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Bilateral Investment Treaties

*A study on international investment law and arbitration, with
special regards to 'fair and equitable treatment'*

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Abstract

AIMING towards increasing knowledge within the field of international investment law, a legal field traced by uncertainty and alike no other.

DESIRING to research the regulatory system which controls international investments, which increase in amount each day. International investment law is built upon bilateral treaties signed by States, and each State has negotiated one such treaty with every contracting State meaning that there are several thousand treaties.

CONSCIOUS about the issues regarding a clause included in almost every bilateral investment treaty, regarding fair and equitable treatment. All States seem to be convinced that such treatment is important to induce international investments, but there is no general definition of the term.

BUILDING on the notion that there may be need for clarification regarding how to interpret the fair and equitable treatment standard.

CONSIDERING that there may even be grounds for researching and establishing a new legal system regulating international investment law.

RECOGNISING that this study will not reach final conclusions on rectifying the issues within the legal field, but search to identify and bring them into the light, to be able to discuss and analyse them.

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Abbreviations

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| 1962 OECD Draft Convention | Organisation for Economic Co-operation and Development, Draft Convention on the Protection of Foreign Property of 1962 |
| 1967 OECD Draft Convention | Organisation for Economic Co-operation and Development, Draft Convention on the Protection of Foreign Property of 1967 |
| BIT | Bilateral Investment Treaties |
| CIL | Customary International Law |
| EU | European Union |
| Draft Convention | Draft Convention on Investments Abroad or Abs-Shawcross Draft Convention |
| ICC | International Chamber of Commerce |
| ICSID | The International Centre for Settlement of Investment Disputes |
| ICSID Convention | Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965 |
| FCN | Treaties on Friendship, Commerce and Navigation |
| FET | Fair and Equitable Treatment |
| GDP | Gross Domestic Product |
| ICJ | International Court of Justice |
| IIA | International Investment Agreement |
| ISDS | Investor-State Dispute Settlement |
| MFN | Most Favored Nation |
| NAFTA | North American Free Trade Agreement |
| OECD | Organization for Economic Co-operation and Development |
| UN | United Nations |
| UNCTAD | United Nations Conference on Trade and Development |

1. Introduction

The legal system on international law is both complex and unwieldy since it involves not only statutes and treaties, but also case law and customary law. This intricate system however, is even more complex with regards to international investment law, which completely lack a general legislation. Today's international investment law is built on bilateral and multilateral treaties where States themselves have set the scene for investment-related regulations and disputes, which has been shown to cause trouble in the international community. Foreign direct investments can make out a large portion of a State's economy, and to avoid miscalculations and deviations it is important that the area is clearly regulated. Foreign investments are included in a State's gross domestic product (GDP) and could make up a substantive portion of it.¹

This essay will show how the current legal system is built, focusing on the bilateral investment treaties and case law. It will also discuss whether there is need for a general international legislation on foreign direct investments. Furthermore, it shall examine the abstract treaty-based idea of 'fair and equitable treatment'. This standard of treatment is the ground for nearly every claim in an Investor-State dispute. It will be shown that there are severe weaknesses in the judicial system regarding international investments, and in particular with regards to the clause on fair and equitable treatment (FET). The intention is to provide the international community with tools for continued discussion regarding the establishment of an international regulatory framework.

The intended readers and users of this paper are practitioners and scholars, entering the field of international investment law. Whether doing so in a line of practice or by personal interest, this paper aims to provide helpful knowledge. Since international investment law is built on such a complex and elusive system which resembles no other legal system, the need for thorough knowledge is vital. Knowledge in the field of international law is presumed and will prove useful when approaching this particular part of international law, but many areas in international investment law stand by itself and is unlike any other legal field. Thus, the legal field will be thoroughly presented through research to establish the applicable law. The fact that an examiner will have knowledge of this background information is noted, but with the intended reader reaching beyond the examiner as the aim is for providing useful guidance outside the world of university, it still is deemed necessary for the scope and purpose to include.

¹ *For a complete list of foreign direct investments in GDP see: The World Bank Group, Foreign Direct Investments, Net Inflows (% of GDP) (World Bank Group 2018) <<https://data.worldbank.org/indicator/BX.KLT.DINV.WD.GD.ZS>> accessed 22 May 2018.*

The objective with this essay is to establish the applicable law and to highlight and discuss issues within the field which are based upon the judiciary system. Through this, suggestions for improvement and further discussion can be made. The aim with such an attempt is to help decrease the number of investor-state disputes which are based on the FET clause, in order to consequently decrease the impact such disputes have on both States' and investors' economy. The system should be in place to promote international investments, not to prevent them.

1.1. Background

International investment law is built on an intricate system of mainly bilateral investment treaties (BIT) which are agreed to between States. The estimated number of such treaties is 2 900 and counting.² There is no general international investment law comparable to, for instance, EU law or international trade law. In comparison to other fields, this lack of a general regulation is what distinguishes the field the most. The non-existing regulation is not a result of the lack of trying, on the contrary several efforts have been made in order to establish such a regulation. For instance, during the 1960's, two drafts for a convention on an international investment law regime was presented but were both ultimately rejected for the benefit of BITs.³ However, the need of support for the international community regarding dispute settlement was clear, and as a result the Convention on Settlement of Investment Disputes between States and Nationals of Other States⁴ (ICSID Convention) was approved in 1985.⁵ The ICSID Convention in turn established the International Centre for Settlement of Disputes (ICSID) for the purpose of acting as a location for arbitration.⁶

Once the ICSID Convention and the centre itself was in place and active, it did not take long until States started incorporating them into the BITs as the legislation and institute for dispute settlement.⁷ Thus, as international investments increased as did the need of

² 'International Investment Agreements Navigator' (*Investment Policy Hub, UNCTAD*) <<http://investmentpolicyhub.unctad.org/IIA>> accessed 12 February 2018.

³ Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 77.

⁴ Convention on the Settlement of Disputes Between States and Nationals of Other States (Washington, 18 March 1965), 575 U.N.T.S. 159; 17 U.S.T. 1270; T.I.A.S. No. 6090, entered into force 14 October 1966.

⁵ Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (March 18, 1965), para. 2.

⁶ Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (March 18, 1965), para. 15.

⁷ Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 78.

regulations, since States had found the need of aid in dispute resolution after having rejected the proposed law. This course of action appears to be backwards and it may be seen as a sign of the judiciary system not being able to fulfil the wishes and needs of the international community in a timely manner. Thus, the judiciary system had to at last help prevent further discontent and disputes by supporting the community with a neutral institution for dispute settlement.

Something that nearly all of the BITs have in common, is an article stating that fair and equitable treatment of foreign investments must be ensured. An example of this is the China-Sweden BIT where article 2 reads:

(1) Each Contracting State shall at all times ensure fair and equitable treatment to the investments by investors of the other Contracting State.⁸

Articles regarding fair and equitable treatment as the one mentioned above, have proven to be problematic for both investors and States. This is mainly the case due to the fact that the standard of treatment required according to the FET standard is not otherwise defined in international law, but instead must be defined by the contracting parties in each BIT.⁹ This has led to the arbitrators having to regard for example party intents, when judging in a claim brought before the ICSID. Because of the uncertainty such assessments can lead to, it is not surprising that the standard of treatment has been at issue in a large number of Investor-State disputes. The FET standard also seems to be the most problematic clause of BITs.

It has been previously discussed how to handle this issue, both in case law as well as in doctrine. There has also been attempts made to link the fair and equitable treatment to other principles of international law such as the minimum standard.¹⁰ As of yet, none of these attempts have been proven exclusively successful, although they it would be much needed. Perhaps, many of the claims against States brought before the ICSID could have been avoided if the FET was originally defined in an international legislation agreed to by all States. As of now, assessment of the claims based on the FET clause is made based upon several subjective and objective elements such as party intents, as mentioned above, as well as the agreements specific wording and the context in which it is examined and

⁸ China-Sweden BIT signed on 29 March, 1982.

⁹ Directorate for Financial and Enterprise Affairs, Working No. 3 – 2004 '*Fair and Equitable Treatment Standard in International Investment Law*' (September 2004) 2.

¹⁰ Directorate for Financial and Enterprise Affairs, Working No. 3 – 2004 '*Fair and Equitable Treatment Standard in International Investment Law*' (September 2004) 3.

even the national law of the host State. All of this is done through interpretations made by for example arbitrators or a government, if using national authorities.¹¹

With such unusual legal basis as the one governing international investment law, the next source of law to turn to will naturally be case law. With arbitrators differing from case to case as well as them having to consider different subjective and objective elements, the predictability of such case law is most likely uncertain. The guarantee for neither a uniform nor functional case law could likely be ensured through this course of action.

1.2. Thesis and delimitations

The main purpose of this essay is to establish the applicable law in international investment law. As previously stated, international investment law is built upon bilateral investment treaties which are contracted on a State-to-State basis. The purpose is also to examine whether international investment law needs a standard definition of the term ‘fair and equitable treatment’. This is a term which is most commonly used in bilateral investment treaties.¹² To assess if the term needs a standard definition the research will focus on how the term is being interpreted by both international organisations and the centre for arbitration. Since the entire legal field with regards to international investment law is regulated mainly through bilateral investment treaties, it will also be researched how the term is being interpreted in different treaties, depending on how the contracting parties have chosen to formulate the FET standard.

To make it possible to reach conclusions regarding the above-mentioned purpose there are several sub-questions that will be discussed throughout the essay. Initially there is the question of how international investment law is regulated. It has been established that this is done mainly through BIT’s, and thus these will be researched thoroughly. This part will include both an historical view of international investment law as well as the bilateral investment treaties leading to modern time and usage.

Furthermore, the essay will answer questions regarding the fair and equitable treatment and how it is being used and interpreted as of now. Since it is mainly tribunals which deals with issues regarding this interpretation, case law is vital. In which way has fair and equitable treatment been interpreted and developed through case law? Furthermore, is the interpretation consistent? And since many international organisations have contributed

¹¹ Directorate for Financial and Enterprise Affairs, Working No. 3 – 2004 ‘*Fair and Equitable Treatment Standard in International Investment Law*’ (September 2004) 2.

¹² Directorate for Financial and Enterprise Affairs, Working No. 3 – 2004 ‘*Fair and Equitable Treatment Standard in International Investment Law*’ (September 2004) 2.

with their own interpretations, how well do these correlate with each other as well as case law?

There are examples of when principles of common international law are used in international investment law, and these will be discussed with special regards to their meaning and interpretation in international investment law. On occasions where a principle or term is used where there is a definition within common international law and the meaning is the same, these principles or terms will not be further explained since previous knowledge of common international law is presumed.

With consideration to given time frames some aspects will not be considered. Other legal fields besides principles of international law are excluded from the discussions. On some occasions, domestic law prevails international investment law, but the domestic law will not be further explained since it is not the focus of this essay. To shortly explain; through the BITs there is a connection between international investment law and national law, which for instance could include the exhaustion of local remedies before turning to international arbitration. This will be briefly commented but not further studied. Since the research field is international law there will be as little reference as possible to national law.

Furthermore, some principles of international investment law are similar or even seem interchangeable to those found in international investment law. This could be said about the fair and equitable treatment standard found in international investment law, and the two separate principles of 'fairness' and 'equity' found in international law. These must not be misinterpreted as meaning the same thing or be used as synonyms. FET is a principle of its own and in international investment law it is not possible to consider fairness or equity on its own.

During the case studies, other parts of the BIT besides the FET standard fall outside the scope and thus will not be discussed. In the cases included there are claims brought before the ICSID which are based not solely on the FET standard but also other clauses of the BIT, or even solely based on another clause whereas the arbitrators nevertheless regard the FET standard. In these cases, the focus will regardless stay on the FET standard. In most of the BITs there are also definitions of some terms for the purpose of a specific agreement since States have tended to view those terms in dissimilar ways. For instance, the parties can specify what is meant when using words such as 'territory', 'national' or 'investment' in the BIT and thus these have been given different meaning in different agreements. The fact that the contracting parties have agreed to view terms in a specific

way and giving those terms definitions which are more or less different in every BIT, could indeed be troubling but is not regarded in the context of this essay.¹³

The initial thesis is that after the applicable law has been established, a need of a definition of ‘fair and equitable treatment’ will remain. The need for a definition of the standard of treatment will be based on both conclusions made whilst studying cases, as well as through analysing the development of the field. This discussion will aid in highlighting parts of the judiciary system which are in need of further development.

