



FAIR AND EQUITABLE TREATMENT OF INVESTORS
UNDER INTERNATIONAL INVESTMENT LAW AND
FROM THE ISLAMIC PERSPECTIVE

BY

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A dissertation submitted in partial fulfilment of the
requirement for the degree of Master of Comparative Laws

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AUGUST 2016

ABSTRACT

This dissertation initially examines the concept of international investment law and its sources. Fair and equitable treatment (hereinafter “FET”) as one of the principles of International Investment law is examined under multilateral and bilateral investment treaties and the interpretation given by the international arbitral tribunals. These tribunals have the enforcement power of the FET concept and this dissertation will look at whether there are any differences between their interpretations and the contents of multilateral and bilateral investment treaties. The author will look at the extent to which FET can adversely affect the ability of governments, particularly those of developing countries to legislate for the public interest. Additionally, the author intends to inspect at how Islam responds to the fair and equitable treatment of investors. Host states standards of treatment, specifically protecting the investments as well as the dispute settlement, are issues that are connected to the globalization of economy and has led to disputes regarding access to markets, market liberalization and consequently the establishment of rights. Since its beginnings, Islam has been emphatic on the establishment of justice and providing fair and equitable treatment to everyone, from the ruler to the ordinary citizen, and regardless of faith, race, or place of origin. This study adopts both a conceptual analysis of fair and equitable treatment under international investment law and also from the Islamic perspective. This study finds that there is a considerable link between FET principles and Islamic perspectives on the protection of the investors and thus it condemns and prohibits any sort of misappropriation of one’s property without his or her consent.

ملخص البحث

تهدف هذه الأطروحة إلى دراسة مفهوم قانون الاستثمار الدولي ومصادره. تمت دراسة المعاملة العادلة والمنصفة باعتبارها واحدة (FET) من مبادئ القانون الدولي للاستثمار في ظل معاهدات الاستثمار الثنائية والمتعددة الأطراف والتعريف الذي أعطته هيئات التحكيم الدولية. هذه المحاكم لديها السلطة التنفيذية لفكرة المعاملة العادلة و المنصفة أو باختصار (FET) ، وهذه الرسالة هدفها النظر في ما إذا كانت هناك أي اختلافات بين تعريفات هذا المفهوم المنسوبة لهيئات التحكيم الدولية ومحتويات معاهدات الاستثمار الثنائية والمتعددة الأطراف. سيتطرق المؤلف إلى أي مدى يمكن لل(FET) أن تؤثر سلباً على قدرة الحكومات، لا سيما حكومات البلدان السائرة في طريق النمو إلى تشريع للمصلحة العامة. بالإضافة إلى ذلك، ينوي المؤلف للبحث عن كيف ينظر الإسلام إلى المعاملة العادلة والمنصفة للمستثمرين. معايير معاملة الدول المستضيفة ، وتحديد حماية الاستثمارات بالإضافة إلى تسوية النزاعات، هي من القضايا التي تتعلق بالعملة الاقتصادية، وأدت إلى نشوب خلافات بشأن الوصول إلى الأسواق وتحرير السوق. منذ بداياته، كان الإسلام مشدداً على ترسيخ العدالة وتوفير معاملة عادلة ومنصفة للجميع، من الحاكم إلى المواطن العادي، وبغض النظر عن العقيدة أو العرق أو مكان المنشأ. تعتمد هذه الدراسة على التحليل المفاهيمي لمفهوم المعاملة العادلة والمنصفة في ظل قانون الاستثمار الدولي، وكذلك من منظور إسلامي. خلصت هذه الدراسة أن هناك صلة كبيرة بين المبادئ (FET) والمنظور الإسلامي حول حماية المستثمرين، وبالتالي فإنه يدين ويحظر أي نوع من اختلاس الممتلكات دون موافقة مالكيها.

APPROVAL PAGE

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Dedicated to my beloved parents for their unconditional love and ultimate support.

ACKNOWLEDGEMENTS

Glory and gratitude be to Allah (*S.W.T*) who hath ordained law and guidance, and has given me the ability to complete this work. May the peace and blessings of Allah be upon Prophet Muhammad (*P.B.U.H*), Members of his household and his companions.

My highest heartfelt gratitude goes to my supervisor Assoc. Prof. Dr. Haniff Ahamat for guiding and supporting me throughout this work. His outstanding academic qualifications and his clear instructions made my job fantastically easy in completion of this work. I would have never been more grateful than having him as my supervisor.

