briefly, the language of the last approach specifies the FET clause by making a reference to customary international law and contains a definition of the FET standard in the same article. Thus, there shall not be, in any case, an interpretation of the FET beyond standard rather than a mutually accepted of customary international law in practice.

From the abovementioned formulations established by UNCTAD in 2007, it can be summarized that the FET clause is generally drafted as an autonomous standard or together with a reference to the principles of international law.

2.3.2 The Problems of the Application of Fair and Equitable Treatment Standard under Bilateral Investment Treaties

Nevertheless the seventh approach had been established by UNTACD, as explained in the previous section, the scope of application and the exact meaning of the FET clause under BITs are still ones of the most controversial issues in the field of international law due to the proliferation of claims brought before tribunal in relation to FET violation. Because of the absence of the precise meaning of FET endorsed in the majority of BITs and the intrinsic language used in BITs to give arbitrators and judicators the possibility to determine the scope and meaning of the FET clause by taking into account the objective of particular disputed treaty, the scope of application and definition of the FET standard contained in BITs can be traced to awards or judgments rendered in particular cases. However, since there is very little guidance given to adjudicators, the discretion of tribunals thus plays a significant role in this part. In the other way, it can be concluded that the concept of "fairness" and "equity" depends on tribunals' discretion which can be varied case by case.

I hence opine that examining the awards and judgments rendered in relation to the interpretation of FET under BITs, which will be discussed later, can generate an abstract of the FET standard under BITs in order to provide tribunals a guidance on how FET should be translated and applied to particular claim which can help solve one of the most contentious issues in international law. In addition, it can provide guidance for host countries to minimize the risk of breaching the FET obligation and for foreign investors to protect their investments in such territory.

CHAPTER 3
ANALYSIS OF VIEWPOINTS ENDORSED BY INTERNATIONAL DECISION MAKING BODIES

In recent years, the sleeping standard "fair and equitable treatment" has been invoked by investors due to an increase in success rate for FET based claims. This leads the principle of FET in international investment law to be much in vogue. The FET standard has become one of the most controversial investment protection standards due to its lack of precise meaning. Many institutions (which will be selected and addressed below) have, therefore, attempted to seek the accurate interpretation of FET.

3.1 Analysis of Selected Considerations of the ICJ in Regard to FET Standard

3.1.1 Status of the Fair and Equitable Treatment Standard under Customary International Law

3.1.1.1 Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)[47]

Facts

Ahamadou Sadio is a Guinean businessman who had resided in the Democratic Republic of Congo (hereinafter "DRC"), known as Zaire for 32 years (from 1971 to 1997).[48] He established a company named Africom-Zaire (hereinafter "Africom") in 1974 with a registered office located in the DRC. and became a manager. Five years later (1979), Africom together with two partners; Mr. Zala, a Zairean national and Ms. Dewast, a French national, founded Africontainers-Zaire (hereinafter "Africontainers"). These two partners nevertheless withdrew from the partnership and

[47] ICJ, *Case concerning Ahmadou Sadio Diallo, Republic of Guinea v. Democratic Republic of the Congo* [hereinafter "*Diallo*"], Judgment of November 30, 2010.
[48] ICJ, *Diallo*, Preliminary Objections of May 24, 2007, paras. 1 and 28 *available at* http://www.icj-cij.org/docket/files/103/13856.pdf (accessed on December 13, 2015).

60 percentages of the Africontainers' capital was from then on owned by Africom and the remaining 40 percentages belonged to Mr. Diallo who eventually became a manager of the company.

Summarization of the Disputes

In the 1980s, Africom and Africontainers began having problems with major Congolese who were either public institutions or private companies. Both Africom and Africontainers hence submitted their claims against Congolese public entities that amounted to USD 36 billion, three times the amount of the DRC's foreign debt, which remained unsolved.[49]

Mr.Diallo, after the establishment of his campaign in order to destabilize commercial companies in the DRC in 1995, had been arrested and imprisoned, without trial by the authorities of the DRC, on the ground that "presence and conduct have breached public order in Zaire, especially in the economic, financial and monetary areas".

After the engagement of Mr. Diallo in local proceedings to recover the sums the DRC's companies owed to him was abortive, the DRC nevertheless expelled[50] him by refusing his entrance into the country. Mr. Diallo's detention and expulsion committed by the DRC was considered a violation of his fundamental human rights. Moreover, his investments, properties and businesses were unlawfully expropriated.

A submission of a claim of Guinea to the ICJ thus argued that those acts of the DRC had violated Article 36.1 (b) [51] of the Vienna Convention on Consular Relations; the Universal Declaration of Human Rights of December 10, 1948;

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[49] *Ibid*.

[50] Note that the expulsion under the DRC law is not appealable.

[51] "if he so request, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph." This doctrine has been subject of a series of ICJ judgments in the recent years, paramount among them *LaGrand Case (Germany v. United States of America)*, ICJ, *LaGrand Case (Germany v. United States of America)*, Judgment of June 27, 2001. [2001] I.C.J. Rep. 466.

and the International Covenant on Civil and Political Rights of December 19, 1996. Guinea ultimately claimed that the DRC had failed to accord Mr. Diallo a treatment in consistent with "a minimum standard of civilization".[52]

The Respondent, the DRC, made two preliminary objections: first, Mr. Diallo had not exhausted the local remedies available to him, and second, Guinea had no right to claim for the diplomatic protection of Africom and Africontainers because they were not incorporated under its laws.[53]

The ICJ was of view that the first objection was inadmissible. It would merely raise the second one in its decision on preliminary objections.[54]

Final Judgment Delivered on the Merit of a Breach of Mr. Diallo's Rights as an investor by the DRC

Either Article 13 of the International Covenant on Civil and Political Rights (hereinafter "ICCPR") or paragraph 4 of Article 12 of the African Charter on Human and Peoples' Rights provided aliens a protection from arbitrary and unlawful expulsion. Consequently, the Court announced that the DRC's expulsion of Mr. Diallo from its territory on January 31, 1996 was contrary to such provisions.

Concerning the circumstances in which Mr. Diallo was arrested and detained in 1995-1996, the Court unanimously found that the right to liberty and security of Mr. Diallo under Article 9 (1) and (2) of the ICCPR as well as Article of the African Charter had been violated.

Additional judgment shows that the DRC had also violated its obligation under the Vienna Convention on Consular Relations by not informing Mr. Diallo of his rights upon detention. The rest of the submission of the Guinea had been dismissed.

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[52] *Diallo, supra note* 81, para 28.
[53] *Ibid,* para 32.
[54] *Ibid,* para. 94. For the practical purposes the DRC virtually won the case in financial terms. The Court will not deal with the diplomatic protection of Africom and Africontainer, and thus it will neither decide nor award damages regarding the contractual claims that these companies have against Congolese entities and private companies. Alberto Alvarez-Jiménez, *Minimum Standard of Treatment of Aliens, Fair and Equitable Treatment of Foreign Investors, Customary International Law and the Diallo Case before the International Court of Justice* 10 *available at* http://dialnet.unirioja.es/descarga/articulo/4897681.pdf (accessed on December 13, 2015).

Lastly, the ICJ ordered the DRC to compensate the Guinea for its violations for the amount of USD 95,000 by August 31, 2012. The Court expected that the payment would be timely paid because there was no reason that DRC would not follow its order. Nevertheless, the Court still fixed post-judgment interest on the principal sum due in case of delayed payment at an annual rate of 6 percent which would accrue starting from September 1, 2012.[55]

Considerations of FET Standard under the Hearing

Due to the uncertainties surrounding the context of a "minimum standard of civilization" or so-called minimum standard of treatment (MST) in public international law, the Court therefore turned to consider the principle that nationals of other States whose investments occurred in other territories should be treated "fairly" and "equitably" in order to deliver judgment regarding the question that whether treatment provided to Mr. Diallo by the DRC had been violated a minimum standard of civilization.

The declaration of the status of FET by the ICJ is possible as to the flexible approach of *opinio juris* endorsed by the ICJ. The FET standard was thus practically adopted in this case by the ICJ as a customary rule of international law and by equating it to the MST.[56] However, regarding the judgment delivered in this case, it is unlikely that the FET standard will be officially transposed to a customary international law.

3.1.2 Jus Standi / Recognized Right or Right of Standing

3.1.2.1 Barcelona Traction Light, Belgium v. Power Company Limited, Spain[57]

Facts

The Barcelona Traction, Light and Power Company (hereinafter "Barcelona Traction") is a company established in 1911 and incorporated under the laws of Canada with 88-percentage of its shareholders being Belgians. Its registered office was located in Toronto, Canada. Barcelona Traction dealt with

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[55] ICJ, *Case concerning Ahmadou Sadio Diallo, Republic of Guinea v. Democratic Republic of the Congo* [hereinafter "*Diallo*"], Judgment of June 19, 2012.
[56] Jiménez, *supra note* 10 at 30.
[57] ICJ, *Case concerning The Barcelona Traction, Light and Power Company, Limited* [hereinafter "*Barcelona Traction*"], Judgment of February 5, 1970.

creating and developing an electric power production and distribution system in Catalonia, Spain. It also had many subsidiaries which were mostly located in Spain rather than Canada.

As a consequence of the Spanish civil war, Barcelona Traction's services were suspended. After the war, the transfer of foreign currency which was essential for the recovery of the business of Barcelona Traction was denied. Barcelona Traction eventually declared bankrupt.

As aforementioned, most of the shareholders of Barcelona Traction were Belgians. They therefore decided to use diplomatic protection of shareholders and finally brought a case to the ICJ against Spain to request for compensation from Spain's action.

Afterwards, Belgium and Spain entered into negotiation stages, which led Belgium to file a notice of discontinuance of the proceedings and remove the case from the Court's General List. Nevertheless, the negotiation failed and Belgium then submitted a new application to the ICJ.

Summarization of the Disputes

There are many issues raised by both parties; however, only the legal capacity of Belgium will be addressed below.

Spain claimed that the Belgian government had no legal capacity to bring this case to the ICJ because diplomatic protection of shareholders under international law can be exercised merely by a State of claimant (Belgium) other than the national State of the Company when the foreign company was damaged from any actions done by host countries.

Decision

ICJ stated that to determine the right of government to protect the interests of shareholders, the rules of international law concerning the treatment of foreigners should be taken into account.

ICJ explained that none of the rule of international law explicitly conferred the right to exercise a diplomatic protection to the home state of shareholders. Only the State of the company had the right to exercise such protection.

ICJ, therefore, declared that Belgium had no *jus standi* to bring the case against Spain due to its actions over a Canadian Company. Canada was the

only one who had a proper jurisdiction and authority to bring the case against Spain. The ICJ then dismissed the case.

Considerations of FET Standard under the Hearing

The principle of international law has provided shareholders with the rights that are different from the rights granted to State. An individual hence has no authority to bring a claim against State.

3.1.3 Due Process of Law

3.1.3.1 Elettronica Sicula S.p.A. (United States of America v. Republic of Italy)[58]

Facts

Elettronica Siluca S.p.A. (hereinafter "ELSI"), an Italian company wholly owned by the United States corporations Raytheon Company and its subsidiary, the Machlett Laboratories. ELSI was established in Palermo, Italy, to produce electronic components. It faced an economic trouble since the 1960s which led ELSI and Raytheon to arrange various meetings with Italy's officials in order to secure governmental support and to maintain ELSI's plant. After that, the Mayor of Palermo, on April 1, 1968, issued a requisition and ordered to seize ELSI's plant including all related assets for a six-month period. The appeal, which was dismissed, had been raised. ELSI, in July 1969, was purchased by a subsidiary of the State-controlled, IRI.