1.3. Theory, method and material

The research focus is the applicable law within international investments law and how the FET standard is currently being used and interpreted in international investment law, and if there are problems with regards to this. The basis for the research throughout the essay is a traditional legal method, which is used as a tool to gain deeper understanding within the field of international investment law.

The sources of law which regulate international investments are many. The conventions and agreements which are specific for international investment law will be given most consideration for the purpose of this essay. However, international investments are also regulated through common international law and principles which originally are found in this source of law. The legal field is also regulated by customary international law, which play an important role in regards to for instance the analysis of case law. Furthermore, national law of a host State could also affect the outcome of interpretation. For instance, domestic law can be referred to in BITs and when a claim is brought before the ICSID the arbitrators must consider not only international law but also national law, if the parties have agreed on in the treaty.¹⁴ In international law, conventions and customary international law are considered equally as they are primary sources of law. Case law and doctrine are considered as secondary sources which usually do not take precedence over primary sources. With regards to international investment law, which is special in its nature, BITs and customs are primary sources of law whilst case law and doctrine are secondary sources.

¹³ For some examples of different definitions, see e.g.: Finland-Latvia BIT, signed on 5 March 1992, Art. 1.; France-Uganda BIT, signed on 3 January 2003, Art. 1.; Morocco-United States of America BIT, signed on 22 July 1985, Art. 1.; South Africa-Sweden BIT, signed on 25 May 1998, Art. 1.

¹⁴ Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 84.

The first chapters of the essay are dedicated to defining and explaining the current legal system and particularly BIT's and the FET standard. This is done through traditional legal dogmatics, to establish the law applicable within the field of international investment law. The traditional legal dogmatics used in the first chapters will help establish *de lege lata*, through methodising and describing the regulations used within international investments. The chosen method is often used for such qualitative studies and allows for both using primary sources of law to reach conclusions on *de lege lata*, as well as using additional sources to enrich the analysis.¹⁵ It is important that the material used is representative for the field as well as it being interpreted in a correct way since the validity of the study could otherwise be questioned, thus a variety of sources will be presented.

Legal analysis is used when discussing interpretations by awards and international organisations. This allows for an in-depth analysis, with comparisons to for instance common international law. The method also allows for analysis based on important values and principles such as predictability, legal certainty and efficiency.¹⁶ Since it is not possible to study every case or interpretation a selection has been made based on relevance, using literature and articles.

The research results used in the essay are important not only to understand international investment law, but also to be able to fully understand common international law. Some of the customs which derive from common international law are almost only used in international investment law and in arbitration from the ICSID. This regards for instance expropriation, nationality and denial of justice. The initial chapter which establish the applicable law in international investments helps to increase this understanding.

1.4. Outline

This essay contains several chapters which are used as a guide towards a conclusion on the thesis. Some different research methods will be used throughout these chapters in order to gain as much knowledge as possible, as discussed in this introductory chapter. Chapter 2 aims to establish the applicable law and discusses the field of international investment law in a historical view as well as its progression towards being BIT-based. It will further briefly examine how international investment law correlates to other legal systems such as national law, where the distinctions have become a bit diffuse due to how the BITs are formulated and connected to national law. The chapter will also discuss some

¹⁵ Claes Sandgren, *Rättsvetenskap för Uppsatsförfattare: Ämne, Material, Metod och Argumentation* (3rd edn, Nordstedts Juridik 2016) 43f.

¹⁶ Claes Sandgren, *Rättsvetenskap för Uppsatsförfattare: Ämne, Material, Metod och Argumentation* (3rd edn, Nordstedts Juridik 2016) 46f.

principles of international law that has been implemented into international investment law.

The subject of fair and equitable treatment is discussed in-depth in chapter 3. The aim is to examine and discuss how the FET standard is used and defined in the BITs and how its wording affects how the clause should be interpreted. The chapter also focuses on which standard of treatment is upheld because of the inclusion of a clause on FET and how this is being interpreted in the international community. In chapter 4 a case study is conducted and the aim is to examine how case law has helped develop the FET standard and how well cases correlate with each other. The chapter contains brief summaries of each case discussed to ascertain that basic knowledge is established before moving on to deepened discussions. It will show that the fair and equitable treatment is the issue in many cases brought before the tribunal even though no case is similar to the other, and that the interpretation has developed over time.

Chapter 5 shows how the FET standard is interpreted by international institutions, to deepen the understanding of the standard and the issues related to it. These interpretations will both correlate and not correlate, supporting the thesis regarding issues in interpreting the FET standard.

The final discussion is held in chapter 6 and aims to bring together all previous topics and their subsequent discussions. The final chapter 7 concludes the essay by summarising its findings and concluding the thesis and what the research has found regarding those questions. Suggestions on further studies and developments is also presented in this chapter.

2. International investment law and Bilateral Investments Treaties

The history of international investment law dates back to the middle of the 19th century, and international investments themselves go back even further. At first there seemed to be little interest in creating international rules regulating treatment of foreign investments, as they were presumed to acquire protection under national law. During this time, early treaties referred to domestic law as the protector of foreign investments, stating that foreign investors should enjoy the same treatment as domestic investors were given.

Nevertheless, from the very beginning there were issues regarding which laws would dominate in disputes arising from international investments. There was a long debate on whether national or international law should take precedence in the case of investor-State disputes. It was not until a century later when the first BITs were concluded that the issue got somewhat cleared up, along with the establishing of the ICSID.

2.1 History

The history of modern international investment law stems from an US-Mexico conflict dating back to the 1930's, where correspondence between Mexico's Minister of Foreign Affairs and US State Secretary advocated two different stances on the protection of alien property in a host State. The conflict in itself regarded Mexico's expropriation of US-owned land and the subsequent claim of compensation from the US.¹⁷

2.1.1. Friendship, Commerce and Navigation Treaties

The BITs precursor was treaties on Friendship, Commerce and Navigation (FCN), which were initiated by the US in 1778 when they concluded the very first FCN Treaty with France. The aim was to conclude agreements on how the States could engage in trade and shipping during times of war. The first FCN Treaty did so by for instance referring to the well-known principle of most-favoured-nation.¹⁸ The US continuously concluded such

¹⁷ Edwin Borchard, *Minimum Standard of the Treatment of Aliens* (Michigan Law Review, vol. 38, p. 445-461, 1940) p. 445.

¹⁸ Andreas Paulus, *Treaties of Friendship, Commerce and Navigation* (Oxford Public International Law 2011)

<<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1482>> accessed 14 May 2018.

treaties over the centuries and in 1944 there were approximately 29 FCN Treaties in force.¹⁹

2.1.2. The Calvo doctrine

One of the first to address the issue regarding protection of alien property, was the Argentine jurist as well as Mexico's Minister of Foreign Affairs, named Carlos Calvo, founder of what was later to be known as the Calvo doctrine. His ideas were based on a study that was first released during the 1860's which, according to Calvo, showed that the way foreign property was treated in a host State allowed for too much influence by that State.²⁰ During this period in time, it was often stated in treaties and such other agreements that foreign property should be treated in the same way as national property would in a host State, i.e. they were to be governed by the same laws.²¹ It was subsequently assumed that this gave foreign property a suitable protection, meaning that the standard of treatment for foreign property could not be lowered. However, Calvo in his study highlighted something that had not been previously discussed. Calvo stated that “[a]liens who established themselves in a country are certainly entitled to the same rights as of protection as nationals, but they cannot claim any greater measure of protection”.²² What this meant in reality, according to Calvo, was that a host State would be able to reduce the protection of foreign investors' property by reducing the protection of such domestic property.²³

The Calvo doctrine indicated that no international law governed foreign investments and thus, an investor would not be able to demand rights in a host State which was established under international law such as the minimum standard, neither could they bring claims against a State in international courts. The Calvo doctrine was later internationalised in several ways, for instance by the UN which adopted a resolution with regards to economic rights and duties of States. The resolution stated that “[i]n any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of

¹⁹ Kenneth J. Vandeveld, *The First Bilateral Investment Treaties: U.S. Postwar Friendship, Commerce and Navigation Treaties* (1st edn, Oxford University Press 2017) 61.

²⁰ Rudolf Dolzer and Cristoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 71.

²¹ Rudolf Dolzer and Cristoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 71.

²² Carlos Calvo, *Le Droit International* (5th edn, 1885) cited in Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (2nd edn, Cambridge University Press 2004) 21.

²³ Rudolf Dolzer and Cristoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 71.

the nationalizing State and by its tribunals (...)".²⁴ This gave the host State jurisdiction to rule in any cases regarding compensation as a result of for instance expropriation or nationalisation. It was still possible to have a case brought before an international court or tribunal, but the UN Resolution stated that such a proceeding must be agreed to by all States involved in a specific dispute. Because of this, it must have been unlikely for such a dispute to be brought before an international court, since a host State would not likely agree to such measures when its own laws regulated any dispute. Traditionally, States have not been eager in giving up its jurisdiction in claims regarding its national laws. Moreover, this treatment of foreign property was even called national standard of treatment in certain areas, for instance Latin America. This did not indicate the level of treatment which this principle now reflects in international law, but merely that a foreign investor could not rely on any other law than the domestic, in a host State. This could be supposed to have hindered many foreign investors from investing in certain States, where the domestic laws were to unfavourable. On the one hand, domestic laws could indeed help investors exceed in their business endeavours but on the other hand the domestic law could also be a hindrance for achieving economic advancements.

2.1.3. The Hull formula

A contrast to the Calvo doctrine is what was later to be known as the Hull formula, which claimed that compensation with regards to foreign property should be "*prompt, adequate and effective*".²⁵ It did not state that the power of arbitration was given to the host State and to be considered only under national law, as the Calvo doctrine did. Instead, the Hull formula concluded that a host State was allowed to, for instance, expropriate foreign investors' property under international law, but that this law also set the standard for compensation.²⁶ Furthermore, the investor was entitled to dispute resolution before a tribunal in a different State, apart from the host State. This would have reduced concern of biased judgements as the dispute in itself was to be separated from the two parties, i.e. the foreign investor and the host State. This is something that can be recognised in the modern arbitrary system where claims brought before the ICSID are judged by arbitrators from other States.

Similar to the Calvo doctrine, the Hull formula has too been internationalised in many instances. Recollecting the earlier example with the UN Resolution, the Hull formula can be found in the opening line of the very same paragraph stating that every State has the

²⁴ G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 29, vol. 1, U.N. Doc. A/RES/29/3281 (vol. 1) (1974) art. 2(2)(c).

²⁵ Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (2nd edn, Cambridge University Press 2004) 38.

²⁶ Rudolf Dolzer and Cristoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 72.

right “to nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures (...)”.²⁷ And so now, the UN chose to combine the two theories. This may have been a result of the disputes between Mexico and the US, since Latin America concurred with the Calvo doctrine and the US did so with the Hull formula. The two States had previously been in dispute regarding Mexico’s expropriation of US property, under which the Hull formula was expressed for the very first time.²⁸ It is possible that the UN indeed took that dispute under consideration whilst formulating its resolution, as a mean to not further fuel the conflict between the two States who both were large economies at the time. Furthermore, whilst large parts of Latin America supported the Calvo doctrine, many States who at the time were members of the European Union (EU) were preferential towards the US and the Hull formula, indicating opposing views dividing a large part of the UN’s Member States. Since the goal with the UN Resolution was to “establish generally accepted norms to govern international economic relations systematically”²⁹, it is possible to interpret the behaviour of the UN as having chosen an intermediary when drafting the resolution. Another possible explanation may be that the decision making in the UN was influenced by both sides, since the drafters of the resolution were of different nationalities to represent the entire UN and thus had different views in this matter.

2.1.4. Development of the legal system

When it became clear that foreign investments were occurring in large extents several groups of people started to formulate proposals for an international convention *proprio motu*, with the aim of ensuring prosperous cooperation between States. This was at many times done with a promise of security and protection, mainly for the investors but also for the host State. The most successful proposal called the Draft Convention on Investments Abroad³⁰ (Draft Convention), also known as the Abs-Shawcross Draft Convention after its most prominent authors, was released in 1962 and received support from the International Chamber of Commerce (ICC). It was first brought to the attention of the Organisation for Economic Co-operation and Development (OECD) (formerly the Organisation for European Economic Co-operation or OEEC) by Germany.³¹ However,

²⁷ G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 29, vol. 1, U.N. Doc. A/RES/29/3281 (vol. 1) (1974) art. 2(2)(c).