My wholehearted gratitude goes to each and every one of my family members specially my parents. Since childhood, my parents intilled in me and my siblings the true value of education. By the time I am writing this, it has been four years that I have not been able to meet my parents. The last time I spoke with them, they both said: “Son, we want you to start your PhD right away. We do not need you to retrun and take care of us as you are intending. What we only dearly want in this world is your utmost prosperity.” They have put themselves through indescribably tremendous hardships since then. No words can deservedly describe how lucky I am for having them in my life. I am as well profoundly thankful to my dearest siblings namely Rabbani, Habibrahman, Ziaolhaq and Somieh Qazi Zada for continuously encouraging and supporting me since the outset of my studies. Their advice, companionship and endless support made my upheaval path exceptionally easy.

Last but not least, my deepest thanks to my friends who shed light on me when I needed the most.

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LIST OF CASES

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Aguas del Tunari, S.A. v. Bolivia, Decision on Jurisdiction, 21 October 2005.

Amco v. Indonesia, Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports 389.

American Manufacturing & Trading v. Zaire, Award, February 21, 1997.

Asian Agricultural Products Ltd. v. The Republic of Sri Lanka, YCA 1991.

Asian Agricultural Products v. Sri Lanka, Final Award, June 27, 1990.

CMS Gas Transmission Company v. The Argentina Republic (CMS case), ICSID Case No. ARB/01/8, Award, 12 May 2005.

Compañía de Aguas del Aconquija v. Argentina, Award, November 21, 2000.

Eastern Sugar v. Czech Republic, Partial Award, March 27, 2007.

Eletronica Sicula SpA (ELSI) (United States v Italy), ICJ Reports, 1989.

Enron and Ponderosa v. Argentina, Award of 22 May 2007, ICSID Case No ARB/01/3.

Eureko v. Poland, Partial Award, 19 August 2005.

Genin v. Estonia, ICSID Case No ARB/99/2, Award of 25 June 2001.

Glamis Gold Ltd v. United States UNCITRAL (1976).

Inceysa Vallisoletana S.L. v. Republic of El Salvador ICSID Case No ARB/03/26.

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

Lauder v. Czech Republic, Award, 3 September 2001.

LG&E v. Argentina, Decision on Liability, October 3, 2006.

Libyan American Oil Co. ("LIAMCO") v. Libya, 17 I.L.M. 3 (1978), 4 Y.B. COM. ARB. 177 (1979).

Metalclad Corporation v. United Mexican States, ICSID Case No ARB (AF)/97/1 of 30 August 2000.2005).

Metalclad v. Mexico, Award, August 30, 2000.

Mondev v. United States of America, Award, 11 October 2002.

MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7.

National Grid Plc v. Argentina, UNCITRAL (Award of 3 November 2008).

Noble Ventures v. Romania, Noble Ventures v Romania, ICSID ARB/01/11 of 12 October 2005

Occidental Exploration and Production Co. v. Ecuador, Award, 1 July 2004.

Parkerings Compagniet AS v. Lithuania, ICSID Case No. ARB/05/8 (Award of 11 September 2007).

Phoenix v. the Czech Republic, Award of 15 April 2009, ICSID Case No ARB/06/5.

Plama v. Bulgaria, Decision on Jurisdiction, 8 February 2005.

PSEG Global v. Turkey, Award, January 19, 2007.

Republic of Ecuador (OEPC case), LCIA Case No. UN 3467, Final Award, 1 July 2004.

Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16.

Saipem v. Bangladesh, Decision on Jurisdiction of 21 March 2007, ICSID Case No ARB/05/07.

Saluka Investments BV (the Netherlands) v. the Czech Republic,

SGS v. Pakistan, Decision on Jurisdiction, 6 August 2003.

SGS v. Philippines, Decision on Jurisdiction, 29 January 2004.

Siemens v. Argentina, Decision on Jurisdiction, 3 August 2004.
Tecmed v. Mexico, Award, May 29, 2003.
Territorial Dispute (Libya v. Chad), ICJ (Judgment of 3 February 1994).
USA (LF Neer) v. United Mexican States, (1927) 21 *AJIL* 555, 556.
Vivendi Universal v. Argentina, ICSID Case No ARB/03/19, Order in Response to a
Petition for Transparency and Participation in Amicus Curiae, 19 May 2002.
Waste Management Inc v. Mexico, A/F/00/3, paras 98–9 (ICSID) 2004.