The United States of America ("USA") therefore claimed for compensation occurred as a result of that requisition order but this claim was dismissed by the Court of Palermo. Even though the Court of Appeal of Palermo granted compensation for damages for the USA, such damages were considered a small portion when considered the whole damages claimed in this case.

Consequently, the USA filed an application instituting proceedings against the Republic of Italy on February 6, 1987 by referring to Article XXVI of the Treaty of Friendship, Commerce and Navigation (hereinafter "FCN treaty") concluded by and between the two states in Rome on February 22, 1948 and claimed for damages for the amount of USD 12,679,000 plus interest.

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[58] ICJ, *Case concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)* [hereinafter "*ELSI case*"], Judgment of July 20, 1989.

The USA claimed that such requisition order of Italy's government violated several articles of the FCN Treaty and it should be compensated from such action.

Summarization of the Disputes

The main issues the ICJ taken into account were:

(1) Whether Italy failed to exhaust local remedies for the two USA corporations?

(2) Whether liquidation order of ELSI's assets should have done at the time of the requisition?

(3) Whether the requisition order violated Article I of the Supplementary Agreement of the FCN Treaty where arbitrary or discriminatory measures were prohibited?

(4) Whether Italy's actions violated Article III, V and VII of the FCN Treaty?

Final Judgment Delivered on the Merit of the Republic of Italy

The judgment of this case was rendered in favor of the Republic of Italy by saying that the Italian authorities and the requisition were not the *causa causans* of the damage.

The Court denied the USA's claims arguing that the requisition order passed by the Mayor of Palermo did not cause the property loss. Of particular importance in this case is the fact that the Court discussed and addressed the meaning of arbitrariness in international law. The majority judgment avoided the issue whether the USA was entitled to bring the claim under the FCN Treaty and proceeded on the basis that the property protected was not ELSI's plant and equipment (its property), but ELSI itself (the company). The ELSI case highlighted some of the procedural and substantive inadequacies with the diplomatic protection model in safeguarding shareholder interests.

When viewing the Judgment critically, there was no mention of the damages in the sum of USD 12,679,000 claimed by the United States. This is striking as the written pleadings had clearly explained the alleged damages but none of the Judges discussed this issue. Even in his dissenting judgment, Judge Schwebel failed

to mention this issue. Further, it is striking that under the municipal law of Italy, the requisition order of the Mayor was held unlawful but under international law, Italy was not held guilty of any illegality, tort or wrongdoing. This created a strange situation where municipal law was not recognized by international law. The Chamber of ICJ by majority judgment held that an act of public authority might have been unlawful in municipal law but that did not necessarily imply that the said act would be unlawful under international law. From the above discussion it is evident that the ELSI case will serve as a benchmark for future assessment of property protection. In future, foreign investors need to thoroughly look into the agreement that they draft, given the fact that the United States hugely suffered at the hands of the International Court of Justice by this judgment.

Considerations of FET Standard under the Hearing

It is evident from the discussion of the case presented above that the United States suffered a huge loss by the judgment passed. This case brought out serious discrepancies in the role of municipal law in international law. From Italy's point of view the decision passed by the ICJ was helpful but from the United States' view the decision seriously impeded its effort to safeguard their investors.

My opinion is that this judgment did not help much in forming international customary law, though for foreign investors this case did mark as an important law that led them to become aware of the importance of standard form of agreements. Treaties need to be drafted in such a way that they are able to protect the investors from claims in respect of acts suffered by the domestic company substantially owned by such investors.

3.2 Analysis of ICJ Interpretation of FET Principle

After examining references to the FET principle in ICJ judgments, I found that the ICJ has hardly dealt with the FET interpretation issue and we have to seek its definition by looking further in Arbitral awards which will be analyzed in the next Chapter. Examining such arbitral awards may give us a clearer view of current legal status and its interpretation under BITs context.

CHAPTER 4
ANALYSIS OF SELECTED ARBITRAL AWARDS REGARDING FET OBLIGATIONS

Historically, most of the cases brought before international tribunals involve the protection of foreign investments.[59] Investment treaty protection and investment arbitration have hence become a cornerstone of international investment law since they, when applied together, provide foreign investors a productive protection.

The earliest investment treaty based claim concerning the violation of the FET obligation under BIT, and not a NAFTA based, was rendered on 21 February 1997.[60] Afterwards, FET based claims under BIT had been drastically increased along with the vagueness surrounding its context i.e. a precise meaning of the FET standard.

Consequently, the author, in this chapter, will only focus on FET based claims at the BIT level of which a legal mechanism for bringing investment claims is typically found in Investor-State Dispute Settlement or ISDS provision.[61] Both arbitration under ICSID Convention and an ad-hoc arbitration under the rules of the United Nations Commission for International Trade Law (hereinafter "UNCITRAL") are ones of the most popular legal mechanism established in such provision. This chapter will thus analyze relative arbitral awards in order to understand the way tribunals have interpreted the FET standard, in particular BIT, and how they have applied the standard to cases. Then the concepts of ICSID and ad-hoc tribunals will be addressed by means of a comparison in order to provide a guideline for foreign investors and also host countries who may encounter this circumstance.

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[59] TUDOR, *supra note* 2, p. 1.

[60] *American Manufacturing & Trading, Inc v Democratic Republic of Congo* (AMT case) (ICSID, ARB/93/1, Final Award rendered on 21 February 1997) (Sucharitkul.Golsong.Mbaye).

[61] There, each State sets forth its advance consent to submit investment disputes to international arbitration. Once a covered investor provides its own written consent, the State's offer becomes legally binding, and the investor can bring proceedings directly against the State without the need for any additional approval. Latham & Watkins, *Investment Treaty Arbitration: A Primer*, Client Alert No. 1563, July 29, 2013: p.3 *available at* https://www.lw.com (accessed on December 8, 2015).

4.1 Analysis of Selected ICSID Awards

The International Centre for Settlement of Investment Disputes or so-called "ICSID" was established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States[62] (hereinafter "the ICSID Convention") and operates under the authority of such Convention. The ICSID Convention was formulated by the Executive Directors of the International Bank for Reconstruction and Development (the World Bank) in order to create facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States.[63] Or we can say that ICSID was set up as a specialized organization for administering investor-state arbitration proceedings. There are now 152 countries that have ratified the ICSID Convention, excluding Thailand.[64]

There are two prominent features that have recently turned ICSID to the significant forum for resolving foreign investment disputes. First is the confidentiality issue. The parties to a dispute can rely on ICSID proceedings whose information are acknowledged by either conciliators or tribunal and shall be kept confidential.[65] Second, contracting parties to the ICSID Convention mutually agreed that an ICSID award will be treated and executed as a final decision from their own courts. This feature requires no further progress for the recognition and enforcement of ICSID award.[66]

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[62] It was submitted for the consideration of the ICSID Convention with a view to its signature and ratification on March 18, 1965. However, it came into force on October 14, 1966. It is also called the "Washington Convention".

[63] ICSID, *ICSID Convention, Regulations and Rules*, ICSID/15 (Washington, 2005) under "Introduction" *available at* https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf (accessed on December 8, 2015).

[64] ICSID, *List of Contracting States and Other Signatories of the Convention (as of November 17, 2015)*, ICSID/3 (Washington, 2015) *available at* https://icsid.worldbank.org (accessed on December 9, 2015)

[65] Rule 6 (Constitution of the Commission) of Conciliation Rules as well as Rule 6 of Arbitration Rules (Constitution of the Tribunal), ICSID, *supra note* 50.

[66] ICSID, *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* Article 54, *supra note* 50.

In 2009, Miss Paradee Chotamano had examined the principle of FET under awards rendered by ICSID[67] with the intention to provide a guideline on how ICSID tribunal interpreted the FET standard and applied it to the case. ICSID however is one form of arbitration used for settling investment disputes between Investors and States. This thesis thus provides a broader examination of awards as well as judgments rendered by other decision-making bodies in order to provide a preliminary guideline on how other international decision-making bodies, besides ICSID, i.e. ad-hoc arbitration and the ICJ viewed the FET standard under BITs and how they applied such viewpoint to particular cases.

In addition to the ICSID's awards, this thesis will also examine other awards rendered under ad-hoc arbitration as well as judgments granted by the ICJ in relation to the FET interpretation under BITs which can provide a broader view for readers.

Besides the ICSID's awards, this thesis will examine other awards rendered under ad-hoc arbitration as well as judgments granted by ICJ in relation to the FET interpretation under BITs which can be provided a broader view for readers.

FET bases claims examined by Miss Chotamano[68] are shown in the below table:

"Table 4.1 Lists of ICSID awards examined by Miss Chotamano"

No	Lists of ICSID awards
1	American Manufacturing & Trading (AMT), Inc. (US) v. Republic of Zaire, 1997
2	Robert Azinian and others (US) v. United Mexican States, 1999
3	Metalclad Corporation (US) v. United Mexican States, 2000

[67] นางสาวภารดี โชตะมโน (2552) แนวคำตัดสินของ ICSID เกี่ยวกับหลักประติบัติอย่างยุติธรรมและเที่ยงธรรม: ศึกษากรณีพิพาทระหว่างรัฐกับเอกชน, วิทยานิพนธ์ปริญญามหาบัณฑิต (กรุงเทพมหานคร, มหาวิทยาลัยจุฬาลงกรณ์). (Miss Paradee Chotamano, *the Principle of Fair and Equitable Treatment under ICSID's Award: Study on State-Investor Disputes* master's thesis. [Bangkok]: Chulalongkorn University; 2009).
[68] *Ibid*.

"Table 4.1 Lists of ICSID awards examined by Miss Chotamano (Cont.)"

No	Lists of ICSID awards
4	Emilio Agustin Maffezini (Argentina) v. Kingdom of Spain, 2000
5	Wena Hotels Ltd. (U.K.) v. Arab Republic of Egypt, 2000
6	Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil (US) v. Republic of Estonia, 2001
7	Middle East Cement Shipping and Handling Co. S.A. (Greece) v. Arab Republic of Egypt, 2002
8	Mondev International Ltd. (Canada) v. United States of America, 2002
9	ADF Group Inc. (Canada) v. United States of America, 2003
10	Tecmed S.A. (Spain) v. United Mexican States, 2003
11	The Loewen Group, Inc. and Raymond L. Loewen (Canada) v. United States of America, 2003
12	Waste Management, Inc. (US) v. United Mexican States, 2004

Source: Data adapted from นางสาวภารดี โชตะมโน (2552) แนวคำตัดสินของ ICSID เกี่ยวกับหลักประติบัติอย่างยุติธรรมและเที่ยงธรรม: ศึกษากรณีพิพาทระหว่างรัฐกับเอกชน, วิทยานิพนธ์ปริญญามหาบัณฑิต (กรุงเทพมหานคร, มหาวิทยาลัยจุฬาลงกรณ์) หน้า 274. (Miss Paradee Chotamano, *the Principle of Fair and Equitable Treatment under ICSID's Award: Study on State-Investor Disputes*, Master's thesis (Bangkok, Chulalongkorn University, 2009), 274).

Miss Chotamano, after completing the analysis of the above mentioned awards, concluded that key elements of the FET standard identified by selected ICSID tribunal are as follows:

4.1.1 American Manufacturing & Trading (AMT), Inc. (US) v. Republic of Zaire, 1997[69]

Facts

American Manufacturing & Trading Inc. (hereinafter "AMT"), is a US company that held 94-percent shares of SINZA. The company was established under the laws of Zaire (currently the Democratic Republic of Congo) and engaged in industrial and commercial activities in Zaire including production and sale of automotive and dry cell batteries and importation and resale of consumer goods and foodstuffs.