²⁸ Rudolf Dolzer and Cristoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 72.

²⁹ G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 29, vol. 1, U.N. Doc. A/RES/29/3281 (vol. 1) (1974) para 1.

³⁰ Herman Abs and Hartley Shawcross, *Draft Convention on Investments Abroad in “The Proposed Convention to Protect Private Foreign Investment: a Round Table”*, *Journal of Public Law* (Vol. 1) (Spring 1960 pp. 115–118).

³¹ Antonio R. Parra, *The History of ICSID* (1st edn, Oxford University Press 2012) 15.

this Draft Convention was not accepted by the States, mainly due to the fact that it gave many advantages to capital-exporting countries in comparison to host States, i.e. the capital-importing countries.³² A second draft was later released but neither this proposal received positive reactions from the States.³³

Regional investment treaties have historically been more successful endeavours than international treaties. The North American Free Trade Agreement (NAFTA) includes a chapter on foreign investments and is an example of such a regional treaty. Characteristic for a regional treaty is that it binds several countries to the same agreements, in the case of NAFTA the countries involved are Canada, Mexico and the US.³⁴ The reasons for this success are probably many, but one possible reason is that negotiations are easier when there are fewer parties involved in the discussion. Regional treaties also include States which are more likely to be similar to each other in both economy and culture, which could reduce disagreements in both drafting such agreements and later in following them.

2.2 Towards a modern legal system on international investments

2.2.1. Background

As international investments became more and more common the need for binding treaties between States became evident, in order to protect investments and set ground rules for both investors and host States. The first step towards creating the current legal system was made in 1959, when the first BIT was concluded between Germany and Pakistan.³⁵ This preceded the Draft Convention by some years and since all attempts of creating a comprehensive treaty binding all States was unsuccessful, the OECD settled for recommending the Draft Convention as a basis for States as they concluded BIT's amongst themselves.³⁶ In the very beginning, it was mostly developed States that concluded BIT's amongst themselves. This has evolved to include developing States as well.

³² Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (2nd edn, Cambridge University Press 2004) 87–88.

³³ Rudolf Dolzer and Cristoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 77.

³⁴ Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (2nd edn, Cambridge University Press 2004) 88.

³⁵ Rudolf Dolzer and Cristoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 76.

³⁶ Rudolf Dolzer and Cristoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 77.

2.2.2. The Bilateral Investment Treaty

Since international investment law lacks an international legislation, the BIT is the most important source of law for international investments. The treaties' function is to provide both access and security for foreign investors and their property, which would have otherwise been granted to them under international law. The way in which the treaties provide access to foreign markets is by levelling the playing field, assuring foreign investors the same treatment as national investors, which will be further discussed below. The same is applicable to security, which is granted through other provisions in the treaty and ensures that the investor can turn to both domestic authorities and international arbitration. Even though the content of treaties is subject to negotiation between the contracting States, their similarities suggest that there are certain standards developing in the field of international investments.³⁷ The similarities are also considered as being a result of the OECD recommending the Draft Convention as a model for concluding the BIT, something that its member states has taken into consideration when concluding BITs.³⁸ The differences between the treaties have been accounted for being dependent upon individual negotiations taking into account the needs of investment-importing States, which often are developing countries.³⁹

Some occurring similarities of BITs should be discussed, as they lay ground for interpretation and dispute settlement with regards to Investor-State disputes. Most of the BITs start with a preamble stating that the contracting States wish to develop their economic relations as well as stating that investments made by nationals of one State placed in the other State should be protected in an advantageous manner.⁴⁰ This is likely done to attract more investors, as it could be supposed that foreign investors are more likely to invest in a State which has agreed to treat foreign investments according to a certain standard. Following the preamble, most BITs contain a section with definitions of some important words used in the treaty, and through this delimiting the scope of the treaty. Such definitions are made with regards to e.g. investments, nationals, companies and territory.⁴¹ This is a way for the contracting parties to establish in which way they interpret these terms, since domestic laws could result in a different interpretation. It is

³⁷ Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (2nd edn, Cambridge University Press 2004) 215.

³⁸ Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (1 edn, Kluwer Law International 1995) 2.

³⁹ Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (1 edn, Kluwer Law International 1995) 13f.

⁴⁰ United Nations Centre on Transnational Corporations (UNCTC), *Bilateral Investment Treaties*, U.N. Doc. ST/CTC/65 (New York, United Nations, 1988) 14.

⁴¹ United Nations Centre on Transnational Corporations (UNCTC), *Bilateral Investment Treaties*, U.N. Doc. ST/CTC/65 (New York, United Nations, 1988) 16.

also a way to adjust the treaty to be as beneficial as possible for both parties. This is also one of the reasons as to why no BIT is a mirror of another, and because of this the party intents are an important part of interpreting an agreement. Since arbitrators must consider the BIT when settling an Investor-State dispute, it is also important that such definitions are included so that arbitration is done on the basis of what the parties have agreed to and how they interpret different terms.

Apart from the preamble and definitions, the BITs also include provisions regulating that investments must be made with respect to the host State's laws and that investments can be subject to prior approval. For instance, Chinese foreign investment law requires a screening process for investments in areas with connection to public health and safety.⁴² A possible explanation for this is China's late entry to the international market, which only began in 1979 through the Open Door Policy. But it is not necessarily true that this is the only reason for China's screening process, it could also be a result of how the country is governed. Pre-entry requisites is something that can be found in other BITs as well. Following this, it is also important to mention that it is possible to fully prohibit investments in some sectors and this is also commonly found in the treaties. For instance, Belgium at one point excluded all investments not mentioned in the treaties concluded with for instance Indonesia and Korea, by giving an exhaustive list of sectors where investments are granted.⁴³

What is most important with regards to the content of a typical BIT are the general standards of treatment. This includes fair and equitable treatment, which is the focus of this thesis and shall be exhaustively discussed in the following chapters. What is important to mention early on, is that it has been widely discussed what should be included in the FET standard in general. However, as for most parts of the BIT the FET is subject to interpretation by party intents. The FET standard is most commonly found in the later part of the treaty but has according to the UN even been incorporated in the preamble of some BITs.⁴⁴ The FET standard is closely linked to non-discrimination as well as the minimum standard of treatment.⁴⁵ There is a difference on how these standards

⁴² United Nations Centre on Transnational Corporations (UNCTC), *Bilateral Investment Treaties*, U.N. Doc. ST/CTC/65 (New York, United Nations, 1988) 18; Law of the People's Republic of China on Foreign-capital Enterprises (31 October 2000), Ministry of Commerce People's Republic of China (MOFCOM), Art. 6.

⁴³ United Nations Centre on Transnational Corporations (UNCTC), *Bilateral Investment Treaties*, U.N. Doc. ST/CTC/65 (New York, United Nations, 1988) 20.

⁴⁴ United Nations Centre on Transnational Corporations (UNCTC), *Bilateral Investment Treaties*, U.N. Doc. ST/CTC/65 (New York, United Nations, 1988) 30f.

⁴⁵ United Nations Centre on Transnational Corporations (UNCTC), *Bilateral Investment Treaties*, U.N. Doc. ST/CTC/65 (New York, United Nations, 1988) 31.

are incorporated and valued depending on which States are parties to the BIT. For instance, whether the States are more sympathetic to the Calvo Doctrine or the Hull Formula would have effect on these clauses. Other important standards incorporated into the BIT's are clauses regarding national treatment and most-favored-nation (MFN).⁴⁶

2.2.3. Settlement of disputes

Drafting the Convention

When it became clear that a general legislation was not going to be unanimously welcomed by the international community and that bilateral agreements were being concluded at a fast pace, then came the issue regarding settlement of disputes. Regardless how well the BIT's had been negotiated between the contracting parties, Investor-State disputes were inevitable. The issue of settlement of disputes was brought to the attention of the community in the Abs-Shawcross Convention, more commonly known as the Draft Convention. When first presented, it contained not only a part regulating international investments, but also a part on settlement of disputes between investor and host State.⁴⁷ The Draft Convention was brought to the attention of the OECD which itself issued a revised proposal in 1962 calling it the Draft Convention on the Protection of Foreign Property⁴⁸ (1962 OECD Draft Convention), which was largely similar to the Abs-Shawcross Draft Convention but in some ways, more precise and strict. However, the OECD issued this proposal stating that they had not yet decided on whether to back it or not, rather just making it available to other interested parties.⁴⁹ After a second revision was made by the OECD following a second Draft Convention being published in 1967⁵⁰ (1967 OECD Draft Convention) it initially was approved to be published, but since the support from Member States was still lacking the 1967 OECD Draft Convention did not break any further ground and failed to see the light of day.⁵¹

As it was now clear that the time for a general law on international investments had past and that States started solving the issue of the lack of legislation themselves, the OECD then approached the World Bank asking them to draft a convention on dispute settlement

⁴⁶ United Nations Centre on Transnational Corporations (UNCTC), *Bilateral Investment Treaties*, U.N. Doc. ST/CTC/65 (New York, United Nations, 1988) 33ff.

⁴⁷ Antonio R. Parra, *The History of ICSID* (1st edn, Oxford University Press 2012) 14.

⁴⁸ Organisation for Economic Co-operation and Development, *Draft Convention on the Protection of Foreign Property*, 2 ILM 241 (1963) (1962 OECD Draft Convention)

⁴⁹ Antonio R. Parra, *The History of ICSID* (1st edn, Oxford University Press 2012) 15.

⁵⁰ Draft Convention on the Protection of Foreign Property and Resolution of the Council of the OECD on the Draft Convention, 12 October 1967 (OECD Publication 1967) (1967 OECD Draft Convention and OECD Council Resolution).

⁵¹ Antonio R. Parra, *The History of ICSID* (1st edn, Oxford University Press 2012) 19f.

aiming towards aiding both investors and States. The Bank accepted and its General Counsel Aron Broches took lead in the work of creating the convention and the accompanying centre for arbitration.⁵² Although not part of the Bank's usual tasks, Broches had previously stated during a speech at the Hague Academy of International Law in 1959 that "... *the Bank's powers are not limited to those that are granted in express terms*". A committee was established to draw up and finalize the Draft Convention for the Resolution of Disputes Between States and Nationals of Other States which was dated 5 June 1962.⁵³ In September 1963 the committee decided that the First Preliminary Draft was ready for review by the Bank's Member States.⁵⁴ After a number of meetings and revisions the ICSID Convention⁵⁵ was finalized and signed in March 1965.^{56, 57} The Convention then entered into force when a number of 20 Member States had ratified it, which was in October 1966.⁵⁸

General information about the Convention and dispute settlement body

The ICSID Convention contributes to international investment law by providing both a practical framework for arbitration as well as a physical establishment for settlement of Investor-State disputes, called the Centre.⁵⁹ After the ICSID Convention was finalised the work on the Centre for arbitration began as did the implementation of it as a place for conciliation between disputing parties. The framework is constructed so that parties must negotiate separately on arbitration in the BIT. States have made different arrangements depending on the level of development and co-operation in place between parties. Typically, the parties have negotiated that all local remedies must be exhausted in order

⁵² Antonio R. Parra, *The History of ICSID* (1st edn, Oxford University Press 2012) 25.

⁵³ Antonio R. Parra, *The History of ICSID* (1st edn, Oxford University Press 2012) 30.

⁵⁴ Antonio R. Parra, *The History of ICSID* (1st edn, Oxford University Press 2012) 43.

⁵⁵ Convention on the Settlement of Disputes Between States and Nationals of Other States (Washington, 18 March 1965), 575 U.N.T.S. 159; 17 U.S.T. 1270; T.I.A.S. No. 6090, *entered into force 14 October 1966*.

⁵⁶ Antonio R. Parra, *The History of ICSID* (1st edn, Oxford University Press 2012) 94.

⁵⁷ For a more elaborated view see for example: International Centre for Settlement of Investment Disputes, *History of the ICSID Convention* (ICSID Publication 1968) (Reprinted 2009)

<<https://icsid.worldbank.org/en/Documents/resources/History%20of%20ICSID%20Convention%20-%20VOLUME%20II-1.pdf>> accessed 6 April 2018.