LIST OF STATUTES

General Agreement on Trade and Tariffs (GATT) 1994.

Havana Charter 1948.

Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001.

Statute of the International Court of Justice (ICJ).

The Charter of the United Nations 1945.

Vienna Convention on the Law of Treaties (VCLT) 1969.

LIST OF ABBREVIATIONS

A.H.	After. Hijrah
BITs	Bilateral Investment Treaties
CAFTA	Central America Free Trade Agreement
CE	Common Era
COMESA	Common Market for Eastern and Southern Africa
FCN	Friendship, Commerce and Navigation
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FTAs	Free Trade Agreements
GATT	General Agreement on Trade and Tariffs
ICC	International Chamber of Commerce.
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IAs	International Investment Agreements
ILC	International Law Commission
IMF	International Monetary Fund
ITO	International Trade Organization
MFN	Most Favoured Nations
MITs	Multilateral Investment Treaties
NAFTA	North American Free Trade Agreement
OECD	Organization for Economic Cooperation and Development
P.B.U.H	Peace Be Upon Him
RTAs	Regional Trade Agreements
P.B.U.H	<i>Sallal Allahu 'Alayhi wa-sallam</i> (Blessings and Peace of Allah be upon Him)
S.W.T	<i>Subhanahu wa Ta 'ālā</i>
UNCTAD	United Nations Conference on Trade and Development
UNCTC	United Nations Centre on Transnational Corporations
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

TABLE OF TRANSLITERATION

Before using this Table, you must first install the AHT Times New Arabic fonts.

Table of transliteration of Arabic words and names used by the International Islamic University Malaysia.

b	=	ب	z	=	ز	f	=	ف
t	=	ت	s	=	س	q	=	ق
th	=	ث	sh	=	ش	k	=	ك
j	=	ج	ṣ	=	ص	l	=	ل
ḥ	=	ح	d	=	د	m	=	م
kh	=	خ	ṭ	=	ط	n	=	ن
d	=	د	ẓ	=	ظ	h	=	ه
dh	=	ذ	‘	=	ع	w	=	و
r	=	ر	gh	=	غ	y	=	ي

Short Vowels	
اَ	A
اِ	I
اُ	U

Long Vowels	
اَ + اَ	ā
اِ + اِ	ī
اُ + اُ	ū

Diphthong: ay = اِ ي ; aw = اِ و

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND OF THE STUDY

Law of international investment deals with foreign direct, and to a lesser degree, indirect and portfolio investment of international property worldwide.¹ The capital exporting countries (i.e., the country of origin of the investors), capital importing countries (i.e. states which host investors) as well as the private international investors are considered its main players.² A host state's standards of treatment, specifically protecting investment as well as dispute settlements, are issues that are connected to the globalization of the economy and have led to certain tensions concerning access to markets, market liberalization and consequently the establishment of rights.³

From an international law point of view, countries have the general freedom to regulate the entry of international investment as well as the liberty to deal with those investments.⁴ Moreover, the general framework of international law and its primary concerns have always been the protection of foreign properties against any confiscation and treatment that is not 'fair and equitable' or do not facilitate 'full protection and security by the host states.'⁵

For the purpose of addressing some of these issues dealing with the international investments and as well as trade, negotiations began in the late 18th century among

¹ B A Wortley, "Expropriation in Public International Law," *The International Executive* 2, no. 4 (1960): 7–8. Edwin Ifeanyichuwu Nwogugu, *The Legal Problems of Foreign Investment in Developing Countries* (Manchester University Press, 1965).

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

³ *Ibid.*

⁴ Ibrahim F. I. Shihata, *The World Bank in a Changing World: Selected Essays and Lectures*, vol. 2 (Martinus Nijhoff Publishers, 1995).