Some members of Zairian armed forces destroyed property in AMT's industrial complex in 1991 in order to produce automotive and dry cell batteries. They also broke into the commercial complex including stores owned by SINZA in 1992 and destroyed, damaged and carried away all finished goods and most of raw materials. The second destruction of property took place in 1993 which caused the closing SINZA business.

AMT submitted a claim to ICSID Tribunal claiming that Zaire violated its obligations under the US-Zaire BIT which has entered into force since 1989. AMT claimed that Zaire failed to accord AMT's investment "protection and security" and asked for compensation under a special BIT which entitled parties to the BIT compensation for losses from war or similar events.

Zaire did not deny the occurrence of destruction and damage to SINZA's property by its soldiers. However, it denied paying compensation to AMT by arguing that domestic businesses and other foreign investment were not compensated for similar losses. Hence, AMT was not treated less favorably than SINZA and AMT.

Summarization of the Disputes

Besides the competence issue, the issue raised by this case is to consider whether AMT and SINZA were entitled for compensation or not, and if yes, what was the appropriate quantum?

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[69] ICSID, *American Manufacturing & Trading (AMT), Inc. (US) v. Republic of Zaire,* ICSID Case No. ARB/93/1, Award of February 21, 1997.

Award

Referring to Article II(4) of the US-Zaire BIT, "investments shall enjoy protection and security" which might not be less than that recognized by international law, the Tribunal therefore found that Zaire had apparently failed to comply with the standard of vigilance and care. It failed to take any precautionary measure to ensure AMT's investments the protection and security. Consequently, Zaire should be responsible for the consequences as a result of their reckless or omission.

In addition, the US-Zaire BIT also provided a special Article, Article IV, on compensation for damages due to war or similar events, including riots and acts of violence. The Tribunal was of view that the purpose of this Article was to strengthen the protection and security standard in Article II. Thus Zaire should be held responsible under Article IV for the losses due to the events of 1991 and 1993.

As mentioned earlier, the Tribunal finally established Zaire's international responsibility under those two provisions of the US-Zaire BIT and fixed the amount of compensation for AMT.

Considerations of FET Standard under the Hearing

Host Countries are obliged to accord both foreign investments and foreign investors should not less than that recognized by international law. The tribunal mentioned in its award that obligation to provide foreign investments protection and security includes also an obligation to provide any precautionary measure to protect and secure foreign investments. Failing to do so, Host Countries shall be liable for compensation arouse from such incident.

To determine the amount of compensation, the Tribunal used the standard of "fair market value" of the destroyed property regardless of damages award on scientific evidence (precise valuation). In addition, the Tribunal may take into account "equitable principle", political, business and other risks existing at the time of investment.

4.1.2 Robert Azinian and Others (US) v. United Mexican States, 1999[70]

The Claimants, Robert Azinian, Kenneth Davitian and Ellen Baca, shareholders of Desechs Solidods de Naucalpan, S.A. de C.V. (hereinafter "Desona")

[70] ICSID, *Robert Azinian and others (US) v. United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award of November 1, 1999.

concluded a contract for waste collection in Naucalpan de Juarez, a country outside Mexico City, which was revoked by the city council by claiming “irregularities”. The Claimant then submitted the case to domestic court against the city council and lost the case due to the consideration of irregularities (nine from twenty seven claims of irregularities) which led to the decision to cancel the contract. The Claimant thus brought the case to NAFTA Tribunal on March 17, 1997.

Award

The Tribunal rendered the Award in favor of the United Mexican States since the Claimant failed to prove their case. In addition, the Tribunal was also of view that the behavior of the Mexican authorities including the city council and the Court, was appropriate even the standard applied to their assessments were higher than required in applicable International law.

Considerations of FET Standard under the Hearing

Not all situations that standards, which higher than current applicable standard under International law, being applied as a measure for assessment by Host States will be considered a violation of its obligation.

4.1.3 Metalclad Corporation (US) v. United Mexican States, 2000[71]

This case involves two separate government measures; cumulatively denied the company a permit to operate a hazardous waste disposal facility and the state-level act that essentially converted property into an ecological reserve by taking all private use rights away from Metalclad.

Facts

The Mexican federal government, in 1990, issued a license for a hazardous waste transfer station to be built by COTERIN, a Mexican company, in La Pedrera which was extended in January 1993, to build and operate a hazardous waste landfill.

Metaclad, in April 1993, decided to enter into a purchase option for COTERIN due to the approvals to build the landfill being fully issued. After that, in

[71] ICSID, *Metalclad Corporation (US) v. United Mexican States*, ICSID Case No. ARB (AF)/97/1, Award of October 31, 2001.

May 1993, the state government issued a land use permit for the landfill which excluded operating and building permit. Metalclad, in June 1993, therefore met with the governor of the state to ensure that COTERIN had obtained his support for the landfill in order to decide whether it would exercise its purchase option of COTERIN. Believing that it had obtained support for the project from federal and state level officials, Metalclad, on September 10, 1993 exercised its purchase option.

Shortly, the state governor started a campaign against the landfill. However, Metalclad began construction in May 1994 since it believed that it had state government's support. Then a halt to construction had been issued by municipal officials in October 1994 due to an absence of construction permit. The construction continued again in November 1994 while applying for the permit, which finally being issued in January 1995 for the final elements of the facility. After that in February 1995, an environmental impact assessment was completed and the facility was approved subject to some mitigation measures. The federal environmental agency confirmed it in March 1995 but the facility never became operational because the entry to site was blocked by the assistance of state officials and police officers.

Later, in November 1995, Metalclad concluded a contract with the federal officials for the operation of the facility which added additional environmental steps to be taken by Metalclad. However, the state government denied to participate in the process and terminated such contract after the conclusion.

Furthermore, the municipality, in December 1995, rejected Metalclad's application for the construction permit. Metalclad was not notified of the meeting where the decision not to give the permit to COTERIN was made.

The municipality in January 1996 started a legal action in Mexico's constitutional court challenging the federal contract with Metalclad that intended to allow an operation of facility. Simultaneously, a permit authorizing the expansion of Metalclad's landfill operations from 36,000 tons per year to 360,000 (ten-time increasing) was granted by the federal officials. Nonetheless, the state and municipal officials continued opposing the facility.

In September 1997, an Ecological Decree declaring the property a Natural Area for the protection of rare cacti was published by the state governor. Such

decree considered to be an equivalent to a national or state level nature reserve or park in most jurisdictions, which affected the uses of the facility by Metalclad.

Therefore, in January 1997, Metalclad submitted a case to arbitration proceedings.

Summarization of the Disputes

Metalclad's claims highlight three violations of NAFTA as follows:

(1) The series of acts led to the denial of the construction permit and inability to operate the hazardous waste landfill establishing a breach of NAFTA's Article 1105 on minimum international standards of treatment;

(2) The series of act of Mexico authorities also considered a breach of Article 1110 of NAFTA, an indirect expropriation; and

(3) The Ecological Decree itself also constituted a violation of NAFTA Article 1110.

Award

The Tribunal reached its award in favor of Metalclad for all issues together with the damages in the amount of USD 16.5 million, which was principally the amount of its sunken costs in the investment.

However, Mexico sought judicial review of the award in the court of British Columbia, Canada, where the arbitration was legally seated. Judicial was of view that the findings concerning the events of rejection of municipal permit were annulled though the issues of violation of expropriation in relation to the Ecological Decree which was considered a lawful action.

Considerations of FET Standard under the Hearing[72]

(1) Minimum Standard of treatment: Applying wide-ranging requirements on host states

[72] IISD, edited by Nathalie Bernasconi-Osterwalder and Lise Johnson, **International Investment Law and Sustainable Development, Key cases from 2000-2010**: *Metalclad Corp. v. United Mexican States*, ICSID case No. ARB (AF)/97/1, P.72. Also *available at* http://www.iisd.org/pdf/2011/int_investment_law_and_sd_key_cases_2010.pdf. (accessed on June 30, 2016).

The Tribunal, in this case, equated “Minimum Standard of Treatment or MST” provided in Article 1105 of NAFTA with the FET standard; however, two broad findings appear to have gone beyond FET’s expressions at that time:

(a) FET encompasses the obligations on government transparency that are found in Article 102 of NAFTA. It holds that this combination requires the host state to ensure

…that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known…. There should be no room for doubt or uncertainty on such matters. Once the authorities of the central government of any Party… become aware of any scope for misunderstanding or confusion in this connection, it is their duty to ensure that the correct position is promptly determined and clearly stated so that investors can proceed with all the appropriate expedition in the confident belief that they are acting in accordance with all relevant laws. (para. 76)

The Tribunal held that the absence of any clear rule on the need or process for obtaining a construction permit in the municipality constituted a violation of Article 1105 of NAFTA. However, other tribunals have noted that neither NAFTA nor other treaties guarantee the success of an investment, the Metalclad decision places a heavy burden on governments to ensure legal certainty in relation to the investment for all levels of government within a jurisdiction, including those over which they have no authority; and

(b) The critical element of FET ruling addressed in this case is the findings of Tribunal that “Metalclad was legally entitled to rely upon the representations of the government officials in relation to all aspects of the investment, including the need for other permits and the likelihood they would be issued.” This echoes the Tribunal’s point on “transparency”. In addition, this also addressed a beyond legal obligation of State resulting from the statements of government officials though such statements relating to matters within the jurisdiction of another level of government over which they have no legal sway.

(2) Expropriation: Applying a test that focuses on the economic impacts of the measures and the protection of the investors’ expectations

The Tribunal held that the denial of FET was in breach of Article 1105 of NAFTA and also amounted to a breach of Article 1110 on expropriation.

(a) Denial of the construction permit

The most critical point to consider whether the expropriation standard to protect an investment had been breached or not specified at paragraph 103, the Tribunal states:

Thus, expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favor of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.

The Tribunal added that Metalclad's "justified reliance" on federal government's representations about the required permits, taken with the other government acts, also supported the finding of expropriation.

The reliance on governmental representation as a basis for a finding of expropriation was adopted several times in later cases.

(b) The Ecoligical Decree

The Tribunal also established a separate ground for an expropriation under Article 1110 that "The tribunal need not decide or consider the motivation or intent or the adoption of the Ecological Decree" (para. 111).

Unfortunately, the Ecological Decree is relating to "ecological reserve area to protect rare cacti" is not illegal or inappropriate in itself; even though, such kind of measures, compensation is required to be paid to the investors.

4.1.4 Emilio Agustin Maffezini (Argentina) v. Kingdom of Spain, 2000

Facts and summarization of the disputes[73]

Emilio Agustin Maffezini, the Claimant, was an Argentine who made an investment in Spain and initiated an ICSID arbitration against Spain under the Argentina-Spain BIT. The dispute was related to a chemical products joint

[73] ICSID, *Emilio Agustin Maffezini (Argentina) v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award of January 31, 2001.

venture (EAMSA), established in 1989 by Mr. Maffezini who invested 70 percentages of interest with a Spanish publicly owned entity named SODIGA which had 30 percentages of interest.

The project of EAMSA continued to operate its business and received a loan from SODIGA and subsidies from Spanish government in 1992. EAMSA then bought a land to construct a chemical plant, but unfortunately had come to face with a serious financial problem which affected the construction of the project and its employees. The construction had eventually come to a halt and some employees were dismissed.