⁵⁸ International Centre for Settlement of Investment Disputes (ICSID), *ICSID Convention, Regulations and Rules*, ICSID/15 (ICSID Publication 2006) <<https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20Convention%20English.pdf>> accessed 9 April 2018, 5.

⁵⁹ See e.g. Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) ('ICSID Convention') art 6(1).

to solve an Investor-State dispute, using national courts or other places of arbitration.⁶⁰ This means that national law precludes international investment law in this specific area. When all measures for conciliation on a national level have been exhausted, then can a party turn to international arbitration from the ICSID.

However, the parties must also negotiate on the jurisdiction of the ICSID. This meaning, that the contracting States must both recognize the ICSID as having the right to arbitrate in cases between the States. This could be done in some different ways. The parties can include in the BIT that a suit can be brought before the ICSID after all national measures have been taken, as previously discussed. When a party wishes to bring a case before the ICSID both parties must give their consent on beforehand.⁶¹ The parties can also include in the BIT a clause giving the ICSID jurisdiction over all cases immediately, meaning that a dispute could be brought before the ICSID before being handled on a national level, as well as not requiring both parties' approval before being introduced to the ICSID.

The ICSID Convention states that the Tribunal should “... consist of a sole arbitrator or any uneven number of arbitrators...”.⁶² Typically, and also if the parties cannot agree on the number of arbitrators, the Tribunal will consist of three arbitrators. Both parties each will have the opportunity to choose one, and then together decide on the third, which will act as the president of the tribunal. If investor and State cannot agree on the third person or neither one of them, the Chairman of the Administrative Council will appoint them upon request by either party.⁶³

Both parties will be able to bring forward their view on the matter before the ICSID as well as introducing necessary material and expert-opinions as the tribunal deems needed.⁶⁴ If either of the parties does not appear at the Centre to present their view on

⁶⁰ Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) ('ICSID Convention') art 26.

⁶¹ Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) ('ICSID Convention') art 25.

⁶² Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) ('ICSID Convention') art 37(2)(a).

⁶³ Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) ('ICSID Convention') art 38.

⁶⁴ Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) ('ICSID Convention') art 43.

the case, it will not be seen as an admission of guilt and the proceedings would continue on the request of the appearing party.⁶⁵ The arbitration is then finalised with the tribunal issuing an award in favour for one of the parties.⁶⁶

2.2.4. Blurred distinction between international law and domestic law

It is included in many of the BITs that an Investor must first turn to national courts and authorities with their claims.⁶⁷ By making this reference, the treaties have allowed national law to preclude international investment law in some cases.⁶⁸ This means that as the Calvo doctrine predicted, any changes in legislation on a national level would have effect on an investor regardless of this investor being domestic or foreign. Although this could prove problematic for foreign investors, the current legal system does entitle the parties to bring claims before international arbitrators in the ICSID. This is something that Calvo did not include as a possibility but rather only local courts could be used when a foreign investor had a dispute with the host State.⁶⁹ The international investment law is also closely linked to national law in such a way that national law may be considered for instance during arbitration in a dispute, since national law on many occasions is referenced in the BIT, as discussed above.

2.3 Rules of international law incorporated into international investment law

2.3.1. Background

Even though international investment law is clearly unique in both regulations and principles, there are indeed rules and principles which stems from international law. Some of the most important principles will be discussed, this regarding the minimum standard of treatment, as well as national treatment and MFN. These are some of the principles of international law that has been incorporated into international investment law and for instance they can be found in the BITs.

⁶⁵ Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) ('ICSID Convention') art 45.

⁶⁶ Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) ('ICSID Convention') art 48.

⁶⁷ See e.g. United Kingdom-Uruguay BIT, signed on 21 October 1991, Art. 8.

⁶⁸ Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) ('ICSID Convention') art 42(1).

⁶⁹ Rudolf Dolzer and Cristoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 71.

2.3.2. The minimum standard

In general, developed countries have maintained that there is a requirement of a minimum standard of treatment of foreign investments, in accordance with the Hull formula. This has allowed for developed countries to demand a certain standard of treatment for its nationals whilst conducting international investments. Since developed countries generally have been in a better position for making demands during negotiations than developing countries, the minimum standard of treatment has been incorporated in the BIT's.⁷⁰ As for developing countries, many of those have historically been in favour of a different view concurring with the Calvo doctrine, stating that foreign investors are not entitled to a more favourable treatment than nationals but at the most, foreign investors may enjoy the same level of treatment. With regards to the US-Mexico conflict, it has been said that Latin America's objections to the minimum standard of treatment was to be expected, since a Latin American country was the first country to be the potential subject of the obligations following such a rule.⁷¹

The international minimum standard has been recognized in case law on many occasions. From the beginning the international minimum standard was used in cases regarding injuries suffered to the persona of an alien, for instance as in the *Neer Claim*.⁷² In this case, the US sued Mexico on behalf of Fay Neer and Pauline Neer, wife and daughter of Paul Neer. He was an American national residing in Mexico who was allegedly murdered by Mexican nationals. The US filed its suit due to the before mentioned murder and the following treatment of the investigation as well as the suspected offenders, who were not charged with the crime as a result of lacking evidence. The suit claimed that the Mexican government did not act accordingly with international standards and thus should pay damages to the claimants. Although the *Neer Claim* was unsuccessful as the Commission dismissed all charges, it is important since this was one of the first occasions where the international minimum standard was first discussed. The *Neer Claim* should therefore be seen as a precursor to the similar rule applied in international investment law, where the minimum standard has been extended to be used for the protection of alien property instead of its persona.

⁷⁰ Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (2nd edn, Cambridge University Press 2004) 140.

⁷¹ Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (2nd edn, Cambridge University Press 2004) 142.

⁷² *L.F.H. Neer and Pauline E. Neer (USA) v. United Mexican States*, United States and Mexico General Claims Commission Decision of 15 October 1926, United Nations, Reports of International Arbitral Awards, (1926), Vol. IV, 60.

Since the minimum standard has now been included in the BITs it is treated as a general principle of international investment law.⁷³ It has accordingly also been recognized in more recent arbitral awards, such as the *American Machine Tools v Zaire*.⁷⁴ In this case members of Zairian military had on two separate occasions attacked and destroyed the American company's properties and goods, causing them to first having to rebuild and then permanently close their business. The American company AMT then filed for arbitral procedures against Zaire, due to their failure to protect the foreign investors' property in accordance with the BIT which was agreed to between the US and Zaire. The Tribunal took into consideration that there are minimum standards that must be fulfilled with regards to the host States' treatment of a foreign investor, and accordingly awarded AMT compensation for injuries sustained.

2.3.3. National treatment

The principle of national treatment is found in most of the BITs according to the ICSID tribunal⁷⁵ and is strongly connected to the MFN principle. The national treatment standard can be found both by itself or combined with the MFN principle in the treaties and they are both rules of non-discrimination.⁷⁶ Focusing on national treatment, the principle sets out the same ground rules as it does with regards to common international law. The principle of providing aliens with the same level of treatment as domestics would be offered has proven somewhat controversial, depending on whether a State is mainly exporting or importing capital. As it can be said that capital-exporting States favour the treatment of foreign investors according to the international minimum standard, it can conversely be stated that capital-importing States such as the Latin American countries hold higher the principle of national treatment.⁷⁷

National treatment is one of the most important principles of international law as well as international investment law, and is seen as not only a result of customary international law but rather an obligation of courtesy that contracting parties agree on. The duty to offer national treatment to foreign investors can either be valid for pre-establishment or post-establishment. If the BIT includes national treatment in the post-establishment phase then

⁷³ Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (2nd edn, Cambridge University Press 2004) 140.

⁷⁴ *American Manufacturing & Trading, Inc v Republic of Zaire*, ICSID Case No. ARB/93/1, Award (21 February 1997).

⁷⁵ Meg Kinnear and others, *Building International Investment Law: The First 50 Years of ICSID* (1st edn, Kluwer Law International 2016) 389 note 2.

⁷⁶ Meg Kinnear and others, *Building International Investment Law: The First 50 Years of ICSID* (1st edn, Kluwer Law International 2016) 389.

⁷⁷ Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (2nd edn, Cambridge University Press 2004) 233.

the parties have not agreed on national treatment before a foreign investor is established in the host State, meaning that entry to the market is not guaranteed but could be subject to prior screening or approval.⁷⁸

Case law that regards national treatment has been found to often focus on a three-step evaluation when the tribunal is to render an award on the basis of non-compliance with the clause on national treatment. Many of the BIT's uses national treatment as a way of assuring a level playing field for investors, both domestic and foreign.⁷⁹ However, to be able to make comparisons the clause of national treatment is often followed by an explanation stating that this applies to investors in "like circumstances"⁸⁰ or "like situations"⁸¹ which makes the mentioned three-step evaluation necessary. Firstly, the tribunal must find a national competitor which is in a 'like situation or circumstance' as is the foreign investor. The tribunal then investigates whether the foreign investor did receive any less favourable treatment than the domestic investor had been receiving, and thirdly the Tribunal must consider possible justifications for the difference in treatment between the two compared investors.⁸² It is an intricate system for rendering a decision in cases regarding national treatment, but the three-step test has been commonly used after it was introduced in an award rendered in the *Bayindir v. Pakistan*⁸³ case where the Tribunal stated that:

*"The Tribunal will first determine whether Bayindir's investment was in a "similar situation". If so, it will then assess whether Bayindir's investment was accorded less favourable treatment than PMC-JV and whether the difference in treatment was justified."*⁸⁴

In its core, the principle of national treatment is a requirement of non-discrimination which has been the cause of many arising disputes, however not being as common as the FET-standard.

⁷⁸ Meg Kinnear and others, *Building International Investment Law: The First 50 Years of ICSID* (1st edn, Kluwer Law International 2016) 390.

⁷⁹ Meg Kinnear and others, *Building International Investment Law: The First 50 Years of ICSID* (1st edn, Kluwer Law International 2016) 390.

⁸⁰ Reference BIT that contains this

⁸¹ Reference BIT that contains this

⁸² Meg Kinnear and others, *Building International Investment Law: The First 50 Years of ICSID* (1st edn, Kluwer Law International 2016) 395.

⁸³ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award (27 August 2009)

⁸⁴ *Bayindir v. Pakistan*, para. 399.

2.3.4. Most-favoured-nation

This principle of international law is widely spread throughout the World Trade Organisation as a cornerstone of international trade, alongside the national treatment standard. However, this principle has also been incorporated into the system regulating international investment law. It is often found in the BIT and makes it possible for foreign investors to profit from the same favourable treatment as other parties has enjoyed. Within the law of treaties this has made it possible for a party to reference a treaty providing more favourable treatment and claim the same level of treatment, whether this treaty be past or future. This phenomenon has also been established as precedent in modern case law.⁸⁵

If the MFN clause is not included in the treaty, the principle cannot be invoked by reference to general international law. Instead, if the MFN clause is not included this would mean that the host State has the right to discriminate the contracting State in comparison to other States which enjoy the right to MFN treatment, or simply a more favourable treatment than the contracting State.⁸⁶ It is said that the obligation to offer MFN treatment exist only based on regulations in treaties with regards to international investment law.⁸⁷

The principle of MFN is something that in international investment law can be invoked by the foreign investor bot with regards to the investor itself, but also with regards to the investment. Since there is a difference between less favourable treatment for an investor and its investment, this is important to note. For instance, an investor could enjoy less favourable treatment than does a third party, if the investor is not allowed entry to the market. However, an investment could enjoy less favourable treatment by being subject to higher taxations on profit or turnover on investments.

2.3.5. Similarities and differences between national treatment and MFN

National treatment works on the national market assuring foreign investors the same treatment as domestic investors offering, or trying to offer, a level playing field within the domestic market. MFN is instead regulating the relationships between all foreign investors assuring them equal treatment in between competing States whilst trying to

⁸⁵ See Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (2nd edn, Cambridge University Press 2004) 236, especially note 75.

⁸⁶ Organisation for Economic Co-operation and Development, *Most-Favoured-Nation Treatment in International Investment Law*, OECD Working Papers on International Investment, 2004/02 (OECD Publishing 2004) 2.