⁵ ICSID Award, *Asian Agricultural Products Ltd. v. The Republic of Sri Lanka*, YCA 1991, at 106 et seq.

various countries for bilateral commercial treaties.⁶ Eventually, this resulted in the drafting of the Havana Charter in 1948, which was an attempt to establish an International Trade Organization (ITO). This multilateral effort was mainly concerned with addressing both trade and investment.⁷ However, this effort largely failed owing to the non-ratification by the United States of America's Senate of the Charter, due to the US Senate's concern over investment's sanctions.⁸

The failure of the ITO subsequently gave birth to the General Agreement on Trade and Tariffs (GATT) which was solely focused on business rather than investment, as well as the Resolution on International Investment for Economic Development, adopted in 1955.⁹ It has been inferred that MITs (multilateral investment treaties), BITs (bilateral investment treaties) and IIAs (international investment agreements) are useful tools that usually lead to an increase in investment.¹⁰ The governments of Pakistan and Germany were one of the first countries to execute bilateral investment treaties in 1959 followed by Netherlands, Switzerland and France.¹¹

The establishment of Organization for Economic Cooperation and Development (OECD) led to the adoption of the Codes of Liberalisation of Capital Movement and of Current Invisible Operations.¹² The belief that free circulation of capital, trans-border

⁶ UNCTAD/ICC, "Bilateral Investment Treaties 1959-1991. United Nations. New York. ST/CTC/135.

⁷ M. Koulen, "Foreign Investment in the World Trade Organization." In *Multilateral Regulation of Investment.*, ed. Niewenhuys and MMTA Brus (Kluwer Law International, 2001).

⁸ Aaron Cosbey and International Institute for Sustainable Development, *Investment and Sustainable Development: A Guide to the Use and Potential of International Investment Agreements* (International Institute for Sustainable Development, 2004).

http://www.iisd.org/pdf/2004/investment_invest_and_sd.pdf (last accessed on 12/11/2015)

⁹ Bradford S. Gentry and Jennifer J. Ronk, "International Investment Agreements and Investments in Renewable Energy," *From Barriers to Opportunities: Renewable Energy Issues in Law and Policy. Yale School of Forestry and Environmental Studies. Htp://environment. Research. Yale. edu/documents/downloads/0-9/11-03-Gentry_Ronk. Pdf (Accessed 16 June 2010)*, 2007.

¹⁰ Ibid.

¹¹ UNCTAD/ICC, "Bilateral Investment Treaties 1959-1991. United Nations. New York. ST/CTC/135."

¹² United Nations Center on Transnational Corporations/the International Chamber of Commerce (UNCTC/ICC), "Bilateral Investment Treaties 1959-1991. United Nations. New York. ST/CTC/135," 1992.

services and investments lead to economic growth, employment and development were the key causes behind the adoption of the Code and was followed by a Draft Convention on Investment in the year of 1967.¹³

In 1965, the International Centre for Settlement of Investment Disputes (ICSID) was formed after the draft of the Settlement of Investment Disputes Convention among the states and nationals of other countries by the Executive Directors of the World Bank. It was with the main objective of facilitating the means for arbitration and conciliation of disputes with regards to investment among the Contracting States as well as citizens.¹⁴

In addition to that, the discussion over investment issues intensified after a report provided by the CMS (Centre for Multinational Studies) in Washington DC. The report provided that the middle of 1970 was a period when the highest number of nationalization (“expropriation”) of foreign owned properties by the states took place.¹⁵ The primary basis of the Declaration on International Investment and Multinational Enterprises OECD 1976 was the establishment of a policy commitment for the improvement of investment climate, to make social and economic progress by encouraging the positive contribution of multinational enterprises and to minimize and resolve difficulties which may arise from their operations.¹⁶

Moreover, the first time where the concept of “equitable” treatment appeared was in the Havana Charter. The purpose was to establish an International Trade Organization to ensure fair treatment of foreign investments by member states as a

¹³ Ibid.

¹⁴ Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1 - See more at: <http://www.italaw.com/cases/671#sthash.PU5V5LIX.dpuf>

¹⁵ George Chifor, “Caveat Emptor: Developing International Disciplines for Deterring Third Party Investment in Unlawfully Expropriated Property,” *Law & Pol’y Int’l Bus.* 33 (2001): 179.