Shortly after such incident, in November 1991, thirty million Spanish pesetas were transferred from Mr. Maffezini's personal bank account to EAMSA as a loan. This transfer was ordered by a SODIGA's representative in EAMSA, who was acting under the general authorization of Mr. Maffezini.

EAMSA had an outstanding debt to SODIGA and cannot settle such debt. This led to an arbitration initiated by Mr. Maffezini in 1997. Mr. Maffezini claimed that:

(1) Due to SODIGA's status as a public entity, all of its acts and omissions were attributable to Spain;

(2) Failure of the project arose from the wrong advice relating to the costs of the project given by SODIGA which was significantly higher than estimated costs;

(3) Consequently, SODIGA was responsible for additional costs for environmental impact assessment (EIA) since EAMSA was pressured to make an investment before the EIA process was final and before its implications were known; and

(4) Mr. Maffezini did not agree to lend 30 million Spanish pesetas to EAMSA and claimed that the transfer from his personal bank account was irregular.

Award

The Tribunal finally dismissed all of Mr. Maffezini's claims excluding the issue regarding to the irregular transfer of 30 million Spanish pesetas from his personal account as a loan to EAMSA. The Tribunal was of view that

SODIGA's representative in EAMSA, who ordered such transfer, had been exercising SODIGA's public functions attributable to the Kingdom of Spain which considered a breach of Spain's obligation of Article 3(1) of the Argentina-Spain BIT, to protect the investment as well as obligation to accord FET to investments subject to Article 4(1) of the BIT. (paras. 72-83)

Considerations of FET Standard under the Hearing

The scope of MFN clauses in investment treaties can be very broad, most debates related to MFN clauses since this decision rendered in 2000, have concentrated primarily on the settlement of disputes. In this case, by virtue of MFN clause, the Claimant investor was allowed to benefit from a more advantageous dispute settlement procedure provided in a BIT of a third country.

After this case, most investors have been brought a case before arbitral tribunals against Host States, sought more advantageous treatment for the settlement of disputes. However, arbitral tribunal, recently turn out its judgment, did not always allow investors, by virtue of MFN clauses, to benefit from the more advantageous dispute settlement mechanisms of other third party BITs.

4.1.5 Wena Hotels Ltd. (U.K.) v. Arab Republic of Egypt, 2000[74]

Facts and Summarization of the Disputes

This case arose out of a contract between Wena Hotels Ltd., a United-Kingdom Company, and the Egyptian Hotels Company (hereinafter "EHC"), an Egyptian state company. Under such contract, the Claimant was entitled to operate and manage two luxury hotels in Egypt.

EHC claimed that the Claimant committed corruption, which later on was dismissed by the Tribunal, and made an administrative decision to expel the Claimant from the Hotels by using police force which significantly affected hotel properties.

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[74] ICSID, *Wena Hotels Ltd. (U.K.) v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award of October 31, 2005.

The Claimant therefore brought the case against Egypt claiming that Egypt failed to accord FET and full protection and security which were considered a breach of the BIT.

Award

The Tribunal dismissed the Respondent's allegations and awarded USD 20,000,000 of damages to the Claimant.

Considerations of FET Standard under the Hearing

This case reflects the arbitration practice of how Tribunal relieved investors whose interests were harmed by state conduct and the state acknowledged its wrongful action.

4.1.6 Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil (US) v. Republic of Estonia, 2001[75]

Facts and summarization of the disputes

Mr. Genin is a US nation and two companies owned by him, brought the case to ICSID under the 1994 United States-Estonia BIT.

The dispute in this case concerning the cancellation of an operating license held by Innovation Bank, a company incorporated under the laws of Estonia in which the Claimants were shareholders.

In regards of Innovation's Bank Capital requirements which constituted the series of disagreements between Innovation Bank and the Central Bank of Estonia. As a consequence, the Central Bank of Estonia cancelled the Innovation Bank operating license, arguing that Innovation Bank failed to provide information concerning its ultimate owners.

The Claimants initiated ICSID arbitration proceedings subject to a parties' consent to arbitration under ICSID Convention specified in the BIT on March 11, 1999.

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[75] ICSID, *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil (US) v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award of January 1, 2006.

Award

The Tribunal found that the measures undertaken by the Central Bank of Estonia did not amount to a breach of BIT by Estonia and dismissed a claim brought by Mr. Genin.

Considerations of FET Standard under the Hearing

Actions done irregularly, exceptionally formalistic or by contrary to generally accepted in such profession and regulatory practice might be considered as a breach of International Minimum Standard of Treatment which is separate from domestic law.

4.1.7 Middle East Cement Shipping and Handling Co. S.A. (Greece) v. Arab Republic of Egypt, 2002[76]

Facts and Summarization of the Disputes

Middle East Cement (hereinafter "MEC"), a Greek company, established its branch in Egypt to operate a business of importing, storing and selling cement under a ten-year license. In 1989, Egypt issued a decree prohibiting importation and sales of Grey Portland Cement which effectively prevented MEC from continuing its business. MEC decided to stop its business though such decree was revoked in 1992.

In addition, Egypt did not approve a re-exportation of MEC's on-shore installations until 1995. In 1999, MEC's ship, Poseidon 8, was also seized by the Red Sea Port Authority and sold at auction to cover MEC's debts.

Award

The Tribunal decided that such Decree amounted to "expropriation" of the investment of the Claimant and award damages for lost of profits to the Claimant since the Tribunal was of view that Egypt's actions led to the seizure and auction sale of the ship. All other claims for damages were rejected.

4.1.8 Mondev International Ltd. (Canada) v. United States of America, 2002[77]

Facts and Summarization of the Disputes

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[76] ICSID, *Middle East Cement Shipping and Handling Co. S.A. (Greece) v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award of April 12, 2002.

[77] ICSID, *8Mondev International Ltd. (Canada) v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award of October 11, 2002.

In the late 1970s, the city of Boston (hereinafter "City"), under the leadership of Mayor Kevin White, revealed redevelopment plans for an area of the City that catered to the adult entertainment industry and was appropriately known as the "Combat Zone." The City and the Boston Redevelopment Authority (hereinafter "BRA") formalized this vision of Combat Zone rejuvenation in a 1978 Tripartite Agreement (hereinafter "Agreement") with Lafayette Place Associates (hereinafter "LPA"), a Massachusetts limited partnership. The Agreement granted LPA the exclusive development rights to the Combat Zone and established two phases for the urban renewal project. Phase I, which included construction of a shopping mall and a luxury hotel, was completed in November 1985. Phase II, which contemplated construction of office buildings, retail space, and a department store on property adjoining the Phase I parcel, was contingent on the City's decision to remove a parking structure. Essentially, the Agreement granted LPA a conditional option to purchase the Phase II property upon notice of the City's intention to demolish the garage. The Agreement specified the terms of the option, including a detailed formula for determining the purchase price if LPA exercised the option and a binding arbitration procedure to resolve potential disputes between the parties regarding the sale of the property.

On December 16, 1983, the City notified LPA of its intent to discontinue the use of the parking garage, thereby commencing the three-year option period. After securing an anchor store for the Phase II complex, LPA exercised the option on July 2, 1986. The City and LPA, however, were unable to finalize plans for Phase II. In 1987, the parties amended the Agreement to extend the closing deadline and to add a "drop dead" date: "the Developer shall lose its rights hereunder to proceed with an acquisition if a closing has not occurred by January 1, 1989, unless the City and/or the Authority shall fail to work in good faith with the Developer through the design review process to conclude a closing." Despite the extension, the parties could not resolve their differences. Faced with the impending expiration of the option, LPA leased its rights in the project to a Canadian developer, the Campeau Corporation ("Campeau"). Like LPA, Campeau encountered resistance from City authorities who refused to approve Campeau's plans for redevelopment of the property. Only after the January 1, 1989 deadline expired and Campeau agreed to pay the current market price (not the more

favorable option price specified in the Agreement), did the City approve Campeau's plans.

At the time the City and LPA entered into the Agreement, the contractual terms seemed to benefit each party—the City would finally realize its goal of urban renewal of the unseemly Combat Zone and LPA could potentially exercise its contingent option to purchase the Phase II property at a predetermined rate if Phase I proved successful in enhancing the value of the area. Neither party, however, foresaw the Boston real estate boom of the 1980s and the dramatic increase in property values that ensued. Like other property in downtown Boston, the fair market value of the Phase II parcel skyrocketed. Indeed, the City could have realized much more on the sale of the Phase II parcel if it had not been bound by the Agreement's formula.

In January 1984, just after the City notified LPA of its intent to discontinue use of the garage, Raymond Flynn replaced Kevin White as Mayor; he served in that capacity until July 1992. Seen through the fresh eyes of a new City administration, the Agreement seemed to heavily favor LPA, especially in light of the real estate boom. Although Mayor Flynn inherited the now unfavorable terms of the Agreement from his predecessor, the City was nonetheless contractually bound by those terms. LPA perceived the City's reluctance to finalize Phase II as an attempt avoid the contractual terms, and sought redress in the judicial system. The litigation that ensued began in Massachusetts state court with allegations of breach of contract and tortious interference with contractual relations and ended a decade later in an international arbitral tribunal pursuant to the investor protections enshrined in NAFTA Chapter 11.

Award

NAFTA tribunals have not yet established a uniform practice in respect to the award of costs and expenses. In the present case the Tribunal did not think that it was appropriate to make any order for costs or expenses, for several reasons. First, the United States had succeeded on the merits, but it had by no means succeeded on all of the arguments it had advanced, including a number of arguments on which significant time and costs were expended.

Secondly, in these early days of NAFTA arbitration, the scope and meaning of the various provisions of Chapter 11 were a matter of both uncertainty and legitimate public interest.

Thirdly, the Tribunal had some sympathy for Mondev's situation, even though the bulk of its claims were related to pre-1994 events. It is implicit in the jury's verdict that there was a campaign by Boston (both the City and BRA) to avoid contractual commitments from freely entering into the contract. In the end, the City and BRA succeeded, but only on a rather technical ground.

An appreciation of these matters can fairly be taken into account in exercising the Tribunal's discretion in terms of costs and expenses.

Considerations of FET Standard under the Hearing

The Tribunal in this case interpreted the FET principle under the prism of customary international law that:

"…in applying the international minimum standard, it is essential to distinguish the different factual and legal contexts presented for decision. It is one thing to deal with unremedied acts and the other thing to be noted is that if the parties to the case had brought the case to local Court before the Tribunal, it is essential to note that the Tribunal is not a Court of Appeal" (para. 126)

Under this standard, the national court will only decide in favor of foreigners only once it becomes clear that there has been judicial impropriety, rather than a mere legal mistake.

4.1.9 ADF Group Inc. (Canada) v. United States of America, 2003[78]

Facts and Summarization of the Dispute

The disputes in this case arose out of the construction of the Springfield Interchange Project (hereinafter "SIP") by the Department of Transportation (hereinafter "VDOT"), which received federal funding for the SIP from the Federal Highway Administration (hereinafter "FHWA"). Shirley Contracting Corporation (hereinafter "Shirley") was awarded the main contract and sub-contracted with ADF International for the supply and delivery of the structural steel components for nine bridges. Because of the federal funding, ADF International, like Shirley, was

[78] ICSID, *Mondev International Ltd. (Canada) v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award of October 11, 2002.

required to adhere to U.S. "Buy America" laws,[79] which required that steel and other products be purchased and manufactured in the United States.

ADF International proposed to ship U.S.-purchased steel to its facilities in Canada, which was owned by its parent company ADF Group in order to further process and manufacture steel girders to meet VDOT technical specifications. VDOT and FHWA advised that ADF International's proposal violated Buy America provisions since the fabrication of the girders in Canada prevented the material from qualifying as "domestic".