⁸⁷ Organisation for Economic Co-operation and Development, *Most-Favoured-Nation Treatment in International Investment Law*, OECD Working Papers on International Investment, 2004/02 (OECD Publishing 2004) 2.

enter the domestic market. MFN is important to make sure that the host State does not favour a specific State or region by giving investors from that or those States a more favourable treatment than investors from other States or regions would be given. In international trade this promotes free trade, and in international investments it promotes flow of capital.

2.4. Closing comment

It is important to make note of the long period of time it took for international investments to be even fairly regulated. Treaties were not being concluded until after a proposed legislation had been shot down, only to leave the States fending for themselves making their best efforts to protect their nationals investing in other States and their property. The ICSID Convention followed this however the first initiative was made in the early 1960's and the final convention did not enter into force until 1966.

It is remarkable that the process of regulation international investments took such a turn. Perhaps the States were too afraid of what would happen if the governance of international investments was given to an international institution, giving up parts of sovereignty in favour of the international community. It is difficult to establish whether the States were at fault for not accepting the law as it was first presented or if the law itself, concluded by the World Bank was too poorly formulated. Either way it is clear that the World Bank, naming itself the legislating body, did not handle the situation in a proactive manner but rather a reactive, and that the actions were not adapted to the actual circumstances which surrounded international investments.

3. Fair and Equitable Treatment

3.1. History

Fair and Equitable Treatment is by far the most debated clause of both modern and historical BITs. It is also the most common ground for an Investor-State dispute, as well as the most successful ground for claims.⁸⁸ The United Nations has on several occasions discussed the topic of FET during the United Nations Conference on Trade and Development (UNCTAD), latest at the 2012 session which was the Thirteenth session and took place in Doha, Qatar.⁸⁹

Historically, the FET was introduced with a desire to establish a basic level of treatment which would apply to all contracting parties in order to protect foreign investments. It first appeared shortly after the end of World War II when the Havana Charter was introduced.⁹⁰ Even though the Havana Charter did not gain enough support to enter into force, it is seen as having paved the way for the FET standard as found in modern BITs. The FET standard can be found in the Abs-Shawcross Draft Convention:

“Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties. Such property shall be accorded the most constant protection and security within the territories shall not in any way be impaired by unreasonable or discriminatory measures”⁹¹

The FET standard can also be found in both the 1962 and 1967 OECD Draft Conventions, see here an extract from the latter:

“Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties. It shall accord within its territory the most constant protection and security to such property and shall not in any way impair the management, maintenance, use, enjoyment or disposal thereof by unreasonable or discriminatory measures. The fact that certain nationals of any State are accorded treatment more favourable

⁸⁸ Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 174.

⁸⁹ For a list of conferences to this date, see *United Nations Conference on Trade and Development’s webpage*. <<http://unctad.org/en/Pages/Meetings/UNCTAD-Conferences.aspx>> accessed 9 April 2018.

⁹⁰ United Nations Conference on Trade and Development, *Fair and Equitable Treatment – UNCTAD Series on Issues in International Investment Agreements*, UNCTAD/ITE/IIT/11 (Vol. III) (UN Publication 1999) 7.

⁹¹ Abs-Shawcross Draft Convention, art. 1.

*than that provided in this Convention shall not be regarded as discriminatory against nationals of a Party by reason only of the fact that such treatment is not accorded to the latter”.*⁹²

Both drafts contain the same initial sentence, which is a testament to the fact that the OECD Drafts Conventions indeed are based upon the earlier Abs-Shawcross Draft Convention. Since the OECD Drafts aimed to be more precise, and to attribute more rights to the investor it should be no surprise that the latter is more extensive. The rights given to investors in both of the drafts are based upon obligations for the host State to treat the investor, as well as its investments, with respect to a certain standard. However, it should also be noted that the OECD Draft Convention does not only include the host State’s treatment of foreign investments, but also a reference to possible difference in treatment. Reading the OECD’s article, it seems as though the aim was to not include the international principle of MFN as being discriminatory within the field of international investments. This could also be said about the minimum standard of treatment also stemming from international law. Also, since the OECD Draft Convention does not mention whether this should only be applicable to foreign nationals, it could also have been used as a mean to justify discriminatory measures taken towards all but domestic investors. Interpreting the meaning of “*certain nationals of any State*” could indeed lead to this result, which would have gone against its prohibition of discriminatory measures mentioned in an earlier sentence.

The FET standard is included in almost all the BITs that are currently active, even though the standard of treatment lacks a definition.⁹³ The treaties include the FET standard in some different formats, depending on the agreement between contracting parties. This will be discussed in-depth in section 3.2. below. The FET standard can also be found in multilateral drafts and treaties negotiated during the 1990’s such as the OECD Draft Negotiating Text for a Multilateral Agreement on Investment, NAFTA and the Energy Charter Treaty.⁹⁴

3.2. Definition of the term

The efforts on trying to define the FET standard have been ongoing since it was first introduced. However, this has proven to be a difficult task. The UN has commented on this on several occasions, for instance during the before mentioned Thirteenth session of

⁹² 1967 OECD Draft Convention, art. 1.

⁹³ Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (1 edn, Kluwer Law International 1995) 58.

⁹⁴ Rudolf Dolzer and Cristoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 175.

UNCTAD. It discusses the problems which has arisen related to both formulations of the standard in BIT's as well as arbitral awards issued by the tribunals at ICSID.⁹⁵ The topic has also been discussed to great lengths by lawyers and jurists as well as at the ICSID itself in the above-mentioned tribunals. Indeed, the tribunals are probably the place where this issue has been discussed to the greatest of lengths. This is one of the reasons as to why the upcoming case studies are of great importance, and why the matter shall be more thoroughly discussed below. Indeed, the lack of a definition of the term could also be one of the reasons for how the BITs include the FET standards differently.

Even though there is no established definition of the FET standard, there is no lack in discussion on the topic or efforts made to establish such a definition. Many different actors have voiced their opinion in the matter, for instance UNCTAD, ICSID as well as prominent professionals. Professor Muchilinski has stated that “[t]he concept of fair and equitable treatment is not precisely defined. It offers a general point of departure in formulating an argument that the foreign investor has not been well treated...”.⁹⁶

Another description sets out a minimum standard of treatment per the FET clause, that contracting parties should be able to expect of one another when signing a treaty containing such a clause. This minimum standard has been explained as “no discrimination by nationality or origin, in respect of such matters as access to local courts, administrative bodies, applicable taxes and administration of governmental regulation”.⁹⁷ If adhering to this interpretation then the very least that contracting parties can expect when nationals of one State invests within the other State is to not be discriminated. In short terms, the FET standard is here described as a matter of ascertaining non-discriminatory measures being taken against the foreign investor.

With regards to efforts made in order to create a definition of the term, Dolzer and Schreuer has gone as far as stating that “[g]eneralizations about the standard of fair and equitable treatment should be treated with caution. (...) Indeed, the variations in this area are quite significant.”⁹⁸ This should be seen in the light of the different variations of the

⁹⁵ United Nations Conference on Trade and Development, *Fair and Equitable Treatment – UNCTAD Series on Issues in International Investment Agreements II*, UNCTAD/DIAE/IA/2001/5 (UN Publication 2012) 1f.

⁹⁶ Peter Muchilinski, *Multinational Enterprises and the Law* (1st edn, Oxford University Press 1995) 625.

⁹⁷ Talkmore Chidede, *Legal Protection of Foreign Direct Investment. A Critical Assessment with Focus on South Africa and Zimbabwe* (Anchor Academic Publishing 2016) 83.

⁹⁸ Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 175.

FET standard in BITs. This view is elaborated by Dolzer himself as he explains “*the purpose of the clause as used in BIT practice is to fill gaps which may be left by the more specific standards, in order to obtain the level of investor protection intended by the treaties*”.⁹⁹ This view on the FET standard and its wording and thereby its scope, has founds support for instance in the *Sempra v Argentina* tribunal.¹⁰⁰

In general, it has been found that there are five common variations of the FET standard which can be recognized in the various BITs. These are described by UNCTAD as follows;

“(a) *No FET obligation;*

(b) *FET without any reference to international law or any further criteria (referred to as unqualified, autonomous or self-standing FET standard);*

(c) *FET linked to international law;*

(d) *FET standard linked to the minimum standard of treatment of aliens under customary international law;*

(e) *FET with additional substantive content (denial of justice, unreasonable/discriminatory measures, breach of other treaty obligations, accounting for the level of development.*”¹⁰¹

The variations in the FET standard may look different in the treaties depending on which States are the contracting parties. Some examples of each will be given to illustrate how the variations can be formulated.

3.2.1. No FET obligation

Some treaties do not include any reference to the FET standard, remaining silent in the matter. This could indicate that the contracting parties do not want to subject themselves to an obligation to provide a certain level of treatment to nationals of the other contracting

⁹⁹ Rudolf Dolzer, *Fair and Equitable Treatment: a Key Standard in Investment Treaties*, *The International Lawyer* (Vol. 39) (No. 1) (2005, pp. 87-106)

¹⁰⁰ *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award (28 September 2007) para 297.

¹⁰¹ United Nations Conference on Trade and Development, *Fair and Equitable Treatment – UNCTAD Series on Issues in International Investment Agreements II*, UNCTAD/DIAE/IA/2001/5 (UN Publication 2012) 17f.

party, or that one of the contracting parties have a stronger position in negotiation.¹⁰² This would often be the case if it is a developed country negotiating with a developing country in need of import of investments.

However, the UN argue that the formulation of a clause regarding dispute settlement could include or exclude the possibility to invoke principles of customary international law, such as the minimum standard of treatment of aliens.¹⁰³ They on the one hand reference the India-Singapore Comprehensive Economic Cooperation Agreement which is stated to apply only to those disputes “*concerning an alleged breach of an obligation of the former under this Chapter*”.¹⁰⁴ On the other hand, they reference the Thailand-New Zealand Closer Economic Partnership Agreement which applies to disputes “*with respect to a covered investment*”.¹⁰⁵ They argue that the clause in the India-Singapore Agreement should be understood as to exclude all possibilities to bring claims regarding a breach of the minimum standard of treatment before the tribunal, whilst the Thailand-New Zealand Agreement’s clause should be understood as to include such breaches.¹⁰⁶

The agreements between States should be read and understood with the party intents in mind. Since it is up to the contracting parties to agree on the jurisdiction of a tribunal it is possible for the agreements can to be interpreted in the way that the UN does. A Tribunal would not reach the conclusion that it had jurisdiction in a claim, in contradiction to what the parties has agreed on in their treaty. This signals that it is the States themselves who control the international investment law and its system for arbitration.

¹⁰² United Nations Conference on Trade and Development, *Fair and Equitable Treatment – UNCTAD Series on Issues in International Investment Agreements II*, UNCTAD/DIAE/IA/2001/5 (UN Publication 2012) 18.

¹⁰³ United Nations Conference on Trade and Development, *Fair and Equitable Treatment – UNCTAD Series on Issues in International Investment Agreements II*, UNCTAD/DIAE/IA/2001/5 (UN Publication 2012) 18f.

¹⁰⁴ Comprehensive Economic Cooperation Agreement Between the Republic of India and the Republic of Singapore, signed on 1 August 2005, Art. 6.21.

¹⁰⁵ Thailand-New Zealand Closer Economic Partnership Agreement, signed on 1 March 2005, Art. 9.16.

¹⁰⁶ United Nations Conference on Trade and Development, *Fair and Equitable Treatment – UNCTAD Series on Issues in International Investment Agreements II*, UNCTAD/DIAE/IA/2001/5 (UN Publication 2012) 18f.

Examples on BITs which does not include the FET standard are the Albania-Croatia BIT¹⁰⁷, the Croatia-Ukraine BIT¹⁰⁸ and the Bulgaria-Turkey BIT¹⁰⁹ which are all concluded in the 1990's.¹¹⁰

3.2.2. Unqualified FET standard

Some States have chosen to include the FET standard in the BITs but not linking it to neither any other criteria nor principles of international law to provide support for its interpretation. By including the FET standard in such a way, it does nothing more than just stating an obligation to accord FET to nationals of the opposing contracting party. This is called an unqualified FET standard, since it does not add any distinct rights or obligations. In some treaties, this unqualified FET standard is mentioned in the same clause as other standards of treatment, but this does however not change the interpretation of the FET standard in itself.¹¹¹

The use of this unqualified FET standard leads to uncertainty with regards to both expectation and outcome, since the level of treatment following with the FET standard lacks a definition. The ambiguity of the FET standard which permeates most BITs will be even more prominent in those treaties that use an unqualified FET standard, since not even the treaty itself discusses the content of the already unclear clause. This will lead to uncertainty with regards to what an investor could expect of a host State whilst making foreign investments, as well as uncertainty with regards to how a tribunal would interpret the party intents in a possible dispute settlement and what the outcome of such arbitration would be.