¹⁶ OECD Declaration and Decisions on International Investment and Multinational Enterprises.

recommendation for the establishment of bilateral and multilateral investment treaties by Havana Charter.¹⁷ Accordingly, combined with other standards, states are obligated to provide fair and equitable treatment to international capital investors.¹⁸

Generally speaking, the treatment of the foreign investors has become the major concern of the international community in developing and least developed countries (the reasons behind this could be due to the absence of proper laws and poor enforcement of the laws). However, sometimes the level of development of a state is not an issue and the problem faced for foreign investment treatments have general application i.e. to both developed and developing countries.¹⁹

In recent years, the higher standards of treatment of investors together with other standards have become a useful yardstick in terms of assessment of the fair and equitable treatment between foreign investments and governments of capital importing countries. As a broad supposition, observation and implementation of fair and equitable treatment of investors by the host country sends a signal to the international community that it wants to portray to the international investors that the investment within its territory will be subject to fair and equitable treatment which is compatible with the main expectations of foreign investors.²⁰

The attempt to seek protection against commercial risks: the core concern of foreign investment law is to protect the investors against any sort of political instability and risks in the host state, to assure legal certainty, to increase the efficiency of the host state economy and predictability to foreign investors. This is why, through creative

¹⁷ Fiona Marshall, "Fair and Equitable Treatment in International Investment Agreements," *Issues in International Investment Law*, 2007.

¹⁸ OECD, "Fair and Equitable Treatment Standard in International Investment Law," *OECD Publishing*, 2004, <http://dx.doi.org/10.1787/675702255435>.

¹⁹ Qureshi and Ziegler, *International Economic Law*.

²⁰ Stephen Vasciannie, "The Fair and Equitable Treatment Standard in International Investment Law and Practice," *The British Year Book of International Law* 70, no. 1 (1999): 99.

interpretations, foreign investors try to seek protection against the business and commercial risks after scrutinizing the current trends in practices and jurisprudence.²¹

Thus, it was stated by PCIJ in the Oscar Chinn affair of 1934:

No enterprise can escape from the chances and hazards resulting from general economic conditions. Some industries may be able to make large profits during a period of general prosperity, or else by taking advantages of a treaty of commerce or of an alteration in customs duties; but they are also exposed to the danger of ruin or extinction if circumstances change. Where this is the case, no vested rights are violated by the State.²²

Problems posed by the expansive or creative trend in interpretation: through opportunities arising out of globalization and multinational enterprises, foreign investors are penetrating in very far territories and countries with different degrees of development in their laws. These least developed or sometimes developing countries are plunged into internal conflicts, poor system of governance, high level of corruption and politicized judiciary.²³ Thus, these foreign investors through BITs and FTAs are demanding maximum protection under international law and individual investment contracts with broad and easy access to mechanisms of international dispute settlements and substantive standards in case anything goes awry by the actions of the host state.²⁴

The vast majority of BITs, FTAs and MITs currently in force contain the standard obligation for a host state to provide foreign investors and their investments with fair and equitable treatment. The FET standard has, for a long time, received little attention in the practice of international arbitral tribunals despite the fact that its principles were presented in various international investment instruments for more than 60 years. This scenario changed radically during the 1990s, with foreign investors

²¹ Surya P. Subedi, *International Investment Law Reconciling Policy and Principle* (Hart Publishing, 2008), 193.

²² *Oscar Chinn* affair, PCIJ, 1934, Ser A/B, Case No 63.

²³ Report on "Doing Business in Dangerous Places", *The Economist*, 14 August 2004, 9.

²⁴ *Ibid.*, 160.

aggressively pursuing FET claims as a result of the actions of the host states. The FET standards have emerged as an essential element in the last 15 years, as host states are increasingly ordered to compensate the damages inflicted on foreign investors in disputes before investor-state arbitration. Even in the circumstances where the investor-state arbitral tribunals found no state liability for indirect expropriation, the FET standards were found to be an independent source for assessing liabilities. Historically, it was claimed that foreign investors were being pursued as the lynchpin of their compensatory demands.²⁵

1.2 STATEMENT OF THE PROBLEM

No comparative studies have been conducted on fair and equitable treatment of investors under International Investment Law and from the Islamic perspective. In addition to that, settlement of investment disputes have mentioned that although it may be considered the most important standard in investment disputes, the FET standards have not lent itself to easy or clear definition. They are broad and widely accepted as encompassing principles such as fundamental standards of good faith, due process, non-discrimination, and proportionality. Just as a claimant (e.g., investor) needs not demonstrate the intent to expropriate on the part of the host State to establish an expropriation, a claimant needs not demonstrate the host State's bad faith to establish an FET violation as well.