ADF International thus alleged that its U.S. fabrication facilities were unfit for the job and all other potential facilities were "fully loaded" (para. 53) in order to waive the Buy America requirements. VDOT denied such request by stating that "no basis" as dozens of facilities in the USA could fabricate steel girders.

Consequently, ADF International decided to use its own Florida facility and other U.S. facilities to fabricate the girders. Although the project was completed on time, ADF International and Shirley had suffered the loss of profits resulting from the manufacture of the steel girders in USA as opposed to ADF Group's Canadian facilities. This led to the arbitration case concerning the "Buy America" provisions an infringed provision of investment rights of Chapter 11 of NAFTA.

Award

In its discussion of minimum standard, the tribunal first noted that FTC interpretations were necessary "for consistency and continuity of interpretation, which multiple ad hoc arbitral tribunals are not well suited to achieve and maintain". The tribunal then observed that customary law projects were not a static photograph, and that minimum standard in customary law was constantly in the process of development. Next, after extensively quoting Mondev's reasoning for departing from the Neer standard, the ADF tribunal added that "there appears no logical necessity and no concordant State practice to support the view that the Neer formulation is

[79] The Buy America Act requirements are specifically listed in the main contract between VDOT and Shirley and incorporated by reference into the sub-contract between ADF International and Shirley. It includes provisions from § 165(a) and (b) of the Surface Transportation Assistance Act (STAA) of 1982, 23 U.S.C. § 101, and 23 C.F.R. § 635.410 for the implementation of § 165.

automatically extendible to the contemporary context of treatment of foreign investors" by a host State. The ADF tribunal ultimately dismissed all claims.

Considerations of FET Standard under the Hearing

An illegal act by Host States does not by itself constitute a violation of minimum standard of treatment.

4.1.10 Tecmed S.A. (Spain) v. United Mexican States, 2003[80]

Facts, Summarization of the Disputes and Award

Tecmed initiated this case on the grounds that the decision by the Environmental Protection Agency to deny renewal of the Permit and order the Landfill's closure violated Mexico's obligations under the governing bilateral investment treaty (BIT) between Spain and Mexico (para. 93). More specifically, Tecmed argued that Mexico violated its obligations to (1) promote admission of investments, (2) provide full protection and security, (3) accord the investment fair and equitable treatment (FET), (4) provide the investment treatment no less favorable than treatment provided to nationals and investors from other foreign states, and (5) refrain from expropriating the investment without paying appropriate compensation (paras. 93–94). Tecmed also argued that even though the governing BIT only came into force on December 18, 1996, after original issuance of the one-year renewable Permit, the BIT's most favored nation (MFN) clause required retroactive application of Mexico's international law obligations to Spanish investors so that those obligations would run concurrently with Mexico's obligations to investors from other countries (para. 69).

After rejecting Tecmed's argument that the MFN clause extended the BIT's temporal coverage (which would have extended the BIT to apply to issuance of the less-favorable Permit).

Award

The Tribunal held that Mexico had both expropriated Tecmed's investment and violated the FET standard. As a consequence, the Tribunal ordered Mexico to pay Tecmed approximately 5.3 million Mexican pesos, with interest accruing

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[80] ICSID, *Tecmed S.A. (Spain) v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award of May 29, 2003.

from the date of the Environmental Protection Agency's resolution denying the Permit's renewal (para. 201).

Considerations of FET Standard under the Hearing

The MFN clause must be used to its proper and full potential, both by tribunals and by treaty drafters. To achieve this, MFN clauses can be invoked to import more favorable dispute settlement provisions of third parties under the VCLT. The tribunals will therefore apply MFN clauses strictly to dispute settlement provisions in instances where doing so would provide a manifestly absurd result.

4.1.11 The Loewen Group, Inc. and Raymond L. Loewen (Canada) v. United States of America, 2003[81]

Facts and Summarization of the Disputes

The Loewen Group, a Canadian firm, initiated a case against the U.S. government in July 1998 at the World Bank's International Centre for Settlement of Investment Disputes (ICSID) demanding USD 725 million in damages. This was the first NAFTA Chapter 11 investor-state case to challenge a domestic court ruling. In this claim, the Canadian funeral home conglomerate challenged a Mississippi state court jury's damage award in a private contract dispute and various rules of civil procedure relating to posting bond for appeal. The underlying civil court case involved a suit initiated by a local Mississippi funeral home owner that claimed Loewen had engaged in anti-competitive and predatory business practices in breach of contract. Loewen lost the domestic civil court case. It then decided to appeal and, under normal rules of civil procedure, was required to post a bond covering the lower court's damages award. (This is also a similar requirement for appeal under U.S. federal civil procedure, which is designed to safeguard against a losing party reorganizing its assets to avoid the lower court judgment.)

Award

The ICSID tribunal, in the 2001 and 2003, held that the function of a domestic court hearing a private contract dispute was qualified as a government action which is covered by NAFTA's Chapter 11 investor rules, and thus was subject to a

[81] ICSID, *11The Loewen Group, Inc. and Raymond L. Loewen (Canada) v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award of October 31, 2005.

NAFTA investor-state claim. The panel also blamed the U.S. for a "miscarriage of justice" in the function of the civil court.[82]

Considerations of FET Standard under the Hearing

The foreign investor expects that Host State will be act in consistent manner, free from ambiguity and totally transparently in its relations with foreign investor, so that foreign investor can access and foresee any and all rules and regulations that will govern its investments. In the other hand, it will help foreign investors to govern their investments in accordance with all relative rules and regulations required by Host States.

Accordingly, Good Faith principle established by international law, requires the Contracting parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.

4.1.12 Waste Management, Inc. (US) v. United Mexican States, 2004[83]

Facts

Waste Management, Inc. v. United Mexican States, on September 29, 1998, acted on its own behalf and on behalf of its investment Acaverde S.A. de C.V., filed a notice of arbitration proceeding against the Government of the Government of the United Mexican States in accordance with the Additional Facility Rules of ICSID. Wasted Management claimed compensation for damages arising from violations of Article 1105, fair and equitable treatment obligation, and Artilcle 1110, obligation not to exercise inappropriate expropriations, by State-owned entities – Banco Nacional De Obras Y Servicios Publicos, S.N.C. (hereinafter "Banobras"), the Mexican State of Guerrero (hereinafter "Guerrero"), and the City Council of Acapulco De Juarez (hereinafter "Acapulco")

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[82] The case was dismissed on a technical standing matter: in 2002, Loewen's lawyers had reorganized what had been a Canadian firm as a U.S. corporation under bankruptcy protection, thus terminating the firm's standing as a *foreign* investor.

[83] ICSID, *Waste Management, Inc. (US) v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award of April 30, 2004.

Waste Management alleged that Acapulco refused to pay invoices submitted by Acaverde under a concession agreement and Banobra's failure to make payment for the defaulting Acapulco as its guarantor under a line credit agreement.

Summarization of the Disputes

Whether or not the waiver submitted by Waste Management permitted the conduct expressly prohibited by Article 1121.

Award

Two tribunals, although not confronted with an umbrella clause, expressed their views as for the meaning of such a clause. In Waste Management v. United Mexican States, the NAFTA Tribunal expressed its view on the "umbrella clause" although NAFTA Chapter 11 did not contain such a clause. It observed that:

"NAFTA Chapter 11 – unlike many bilateral and regional investment treaties, does not provide jurisdiction in respect of breaches of investment contracts such as [the Concession Agreement]. Nor does it contain an 'umbrella clause' committing the host state to comply with its contractual commitments". Along the same lines, the Tribunal in Consorzio Groupement L.E.S.I.-DIPENT A v. Republic of Algeria, although held that the BIT between Italy and Algeria did not contain an umbrella clause, stated that:

"the effect of such clauses is to transform the violations of the State's contractual commitments into violations of the treaty umbrella clause and by this to give jurisdiction to the Tribunal over the matter…"

Considerations of FET Standard under the Hearing

Maintaining the claims against Host State at the local level concurrently with International Arbitration level is unlawful act.

4.1.1 "Denial of Justice"

The obligation of host countries not to deny of justice in criminal, civil or administrative in accordance with the principle of due process lays in customary international law. As to a responsibility of host countries for the actions of its court, thus in case that fundamentally unfair manner in justice system is appeared against foreign investors, the tribunal shall considered such action of host countries as a breach of this obligation. However, the preliminary condition required for claiming of denial

of justice against host countries is that all available procedural remedies by local courts must be proceeded. Like the statement of Newcombe & Paradell[84] which provided that "denial of justice arises where a national legal system fails to provide justice – not where there is a single procedural irregularity or misapplication of the law at some level of the judicial system".

To be considered denial of justice, Miss Chotamano had concluded that there are two factors that ICSID tribunal take into account: denial of access to justice and the refusal of domestic courts to decide as well as failure to execute final judgments or arbitral awards.

This element is reflected in many ICSID awards as such, including *Robert Azinian and others (US) v. United Mexican States (1999), Mondev International Ltd. (Canada) v. United States of America (2002), The Loewen Group, Inc. and Raymond L. Loewen (Canada) v. United States of America (2003)* and *Waste Management, Inc. (US) v. United Mexican States (2004).*

4.1.2 "Due Process of Law"

Host countries were bound by an obligation to respect due process in their administration of justice. Moreover, this element are also closely connected with transparency, good faith and unlawful discretion of administration.[85]

Due process of law is a fundamental principle in administrative law which requires officials to be bound under rules and regulations enacted by Administration. In addition, it also requires officials to protect the infringing of rights, freedom or any other righteous rights of any individuals or private sectors.

In brief, due process of law is an action or omission that deny of justice which shall be considered as a violation of FET obligation.

Illustrations of "due process of law" are endorsed in *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil (US) v. Republic of Estonia (2001), Middle East Cement Shipping and Handling Co. S.A. (Greece) v. Arab Republic of Egypt (2002)* and *Waste Management, Inc. (US) v. United Mexican States (2004).*

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[84] Newcombe & Paradell, *supra note* 26, p. 240-241.
[85] M. Sornarajah, *The International Law on Foreign Investment* 337, 2nd ed. (Cambridge, United Kingdom: Cambridge University Press, 2004).

4.1.3 "Full Protection and Security"

Full protection and security is generally accepted in international law for ages. It evolved by the United States of America and considered as one of investment protection standards in customary international law.

Full protection and security have ordinarily been found together with the FET clause in the majority of BITs. Full protection and security mainly emphasized the protection that States given to aliens whilst FET is focusing on the treatment accord to investors. Moreover, full protection and security are always identified broadly in BITs. This action hence imposes an onerous level of liability on host countries as to its limited resources. This obligation undoubtedly relates to the physical protection of the investors and their assets and prohibits host countries, both State organs and private parties, from violating individuals and properties.

For the most effective way to protect foreign investors, M. Sornarajah opined that full protection and security should be jointly used with the FET standard.[86] ICSID tribunals in selected cases, as earlier mentioned, also endorsed this in *American Manufacturing & Trading (AMT), Inc. (US) v. Republic of Zaire (1997), Wena Hotels Ltd. (U.K.) v. Arab Republic of Egypt (2000), Middle East Cement Shipping and Handling Co. S.A. (Greece) v. Arab Republic of Egypt (2002), ADF Group Inc. (Canada) v. United States of America (2003), Tecmed S.A. (Spain) v. United Mexican States (2003)* and *The Loewen Group, Inc. and Raymond L. Loewen (Canada) v. United States of America (2003).*

4.1.4 "Non-Discrimination"

States, in international law, are not prohibited to provide in its legislation certain types of distinction of treatment between nationals and aliens.[87] However, Miss Chotamano had studied the above selected ICSID awards and concluded that non-discrimination required state to provide nationals and aliens an equal standard of treatment. This can be divided into two points: "Most-Favored Nation

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[86] *Ibid*., p. 156.