The unqualified FET standard can for instance be found in the Albania-United Kingdom BIT¹¹² where it is linked to protection and security. However, this does not change the interpretation of the FET standard itself, as discussed above. Another example is the Belarus-Netherlands BIT¹¹³ which includes the same linkage.

¹⁰⁷ Albania-Croatia BIT, signed on 10 May 1993.

¹⁰⁸ Croatia-Ukraine BIT, signed on 15 December 1997.

¹⁰⁹ Bulgaria-Turkey BIT, signed on 6 July 1994.

¹¹⁰ United Nations Conference on Trade and Development, *Fair and Equitable Treatment – UNCTAD Series on Issues in International Investment Agreements II*, UNCTAD/DIAE/IA/2001/5 (UN Publication 2012) 18.

¹¹¹ United Nations Conference on Trade and Development, *Fair and Equitable Treatment – UNCTAD Series on Issues in International Investment Agreements II*, UNCTAD/DIAE/IA/2001/5 (UN Publication 2012) 20f.

¹¹² Albania-United Kingdom BIT, signed on 30 March 1994, Art. 2(2).

¹¹³ Belarus-Netherlands BIT, signed on 11 April 1995, Art. 3.

3.2.3. FET linked to international law

Some treaties connect the FET standard to international law, within one clause. There are two ways in which this has been done in current BITs. The first way is when the FET clause in the BIT states that the standard of treatment should be accorded the foreign investor in accordance with international law. This leads to the inclusion of principles of international law when interpreting the treaty.¹¹⁴ Such usage of the FET standards can be found in the Algeria-France BIT¹¹⁵ and the Bahrain-Spain BIT¹¹⁶.

The second way in which the FET standard is linked to international law, is when the treaty states that the level of treatment accorded to the foreign investor should not be less favourable than what is required under international law. This does not only include principles of international law in the interpretation of the standard of treatment, but rather goes beyond that by making the principles of international law the minimum that a foreign investor can expect from a host State.¹¹⁷ The Ecuador-US BIT¹¹⁸ is formulated in this way meaning that investments made by a national of one contracting party made within the territory of the other contracting party does not only enjoy treatment according to the FET but instead, international standards will set the bar for the standard of treatment to be expected.

3.2.4. FET linked to the minimum standard of treatment

Treaties which link the FET standard to the minimum standard of treatment established in CIL are more uncommon than the before mentioned variations, but are becoming more and more included in modern treaties. This is also found in other kinds of trade and investment agreements such as the NAFTA, resulting in the NAFTA countries' model BITs often including this formulation of the FET standard.¹¹⁹ After some time of disorientation regarding the use of the original article in NAFTA the wording is currently

¹¹⁴ United Nations Conference on Trade and Development, *Fair and Equitable Treatment – UNCTAD Series on Issues in International Investment Agreements II*, UNCTAD/DIAE/IA/2001/5 (UN Publication 2012) 22.

¹¹⁵ Algeria-France BIT, signed on 13 February 1993, Art. 3.

¹¹⁶ Bahrain-Spain BIT, signed on 22 May 2008, Art. 3.

¹¹⁷ United Nations Conference on Trade and Development, *Fair and Equitable Treatment – UNCTAD Series on Issues in International Investment Agreements II*, UNCTAD/DIAE/IA/2001/5 (UN Publication 2012) 23.

¹¹⁸ Ecuador-United States of America BIT, signed on 27 August 1993, Art. 2(3)(a).

¹¹⁹ United Nations Conference on Trade and Development, *Fair and Equitable Treatment – UNCTAD Series on Issues in International Investment Agreements II*, UNCTAD/DIAE/IA/2001/5 (UN Publication 2012) 25.

de facto stating that the inclusion of an FET standard does not add any commitments to the standard according to the minimum standard of treatment established in CIL.¹²⁰

The FET standard linked to the minimum standard of treatment can also be found in the Canadian Model BIT¹²¹ which has been commonly used as a basis for negotiations when Canada has entered into such agreements.

3.2.5. FET linked to further criteria

In an effort to clarify what is regarded as included in the FET standard some BITs add substantive content to the clause. This is one way of increasing the predictability of any interpretation of the FET standard and provide guidance for the tribunals who come in contact with the treaty during ISDS.¹²² As mentioned, the criteria could for instance regard such things as denial of justice, discriminatory measures or breach of other treaty clauses.

A FET standard which is linked to further criteria can for instance be found in the US Model BIT¹²³ which references both the minimum standard of treatment of aliens as the Canadian Model BIT also does. The US Model BIT also elaborates on FET stating that it includes a prohibition on denial of justice.¹²⁴ It has been argued that BITs including a requirement to provide foreign investors national treatment, is *de facto* a reference to non-discrimination since national treatment interdicts discrimination between domestic and foreign investors.¹²⁵

3.2. Standard of treatment

The issue arising from the lack of a definition of the FET standard, is what level of treatment a national of another State could expect when investing in another contracting State. There is also an issue with predictability in regards to the outcome of ISDS.

¹²⁰ United Nations Conference on Trade and Development, *Fair and Equitable Treatment – UNCTAD Series on Issues in International Investment Agreements II*, UNCTAD/DIAE/IA/2001/5 (UN Publication 2012) 28.

¹²¹ Canadian Model Foreign Investment Promotion and Protection (FIPA), signed on 1 October 2014, Art. 5.

¹²² United Nations Conference on Trade and Development, *Fair and Equitable Treatment – UNCTAD Series on Issues in International Investment Agreements II*, UNCTAD/DIAE/IA/2001/5 (UN Publication 2012) 29.

¹²³ U.S. Model BIT (2012).

¹²⁴ U.S. Model BIT (2012), Art. 5(2).

¹²⁵ Nicholas DiMascio and Joost Pauwelyn, *Nondiscrimination in trade and investment treaties: Worlds apart or two sides of the same coin?*, *American Journal of International Law* (Vol. 102) (No. 1) (2008, pp. 48-89) 48.

Tribunals have also shed light on the issue and admitted to this fact. For instance, in *PSEG Global Inc. v. Turkey*¹²⁶ the tribunal held that

“[b]ecause the role of fair and equitable treatment changes from case to case, it is sometimes not as precise as would be desirable. Yet, it clearly allows for justice to be done in the absence of the more traditional breaches of international law standards”.¹²⁷

3.3 Closing comment

The FET standard has been shown to be multifaceted and used in several different ways. It is not certain that even the contracting parties were aware of the FET standard’s meaning at the time treaties were concluded, and due to the evolution of both international investment law and interpretation of the FET standard the interpretation is likely to have changed since then.

¹²⁶ *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award (19 January 2007).

¹²⁷ *PSEG Global Inc. v. Turkey*, para. 239.

4. Case studies: The FET standard's development through awards

As previously stated, a large percentage of the Investor-State disputes link their claims to the FET standard. The investors use the FET standard claiming that the host State has not been according the foreign investor or its investment an acceptable standard of treatment, which can include any other number of violations of the clause in the relevant treaty.

The FET standard has developed through case law and draft conventions to finally be included in most of the BIT's. In this chapter, focus is on how the FET standard was first introduced in case law and how it has later developed through cases. The chapter also works as an illustration of how diverse the FET standard is touching upon many issues in international investment law.

4.1. The Neer Claim

The Neer Claim¹²⁸ is the first case which discusses the standard of treatment of alien nationals and it is also seen as the first case touching upon the FET standard, even though the standard did not yet exist.¹²⁹ The case is an example of how tribunals have given substance to the FET standard by linking it to practice. This has over time helped both the contracting States as well as the tribunals in forming principles that later have been applied to other cases. Even though the FET standard did not exist at the time this case was settled, the judges took into consideration such things that is now linked to the FET standard and because of his, the case is very important within the field of international investment law.

4.1.1. Summary of the case

In the Neer Claim, the United States represented L. Fay H. Neer and Pauline E. Neer, widow and daughter of Paul Neer, in their claim against the United Mexican States. Paul Neer was an American citizen living and working in Mexico at the time he was killed in 1924. He left behind him a widow and a daughter, who brought claims against the Mexican State due to the authorities handling of the murder of the American citizen. The grounds for their claim was damages sustained since the Mexican government allegedly did not make enough effort in trying to find the perpetrators within a reasonable time.

¹²⁸ *L.F.H. Neer and Pauline E. Neer (USA) v. United Mexican States*, United States and Mexico General Claims Commission Decision of 15 October 1926, United Nations, Reports of International Arbitral Awards, (1926), Vol. IV, 60.

¹²⁹ Christoph Schreuer, *Fair and Equitable Treatment in Arbitral Practice* in "J. World Investment & Trade (2005 pp. 357-386) 368.

The judges naturally did not expressively link its arguments to FET since it had not yet been become a principle of international investment law, however they linked the case to what level of treatment an alien should be able to expect from a host State. They did so through a discussion on denial of justice, with regards to the Neer's claim that the Mexican government "*showed an unwarrantable lack of diligence or an unwarrantable lack of intelligent investigation in prosecuting the culprits*".¹³⁰ The Commission argued that the case could be judged under the requisites of denial of justice, or under another principle of international law even though that principle was given another name. Regardless what principle should be used, the Commission argued "*without attempting to announce a precise formula*"¹³¹ that the level of propriety afforded to a host States' actions against an alien should be judged based on international standards, and stated that:

"the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency".¹³²

By making this statement, the Commission opened up for a new principle of international investment law.

4.1.2. The importance of the case

This is the first case to include arguments regarding something similar to FET. It could also be regarded as a discussion on the international minimum standard, which in some BITs are linked to the FET standard. The principle is introduced by the Commission as a standard of treatment that an alien should be able to expect when under the protection of a foreign State. More precisely, the case discusses the level of treatment that an alien should be afforded according to international law. The principle which is suggested by the Commission should be used so that the State does not expose itself to any claims regarding international delinquencies, as a result of non-compliance with international law. The case does, of course, not regard damage to property as does the modern cases

¹³⁰ *L.F.H. Neer and Pauline E. Neer (USA) v. United Mexican States*, United States and Mexico General Claims Commission Decision of 15 October 1926, United Nations, Reports of International Arbitral Awards, (1926), Vol. IV, 60, para. 1.

¹³¹ *L.F.H. Neer and Pauline E. Neer (USA) v. United Mexican States*, United States and Mexico General Claims Commission Decision of 15 October 1926, United Nations, Reports of International Arbitral Awards, (1926), Vol. IV, 60, para. 4.

¹³² *L.F.H. Neer and Pauline E. Neer (USA) v. United Mexican States*, United States and Mexico General Claims Commission Decision of 15 October 1926, United Nations, Reports of International Arbitral Awards, (1926), Vol. IV, 60, para. 4.

but rather it concerns damages to an aliens' person. However, this has not affected the use of the case with regards to injuries to alien property.

Even though the claim was ultimately dismissed, the Commissions' arguments did open for the FET standard by introducing a new principle, regardless of it being precisely formulated or even given a name. This is shown as the judges made the assessments based on the new principle that was codified early in the argumentation, and then used principles of international law to make the final decision. The analogue comparison would not have been possible if the Commission had not itself introduced it and has later on opened up for both the FET standard itself as well as the incorporation of some of the principles of international law such as the international minimum standard. There is however, some concerns which have been voiced about the use of the Neer Claim as case law. This has been based on the comparison made in the Neer Claim between the international minimum standard and the FET standard, and the high level of violation required for the State to be held responsible.

4.2. ELSI Case

The second case which is most commonly cited when discussing the origin of the FET standard is the ELSI case¹³³. In this case, which was decided by the International Court of Justice (ICJ), the treaty between the contracting parties included a clause which proscribed arbitrariness and discrimination of investors from the other contracting party, as well as their investments.¹³⁴ Even though the FET standard was not expressly mentioned in this case either, much alike the Neer Claim, it has been said that the case has had great importance on the forming of the FET standard since both arbitrariness and discrimination is now seen as included in the modern FET standard.