Furthermore, there is a need for the protection of investors in a globalized environment dominated by bilateral investment treaties. It has become exceedingly rare

²⁵ Deng Ting Ting, "The Impact of the Fair and Equitable Treatment Standard on State Sovereignty: From the Perspective of International Investment Practice" (City University of Hong Kong, 2012), 162.

for states to directly expropriate foreign investment by government decree; instead, where expropriations occur, they are carried out indirectly through measures tantamount to expropriation or nationalization.

1.3 RESEARCH QUESTIONS

1. What is fair and equitable treatment and how it is defined under multilateral and bilateral investment treaties?
2. How international arbitral tribunals which enforce the FET interpret the concept and whether there is difference between their interpretations and what is in the multilateral and bilateral investment treaties?
3. Does the FET adversely affect the ability of governments particularly those of developing and least developed countries to legislate for the public interest?
4. What is the Islamic Perspective on Fair and Equitable Treatment of investors?

1.4 OBJECTIVES

The study intends to achieve the following objectives:

1. To determine what is fair and equitable treatment and how it is defined under multilateral and bilateral investment treaties.
2. To determine the FET interpretation concept by the international arbitral tribunals and whether there is difference between their interpretations and what is in the multilateral and bilateral investment treaties.
3. To determine to what extent FET adversely affects the ability of governments particularly those of developing and least developed countries to legislate for the public interest.

4. To determine the Islamic Perspective on Fair and Equitable Treatment of investors.

1.5 LITERATURE REVIEW

Vasciannie, in his book “The Fair and Equitable Treatment Standard in International Investment Law and Practice” stated that traditionally, International Investment Law was specifically affiliated to the movement of money (capital flows) from developed to developing states. However, nowadays the focus is on attracting the major international investment flows and companies from developing countries as well, due to the significant amount of investing these emerging markets make.²⁶

The fair and equitable treatment standards became a consistent feature of investment treaty practice after it appeared in the Havana Charter 1948.²⁷ Its Article 11(2) contemplated that foreign investments should be assured “just and equitable treatment”. This Article provides that the International Trade Organisation (ITO) could “Ensure just and equitable treatment for the enterprise, skills, capital, arts and technology brought from one Member country to another.”²⁸

Wouters, Duquet, and Hachez discuss that the risks associated with engaging Foreign Direct Investment (FDI) are well-documented. Foreign investors put themselves under the rules of a foreign government which may potentially treat them unfavourably. The creation of international standards for the protection of foreign investors has always been a prime political objective for capital-exporting countries.

²⁶ Vasciannie, “The Fair and Equitable Treatment Standard in International Investment Law and Practice.”

²⁷ Kenneth J. Vandeveld, “A Unified Theory of Fair and Equitable Treatment,” *New York University Journal of International Law and Politics (JILP)* 43, no. 1 (2010): 43.

²⁸ Havana Charter 1948.

Countries that receive capital, on the other hand, have always been wary of such protective framework as they wish to retain as much sovereign regulatory powers as possible.²⁹

The obligation to provide FET standards are often stated, together with other standards, to be part of the protection given to foreign direct investment by host countries. It is an absolute, non-contingent standard of treatment that expresses the treatment to be accorded in terms which exact meaning has to be determined. This is accomplished by reference to specific circumstances of application, as opposed to the relative standards such as “national treatment” and “most favoured nation” principles which define the required treatment in reference to the treatment accorded to other investments. Even though some references to the standard can be found in the first negotiating attempts of multilateral trade and investment instruments, it became established as a principle mainly through the increasing network of bilateral investment treaties.³⁰

Schreuer further discussed that it is possible to identify typical fact situations to which the standard of FET has been applied by investment tribunals. Based on these factual situations, certain principles have evolved which may be described as transparency, consistency, stability and protection of the investor’s legitimate expectations, compliance with contractual obligations, procedural propriety and due process, action in *good faith (bona fide)* and freedom from coercion and harassment.³¹

International Centre for Settlement of Investment Disputes (ICSID) made a report on the case of *AApl vs Sri Lanka* which stated that in the framework of general

²⁹ Jan Wouters, Sanderijn Duquet, and Nicolas Hachez, “International Investment Law: The Perpetual Search for Consensus,” *Available at SSRN 2031552*, 2012.

³⁰ *Ibid.*

³¹ Christoph Schreuer, “Investments, International Protection,” n.d.