[87] *Grand River v. United States,* US Counter-Memorial (December 22, 2008), para.472, 473, 475; *Methanex v. United States*, US Amended Statement of Defense (December 5, 2003), para 367.

or MFN" and "National Treatment or NT". To prove to a tribunal that non-discrimination has been breached is to thus determine onerous liability as to many factors. Both investors and investments have to also be taken into account.

FET obligation and Non-Discrimination are a delicate issue in international law since there are a number of controversies whether or not FET is equate to NT. Some authors identified the uniformity of FET and NT while others established NT as a minimum standard of treatment under FET.

ICSID tribunal in selected cases concluded that any actions or omissions which performed irrationally and discriminatory conduct of host countries shall be determined illegal. These reflected in *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil (US) v. Republic of Estonia (2001), ADF Group Inc. (Canada) v. United States of America (2003)* and *Waste Management, Inc. (US) v. United Mexican States (2004)*.

4.1.5 "Expropriation, Nationalization and Compensation"

Robert L. Bledsoe and Bolesaw A. Boczek, in the International Law Dictionary, had defined an expropriation as a seizure of aliens' assets and transfer the ownership to host countries which is allowed under limited conditions and considered as an exceptional action under international law. The expropriation can be exercised for the sake of public interests with neither discrimination nor retaliation. In addition the expropriated parties are entitled to be paid with a prompt, adequate and effective compensation. Expropriation, nevertheless, has to be proceeded in accordance with a treaty and under due process of law otherwise it is called "Confiscation".

Nationalization does not equate Expropriation because nationalization can occur to assets of either nationals or aliens. The common feature of both nationalization and expropriation is to be done merely for public interests together with compensation[88] or it will be considered as an illegal action.

The examination conducted by Miss Chotamano found that a compensation paid to aliens in developed and developing countries were considered on a different basis. Developing and underdeveloped countries believe that compensation accord to aliens from expropriation should be treated equally to their own nationals and

[88] M. Sornarajah, *supra note* 57, at 194.

depend on the ability to pay of State rather than an appropriate compensation (prompt, adequate and effective) which was adopted by developed countries.

These followings are samples of expropriation based claims: Robert *Azinian and others (US) v. United Mexican States, 1999, Metalclad Corporation (US) v. United Mexican States, 2000, Wena Hotels Ltd. (U.K.) v. Arab Republic of Egypt, 2000, Middle East Cement Shipping and Handling Co. S.A. (Greece) v. Arab Republic of Egypt, 2002, Mondev International Ltd. (Canada) v. United States of America, 2002, Tecmed S.A. (Spain) v. United Mexican States, 2003* and *Waste Management, Inc. (US) v. United Mexican States, 2004.*

4.1.6 "Good Faith"

The principle of good faith requires parties to a transaction to deal honestly and fairly with each other, to represent their motives and purposes truthfully, and to refrain from taking unfair advantage that might result from a literal and unintended interpretation of the agreement between them."[89]

Furthermore, a position of good faith is considered a natural law which is a fundamental of public international law. In addition, good faith has a great impact on customary international law which reflected in a great number of BITs and given also a clarification of Article 31 (1) of the Vienna Convention on the Law of Treaties.[90]

In brief, ICSID tribunal in *Mondev International Ltd. (Canada) v. United States of America (2002)* and *Tecmed S.A. (Spain) v. United Mexican States (2003)* endorsed that it was not necessary for investor to prove bad faith of host country to tribunal. To determine a violation of the FET obligation by host countries, tribunal also took into account a particular effect of measures exercised by State against investors. Furthermore, in some cases, an action with bad faith may lead State to a breach of the FET obligation.

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[89] Anthony d'Amato, *"Good Faith" in Encyclopedia of Public International Law* (1992) at 599 *available at* http://anthonydamato.law.northwestern.edu/encyclopedia/ good-faith.pdf (accessed on December 11, 2015).

[90] UN, *the Vienna Convention on the Law of Treaties* (Vienna on May 23, 1969), United Nations *available at* https://treaties.un.org/doc/Publication/UNTS/ Volume%201155/ volume-1155-I-18232-English.pdf (accessed on December 11, 2015).

4.1.7 "Transparency"

Transparency is yet to be defined as a customary international law. However, tribunal in *Metalclad Corporation (US) v. United Mexican States (2000)* and *Emilio Agustin Maffezini (Argentina) v. Kingdom of Spain (2000)* identified transparency as one of the elements compounded in the FET standard. Therefore, a breach of such element shall be considered as a FET breach.

In summary, in 2009, Miss Chotamano had analyzed the above mentioned ICSID awards and defined the following elements as substantive elements of the FET standard under BITs: 1) Denial of Justice, 2) Due Process of Law, 3) Full Protection and Security, 4) Non-Discrimination, 5) Expropriation, Nationalization and Compensation, 6) Good Faith and 7) Transparency.

Nevertheless, there is an additional key element of the FET standard endorsed by ICSID tribunal i.e. "Legitimate Expectations". In the last few years, legitimate expectation is like a sleeping standard in the investment arbitration context since it has been barely mentioned in any claims brought before ICSID tribunal against contracting States. Lord Scott[91] however discovered the increasing prominence of legitimate expectations doctrine in English law in 2008 and it has recently become a fashionable doctrine in international investment law. Lately, ICSID tribunals have regularly taken for granted the notion that a breach of investor's expectations may be conducive to a violation of an investment treaty particularly the FET standard. The invocation of legitimate expectations has thus extremely been founded on precedent, that is, ICSID awards citing to previous awards that have referred to the concept.[92] For example, *Tecmed v. Mexico*, *EDF (Services) Limited v. Romania*[93] and *Generation*

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[91] *EB (Kosovo) v. Secretary of State for the Home Department* [2008] UKHL 41, para. 31 *per* Lord Scott.

[92] ICSID Review (Spring 2013) 28 (1): 88-122, Michele Potestà, *Legitimate expectations in investment treaty law: Understanding the roots and the limits of a controversial concept* (first published online on February 27, 2013) at 2 *available at* http://icsidreview.oxfordjournals.org/content/28/1/88.full.pdf+html (accessed on December 11, 2015).

[93] *EDF (Services) Limited v. Romania*, ICISD case No. ARB/05/13, Award, October 8, 2009, para. 216.

Ukraine, Inc. v. Ukraine.[94] Eventually, the doctrine of "legitimate expectations" had been endorsed as an additional subjective element of the FET standard

4.2 Analysis of Ad-hoc Arbitration Awards

Besides the ICSID proceedings, BITs also granted investors an option for settling disputes arising from or in connection with BITs with host countries. The other frequent alternative to ISDS is "ad-hoc" or "non-administered" arbitration which comes along with an autonomous set of arbitration rules drafted by the United Nations Commission for International Trade Law or so-called "UNCITRAL". In addition, such rules provide more resiliencies to parties to the case and tribunal. An illustration of such flexibility is a freedom of parties to mutually appoint an exact institution to conduct the proceedings.[95]

Bearing in mind that this section will only focus on selected landmark arbitral awards under ad-hoc arbitration, *Walter Bau AG v. Kingdom of Thailand*[96] will be analyzed below.

4.2.1 "Non-Discrimination"

4.2.1.1 Methanex Corporation v. United States of America[97]

Summary

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[94] *Generation Ukraine, Inc. v. Ukraine*, ICISD case No. ARB/00/9, Award, September 16, 2003, para. 20.37.

[95] Latham & Watkins, *supra note* 48, p.4.

[96] In the matter of an arbitration in Geneva, Switzerland and under the treaty between the Federal Republic of Germany and the Kingdom of Thailand made on June 24, 2002 concerning the encouragement and reciprocal treatment of investments and under the UNCITRAL Arbitration Rules 1976, *Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau AG (In Liquidation) v. The Kingdom of Thailand* (formerly *Walter Bau AG (in liquidation) v. The Kingdom of Thailand*), UNCITRAL, Award, July 1, 2009 *available at* http://www.italaw.com/documents/WalterBauThailandAward.pdf (accessed on December 12, 2015).

[97] Methanex Corporation v. United States of America, UNCITRAL, Final Award rendered on August 3, 2005.

The Methanex case is an investment dispute between Canadian-based Methanex Corporation and the United States, arising from the provisions in the North American Free Trade Agreement's (NAFTA) Chapter 11 on investment. Methanex is a major producer of methanol, a key component of MTBE (methyl tertiary butyl ether), which is used to increase oxygen content and act as an octane enhancer in unleaded gasoline. Methanex launched its international arbitration against the United States in response to the March 1999 order by the State of California to ban the use of MTBE by the end of 2002.

California argued that banning MTBE was necessary because the additive was contaminating drinking water supplies, and was therefore posing a significant risk to human health and safety, and the environment. Methanex argued in its original submission that the ineffective regulation and non-enforcement of domestic environmental laws, including the U.S. Clean Water Act, were responsible for the presence of MTBE in California water supplies. The company argued that the ban was tantamount to an expropriation of the company's investment and thus a violation of NAFTA's Article 1110; was enacted in breach of the national treatment obligation in Article 1102 of NAFTA; and was also in breach of the minimum international standards of treatment obligations in Article 1105 of NAFTA. It was seeking almost USD 1 billion in compensation from the United States.

The Tribunal undertook an extensive review of the process by which California enacted its MTBE ban. In brief, it found that the legislative process had been transparent, sciencebased, subject to due process and to legitimate peer review, and done in a manner that was consistent with California practice in this area. Methanex' allegations of corruption on the part of California Governor Gray Davis as a key factor in the decision-making, were determined to be unfounded, and thus were not accepted as a basis to interfere with the overall assessment of the legislative process as summarized above.

4.2.2.2 Saluka Investments B.V. (The Netherlands) v. the Czech Republic[98]

Summary

This arbitration arose from the reorganization and privatization of the Czech banking sector following the end of the Communist period in 1990. All four of the major Czech banks faced problems arising from bad debts and the lack of effective legal procedures whereby the banks could enforce payment of the debts. By April 1997, Nomura had acquired almost 10% of the shares in IPB, one of the four major Czech banks, and on March 8, 1998 the Czech government agreed to sell its remaining holding of 36% in IPB to a company within the Nomura Group of companies. The Nomura Group is a major Japanese merchant banking and financial services group of companies, which typically act through subsidiaries established in various countries. The Nomura Europe company that bought the IPB shares transferred them in two tranches on October 2, 1998 and February 24, 2000 to another Nomura subsidiary, Saluka Investments BV ("Saluka"), which was established under the law of the Netherlands. In June 2000, Saluka agreed with Nomura to sell some of its shares, but at the time the arbitration was initiated, Saluka continued to be the registered holder of the IPB shares. It was clear, however, that Saluka's rights of ownership were exercised in accordance with directions given by the Nomura Group.