4.2.1. Summary of the case

In the ELSI Case the United States represented Raytheon in their claim against Italy. Raytheon, together with one of its subsidiaries, owned 100 % of the shares in the company ELSI which was established in Italy. The grounds for the claim was the Italian governments' requisitioning of the ELSI plant in April 1968.¹³⁵ During the time, ELSI was experiencing a liquidity crisis and the owners had decided to stop all productions at the plant and o subsequently dismiss the employees. The Italian authorities had

¹³³ *Elettronica Sicula S.p.A. (ELSI) (U.S.A) v Italy*, ICJ Reports 1989 (Award 20 July 1989) p. 15.

¹³⁴ Christoph Schreuer, *Fair and Equitable Treatment in Arbitral Practice* in "J. World Investment & Trade (2005 pp. 357-386) 368f.

¹³⁵ *Elettronica Sicula S.p.A. (ELSI) (U.S.A) v Italy*, ICJ Reports 1989 (Award 20 July 1989) p. 15, para. 10.

vigorously advocated that the workforce remain in place, but the owners did not agree to this point. The Mayor of Palermo, where ELSI was established, then ordered the requisition order to hold both the plant itself as well as the remains of the company's assets.

Following the liquidity crisis and the governments requisition, ELSI filed for bankruptcy with reference to the requisition and subsequently filed for an administrative appeal against the requisition. This led to the requisition order being annulled in 1970 and ELSI was later awarded damages by the Italian Court of Appeal and received payment from the authorities, on the grounds that the requisitioning prevented an orderly liquidation which had been planned for by the U.S. owners. However, the ICJ did not agree with the Italian governments and argued that the requisitioning was in fact not unlawful.¹³⁶ The ICJ's grounds was that the probability for the orderly liquidation was not established and thus the requisition was not a factor to take into account. They argued like so referring to the fact that compliance with national law and compliance with the treaty and international law can be interpreted in dissimilar ways since they are different from one another.

The discussion which has later been connected to the FET standard regarded arbitrariness. To this point the ICJ repeats that incompliance with national law does not equal incompliance with international law. The ICJ also contends that unlawfulness does not automatically equal arbitrariness. The ICJ held that arbitrariness "*is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety*".¹³⁷ Since the requisitioning was supported by law and handled by the authorities the conditions for arbitrariness were not met.

4.2.2. The importance of the case

Despite the U.S. claim being rejected, the case has been of high importance in international investment law. The given interpretation of arbitrariness has been upheld by for instance the ICSID whilst judging in cases regarding the FET standard, with special regards to non-arbitrariness. Furthermore, the ELSI Case has been described as "*the landmark case*" regarding the interpretation of arbitrariness together with the Neer

¹³⁶ *Elettronica Sicula S.p.A. (ELSI) (U.S.A) v Italy*, ICJ Reports 1989 (Award 20 July 1989) p. 15, para. 92.

¹³⁷ *Elettronica Sicula S.p.A. (ELSI) (U.S.A) v Italy*, ICJ Reports 1989 (Award 20 July 1989) p. 15, para. 128.

Claim.¹³⁸ What is important to highlight in regards to the ELSI Case is the ICJ's statement regarding unlawfulness and arbitrariness in national law compared to that of international law. The U.S. supported their claim regarding unlawfulness before the Chamber, on the fact that the requisitioning was deemed unlawful by a Palermo Court and thus equally should be seen as unlawful in international law. However, the ICJ did not agree to this in their final judgement. They did however acknowledge that the national court's judgement could give suggestions for the Chamber's argumentation.¹³⁹ The Court further discussed how an unlawful act in international law does not necessarily equal an arbitrary act in international law. The mere fact that the requisitioning was judged as unlawful by a domestic court does not indicate any level of arbitrariness. Quite contrary to this, the Palermo Court's judgement which annulled the requisition order, as well as the requisition order itself, was in fact found to correctly mention the relevant law applicable to the dispute. The fact that this had been done correctly on a national level made it unthinkable to conclude that there had been any arbitrary measures taken against ELSI or its U.S. owners.¹⁴⁰ This provides an indication on how intricate international investment law is. At some points, national law precludes treaty law by reference in the treaty. On some occasions, national resources for dispute settlement must be exhausted before a contracting party can turn to international arbitration by the ICSID. And finally, in some instances a judgement from a national court does not necessarily equal an alike judgement when the same claim is brought to international arbitration.

4.3. Maffezini case

The Maffezini case is one of the first cases where the ICSID raises its judiciary voice towards an investor due to the claims brought before it. Maffezini was an Argentine national placing foreign investments in Spain which did not fall out according to plan. When Maffezini then brought claims before the ICSID claiming that Spanish public entities were responsible for this due to bad financial advice, the ICSID made sure to undermine all such accusations.

¹³⁸ Jacob Stone, *Arbitrariness, the Fair and Equitable Treatment Standard, and the International Law of Investment*, in "The Leiden Journal of International Law" (2012, pp. 77-107) p. 88.

¹³⁹ *Elettronica Sicula S.p.A. (ELSI) (U.S.A) v Italy*, ICJ Reports 1989 (Award 20 July 1989) p. 15, para. 124.

¹⁴⁰ *Elettronica Sicula S.p.A. (ELSI) (U.S.A) v Italy*, ICJ Reports 1989 (Award 20 July 1989) p. 15, para. 129.

4.3.1. Summary of the case

The Maffezini case¹⁴¹ regards a claim where a private investor, here represented by Argentine, brought claims towards the Kingdom of Spain before the ICSID. The investment regarded a company which was established in Spain by Mr. Maffezini in 1989, through a joint venture with a Spanish public-private company called *Sociedad para el Desarrollo Industrial de Galicia* (SODIGA). The project included a production plant intended for chemical products to be constructed on location in Spain.¹⁴² The enterprise however was unsuccessful and due to bad financial status, the construction of the plant was stopped and the company's employees were subsequently dismissed by Mr. Maffezini in 1992.¹⁴³ The grounds for the claim were several, and firstly the claimant contended that the dispute was between investor and State since SODIGA was a public entity. Secondly, the claim proposed that the reason for the failure of the enterprise was poor financial advice which the investor received from SODIA and in the claimants' opinion i.e. the Kingdom of Spain. The claim also states that SODIGA should be held accountable for some of the additional cost which were needed to retain all approvals for construction to begin.

The final claim of the case is perhaps the most interesting one, and this regards a bank transfer of 30 million Spanish pesetas which was made from Maffezini's personal account directed to the company funds. This transfer was not made by Maffezini but rather it was made by a SODIGA official. Mr. Maffezini claimed this transfer to be irregular however Spain contended that this transfer was made by the SODIGA official acting in his personal interest and not as a company official, and that this was done according to Mr. Maffezini's own instructions.¹⁴⁴

The tribunal first discussed SODIGA and it being or not being a public entity. In this instance the tribunal adopted the *prima facie* view presented by the claimant and through both a structural and a functional test the tribunal reached the conclusion that the claimant was correct in this instance.¹⁴⁵ The tribunal did however differentiate between different

¹⁴¹ *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award (13 November 2000)

¹⁴² *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award (13 November 2000) para. 39.

¹⁴³ *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award (13 November 2000) para. 43.

¹⁴⁴ *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award (13 November 2000) para. 45.

¹⁴⁵ *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award (13 November 2000) para. 46-47

acts performed by SODIGA and stated that they would need to be examined separately, since it had been found that some of SODIGA's actions was in fact private-oriented rather than public.

Regarding the claim that Spain was to be held accountable for the financial losses the company suffered from, the tribunal made a note-worthy statement saying that:

*“Bilateral Investment Treaties are not insurance policies against bad business judgments. While it is probably true that that there were shortcomings in the policies and practices that SODIGA and its sister entities pursued in the here relevant time frame in Spain, the cannot be deemed to relieve investors of the business risks inherent in any investment.”*¹⁴⁶

Coming from an international tribunal, this wording is a way of strongly correcting the investor. It tells that the State cannot be held accountable for business decisions and that it is the investor himself who carries all risks for investments made and that there is no use of trying to transfer the responsibility to any other party. Thus, the claim was dismissed on both this point as well as all the previous.

The only part of the claim that won support from the tribunal was that regarding the illegal transfer of funds, from Mr. Maffezini's personal account directed to the company funds. There had indeed been discussions regarding such loan of the claimants' private funds in 1991, but this had never been fully negotiated.¹⁴⁷ Nevertheless, a SODIGA representative acting as an official, ordered the transfer in early 1992 without having a contracted consent from Mr. Maffezini. The tribunal thus awarded Spain to repay the 30 million pesetas, including interest of almost 28 million pesetas.¹⁴⁸

4.3.2. The importance of the case

The *prima facie* view in this case in an interesting discussion and something that can from time to time be found in cases regarding international investment law. The basis for *prima facie* is that there is enough evidence to prove that something has happened or should be seen as a fact, unless it is rebutted or refuted by other proof. The Tribunal took this view for instance regarding the discussion on SODIGA and it being or not being an enterprise

¹⁴⁶ *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award (13 November 2000) para. 64.

¹⁴⁷ *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award (13 November 2000) para. 74.

¹⁴⁸ *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award (13 November 2000) para. 95-96.

under the State.¹⁴⁹ Equally, this is the part where the case is related to fair and equitable treatment. The tribunal attacked the level of transparency from the Spanish government with regards to the transfer stating that it went against the BIT clause regarding fair and equitable treatment.

Spain had through the BIT agreed to provide foreign investors FET, which includes both transparency and good faith. By allowing a public entity to act in the ways as has been done in this case, is a breach of both of those requirements. The Maffezini case is one of the earlier cases which touches upon such breaches which is why it is often discussed with regards to FET.

4.4. Pope & Talbot awards

The Pope & Talbot awards was a long ongoing process between the United States and Canada. There has been a number of awards issued with regards to specific parts of the claim and the arbitration. The awards that are directly linked to the development of the FET standard will be discussed.

4.4.1. Summary of the case

Pope & Talbot Inc. was a U.S. company with a subsidiary in Canada which produced and exported lumber back the United States. In 1996 the U.S. and Canada had signed an agreement called the SLD which limited the quotas of free export of lumber to the United States and subsequently levied export fees on quotas which exceeded the established limits. The agreement concluded that there were three different levels for which fees should be applied. The first level was free from any fees, the second level activated a fee of 50 U.S. dollars per 1000 feet of lumber and the third level meant a fee of 100 U.S. dollars per 1000 feet of lumber.¹⁵⁰ Both parties in this case were also parties to NAFTA and the grounds for the U.S. claims against Canada was that through the implementation of the export fee agreement, Canada had denied Pope & Talbot the standard of treatment which it was guaranteed through NAFTA. The denial of treatment claims was based on the procedure Canada underwent to verify information on the exports given by Pope & Talbot. The U.S. claimed Canada was in breach of several articles in NAFTA such as

¹⁴⁹ *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award (13 November 2000) para. 46-47.

¹⁵⁰ *Pope & Talbot v Canada*, UNCITRAL, Award on the Merits of Phase 2 (10 April 2001) para. 18.

article 1102 regarding national treatment and article 1105 regarding the minimum standard of treatment.¹⁵¹

The case was brought before UNCITRAL which disregarded all claims but one, which was the alleged breach against NAFTA article 1105 regarding the FET standard. The precise wording of the article was:

*“[e]ach party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security”.*¹⁵²

Canada on its part argued that the article indeed did provide a minimum standard of treatment but did not share the U.S. view that the minimum standard included anything more than what was already required by the parties under international law. The Court does not agree to this interpretation, instead their arguments regarding the NAFTA parties’ intent with the investment agreement must have been not to limit the parties in comparison to States which had adopted the model BIT but to at least have the same standard of treatment to be applicable. This is how the Court reaches the conclusion that the NAFTA article 1105 should be seen as containing additive requirements, meaning that the parties had agreed to accord the investments of another contracting party the minimum standard of treatment according to international law, and adding to this the fairness elements including both the FET standard and full protection and security.

With regards to damages, the Court subsequently awarded the U.S. payment for its suffered losses due to Canadas review process with regards to verifying information in the process of determining export quotas. The Court stated that:

*“[t]he relations between the SLD and the Investment during 1999 were more like combat than cooperative regulation, and the Tribunal finds that the SLD bears the overwhelming responsibility for this state of affairs”.*¹⁵³

¹⁵¹ *Pope & Talbot v Canada*, UNCITRAL, Award on the Merits of Phase 2 (10 April 2001) paras. 30 and 105.

¹⁵² *Pope & Talbot v Canada*, UNCITRAL, Award on the Merits of Phase 2 (10 April 2001) para. 105.

¹⁵³ *Pope & Talbot v Canada*, UNCITRAL, Award on the Merits of Phase 2 (10 April 2001) para. 181.

The way in which Canada undertook the review of the U.S. company's information did, according to the award, lead to the conclusion that this was no less than a denial of the FET standard in NAFTA article 1105.¹⁵⁴

4.4.2. The importance of the case

In this case the interpretation of the FET standard as included in NAFTA is elaborated so that the Court can conclude that it includes not only what is established through the precise wording in the agreement, but to also include additive elements.¹⁵⁵ The Court compared NAFTA to other agreements made by the contracting parties with other States and saw that those often followed the model BIT which did not limit the FET to only require treatment as established in international law. The way in which the Court discusses the party intents is something quite typical to international investment law, since interpretations of the investment treaties is an important way in which the legal field is developed and clarified. This is also an example of how Courts are involved in developing the law.

The case also includes a lengthy discussion on the relations between the NAFTA article 1105 and customary international law. Canada had argued that a violation of the treatment required by article 1105 and thus per Canada's interpretation a violation of the treatment required by international law, required an "egregious" behaviour.¹⁵⁶ This argumentation is in line with the interpretations made in the Neer Claim, where the Court stated that the treatment had to be "outrageous" to be seen as in breach of international law. However, the Court in this case did not accept any such line of arguments and thus withheld that the minimum standard of treatment is much higher now than that established in the Neer Claim. The Court's arguments are more in line with the more modern ELSI Case which requires a surprise instead of an outrage thus increasing the level of minimum standard of treatment and lowering the threshold for what is to be seen as a breach of international law regarding treatment of aliens.

4.5 Closing comment

The FET standard is, as shown, used on many different occasions and is also interpreted differently on a case-to-case basis. It has evolved not only through BIT's but first and

¹⁵⁴ *Pope & Talbot v Canada*, UNCITRAL, Award on the Merits of Phase 2 (10 April 2001)

para. 181.

¹⁵⁵ *Pope & Talbot v Canada*, UNCITRAL, Award on the Merits of Phase 2 (10 April 2001) para. 113.

¹⁵⁶ *Pope & Talbot v Canada*, UNCITRAL, Award on the Merits of Phase 2 (10 April 2001) para. 108.

foremost through awards from the ICSID. In the small number of cases presented none is remotely alike the other. The study is meant to illustrate how complex the interpretation of the different BIT's is, not only for the States who are using the FET standard in their respective BIT's but also for the tribunals set out to render awards. A legal system where States themselves have constructed the core body of legislation through individual agreements is according to the study, causing issues in the international community both regarding what the standard of treatment actually is and how States can comply with it. The tribunals not only use the arbitration to lay down the law but also to correct either State or investor on their behaviour or even to correct previous awards which no longer should be given any consideration.

5. International institutions' interpretations of the FET standard

It is not only during international arbitration that the FET standard has been discussed and developed. Several international institutions have contributed with their own interpretations of the standard as according to them is found in BIT's and awards. There are some more prominent than others and two of those will be discussed below.

5.1. The United Nations

The UN have named five variations of FET standard concepts which they have found to be commonly upheld and referenced by the tribunals in Investor-State disputes. These are:

“(a) Prohibition of manifest arbitrariness in decision-making, that is, measures taken purely on the basis of prejudice or bias without a legitimate purpose or rational explanation;

(b) Prohibition of the denial of justice and disregard of the fundamental principles of due process;

(c) Prohibition of targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;

(d) Prohibition of abusive treatment of investors, including coercion, duress and harassment;

(e) Protection of the legitimate expectations of investors arising from a government's specific representations or investment-inducing measures,

although balanced with the host State's right to regulate in the public interest."¹⁵⁷

5.2. The Organisation for Economic Co-operation and Development

The OECD on its part has done a survey on the same subject trying to identify what case law says about the FET standard and they instead found that the elements concluding FET are;

- "a) Obligation of vigilance and protection,*
- b) Due process including non-denial of justice and lack of arbitrariness,*
- c) Transparency,*
- d) Good faith, which could include transparency and lack of arbitrariness,*
- e) Autonomous fairness elements.*"¹⁵⁸

5.3. Similarities in the UN and the OECD's interpretations

Both interpretations, albeit the OECD's more so, include arbitrariness as the core content of the FET standard. Arbitrariness in international investment law can be explained as illegitimate measures taken against an investor which negatively affects the investment. Tribunals often stress the fact that non-arbitrariness is the core of the FET standard since it is so fundamental. International investments rely on not being subject to unreasonable demands or measures since that would counteract the grounds for undertaking international investments whatsoever, namely that they should be profitable. Arbitrariness is, for instance, one of the most important factors in the ELSI case, where the measures taken against the investor was indeed illegal according to national law. However, the ICJ stressed that the fact that an act is deemed illegal per national law as in this case does not equal an illegal act per international law since the assessment is not done on the same grounds.¹⁵⁹

¹⁵⁷ United Nations Conference on Trade and Development, *Fair and Equitable Treatment – UNCTAD Series on Issues in International Investment Agreements II*, UNCTAD/DIAE/IA/2001/5 (UN Publication 2012) xvi.

¹⁵⁸ Organisation for Economic Co-operation and Development, *Fair and Equitable Treatment Standard in International Investment Law*, OECD Working Papers on International Investment 2004/03 (OECD Publishing 2004) 26.

¹⁵⁹ See also here the ICJ's interpretation of arbitrariness: *Eletronica Sicala S.p.A. (ELSI) (U.S.A) v Italy*, ICJ Reports 1989 (Award 20 July 1989) p. 15, para. 128.

Also included in both interpretations is the denial of justice, with the UN also discussing due process in connection to it. Denial of justice can be described as measures or disadvantages accorded to a foreign investor or its investment due to mishandling of a claim or misinterpretation of regulations made by the national court. The UN also stresses that minor errors due to mishandling or the human factor should not be interpreted as a denial of justice. Rather, it concerns wilful measures or actions taken in order to cause harm or disadvantage to the investor or its investment.¹⁶⁰ The denial of justice was discussed as early as during the Neer Claim, where the Commission stated that it should contain:

*"the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency".*¹⁶¹

This was also later the model for the minimum standard of treatment of aliens which was upheld for decades.

A third view shared by both institutions is that the FET standard includes an obligation to protect the investor and its investment. This has been described as including due diligence from the host State, something which is most commonly discussed with regards to the investor itself. This was, for instance, the case in the Maffezini case, where the tribunal specifically pointed out that the risk for the investment does not fall upon the host State but on the investor, and that it is the investor which is responsible for undertaking the necessary due diligence before placing investments.¹⁶² However, some due diligence is also required by the host State. It has even been said that *"due diligence is a standard not a definition"*.¹⁶³

¹⁶⁰ United Nations Conference on Trade and Development, *Fair and Equitable Treatment – UNCTAD Series on Issues in International Investment Agreements II*, UNCTAD/DIAE/IA/2001/5 (UN Publication 2012) 80.

¹⁶¹ *L.F.H. Neer and Pauline E. Neer (USA) v. United Mexican States*, United States and Mexico General Claims Commission Decision of 15 October 1926, United Nations, Reports of International Arbitral Awards, (1926), Vol. IV, 60, para. 4.

¹⁶² *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award (13 November 2000) para. 64.

¹⁶³ Organisation for Economic Co-operation and Development, *Fair and Equitable Treatment Standard in International Investment Law*, OECD Working Papers on International Investment 2004/03 (OECD Publishing 2004) 26, note 115.

5.4. Closing comment

International institutions share some views on what is included in the FET standard, but are not completely united. It is not surprising since contracting States and the ICSID also tend to make different interpretations of the standard. Adding to the confusion, the FET standard and what could be included in it such as arbitrariness and denial of justice, are also important foundations of the international minimum standard of treatment of aliens. This meaning, that even though international investment law and CIL should not be confused with one another, they do share imperative elements. This is an example of why the legal system in international investment law is hard to define and more specifically why this is difficult with regards to the FET standard.

6. Discussion

The issues regarding international investment law are plenty, and some of them have been highlighted through this study. It includes, for instance, how States themselves' have been able to create the legislation through contracting BITs with other States and thus no BIT is like the other. The ICSID arbitrate in investor-State disputes and at the same time try to develop the judiciary system through case law, in directions that the tribunal deem necessary. However, the tribunals must interpret each BIT based on party intents and other factors such as domestic law. This creates difficulties in predicting outcomes of claims brought before the ICSID. The fact that almost all of the investor-State disputes involve the FET standard points to it being one of the most problematic parts of the BITs and this is not something that should be overlooked.

The issues within international investment law thus could be said to stem from both insecurities regarding how to regulate this elusive field of law, as well as a lack of certainty regarding who should carry the responsibility of regulating international investments. The initial steps taken by Abs-Shawcross and the World Bank were right both in time and direction, but still failed to succeed. It seems as if the international community was then not ready for this kind of international legislation, only to find itself lacking it when the time came for international investments to rapidly increase in both number and amounts. Today, a State's GDP can be made up of anywhere between 3-80 percentage of its total assets and there is still no common legislation agreed to by all States. Indeed, States have adapted by contracting BITs amongst themselves, but this is not the ideal way of handling the situation. There is a sense of one-sidedness with regards to the BIT's, since the stronger and more financially stable State will have leverage over the other. This is typically the case when there is one developed State and another which is a developing State. These have also been referred to in kinder words as investment-exporting States and investment-importing States. The investment-importing States have long relied on import of foreign investments to support both their GDP and to induce economic growth thus having had to forfeit requests in order to establish BITs.

Future studies should include a thorough investigation on the States' opinion towards establishing an international law other than the current BIT-based regulation. If the States who are most active within the field are interested, then the ICSID seems like the most reasonable choice for developing such a law, perhaps together with the UN. Regardless, it does not seem like the current system is optimal in regulating the investments. Perhaps a starting point should be the part of the BIT which is most problematic, of course speaking of the FET standard. As this standard has been accorded as meaning and including a variety of different things, setting the record straight with regards to this had

been a welcomed addition to international investment law and something that should be discussed with the States which are possible to sway others in the same and sensible direction. Most likely this would be investment-exporting States. However, it is also certain that such research undertaken to once and for all establish what is included in the FET standard, will be extremely time a finance demanding. Thus, it should not be done without discussion being held with the States it concerns to assure their support before embarking on such a journey.

7. Conclusion

The research suggests that there is a need of providing the contracting States with guidance in order to maintain and induce international investments and to decrease the number of investor-State disputes which occur as a result of unclear contractual contents, for instance as regards the FET standard. The research also suggest that there is a need for developments of the legal system to increase certainty regarding what to expect when undertaking foreign investments, as well as decrease any concerns regarding the safety of such investments.

The most desirable solution would be a common international legislation regulating international investment law. This, which according to the study could be the most important part, is a task hard to execute. The BITs which now constitute the laws are already in place and active on most occasions and there are no legal grounds to revoke them. What could be done, however, regards the FET standard. The interpretation of the standard should be clarified and formulated to better suit its' very important purpose of protecting foreign investors embarking on international investments. The fact that international institutions as well as the ICSID have found it to include a various number of things such as arbitrariness, denial of justice and the obligation of protection, speaks to this conclusion. A single standard containing so much more than just one thing, should not be left open for interpretation in the way in which it is done now. However, clarifying the FET standard would in the end lead to the need of renegotiating all currently active BITs. This is not something which can be done swiftly, but the work should nonetheless begin.

Renegotiating one paragraph of the BITs is a first step towards resolving the troubles which it causes, grasping from negotiations between States to legal certainty and predictability with regards to international arbitration. A first step towards establishing an interpretation of the FET standard would be to negotiate which institution should oversee such research and development and thus become the legislating body in international investment law.

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