During the process of privatizing IPB's competitors (the other three major banks), the Czech Government provided them with assistance in relation to their bad debt problems and discussed with one of them, CSOB, taking over IPB. On June 1, 2000, the Czech Government informed Nomura that state assistance to IPB would only be forthcoming if Nomura raised its stake in IPB from 46% to 51%. In early June 2000, members of the Czech Government made statements which raised speculation that IPB might be placed in forced administration, which triggered a massive run on IPB. On June 16, 2000, IPB was placed in forced administration and armed police entered IPB's headquarters and physically removed all bank managers. On June 19, 2000, IPB was transferred to CSOB, together with a state guarantee and an

[98] Saluka Investments B.V. (The Netherlands) v. the Czech Republic case issued a Partial Award on March 17, 2006. The Partial Award was made public on 22 March, 2006.

indemnity. A Parliamentary Investigation Commission found that this had been carried out unlawfully, but the transfer of IPB to CSOB went ahead nonetheless. A police search of Nomura's Prague offices and seizure of documents on January 30, 2001, was held to have violated Nomura's fundamental rights.

By a notice of arbitration dated July 18, 2001, Saluka commenced arbitration proceedings against the Czech Republic under Article 8 of the Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic of 1991 ("the Treaty"). Following the separation of the Czech and Slovak States in 1992, the Czech Republic confirmed to the Netherlands that the Treaty would remain in force. By Article 8(5) of the Treaty, the UNCITRAL Arbitration Rules applied.

The parties accepted the ad hoc Tribunal's proposal that the registry service for the arbitration should be provided by the Permanent Court of Arbitration ("PCA"), and the PCA agreed to provide such service. Geneva, Switzerland, was selected as the place of arbitration, although this did not preclude the Tribunal from holding meetings in any other place when convenient. The agreed language of the arbitration was English. The procedural meeting was held in London on November 2, 2001. In June 2002 and February 2003, two members of the Tribunal resigned and were replaced by Maitre L Yves Fortier CC QC and Sir Arthur Watts KCMG QC (Chairman) respectively. The oral hearing was held in London from April 8 to 20, 2005.

The substance of Saluka's claim was that the Czech Republic had deprived Saluka of its investment contrary to Article 5 of the Treaty, and that the investment had not been treated fairly and equitable, contrary to Article 3.

The parties agreed to postpone issues of quantum of the claim and counterclaim, and the present Award related only to jurisdiction and liability for the Claim.

Award

The Czech Republic had violated the "fair and equitable treatment" obligation by according IPB differential treatment and by unreasonably frustrating IPB's good faith efforts to resolve its bad debt crisis. There was also a violation of the "non-impairment" obligation, firstly on the same grounds that led the

Tribunal to find a violation of the “fair and equitable treatment” by the circulation of negative information about IPB.

The Czech Republic had not violated Article 3.1 by a failure to ensure a predictable and transparent framework for Saluka’s investment, nor did it violate Saluka’s legitimate expectations. The provision of financial assistance to CSOB did not violate the “fair and equitable treatment” obligation and there was no unjust enrichment of CIOB. There was also no breach of the “full security and protection” obligation.

With the aforesaid reasons, the Tribunal then held that:

(1) it had jurisdiction to hear Saluka’s claim;

(2) the Czech Republic had not acted in breach of Article 5;

(3) the Czech Republic had acted in breach of Article 3;

(4) questions of redress and quantum would be addressed in a second phase of the arbitration;

(5) the Tribunal would separately determine the timetable for the second phase; and

(6) the Tribunal reserved questions of costs until final consideration could be given to the costs of the arbitration as a whole.

4.2.2 “Legitimate Expectations”

4.2.2.1 Walter Bau AG v. Kingdom of Thailand

Background of BITs between Thailand and Germany

Germany and Thailand had concluded the first BIT on December 13, 1961 which came into force later on April 10, 1965. The Germany-Thailand BIT (1961) provided the investments of nationals of the other contracting party a protection against expropriation, with the absence of the FET obligation.

Afterward, Germany and Thailand signed an additional BIT on June 24, 2002 which came into effect on October 20, 2004. Under the Germany-Thailand BIT (2002), either Germany or Thailand was, at all time, obliged to accord investments by investors of the other party as well as their returns fair and equitable

treatment and full protection.[99] In addition, Article 8[100] stated that the scope of such protection applied also to the approved investments even made before the enforcing date.

Furthermore, Germany and Thailand gave their consent in Article 10 of the Germany-Thailand BIT (2002) that any disputes in regard to investments between a contracting State and an investor of the other contracting State shall be settled amicably. In the case that such dispute cannot be settled amicably, either Germany or Thailand hereunder gave its consent to an investor who made an investment in the territory of the other contracting State to refer the case to arbitration.[101]

Facts

Walter Bua, the Claimant, is a company incorporated under the German Law which is presently in liquidation, made an investment through a ten-percent stake in a joint venture registered under Thai Law, named Don Muang Tollway Co., Ltd. (hereinafter "DMT").

DMT had submitted a bid to the governments of Thailand, notably the Department of Highways (hereinafter DoH) for the construction of Tollway in Bangkok where the bid was based on the 1986 and the 1987 DoH Guidelines[102] together with a one-page outline of the average daily traffic volumes on the Vibhavadi-Rangsit Highway or so-called "VRR".[103] DMT was eventually selected as a constructor and operator of a Tollway from Bangkok to the Don Muang airport. DMT then became

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[99] Germany-Thailand BIT, *Treaty between the Kingdom of Thailand and the Federal Republic of Germany concerning the Encouragement and Reciprocal Protection of Investments* Article 2 (3) (signed at Bangkok on June 24, 2002 and came into force on October 20, 2004) *available at* http://investmentpolicyhub.unctad.org/Download/TreatyFile/1428 (accessed on December 12, 2015).

[100] *Ibid.* Article 8.

[101] *Ibid.* Article 10.

[102] DoH established report on 1986 acknowledged that to attract foreign investors to make an investment on infrastructure in Thailand, tollway is included, government should grant a concession right to construct and operate a toll road. Subsequently in 1987, a further report had been published by DoH called "Guidelines for Proposals for a Concession Highway" or "the 1987 Guidelines". The 1987 Guidelines recorded that "Concessionaire has the right to collect toll fees for elevated road users at justifiable rates to recover investment", *supra note* 68 paras. 2.8-2.9.

[103] Walter Bau v, Thailand *supra note* 68 para 2.14.

a concessionaire under a concession agreement granted by Thailand authority i.e. DoH, the Respondent, on August 21, 1989 for the financing, design, construction, operation and maintenance of the Tollway for 25-year period (hereinafter "concession agreement").[104] DMT, after a life of concession period, was obliged to return the Tollway, in good condition, to the Respondent without further payment. Hence, the tolls being collected during the period of a concession agreement is the only resource of DMT's earnings under this project.

Summarization of the Disputes

In September 2005, Walter Bau requested for an arbitration against the Kingdom of Thailand under the Germany-Thailand BIT (2002) of which the tribunal consisted of Sir Ian Barker, Mr. Marc Lalonde (the Claimant's nominee), and Mr. Jayavadh Bunnag (who was appointed by the Respondent in replace of Dr. Suvarn Valaisathien who resigned from the tribunal. The arbitration was to be proceeded under the UNCITRAL Rules.

Walter Bau claimed that Thailand had been involved in the conduct which is cumulatively considered as a "creeping expropriation" of its rights over the years. Its allegations also included a breach of the FET obligation under the 2002 BIT and action in arbitrary and outrageous manner over a long time and frustrating its legitimate expectation to make a reasonable rate of return over its investment.

Briefly, those allegations were based on the following actions as well as omissions committed by the DoH:

(1) The delayed approval of the drawing of the tollway;

(2) The delayed delivery of land being used for the tollway construction;

(3) VAT imposed on the tolls charges, after the signing of the concession agreement, without the approval to raise the toll rates to compensate DMT;

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[104] Walter Bau v. Thailand, *supra note* 68 para 2.35-2.36. *See also* A Thomson Reuters Legal Soltuion, *Practical Law: Cumulative pre-treaty conduct can be a breach of a fair and equitable treatment obligation* (May 12, 2010) *available at* http://uk.practicallaw.com/9-502-2568?service=arbitration (accessed on December 12, 2015).

(4) A concession agreement had been signed between the Thai Ministry of Transport[105] and Hopewell, a Hong Kong Company in November 1990, just after DMT entered into loan agreements for Don Muang Tollway project. Hopewell is obliged to construct a 60-kilometer long, elevated toll-road which was to run in parallel to the Don Muang Tollway for a length of 12 kilometers (hereinafter "Hopewell Project") on;[106]

(5) A lengthy failure to approve the toll hikes requested by DMT;

(6) The votes for a deduction of toll charges by four directors of DMT which is appointed by the Thai government in December 2004; and

(7) The short-term closing of Don Muang Airport which was a reflection of the internal political problems.

Thailand raised the issue that the tribunal had no jurisdiction over the case since the disputes arose before the effective of the 2002 BIT.

Tribunal, consequently, considered the following issues in order to grant the award:

(1) Jurisdiction of the tribunal over the case or *Jurisdiction ratione remporis*;

(2) Whether the claimed conduct of Thailand a creeping expropriation;

(3) Whether or not the FET obligation under the 2002 BIT had been violated by Thailand;

(4) If Thailand is found guilty, what is the appropriate damages; and

(5) Costs of arbitration.

Award

In this section, I will examine only the award rendered in regard to FET issue.

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[105] DoH is a constituent part of the Ministry of Transport.

[106] Walter Bau v, Thailand *supra note* 68 under *The Hopewell Project*.

The proceeding of the tribunal was based on the notion that a subjective element of the FET standard is the protection of legitimate expectation which is, in this case, an opportunity to make a reasonable rate of return over its investment through the increasing of toll rates as contemplated in a concession agreement.

The tribunal was of view that Thailand's failure to fulfill such expectation should be considered as a breach of the FET obligation. The long period of refusal to increase the toll rates, the forced toll reduction in December 2004 and other earlier mentioned conducts were taken into account. The conclusion of tribunal was therefore based on the "total factual matrix", including the intrinsic probability that an investor would not engage in a long-term investment unless a legitimate expectation of reasonable return is granted.

At the end, the tribunal granted an award in favor of the Walter Bau, the Claimant, by ordering that the Claimant shall be paid in the amount of 29.21 million Euros by the Kingdom of Thailand, the Respondent.

Summary

The tribunal in Walter Bau v. Thailand had established the notion that a breach of the FET obligations should be considered under a series of cumulative acts and omissions (total factual matrix). Even one of these actions or omissions may not be enough on its own, but putting these together can constitute a breach of the FET obligations.

4.2.2.2 CME v. The Czech Republic of Argentina[107]

Summary

CME, a Dutch corporation with a Czech subsidiary CNTS (investment) engaged in media business, brought a dispute against the Czech Republic under the Netherlands-Czech BIT, alleging several violations of the BIT by the Media Council (Czech media regulatory body) and claiming damages of over USD 500 million.

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[107] CME v. The Czech Republic of Argentina, UNCITRAL, Award rendered on December, 2007.

In accordance with the license granted to a Czech company CET 21 in 1993, CNTS had become an exclusive provider of broadcasting services for the first private Czech TV channel TV Nova, which turned out to be extremely popular and profitable. Following the Media Council's actions and omissions and the conflict with the head of CET 21 Dr. Zelezny, the exclusive position of the CNTS as a services provider for TV Nova was first undermined in 1996 and then fully destroyed in 1999. As a result, CNTS effectively went out of business, with its place being taken by other service providers.

The Tribunal found that Media Council's actions and omissions constituted expropriation of CME's investment and violated other four provisions of the BIT. The Tribunal held that the fair market value of CME's investment should be compensated. In its very detailed award on damages, the Tribunal reviewed several valuation methods suggested by the Claimant. As a primary method to determine the value of CNTS as a going concern, the Tribunal used valuation done by a Swedish media company that had intended to buy CNTS from CME not long before the 1999 events. On this basis, with some adjustments, the Tribunal determined the market price a willing buyer wished to pay for the investment. The Tribunal also accepted the parties' DCF analyses as proper method for CNTS valuation. The Tribunal made its own assessment of the parties' DCF estimates and used the resultant figure to support its findings under the primary valuation method. Remaining valuation methods were declined as unnecessary or otherwise unhelpful.

After making all the adjustments, the Tribunal awarded CME the damages of US$ 270 million plus simple interest of 10% per annum from the date of the arbitration request and up to the date of payment.

The Czech Republic applied to a Swedish domestic court for the judicial review of the arbitral award. The Swedish court upheld the award.

4.3 Identifying the Difference of FET Obligations under BITs (Comparing ICSID Arbitration and Ad-hoc Arbitration)

By examining awards rendered under either ICSID or Ad-hoc arbitration, I acknowledged that the tribunal under both arbitrations had endorsed a similar set of key elements of the FET obligations by host States under BITs as follows:

(1) Non-Denial of Justice;
(2) Due Process of Law;
(3) Full Protection and Security;
(4) Non-Discrimination;
(5) Expropriation, Nationalization and Compensation;
(6) Good Faith;
(7) Transparency; and
(8) Legitimate Expectations

Nevertheless, the tribunal's conclusion in *Walter Bau v. Thailand* shows that an accumulation of a series of acts and omissions done by host States is a new trend of the case being heard under arbitration; either ICSID or Ad-hoc arbitration, pertaining to a breach of FET obligations under BITs.

4.4 Identifying the Difference of the Interpretation of FET

In summary, it is likely that, after examining the aforementioned judgments and awards, the interpretation and the application of FET are found to be even more variable depending on surrounding circumstances, yet the manner in which they have been interpreted and applied are considerably similar. However, it can be argued that the FET standard has been defined broadly in ICJ trials while in the arbitration proceedings, the FET standard was defined more thoroughly; for instance, its elements have been addressed as to the development and drastically increasing of investment disputes nowadays.

The subjective elements of the FET standard in present day can be traced to the precedent awards or judgments as follows:

(1) Non-Denial of Justice;

(2) Due Process of Law

(3) Full Protection and Security

(4) Non-Discrimination;

(5) Expropriation, Nationalization and Compensation;

(6) Good Faith;

(7) Transparency; and

(8) Legitimate Expectations.

CHAPTER 5
CONCLUSIONS AND RECOMMENDATIONS

5.1 Conclusions

Fair and Equitable Treatment (FET) has been recognized as a general principle abided by civilized nations to provide protection to foreign direct investment. The influx of FET based claims in recent years has been accompanied by various interpretations of FET and a lack of its precise meaning, I thus decided to examine relevant arbitral awards as well as legal cases in order to extract some of the elements taken into account, at least subjectively, by the tribunals to interpret the meaning of FET when considering a breach of FET obligations at BIT level.

The initial appearance of FET language was found in 1948 and it has been used frequently in international investment treaties particularly in BITs since the 1960s onwards. FET is a standard that seeks to protect both international investors and investments fairly and equally. However, the FET language has been used differently in different treaties. UNCTAD in 2007 thus categorized the formulations of FET language generally found in the majority of IIAs. Such variation further led the tribunals to face the problems of interpretation and application of FET which have been examined in this thesis.

Precedents of relevant arbitral awards and judicial judgments reveal that even the FET standard has been interpreted and applied in the same manner, yet it is slightly different in each trial depending on surrounding circumstances. I assumed that the principle of the FET standard had been created intentionally as a flexible approach to let the tribunal exercises its appropriate discretion depending on the circumstances encompassing the disputes.

In summary, the conceptualization of interpretation and application of the FET standard under BIT can be traced primarily to judicial judgments which defined FET widely. Subsequently, such precedent had been adopted in international arbitration proceedings and had been given more details as explained earlier which led to the application of the FET standard to disputes as a general principle of law.

5.2 Recommendations

Thailand is one of the significant developing countries in South-East Asian Area with expanding volume of foreign direct investments (FDIs). In addition, Thailand has concluded more than 40 BITs in order to promote its investments as well as to attract the investments into its territory. As discussed earlier, the majority of BITs nowadays accord investors and investments a fair and equitable treatment, including BITs signed by Thailand.

Concerning FET based claims which have been drastically increased, Thailand has very little experience in dealing with these type of claims. Moreover, it has recently lost the case in *Walter Bau v. Thailand* which rendered the final award in favor of the claimant. Thailand is bound by such award and obliged to pay compensation in the amount of 29.21 million Euros plus interests to the claimant causing a severe impact to Thailand's financial status.

The following recommendations, concerning the present flow of international investments, are that Thailand, in order to minimize the risks from the upcoming FET based claims, should: first, modify its current Model BIT by providing a clearer clarification of the FET obligations as well as adding the provisions of Policy Space; second, keep the relevant authorities up to date on the information pertaining to the FET obligations including providing a guideline on the ISDS proceeding and also illustrations of what actions or omissions can be determined as a breach of the FET obligations.

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APPENDICES

"Table 2.1 BITs of which Thailand had signed, updated on December, 2015"

No.	Short Title	Parties	Date of Signature	Date of entry into force
1.	Germany – Thailand BIT (1961) [a]	Germany, Thailand	13/12/1961	10/04/1965
2.	Netherlands – Thailand BIT (1972)	Netherlands, Thailand	06/06/1972	03/03/1973
3.	Thailand – United Kingdom BIT (1978)	Thailand, United Kingdom	28/11/1978	11/08/1979
4.	China – Thailand BIT (1985)	China, Thailand	12/03/1985	13/12/1985
5.	Bangladesh – Thailand BIT (1988)	Bangladesh, Thailand	30/03/1988	
6.	Korea, Republic of – Thailand BIT (1989)	Korea, Republic of, Thailand	24/03/1989	30/09/1989
7.	Lao People's Democratic Republic – Thailand BIT (1990)	Lao People's Democratic Republic, Thailand	22/08/1990	07/12/1990
8.	Hungary – Thailand BIT (1991)	Hungary, Thailand	18/10/1991	18/10/1991
9.	Thailand – Viet Nam BIT (1991)	Thailand, Viet Nam	30/10/1991	07/02/1992
10.	Peru – Thailand BIT (1991)	Peru, Thailand	15/11/1991	15/11/1991
11.	Poland – Thailand BIT (1992)	Poland, Thailand	18/12/1992	10/08/1993
12.	Romania – Thailand BIT (1993)	Romania, Thailand	30/04/1993	20/08/1994

"Table 2.1 BITs of which Thailand had signed, updated on December, 2015 (Cont.)"

No.	Short Title	Parties	Date of Signature	Date of entry into force
13.	Czech Republic – Thailand BIT (1994)	Czech Republic, Thailand	12/02/1994	04/05/1995
14.	Finland – Thailand BIT (1994)	Finland, Thailand	18/03/1994	18/05/1996
15.	Cambodia – Thailand BIT (1995)	Cambodia, Thailand	29/03/1995	16/04/1997
16.	Philippines – Thailand BIT (1995)	Philippines, Thailand	30/09/1995	06/09/1996
17.	Sri Lanka – Thailand BIT (1996)	Sri Lanka, Thailand	03/01/1996	14/05/1996
18.	Taiwan Province of China – Thailand BIT (1996)	Taiwan Province of China, Thailand	30/04/1996	30/04/1996
19.	Canada – Thailand BIT (1997)	Canada, Thailand	17/01/1997	24/09/1998
20.	Switzerland – Thailand BIT (1997)	Switzerland, Thailand	17/11/1997	21/07/1999
21.	Indonesia – Thailand BIT (1998)	Indonesia, Thailand	17/02/1998	05/11/1998
22.	Thailand – Zimbabwe BIT (2000)	Thailand, Zimbabwe	18/02/2000	
23.	Israel – Thailand BIT (2000)	Israel, Thailand	18/02/2000	28/08/2003
24.	Argentina – Thailand BIT (2000)	Argentina, Thailand	18/02/2000	07/03/2002
25.	Egypt – Thailand BIT (2000)	Egypt, Thailand	18/02/2000	27/02/2002

"Table 2.1 BITs of which Thailand had signed, updated on December, 2015 (Cont.)"

No.	Short Title	Parties	Date of Signature	Date of entry into force
26.	Croatia – Thailand BIT (2000)	Croatia, Thailand	18/02/2000	10/08/2005
27.	Slovenia – Thailand BIT (2000)	Slovenia, Thailand	18/02/2000	20/10/2002
28.	Sweden – Thailand BIT (2000)	Sweden, Thailand	18/02/2000	23/11/2000
29.	India – Thailand BIT (2000)	India, Thailand	10/07/2000	13/07/2001
30.	Korea, Dem. People's Rep. of – Thailand BIT (2002)	Korea, Dem. People's Rep. of, Thailand	01/03/2002	24/05/2002
31.	Bahrain – Thailand BIT (2002)	Bahrain, Thailand	21/05/2002	17/07/2002
32.	Bangladesh – Thailand BIT (2002)	Bangladesh, Thailand	09/06/2002	12/01/2003
33.	BLEU (Belgium-Luxembourg Economic Union) – Thailand BIT (2002)	BLEU (Belgium-Luxembourg Economic Union), Thailand	12/06/2002	19/09/2004
32.	Bangladesh – Thailand BIT (2002)	Bangladesh, Thailand	09/06/2002	12/01/2003
33.	BLEU (Belgium-Luxembourg Economic Union) – Thailand BIT (2002)	BLEU (Belgium-Luxembourg Economic Union), Thailand	12/06/2002	19/09/2004
34.	Germany – Thailand BIT (2002)	Germany, Thailand	24/06/2002	20/10/2004

"Table 2.1 BITs of which Thailand had signed, updated on December, 2015 (Cont.)"

No.	Short Title	Parties	Date of Signature	Date of entry into force
35.	Russian Federation – Thailand BIT (2002)	Russian Federation, Thailand	17/10/2002	
36.	Bulgaria – Thailand BIT (2003)	Bulgaria, Thailand	11/09/2003	12/08/2004
37.	Thailand – Turkey BIT (2005)	Thailand, Turkey	24/06/2005	21/07/2010
38.	Tajikistan – Thailand BIT (2005)	Tajikistan, Thailand	09/08/2005	
39.	Hong Kong, China SAR – Thailand BIT (2005)	Hong Kong, China SAR, Thailand	19/11/2005	18/04/2006
40.	Jordan – Thailand BIT (2005)	Jordan, Thailand	15/12/2005	08/06/2012
41.	Myanmar – Thailand BIT (2008)	Myanmar, Thailand	14/03/2008	08/06/2012

Source: Data adapted from UNCTAD, *International Investment Agreements Navigator*, *available at* http://investmentpolicyhub.unctad.org/IIA.

Note. Thailand had signed 41 BITs as indicated in the above table, however, there were only 4 BITs that never came into force i.e. Bangladesh – Thailand BIT (1988), Thailand – Zimbabwe BIT (2000), Russian Federation – Thailand BIT (2002) and Tajikistan – Thailand BIT (2005).

[a] Germany – Thailand BIT (1961) was terminated on October 20, 2004 and been replaced simultaneously by Germany – Thailand BIT (2002) which came into force in the same day.

BIOGRAPHY

Name	Miss Nuttiya Wiboonchokseit
Date of Birth	December 1, 1986
Educational Attainment	2008: Bachelor Degree Faculty of Law (Business Law), Thammasat University
Work Position	Associated Lawyer Thep Law Office
Work Experiences	2010 – Present: Assistant Lawyer Thep Law Office